

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

Civil Case No. 26 of 2013

BETWEEN: JAMES HINGE
Claimant

AND: JEAN TOA
First Defendant

AND: GAETAN PIKIOUNE
Second Defendant

Coram: Mr. Justice Oliver A. Saksak

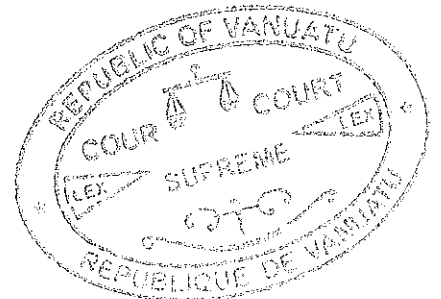
Counsel: Lent Tevi for the Claimant
Marisan P. Vire for First Defendant
George F. Boar for Second Defendant

Date of Hearing: 27th June 2014
Date of Judgment: 19th September 2014

JUDGMENT

Introduction and Background

1. On 2nd July 2013 the Claimant filed a claim against the first and second Defendants.
2. The claim is founded on an Agreement to lease (the Agreement) entered into between the Claimant and the first defendant's father on 3rd September 1991. He alleges that the Minister had approved the agreement on 16th October 1991. He challenges the forfeiture notice issued by the first defendant on 4th April 2011 and then later on 5th August 2011, and a further letter and notice of forfeiture dated 5th September 2011 as illegal, void and of no legal effect. He alleges he was not personally served with any of the forfeiture notices issued by the first defendant. As against the Second Defendant the Claimant alleges that he had entered on the land the subject of the Agreement and has started to develop it.
3. The Claimant seeks the following reliefs-
 - a) An Order quashing the notices of forfeiture issued by the first Defendant.
 - b) An Order prohibiting the Second Defendant from entering and developing the land
 - c) An Order recognizing the Claimant as legal owners,
 - d) Costs against the first and second defendants, and
 - e) Any other orders as the Court deems just.



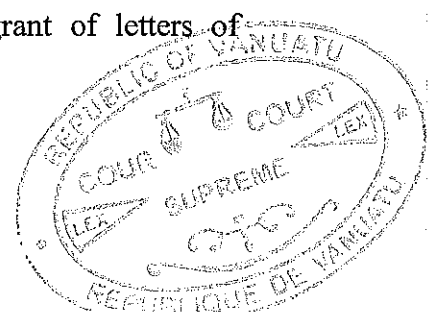
4. The reliefs in paragraph (b) were granted by the Court on 16th August 2013 following the Claimant's application made on an urgent interlocutory basis. Those orders remain in force pending the final determination of the Claimant's claims.
5. The Claimant filed evidence in support of his claims by sworn statements from the Claimant himself dated 6th August 2013 and from Martin Hava and Justin Hava dated also on 6th August 2013.
6. Mrs Vire filed a defence on behalf of the First Defendant on 11th July 2013. He acknowledges the Agreement but say the Claimant had breached the terms and conditions of the Agreement. Further he says that he had issued and served forfeiture notices on the Claimant after the claimant had failed to remedy the breaches following written requisitions. Further he says the Claimant had failed to take necessary steps to ensure proper survey and creation of a lease title and its registration pursuant to the Agreement. He denies the Claimant is entitled to any of the reliefs sought.
7. The First Defendant filed evidence by sworn statement on 9th September 2013.
8. Mr Boar filed a defence on behalf of the Second defendant on 2nd September 2013. He says his entry onto the land was made with the consent of the First Defendant. Further he says he applied and was granted a negotiation certificate on 24th August 2012 and that on 15th March 2013. The first defendant entered into an Agreement to lease for agricultural lease which was duly signed. Further he says he paid by way of a premium the sum of VT 1.402.865 to the first defendant, and that he balance would be paid upon final registration of the lease. He seeks an order dismissing the Claimant's claims.
9. On 27th June 2014 Counsel agreed that all statements be taken as read into evidence.

Issues

- 10 Four issues have been raised by the Claimant-
 - a) Whether the Notice of forfeiture by First Defendant is lawful?
 - b) Whether the Claimant failed to pay land rentals?
 - c) Whether the Claimant failed to register interest over the land?
 - d) Whether the Claimant failed to develop the land?

Discussions

11. On the face of it, as a preliminary point of observation, this action appears to be misconceived for the following factors-
 - a) The first defendant's father who entered into the Agreement with the Claimant is deceased and there appears to be no authority that his son (first defendant) should be acting as his personal representative.
 - b) Being deceased, the more appropriate course is to sue the deceased's estate but that has not happened here.
 - c) The First defendant has not applied for probate or for grant of letters of administration of the estate of his father.



