

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(CIVIL JURISDICTION)**

CIVIL CASE No. 38 of 2012

BETWEEN: KALSAKAU NARU KALBEAU
Claimant

AND: KALFAU KALSAKAU
First Defendant

AND: MILDRED KALSAKAU
Second Defendant

AND: REPUBLIC OF VANUATU
Third Defendant

Coram: Justice Mary Sey

Counsel: Felix Laumae for the Claimant
Justin Ngwele for the First and Second Defendants
Kent Ture Tari (SLO) for the Defendant

Hearing: 06 July 2015

Judgment: 12 August 2015

RESERVED JUDGMENT

Introduction

1. This is a claim for rectification of the Land Register pursuant to s.100 of the Land Leases Act [Cap. 163].
2. The Claimant (KNK) is challenging the issuance and registration of **Commercial Lease Title Number 12/0633/1233** by the First and Second Defendants (KK and MK) to KK over part of Tamau land in the Smet Area of Port Vila.

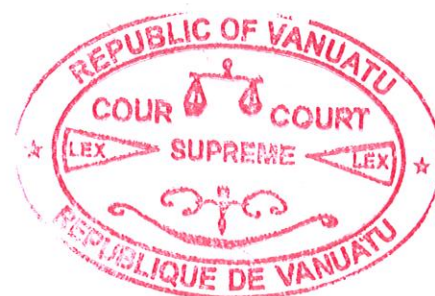


Background

3. On 13 March 1995, the Efate Island Court declared Tamau Land to have three different families as custom owners. Neither KNK nor KK and MK were parties to the Island Court Case No.4 of 1993 over ownership of Tamau Land.
4. KNK has appealed the 1995 decision of the Efate Island Court with leave being granted in 2000 to bring the appeal out of time. Land Appeal Case No. 01 of 1995 between *Naru Kalbeau Kalsakau & ors v James Kalua Lauru & Ors* is still in progress before another Judge and has not yet been resolved by the Supreme Court.
5. On 16 February 2006, the Efate Island Court stayed the operation of its decision pending the hearing of the appeal. That Island Court order also prohibits the declared custom owners from undertaking any development over Tamau land pending the appeal determination.
6. The Minister of Lands was advised by letter dated 16 August 1996 from the Claimant's lawyer (at that time Mr. Jon Baxter-Wright of Clayton Utz) about the Claimant's appeal in Land Appeal Case No. 01 of 1995.
7. A second letter dated 21 January 1997 was sent to the Minister of Lands of the time. By letter dated 28 January 1997, the Minister of Lands acknowledged receipt of Mr. Baxter-wright's letter of 21 January 1997 relating to the disputed ownership of Tamau land.

(See **Exhibit C9** annexed to the sworn statement of Naru Kalbeau Kalsakau dated 19 March 2012).

The body of the letter reads:



"Dear Mr. Baxter-Wright,

RE: TAMAU LAND TAGABE, PORT VILA

I acknowledge receipt of your letter of 21 January 1997 relating to the disputed ownership of the above named land.

In the past the Ministry may have issued certain leases and Negotiator Certificates on this land not knowing that your clients have appealed against the Island Court's decision concerning the ownership of the land.

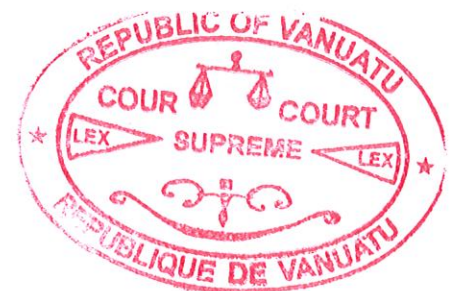
You can assure your clients that from now on no leases including Negotiator Certificates will be issued by the ministry until the Supreme Court has sat and finally determined the ownership of the Tamau land.

Yours sincerely,

Hon. J. Natuman
Minister of Lands & Natural Resources

Cc: A/Director, Lands Dept."

