

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

Civil
Case No. 20/1049 SC/CIVL

**BETWEEN: Samson Mahe administrator of the estate of
late Emile Mahe**
Claimant

**AND: Roro Poilapa, Lorry Kaltabanga Bangalulu &
Tilu Bema Charley representing Family
Songoriki**
First Defendants

AND: Vakutono Ione Committee (Inc.) (500560)
Second Defendant

**AND: Blue Spring Evergreen Farm and Plantation
Limited**
Third Defendant

**AND: Hans Yequ Hans as Director of Blue Spring
Evergreen Farm and Plantation Limited**
Fourth Defendant

AND: Republic of Vanuatu
Fifth Defendant

Date of Hearing: 27 May 2020
Before: Justice V.M. Trief
In Attendance: Claimant – Mrs M.N.F. Patterson
First and Second Defendants – no appearance
Third Defendant – Ms S. Mahuk
Fourth Defendant – Mr J.C. Malcolm
Fifth Defendant – no appearance (State Law Office)

Date of Decision: 4 June 2020

DECISION AS TO INTERLOCUTORY AND CROSS APPLICATIONS

A. Introduction

1. The Claimant occupies land that the Third Defendant is now the registered proprietor of. He alleges that the Third and Fourth Defendant's workers have threatened him and



seeks certain restraining orders. The Third and Fourth Defendants oppose his application and have applied for other restraining orders. I was satisfied that urgency was made out. This decision determines the Claimant's Interlocutory Application for Restraining Orders and the Third and Fourth Defendants' Cross Application.

B. Considerations for the grant of Interlocutory orders

2. Rule 7.5 of the *Civil Procedure Rules* ('CPR') applies to applications for interlocutory orders before a proceeding is started. No defence has been filed so I will deal with the Applications under r. 7.5.
3. The Court may make the orders sought if it is satisfied of the matters set out at r. 7.5(3). That is, that the applicant has a serious question to be tried and, if the evidence brought by the applicant remains as it is, the applicant is likely to succeed. Finally, that the applicant would be seriously disadvantaged if the order is not made.
4. The issues are:
 - a. Is there a serious question to be tried?
 - b. If the evidence remains as it is, is the Claimant likely to succeed?
 - c. Will the Claimant be seriously disadvantaged if the Order is not made?
 - d. Where does the balance of convenience lie?

C. Background

5. The Claimant Mr Mahe is the administrator of the Estate of the late Emile Mahe. The late Mr Mahe was the registered proprietor of leasehold title no. 12/0544/002; Mele Trustees Limited ('MTL') was the lessor and the lease term was 30 years commencing from 30 July 1980 (the 'Original Lease'). The lease expired on 30 July 2010.
6. On 3 August 2009, the lessor of the Original Lease was rectified from MTL to Family Songoriki. The Claimant asserts that he and his family did not know of this change.
7. On 27 October 2010, MTL lodged with the Department of Lands a variation of condition of the Original Lease (extension of 50 years). This has never been registered. I note that this was seeking extension of a lease which had already expired.
8. On 22 August 2011, the Director of Lands registered a Cancellation of Lease of the Original Lease, at the request of Family Songoriki.
9. On 2 October 2019, a new lease title no. 12/0544/060 between the First Defendant (lessor) and the Second Defendant (lessee) was registered over the land previously subject to the Original Lease. On the same date, this lease was transferred from the Second Defendant to the Third Defendant (the 'New Lease and Transfer').
10. The Claimant asserts that he and his family have occupied the subject land for over 80 years.

