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

Civil Case No. 228 of 2013

BETWEEN: SAM TOARA and JIMMY WORWOR of Teouma Area, Efate in the Republic of Vanuatu
Claimants

AND: RONIE MANSAI KALTAKTAK of Eratap Village, Efate in the Republic of Vanuatu
First Defendant

AND: THE REPUBLIC OF VANUATU
Second Defendant

AND: CHIKO FARM PRODUCTS LIMITED
Third Defendant

Date of Hearing: ***June 15th 2016***
Date of Submissions: ***June 22nd and July 12th 2016***
Date of Judgment: ***September30th,2016***
Before: ***Justice JP Geoghegan***
Appearances: ***Mr J Tari for the Claimants***
Mr D Yawha for the First Defendant
Mr S Aron (SLO) for Second Defendant
No appearance by or on behalf of the Third Defendant

JUDGMENT

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1. These proceedings involve a dispute over land in the Teouma area. The disputed land is contained within registered land lease titles 12/0942/122 (*"lease title 122"*) and 12/0942/123 (*"lease title 123"*). The lessee of land lease title 122 is the third defendant Chiko Farm Products Ltd (*"Chiko"*).

2. The claimants seek an order from the Court cancelling leases 122 and 123 on the grounds of mistake and/or fraud or, in the alternative, an order granting the claimants right of occupation of the land pursuant to section 17 (g) Land Leases Act. The basis for the latter order is the claimant's alleged occupation of the land since January 1994.

3. The claimants say that in 1993 they entered into an agreement with Jack Kalmetlau to live on the disputed land. They say that Mr Kalmetlau was the duly authorised representative of the Kalmet family who had been declared custom owner of the land by the Efate Island Court. At the time they entered into the agreement with Mr Kalmetlau custom ownership of the land was disputed, however the claimants say, and it is not disputed, that the Kalmet family had subsequently been declared custom owner of the land by the Efate Island Court on March 24th 2006. That decision is currently under appeal before the Supreme Court in Land Case No. 71 of 2006. The Island Court judgment was stayed by an order of the Supreme Court on November 24th, 2006.

4. The claimants say that they moved onto the land in January 1994. Since that time they have built houses there and are growing crops.

5. On October 17th 2000 the Minister of Lands issued an Agricultural Lease over the land - lease 12/0924/037. In September 2012 that was surrendered and two new leases were issued, those leases being lease title 122 and 123.

6. The claimants say that lease titles 122 and 123 should never have been registered for the following reasons:-

    a) The Minister of Lands was not permitted to deal with the land as on April 15th 1994 the Efate Island Court had issued orders preventing any development of the land until the true custom owners of the disputed area were determined.

    b) The claimants advised Chiko Farm that the land was still in dispute but Chiko went ahead and registered lease title 122 despite that advice.

    c) The Minister of Lands had the mistaken belief that there was no restraint on developing the land when in fact there was, by virtue of the order of April 15th 1994.

7. The first defendant Mr Kaltaktak says that Mr Kalmetlau was one of the parties disputing custom ownership of the land and accordingly he could never have had lawful authority to enter into the agreement which he entered into with the claimants. Accordingly the claimants have never lawfully occupied the land and

have instead been squatters. While Mr Kaltaktak admits that on March 24th 2006 the Kalmet family was declared custom owner of the land, that decision was appealed and therefore it cannot retrospectively validate the agreement between the claimants and Mr Kalmetlau. Mr Kaltaktak does not accept that the claimants have been living on the land since January 1994 but says that in any event any agreement between the claimants and Mr Kalmetlau is nothing more than a money making venture for Mr Kalmetlau which cannot bind Mr Kaltaktak.

8. The position of the State is that the State, through the Minister of Lands, was never a party to the proceedings in the Efate Island Court and was unaware of any restraining order issued by the Court. Lease 037 was registered in good faith on the information provided.

9. The proceedings were triggered by action taken by Mr Kaltaktak in the Magistrates' Court in 2003 when he sought eviction orders for the eviction of the claimants from the land in leasehold title number 12/0924/034. The reference to 034 appears to have been a mistake, as at all times it appears that it was intended that the land referred to was the land in lease 037. Mr Kaltaktak claimed that the claimants in this case were illegal residents and had refused to vacate the property. An eviction order was granted together with an order requiring the claimants to pay mesne profits.

