

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

**Civil
Case No. 17/3528 SC/CIVL**

BETWEEN: Jude Malingy representing Family Malingy
First Claimant

AND: Pierre Massing Nale
Second Claimant

**AND: Herve Leymang representing Family
Leymang**
Third Claimant

**AND: Etuel Habong Kekei representing Family
Habong Kekei**
Fourth Claimant

AND: Percy Ashem representing Family Ashem
First Defendant

AND: Cedric Philip representing Family Philip
Second Defendant

**AND: Sethy William (deceased) and administrator
of the deceased estate**
Third Defendant

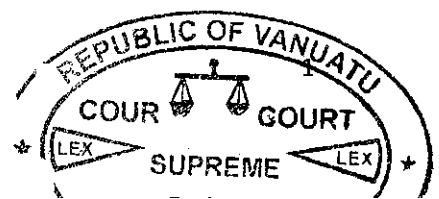
AND: Republic Of Vanuatu
Fourth Defendant

Date: 3 November 2021
Before: Justice V.M. Trief
Counsel: Claimants – Mr E. Molbaleh
First, Second and Third Defendants – Mr J. Tari
Fourth Defendant – Ms J.E. Toa

JUDGMENT

A. Introduction

1. By their Claim, the Claimants seek an order cancelling the registration of leasehold title no. 09/1543/001 (the 'lease) in the name of the Third Defendant Sethy William (deceased) ('Mr William') and an order that the Defendants vacate the subject land. Damages are also sought.



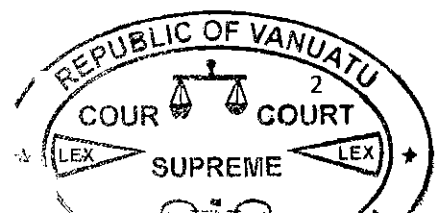
2. No witnesses were required for cross-examination therefore this matter proceeded by way of written submissions with the Court making its decision on the papers after that.
3. Despite being reminded twice, Mr Molbaleh has not filed any submissions for the Claimants. The First-Third Defendants' submissions were filed on 15 October 2021.
4. This is the Court's decision.

B. Facts

5. The following background was provided by the sworn statement of Paul Gambetta, the Director of Lands, filed on 4 August 2021.
6. On or about 16 August 2011, Mr William lodged an application with the Department of Lands for a Negotiator Certificate.
7. By letter dated 7 October 2011, the Secretary of the Land Management and Planning Committee (the 'LMPC') wrote to Mr William that the LMPC had decided to recommend his application for approval and would send a custom owner identification form and Public Notice to the Lamap Council of Chiefs to identify the custom owner of the land.
8. By letter dated 7 October 2011, the Secretary of the LMPC wrote to the Lamap Council of Chiefs attaching a custom owner identification form and undated Public Notice.
9. On or about 7 December 2011, the Minister of Lands issued a Negotiator Certificate to Mr William.
10. On or about March 2012, a surveyor prepared a survey plan in accordance with Mr William's application.
11. On or about 12 April 2012, the Surveyor General approved the survey plan.
12. On or about 8 August 2012, the Minister of Lands approved the lease.
13. On or about 10 August 2012, the Director of Lands registered the lease for leasehold title no. 09/1543/001 between the First Defendant Family Ashem and Second Defendant Family Philip (lessors) and Mr William (lessee). The area of the land comprised in the lease land is 1149 hectares 40 acres 26 centiares.

C. The Issues

14. By the Claim filed on 5 December 2017, the Claimants claimed that the registration of the lease was obtained by fraud or mistake as the Lamap Council of Chiefs never declared the First and Second Defendants Percy Ashem representing Family Ashem and Cedric Philip representing Family Philip as custom owners, and a part of the lease overlaps with land that the Fourth Claimant Ethuel Habong Kekei has been declared the custom owner of. Cancellation of the lease is sought pursuant to s. 100 of the *Land Leases Act* [CAP. 163] (the 'Act').



