

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 313 of 2014

BETWEEN: BEN TUNALA
Claimant

AND: ERIC JOHN TABIR
First Defendant

AND: REPUBLIC OF VANUATU
Second Defendant

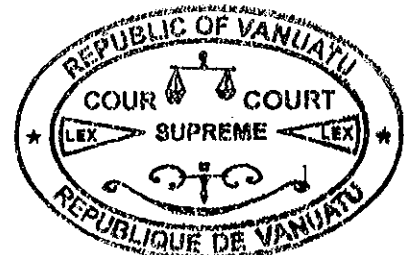
Hearing: *Wednesday 27 May 2015 at 2.00 pm*
Before: *Justice Stephen Harrop*
In attendance: *Colin Leo for the Claimant*
Jack Kilu for the First Defendant
Lennon Huri (SLO) for the Second Defendant

Judgment: *Thursday 11 June 2015*

**RESERVED JUDGMENT OF JUSTICE SM HARROP
AS TO APPLICATION TO STRIKE OUT THE CLAIM**

Introduction

1. Mr. Tunala says he is the custom owner of all of the land in Central Santo known as Samansen customary land. In this proceeding he seeks an order cancelling the registration of an agricultural lease granted by Newman and Robert Tangis to the first defendant Mr. Tabir in 2007. Essentially Mr. Tunala's case is that as custom owner he is the only person who can grant a lease of the relevant land and that therefore registration of a lease granted by Messrs Tangis was obtained, and registered, at least by mistake if not fraud. Mr Tunala seeks cancellation of the lease under s.100 of the Land Leases Act.



2. Mr. Tabir has applied to strike out the claim on the basis that Mr. Tunala has no standing to challenge the registration of the lease because he has never been declared by an Island Court or any customary land tribunal to be the custom owner of Samansen land. The application to strike out is supported by the Republic.
3. Mr. Tunala's response is that he and his family have enjoyed and cultivated the land for over fifty years. Their custom ownership has never been disputed, which explains why there is no declaration by a court or tribunal; there has never been a dispute to place before a court or tribunal. He also relies on a 1982 declaration of the Minister of Lands to support his claim to custom ownership.

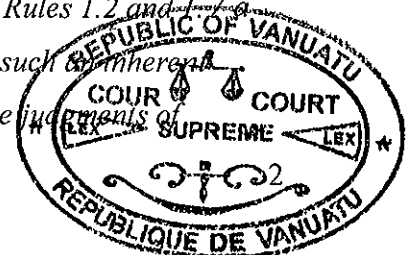
Issue

4. There is no doubt that Mr. Tunala needs to show he has standing to mount this challenge to the registration of the lease. If he is not able to prove he is the custom owner of the land in question the claim cannot succeed. However Mr. Tunala says that his family's occupation of the land over many years is sufficient proof and that it is confirmed by the 1982 declaration. The issue I need to determine therefore is whether or not Mr. Tunala has an arguable basis for his claim to be the custom owner, and therefore standing, or not. The outcome of the application to strike out the claim depends on the answer to that question.

Approach on an application to strike out

5. The Court has jurisdiction to strike out a claim which has no reasonable prospect of success. Mr. Leo referred me to what the Court of Appeal said in **Noel v. Champagne Beach Working Committee [2006] VUCA 18** :

"Although, as this Court pointed out in Kalses v Le Manganese de Vate Ltd [2005] VUCA 2, Civil Appeal Case 34 of 2003 (3 May 2005), there is no specific provision in the Civil Procedure Rules to strike out a proceeding on the grounds that there is no reasonable cause of action or that it is frivolous, vexatious or an abuse of process, it was not disputed that such a power exists. Jurisdiction can be found within the broad terms of ss.28 (1) (b) and 65 (1) of the Judicial Services and Courts Act No. 54 of 2000 and the Civil Procedure Rules themselves provide in Rules 1.2 and 1.7 a basis for exercising the jurisdiction. In practice the existence of such an inherent jurisdiction has been assumed by the Supreme Court: see e.g. the judgments of



Treston J in Naflak Teufi v Kalsakau [2004] VUSC 94; Civil Case 102 of 2002 (6 May 2004) and Kalomtak Wiwi Family v Minister of Lands [2004] VUSC 47, Civil Case 14 of 2004 (2 September 2004).

However it has always been recognised that the jurisdiction should be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material; the claimant's case must be so clearly untenable that it cannot possibly succeed: Electricity Corp Ltd v Geotherm Energy Ltd [1992] 2 NZLR 641."

