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

Judicial
Review Case No. 23/3273 SC/JR

BETWEEN: **Family Kalsakau represented by Ephraim Kalsakau, Hendon Kalsakau, Alatoi Ishmael Kalsakau jospha Kalsakau, Korofatu Kalsakau, Yoan Tarimata Kalsakau, Steven Kalsakau, Ian Kalsakau, Kalpokoro Kalsakau, Worai Kalsakau, Seretangi Kalsakau, Edward Kalsakau, Naru Kalpeau Kalsakau**

First Claimants

AND: **Ifira Land Management Corporation Limited**

Second Claimant

AND: **John Nalwang in his capacity as the Acting National Coordinator of the Customary Land Management Office**

First Defendant

AND: **Jeffrey Tokatakee, Nisos Meneai, Peter Tulangi, Samson Abock, Kalmaling Managawai and Antonio Kaltaki**

Second Defendants

Date of Hearing: ***15th February 2024***
Date of Judgment: ***16 February 2024***

Before: ***Justice Oliver Saksak***

Counsel: ***Mr Sakiusa Kalsakau for the First and Second Claimant***
Mr Freddie Bong for First Defendant
Mr Avock Godden for Second Defendants

JUDGMENT

Introduction

1. The claimants filed an urgent claim for judicial review on 27th November 2023. They also filed an urgent application for interim orders on the same date.

2. In support of the claim and application the claimants filed a statement as to urgency by Counsel, an undertaking as to damages and a supporting sworn statement by Christian Kaltapang.

3. I heard the application exparte and issued orders on 28th November 2023-
   a) Suspending the effect of the Greeen certificate issued on 17th November 2023 (the subject of this proceeding) pending final determination,

b) Restraining the second named Defendants from holding themselves out as declared custom land owners pursuant to the Green Certificate (under challenge).

c) Restraining the Second Defendants from effecting any rectification of leases and from demanding and collecting any land rents.

d) Giving parties liberty to apply on 48 hours notice.

e) Directing the Defendants to file their defences by 26th January 2024, and

f) Fixing the Rule 17.8 hearing for 2nd February 2024.

4. The First Defendant filed a defence on 14th February 2024. Relying on Article 95 (2) of the Constitution and Kalotiti v Kaltapang [2007] VUCA 25, the First Defendant submitted he issued the certificate in good faith on the information provided.

5. The Second Defendant filed a defence on 29th January 2024. They say the claimants are not entitled to the orders sought because they alleged their claims are misconceived based on Judgment No. 57 which is not the judgment under which the "Green" Certificate was issued. They also contend that the claimants have not pleaded their claims properly in that they claim ownership of the land covered in the certificate without ascertaining which judgment grants them the entitlement giving them the legal basis to file the proceeding.

6. At the hearing of the claim under Rule 17.8 Mr Bong handed up the *" Green"* Certificate with a copy of Judgment No. 62 and conceded verbally that the Frist Defendant was simply relying on the defence they filed and would abide orders of the Court. Counsel conceded to Mr Kalsakau's submissions that the Court should determine the whole case without going any further hearing to minimize time and costs to every stake-holders.

7. Mr Godden disagreed saying the Court should allow time for the defendants to file and serve their evidence and proceed to a substantive hearing.

Discussion

8. First I consider whether I should consider and decide the whole claim of the claimants at the same time as hearing it as a preliminary prima facie consideration under Rule. 17.8.

9. I see no reason why I should not, as there is nothing in Part 17 of the Civil Procedure Rules specifically prohibiting the Court from doing so.

10. The only reason why Mr Godden opposed the submission by Mr Kalsakau and Mr Bong who made verbal concession in Court was because his clients have not filed any evidence to support their defence. Their failure shows that they did not comply with Rule 17.7 (4) which states:

> *"Response*
>
> ***17.7***
>
> *(4) With the defence the defendant and other person must file:*
>
> *(a) detailed grounds for disputing or supporting the claim; and*
>
> *(b) a sworn statement supporting those grounds."*

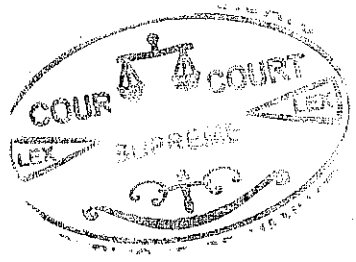
11. The Second Defendants filed their defence on 29th January 2024. They should have filed their evidence with that defence and they failed to do so.

12. Similarly the State. They filed a defence but no sworn statement containing the supporting evidence. Mr Bong handed up over the Bar Table a copy of the "Green" Certificate and the Judgment No. 62 which I presume, formed the basis of their verbal concession made in Court. That concession rendered the defence filed without value and relevance.

13. The documents produced by Mr Bong are copies of official documents and records and the Court can and will take judicial notice of them and admit them as evidence.

14. The purpose of filing a claim together with its supporting evidence by sworn statements by the claimant and a defence and evidence by the defendants is to assist the Court at the conference hearing under Rule 17.8 decide the case.

15. The Court must be satisfied that the claimant-
    a) Has an arguable case,
    b) He/ She is directly affected by the decision (under challenge),
    c) There is no undue delay in making the claim, and
    d) There is no other remedy that resolves the matter fully and directly.



