IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

CIVIL APPEAL CASE NO.38 OF 2012

BETWEEN: KALFAU KALSAKAU
First Appellant

AND: MILDRID KALSAKAU
Second Appellant

AND: KALSAKAU NARU KALBEAU
First Respondent

AND: THE REPUBLIC OF VANUATU
Second Respondent

Coram: *Hon. Chief Justice V. Lunabek*
Hon. Justice J.B. Robertson
Hon. Justice O. Saksak
Hon. Justice D. Fatiaki
Hon. Justice J. Mansfield
Hon. Justice D. Aru

Counsel: *Mr Saling Stephens for the Appellants*
Mr George Boar for the First Respondent
Mr Justin Ngwele for the Second Respondents

Date of hearing: *22nd October 2012*
Date of judgment: *25th October 2012*

JUDGMENT

BACKGROUND

1. Kalsakau Naru Kalbeau (KNK) claimed in the Supreme Court that the Land Register should be corrected pursuant to s.100 of the Land Leases Act [CAP.163] by the removal of Lease 12/0633/1233 (the Lease) from the Register. The Lease relates to part of Tamau land in the area SMET, Port-Vila.

2. On 27 August 2012, the Supreme Court made an order for rectification, and for the Director of Lands to cancel the registration of the Lease. The Court also required the Republic through the Director of Lands not to permit any registration of a Lease under either the Land Leases Act or the Land

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Reform Act [CAP.123] without notice to the parties in that action. They are the same as the parties to this appeal. The Court ordered the present appellants Kalfau Kalsakau (KK) and Mildred Kalsakau (MK) and the Republic to pay the costs of KNK, who was the claimant in the action on an indemnity basis.

3. The trial judge was critical of KK and MK, who had clearly failed to comply with the Civil Procedure Rules and he considered they had tried to frustrate KNK from bringing the claim.

4. He was also critical of the Department of Lands. Counsel for the State Law Office on behalf of the Republic said no defence had been filed because that Department had simply failed over time to give the State Law Office instructions about the background to the registration. It is obviously a matter of concern that the relevant officers of the Department had failed to give instructions over 5 months. No doubt the Director of Lands is further investigating how and why that occurred.

5. However, the subject of this appeal is whether the order to remove the Lease from the Register was properly made.

THE JUDGMENT APPEALED FROM

6. KNK has lived on the block of land the subject of the Lease since 1960. He also operates the Tamau Store on that block.

7. In the 1970s, he allowed KK and MK (who are relatives) to also live on the land.

8. On 13 March 1995, the Efate Island Court declared Tamau Land to have three different families as custom owners. Neither KNK, nor KK and MK, were declared custom owners. In 2000, KNK was given leave to appeal out of time to challenge the decision of the Efate Island Court. That appeal has not yet been resolved by the Supreme Court. On 16 February 2006, Efate Island Court stayed the operation of its decision pending the hearing of the appeal. The Director of Lands had also, on 6 March 2000, acknowledged the existence of the Supreme Court appeal, and indicated that the interest

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of competing claimant land owners could be protected under s.8 of the Land Reform Act until the appeal had been resolved and the position as to custom ownership clarified.

9. So, the entitlement to the land was, or appeared to be, in abeyance and to await the outcome of that appeal.

10. That did not turn out to be the case. On 1 October 2008 KK and MK purporting to be the custom owners of Tamau Land granted a lease over the particular block of Tamau Land now in dispute, and it became a registered Lease, at least until the Supreme Court Orders of 27 August 2012.

11. On those facts, the trial judge concluded that neither KK nor MK had any right to grant the Lease. They were not the custom owners. Nor had the Department of Lands shown that there has been any negotiation by a registered negotiator under the certification of the Minister of Lands, with the custom owners being shown. The trial judge concluded, therefore, that the registration of the Lease had occurred through fraud and mistake, and that the case for rectification was overwhelming.

THE APPEAL AND CROSS-APPEAL

12. Both KK and MK have appealed from that judgment.

13. By a separate notice of cross-appeal, the Republic has also appealed from the judgment.

14. The appeal by KK and MK seeks that all the Orders be set aside, and the matter be retried in its entirety. It is claimed that the trial judge had not listed the matter for hearing on 27 August 2012, and failed to comply with rules 6.5, 6.6, 12.1 and 12.2 of the Civil Procedures Rules. In essence, they say they were deprived of the opportunity for a fair trial.

15. The cross-appeal by the Republic is a little more refined, but to much the same effect. The Republic seeks the Orders of 27 August 2012 be set aside, and the matter be remitted for rehearing. It also asked for the Lease

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itself to be rectified to substitute the Minister of Lands and Natural Resources as lessor of the Lease pursuant to s.8 of the Land Reform Act. It too, complains that the Republic was not given an opportunity for a fair hearing, as the Republic was not allowed an opportunity to file a defence or to test the evidence of KNK.

