



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

Civil Case No .217 of 2015

BETWEEN: SANDY CHARLEY FOUBAWAN
PAUL HARRY NAREA
EZEKIEL MASEMAN
KALO TARIPUAMATA
ROBSON TIMATASO KOKORU
JOSEPH TIMAKURA
KALO SIMBOLO MARAKTATAN
PHILIP CHARLEY TIPOLOA
REUBEN MASSOERANGI
CHARLEY SASAMAK
Claimants

AND: EDWARD CROWBY AND CHIEF
MANAREWO
First Defendant

AND: REPUBLIC OF VANUATU
Second Defendant

Coram: Mr. Justice Oliver A. Saksak

Counsel: James Tari for the Claimants
Mary Grace Nari for the First Defendant
Hardison Tabi for Second Defendant

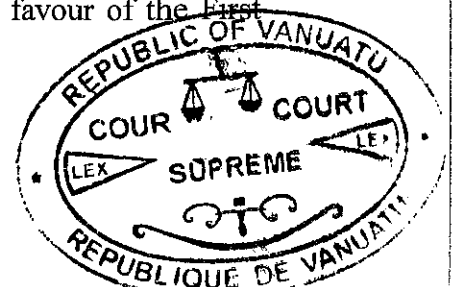
Date of Hearing: 23rd February 2017

Date of Judgment: 30th June 2017

JUDGMENT

Introduction

1. This is a claim made pursuant to section 100 of the Land Leases Act [CAP.163] (the Act).
2. The Claimants allege the First Defendants committed fraud in obtaining Lease title 12/0632/013 (the 013 Lease). They further allege that the Second Defendant committed mistake in granting and registering the 013 Lease in favour of the First Defendants.



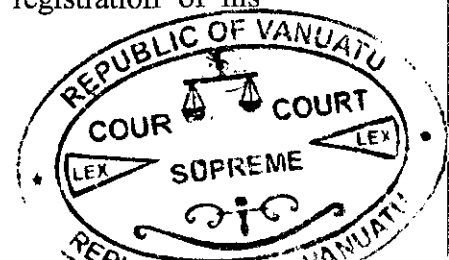
Reliefs Sought

3. The Claimants seek the following reliefs-
- a) An Order that the register kept in respect of the 013 Lease in favour of the First Defendants be cancelled by the Second Defendant.
 - b) An Order directing the Second Defendant to effect such cancellation.
 - c) In the alternative if Relief 1 is refused, that the claimants be entitled to the land under section 17 (g) of the Act.
 - d) Costs.

Chronology of Facts

4.

- 7th August 1996- Lease Title 12/0643/007 (the 007 Lease) was registered between the Minister of Lands as lessor and the First Defendant as lessee.
- 28th December 2009- The 007 Lease was surrendered for the purposes of subdivision and creating 4 new agricultural leases.
- 27th February 2014- Lease title 12/0632/013 (the 013 Lease) derived from the surrender of the 007 Lease was registered between the Minister of Lands as lessor and the First Defendant as lessee.
- 4th September 2015- One of the Claimants namely Charley Sandy Foubawan sent a letter to the Chief of Erangorango village seeking registration of his



claim as custom owner of Erangorango land. This letter was copied to the Land Management Office and to the Custom Land Officer for Shefa Province.

30th September, 2015-

The Claimants commenced this proceeding against the First and Second Defendants.

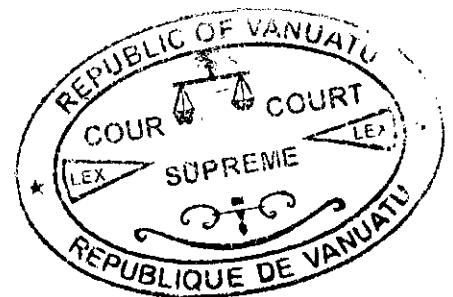
Evidence

5. The Claimants rely on the evidence of Philip Charley Tipoloa by sworn statement filed on 13th April 2016.

The First Defendant relies on the sworn statement of Edward Crowby filed on 17th June 2017. And the Second Defendant relies on the sworn statements of Gordon Willie filed on 23rd and 24th June 2016. All the statements were agreed and admitted into evidence by Counsels on 23rd February 2017.