16. For the Court to be satisfied Rule 17.8 (4) states:

"17.8
(4) To be satisfied, the judge may at the conference:

(a) consider the papers filed in the proceeding; and
(b) hear argument from the parties."

17. What is the purpose of hearing arguments at the rule 17.8 conference? It is so that the Judge can decline to hear a case and strike it out or, make necessary and appropriate orders under Rule 17.9 (1) and (2).

18. This is a judicial review claim filed on an urgent basis explaining why exparte orders were sought and issued on the same date the claim was filed. The momentum flows from that urgency. The defendants failed to keep the momentum by filing the defences without sworn statements within the 14 days periods required under Rule 17.7 of the Rules.

19. It is for the reason of urgency and on the basis of the Rules that I have reached the conclusion that I should decide the whole of the claim together with the matters under Rule 17.8 (3).

20. Next I consider the matters required under Rule 17.8 (3). First whether the claimants have an arguable case? I have no difficulty in finding that the claimants have an arguable case.

21. The claimants have disclosed in the sworn statement of Champion Kalsakau a copy of Judgment No. 57 of the Joint Court of the New Hebrides dated 24th January 1930 from pages 7 to 17. On page 16 the Court stated:

> ***" IT IS THIS DAY ADJUDGED:***
> .....
> .....
> ***There shall be assigned to the natives of Fila a reserve of land known as " MALAPOA" on the left bank of the Tagabe River....."***

22. In my view the interest and claims of the First Claimants to Malapoa land arises directly from this passage of the judgment. They are therefore directly affected by the decision of the First Defendant issuing the Green Certificate to the Second Defendants.

23. Mr Gordon argued that Judgment No. 57 does not afford the claimants any right or entitlement to file their claims. That argument is untenable. The Second Defendants argued there is

another document which the First Defendant relied on to grant them their Green Certificate. The Second Defendants do not have the evidence to support their defence and argument.

24. If the document they are referring to is Judgment No. 62 which was handed up by Mr Bong with the Green Certificate in favour of the Second Defendant, then that judgment falls far short of making any declaration of customary ownership in favour of Chief Tawara and family. There is nowhere in the said judgment is there reference made to *" Chief Tawara and Family"* which was adopted by the First Defendant and used in the Green Certificate dated 17th November 2023.

25. The only reference in the judgment is found on the front page which states:
" A deed of sale under private seal executed at Vila 19th June 1899 between TAVARA and other natives of the tribe of Vila of the one part, and Mr Jacques Rodolphe....."(My emphasis)

26. It is to be noted that what is referred to here is a deed of sale, not a declaration of customary ownership. And it is also trite and well established that a deed of sale is no proof of customary ownership of customary lands. (see Family Makono v Orah [2020] VUCA as applied in Kalsakau v Manrealima and others [2022] VUSC 14).

27. It is to be noted also that the deed of sale was between *" Tavara (not Tawara) and other natives of the tribe of Vila."* It was not a sale by Tavara alone but it included ***" other natives of the Tribe of Vila"*** which qualifies the claimants as having a direct interest as well in that sale. Therefore regardless of whether it is the Judgment No. 57 or No. 62, the claimants are directly affected by the decision of the National Coordinator, First Defendant. And it is that decision that is under challenge. It was not a decision of the Second Defendants therefore they have no course of action and should not be a party to this proceeding anyway. That makes their call for time to file evidence to support their defence less attractive and without any relevance and basis.

28. Next, has there been undue delay in making the claim? I am of the view there was no undue delay. The certificate is dated 17th November 2023. The claimants filed the claim 10 days later on 27th November 2023. There was no undue delay.

29. Finally, is there any other remedy to resolve the matter fully? The answer is "No". The certificate appears to be final and the only way to challenge it is by way of Judicial review of the decision.

The Result

30. The claimants have met all the requirements in Rule 17.8 (3). They are therefore entitled to the orders that they seek in the claim. I enter judgment in favour of the claimants.

31. The final orders are-

a) The First Defendant's decision to issue the Certificate of Recorded Interest in land on 17th November 2023 is called up and quashed.

b) A Declaration that Judgment No. 57 dated 24th January 1930 and Judgment No. 62 dated 11th July 1930 by the Joint Court of the New Hebrides are not judgments declaring customary ownerships and are not capable of creating any recorded interests to land.

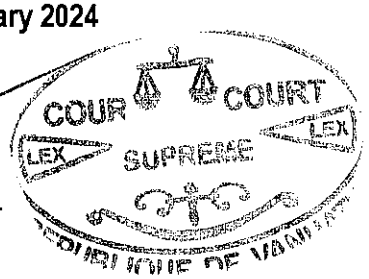
c) A Declaration that the purported deed of sale relied on by the Defendants to create a recorded interest in land could not in law be taken as a valid declaration of custom land ownership.

d) The Second Defendants, their families and relatives be hereby prohibited from asserting, representing and holding themselves out as descendants of Nareo Marik Atlangi, unless and until they have been validly declared by a competent Court or Tribunal.

e) The Second Defendants are hereby restrained from acting upon the Certificate dated 17th November 2023 to effect any rectification of leases and to collect or demand payments of land rents.

f) The First and Second Defendants will pay the costs of the claimants on an indemnity basis as agreed or taxed.

DATED at Port Vila this 16th day of February 2024
BY THE COURT



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Hon. Oliver Saksak
Judge