

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

CIVIL APPEAL CASE No. 18 OF 2015

**BETWEEN: KOUBAK MARTIN, KOUBAK MARCEL
AND KOUBAK RONO**

Appellants

AND: ABONG MARCELIN
First Respondents

AND: LITOUNG LUCIEN
Second Respondent

AND: BLAISE TOKTOK
Third Respondent

AND: VIDEL VANUSOKSOK
Fourth Respondent

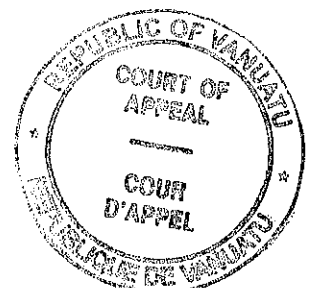
AND: ALEX MELEUM AND AMIE MELEUM
Fifth Respondent

AND: REPUBLIC OF VANUATU
Sixth Respondent

AND: FRANCOIS BATICK
Seventh Respondent

Coram: Hon. Chief Justice Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Mary Sey
Hon. Justice Richard David Chetwynd

Counsel: Mr. James Tari for the Appellants
Mrs. Evelyn Blake for the Second and Third Respondents
Mr. Colin Leo for the Fourth & Seventh Respondents
Ms. Christine Lahua for the Sixth Respondent



Date of Hearing: 16 July 2015

Date of Judgment: 23 July 2015

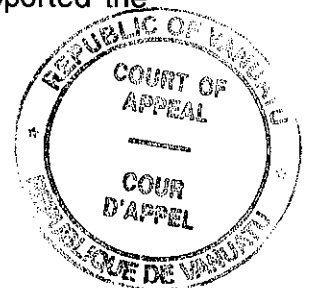
JUDGMENT

Introduction

1. This is an appeal against the entire judgment of Harrop J dated 27 November 2014 in which an order for rectification of the land leases register was made to cancel the registration of lease title 09/1542/005 (the 005 Lease) pursuant to section 100 of the Land Leases Act [CAP 163]. The appellants in their notice of appeal seek the following relief:-
 - 1) That the judgment and declarations or orders made be set aside;
 - 2) That any consequential decisions taken to enforce the decision shall be null and void and of no effect; and
 - 3) costs.

Background

2. The appellants do not dispute the findings of fact by the primary Judge. In summary, the area covered by the 005 Lease was disputed by the parties. The first decision as to custom ownership of the land was made by the Pelongk Sorsambi Custom Lands Tribunal (the PSCLT) on 2 July 2010. The PSCLT decision identified 26 tribes and declared them custom owners of their respective nasara within the 005 Lease which included the appellants. The appellants then appealed the PSCLT decision to the South Malekula Area Land Tribunal (the SMALT). Whilst their appeal was still pending the appellants registered the 005 Lease on 14 February 2011 in their names. Koubak Martin and Koubak Marcel were the lessors and Koubak Rono was the lessee. On 12 July 2011 the SMALT gave a decision that there were 36 and not 26 nasara with different custom owners including the appellants in the area covered by the 005 Lease.
3. As the 005 Lease had by then been registered the only recourse available was to challenge the registration pursuant to section 100 of the Land Leases Act.
4. This was the claim filed by the first, second and third respondents as claimants in the court below. It was noted by the Judge in his decision that the fourth and fifth respondents who were named as defendants in the court below supported the



claim and the sixth respondent, the State being also a defendant did not oppose the claim. We accept that this is not disputed.

5. The appeal against the judgment of the court below is now advanced on the grounds that the Supreme Court erred in law and fact in deciding to cancel the appellants interest in the 005 Lease because:

- 1) The claimants had an interest to invoke the power of the court under section 100 of the Land Leases Act, whereas custom ownership are not interests that can give rise to the power of the court under section 100;
- 2) The failure of lawyers representing the appellants to prosecute the appellants case which meant the Supreme Court did not take into account the merits of the case;
- 3) The appellants had properly followed all the procedures and processes leading to the registration of their interest in the 005 Lease; and
- 4) All the authorities whose names appeared on the Department of Lands check list have all given their approval for the 005 Lease to be registered under the appellants' name.

