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

Civil
Case No. 20/787 SC/CIVL

BETWEEN: Kalkot Mataskelekele represented by the Family Matas

Claimant

AND: Kalsale Family

First Defendant

AND: Christiane Brunnet

Second Defendant

AND: Republic of Vanuatu

Third Defendant

Date of HEARING: ***12th June 2020***
Date of Decision: ***15th June 2020***
Before: ***Justice Oliver.A.Saksak***
In Attendance: ***Mr Kalkot Mataskelekele for the Matas Family- Claimant***
Mr Bruce Kalotiti Kalotrip for the First Defendant
No appearance for the Second Defendant
Ms Adeline Bani for the Third Defendant

DECISION

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1. The application by the First Defendant, the Kalsale Family to strike out the interlocutory orders issued by this Court on 30th April 2020 and the statement of claim filed on 17th April 2020 by the claimant family is declined and is to be dismissed.

2. The application was advanced on several grounds that-

a) The issue of ownership has already been decided in 2016 by the Farea Narsoqtasoqsoq Malarua (the FNM) in favour of the First Defendant,

b) The claimant did not appeal against the Decision within 30 days as stipulated in section 45 (1) of the Customary Land Management Act (the Act),

c) The appeal currently before the Island Court (Land) is time- barred by more than 3 years,

d) The Claimant Family has no standing and are estopped from bringing this proceeding, and

e) The process under the Act has been completed by the National Co-ordinator issuing a Green Certificate on the advice of the Attorney General.

3. The First Defendant relied on the sworn statements of Wota Kalsal and Lai Kalsal in support of those grounds.

4. The Republic neither supported nor opposed the application but maintained a neutral position. They merely assisted the Court by filing two sworn statements from Director Mr Paul Gambetta and from Mr Humphrey Tamata.

5. Mr Mataskelekele opposed the application and relied on his sworn statement and his reply and submissions filed at 8:15am on 12th June 2020 just prior to the hearing of the application.

6. Mr Mataskelekele relied on Article 47 of the Constitution to submit the Court has in-herent jurisdiction to deal with his application for interlocutory orders where there is no rule of law applicable and where substantial justice requires that the Court hears the matter.

7. Further, Counsel submitted that reliant on sections 16 and 17 of the Act in conjunction with section 6C of the Land Reform Act [CAP.123] the processes were not followed by the Nakamal Meeting.

8. Finally reliant on his letter dated 23rd November 2015 Annexure D "KMK-1 (9) to the National Co-ordinator which was never responded to, he had exhibited his family's interest as a party and as such the Claimant Family has standing.

Discussion

9. As I understand it there are 2 separate proceedings the Court is dealing with in this one application. The first is Review Case No. 824/2019 currently before the Island Court (Land) which is due for hearing in July 2020 and the Second is Civil Case 787 of 2020 which is the foundation of the Interlocutory Orders issued on 30th April 2020. It is important that we must not be confused and mix up the two cases. We can easily lose track if we do that as the First Defendant is trying to do.

10. Let us deal first with Review Case No. 824 of 2019.

Does the Claimant have standing?

Section 45 of the Act provides for Review of decisions of nakamals or custom area Land Tribunals on certain grounds as follows-

(1) *" If it is alleged by a custom-owner, a member of a nakamal or disputing group that a decision of a nakamal.....*

(a) has been made by a nakamal or custom area Land Tribunal that was not constituted in accordance with the provisions of the Act, or

(b) has been made in breach of the process of the process described in this Act, or

(c) Has been procured by fraud,

The custom-owner, the member of the nakamal or the disputing group may lodge an application for review with the Registrar of the Island Court (Land) or with the National Co-ordinator within 30 days from the date of the original decision and provide evidence to support the allegation...."

(my underlining for emphasis).

11. It is evidently clear that the Claimant Family are members of the FNM Nakamal and are a disputing group. Under section 45 (1) they have standing in the Island Court (Land) to have lodged their Review.

12. Second, whether or not their Review falls outside of the 30 days period under section 45 (1) is an issue for the Island Court (Land) to decide. It is correct as submitted by Mr Mataskelekele that the Act does not make any provision for extension of time and therefore Article 47 (1) of the Constitution may have application, but again that is a matter for the Island Court.

13. Third, are the claimants estopped from appealing or seeking a review? From the evidence produced by the Claimant Family it would appear to me there were clear breaches of the processes required by sections 16 and 17 of the Act and of section 6C of the Land Reform Act. Is it therefore fair that they should be estopped from being heard? It is clearly evident Mr Mataskelekele wrote expressing the family's interest in November 2015 prior to the Nakamal Hearing but this letter fell on deaf ears. Had there been a response, this problem and case would not have arisen today. It is common knowledge that land is a very sensitive issue and if as here, it is not handled properly within the armbit of the legal provisions, it will cause endless litigations and divisions even between close families and relatives for all generations to come. Somewhere and somehow common sense must be revived and applied between close families to maintain peace and harmony and retain family property in particular land, from alienation to the families detriment and disadvantage in future.

14. Fourth, that the process under the Act has been complete by the issuance of a Green Certificate. That submission is untenable. If it were so there would not have been any provisions in the Act for a review of the nakamal decision or a custom land tribunal under section 45 of the Act.

15. If as here it is alleged there were breaches of sections 16 and 17 of the Act and section 6C of the Land Reform Act, then I accept Mr Mataskelekele's submission that the decision must be followed to its roots to determine whether it is made lawfully or unlawfully to render if void from the beginning (ab initio).

16. Finally Civil Case 787 of 2020. Put simply the claimant is simply seeking restraining orders to maintain status quo pending the determination of Review Case 824 / 019. The subject matter in this proceeding are surveying, clearing, cutting trees, removing or destroying food crops, developing in any way, sale or other dealings on the disputed Lands within Leasehold Titles 12/0633/1360 and 12/0633/1361 as distinguished from Review Case No. 824/019 where the subject matter is customary ownership of land.

17. The Orders dated 30th April 2020 are interlocutory orders until the determination of Review 824/019 and further orders of the Court. The substantive hearing of whether or not the orders should be permanent orders will be dependent on the outcome of the Review.

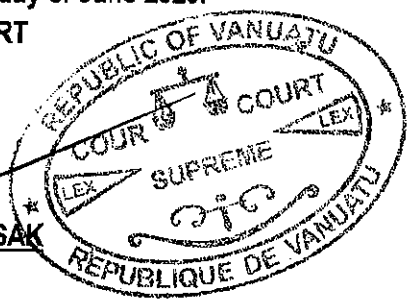
18. Does the claimant Family have standing to bring Civil Case 787/2020? Of course as a disputing group with interests in lands comprised in the two leasehold titles, they are directly affected. That gives them standing to seek the restraining orders they now have in existence which not only bind the First Defendants but themselves as Claimants as well.

19. For those reasons the application by the First Defendant is misconceived and is hereby dismissed. The claimant is entitled to their costs of the application on the standard basis as agreed or taxed.

20. Finally I order that Civil Case 787/2020 be returnable for mention on Friday 7th August 2020 at 8:30am.

DATED at Port Vila this 15th day of June 2020.

BY THE COURT



OLIVER.A.SAKSAK

Judge