The Issues

6. There are 4 issues in common namely-
 - a) Whether or not the Claimants have standing to invoke section 100 of the Act?
 - b) Whether or not the 013 Lease was obtained by fraud or mistake?
 - c) Whether or not the Claimants are entitled to the land pursuant to section 17 (g) of the Act?
 - d) Whether or not the Court can cancel the 013 Lease pursuant to section 100 of the Act?



The Relevant legal Provisions

7. A. Land Leases Act [CAP 163], section 100 states:

“ (1) Subject to subsection (2) the Court may order rectification of the register by directing that any registration may 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 cause such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.”

Section 17 (g) states:

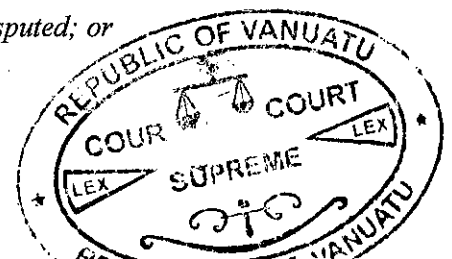
“ Unless the contrary is expressed in the register, the proprietor of a registered lease shall hold such lease subject to such of the following overriding liabilities, rights and interests as may, for the time being, subsist and affect the same, without their being noted on the register-

(g) the rights of a person in actual occupation of land save where enquiry is made of such person and the rights are not disclosed.....”

B. Land Reform Act [CAP 123], section 8 states:

“Minister to have general management and control of certain land

1. *The Minister shall have general management and control over all land –*
 - a) *occupied by alienators where either there is no approved agreement in accordance with sections 6 or 7 or the ownership is disputed; or*
 - b) *not occupied by an alienator but where ownership is disputed; or*



- c) *not occupied by an alienator, and which in the opinion of the Minister is inadequately maintained.*
- 2. *Where the Minister manages and controls land in accordance with subsection (1) he shall have power to –*
 - a) *consent to a substitution of one alienator for another;*
 - b) *conduct transactions in respect of the land including the granting of leases in the interests of and on behalf of the custom owners;*
 - c) *take all necessary measures to conserve and protect the land on behalf of the custom owners.”*

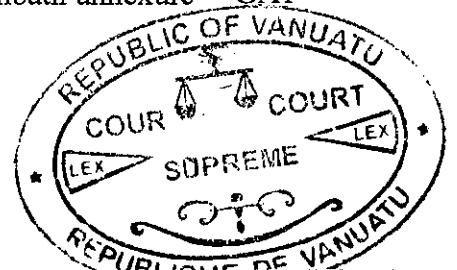
Discussions

8. I deal first with the first issue in paragraph 6 (a). This is the issue of standing of the claimants. This, I consider is an important issue because the remaining issues stand or fall depending on the outcome reached by the Court.

I consider first the pleadings. Paragraph 1 of the claim of the claimant state clearly that the claimants are “ *disputing owners*” of those lands including Agriculture Lease 12/0623/013. Mr Tari confirms this status at paragraph 2 of his written submissions.

Next I consider the evidence. Of the 10 claimants only Sandy Charley Foubawan deposed to a sworn statement. At paragraph 2 he states again that the claimants are “ *disputing owners*”. The deponent annexes as annexure “ PCT1” a document headed “ RI- SETIFAE LETA BLONG IMMEDIATE JIF KONSEN. Next as “ PCT 2” he annexes the reply by Alicita Vuti dated 10th September 2015 headed “ subject: ERANGORANGO CUSTOMARY LAND CLAIM.”

These documents are letters. There are no claims disclosed by the deponent. However I have found assistance from the evidence of Gordon Arnhambath annexure “ GA1”



which discloses what appears to be a claim by Charley Sandy Foubawan and Paul Harry Nareo.

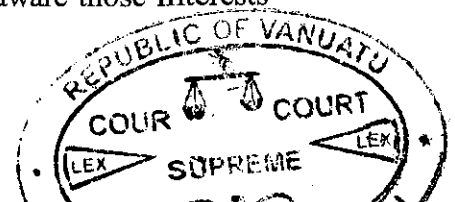
Secondly, section 8(2) of the Land Reform Act in subsection (2) (b) and (c) make references to “*custom owners*” not disputing custom owners.”