10. That order was subsequently stayed pending determination in the Supreme Court of a claim filed by the claimants for damages arising from alleged breach of an agreement entitling the claimants to occupy the land. The damages were in respect of the claimant's crops and building. The proceedings were issued against Mr Kaltaktak, Mr Kalmetlau and the State but were struck out by the Court on July 29th 2009.

11. Mr Kaltaktak obtained an enforcement order which then prompted the claimants to apply for an injunction preventing their eviction pending determination of these proceedings. In a sworn statement dated 6th October 2013 Mr Toara stated that:-

> *"2. I have lived in the Teouma Area since 1994. I took possession and occupation of the parcel of land the subject of these proceedings*

after entering an agreement with Chief Jack Kalmet Laau of Eratap village, South East Efate.

3. *It was part of the agreement entered into between my family and Chief Jack Kalmet that I would make payment of 50% of our agreed purchase value of the parcel of land subject of these proceedings and I and my family could take possession and occupation of the land.*
4. *Having made payment of 50% of the parcel of land I and my family took possession and occupation of the land and made monthly payments to complete payment of the balance owing.*
5. *Since taking possession and occupation of the land in 1994 I have cleared the dark bush, established my home, as well as work the land and established large areas of gardens.*
6. *As well as myself, my family have also established their homes and gardens and livelihood within the lands subject of these proceedings."*

12. It is unclear from Mr Toara's sworn statement, how much he paid to Mr Kalmetlau and what, precisely, was meant by the words *"agreed purchase value of the parcel of land subject of these proceedings"*. Mr Toara also deposed that he was aware that there had been a long standing dispute between various parties over custom land boundary in respect of the disputed land.

13. There must also be some doubt regarding just when the claimants began to occupy the land. That is because Mr Kaltatak gave sworn evidence that in 2000 he was contacted by Mr Thomas Tau, the son-in-law of the claimant (he did not say which claimant) who advised him that the claimant had bought a piece of land from the Kalmets where Mr Kaltaktak's lease was registered. As a result of that advice, Mr Kaltaktak drove out to the land with Mr Tau to check the situation. The relevant piece of land was pointed out to him however it was undeveloped and unoccupied.

14. Mr Kaltaktak's evidence was that he was again notified of possible occupation of the land towards the end of 2000 and he again checked the land to find that some virgin bush had been cleared and some tin shade houses had been built on the land. Subsequent to that, eviction orders were granted.

15. The evidence of Mr Kaltaktak was unchallenged. While the reference to what he was told by Mr Tau is inadmissible hearsay evidence, the remainder of his evidence is not and therefore there is unchallenged evidence that in 2000 the land had not been occupied but that some occupation commenced at the end of 2000.

16. Mr Harry Kalsarei provided a sworn statement in support of Mr Kaltaktak. Mr Kalsarei confirmed that he was the former chairman of the Eratap land committee which was body consisting of "chiefly council" looking after the land interests of the people of Eratap.

17. He deposed that in 1986 the land between Teouma river and Rantapau river was already in dispute in the Island Court with certain families claiming the land. Those families included family Kalpong, family Kaluatong, family Kalmermer, family Koriman, family Palupau and family Kalmet. Mr Kalsarei stated that the families other than the Kalmet family had taken a grievance to the land committee because of concerns that family Kalmet was selling land and collecting money without the proper lease titles. Accordingly an application was made to the Court against three members of the Kalmet family to restrain them from selling land to people and collecting the purchase price for their own benefit. Those members of the Kalmet family were chief Pakoa Andrew, Jack Kalmetlau and Lawa Kaluetalu. On April 15th 1994 the Eratap land committee obtained a number of orders from the Efate Island Court against the defendants in respect of the use or occupation of the land at Teouma area (title 168 and 170). Those orders were as follows:-

