

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

Judicial Review Case No. 22 of 2015

BETWEEN : PHILIMON PAKOALAE LAE

Claimant

AND: REPUBLIC OF VANUATU

Defendant

AND: ANDREW DANIEL, SANIEL DANIEL,
DOUGLAS DANIEL, WILSON DANIEL

Interested Party

Coram: Justice Aru

Counsel: Mr. G. Boar for the Claimant
Mr. S. Kalsakau for the Defendant
Mr. J. Malcolm for the Interest Party

JUDGMENT

Introduction

1. Mr. Philimon Pakoalaelae comes from Tanoliu village on Efate and is the claimant in this proceeding for judicial review. He alleges that he is the paramount chief of the area and especially over certain land near Tanoliu known as Udaone and Esema lands. A number of leases were registered over these lands which he now claims are under his jurisdiction as paramount chief of the area therefore he should be the named lessor in these leases.
2. The relief he seeks are as follows:-
 - (a) A quashing order against the decision of the defendant to delay withhold an refuse the registration of the claimant as paramount chief of Tanoliu, Udaone



and Esema land North Efate and the lessor of the following leases created on Udaone and Esema land namely the lease instrument titles:-

12/521/067, 12/521/049, 12/521/066, 12/521/048, 12/521/065, 12/523/018, 12/521/064, 12/523/022, 12/521/063, 12/5213/023, 12/521/062, 12/523/027, 12/521/061, 12/523/028, 12/521/060, 12/523/029, 12/521/059, 12/523/030, 12/521/058, 12/523/031, 12/521/057, 12/523/035, 12/521/056, 12/523/036, 12/521/055, 12/523/005, 12/521/054, 12/521/053, 12/521/052, 12/521/051, 12/521/050; (*the 31 leases*)

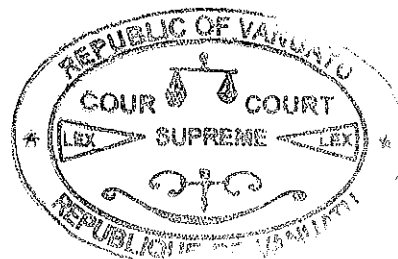
- (b) A quashing order against the decision of the defendant dated 17 August 2015.
 - (c) A mandatory order directing the defendant to register the claimant as lessor of all leases referred to in paragraph 1 a) above forthwith which were created on Tanoliu, Udaone and Esema land boundaries in place of the Interested Party;
2. An order prohibiting the Interested Party from signing any consent, mortgage, and lease transfer relating to any lease created on Tanoliu, Udaone and Esema land, North Efate;
 3. An order that the Defendant and the Interested Party pays all costs incidental to this action.

Background

3. The claimant and the interested party have a history of disputing over the chiefly title Popovi and Udaone and Esema lands. Facts which are not disputed and give some perspective into this case are as follows:-

- 6 March 2009

The Efate Island Court (EIC) in **Chief Popovi v Andrew Kalontas** Civil Case No 5 of 2008 (CC No. 5 of 2008) declared Mr Pakoalaelae as having customary rights and authority over the chiefly title "Popovi" and as such is the paramount chief of Tanoliu village.



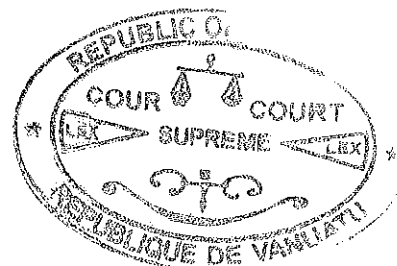
- 9 August 2010
The current parties signed consent orders restraining any dealings in land in **Andrew Kalontas Popovi v the Government and Philimon Pakoalaelae** Civil Case No 51 of 2010
- 14 May 2014
The decision in CC No 5 of 2008 was appealed to the Magistrate Court in Civil Appeal Case No.1 of 2009 (CAC No 1 of 2009) and the appeal was allowed and declared that the chiefly title "Popovi" was lawfully inherited in accordance with custom by Mr Andrew Kalontas.
- 17 June 2015
Counsel on behalf of Mr. Pakoalaelae wrote to the Department of Lands seeking rectification of the *31 lease* titles by removing the lessors and replacing them with Mr Pakoalaelae.
- 17 August 2015
Mr. Alicita Vuti of the Customary Land Management office responded to the effect that a certificate of recorded interest cannot be issued to Mr Pakoalaelae as yet given that there is no declaration of custom ownership over the lands concerned.

