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

Civil Case No.75 of 2009

BETWEEN: WESLEY RASU
First Claimant

AND: WESLEY RASU on behalf of the RASUNAPOE FAMILY
Second Claimant

AND: JAMES MOLI
First Defendant

AND: DIRECTOR OF LAND RECORDS
Second Defendant

AND: THE ATTORNEY GENERAL on behalf of MINISTRY OF LANDS
Third Defendant

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

Counsels: *Garry Blake for the Claimants*
George Boar for the First Defendant
Florence Williams for the Second and Third Defendants

Date of Judgment: *16 September 2016*

JUDGMENT

Background

- 22 June 1981 - A custom owner representative form was issued by the Minister of Lands to Edouard Jean Jacquier in respect of land on Malo Island in which the representatives are named as:
  - Daniel Rasu (the claimant's uncle);
  - Tom Vanua (the claimant's father);
  - Ben Arulengalenga (a relative);
- 29 Feb. 1985 - **Lease Title No. 04/3422/001** was executed between the above-named custom owner representatives (as "*Lessors*") and Edouard Jean Jacquier of Abaone, Malo (as "*lessee*") for a term of 30 years;
  - The leased land had an area of 132ha 75a and was an amalgation of 3 older titles 837, 1227 and 1335;

- 16 Oct. 1995 - Lease Title No. 04/3422/001 was surrendered by the lessee with the agreement of the 3 named lessors (**surrender registered on 9 Nov. 1995**);

- 9 Nov. 1995 - A Sale and Purchase Agreement was executed between Edward Jacquier and Wesley Rasu for the sale of Abaone Plantation business to Family Rasu;

- 4 July 2000 – James Moli applied for a Negotiator Certificate to lease "*Abaone (former title 04/3422/001)*" and paid a fee of VT2,250;

- 23 Aug. 2000 - The Santo Land Management and Planning Committee approved the First Defendant's application;

  - The meeting minutes supplied by the First Defendant is incomplete and shows that the First Defendant applied for two (2) plantations – "*Nakere Plantation at South Santo and Abaone Plantation at Abaone, East Malo*". In both applications the First Defendant is addressed as *"Pastor";*

- 16 Feb. 2001 - James Moli obtained a Negotiator Certificate which enabled him to enter into negotiations to lease "*Abaone (former title 04/3422/001)*" situated on East Malo Island;

  - The Certificate discloses that the custom ownership of Abaone land is "*Disputed (to be identified)*" without naming the parties;

1. In the absence of any relevant Island Court claim or "*notice of dispute*", there is not a shred of evidence as to how the identities of the disputing claimants was subsequently uncovered or who prepared and provided the signed Agreement to Lease form which named seven (7) individuals as claimants of "*Abaone land*" including Pastor Ephraim Moli (the First Defendant's father); the three (3) persons named as "*Lessors*" in the predecessor lease title No. 04/3422/001 (including the claimant's father and deceased uncle); and three (3) "*Arukesa*" brothers who are not named as claimants before the Sanma Island Court (see below);

- 17 March 2001 - Five of seven named persons (including the First Defendant's father) claiming to be custom owners of Abaone land on Malo Island agreed to lease Abaone to James Moli for 50 years at VT250 per hectare;

- 20 March 2001 - **Sanma Island Court** recorded in an open letter that Abaone land on East Malo was registered as a "*disputed land*" between "***Pastor Ephraim Moli, Mr. Tom Rasunaboe, Mr. Moli Ravo and Ernest Belbong***";

- 15 Feb. 2002 - The then Minister of Lands (**Sela Molisa**) acting under Section 8(2)(b) of the Land Reform Act [CAP. 123] as "*Lessor*" executed a new Lease Title No. **04/3422/003** with James Moli as "*lessee*" for a term of 50 years at a yearly rental of VT33,000 (**registered on 19 April 2002**);