> *"1) That the defendants are restrained from further development of any kind on land titles 168 and 170 until the Efate Island Court decides the true custom owner.*
>
> *2) That there will be no selling of land within titles 160 and 170 until the Efate Island Court decides the true custom owner.*
>
> *3) That there will be no receiving of royalties from any developers on land title 168 and 170 until the Efate Island Court decides the true custom owner.*

4) *That the defendants not allow any people from other islands to move into land titles 168 and 170, until the Efate Island Court decides the true custom owner".*

18. A sworn statement was also filed on behalf of the first defendant by Maxime Carlo Korman who was the Minister of Lands at the time Mr Kaltatak was issued with lease 037. He stated that at the time he granted that lease he was well aware of the restraining order of 1994 in the Efate Island Court. He said that he had seen the order because his family was also a claimant in respect of the land in dispute. He decided to approve the lease because of his clear understanding that the order did not restrain him as Minister of Land from issuing a lease on the land subject under dispute.

19. The only witness cross examined in the hearing was the claimant Mr Sam Toara.

20. Under cross examination by Mr Yawha, Mr Toara acknowledged that he had made an oral agreement with Mr Jack Kalmet to enter the land. In his evidence Mr Toara referred to Mr Kalmet giving the claimants land which they *"bought", "as a right of entry".* Mr Toara stated that Mr Kalmet *"gave it just for us to live there and not let other guys interfere in his land. Because that land of his is disputed land".* Mr Toara acknowledged that Mr Kalmet was the same person referred to as Jack Kalmetlau in the order of the Efate Island Court.

21. When Mr Toara was asked what he meant by *"right of entry"* he stated that that meant *"that the land was disputed".* Accordingly I am satisfied that at the time the claimants entered the land, acting on the apparent agreement with Mr Kalmetlau, they knew that ownership of the land was disputed.

22. Mr Toara also gave evidence that the sum of Vt 200,000 was paid to enter the land although he was unable to produce any record of that payment. He referred to the area of land as being five hectares. He stated *"because the land was disputed we didn't ask a surveyor. He [Kalmetlau] showed us where the land stopped. He [Kalmetlau] said land wasn't surveyed because it was disputed".* Mr Toara stated that Mr Kalmetlau said that because there was a dispute the claimants could *"only pay for right of entry".* He agreed also that the claimant's

status was one of *"temporary occupation"*. When it was put to Mr Toara whether, if the Court determined the ownership dispute six months later with the result being that Mr Kalmetlau was not the owner, the claimants would have expected to move to another place, Mr Toara confirmed that that was so.

23. With reference to any payments in addition to the Vt 200,000 paid, Mr Toara stated that every year *"we"* paid Vt 15,000 to the *"Kalmet community"*. Mr Toara advised that that was stopped when *"the order said we don't have to pay anymore"*. That was the order of 2006 which declared Mr Kalmetlau to be the custom owner of the land but which was immediately appealed. No evidence of these payments was provided.

24. Mr Toara acknowledged thst he had seen the Efate Island Court order of 1994 prior to 2006. Mr Toara then said that the claimant stopped paying the money when the first defendant *"brought in"* another lease title. He acknowledged that the claimants disregarded the 1994 order.

25. Having heard and read the evidence I consider the following facts to have been established:-

    a) When the claimants first occupied the land they were aware that custom ownership of the land was disputed;

    b) The claimants did not endeavour to *"purchase"* the land (in the sense of obtaining a leasehold title) but rather paid Mr Kalmetlau to occupy the land, and to prevent others from occupying the land;

    c) While the claimants had originally paid rent, although the amount paid is entirely unclear, they have not done so since 2006, and quite possibly prior to that year.

    d) Any rental paid was paid to Mr Kalmetlau without the knowledge, approval or agreement of any of the other disputing custom owners;

    e) The claimants were aware that in the event of the claim of custom ownership being resolved against Mr Kalmetlau, they would, in all likelihood be required to vacate the land;

    f) There had been previous attempts to evict the claimants from the land because of the disputes regarding custom ownership.

g) The precise date of occupation is unclear but that it is likely to have been towards the end of 2000 rather than in 1994 as asserted by the claimants.

