

(Civil Jurisdiction)

BETWEEN: HAROLD KENNETH
representing the Family
Kenneth

Claimant

AND: THE GENERAL
SECRETARY representing
the Malampa Provincial
Council

First Defendant

AND: THE MINISTER OF LANDS

Second Defendant

Coram: Mr Justice Oliver A. Saksak

Counsel: Mr Saling N. Stephens for the Claimant
Mrs Viran M. Trief for the Second Defendant
Mr James Tari for the First Defendant

Date of Hearing: 7th September, 2005 at Lakatoro, Malekula

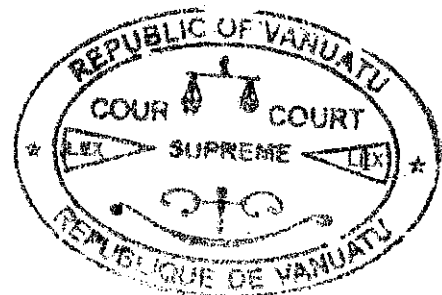
Date of Decision: 24th November, 2005

Date of Judgment Giving Reasons: 16th December ~~2006~~ 2005

JUDGMENT

Introduction

This judgment provides the reasons for the Decision and Orders of this Court dated 24th November 2005. A copy thereof is attached to this judgment for ease of reference. In brief summary the Court decided that: -



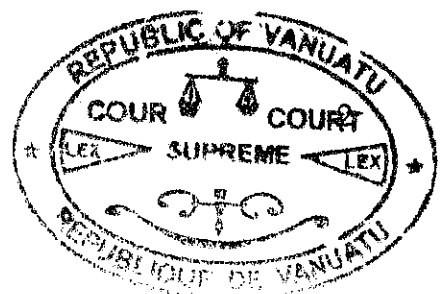
1. The Claimants claim for compensation for public land at Lakatoro was valid but he had adopted the wrong process in claiming it.
2. The land on which the new market house stands is public land and that the Claimant's claim for trespass had not been made out.
3. The Claims of the Claimant be struck out in their entirety.
4. The Defendants be entitled to their costs of and incidental to the proceedings to be agreed, or assessed by the Court.

Claims

The Claimant instituted the proceedings on 20th September 2004 following the judgment of this Court presided by the then Chief Justice Cooke sitting in an appellate jurisdiction in Land Case No. L5 of 1984. The judgment is dated 5th July 1988. The Court declared that this Claimant along with two other claimants were equally the custom owners of the Lakatoro state land and that the land be divided equally between them. The Court then Ordered that any compensation paid by the Government for the state land should be divided between the three custom owners at one third to each family.

The Claimants claim that they have made several requests to the Second Defendant for payment but to no avail. They then complain about the developments being carried out by the Defendants on the state land and in particular on the eastern part of the land with out their consent and allege the Defendants are acting in contempt of the judgment of the Court. As a result the Claimant allege they have suffered loss and damage as follows:-

- | | |
|--|-------------|
| (a) trespass to property | VT3,000,000 |
| (b) mental stress and anxiety | VT2,000,000 |
| (c) one third entitlement to compensation
to be paid by the Defendant
(to be assessed) | VT..... |
| (d) exemplary damages | VT3,000,000 |



Defence of Defendants

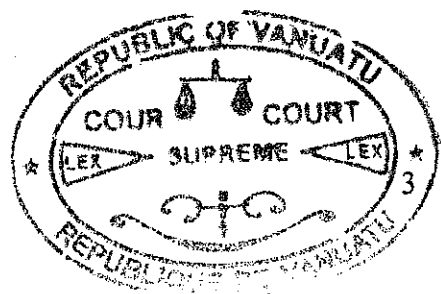
The Defendants agreed the facts but denied liability for trespass and damages for mental stress and exemplary damages on the ground that the land on which the alleged developments are or have taken place are state land.

The Second Defendant admitted that the Claimant has made requests for payment and admits that the payment has not yet been made.

Reliefs

They sought the following reliefs:-

- (a) An eviction Order against the Defendants jointly and severally to remove and/or dismantle their projects unlawfully built on the Claimants land on the eastern part of state land.
- (b) An Order for general damages (to be assessed)
- (c) In the alternative, an enforcement order requiring the Defendants jointly and severally to comply with the judgment of 5th July 1988.
- (d) An Order for specific performance against the Default jointly and severally in respect to the issuance of immediate payment of Claimant's one third of the compensation entitlement.
- (e) An Order for exemplary damages in the sum of VT3,000,000 against the Defendants jointly and severally.
- (f) Interest at 12% per annum on the judgment sum until the judgment is settled in full and final payment.
- (g) Costs of and incidental to the proceedings.



Evidence

In deciding the issues before me the Court had regard to the sworn statements of Lambert Maltock, Donald Malignen, Persi Timothy and Melten Tassongi on the part of the First Defendant.

