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

Civil Case No. 122 of 2010

BETWEEN: **NTM FAMILY WORSHIP CENTER LIMITED**
Claimant

AND: **EMMA MOLISINGI**
First Defendant

AND: **CHEN WEI HONG**
Second Defendant

AND: **THE MINISTRY OF LANDS**
Third Defendant

AND: **THE DIRECTOR OF LANDS RECORD**
Fourth Defendant

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

Counsels: *Mrs. MNF Patterson for the claimant*
Mr. J. Boe for the First Defendant
Mrs. M. Vire for the Second Defendant
Mr. AF Obed for the Third and Fourth Defendants

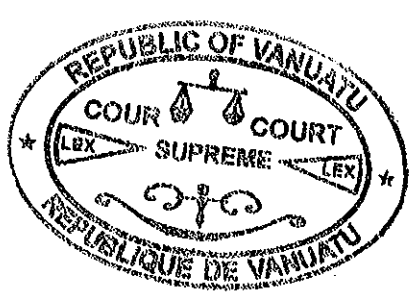
Date of Decision: *18 June 2013*

JUDGMENT

1. This case concerns competing claims to leasehold title **No. 03/0172/038** situated in Luganville, Santo of which the second defendant is the existing registered proprietor (*'the property'*). The claimant seeks rectification of the second defendant's title in accordance with **section 100** of the **Land Leases Act** [CAP. 163] on the basis that the second defendant's registration was obtained through fraud and mistake.

2. At the trial the claimant called:

Seth Tatamat – President of the claimant church who negotiated the purchase of the property with the first defendant and later the variation in the purchase price;



David Archie – Pastor of the Luganville church at the relevant time who met and spoke with the second defendant in Luganville, about the claimant's interest in the property. He recalled delivering a copy of the documents evidencing the claimant's purchase of the property to the second defendant at his store a few days after he requested it and he was sure that all communications with the second defendant ceased "*after September 2008*";

Ronly Ala – who looked after the church administration side of the claimant. He tendered a record of all payments made by the claimant; and

Amanda Kensen Molu – who accompanied David Archie to the second defendant's shop. She was unavailable for cross-examination.

3. The first and second defendants also testified and were cross-examined. Notable by his absence however, neither defendant called **Jansen Molisingi** who played a pivotal and crucial role in the sale of the property to the second defendant and in the receipt of monies from the claimant for 6 months after the said sale.

4. The claimant's case is that it had entered into an agreement in 2003 with the first defendant who was then the registered proprietor, to purchase the property for **VT12 million** to be paid by way of an initial deposit of VT1 million and the balance by monthly installments of **VT125,000**. Then, after the property was professionally valued at **VT8 million**, with the first defendant's agreement, the purchase price was reduced to **VT9 million** in an agreement dated **27 October 2003** which also reduced the claimant's monthly repayments to **VT80,000** (the variation agreement). The first defendant's original lawyers subsequently sought unsuccessfully, to reinstate the original purchase price of VT12 million.

5. The claimant produced clear undisputed evidence that the initial payments were made out of its Port Vila office from 2003 until October 2006 when payments were continued through its Santo office. By May 2009 it had paid a total sum of **VT8,874,000** towards the purchase price of the property. In respect of the Santo payments, nine (9) of the payments totaling **VT237,000** were also paid directly to Jansen Moli (the first defendant's son) between November 2008 and April 2009.

6. Against the second defendant, the claimant asserts that he was fully aware of the claimant's agreement with the first defendant to purchase the property and, despite that knowledge, he collaborated the first defendant

to sell him the property at a much reduced price, and thereby fraudulently obtained the registration of a transfer of the property into his name in February 2009.

7. The first defendant's case is that she agreed to sell her property to the claimant for **VT12 million** to be paid by an initial lump sum deposit of VT1 million and thereafter monthly installments of **VT125,000**. Right from the start she claims, the claimant was in breach of the agreed payments and was often irregular with its monthly payments which also varied in amount. Despite that however, she continued to receive and accept payments from the claimant towards the purchase price of the property.

