

**IN THE SUPREME COURT  
OF THE REPUBLIC OF VANUATU  
(CIVIL JURISDICTION)**

**CIVIL CASE No 328 OF 2014**

**BETWEEN: FAMILY KALPOI** as represented by  
Bill Kalsarap Kalpoi and Vira Kalpoi  
Claimant

**AND: THE REPUBLIC OF VANUATU**  
First Defendant

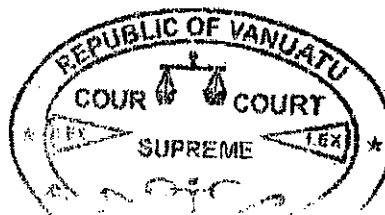
**AND: FAMILY KALMET KALPRAM** as  
represented by their trustees Wano  
David Kalmet and Brent Kalpram  
Kalmet  
Second Defendant

**Submissions:** 14<sup>th</sup> & 17<sup>th</sup> November 2016 and 6<sup>th</sup> February 2017  
**Date of Judgment:** 3<sup>rd</sup> March 2017  
**Before:** Justice Mary Sey  
**Appearances:** Mr. George Boar for the Claimant  
Mr. Sakiusa Kalsakau for the First Defendant  
Mrs. Mary Grace Nari for the Second Defendant

**RESERVED JUDGMENT**

**Introduction**

1. The Claimant is a Ni-Vanuatu family from Pango and represented by Bill Kalsarap and Vira Kalpoi. The Second Defendant is Family Kalmet Kalpram as represented by their trustees Wano David Kalmet and Brent Kalpram Kalmet.
2. The issues in this case relate to the rectification of Rural Commercial Tourism Lease title 12/0913/501 ("the lease") on 23 August 2010 by the First Defendant.
3. **Brief background Facts** of this case can be gleaned from the following chronology:-



**12 March 2004:** the Second Defendant was declared by the Efate Island Court as custom owner of Emetnai land where Breakas Resort is located. The parties to the above matter were the Second Defendant, George Lawrence and Toktok Kaluatman. The Claimant did not participate in the proceeding.

**22 December 2006:** Rural Commercial Tourism Lease title 12/0913/501 ("the lease") which named as lessors Charlie Kalorus Kalpoi, Tom Kaluatman, Billy Kalsa and Thomas Lei Kalsa and 100% Pur Fun Limited as lessee was registered by the First Defendant.

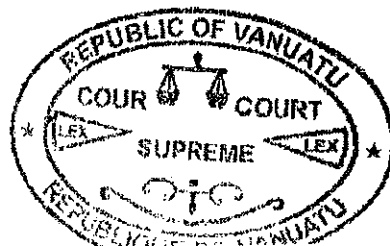
**30 June 2010:** Wano David Kalmet, Abel Frank Kalmet, Ephraim Kalmet and Kaloros Kalmet wrote a letter to the Director of Lands citing the decision of the Efate Island Court declaring Family Kalmet as the custom owner of the land Emetnai and requesting a change of lessor's name.

**23 August 2010:** the Director of Lands rectified the lease by changing the lessor's name to that of the Second Defendant pursuant to the custom declaration by the Efate Island Court.

4. The Claimant contends that the Director of Lands does not have power to rectify the lease register. The Claimant says the rectification of the lease register was not made pursuant to an order from the Supreme Court. Further, that it was not made in accordance with **sections 99 (3) and 100 (1) of the Land Leases Act [CAP 163]**.

#### **The Claim**

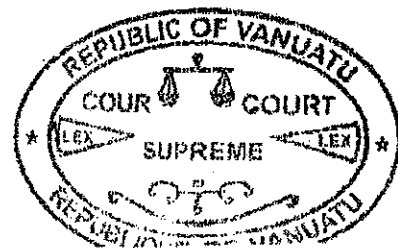
5. By an amended Supreme Court Claim filed on 12 August 2015 pursuant to the Court's direction order of 6 July 2015, the Claimant seeks the following reliefs:
  - (a) A declaration that the rectification made on 23 August 2010 was unlawful;
  - (b) An order that the Defendant through its Director of Lands reinstate Tom Kaluatman, Billy Kalsa, Thomas Lei Kalsa and the Claimant to the register of lease title 12/0913/501 as lessors.
  - (c) Alternatively, an order that the First and Second Defendants indemnify the Claimant in the sum of VT 1,685,000,000 pursuant to section 103 and 101 of the Land leases Act.