On the part of the Second Defendant the Court had regard to the sworn statements of Jean Marc Pierre, Director of Land Records and of Paul Gambetta, Director of Land Surveys.

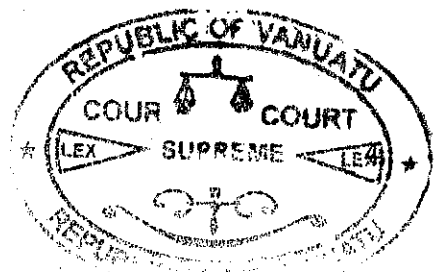
The Claimant relied on the sworn statement of Harold Kenneth. He did not call or adduce evidence from any independent witness to support his case.

Counsel agreed to the facts and none of them requested an opportunity for cross-examination. All statements were taken as read into evidence. There is no need to restate the facts and evidence.

The Court, including Counsel and the Parties on the proposal by Mrs Trief actually walked the boundary of the state land in the morning and also in the afternoon.

The Court walk commenced at 10 O'clock at the peg near the Public Works Department along the fence of the Lakatoro School, down through the Agriculture College ending at the corner peg at the coconut plantation, then across to the Southern end passed the Lakatoro warf; then back up to the main road, and ending at the Malekula Development Centre (MDC) at 11.30 hours.

The Second leg of the walk commenced at 13.30hours at the center of the land adjacent to the Administrative Block of the Malampa Provincial Council to the peg at the foot of the hill, then further up the top of the first plateau locating the peg near a huge white wood tree, then across to the corner peg marked by a palm tree, then across passed the center pegs and to the corner peg near a banyan tree, then back down past the ancestral nasara and down to the jail house where the walk was rounded off.



The Court party included the judge and Mrs Anita Simon, Mr Stephens and his clients, the Secretary General, the President of Malampa Provincial Council, Mrs Trief and interested members of the public. The walk was headed by Mr Paul Gambetta, Director of Land Surveys Department who identified the survey pegs for the Court party.

Issues

Two basic issues were identified as a result of submissions received from Counsel representing the Parties. I deal with them in the following manner -

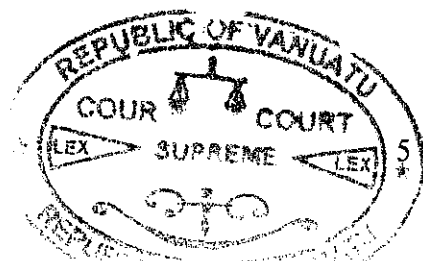
1. Claim for Compensation

The Claimants submitted they are entitled to compensation for state land. The defendants do not deny that entitlement however they say the Claimants had used the wrong procedure. The Court agrees with the submissions of the defendants.

The claim was lodged following a judgment of the Court which has been in place since 1988. To enforce a judgment under the new Civil Procedure Rules No. 49 of 2002 the Claimants could have applied for an Enforcement Order. There is no evidence from them that they have done so. Mr Kenneth's evidence is that they made several requests for payment. He did not show those actual requests by producing copies of the requests and what dates and sums they were made for.

The evidence of Harold Kenneth dated 20th September 2004 annexes a copy of the Supreme Court Judgment in Land Case L5 of 1984 as Annexure A. The relevant parts of the judgment are found at page 10 at paragraphs 10 and 11 where the Court exercising its appellate jurisdiction said:

"I therefore hold that the Kenneth Kaltabang Family, the Sandy Malro Family and the Sato Kilman Family are the true custom-owners of the land in dispute and it shall be divided equally between them.



It is hereby ordered that any compensation paid by the government of Vanuatu for the State land which is set out on the plan attached shall be divided between the three custom-owners. One third to each family.”(My underlining).

Then on page 10 at paragraph 3 the Court said –

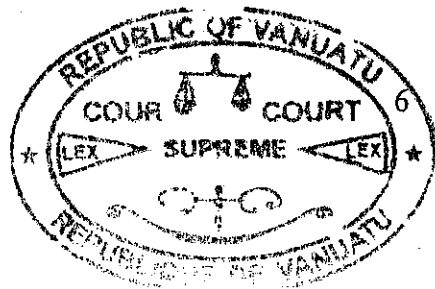
“It is further ordered that any lease of the disputed land other than the state land must be signed by a representative of the three custom owners. It is also ordered that the custom owners have no rights to interfere with any project on the state land. All the custom-owners are entitled to is compensation for the said land.”(My underlining).

The Second Defendant admits that the Claimant is entitled to compensation. They further admit that requests have been made by the Claimant for payment and the payment has not been made. Counsel made submissions that according to the judgment compensation is to be paid equally to the three declared custom-owners. The Court agrees with that submission. In the relevant passage of the judgment as quoted on the previous page it is clear that compensation cannot be made in isolation but as a whole payment and divided equally between the three families declared as custom owners. But the other interesting point to not about compensation is the issue of division of land equally between the three families. It is apparent that division precedes the issue of payment of compensation. Further the Court ordered the custom-owners not to interfere with any developments.

