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

Civil Appeal
Case No. 3993 of 2021 COA/CIVA

BETWEEN: **PERCY ASHEM REPRESENTING FAMILY ASHEM**
First Appellant

CEDRIC PHILIP REPRESENTING FAMILY PHILIP
Second Appellant

ADMINISTRATOR OF THE ESTATE OF SETHY WILLIAM (DECEASED)
Third Appellant

AND: **JUDE MALINGY REPRESENTING FAMILY MALINGY**
First Respondent

PIERRE MASSING NALE REPRESENTING FAMILY MASSING NALE
Second Respondent

HERVE LEYMANG REPRESENTING FAMILY LEYMANG
Third Respondent

ETUEL HABONG KEKEI REPRESENTING FAMLY HABONG KEKEI
Fourth Respondent

GOVERNMENT OF THE REPUBLIC OF VANUATU
Fifth Respondent

Coram: ***Hon Chief Justice V Lunabek***
Hon Justice O SakSak
Hon Justice D Aru
Hon Justice GA Andrée Wiltens
Hon Justice J Hansen
Hon Justice R White
Hon Justice E Goldsbrough

Counsel: *Mr J Tari for the Appellants*
Mr E Molbaleh for the First, Second, Third and Fourth Respondents
Ms J Toa for the Fifth Respondent

Date of hearing: *10 February 2022*

Date of Decision: *18 February 2022*

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

JUDGMENT

Introduction

1. On 10 August 2012, the Director of Lands registered Lease 09/1543/001 (the Lease) over an area of 1,149 hectares, 40 acres and 26 centiacres located in South Malekula (the Land). The Family Ashem and the Family Philip (the first and second appellants) were the lessors and Sethy William the lessee.

2. It was common ground that the Land is located within the jurisdiction of the Navsagh Council of Chiefs which is the Lamap Council of Chiefs.

3. Sethy William died on 29 June 2016 and, on 28 November 2018, the transmission of the Lease to his widow (Julian Nettie Ben) was registered. She is the third appellant.

4. On 3 November 2021 and acting pursuant to s 100 of the *Land Leases Act (Cap 163)*, a judge of the Supreme Court ordered the Director of Lands to cancel the registration of the Lease. The Judge did so on the application of four claimants: Jude Malingy representing Family Malingy, Pierre Nale representing Family Massing Nale, Herve Leymang representing Family Leymang, and Etuel Habong Kekei representing Family Habong Kekei (collectively the Claimants). They are the first to fourth respondents to the appeal.

5. The fifth respondent is the Republic of Vanuatu. Counsel for the Republic supported the decision of the primary Judge.

6. Section 100 of the Land Leases Act provides:

> ***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. The Judge ordered the cancellation of the Lease because she was satisfied that the Claimants had standing to bring the application and that they had established that the Lamap Council of Chiefs had never declared that the Family Ashem and the Family Philip to be the custom owners of the Land, that there was no land tribunal or court decision to that effect, and the Ministry or Department of Lands had not been provided with a completed custom owner identification form in respect of the Land.

8. The Judge did not identify expressly the mistake which had occurred in the obtaining of the registration but it seems to be that it had been a mistake for the registration to have been made when the required processes for registration had not been followed and when the Family Ashem and the Family Philip, not being declared custom owners of the Land, had not lawfully entered into the Lease as lessors.

9. The questions on this appeal are whether the Judge was correct in concluding that the Claimants had standing to seek rectification of the Register under s 100 and whether the Judge had been correct to conclude that the registration of the Lease had been obtained by mistake.

10. We consider that the Judge was correct on both matters and that the appeal should be dismissed. Our reasons follow.

The obtaining of the Lease

11. The evidence disclosed the following concerning the circumstances in which the Lease had been registered. There was relatively little dispute about these circumstances although it is evident that the evidence about them is incomplete.

12. On 16 August 2011, the late Sethy William lodged an application for a Negotiator Certificate with the Department of Lands. He did so with a view to complying with s 6 of the *Land Reform Act* which, as in force in 2011, provided:

> ***6 Certificate of registered negotiator***
>
> *(1) No alienator or other person may enter into negotiations with any custom owners concerning land unless he applies to the Minister and receives a certificate from the Minister that he is a registered negotiator.*
>
> *(2) A certificate issued in accordance with subsection (1) shall –*
>
> *(a) state the names of the applicant and of the custom owners;*
>
> *(b) give brief details of the land in respect of which negotiations are registered; and*
>
> *(c) state the object of the negotiations.*

(3) *If negotiations are completed without compliance with subsection (1) the Minister may refuse to approve the agreement between the custom owners and the unregistered negotiator and if he is an alienator may declare the land unsettled land.*

(Emphasis added)

13. The reference in s 6(2)((a) to "the custom owners" is to be noted. The certificate had to state the names of *the* custom owners and not, by inference, the names of some only of the custom owners. Section 6 is an indication of the importance of proper identification of custom owners in the process for registration of a lease.