- (d) An order that the First and Second Defendants pay the Claimant's expenses leading to the lease title on 23 December, 2006.
- (e) An order for costs to be taxed if not agreed; and
- (f) Any other order the Court deems fit.

### **The Defence**

6. The First Defendant says that on 30 June 2010, the Department of Lands received a letter signed by Wano David Kalmet, Abel Frank Kalmet, Ephraim Kalmet and Kaloros Kalmet requesting a change of lessor's name based on the decision of the Efate Island Court declaring Family Kalmet as the custom owner of the land "Emetnai". The First Defendant further says that the letter also informed the Director of Lands that Wano David Kalmet and Brent Kalpram Kalmet were appointed as trustees for Family Kalmet Kalpram.
7. Furthermore, the First Defendant says that on 23 August 2010, the Director of Lands rectified the lease and recorded in the register Wano David Kalmet and Brent Kalpram Kalmet as trustees of Family Kalmet Kalpram. It says the rectification of the lease was made in good faith pursuant to section 9 of the *Land Leases Act* [Cap 163] and the letter dated 30 June 2010 as aforesaid.
8. The First Defendant denies that the lease was registered by fraud and/or mistake and contends that the rectification of the lease was made to reflect the name of the Second Defendant on the basis of the Efate Island Court Judgment dated 12 March 2004 in Land Case No. 02 of 2001.
9. For their part, the Second Defendants say that the claim is misconceived because the Director of Lands rectified the register after he was notified by the Second Defendants that they had obtained a valid declaration in their favour from the Efate Island Court in a judgment dated 12 March 2004.
10. The Second Defendants further say that this declaration gave them the right to request a change of lessor's name. They contend that the Claimant was not a party to the custom land dispute in 2004 and that the Claimant has no valid document to show otherwise whereas Family Kalmet Kalpram had obtained a valid Island Court judgment to prove their custom ownership of "Emetnai" which covers the Breakas Resort lease.



## The Evidence

11. The Claimant relies on the *Sworn Statement of Bill Kalpoi* sworn to on 25 August 2015 in support of the claim. The sworn statement of *Jean Marc Pierre* in support of the First Defendant was filed on 1 July 2015. The Second Defendant's evidence was essentially contained in the *Sworn Statement of Wano David Kalmet* filed on 19 May 2015, the *Sworn Statement of Wano Kalmet in response to Bill Kalpoi's Statement* filed on 6 October 2016 and the *Sworn Statement of Brent Kalpram Kalmet* filed on 6 October 2016.

## RELEVANT LAWS:

Section 99 and 100 of the Land Leases Act provide:

### PART 15 – RECTIFICATION AND INDEMNITY

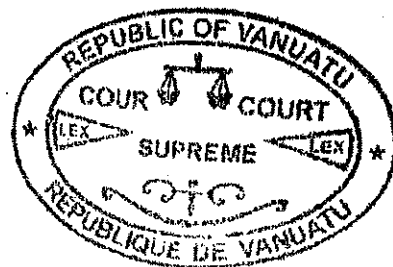
#### 99. Rectification by the director

- (1) Subject to section 100(2), if it appears to the Director that any register does not truly declare the actual interest to which any person is entitled under this Act or is in some respect erroneous or imperfect, the Director after taking such steps as he thinks fit to bring to the notice of any person shown by the register to be interested his intention so to do, and giving every such person an opportunity to be heard, may as from such date as he thinks fit, rectify the register:

Provided that it shall not be necessary for the Director to take steps to bring the rectification to the notice of any person shown by the register to be interested nor to give any such person an opportunity to be heard in formal matters and in the case of errors and omissions not materially affecting the interests of any person.

