

(Civil Jurisdiction)

BETWEEN: NOEL TAKAU
First Applicant

AND: PAKOA ANDREW
Second Applicant

AND: CHARLIE PAKOA
Third Applicant

AND: ALFRED CARLOT
First Respondent

AND: JONE ROGARA
Second Respondent

AND: LEON LALIE
Third Respondent

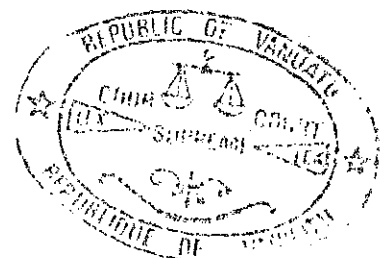
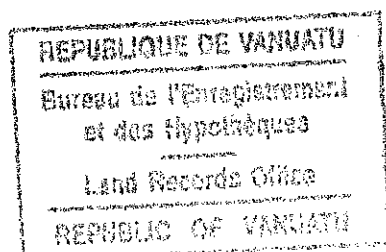
AND: DIRECTOR OF LAND RECORDS
Fourth Respondent

AND: ATTORNEY GENERAL
Fifth Respondent

Mr. Edward Nalial for the Applicants
Mr. Robert Sugden for the Respondents

JUDGMENT

The applicants are Noel Takau, Pakoa Andrew, Charlie Pakoa and Ben Saul. The second applicant is a Paramount Chief, the first, and third applicants occupy the said land under license from the second applicant.



It was agreed that the respondents obtain leases on the said land that were registered under the Land Leases Act. The said leases were obtained from the Minister and the three respondents became proprietors of such registered lease.

The applicant Pakoa Andrew claims that he is the custom owner of the said land and entered into agreement with the other two applicants for the use of the said land. Further Andrew Pakoa in 1993 lodged a claim with the Island court for the Island Court to declare him as the true custom owner. In April 1994, the Island court issued a restraining order stopping sale of the land within title 168 and 170. In July 1996 the Minister granted to the three respondents certificates of negotiators. By this granting by the Minister the applicants claims that the respondent obtained the certificate of negotiator by false and misleading application by: -

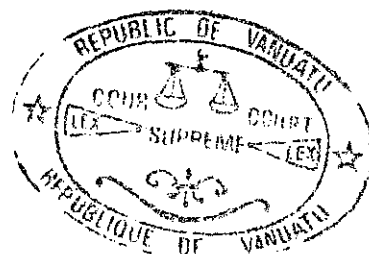
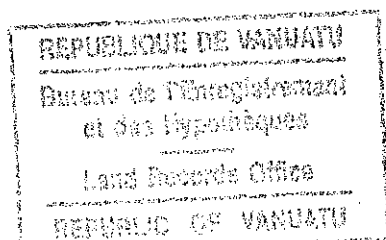
- a) That they each fail to disclose the existence of person having lease on the land;
- b) They fail to disclose license people using the land;
- c) They fail to disclose customary right claim over the land;
- d) They fail to disclose the occupant of the land;
- e) They each respond falsely to the question in the application form knowing very well that their response was not true.

And in all, the respondent obtained the certificate of registered negotiator fraudulently. And by the Minister granting them title 12/1011/003, 12/1011/002 and 12/1013/005 they obtain that registration by fraud.

Evidence

The plaintiff called 7 witnesses. At the close of the applicants case the defense elect not to call any evidence.

In this matter, there is not very much dispute as to the obtaining of the registration of the said land. But what is disputed was that the land was obtained by fraud in that process.



The land we are referring to is old title 170 of which the applicant alleges that the first respondent had the registered lease No. 12/1011/003 within old title 170, the second respondent also had a granted lease No. 12/1011/002 also within the old title No. 170 and the third respondent had a granted lease No. 12/1011/005 also within old title No. 170.

The old title 170 since 1991 Andrew Pakoa as a paramount chief entered into agreement with the first and third applicants including other occupants of the land to occupy the land 170 and develop it.

