

BETWEEN: TONY NICHOLS and LILY NICHOLS
Claimants

AND: WILLY HOCTEN, REFFIN OCTEN, DAVID NILANU,
MANIKTAT MALIKEN, REMI WILSON, CHARLEY
IAPUD, CHRIST ELAKNTANI, EGGAR ELAKNTANI and
LAF REP
First Defendants

AND: MAKETE KALTACK
Second Defendant

AND: REPUBLIC OF VANUATU
Third Defendant

AND: SYLVIE KALSRAP
Third Counter-Claim Defendant

Date of Hearing: 11th day of December 2023

Before: Justice W. K. Hastings

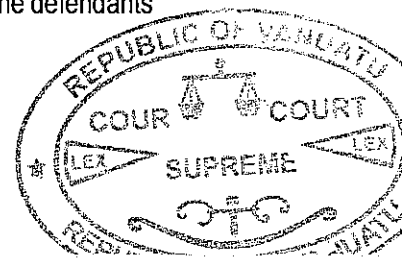
Distribution: A Sarisets for the Claimants
L Malantugun for the Defendants
Second Defendant
L Huri for the Third Defendant
Third Counter-Claim Defendant

DECISION

1. This is an application by Tony Nichols and Lilly Nichols (the claimants) and Sylvie Kalsrap (the third defendant) to strike out the amended counterclaim of the first defendants (nine people including Willy Hocten) and the second defendant, Makete Kaltak.
2. The Republic supports the strike-out application.

The pleadings

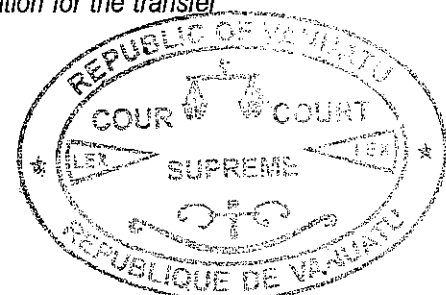
3. The amended statement of claim was filed on 26 October 2021. In it, the claimants seek an order evicting the first defendants from property covered by lease title 12/1914/100. It is claimed that nobody, including the first defendants, was living on the property when the claimants and the third defendant walked the boundary of the property in 2011 before they purchased it and before the lease was transferred to them and registered on 12 May 2011. The claimants claim the defendants only began residing on the property as trespassers in 2013.



4. In their defence filed on 2 February 2022, the first defendants allege they were authorized to live on the land by Makete Kaltak who is the widow of James Kaltak, who they say was the custom owner of the land. The first defendants deny not living on the land before 2011. They plead that *"they have since the time of their ancestors worked the land and lived on that land to these days and at no time the land was vacated as alleged by the Claimants."* They allege fraud or mistake when the lease naming Marc, Herve, Laurent and Makson Kalsrap as lessors and Sylvie Kalsrap as lessee was created, without any declaration of ownership from a competent court or tribunal. They allege that Sylvie Kalsrap sold the fraudulently or mistakenly obtained lease to the claimants. At paragraphs 3(d)(ii) and 4(c), the first defendants allege the claimants *"were regularly warned"* that the land belonged to Makete Kaltak, not Sylvie Kalsrap, and that they therefore had notice of the alleged fraud in the creation of the lease. On this basis, the first defendants allege the claimants are the trespassers.
5. Following the Court of Appeal's judgment in *Hocten v Nicholls* [2022] VUCA 16, additional parties were joined. On 18 October 2022 the Republic was joined as a defendant because the defendants alleged fraud or mistake in the creation of the lease. On 2 December 2022 Makete Kaltak was joined as a defendant. On 25 April 2023, Sylvie Kalsrap was added as the third counterclaim defendant.

