

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No.75 of 2009

BETWEEN: **WESLEY RASU**
First Claimant

AND: **WESLEY RASU on behalf of the
RASUNAPOE FAMILY**
Second Claimant

AND: **JAMES MOLI**
First Defendant

AND: **DIRECTOR OF LAND RECORDS**
Second Defendant

AND: **THE ATTORNEY GENERAL on behalf of
MINISTRY OF LANDS**
Third Defendant

Coram: **Justice D. V. Fatiaki**

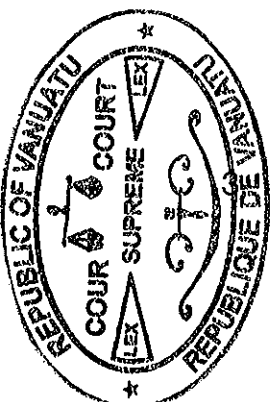
Counsels: **Mr. Garry Blake for the Claimants**
First Defendant in person
Ms. Florence Williams for the 2nd and 3^d Defendants

Date of Decision: **16 August 2012**

RULING

1. By an amended claim dated **16 October 2009** the claimants seek an order that registered lease title No. **04/3422/003** be rectified by cancelling the registration of the lease or alternatively, a declaration that the first defendant holds the lease subject to the claimants' overriding right of occupation in the manner they are currently enjoying use and occupation of the land.
2. In essence, the claimants say in their claim that they are the declared custom owners of the land comprised within the first defendant's lease No. **04/3422/003** situated on **Malo Island** and which they have been occupying since **October 1995** and have been operating a cattle farm on the land. The land they occupied and farmed was then leased, without their knowledge and consent, to the first defendant by the **Minister of Lands** purportedly in exercising of his powers under **Section 8 (2)** of the **Land Reform Act**.

The claimants further say that the first defendants' lease dated **15 February 2002** was registered as a result of fraud and/or mistake on the part of the **Minister of Lands** owing to the first defendant deliberately withholding material information from the Minister, including, the claimant's



longtime occupation and use of the land and their claim to customary ownership of the land over which the first defendant's lease was granted.

4. In brief, without specifically mentioning them, the claimants are invoking **Sections 100 and 17** of the **Land Leases Act** in their claim.
5. In his defence filed on **29 September 2009** the first defendant denied that there had been any fraud in obtaining the lease which he obtained by applying for it under the normal procedure. Likewise, he does not believe that there was any mistake involved in the registration of his lease.
6. The second and third defendants deny the existence of any fraud or mistake in the grant and registration of the first defendant's lease which "*was registered in good faith and based on information supplied*" (by the first defendant) and they rely on the protective provisions of **Sections 9 and 24** of the **Land Leases Act** [CAP. 163].
7. By application dated **30 March 2010** the claimants seek an order striking out the defendants' defence and the entry of judgment for the claimants on their claim.
8. The application is brought under **Rule 9.6** of the **Civil Procedure Rules** for summary judgment on the basis that the claimants believe that "*the defendant does not have any real prospect of defending*" the claim.
9. **Rule 9.6** states:
"Summary judgment

9.6 (1) *This rule applies where the defendant has filed a defence but the claimant believes that the defendant does not have any real prospect of defending the claimant's claim.*

(2) *The claimant may apply to the court for a summary judgment.*

(3) *An application for judgment must:*

(a) *be in Form 15; and*

(b) *have with it a sworn statement that:*

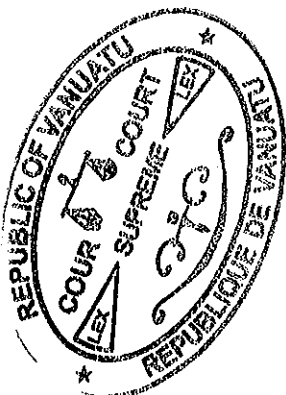
(i) *the facts in the claimant's claim are true; and*

(ii) *the claimant believes there is no defence to the claim, and the reasons for this belief.*

(4) *The claimant must:*

(a) *file the application and statement; and*

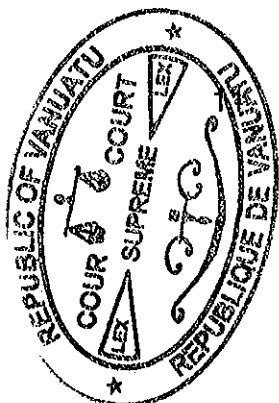
(b) *get a hearing date from the court and ensure the date appears on the application; and*