14. At the time Sethy William lodged his application, the amendments to the Land Reform Act effected by the *Land Reform (Amendment) Act* 2013 had not yet been enacted. Mr Gambetta, the present Director of Public Lands and Records, described the administrative process which the Department followed in 2011 when an application for a Negotiator Certificate was lodged. In particular, the process involved:

(a) *the Land Management and Planning Committee (LMPC) within the Department of Lands would write to the applicant for the Negotiator Certificate telling him or her:*

(i) *whether the application would be recommended for approval by the LMPC;*

(ii) *that the pro forma custom owner identification form would have to be completed by the relevant Council of Chiefs; and*

(iii) *public notice would have to be given of the application for the Negotiator Certificate over the relevant land;*

(b) *the LMPC would send directly to the Council of Chiefs a pro forma custom owner identification form and the form of a public notice it should publish, with a request that the Council inform the LMPC whether there was any dispute as to ownership of the land in question. If there was a dispute, the Council of Chiefs was to refer it to the appropriate land tribunal. If there was no dispute, the Council of Chiefs was to complete and return the Custom Owner Identification Form. In addition, the LMPC requested the Council of Chiefs to provide to it minutes of any meeting at which the issue of custom ownership had been addressed; and*

(c) *the decision of a land tribunal on a dispute over the subject land was to be recorded on the custom owner identification form and returned to the LMPC.*

15. This process underlined the importance of the provision to the Department of a completed Custom Owner Identification Form. It was the means by which the LMPC, the Department, and in turn the Minister, could be satisfied that the custom owners had been properly identified.

16. In the present case, on 7 October 2011, the Secretary of the LMPC wrote to the late Sethy William informing him that the LMPC would recommend his application but telling him of the requirement for a Custom Owner Identification Form.

17. On the same date, the LMPC sent a letter addressed to the Chairman of the Lamap Council of Chiefs by which it informed the Chairman of Mr William's intention to secure an agricultural lease over the Land. The letter had the subject line "Custom owner identification form". The Secretary of the LMPC attached to the letter a *pro forma* Custom Owner Identification Form and the form of a public notice to be used.

18. Mr Gambetta deposed that the letter was sent to the Council Chiefs in order that they could facilitate a hearing by a land tribunal so as to identify the custom ownership of the land. When that custom ownership had been determined, the recipient of the negotiator certificate could then negotiate a lease of the custom land.

19. The evidence did not disclose what happened in the two months after the LMPC's letter of 7 October 2011. However, on 7 December 2011, the Minister of Lands issued a Negotiator Certificate to the late Sethy William. This showed that the custom owners of the land were the Family Ashem and the Family Philip and indicated that a lease could be negotiated with them over the land. The source of the Department's belief that the Family Ashem and the Family Philip were the custom owners is not clear as their names had not been included in any of the documents lodged with the Department before 7 December 2011, at least in those documents put in evidence. However, one thing is plain. At the time of issue of the Negotiator Certificate, neither the Department nor the Minister had been provided with a completed Custom Owner Identification Form, let alone one which identified the Family Ashem or the Family Philip as custom owners.

20. So far as the evidence before the trial Judge disclosed, the next relevant event in relation to the registration of the Lease was that on 12 April 2012, nine members of the Family Meravemf sent a letter to the Survey Department of the Department of Lands, but copied to several others, including the Minister of Lands, the Director General and the Officer in Charge of the Land Tribunal Office. By that letter, these Family members objected to the surveying of the land then being undertaken in relation to the application for a lease and to any execution of a lease. Although the letter did not say so explicitly, it is apparent that the Family members were asserting an interest in at least some of the land as custom owners. The evidence did not disclose what, if any, action or cognisance was taken of that letter by its recipients.

21. The next event disclosed in the evidence was that, on 19 July 2012, representatives of the Family Ashem and the Family Philip, as well as the late Sethy William, executed the Lease. It appears that the Lease had been originally executed, or at least intended to be executed, on 19 April 2012 as that date had been entered on it but crossed out. The Lease was for a term of 75 years commencing on 31 (sic) April 2012 and provided for an initial rental of VT5000 per year.

22. On 9 August 2012, Sethy William lodged his application for registration of the Lease.

23. The Minister gave his consent to the Lease on 10 August 2012 and it was registered on or about 10 August 2012.

24. The Claimants filed their application for the cancellation of the Lease on 5 December 2017. Several of them deposed that they had learnt of its existence only shortly beforehand.