SUBMISSIONS

26. Submissions filed by counsel focused on three issues namely:-

a) Whether the claimants have standing to apply for rectification of leases 122 and 123 under section 100 of the Act.

b) Whether leases 122 and 123 were registered by fraud and/or mistake.

c) Whether the claimants are entitled to any relief under section 17 (g) of the Act.

27. As to the issue of the standing of the claimants, section 100 of the Land Leases Act makes no reference to who may apply for rectification.

28. Both counsel referred to the Court of Appeal decision in Naflak Teufi v. Kalsakau (Civil Appeal Case No. 7 of 2004) where the Court determined that a person seeking to invoke section 100 must include a person who has an interest in the register entries to be rectified. The Court of Appeal stated :-

"That is not to say that no one may apply to invoke section 100 outside the Court itself. 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 a 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 advice on 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".

29. Further in the judgment the Court of Appeal stated:-

"In light of the foregoing and our interpretation of section 100 of the Land Leases Act, we are satisfied that an applicant for rectification of a register does not have to be able to show a right to be registered by way of substitution. In other words, a successful application pursuant to section 100 of the Land Leases Act can lead to rectification by way of cancellation or amendment of an entry in the register not necessarily in the registration of the person who initiates the challenge. The suggestion in our view that an applicant for rectification must have a personal or legal right to be registered in place of the interest being challenged places an unwarrant gloss on the plain words of section 100".

30. There is no suggestion in this case that the claimants have any right to be registered in place of the interest being challenged and accordingly the issue is whether it could be said that the claimants have an interest *"in the register entry sought to be rectified".*

31. For the claimants Mr Tari points to the fact that they had been given the right to develop the land and that that is sufficient to give them standing under section 100. As I have already referred to however, I do not consider that the evidence establishes that. What the evidence establishes is that the claimants were given occupation of the land in circumstances where they knew that the land was disputed and where they appreciated that in the event of custom ownership being determined they may have to vacate the land.

32. While Mr Tari refers to the Supreme Court decision in Vanuatu Rowing Association (Inc) v Kalo Sandy and Others (Civil Case No. 30 of 2015) upheld by the Court of Appeal in Sandy v. Vanuatu Rowing Association (inc) [2015] VUCA 48, that case did not involve an examination by either the Supreme Court or the Court of Appeal of the Rowing Association's standing. In addition, I do not consider that case to be similar. In that case, the Rowing Association was lawfully occupying the land which was public land. In this case the claimants

could not be said to be occupying the land lawully and indeed they have encountered previous efforts to evict them.

33. For the second defendant Mr Aron emphasizes the fact that the claimants in their evidence have acknowledged the temporary nature of their occupation indicating, as it does, that the claimants had no intention to lease the land. It is on that basis that it is submitted that the claimants do not have a sufficient interest to have standing to apply for rectification of the lease.

34. Having assessed the evidence I do not consider that the claimants have established sufficient or any interest in the register entry sought to be rectified. I consider that the situation would be different if the claimants were lawfully occupying the land with the express consent of the custom owners. They are not however, and in such circumstances I do not consider that that establishes an interest capable of entitling the claimant to make an application under section 100.

35. In the event that I am wrong on this point I do not consider in any event that the claimants have established that the registration of leases 122 and 123 was occasioned by fraud and/or mistake.

36. The claimants submit that leases 122 and 123 should be set aside through having been obtained by fraud or mistake.

37. The claimants submissions turned largely on the order made in the Efate Island Court on April 22nd 1994.

38. In this regard the claimants refer to the evidence of Mr Toara that he advised Chiko Farm Products prior to the transfer of the lease that the land was in dispute and that there was an order stopping the registration of leases. Despite that, Chiko went ahead with the transfer of the lease anyway. The claimants submit also that Mr Kaltatak was also well aware that the land was in dispute and that there was an order stopping the issuing of a lease but that despite that, he went ahead and negotiated lease 037 with the Minister, a lease where no premium was paid and an annual land rent of Vt 3,000 only was paid. Despite

this Mr Kaltatak surrendered the lease thereby leading to the issuing of leases 122 and 123 with Mr Kaltatak transferring lease 122 to the third defendant for a value of Vt 27 million.

