

BETWEEN: REPUBLIC OF VANUATU
Claimant/Applicant

AND: FAMILY JIA JULUN
Defendant/Respondent

Coram: Justice D. V. Fatiaki

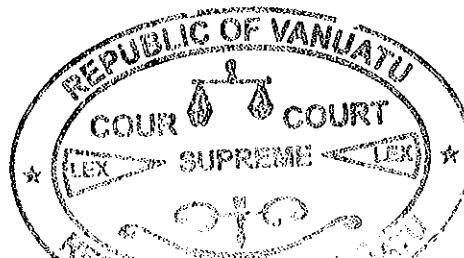
Counsels: Ms. C. Thyna for the Applicant
Mr. C. Leo for the Respondent

Date of Decision: 27 May 2011

JUDGMENT

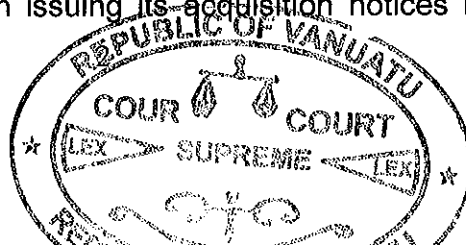
Chronology

- 10 May 2008 – Government enters into an Agreement with Huawei Technologies Co. Limited for the construction of a nationwide telecom network system in Vanuatu to facilitate the implementation of the E-government project. (*the Agreement*).
- 1. **Clause 2.1** of the Agreement required the contractor to assist the Government to identify sites throughout Vanuatu suitable for the project and Government was charged with responsibility for acquiring the respective sites.
- 12 March 2009 – Survey plan title **No. 09/0713/048** was prepared over a piece of vacant customary land on the island of Malekula identified as suitable for the erection of a transmission tower for the E-government project (*the said land*);
- 25 March 2009 – Public Notices were issued to custom owners and interested persons concerning customary land known as "**Tempeko**" situated on Malekula a part of which, the Minister of Lands had decided to acquire for the purpose of constructing a transmitter station tower for the E-government project.
- 8 December 2009 – **Deed of Release** entered between Government and the Sato Kilman Family as custom owners of



"**Tempeko**" customary land which comprises the whole of the said land.

2. The relevant Land Acquisition Act documentation including the **Deed of Release** all refer to the land being acquired as located within "**Tempeko**" or "**Tembogoh**" customary land boundaries at Lakatoro on the island of Malekula.
- 16 January 2010 – site leveling works and clearing of the access road to the said land commences on Malekula;
 - 18 January 2010 – the respondent's placed "*namele*" leaves across the access road to the site effectively halting further works at the site;
 - 28 January 2010 – A meeting between government officials and the respondent's representatives failed to resolve the dispute;
 - 19 February 2010 – Minister of Lands issues an acquisition order under the Land Acquisition Act to the acquiring officer to take possession of the land comprised in title **No. 09/0713/048**;
 - 19 March 2010 – Government issued a **Supreme Court Claim No. 36 of 2010** alleging trespass by the respondents on the said land and seeking the removal of the respondent's namele leaves. An urgent injunction was also sought to prevent the defendant further interfering with the government's access to and leveling works on the site;
 - 15 April 2010 – The urgent application and sworn statement in support were served on the respondent's representative;
 - 16 April 2010 – The Supreme Court granted the urgent application in terms. The respondents were represented at the hearing by a family member **Pierre Willie**. A further conference was set for 3 May 2010;
 - 30 April 2010 – The respondents filed a defence and an application for a stay of the injunctive orders of 16 April 2010. the application was supported by a sworn statement;
3. In its defence the respondent denies trespassing on '**Tembogoh**' land and asserts that the namele leaves were placed on '**Amelingas**' land. The sworn statement filed in support deposed that the map which the government relied upon in issuing its acquisition notices had incorrectly



exchanged the customary names of the lands in question. In short, the respondents says the E-government tower is actually being erected on '**Amelingas**' customary land which the defendants have been occupying for more than 50 years and, not on '**Tembogoh**' customary land as the government claims.

- 3 May 2010 – Government filed an application seeking the punishment of 5 named members of the respondent family for contempt of court in not complying with the Court's injunction orders of 16 April 2010;
 - 4 May 2010 – Respondents application for a stay of the Court's injunctive orders was granted until further order and the matter was adjourned to 3 June 2010 with directions to both parties to file sworn statements in the hope that the land issue would be clarified;
 - 3 June 2010 – Government was granted leave to formally seek the removal of the stay order and the re-imposition of the injunction;
 - 9 June 2010 – Government filed an application for the removal of the respondents stay order;
 - 23 June 2010 – Stay order lifted by consent and respondent granted leave to file an amended defence;
 - 26 July 2010 – Amended defence and counterclaim filed. This makes it clear that the respondents are asserting that the E-government tower is erected on '**Amelingas**' customary land over which the respondents have a superior claim as longtime unopposed occupants of the land;
 - 10 August 2010 – Government filed an application to stay the respondent's counterclaim pending a final determination of the custom ownership of '**Amelinges**' by a competent court or tribunal;
 - 26 August 2010 – Government's reply and defence to the respondent's counterclaim filed. Respondents opposition to government's application to stay the counterclaim filed.
4. So much then for the background to this application. The grounds upon which the Government's stay application is brought are set out as follows:

"1. The Respondent's counterclaim is based on the allegation that they are the owners in custom of the Amelinges land, including the land acquired by the Applicant;



2. *There has been no determination of the custom ownership of the land by a competent court or land tribunal;*
 3. *The Respondent have no locus standi in bringing their counterclaim;*
 4. *In the circumstances, the Respondent's counterclaim should be stayed sine die until the customary ownership of 'Amelingas' land and 'Tembogoh' land are resolved".*
5. Additionally, Government asserts the conclusiveness of its title as registered proprietor of survey title **No. 09/0713/0418**, and, its right, as such, to enforce its title to the said land. In other words, even if the said land is within '**Amelingas**' land boundary (which is denied), then, irrespective of the outcome of any such determination of the customary ownership of '**Amelingas**' land (which the respondent claims), the Government's acquired registered title over the said land is conclusive and indefeasible in terms of the Land Leases Act.
6. **Section 17 of the Land Leases Act** [CAP. 163] however provides for the following unregistered "*overriding rights and interests*" including:
- "(g) the rights of a person in actual occupation of land save where enquiry is made of such person and the rights are not disclosed".*
7. In **Williams v. Williams [2004] VUCA 16** the Court of Appeal had occasion to consider Section 17 (g) in some detail and the Court determined that the language of the section raised seven (7) important matters of which, for present purposes, it is only necessary to refer to the following four (4) matters (adopting the Court of Appeal's numbering):

"Fourthly, paragraph 17(g) applies to the rights of a person "in actual occupation of land"... We consider the expression requires that the person be physically occupying the land, although this does not require that the person be constantly on the land. For example, ... if a person uses a plot of land as a garden that person is likely to be in actual occupation of the plot ... The fact of ongoing cultivation and maintenance of the garden would provide the evidence of "actual occupation".

Depending on the circumstances, the area actually occupied may extend to include areas used periodically as part of crop rotation. In the case of a plantation worked by a person, the person could be in actual occupation of a substantial plantation area, if that area comprises the farming unit conducted by that person. Questions of fact and degree are likely to arise and will need to be determined having regard to all the



circumstances of the case, including the nature of the right being asserted and the evidence led in support of it.

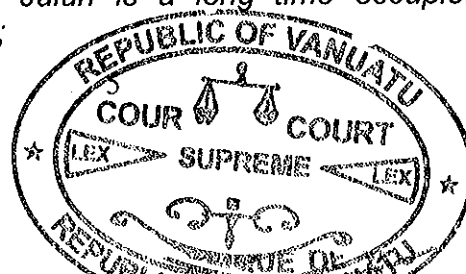
Fifthly, s.17(g) operates in respect of “rights”, that is rights recognized by the law of Vanuatu. A person in actual occupation who is a trespasser will have no “rights” which are protected by the provision. A right may arise under custom law, or it might be a right that derives from and through the proprietor of a registered lease or the predecessor in title of that lease.....

Sixthly, if the person in actual occupation claiming under s.17(g) establishes rights which support the occupation, the rights will be ‘**overriding**’ rights unless the proprietor of the registered lease establishes that enquiry was made of that person for an explanation of his or her occupancy, and the rights were not disclosed. The onus of proof as to the making of due enquiry is on the proprietor of the registered lease. To discharge that onus the proprietor would have to establish that a sufficient enquiry was made before the proprietor became the registered proprietor of the lease.

Seventhly, the evident intent of s.17(g) is to protect on the one hand a person who is in actual occupation of land pursuant to rights recognized by law, and on the other hand to provide a mechanism for those acquiring leases to protect themselves by making appropriate enquiry and inspection before acquisition. If a person in actual occupation is found on the land, the would-be purchaser, by making enquiry, can have the rights of that person identified so that the consideration for their acquisition can be adjusted, or the proposed acquisition can be abandoned. Alternatively, if the person found in actual occupation does not disclose a right that justifies his or her actual occupation, the would-be purchaser will obtain good title against that person, and will be entitled after registration to recover possession.”

