

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

Civil Case No.80 of 2012

BETWEEN: CHARLEY KAUN
Claimant

AND: DANDRUM LONGA FAMILY represented by
PHILIP RIA, ABNER MAKI, LEVI BANGA,
WENJIO TAMAU and WILLIEKON OLOI
First Defendants

AND: DANDRUM TALNVANU FAMILY
represented by TOM RIA, NICHOLAS OLOI,
EDWIN TAMAU, KALPLELO BANGA and
NUMA MAKI
Second Defendants

AND: THE REPUBLIC OF VANUATU
Third Defendant

Coram: Justice D. V. Fatiaki

Counsel: Mr. S. Joel for the Claimant
Ms. P. Kalwatman for the First and Second Defendants
Mrs. V. Trief and Mr. H. Tabi for the Third Defendant

Date of Judgment: 6 May 2016

JUDGMENT

1. This case is the latest in a series of cases concerning valuable customary land variously described as: "Arbotan"; "Lannunu"; "Metabon 1 & 2"; "Louni" or "Bushmans Bay Plantation" on the island of Malekula.
2. The customary owner of the land(s) is yet to be determined despite a claim having been lodged in the Malekula Island Court in Land Case No. 2 of 1992 by "Charley Hambi" aka Charlie Kaun in which the "Longa Family" who was represented by Philip Rea and Numa Fed is named as a counter claimant.
3. With the enactment of the Customary Land Tribunals Act [CAP. 271] in December 2001, Land Case No. 2 of 1992 was withdrawn by the parties. The claimant then filed a fresh claim before the Louni Uripiv, Vinamavis, Potindir and Litzlitz Village Joint Land Tribunal.
4. Prior to the above proceedings, the Malekula Island Court in about 1984 declared that Eric Ross and Jack Abel were the custom owners of "Metabon



land". This decision was later appealed by the unsuccessful claimant John Selwyn Regenvanu Family to the Supreme Court in Land Appeal Case No. L8 of 1985.

5. The appeal was determined by Coakley ACJ and two assessors in a judgment delivered on 21 March 1987 (see: Regenvanu v. Ross [1987] VUSC 5). The Supreme Court quashed the proceedings and orders made by the Malekula Island Court and also dismissed the appeal. It went on however to determine that:

"... the custom owners of Metaven No. 2 are the head chiefs for the time being of Uri and Uripiv Islands respectively ... who will hold such land in trust and for the benefit of the people residing in these two Islands".

6. Unfortunately the boundaries of Metaven (Metabon?) No. 2 land are not clearly described in the judgment nor is an accepted sketch plan annexed which would have helped. Having said that there is some suggestion in the judgment that the land in dispute had an area of "307ha 08a" and mention is made of:

"... a piece of ground known as Lolnevnu" (Lanunu?) ... situated in the district of Botindi (also spelt Potindi), ... (and) ... is a landing point in Port Stanley ...".

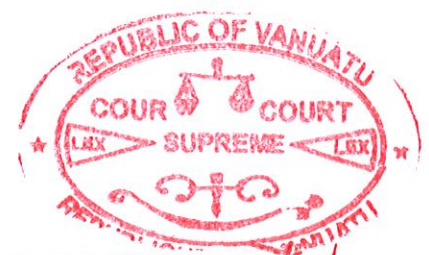
7. For completeness, I make a brief reference to Judicial Review Case No. 29 of 2013 between "Tonny Longa" against "the Limap Lingarak Joint Village Customary Land Tribunal" and Chief Lesly Malsungavul and the Department of Lands (unreported) where the Supreme Court in an oral judgment on 13 June 2014 quashed the decision of the tribunal on the State's concession that it was "improperly constituted" and ordered that the dispute be

"... redetermined by a differently constituted land tribunal in accordance with (the Customary Land Management Act No. 33 of 2013)".

8. The significance of the oral judgment is that it effectively disposes of the claim in Civil Case No. 184 of 2009 where the present claimant issued proceedings to quash the determination of the "Lingarak & Limap Village Joint Land Tribunal" in favour of Chief Lesly Malsungul over "Bushmans Bay Plantation" (see: Kaun v. Lingarak and Limap Village Joint Land Tribunal [2012] VUSC 12). So much then for the background litigation.

