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

CIVIL APPEAL CASE No. 3616 OF 2016

BETWEEN: **SAM TOARA and JIMMY WORWOR**
Appellants

AND: **RONNIE MANSAI KALTATAK**
First Respondent

AND: **REPUBLIC OF VANUATU**
Second Respondent

AND: **CHIKO FARM PRODUCTS Ltd**
Third Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice John Mansfield
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Mary Sey
Hon. Justice David Chetwynd

Counsel: *Mr. J Tari for the Appellant*
Mr D Yawha for the First Respondent
Mr L Huri for the Second Respondent
No appearance of the Third Respondent

Date of Hearing: *14 November 2016*

Date of Judgment: *18 November 2016*

JUDGMENT

1. This appeal relates to land which is located between the Teouma and Rentapau Rivers on Efate. The custom ownership of the land between the two rivers (and other land in the Eratap area) has apparently been disputed since the 1980's. At some unknown date the people of Eratap decided to form the Eratap Land Committee ("the Committee") which consisted of Chiefs from the area and

which was created to look after all the land interests of the people of Eratap. The Committee was approached in 1994 because some families were concerned about the family Kalmet selling land at Teouma and Rentepau without proper leases. The Committee initiated an application to the Efate Island Court in Land Case 85 of 1994. The Committee was the named Plaintiff in the case and the defendants were named as chief Poakoa Andrew, Jack Kalmetlau and Lawa Kalmetlau. There has never been any dispute that the defendants represented the Kalmet family. No other parties were named in the case. On 22nd April 1994 the Court issued an order:

> *"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".*

3. In 2000 the Minister responsible for Lands ('the Minister") issued agricultural lease 12/0924/037 ("037") which comprised some 26 hectares. The lessee was the first respondent ("Mr Kaltaktak") and it was registered on 17th October 2000.

4. In 2003 Mr Kaltaktak commenced proceedings in the Magistrates' Court where an eviction order was obtained against the appellants. The order was stayed following the filing of a claim by them in the Supreme Court against Mr Kaltatak, Mr Kalmetlau (also known as Mr Kalmet) and The Republic of Vanuatu. The claim was eventually struck out in July 2009.

5. On 24th March 2006 the Efate Island Court declared Family Kalmet the custom owners of the land but that decision was immediately appealed to the Supreme Court (Land Appeal Case No 71 of 2006) and on 24th November 2006 the Supreme Court stayed the judgment of the Efate Island Court.

6. In August and September 2012 following the surrender of the agricultural lease 037, two new leases were created 12/0924/122 ("122") and 12/0924/123 ("123"). On 20th September 2012 the Minister consented to the transfer of 12/0924/122 to the Third Respondent.

7. In 2013, Mr Kaltatak obtained an enforcement order against the appellants who then filed a claim in the Supreme Court. On 9th December 2015, the

appellants filed a Further Amended Claim seeking an order that registration of 122 and 123 be cancelled on the basis of fraud or mistake or alternatively an order that the appellants "are entitled to the land" because they had an overriding interest in the land pursuant to section 17(g) of the Land Leases Act.

8. Following a trial and after receiving written submissions the Court below made several findings and dismissed the appellants' claim. The findings were:

> "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.*

9. In this appeal, the appellants do not pursue the claim that they have an overriding interest in the land pursuant to section 17(g) of the Land Leases Act.

10. In the court below, the appellants argued that they had standing to seek rectification of the Register in accordance with section 100 of the Land Leases Act. The Court held:-

> *"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.*

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."

11. Before this Court the appellants pursued the issue of *locus standi.* The appellants persisted in their claim that they had sufficient interest in the land to enable an application for rectification to be made. The argument advanced was that the appellants entered into an agreement with Mr Kalmetlau sometime in 1994. They paid VT200,000 to be allowed onto the land and to build houses and establish gardens there. That agreement with Mr Kalmetlau, according to the appellants, created sufficient interest in the register entry they sought to rectify.

12. In our view, Geoghegan J in the Court below was entirely correct. There was evidence, much of it unchallenged, before him which entitled him to make the findings he did. He sets out that evidence at paragraphs 20 to 23 of his judgment. We have set out his findings above. The inevitable consequence of making those findings was to conclude the appellants could not establish, "*sufficient or any interest in the register entry sought to be rectified".* The appellants have not advanced any alternative argument before us to allow this Court to arrive at a different conclusion. Whatever the agreement between the appellants and Mr Kalmetlau created, it was not an interest in the land or the register entry. The appellants have no standing to seek rectification of the register entry.

13. In our view, that should dispose of the appeal but in deference to the arguments put to us, we will deal with the suggestion that there has been fraud or a mistake. The appellants say the Minister was wrong to issue the agricultural lease 037 in the face of the 1994 order from the Efate Island Court. Of course the most obvious difficulty for the appellants is the plain fact that the Minister was not a party in the Efate Island Court case. The appellants rely on the case *Roqara v Takau* [2005] VUCA 5; Civil Appeal Case 25 of 2004 (3 May 2005) when this court referred to the earlier decision by Chief Justice D'Imecourt in *Tretham Constructions Ltd v Malas* [1996] VUSC 1 and said:

"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 *Roqara* it was pointed out;

"Second, the relevance of the Island Court order 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 power under s. 8 of the Land Reform Act."

Later still in *Roqara* this court said:

"The relevance of that order in a particular case will depend on a consideration of all the evidence about the material placed before the Minister, and the Minister's own knowledge of relevant facts. Whilst the conclusion was reached in this case that the decision of the Department not to bring the order to the attention of Minister Kilman constitute a mistake which justified an order for rectification under s.100 of the Land Leases Act, the relevance of the court order in the case of other lessees in relation to land comprised in titles 168 and 170 is likely to be very different. Again, we emphasize that the order of the Island Court did not have binding legal effect upon the Minister, and so long as the Minister was fully informed of all relevant facts, including the order, it would be open to a Minister to grant a lease pursuant to s.8 of the Land Reform Act."

14. In the Court below there was unchallenged evidence from the Minister that he was aware of the Order from the Island Court and as "*a native of Erakor which is adjacent to Eratap village*" [1] he knew the background of the case which gave rise to the Order. The Minister was "*fully informed of all the relevant facts*" and it was open to him to grant the lease. His decision to do so has not been challenged. The circumstances in this case are entirely different to those in *Roqara.* In that case, Minister Kilman had no knowledge of the Order but in this case Minister Korman had full knowledge of the Order and all relevant facts. It cannot be said that Minister Korman granted the agricultural lease in the mistaken belief there was nothing to consider except an application for a lease.

15. The appellants also argue the custom owners have been defrauded because the Minister failed to consider the interests of the "disputing owners" by granting the lease (037) for nil premium. As His Lordship in the court below pointed out and as the appellants in this appeal confirmed, there is no evidence the disputing custom owners were of that view or that they had or have taken any steps or initiated any challenge against the Minister.

16. It is our firm view that even if the appellants had been able to establish that they had sufficient or any interest in the register entry they would have failed to show the lease was granted by reason of mistake or fraud. The appeal must be

[1] See the sworn statement of Maxim Karlot Korman sworn on 18th March 2016

dismissed. The respondents are entitled to their costs. The costs below have been dealt with in the court below. In respect of the costs in the appeal, the appellants shall pay the costs of the First and Second Respondents fixed at VT50,000 each.

DATED at Port Vila this 18th day of November, 2016

BY THE COURT

Hon. Vincent LUNABEK
Chief Justice.

REPUBLIC OF VANUATU
COURT OF APPEAL
COUR D'APPEL
REPUBLIQUE DE VANUATU