In 1994, the second applicant was a defendant in Civil Case No. 85/94 in the Island Court whereby the Island Court made order as follows: -

"That the defendant are restrained from further development of any kind on the land title 168 and 170 until the Efate Island Court decide the true ownership of the land."

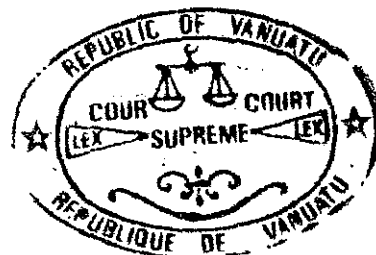
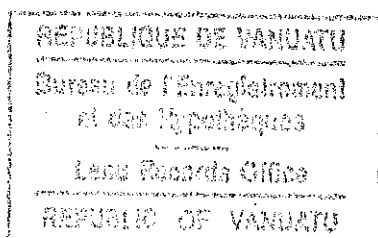
There were other 3 orders made which I may endeavor too when I require to. This is an order of the Court, and I take judicial notice of it as order by a Court of competent jurisdiction having jurisdiction to make such order under Section 13 (d) of the Island Court Act and remain enforceable order. Section 13 (d) states: -

"In civil proceeding an Island Court in addition to any other powers it may have may make any or a combination of the following orders-

(d) An order prohibiting, where appropriate, by any one of the parties to the dispute the use or occupation of land by one of the parties to the dispute."

The issue as to dispute of ownership of the said land was registered as Case No. 08/93 and registration fee was paid in official receipt No. 745162. So in actual fact the land 170 was a disputed land of which pending the hearing before the Island Court.

While this was pending the next development took place where the registration of land title 12/1011/003 - 12/1011/002 and 12/1011/005

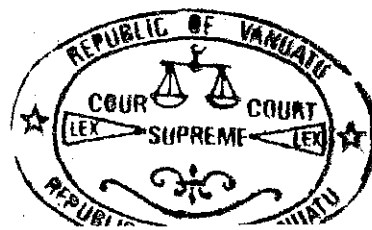
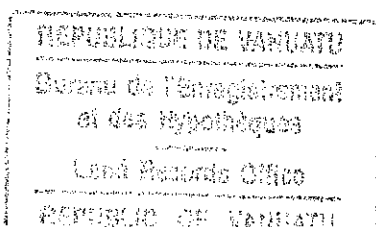


were issued to the three respondents respectively. As a result the applicant put his claim before this Court on the ground of fraud.

Order of Island Court

The Island Court order specifically refer to the defendants and others. Sugden submitted the case *Claudie -v- Philip Malas & Loken Malas* whereby the parties to a dispute are the only person subject to the Island Court Orders and no others. The case where the second applicant was made a defendant was *Eratap Land Committee -v- Chief Pakoa Andrew, Jack Kalmelau and Laua Kalmelau*. In the case *Claudie Mitride -v- Philip Malas* the second appellant already had an existing agricultural leases granted to him, which I gathered from the judgment, as in 1983 for 30 years and the first appellant was granted new leases in 1995 and both appellant which had existing lease and were obtaining permission again to change the status of their agriculture leases to residential. When this came about the respondents applied to the Island Court for injunctive orders pursuant to their claim of ownership of land registered in the Island Court in 1993 which was granted and in my view this was within the Minister conclusive power to deal with. Whereas in this present case the second applicant already registered his claim of ownership in the Island Court in 1993. While the dispute was pending than the three respondents applied for agricultural leases and was issued to them. In this case the second applicant had a right in the Court Order to protect his interest as to ownership of land and therefore can take steps as in this case to protect his interests against the parties in that order or any other person who involves himself with that land in dispute which may affect the applicants' right. And in this case the power of the Minister can not be said is conclusive but subject to Article 78 of the Constitution as it was registered prior to obtaining the leases which I will endeavor to later on as submitted by counsel for the applicants and also Section 5 of the Land Reform Act.