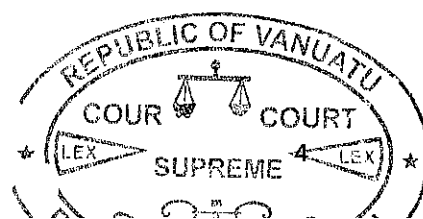


D. Issue: Is there a serious question to be tried?

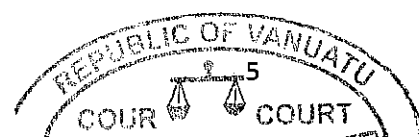
11. The Claim is brought under s. 100 of the *Land Leases Act* alleging that:
- a. The 3 August 2009 registration of the rectification of the lessor of the Original Lease from MTL to Family Songoriki was obtained by fraud or mistake;
 - b. The 22 August 2011 cancellation of the Original Lease was obtained by mistake or fraud;
 - c. The 2 October 2019 registrations of the New Lease and Transfer were obtained by fraud or mistake; and
 - d. Includes a claim for damage done to the Claimant's property.
12. Mrs Patterson submitted that the 3 August 2009 rectification of the lessor to Family Songoriki flew in the face of restraining orders by Lunabek CJ and Fatiaki J. Therefore the registration of that rectification was obtained by fraud or mistake. Consequently the cancellation of the Original Lease at the request of Family Songoriki was obtained by fraud or mistake. As I understood the Claimant's case, he alleges that the registrations of the New Lease and Transfer was obtained by fraud or mistake as Family Songoriki were the lessor and further, those registrations would not have occurred if the extension of the Original Lease sought by MTL had been registered. The New Lease is also attacked for having been made at an under-value.
13. I take the following into account in considering where or not there is a serious question to be tried:
- a. The case law is clear that only persons with a registrable interest can bring a claim under s. 100 of the *Land Leases Act* alleging that a lease registration was obtained by fraud or mistake. The Claimant will have only have a registrable interest if the Court finds that the change of lessor and the cancellation of the Original Lease were wrongfully obtained and that the extension of lease was not registered when it should have been.
 - b. However, the cancellation of the Original Lease occurred in 2011. Further, that lease had already by its terms expired on 30 July 2010. The cancellation was a formality in removing the lease from the Land Leases Register (the 'Register').
 - c. The Claimant brings his action now 9 years later. Ms Mahuk and Mr Malcolm submit that the Claimant's delay in bringing proceedings could result in loss of his potential rights. The Register is everything. Events had moved on since 2009 as reflected in the Register but the Claimant took no steps to confirm the registration of the desired extension of lease nor any other steps to protect his position.



- d. In addition, there could be any number of reasons why the Director of Lands did not register the extension of lease. That is a matter for determination at trial. Ms Mahuk and Mr Malcolm submit that the Claimant has never obtained registration by transmission. It is not clear that that has ever been sought. Therefore even if the Claimant proves that MTL lodged the variation of lease, it does not follow that it should have been registered.
- e. Proving that the rectification of the name of the lessor and cancellation of the Original Lease were obtained by fraud or mistake is a necessary precondition to the Claimant successfully proving that the registrations of the New Lease and Transfer were obtained by fraud or mistake.
- f. The Claim by its prayer for relief seeks orders in favour of MTL. MTL has not been named as a Defendant to this proceeding and it should be.
- g. Without a registrable interest, the Claimant is a mere occupier of the land. Ms Mahuk and Mr Malcolm submitted that the Claimant is not a lawful occupier and at best, can claim a right to occupy under s. 17(g) of the *Land Leases Act*. However, and importantly, no right under s. 17(g) has been pleaded in the Claim.
- h. The Claimant also claims for damage done to his property including trees, vegetables and other vegetation. The Third and Fourth Defendants assert that the Claimant has in turn damaged 26,000 kava plants on the land, and so he comes to the Court with unclean hands. There is no doubt that damages is an adequate remedy for damage to property which counts against the issue of restraining orders.
14. For the reasons set out above, I do not consider that the Claimant has a serious question to be tried such that restraining orders should be made. My answer to the question, "Is there a serious question to be tried?" is, "**No.**"
- E. Issue: If the evidence remains as it is, is the Claimant likely to succeed?
15. In addition to the matters discussed in para. 13 above, the Third and Fourth Defendants' dispute that the subject land is part of Ponatoka land such that there was any breach of the restraining orders by the 2009 rectification of the lessor from MTL to Family Songoriki.
16. For all of these reasons, I am not satisfied that if the evidence remains as it is, that the Claimant is likely to succeed. My answer to the question posed is, "**No.**"
- F. Issue: Will the Claimant be seriously disadvantaged if the Order is not made?
17. The Third Defendant is the registered proprietor of the land that the Claimant is in occupation of. The Third Defendant has indefeasible title pursuant to the *Land Leases Act*.



