

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

CIVIL CASE No 618 of 2017

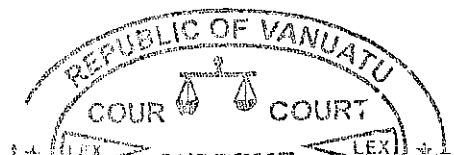
**BETWEEN: KAPEL PAKOA, FAENA PAKOA
SYLVIE PAKOA, MARGARET PAKOA**
Claimants

**AND: SIMPSON KASWELY, WILLIE PAKOA & FAMILY
AMOS PAKOA & FAMILY**
Defendants

Hearing: 20th and 24th August 2018
Before: Justice Chetwynd
Counsel: Mr Livo for the Claimants
Ms Matariki and Mr Willye for the Defendants
Mr Godden (holding an amicus brief for an interested party)

JUDGMENT

1. On 15th March 2017 a claim was filed by Kapel Pakoa, Faena Pakoa, Sylvie Pakoa and Margaret Pakoa ("the claimants") against Simpson Kaswely, Willie Pakoa & family and Amos Pakoa & family ("the defendants"). The relief claimed was an eviction order against the defendants in respect of registered title 11/0J23/025 near Tagabe roundabout and VT 200,000 damages for loss and distress. Any personal property or the home of Sylvie Pakoa was to be excluded from any order.
2. A defence was filed basically saying the defendants were the relatives of Ben Pakoa and Pakoa Mala Shem George. They claimed they (together with Toara Pakoa) were proprietors in common of the land. The basis of their claim was a document which they called a Will and which was said to have been executed in October 2008.
3. The defendants counterclaimed seeking a declaration they owned the property as proprietors in common and requiring compensation for developing and improving the land. They required the lease to be re-registered in the names of all the parties.
4. It was obvious that the document of October 2008 was of great importance and a trial was held in respect of the preliminary issues of the authenticity and effect of that document. A decision on the preliminary issues was handed down on 19th December 2017. That decision should have brought the proceedings to an end or at least led to a negotiated settlement. Unfortunately it did not and the claimants insisted on a trial.
5. A trial was listed for Monday 20th August. Before witnesses were called I asked counsel for the claimants what it was they wanted as the result of the trial. The answer was an order or direction of some sorts confirming the claimants were the Administrators of the Estate of the late Toara Pakoa and an order for eviction of the defendants.



6. I pointed out that there was an order in Probate case No 49 of 2014 granting Letters of Administration of the estate of the late Toara Pakoa to the claimants. The grant was not disputed by the defendants. I also suggested to counsel that he re-read the decision on the preliminary issues from December as that had findings which were pertinent. I adjourned the trial to Friday 24th August.

7. At the adjourned hearing I asked counsel for the claimants if he had re-read the decision and discussed it with his clients. He said he had. I asked again what he and his clients expected from the trial. He repeated that they wanted confirmation the claimants were the Administrators of the late Toara Pakoa and that they were entitled to evict the defendants.

8. I suggested that there was no need of any evidence, no need of a trial to confirm the appointment of the claimants as Administrators of the estate. I asked defence counsel if that fact was disputed. Defence counsel said no, the claimants had been granted Letters of Administration. I then referred counsel to paragraph 20 of my decision from December. I say in that paragraph that it is an undeniable fact that the claimants have been appointed as Administrators of the Estate of the late Toara Pakoa.

9. As to eviction, I also referred to the same paragraph where I said :

"The claim is for vacant possession and/or eviction. That will be denied to the claimants because the defendants, or any of them, on any of the arguments raised above have the right or a right to be on the land."

That finding has not been appealed. The claim for an eviction order cannot succeed.

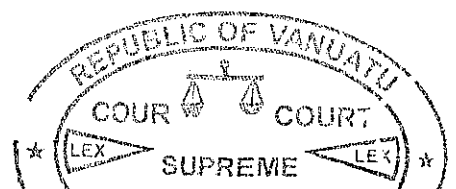
10. The claimants' argument seems to be that as they are Administrators they are entitled to vacant possession and that they must have vacant possession to properly administer the estate. That is not the case. The claimants do not need vacant possession in order to properly administer the estate of Toara Pakoa.

11. In any event, it is quite apparent that Ben Pakoa and Pakoa Mala Shem George and /or their families have been living on the land since before the lease was granted in 1986 or 1987. They would clearly have section 17g¹ rights as occupiers of the land. The defendants were not, are not, mere squatters.

12. There being no other issues I again queried with counsel the need for a trial. It was then suggested that claimants wanted to call evidence to challenge the authenticity of the October 2008 document. I had to point out quite forcefully to counsel that the claimants already had their answer on that issue and there had been no appeal. I will quote from the December decision:-

"What is clear from the evidence available is the copy document annexed to Mr Ben Pakoa's sworn statement (filed 26th June 2017) and marked BP01 is a copy of an original document dated 12th October 2008. I have no doubts that a document was drawn up in 2008 and signed by Toara Pakoa, Ben Pakoa and Pakoa Mala Shem George. I have no doubts that the copy is genuine."

¹ Section 17g of the Land Leases Act [Cap 163].



13. The defendants did not wish to add anything to the discussions between myself and counsel for the claimants.

14. At this point I should mention that there was an application for joinder by Ms Melta Arutokala. She is said to be the first born daughter of Pakoa Mala Shem George. I refused to hear the application on Monday 20th as I thought it would delay matters. Ms Arutokala would suffer no prejudice if she did not have a say as a party because her interests were inextricably tied up with those of the defendant Willie Pakoa and family.

15. Thus, in so far as the claim is concerned, the claimants are not entitled to an eviction order against all or any of the defendants. I am told that Simson Kaswely is related to the claimants through Toara Pakoa. Amos Pakoa is the adopted son of Toara Pakoa. Willie Pakoa is related to Pakoa Mala Shem George.

16. What needs to happen is that the surviving relatives of Pakoa Mala Shem George need to apply for Letters of Administration in respect of his estate. They can then, as Administrators, deal with his interests in the property.

17. Ben Pakoa is still alive and so obviously he can deal with his 1/3 interest in the property.

18. The Administrators of Toara Pakoa's estate, the Administrators of Pakoa Mala Shem George's estate and Ben Pakoa then need to meet to decide what should happen to the property.

19. One point needs to be made at this juncture, those who are living on the property are probably not entitled to do so rent free. They must certainly meet the expenses of maintaining the title (e.g. pay rates and taxes). If they are using all of the property they must account to the estates of Toara Pakoa and Pakoa Mala Shem George and to Ben Pakoa. The defendants' counter claim for improvements is therefore highly likely to fail and the best they can hope for is that any expense they have gone to can be set off against rent or any other expenses.

20. Thus, whilst the claimants have the right to have the title registered in their names as personal representatives of the late Toara Pakoa they are still obliged to properly exercise the obligations they have chosen to take up. They cannot rely on their being the registered proprietors alone, they are so registered as the personal representatives of the late Toara Pakoa. They must do as he wanted or what he agreed and not what they want.

21. I bear in mind that there is a counterclaim in this case. The finding I have made concerning the authenticity of the 2008 document does not in itself assist in the disposal of that counterclaim. That finding does effectively end the Claim because in all probability the defendants have a right to be on the property, they are not merely squatters.

22. As I said in December, what now needs to be decided is exactly what rights or interests the parties have. I cannot direct or order how the different interests of the parties are dealt with. The obvious and only starting point is that Ben Pakoa, Toara Pakoa and Pakoa Mala Shem George each had a 1/3 interest in the whole title. As they are proprietors in common their 1/3 interests survive their deaths. The claimants



as Administrators of Toara Pakoa must account to all the beneficiaries of the deceased including Vandua Morris Pakoa (who apparently lives with Amos Pakoa and family) and Ishmael Amos Pakoa or their descendants. Whoever obtains Letters of Administration for Pakoa Mala Shem George must deal with his interests in the property. Ben Pakoa is, as already mentioned, still alive and can do what he wants with his interests.

23. The real problem is how to practically divide the property up into 1/3 shares. The parties could for example, consider a sale of the whole and simply divide the proceeds. They could consider some of the beneficiaries buying out the interests of the remaining beneficiaries. They could sub divide the plot into 3 equal portions with costs of the subdivision being shared equally by those wanting to sub divide.

24. There is no mechanism for making those types of order in these proceedings. The first thing that needs to happen is that Pakoa Mala Shem George's estate is represented. Then Ben Pakoa needs to be involved as well. In the circumstances the simplest way forward is to dismiss both the claim and counter claim. That is the order I make in this case. The claim is dismissed and the counterclaim is dismissed. As there are no winners or losers there will be no order for costs. Each party will be responsible for their own costs (including the interested party Ms Melta Arutokala). I also make it clear now that the claimants' costs are not to be paid from the estate of Toara Pakoa. They must pay the costs from their own pockets

25. Finally, I suggest the parties will make more sense of this decision if they go back and read the decision of the preliminary point dated 19th December 2017.

Dated at Port Vila this 29th August 2018

BY THE COURT

