

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

Civil
Case No. 19/1793 SC/CIVIL

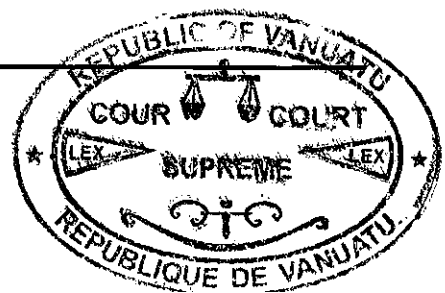
BETWEEN: Migale Limited
Claimant

AND: Marik Naot Kalsau Ponal
Viti, Marik Ataf Kalopong,
Marik Ataf Kaltfer, Marik
Sailosi, Marik Naklokut,
Marik Kaluat, Marik Ake,
Marik koftau, Marik Mal,
Marik Api Ataf, Marik
Waoute, Marik Kalosik,
Marik Wefirau, Marik
Tukune, Marik Kalsal and
Marik Kalmatmal
First Defendants

AND: The Republic of Vanuatu
Second Defendant

Before: Justice G.A. Andrée Wiltens
Counsel: Mrs M. Ferrieux Patterson for the Claimant
No appearance for the First Defendants
Mr S. Aron for the Second Defendant
Date of Hearing: 17 July 2020
Date of Decision: 19 October 2020

JUDGMENT



A. Introduction

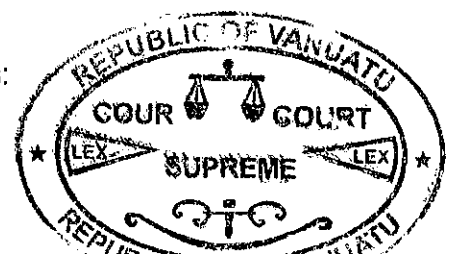
1. This decision deals with one aspect of a Claim, the other aspects having been separately dealt with and concluded.
2. This dispute relates to a portion of reclaimed land adjacent to Lagoon Number One in Port Vila. A swimming pool and other amenities have been constructed on the reclaimed land by Migale Limited, which currently is not the subject of a formal lease title. The reclamation and construction are improvements to the existing lease titles appropriately authorised by the Ministry of Internal Affairs in 2011 pursuant to the Foreshore Development Act. There is no challenge to the reclamation or the construction of the amenities.
3. Following an aggressive approach by persons claiming to be the custom owners of the reclaimed land in 2019, the registered proprietor Migale Limited has determined it appropriate to regularise the situation by seeking to incorporate the existing reclamation into existing leases or to apply for a new lease dealing with the reclaimed land.
4. The issue for determination is whether Migale Limited must negotiate a new lease or extend the existing leases with either the Government (the Director of Lands) or the customary owners of the land. That conundrum is the basis of this aspect of the Claim and the answer depends on whether the reclaimed land area is within the area declared to be "public land" in 1981 or is outside that area.

B. Background

5. The land at issue involves the reclaimed area adjacent to two separate titles. Lease Title No. 11/OA24/005 was first registered in 1985, and was surrendered on 9 August 2016. Lease Title No. 11/OA24/009 was first registered on 16 August 1984, and was surrendered on 10 March 2016.
6. In their stead, Lease Title No. 11/O24/100 and Lease Title No. 11/OA24/099 were registered on 30 November 2016, each running for 50 years from 30 July 1980.
7. It was agreed for the purposes of determining this case that a survey of the area comparing the reclaimed land with the low water mark adjacent to the registered leases should occur. Mr M Meltenoven from Geomap Limited undertook this task on 6 June 2020, when the tide was at its lowest ebb for the year. There was a group from the Republic of Vanuatu Survey Department in attendance.
8. The survey produced shows the reclaimed land beyond Lease Title No. 11/OA24/100 amounts to 823 m², and that beyond Lease Title No. 11/OA24/099 amounts to 386 m². Both "improvements" involve sizeable areas of additional land.
9. The survey produced by Mr Meltenoven is virtually identical to that prepared by Mr N Naki, who is a Geodetic Surveyor at the Department of Lands, and who was one of the attendant group present on 6 June 2020.

C. Order 26 of 1981

10. The gazetted 26 January 1981 Order No. 26 of 1981, reads as follows:



"Republic of Vanuatu

Land Reform (Declaration of Public Land) Order No. 26 of 1981)

To provide for the Declaration of certain land situated within the Urban Physical Planning Boundaries of Port Vila and Luganville to be public land.

IN EXERCISE of the power contained in Section 12 of the Land Reform Regulation 1980, I hereby make the following Order:

1. The shaded areas of land shown on the map attached hereto as Annex 1 shall with effect from the date of commencement of this Order be public land.
2. The boundaries of those areas, of which a description is attached hereto as Annex 2, shall constitute the urban physical boundaries of Port Vila.
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5. This Order shall come into force on the date of signature.

MADE at Port Vila this 26th day of Jan. 1981.

T. Reuben
Acting Minister of Lands".

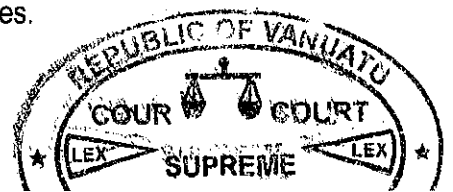
11. The description contained in Annex 2 describes the outer circumference of a large area in the Port Vila region, and all the land within that outer circumference is "public land" within the urban physical boundary of Port Vila. One part of that outer circumference is described as:

"...to the low water mark in a generally north eastern direction the length of the western coast of the Ekaauvat Lagoon (First Lagoon of Erakor)....".

