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IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU **CIVIL CASE No 126 OF 1995**

(Civil Appellate Jurisdiction)

BETWEEN: Tretham Constructions Limited & Trevor Hannam

First Appellant

AND: Claude Mitride

Second Appellant

AND: Philip Malas & Loken Malas

Respondents

Coram: The Chief Justice.

Mrs Susan Bothman-Barlow of Counsel for the Appellants.
Mr John Malcolm of Counsel for the Respondents.

JUDGMENT

This matter comes before this Court by way of an appeal from a decision of the learned Senior Magistrate, Mr Vincent Lunabeck, sitting in his capacity as a presiding magistrate of the Island Court in land matters, pursuant to the powers vested in him by Section 2 (2) (A) of the Island Courts Act CAP 167. The matter came before the learned magistrate for an interim injunction pending a decision of the Island Court in a land dispute case in which the Respondents are plaintiffs. The land in dispute is land situated in Mele and the land the subject matter of this appeal forms part of that land.

The brief facts are as follows: The Appellants in this case are leaseholders of land in Mele. They hold the land under the terms of an agricultural lease granted to them by one or other of the Ministers of Land at the time. The leases were granted pursuant to the powers vested in the Minister by Sections 6 & 8 of the Land Reform Act CAP 123. The

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first Appellant is a property developer who was granted an agricultural leasehold over the land recently. The second Appellant was an alienator of the said land, by virtue of having held the land prior to independence, and was granted an agricultural lease some years ago. Recently, both Appellants applied under the Physical Planning Act CAP 193, for planning permission to change the user of the land from agricultural to residential and for permission to develop the land, pursuant to Sections 4, 5, 6 and 7 of the Act. The general idea being that they sought permission to subdivide the land, the subject matter of their leasehold title, into building plots over which they would build residential premises for sale. The planning permission was granted to them in principle and they then sought leave to subdivide the land pursuant to section 12 of the Land Leases Act CAP 163, in order to surrender their existing leases for the purpose of regrant of leases over the same land but in the form of several subdivisions. In the case of the first Appellants, the leases had already been granted by the Minister of Land; in the case of the second Appellant the leases were about to be granted, when the learned magistrate granted the interim injunctions the subject matter of this appeal. The circumstances in which the injunctions were granted were that the Respondents to the present appeal, (who had filed a custom land claim in the Island Court on the 8 August 1993, over land covering an area which also included land over which the present leases were granted) got to hear that the Appellants had obtained or were about to obtain permission to change the user of the land from an agricultural holding to a residential holding for the purpose of development. They then applied to the Island Court for interim injunctions restraining the Appellants from developing the land the subject matter of the leases, pending a decision of the Island Court (and possibly later the Supreme Court) over the determination of the custom ownership of the said land, now the subject matter of a 'land dispute' between themselves and other groups of people, who all claim to be the indigenous custom owners of the land, pursuant to Article 74 of the Constitution.

The historical background of this case is as follows:

i) On the 8 August 1993, the Respondents, who are indigenous Ni-Vanuatu residing in Mele, registered a land dispute claim before the Island Court of Efate over an area of land which includes land leased to the Appellants. The said claim is still awaiting a hearing date.

ii) On August 23, 1995, the first Appellants obtained a certificate as Registered Negotiator over part of a land in Mele, then known under its old title number 112 G, from the then Minister for Land, The Hon Paul Telukluk, pursuant to Section 6 of the Land Reform Act CAP 123. As a result of which they were granted two new leases for a period of 75 years. The new leases were registered at the Lands Records Office on 26 October 1995, as leases number 12/ 0821/061 and 12/0821/062. The leases granted were rural agricultural leases.

iii) The second Appellant had been an Alienator within the meaning of the Land Reform Act, CAP 123, by virtue of having been the owner of the land prior to independence. It is an agreed fact that he had obtained some years ago, from the then

Minister of Land, a certificate of Registered Negotiator pursuant to Section 6 of the Act. As a result he had secured in 1983 two leases number 12/ 0822/011 and 12/0823/001 for periods of 30 years each. These leases were also rural agricultural leases.

