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

Civil Case No.109 of 2009

BETWEEN: REPUBLIC OF VANUATU
Claimant

AND: SATO KILMAN
Defendant

Coram: *Justice D. V. Fatiaki*

Counsel: *F. Gilu for the Claimant*
N. Morrison for the Defendant

Date of Delivery: *8 July 2016*

RULING

1. The precursor to the present claim is Civil Case No. 133A of 2008 where the defendant successfully challenged a ruling of the Electoral Commission that sought to disqualify him from standing as a candidate in the September 2008 General Elections on the basis that: "*... there was a claim by the Ministry of Lands that there was an outstanding undisputed debt due to them* (from the defendant)".

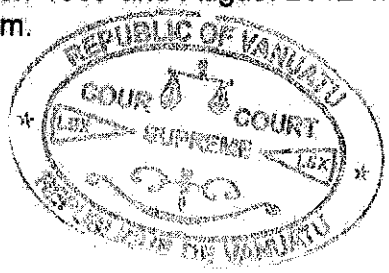
2. The so-called "*debt*" was vigorously disputed in a claim filed against the Electoral Commission and despite an application to strike out the claim the Court noted and ordered on 17 August 2009:

   "*... there is a sense that* (the Electoral Commission) *in the initial action become the claimant ... As such, the* (Electoral Commission) *in CC133A of 2008 become the claimants and must file and serve their claim on ... Sato Kilman by 14 days i.e. 31 August 2009*".

3. Pursuant to the order on 7 September 2009 a claim was filed in Civil Case No. 109/2009 wherein the Republic sought against Sato Kilman the following reliefs:

   "*A. Possession;*
   B. Damages for trespass;
   C. Alternatively to A and B money due and owing under the licence;"

4. The reliefs were sought on the basis that Sato Kilman had been occupying a premises on Lease title No. 11/OF21/037 owned by the Republic since about September 1988 until July 1995 when his right of occupation was terminated for non-payment of rent. Despite that termination Sato Kilman continued to occupy the premises without paying any rental between 1995 and August 2012 when the Lease Title was eventually transferred to him.



5. In his defence Sato Kilman admits that he used and occupied the premises by permission and licence of various Ministers for Lands and the Prime Minister and says his occupation "*... was on the condition that the rental liability would only arise once the Lakatoro claim was resolved*" (whatever that means).

6. On 31 August 2012 Lease Title No. 11/OG21/037 was transferred to Sato Kilman for the sum of VT900,000. This necessitated an amended defence which was filed on 22 February 2013 wherein the defendant maintained his earlier defence and pleaded by way of "*set-off*" that the claimant "*... is significantly indebted to him and this indebtedness should in part be set-off against any determination made in favour of the claimant*". More particularly the defendant's "*set-off*" avers that the claimant or its servants have occupied 3 parcels of land at Lakatoro, Malekula since independence without payment of rental or compensation despite demands for the same.

7. Notable by its absence in the amended defence or "*set-off*", is any clear mention of a payment of VT33,000,000 made by the claimant to the defendant personally on 11 September 2007 in respect of the Lakatoro Land Compensation claim that was settled in Civil Appeal Case No. 3 of 2007 in which the defendant was a consenting party. Nor is there an averment that the defendant is the registered lessor or the sole declared customary owner of the 3 parcels of land at Lakatoro, Malekula for which he claims compensation or the date(s) when demand for payment of compensation was made.

8. In this latter regard as long ago as 5 July 1988 in Land Appeal Case No. L5 of 1984 – Bue Manie and Kenneth Kaltapang v. Sato Kilman [1988] VUSC 9 in which custom ownership of Lakatoro land was under consideration, the Supreme Court declared that:

"***... the Kenneth Kaltabang family, the Sandy Malro family and the Sato Kilman family are the true custom owners of the land in dispute and it shall be divided equally between them.***

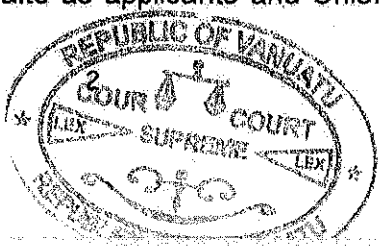
It is hereby ordered that any compensation paid by the Government of Vanuatu for the State Land which is set out on the plan attached shall be divided between the three custom owners. One third to each family."

