

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

Civil Case No's 20/3476 &
22/1088 SC/CIVL (consolidated)

CC 20/3476

BETWEEN: Harry Kausir and Family
Claimants

AND: Jeffrey Lauha
First Defendant

AND: Havard Namaka
Second Defendant

AND: Republic of Vanuatu
Third Defendant

CC 22/1088

BETWEEN: Harry Lauha
Claimant

AND: Harry Kausir, Joel Nimok, Jimmy Iaruel, Iaruel
Wan, Charlie Naus, Allan Naus, Patrick
Lalpen, Nalusen Maima, Benaih Nakat, Harry
Kausir Junior, Ben Iouma, Ben Iaruel, Jimmy
Nako, Andrew Naus, Kalo Kamoi, Iawa
Loanako & John Kay
Defendants

Date: 23 January 2023
Before: Justice V.M. Trief
Counsel: Claimants – Mr E. Molbaleh
First and Second Defendants – Mr D. Yawha
Third Defendant – Mr F. Bong

**DECISION AS TO URGENT APPLICATION TO RE-OPEN/REINSTATE
THE CLAIM OF FRAUD**

A. Introduction

1. The Claimants Harry Kausir and Family alleged mistake in the registration of leasehold title no. 14/2243/001 (correctly no. 14/2243/100 according to the Director of Lands'



sworn statement) as the First Defendant Jeffrey Lauha did not have a custom ownership declaration in his favour. Fraud had also been alleged in the Claim but was abandoned when the matter came on for trial on 6 December 2021.

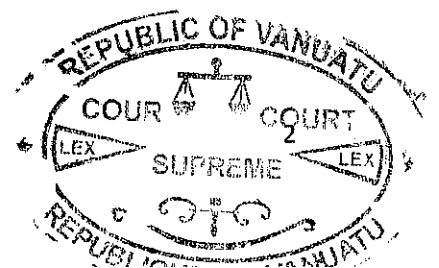
2. Also on 6 December 2021, counsel confirmed that none of the witnesses were required for cross-examination and requested that this matter proceed by way of written submissions. The Court would then make its decision on the papers after that.
3. Judgment had not yet been issued when on 17 May 2022, the Claimants filed Urgent Application to Re-Open/Reinstate the Claim of Fraud in this Proceeding (the 'Application'). The Application was heard on 29 September 2022 however Claimant's counsel was absent so I set out in a minute the submissions made by Defendants' counsel and gave the Claimant the opportunity to file submissions in response.
4. Those submissions were filed on 27 October 2022.
5. This is the decision as to the Application.

B. Background

6. In 2007, Mr Lauha obtained a Certificate of Registered Negotiator.
7. A Kastom Ona blong Kraon form was completed and submitted to the Department of Leases as part of the leasing process.
8. In 2011, the lease between Mr Lauha (lessor) and the Second Defendant Havard Namaka (lessee) was registered.
9. There has never been a custom ownership dispute or declaration in relation to the subject land.

C. The Application and Submissions

10. The Claimants filed with the Application a Sworn statement of Urgency, Undertaking as to Damages and supporting Sworn statements of Amos Kalaua.
11. The grounds for the Application are said to be that witnesses have now stepped forward so that the Claimants wish to proceed with the fraud aspect of the Claim, that the Kastom Ona blong Kraon form was signed by the First Defendant's brothers (from the same mother and father) and by Mr Nakat of the Lonelapin West Tanna area council of chiefs instead of the Southwest Tanna area council of chiefs where Bethel custom land is located and no custom declaration has ever been made for the subject land. The Claimants relied on *Ashem v Malingy* [2022] VUCA 11 as being a guideline judgment.
12. The First and Second Defendants filed submissions in response to the Application on 28 September 2022.



