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

Civil Appeal
Case No. 20/870 CoA/CIVA

BETWEEN: Kalkot Mataskelekele for the Kelekele Matas Family

Appellant

AND: Georgie Bakokoto and Philip Bakokoto

First Respondents

AND: Republic of Vanuatu

Second Respondent

AND: The National Bank of Vanuatu

Third Respondent

Date of HEARING:	***10th day of July, 2020 at 10:00 AM***
Date Of JUDGMENT:	***17th day of July, 2020 at 2:00 PM***
Before:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice Sir Bruce Robertson*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice John Mansfield*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Viran Molisa Trief***
In Attendance:	***Mr Kalkot Mataskelekele for Appellant*** ***Mr Sakiusa Kalsakau for First Respondents*** ***Ms Adeline Bani for Second Respondent***

JUDGMENT

Introduction

1. This is an appeal against the decision of a Judge of the Supreme Court issued on 27th April 2020 striking out the appellant's New Amended Statement of Claim, with costs in the sum of VT 75,000.

2. The appellant maintained only two grounds of appeal. The first is that the primary judge erred in holding the appellant had no standing to bring his proceeding in the Supreme Court. The second ground is that the primary judge erred in not granting the interlocutory orders he sought to maintain status quo.

Background

3. On 5th April 2012 Georgie Bakokoto, one of the named first respondents executed Lease Title No. 12/0633/1327 (the Lease) as lessor with himself and Philip Bakokoto as lessees.

4. The Lease was registered by the Department of Lands on 4th June 2012.

5. A caution was lodged on 1st October 2012 by Tommy Zaiseng and was registered on 28th September 2012.

6. On 10th October 2012 Georgie Bakokoto as lessor consented to the registration of the transfer of the Lease from himself and Philip Bakokoto as lessees to Liang Ri Shang and Liang Chen.

7. On 8th April 2013, the caution by Tommy Zaigeng was withdrawn resulting in the registration of the transfer of the Lease to Liang Sheng and Liang Chen on the same date.

8. On 31st October 2012, Mr Mataskelekele filed his statement of claim in Civil Claim No. 204 of 2012. He filed an Amended Claim on 17th December 2018 and a Further Amended Claim on 9th July 2019.

9. On 13th February 2020 Mr Mataskelekele filed a New Amended Statement of Claim. The Claim alleged fraud, mistake and/or negligence first against the first respondents on the grounds (a) they knew the appellant and his family were also disputing the ownership of Falea Iaru customary land, (b) they had used the Chief's Council fraudulently or by mistake on 6th December 2011 to obtain the Lease by using the declaration that referred to another small plot of land instead of the Falea

laru land, and (c) they knew the dispute over Falea laru land would be brought before the Land Tribunal for resolution, yet proceeded to obtain the Lease.

10. As against the second respondent, it was alleged they were aware of the dispute but failed to maintain its status quo, thus assisted the first respondents in registering the Lease.

Relief Sought in the Claim

11. The appellant sought the following reliefs:

"i. Firstly, the 1st Respondents declare as to what remaining amount of money, vehicles and other movable or immovable assets, if any still held by the 1st Respondent relating to the sale and purchase of the Lease and for such money and/or assets to be transferred into the Supreme Court trust account for safe-keeping until further order of the Court;

ii. Secondly, that the 3rd Respondent declare the remaining amount of money held by it in respect to the same transaction, and to the transfer of the sum to the Supreme Court trust account for safe-keeping until further order of the Court;

iii. Thirdly, that the proprietorship of the lease and/or the mortgage registered against that title by rectified in accordance to section 100 of the LLA; and

iv. Fourthly, in the alternative, that the Respondents pay damages, including aggravated damages, for jointly causing the loss of possession, use and enjoyment of the Appellant's ancestral land."

Application to Strike Out Claim of Appellant

12. The first respondents applied for the striking out of the appellant's claim on 13th February 2020 on grounds that (a) the appellant is not the declared custom owner of the land in the Lease, (b) he has no standing; (c) the Supreme Court has no jurisdiction to deal with ownership issues; (d) the claim was an abuse of process; (e) there was no evidence of fraud or mistake; (f) there was no cause of

action disclosed, and (g) the first respondents and all bona fide purchasers of the Lease were prejudiced by not developing their land.

The Judgment

13. The primary judge held in paragraphs 12 and 14 of the judgment that given the concession by Mr Mataskelekele, he had no standing to bring his claims and that it was impossible for the Court to grant the orders he was seeking, and therefore it was inevitable that the claim should be stuck out. Accordingly the Judge struck out the claim in its entirety.

The Issues

14. The two issues are:
    (a) Whether or not the Judge erred in holding the appellant had no standing?; and
    (b) Whether or not the Judge erred in holding that the Court could not issue the interlocutory orders sought in the claim?

Discussion

15. The National Bank of Vanuatu as third respondent did not take part in the hearing of the appeal. The appeal did not concern them.

16. In relation to the first issue, Mr Mataskelekele maintained in his submissions that he and his family have standing and that they do not agree with what the Judge said in paragraph 12 of the judgment. He submitted he thought the Judge may have misheard what he said.

17. At [12] the Judge said:

"12. Mr Mataskelekele ultimately agreed that he had no standing to bring the claim but he maintained that he did have standing to seek the restraining orders, which was all his present claim amount to."