16. Both KK and MK, and the Republic assert that there was no application for summary judgment filed by KNK.

THE COURSE OF THE SUPREME COURT ACTION

17. The Supreme Court Action was commenced by a claim made by KNK on 16 March 2012. He filed his sworn statement on 19 March 2012. It appears to provide the basis for the judgment of the trial judge.

18. Defence were filed by KK and MK by 23 April 2012. No defence was filed by the Republic.

19. KK and MK, by their defences, put in issue that KNK had lived at SMET since the 1960s (although they accept he now lives there) and that he authorized them in the 1970s also to live there. They say they have no knowledge of the decision of the Efate Island Court, or the appeal from its decision by KNK. They assert that the Lease was validly granted and registered.

20. There are no pleaded facts explaining how they became entitled to grant the Lease, or to assert any different or further facts which they might wish to prove at any hearing: see Rule 4.5(4)(b) of the Civil Procedure Rules.

21. As noted, there is no defence filed by the Republic.

22. By notice of 1 June 2012 the parties were notified of a case conference on 6 July 2012. Little then occurred. It was unclear whether KK and MK were to be represented.

23. A further conference took place on 13 August 2012. KK and MK did not appear. Counsel who had provisionally appeared for KK at the first

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conference, and another counsel not on the record, both agreed to notify them of the next hearing fixed for 27 August 2012. Their defences were defective because they contained no address for service. There was clear material to show that counsels had done so, and that KK and MK were aware of the next date.

24. At the conference on 27 August 2012 the position was clearly unsatisfactory:

    (1) KNK had not until that time appeared at either earlier conference, although his Claim appeared in order and he had filed his sworn statement;

    (2) KK (who was provisionally represented at the first conference) had not appeared at the second conference, and had filed only a defence which put KNK to proof – it did not assert any facts to show a substantive defence, and he did not appear;

    (3) MK had not appeared at either earlier conference and had filed only a defence which put KNK to proof, and she again did not appear; and

    (4) The Republic had appeared on both earlier occasions on 27 August 2012, but had not filed a defence, and there was no indication what extension of time it would need to do so.

25. It is not surprising that the judge in charge of the matter decided on more vigorous action.

26. It was over five months since the Claim and KNK's evidence had been filed. KK and MK's defence did not indicate they had any defence, and proof of KNK's claim was therefore apparently uncontested. The Republic did not know when it could find out whether it had defence, and could not say whether, or if so when, it could find that out.

27. However, counsel for the KNK conceded the appeals. Despite the failings of the KK and MK, and of the Republic referred to above, we assume he considered there was merit in the contentions or some of their contentions. Counsel for KNK did not apply for summary judgment, and the parties had no notice that the judge would proceed to the hearing of the matter on 27

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August 2012. We do not need to go through the detailed complaints of KK and MK and the Republic, as it is acknowledged by KNK that the orders made on that date should to set aside.

28. Both KK and MK, and the Republic, sought costs of the appeal. In our view, the proper order is that there should be no costs of the appeal. The circumstances were brought about by the defaults of each of them. Indeed, now that the orders are to be set aside, they will each need leave to file amended defences or in the case of the Republic to file a defence out of time. They will need to file their witness statements promptly. In this matter, as the judge at first instance has made a finding of fraud, it is appropriate to order that the matter be remitted to another judge for case management and hearing.

The orders of the Court of Appeal are:

1. Each of the appeals of Kalfau Kalsakau and Mildred Kalsakau, and of the Republic of Vanuatu, are allowed.

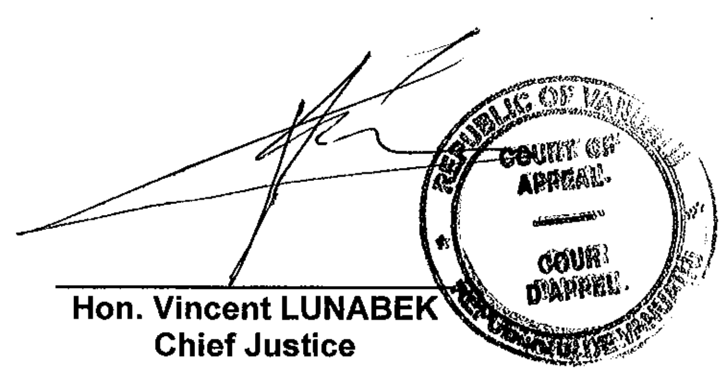
2. The Judgment and orders of the Supreme Court in Civil Case 38 of 2012 made on 27 August 2012 are set aside, and Kalfau Kalsakau and Mildred Kalsakau and the Republic of Vanuatu are ordered to pay the costs of Kalsakau Naru Kalbeau of his attendance for the conference on 27 August 2012.

3. The matter be remitted to the Supreme Court for case management and hearing before another Judge of the Supreme Court.

4. There be no order as to the costs of the two appeals to the Court of Appeal.

DATED at Port-Vila this 25th day of October 2012

ON BEHALF OF THE COURT



Hon. Vincent LUNABEK
Chief Justice