Claim

4. Mr. Pakoalaelae claims that he was ordained in custom as the paramount chief of Tanoliu, Udaone and Esema lands and that he was recognised by the Vaturisu Council of chiefs and the Efate Island Court therefore he is entitled to be registered as lessor of the *31 leases*.

Defence

5. The defendant says that although the EIC in CC No 5 of 2008 declared Mr. Pakoalaelae as having customary rights and authority over the chiefly title Popovi and as paramount chief of Tanoliu village, that decision was set aside on appeal by the Magistrate Court in CAC No 1 of 2009.



6. Furthermore it says that in relation Mr. Pakoalaelae's application to rectify the register in respect of the *31 leases*, they rely on section 99 and 100 of the Land Leases Act [CAP 100] and section 100A of the land leases (Amendment) Act No 32 of 2013. It says that the letter of 17 August 2015 advised Mr Pakoalaelae that he did not have a declaration from any competent tribunal that he was the declared custom owner of the area concerned and in addition the Court of Appeal in *Saipir v Siviri-Sunae Joint Village Land Tribunal* [2014] VUCA 26 recognised that there still exists a dispute over Udaone land.
7. The interested party in their amended defence deny that Mr Pakoalaelae is the paramount chief of Tanoliu. They say that in 2008 he was ordained as an ordinary chief. Furthermore they say that the delay or refusal has nothing to do with the custom law of Efate and the leases have nothing to do with custom law. They further say that they are the lawful lessors of the *31 leases* and deny that Mr Pakoalaelae's permission was required or that he is entitled to any revenue or that they unjustly enriched themselves.

Evidence

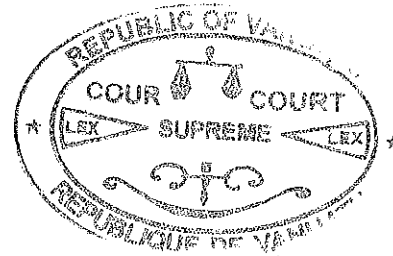
8. For the claimant, Mr. Pakoalaelae relies on a number of sworn statements he filed which were tendered as Exhibit C1 to Exhibit C6. The evidence for the defendant was given by Mr. Gordon Arnambat and tendered as Exhibit D1. The interested party filed two sworn statements deposed by Mr Morris Daniel and tendered as Exhibit IP1 and Exhibit IP2.

Law

9. Section 99, 100 and 100A of the Land leases Act [CAP 163] provide as follows:-

"Section 99 Rectification by the director

- (1) *Subject to section 100(2), if it appears to the Director that any register does not truly declare the actual interest to which any person is entitled under this Act or is in some respect erroneous or imperfect, the Director after taking such steps as he thinks fit to bring to the notice of any person shown by the register to be interested his intention so to do, and giving every such person an opportunity to be heard, may as from such date as he thinks fit, rectify the register:*



Provided that it shall not be necessary for the Director to take steps to bring the rectification to the notice of any person shown by the register to be interested nor to give any such person an opportunity to be heard in formal matters and in the case of errors and omissions not materially affecting the interests of any person.

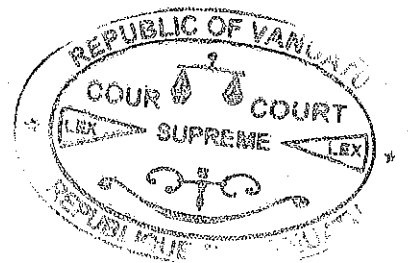
- (2) *Upon the written application of any proprietor accompanied by such evidence as the Director may require, the change of name or address of that proprietor shall be recorded in the register.*
- (3) *The Director shall rectify the register to give effect to an order of rectification of the register made by the Court.*

Section 100. Rectification by the Court

- (1) *Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is so empowered by this Act or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.*
- (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.*

Section 100A Recorded interest in land

- (1) *The Director or the Court under section 99 or 100 may after complying with the procedures set out in those sections rectify the register in the manner specified in those sections based on a recorded interest in land provided for under the Custom Land Management Act No. 33 of 2013.*
- (2) *For the purposes of reaching a decision under section 99 or 100, a certificate from the National Coordinator of the names of custom owners and their appointed representatives is evidence of the recorded interest in land.*
- (3) *In addition to subsection (2), the Director or the Court must be satisfied that the certificate provided to them under that subsection has been produced after complying with the provisions of the Custom Land Management Act No. 33 of 2013 in relation to the identification of custom owners.*



10. Section 57 and 58 of the Customary Land Management Act No 33 of 2013(CLM Act) provide as follows:-

"57 Existing decisions of Island Court and Supreme Court

Decisions of the Supreme Court and an Island Court which determine the ownership of custom land and which were made before the commencement of this Act are deemed to create a recorded interest in land in respect of the person or persons determined by such Court to be the custom owners and will enable the custom owners so recorded to be identified for the purpose of consenting to an application for a negotiator's certificate or a lease, or is to provide the basis for rectification of an existing lease instrument.

