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

Civil Case No.28 of 2015

BETWEEN: HENDON KALSAKAU
Claimant

AND: POWER 8 LIMITED
First Defendant

AND: THE REPUBLIC OF VANUATU
Second Defendant

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mr. J. Ngwele for the Claimant*
Mrs. E. Blake for the First Defendant
Mr. K. T. Tari for the Second Defendant

Date of Judgment: *19 February 2016.*

JUDGMENT

1. This is an application to strike out the claim on the basis that the claimant lacks the necessary "*locus standi*" to bring the claim, and further, that the claim is "*res judicata*".

2. The original claim for a declaration was filed on 29 January 2015 together with an application for injunctive relief seeking to prevent the first defendant from "*constructing, erecting and/or developing structures on land adjacent to and beyond the mean high water mark of leasehold title 11/OD24/013*".

3. In the claim the claimant avers that he is the undisputed custom owner of all parcels of land within the lease and adjacent thereto extending beyond the mean high water mark of the lease.

4. This is said to be confirmed by an open letter dated 24 January 2007 signed by the Paramount Chief and members of the Ifira Island Council authorizing the claimant to operate his business "*... long smol pasis long part blong Ex BP Wharf Title No. 11/OD24/013 mo Ex British Residency Reclaim mo Wharf we hemi part lo Land Title No. 11/OC22/009*".

5. If I may say so the letter is not a declaration of custom ownership under the relevant applicable legislation, namely, the Island Courts Act or the Customary Land Tribunals Act. Furthermore the Court of Appeal relevantly observed in Hendon Kalsakau v. Dinh [2005] VUCA that the claimant's assertion in that case (as in the present case), that they are custom owners

of lease title No. 11/OD24/013 (and "*parcels of land*" adjacent thereto): "*... cannot survive the Order made in 1981*". This latter reference is a ministerial Order made under Section 12 of the Land Reform Act declaring the boundaries of State-owned "*public land*" for the urban area of Port Vila.

6. In its defence filed on 16 February 2015 the first defendant company whilst admitting that it had the necessary official approvals and had commenced reclamation works, denies the claimant's customary entitlement and ownership of the area of land being reclaimed.

7. The second defendant for its part, disputes the binding nature of the letter of the Ifira Council and whilst confirming the Council's refusal to consent to the first defendant's reclamation, nevertheless, asserts that the claim is an "*abuse of process*" and also "*res judicata*. In brief, the second defendant supports the first defendant's averments and application to strike out the proceedings.

8. By an amended claim filed on 7 July 2015 the claimant removed its claim for a declaration and, instead, sought damages for trespass and an order that the claimant reinstate the reclaimed land to its earlier undeveloped state. The first defendant company maintained its denials and asserts that the reclamation has been completed and relies on an earlier decision of this court in **Civil Case No. 218 of 2014** which raised a similar unsuccessful claim against the first defendant company.

9. After the parties had complied with the court's direction orders which included a survey plan of the relevant leasehold title and reclamation by a registered surveyor, the strike out application was heard on 14 December 2015. In the absence of counsel who had carriage of the claimant's case the parties were ordered to file written submissions if they desired by 23 January 2016.

10. No written submissions were filed but at the chamber hearing on 14 December 2015 counsel for the second defendant confirmed that its defence is that the claimant's reclamation extended over "*public land*" comprised within the Land Reform (Declaration of Public Land) Order No. 26 of 1981 promulgated by the then Minister of Lands on 26 January 1981.

11. In this latter regard it may be noted that the lengthy narrative description of the "*public land*" contained within the urban physical planning boundaries of Port Vila which extends from Bauerfield airport in the North to Erakor landing at Pango in the South, delineates "*... the low water mark*" as its outermost limit wherever the boundary extends into water such as at Fatumaru Bay, Ekasuvat Lagoon (first lagoon of Erakor), and Emten Lagoon (second lagoon of Erakor) and also at Malapoa including any reclaimed land .

12. The relevant "*low water mark*" of the land immediately adjacent to the first defendant's lease title No. 11/OD24/013 and completed reclamation works

is graphically illustrated by the annexures to the surveyor's sworn statement both visually and by linear extrapolation in a survey plan based on an earlier hydrographic survey done for a development at an adjoining site. It clearly shows that the first defendant's reclamation does **not** extend beyond the "*low water mark*" and is therefore within the boundaries of the Port Vila "*public land*" delineated in Order 26 of 1981 and I so find.

13. The above evidence is neither denied or disputed by the claimant whose entire claim is premised on establishing that the first defendant's approved and actual reclamation extends: "*... beyond the mean high water mark*" which the claimant avers is "*... customary land owned by the claimant*".