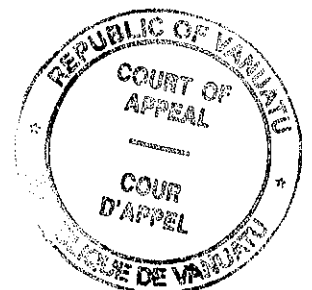
Discussion

6. Section 100 of the Land Leases Act [CAP 163] as enacted by Parliament gives the court jurisdiction to rectify the land leases register by directing that any registration be cancelled where it is satisfied that the registration was obtained, made or omitted by fraud or mistake. It relevantly states:-

" 100. Rectification by the Court

(1) *Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is so empowered by this Act or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.*

(2) *The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default."*



7. In their first ground of appeal, the appellants argue that in law custom owner issues are not interests that can invoke the power of the Court under section 100.
8. The pleadings in the court below show that the issue was whether the 005 Lease was obtained by fraud or mistake because the lessors were granted the lease over the whole area in dispute when at the time of registration they were custom owners of only one nasara out of the 26 nasaras in the area leased to their knowledge.
9. The Judge at paragraph 41 of the judgment said:-

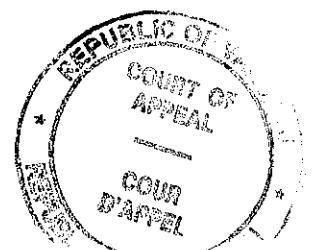
"...The mistake was in registering a lease purportedly granted over the whole area by the lessors when at the time of registration they owned only one of 25 nasaras contained within the custom land boundary in question. That was the position at date of registration by virtue of the PSCLT decision. While it was under appeal, the appeal was by the first defendants. By registering the lease they circumvented both the PSCLT decision and the risk of their appeal being unsuccessful, as it later proved to be."

10. The lease was cancelled on the basis that it was registered by mistake because the appellants as lessors were not the custom owners of the whole area under the lease. This accords with what this Court has said in its decision in Ratua Development Limited v Dai [2007] VUCA 23 that:-

"...That is not to say that there is no remedy available to a person claiming to be the custom owner of land in respect of which a lease naming someone else as lessor has been or is about to be registered. In a case where the title of the registered proprietor of the leasehold interest is not protected by s. 100 (2) of the Act, a custom owner claiming to be the party who should be the lessor may have available to him a remedy by way of cancellation of the registration of the lease which shows another party as the lessor. In proceedings to enforce such a remedy, the Court would have power to make interim orders having an effect similar to a caution".

(emphasis added)

11. The appellants in relying on the Ratua decision have misconstrued what the Court said. The first respondents as custom owners did not seek rectification of the lease but sought an order for the cancellation of the registration of the 005

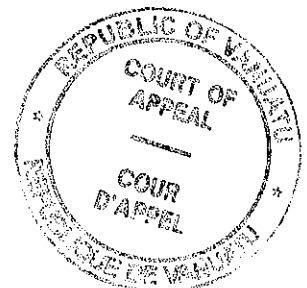


Lease as the Judge found that the 005 Lease was registered by mistake over land belonging to other custom owners as well.

12. As to ground 2, the appellants submitted that the Judge made the orders to cancel registration of the lease because the appellants' lawyers failed to prosecute their case. On the basis of what is said in relation to ground 1 above, the claim in itself alleges fraud and mistake and the Judge made a finding as to mistake which led to the registration of the 005 Lease. That was the reason for the cancellation of the registration of the 005 Lease.
13. The case was delayed and prolonged for many reasons including the non availability of counsel which the Judge had turned his mind to before proceeding by way of a formal proof hearing and making the findings that he made. The Judge relevantly says at paragraph 25 of the judgment that:-

"..I have gone to extraordinary lengths to try to ensure that the first defendants' position was put fully before me, I now proceed to deal with the case on formal proof basis on the information on file, which includes the documents filed by them. I would have been justified in striking out the first defendants' defence but prefer to take into account the documents they have filed. Regardless of the first defendants' conduct, the claimants must still establish their claim; an untenable claim is not made tenable by the procedural defaults of a defendant".

14. There is no basis for the appellants to argue that the Judge made the Orders for the cancellation of the registration of the lease because of the failures of their counsel. He made the Orders because the lease purported to give the lessee rights over land of which the lessor was not the custom owner.
15. As to grounds 3 and 4 the appellants say that they complied with all the procedures to have their lease registered and obtained all the approvals to do so from every authority on the Department of Lands check list. This argument in our view is misconceived as it fails to appreciate the application of section 100 of the Land Leases Act. Section 100 empowers the Court to order rectification of the register by cancelling a registration on the basis of fraud or mistake even if all such procedures were complied with.



Conclusion

16. The appeal must therefore be dismissed and the respondents are entitled to costs to be taxed if not agreed.

DATED at Port Vila this 23rd day of July 2015.

FOR THE COURT



**HON. Vincent LUNABEK
Chief Justice.**