The other two applicants Noel Takau and Charlie Pakoa including Richard Malili and Eddie Sailas were granted by the first applicant to develop portion of the given land and have no claim of ownership over the land apart from their agreement between Andrew Pakoa



and themselves. However their evidence shows that they were occupying portion of that land and developed it for the purpose of Form A which I will address later on.

The Land Reform Act recognize the customary rights over alienated land.

Section 5 of the Land Reform Act states: -

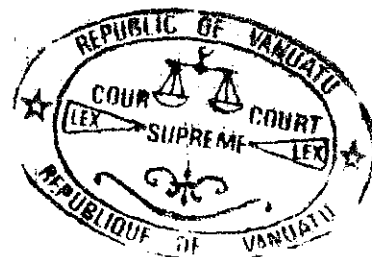
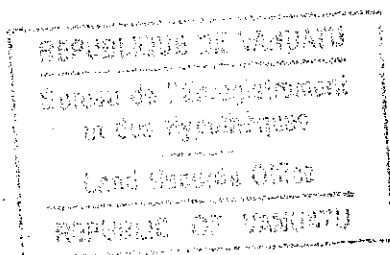
"In any case where there is doubt as to who are the custom owners of land occupied by an alienator one of the custom groups who claim the land, may apply to an Island Court established in accordance with section of the Island Court Act to decide the ownership of the land."

There are two aspects of ownership under Section 1 of the said Act; *Custom owners*: means the person or persons who, in absence of a dispute, the Minister is satisfied as custom owners of land and, *Custom group*: means a person or person who claim custom ownership of disputed land.

In the situation as *custom owners*: applies to custom owners of land of which there is no dispute as to ownership, as not all land are disputed land but only some. Whereas *custom group*: applies to a person or group of persons and in the case *Eratap Land Committee - v- Chief Pakoa Andrew, Jack Kalmetlau and Laua Kalmetlau* will place the disputing parties under *custom group* of which the said land is a disputed land.

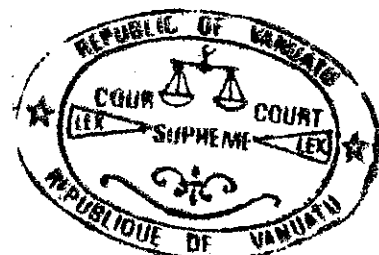
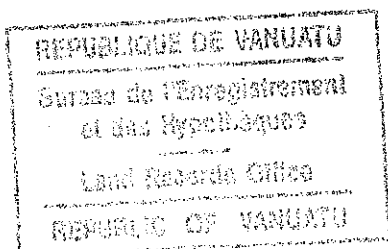
From Andrew Pakoa's evidence which I accept that Copravi Ltd. owned by Robert Monoviseen before independence owned the said land and now not occupied and he has worked on the land and claim that his land he applied to the Island Court to declare him the true custom owner. And this exercise he took was pursuant to section 5 of the Land Reform Act.

Procedure for issue of certificate



As explain by Paul Simon the land officer at Vila that procedure are different over customary land and alienated land. This land is an alienated land as is in record and title 170. What they do over alienated land was that when an applicant applied for an alienated land property they prepare straightaway certificate of registered negotiator to the Minister for approval. But before it goes to the Minister it has to go through the Rural Development Committee for screening purposes. However, if this is to be taken then with this explanation I find that it will not reflect the purpose of Form A. as in that form there are a lot answers to be answered covering a number of information for the Minister's consideration, such as right of way, customary rights of occupation, cash crops planting clearance, even customary leases between the second applicant and other occupants on the said land in addition to other rights in the Form A that the minister would like to know before exercising his power. This is because the power vested in him and not the Rural Development Committee. The committee is regarded as collection of information and those information to be passed on to the Minister as their role is for screening purposes only but does not have any power to decide. This means that Form A information and answers together with the Court Order were necessary information for the Minister to know and be given to the Minister as a right under the Land Reform Act for his decision.

