

BETWEEN: JACK NATMANING NATUMAN
Appellant

AND NAKOU IAWHA
First Respondent

AND: WEST TANNA AREA COUNCIL LAND TRIBUNAL
Second Respondent

AND: NAKOU NATUMAN, KODNY NATUMAN,
NISIKAPIAL TUAKA, JOHN IARAMAPEN AND
JAMES YOKAOAIU
Third Respondents

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice Robert Spear
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Mary Sey

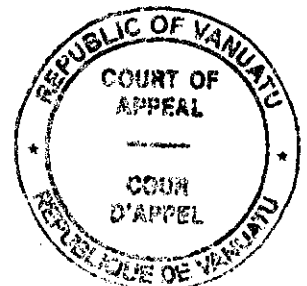
Counsel: -Mr Felix Laumae for the Appellant
-Mr Jack Kilu for 1st Respondent
-Mr Frederic Gilu 2nd Respondent
-Mr Willie Kapalu 3rd Respondents

Date of hearing: 18th November 2013
Date of judgment: 22nd November 2013

JUDGMENT

INTRODUCTION:

1. On 3 October 2013, Fatiaki J. made Interim Ex-parte Orders, among other matters, restraining the Appellant and the First Respondent forthwith from dealing with or developing Taniwenu customary land pending the final resolution of Taniwenu land ownership dispute.
2. On 11 October 2013, the Learned Judge confirmed these orders by dismissing an application by the Appellant to set them aside.
3. These Orders are made in the following terms:

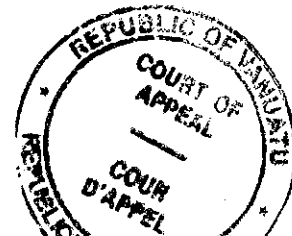


"UNTIL FURTHER ORDER -

1. *The Claimants and the First Defendant, their respective servants, agents and or representatives shall refrain forthwith from dealing with or developing Taniwenu Land in any way or manner, pending the final resolution of Taniwenu Land ownership dispute.*
 2. *There shall be no survey or sub-division works undertaken on Taniwenu Land pending the final resolution of Taniwenu Land ownership dispute.*
 3. *There shall be no creation of leases, or registration of leases or sale of leases within Taniwenu Land pending the final resolution of Taniwenu Land ownership dispute.*
 4. *The Claimants shall provide an account within 14 days and any and all monies already paid to the Claimants shall be paid into Court and kept in a Trust Account to be opened and maintained by the Chief Registrar.*
 5. *The Claimants and the First Defendant, their respective servants, agents and or representatives shall keep peace and order at all times.*
 6. *The First Defendants to serve this Order on the Claimants within 7 days.*
 7. *Costs reserved."*
4. The Appellant now applies for leave to appeal these orders before this Court and files a notice of appeal challenging them.
 5. The Supreme Court claim and this appeal seek to resolve a conflict between competing land tribunal decisions pursuant to its statutory supervisory jurisdiction under s.39 of the Customary Lands Tribunal Act. In that respect, the Appellant and the Third Respondents claim that they are the custom owners of the land. The First Respondent claims that he is the custom owner of the same land.
 6. The Appellant, besides being one of the claimants in the Supreme Court, is also a lessee in respect of a registered lease of land in which he has commenced a subdivision.
 7. The interim orders prohibits the Appellant from continuing with the development until the dispute between the competing custom owners is resolved.
 8. It is necessary to explain how the issues arise.

BACKGROUND

9. This is a very long outstanding dispute over the customary ownership of land known as Taniwenu located on West Tanna.
10. The dispute started back in the condominium period. The Appellant refers and relies on a Land Agreement dated 2nd day of May 1962 bestowing part of the land

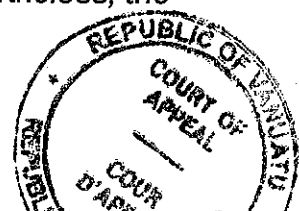


to his ancestors. It was witnessed by both the then French District Agent and British District Agent.