6. The Court must proceed on the assumption that factual allegations are true or capable of proof but may take into account the sworn evidence before the Court where it is not inconsistent with the allegations in the claim. Although on the face of this claim a cause of action exists because of the assertion of custom ownership, both parties have had the opportunity to put before the Court on this application all the evidence bearing on that allegation and to make written submissions. I am satisfied that the question of standing can therefore be properly dealt with on this application. If Mr. Tunala has been able to identify a sufficiently arguable basis for his standing then the case must be allowed to proceed; if he has not it must be struck out.

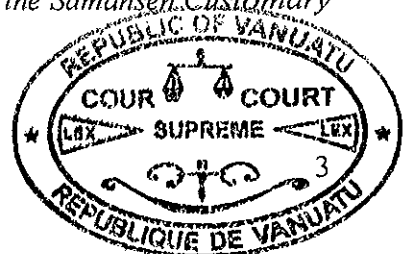
The facts in more detail

7. Paragraph 1 of the claim is as follows:

"1. The Claimant is the Custom Owner of all the customary Land At Samansen Area, Central Santo, Sanma Province in the Republic of Vanuatu.

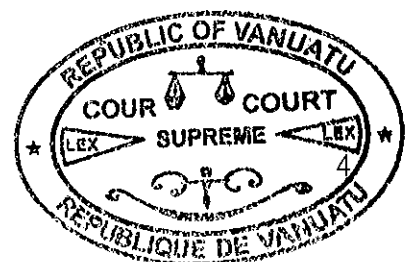
Particulars

- (i) *The Samansen Customary Land from time to time is also referred to as Jubilee Farm.*
- (ii) *The Samansen Customary Land included a 40 hectares of land now registered as Agricultural Lease under title number 04/02632/079 ("the Lease") purportedly registered under the name of the First Defendant.*
- (iii) *From time to time, there was never a customary land dispute between the Claimant or any interested or disputing parties over the Samansen Customary Land.*



- (iv) *The Claimant has experienced a quiet enjoyment of his customary land since the days of his grandfather and his father before him and the said customary land was never disputed in any court or tribunal.*
- (v) *As evidence of his rightful custom ownership of the custom area the Claimant has planted coconut and other related commercial crops in the said customary land without any disturbance from any person for some 60 years.*
- (vi) *The Claimant will rely on his Declaration from a relevant Tribunal as if the same is set out in full herein."*

8. The claim further pleads that in August 2006 Mr. Tabir obtained a registered negotiator certificate in respect of customary land known as Monixil in Central Santo; this was soon after amended to refer to Natuntula customary land, also known apparently as Samansen land. The lease granted by Newman and Robert Tangis purporting to be lessors of leasehold title 04/02632/079 to Mr Tabir was signed on 19 January 2007 and registered on 7 August 2007. It is a 75-year agricultural lease for the term commencing on 19 February 2007. The area of land involved is 53 hectares.
9. Self-evidently Mr. Tunala was neither asked for nor gave consent to the registration of the lease. He submits the lessors, not being the custom owners of the land, had no right to grant the lease and the Director should not have registered it. Mr Tunala has received no payment from Mr Tabir under the lease.
10. Mr. Tunala filed a sworn statement in support of the claim and a further statement in opposition to the application to strike out. In these statements he says that he is the custom owner following of the passing of his late father, Thomas Toaserkite. He has provided a declaration dated 2 June 1982 made by Sethy Regenvanu, the then Minister of Lands and Natural Resources which provides:



"BTI"

DEKLARASON BLONG REPRESENTATIV
BLONG OL KASTOM OWNA

Mi, Sathy Regonvanu, Minista blong Land, mo Natural Resources mi bin
save i naf se i bin kat toktok long saed blong ol kastom owna blong land ia;
we i kat long taetel namba long SANTO
nelan ensaed NORTHERN District, se omi land

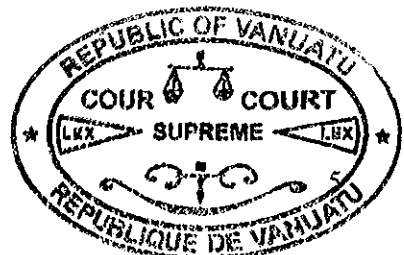
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we mi Deklea Long Ples ia se long tingting blong mi, olsem we i stap
anda long Sekson 6 (2) blong Land Reform Reguleson blong 1980 blong
kivem Nem:

	<u>Taetel</u>
<u>Kastom Owa</u>	473 (naf plantesen blong Simonsen),
Thomas Toasarkite	1460 (Georges Coulon), - 04/12/32/oul
Tari Buluk	1428 (Juliette Tamagusiku), - No born
	1432 (Ben Wilber), ✓
<u>Kastom Nem</u>	1442 (Salat Bakeo), ✓
	1443 (Ruben Mara), ✓
Pat long taetel 494:	2126 (Sailas Abok), ✓
THALSAFANUA	590 (Buteri), - ulas
Taetel 473: BELTHI	4889 (Jack Ulas), ✓
Ol mara wans PATUNTULAI	4692 (Ngo Van Mo), ✓
	4580 (John Garae), ✓
	4581 (Ruben Mara), ✓
	4405 mo 1555 (Ngo Van Quan),
	1623 (Thomas Raphael),
	1036, 1474 mo 1477 (Société Civile Immobilière des Niles Hébrides),
	pat long taetel 494 (Francis Kampani - SFMH - we i stap long East saed long Sarakata Riva.

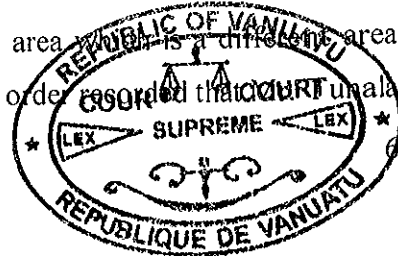
se ol man ia babae oli representem ol kastom owna mo ol pipol we oli
kat kastom interest long land ia mo blong mekem pli save tok baot way
mo use blong land folem Land Reform Reguleson.

Sapos wan man ino ekri blong ol man ia olsem representativ blong ol
kastom owna, i mas talem i kam long mi or Ofisa long Depatmen blong
Rural Lands or long District Komisona long ples we land ia i stap long
em bifo 30 dei i pas.

Makem long Vila long dei 1982



11. Mr. Tunala says that his family's custom ownership of the land has never been disputed in any court or tribunal and he has never been summoned to a court or tribunal to address any opposing party's claim to custom ownership. He has put in evidence letters from the Santo/Malo Island Court and the Santo Island Council of Chiefs certifying that there has never been a registered dispute in relation to the Samansen Customary Land. He says that over time he has been recognized by the Lands Department at Luganville as custom owner and has sold leases of land, within what he calls the Samansen/Belsie Customary Land, to a number of buyers. He has annexed copies of a number of these leases.
11. Mr. Tunala says he is upset with Mr. Tabir for having acquired a piece of land from a unknown parties. Perhaps Mr. Tunala should also be annoyed with Robert and Newman Tangis who purported to lease land which, according to Mr. Tunala, they had no right to lease and who received a premium of Vt2,300,000 together with annual rent of vt40,000.
12. When Mr. Tunala discovered what had happened he contacted Mr. Benuel Tabi, a lands officer at the Lands Department in Luganville, who wrote a letter dated 10 July 2009 confirming that Mr. Tabir had applied for a negotiator certificate in respect of Monixil but not Samansen Customary Land. Mr. Tunala has also annexed a letter from Mr. Tabi dated 10 August 2009 referring to the Department's records as confirming the custom owners to be Mr. Tunala's father, Thomas Toaserkite and Taribuluk; the letter purports to annexe a declaration, which I assume would have been that of Minister Regenvanu on 2 June 1982.
13. In his sworn statement in support of the strike out application Mr. Tabir says that Mr. Tunala's assertion of being the custom owner goes back to 2009. He says that he took Mr. Tunala to the Magistrate's Court and obtained an order to vacate the property on 12 October 2009. He also says that he recently had Mr. Tunala evicted on an enforcement warrant and an eviction order of the Magistrate's Court issued on 12 September 2014, which noted that the 1982 declaration could not be enforced because it was not an order made by the Court of law or a land tribunal. Further, it was made in relation to the certain areas of land in the Monixil area which is a different area from the land claimed by Mr Tunala at Samansen. The order

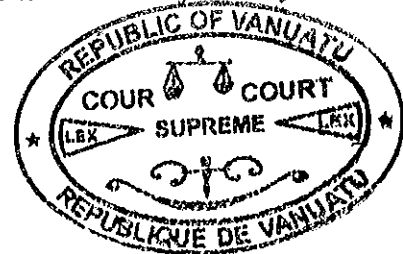


and another defendant had apologized and promised not to cause any further problem with Mr. Tabir's enjoyment of the property.