Thirdly, to have standing the claimants must adduce evidence they are the declared custom owners of the land in issue and secondly that they have interests in the register entry as held by the Court of Appeal in Naflak Tevfi Ltd.v. Kalsakau [2005] VUCA 15. Mr Tari refers to Ratua Developemnt .v. Mathew Ndai and others [2007] VUCA 32 and Sam Toara and Anor.v. Kaltak and others CAC 3616 of 2016 which are clearly against his argument that his clients have interests in the Erangorango land.

Fourthly, the claimants must establish by evidence that mistake or fraud was known to the registered proprietor, the First Defendant at the time of entry. In the Naflak case the Court of Appeal said this:

“..... Not only must there be proof of mistake or fraud but also that such mistake or fraud caused the entry to be registered. Furthermore it has to be proved that mistake or fraud was known to the registered proprietor of the interest sought to be challenged or was of such a nature and quality that it would have been obvious to the registered proprietor had he not shut his eyes to the obvious, or where the registered proprietor himself caused such omission, fraud or mistake or substantially contributed to it by his own act, neglect or default. We use the word “ interest’ in the widest possible since although accepting it may have in appropriate circumstances (sic) be distinguished from a mere busy body” (My emphasis).

The accepted evidence is that the 013 Lease was initially registered by the First Defendants as registered proprietor on 7th August 1996. Also it is unchallenged that the claimants only made known their interests in the land on 4th September 2015. This is after some 17 years had lapsed after registration in 1996. Two questions arise (a) Did the claimants have any interests in the Erangorango land in 1996? And (b) if they had, had the First Defendant as registered proprietors known or aware those interests



existed? The obvious answers to these are “no”. The claimants have the onus of proof and they have no evidence to prove they had interests in 1996 or prior to registration in August 1996 or that the First Defendants have such knowledge.

Having said all that, I come to conclude that the claimants have no standing to bring this claim against the defendants. I therefore reject all the claimants submissions made in relation to the first and second issues in paragraph 6(a) and (b). Those issues are answered in the negative.

9. I now turn to consider the claimants’ alternative claim made under section 17(g) of the Act.

For the claimants to succeed on this claim they each must show by admissible evidence that they have actual occupation of the land in question. That is the law according to William .v. William [2004] VUCA 16. They have to show by evidence also that they are not trespassers on the land. Unfortunately the claimants have no evidence showing how they moved onto the land, whether they are in actual possession and when they occupied the land.

I therefore reject their submissions on this issue and answer this issue in the negative.

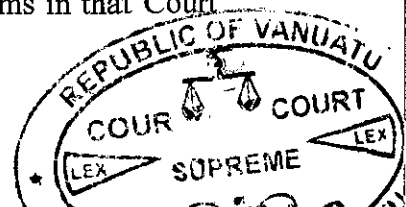
10. The final issue is by the State. It is whether the court can cancel the 013 Lease?

The answer is obvious from reading section 100 of the Act. However in this case the Court declines to exercise that power for reasons given earlier in relation to the issues raised and in particular the issues of mistake or fraud.

The Counter-claim

11. Finally the issue of the First Defendant’s counter-claim.

The evidence of Edward Crowby dated 17 June 2016 annexes as “ C” his Magistrate Court claim against Philip George Tipoloa. This claim remains outstanding in that Court. It is my view that the counter-claims are the same as the claims in that Court



and that they should be allowed to continue in that Court. For that reason the counter-claims are struck out in this Court.

The Result

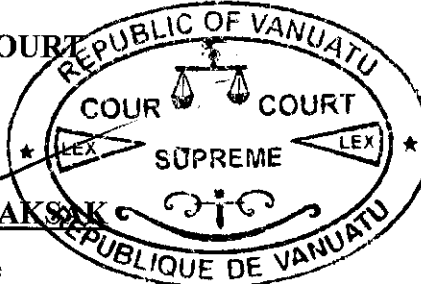
12. The Claimants are unsuccessful and their claims are dismissed in their entirety.

Costs

13. The claimants have put the defendants to costs. The Defendants are entitled to their costs of and incidental to the action on the standard basis as agreed or be taxed by the Master.

DATED at Port Vila this 30th day of June 2017

BY THE COURT



REPUBLIC OF VANUATU
COURT COURT
LEX SUPREME LEX
REPUBLICQUE DE VANUATU

OLIVER A. SAKSOK
OLIVER A. SAKSOK
Judge