58 Existing decisions of Customary Land Tribunal

(1) Decisions of:

- (a) a single or joint village Customary Land Tribunal; or*
- (b) a single or joint sub-area Customary Land Tribunal; or*
- (c) a single or joint area Customary Land Tribunal; or*
- (d) an island Customary Land Tribunal,*

which determined the ownership of custom land and which were made before the commencement of this Act and have not been challenged within 12 months after the commencement of this Act, are deemed to create a recorded interest in land in respect of the person or persons determined by such tribunal to be a custom owner.

(2) The creation of a recorded interest in land under subsection (1) will enable the custom owners so recorded to be identified for the purpose of consenting to an application for a negotiator's certificate or a lease, or is to provide the basis for rectification of an existing lease instrument.

..."

Discussions

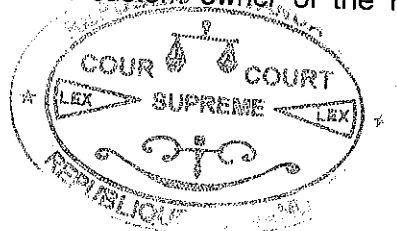
11. The claimant's case in a nut shell is that he was ordained paramount chief over Udaone and Esema lands and his chiefly title confers on him the right to be the lessor of the 31 leases. As Andrew Popovi and Saniel Daniel who were the lessors to the 31 leases are now deceased the Popovi chiefly title no longer exists therefore the leases should be rectified by removing their names and replacing them with him as the lessor.

12. Mr Boar makes the submission that there was no response to their letter of 17 June to Mr Gordon Willie. He says that the purported response which is the letter of 17 August

was written by Mr Alecta Vuti whereas the claimant's case has nothing to do with a certificate of registered interest in land. Mr Boar submits that the Court should look beyond the certificate of registered interest in land. He relies on **Taurakoto v Mormor** [1996] VUSC 7 and **Regenvanu v Ross** [1987] VUSC 5 to support his proposition that where the land is in dispute the paramount chief will look after the land and sign leases on behalf of the disputing parties.

13. The claimant's letter of 17 June to Mr Gordon Willie states that "*the basis of seeking rectification are contained in the documents attached and explained below*" and refers to the Island Court judgment in CC No5 of 2008 which he asserts declared him as paramount chief, photos of his ordination as chief on 27 May 2006 and a number of letters from various council of chiefs and chiefs whom he asserts confirm and give him recognition as paramount chief.
14. The factual circumstances of this case and **Taurakoto** and **Regenvanu** are different and are distinguished. These two cases are land appeal cases from the Island Court concerning disputes over ownership of custom land. In both cases for obvious reasons this Court ordered that the high chiefs or paramount chief hold the land on behalf of their people.
15. In Mr. Pakoalaelae's case, the dispute as to who should be the paramount chief was settled on appeal by the Magistrate Court on appeal in CAC No1 of 2009 where it was declared that:-

"the title "popovi" was lawfully inherited in accordance with custom by Mr Andrew Kalontas"
16. That decision brought finality to the dispute over the chiefly title Popovi who is the paramount chiefly title. Therefore **Taurakoto** and **Regenvanu** cannot be relied upon as authority to support the claimants case as Mr. Andrew Kalontas was declared inheritor of the Popovi chiefly title. Although Mr Kalontas is deceased does not change that fact.
17. Furthermore, Mr. Pakoalaelae has not shown any evidence that the Island Court, the Land Tribunal, or Supreme Court has declared him custom owner of the lands



comprising the 31 leases which is the prerequisite to seeking any form of rectification.

18. In CC No 51 of 2010 **Andrew Popovi v the Government & Mr. Pakoalaelae** consent orders were entered into preventing any dealings in land in the respective area. In short the dispute as to custom ownership of Udaone and Esema lands is yet to be determined as confirmed by the Court of Appeal in **Saipir v Siviri Sunae Joint Land Tribunal** [2014] VUCA 26.

Conclusion

20. For the above reasons the claim is hereby dismissed. The defendants are entitled to costs to be agreed or taxed by the Master.

DATED at Port Vila, this 3 day of July, 2017

BY THE COURT

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D. Aru
Judge

