

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

Civil Case No.152 of 2012

BETWEEN: BERNARD ITAI LAUTO
Claimant

AND: TIMAIMA TOUNTAN LAUTO and ITAI
RAFHAIL LAUTO
First Defendants

AND: MINISTER OF LANDS
Second Defendant

AND: THE ATTORNEY GENERAL
Third Defendant

Coram: Justice D. V. Fatiaki

Counsels: Mr. R. Sugden for the Claimant
Mr. J. Ngwele for the First Defendants
Mrs. V. Trief for the Second and Third Defendant
Mr. J. Malcolm for the Interested Party

Date of Judgment: 22 April 2016

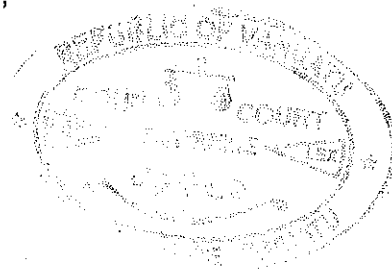
JUDGMENT

1. This is an application for Summary Judgment in a substantive claim seeking the cancellation of a lease registered in the name of the first Defendant as lessees. The claim is based on the provisions of section 100 of the Land Leases Act which empowers the Supreme Court to order rectification of the Land Leases register maintained under the Act by directing that a registration be cancelled where such registration has been obtained or made by fraud or mistake.

Chronology

- 13 Aug. 2007 – The Paramount Chief of Erakor and his council issued an open certification that:

“... late Itai Lauto's first born son is GERALD LAUTO and according to custom, he is the current Head of late Itai Lauto's family and he is entitled to be awarded first priority over lands belonging to late Itai Lauto”;
- 28 Jan. 2009 – Gerald Lauto paid De Roza Investment group VT15,750 for the preparation of lease title No. 12/0914/026 situated at Erakor, Efate;
- 29 Aug. 2009 – Gerald Lauto passed away;



- 26 April 2011 – The Claimant Bernard Lauto obtained orders from the Efate Island Court in Civil Case No. 15 of 2010 in which Timaima Lauto was the defendant as follows:

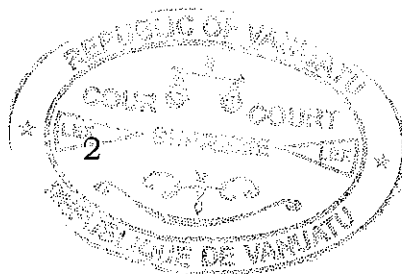
“1. Claimant Bernard Itai Lauto is hereby granted the customary right on behalf of Family Itai Lauto of Erakor Village to take care and have the right to distribute the custom properties that belongs to his father late Itai Lauto.

2. That any dealings within Family Itai Lauto's customary land, Claimant must give his consent before any development may be carried out.”

2. In my view the above orders are not a declaration of customary ownership of land nor does it affect succession rights to land belonging to Gerald Lauto. Rather it is in the nature of a representation order concerning Lauto lands not unlike the earlier certification in favour of Gerald Lauto by the Erakor Council of Chiefs. Although undoubtedly in Bernard's favour where the sole competing claimant was Timaima Lauto who was Gerald's wife, it does not reflect the position of Itai Raffhail Lauto who is Gerald's legitimate son nor does it specifically refer to Lease Title No. 12/0914/026.

- 25 June 2011 – The Claimant obtained a registered negotiator certificate for the land known as 'Etaslep' with a land area of '6 ha 04 a 61 ca'. (Although no lease title is mentioned in the certificate, the area of land is identical to that in the surveyed plan of lease title 12/0914/026);
- 08 Aug. 2011 – Timaima Lauto obtained a grant of administration over the estate of her late husband Gerald Lauto;
- 13 Sept. 2011 – Timaima Lauto sought ministerial consent to lease title No. 12/0914/026 after having obtained all necessary approvals as noted on the relevant application;
- 10 Feb. 2012 – State Law Office passed the Claimants application to lease title No. 12/0914/026 by the claimant and his wife Emma Bernard Lauto for ministerial approval;
- 16 Feb. 2012 – The first named defendant's obtained a Registered Negotiator certificate for Lease Title No. 12/0914/026 at Erakor, Efate with a land area of '06 ha 04 a 61 ca';

3. There is no title document or survey plan of Lease Title No. 12/0914/027 in the papers placed before the Court albeit that it appears to abut lease title No. 12/0914/026 nor is it known whether Gerald Lauto's family home is fully or partly located within its boundaries.