12. In any event, neither the Claimant nor the Defendants have raised these factors as issues so the Court does not have to consider and decide on them.

12.1 Now for the issues raised by the Claimant it is necessary to decide on the issues in (b), (C) and (d) first as the issue in (a) hinges entirely on these.

12.2 First, it is to be noted that in his written submission the Claimant readily accepts he had failed to fulfil the Agreement.

12.3 Second, the Claimant readily admitted in his sworn statement and also in his written submissions that he had failed to pay land rentals for the years 2010 and 2011, and including 2012 and 2013. The total land rents for these years is given at VT 45.000.

12.4 Third, the Claimant readily admits in his written submissions that he had failed to register his interest over the land after the Agreement was signed.

12.5 Fourth, the Claimant in his evidence shows that since 1991 he had developed the land by-

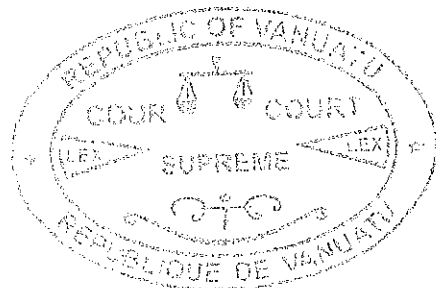
- a) Building houses,
- b) Fencing the full 80 hectares of land,
- c) Grazing cattle on the land,
- d) Planting gardens, and
- e) Building an access gravelled road.

It appears the first defendant does not take issues with these.

12.6 Fifth, the Claimant argues that the forfeiture notice issued was unlawful. He contents that the first defendant had waived that right pursuant to section 43 (3) of the Land Leases Act Cap.163. Further he contents that as he was never served with letters of demand and the notice of forfeiture, they were unlawful relying on the cases of Kalses V. Le Manganese de Vate Ltd [2005] VUCA 2 and Aore Island Ltd v. Vatarul [2013] VUCA 16.

12.7 Section 43 of the Land Leases Act provides for the lessor's right of forfeiture as follows-

1. "Subject to the provision of section 45 and any provision to the contrary to the lease, the lessor shall have the right to forfeit the lease if the lessee commits any breach of, or omits to perform any agreement or condition on his part expressed or implied in the lease.
2. The right of forfeiture may be:-
 - a) Exercised, where neither the lessee nor any person claiming through or under him is in occupation of the land, by entering upon and remaining possession of the land, or
 - b) Enforced by a reference to the Referee



3. The right of forfeiture shall be taken to have been waived if:-

- a) The lessor accepts rent which has become due since the breach of the agreement or condition which entitled the lessor to forfeit the lease or has by any other positive act shown an intention to treat the lease as subsisting, and
- b) The lessor is, or should by reasonable diligence have become, aware of the commission of the breach,

Provided that the acceptance of rent after the lessor has commenced a reference under subsection (2) shall not operate as a waiver". (My underlining for emphasis).

13 The evidence by the Defendant is that-

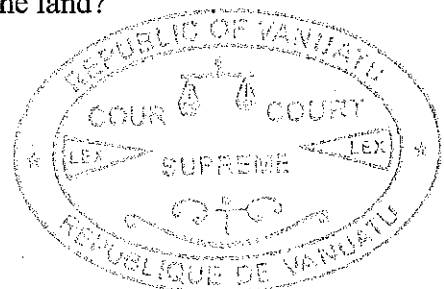
- a) He gave a 30 days notice by letter dated 6th February 2011 which expired on 6th March 2011.
- b) He waited until 4th April 2011 when he issued the final notice.
- c) He gave an additional 10 days grace period (to 15th April 2011) for the Claimant to remedy the breaches.
- d) He served the first notice on the Claimant at chapuis under the " Nandao Tree".
- e) The final notice was served by the defendant on the Claimant at Jubilee Farm near the water Tank.
- f) After service Martin Hava (Claimant's brother) approached the first Defendant with VT 45.000 rentals for years 2009, 2010 and 2012, however the first defendant refused to accept payment. This was after he had taken repossession on 5th August 2011.

14 The Court believes the evidence of the first defendant as to service. The Claimant has had sufficient and reasonable service. The Court rejects his evidence denying service. Therefore the cases of Kalses and Vatarul do not lend assistance to the Claimant.

15 And the Court rejects the Claimant's submissions that the first defendant had waived his right of forfeiture under section 43 (3) of the Land leases Act.

16 I therefore answer the issues as follows:-

- a) Whether the forfeiture notice issued was unlawful?
The answer is in the negative.
- b) Whether the Claimant failed to pay outstanding land rentals?
The answer is in the affirmative.
- c) Whether the Claimant failed to register his interest over the land?
The answer is in the affirmative.
- d) Whether the Claimant failed to develop the land?
The answer is in the negative.



