

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

Civil
Case No. 21/3485 SC/CIVL

BETWEEN: Family Minnie Laumanu represented by James
Kalkaua Laumanu, Donald James Aromalo
Laumanu & Kalmatak James Aromalo Laumanu
Claimants

AND: Karl Kalsev
First Defendant

AND: Kalmelu Marimelu, Kaitu Ivoky, Ataviavu, Morris
Tonglemanu & Edward Matokoala
Second Defendants

AND: Goodies Limited
Third Defendant

AND: Director of Land Records
Fourth Defendant

AND: Republic of Vanuatu
Fifth Defendant

AND: Philimon Pakoalaelae also known as "Obed
Pakoa"
Interested Party

Date of Hearing: 4 August 2022
Before: Justice V.M. Trief
In Attendance: Claimants – no appearance (Mr P. Fiuka)
First and Second Defendants – Ms J. Kaukare, for Mr D. Yawha
Third Defendant – Mr N. Morrison
Fourth and Fifth Defendants – Ms J.E. Toa
Interested Party – Ms V. Muluane
Date of Decision: 21 September 2022

DECISION AS TO INTERESTED PARTY'S APPLICATION TO STRIKE OUT THE CLAIM

A. Introduction

1. The Claimants Family Minnie Laumanu by the named representatives ('Family Laumanu') are suing the Defendants for alleged fraud or mistake in the registration of leasehold title no. 12/0522/001 (the 'lease') on 21 April 2001 and the transfer of the lease from the First Defendant Karl Kalsev to the Third Defendant Goodies Limited registered on 18 April 2008.

2. The Claim is disputed in the Defendants' and Interested Party's Defences.
3. I heard Ms Muluane as to the Interested Party Philimon Pakoalaelae's Application to Strike Out the Claim filed on 18 July 2022 (the 'Application'), supported by the Sworn statement of Philimon Pakoalaelae filed on the same date.
4. Claimants' counsel was absent so I then gave the Claimants the opportunity to respond in writing. On 17 August 2022, the Claimants filed submissions in response. On 23 August 2022, the Interested Party filed submissions in reply.
5. Having considered the submissions, I now determine the Application.

B. The Application

6. Ms Muluane referred to para. 15 of the Claim which alleged as follows:

15. *Sometimes in 2007, the Third Defendant through one of its shareholders, Tal Milfer, had a meeting with the Claimants and residents of Tanoliu Village purposely to obtain their consent for road construction through centre of the Udaone land but was rejected for reason that the lands are disputed before the court. That meeting was chaired by Kalmatak James Aromalo Laumanu.*

7. She submitted that Family Laumanu have known of the alleged fraud or mistake since at least 2007 as they have known since that time that the custom ownership of Udaone land was disputed and that they intended to challenge the legality of the subject lease. Accordingly, the Claim was barred by section 14 of the *Limitation Act* as Family Laumanu should have filed within 6 years of that meeting as required by that section and by subsection 3(1) of the *Limitation Act* which provide as follows:

3. *The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say –*

(a) *actions founded on simple contract or on tort;*

.....

14. *Where, in the case of any action for which a period of limitation is prescribed by this Act, either –*

(a) *the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or*

(b) *the right of action is concealed by the fraud of any such person; or*

(c) *the action is for relief from the consequences of a mistake,*

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against or set aside any transaction affecting, any property which –

(i) *in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud has been committed; or*

(ii) *in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.*

(my emphasis)

8. It was also submitted that the Claimants did not have standing as the 2008 land tribunal decision has been appealed, that appeal is still pending and that the Claimants have not shown that they have complied with sections 5 and 58 of the *Custom Land Management Act* to have the matter reviewed by the Island Court (Land) – Ms Muluane cited the Court of Appeal judgments attached as **Annexures “PP5” and “PP6”** to the Sworn statement of Mr Pakoalaelae filed on 15 June 2022. Ms Muluane submitted that on the other hand, Mr Pakoalaelae has evidenced in his sworn statement filed on 18 July 2022 that he has complied with those sections of the *Custom Land Management Act* including by attaching a copy of his Application lodged with the Island Court (Land).
9. Mr Morrison stated that he agreed with the limitation point raised by the Interested Party. He submitted that the Court need not consider the ground of the Application as to standing as it could decide the Application on the limitation point.
10. Ms Kaukare agreed with and supported the Application.
11. Ms Toa stated that the Fourth and Fifth Defendants would abide the order of the Court except as to costs.

C. Submissions in response

12. Mr Fiuka submitted that the Claim was not barred by section 14 of the *Limitation Act* because Family Laumanu only begun pursuing their claims before the land tribunal in 2006 and in this Court in 2021 after they obtained evidence in 2017.
13. Mr Fiuka also submitted that Mr Pakoalaelae had not come to the Court with clean hands as he had concealed evidence from Family Laumanu to favour the Defendants.