11. The First Respondent obtained restraining orders from the Magistrates court against the Appellant and the Third Respondents on 29 May 2007. These Magistrate's court orders were discharged on 31 July 2007.
12. On 7 July 2008, the Appellant obtained a leasehold title 14/2213/005 from the Third Respondents as custom owners of the land (Lessors) on the basis of the Land Agreement of 2 May 1962.
13. The First Respondent filed proceedings before the Land Tribunal claiming ownership of Taniwenu Land in 2008. On 14 August 2008, the land tribunal made a declaration declaring the First Respondent as the true custom owner of Taniwenu land.
14. The First Respondent also in September 2008, filed a Supreme Court Claim in Civil Case No.149 of 2008, challenging the validity of the Appellant's Leasehold title 14/2213/005. The Supreme Court struck out this claim on 1 June 2009 pursuant to Rule 9.10(3) (b).
15. The Appellant challenges the declaration of the Land Tribunal dated 14 August 2008 by:
 - (a) Filing an appeal against the declaration of the Land Tribunal of 14 August 2008 before the Tanna Island Land Tribunal; and
 - (b) Filing a judicial review claim in the Supreme Court claim No.67 of 2009.
16. These two matters relate to the dispute of customary ownership of Taniwenu Land on West Tanna and are both pending determination.

INTERIM ORDERS OF 11 OCTOBER 2013

17. On 11 October 2013, the primary judge considered the application of the Appellant to set aside the interim *ex parte* orders of 3 October 2013 and dismissed the application. They were confirmed by the primary judge in his ruling of 11 October 2013.
18. The primary judge explains the rationale of the interim orders in these terms:
 2. *The basis on which the "ex parte" injunction was granted was that the Court was satisfied from the materials presented in the application that there was a serious question to be tried between the parties as to the true custom owners of "Taniwenu" land and that damages was an inadequate remedy in the circumstances.*
 3. *In particular, the court was concerned that the first defendant had a subsisting declaration of customary ownership in his favour over the said land, and, despite the claimants having filed an application to set aside the said decision and despite no decision having been given in the claimant's appeal, nevertheless, the*



claimants commenced clearing and subdivision works on part of the disputed land.

4. *The clear intention and purpose of the interim injunction was to maintain the "status quo" until the matter could be fully considered at an inter parties hearing which was immediately sought by the claimants by an application dated 4 October 2013 in which, the claimants seek the setting aside of the injunction in its entirety or alternatively, the variation of the injunction "to allow for all (unspecified) monies due to custom owners (to) be paid (into) the trust account (to) be kept in the court".*

...

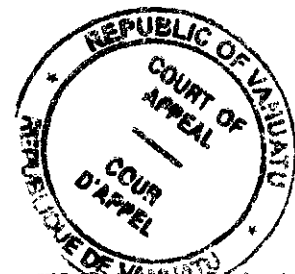
20. *Undoubtedly, a purpose of a prohibitory injunction is to restrain action(s) that seeks to alter the "status quo" that exists between disputing parties before the determination of the dispute.*

21. *In this case, the actions of the claimants on the land comprised within the lease would irreparably and irreversibly alter the original character and natural topography of the land as well as its existing usage which includes cattle grazing and subsistence gardens. In addition, subdividing the land and leasing the subdivided plots would effectively divest the land from its eventual custom owners for a period of 75 years (i.e. the duration of the leases) and finally, the claimants' current unilateral actions denies the eventual custom owners of "Taniwenu" land, any say as to how? and what? developments (if any) should take place on their customary land.*

22. *In my view the "balance of justice" in this case strongly favours the first defendant and the maintenance of the "status quo" pending the final determination of the true custom owners of 'Taniwenu' land by a land tribunal and which is presently held in abeyance because of the claimants' own challenge to the defendant tribunal's determination in favour of the first defendant."*

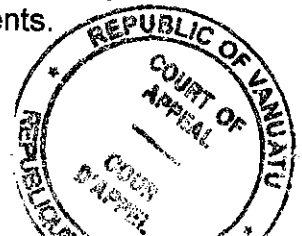
APPEAL HEARING

19. The Appellant sought leave to appeal and filed a notice of appeal against the orders of 11 October 2013.
20. Mr Laumae of Counsel submitted on behalf of the Appellant that the making of the interim orders of 11 October 2013 was wrong in law and fact on the following three main grounds:
- First, the orders interfere with the rights of the Appellant and others as protected under the Land Leases Act who have registered leases on land which the orders of 11 October 2013 cover; and
 - Secondly, there is no substantive cause of action filed or pending challenging the validity of the Appellant or any other person's leases in the area of the land covered by the said orders; and



- Thirdly, the orders made are an abuse of the process of the Court.