Section 6 of the Land Reform Act states as follows:

(1) *"No alienator or other person may enter into negotiations with any custom owners concerning land unless he applies to the Minister and receives a certificate from the Minister that he is a registered negotiator.*

(2) A certificate issued in accordance with subsection (1) shall-

(a) state the name of the applicant and of the custom owners; ... "

Section 7 states:

"All agreements between persons who are not indigenous citizens and custom owners relating to land shall be void and unenforceable in law unless they have been-

(a) approved by the Minister; and

(b) registered in the Lands Records Office"

Section 8 (1) of the same Act states:

"The Minister shall have general management over all land-

(a) Occupied by alienators where either there is no approved agreement in accordance with sections 6 or 7 or the ownership is disputed; or

(b) not occupied by an alienator but where ownership is disputed;

iv) It is an agreed fact that some years ago, all the custom owners of Mele had agreed to form a trust to be managed by a company called the Mele Trustees Limited, who were to represent all the indigenous custom owners of Mele, thus facilitating the distribution of the proceeds from the management of custom land by the Minister of Lands for the time being, for the benefit of all indigenous custom owners of land in Mele. This appeared to be an excellent idea, because it allowed the government to distribute immediately to the Trustees of the land in Mele, the various moneys that it had collected as a result of its management of the Mele custom land, rather than wait for each individual custom owner to be identified before the money could be shared out; a process that could take many years, thus depriving the majority of the immediate benefit of the revenue from the land. It had this further advantage, that it established an 'organ' through which the Minister could delegate certain of his powers of administration over the land back to the indigenous custom owners, thus permiting them to play a role in the administration of their own

custom land, in a way that no statute permitted them to do, prior to the time when individual owners could be identified. Of course, it is true that the Trustees can only represent the custom owners, what the trust company cannot do is to substitute itself for any custom owner. To be a custom owner under the Constitution one has to be an indigenous Ni-Vanuatu.

v) In late 1995, the Appellants applied for and obtained planning permission for a development project pursuant to sections 4, 5, 6 and 7 of the Physical Planning Act CAP 193, for a change of user and for the subdivision of their leasehold properties into several building plots for residential premises. I need not set out here the terms of those sections as nothing turns on them.

vi) In late 1995, both Appellants applied for change of user over their several leasehold properties, pursuant to Section 12 of the Land Leases Act CAP 163, in order to develop their leasehold properties into residential plots. The first Appellants had actually succeeded in completing the transaction and in obtaining the registration of their several leasehold titles, while the second Appellant was well on his way to doing so.

The relevant parts of Section 12 of the Land Leases Act state as follows:

> (1) *"Where registered leases granted by the same lessor, free from any registered encumbrances other than the agreements and liabilities contained or implied in the lease, of contiguous parcels are held by the same proprietor, upon application by him accompanied by a surrender of the existing leases in the prescribed form and a new lease in the prescribed form the Director shall effect combination by closing the register relating to the surrendered leases and opening a new register in respect of the new lease.*
>
> *(2) .... upon application by the proprietor of a registered lease for the division of the land comprised in his lease into two or more parcels accompanied by a surrender of the existing lease in the prescribed form and new leases in the prescribed form the Director shall effect the division by closing the register relating to the surrendered lease and opening new registers in respect of the new leases resulting from the division ..."*

vii) In late November 1995 the Respondents applied before the presiding magistrate of the Island Court in land matters, for an interim injunction restraining the Appellants form developing their leasehold properties, pending the determination by the Island Court of the Respondents custom ownership dispute, which they had placed before the Court in August 1993.

From the terms of Sections 6, 7 and 8 of the Land Reform Act CAP 123 set out above, it will be seen that the management of the land the subject matter of this appeal is entirely in the province of the Minister (for the time being) of Lands. It is also an agreed fact that the Appellants did hold, at the material time, proper agricultural leases. It is also an agreed

fact that the Appellants had complied with all the terms of the Physical Planning Act CAP 193 and that they had registered or were in the process of registering new leases pursuant to their various applications for change of user.

viii) On the 1 December 1995, the learned senior magistrate granted the interim injunctions sought by the Respondents restraining the Appellants from subdividing their leasehold titles, and in effect from undertaking the development that they had planned on the land.