8. By letter dated 3 February 1997, The Director of Lands confirmed that further consideration of applications for Rural leases in the Tamau area will be withheld until further notice. The Director of Lands had also, on 21 December 2000, acknowledged the existence of the Supreme Court appeal, and indicated that the interest of competing claimant land owners could be protected under s.8 of the Land Reform Act until the appeal had been resolved and the position as to custom ownership clarified. (See **Exhibit C6** annexed to the sworn statement of Naru Kalbeau Kalsakau dated 19 March 2012).
9. So, the entitlement to the land was, or appeared to be, in abeyance and to await the outcome of that appeal.



10. However, that did not turn out to be the case. On 1 October 2008, KK and MK, purportedly as the custom owners and lessor of the land, granted a commercial lease to the First Defendant KK over that particular part of Tamau Land.
11. KNK instituted an action against KK and MK in the Supreme Court and he claimed that the Land Register should be corrected pursuant to s.100 of the Land Leases Act [CAP.163] by the removal of Lease 12/0633/1233 from the Register.
12. The trial Judge found that neither KK nor MK had any right to grant the lease and that they were not the custom owners. Nor had the Department of Lands shown that there has been any negotiation by a registered negotiator under the certification of the Minister of Lands, with the custom owners being shown.
13. The trial Judge concluded, therefore, that the registration of the lease had occurred through fraud and mistake, and that the case for rectification was overwhelming.
14. Both KK and MK appealed from that judgment seeking that all the Orders be set aside and the matter be retried in its entirety on the grounds that the trial Judge had not listed the matter for hearing on 27 August 2012, and failed to comply with rules 6.5, 6.6, 12.1 and 12.2 of the Civil Procedures Rules. In essence, they say they were deprived of the opportunity for a fair trial.
15. By a separate notice of cross-appeal, the Republic had also appealed from the judgment and it asked that the Orders of 27 August 2012 be set aside and the matter be remitted for rehearing as it was not allowed an opportunity to file a defence or to test the evidence of KNK.
16. This matter is now before this Court pursuant to the Court of Appeal's Orders of 25 October 2012 setting aside the Judgment of Spear J. and remitting the matter to the Supreme Court for case management and hearing before another Judge.

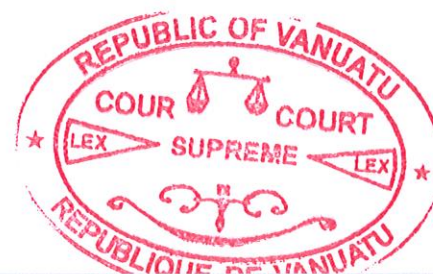


The Claim

17. It is the Claimant's case that despite having full knowledge of the pending land dispute case and Orders restraining any dealings over Tamau land, the First and Second Defendants issued the lease to the First Defendant on 20 November 2008. Further, that the lease was approved by the Minister of Lands on 10 December 2008 and registered by the Director of Lands, Survey and Records on 18 December 2008.
18. The Claimant contends that the Third Defendant through the Department of Lands wrongly processed the First Defendant's application for lease over Tamau land and registration of the same in breach of the Order of the Efate Island Court dated 16 February 2006.

The Evidence

19. KNK gave evidence on the basis of his sworn statements filed on 19 March 2012 and 17 July 2014. He said that he was born on 25 July 1945 and he was from Ifira Island and he has been living at Tamau land area since 1960. He asserted that this particular commercial lease is over the land on which is situated not only his home of approximately 50 years but also the Tamau store which he operates.
20. In answer to questions put to the Claimant under cross-examination by Mr. Ngwele, he said: *"Yes the First Defendant's father is my younger brother. My father's name is Kaltava Kalsakau. The land covered by the lease belonged to my grandfather Tarimata Kalsakau. Harry Ohlen was on the land from 1930 - 1960. I went to live on the land in 1960. There was no one there. It was just Harry Ohlen and he was on the land and he told me to go but I told him that it was my father's land and that he was supposed to be there for 30 years only. The First Defendant's father came to reside on the land in 1975 and I only allowed him to*

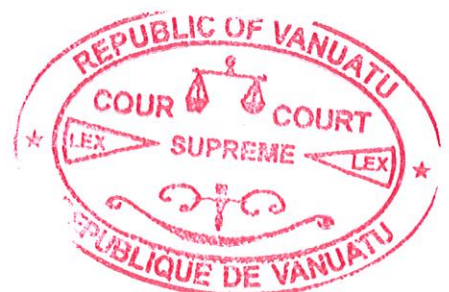


stay. I did not give him ownership of the land. My father did not pass away in 1970. He died in 1972. My father had given me everything because I am the eldest son and I took care of him better than my other three brothers and sisters”.