D. Discussion

14. It is alleged in the Claim that the registration of leasehold title no. 02/0522/001 on 21 April 2001 was obtained by fraud on the following grounds:
 - a. The Second Defendants Kalmelu Marimelu, Kaltu Ivoky, Ataviau, Morris Tonglemanu and Edward Matokoala had no custom ownership declaration of Undaone and Esema lands covered by leasehold title no. 02/0522/001;
 - b. The Defendants knew there was no custom ownership declaration (or kastom ona declaration form) over Undaone and Esema lands;
 - c. There was no checklist to show compliance with the requirements before the lease was registered;
 - d. The Defendants knew that the custom ownership dispute over Undaone and Esema lands was pending before the Island Court (since 1991); and

- e. The lease was registered in contravention of restraining orders by the Supreme Court dated 5 November 1991.
15. It is further alleged in the Claim that the registration of the transfer of the lease title no. 02/0522/001 on 18 April 2008 was obtained by fraud on the following grounds:
- The Defendants knew there was still no custom ownership declaration (or kastom ona declaration form) of Undaone and Esema lands;
 - The Defendants knew that the custom ownership dispute over Undaone and Esema lands was still pending before the Island Court (since 1991); and
 - The transfer of lease was registered in contravention of restraining orders by the Supreme Court dated 5 November 1991.
16. It was pleaded in the alternative that the registrations were obtained by mistake on the following grounds:
- Goodies Limited mistakenly believed that there were no restraining orders by the Supreme Court dated 5 November 1991;
 - Goodies Limited mistakenly believed that there was no custom ownership dispute over Undaone and Esema lands and/or that the Second Defendants were the declared custom owners of those lands; and
 - Goodies Limited mistakenly believed that the proper administrative process within the Lands Department had been observed when it had not.
17. The grounds on which fraud or mistake are alleged in the Claim can be summarised as knowledge on the part of the Defendants that the custom ownership of Undaone and Esema lands was still disputed. It follows on from there that there was no proper administrative process within the Lands Department in terms of a kastom ona declaration form or completed checklist.
18. On their own pleadings in the Claim, at para. 12, Family Laumanu has known since 2003 of the lease over title no. 12/0522/001:
12. *On 25 April 2003, the First Defendant filed eviction claim against the Claimants and others in the Magistrate Court Civil Case No. 77 of 2003 but was discontinued on 12 August 2004 because the Claimants intent to challenge the legality of the lease 12/0522/001.*
- (my emphasis)*
19. By its pleading in para. 15 of the Claim, Family Laumanu has known since 2007 that the custom ownership of Undaone and Esema lands was still disputed.
20. By a decision of the Siviri mo Sunae Joint Village Customary Land Tribunal ('SSJVCLT') dated 9 January 2008, Family Laumanu (and others) were declared custom owners of Udaone customary land, including Esema land.
21. The Court of Appeal in its judgment dated 14 November 2014 in *Saipir v Siviri/Sunae Joint Land Tribunal*; CAC 25 of 2014, at para. 14, recorded that the appellants in that matter had acknowledged that their dispute was currently pending before the Land Tribunal and that due to the *Custom Land Management Act* having commenced, that

the disputing parties should make progress towards having their dispute heard under that Act:

14. *We allow the appeal for those reasons and set aside the judgment of the Court below. As the appellants do not now wish to reopen the case and have acknowledged that their dispute is currently pending before the Land Tribunal and have indicated their willingness to have their dispute heard under the scheme established by the Custom Land Management Act, it is not necessary to remit the matter for a rehearing. Civil Case 66 of 2009 should now be at end. The disputing parties should adopt the common sense approach to make progress towards having their dispute heard under the Custom Land Management Act. This means that Section 5 (4) of the Custom Land Management Act becomes operational.*
 22. Despite the SSJVCLT decision dated 9 January 2008 and the Court of Appeal's judgment dated 14 November 2014, the custom ownership of Undaone and Esema lands remains disputed.
 23. As Family Laumanu's action in this matter is based upon fraud or mistake (due to the Defendants' knowledge that the custom ownership dispute remained pending), the period of limitation shall begin to run from when they discovered the fraud or mistake: section 14 of the *Limitation Act*. The period of limitation therefore began to run from 2007.
 24. Family Laumanu therefore should have filed this action within 6 years (that is, by 2013) as required by subsection 3(1) of the *Limitation Act*. However, they did not file until 2021.
 25. In the circumstances, I agree with the submissions that the Claim is barred by section 14 of the *Limitation Act* and must be struck out.
 26. The Application having been determined on the limitation point, I need not consider the ground of the Application as to standing.
- E. Result and Decision
27. For the reasons given, the Interested Party's Application to Strike Out the Claim is **granted**.
 28. The Claim is **struck out**.
 29. Costs must follow the event. The Claimant is to pay the Defendants' and Interested Party's costs as agreed or as taxed by the Master. Once settled, the costs are to be paid within 21 days.
 30. The listings for 28-30 March 2023 are **vacated**.

DATED at Port Vila this 21st day of September 2022
BY THE COURT


Justice Viran Molisa Trief

