

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

Civil Case No. 29 of 2010

**BETWEEN: JULIANE VARISIPITI**  
Claimant

**AND: THE REPUBLIC OF VANUATU**  
First Defendant

**AND: NOEL VARI**  
Second Defendant

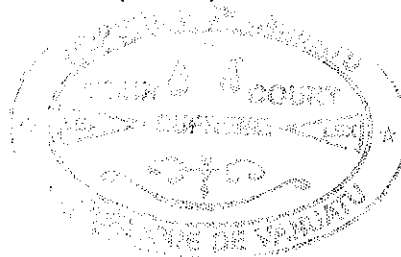
**Coram: Justice D. V. Fatfaki**

**Counsel: Mr. S. Hakwa for the Claimant  
Mrs. V. Trief for the First Defendant  
Mr. E. Nalyal for the Second Defendant**

**Date of Ruling: 8 April 2015**

**RULING**

1. On 14 March 1994 the late **Michael Varisipiti** entered into an Agreement For Lease of Land with the then Minister of Lands of a piece of land located at South Santo Island. The land was formerly registered as Title No. 610 with a land area of approximately 14.50 hectares ("*but subject to survey*"). The term of the lease was for 75 years and its purpose was for: "*Agriculture and related purposes*". The annual rent was agreed at "*Three Hundred (VT300)*".
2. **Clause 4** of the Agreement provided:  
  
*"this agreement shall subsist only until an approved survey plan of the leased land has been completed and a formal lease has been executed"*.
3. It is unclear as to what became of "*(old) Title No. 610*" but by May 2001 a new **Lease Title No. 04/2943/020** was created and effectively subsumed and replaced Title No. 610. This appears not to be seriously disputed and is confirmed in the Second Defendant's application for registration of his own lease wherein Lease 04/2943/020 is described as "*(Ex – 610)*".
4. On 15 May 2006 Michael Varisipiti met his untimely death leaving the claimant his legal wife, a son Michael (Junior) and two daughters, Lisa (a

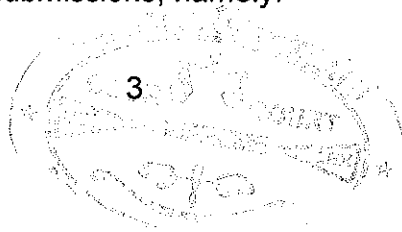


daughter of an earlier marriage and resident in Sydney, Australia) and Jann who resides with the claimant in Port Vila.

5. In early August 2006 the claimant lodged with the Director of Land Records a draft lease document over Title No. 04/2943/020 between the Minister of Lands and the claimant for consideration and approval. All necessary approvals were given by the relevant bodies and authorities by March 2007 including the endorsement of the Director-General (MoL) by 31 May 2007. On 4 January 2008 (corrected) the Minister of Lands executed the claimant's lease over Title No. 04/2943/020. Although lodge with Land Records, the claimant's lease has not been registered.
6. On 23 March 2007 the claimant applied for administration of the estate of her late husband Michael Varisipiti and included in the estate inventory, the unregistered Lease Title No. 04/2943/020. The application was opposed by Noel Vari (a younger brother of the deceased) and Lisa (through her biological mother Manina P. Varisipiti). This became **Probate Case No. 07 of 2007**.
7. On 24 August 2006 the second defendant and two others applied for ministerial consent to lease Title No. 04/2943/020. A negotiator certificate was granted to the applicants on 23 October 2006 in respect of Niafu Plantation. On 6 November the second defendant lodged an application to lease Title No. 04/2943/020. This was also approved and on 15 November 2007 (6 months after the claimant's lease had received all necessary approvals) an agricultural lease over Lease Title No. 04/2943/020 was registered between the Minister of Lands and the second defendant as representative of himself and the other 2 named applicants. Interestingly, the relevant survey plan of the lease granted to the second defendant is dated May 2001.
8. On 21 January 2008 the Supreme Court (**Tuohy J**) appointed the claimant interim administratrix of the estate of the late Michael Varisipiti with specific authority: "*... to issue any proceedings or take any other action she considers necessary to protect the interests of the estate in Niafu land ...*". On 6 March 2008 full Administration of the estate was finally granted to the claimant.
9. On 15 February 2008 the claimant's solicitors lodged a Caution on the Second Defendant's lease Title No. 04/2943/020 and on 8 March 2010 the claimant issued the present proceedings (amended on 25 November 2010) seeking:



- (1) Specific Performance;
  - (2) Cancellation of the lease issued in favour of Noel Vari;
  - (3) Registration of the claimant's lease over Title No. 04/2943/020;
  - (4) Damages; and
  - (5) Costs.
10. It is unclear what the claim for "*specific performance*" entails given the executed lease in the claimant's name, but, it is obvious that her deceased husband could no longer personally perform or complete the Agreement to Lease. In this latter regard although an agreement for lease is expressly excluded from the definition of a "*lease*" under the **Land Leases Act** [CAP. 163], **Section 22** clearly recognizes that an unregistered instrument nevertheless, operates "*as a contract*" and subsection (6) recognizes the validity of any instrument of dealing executed on behalf of a deceased person "*as if the death had not occurred*". For completeness, a "*transmission*" which is included in the definition of a "*dealing*" is defined as "*... the passing of an interest from one person to another by operation of law on death*".
11. On 2<sup>nd</sup> and 7<sup>th</sup> December 2010 respectively, the First and Second Defendants filed amended defences denying that Lease Title No. 04/2943/020 formed part of the estate of the late Michael Varisipiti and further that the Agreement to Lease had "*lapsed*" or, being a contract "*in personam*" between the Minister of Lands and the deceased, did not survive his death.
12. After the filing of sworn statements and discovery as well as a draft chronology and agreed facts and issues and an aborted 5 days trial fixture in May 2011, the trial eventually commenced on 5<sup>th</sup> September 2011 with the calling and cross-examination of the claimant. After 3 partial days of hearing all counsels sought time to pursue settlement talks and/or a possible mediation of the claim. The Court agreed to counsel's request being of the firm view that the matter was essentially a family dispute that was best resolved by agreement or mediation without litigation.
13. On 30 May 2012 when the matter was called again before the Court, it was clear that no settlement or mediation had been reached between the claimant and second defendant. All counsels agreed, however, that the pleadings and evidence (thus far) raised a discrete legal issue which could be addressed by way of submissions, namely:



*"Whether the asserted Agreement to Lease survived the death of the lessee, Michael Varisipiti?"*

Written submissions were ordered and the final submission from the second defendant was received on 30 June 2012.

14. In essence, the defendants accept that Michael Varisipiti had a binding and enforceable Agreement to Lease with the Minister of Lands, but, it was subject to an unperformed "*proviso*" or pre-conditions, namely, the completion of an approved survey plan of the leased land and the execution of a formal lease over the surveyed land (this is a clear reference to Clause 4 of the Agreement set out at paragraph 2 above). Furthermore, it is submitted that the Agreement to Lease was made "*in personam*" by Michael Varisipiti and did not include or refer to the claimant in any way, shape, or form such as to make her a party but, in any event, the Agreement was frustrated by Michael Varisipiti's subsequent death.
15. Finally, the defendants submit that customary ownership of land or succession thereto, cannot be effected by a will or under a grant of administration and reliance is placed on the decision of the Court of Appeal in In re Estate of Molivono [2007] VUCA 22.
16. I can deal briefly with the latter argument which, in my view, is based on a misreading of the claim. Quite simply this was an claim by Michael Varisipiti's administratrix on behalf of his Estate seeking specific performance of an agreement between Michael Varisipiti and the Minister of Lands to lease land which is comprised within a registered survey plan of lease Title No. 04/2943/020. Nowhere in the claim is there any mention or assertion of customary ownership of the land the subject matter of the Agreement to Lease, nor is there any suggestion that, at the relevant time, the Minister of Lands was neither empowered to enter into the Agreement or to execute a formal lease over the said land in favour of Michael Varisipiti pursuant to the Agreement.
17. The second submission is to the effect that the Agreement to Lease was an "*impersonam*" agreement that could not survive Michael Varisipiti's death. Even accepting that the Agreement does not mention the claimant by name, nevertheless, **Clause 5 (b)** of the Agreement dealing with Quiet Enjoyment expressly refers to "... *the lessee and his successors in title*" thereby contemplating persons other than the lessee may benefit under the lease.