9. The present claim concerns a Lease Title No. 09/0744/001 registered on 12 March 2010 and entered between the First and Second Defendants on 22 September 2009 over a piece of land containing an area of 124ha 85a 00ca which comprises:

"... the disputed custom land referred to variously as 'Arbotan', 'Lanunu' or 'Bushman's Bay Plantation' on the island of Malekula" (see: para 3 of claim).



10. The claimant also claims that the said lease was registered “*by mistake*” in the name of the defendants as lessor and lessee respectively of Bushman’s Bay Plantation and, further, the defendants by way of mistake and or fraud caused such registration by the Director of Lands (see: paras. 4 and 5 of the claim). After referring to Section 100 of the Land Leases Act, the claimant seeks the rectification of the lease by way of cancellation only.
11. On 8 August 2013 this Court refused an application by John Kennedy to be joined in this action on the basis that his sole claimed entitlement was as “... *paramount chief of the area and statements in letters that indicate his custom ownership*”. The Court also stayed this action to await the outcome of the claimant’s challenge in Civil Case No. 184 of 2009 which would have had a definitive impact on the claimant’s standing to bring the present claim. In this latter regard as mentioned above, the decision in Judicial Review No. 29 of 2013 has effectively overtaken Civil Case No. 184 of 2009 in so far as the customary ownership declaration by “*the Lingarak and Limap Joint Village Land Tribunal*” which the claimant was challenging in Civil Case No. 184 of 2009 has been quashed and therefore no longer exists.
12. Be that as it may, in the Amended Defence of the First and Second Defendants filed on 4 April 2013 they denied that Lease Title No. 09/0744/001 was registered by mistake and/or fraud and asserted that “... *they registered the lease based on the customary land declaration made on 12 September 1984* ...” in their favour.
13. In this latter regard the Third Defendant’s defence is more helpful and informative where it pleads (in para. 3):
 - “(b) *Says that on 19 May 2009, the Minister of Lands granted a negotiator certificate to Danrum Tauvanu Family as the registered negotiator over Metabon land which comprises over lease title 09/0744/001;*
 - “(c) *Says that the Kastom Ona blong Kraon shows that the declared custom owner of Metabon land is Danrum Longga;*
 - “(d) *Says that the decision based on to issue the Kastom owner blong Kraon is the decision of 12 September 1984;*
 - “(e) *Says that after the decision of 12 September 1984 the Chairman of Central Area Kaonsel blong ol Chief of Central Malekula issued a notice dated 15 October 1984 about the 12 September 1984 decision and also to parties who intends to appeal the decision;*
 - “(f) *Says that the decision of 12 September 1984 was not appealed following the notice of 15 October 1984”.*
14. The declaration or decision is described by counsel for the First and Second Defendants as the 1984 decision of the Central Malekula Council of Chiefs which is relied upon by the defendants as a proper basis for the registration of the lease.



15. The exact nature and status of that 1984 decision is not clearly disclosed by any primary documents provided to the Court other than an oblique reference in a KASTOM ONA BLONG KRAON Form provided in March 2009 to the Lands Department as part of the administrative documentation required for the Minister's consent to be given to lease Title No. 09/0744/001.
16. The Form although appearing to reproduce the decision taken at a meeting of three (3) named chiefs on 12 September 1984 concerning the custom ownership of "*Metabon 1 land*" also indicates by crosses ("X") over section A of the Form that there was no dispute about the ownership of the land. In other words the 1984 decision was not a determination or declaration pursuant to a dispute over customary land nor was that its intention or purpose.
17. On 29 January 2014 after extensive discussions with all counsels and with their agreement the following preliminary legal issue was agreed namely:

"What is the legal status and/or validity of the determination of the Council of Chiefs dated 12 September 1984 relied upon by the defendants".