21. The rest of KNK’s evidence dealt extensively with his customary claim before the Island Court relating to ownership of the land and the construction of the house on the land. He said he had filed an Island Court claim before the lease was issued. He went on to say that his case has been pending for 22 years and that he was awaiting determination of Land Appeal Case No. 01 of 1995 over ownership of Tamau Land between *Naru Kalbeau Kalsakau & ors v James Kalua Lauru & Ors* which is still in progress before another Judge and has not yet been resolved by the Supreme Court.

22. For their part, KK gave evidence on behalf of himself and MK. His sworn statement was admitted in evidence as “Exhibit D1” together with Annexures KK3, KK4, KK5, KK6, KK7 and KK8. He said that the Area Council of Chiefs of Ifira at their meeting on 5 October 2006 had signed a *Kastom Ona Blong Graon Form* in which they stated that part of Tamau land was owned by him and MK. He said that when he processed his lease, he did so with the belief that they were the custom owners of that portion of land covered by the lease. He said he had never been made aware of the Efate Island Court case and the appeal between *Naru Kalpeau Kalsakau v. James Lauru & Ors*.

23. KK was shown Exhibit KK6 and he agreed that he did not have Ministerial consent for a commercial lease and that the approval that was granted to him was for a residential lease. He said: *“When I got the lease I personally went and approached David Moses and asked him why I had applied for a residential lease and they had given me a commercial lease. I even explained to him that I had no intention to sell the land and that all my family was living on the land. In reply, David Moses told me that it didn’t matter. I accept that there is a mistake and that the lease was registered by mistake.”*



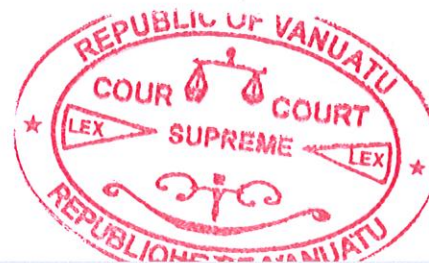
24. The Third Defendant called Mr. Paul Gambetta as a witness. His sworn statement dated 7 March 2014 was admitted in evidence together with annexures "PG1, PG2, PG5 - PG11" and marked as "Exhibit D2."
25. During cross-examination by Mr. Laumae, Mr. Gambetta referred to annexure KK8 and he said: "The Class is Commercial. It does not confirm to the negotiator's certificate which is "PG4". It shows that someone crossed the residential and wrote commercial. Yes for any such changes you have to go back to the LMPC because the recommendation will come from them so if you want to change you would have to go back to the committee again. To me, these are some irregularities".
26. Mr. Gambetta went on to say that he would not have registered the lease because of the irregularities on all the documents and he agreed that the lease was issued in breach of the Island Court Order dated 16 February 2006. He also confirmed that the lease which was issued and registered on 18 December 2008 has been cancelled and he said that he was not aware of any application made by the First Defendant to register the lease after it was cancelled.

Discussion and Decision

27. The Claimant seeks rectification of the Land Register pursuant to s.100 of the Land Leases Act by cancelling its registration on grounds of fraud and/or mistake. Section 100 provides as follows:

"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 or 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."

28. Based on the evidence before me at present, I am not in a position to discuss the issue of customary ownership of Tamau land. As mentioned earlier, that matter is still in progress before another Judge and has not yet been resolved by the Supreme Court.
29. Suffice to say that, having carefully considered the evidence adduced before this Court by all the witnesses, and mindful of the submission by Mr. Kent Tari (SLO), that on 27 February 2013, the Department of Lands had rectified the First Defendant's lease by cancelling the registration of lease number 12/0633/1233 from the Register, I find that there is nothing to cancel.

Conclusion

30. In the circumstances:
- (a) There is no utility in granting the relief sought by the Claimant.
 - (b) The lease has already been cancelled and it should remain cancelled.
 - (c) There would be no Order as to costs.

DATED at Port Vila, this 12th day of August, 2015.

BY THE COURT


M.M. SEY
Judge