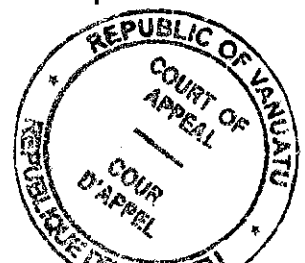
21. We first consider grounds 3 and 2.
22. In ground 3, the Appellant contends that the First Respondent had challenged the validity of the Appellant's leasehold title 14/2213/005 in the Supreme Court claim no. 149 of 2008 which was struck out. The First Respondent did not appeal the decision of the Court made on 1 June 2009 to strike out the claim.
23. The Appellant also contends that the First Respondent obtained restraining orders from the Magistrate's Court on 6 August 2009 in Magistrate's Court claim no. 82 of 2009 restraining the Appellant from developing his leasehold title 14/2213/005 which later on were vacated on 15 September 2009. The First Respondent did not appeal the decision of the Magistrate's Court.
24. The Appellant submitted that considering the matters submitted above and coupled with the manner by which the First Respondent applied and obtained the interim orders it amounted to an abuse of process. We do not agree with these submissions. There is no material evidence to support a conclusion of an abuse of process.
25. As to ground 2, the Appellant submits that the interim orders of 11 October 2013 were made without any substantive cause of action having been filed challenging the validity of the Appellants leasehold title 14/2213/005.
26. We do not agree with this submission. On 14 August 2008, the First Respondent obtained a declaration from a land Tribunal declaring him custom owner of the Taniwenu Land on West Tanna. The Appellant challenged that declaration by filing an appeal before the Tanna Land Tribunal which is still pending for determination between the Appellant and the First Respondent.
27. We agree with the primary judge that on the material presented in the application, there was a serious question to be tried between the parties as to the true custom owners of Taniwenu land. The Appellant's appeal before the Land Tribunal was on foot and pending determination on the customary ownership of Taniwenu land between the parties.
28. We now consider the First ground. The Appellant submits that he has indefeasible title in leasehold title 14/2213/005 that cannot be defeated except as provided by the Land Leases Act (ss.15 and 14).
29. It is common ground that the Appellant has a leasehold interest in the land in question as he is on the Register. The law protects that position as we have said in many Court of Appeal Judgments. **Ratua Development Ltd v. Ndai** [2007] VUCA 23 illustrates the point.
30. The factual issues in the present case are particularised in the following respects:
31. First, the Taniwenu land customary ownership is uncertain as it is in dispute between the Appellant, the First Respondent and the Third Respondents.



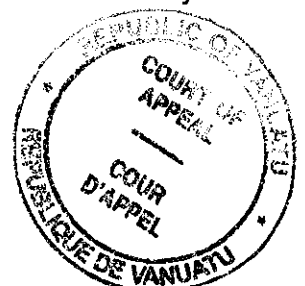
32. Second, despite the dispute on the customary ownership of Taniwenu land, the Appellant obtained his leasehold interest from the Third Respondents and got registered on the Register.
33. Third, it is common ground that when there is a dispute on the ownership of a customary land, section 8 of the Land Reform Act provides the legal means by which the competing interest between Lessors are resolved pending the determination of the true customary ownership of the land in question. This is not such a case on the material before the court.
34. Fourth, the Appellant says that he had obtained his leasehold title 14/2213/005 from the Third Respondents as custom owners of Taniwenu based on the land agreement of 2 May 1962.
35. We note that on its face, it is an agreement. It is not a court judgment. It is of questionable value for the purpose of enforcement after the Independence Constitution of 1980 (chapter 12). In the absence of any other evidence, that land agreement would not appear to be sufficient as a basis for granting of a lease under s.100 of the Land Leases Act. In that respect, the Judgment of this court in **Kalotiti v. Kaltapang** [2007] VUCA 25 does not apply to the Appellant's case.
36. However, the Appellant's leasehold title is on the Register. Courts must confront and deal with facts and circumstances of each case. Based on the factual circumstances of this case, the way forward is for the injunctions to be on foot for a period of four weeks. The First and Third Respondents will need to issue a section 100 proceeding within the four week's period.
37. If there is no proceeding under s.100 instituted within the four weeks, the injunctions will lapse.
38. If a section 100 proceeding is issued, the injunctions will be stayed so long as the Appellant provides accounts of the money spent or expenses of the development of the lease with the production of receipts until the determination of the customary ownership of Taniwenu land on West Tanna.
39. We issue the following orders:

ORDERS

1. In the event of the first respondent instituting and serving within 28 days a claim seeking rectification under section 100 of the Land Leases Act [Cap.163], the injunction orders made on 11 October 2013 in Civil Appeal Case 37 of 2013 be stayed until further order of the Court.
2. The stay of the injunction orders made on 11 October 2013 in Civil Appeal Case 37 of 2013 is conditional upon the appellant complying in full respects with the following:-



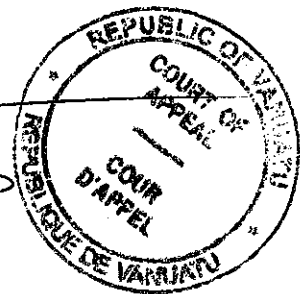
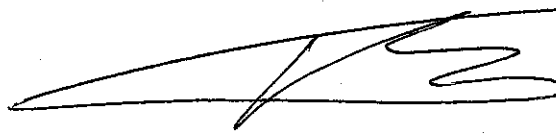
- a) The appellant from the date of these orders maintaining proper records to show all monies received by the appellant in relation to the development on the leased land and all monies paid by the appellant of or in respect of that development from the date of these orders.
 - b) The appellant providing to the solicitors for the first respondent and the solicitors for the third respondent no later than the last working day of each calendar month, commencing in December 2013, a statement of all monies received by the appellant of or in relation to the development or the proposed development, in that calendar month and a statement of all monies paid by the appellant of or in relation to the proposed development in that calendar month together with a copy of all invoices received by the appellant upon which the payment or payments referred to in the schedule of payments for that calendar month made.
 - c) The appellant making payment of monies of or in relation to the development or the proposed development only to any third party that is to a person or entity unrelated in any way to the appellant or his family to the intend that, apart from monies paid to or in relation to the proposed development to third parties, there be no monies paid by the appellant to himself or any person to whom he is related.
 - d) At the written request of the lawyers for the first respondent or the third respondent on two business days notice, the appellant take all reasonable steps to make available to an accountant nominated in writing by the lawyers for the first respondent or the third respondents the records of the appellant to enable that accountant to verify to the extent necessary the accuracy of the statements provided from month to month in accordance with the above directions.
3. Leave to the first respondent or the third respondents on two days notice to the appellant to apply to the Court for an order lifting the stay of the injunction or injunction orders made on 11 October 2013 on the ground that the appellant has not complied fully and in every respect with the conditions set out above upon which the injunction orders are stayed. Such application is to be made to a Judge in Civil Appeal Case 37 of 2013.
 4. In the event that the first respondent or the third respondents do not institute within the period of 28 days from the date of these orders the proceedings referred to in Order 1 hereof, the appeal is allowed and the interlocutory injunctions made on 11 October 2013 are discharged.



5. Subject to orders 1, 2, 3 and 4 hereof, the appeal is dismissed.
6. Costs in this Court are awarded to the First, Second and Third Respondents on standard basis to be agreed or determined.
7. In all other respects the matter is remitted to the Supreme Court for further hearing and determination of the issues between the parties.

DATED at Port-Vila this 22nd day of November 2013

BY THE COURT



Vincent LUNABEK
Chief Justice