

**IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU**
(Other Jurisdiction)

Civil Appeal
Case No. 17/1928 CoA/CIVA

BETWEEN: Charlie Molitaekwae
Appellant

AND: Edward Crowby
Respondent

Date of HEARING: *7th day of November, 2017 at 11:00 AM*

Date of JUDGMENT: *17th day of November 2017 at 4:00 pm*

Before: *Hon. Chief Justice Vincent Lunabek*

Hon Justice von Doussa

Hon. Justice Ronald Young

Hon. Justice Daniel Fatiaki

Hon. Justice Dudley Aru

Hon. Justice David Chetwynd

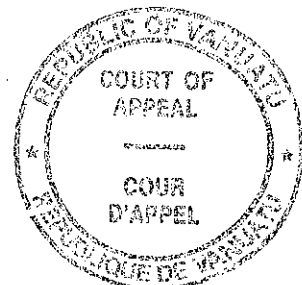
Hon. Justice Paul Geoghegan

In Attendance: *Jack Kilu for Appellant*

Christina Thyna for Respondent

JUDGMENT

1. The respondent Mr Crowby is the registered proprietor of leasehold title 12/0632/013 ("title 013") in respect of a block of land of some 244 hectares located near Bauerfield Airport in Port Vila.



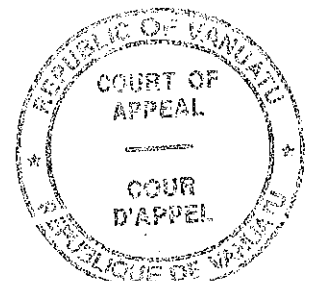
2. In August 2016, Mr Crowby filed a claim in the Supreme Court in which he alleged that the appellant Mr Molitaekwae and his family had been living on the land despite having been asked to leave. Mr Crowby sought an order restraining Mr Molitaekwae together with any person claiming a right of occupation to the property through him from continuing in occupation of the land, together with damages for trespass to be assessed by the Court.

3. Mr Molitaekwae filed a defence and counter claim. In his statement of defence, Mr Molitaekwae alleged:-
 - a) Mr Crowby had acquired the leasehold title by way of fraud; and
 - b) The parties had agreed on compensation to be paid by Mr Crowby to Mr Molitaekwae for trees, crops and buildings which had been grown or erected on the land by Mr Molitaekwae and his family but that the claimant had failed to pay any compensation.

4. By way of counter claim, Mr Molitaekwae repeated the allegations and sought a number of orders including:-
 - a) A declaration that the lease title was obtained by fraud;
 - b) An order that the lease title was "invalid and of no effect";
 - c) An order that the lease title be rectified by way of cancellation of the lease;



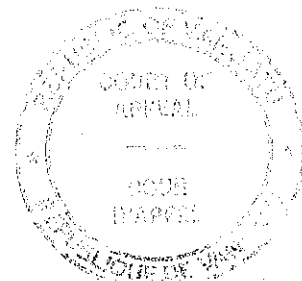
- d) An order requiring Mr Crowby to pay Mr Molitaekwae the sum of Vt 15,759,156 by way of compensation for improvements to the land "following which the first defendant shall vacate the property".
- e) An order that Mr Crowby pay exemplary/common law damages in the sum of Vt 1 million.
5. The orders referred to in (d) and (e) above were sought as alternative remedies in the event that the counterclaim under section 100 of the Land Leases Act regarding fraud or mistake, failed.
6. Mr Crowby applied for summary judgment on the basis that it was uncontested that Mr Crowby was the registered proprietor of the leasehold title and had occupation of the lease prior to Mr Molitaekwae settling onto the land and that Mr Molitaekwae was aware that he was trespassing. It was also contended that Mr Molitaekwae had no standing in respect of section 100 of the Land Leases Act and accordingly could not apply for rectification of the title.
7. A judgment was issued in the Supreme Court on July 5th 2017 in respect of the summary judgment application. The Supreme Court Judge granted the summary judgment application and made the restraining order requested by Mr Crowby together with an order requiring Mr Molitaekwae, his agents, servants, relatives and families to vacate the property on or before July 28th 2017.