17 The developments the Claimant asserts carrying out on the land were illegal for the following reasons:-

- a) He never had a registered lease.
- b) All he had was an Agreement to lease dated 16th October 1991.
- c) Clause 1 of the Agreement reads-

“This Agreement is for lease of approximately the area of land outlined in red on the attached sketch plan situate on the island of Santo and formerly registered under title(s) and measuring in area approximately 80 hectares (but subject to survey) upon the terms and conditions set out in the annexed schedule”.

d) Clause (1) (c) states-
“The land shall be used only for the purpose of agriculture”.

e) Clause (4) states-
“This Agreement shall subsist only until an approved survey plan of the leased land has been completed and a formal lease has been executed”.
(My underlining for emphasis)

f) Schedule A contains an Agriculture Lease.
The relevant provisions are-

I. Clause 3 (a) (b) (f) and (n) which state-
i. “The lessee agrees with the lessors as follows:

a) Not to permit any part of the demised land to be used for any purpose other than agriculture including primary processing and other services required for the sale and explicit support of same.

b) To promptly pay the rents hereby reserved or any new rent substituted therefore in accordance with the provisions of this lease.

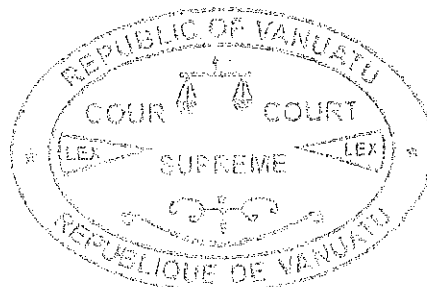
f)To use its best endeavours to prevent squatters entering or residing on the land.

n)Not without the prior consent in writing of the lessor (which consent shall not be unreasonably withheld) to assign sublease, underlet, mortgage or part with possession of the demised land or any part thereof.”

II. Clause 6 States-

If there shall be any breach of any of the conditions, agreements or obligations hereby imposed or implied or by law imposed on the lessee, the provisions of the Land Leases Act 1983 shall apply”.

(My underlining for emphasis)



18 From the evidence of the Claimant and his two brothers Martin Hava and Justin Hava, it is seen that-

- a) There are buildings for residential purposes on the land.
- b) There is gardening being done on the land.
- c) The Claimant does not live on the land but his brothers do.

These activities are done in contravention of clause (1) (c) and clause (3) (a), (b), (f), and (n) of the Agreement to lease. Those activities amounted to breaches which entitled the first defendant to invoke clause 6 of the Agreement to issue a forfeiture notice under the Land Leases Act. That provision entitles the first defendant, as successor and heir to his deceased's father's land to treat the Agreement as if it were a lease.

19 Further from the evidence it appears the only lawful developmental activities the Claimant was entitled to do were-

- a) The fencing, and
- b) The grazing of cattle.

However these are arguable because for the past 20 years since 1991 to 2011 the Claimant failed, either deliberately or by oversight to-

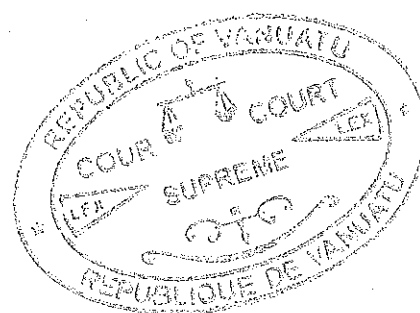
- a) Do a survey of the land,
- b) Obtain a proper lease, and
- c) Register his leasehold interest

The length of that failure and/or omission has become so unreasonable such that it renders those other developments to become unlawful.

20 The Claimant claims under paragraph 25 of his sworn statement dated 6th August 2013 that he is still the legal owner of the land. That claim is rejected. He has no leasehold interest as a registered proprietor. The legal owner of the land is the deceased and his son, the first defendant as successor and heir.

21 As regards the Second Defendant, he followed the proper legal procedures to obtain-

- a) A negotiator certificate approved on 24th August 2012.
- b) An agreement to lease for an agricultural lease on 15th March 2013, and
- c) He has paid 80% of the premium in the sum of VT 1.402.865




Conclusions

22 For those findings and reasons the Court concludes that the Claimant is unsuccessful in his claims and that all the reliefs he seeks are declined. His claims are therefore dismissed in its entirety. The restraining Orders issued on 16th August 2013 are hereby vacated accordingly.

In the circumstances of the case there will be no Order as to costs. Costs lie where they fall and each party must meet their own costs.

DATED at Port Vila this 19th day of September 2014

BY THE COURT


OLIVER A. SAKSAK

Judge

