

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

Civil Case No. 16/2801 SC/CIVL

BETWEEN: HUNGAI TOMAKI and AVOK ATO
First Claimants

AND: ABEL TOMAKI & OTHERS
Second Claimants

AND: ADO INVESTMENTS LIMITED
First Defendant

AND: THE ESTATE OF EMILE OLSEN
Second Defendant

AND: REPUBLIC OF VANUATU
Third Defendant

Coram: Justice D. Aru

Counsel: Mr. J. Ngwele for the Claimants
Mr. J. Malcolm for the First Defendant
Mr. H. Tabi for the Third Defendant

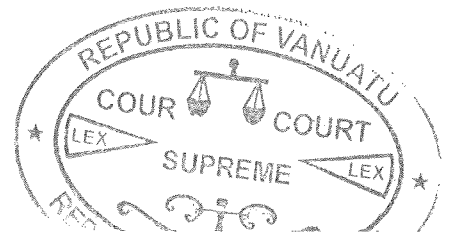
JUDGMENT

Introduction

1. This is a section 100 claim brought under the Land Leases Act [CAP 163] seeking rectification of lease title 11/OX22/027 (the 027 lease) on the grounds of fraud and/or mistake. The claimants are from the Island of Paama and belong to the Aveck Paama community. The Property is located at No3 in Port Vila.

Pleadings

2. In summary, the claimants allege that the first claimants occupied the land covered by 027 lease since 1967. They allege that since then they have been living on the property as occupiers of the land they are entitled to s 17 (g) rights under the Land Leases Act. Secondly they allege that the lease was granted to the late Mr Emile Olsen by fraud

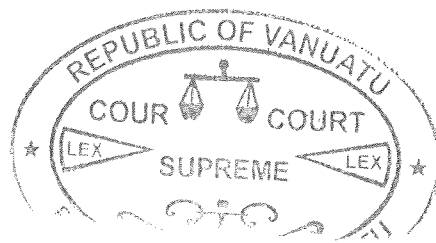


and/ or mistake. Furthermore, they allege that the subsequent registration of the transfer from Mr Olsen to the Ado Investments Limited (Ado Investments) was also made by fraud and/or mistake.

3. Ado Investments on the other hand says that the claimants were squatters on the land. It says it bought the 027 lease as a bona fide purchaser and is validly registered as proprietor. It denies any knowledge of any proceedings or disputes between the claimants and Mr Olsen.
4. The Republic says that it acted in good faith in registering both the lease to Mr Olsen and the subsequent transfer to Ado Investments.

Facts

5. In 1977 the land was owned by Sea Breeze Investments Ltd. Sea Breeze Investments allowed the first claimants to occupy the land in order to maintain it. Following independence in 1980, the Government in 1981 under the Land Reform (Declaration of Public Land) Order No 26 of 1981 declared the Port Vila urban area to be public land. The 027 lease is located within the Port Vila urban boundary and so became public land.
6. In 1984 or thereabout, the claimants applied to the Vanuatu Urban Land Corporation (VULCAN) for a lease of the land concerned. They were then invited by VULCAN to attend their offices for an interview to prepare their agreement to lease.
7. On 20 April 1990 a certificate of registered negotiator was issued to Mr Olsen by the Minister of Lands.
8. On 4 October 1990, Mr Tomaki paid VT 2000 to the Lands Department as his application fee for title 11/0X22/019 (the old title). Sometime after that he was advised by the Urban Land Leases Selection Committee (ULLSC) that his application was approved and that he will be issued a negotiator certificate.
9. On 25 March 1992 the old title was cancelled by the Land records Office and replaced by the new title being the 027 lease. On the same date the 027 lease was registered to Mr Olsen for a sum of VT 1,700, 000.
10. On 13 August 2003 the first claimants registered a caution over the 027 lease.
11. On 12 March 2010, the Minister of Lands consented to the transfer of lease from Mr Olsen to Ado Investments.
12. On 15 June 2010 the Director of Lands Records removed the first claimants's caution against the 027 lease.



13. On the same date, 15 June 2010 the transfer of lease from Mr Olsen to Ado Investments was registered.

Issues

14. The following issues arise for consideration:

- Whether the claimants have s17 (g) rights under the Land Leases Act?
- Whether the registration of the 027 lease to Mr Olsen was obtained by fraud and /or mistake?
- Whether the registration of the transfer of the 027 lease from Mr Olsen to Ado Investments was obtained by fraud and /or mistake?

15. I deal with each issue as follows.

Do the claimants have s 17 (g) rights

16. Section 17 (g) of the Land provides:

“17. Overriding interests

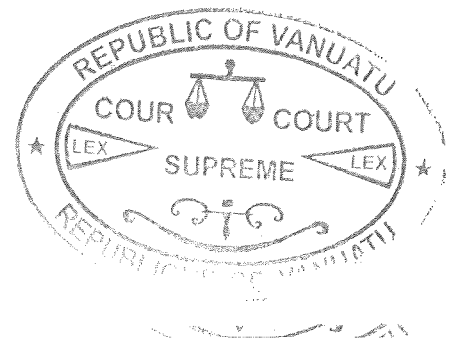
Unless the contrary is expressed in the register, the proprietor of a registered lease shall hold such lease subject to such of the following overriding liabilities, rights and interests as may, for the time being, subsist and affect the same, without their being noted on the register –

.....