8. While the Judge did not make a specific order dismissing Mr Molitaekwae's counter claim he observed that Mr Molitaekwae was not the land owner of title 013 and therefore could not invoke section 100 of the Land Leases Act by way of counter claim. He also referred to the counterclaim for compensation by Mr Molitaekwae as "*vexatious and frivolous*". Accordingly, while he made no specific orders regarding the counter claim it is clear that he saw no merit in it.

9. In reaching his decision, the Supreme Court Judge referred to two sworn statements filed by Mr Molitaekwae in respect of the summary judgment on June 23rd 2017. The Judge referred to the fact that Mr Molitaekwae had been directed on February 2nd 2017 and on April 28th 2017 to file sworn statements but had not complied with those directions. The Judge referred to the filing of the sworn statements as an abuse of Court process and accordingly rejected the statements as evidence.

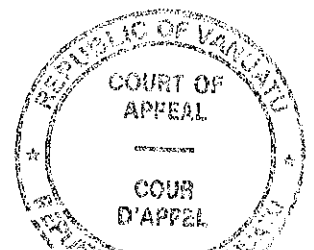
10. Mr Molitaekwae now appeals that judgment. While there are eight stated grounds of appeal, it essentially centres on submissions that the Judge was wrong in excluding the sworn statements filed by the Appellant and to hold that no evidence had been filed in support of the defence and counterclaim, was wrong to hold that Mr Molitaekwae did not have a claim under section 100 of the Land Leases Act, and was wrong to hold that the claim for compensation was "*vexatious and frivolous*" and had no merit.



11. As to the submission that the Judge determined that Mr Molitaekwae had filed no evidence in support of his defence and counter claim, it is clear that when the Judge determined that the sworn statements filed on behalf of Mr Molitaekwae had been filed in breach of previous timetabling directions the Judge was actually wrong and had failed to take proper account of previous timetabling directions made by him. On April 28th the Judge directed that Mr Molitaekwae be given an extension of 14 days to file and serve sworn statements by May 14th 2017. That timetabling direction was not complied with, however subsequently, on June 5th 2017 the Judge made a further direction that Mr Molitaekwae file and serve any response to the application for summary judgment by June 26th 2017. It is accordingly clear that the sworn statements filed by Mr Molitaekwae were filed in accordance with the Court's timetabling directions and should not have been categorized as an abuse of process and rejected.

12. Having come to that conclusion however, it is important to take account of what the sworn statements actually contained, as if they did not raise an arguable defence then they could have had no impact upon the judgment in the Supreme Court.

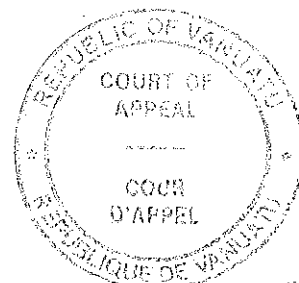
13. The first statement is a sworn statement of George Soalo dated June 23rd 2017. Mr Soalo deposed that his late father Chief Alick Soalo was declared by the Island Court on February 25th 1994 as having "*customary rights*" over a land area which covered the land contained in lease 013. He deposed that his father had died in 2007 and



that his rights automatically vested in Mr Soalo as the late chief's first born son. He then deposed that his father had never granted a lease to Mr Crowby and had never mentioned such a lease. Mr Soalo also deposed that his late father had given Mr Molitaekwae the right to garden on part of the customary land.

14. The only thing established by Mr Soalo's sworn statement is that he may have a claim of custom ownership in respect of the land the subject of these proceedings and that he may have a right to seek relief under section 100 of the Land Leases Act. That right is a right personal to him. It is not a right held by Mr Molitaekwae. Accordingly Mr Soala's evidence was irrelevant to the issues for determination in the summary judgment application.

