

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

Civil Case
No. 22/780 SC/CIVL

BETWEEN: Albea David representing Mele Maat
Community
Claimant

AND: Ponatoka Development Company
Limited
Defendant

Date of Hearing: 28 April 2023

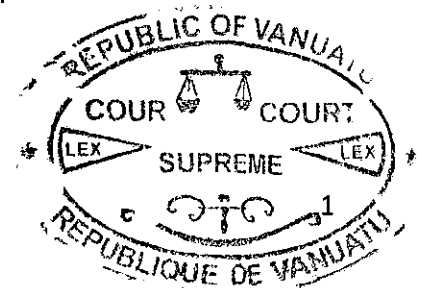
Before: Justice V.M. Trief

In Attendance: Claimant – no appearance (Mr J. Harold, for Mr D. Yawha)

Defendant – Ms V. Muluane, for Mrs M.N. Ferrieux Patterson

**DECISION AS TO APPLICATION TO STRIKE OUT CLAIM AND AS TO CLAIMANT'S
URGENT EX PARTE APPLICATION FOR RESTRAINING ORDERS**

- A. Preliminary matter
1. The 2 Applications before the Court were by Orders dated 6 April 2023, listed for hearing at 1.15pm on 15 June 2023. Then by Orders dated 13 April 2023, they were listed for hearing at 8am on 26 April 2023. Also, by the Orders dated 13 April 2023, at the Claimant Albea David representing Mele Maat Community's counsel Mr Harold's request, the Claimant was granted an extension of time to 4pm on 20 April 2023 to file submissions in response to the Strike-out Application.
 2. No submissions have been filed by that time or since.
 3. Counsel for the Defendant Ponatoka Development Company Ltd Ms Muluane attended today for hearing. The Registry called Mr Harold and was told that he was on his way to Court. However, he did not appear at the hearing.
 4. Having heard Ms Muluane and having considered the 2 Applications and the Claimant's submissions filed, this decision determines the Applications.
 5. The listing on 15 June 2023 is **vacated**.



B. The Claim

6. The Claim filed on 21 December 2022 seeks the following orders:

- 1) *An order of the Court to restrain the Defendant and his agents from entering and interfering with the Claimant and his Council.*
- 2) *An order for the Court to restrain the Defendant and his agents from further subdividing the land and refrain from advertising the sale of the subleases of land.*
- 3) *An Order that the police will intervene if the Defendant and his agents breach any of these orders.*
- 4) *Costs.*
- 5) *Any other orders deem just.*

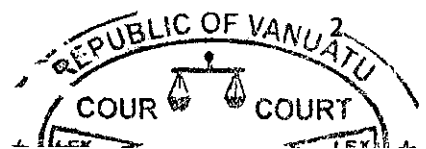
7. The following is alleged in the Claim:

- a) That the Claim is brought for loss and damages in relation to the subdivision and acquiring [sic] lease title no. 12/0822/014 by way of fraud and mistake as the land was subdivided without the consent of the Claimant and his council of Maat community;
- b) That the Claimant believes they have interest and are claiming the ownership of the land as they have lived on the land since pre-Independence times until a new lease was created from title no. 3252 without their consent after they surrendered the pre-Independence title in 2008;
- c) Their tribe made payment of four thousand pounds for the land to French planter Andre Houdie in 1963 and customary payment to the Mele village paramount chief and people on 17 November 1978 to ensure that the Maat tribe became the custom owners of the pre-Independence title;
- d) On 17 November 2015, the Defendant became the lessee;
- e) In 2017, the Defendant subdivided the land and advertised the sale of the subleases without notice to the Claimant; and
- f) On 19 August 2019, the lessor changed from the Minister of Lands to Family Songoriki.

C. Claimant's Urgent Ex Parte Application (the 'Claimant's Application')

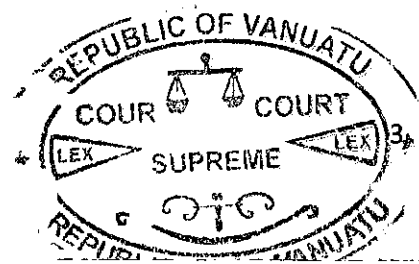
8. By this Application filed on 7 December 2022, the Claimant seeks the following orders:

- a) *An order restraining or prohibiting the Defendant and his agents from entering the land Title No. 12/0822/014 located opposite to Maat Village, and to refrain them from subdividing the land and subleasing the plots of land.*
- b) *An order restraining the Defendant and their Agents from causing any threats directly or indirectly on the Applicant and the Mele Maat Village Council members namely, Emil*



Mael, Perth Jackson, Norman Samuel, Frank Tovo, George Simelum and Maki Simelum and any members of Maat tribes living at Mele Maat Village.