- 14 Mar. 2012 – Erakor Council of Chiefs certified to the Minister of Lands that the custom owners of the land on which Lease Title No. 12/0914/026 was situated were:

"Gerald Lauto and Timaima Lauto (wife)".

4. In similar vein is an open support letter from Alfred Lauto an uncle of Gerald Lauto to the effect that Lease Titles "... 12/0914/026 mo 12/0914/027 hemi blong late Gerald LAUTO we woman blong him Timaima mo son blong hem ITAI LAUTO JUNIOR, oli onem ol properties ia".

- 26 Mar. 2012 – The First defendants executed a lease over title No. 12/0914/026;
- 27 May 2012 – The Claimant lodged an application for ministerial consent to lease title No. 12/0914/026 located at Erakor half road with an area of '6 ha 04 61';

5. In this regard there is no evidence led by the claimant that he had paid for either the survey plan or registration fee for lease title No. 12/0914/026 or indeed, how he came to know of its existence or what right he claims he has to apply for a lease using Gerald Lauto's survey plan.

- 31 May 2012 – The Minister of Lands signed his approval of lease title No. 12/0914/026 in favour of the first named Defendants;
- 13 June 2012 – Timaima Lauto paid registration fees of VT18,750 and lease title No 12/0914/026 was registered by the Director of Lands;
- 20 Aug. 2012 – The first named defendants granted a power of attorney over Lease Title No. 12/0914/026 to Allan Kalfabun. This was subsequently registered on 26 September 2012;
- 03 Sept. 2012 – The Claimant issued the present proceedings claiming to be:

"... custom owner of the land on Efate Island within the registered land survey diagram having registered number 12/0914/026"

- 22 Nov. 2012 – The Second and Third Defendants filed a joint defence invoking sections 9 and 24 of the Land Leases Act;
- 02 May 2013 – The First Defendants filed a defence denying the Claimant's claimed status:

"... as custom owner of land within which leasehold title 12/0914/026 was registered".

6. It is immediately apparent from the above chronology that the Claimant and the First Defendants were competing applicants for lease title 12/0914/026. Furthermore the customary ownership of the land comprised within the lease title is claimed by both parties relying on somewhat similar worded utterances

of the Efate Island Court in the Claimant's case and, of the Erakor Council of chiefs on behalf of the First Defendant.

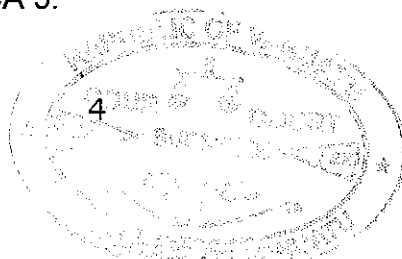
7. In an earlier not dissimilar claim which will be familiar to the claimant in Robert and Others v. Gerald Lauto and Bernard Lauto [2011] VUSC 347 where summary judgment was ordered against the claimant's on the defendant's counterclaim, the Court observed:

"At the background to this counterclaim is land at Erakor. There has been no determination by either the Courts or a land tribunal as to custom ownership but it is clear that the first defendant Gerald Lauto was at all material times treated as the custom owner. Gerald Lauto the first defendant has since died and there remains outstanding an issue as to succession of custom ownership".

8. That observation is equally relevant in the present case where there has been no clear determination of custom ownership of the land on which Lease Title No. 12/0914/026 is situated albeit that the customary right to represent Family Lauto in the care and distribution of customary lands belonging to the late Itai Lauto (not to Gerald Lauto) was granted to the claimant by the Efate Island Court. Similarly the right to administer the estate of the late Gerald Lauto has been granted to his wife Timaima Lauto by this Court as well as a certificate of the Erakor Council of Chiefs that she along with her late husband are undisputed customary owners of the land on which Lease title No. 12/0914/026 is located.
9. It is obvious that the claimant and the First Defendants are closely related by marriage and blood. It is also undisputed that the late Gerald Lauto's family home is situated within the surveyed boundaries of lease title No. 12/0914/026 at Erakor half road and that before his death Gerald Lauto had commenced the process to obtain formal registration of lease title No. 12/0914/026 with a surveyed plan over the land on which his family home stood.
10. It is also common ground that Itai Raffhail Lauto was a minor of 8 years of age at the time of his registration as a joint lessee of Lease Title No. 12/0914/026. In this regard section 107 of the Land Leases Act (CAP 163) provides inter alia:

"... A person under the age of 18 years shall not be registered as the proprietor of a lease or of any interest therein."