- 8 May 2002 - The First Defendant issued a Notice to Quit to John Pinap and Rasu Family "*to vacate ... Abaone Plantation within 14 days ...*";

- Mid-May 2002 and late April 2003 - The Claimant wrote numerous letters to various government officials seeking a stay or suspension of the registration of Lease Title No. 04/3422/003 in favour of the First Defendant and the lodging of a "*caution*" against the title if it had been registered;

- April/May 2003 – By an undated letter the First Political Advisor of the then Minister of Lands wrote to the Director of Lands:

  "*... to halt all further processing ... by due registration of the lease* (No. 04/3422/001); *and proceed immediately to refer the file back to the Director of Lands to be reprocessed through the Ministry of Lands*".

  The reason given for this urgent request was:

  "*... **the Hon. Minister of Lands has mistakenly signed this particular lease over to a certain Messrs James Moli and/or Ephraim Moli without prior knowledge that the dispute over the title is before the Court***";

- 07 May 2003 - The Director of Land Records wrote an open letter confirming that lease title No. 04/3422/003:

  "*... **was never registered**. This was done following the Minister of Lands instruction who stated to have mistakenly approved the lease not knowing that there is a case pending in Court regarding the same*".

- 14 June 2007 - The Director of Lands advises the First Defendant that a "*caution*" has been registered on Lease Title No. 04/3422/003 in favour of "*Wesley Rasu for Rasu Family*" pursuant to an interest under Section 93 (1)(a) of the Land Leases Act;

- 11 July 2008 - The **Molimaimai (Malo Island) Land Tribunal** sitting at Avunatari Community Hall declared that "*NAVIMAPEOLOOLO*" comprising "*Avasise*"; "***Abaone***"; and the off-shore islands of "*Malotina*"; "*Malokilikili*" and "*Maloveleo*" belonged to "*Family Rasunaboe*" of Asatapu Village, East Malo (**later**

confirmed in a letter issued by the Customary Land Tribunal Unit, on 30 June 2009);

- 24 June 2009 - Claimant filed a claim in the Supreme Court invoking Sections 100 and 17 of the Land Leases Act seeking the cancellation of Lease Title No. 04/3422/003 and, alternatively, a declaration recognizing the claimant's overriding right to occupation of the land comprised within the lease (**subsequently amended on 16 October 2009**).

2. In essence, the claimants say that they are the declared custom owners of the land comprised within the first defendant's lease **No. 04/3422/003** situated on **Malo Island** which they have been occupying since **October 1995** and have been operating a cattle farm on the land. The land they occupied and farmed was later leased in 2002, without their knowledge and consent, to the first defendant by the **Minister of Lands** purportedly in exercising his powers under **Section 8 (2)** of the **Land Reform Act**.

3. The claimants further say that the first defendants' lease was registered as a result of "*fraud*" and/or "*mistake*" on the part of the Minister and Director of Lands owing to the first defendant deliberately withholding material information from the Minister, including, the claimant's lengthy occupation and use of the land and the unresolved pending claim to customary ownership of the land over which the first defendant's lease was granted and where the First Defendant's father Pastor Ephraim Moli was a competing claimant.

- 25 Sept. 2009 - The Second and Third Defendants filed a defence denying any fraud or mistake in the registration of the lease which was done "*... in good faith and based on information supplied*" and they rely on the provisions of Sections 9 and 24 of the Land Leases Act [CAP. 160];

- 29 Sept. 2009 - The First Defendant filed a bare defence denying that there had been any fraud on his part in obtaining the lease or any mistake in the registration of the lease;

4. For completeness, reference may be made to an earlier claim lodged in the Santo registry by the claimant in Civil Case No. 48 of 2005 which was dismissed for want of prosecution. Similarly there had been an unsuccessful eviction proceeding filed by the First Defendant in the Santo registry in Civil Case No. 10 of 2003 where the Supreme Court set aside a default judgment entered against the "*Rasu Family*" and stayed all orders on 8 May 2003.