15. The second sworn statement was by Mr Molitaekwae dated June 26th 2017. Mr Molitaekwae deposed that the late Chief Soalo had permitted him to establish a garden on the land and that he moved onto the property in 2003 building a residence on it and then starting to clear the land and plant agricultural crops as well as forestry timber trees. He deposed that he was unaware of the claimant's lease but confirmed that the claimants had requested that he vacate the property in October 2011. He deposed that after again being requested to leave the property an agreement was reached between he and Mr Crowby that Mr Molitaekwae would obtain an assessment of the developments on the land and that Mr Crowby would then pay compensation so that he could vacate the land. That assessment was obtained and valued the developments and improvements on the land at Vt 15,759,156. That compensation had not been paid and Mr Molitaekwae confirmed

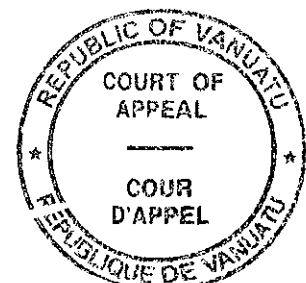


that if it were paid to him he would vacate the land *"depending on the challenge by the land owner, George Soalo to have the lease cancelled"*.

16. While the sworn statements filed provided some support for Mr Molitaekwae's claim for compensation they did not and could not have established a right of occupation on the part of Mr Molitaekwae and it is clear that Mr Molitaekwae had no arguable defence to Mr Crowby's claim for a restraining and/or eviction order. Additionally, Mr Molitaekwae clearly had no standing and therefore no ability to pursue a claim under section 100 Land Leases Act. The Judge was accordingly correct in his view that that part of the defence and counterclaim relying on a claim under the Land Leases Act could not be sustained.

17. Mr Kilu also argued that Mr Crowby was statute barred under the Limitations Act from taking an action in trespass against Mr Molitaekwae who had occupied the land for more than nine years. That submission overlooks the fact that trespass provides a continuing cause of action and accordingly in these circumstances the Limitation Act cannot be invoked.

18. As to the submission that the Supreme Court Judge erred in law in referring to Mr Molitaekwae's claim for compensation as *"vexatious and frivolous"*, we agree. It is clear from the evidence that Mr Molitaekwae was asserting that there was an agreement for compensation between he and Mr Crowby. Evidence of an

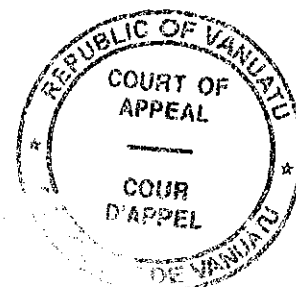


assessment of that compensation was provided. In those circumstances, it could not have been said that the counter claim for compensation was "*vexatious and frivolous*" or that it had no reasonable prospect of success. Accordingly the defendant should be permitted to continue with his counter claim in respect of compensation.

19. For these reasons the appeal is dismissed and orders 1 – 5 of the judgment dated July 5th, 2017 are upheld.

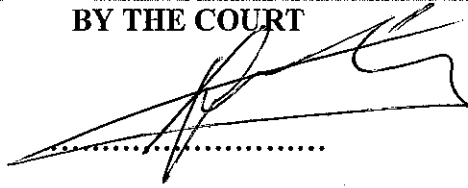
20. Given however, that no formal orders were made regarding Mr Molitaekwae's counter claim the counter claim should now be dealt with by the Supreme Court and we remit the matter to the Supreme Court for that purpose. It will be clear from this judgment that the counter claim seeking relief under section 100 of the Land Leases Act has no reasonable prospect of success and that Mr Molitaekwae should focus on that part of the counter claim seeking compensation.

21. Given the outcome of the appeal and the fact that the matter has been remitted to the Supreme Court for completion there is no order as to costs.



DATED at Port Vila this 17th day of November, 2017

BY THE COURT



Vincent Lunabek

Chief Justice