- (2) Upon the written application of any proprietor accompanied by such evidence as the Director may require, the change of name or address of that proprietor shall be recorded in the register.
- (3) The Director shall rectify the register to give effect to an order of rectification of the register made by the Court.

#### 100. Rectification by the Court



(1) Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is so empowered by this Act or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

12. At a conference hearing on 10 October 2016, the Court was informed that counsel had agreed that they will not need to cross-examine each other's witnesses and that they would file submissions for the Court's determination.

#### Issues for Determination

A. Whether fraud and mistake was committed by the First and Second Defendants when they rectified the Claimant's lease title 12/0013/501 on 23 August 2010?

B. Whether the Second Defendant should compensate the Claimant?

#### Discussion and Decision

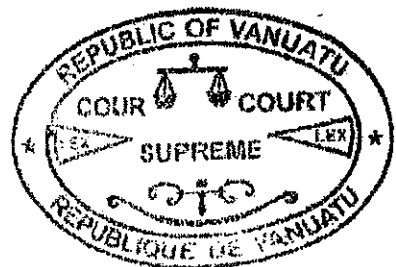
13. The Efate Island Court's Judgment in Land Case No. 02 of 01 is exhibited to the sworn statement of Jean Marc Pierre as annexure "JMP1". It records the parties as:

"Family Kalmet (Original Claimant)  
George Lawrence (Claimant No. 1)  
Toktok Kaluatman (Claimant No. 2)"

The declaration can be found at paragraph 19 of the said judgment and it reads as follows:

**"19) Dekleresen Blong Kot**

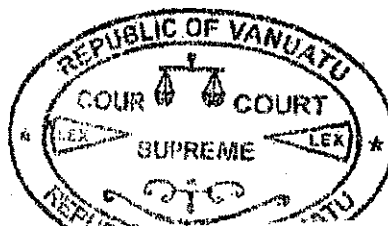
*Forum resens ia Kot istap deklarem tedei se:*



- (1) Family Kalmet Kalpram nao oli raetful mo tru kastom ona blong area we istap insaed long graon/land ia Emetnai we i stat long solwoat start long Ementnarwarof long Breakers Resort igo antap long saed blong area blong Emalfeng mo go antap long saed blong Eluksa then incrosem ikam long area blong Epagkaprawot mo ikam down long saed blong ples we George Lawrence iliv mo kam down long solwota bakagen long saed blong Etruk.
- (2) Kot ideclarem se George Lawrence hemi gat raet mo naoi a hemi onem area insaed long Emetnai follem acquisition we ol Elders blong Presbyterian mo ol people blond Pango oli givim long oflala blong hem. Hemia area we icoverem haos blong hem igo across kasem area we Kaltallu iliv long hem mo igo daon kasem solwota we hemi include basketball court mo 4 fala Bangalows blong Breakers Resort.
- (3) Folem declaration ia kot italem long family Kaluatman se olgeta inogat raet long area ia long Emetnai we istap long clem. Overall authority istap long family Kalmet olsem kastomary land owner.
- (4) Kot imas talem aot long ol paties tu se sipos ikat any development itek ples long area we family George Lawrence ikat raet long hem hemi mas kat say long hem".
14. It also seems clear to me that the Claimant is not the declared custom owner and there is no evidence before this Court to support the Claimant's allegation that the Director had no power to rectify the register. Besides, the Claimant was aware of the Efate Island Court decision and does not dispute the finding of the Court. Instead, the Claimant alleges that Family Kalpoi wanted to appeal but that they were dissuaded by the Second Defendant from doing so. At paragraphs 5 – 8 of the sworn statement of Bill Kalpoi in support of the claim he deposed as follows:

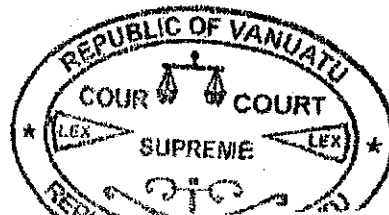
"5. I confirm Family Kalpoi wanted to appeal the Island Court Decision then but the Second Defendant represented by Wano David Kalmet and Brent Kalpram Kalmet advised us not to appeal the judgment of the Island Court decision of 12 March, 2004 and in fact these two persons represented to us that we do not need to worry since we are all custom landowners of the premises.