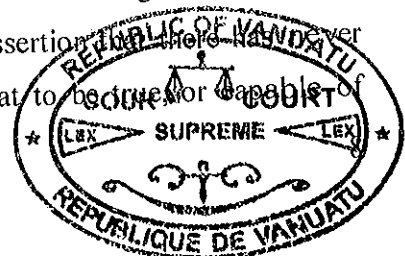
14. I infer that this claim was filed on 10 October 2014 because of what had occurred in the Magistrate's Court. I note at this stage that of course I am not bound by any findings or comments of the learned Magistrate and will proceed to make my own determination of the question of standing which arises on this application.

Does Mr. Tunala have standing to challenge the registration of the lease?

15. Mr. Tunala relies first on the 1982 declaration as a basis for his custom ownership and consequent standing to take his claim. Both the defendants submit that the document is no more than the declaration of who the **representatives** of the custom owners will be for the purposes of determining custom ownership. They say the document does not purport to declare ownership and in any event the Minister of Lands has no power to do so.
16. Counsel for the Republic referred to what the Court of Appeal said in a similar case, *Valele v. Family Touru* [2002] VUCA 3. There the same Minister of Lands, Mr Regenvanu, had made a similar declaration, on 22 February 1982.
17. At page 10 of its judgment the Court of Appeal said "*Even if the Minister's Declaration made on 22 February 1982 were to be considered as one validly made under his 25 of the Alienated Land Act, the terms of the declaration and the role which those people named as representatives would assumed cannot support conclusion that the Declaration constitutes their title as custom owners. The Declaration merely appoints them to represent the custom owners and others having interest in the land, whoever those people maybe. In acting as representatives those people named in the Declaration act in a fiduciary capacity (whether or not they are trustees as a matter of strict law). A person who acts in a fiduciary capacity cannot use that position or the instrument of appointment to further personal interest at the expense of the interests of those who are being represented. The law is very strict in enforcing that principle and may set aside transactions where a fiduciary has improperly used his or her position.*"

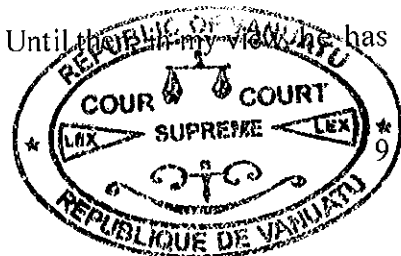


14. Mr. Leo, for Mr. Tunala, submitted that this principle was applicable only to circumstances whether there is a dispute between parties as to custom ownership. I do not accept this submission. The declaration by the Minister as to who would represent the parties who may be custom owners cannot, as its terms indeed indicate, be taken as a determination of who the custom owners actually are. If the custom owners were known they would not need representatives but could represent themselves.
15. Consistent with this, I note that the last paragraph of the Declaration provides the opportunity for anyone who disagrees with the appointment of these representatives to advise the Minister or the Department within 30 days.
16. The apparent purpose of the Declaration was to facilitate a process by which discussions designed to progress resolution of custom land issues in the newly post-Independence environment.
17. The Declaration itself expressly refers to those named as representatives of the custom owners rather than saying they *are* the custom owners.
18. I do not accept that the Court of Appeal's comments have no application whether there is no dispute between parties. Regardless of whether there was any dispute, a Declaration of who is to represent custom owners is, self-evidently, not a Declaration of who in fact *are* the custom owners.
19. I therefore not satisfied that the Declaration amounts to a determination that Mr. Tunala's father was a custom owner. He may well in fact have been one but the Declaration does not establish that, or purport to do so. The Magistrate's Court noted that in any event the Declaration does not relate to the Samansen land. I heard no argument on that point so cannot determine that issue. For present purposes that matters not as the key point is that even if the Declaration does relate to the leased land, it does not provide proof of Mr Tunala's custom ownership of the leased land.
20. The other fundamental basis on which Mr. Tunala claims standing is his, and his family's, longstanding occupation of the land and his assertion that to be true or capable of



proof, for present purposes as I must on a striking out application, the reality is that, at least from the time of signing and registration of the lease in 2007, there *has been* such a dispute.