The amended counterclaim

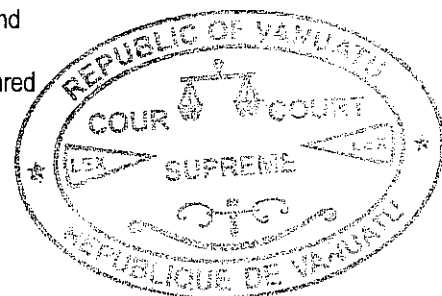
6. Mr Maluntugun filed the amended counterclaim on 30 August 2023 (an earlier counterclaim had been filed on 16 November 2022). In it, the first and second defendants seek an order *"for rectification by cancellation of the lease,"* and damages for harm caused by the clearing of bushes, gardens and trees by the claimants. They do not seek an eviction order, presumably because the claimants have been unable to occupy the land.
7. It is difficult to discern early in the counterclaim the basis of any cause of action against the claimants. It is not until paragraph 42 that there is any allegation made against them. The allegation is that the Minister of Lands, the Director of Lands, the original lessors (Marc Kalsrap and his sons Herve, Laurent and Makson), Sylvie Kalsrap, and the claimants Tony and Lilly Nichols *"by way of mistake or fraud created the transfer of the lease title no. 12/0914/100 from Sylvie Kalsrap to the claimants Tony and Lilly Nichols."* The particular relied on is the lease itself. This is insufficient.
8. In paragraph 43, the same persons, including the claimants, are alleged to have violated ss 6 and 8 of the Land Reform Act *"by wrongfully allowing Sylvie Kalsrap to become the sublessor and the Claimants to become the sublessees without any declaration from any competent court."*
9. In paragraph 47, it is again alleged that the transfer from Sylvie Kalsrap to the claimants was made through fraud and mistake, that the claimants knew about the fraud and mistake, and that the claimants *"contributed to that fraud and or mistake in obtaining the second transfer in their names."* Paragraph 48 alleges that the claimants were warned in 2009 to negotiate with James Kaltak rather than Mark Kalsrap, but that the claimants ignored those warnings and negotiated with Mark Kalsrap's wife Sylvie. Paragraph 49 alleges that the claimants *"contributed to the fraud by paying an amount of VT3,000,000 to Sylvie Kalsrap on 12th May 2011 as consideration for the transfer although they knew about the fraud and or mistake."*



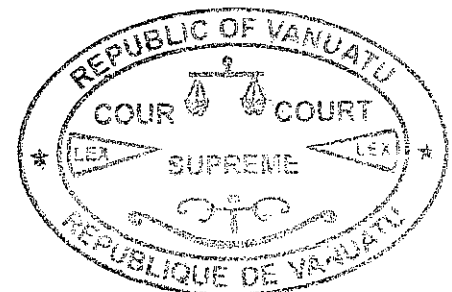
10. At paragraph 51, the allegation against the claimants is that they damaged crops, took yams, took other crops, used a bulldozer to clear bushes and trees, used the big trees as timber and erected a fence in 2021.
11. It is in 2021 when one of the counterclaimants Makete Kaltak , described as a customary land owner of the relevant land, states in her sworn statement filed on 27 November 2023 that she first became aware of lease title 12/0914/100 “created on my husband James Kaltak’s custom land” in April 2021 when her lawyer showed her the claim and sworn statement of Tony Nichols. She said had she known about the lease in 2010 or 2011 at the time of its purchase by the claimants “I would have challenged it at that time.” Her assertion of her husband’s custom ownership was confirmed by the Erakor Village Mpau Natkon Nakamal on 9 March 2021, although this decision was not in place when the lease was created and its legal effect is challenged by the claimants and the Republic. This decision is annexed to the sworn statement of Willie Hocten filed on 2 February 2022.
12. In their response to the counterclaim, the claimants Tony and Lilly Nichols say they had nothing to do with the creation and registration of the lease. As the lease was registered with the Lands Department, they claim to be bona fide purchasers without notice of fraud or mistake either in the creation of the lease or in its transfer to them. They entered the land in 2011 after the lease was transferred to them. They later hired a group of men to clear the bush so they could build a house, but they allege the men were threatened by the occupants of the land. The Nichols say they have no knowledge of the circumstances surrounding the creation of the lease, and as legal proprietors of the lease, they just want to have full enjoyment of the property.

