

CIVIL JURISDICTION

BETWEEN : PULUROVO

- Plaintiff

AND : GILBERT DINH

- Defendant

Mr R. Sugden for Plaintiff
Mr J Ozols for Defendant

APPLICATION TO STRUCK OUT

O.27 r.4

Lenalia J. These were two applications brought before me in Chambers. One by the Plaintiff's lawyer and another by the lawyer for the Defendant. The Plaintiff's Summons (General Form) is seeking restrictive orders against the Defendant not to carry out any work on or in any way altering Urelapa Island on the East of Santo, its flora or fauna or the waters thereon. By consent the application filed by the lawyer for the Defendant was heard first and this is an application to struck out the claim filed against his client for non disclosure of any cause of action.

At the commencement of the hearing of their application, Mr Ozols introduced the Honourable Attorney General Mr Patrick Ellum appearing as an "amicus curiae" on the invitation of the Court as put by Mr Ozols.

Mr Sugden objected to the appearance by the Attorney General arguing that he was not advised about this arrangement to have Mr Ellum appearing as friend of the Court and secondly that Mr Ellum would have conflict of interest in the action. The reason for his objection is that since this claim concerns a leasehold title it may eventually be subjected to a claim by the Defendant against the Government for indemnity Mr Ellum submitted his purpose was to merely give a summary on the status of the Land Leases and the Land Reform Acts Caps 136 and 123 respectively.

The Court overruled the objection and Mr Sugden urged the Court to give reasons. I now do in this paragraph. There is no evidence of any conflict of interest put before this Court. This is purely a case the Plaintiff against the Defendant. For the Court to assume there would be likely proceedings against the Government of Vanuatu would be an erroneous inference and a conclusion unsupported by evidence.

Mr Ellum submitted in brief the Land Reform and Land Leases Acts Cap 123 and 136 are particular laws made pursuant to Article 76 of Chapter 12 of the Vanuatu Constitution.

Article 73 of the same Chapter provides all land in Vanuatu belongs to indigenous ni-Vanuatu custom owners. The customs form the basis of ownership and use of land in the Republic of Vanuatu. Section 15 of the Land Leases Act was cited to the Court by Mr Ellum saying that the rights of a registered proprietor cannot be defeated except as provided for by the Act itself and that once a lease is granted it is subject to section 15 of the Act. He also cited section 14(1) of the Land Reform Act Cap 123.

Section 14 of the Land Reform Act provides that when a lease has been registered in the Land Records Office its registration is evidence of its validity and the only way available for the Plaintiff is to obtain an order from the Court for rectification in accordance with section 100 (1) of the Land Leases Act. In fact where it is satisfied that registration has been obtained by fraud rectification has to be sought.

The Director of the Land Records appointed under section 3 of the Land Leases Act is empowered to give notice to a lessee or a lessor about rectification when he finds out that any register does not truly declare the actual interest to which any person is entitled to under the Act or if he feels that such registration is in some respect erroneous or imperfect. But the Director can only do this after giving each party an opportunity to be heard. See section 99 (1) Land Leases Act.

I then heard Mr Ozols who submitted that there is no course of action and as such the claim filed by the Plaintiff should be struck out. Mr Sugden drew the Court's attention to paragraphs 2 and 6 of the Defendant's affidavit arguing that Mr Pamavari is not the custom owner. I accepted this and ruled that the two paragraphs would not be considered in the final determination of this application.

What is clear from the Affidavit of the Defendant is that he is the lessee of the Leasehold Title No.04/2952/002. The Defendant has paid a sum of Vt 7,500,000 for the rent of 75 years as shown on Clause 1 of schedule 1 to the lease. He estimates expenditure of some Vt 35,000,000 for landscaping improvement and building of an airstrip on the island. Mr Ozols submits that the proper course of action would be to proceed under or by way of administrative procedures provided for under the Act.

Mr Sugden opposed this application bitterly arguing that in their pleadings, the Plaintiff is the custom owner and in order for the Defendant to apply for the matter to be struck off there ought to be proper pleaded defences. I agree with that part of his submission. In fact Mr Ozols has not referred this Court to any particular rules or orders.

However O.27 r.4 gives this Court jurisdiction to order any pleadings to be struck out on the ground of non disclosure of a reasonable cause of action or where defence is shown by pleadings to be frivolous or vexatious may then dismiss the claim or enter judgment as the case may be.

This Court is also empowered under O.21 r.29 to struck out any claim at any state of the proceedings or even to have a cause amended if I thought the pleadings were

unnecessary or scandalous or which would tend to prejudice embarrass or delay fair trial of an action.

I have considered all authorities that were referred to me by both counsels. I do not consider it necessary to refer to them by the look of the pleadings. The statement of claim alleges that Pulurovo is the custom owner of the Urelapa Island on the East Coast of Espiritu Santo - an island off the coast of Santo. I think it is sufficient for the Court to look at the pleadings in the Statement of Claim and ask itself if there is a maintainable action and whether or not this is an appropriate venue to entertain this action.

Mr Sugden raised an issue about validity of section 31 of the Land Leases Act saying this section would be in conflict, with Article 73 and 74 of Chapter 12 of the Constitution. Of course the Constitution is the Supreme Law in Vanuatu. Any law made that is inconsistent with it does not have status. The Land Leases and the Land Reform Acts were made to give effect to Chapter 12 of the Constitution see Articles 75 and 76. If there is any defect in Section 31 of the Land Leases Act, Mr Sugden is at liberty to challenge that provision.

Mr Sugden's client's claim is a customary ownership of Urelapa Island. Disputes on custom ownership are vested on the Island Court. An Island Court is empowered to deal with custom ownership of land in accordance with section 9(2) of the Island Courts Act - Cap 167. It is one of the institutions envisaged by Article 78 sub-article (2) of the Constitution. This sub-article provides that :

"The Government shall arrange for the appropriate custom institutions or procedures to resolve disputes concerning the ownership of custom land".

The application before me regards a properly registered lease. The Land Lease Act provides for procedural guidelines and administrative procedures to take in a case where there was error in granting of a lease - see section 99 (1) (2) and (3) Land Leases Act Cap 163. It is my opinion that the affidavit of the Defendant reveals that he is the proprietor. Subsection (2) of Section 100 of the Land Leases Act provides that the register cannot be rectified unless such proprietor had knowledge of an omission, fraud or mistake in consequence of which the rectification is sought. However, this proceeding is not for rectification before the Director of Land Records, it is a claim for ownership of land of which this Court has no jurisdiction.

There is a dispute regarding ownership of custom land and not only custom land but the subject of a registered lease that has properly been granted to the proprietor.

Having said what I have said, I feel that this is not the proper venue to entertain this claim and the parties must go to the Island Court to determine ownership. Under section 22(1) (a) of the Island Court Act 167, the Supreme Court is only given an appellate jurisdiction over custom ownership of land. This is not a case where this Court would have an original jurisdiction concurrent with the Magistrate Court under section 10 of the Courts Act Cap 122. As I can see there is only an action maintainable at the Island Court or for the Plaintiff to proceed by way of rectification under Part XV of the Land Leases Act Cap 163. I therefore struck off this claim and order the

Plaintiff to pay costs to be taxed if not agreed. No costs is ordered for the appearance of the Attorney General.

DATED at Port Vila this 4th day of December 1995.


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SALATIEL LENALIA J.
Judge