Sugden also submitted that as the land was disputed land there were no requirements of Certificate of Registered Negotiator. In view of this submission than this be seen as contrary to the Minister's power under Section 6 of the Act in that the Minister did issue Certificate for Registered Negotiators for them to go out and negotiate with custom owner over land 170 and valid for 12 months to the second and third respondents on the 9th July 1996. If the Minister has issued to these two respondents than surely he would have issue it to the first respondent also. The issuing of such certificate was an order to the respondents to give the required information he wants in the said Form A to him. Even if the Minister is not satisfied with such information in Form A he can require the applicant to appear before him for interview or to provide additional information and that is a process taken by decision makers to be satisfied before making



decisions. As in this case he may require the first respondent plus the other two respondents to come and give more information.

In this case the three respondents application went before the said committee. Alfred Carlot, the first respondent was the Chairman of the said committee who screened his own application including the other two respondents' application. Nalial for the applicant submitted that Alfred cannot be a judge in his own case. I agree with him. At least the Minister at that time William Edgel should have been informed by Paul as secretary of the Committee that Alfred Carlot was the chairman of the said committee and that was for fairness purposes.

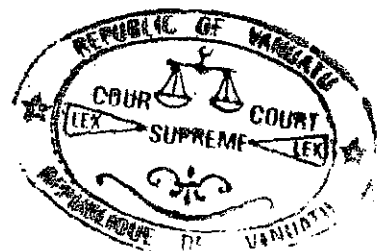
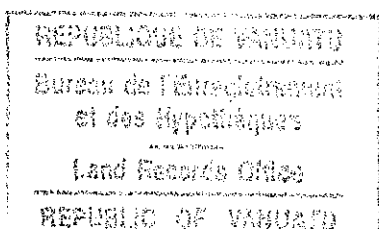
I find that the Minister William Edgel was not informed that Carlot was an interested party over the said land. The next Minister Sato Kilman who granted the leases correctly expresses too in his affidavit that if he was told of the dispute he would not have granted the leases.

Section 6 requirement of the Land Reform

Sugden submitted that no evidence from the applicant to say that the three did fill out a form and answered the questions there in and submitted that what the applicants could have done was to tender a copy of each form filled by the three respondents. On this submission, I find from the evidence that there were no records tendered to Court and agree with Sugden on that. What the Court received was a copy of general questionnaire in Form A Rule 2 of the Land Reform Act for the applicants to fill in. Neither, the respondents gave evidence to explain that they did fill these forms in compliance with Section 6 of the Land Reform Act. Section 6 (1) reads: -

"No alienator or other persons may enter into negotiation with any custom owners concerning land unless he applied to the Minister and receive a certificate from the Minister that he a registered negotiator."

Section 6 is the requirement in law for the respondents to comply with as they were issue with Certificate of Registered Negotiator to



negotiate with custom owner and the answers to those questions will help the Minister to exercise his power under Section 8 of the said Act. Penalty for non-compliance is prescribed under Section 6 (3) which reads: -

"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."

Some of the requirement to answer in that form A that were relevant to the plaintiff claims were answers to present occupation of the land, improvement, right of way, customary rights and cash crops planted on the said land. As in this case the first and third applicant and others of which the second applicant by payment of fees to him gave portion of land within title 170 to reside or do gardening. Therefore, the form was necessary document to inform the Minister of the actual information of the real nature of the said land before exercising his powers. There were no evidence from the plaintiff and defendant in actual filling of Form A. From this evidence I can only draw a prima facie inference that such form was not fill in for the Minister's consideration under Section 8 of the Land Reform Act.