This matter now comes before this Court by way of Appeal; the issue being whether or not the learned senior magistrate had the jurisdiction to grant the injunction that he did, either pursuant to the powers vested in the Island Court by the Island Court Act CAP 167 or through the wider powers of the Court through its inherent jurisdiction.

The powers of the magistrate are set out in section 2 A (1) of the Island Court Act as follows:

> *"The Chief Justice shall nominate a magistrate who shall* ***subject to the provisions of this Act*** *have such powers, functions and duties in respect of all Island Courts, as the Chief Justice may prescribe."*

Pursuant to the powers conferred on him by the above Act, the learned Chief Justice on the 29 January 1990, prescribed as follows:

> *"Where a magistrate presides over a matter in an Island Court concerning disputes as to the ownership of land, such magistrate shall have the following powers, functions and duties:-*
>
> *(c) to issue orders* ***for the parties*** *to refrain from interfering with the land or buildings or crops on the land during the hearing of the case;*
>
> *(e) to have the same powers of a Senior Magistrate under the Courts Regulation No 30 of 1980 (namely under the Courts Act CAP 122);*

The powers under the Courts Act referred to in (e) above are those under Section 3 of that Act referring to a magistrate's powers concerning contempt of Court, with which we are not concerned here.

Section 29 of the Courts Act also provides that:

> *"Subject to the Constitution,* ***any written law*** *and the limits of its jurisdiction a court shall have such inherent powers as shall be necessary for it* ***to carry out its functions.***"

'Court' is defined in the Interpretation Act as follows:

""Court" means a court of competent jurisdiction in Vanuatu whether provided for under the Constitution or any law."

It is clear that Section 29 above applies to Island Courts as it does to any other Court in the land. That also means subject to any written law and the necessity of carrying out its purpose.

Section 13 of the Island Court Act states:

"In civil proceedings an island court in addition to any other powers it may have may make any or a combination of the following orders-

(c) an order authorising the use or occupation of the land by ***one of the parties to the dispute*** *for such purposes and subject to such conditions as are set out in the order;*

(d) an order prohibiting, where appropriate, the use or occupation of the land ***by any one of the parties to the dispute;***

(e) an order restraining ***the other party to the dispute*** *from interfering with the authorised use or occupation.*

The **'function'** of the Island Court in land matters is to determine the ownership of custom land as between the parties before it. Under the Island Courts Act as we have seen, the Island Court has certain limited powers to grant injunctions restraining the **'parties'** from occupying or using the land. Section 29 of the Courts Act extends to the presiding magistrate any other inherent powers of the Court, but he is still limited to the powers conferred on him by the written law, namely section 13 of the Island Courts Act. It is clear that the presiding magistrate under that Act has no power other than to injunct the **'parties to the dispute'.** The only parties to a dispute before the magistrate in a custom claim are the customs owners who challenge each other regarding the custom ownership of the land in question. The Minister of Land has the exclusive power to administer all custom land pursuant to the Land Reform Act. Nor can he be restrained by the Island Court, because he is not **'one of the parties'** referred to in the Island Courts Act. In his administration of those lands he is free to alienate by means of leases all lands under his management. Likewise, the leaseholders in this case have, subject to the Physical Planning Act, the Land Reform Act and the Land Leases Act, all the rights to enjoy and manage their leasehold properties subject to the terms of the lease itself and the limits imposed upon them by any law. Nor are they in any way **'one of the parties'** to a custom land dispute. Therefore, they also do not form part of the category of persons who can be restrained by a presiding magistrate within the ambit of the Island Courts Act. The next question is: can such a magistrate restrain such parties under the larger powers conferred upon him under Section 29 of the Courts Act, namely the inherent powers of the Court. These powers are not unfettered powers. By the terms of the Act itself, they are limited in a number of ways:

i) by any written law [to the contrary];
ii) the limit of its jurisdiction; and more importantly
iii) by the necessity of its functions.