Was the registration of the Lease obtained by mistake?

25. We consider it convenient to consider first the question of whether the Judge was correct in finding that the Lease had been obtained by mistake, before considering the standing of the Claimants to seek relief under s 100 in respect of the claimed mistake.

26. A number of matters indicate that the overall process by which the Lease was registered was affected by a number of mistakes.

27. First, while the Department and the Minister may have assumed that public notice of the application for a Negotiator Certificate in respect of the Lands had been given by the Council of Chiefs, that had not occurred. There was no publication of a public notice to the custom owners.

28. Secondly, neither the Department nor the Minister had been provided with a completed Custom Owner Identification Form by which the identity of the custom owners with respect of the whole of the Land could be ascertained. This meant that when issuing the Negotiator Certificate, the Minister proceeded without any evidence which was independent of Family Ashem and Family Philip and the late Sethy William as to the identity of the custom owners.

29. Thirdly, although the Negotiator Certificate was issued to the late Sethy William naming Family Ashem and Family Philip as the custom owners, there had been no information provided to the Department or the Minister at the time of the registration of the Lease confirming that they were the two custom owners. Again, there had not been any completed Custom Owner Identification Form provided to the Department or the Minister. The Department proceeded without having formal identification of the custom owners of the Land. This was a mistake.

30. Fourthly, although the late Sethy William provided with his application for registration of the Lease records of the decisions on 2 July 2010 of the Pelongk Sorsambi Land Tribunal which recognised the custom ownership of the Family Ashem and the Family Philip in respect of some land, this was not the whole of the Land which was to be the subject of the Lease. Counsel for the appellants acknowledged on the appeal that that was so.

31. Fifthly, the registration of the Lease proceeded without any regard to the notice of dispute provided by the members of the Family Meravemf on 12 April 2012. That letter should have been sufficient by itself to put the Department and the Minister on notice of the existence of a dispute about the custom ownership of the Land and underlined the significance of the absence of a Custom Owner Identification Form.

32. We have referred to these matters without identifying the evidence which supported them. That evidence was found in documents provided by Mr Gambetta from the Departmental records and in part in the sworn witness statements of the Claimants and their witnesses. We have already referred to some of the documentary evidence. What is stark is that the Department could not provide evidence of its receipt of any completed Custom Owner Identification Form.

33. The Judge had evidence from the following witnesses of the Claimants:

- Jude Malingy;
- Herve Leymang;
- Romain Dralikon;
- Armand Batick-Akon; and
- Fabrice Leymang.

34. Taken in combination, their evidence confirmed the following matters:

(a) the Land is within the jurisdiction of the Lamap Council of Chiefs;

(b) the Land has not been the subject of a decision or determination by a land tribunal or a court in favour of the Family Ashem or the Family Philip, at least in respect of the whole of the Land;

(c) The Chair of the Lamap Council of Chiefs had not received any documents from the Department of Lands or the LMPC in relation to the application for the Negotiator Certificate and had not provided the Department or the Minister with a completed Custom Owner Identification Form; and

(d) the witnesses had not seen a published public notice.

35. The evidence of Mr Malingy, Herve Leymang, Mr Dralikon and Fabrice Leymang about these matters seems to have been particularly cogent as they were members of the Lamap Council of Chiefs at relevant times. They were accordingly in a position to know first hand the matters to which they deposed.

36. The Judge did not say explicitly that she accepted the evidence of these witnesses but it is implicit in the judgment and the reasons that her Ladyship did so. Moreover, as the Judge noted, there was no evidence that the Family Ashem and the Family Philip were declared custom owners of the Land. Further again, they did not provide any explanation to the Court as to how they had come to be the named lessors on the Lease.

37. In the circumstances just described, there was ample evidence by which the Judge could conclude that the registration of the Lease had been obtained by mistake. The mistake lay in

the Department proceeding with the registration even though it had not received certification of the identity of the custom owners in respect of the whole of the Land.

38. By Ground 2 in the Notice of Appeal, the appellants contended that, despite these matters, the appeal should be allowed because they had relied upon the Department to undertake the proper enquiries and to ensure that the required process was followed. We do not accept this submission. The question for the Court on an application under s 100 is (relevantly) whether it can be satisfied that the registration of the Lease had been obtained by mistake. That is to say, the Court is concerned with whether there was a mistake and, if so, with its causative effect on the registration. It is not concerned, at least directly, with the allocation of responsibility for a mistake which it finds to have occurred.

39. By Ground 3, the appellants contended that the Department had been entitled to proceed in the way it did in the absence of a registered dispute and in the absence of any custom owners. It is apparent from what we have said already that this ground is rejected. It fails to recognise the importance of the provision to the Department of the completed Custom Owner Identification Form.

