

BETWEEN: NWARDUR ROSIE TEVET KALHU

Claimant

AND: CHARLIE WILLIAM

First Defendant

AND: THE DIRECTOR OF LANDS

Second Defendant

Coram: *Mr. Justice Oliver A. Saksak*

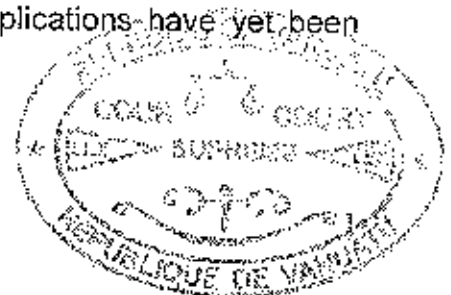
Counsel: *Ms Jane Tari for the Claimant
Mr. Stephen Joel for First Defendant
Mr. Fredrick Gilu for Second Defendant*

Date of Hearing: *12th August 2011*

Date of Judgment: *27th September 2013*

JUDGMENT

1. On 12th August 2011, Ms Tari informed the Court she had just been served with the written submissions by the First Defendant. She therefore sought 14 days to file responses. Mr. Gilu on the other hand informed the Court that as to the strike out application, they would take no issue but would simply abide any orders of the Court.
2. Mr. Joel filed written submissions as long ago as 3 June 2011. Since 12th August 2011 to date, the Claimant has never filed any written submissions in response.
3. On 31st May 2011, the First Defendant filed two applications. The first application seeks to set aside and dismiss the Claimants' claims and/or order that this proceeding be stayed. The second application seeks leave to apply for judicial review out of time. Neither of these applications have yet been determined by the Court.



4. The view of the Court in relation to the application for leave to file a judicial review claim out of time is not necessary because –

(a) It seeks to review the decision of the Malkep Council of Chiefs made on 22nd July 1984; and

(b) Chief Kuvu Kaven who signed the decision is deceased and the secretary, Thomas Reuben Seru is also deceased.

The application for leave is therefore declined and is dismissed. It follows also that the application to stay this proceeding must be declined and is hereby dismissed.

5. The Claimant's found their claims for royalties relying on the decision of 22nd July 1984. That claim was filed on 23rd November 2006. Their claims are for loss and damage in the sum of VT3,740,864 with interests at 5%, and costs.

6. The First Defendant filed an initial defence and counter-claim on 19th December 2006. And on 11th June 2007 the First Defendant filed an amended defence and counter-claim. They deny all claims of the Claimant and counter-claim against them for –

(a) Loss of earnings – VT4,600,000;

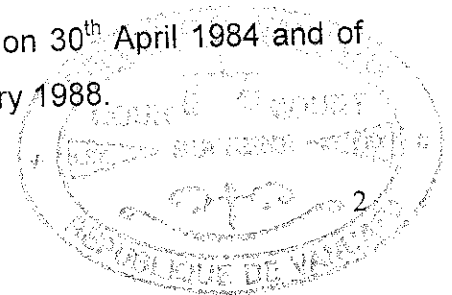
(b) Dismissal of the Claimant's claims;

(c) A declaration that the rectification of name of lessor made on 6th February 2007 is null and void;

(d) An order rectifying the register by removing John Ian Frazer as lessor to Leasehold Title 04/1722/001 and 04/1722/002; and

(e) Costs of the action.

7. The First Defendant relying on another declaration made by the Supenatavuitano on 6th August 1996 (Annexure "A" – sworn statement of Mara William of 20th March 2007). They contend this decision gave them recognition as custom land owners of Lorocrav land and William Hein was registered as lessee of leasehold title 04/1722/001 on 30th April 1984 and of leasehold title 04/1722/002 registered on 29th January 1988.



leasehold titles hold by William Hein. This rectification was effected on 6th February 2007.

9. The First Defendant challenges that rectification and submitted it was done through mistake and should be rectified. They also challenge the decision of the Malkep Council of Chief of 22nd July 1984 because it was not a decision of competent Court being an Island Court or a Land Tribunal. They further challenge the validity of the recognition by Alick Kalmelu of the decision of 22nd July 1984 being final. This seen in the letter dated 14th October 2004 annexed as "JMP9" tot eh sworn statement of Jean-Marc Pierre of 2nd June 2009. And finally they challenge the declaration made by the Minister dated 26th July 1984 as unlawful.