11. Undoubtedly the naming of Itai Raffhail Lauto as a joint lessee of lease title 12/0914/026 is an error or mistake on the face of the lease document. But the relevant question for the purposes of Section 100 is not whether a mistake has been made but rather, whether that mistake was causative of the registration of the lease? As was said by the Court of Appeal in Jone Rogara & Others v. Noel Takau and Others [2005] VUCA 5:

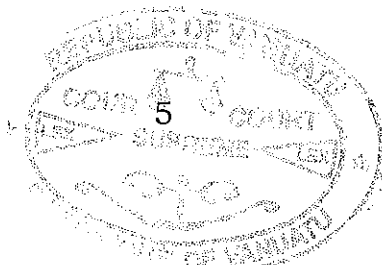


"For a party seeking rectification under s.100 of the Land Leases Act, it is not sufficient to prove that a mistake occurred in the course of a transaction which ultimately concluded in registration of the interest which is sought to have removed from the register ... The section imposes a causal requirement. The mistake must lead to the impugned registration being made. The onus is on the party seeking rectification not only to establish a mistake but also to satisfy the Court that it caused the registration to occur".

12. Timaima Lauto frankly admits that the inclusion of Itai Rafhail Lauto's name as a joint lessee of Lease Title 12/0914/026 occurred at the time when the lease was prepared but she denies knowing that he was ineligible to be registered as a lessee. Plainly her ignorance caused Itai Rafhail Lauto's name to be inserted in the lease document but there is no similar evidence from any lands registry official confirming an awareness of Itai Rafhail Lauto's age or ineligibility at any time either before or during the registration of the lease.
13. I do not accept counsels' submissions that the mere existence of a latent error or mistake on the face of the lease title No. 12/0914/026 renders it rectifiable under Section 100, without any need to establish actual knowledge of the mistake on the part of the officials who had a hand in the registration of the lease. In my view this is the inevitable effect of the statutory presumption expressed in the introductory part of Section 107 which reads:

"The parties to any instrument affecting a registered interest shall, until the contrary be proved, be presumed, to be of the age of 18 years or more at the date thereof..."

14. In other words, at the time of registration of the lease which is the critical time for the purposes of section 100, the Lands Registry officials were entitled to assume that Itai Rafhail Lauto was "... of the age of 18 years or more ..." and therefore eligible to be registered as a joint lessee unless and until the contrary is proved. Needless to say in the face of that statutory presumption, discovery of the error regarding Itai Rafhail Lauto's age after registration does not render his earlier registration as a joint lessee a "mistake" that was causative of the registration of the lease.
15. A similar approach might be taken to the naming of Timaima Toutan Lauto as the 'LESSOR' of lease title No. 12/0914/026 which counsel submits is also an error on the face of the lease document as "(she) knew that the Claimant was the owner of the land 12/0914/026 and not her". In my view given the defence averments and in the absence of a clear declaration of custom ownership by an Island Court or a Land Tribunal in the claimant's favour, the status of Timaima Lauto's claims through marriage and as administratrix of Gerald Lauto's estate is not much different to that asserted by the claimant who was specifically authorized to administer his later father's (not Gerald Lauto's) property.



16. Timaima Lauto also has a letter of support from an uncle of her late husband namely, Alfred Lauto, as well as an official form signed by several chiefs of Erakor to the effect that the land comprised in Lease 12/0914/027 belongs in kastom, to "Gerald Lauto and Timaima Lauto (wife)" and that the ownership of the land was not disputed "*inokat disput*".
17. I accept at once that neither of these documents emanates from the Efate Island Court or a Customary Land Tribunal but where ownership of customary land is "*undisputed*" (as declared by the Chiefs of Erakor to the Minister of Lands) then, in my view, there is no need to obtain a declaration from either the Island Court or a Customary Land Tribunal. Needless to say the declaration also colours the actions of the government officials and the Minister in the registration of the first defendant's lease.
18. Finally, Timaima's applications for ministerial consent which preceded the claimant's similar application by 7 months, received the consent of the Minister for Lands on 31 May 2012 and registration of Lease Title 12/0914/026 in her favour occurred on 13 June 2012. No such consent has been granted on the claimant's later application for Ministerial consent albeit that he received his negotiator certificate several months before the first defendants obtained theirs.
19. The Court of Appeal makes it clear in Ratua Development Ltd. v. Ndai [2007] VUCA 23 that:
- "The (Land Leases) Act does not provide for registration of the interest of custom owners of land (...) Nor does it in any way seek to regulate the custom ownership of land. There is indeed no specific place for the identification of lessors in the register ... it is clear that the property section is intended to record the details of the lease not the lessors. It follows that the Land Leases Register does not purport to and does not declare the custom ownership of the land subject to a registered lease. There is no Torrens System in respect of those to whom the land belongs, namely the custom owners ... The right claimed is custom ownership. As stated above, that is not a right which is capable of registration or of obtaining the protection of indefeasibility under the Act"***.
20. In light of the above, even if Timaima Lauto is incorrectly named as lessor in lease title No. 12/0914/026, that is an error which is immaterial and merely renders the lease document inaccurate and capable of being corrected under Sections 99 or 100 (1) of the Lands Leases Act. Such an error however would not be causative of the registration of the lessees whose interest would be protected under the Act.
21. Claimant's counsel also highlights as one so-called "*mistake*", the absence of a Registered Negotiator Certificate for Lease Title No. 12/0914/026 authorizing the first defendants to negotiate with customary owners of the land over which the lease title is registered.