39. With reference to the premium and annual rental, if the claimants wished to base an allegation of fraud on the apparent absence of a premium and/or the level of the annual rental then some valuation evidence to justify any finding of fraud should have been placed before the court.

40. I would add that throughout his submissions Mr Tari referred to the effect of the alleged fraud or mistake on the custom owners. There was reference to the disputing owners being deprived of appropriate payments and the Minister not acting in the interests of the custom owners, However there is no evidence that the custom owners are concerned by this or have taken any legal steps themselves.

41. There is simply insufficient evidence to justify any finding of fraud on those grounds.

42. As to the alleged advice given to Chiko that the land was disputed, Chiko was entitled to deal with the registered proprietor. While the alleged advice might be relevant to an argument under S 17(g) I do not consider that it is relevant to an assertion of fraud or mistake.

43. As to the issue of mistake, the claimants assert that the Minister mistakenly believed that the Efate Island Court order affected the Kalmet family only whereas in fact the order was issued to restrain people generally from dealing with the land.

44. In this regard counsel refer to the Court of Appeal decision in Roqara v. Takau, Civil Appeal Case No. 25 of 2004 where the Court of Appeal dealt with the same order which is involved in these proceedings.

45. Roqara v. Takau concerned a dispute involving a claim for rectification of a lease in respect of land within titles 168 and 170 referred to in the Efate Island Court order set out in paragraph [13] herein. In that decision it was asserted that the

Minister (the same Minister involved in this case) had not been made aware of the Efate Island Court order and that that was a mistake which justified rectification. While the Court of Appeal accepted that the Court order did not bind the Minister in any particular way as a matter of strict law, it found that the fact that the Minister was unaware of the order meant that he was unaware of a significant and highly relevant fact to be taken into account by him when considering whether to exercise his power under section 8 of the Land Reform Act. The Court of Appeal made various observations regarding the significance of the order and in referring to a decision of Chief Justice D'Imecourt in Tretham Construction Ltd v. Malas which was submitted as authority for the proposition that a Minister is entitled to disregard the order the Court observed that:-

> *"The case is no authority for the proposition that the Minister in similar circumstances can merely disregard the order of the Island Court as if it were wholly irrelevant. It must be emphasized that when any Court within this Republic makes a restraining order, it is to be respected by all those whose dealings might impinge upon its efficacy.*
>
> *In the present case, the fact that the Island Court hearing the dispute over custom ownership had made an order intended to preserve the subject matter of the dispute pending a decision was a highly relevant matter which required the attention of the Minister in deciding whether, in the exercise of power under section 8 of the Land Reform Act, a lease was to be granted. In our opinion, if the existence of that order had been brought to the attention of the Minister the high probability is that the knowledge of it would have led to a refusal to grant the lease.*
>
> *Second, the relevance of the Island Court is not that it bound the Minister in any particular way as a matter of strict law. In so far as counsel for the appellants asserted that such an effect was given to the order, the submission misunderstands the position. As we have already said, the relevance of the order is not that it had binding legal force on the Minister, but that the Island Court had restrained people claiming direct interests in the land from dealing with it. That was a highly relevant fact to be taken into account by the Minister when considering whether to exercise powers under section 8 of the Land Reform Act."*

46. I do not consider the order to have been binding on the Minister. The order was clearly intended to prevent the disputing custom owners from dealing with the land. It could not be read as having had the effect of preventing the Minister from taking the steps he was entitled to take pursuant to the Land Reform Act. He clearly had regard to the order when he granted the lease and, in the circumstances, I do not consider that a mistake is established.

47. For these reasons I consider that the claimants application for relief under S. 100 would have failed in the event of a determination that they had standing to make an application.

48. I do not consider the order to have been binding on the Minister. The order was clearly intended to prevent the disputing custom owners from dealing with the land. It could not be read as having had the effect of preventing the Minister from taking the steps he was entitled to take pursuant to the Land Reform Act. He clearly had regard to the order when he granted the lease. His evidence in this regard was not challenged and he was not cross-examined. In the circumstances, I do not consider that a mistake is established.