The application to strike out the counterclaim

13. This application is not about the veracity of the pleadings. It says nothing about the claim or the defence, it makes no finding about whether the claimants had knowledge of fraud or mistake at the time the lease was created from statements allegedly made to them at the time, and it says nothing about the credibility of the parties and witnesses. It is only about whether or not the counterclaim should be struck out.
14. I emphasise that striking out any statement of a case has been called a “draconian remedy” (*Asiansky Television plc v Bayer Rosen* [2001] EWCA Civ 1792). Although striking out a claim or counterclaim is not inherently contrary to the Constitution’s guarantee of protection of the law, and equal treatment under the law or administrative action, in Article 5, the Court must nevertheless be cautious to ensure its exercise of discretion to strike out a claim does not violate those guarantees. A claim will not be suitable for striking out if it raises a serious factual issue which can only be properly determined by hearing oral evidence (*Bridgeman v McAlpine-Brown* [2000] LTL January 19, CA). Nor should a claim be struck out unless the Court is certain that the claim is bound to fail (*Hughes v Colin Richards & Co* [2004 EWCA Civ 266]). In short, if a pleading raises a serious contested issue, then it should not be struck out and the issue should be determined after trial.
15. The claimants Tony and Lilly Nichols, together with the third counterclaim defendant Sylvie Kalsrap applied to have the counter-claim struck out in its entirety on two grounds:
 - a. the counterclaim is time-barred by s. 14 of the Limitation Act [Cap 212]; and
 - b. the counterclaimants have no standing because they are not the declared custom owners.



16. I will consider the Limitation Act submission first, and then the submissions on standing.
17. Where fraud or mistake is alleged, s 14 of the Limitation Act provides that “*the period of limitation shall not begin to run until the plaintiff [or in this case, the counterclaimant] has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it.*”
18. The fraud or mistake alleged in the counterclaim happened when the lease was registered on 15 April 2009. The counterclaim alleges that the claimants became involved in the fraud or mistake when the fraudulently or mistakenly registered lease was transferred to them and registered on 12 May 2011. The amended counterclaim was filed 12 years later. This was well out of time unless there is evidence to show that the counterclaimants discovered the alleged fraud or mistake more recently, or with due diligence could not have discovered it earlier.
19. Makete Kaltak deposes that she did not know of the lease until April 2021 when her lawyer showed it to her, and not knowing of the lease, did not know of its transfer to the claimants. Had she known of it in 2010, she deposes she would have challenged it then. Mr Maluntugun submitted at the hearing that Makete Kaltak did not become aware of the lease until 2021 when fencing was erected and bush cleared.
20. Ms Sarisets questioned the credibility of Makete Kaltak’s sworn statements. She submitted that Yuen Kaltak, Makete Kaltak’s son, deposed that he warned the Nichols in 2009 before they purchased the land that they should be negotiating with Makete Kaltak not Sylvie Kalsrap because Makete Kaltak was custom owner of the land. Yuen Kaltak also signed the kastom land agreement form on 17 November 2008 to register the lease. As Yuen Kaltak is Makete Kaltak’s son, Ms Sarisets submitted Makete Kaltak must have been aware then that a lease of the land was in the process of being registered and of its transfer to the claimants, yet she sat on her hands for over a decade.
21. A strike-out application is not the place to assess the credibility of witnesses. These are triable issues of fact. The submissions raise a serious factual issue which can only be properly determined by hearing oral evidence. I am not persuaded that the counterclaim is barred by the Limitation Act for the reason that there is evidence that needs to be tested about when the counterclaimants discovered the alleged fraud or mistake or whether or not with due diligence it could have been discovered earlier.
22. I turn now to the issue of standing to bring the counterclaim.
23. The first and third defendants submit that the counterclaimants are neither lessors nor lessees of the lease and therefore have no standing to bring the counterclaim against the claimants. The third defendant also submits the defendants have no standing to bring the counter-claim because they have provided no evidence that Family Kaltak or James Kaltak are the custom owners.
24. In *Johnny v Molbarav* [2024] VUCA 12, the Court of Appeal confirmed its judgments in *Ishmael v Kalsev* [2014] VUCA at [14] and *Mataskelekele v Bakotoko* [2020] VUCA 31 at [26]. Both cases hold that a person merely claiming as a custom owner does not have the required legitimate interest or standing to apply for rectification. *Mataskelekele* concerned a situation where there was a dispute as to custom ownership, and one of the claimants for custom ownership sought to have a lease over the land rectified on the ground that it was registered as the result of fraud or mistake. At [26] the Court of Appeal said:

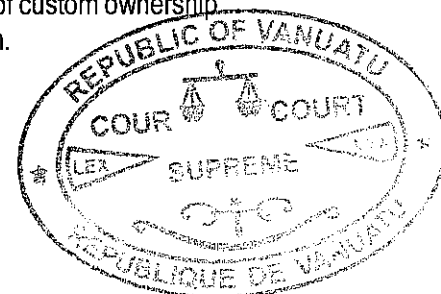


In the appellant's case it was a case of challenging the validity of a lease under section 100 of the Land Leases Act. The appellant was neither the lessor nor the lessee. And neither had he nor his family been declared custom-owners by any Court or tribunal of competent jurisdiction. In this case the appellant had no standing.