6. That I confirm there (sic) was one of the reasons why we did not appeal the Island Court Judgment which was dated 12 March, 2004, and further, this explains why Family Kalpoi, Family Kalwatman and Family Kelsa



continued to press on with the registration of the premises which was done on 22 December, 2006.

- ~~7. I understand under Section 22 of the Island Court Act, any party who does not agree with the Island Court Judgement can appeal although that party was not a party/claimant to the Island Court judgement. We were not party and or claimants to the land in dispute but nevertheless were entitled to appeal the Island Court judgment had not for (sic) the Second Defendants assurances that we were all custom land owners of the premises. ....~~
8. That I confirm another reason why the Second Defendants did not take objections to Family Kalpoi, Family Kalwatman and Family Kelsa processing the registration of the premises on 22 December, 2006 is that immediately after the premises was registered on 22 December, 2006, the Second Defendants did not take immediate steps to have the lessor status rectified and changed into their own names following the Island Court Judgment. It took about 4 years and 7 months for the Second Defendants to finally apply to have the lessor status changed from Family Kalpoi, Family Kalwatman and Family Kelsa to themselves. ...."
15. However, these averments are denied by Brent Kalpram Kalmet in his sworn statement dated 6 October, 2016. He states at paragraph 3 as follows:
- "3. I also confirm to this Court that at no time before or during the land matter relating to 'Emetnai land' [Land Case 02 of 2001] that our family made an agreement with the Claimant about representation of the Land matter or custom ownership".*
16. I also note the same confirmation in paragraph 1 of the sworn statement of Wano David Kalmet and at paragraphs 2 to 4 therein he says:
- "2. I repeat that the Claimant was not a party to the case even though Bill Kalpoi claims that his family resided on the land for many generations*
- 3. After the Efate Island Court declaration on 12 March 2004, our former lawyer wrote to Breakas Resort about funds to custom owners. See annexure marked 'A'.*
- 4. On 22 December 2006, the Claimant and others were registered as custom owners/lessor of the Breakas lease contrary to the Efate Island Court declaration. That is mentioned in my first statement filed on 19 May 2015".*
17. Judging from the totality of the evidence adduced by the parties in their sworn statements, I find that no fraud and/mistake was committed by the First and Second Defendants when they rectified the Claimant's lease title 12/0913/501



on 23 August 2010. The Director of Lands acted well within his powers under s.99 (1) of the Land Leases Act to rectify the register on the basis of the Efate Island Court Judgment dated 12 March 2004.

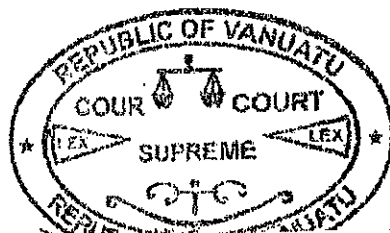
18. In effect, what the Director did was to take steps to rectify the register which, at the material time, was in some respect erroneous or imperfect. Given that on 12 March 2004, the Efate Island Court in Land Case No. 02 of 2001 had declared Family Kalmet Kalpram as custom land owners of Emetnai custom land, Pango Village, South Efate, the Director was then empowered (after taking the necessary steps) to rectify the register to reflect the Second Defendant as the lessors of the lease.
19. In reaching this conclusion, I adopt and apply the reasoning of the Court of Appeal in the case of *In Turquoise v Kalsuak* [2008] VUCA 22; Civil Appeal Case 21 of 2008 (4 December 2008) where the Court said:

*"In ordinary use the concept of "mistake" is a broad one that includes mistake of law as well as mistake of facts.*