15. This is denied by the First, Second and Third Defendants. They also alleged in their Defence filed on 15 June 2021 that the Claimants do not have standing to bring a claim under s. 100 of the Act.
16. The Claim is also denied by the Fourth Defendant the State. Further, it alleged in its Defence filed on 25 November 2020 that it acted in good faith based on the information supplied by Mr William to register the lease and relied on sections 9 and 24 of the Act. It also alleged that the Claimants do not have standing to bring the Claim.
17. The issues between the parties therefore are:
- a. Do the Claimants have standing to bring their Claim under s. 100 of the Act? **[Issue 1]**; and
 - b. Is the Land Leases Register to be rectified in relation to leasehold title no. 09/1543/001? **[Issue 2]**

D. The Law

18. Section 9 of the Act provides:

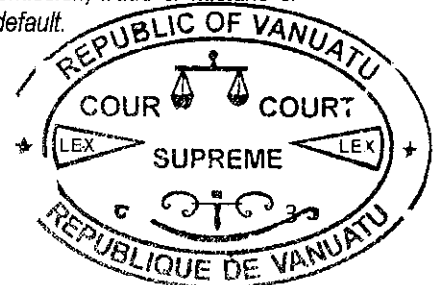
9. (1) *The Director or any other staff of the Department of Lands are not liable for anything done or omitted to be done in good faith in exercising his or her functions or powers under this Act.*
- (2) *Subsection (1) does not apply, if it is proven that the Director or any of his officers acted in bad faith or in dereliction of their duties or exercise of their powers under this Act.*

19. Section 24 of the Act provides:

24. *Where by this Act any person is exonerated from enquiring as to any matter of fact relating to a registered interest, or to a power of dealing therewith, or is protected from the effect of notice of any such matter or fact, then, in registering any instrument relating to that interest, the Director shall not be concerned to make any enquiry or search in relation to that interest which such person need not have made nor shall the Director be affected by any notice with which such person need not have been affected.*

20. Section 100 of the Act provides:

100. (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.*



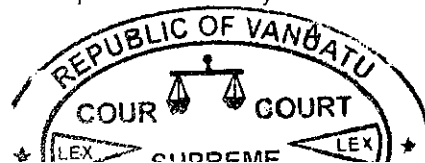
- E. Issue 1: Do the Claimants have standing to bring their Claim under s. 100 of the Act?
21. Mr Tari cited the Court of Appeal's judgment in *Mataskelekele v Bakokoto* [2020] VUCA 31 at [26]:
26. *In the appellant's case it was a case of challenging the validity of a lease under section 100 of the Land Leases Act. The appellant was neither the lessor nor the lessee. And neither had he nor his family been declared custom-owners by any Court or tribunal of competent jurisdiction. In this case the appellant had no standing. He had no serious question to be tried in the Supreme Court. The appellant agreed that if he is later declared to be the custom-owner of the leased land, he will be in as good a position then as he would be now without any interlocutory relief to recover any wrongly paid monies, or to seek rectification of the Register.*
22. Mr Tari submitted, relying on *Mataskelekele v Bakokoto*, that the Claimants are neither lessee nor lessor of the lease and have not been declared the custom-owners therefore they do not have standing to bring the Claim.
23. The claimant in *Mataskelekele v Bakokoto* sought rectification of the proprietorship of the lease. However, that is not sought in this matter. What is sought is the cancellation of the lease as a whole on the basis that the registration of the lease was obtained by fraud or mistake as the Lamap Council of Chiefs never declared the First and Second Defendants as custom owners, and a part of the lease overlaps with land that the Fourth Claimant has been declared the custom owner of. Accordingly, *Mataskelekele v Bakokoto* is distinguishable on its facts and does not apply.
24. I note the Court of Appeal stated in its judgment in *Naflak Teufi Limited v Kalsakau* [2005] VUCA 15 at p. 6:

The particular aspect of section 100 that requires clarification in this appeal, is the question of who may make the application or who may invoke section 100 of the Land Leases Act?

The answer to the question is not immediately apparent as the section itself does not speak about Applicants or Claimants; it is purely an empowering section for the Supreme Court. That is not to say that no one may apply to invoke section 100 outside the Court itself.

