

IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU

Civil Appeal
Case No. 25/1896 COA/CIVA
[2025] VUCA 38

(Civil Appellate Jurisdiction)

BETWEEN: MORRIS LUI AND FAMILY, MOLI MORRIS AND FAMILY, BANI MORRIS AND FAMILY, TARI BOESULAWONO AND FAMILY, HAENAMOLI AND FAMILY, CHRISTIAN TARI AND FAMILY, TANGATI ANJI AND FAMILY, MALAHASE LANGATI AND FAMILY, VOTAMBE VANUATURU AND FAMILY, HAROLD VANUATURU AND FAMILY, VOLEO AND CLEN MICHAEL AND FAMILY, TANGISI MOLIRA AND FAMILY, TOATURU TANGISI AND FAMILY, DAMSAL TANGISI AND FAMILY, MOLI TANGISI AND FAMILY, WILLIE TANGISI AND FAMILY, ULOULOU DAMSAI AND FAMILY, LEOWONO DAMSAI AND FAMILY AND SOHLOSU DAMSAI AND FAMILY

First Appellants

AND: SYLVAIN VANUATURU, MOLISALE VUROBARAVU, FRED VANUATURU, MIGAEL GLEN, BATRICK CLEN, MAX CLEN, KALVANO HAROLD VANUATURU CLEN MIGAEL, ULOULO DAMSAL, VOTAMBU VAUAURU LINA VANUATURU, VOLEO VANUATURU, TANGISI MOLIORA DAMSAI, TANGISI AND TOATURU TANGISI

Second Appellants

AND: ANNA LIVO ERENGA, ERANGA LIVO and VOSUMBE LIVO BANI LIVO, MOLIMWEMWE LIVO MANJEU LIVO and ESBEL LIVO BERNA LIVO and FAMILY, BERNA LIVO and KATHY LIVO VOTARIVUI LUI WALA VUI LUI and PASCALINE VUI LUI

Third Appellants

AND: FAMILY BANI ASI represented by ASITAVITI MOLIVALALEO and TARI MOLI

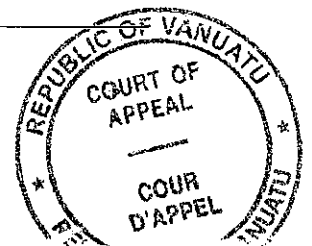
Respondent

Before: Hon. Chief Justice V. Lunabek
Hon. Justice M. O'Regan
Hon. Justice A.J. Besanko
Hon. Justice O. Saksak
Hon. Justice D. Aru
Hon. Justice V.M. Trief
Hon. Justice M. MacKenzie

In Attendance: Mr J. Vohor for the Appellants
Mr C.B. Leo for the Respondents

Date of Hearing: 8 August 2025
Date of Decision: 23 September 2025

JUDGMENT OF THE COURT

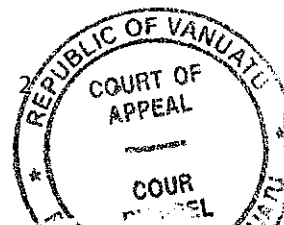


A. Introduction

1. The respondent Family Bani Asi represented by Asitaviti Molivalaleo and Tari Moli filed a Claim in the Supreme Court seeking orders evicting the appellants from Nabatuliu custom land situated at North West Malo Island in Sanma Province. Family Bani Asi alleged that it is the declared custom owner of Nabatuliu custom land pursuant to the Molirantalom Village Land Tribunal decision dated 10 March 2004 and the West Malo Area Lands Tribunal decision dated 26 April 2004.
2. The appellants filed Defences disputing the Claim. The final iteration, a Further Amended Defence, was filed on 26 May 2025, the day of the hearing of a summary judgment application.
3. The summary judgment application was heard on 26 May 2025. After the hearing had concluded and the primary Judge had considered the evidence filed by the parties, the appellants asked to withdraw the evidence filed in support of the further amended defence. By decision dated 27 May 2025, the primary Judge in the Supreme Court refused to permit the appellants to withdraw their filed evidence.
4. By decision dated 28 May 2025, the primary Judge granted Family Bani Asi's application for summary judgment and ordered eviction save that that order would not include any person other than those named in the claim and served with process therefore excluding, "and family."
5. The appellants are appealing against both decisions.
6. This matter was set down for hearing of the appeal on 8 August 2025. However, the Court aborted the hearing due to the conduct of then appellants' counsel Mr R. Willie. The Court directed that the appellants retain new counsel and for the parties to file and serve written submissions.
7. The parties filed submissions.