8. The Government's assertion is also dependant, on the lawful acquisition of survey title **No. 09/0713/0418** under the **Land Acquisition Act** [CAP. 215] which process includes service of Notices “to the custom owners and persons interested in the land ...” and the payment of compensation to the custom owner(s) of the land acquired, as conditions precedent to a lawful acquisition (see: **Sections 2, 4, 7, 14, 16 & 17** of the **Land Acquisition Act**). In this regard too, it is common ground that a sum of **VT5.8 million** has been paid to the Sato Kilman Family for the acquisition of the said land which is said to be comprised within ‘Tempoko customary land’. Needless to say, if the land to be acquired is on “**Amelingas**” customary land (as asserted by the respondent) then the entire acquisition process may be still open to challenge.
9. In response to the Government's claims, the respondent forcefully asserts:

“(a) The Defendant's counterclaim is based on the fact that the Family Jia Julun is a long time occupier of the Amelinges land;



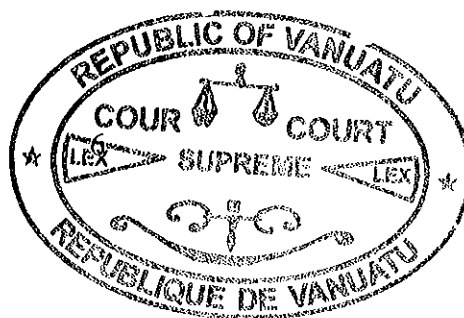
- (b) *The Defendant's occupancy of the Amelinges Land is never disputed by other parties within the locality;*
- (c) *The Defendant's rights to possession of Amelinges Land does not require a declaration of a Lands Tribunal in the premises that the Defendant has a right in law to claim for damages sought even without any customary declaration from a Lands Tribunal;*
- (d) *The Defendant's right to possession of Amelinges Land is superior to any other parties or custom owner(s);*
- (e) *The Defendant is not interested in Tembogoh Land and has no claim whatsoever with the said land;*
- (f) *The Defendant's counterclaim is based on the Defendant's right to possession of Amelinges Land and does not relate to whether the Defendant is the custom owner of the Amelinges Land".*

10. Plainly the respondents do **not** claim to be customary owners of **Amelingas** land, rather, the respondent claims a superior possessory title and right over the customary land of which they say survey title **No. 09/0713/0418** forms a small part. The right is said to be based upon the respondents unchallenged long-term occupation and cultivation of '**Amelingas**' customary land to the exclusion and acceptance of all others.

11. In this regard the Court of Appeal recently said in **Vuroese Family v. Ave** [2010] VUCA 22 in words that might equally apply to the present case (under subheading 3):

"The First Respondent conceded that they have no declaration of custom ownership from either an Island Court or a Land Tribunal. However they say their custom ownership of the land is public knowledge and is known and respected in the location. They gave evidence by sworn statements, and orally about their custom ownership.

As a matter of law it is not necessary for a plaintiff in a trespass case to prove actual ownership of the land. An action in trespass protects a plaintiff's immediate right to possession. A plaintiff with only ... a licence to occupy land, can bring an action against someone coming onto the land and using it without his authority ... The relevant question is not whether the plaintiff is the owner of the land, but whether the plaintiff's right to possession of the land is superior to that of the defendant."



12. In light of the foregoing there is a serious dispute over which customary land the Government survey plan No. **09/0713/0418** is situated, namely "**Tempeko**" or "**Amelinges**". This dispute can only be resolved at a trial after hearing all of the evidence in the case including respondent's counterclaim.
13. It is also clear from **Rule 4.8** of the **Civil Procedure Rules** that a counterclaim may properly be included in a defence to a claim as occurred in this instance.
14. Furthermore **Rule 4.9** envisages the possibility of including in a counterclaim, a "*person other than the claimant*" if certain conditions are satisfied.
15. After careful consideration of the competing submissions and mindful of the overriding objectives of the **Civil Procedure Rules** and the Court's duty to actively manage cases including "*dealing with as many aspects of the case as it can at the one time*", I am **not** persuaded that this is an appropriate case in which to exercise the Court's power to stay the respondent's counterclaim and allow the Government's claim to proceed.
16. Needless to say in the present case the Government's claim and the respondent's counterclaim are so inextricably interwoven that it would be impossible to determine one without determining the other.
17. The application to stay the respondent's counterclaim is accordingly dismissed with costs to the respondents.
18. By way of further directions the applicant is ordered to file and serve by **10 June 2011** a defence to the respondent's amended counterclaim filed on 26 July 2010, and thereafter the respondent to file and serve a reply (if desired) by **24 June 2011**.
19. Liberty is also granted to the parties to file and serve any additional sworn statements by 24 June 2011, and thereafter the matter is fixed for a conference on **Monday 4 July 2011 at 9.30 a.m.**

DATED at Port Vila, this 27th day of May, 2011.

BY THE COURT


D. V. FATIAKI
Judge.