8. She denied agreeing with the claimant to a reduction in the purchase price and the monthly repayments or to signing any agreement to that effect. Surprisingly, she did not complain to the police at any time that her signature had been coerced or was a forgery on the variation agreement and I disbelieve her in her denials and accept the evidence of the claimant's witnesses that she voluntarily agreed and signed for the reduced purchase price of **VT9 million** after sighting the valuation report on the property.

9. She had given her son **Jansen Molisingi** a Power of Attorney to deal with the property including receiving payments from the claimant as he was based in Luganville where the property was situated. Although she claims that her son regularly reported to her she was unsure how much she had been paid for the purchase price by the claimant and she agreed to re-sell the property to the second defendant for the sum of **VT5 million** without cancelling the contract with the claimant or informing it of her decision to re-sell the property. I am satisfied, that even if the first defendant was unaware of the exact amounts paid to her son, **Jansen Molisingi**, in Luganville, he had received the money on her behalf as her authorized attorney and therefore she is accountable for such monies.

10. Furthermore, on the basis of the recent Court of Appeal judgment in **Colmar v. Rose Vanuatu** [2011] VUCA 20 in which the Court referred to and applied the New Zealand Supreme Court decision in Nathan v. Dollar & Sense Ltd. [2008] 2 NZLR 557, I have no hesitation in imputing to the first defendant, the patently dishonest actions of her son and attorney **Jansen Molisingi** in accepting payments from the claimant after he had personally negotiated the sale of the property to the second defendant.

11. The second defendant's case is that he is a "*bona fide*" purchaser of the property and that he had enquired and was told that the claimant was a mere tenant on the property. He denies knowing that the claimant had entered into an agreement with the first defendant to purchase the property and he had personally verified that the first defendant was still the registered proprietor of the property when he purchased it.

12. Under cross-examination he said he paid the purchase price in two (2) installments instead of one payment because he wanted to be secure and safe before he paid all the money. That was his practice as a cautious Chinese businessman.

13. Similarly he did not tell the claimant's about purchasing the property because he wanted everything to be secure and he had the title before he talked about it. He was aware of the claimant's claim that it "*owned the land*" but that changed when the first defendant's son **Jansen Molisingi** offered to sell him the property.

14. He didn't ask the claimant details of its claim to ownership of the property or the terms of its tenancy. He admits seeing the claimant's sale and purchase agreement in April 2009 but that was long after the properly had been transferred to him. He accepted that he had purchased the property at a "*bargain price*" and he had been greatly assisted by officials of the Lands Department in Santo. He was willing to take the risk of having to evict the claimant once he had acquired the property if it became necessary.

15. He admitted not going back to the claimant once he became interested in the property and, to counsel's question: "***You ignored NTM's rights?***" he answered: "***I never checked***".

16. In this regard the Court of Appeal relevantly observed in **Naflak Teufi Ltd. v. Kalsakau** [2005] VUCA 15 of the requirements of section 100 (1) of the Land Leases Act [CAP. 163]:

> *"We are satisfied on a consideration of the object and purpose of the section that, at the very least, a person seeking to invoke section 100 must include a person who has an interest in the register entry sought to be rectified and which it is claimed was registered through a mistake or fraud. Not only must there be proof of mistake or fraud but also that such mistake or fraud caused the entry to be registered. Furthermore it has to be proved that the*

*mistake or fraud was known to the registered proprietor of the interest sought to be challenged or was of such a nature and quality that it would have been obvious to the registered proprietor had he not shut his eyes to the obvious or, where the registered proprietor himself caused such omission, fraud or mistake or substantially contributed to it by his own act, neglect or default. We use the word **'interest'** in the widest possible sense although accepting it may have in appropriate circumstances be distinguished from a mere busy body."*

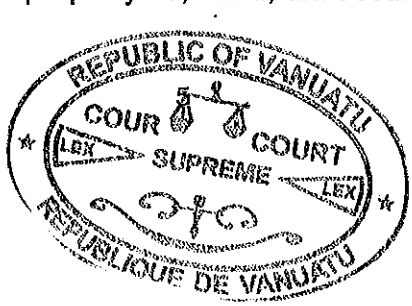
(my underlining)

17. If I may say so having seen and heard the first and second defendants give evidence I can categorically say that neither impressed me. The first defendant was defensive and aggressive towards counsel and indeed, the case had to be adjourned to allow her to calm down at one stage during her cross-examination by the claimant's counsel. I was particularly unimpressed with the terms of the Power of Attorney dated 16 November 2006 which she gave her son and which included a power to "*negotiate*" and "*sale*" (sic) the property at Luganville which she had sold to the claimant and had been receiving payments for over 3 years.