10. Mr. Joel posed three issues in his written submissions –

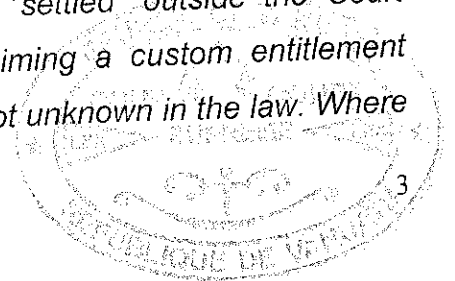
- (a) Whether or not the Claimant was declared custom-owner of the land comprised in Agricultural Lease Title 04/1722/002?
- (b) Whether or not the Claimant's declaration and promotion as custom owner of land title 04/1722/002 is lawful?
- (c) Whether or not the Claimant's registration by way of change of name as lessor of land title 04/1722/002 is lawful?

11. Mr. Joel's submissions are that all issues should be answered in the negative. The Court accept those submissions on the basis that –

(a) They are unchallenged;

(b) In relation to the decision of the Malkep Council of Chiefs dated 22nd July 1984, the Court relies on the decision of the Court of Appeal in Valele v. Touru [2002] VUCA 2 where the Court said:

"Unless an ownership dispute is determined through the Court system, in the manner provided for in the Constitution, a descendant of a party to an ownership dispute that has been "settled" outside the Court system may re-open the dispute by claiming a custom entitlement under Article 73. This kind of difficulty is not unknown in the law. Where



interests of children and future generations relating to land arise, the general law provides that their interests can only be affected by a settlement of the terms of the settlement are approved by a Court as being in the interests of the present and future children.

It follows that neither the Ultalamba Committee and its associates "Area Land Court" or Committee (which was in no sense a Court established under the Constitution) nor the Council of Chiefs that sat at Deproma had any jurisdiction or authority to make a determination or custom ownership which bound claimants who disagreed with their ruling."

- (c) On 12th September 1995, Tevet Kalhu cancelled a kastom ceremony held on 27th July 1989 between himself and Ian Frazer. See Annexure "A" to the sworn statement of Chief Namser Iako filed on 14th January 2009. In relation to the third issue, Ian Frazer therefore cannot be the custom owner and lessor of custom lands owned by Tevet Kalhu.
- (d) Mr. Jean Marc Pierre at paragraph 8 of his sworn statement dated 2nd June 2009 conceded they had not seen the copy of the Council of Chiefs decision but relied only on corroborated evidence that the document existed. This omission amounted to a mistake. Had they insisted on seeing the decision, it would have provoked them to seek legal advice before effecting any rectification of the register.
- (e) The Ministerial decision of 26th July 1984 was a declaration of custom owner representative. It was not a declaration that Tevet Kalhu was the custom land owner. Again to rely on the declaration as purporting to declare customary ownership of land to Tevet Kalhu was a mistake by the Claimant. The case of Valele v. Toura also addresses the issue of Ministerial declarations of custom owner representatives.

12. For the reasons given the claims of the Claimant are unfounded and accordingly they are dismissed.



12. For the reasons given the claims of the Claimant are unfounded and accordingly they are dismissed.

13. As regards the Counter-Claims of the First Defendant they are successful but only in part as follows:-

- (a) The rectification of name of lessor dated 6th February 2007 is hereby declared unlawful and therefore null and void.
- (b) The Second Defendant be hereby directed to rectify the register by removing the name of John Ian Frazer as lessor and substituting the Minister of Lands as lessor in respect to Leasehold Titles 04/1722/001 and 04/1722/002.
- (c) The claims for loss of earnings at VT4,600,000 be dismissed.
- (d) The decision of Malkep Council of Chiefs dated 22nd July 1984 be hereby declared invalid and therefore null and void having no force of law.
- (e) The decision of the Supenatavuitano Council of Chiefs dated 6th August 1996 be hereby declared invalid and therefore null and void having no force of law.
- (f) There be no order as to costs. Each party will pay their own costs.

DATED at Luganville this 27th day of September 2013.

BY THE COURT


OLIVER A. SAKSAK

Judge