*We are satisfied on a consideration of the object and purpose of the section that, at the very least, a person seeking to invoke section 100 must include a person who has an interest in the register entry sought to be rectified and which it is claimed was registered through a mistake or fraud. Not only must there be proof of mistake or fraud but also that such mistake or fraud caused the entry to be registered. Furthermore it has to be proved that the mistake or fraud was known to the registered proprietor of the interest sought to be challenged or was of such a nature and quality that it would have been obvious to the registered proprietor had he not shut his eyes to the obvious or, where the registered proprietor himself caused such omission, fraud or mistake or substantially contributed to it by his own act, neglect or default. We use the word **'interest'** in the widest possible sense although accepting it may have in appropriate circumstances be distinguished from a mere busy body.*

We are satisfied from the pleadings that the Appellants in this case had a legitimate interest to seek rectification of the register pursuant to section 100 of the Land Leases Act [CAP 163]. Not only was the Appellants the holder of a registered negotiator's certificate in respect of the disputed land, but also, they were the Applicant first in time to seek a lease over the subject land. Plainly the Appellants were a competing Applicant for the land in question and on any



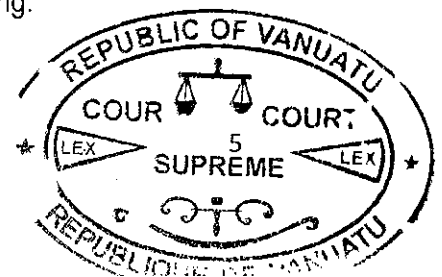
sensible test, have a sufficient interest to seek rectification of the First Respondent's registration. We do not and cannot put it any higher than that. As it is not relevant for the appeal we make no observation as to the quality of the allegations of mistake and fraud which caused the First Respondent to become registered as the lessee of the land in dispute.

In light of the foregoing and our interpretation of section 100 of the Land Leases Act, we are satisfied that an Applicant for rectification of a register does not have to be able to show a right to be registered by way of substitution. In other words, a successful application pursuant to section 100 of the Land Leases Act can lead to rectification by way of cancellation or amendment of an entry in the register **not** necessarily in the registration of the person who initiates the challenge. The suggestion in our view that an Applicant for rectification must have a personal or legal right to be registered in place of the interest being challenged places an unwarranted gloss on the plain words of section 100.

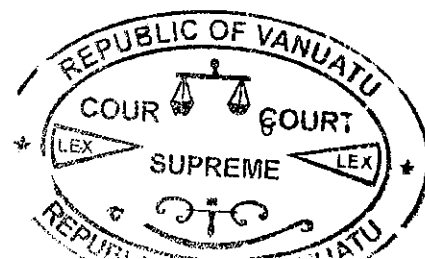
In similar vein, the question of whether or not the Minister had the power to grant the First Respondent the lease over the disputed land asks the wrong question. No one doubts the right or power of the Minister to grant the First Respondent the lease over the disputed land but, that is **not** the issue in the case nor is it raised by section 100. The issue is **not** the power of the Minister to grant the lease to the First Respondent (which is accepted) rather, the issue is whether or not the First Respondent's registration was obtained as a result of fraud or mistake which may be raised by an applicant with a legitimate interest.

(my emphasis)

25. It is not necessary that the Claimants must be able to show a right to be registered by way of substitution. The Claimants do not seek that; they seek the cancellation of the lease. They must have a legitimate interest.
26. The Claimants' interest is not set out in the Claim however it is clear from their evidence. Herve Leymang the Third Claimant in his sworn statement filed on 21 November 2019 evidences that the lease is situated within the jurisdiction of the Navsagh Council of Chiefs which is the Lamap Council of Chiefs however that Council has never consented to the lease nor has any Land Tribunal ever heard a dispute over the subject land. Jude Malingy the First Claimant in his sworn statement filed on 21 November 2019 evidenced that he is a member of the Navsagh Council of Chiefs as a Chief Nasara and was not aware of any forms, papers, notice or letter from the Department of Lands in relation to the subject land which covers parts of four different Nasara including that of his grandfather. Further, there has never been a claim for the subject land before a Land Tribunal. Romain Dralikon, Fabrice Leymang and Mathias Batick-Akon gave similar evidence in their sworn statements.
27. The process by which the lease was obtained including the sending of a custom owner identification form to the Lamap Council of Chiefs. The First and Third Claimants are members of the Lamap Council of Chiefs now evidencing that the Council never consented to the lease nor has any Land Tribunal ever determined the custom ownership of the land comprised in the lease.
28. Accordingly, the Claimants in all the circumstances must be treated as having a sufficient interest. The allegations made, if proved, could amount to fraud or mistake which might justify cancellation of the lease. There is accordingly an issue to try and I decline to pre-emptively strike out the Claim on the issue of standing.



- F. Issue 2: Is the Land Leases Register to be rectified in relation to leasehold title no. 09/1543/001?
29. The Claimants allege that the registration of the lease was obtained by fraud or mistake as the Lamap Council of Chiefs never declared the First and Second Defendants as custom owners, and a part of the lease overlaps with land that the Fourth Claimant has been declared the custom owner of.
30. As to the allegation that a part of the lease overlaps with land that the Fourth Claimant has been declared the custom owner of, the Claimants' evidence is as follows: Romain Dralikon evidenced in his sworn statement filed on 21 November 2019 that there was a previous lease title no. 09/1452/005 for the Fourth Claimant that was later cancelled because he and others challenged the creation of that lease in the Supreme Court. There is no other evidence as to this allegation. Accordingly, the allegation that part of the lease overlaps with custom land owned by the Fourth Claimant is not proved.
31. The Claimants' evidence that neither the Lamap Council of Chiefs nor any Land Tribunal has ever declared the First and Second Defendants as custom owners is set out above at [26].
32. Mr Gambetta evidenced that the Officers of the Ministry of Lands and the Department of Lands were not aware of any registered dispute concerning the ownership of the leased land with any recognised Court during the initial process and registration of the lease. No completed custom ownership identification form was ever received from the Lamap Council of Chiefs.
33. I accept that a Council of Chiefs could not decide the ownership of custom land but facilitates the determination of custom land ownership through Land Tribunals.
34. The First-Third Defendants filed the Sworn statement of Julian Nettie Ben on 27 July 2021. Mrs Ben evidenced that she is the administrator of the estate of her late husband Mr William. He died on 29 June 2016. She is the registered lessee of the lease pursuant to the registration on 28 November 2018 of her application for transmission of the lease. Mrs Ben evidenced that if the Court grants the Claim, that she will be affected as the lessee but she has not been named as a party to this case. That is incorrect. The entitling of the Third Defendant is "Sethy William (deceased) and the administrator of the deceased estate". Accordingly, Mrs Ben is a party to this case as Third Defendant.
35. It is glaring that there is no evidence that the First and Second Defendants are the declared custom owners of the leased land. Nor is there any explanation proffered as to how they came to be the lessors of the lease. I infer that the First and Second Defendants are not the declared custom owners of the leased land.
36. It is also glaring that there is no evidence that Mrs Ben is in possession of the leased land. I infer that she is not in possession of the land.



37. I am satisfied that the absence of a Customary Land Tribunal or Court decision declaring custom ownership of the leased land in favour of the lessors the First and Second Defendants is a mistake for the purposes of s. 100 of the Act.
38. Subsection 100(2) of the Act provides that the Land Leases Register shall not be rectified to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless that proprietor had knowledge of the mistake in consequence of which the rectification is sought or substantially contributed to it. There is no evidence that Mrs Ben is in possession of the leased land. She did not acquire the leasehold interest for valuable consideration as she acquired it as a result of transmission of the lease following her husband's death.
39. In the circumstances, subs. 100(2) of the Act does not apply. The Land Leases Register can be and is to be rectified as the registration of the lease was obtained by mistake.

G. Result and Decision

40. The Claimants have proved the Claim on the balance of probabilities.
41. It is ordered that the Director of Lands is to cancel the registration of leasehold title no. 09/1543/001.
42. The Claimants are not entitled to the balance of the orders sought in the Claim as they are not the declared custom owners of the subject land.
43. The general rule is that costs are paid by the unsuccessful party. However, in the circumstances in which Mrs Ben acquired the lease interest under a transmission of lease and the lease will now be cancelled, I consider that costs should lie where they fall. There is no order as to costs.

**DATED at Port Vila this 3rd day of November 2021
BY THE COURT**