B. Grounds of Appeal and Submissions

8. The grounds of appeal in respect of the decision refusing to permit the appellants to withdraw their sworn statements are that the primary Judge erred in law by refusing to permit the withdrawal and replacement of sworn statements that were contradictory, misleading and in large part prepared by a person not qualified to act as legal counsel, that the Judge failed to consider the breach of the appellants' right to present their case through competent legal representation, and that the Judge erred by failing to recognise that most of the sworn statements were filed without the knowledge or input of appellants' counsel.
9. The balance of the grounds of appeal assert procedural and fairness concerns given the reliance on an unqualified individual, that a miscarriage of justice has occurred by denying the appellants the opportunity to correct their pleadings, and that the refusal to allow the amendment or substitution of key evidence after the summary judgment hearing had commenced ignored the court's overriding obligation to ensure justice is done.

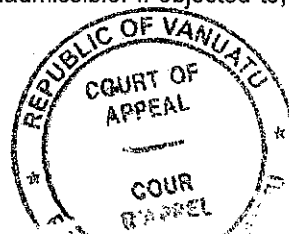


10. The grounds of appeal in respect of the grant of summary judgment are that the primary Judge erred in granting summary judgment as there are serious disputes of fact particularly regarding occupation, customary ownership and the validity of past transactions, that the Judge decided complex factual and historical land ownership issues without trial, that he placed undue reliance on the Certificate of Recorded Interest issued in 2021 which has never been legally challenged due to the appellants' lack of legal knowledge, and that the Judge wrongly applied the doctrine of estoppel.
11. The respondents submitted that the grounds of appeal were not made out and should be dismissed for the reasons in its submissions filed on 8 August 2025 and 27 August 2025.

C. Analysis

Decision to refuse withdrawal of the appellants' sworn statements

12. *Then appellants' counsel Mr R. Tevi sought withdrawal of the appellants' sworn statements by way of a Memorandum filed on 27 May 2025 as follows:*
 1. *That after the Court hearing yesterday, I received further instructions from the Defendants.*
 2. *They felt that their evidence towards the statement of Claim was not properly addressed in the sworn statements that were prepared by Steven Johnny from Volish Consultancy and Real Estate Services.*
 3. *They felt that this eviction claim covers areas of land which they have lived upon for more than 3 generations, and they find it difficult just to give up like that.*
 4. *They would like this Court to withdraw all the evidences that are within the Court's file, and they would like fresh evidence that would address the sworn statements filed by the Claimants.*
 5. *The Defendants therefore request that liberty be given to them to file proper sworn statements in support of their defence, as well as in response to the sworn statements of the Claimants.*
13. The content of the memorandum can be summarised as a request to withdraw the appellants' sworn statements as they fail to properly present the defence case, having been in large part prepared by a consultant who is not a registered legal practitioner.
14. This was an unusual request. It was referred to by the primary Judge as an application, but it was not made by any application filed and served in accordance with the *Civil Procedure Rules* ('CPR'). In addition, there was no evidential basis for the assertions set out in the memorandum. The appropriate course would have been to file an application and evidence in the Supreme Court to effectively re-open the appellants' case. This was not done.
15. Rule 11.7(1) of the CPR provides as follows:
 - 11.7 (1) *A sworn statement that is filed and served becomes evidence in the proceeding unless the court has ruled inadmissible.*
16. Therefore, pursuant to rule 11.7(1), a sworn statement that is filed and served becomes evidence in the proceeding unless the Court has ruled it inadmissible. If objected to, either a



part or the whole of the sworn statement may be ruled inadmissible according to the law of evidence.

