

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No.58 of 2011

BETWEEN: FAMILY KALTAK

Claimant

AND: ENTREPRISE DINH VAN TU

Defendant

Coram: Justice D. V. Fatiaki

**Counsel: Mr. E. Molbaleh for the Claimant
Mr. D. Yawha for the Defendant**

Date of Ruling: 26 February 2016

RULING

1. This is an application to strike out the claim on the dual basis that the claimant does not have standing to bring this claim and the Court lacks the jurisdiction to entertain it.
2. The claim was filed on 8 April 2011 together with an urgent application for an injunction to restrain the defendant from entering Engmelsa land and excavating limestone from the land. In the substantive claim the claimant asserts that it is "... *the customary owners of Engmelsa*" which the defendant trespassed onto and illegally excavated 11,410 cubic metres of limestone worth VT34,230,000. No undertaking in damages was filed in support of the injunction as there should have been.
3. Although there is a written Minute dated 14 March 2011 of a Erakor Village Kot determination in both the claimant and Saul Kalmay Family's favour, there is no clear determination of any customary boundaries other than the mention of two types of trees. Neither does the Minute identify by customary name the disputed land(s) nor is there a map or plan attached to the Minute to clarify the foregoing. Indeed, the Minute clearly urges the parties "... *imas ko tugeta blong toktok stretem mak or poundry blong tufala*".
4. Be that as it may the decision would only have been necessary if the ownership of the excavated land was disputed which the claimant accepts it was, by Family Kalmay. Co-incidentally, it was a member of the Kalmay family (Saul) who allegedly authorized the defendant to undertake "... *levelling the hilly topography of the mount surface*" as averred at paragraph 3 of the defence.



5. Nonetheless, on 13 April 2011 a defence was filed denying the claimant's "*legal capacity to sue ... unless they exhibit a competent land court judgment which proves they are custom owners of the said land*". The defendant also denies trespassing on the land and avers that its entry onto Engmelsa land was with "*... the consent from Sual Kalmaly who claimed he is the custom owner of Engmelsa land*".
6. On 28 February 2014 claimant's counsel withdrew the injunction application and sought leave to amend the claim to regularize the claimant which counsel accepted was an indeterminate entity called: "*Family Kaltak*".
7. The conference minutes indicates that the action effectively went to sleep after it was filed and, since then, the claimant has changed lawyers three times and, even though ordered to do so in February 2014, no amended claim has ever been filed by the claimant. Notwithstanding that, an urgent application to file an amended claim was filed 3 months after the matter was adjourned for ruling on 25 February 2015.
8. Despite the absence of an amended claim as there should have been, the renewed application to amend and the sworn statements in support of Timothy and Russel Kaltak makes two (2) material concessions as follows:

(1) In the application:

"... (there is) a lack of any court of law judgment which declared that Family Kaltak is the custom owner of the land where the excavation was done by the defendant, the land known as Emelsa; and

The claimant concurs with the court that there is no such judgment which could give them right to claim damages of trespass and royalties over the quarry excavated but says that the claimant can rely on the decision of Erakor Village Kot and the registered lease over that area of excavation which the claimant is the lessor"; and

(2) In the sworn statements:

"Family Kalmaly tried to dispute over ownership of the land where we claim against the defendant but that matter was sorted out by the Erakor Village Kot and he did not pursue his claim of ownership to the court of law; and

At present there is a lease registered over our land where the defendant excavated the quarry and the lease shows clearly that Family Kaltak is the lessor of that registered lease title number 12/0912/1025".

9. The lease was registered on 29 August 2014 and was entered between Kaltabang Kaltak and Samuel Ialu Kaltak on 4 August 2014. Despite what is deposed "*Family Kaltak*" is nowhere mentioned in the lease.
10. If I may say so, the mere issuance of a lease under the Land Leases Act over customary land does not establish that the lessor is the declared customary



owner of the land for the purposes of the Island Courts Act or the Customary Land Tribunal Act as the claimant appears to suggest. This much is also clear from Clause 3 of the lease conditions which clearly states that: "*the lessor(s) hereby represent and confirm that they are the duly authorized representatives of the custom owners ... (of) ... the demised land*" which is a statement of representative capacity and not of customary ownership.

11. Whatsoever, in the event that a lease over customary land is wrongly registered by mistake or as a result of fraudulent behavior by the lessor or lessee, such a lease is liable to be rectified by cancellation by the Court in terms of Section 100 of the Land Leases Act.
12. In light of the evidence thus far, I am satisfied and find as follows:
 - (1) Engmelsa land was "*disputed land*" claimed by both the claimant family and Family Kalmay at the relevant time when the defendant's excavation works occurred between July 2010 and March 2011;
 - (2) The excavation works ceased on the filing of the present claim;
 - (3) In August 2014 (3 years after the excavation works had ceased) a lease was registered in the name of Samuel Ialu Kaltak (not "*Family Kaltak*") allegedly over the defendant's excavated site.
13. I say "*allegedly over*" advisedly, because no independent survey evidence has been placed before the Court by the claimant to clearly establish that the defendant's excavation works occurred within the surveyed boundary of the claimant's lease or that Engmelsa land is wholly contained within the lease.
14. Nor has the claimant clearly excluded the applicability and effect of the Court's decision in Entreprise Dinh Van Tu v. Kaltak [2011] VUSC 231 which concerned the extraction of material by the defendant company from unsurveyed customary land known as "*Eruelep*" also located at Erakor and where the Court found that Kaltapu Kaltak (the father of the 3 deponents of the sworn statements filed in this claim) had entered into an exclusive quarrying contract with the defendant company "*to remove aggregate, metal or other such material from the quarry in question for a 20 year period from 19 September 2009*". In that case the 3 named deponents in the present case – Timothy, Andrew and Russel Kaltak were all restrained until further order from interfering with the defendant company's exclusive quarrying contract.
15. Even if "*Eruelep*" is a different customary land to "*Engmelsa*", the fact remains that the defendant had an exclusive quarrying contract granted by a senior member of the claimant family within the vicinity at Erakor and the defendant had been authorized to enter the excavated site and was not stopped or prevented from working on the site for 8 months.



16. In the present case in the absence of a clear determination of an Island Court or recognized Village Land Tribunal of the customary ownership and boundaries of "Engmelsa Land" and confirmed by a registered survey plan of the same, the claimant's averments that it is the customary owner of "Engmelsa" and that the defendant company's quarrying occurred within Engmelsa land cannot be sustained and remains as unsubstantiated claims. If however, the claimant is able to establish the above then they are at liberty to pursue a fresh claim as they are advised.
17. The application is allowed and the present claim which discloses no reasonable cause of action must be and is hereby struck out with costs to be taxed if not agreed.

DATED at Port Vila, this 26th day of February, 2016.

BY THE COURT



D. V. FATIAKI

Judge.