18. Then at [14] the Judge said:

"14 Given the concession in argument by Mr Mataskelekele, in which he accepted that he had no standing and that what he was asking the Court to do was not possible, it is inevitable that the claim be struck out."

Mr Kalsakau submitted the judge correctly recorded the position of the appellant in paragraphs 12 and 14. Further that the judge had also correctly recorded the appellant's position in paragraph 17 of the judgment that Mr Mataskelekele needs to establish his customary ownership in the correct form.

19. At [17] the Judge said:

"Both the first two orders sought were premised on the assumption that Mr Mataskelekele will be declared to be the custom owner of the land in question. However, before this Court is able to endorse Mr Mataskelekele's claim, he needs to establish his customary ownership in the correct form- simply making the bald assertion is insufficient. Without a definitive and authoritative statement to that effect, there is no basis on which he can advance his claims in the Supreme Court. The third and fourth prayers for relief are similarly premature."

20. Mr Mataskelekele included his own notes at TAB C of the Appeal Book but failed to or omitted to include the judge's notes which would have been more reliable and of more assistance to the Court. At the hearing Mr Mataskelekele maintained he has standing. However in a proposition put to him by the Court that no Island Court has determined his ownership, Mr Mataskelekele accepted that under the Custom Land Management Act it is the Nakamal who should hear the dispute, but the Nakamal has not sat since 2012.

21. That is clear indication there is no declaration of custom ownership of land comprised in the Lease being challenged made in the appellant's favour.

22. The Judge was therefore correct in recording that the appellant had no standing to challenge the validity and legality of the Lease in paragraphs 12, 14, and 17 of his judgment.

23. This ground of appeal therefore fails.

24. In relation to the second ground of appeal Mr Mataskelekele submitted that the judge in the Supreme Court had jurisdiction to issue the interlocutory orders he sought in paragraphs 3 and 4 of the appellants claim. Mr Mataskelekele relied on what this Court said in **Valele Family v Touru [2002] VUCA 3** in the following passages:

> *"Generally speaking, it is not appropriate upon an application for an interlocutory injunction for the Court to finally decide disputed questions of fact. That is for the ultimate trial. At the interlocutory stage it is sufficient that there is evidence that could be accepted at trial which raises a serious question to be tried. The application which the parties argued before the primary judge was only for an interlocutory injunction. However, the case was unusual in that the evidence put before the primary judge by Mr. Touru raised factual and legal arguments as to why the claim for an account of moneys received by him would inevitably fail. It was necessary in this circumstance for the primary Judge to go further than would have normally been necessary and decide the substance of Mr. Touru's arguments that custom ownership had already been finally determined.*
>
> *The affidavit material before the primary judge identified a serious issue to be tried, namely whether Mr. Valele and his family are custom owners of the land, and if so, the extent of their interest. The proper body to determine that issue is the Island Court (or its successor in law), but the Island Court lacks the full extent of the power of the Supreme Court to order an account of the past rents received. The originating summons therefore properly initiated a cause or matter in the Supreme Court, and the claim for an interlocutory injunction to hold the position until the Island Court determines the ownership dispute was properly made. In our opinion upon the appellant giving the usual undertaking as to damages, there should be an interlocutory injunction in terms of paragraphs 2, 3, 4, 5, 7 and 10 of the originating summons with liberty to apply on short notice to a single judge of the Supreme Court."*

25. The **Valele Case** is totally different and it does not assist the appellant. It is applicable only to disputes relating to customary ownership of land which have not yet been determined in any way by a Court of competent jurisdiction. In such disputes, disputing parties may seek interlocutory orders to maintain the status quo pending final determination of customary ownership. But parties doing so must file proper applications with supporting sworn statements, statements of urgency and undertakings as to damages in accordance with Rule 7.5 and Rule 7.8 of the Civil Procedure Rules.

26. In the appellant's case it was a case of challenging the validity of a lease under section 100 of the Land Leases Act. The appellant was neither the lessor nor the lessee. And neither had he nor his family been declared custom-owners by any Court or tribunal of competent jurisdiction. In this case the appellant had no standing. He had no serious question to be tried in the Supreme Court. The appellant agreed that if he is later declared to be the custom-owner of the leased land, he will be in as good a position then as he would be now without any interlocutory relief to recover any wrongly paid monies, or to seek rectification of the Register.

27. We do not see any error in the decision of the judge in the Supreme Court. This ground of appeal also fails.

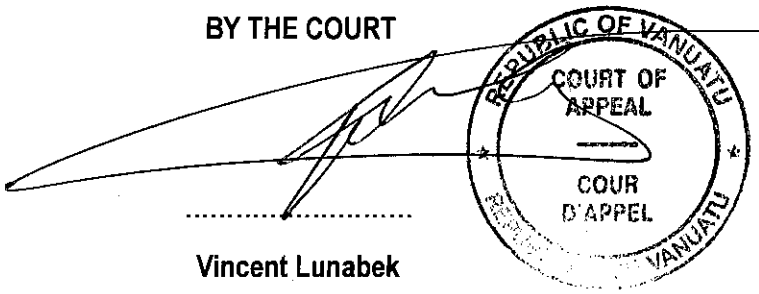
The Result

28. The appeal fails and is accordingly dismissed.

29. Costs follow the event. The appellant will pay the first and second respondent's costs of the appeal set at VT 25.000 each, to be paid within the next 21 days.

DATED at Port Vila this 17th day of July, 2020.

BY THE COURT



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Vincent Lunabek

Chief Justice