21. Regardless of whether there was ever a dispute prior to the signing of the lease on 19 January 2007, at that point Messrs Tangis purported to act as custom owners of the Samansen Land and Mr. Tunala disputes they had the right to do so. He may not have been aware of their action immediately but on the evidence before me he certainly was aware of it by sometime in 2009. On 12 October 2009 on the application of Mr. Tabir the Magistrate's Court made an order restraining Mr. Tunala and others from causing damage to Mr Tabir's property on the leased land. Mr. Tunala himself appears to have been aware of the problem, at least to some extent, as early as July and August 2009, because he arranged for Mr. Tabi to write the two letters to which I have referred.
22. The position then is that some five years before this proceeding was issued Mr. Tunala was aware that there *was* a dispute as to his claim of custom ownership. However unjustified the claims of others might be, his appropriate remedy in the face of that dispute was to apply under the then applicable Customary Land Tribunal Act [CAP 271] to the appropriate village land tribunal for the dispute about custom ownership to be resolved. Had he done so and had he succeeded (and successfully defended any appeals) *then* he would have been justified in pleading, as he has in his claim, that he is the custom owner of the Samansen customary land.
23. That would have given him standing to contend, as he does in this proceeding, that the lease from Messrs Tangis to Mr. Tabir was procured by mistake if not fraud because it was granted by lessors who purported be but who were not custom owners. In principle it would also have allowed him to obtain damages from the lessors at least by way of premium and rental payments unjustifiably received by them together with potentially other damages. The success of any claim for cancellation of the lease under Section 100 of the Land Leases Act would however depend on Mr. Tunala also establishing that Mr. Tabir was not protected by Section 100 (2). If and when Mr Tunala achieves the status of declared custom owner of the land contained within Mr Tabir's lease he may be able to take a fresh proceeding. Until ~~that time~~ *then* he has no standing to do so.



23. In summary the position is that Mr. Tunala and his family may well be, in truth, the custom owners of Samansen Land which includes the leased land. But at present he is no more than the *claimed* custom owner. His claim is disputed. The way in which the lands system works in post-Independence Vanuatu, pursuant to the Constitution and the subsequent establishment of the Island Courts and Customary Land Tribunals, and most recently of the process under the Custom Land Management Act 2013, is that it is for the courts or tribunals empowered under that legislation to determine customary ownership. Appeal rights are provided. Unless and until that process is completed, nobody is a finally declared custom owner with standing to challenge a registered lease of the land in question.
24. While I am not suggesting Mr Tunalas is an interloper with no basis for his claim of custom ownership (and indeed, to the contrary, I must and do assume for present purposes that his factual claims are capable of proof), unless there is a determination, after adversarial argument, by a statutorily-authorized court or tribunal, *any* ni-Vanuatu person could make a claim in the Supreme Court to be the custom owner of any custom land and to challenge any lease over that land. Except by referring to Island Court or customary land tribunal judgments, and having regard to any consequential appeal judgments, this Court is simply not in a position to determine the standing to make such a claim if it is disputed.
24. This principle was confirmed in my own judgment in *Ishmael v. Kalsev* [2014] VUSC 88 (an appeal against which was dismissed by the Court of Appeal in *Ishmael v. Kalsev* [2014] VUCA 27). In that case I struck out Mr. Ishmael's claim because he too was merely a *claimed* custom owner. His longstanding occupation of the land in question did not give him a basis to challenge a lease of the land under Section 17 (g) of the Land Leases Act because he had no established legal right to be there.
25. Although of course the facts in that case were different, the principle applies equally to Mr. Tunala. Also, he has not pleaded his case as an overriding s17(g) claim to occupation to which Mr Tabir's lease is subject (indeed the only basis of occupation is as one of the particulars to the assertion of custom ownership in paragraph 1), but rather he attacks the lease directly, alleging that the registration was



procured by fraud and/or mistake. While on a strike out application the court will usually dismiss a challenge to a claim if the problem with it is remediable by an amended pleading, a section 17(g) claim is very different from a section 100 claim. The former accepts the validity of the lease but claims it is subject to an overriding interest, the latter challenges the validity of the lease. Occupation of the leased land, without more, does not provide standing to mount a section 100 claim.

25. For these reasons I am satisfied that Mr Tabir's application to strike Mr Tunala's claim out must succeed and I strike it the claim accordingly.
26. The defendants are entitled to costs on a standard basis which are to be taxed if cannot be agreed.

BY THE COURT

John M. [Signature]