17. There is no provision in the CPR for withdrawal of evidence. The appellants cited *Fujitsu (NZ) Ltd v International Business Solutions Ltd* [1988] VUCA 13 in support of the submission that the Court take a lenient approach to the application of the Rules of Court. In *Fujitsu*, the rule which applied concerned an application for summary judgment. However, in the present matter, there is no provision in the CPR for withdrawal of evidence. Accordingly, *Fujitsu* does not assist the appellants.
18. It is also contrary to the litigation process for a sworn statement to be withdrawn. If withdrawal of sworn statements were possible, parties could change their evidence whenever they saw the other side's evidence and believed that they had not adequately countered it.
19. The grounds of appeal include that the primary Judge erred in law by refusing to permit the appellants to withdraw and replace sworn statements that were contradictory and misleading. Where a party forms the view that its sworn statements are contradictory or misleading, its witness could file further evidence to explain his or her previously filed evidence, or the witness could correct any part of his or her evidence when he or she has been called into the witness box to give evidence. These grounds of appeal are devoid of legal merit.
20. For the reasons given, it is a serious misconception that evidence can be 'withdrawn'.
21. The grounds of appeal also include that the sworn statements were in large part prepared by a person not qualified to act as legal counsel, and that the Judge erred by not recognising that most of the sworn statements were filed without the knowledge or input of appellants' counsel. In support of this contention, the appellants' counsel cited this Court's decision in *Michel v Galinie* [2014] VUCA 35. However, we do not consider that *Michel* is of assistance. In *Michel*, the primary appeal ground related to the entry of summary judgment. However, the appellant in *Michel* also made assertions about his lawyer, without evidence of the dealings between the client and lawyer. This Court observed that the Court is entitled to rely on counsel for a party to attend properly to matters involved in the conduct of litigation, and that it is not sufficient to make out that appeal ground without evidence by sworn statement of the dealings between lawyer and client. Those observations are equally apt in the present case, as there was no evidence before us as to the appellants' dealings with either the unqualified person or their former lawyer. Thus, *Michel* does not help the appellants' contention as to these appeal grounds.
22. In the absence of evidence by the appellants as to the involvement of a person not qualified to act as legal counsel and their former counsel's lack of knowledge or input, there is nothing to demonstrate error on the part of the primary Judge. These grounds are dismissed.
23. The appellants also submitted that three of their sworn statements which were filed before their lawyer commenced acting were filed without the lawyer's input hence the primary Judge should have declared them ineffectual. However, by the time of the hearing of the summary judgment application, the appellants had had the benefit of counsel for over 18 months and the Court was entitled to rely on the assistance of counsel. In the absence of evidence as to the lawyer's

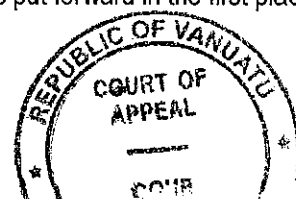


conduct, the Court is entitled to assume, generally speaking, that the lawyer for a party is acting properly. If the appellants have any issue about the way in which their matter was conducted by their lawyer, it is a matter that they must take up with their lawyer. No error has been demonstrated on the part of the primary Judge.

24. The remaining ground of appeal against the decision refusing the withdrawal of the appellants' sworn statements is that the primary Judge failed to consider the breach of the appellants' right to present their case through competent legal representation. This misstates the nature of the right. A party has a right to be represented by a lawyer, and it is for the party to choose the lawyer to represent him or her. If the lawyer does not present the case as instructed by the party, that is a matter between the party and the lawyer. This ground of appeal is also devoid of merit.

