

(Civil Jurisdiction)

**BETWEEN: TIMOTHY WASS**

Claimant

**AND: FRANCOIS TARI**

First Defendant

**AND: GIDEON CHARLIE**

Second Defendant

**AND: JOHN KNOX**

Third Defendant

**AND: DIRECTOR OF LAND RECORDS**

Fourth Defendant

Mr Justice Oliver A. Saksak  
Mrs Anita Vinabit – Clerk

Mr Saling Stephens for the Claimant  
Mrs Marisan P.Vire for the First, Second and Third Defendants  
Mr Justin Ngwele for the Fourth Defendant

Date of Hearing: 21 – 22 July 2009  
Date of Oral Decision: 22 July 2009

## **JUDGMENT**

1. This judgment provides reasons for the oral decision handed down on 22<sup>nd</sup> July 2009.
2. The oral decision was to the effect that the Court found the Claimant had not proven to the required standard, that there was fraud in the

transactions regarding Leasehold Title No. 03/k103/007 being passed down from the original proprietor late Rose Mala, to the First, Second and Third Defendants, and including its registration by the Fourth Defendant.

2.1. The Court also held that the consequential effect of the decision was that the Letters of Administration granted to the Claimant on 2<sup>nd</sup> October 2007 in respect to Probate Case No. 7 of 2007 were vacated and that John Knox, the respondent in that proceeding was to be substituted in his place.

2.2. The Court did not make any decision as to costs.

3. The Claimant based his case on Section 100 of the Land Leases Act [CAP 163]. The section reads:

***“(1) Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is so empowered by this Act or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.***

***(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought; or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”***

4. The Claimant alleged the following against the defendants:-

(a) That on or about 3<sup>rd</sup> March 1995 the First Defendant had fraudulently transferred the Title to his own name and benefit without his knowledge, consent and consideration.

(b) That on or about 18<sup>th</sup> March 2002 the First and Second Defendant had fraudulently transferred the Title to the Third Defendant's name and benefit without his knowledge and consent.

(c) That on or about 2<sup>nd</sup> September 2004 the Second and Third Defendants had fraudulently transferred the Title to the Third Defendant's name and benefit without his knowledge and consent.

5. The Claimant sought the following reliefs:-

(a) A declaration that the purported transfers were null, void and of no legal effect due to fraud.

(b) An order requiring the Fourth Defendant to rectify the above transfer under Section 100 of the Land Lease Act to restore the lease to the Claimant.

(c) Costs.

6. By way of background information the Claimant in Probate Case No. 7 of 2007 had applied for Letters of Administration regarding the estate of the late Rose Mala comprising mainly in Leasehold Title No. 03/K103/007 (the Title).

- 6.1. The Third Defendant John Knox was the respondent. He filed a Notice of Discontinuance against the Claimant. The Court therefore on the basis of a purported will that was annexed, granted letters of administration in favour of the Claimant. The Order is dated 2<sup>nd</sup> October 2007.
7. The Claimant did not allege or plead mistake in his claims against the Defendants in this case.
8. The onus of proving fraud rested therefore on the Claimant. (See Albert Solomon and Another v. Turquoise Ltd and Others VUSC 64; CC 163/2006 and CC 29/27 p. 10, para. 3).
- 8.1. As for the standard, it is the higher standard of proof on the balance of probabilities. But this does not mean that where a serious allegation such as fraud is in issue the standard of proof required is higher. ***"It means only that the inherent probability or improbability of fraud as itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, fraud occurred. The more improbable the fraud, the stronger must be the evidence that it did happen before, on the balance of probability, its occurrence will be established."*** (Per Mc Gath, J in Z v. Dental Complaint Assessment Committee [2008] N ZSC 55 cited in Solomon (above).
9. The Claimant's evidence was by way sworn statements dated 20<sup>th</sup> April 2007 and 20<sup>th</sup> July 2009 which he confirmed in examination in chief and was cross-examined by Counsel for the Defendants. His primary challenge was in respect to the initial "RM" placed at the bottom right hand corner of the thumb print found on the Transfer of

Lease/Sublease LR Form 11 annexed "D" to his sworn statement of 24<sup>th</sup> April 2007.

- 9.1. He gave evidence of a purported will dated 11<sup>th</sup> March 2004 which the late Rose Mala signed her name as "Rose" (Annexure "A" – 24<sup>th</sup> /4/07). He also disclosed the original Lease dated 18<sup>th</sup> July 1986 which the late Rose Mala signed her name also as "Rose" (Annexure "B" – 24<sup>th</sup> /07/07). Further, the Claimant gave evidence about a letter written on 26<sup>th</sup> August 2003 to Mr Willie Jack Kapalu which the late Rose Mala signed as "Rose" on behalf of Thomas Mala. (Annexure "C" – 20<sup>th</sup> /07/07).
- 9.2. The Second challenge by the Claimant was that the First Defendant had not paid any consideration to the late Rose Mala for the first transfer of the lease to him in 1995. His evidence in support of that was that the VT300.000 specified in paragraph 1 of the Transfer of Lease document dated 7<sup>th</sup> October 1994 is a false representation. (Annexure "D" – 24<sup>th</sup> /04/07).
10. Each of the Defendants gave evidence by confirming their respective sworn statements and being cross-examined in respect to them. The First Defendant's evidence was that as a relative of the late Rose Mala's husband the deceased desired that the property be transferred to him and that it would be a gift without any consideration. In cross-examination about the VT300.000 he accepted he did not pay any of that money to the late Rose Mala because the transfer was a gift. He said it was the Lands Department that had written in the figure of VT300.000 on the Transfer document as a matter of practice and that he did not understand why they had done it that way. His evidence was

that he had used two different types of signatures one for "public purposes" and the other for "private purposes".

- 10.1. The evidence of the Second Defendant was that the First Defendant had transferred the Title to him being the nephew of the late Rose Mala. The transfer was made on 18<sup>th</sup> March 2002. He relied on Annexure "E" to the sworn statement of the Claimant of 24<sup>th</sup> April 2007. His evidence also was that he transferred the Title to the Third Defendant for the consideration of VT100.000.
  - 10.2. The evidence of the Third Defendant was that he obtained the Title by transfer from the Second Defendant and that he paid VT100.000 to the Second Defendant as consideration.
  - 10.3. The Director of Lands gave evidence showing that upon certification by his lands officers, he was satisfied all procedures has been followed to warrant a registration of all the transfer made between these Defendants.
11. Now for the reasons. And the first issue was whether the Defendants had committed fraud. The Court was not satisfied the Defendants had committed fraud because –
- (a) The Claimant could not disprove that the finger print found on the Transfer Instrument dated 7<sup>th</sup> October 1994 was Rose Mala's. He was not present when the document was signed by Francois Tari, Neirove Zoe, Peter Tulangi and Rose Mala herself. Francois Tari was present and he confirmed in his evidence that the finger print was Rose Mala's. That is sufficient to make the document valid.

- (b) The Claimant had not known Rose Mala in 1994. His evidence was that he only knew her from 2001 onwards. In cross-examination he was asked if he asked Rose Mala about whether the initial was her signature and he said he did and that Rose Mala had denied it was her signature. The Court did not accept that as the truth. If it was, the Claimant should have challenged the document in either 1994 or so soon after he was told about it. But to wait until some 15 years have gone by and long after Rose Mala had passed away makes his case doubtful and questionable.
- (c) The Claimant had no evidence showing fraud in the transfers from the First to the Second and Third Defendants. And he had no evidence showing the registration of those transfers by the Fourth Defendant was done fraudulently.
12. Fraud is defined in general as the obtaining of a material advantage by unfair or wrongful means. Fraud is proved when it can be shown by evidence that a false representation was made (a) knowingly, or (b) without belief in its truth; or (c) recklessly, careless whether it be true or false (**See Osborn's Concise Law Dictionary 6<sup>th</sup> Edition**).
- 12.1. From the evidence before the Court, the Claimant fell short of proving any of these three elements to the required standard.
13. That brings me to the issue of consideration of the VT300.000 indicated but not paid by Francois Tari to Rose Mala. The issue is whether the figure is deceptive.
- 13.1. Francois Tari explained in his oral evidence that there was no consideration paid as the transfer was a gift. He said he did not

know or understand why the figure of VT300.000 was inserted but understood it was a practice within the Lands Department. The Claimant did not request a summons from someone in the Department to come forward to offer some explanation. It was incumbent up on him to do so. Alternatively he could have joined the Lands Officer as a party but he did not do so. It cannot therefore be said that the First Defendant had knowledge of the fraud or caused it to occur or substantially contributed to it so as to fall within the scope of Section 100 (2) of the Land Leases Act.

14. Coming now to the purported will dated 11<sup>th</sup> March 2004 naming the Claimant as the beneficiary of Leasehold Title 03/k103/007. The Claimant was granted letters of administration over the estate of Rose Mala based on that purported will.
  - 14.1. It was submitted by Mrs Vire that the will had no effect because the property had passed from Rose Mala to Francois on 3<sup>rd</sup> March 1995, from Francois Tari to Gideon Rocroc on 18<sup>th</sup> March 2002 and from Gideon Charlie Rocroc to John Knox in June 2004.
  - 14.2. The Court accepted that submission. It is common knowledge that wills do not take effect unless and until the testator had died. Rose Mala died on 10<sup>th</sup> January 2006. Although, the will is dated 11<sup>th</sup> March 2004, it did not take effect until after 10<sup>th</sup> January 2006. However, by this time Leasehold Title No. 03/K103/007 and the interests thereon had passed from Rose Mala to Francois Tari and to Gideon Charlie and to John Knox. The title now rests with and in John Knox's name. And as such, it is John Knox who should be entitled to the grant of letters of administration as a substitute for the Claimant. A separate order will issue to that effect. The grant of

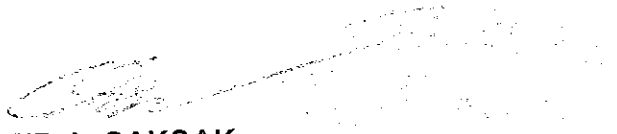


letters of administration to the Claimant dated 2<sup>nd</sup> October 2007 is therefore vacated and substituted.

15. As regards Francois Tari's signatures it is not uncommon that a person uses two different signatures where circumstances so required.
16. It was for these reasons that the Claimant's claims and proceedings failed and were dismissed by the Court.
17. The Court did not deal with costs but parties have liberty to apply separately seeking costs. Any application should be forthcoming within 21 days from the date of this judgment.

**DATED at Luganville this 29<sup>th</sup> day of July 2009.**

**BY THE COURT**

  
**OLIVER A. SAKSAK**

**Judge**