

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

Civil Appeal Case No. 27 of 2014

BETWEEN: FRANK ISHMAEL
First Appellant

AND: TAMARA, LONGWAH LEONG & JOHN TATAI
MALAS
Second Appellants

AND: KARL KALSEV
First Respondent

AND: KALMELU MARIMELU
Second Respondent

AND: GOODIES LIMITED
Third Respondent

AND: THE DIRECTOR OF LANDS
Fourth Respondent

AND: REPUBLIC OF VANUATU
Fifth Respondent

AND: ANDREW POPOVI
Sixth Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru*

Counsel: *Mr. W. Daniel for the First and Second Appellants
Mr. R. Sugden for the First and Third Respondents
Mr. F. Gilu for the Fourth and Fifth Respondents
Mr. J. Malcolm for the Sixth Respondent*

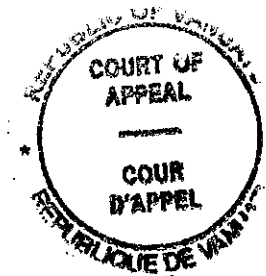
Date of Hearing: 12 November 2014

Date of Judgment: 14 November 2014

JUDGMENT

Introduction

1. This is an appeal against the Judgment of Harrop J issued on 14 July 2014 where the judge struck out the proceedings in Civil Case 220 of 2012.



2. The Appellants in their Notice of Appeal primarily seek two orders. First that the Judgment be set aside and secondly that Civil Case 220 of 2014 be reinstated so that it can be fully heard on its merits.
3. In asserting that this court should grant the above orders the Appellants rely on a number of grounds as highlighted in their Notice of Appeal where they allege the trial judge fell into error but it is not necessary to restate them all here.

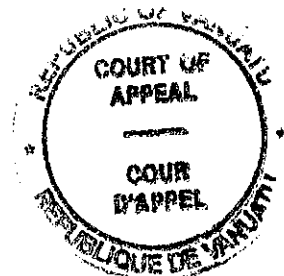
Issues

4. Two main issues arise from the grounds of appeal. First is whether or not the trial judge was correct in striking out the proceedings and refusing to apply s 100 of the Land Leases Act [Cap 163] (the Act), and secondly whether or not the Appellants have standing.
5. Section 100 provides for rectification of the register by the Court and states:

"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."
6. Relying on s.100 the First Appellant as Claimant in the court below sought to rectify lease title No. 12/0522/001 on the basis of fraud and mistake. It is not said that the registered interest of the Third Respondent as lessee under the lease is at risk, because it is accepted that it is a lessee in good faith and for a proper rental.
 7. The trial judge at paragraph 39 of the judgement said:

"... being merely a *claimed* custom owner, he does not have the requisite legitimate interest or standing to apply for rectification under s 100."



8. The Appellants submit that the trial judge erred in not accepting and applying what this court said in **Ratua Development Ltd v Ndai** [2007] VUCA 23 essentially at paragraph 32 of the judgment that:

"32. In cases where the title of the registered proprietor of the leasehold interest is protected by s. 100 (2) of the Act, the lease cannot be cancelled, but rectification could nonetheless be ordered under s. 100 (1) by requiring the removal of the person wrongly named as lessor, and the substitution of the true custom owner."

9. This needs to be read and understood in the full context of the judgment and the overall scheme of the Act, not in isolation. First the register that can be rectified under s. 100 is the Land Leases Register established under s 4 of the Act which clearly does not provide for the registration of lessors or more specifically custom owners.
10. Secondly what this court said at paragraphs 25, 26 and 28 of the **Ratua** judgment confirms what is said above that:

"25. *The Act does not provide for registration of the interests of custom owners of land.*

26. *There is no Torrens system in respect of those to whom the land belongs, namely the custom owners.*

.....

28. *A right of custom ownership is not transferrable and registrable under the Act.."*

11. What this court said at paragraph 32 referred to above must therefore be limited to the context of a claim that sought a remedy under s 100 (1) in respect of a registrable interest. Therefore the Appellants submission on this issue must be rejected.

Standing

12. The Appellants submit that the trial judge erred in finding that the First Appellant did not have standing to bring his claim. The trial judge at paragraph 30 said:

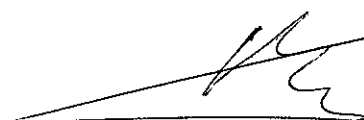
"30. There is however no application for Mr Ishmael's name to be included as lessor so one might well conclude that he personally has no right or standing to ask for an order that the Minister of lands be recorded as lessor. The Minister is not the applicant for rectification."



13. Section 8 of the Land Reform Act [CAP 123] as it then was, gave the Minister of Lands power in cases where the custom land is disputed to issue leases as lessor of the disputed land. That was a power within the Minister's sole discretion to exercise but not the disputing custom claimants. The consequences of this is that the appellants, be they custom land claimants or lessors, have no standing to seek orders for the Minister to take over the lease on their behalf. We agree with the First and Third Respondents submissions that that is a matter purely for the Minister and any suggestion otherwise is rejected.
14. Having reached these conclusions in favour of the Respondents on these two issues essentially determines the appeal. There is no need to deal with the remaining grounds. The appeal is dismissed and the First and Third Respondents are entitled to costs of the appeal. If, and when, the appellant succeeds in establishing that he is the custom owner of the leased land, he may then apply to be substituted as the lessor and receive the benefit of the lease.

Dated the 14th day of November 2014

BY THE COURT



Vincent LUNABEK

Chief Justice.