Procedural and fairness concerns

25. One of the grounds of appeal under 'procedural and fairness concerns' is the appellants' reliance on an unqualified individual. As set out above, there was no evidence before the primary Judge or in this Court to substantiate this assertion. Had that matter been addressed, other matters may have been addressed or, if they were not, the failure to do so may itself have been significant. Those other matters include the appellants' belief as to the qualifications of the person, their belief as to the exercise being carried out and precisely why the "mistake" only came to the attention of the appellants at or after the hearing of the summary judgment application. There is no merit in this ground of appeal.
26. Another ground of appeal is that a miscarriage of justice has occurred by denying the appellants the opportunity to correct their pleadings. However, the appellants did not seek to correct their pleadings. They sought to withdraw their sworn statements. There is also no merit in this ground of appeal.
27. The final ground of appeal in respect of the 27 May 2025 decision is that the primary Judge's refusal of the amendment or substitution of key evidence after the summary judgment hearing had commenced ignored the court's overriding obligation to ensure justice is done. That is misconceived. The administration of justice is vested in the judiciary, and it is the function of the judiciary to resolve proceedings according to law: art. 47(1) of the Constitution. As set out above, there is no law permitting a party to withdraw and replace its evidence. Even if there was, to allow the party to change or substitute its evidence after the summary judgment hearing had commenced would be contrary to the litigation process and undermine procedural fairness which is fundamental to the administration of justice.
28. In conclusion, we make the following points.
29. First, it would be a rare case indeed where a court would grant permission to a party to withdraw evidence previously filed. Even if there was a case where this was allowed, this is not one of them. Secondly, the court does have power to allow a party to file further evidence in order to correct earlier evidence. In the ordinary case, before the court would allow that to be done, the party would adduce evidence of how the "incorrect" evidence was put forward in the first place,



a clear and detailed statement of the evidence now advanced and an indication of how the evidence relates to the issues in the case. In an application such as this, unless the other party does not object, it would not be sufficient to advance such matters through submissions of counsel. We would add that even if counsel's submissions in this case did address these matters in the detail required, none of these requirements were met in this case. Finally, we would add this. Whether it would be sufficient or not, the fact is that the appellants made no attempt to place before this Court evidence, as distinct from some submissions, relevant to the matters that we have identified.

30. For the foregoing reasons, no error has been demonstrated in the decision dated 27 May 2025.

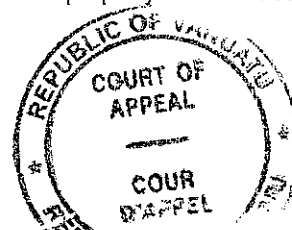
The grant of summary judgment

31. The appellants filed a number of Defences disputing the Claim. They filed the Further Amended Defence on 26 May 2025, the day of the hearing of the summary judgment application. The appellants pleaded the following in that Defence:

- a) The first defendants/appellants' case is that they do not reside in any part of Nabatuliu custom land but that they reside at Amaliaro custom land;
- b) The second defendants/appellants' case is that they reside on Nabatuliu custom land following their late father and late mother's cash payment of Nabatuliu custom land in 1966 in the amount of 150 pounds to the late Fred and his wife Votari Fred, and a further payment to Votari Fred before her death (the appellants asserted that they cannot be evicted as they have rights over Nabatuliu custom land from Fred and his wife Votari. However, Fred and Votari have never been declared as custom owners of Nabatuliu custom land); and
- c) The third defendants/appellants' case is that not all of them reside on Nabatuliu custom land and that the Second Defendants' late parents had already paid for Nabatuliu custom land in 1966 in the amount of 150 pounds, hence they cannot be evicted as they have rights over Nabatuliu custom land, and they have been living on the land since the 1960s.

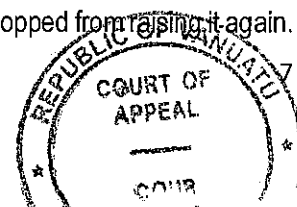
32. The respondents applied for summary judgment. Rules 9.6(1) and (2) of the CPR permit a claimant to apply for a summary judgment where it believes that the defendants do not have any real prospect of defending the claimant's claim. Rule 9.6(7) of the CPR provides that if the court is satisfied that the defendant has no real prospect of defending the claim or part of the claim, and there is no need for a trial of the claim or that part of the claim, the court may give judgment for the claimant for the claim or part of the claim. Rule 9.6(9) of the CPR provides that the court must not enter summary judgment if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law.