These information were fundamental to the Minister for the exercise of his independent powers. Section 8 (1) reads: -

"The Minister shall have general management of all land

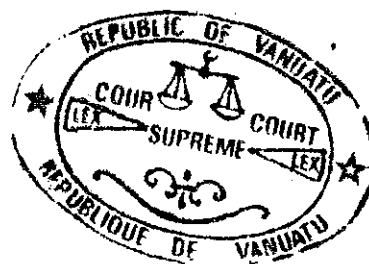
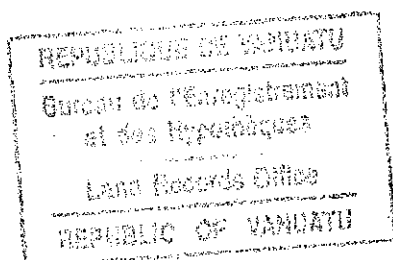
- a)
- b)
- c)"

Section 8 (2) reads:-

"Where the Minister manages and controls land in accordance with subsection (1) he shall have the power to:

a)

b) *Conduct transactions in respect of land including the granting of the lease in the interest of and on behalf of custom owner.*



- c) *Take all necessary measures to conserve and protect the land on behalf of custom owners."*

What the Minister stated in his affidavit shows that he was not informed that the land 170 was a disputed land and registered with the Island Court. The responsibility was upon the Rural Development Committee and Paul Simeon as the officer of the Lands Department to inform the Ministers accordingly.

So when Sato Kilman realized of what has taken place he stopped further negotiation from new land leases on title 168 and 170 and commence to revoked the leases 12/1011/002, 12/1011/003 and 12/1011/005 but did not complete it before he ceased as a Minister. This shows that the Minister was not informed of present occupation of land 170 actual improvement on it, right of way, customary rights, cash crops planting and the dispute. I am satisfied that the Minister conscience was clear and no dishonest act on his part in granting the leases.

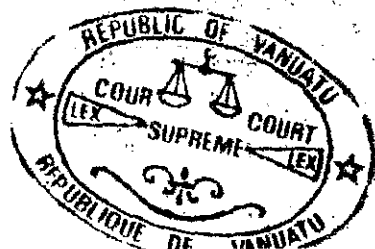
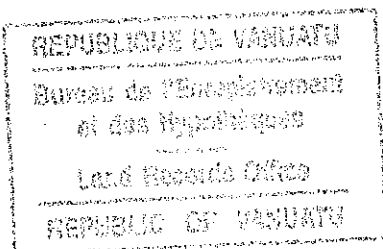
Court Order

In this case the Minister exercise of power affected the right of the applicant. To approve the land under dispute and to lease it to others is a clear cut of removing of right of ownership's of land away from the disputing parties before the ownership is properly decided by the Island Court and thus this right is protected by Article 78 of the Constitution.

Ownership

Dispute as to ownership of land is recognized under the Constitution which Article 78 (1) states:-

"Where consequent on the provision of this Chapter, there is dispute concerning the ownership of alienated land, the government shall hold such land until the dispute is resolved. The government shall arrange for the appropriate customary institution on procedures to resolve dispute concerning the ownership of custom land."



Sugden submitted that the land was a disputed land where there is no custom ownership and the Minister has power to conduct transaction on it. If this is so then that power will not go down well with Article 78 of the Constitution. In view of the call under Article 78 (1) the Island Court Act prescribed procedure and power to determine ownership of customary land and the Land Reform Act provides the Minister power over control of alienated land. By Article 78 of the Constitution and Section 5 of the Land Reform Act the Minister is duty bound to withhold the disputed land for registration by any applicant until the dispute between the parties is resolved as to who is the true owner even though the Minister is not a party. That's why the Committee must inform the Minister of the disputed land for the exercise of his power as by his affidavit he expresses why the director of lands and director of lands record did not inform him of the court order.