49. For these reasons I consider that the claimants application for re;ief under S. 100 would have failed in the event of a determination that they had standing to make an application.

50. Finally I turn to the issue of whether or not the claimants are entitled to relief pursuant to section 17 (g) of the Land Leases Act. Section 17 (g) provides that:-

> *Unless the contrary is expressed in the register, the proprietors of a registered lease shall hold such lease subject to such of the following overriding liabilities, rights and interests as may, for the time being, subsist and affect the same, without their being noted on the register –*
> *(g) the rights of a person in actual occupation of land save where enquiry is made of such person and the rights are not disclosed.*

51. The interpretation of section 17 (g) of the Act was considered by the Court of Appeal in William v. William [2004] VUCA 16. The Court observed that a number

of important matters arose from the language of section 17 and with reference to section 17 (g):-

> *Fifthly, section 17 (g) operates in respect of "rights", that is rights recognised by the law of Vanuatu. A person in actual occupation who is a trespasser will have no "rights" which are protected by the provision. A right may arise under custom law, or it might derives from and through the proprietor of a registered lease or the predecessor entitled of that lease.*
>
> *Sixthly, if the person in actual occupation claiming under section 17 (g) establishes rights which support the occupation, the rights will be, "overriding" rights unless the proprietor of the registered lease establishes that enquiry was made of that person for an explanation of his or her occupancy, and the rights were not disclosed. The onus of proof as to the making of due enquiries is on the proprietor of the registered lease. To discharge that onus the proprietor would have to establish that a sufficient enquiry was made before the proprietor became the registered proprietor of a lease.*
>
> *Seventhly, the evident intent of section 17 (g) is to protect on the one hand a person who is in actual occupation of land pursuant to rights recognised by law, and on the other hand to provide a mechanism for those acquiring leases to protect themselves by making appropriate enquiry and inspection before acquisition. If a person in actual occupation is found on the land, the would be purchaser, by making enquiry, can have the rights of that person identified so that the consideration for their acquisition can be adjusted or the proposed acquisition can be abandoned. Alternatively, if the person found that actual occupation does not disclose a right that justifies his or her actual occupation, the would be purchaser will obtain good title against that person, and will be entitled after registration to recover possession".*

52. In this case there is no dispute that the claimants are in actual occupation of the land. There is also no evidence that the third defendant made enquiry of the claimants. Indeed the evidence of the claimants is that they disclosed they occupancy of the land to the third defendant.

53. The real issue in this case however is whether or not the claimants have established rights recognised by the law of Vanuatu. In that regard my

conclusion, taking into account my findings regarding the evidence is that the claimants have not established such a right,

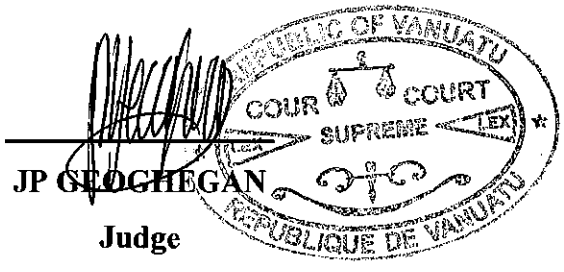
54. The claimants were aware when they entered the land that it was disputed land and the plain evidence of the claimants has been that they were aware that their stay on the land might be temporary. Indeed efforts were made to remove them from the land by way of eviction which led to an order preventing that from occurring pending the outcome of this case. While there appears to be no dispute that the claimants made payments of some kind to Mr Kalmetlau, Mr Kalmetlau was never in a position to grant the claimants a license to occupy the land. In such circumstances the fact that they may have paid money to him or that there has been an order preventing their eviction pending the outcome of this case cannot change their status from trespassers to persons who have a recognized right which provides a basis for the granting of relief pursuant to section 17 (g). In addition it is not suggested that the claimants have any customary right to occupation of the land.

55. For these reasons the claimant's claim for relief under section 17 (g) must fail and is dismissed accordingly.

56. The defendants are entitled to costs in the cause and costs are to be agreed within 21 days failing which they are to be taxed.

Dated this 30th day of September 2016

BY THE COURT



JP GEOGHEGAN
Judge