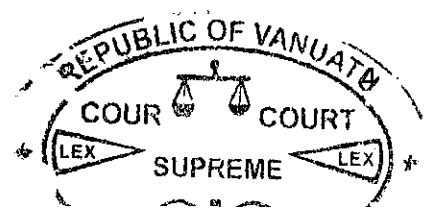
- c) An order that any breach of these orders by the Respondent and their agents will compel the Police to intervene for contempt of Court Order.
 - d) Cost.
 - e) Such further order as the Court deems just.
9. The grounds for the Claimant's Application are stated to be set out in the supporting Sworn statement of Albea David filed on 7 December 2022. Mr David deposed that he is the Chief of Maat Tribe residing at Mele Maat village and they worked on pre-Independence title no. 2352 from 1963 until the land was registered to the Defendant in 2015 as lease title no. 12/0822/014.
 10. Mr David further deposed that the Defendant did not make any negotiation with him or the community according to the *Land Leases Act* of their rights as occupants of the land. They used the land since pre-Independence times for gardens and part of the land for sporting activities but have not done so since the subdivision began.
 11. In opposition, Ms Muluane submitted that the Application should be dismissed with indemnity costs. She submitted that lease title no. 12/0822/014 does not exist anymore and therefore no order can be made against that lease. Further, that the Claimant does not have standing to bring the Claim (*locus standi*), has not shown that it has a serious question to be tried and that it would be seriously disadvantaged if the order is not made. Ms Muluane also submitted that the matter was *res judicata* as the Claimant had previously made the same claim by way of its Counter Claim in *Malas v David* [2008] VUSC 56; Civil Case No. 3 of 2008, which was struck out.
 12. The Claimant in its Application seeks the same relief as the ultimate relief sought in the Claim. It is an abuse of process to do so. That alone is sufficient to dispose of the Application. However, in addition, the Claim purports to be a claim for fraud or mistake in relation to lease title no. 12/0822/014 as the land was subdivided without the consent of the Claimant and his council of Maat community. However, by their own pleading, the Claimant was not the lessee, the lessor or a declared custom owner of the land therefore the subdivision of the land without its consent could not constitute fraud or mistake. I must conclude therefore that the Claim does not disclose a cause of action.
 13. Additionally, the Claimant's alleged standing to challenge the lease is that it (the Maat tribe) worked on the lease from 1963 until the land was registered to the Defendant in 2015. That is not an interest that confers standing to bring a claim for fraud or mistake under s. 100 of the *Land Leases Act*. I must conclude therefore that the Claimant does not have standing to bring the Claim and therefore does not have a serious question to be tried.
 14. Finally, the Claimant has not set out in the Application nor in Mr David's evidence that it would be seriously disadvantaged if the order is not made.



15. For the reasons given, the Claimant's Application must be declined and dismissed. Costs must follow the event.
16. Another Claimant's Application and Mr David's sworn statement were filed on 21 December 2022 in identical terms to the Application and sworn statement filed on 7 December 2022. Accordingly, the documents filed on 21 December 2022 are declared **ineffectual** pursuant to rule 18.10(1)(c) of the *Civil Procedure Rules* ('CPR').


D. Defendant's Strike-Out Application

17. The Defendant's Application to Strike Out Claim was made on the following grounds:
 - a) That on the Claimant's own pleading (in para. 3 of the Claim) and para. 3 of Mr David's sworn statement, the Claimant became fully aware of or discovered the alleged "fraud or mistake" in 2008 however it filed the Claim 14 years later which is outside the 6-year limitation period and is therefore statute-barred pursuant to s. 14 of the *Limitation Act*;
 - b) That the Claimant is claiming fraud and mistake, interest and ownership in titles 3252, 298 and 2314, that they purchased this land from a French planter and did a custom ceremony and payment to the chief and people of Mele Village however the same claim was made by way of Counter Claim in *Malas v David* [2008] VUSC 56; Civil Case No. 3 of 2008. The Court struck out their counter claim therefore the Claimant is prevented by the principle of *res judicata* or estoppel from bringing the same proceeding again;
 - c) The Claimant does not have standing to bring the Claim as at no point in time has it had a registrable interest concerning lease title no. 12/0822/014; and
 - d) The Claim does not disclose a reasonable cause of action and is an abuse of the Court's process.
 18. No submissions in response have been filed.
 19. For the reasons already given, the Claim does not disclose a cause of action and the Claimant does not have standing to bring the Claim.
 20. Accordingly, the Claim must be struck out. Costs must follow the event.
- E. Costs
21. There was no attempt by the Claimant to comply with rule 7.5 of the CPR in the manner in which it made its Application hence the Application was doomed to failure. Further, it prolonged the proceeding without good cause. The Claim also was hopeless as it does not disclose a reasonable cause of action nor does the Claimant have standing to bring it. I am minded therefore to order that the Defendant's costs of the proceeding be paid on an indemnity basis.



22. I consider that a reasonably competent lawyer would not have drawn the Claimant's Application and the Claim as they did with each having no prospect of success. In the circumstances, I consider that Mr Harold and Mr Yawha have without good cause engaged in conduct that resulted in increased costs – see r. 15.5 of the CPR.
23. For the same reason, the costs of the proceeding are an unnecessary expense for the Defendant incurred by Mr Harold and Mr Yawha – see r. 15.26(2)(c) of the CPR. Accordingly, it is not fair that the Claimant pay those costs. I am minded therefore to order that Harold and Mr Yawha personally pay the Defendant's costs of the proceeding.
24. Therefore in accordance with r. 15.26(3) of the CPR, I hereby require Mr Harold and Mr Yawha's written response **by 4pm on 16 May 2023** as to why the Defendant's costs of the proceeding should not be paid on an indemnity basis, and why those costs should not be personally paid by Mr Harold and Mr Yawha
- F. Result and Decision
25. The Claimant's Urgent *Ex Parte* Application is **declined and dismissed**.
26. The Defendant's Application to Strike Out Claim is **granted**.
27. The Claim is **struck out**.
28. In accordance with r. 15.26(3) of the *Civil Procedure Rules*, I require Mr Harold and Mr Yawha's written response **by 4pm on 16 May 2023** as to why the Defendant's costs of the proceeding should not be paid on an indemnity basis, and why those costs should not be personally paid by Mr Harold and Mr Yawha.
29. The Claimant's Application and Mr David's sworn statement filed on 21 December 2022 are in identical terms to the Application determined in this decision and its supporting sworn statement therefore both documents are declared **ineffectual** pursuant to rule 18.10(1)(c) of the *Civil Procedure Rules*.
30. The listing on 15 June 2023 is **vacated**.

DATED at Port Vila this 28th day of April 2023
BY THE COURT


Justice Viran Molisa Trief