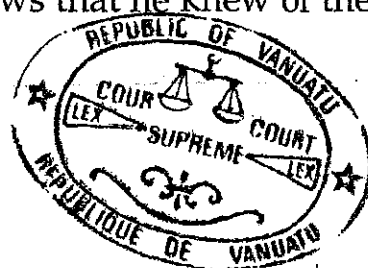
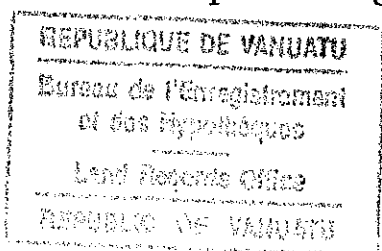
Intention

Sugden submitted that the respondents did not know of the dispute, but fail to call evidence to establish absent intention. On this submission, Paul Simeon's evidence was quite clear that he was aware of the dispute. He was the one who wrote the letter of the 17th July 1996 calling for the Rural Land Development Committee to sit and decide the application for Alfred Carlot, Leon Lalie and Jone Rogara on title 170. He was the one who took the minutes of the meeting which Alfred Carlot, Jone Rogara and Leon Lalie were the applicants. Of which Alfred Carlot was the chairman, and it was about a 15 minutes meeting. Paul admitted that the Lands Department was aware of the dispute over title 170, when asked in examination in chief that:-

"Q: You were in the Committee, was that dispute known?"

A: Yes."

Further, before writing the letter of 17th July 1996, Alfred Carlot himself wrote a letter to the Island Court clerk on the 27th May 1996 questioning the Island Court Order, which shows that he knew of the



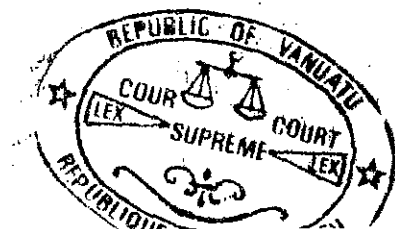
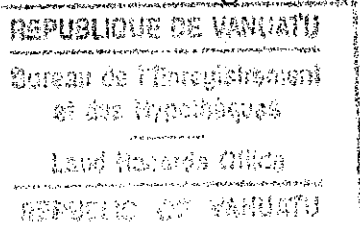
dispute before the 17th July 1996. In absent of other evidence as to knowledge and the dispute, I can only draw a prima facie inference that the Rural Development Committee, where Alfred Carlot as the first respondent and chairman and the Lands Department were all aware that the alienated land under title 170 was a disputed land and registered with the Island court for determination of ownership. Sugden further submitted that no evidence of occupation as to land granted to the respondents and a surveyor need to come and give evidence. In view of this submission than, Paul and Alfred Carlot, the first respondent were aware of the dispute on this land 170, the Minister issue Certificate of Registered Negotiators on land 170 to Alfred Carlot, Jone Rogara and Leon Lalie. If Form A was filled in then it will reveal that Noel Takau, Charlie Pakoa, Richard Malili and Eddie Sailas were occupying and developing portion of that land 170.

The dispute was over land 170 as a whole and whether the lease was granted to them in land 170 was at the left hand corner or center or elsewhere in the land 170 it makes no different at all as the whole land 170 was disputed. The surveyor will only come into assistant if the land 170 was disputed as not land 170 but other title. The evidence by Andrew Pakoa stands that those leases granted to the respondents were in land 170 and even the Certificate of Registered Negotiator issued by the Minister was over land 170 unless the respondents can show to the contrary which they did not. So there would not be any mistake as to land 170.

Fraud

Fraud can be term as something more then mere disregard of the rights of other person but goes further to the nature of personal dishonesty. In this case it is an alienated land and by Article 78 the Minister if he was informed that the land was in dispute with information in Form A than he must withhold such application for registration until such dispute is resolved, as in this case in the Island Court already registered the dispute.