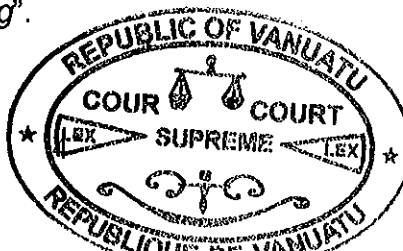
- (c) *serve a copy of the application and sworn statement on the defendant not less than 14 days before the hearing date.*
- (5) *The defendant:*
 - (a) *may file a sworn statement setting out the reasons why he has an arguable defence; and*
 - (b) *must serve the statement on the claimant at least 7 days before the hearing date.*
- (6) *The claimant may file another sworn statement and must serve it on the defendant at least 2 days before the hearing date.*
- (7) *If the court is satisfied that:*
 - (a) *the defendant has no real prospect of defending the claimant's claim or part of the claim; and*
 - (b) *there is no need for a trial of the claim or that part of the claim, the court may:*
 - (c) *give judgment for the claimant for the claim or part of the claim; and*
 - (d) *make any other orders the court thinks appropriate.*
- (8) *If the court refuses to give summary judgment, it may order the defendant to give security for costs within the time stated in the order.*
- (9) *The court must not give judgment against a defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law."*

10. Plainly, the claimant has the dual burden of satisfying the Court in an application for summary judgment, not only, that the defendant has "no real prospect of defending the claimants claim", but also, that "there is no need for a trial of the claim ...". In this regard **subrule (9)** identifies 2 instances where a trial is required namely, where "there is a dispute on a substantial question of fact or a difficult question of law".

I accept that there is no clear impediment in the above Rule to the grant of summary judgment on a claim for rectification of a lease under **Section 100** of the **Land Leases Act**, but, having regard to the dual grounds on which such a rectification may be ordered, namely, "fraud" or "mistake" it would take an exceptionally strong case to satisfy the Court in terms of **Rule 9.6 (7)**.



12. In this regard it should be noted that the relevant **Minister of Lands** has **not** provided a sworn statement in the proceedings. This lacuna in the evidence is significant in so far as the allegations of "fraud" are mainly directed at the first defendants willful non-disclosure or deliberate withholding of relevant facts from the **Minister of Lands** in obtaining firstly, a Negotiator Certificate and then, a lease for the land. The allegations of "mistake" are solely directed at the relevant **Minister of Lands** who granted the first defendant's lease.
13. The effect of the first defendants defence dated **29 September 2009** and sworn statement filed on **23 June 2010** may be conveniently summarized as follows: The first defendant applied for and was granted a Negotiator's Certificate over rural land situated on **Malo Island, Santo**. Even though custom ownership of the land was disputed, he nevertheless conducted successful negotiations with some of the custom-owner claimants of the land and obtained their written consent to lease the land. The **Minister of Lands** granted the first defendant a lease over the land in the exercise of his powers under **Section 8** of the **Land Reform Act** [CAP. 23].
14. In response, claimants' counsel conveniently summarizes the claim as follows (with my observations interspersed as appropriate):
- (a) *The original registered lease over the land was granted by members of the Second claimant as customary owners of the land;*
15. In this regard, the original registered lease No. **04/3422/001** is dated **26 February 1985** and was for a term of 30 years commencing on 30 July 1980. The named lessors were three (3) individuals: **Tom Vanua, Daniel Rasu**, and **Ben Aoulangalanga**. This lease was surrendered and cancelled on **9 November 1995** ("the first lease").
- (b) *The original lease was surrendered with the consent of the second claimant and at the same time the first claimant acquired the plant and equipment employed on the land by the previous registered lessee and from that point continued to occupy, farm and develop the land.*
- (c) *The first defendant disputed the second claimant's ownership of the land;*
16. This is confirmed in an open Memorandum dated 20 March 2001 from the Sanma Island Court clerk advising that (A) Baone land on East Malo is a "Disputed Land" with the competing claimants being "Pastor Ephraim Moli (presumably a relative of the first defendant), Mr. Tom Rasunaboe, Mr. Moli Ravo and Ernest Belbong".



- (d) *The first defendant applied for a lease of the identical land that was the subject of the original lease, on the grounds that the land ownership was disputed but failed to advise the Minister of the interest of the Rasu family. In his defence, the first defendant does not specifically deal with the failure to notify the Minister of the parties in actual occupation of the land or the identity of the claimants to customary ownership. He simply says that he applied for the lease following normal procedures without stating what those procedures were. It is incumbent upon the first defendant to put on sworn testimony as to what occurred in terms of the normal procedures that he alludes to.*

(my underlining)

17. In this regard on **16 February 2001** the then Acting Minister of Lands **Hon. Stanley Reginald** issued a Negotiator Certificate under **Section 6** of the **Land Reform Act** authorizing the first defendant to negotiate for a lease over Abaone land (*former title 04/3422/001*).
18. On **17 March 2001** the first defendant obtained the signed consent of 5 of 7 named persons *including* from the attorney of **Ben Arulenglenga** who was a named lessor in the first lease.
19. If I may say so, the practice of issuing Negotiator Certificates to applicants who seek to lease land which is the subject matter of a custom owner dispute is, at best, confusing, and at worst constitutes an unreasonable fetter on the exercise of the Minister's powers under **Section 8** of the **Land Reform Act**.
20. In so far as the submission seeks to impose a positive duty to make disclosures on an applicant for a Negotiator Certificate beyond the requirement to lodge an application with the Minister of Lands, I cannot agree that such a duty (which is akin to "*uberrima fides*") is within the contemplation of **Section 6** of the **Land Reform Act** which reads:

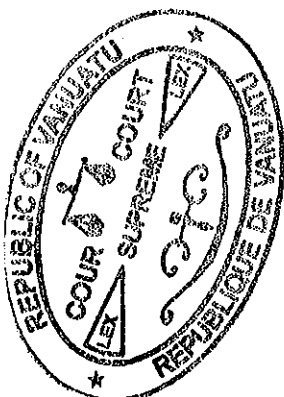
"(1) No alienator or other person may enter into negotiations with any custom owners concerning land unless he applies to the Minister and receives a certificate from the Minister that he is a registered negotiator.

*(2) A certificate issued in accordance with subsection (1) shall –
(a) state the names of the applicant and of the custom owners;*

(b) give brief details of the land in respect of which negotiations are registered; and

(c) state the object of the negotiations.

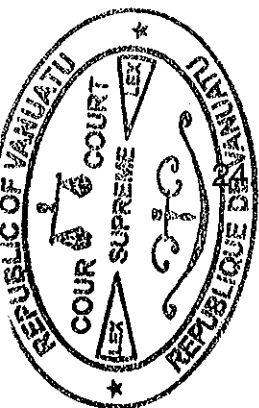
(3) If negotiations are completed without compliance with subsection (1) the Minister may refuse to approve the



agreement between the custom owners and the unregistered negotiator and if he is an alienator may declare the land unsettled land."

21. Nor is such a duty consistent with the provisions of **Regulations 7 and 8** of the **Land Reform (Rural Alienated Land) Regulations [CAP. 123]** which together enables the **Minister of Lands** not only to require further and better particulars including documentary evidence of any matter contained within an application for a Negotiator Certificate, but also, to appoint a person to verify and establish the accuracy of the particulars of the application including by way of physical inspection of the land and improvements thereon.
22. Needless to say, between the surrender of the first lease in **1995** and grant of the second lease to the first defendant in **2002**, there must have been a deterioration in relations between the families of the three (3) named lessors in the first lease resulting in competing claims of custom ownership of the leased land as evidenced by the open Memorandum from the **Sanma Island Court** in 2001 and the subsequent proceedings before the **Molimaimai Land Tribunal**.
23. Finally, the first defendant submits without contradiction, that an appeal has been filed in the **Supreme Court, Luganville** registry in **Civil Case No. 28 of 2009** against the decision of the **Molimaimai Land Tribunal**, and such appeal not having been heard or determined, it cannot be said that the claimants declaration of customary ownership of Abaone land is final and conclusive.
 - (e) *It is clear from the first claimant's statement and the correspondence from the Ministry and the Department of Lands appearing at annexures 'P', 'Q' and 'R' to Rasu's statement that the Minister was not aware of the Rasu interests when he signed the lease.*
 - (f) *Therefore, the simple and undisputed facts are that the Rasu family were the recognized custom owners, having previously issued a lease over the land, pending a determination by a duly constituted tribunal, and indeed as evidenced by the decision of the Land Tribunal in their favour they were duly confirmed as undisputed owners. In addition the Rasu family were in actual occupation of the land. Prior to granting the lease these matters were not brought to the Minister's attention nor did the Minister consult with the Rasu family as Claimants.*