33. In the decision dated 28 May 2025 granting summary judgment, the primary Judge noted that despite the first appellants' defence that they do not occupy Nabatuliu custom land, yet in the sworn statement of Morris Lui, the first-named first appellant filed in support of that defence, he attested that the first defendants do live and work and have built property within Nabatuliu



custom land. The Judge accepted the respondents' submission that that apparent conflict demonstrated that the first appellants' defence had no prospect of success. We agree.

34. The primary Judge also noted in the summary judgment that the second and third appellants raised the question of having bought portions of Nabatului custom land, in 1966 from Fred and his wife Votari, and also from Votari Fred in 2006.
35. The grounds of appeal include that the primary Judge erred in granting summary judgment as there are serious disputes of fact particularly regarding occupation, customary ownership and the validity of past transactions, and that the Judge decided complex factual and historical land ownership issues without trial.
36. These grounds overlook the fact that the Supreme Court has no jurisdiction to determine issues as to customary ownership of land and related transactions: art. 78 of the Constitution. In addition, the defence did not raise any such issues. It raised alleged purchases of land in 1966 and 2005, but as the primary Judge noted, it was incumbent on the appellants to raise the 1966 alleged purchase and their alleged position as custom owners before the land tribunals, and they could not now raise it before the Court. As for the 2006 alleged purchase, the Judge noted that Votari Fred was not identified as a custom owner within the decision of the West Malo Land Tribunal therefore this was not a triable issue. No error has been shown in the primary Judge's reasoning.
37. In response to the application for summary judgment, the appellants submitted that they had secondary rights to Nabatului custom land. Those submissions also overlook the fact that the Supreme Court does not have jurisdiction to determine the ownership of custom land, including any secondary rights to such land: art. 78 of the Constitution. In addition, it was incumbent on the appellants to raise their alleged secondary rights over Nabatului custom land before the land tribunals, and they could not now raise it before the Court.
38. In summary, there was nothing before the primary Judge to show that the appellants had a viable defence. The Judge was correct to conclude that the appellants did not have a real prospect of defending the claim, and to enter summary judgment.
39. Another ground of appeal is that the primary Judge erred in placing undue reliance on the Certificate of Recorded Interest issued in 2021 which has never been legally challenged due to the appellants' lack of legal knowledge. The Judge noted that the Certificate of Recorded Interest was issued on 5 November 2021, based on the West Malo Area Land Tribunal decision of 16 April 2004. He noted that the Certificate had never been challenged by the appellants and that there was no counter claim to challenge it. The assertion that the Certificate of Recorded Interest has never been challenged due to the appellants' lack of knowledge has no evidential basis and is irrelevant given the absence of a counter claim challenging the Certificate. No error has been shown in the primary Judge's reasoning. This ground of appeal is dismissed.
40. The remaining ground of appeal against the summary judgment is that the primary Judge wrongly applied the doctrine of estoppel. The primary Judge stated that given that the appellants had had the opportunity to have raised in the land tribunal hearing the question of their alleged ownership of Nabatului custom land, they were now estopped from raising it again.



We agree that this was not a correct usage of the word, 'estopped' however there is no error in the Judge's reasoning that not having raised their alleged ownership before the land tribunals, the appellants could not now raise it before the Court. This ground of appeal is also dismissed.

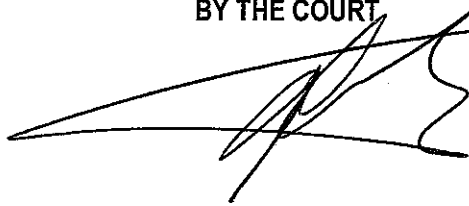
41. In the circumstances, no error has been demonstrated in the decision dated 28 May 2025.

D. Result

42. For the reasons given, the appeal must be dismissed. The appellants must pay the respondent's costs fixed in the amount of VT75,000 within 28 days.

DATED at Port Vila this 23rd day of September, 2025

BY THE COURT



.....
Hon. Chief Justice Vincent Lunabek