However in a situation where a dispute over alienated land is not registered and there is evidence that any alienated land under his

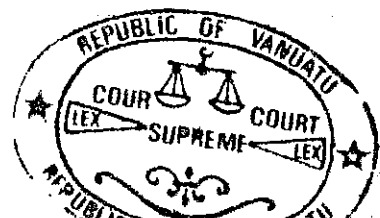
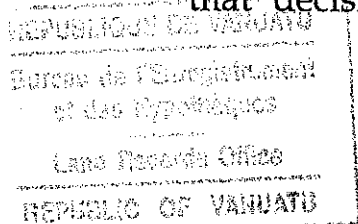


control has some dispute than the Minister can exercise too the power under section 5 (2) of the Land Reform Act to refer the matter for dispute settlement or refer it to the Island Court that has power to decide customary ownership of land dispute. And only there after the Minister can have that general management power under Section 8 (1). Section 8 (2) gives him the powers to substitute one alienator for another or grant leases in the interest of custom owners and to conserve and protect the land on behalf of custom owners. For the Minister to exercise those powers he must have the required information. As in this case the information in Form A were vital to him and must be made available to him for that exercise including the dispute as to ownership. In this matter the Minister's conscience was clear in approving the leases and there was no fraudulent act on his part. However, if the Court Order was put to him and continue to grant the leases then only the issue is whether he will have power under the Constitution and Land Reform Act to issue such leases when the said land 170 was known to him as under dispute and not for fraudulent.

Order of the Island Court and Decision by the Rural Development Committee

As for Form A, Paul in cross-examination in his evidence quite admitted that he was not aware of such application and when shown to him (P. 4) he said that it was the first time he saw that form. I agree with Sugden that this was a very essential evidence for the applicant to prove that it was filled out. Nevertheless, by law, under Section 6 of the Land Reform Act the three respondents were at liberty to give evidence that they filled the form pursuant to Section 6 to show to this Court that they did fill those form for Minister's decision as they were issued with Certificate of Registered Negotiator.

Sugden further submitted that even though the Court Order was pleaded the meeting of the Rural Land Committee was not pleaded where issue of biased was raised in submission of that Committee and therefore it was not open to the Court. In light of this advancement, the issue of the Island Court Order was also vital in that decision process making. And a requirement in law under



Article 78 and Section 5 of the Land Reform Act for the Minister to know. As Paul admitted that in that meeting that they were aware of the dispute, not only that but that meeting was over land 170. I see no reasons at all why this Court should not follow the event of the Island Court Order even as far as to the said meeting as a matter of law. As the Rural Development Committee is part and parcel of a process of screening of applicant for the requirement of Section 8 of the Act, I see no reason why their function cannot be screened even though not pleaded to bring about the requirement of Article 78 and Section 5 of the Land Reform Act to be complied with.

Alfred Carlot, the first respondent was the chairman of the said Committee who screened the applications. I find that this was a clear cut across the principle of the chief rule of acting fairly in good faith, without bias in deciding the application. As all respondents application were over land 170 all be treated the same. I find that by not informing the Minister of Form A information and to the dispute of ownership over land 170 all amount to dishonest attitude in the process taken leading up to the granting of the leases to the three respondents and that amount to fraud within the process in law under Section 100 of the Land Leases Act.

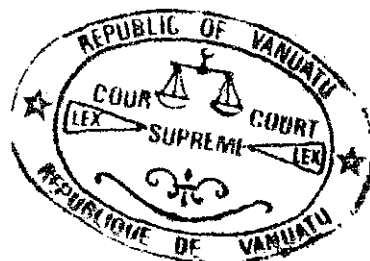
Rectification under Section 100 reads:-

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

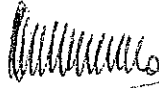
By section 100 the action of the first respondent contributed a lot to the granting of the leases. As the other two respondents leases were granted upon the same land they will all be treated the same.

For all these reasons I find that proper cause to take to put the position of the parties back to square one is for me to exercise the power under Section 100 of the Land Leases Act for the registration issued to the three respondents for agriculture leases be cancelled. Therefore, the registration of the three leases issued to the three respondents is cancelled.

REPUBLIQUE DE VANUATU
Bureau de l'Enregistrement
et des Hypothèques
Land Resources Office
REPUBLIC OF VANUATU



Dated at Port Vila, this 8th day of February 2001.



R. MARUM MBE
JUDGE.