And later the Court ordered:

"*... any lease of the disputed land other than the State land must be signed by a representative of the three custom owners. It is also ordered that the custom owners have no right to interfere with any project on the State Land. All the custom owners are entitled to is compensation for the said land*".

9. From that judgment it appears that the Supreme Court was dealing with a customary boundary that is larger than and includes the "*State Land*" at Lakatoro. In the absence however of the relevant sketch map before the Supreme Court namely "*Exhibit 1*", it is difficult to be definitive.

10. Having said that and for completeness, the Area Land Tribunal of Central Malekula in Land Tribunal Appeal Case No. 1 of 2011 between Tasongi Velvelvatel and Roger Veremaito as applicants and Chief Melten Tasong and



Boyd Buemennmen and concerning "*Tenevum* (mo) *Tembogo we Lakatoro e stap insaed*", declared inter alia:

"*Mi declarem tede 11 July 2011 se graon ia wetem ol identity blong hem, oli ol property blong Chief Melten Tasongi Velvelvatel wetem ol Family blong hem, Area Land Tribunal e declarem se Lakatoro State Land Baondry decision ino kaveremap*".

(This decision has been challenged in Judicial Review No. 193 of 2010 by the defendant's family and remains extant).

11. So much then for the historical litigation thus far concerning "*Lakatoro land*" on Malekula. Suffice it to say that the matter still remains in dispute and puts the pleaded "*set-off*" in its proper perspective. Whatsmore on the basis of the defendant's claim in Judicial Review No. 193 of 2010 it may safely be said that the defendant fully accepts the judgment in Land Appeal Case No. 3 of 2007 that he is an undivided "*one-third*" share customary owner of Lakatoro land.

12. Returning to the present claim. The relevant chronology extends over 20 years from September 1988 to September 2009 during which time the defendant occupied the premises under different capacities until he finally purchased it in August 2009.

13. During that period of occupation since November 1990 the defendant paid no rental despite several requests for payment and abortive notices to quit the premises served in August 1995 and August 1998. The total accumulated rent arrears has been quantified in the sum of VT5,800,000.

14. Also during those 20 years the defendant has consistently maintained that he is owed unpaid compensation for Government's occupation of various buildings and houses on his family's customary land at Lakatoro in Malekula since after independence in 1980. The unpaid compensation has been valued at in excess of VT1.4 billion.

15. It is not asserted that the buildings and houses at Lakatoro were either constructed by, paid for, or transferred to the defendant's family. Indeed it cannot be seriously disputed that the buildings and houses were erected during condominium times to house the district administration and its officers and existed on the land at the time of independence.

16. In similar vein it cannot be disputed that most, if not all, of the condominium district administration buildings at Lakatoro were erected within a pre-independence land title **No. 1993** delineated in a registered survey plan **No. 402**. The surveyed land is roughly "***L***" – shaped and extends from the coast of Port Stanley traversing the main public road to Litzlitz then up the hill to beyond the area housing the district administration buildings at Lakatoro.

17. This survey plan has a total area of approximately 86 acres and was "*State land*" which vested in the Government at independence in accordance with the provisions of **Section 9(1)** of the **Land Reform Act [CAP. 123]**. This vesting occurred 8 years before the Supreme Court's decision in Manie v. Kilman (op. cit) and was confirmed and expressly excluded from the Court's decision. (***see:*** the last 3 paras. of the decision).

18. By an application dated 20 October 2014 the claimant sought to strike out the defendant's counterclaim and set-off on two principal grounds listed in the submissions of claimant's counsel as follows:

    (1) Whether the defendant has "*locus standi*" to file a counterclaim as a set-off? and

    (2) Whether a "*set-off*" in a debt claim could be construed as part of a compensation claim for compulsory acquisition? (what this may mean)

19. As to ground (1) counsel refers to the judgment of the Supreme Court in Manie and Kaltapang v. Kilman (op. cit) and the payment of VT33,000,000 to the defendant on 11 September 2007 and counsel submits that "*... the defendant and his families are not the sole customary owner of Lakatoro land*" and "*Furthermore any claim for debt owed in respect to Lakatoro land should be brought by all the three families or in a representative capacity on behalf of the three families*".