18. Moreover, the Third Defendant has given the Claimant notice to quit. From its perspective, the Claimant is a squatter on its land.
19. As the Claimant is not the legal owner of the land, he will not be seriously disadvantaged if the Order sought is not made. My answer to the question, "Will the Claimant be seriously disadvantaged if the Order is not made?" is **"No."**
- G. Issue: Where does the balance of convenience lie?
20. The purpose of restraining orders is to maintain the status quo pending the outcome of the proceeding. The restraining orders sought seek to exclude the Third Defendant wholly from its land. Such orders cannot issue.
21. I also note counsel's objections that the orders sought by the Claimant are directed at the world at large and include people who are not party to the Claim.
22. By their Cross Application, the Third and Fourth Defendants seek orders restraining the Claimant from interfering with the Third Defendant's enjoyment of his property, and restraining the Claimant, his family and his assigns from trespassing beyond the confines of his residence as fenced.
23. I consider that the Third and Fourth Defendants would be seriously disadvantaged if the restraining orders they seek are not made. That said, the Claimant has trees and gardens beyond the curtilage of his residence and so any orders must also include these.
24. I will issue restraining orders now but invite counsel to put forward agreed consent orders for variation of those orders if necessary.
25. I am satisfied from the evidence of Olwin Wai and Rose Mary Mahe, the Claimant's wife, that on 27 May 2020 threats were made against her by persons at the direction of the Third and Fourth Defendants' agent Brino, the guardian of the farm on the Third Defendant's adjoining property. She felt intimidated and was frightened. Accordingly, orders must issue restraining the Third and Fourth Defendants and their assigns from threatening the Claimant and his family.
26. The balance of convenience is in favour of granting the orders sought by the Third and Fourth Defendants, with orders to protect the Claimant from any further threats by assigns of the Third and Fourth Defendants.
- H. Result and decision
27. In conclusion, I answer each of the issues in this judgment as follows:
- a. Is there a serious question to be tried? **"No."**
 - b. If the evidence remains as it is, is the Claimant likely to succeed? **"No."**
 - c. Will the Claimant be seriously disadvantaged if the Order is not made? **"No."**



- d. Where does the balance of convenience lie? **The balance of convenience is not in favour of the Court granting the orders sought by the Claimant. It does favour granting the orders sought by the Third and Fourth Defendants with orders to protect the Claimant and his family from any further threats by assigns of the Third and Fourth Defendants.**
28. In the circumstances, I decline to exercise my discretion to grant the orders sought in the Claimant's Interlocutory Application and dismiss that application.
29. The Third and Fourth Defendant's Cross Application is **granted**.
30. I will hear counsels on the question of costs of the Applications at the next conference.
31. I order that:
- a. The Claimant, his family and his assigns are restrained from interfering with the Third Defendant's development on leasehold title 12/0544/060;
 - b. The Claimant, his family and his assigns are restrained from trespassing beyond the confines of the Claimant's residence as fenced and its surrounding curtilage, and beyond his existing gardens and plantations.
 - c. The Third and Fourth Defendants and their assigns are restrained from threatening or intimidating the Claimant, his family and his assigns.
32. This matter is listed for Conference **at 9.30am on 10 June 2020**.

**DATED at Port Vila this 4th day of June 2020
BY THE COURT**


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V.M. Trief
Judge