The **'function'** of the Island Court in land matters is limited to **deciding the custom ownership of land.** It has no greater powers than that, and that which is conferred on it by the Island Courts Act itself. It has the very limited powers regarding the use and occupation of land conferred to it by the Act. If one looks at it more carefully, those powers are limited to **the parties before it.** That means the parties before it **in the custom land claim.** The reason why is not too difficult to imagine: in order to keep the balance between the parties before the Court and peace and good order. It is clear therefore that the presiding Magistrate cannot make any restraining orders against leaseholders who are not also **the parties** before the Court, and cannot restrain them from conducting themselves as they are entitled to do by law.

Mr Malcolm for the Respondents concedes that the real issue in the case is whether or not the Island Court, or more appropriately the presiding Magistrate, has the power to grant restraining orders against the Appellants as he did in this case. He submits that he does, if not under the Island Courts Act itself, then certainly under the inherent powers conferred on the Court by Section 29 of the Courts Act CAP 122. He further submits, on rather emotive grounds, that if the learned presiding Magistrate were not to have such powers, then the indigenous custom owners would be deprived of the use of their custom land for themselves and their descendants to shoot upon and hunt upon as they please. He further submits that the effect would be to deprive them and their descendants from the use and occupation of their land altogether for generations to come.

The Constitution provides under Article 75 as follows:

> *"Only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land."*

The Constitution does not prevent land in Vanuatu from being alienated by means of land leases. So long as such leases do not confer perpetual ownership of the land upon persons who are not indigenous citizens of Vanuatu. Indeed under leases only the enjoyment of land is alienated, not the perpetual ownership. There is therefore no Constitutional bar to the granting of leases which deprive the custom owners of their enjoyment of their land for definite periods of time, even though it may deprive them and their descendants of such enjoyment for several generations. Indeed such alienation is contemplated in the Constitution itself. Article 79 states as follows:

> *"(1) Notwithstanding Articles 73, 74 and 75 land transactions between an indigenous citizen and either a non-indigenous citizen or a non-citizen shall only be permitted with the consent of the Government."*

That is exactly what the Land Reform Act and the Land Leases Act provide for, namely a procedure for the Government, through its Minister of Lands, to control land transactions between indigenous citizens and others. Were it otherwise, the development of this country would grind to a complete halt. There is therefore no merit whatsoever in the submissions made by Mr Malcolm on that point. The learned presiding Magistrate did not have the power to make the restraining orders that he did under the law, and no emotive, as opposed to legal grounds, could extend to him that power.

Finally and in the alternative, Mr Malcolm submits that even if this Court found that the Island Court did not have the restraining powers that it purported to exercise, then this Court does, and this Court should review the granting by the Minister of the various leases to the Appellants and in turn grant the injunction sought by the Respondents against the Appellants on the same emotive grounds that he submitted above; namely on the basis that to do otherwise would be to permit the custom owner, whomsoever he may eventually be, from enjoyment of his land for several generations to come, if not for ever. For the same reasons that I have stated above, there is no validity to this submission either. The indigenous custom owner under the Constitution is entitled to perpetual ownership of his custom land, he has no special Constitutional or other rights to occupation or enjoyment over land that he has leased to others, or that has been leased perfectly legally by the government through the Minister, under the laws of this land. This Court has no power, inherent or otherwise to interfere with the Minister's proper exercise of his statutory duties. It could only do so if the Minister had acted improperly or ultra vires, neither of which has been established here. Nor could the Court on emotive grounds interfere with the proper exercise of Ministerial powers, by substituting for what the Minister did, what it would have done if it had been in the place of the Minister. That would be an improper exercise of judicial powers, inherent or otherwise. Although the learned Senior Magistrate in this case did set out properly the test in the case of American Cyanamid Co v Ethicon Ltd (1975) A.C. 396, he nevertheless failed to consider adequately the powers and jurisdictions of his Court both under the Island Courts Act and the Courts Act as set out above. The triable issue can only be between the relevant parties before the Court, namely the **'parties to the dispute'** and no one else. The American Cyanamid case therefore is of no assistance in the present context of this case.

For the reasons that I have set out above, I allow this appeal and set aside the restraining orders made by the learned Senior Magistrate.

The costs of this appeal shall be the Appellants, to be taxed or agreed.

CHARLES VAUDIN d'IMECOURT
Chief Justice

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