18. As for the second defendant, he struck me as evasive and insincere in his answers. I was left with the distinctly unfavourable impression that he was being less than completely truthful in his answers about how *much*? he really knew about the claimant's real interest in the property or indeed *when*? he came to that knowledge. I was also unimpressed with his claim to being a "*cautious*" businessman in acquiring the property.

19. In my view, once he learnt that the claimant was not the registered proprietor of the property, he went behind the claimant's back and acquired the property despite being told by the claimant's representatives that it was in the process of purchasing the property.

20. Needless to say, a "*cautious*" purchaser would be aware that the mere absence of a claimed purchaser's name on a title document is **no** guarantee that the property comprised therein is not the subject matter of a valid and binding sale and purchase agreement. Such a "*cautious*" purchaser would in my view, have made comprehensive enquiries of the claimed purchaser (who in this case was also occupying the property) and would have made a point of sighting any documentation in that regard before purchasing the property as, I find, did occur in this instance.



21. The second defendant's claim that he made no enquiries of the claimant's representatives because he believed they had not been truthful in their answers to his initial enquiries and because it was his "*cautious*" nature, is a hollow retrospective attempt to conceal and justify his opportunistic actions in purchasing the property. In this regard, I prefer the evidence of the claimant's witnesses especially **David Archie** who impressed me with his frankness and who recalls taking the documents evidencing the claimant's purchase of the property to the second defendant's shop after he had visited the property with some other Chinese men "*in or about June 2008*".

22. From the foregoing I have no hesitation in concluding that the first and second defendants were deliberately dishonest in their dealings with the claimant both before and after the sale and subsequent transfer of the property to the second defendant. Such dealings were intentionally kept secret from the claimant even to the extent, on the first defendant's part, of dishonestly continuing to receive and accept payments from the claimant for the purchase price for the property for 6 months even after the property had been sold and transferred to the second defendant. Furthermore, if the second defendant is to be believed, then he was receiving and photocopying the claimant's documents evidencing its purchase of the property in April 2009 after the transfer of the property to him had been registered.

23. **Section 100 (2)** of the **Land Leases Act** provides:

> *(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.*

24. Even accepting, for the sake of argument, that the second defendant was unaware of the claimant's competing interest as a purchaser of the land, on the evidence which is not in dispute, I find as a matter of fact and law that the second defendant was never "*in possession*" of the land in question (*see:* **Turquoise v. Kalsuak** [2008] VUCA 22 affirming the judgment of Tuohy J. on this point) nor has the second defendant made any attempt to obtain vacant possession even after the property was

registered in his name or before proceedings were issued against him. He is clearly not protected by the provisions of subsection (2) above.

25. For the foregoing reasons, I am satisfied and direct that an order shall issue under **Section 100 (1)** of the **Land Leases Act** rectifying the register for leasehold title **No. 03/0172/038** by cancelling the registration of the second defendant's transfer dated 24 February 2009.

26. For completeness and as sought by the claimant, the Court also declares that the agreement dated **27 October 2003** between the claimant and the first defendant is valid and continues to bind the parties.

27. The claimant having succeeded in its claim is awarded standard costs to be taxed if not agreed and such costs, once quantified, is payable by the first and second defendants in the ratio of 70%:30% respectively.

DATED at Port Vila, this 18th day of June, 2013.

BY THE COURT

REPUBLIC OF VANUATU COURT SUPREME LEX REPUBLIQUE DE VANUATU

D. V. FATIAKI
Judge