14. In similar vein is the statement in the claimant's sworn statement in support of the claim where he deposes:

    "*It is common knowledge that all land beyond the mean high water mark of a lease is customary land owned by the traditional custom owners ...*".

15. Even accepting that "*land*" is defined in the Land Leases Act as including "*land above the mean high water mark ...*" and further that "*improvements*" includes "*... reclaiming of land from the sea ...*", nevertheless, where there is an Order under the Land Reform Act delineating the outer limit of "*public land*" as the "*low water mark*" which is the lowest tidal limit of the sea and which mark necessarily incorporates "*the mean high water mark*" which is closer to the dry land boundary, any reclamation up to the "*low water mark*", if approved, is lawful as being within "*public land*", even though the reclamation necessarily extends beyond the mean high water mark.

16. On the basis of the competing claims and defences as well as the opposing sworn statements filed by the parties a crucial and critical issue is raised, namely, whether the first defendant's reclamation extends over customary land? If it does, then clearly the claim should not be struck out, but, if it does not, then equally clearly, the claim cannot possibly succeed and therefore must be struck out.

17. In my view this issue and claim is unarguable both legally and factually and has already been determined in earlier proceedings in **Civil Case No. 218 of 2014** albeit not brought by the claimant. Although there were no pleadings filed in **Civil Case No. 218 of 2014**, there was an urgent claim for injunctive relief in almost identical terms to that claimed in the present proceedings and which was refused on the basis that there was no serious question to be tried. In his reasons for refusing relief the learned judge refers inter alia to the injunction sought by the applicant which seeks to restrain the first defendant company from: "*... reclaiming and developing land adjacent to and beyond the mean high water mark of the 013 lease ...*" and after referring to the Land Reform (Public Land) Order No. 15 of 1981 observes contrary to the claimant's claim:

"This effectively means that the area of the intended reclamation falls within the boundaries of public land".

18. In Crown Estate Commissioner v. Doreat County Council [1990] 1 ALL ER 19 Miller J. describes the doctrine of res judicata in the following relevant terms (at p. 23):

"Res-judicata is a special form of estoppel. It gives effect to the policy of the law that the parties to a judicial decision should not afterwards be allowed to relitigate the same question even though the decision may be wrong. If it is wrong, it must be challenged by way of appeal or not at all. As between themselves, the parties are bound by the decision, and may neither relitigate the same cause of action nor reopen any issue which was an essential part of the decision. These two types of res-judicata are nowadays distinguished by calling them 'cause of action' estoppel and 'issue' estoppel respectively."

Halsbury's Laws of England (4th Edition) Vol 16 para 977 *summarizes the relevant principles of issue estoppel as follows:-*

"A party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, is an error of fact or laws, or one of mixed fact and law.

To succeed in its defence of "res judicata" the Defendant must establish:

(a) The parties in both cases are the same;
(b) The issues in both cases are the same;
(c) The previous judgment was final and conclusive and binds every other Court; and
(d) The decision was by a court of competent jurisdiction."

19. Although strictly speaking the claimants in Civil Case No. 218 of 2014 and the present case are different, the first defendant company is a common protagonist in both claims. Furthermore the basis of the claims and the relief sought are similar in all material respects and, in my view, both claims raise a common, identical issue namely, whether or not the first defendant's reclamation works extends into and over the claimant's customary land as identified.

20. It is this issue that was determined in the first defendant company's favour in **Civil Case No. 218 of 2014** and is independently reinforced by the determination of this Court in the present application.

21. In similar vein in Hendon Kalsakau v. Dinh (op. cit) which would be very familiar to the claimant and which concerned the same Lease Title No. 11/OD24/013, the Court of Appeal upheld a summary judgment against the present claimant. In doing so the Court of Appeal had occasion to consider the provisions of the Land Reform (Declaration of Public Land) Order No. 26 of 1981 and the claimant's assertion then, that the Order did not include the claimant's business premises and which assertion the Court of Appeal rejected as: "*... simply inconsistent with the available evidence*".

22. Later in its judgment the Court of Appeal said:

> "*Attached to the Order No. 26 of 1981 was a clear unambiguous survey plan accompanied by a detailed description in Annex 2 which clearly demonstrated beyond doubt the land in question was within the Order. There simply could not be a factual challenge to that reality*".

23. In light of the foregoing I am satisfied in addition to the court's own findings at paragraph 12 above, that the above decisions of the Court of Appeal and of the Supreme Court in **Civil Case No. 218 of 2014** raises an "*issue estoppel*" on the question of whether or not the first defendant company's reclamation extends into the claimant's customary land boundary.

24. The claim as pleaded is misconceived and cannot possibly succeed. It is accordingly struck out with costs to be taxed if not agreed.

DATED at Port Vila, this 19th day of February, 2016.

BY THE COURT

D. V. FATIAKI
Judge.