In this regard the first lease No. **04/3422/001** over the land was signed by three (3) named individuals who confirmed in the body of the lease (**Clause 4**) that "*they are duly authorized representatives of the custom*



owners according to the law ...". Plainly, there was more than one (1) family custom owner of the land at the time of the signing of first lease.

25. Furthermore, the declaration of custom ownership which the claimant relies upon is that of the **Molimaimai Land Tribunal** delivered on **11 July 2008** concerning "**NAVIMAPEOLOLO**" land which includes within its boundary Avasisie, Abaone, and three (3) off-shore islands Malotino, Malo Kilikili, and Maloveleo. Until then, Abaone land was "*disputed land*" and was not the exclusive property of the claimant family. That was also the prevailing status quo at the time that the first defendant's lease was granted by the Minister in 2002.

(g) *The second defendant does not, in its defence, admit or deny that there was a failure to consult with the interested claimants to ownership of the land, but the letters appearing at Annexures 'P' – 'R' confirm that there was no such consultation and it is incumbent on the Minister in response to this application to put on evidence of consultation if in fact there was.*

26. This submission appears to suggest that the **Minister of Lands** in granting a lease pursuant to **Section 8** of the **Land Reform Act** over "*disputed land*" is required to consult with the disputing claimants and also ascertain whether or not the disputed land is occupied. I cannot agree that any such duty is imposed under **Section 8** which reads:

"(1) The Minister shall have general management and control over all land –

(a) occupied by alienators where either there is no approved agreement in accordance with sections 6 or 7 or the ownership is disputed; or

(b) not occupied by an alienator but where ownership is disputed; or

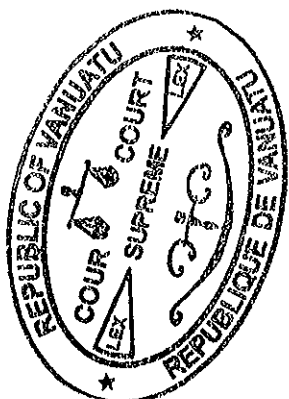
(c) not occupied by an alienator, and which in the opinion of the Minister is inadequately maintained.

(2) Where the Minister manages and controls land in accordance with subsection (1) he shall have power to –

(a) consent to a substitution of one alienator for another;

(b) conduct transactions in respect of the land including the granting of leases in the interests of and on behalf of the custom owners;

(c) take all necessary measures to conserve and protect the land on behalf of the custom owners."



27. Indeed, such a duty “*to consult*” would be inconsistent with the tenor and purpose of **Section 8** which empowers the **Minister of Lands** to deal with customary land for certain limited purposes “*where ownership is disputed*”.
28. As far as the “*occupation*” of the “*disputed land*” may be relevant, the section merely refers to “*occupation by an alienator*”. Needless to say I do not consider consultation with competing claimants to customary land a “*necessary measure to conserve and protect the land*” (my underlining). Nor, in my view, are the interests of the competing claimants to “*disputed land*” within the contemplation of **Section 8 (2) (c)** which specifically empowers “*the granting of leases*” by the **Minister of Lands**.
29. Furthermore **Section 17** of the **Land Leases Act** protects the rights of persons in actual occupation of land against the proprietor of a registered lease.
30. In light of the foregoing I am not satisfied that the claimants have discharged the onerous burden placed upon them in this application for summary judgment.
31. Accordingly, the application is refused with costs. By way of further directions this case is listed for further conference on **Thursday 16 August 2012 at 11.00 a.m.**

DATED at Port Vila, this 16th day of August, 2012.

BY THE COURT


D. V. FATIAKI
Judge.