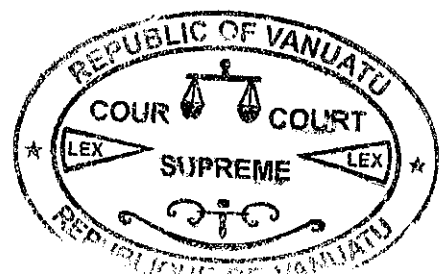
12. The land under consideration lies adjacent the Ramada Hotel site on the western shore of the First Lagoon.

D. Discussion

13. The survey plans produced by Mr Meltenoven and Mr Naki both show the reclaimed land as being between the low water mark and the existing lease boundaries.
14. That fact, together with the definition of "public land" as set out in Order No 26 of 1981, are the basis for Ms Ferrieux Patterson's submission that the reclaimed land is within the Municipal area of Port Vila, and is therefore "public land". If correct, the negotiations Migale Limited needs to undertake in order to regularise it's use of the reclaimed area, should accordingly be entered into with the Republic of Vanuatu, not the customary owners.
15. Mr Aron, on behalf of the Republic of Vanuatu, also relies on Order No. 26 of 1981 as being determinative of what land is "public land". However, he maintained that the reclaimed land is actually outside the land described in Order No. 26, and therefore not "public land". While agreeing that the surveys prepared by Mr Meltenoven and Mr Naki appear to show the reclaimed area as being above the low water mark and therefore apparently within the defined public area, Mr Aron sought to categorise the current surveys as being unhelpful. It was his position that the surveys which resulted in Lease Title No. 11/0A24/005 and Lease Title No. 11/0A24/009 being issued were based on Order No. 26 of 1981. At that point in time, namely in 1984-5, the then low water mark was at the boundary of those titles.



16. The subsequent 2011 reclamation has moved the low water mark from where it was to where it currently is. However Order No. 26 of 1981 has not been amended in any way. Mr Aron submitted that when Order No. 26 was drawn up the boundary and the low water mark were one and the same, as the water's edge was a cliff face. The reclamation has altered that, but in Mr Aron's submission, it has not and cannot alter what is "public land" as depicted by Order No. 26 of 1981.
17. Regrettably, despite lengthy and numerous submissions, especially on behalf of Migale Limited, and the provision of several sworn statements in support of each view, neither counsel saw the need to assist the Court by reference to previous authority.
18. In fact, a not dissimilar issue has been discussed by the Court of Appeal in *Terra Holdings Ltd v Sope* [2012] VUCA 16. Although not the *ratio decidendi* for the decision, the Court made the following relevant statement which I consider helpful when looking at the current matter:
- "Mr Sope's submissions assumes that the present title and ownership boundaries will remain in the same positions notwithstanding that the proposed reclamation will move the high and low water marks to the seaward edge of the development. This assumption is correct.** Where the water mark slowly and gradually changes through naturally occurring accretion or erosion of sand the boundary will in law continue to run to the relevant water mark even though the actual area of land within the title may increase or decrease. **However, where the water mark is altered by artificial means, as would occur here, the boundary does not change.** The artificial structure or development which changes the water mark is considered to be an improvement situated on the land within the original boundaries. This doctrine applies equally to State land as to land owned by individuals: Halsbury's Laws of England, 4th Ed., Vol.49, para 298." (emphasis added)
19. In my view, Order No. 26 of 1981 very precisely sets out the area in Port Vila that is "public land". What has occurred is that by reclaiming additional land adjacent to Lease Title No. 11/0A24/100 and Lease Title No. 11/0A24/099 Migale Limited has increased the footprint of land on the water's edge of Lagoon Number One, and as a result moved the low water mark further into the Lagoon than is depicted in Order No. 26 of 1981.
20. Although the language used in Annex 2 refers to the low water mark, the appended survey at Annex 1 has depicted an exact delineation of what is included as "public land" and what is outside it.
21. The moving of the low water mark in this way, if attended also by a moving of the boundary, would adversely affect the rights of the customary owners, whose rights are closely protected by the Constitution. In my view, that would be wrong.
22. Accordingly, I determine that the reclaimed areas of land, as shown in Mr Meltenoven and Mr Naki's surveys, are outside the area of "public land" as depicted and described in Order No. 26 of 1981.
23. It follows that Migale Limited, in order to regularise it's position as registered proprietor of the adjoining land wanting access to and use of the reclaimed land, will need to enter into dialogue with the customary owners of that land, not with the Director of Lands.



E. Result

24. The Claim sought a declaration that the reclaimed areas in front of Lease Title No. 11/0A24/100 and Lease Title No. 11/0A24/099 was "public land". There will be no such declaration issued, for the reasons given above.
25. Further, the claim sought some indication from the Court that the Republic of Vanuatu, through the Director of Lands, should commence to negotiate with Migale Limited in order to include the reclaimed area into one or both the existing leases. The Court cannot accede to that proposed relief either.
26. In relation to this aspect of the Claim, despite it appearing Migale Limited has failed, costs will lie where they fall. The reason for that is that Migale Limited has succeeded in other aspects of the claim. Further, this point was considered to be of some public interest and importance, and costs do not ordinarily follow in such a situation.

**Dated at Port Vila this 19th day of October 2020
BY THE COURT**