20. As for the buildings and land (outside pre-independence title No. 1993) that are occupied by its servants and agents, claimants counsel submits the Claimant is yet to acquire and pay compensation for it under the provisions of the Land Acquisitions Act and, presumably, until such time when that occurs no compensation is owed or payable to anyone including the defendant.

21. Leading on from the foregoing and expanding on ground (2), counsel submits that there are provisions in the **Land Acquisition Act [CAP. 215]** including Sections 6, 9, 12 and 14 which provides for the acquisition and valuation of any acquired land and for addressing any concerns that the defendant might have with the process and the compensation payable to the customary owners of the acquired land.

22. Given the existence of that specific legislation for the acquisition of customary land and the payment of compensation therefor, counsel submits that the legislature intended that any claim for compensation for acquired land must be the subject matter of a separate claim and procedure and the defendant should not be allowed to evade the statutory regime by way of a counterclaim for "*set-off*" of an amount for compensation which has not yet been determined in his favour in respect of lands that haven't even been acquired by the claimant.

23. In response defence counsel refers to **Rule 4.8** of the **Civil Procedure Rules** as authorizing the defendant's claim for "*set-off*" and submits that "*... the claimant has indisputably occupied parcels of Lakatoro land since independence and compensation must surely be entitled on that basis alone*" (whatever that means).

24. In other words, irrespective of any intended acquisition of the Lakatoro land (outside the "*State Land*"), the fact remains that some compensation for occupying the said land and buildings is due and payable to the defendant. In this regard the defendant's expert evidence is that a sum in excess of VT500 million is due for the claimant's occupation of buildings on the pre-independence Condominium and British Government leases.

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX

25. The expert evidence is a Valuation Report commissioned by the defendant and issued on 19 October 2013. The particular interest that was valued in the Report: "*... is the rent that the buildings would have acquired when the buildings are in good repair*". The Report in the absence of a survey plan or sketch, divided up Lakatoro land into three (3) distinct parcels as follows:

(1) Former Condominium Lease comprising six (6) separate residential buildings occupied by Staff of the Public Works Department;

(2) State Land which comprises buildings within the pre-independence Title No. 1993 in survey plan No. 402 including the Court House, Government offices, residences for government officers, various shops and Lakatoro School;

(3) Former British Lease which comprises the Malampa District Administration buildings and residences including the Police Headquarters and the Malampa Magistrate and Island Court Office (mentioned twice) and presumably is a separate building to the "*Court House*" listed within the "*State Land*" parcel above.

In particular the Report notes that the legal definition of land in Vanuatu includes: "*... improvements affixed to the land*" and further, in respect of the parcel of "*State Land*" the Report states:

"*... the subject land and buildings referred to in the valuation is owned by the custom land owners until 2007 when compensation was paid to the custom land owners. The use of the subject land by the Government of Vanuatu* (including Buildings) *should have been rented to the custom land owners*".

26. Having said that my researches have uncovered two (2) Ministerial Land Acquisition Orders No. 8 and 14 of 19 February 2010 both of which directs:

"*The acquiring officer is to take possession of the land:*

(a) Described in title 09/0713/048; and
(b) ***Located on the Tembogoh Customary Land at Lakatoro on the Island of Malekula,***

for and on behalf of the Government of the Republic of Vanuatu".

27. In the absence of a copy of the above-mentioned title or registered survey plan, it is presently unclear whether the acquisition notices refers to the former Condominium and/or former British Government leases referred to in the above-mentioned Valuation Report.

28. For completeness reference is also made to the following extract in the letter of the Director of Lands to the then Minister of Lands on 16 July 2012 which reads:

"*The Lakatoro Compensation figure has been determined by our Valuers and submitted to the three (3) families concerned including the Kilman Family. This has not been accepted by all three (3) families because they have not responded as required*

REPUBLIC OF VANUATU COURT SUPREME

under the Land Acquisition Act as to whether they accept the determination. Therefore there cannot be any no further progressing of the matter until they act by way of appeal or otherwise".

If I may say so the above extract does appear to suggest that acquisition of the remaining parcels of Lakatoro land is in the process of being implemented under the Land Acquisition Act but has stalled. So much then for the unacquired parcel(s) of Lakatoro Land.