The Evidence

5. With the above background I turn next to consider the claimant's evidence in the case which comprised two (2) sworn statements from Wesley Rasu

upon which he was cross-examined; three (3) other sworn statements from members of the Rasu family that were admitted by consent [**Exhibits C(2), (3) and (4)**].

6. In cross-examination the claimant confirmed his family's purchase of Abaone plantation assets and business but not the land. He accepted that Lease Title No. 04/3422/001 was surrendered and he explained that his family had not sought a fresh lease of the surrendered land because it was being returned to them as custom owner.

7. Asked why his family claimed custom ownership of Abaone land, the claimant replied: "*It's part of our family history passed down from generation to generation everyone on Malo Island knows that*". As to why he was continuing with the case, the claimant said: "*I know we are the customary land owner that's why we pursue this claim and we bought property on the land*". He accepted that their claim to custom ownership was disputed by the First Defendant and the First Defendant's father in pending proceedings that had not yet been determined at the time Lease title No. 04/3422/003 was approved and registered but was later determined in the claimant's favour.

8. The last sworn statement filed in support of the claim is from Sela Molisa who was the Minister of Lands at the relevant time [**Exhibit C(5)**] upon which he was cross-examined by counsel for the First Defendant only. The Minister could not remember what documents accompanied the lease title 04/3422/003 when he signed it. He relied on the correctness of the Lands Department officials advice and documentation when he signed the lease as "*Minister*". Most importantly, the Minister deposed:

> "***I was not aware* that the Rasu Family had previously been the registered lessors of the exact same piece of land and that the lease in question had been surrendered back to them.** *I was not aware that the Rasu family as part of the process leading to the surrender of the prior lease had acquired all the farming equipment belonging to the previous lessee and had since that time cultivated the land in question as their own. Had I been aware of this history as well as the existence of a dispute before the Land Tribunal and the identity of parties to that dispute, I would not have granted the lease over title 04/3422/003 that I signed. Had I been made aware of the parties to the dispute, I would have ensured that all parties were spoken to about the request for the lease, and in doing so would have been made aware of the claims of the Rasu Family to the property and I can say with certainty that in those circumstances I would not have approved the granting of the lease to Mr. Moli.*
>
> ***The signing of the lease by me was**, with the benefit of information available to me after the event, **a mistake on my part brought about by the selective nature of the information made available to me.**"*
>
> (my underlining and highlighting)

This paragraph was not denied or disputed in the first defendant's evidence nor was the Minister cross-examined or challenged on his views expressed therein.

9. The First Defendant James Moli produced a sworn statement **[Exhibit D(1)]** in his defence and was cross-examined. Florrie Tasso the Acting Principal Registration officer in the Lands Records office provided two (2) sworn statements for the Second and Third Defendants.

10. The effect of the First Defendant's defence and sworn statement may be summarized as follows: Without any fore-knowledge of "*Abaone land*" or Lease Title No. 04/3422/001, the First Defendant applied for and was granted a negotiator certificate to negotiate for an agricultural lease over "*Abaone (former title 04/3422/001)*" situated on East Malo Island even though custom ownership of the land was disputed.

11. Although the names of the disputing claimants was not disclosed in the negotiator certificate, nevertheless, the First Defendant negotiated with some so-called claimants (including his father) and obtained their written consent to lease the disputed land. He was later granted a new lease title No. 04/3422/003 over the disputed land by the Minister of Lands under Section 8 of the Land Reform Act.

12. In cross-examination the first defendant who was always resident in Luganville, Santo with no close patrilineal ties to Malo explained that in 2000 he wanted to lease "*vacant*" land on Malo (why is unclear) and enquired with the Lands Department in Santo. He was advised by a Lands officer **Robinson Toka** that "*Abaone land*" was available. (whatever that means) and although his father was from Ambae, nevertheless, the First Defendant applied to lease Abaone customary land situated on Malo Island, "*unsighted*".

13. In cross-examination the First Defendant admitted that he did not seek the approval of **Daniel Rasu** or **Tom Vanua** who were named lessors in the Lease Title No. 04/3422/001 which was the predecessor to Lease Title No. 04/3422/003 as well as in the custom owner consent form dated 17 March 2001 submitted in support of the first defendant's application to lease "*Abaone land*", however, he did receive the consent of his father, and the attorney of Ben Arulenga (Paul Hakwa) and three (3) named members of the Arukesa family who all lived on Ambae and are closely related to him.

14. Under cross-examination the first defendant unconvincingly sought to deny any knowledge of the presence of the claimant's family on "*Abaone land*" or of them farming it. He conveniently relied on what the Lands Department officials told him about the availability of the land and he willfully and blindly applied for it.

15. He gave inconsistent answers to questions about visiting "*Abaone land*" or seeing people living and farming on the land and he accepted that **Daniel Rasu** and **Tom Vanua** would not have consented to lease the land to him if he had sought their consent. He was also aware that his father was claiming custom ownership of "*Abaone land*" and the case was still pending when he applied to lease the land.

16. He admitted not paying a premium for the 135 hectares of land in the lease allegedly on the advice of the Lands Department officials which he accepted in cross-examination was "*not fair*". Similarly it was "*unfair*" that the occupiers of the land didn't consent to the lease and that the claimant's family had been put to the cost of having to come to court to vindicate their claims.

17. In the end I was left with the distinctly unfavourable impression that the First Defendant knew much more than he was letting on and that his lease was a brazen "*try-on*" which succeeded because of the active assistance of Lands Department officials based in Santo.

18. The primary issue in the case is: Whether the registration of Lease Title No. 04/3422/003 in the First Defendant's faovur was obtained by "*fraud*" and/or "*mistake*"? and, if the answer is "*No*", then a supplementary issue is raised, namely, is the Claimant in actual occupation of the land within the overriding provisions of Section 17(g) of the Land Leases Act?

Discussion

"100. 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 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."

19. In this latter regard I observe that the exception or protection recognized in subsection (2) has not been pleaded in the First Defendant's defence nor is it raised or supported by the evidence. Indeed on the First Defendant's own admissions, he was neither "*in possession*" of the leased land nor had he acquired it "*for valuable consideration*".

20. It is clear from the wording of sub-section (1) that there must be a causal connection between the proven "*fraud*" or "*mistake*" and the impugned

registration (**see:** Roqara v. Takau [2005] VUCA 5). Furthermore in the absence of a definition of the term "*mistake*" it is to be given its ordinary broad meaning that "*includes mistake of law as well as mistake of facts*" such as the "*... improper exercise of power of the Minister under Section 8* (of the Land Reform Act)" (**see:** Turquoise v. Kalsuak [2008] VUCA 22).

21. I have carefully read through the evidence in this case and noted counsels' closing submissions and I have no hesitation in finding that Lease title No. 04/3422/003 was registered as a direct result of a series of "*mistakes*" and with the active default and connivance of the First Defendant.

22. The very first of the "*mistakes*" occurred at the surrender of the predecessor Lease Title No. 04/3422/001 and the mistaken belief on the part of Lands Department officers in the Santo office that upon surrender of a registered lease, the land, the subject matter of the lease does not return to the lessor(s) but instead is "*available*" to be leased by the Minister of Lands.

23. In this regard Section 49 of the Land Leases Act provides:

"49. Surrender of leases

(1) Where the lessor and the lessee agree that the lease shall be surrendered it shall be surrendered in the following manner, that is to say –

(a) an instrument shall be prepared in the prescribed form;

(b) the instrument shall then be executed by the lessee and lessor;

(c) the Director shall then cancel the registration of the lease; and

(d) the instrument shall then be filed."

24. It is undisputed that the above process was undertaken in the surrender of Lease Title No. 04/3422/001 and the surrender was registered on 9 November 1995. At the date of its surrender the Lease still had an unexpired term of about 20 years remaining.

25. The effect of such a surrender is that: "*... upon the recording of the surrender upon the register,* ***the interest of the lessee in the land is re-vested in the lessor***" (W. D. Duncan in Commercial Leases in Australia (5th edn) at paras. 14.10 to 14.30). The learned authors of Halsburys Laws of England (4th edn) more exactly describes the legal effect of a "*surrender*" in the following terms (at **para. 444**):

"*A surrender is a voluntary act of the parties whereby, with the landlord's consent, the* ***tenant surrenders his lease to the landlord*** *so that the lease merges with the reversion and is thus brought to an end*".

Later at para. 445 with reference to express surrenders in writing as occurred in the present case, Halsbury says:

"... ***the surrender vests the estate immediately in the surrenderee without express acceptance***, ...".

26. Furthermore, by the express terms of **Clause 3(s)** of the surrendered Lease, the lessee Edouard Jean Jacquier agreed:

"... (upon) *the sooner determination of the lease peaceably and quietly to deliver up vacant possession of the demised land including all improvements thereon* ***to the lessor***".

27. It is clear from the foregoing that as a matter of law, a surrendered lease returns the unexpired portion of the surrendered lease to the lessor. It does not mean that a lease once surrendered renders the underlying land abandoned and ownerless or that the original lessor loses his title or interest in the land. So much then for the first "*mistake*".

28. **Robinson Toka** is named as the lands officer that the first defendant dealt with in the Santo Lands Department. He was aware of the First Defendant's registered negotiator certificate for Abaone land and he witnessed the First Defendant's signature on Lease Title No. 04/3422/003. Given the First Defendant's evidence and defence, it is unfortunate that Robinson Toka neither provided a sworn statement nor was he called as a witness to confirm the First Defendant's evidence and clarify his understanding and the role he played in the First Defendant obtaining Lease Title No. 04/3422/003 as well as what documents and advice (if any) was given to the Minister prior to him signing the lease.

29. This failure to call Robinson Toka is significant because by his own admissions the First Defendant relied almost entirely on the Lands Department officials to identify, facilitate, prepare and obtain the lease over "*Abaone land*" for him.

30. Such a failure prompted the Court of Appeal to observe in the not dissimilar case of Colmar v. Rose Vanuatu Ltd. [2011] VUCA 20 :

"[48] In drawing inferences from ... proved facts, there are two additional principles that apply. One is that all evidence must be weighed accordingly to the proof which it was within the power of one side to have produced and the other to have contradicted:- ***Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32 (HL) at 46, para 13****. The other, ..., is that, in limited circumstances, it is permissible to draw an inference from the absence of a witness who could have given evidence to clarify a material fact. That principle has been adopted in Vanuatu: see* ***Barrett & Sinclair v McCormack [1999] VUCA 11****. The Court of Appeal said:*

> *"****The unexplained failure by a party to get evidence or to call witnesses may, ..., in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case****. The failure may also be taken into account in deciding whether to accept any particular evidence that relates to a matter on which the absent witness could have spoken,* ***and entitles the trier of fact the more readily to draw any inference fairly to be drawn from other***

evidence that could have been explained had the opposing party chosen to do so by calling the absent witness."

*[49] ... **Mr Toka had acted as Aljan's agent**, with knowledge of Mr Colmar's caution. In those circumstances, it is clear that evidence from **Mr Toka could have assisted the trial judge significantly in determining the actual tasks entrusted to Mr Toka and what he actually did to perform them. Any doubts about exactly what Mr Toka knew or did could readily have been clarified by him**. However, Aljan elected not to call its own agent. ... Aljan's failure to call Mr Toka should not have been treated as if it were to its advantage on the basis that allegations of dishonesty had to be put to Mr Toka for a response. **The applicable principle is that adverse inferences may (not must) be drawn from the failure to call a material witness on an issue that is within his or her exclusive knowledge**.*

*[50] **As there is an evidential foundation for Mr Toka's participation in the registration process**, with knowledge of the existence of Mr Colmar's caution, we consider that **his absence as a witness** (in conjunction with Mr Cort's own reluctance to explain the true position voluntarily) **assists us to draw an inference** that he was acting in that role with that knowledge. For an example of the drawing of such an inference in a comparable case, see Loke Yew v Port Swettenhem Rubber Company Ltd [1913] AC 491 (PC) at 503-504."*

And later at paras. 63 to 65 the Court of Appeal observed:

*"[63] We have already determined the scope of Mr Toka's authority. He was entrusted with the task of gaining custom owners' consent and ensuring prompt completion of the registration process. **He undertook both of those tasks, succeeding in both. However, his mode of performing his instructions was dishonest**. On our findings, Mr Toka knew of the Colmar caution and put improper pressure on the Director to remove it otherwise than in compliance with s. 97 of the Act. We have also found that he had real concerns about the possibility of Valele Trust pursuing an appeal and took steps to obtain prompt registration of Aljan's interest to defeat Valele Trust's claim. ...*

[64] Mr Toka's knowledge of the land registration process and his concern that an appeal might be being pursued against Saksak J's judgment meant that he must have known that, had notice been given in accordance with s. 97 of the Act, any extant appeal proceeding would have been brought to light; if not the judgment of the Court of Appeal itself.

*[65] On that basis, t**he dishonest actions of Mr Toka are imputed to Aljan**. ...."*

(my underlining and highlighting)

31. Ironically, the "*Mr. Toka*" referred to in the judgment is one and the same lands official who the First Defendant names as the officer who he dealt with in obtaining lease title No. 04/3422/003. In my view the First Defendant's failure to call Robinson Toka as a witness in the case raises a strong inference that his evidence would not assist the First Defendant's case and indeed suggests that he was complicit in the First Defendant's

deceitful scheme to pre-empt any (adverse) decision concerning the customary ownership of Abaone land that was then pending.

32. The second "*mistake*" arises from the undisputed evidence of the Minister of Lands (Sela Molisa) who frankly and candidly deposed:

"*Had I been aware of this history* (concerning Abaone land) *as well as the existence of a dispute before the* (Molimaimai) *Land Tribunal and the identity of parties to that dispute,* (including the claimant's family and the First Defendant's father) *I would not have granted the lease over title No. 04/3422/003 that I signed*".

And later:

"*The signing of the lease by me was, ..., a mistake on my part brought about by the selective nature of the information made available to me*".

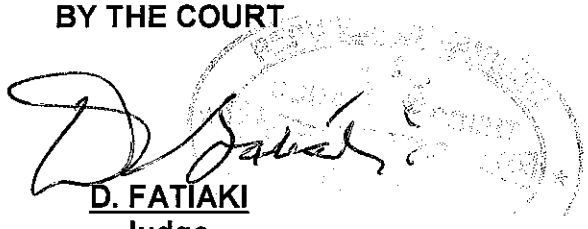
33. In light of the foregoing and in the absence of any conflicting evidence or cross-examination, I am satisfied that the failure of the Minister of Lands to consult with the competing claimants to Abaone land especially the claimant's family who were long-time occupiers of the land and were lessors under the predecessor lease title No. 04/3422/001, constituted a "*mistake*" in the exercise of his power under Section 8(2) of the Land Reform Act. That mistake led the Minister into signing the lease in favour of First Defendant and in turn to its registration.

34. In all the circumstances the claim succeeds and the Director of Lands is ordered forthwith to cancel the registration of Lease Title No. 04/3422/003 in favour of the First Defendant.

35. The Claimants are awarded ordinary costs to be taxed if not agreed and to be paid as to 80% by the First Defendant and 20% by the Second and Third Defendants.

DATED at Port Vila, this 16th day of September, 2016.

BY THE COURT



D. FATIAKI
Judge.