18. Written submissions were ordered and provided by all counsels for which the Court is indebted.
19. The claimant's submission is that the 1984 decision of the Council of Chiefs declaring "*Family Longa*" as the custom owner of "*Metabon land*" over which the defendants' lease is registered is "... *ultra vires the provisions of the Island Court Act (and) whether or not it must be set aside, the State was mistaken in its reliance on it to register the lease*".
20. The First and Second Defendants in seeking to uphold the validity of the Council of Chiefs' 1984 decision refers to Section 6 of the Customary Land Tribunal Act, and the absence of any appeal against the decision and counsel submits:

"17. There is no legal requirement for a custom owner to obtain proof of customary ownership from an Island Court before a lease can be granted or for a negotiators certificate to be issued. The claimant has not identified any legislation or case law which requires a custom owner to require a decision from the Island Court before a negotiators certificate can be granted or lease registered.

18. In Vanuatu, title to leasehold land is indefeasible. A lease is presumed to be valid until a section 100 mistake or fraud has been established.

19. The lease is not proof that the First Defendant is the custom owner of the land. The lease simply provides a lawful basis for the Second Defendants to occupy the land."



21. And later, in rejecting the disputed custom ownership of the land as insufficient to sustain an application under Section 100 of the Land Leases Act counsel writes:

"21. *The alleged 'mistake' under Section 100 will only be established after proof that the claimant is the rightful custom owner of the land. The claimant should first seek this proof, and only after that proof is obtained can the court rectify the lease;*

22. *Rectification of the lease at this stage would be premature, as there is no proof that the claimant is the custom owner of the land".*

22. Learned counsel for the Third Defendant in following a middle path submits relying on the authority of Valele Family v. Toura [2002] VUCA 3 and dicta in Kalotiti v. Kaltapang [2007] VUCA 25:

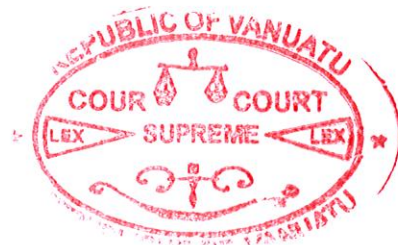
"31. *The Central Area Council of Chiefs made its determination over Bushman Bay land on 12 September 1984 but as it is disputed by some parties, that decision cannot bind the parties because it was not made by a body established by law with lawful jurisdiction and powers to do so.*

32. *The Third Defendant submits that even so, until the custom ownership of Bushman Bay land is finally determined in accordance with the Custom Land Management Act No. 33 of 2013, there is no mistake for the purpose of Section 100 of the Land Leases Act [CAP.163] such that the Court should order rectification of the registered lessor on the Land Leases Register to be substituted with the declared custom owner. In the circumstances, this proceeding should be stayed pending the outcome of the custom ownership dispute over Bushman Bay land".*

23. In considering the competing submissions I am mindful that with the quashing of the Lingarap and Limap Joint Village Land Tribunal decision the custom ownership of "*Bushman's Bay Plantation*" by whatever traditional or customary name(s) it may be known by, remains undecided by a lawfully established court or other decision-making body.

24. I have also noted the tenuous and uncertain nature of the claimant's standing in bringing the claim where he describes himself as: "... a customary land claimant over the *Bushman's Bay Plantation* ...", and not that he is an actual declared custom owner of the land or a long-standing occupier of the land comprised within the lease boundaries. Additionally, there does not appear to be any consensus on the name(s) and/or boundary of the customary land(s) on which the lease is located.


25. I am also mindful that an entirely new statutory regime has been established by Parliament for the determination of custom owners and the resolution of disputes over ownership of custom land under the Custom Land Management Act No. 33 of 2013.



26. I generally agree with the submissions of the defendants but do not consider that any useful purpose would be served in maintaining the claim. Accordingly i order that this claim be dismissed with costs of VT30,000 payable to the First and Third Defendants jointly, and separately, to the Third Defendant within 21 days.
27. As and when there has been a final determination of the ownership of the customary land(s) on which Lease Title No. 09/0744/001 is situated, then a claim for rectification may be instituted. Until such time, the Minister and Director of Land's bona fide reliance (in the absence of clear contrary evidence) on the Kastom Ona Blong Kraon Form in consenting to and in registering the lease cannot be impugned as either a "*mistake*" or fraudulent.

DATED at Port Vila, this 6th day of May, 2016.

BY THE COURT


D. V. FATIAKI
Judge.