(g) the rights of a person in actual occupation of land save where enquiry is made of such person and the rights are not disclosed;

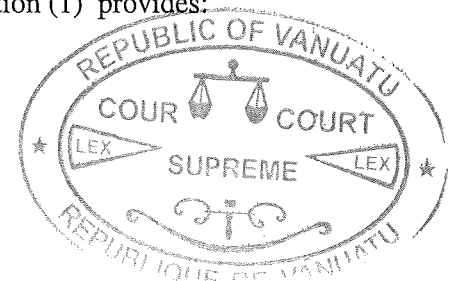
....”

17. Mr Hungai Tomaki is the only claimant who although was not available for the trial says in his sworn evidence that he was invited by Sea Breeze Investments to reside on the land. From then on he moved onto the land. There is no evidence that the company extended the invitation to the second claimants. In 1981, the land was declared public land or state owned land. Following the declaration there is no evidence that the claimants obtained approval from the Government to continue to reside on the land. In the absence of such approval the claimants became trespassers. They had no lawful right to continue to occupy public land. [see *Combera v Sope* [2016] VUCA 42.].



Was the registration of Mr Olsen as lessee obtained by fraud and/or mistake

18. The claimants allege that the registration was obtained by fraud and/or mistake. They submit that the registration was challenged in Court as CC No 9 of 2003. They have not provided any evidence of the claim or a decision in their favour in that case. Mrs Olsen says that they were only aware of CC 165 of 2003 which was struck out by this Court and CC104 of 2003. In the latter case, Mr Olsen brought proceedings in the Magistrate Court to evict the claimants and those orders were granted.
19. Mr Hungai Tomaki says that they had applied to the lands department for a lease and their application was accepted. In his sworn statement, [Exhibit 'C1'] at Annex 'HT1' there is evidence that he first applied to VULCAN for a lease of part title 1035 (11/0X 22/019) which was approved. He was then invited for an interview to finalise his lease. There is no evidence of any meetings with VULCAN.
20. The next piece of evidence in Annex 'HT-1' is a receipt from the Department of Lands that on 4 October 1990 Mr Tomaki paid VT 2000 to the Lands Department as the application fee to lease the land. The ULLSC advised him by letter that his application for a lease was approved. He was also advised that a negotiator certificate will be sent to him after the Minister's approval.
21. The evidence before me is that the person who was first in time to apply and obtain a negotiator certificate was Mr Olsen. He was issued a negotiator certificate by the Minister of lands on 20 April 1990. Some six (6) months prior to Mr Tomaki paying his application fee for a lease. Mr Olsen's certificate was to negotiate a commercial lease. That lease was registered to Mr Olsen as the 027 lease on 25 March 1992. [Exhibit 'D3 -1'].
22. The claimants have not established by their evidence that the registration of Mr Olsen as lessee was obtained by fraud or mistake.
23. Was the registration of the transfer of the 027 lease from Mr Olsen to Ado investments obtained by fraud and/or mistake
24. Ado Investments maintains that it is a bona fide purchaser. The claimants allege that the registration of the transfer was obtained by fraud and/or mistake as no consideration was paid by the company.
25. The claimants provide a valuation by Radams Valuations that the lease is valued at VT 29, 5281,100.
26. Section 60 of the Act relates to transfers of leases and sub section (1) provides:



“60. Transfer

(1) A proprietor may, subject to the provisions of this Act, transfer his registered lease or mortgage to any person, with or without consideration, by an instrument in the prescribed form.

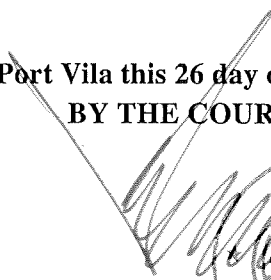
(emphasis added)

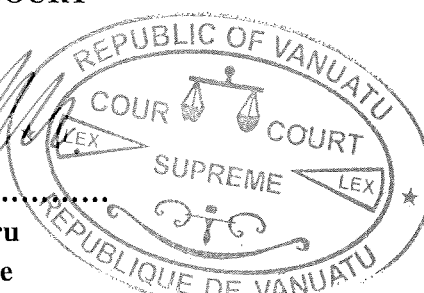
27. The Act recognises that a lessee may transfer his lease to anyone with or without consideration. If Mr Olsen had agreed to transfer his lease without any consideration there is nothing unlawful about it.
28. Other arguments raised by the claimants concern an existing caution and the speed within which registration of the transfer was made. The claimants did register a caution over the title on 13 August 2003. That caution was removed on 15 June 2010 by the Director of lands prior to the registration of the transfer. The claimants were first notified to substantiate their claim as required by s 97 (3). Upon failing to do so the caution was removed.
29. Regarding the unusual speed of registration the claimants have not shown by their evidence that a mistake or fraud was perpetrated. The transfer was a transaction between Mr Olsen and Ado Investments.

Result

30. The claim is hereby dismissed. The defendants are entitled to costs to be agreed or taxed.

**DATED at Port Vila this 26 day of September, 2019
BY THE COURT**


.....
**D. Aru
Judge**

The seal of the Republic of Vanuatu Supreme Court is circular. It features a central scale of justice. The text "REPUBLIC OF VANUATU" is written along the top inner edge, and "REPUBLIQUE DE VANUATU" along the bottom inner edge. The words "COUR" and "COURT" are positioned on either side of the scale, with "LEX" written below each. The word "SUPREME" is written across the bottom of the inner circle. A small star is located on the right side of the seal.