40. Contrary to the assertion in Ground 4 of the Notice of Appeal, the Judge did not base her decision on the view that there must be a decision of a land tribunal before a lease is issued over custom land. As we understand it, the appellants did not seek to maintain that Ground on the appeal.

41. This means that, subject to the issue of the Claimants' standing, the appeal against the Judge's cancellation of the Lease should fail. There had been a mistake because there had not been compliance with an important element of the process for the registration of a lease required in 2011.

Did the Claimants have standing to seek the cancellation of the Lease under s 100?

42. The appellants contended that the Judge had been wrong in finding that the Claimants had standing. They asserted that the Claimants' standing had been based on their claim of custom ownership whereas custom ownership was not an interest registrable under the Land Leases Act and such an interest was necessary in order for an applicant to have standing under s 100.

43. The appellants submitted that two authorities supported this view of the standing required for an application under s 100. The first was *Naflak Teufi Ltd v Kalsakau* [2005] VUCA 15. The appellants submitted that this case stood as authority for the proposition that "an applicant for rectification must have a personal or legal right to be registered in place of the interest being challenged".

44. With respect to counsel, this submission was based on incomplete understanding of what it was that the Court of Appeal had held in *Naflak Teufi v Kalsakau.* In fact, what the Court said was:

"The suggestion in our view that an Applicant for rectification must have a personal or legal right to be registered in place of the interest being challenged places an unwarranted gloss on the plain words of section 100."

45. Thus, the statement of the Court of Appeal is contrary to that for which counsel contended. Moreover, earlier, the Court of Appeal had said:

> *"We are satisfied on a consideration of the object and purpose of the section that, at the very least, a person seeking to invoke section 100 must include a person who has an interest in the register entry sought to be rectified and which it is claimed was registered through a mistake or fraud ... We use the word* ***"interest"*** *in the widest possible sense although accepting it may have in appropriate circumstances [to] be distinguished from a mere busy body."*
>
> (Bold emphasis in the original and italicised emphasis added)

46. As is apparent, the Court in *Naflak Teufi v Kalsakau* was not purporting to state exhaustively, the nature of the interest which would be required for a claimant to have standing. It took a broad view of the nature of the interest which may be sufficient.

47. We also observe that the appeal in *Naflak Teufi v Kalsakau* succeeded even though the appellants in that case had not established that they had a *right* to be registered on the lease.

48. The second case on which the appellants relied was *Mataskelekele v Bakokoto* [2020] VUCA 31. In that case, the appellant sought rectification of the registered lease on the basis that he too was a custom owner even though he was neither the lessor nor lessee of the lease and had no declaration as to his custom ownership. The Court of Appeal upheld the trial judge's conclusion that Mr Mataskelekele lacked standing saying:

> [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.*

49. Counsel for the appellants submitted that *Mataskelekele v Bakokoto* is authority for the proposition that an applicant needed to have an interest as lessor or lessee in order to have standing under s 100. Again, with respect to counsel, this submission involved a misunderstanding of the decision in *Mataskelekele v Bakokoto*. It cannot reasonably be understood as standing for such a broad proposition of general application. It is a decision on its own facts having regard to the nature of the interest claimed by Mr Mataskelekele and his claim for relief.

50. Moreover, the understanding of *Mataskelekele v Bakokoto* for which counsel contends is inconsistent with the reasoning in *Naflak Teufl v Kalsakau* set out above. There is no indication in *Mataskelekele v Bakokoto* that the Court was seeking to modify the broad principle for which *Naflak Teufl v Kalsakau* stands. The present Claimants may claim custom ownership but they sought the cancellation of the Lease on the basis that the proper procedures for the entry into a lease had not been followed and, in particular, that the important requirement for identification of the custom owners of the land in question had not been satisfied.

51. The Claimants, or at least some of them, undoubtedly had the requisite standing under s 100. That interest arose from the role of the Council of Chiefs in relation to the identification of the custom owners. The Claimants as members of the Council of Chiefs in particular had an interest, and indeed a responsibility, of ensuring the proper identification of the custom owners before any lease is negotiated and before any lease of custom land was registered. They would have been entitled to be heard in advance of the registration to object to that registration. They have the same interest after its registration.

52. For these reasons, we dismiss the ground of appeal based on the standing of the Claimants.

Conclusion

53. The formal orders of the Court are:

(a) The appeal is dismissed.

(b) The appellants pay the costs of the first four respondents fixed in the sum of VT250,000 and the costs of the fifth respondent fixed in the sum of VT70,000.

DATED at Port Vila, this 18th day of February 2022

BY THE COURT

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Chief Justice V. Lunabek

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU