

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

Civil
Case No. 21/671 SC/Civil

BETWEEN: **Family Nalau Niatngel, Family
Moukaih, Family Hiwa Apeng,
Family Nauka Nimisa and Family
Ialulu**

Claimants

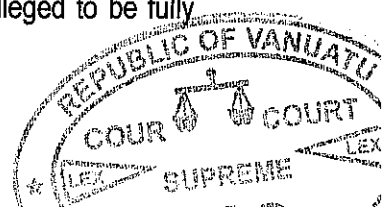
AND: **Katty Sam**
First Defendant
Republic of Vanuatu
Second Defendant

Date: 12 January 2022
Before: Justice G.A. Andrée Wiltens
Counsel: Ms M. Nari for the Claimants
Mr D. Yawha for the First Defendant
Mr L. Huri for the Second Defendant

Judgement

A. Introduction

1. This Claim, filed 9 March 2021, seeks to rectify by cancelling Leasehold Title No. 14/2412/015 issued on 7 August 2009. It is alleged that Mr Katty Sam entered into this lease agreement with the Minister of Lands on behalf of the custom owners of Isla, a parcel of land in West Tanna. The lease was registered on 9 September 2009, and will run for 75 years from 30 April 2008.
2. The claim alleges that the true custom ownership of Isla land remains in dispute. The 5 named Claimants have been challenging the true custom ownership of Isla land since prior to 2006.
3. The claim further alleges that Katty Sam was fully aware of the dispute regarding custom ownership when he made application to the Minister. The Minister is also alleged to be fully

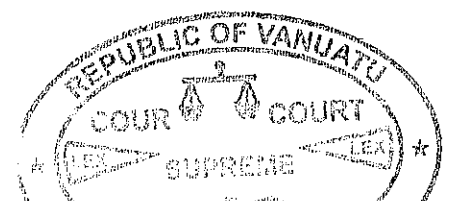


aware of the dispute as to custom ownership and entered into the agreement with Katty Sam despite that and without first obtaining the consent of all the disputing parties.

4. It is therefore alleged that the lease agreement was obtained and registered by mistake or fraud. Further, it is alleged that the lease was registered in the face of a Supreme Court restraining order preventing any such dealing with Isla land.
5. The Republic of Vanuatu is named as Second Defendant as representing the Minister of Lands and the Director of the Lands Department.

B. Evidence

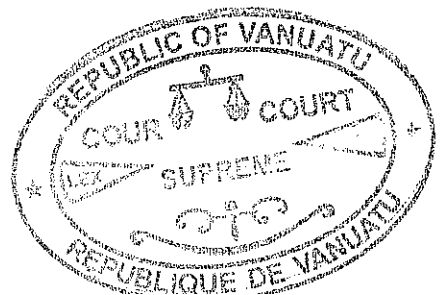
6. In support of the Claim a sworn statement by Mr Alick Kalo evidences that his house is located within lease 14/3412/015. A photograph was appended to the statement, but did not support the actual location of Mr Kalo's house – it could be sited anywhere. Mr Kalo is one of the Isla land custom owner Claimants, as apparently is Mr Sam.
7. Mr Peter Loughman also filed a sworn statement in support of the claim. He too claims to be a custom owner of the Isla land. He appended a photograph which purported to confirm his statement that his coconut plantation sits within lease 14/24012/015. This photo also did not support that statement – it is not possible to reference the photo to any particular location.
8. Mr Steve Dan confirmed he was claiming to be a custom owner of Isla land. He appended a "Concern Note" setting out that families Niatngel, Moukaih, Apeng, Nauka Nimisa and lapupu were challenging custom ownership in land case 06/73. He further appended a photograph which was intended to show that the Isla land claimants had not consented to the lease. Mr Dan stated that lease 14/24012/015 covered "the Claimants' gardens and houses." The photo did not evidence that. It is an aerial photograph with lines drawn by an unknown person on it to depict the boundary of the lease.
9. Mr Dan appended a letter dated 13 May 2008 from the Chief Registrar of the Supreme Court to a number of families which include the current claimants. It was also addressed to the lawyers acting for those parties. The letter records it was written at the behest of family Yalulu, and the purpose of the letter is to ask all those addressed to respect a Court order of 18 May 2007. The Supreme Court Order is described as having stayed the effect of the Island Court orders relating to Isla land of 10 July 2006, pending the outcome of an appeal against those orders. The letter goes on to set out that the Supreme Court 18 May 2007 decision prohibits the building of houses and the erection of gardens on Isla land pending the Court's decision on the appeal.
10. This letter is appended as proof of the claimed stay/restraining orders. It is not. There may well have been such orders made, but this letter does not evidence that. The actual Court orders should have been appended as evidence of this.
11. Mr Dan also appended a Supreme Court decision of Dawson J dated 5 November 2010 in relation to Land Appeal Case No.06/73. The decision records that there is an appeal against the Tafea Island Court decision of 10 July 2006. The decision further records that the Island Court Judgment and all accompanying notes and documents are lost, believed to be destroyed in the fire which destroyed the Supreme Court in 2007. Accordingly, in the interests of justice, the



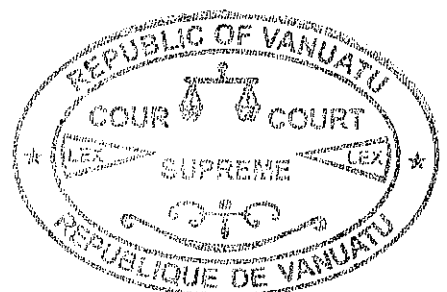
matter was remitted to the Island Court to rehear the case de novo. Paragraph 4 of the decision reads:

"4. No parties or other persons are to take any actions that will alter the physical state or the legal status of the relevant land prior to these claims being heard by the Court."

12. The intituling of the decision makes it obvious it relates to Isla land. Of importance is the date of the decision referred to by the Supreme Court Chief Registrar in his letter of 13 May 2008. It was subsequent in time by some 2½ years.
13. Mr Katty Sam has provided a sworn statement in support of his defence to the Claim. He advised that the Tafea Island Court had scheduled the re-hearing of the various claims to be declared the true custom owners of the Isla land to commence on 22 November 2021, and he stated it was expected that the decision would be published on 22 December 2021. His family is one of the claimants.
14. Mr Katty Sam confirmed entering into the lease agreement with the Minister of Lands on 7 August 2009 in respect of his family's houses and yard compound. He considered this covered less than one acre, and he disputed that the lease covered all present Claimants' houses and gardens as suggested by Mr Steve Dan. He stated that his lease did not include Mr Alick Kalo's house, nor Mr Loughman's coconut plantation.
15. Mr Sam appended a picture of a google earth map showing his lease boundaries, Mr Kalo's house and Mr Loughman's coconut trees. This was to support his statement that his lease did not include anything more than his family's compound. It was also produced to show the comparative size of the entire area covered by Isla land, said to be 300-400 acres. There is no evidence as to who prepared this exhibit, but it is the clearest evidence as to the various boundaries.
16. Mr Sam disputed that Mr Kalo had any legitimate claim to Isla land.
17. Mr Sam further stated that his lease was created following prior consultation with all the claimant families and with their agreement. This followed a meeting involving several of the claimant families with Mr Yawha at which the legality of individual leases over each family's compounds was discussed. Mr Yawha was to subsequently also speak to the remaining claimants.
18. The agreement reached was that each family would arrange for surveys of their compounds and then enter into lease agreements with the Minister. This is what Mr Sam did. Two members of the Nalau family also went ahead on this basis, as did a member of the Nauka Nimisa family.
19. Mr Sam challenges the credibility and veracity of the Claimants' evidence. He further contended that the Minister of Lands had also consulted all the Claimants. He disputed also that his lease was entered into in breach of any stay/restraining order.
20. Mr Tom Hiwa produced a sworn statement in support of Mr Sam's defence. He is the registered proprietor of lease No. 14/2120/016 which is within the Isla land boundary claim, adjacent to Mr Sam's lease title.

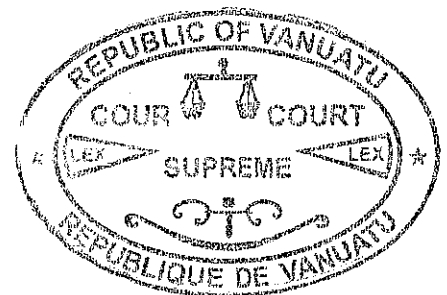


21. Mr Hiwa confirmed Mr Kalo's house is not within Mr Sam's lease. He stated he was able to say that as he had been involved in surveying Mr Sam's yard. Mr Hiwa's family is also one of the claimants to be declared as an Isla land custom owner.
22. Mr Hiwa confirmed the 2009 meeting of the claimants with Mr Yawha and the agreement reached at the time that each family would survey the area of Isla land they occupied and arrange for individual leases with the Minister. Mr Hiwa followed that course, which resulted in his lease being registered.
23. Mr Hiwa confirmed facilitating the surveys of two Nalau family plots, and the plot of one member each of the Nauka Nimisa family and the Hiwa Apeng family.
24. Mr Hiwa was surprised this Claim was filed, as he considered Mr Steve Dan to be one of the initiators of the meeting involving the Claimants and Mr Yawha, and Mr Dan's family hosted that meeting. He also challenged Mr Kalo's situation – he is not of the Claimants in this case, nor in the Island Court case relating to Isla land.
25. Mr Hiwa appended the Island Court Notice of Hearing in relation to the re-hearing of the case, which commenced on 22 November 2021. He noted that Mr Loughman was not one of the Claimants in the original Island Court hearing. Mr Loughman is also not one of the present claimants. Mr Hiwa stated that Mr Loughman's coconut trees are well outside the boundaries of lease No.14/2412/015.
26. Mr Lebu Kalterick provided a sworn statement in support of Mr Sam's defence. He is a qualified Surveyor employed by CTF, which surveyed and drew up the plans for Mr Sam's lease. He confirmed that this lease did not include Mr Alick Kalo's house. Instead, the records on CTF's file show that Mr Hiwa's lease (14/2412/016) encroaches over Mr Kalo's dwelling house.
27. Mr Kalterick also confirmed the small area covered by Mr Sam's lease – approximately 7,000m².
28. Finally, there is a sworn statement filed by Mr Paul Gambetta in support of the Republic of Vanuatu's defence. He is the Director of the Department of Lands. He confirmed that the lease agreement between the Minister of Lands as lessor and Katty Sam as lessee, was entered into on 7 August 2009. He confirmed the lease covered less than 1 acre in size.
29. The Ministry's records do not show that there was prior consultation with the custom owners prior to registration.
30. The Ministry was unaware of any stay order of 18 May 2007.
31. Mr Gambetta stated that the application to register lease title No.14/2412/015 was received and acted upon in good faith, based on the information supplied to the Lands Department.
32. Mr Gambetta further stated that the remedy sought in the Claim, namely rectification of title is available pursuant to the Land Leases Act [CAP 163] only in relation to leasehold interest, not custom ownership – a compelling point.



C. Discussion

33. Counsel acting for all 3 parties involved in this case agreed that the evidence presented to the Court should be considered in light of their written submissions, and that the Court should determine the Claim "on the papers." Accordingly, there has been no cross-examination of any of the witnesses who produced sworn statements.
34. This is a civil claim, meaning the onus of proving its case lies on the Claimants. The burden of proof to be met is on the balance of probabilities.
35. There is no doubt that who is/are the true custom owners of Isla land remains unresolved currently. It is likely that the current Island Court hearing in relation to this issue will not finally resolve the matter, as there are further possible appeals available to the unsuccessful party/parties.
36. There is no explanation why this matter has now re-surfaced. The lapse of time between September 2009 (registration of lease 14/240/015) and March 2021 (filing of this claim) is considerable. No doubt a number of decisions have had to be made in that period affecting individual's use of the land, which decisions were based on the fact that there was a registered lease which was unchallenged. This factor alone inclines the Court to look very carefully at the Claim.
37. As earlier mentioned, the evidence of Mr Kalo and Mr Loughman is largely unhelpful to the Court in determining the issues in dispute. The evidence of Mr Dan goes further, but even putting to one side the incorrect references to the documents appended to his statement, there is a lack of evidence to support his claim, even if the remedy sought were available.
38. The evidence of Mr Sam, Mr Hiwa and Mr Kalterick undermines the Claimants' case considerably.
39. On the balance of probabilities, I find that it is more likely than not that there was a meeting in early 2009 involving those seeking to be declared custom owners of Isla land and Mr Yawha. At the meeting advice was given, and it was agreed that individual leases covering family plots within Isla land could be agreed with the Minister of Lands and registered.
40. Mr Katty Sam achieved this, as did Mr Hiwa,
41. The bona fides of the claimants is undermined by the fact that while fraud or mistake is alleged in respect of Mr Sam, it is not alleged in respect of Mr Hiwa even though his situation is identical to that of Mr Sam – and, if Mr Kalterick is correct, Mr Hiwa's lease encroaches over the dwelling house occupied by Mr Kalo.
42. There is no evidence that the Ministry of Lands acted improperly or negligently.
43. Equally there is no evidence, which is accepted, that the Minister of Lands acted contrary to the interest of those claiming to be Isla land custom owners.



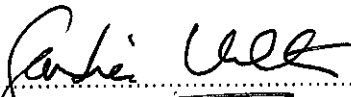
D. Result

44. Accordingly, this Claim fails.

45. Both the First and Second Defendants are entitled to their costs. If they cannot be agreed they are to be taxed by the Master. Once agreed or taxed, the costs are to be paid within 21 days.

Dated at Port Vila this 12th day of January 2022

BY THE COURT


Justice G.A. Andrée Wiltens