25. The third defendant submits that a kastom ona blong kraon form was issued stating that Marc Kalsrap, Herve Kalsrap, Laurent Kalsrap and Makson Kalsrap are the custom owners of Emas custom land over which Sylvie Kalsrap wanted to create a lease. There is no mention of the counterclaimants in that document. The third defendant submits she is therefore a custom owner of the land, not the Kaltaks.
26. Mr Maluntugan submitted this is not enough – what is needed is a judgment or declaration of ownership over the disputed land by a competent court or tribunal, and the third defendant does not have one. He submits that because Sylvie Kalsrap has no declaration of ownership from a competent court or tribunal, the counterclaimants are not prevented from bringing the counterclaim. He also points to a decision declaring Makete Kaltak to be the custom owner of the land. This declaration was made by the Erakor Village Mpau Natkon (the Nakamal) on 9 March 2021. It is attached to the sworn statement of Willie Hocten filed on 2 February 2022 in support of the application to add the lessors and lessee as parties. I note this declaration did not exist when the lease was created, and the third defendant challenges its legal effect. The issue then is whether a subsequent declaration of custom ownership, allegedly irregularly obtained, gives the counterclaimants standing to seek rectification of the register on the ground of fraud or mistake alleged to have occurred before declaration of custom ownership was obtained.
27. The counterclaimants are seeking rectification of the register and cancellation of the lease. This engages ss 17(g) and 100 of the Land Leases Act [Cap. 163]. In *Naflak Teufi v Kalsakau* [2004] VUCA 15, the Court of Appeal said at p6:

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 ... We use the word "interest" in the widest possible sense although accepting it may have in appropriate circumstances to be distinguished from a mere busy body.

28. If, as is pleaded, the counterclaimants were in actual occupation of the land without a declaration of custom ownership before the lease was created, then s 17(g) creates in them an interest but it is not one that could be notified on the register. It is an interest, however, that would characterise the counterclaimants as more than mere busybodies. By pleading that the claimants knew of the fraud or mistake because they knew there was a dispute over the custom ownership of the land before the lease was created, when Yuen Kaltak allegedly told them his family were the custom owners not Sylvie Kalsrap, the counterclaim engages s 100(2) of the Land Leases Act which provides that the register shall not be rectified unless the person who acquired the interest for valuable consideration "had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought ...". Once again however, these are questions of fact that need to be resolved at a full hearing.
29. I am not aware of any appeal from the decision of the Nakamal declaring the counterclaimants to be custom owners. As such, the counterclaimants have a current declaration of custom ownership that gives them standing to seek rectification of the lease in their counterclaim.




Result

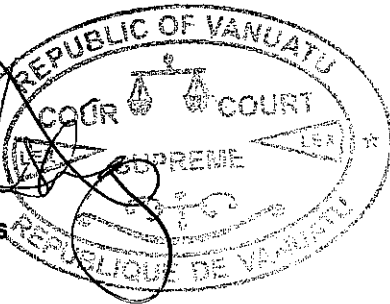
- 30. As there is evidence that needs to be tested at trial that is relevant to the counterclaim – evidence about when the counterclaimants became aware of the lease (the Limitation Act issue), and a current declaration of custom ownership giving the counterclaimants standing to seek rectification of the register, which in turn engages the issue about whether the claimants were aware of possibly disputed custom ownership at the time the lease was created, and as a result, at the time it was transferred to them, from conversations with Yuen Kaltak or from evidence of actual occupation – I decline the application to strike out the counterclaim on both grounds.

- 31. The claim and counterclaim will proceed to trial. The pre-trial conference will be on **28 May 2024 at 11am.**

Dated at Port Vila, this 27th day of May, 2024

BY THE COURT


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Justice W. K. Hastings



The seal is circular with the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom. In the center, it says "COUR SUPREME" and "COURT SUPREME" with a scale of justice above it.