29. Even accepting that the definition of "*land*" in the Land Reform Act, and the Land Acquisition Act includes "*buildings* and "*improvements thereon or affixed thereto*", I do not accept that the pre-independence buildings on Lakatoro Land are necessarily included in the undefined "*land*" referred to in Article 73 of the Constitution as appears to be assumed in the Valuation Report. In any event given the determination of the Supreme Court in Manie v. Kilman (op. cit), I do not accept that the defendant or his family can claim to be personally entitled to receive rental for the buildings on Lakatoro Land to the exclusion of the other custom owners of the land.

30. In light of the uncertainties and complexities concerning the present status of the Lakatoro Land (excluding the "*State land*") and the defendant's as yet undetermined claim to be personally owed compensation for the claimant's occupation of the buildings on the Lakatoro land since independence, I do not accept defence counsel's submissions.

31. In my view to allow the defendant in this action to "*set-off*" or counterclaim for compensation which is fraught with uncertainty and which has not yet crystallized into a liquidated sum would further delay the matter and be contrary to established principle.

32. As was said by the Solomon Islands Court of Appeal in City Centre Ltd. v. Attorney General [2003] SBCA 12:

"*Some rules of law are well settled. Set-off is exclusively a creature of statute. See 29 Halsbury 683 at 482 (2nd ed) it was originally permitted by the old statutes of set-off of 1728 and 1734,* ***but only where the debts sought to be set-off were both liquidated sums****: Mc Donnell & East Ltd. v. McGregor [1936] HCA 28 (1936) 56 CLR 50 (Dixon J). Later, equity allowed an unliquidated demand to be set off,* ***but only if it 'impeached' the indebtedness on the other side, in the sense that it arose out of the same or a closely related transaction***".

(my highlighting)

33. In similar vein the Fiji Court of Appeal observed in Lal v. Ramanlal Brothers Limited [1987] FJCA 17:

"*Although the distinction is usually of no importance there is a difference between the two concepts:*

'A set-off is a monetary cross claim which is also a defence to the claim made in the actions.

It is only available in respect of debt or liquidated demands due between the same parties in the same right ... If successful it extinguishes the claim in whole or in part Hanak v. Green (1958) 2 QB 9 at 29."

A counterclaim is any claim for relief or remedy against a plaintiff in respect of any matter (whenever or however arising) and is pleaded as if it were a separate cause of action ... If successful it may balance or exceed a judgment given in a claim tried at the same proceedings or it may succeed on its own."

See also: Fujitsu (NZ) Ltd. v. International Business Solutions Ltd. [1998] VUCA 13 where the Court of Appeal observed:

"Where the defendant does not dispute the allegation on which the plaintiff's claim depends, but seeks to set up a counterclaim, the court is required to consider whether the counterclaim is raised by way of a defence of set-off or whether independently from the cause of action asserted by the plaintiff".

34. In the present case the defendant's claim for compensation of the Lakatoro Land is neither a *"liquidated sum"* nor does it by any stretch: *"... arise out of the same or a closely related transaction"*. Furthermore the defendant does not dispute the factual basis of the claim including his occupation of the premises and the non-payment of any rental (***see:*** the defendant's agreed facts 2 and 3) and confirmation of the defendant's customary ownership of Lakatoro land did not occur until July 1988.

35. Finally, the defendant's documentation indicates that his Invoices claiming outstanding land rents for the Lakatoro land was first delivered on 31 August 2012 and comprised billings that extended *"from 1980 to July 2012 which is 31 years and 7 months ..."* for the Condominium and British Government Leases and *"... from 1980 to 2007 which is 27 years ..."* for the State Land. In this regard although unpleaded, Section 6 of the Limitation Act [CAP. 212] clearly provides:

"No action shall be brought, ..., to recover arrears of rent, or damages in respect thereof, after the expiration of six years from the date on which the arrears became due".

36. For the foregoing reasons the application is granted and the defendant's set-off and counterclaim filed on 22 February 2012 is struck out in its entirety with costs of VT50,000 to be paid within 21 days.

37. By way of further directions this matter is listed for pre-trial conference on 27 July 2016 at 9.00 a.m.

DATED at Port Vila, this 8th day of July, 2016.

BY THE COURT

D. V. FATIAKI
Judge.