*We are unable to accept that s.99 (1) imposes any limitation on the otherwise broad scope of "mistake". Section 99(1) empowers the Director to take steps to rectify the register where the register "does not truly declare the actual interest to which any person is entitled under this Act or is in some respect erroneous or imperfect". This is a very wide power. If the Minister makes an error in the exercise of power such that the Minister's decision should be set aside on administrative law principles, and if the product of that decision remained on the register, the register would not truly declare the interest of the registered proprietor, and should be erroneous. In our view, the wide scope of the power in s.99 (1) supports an interpretation of s.100 (1) which includes within "mistake" on improper exercise of power of the Minister under 8."*

20. In *Nafalak Teufi Limited v Kalsakau*, Civil Appeal Case No. 7 of 2004, the Court of Appeal said:

*"In our view, the meaning of section 100 of the Land Leases Act CAP163 is not in doubt. We are satisfied that the object of the section is to ensure that the land register and the processes leading up to the registration of any instrument or interest is free of any mistakes, fraud or possible fraudulent activities. In other words, its purpose is to secure the integrity of the register and the internal processes culminating in registration. The section, in its*



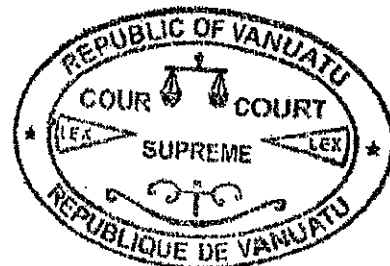


*terms, is one which empowers the Supreme Court where it is satisfied that any registration has been obtained, made, or omitted by fraud or mistake, to order rectification of the register by directing that any registration may be cancelled or amended. We note without comment, the disjunctive nature of the rectification power.*

*We endorse what was said by this Court in Civil Appeal Case, 25 of 2004, [2005] VUCA 5, Jone Roqara & Ors v Noel Takau & Ors about section 100: -*

*"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. In terms of s. 100, the Court must be satisfied that the "registration has been obtained, made or omitted by fraud or mistake". 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."*

21. In this present case, I find that the Claimant has failed to discharge the onus of establishing a mistake and of satisfying the Court that such a mistake (if any) caused the registration to occur so as to invoke the Court's discretion under section 100(1) of the Land Leases Act.
22. Interestingly, it appears that any semblance of fraudulent activities should be attributed to the Claimant who, in the face of a valid subsisting Court Judgment, entered into negotiations as lessors with the proprietors of Breakas in 2006 and received the initial premium in respect of the lease. I agree with the submissions of counsel for the Second Defendant that the registration of lease title 12/0913/501 on 23 December 2006 was fraudulently made because the persons named as lessors therein had knowledge that there was an existing declaration of custom ownership given on 12 March 2004 in favour of the Second Defendant.
23. Alternatively, the Claimant seeks an order that the First and Second Defendants indemnify Family Kalpoi in the sum of VT 1,685,000,000 pursuant to section 103 and 101 of the Land leases Act.



**INDEMNITY**

101. (1) *Subject to the provisions of this Act and of any law relating to the limitation of actions any person suffering damage by reasons of –*

- (a) *any rectification of the register under this Act;*
- (b) *any mistake or omission in the register which cannot be rectified under this Act; or*
- (c) *any error in a copy of or extract from the register or any copy of or extract from any document or plan in each case certified under this Act;*

*shall be entitled to be indemnified by the Government.*

**PROCEDURE FOR CLAIMING INDEMNITY**

103. Any person who considers that he has a right to indemnity under the provisions of section 101 may apply to the Court which shall hear and determine the matter and subject to the provisions of section 102 shall make such award, if, any, including costs and expenses as it thinks fit.

24. Now, having reached the conclusion that no fraud and/mistake was committed by the First and Second Defendants when they rectified the Claimant's lease title 12/0913/501 on 23 August 2010, it follows that the Claimant is not entitled to any indemnity from the First and Second Defendants. I so hold.

25. Accordingly, the Claimant's claim is hereby dismissed. The First and Second Defendants are entitled to costs to be taxed if not agreed.

**DATED at Port Vila, this 3<sup>rd</sup> day of March, 2017.**

**BY THE COURT**

*M. M. Sey*  
**M. M. SEY**  
Judge