18. The Agreement is also expressed to be "... governed by the Laws of Vanuatu" (see: Clause 9). In this regard in William v. Obed [1981] VUSC 1, Chief Justice Cooke in dealing inter alia with a "right of action" surviving for the estate of a deceased boy said:

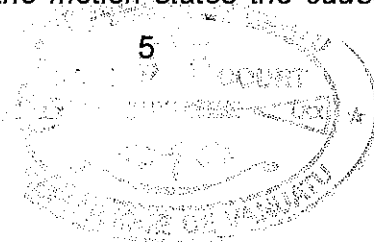
*"This is a right given by virtue of the Law Reform (Miscellaneous Provisions) Act 1934 which I hold is applicable to the Republic of Vanuatu, being a statute of general application".*

19. **Section 1 (1) of the Law Reform (Miscellaneous Provisions) Act 1934 (UK) provides:**

*"Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of actions subsisting against or vested in him shall survive against, or as the case may be for the benefit of his estate. Provided that this subsection shall not apply to causes of action for defamation or seduction, or for inducing one spouse to leave or remain apart from the other or to claims ... for damages on the ground of adultery."*

20. The meaning and intent of the section is plain and clear – as from the date of its commencement, all causes of action subsisting or vested in the deceased survives for the benefit of his estate except for the three mentioned in the proviso, namely, defamation, or seduction and inducing one spouse to leave or remain apart from the other, or to claims for damages on the ground of adultery.
21. The "cause of action" in the present claim is based on breach of an Agreement to Lease as well as, a statutory "cause of action" namely, causing or obtaining the registration of a lease by mistake. In my view there can be no serious argument that neither cause of action is caught by the "proviso" and accordingly, I find that they both survive the demise of Michael Varisipiti for the benefit of his estate. (see also: per Sir Thomas Bingham MR in Fielding v. Rigby [1993] 4 ALL ER 294 at 297).
22. As was said by Associate Justice Richard Benson in Damarline v. Federated States of Micronesia [1997] FMSC 30:

*"The substitution of a party upon the death of a party requires an affirmative showing that the cause of action survived the death. I note that the motion states the cause of action arose*



*out of the decedent's ownership of land. Although sparse I think this may be taken as an allegation that the claim survives. I think I may presume, until proven otherwise, such a claim would survive death. Ownership rights in land are generally inheritable".*

23. Although the above disposes of the discrete legal issue, I deal briefly with the defendants' submissions as to the alleged breach of **Clause 4** of the Agreement to Lease. I accept at once that the Clause anticipates the fulfillment of two conditions namely:

- (1) The completion of an approved survey plan of the leased land; and
- (2) The execution of a formal lease,

but, nowhere in the Clause is the lessee or Michael Varisipiti identified as the person responsible to personally perform the conditions nor is there a time limit fixed by the Clause for the performance of the same. Neither is there any requirement in the Clause that either document must be registered under the Land Leases Act [CAP. 163].

24. In this regard too, **Section 10** of the **Land Leases Act** relevantly provides:

*"The Director of Land Surveys ... shall prepare or cause to be prepared in respect of each parcel the subject of a lease required to be registered, a survey plan the original copy of which shall be retained by him, and certified copies of which ... shall be attached to the original instrument of lease to be presented for registration ...".*

25. Having said that, the registered survey plan for **Lease Title No. 04/2943/020** is dated 4<sup>th</sup> May 2001 and was approved on 7 May 2001, which is 5 years before Michael Varisipiti died. Plainly efforts were made to fulfill condition (1) during his lifetime. Neither is it seriously disputed that Michael Varisipiti lived and worked on Niafu land for several years before he died.

26. In light of this ruling, the discrete legal issue may now be laid to rest and the trial of this case which is part-heard ought to continue to a conclusion. Hopefully the standing and legal rights of the parties having been clarified by this ruling, may prompt the parties to make a final attempt to resolve the dispute in an amicable way that recognizes the interest and rights of the claimant and the late Michael Varisipiti's children to a discrete share in




Niafu land and thereby obviate the need to rectify or cancel the second defendant's registration on Lease No. 04/2943/020.

27. By way of further direction the matter is adjourned for a review conference to fix trial dates on 15 May 2015 at 2.30 p.m.

DATED at Port Vila, this 8<sup>th</sup> day of April, 2015.

BY THE COURT

  
D. V. FATIAKI  
Judge.