22. Section 6 of the Law Reform Act [CAP. 123] provides:

"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 received 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*

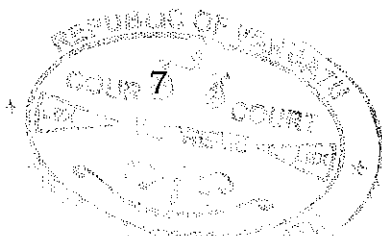
(c) *State the object of the negotiations.*

(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***".

23. Plainly non-compliance with the section may (not shall) lead to the Minister not approving any agreement reached between the unregistered negotiator and the custom owners but, that possibility does not mean that the failure to first obtain a negotiator certificate is a "mistake" that materially affects or could be causative of the registration of any subsequent instrument which has received the Minister's consent. Indeed, such an instrument could still be approved by the Minister and would thereafter be validly registered as occurred on 31 May 2012 in respect of the first defendants lease application which was subsequently registered on 13 June 2012.

24. Furthermore, as annexure "TL5" to the sworn statement of Timaima Lauto clearly reveals, the first defendants were actually issued with a certificate of registered negotiator in respect of Lease Title no. 12/0914/026 by the Minister of Lands on 16 February 2012 under Section 6 of the Law Reform Act [CAP. 123]. This complaint is wholly misconceived and is without any substance or merit.

25. During argument, claimant's counsel summed up the allegation of "fraud" against the first defendant's as: "... basically (Timaima Lauto's) claim that she was qualified to be named as lessor because she knew of the existence of the Island Court's determination in the claimant's favour". However no such claim is made in the first defendants' defence. Against the Minister of Lands, the allegation of "fraud" is that the Minister issued a certificate of registered negotiator naming Timaima Lauto as the customary owner of Lease Title No. 12/0914/026 and also the Minister fast-tracked the registration of the first defendant's lease in preference to the claimant's similar application.



26. After discussions however, claimant's counsel accepted quite properly in my view, that the summary judgment application based on "fraud" is unlikely to succeed and should therefore go to trial. Counsel also accepted that the pleadings alleged "mistakes" against the second and third defendants only and none against the first defendants.

27. Needless to say in order to prove "fraud" it would be necessary to establish some actual "dishonesty" on the part of the Director and/or the Minister of Lands in the registration of Lease Title No. 12/0914/026 to the knowledge of the first defendants (see: Naflak Teufi Ltd. v. Kalsakau [2005] VUCA 15 where the Court of Appeal said:

*"Not only must there be proof of a mistake or fraud but also that such mistake or fraud caused the entry to be registered. **Furthermore it has to be proved that the mistake or fraud was known to the registered proprietor of the interest sought to be challenged**, or was of such a nature or quality that it would have been obvious to the registered proprietor had he not such his eyes to the obvious or where the registered proprietor himself cause such omission, fraud or mistake, or substantially contributed to it by his own act, neglect or default".*

28. Rule 9.6 of the Civil Procedure Rules governs applications for summary judgment. In particular sub-rule (9) provides:

"(9) The Court must not give judgment against a defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact or a difficult question of law".

29. In light of the preceding discussions, I am satisfied that there is a real and continuing dispute between the parties as to the custom ownership of the land on which Lease Title No. 12/0914/026 is located as well as the meaning and effect of the Efate Island Court's declaration in the claimant's favour and the legal effect of the so-called "mistakes" alleged by the claimant against the second and third defendants.

30. The application for summary judgment is accordingly dismissed with costs in the first defendants' favour summarily assessed at VT30,000 and ordered to be paid within 14 days.

31. For completeness, the application of Bred (Vanuatu) Limited to be joined as an interested party is dismissed as unnecessary to the fair and effective disposal of the claim and as it is already a claimant in an existing claim namely, Civil Case No. 151 of 2012.

DATED at Port Vila, this 22nd day of April, 2016.

BY THE COURT



D. V. FATIAKI

Judge.