13. Mr Yawha submitted that the Application is effectively an application to bring fresh evidence however the Claimants have not explained why it was not available at trial on 6 December 2021. Finality of litigation is very important for the parties to achieve justice.
14. He also submitted that the Claim was statute-barred.
15. Mr Yawha submitted that the only allegation of fraud in the Claim was that there was no custom ownership decision. The legislative requirements at the time (lease registered in 2011) was for completion of a Kastom Ona blong Kraon form involving consultation with the relevant council of chiefs and consent by the custom owner. He submitted that *Ashem v Malingy* was distinguishable as no Kastom Ona form was ever completed in that matter whereas in the present matter, a Kastom Ona form was completed and then the lease registered.
16. Mr Yawha submitted in the alternative that the fraud that the Claimants now want to allege (that 2 persons who signed the Kastom Ona form were the First Defendant's own brothers - same father and mother - and were not the council of chiefs for the area where Bethel custom land is) was not part of the initial Claim. Therefore if the Court were minded to grant the Application, all costs up to trial would be thrown away. Therefore the First and Second Defendants sought VT80,000 costs thrown away which must be paid before the Claimants can file their Amended Claim.
17. Mr Bong supported Mr Yawha's submissions and stated that the State would abide the Order of the Court except as to costs, seeking VT40,000 costs thrown away which must be paid before the Claimants can file their Amended Claim.
18. The Claimants' reply submissions were filed on 27 October 2022. Mr Molbaleh submitted that the Defendants have accepted that there was no custom ownership declaration therefore there was a mistake in the registration of the lease. He submitted that the Claim was not statute-barred as the Claimants filed the Claim as soon as they became aware of the lease.

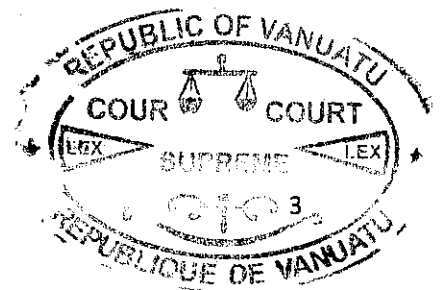
D. Discussion

19. I accept the Claimants' stated reason that witnesses have now stepped forward so that the Claimants wish to proceed with the fraud aspect of the Claim as explaining why that evidence was not available at trial.
20. I do not accept that the Claim is statute-barred as it was filed within 6 years of the Claimants finding out about the lease registration as required by subsection 3(1) and section 14 of the *Limitation Act* [CAP. 212] 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)

21. The submission that the legislative requirement of a Kastom Ona blong Kraon form having been completed does not assist as the Claimants now wish to allege that the persons who completed the form did so improperly thus the registration of the lease was obtained by mistake.

22. In the circumstances, the Claimants have explained why they did not have evidence previously at trial as to fraud and have outlined what they would allege in an Amended Claim. Mr Yawha accepted that if the Court were to grant the Application, his clients' costs up to trial of VT80,000 would be thrown away and must be paid before the Claimants can file their Amended Claim.

23. The State will abide the Order of the Court except as to costs. Mr Bong stated that the State's costs up to trial thrown away were VT40,000 which also must be paid before the Claimants can file their Amended Claim.

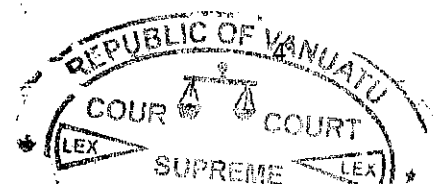
24. Accordingly, the Application will be granted.

E. Result and Decision

25. The Claimants' Urgent Application to Re-Open/Reinstate the Claim of Fraud in this Proceeding is **granted**.

26. The Claimants are to pay the First and Second Defendants' costs up to trial thrown away of VT80,000 **by 24 April 2023 and before the Amended Claim is filed**.

27. The Claimants are to pay the Third Defendant's costs up to trial thrown away of VT40,000 **by 24 April 2023 and before the Amended Claim is filed**.



28. The Claimants are to file and serve Amended Claim by 4pm on 28 April 2023.
29. This matter is listed for Conference at 8am on 22 May 2023.

DATED at Port Vila this 23rd day of January 2023
BY THE COURT

V.M. Trief
Justice V.M. Trief