The Court finds there is no evidence by the Claimant showing that the land has been divided up equally between the three families in accordance with the judgment. Further there is no evidence by the Claimant showing the reason why the Government has not made payments in accordance with his requests. Although the requests are admitted by the Second Defendant, there is no evidence of them and for the amount being claimed in those requests.

The Claim under this Head fails for those reasons.

(2) **Claim for Damages for trespass onto public land**



The Claimant contended that the New Market House and the MDC premises and lease are encroaching on their customary land and that is not within the state land. The Court walked that area of state land with the Parties and the Director of Land Surveys. The Court saw the survey pegs and was satisfied that the Market House and the MDC premises and lease are situated within and are part of state land. Those developments are being carried out on state land. This part of the Claimant's claim therefore fails. In their pleadings the Claimant did not claim for trespass for any other developments other than for the new Market House and MDC Lease.

Further Claims :-

- (1) The Claimant's claimed for VT2,000,000 being for mental stress and anxiety. They did not call any specific medical evidence to show that they suffered stress and anxiety. In those circumstances, this claim also fails.
- (2) **Exemplary Damages**

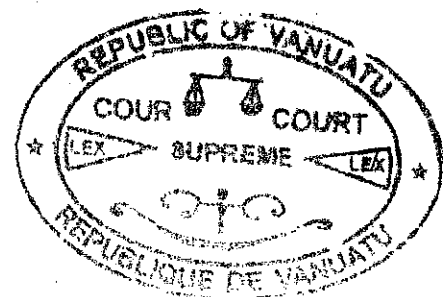
The Claimant's did not provide for any logical reasons why they claimed exemplary damages. No submissions were made in support of the claims and so they must fail.

Submissions

Several points were raised in the submissions by Counsels:

1. **For the Claimant**

Firstly Mr Stephens raised the issue of Jack Semeno being the Commissioner for Oaths in respect of the sworn statements deposed to on behalf of the Second Defendant. Mr Sememo was and is not a party to this case. He works in the State Law Office but there is no evidence that he has an interest in the case. Counsel was entitled to raise objections earlier and to object to the admissibility of those sworn statements at an early stage and he did not. It was not open to him therefore to raise it in the closing submissions.



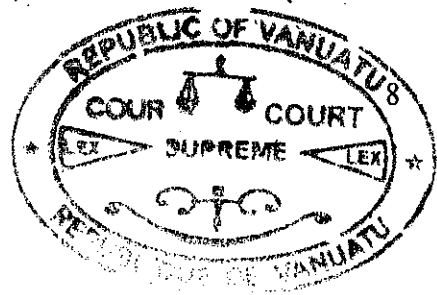
Secondly he raised Articles 76, and 77 of the Constitution. I do not see the relevance of Article 76. Article 77 provides for compensation entitlement to persons whose interests are affected by legislation. The entitlement of the Claimant to compensation is not in issue. The issue is has he claimed for them, if so, when ? and how much ? Further is he entitled to claim on his own or collectively with the other two claimants entitled under the judgment? Further, have the three custom-land owners divided up the land equally in accordance with the terms of the judgment before making claims for compensation ? These are unanswered question which the Claimant did not produce evidence in regard to them. Article 77 of the constitution therefore is not in issue.

Thirdly Mr Stephens raised section 9 of the Land Reform Act [Cap 123]. He submitted that there was no ministerial order issued by the Minister under Section 9 (2) (3) and (4). This was an issue that warranted a cross-examination of witnesses. All Counsels agreed to the facts as they were. It is therefore not open for Counsel to raise the issue when facts were accepted and the point was not in issue at the time.

Fourthly, he submitted that the Court should disregard the statements of Jean Marc Pierre and Paul Gambetta. However the Court rejects that submission. The Court believes their evidence to be the truth as to the boundary of the state land and in that regard their evidence is relevant and admissible.

2. For the Defendants

It was submitted by Counsel for the Second Defendant that the Claimant could not enforce the judgment of the Court in Land Case No. 5 of 1984 in this proceeding and having done so, it amounted to an abuse of process. Further, that the proper course would have been to bring a claim for judicial review seeking mandatory orders pressing the Government for payment. The Court agrees. The Claimant could not institute a new proceeding. When they sought an order compelling the defendants to pay their entitlement under a valid judgment as in paragraphs (c) and (d) of their reliefs, the Court accepts the



Second Defendant's submissions that the correct and proper procedure was to institute a judicial review process and not by a Supreme Court Claim as they have done. The Court agrees with the defendant's submission that there was an abuse of process.

Mr Bani for the First Defendant went further in his submissions to submit that this Court has no jurisdiction to entertain the Claimant's claims for compensation on the basis that the Court in 1988 sat in its appellate jurisdiction, while this Court is exercising its original jurisdiction.

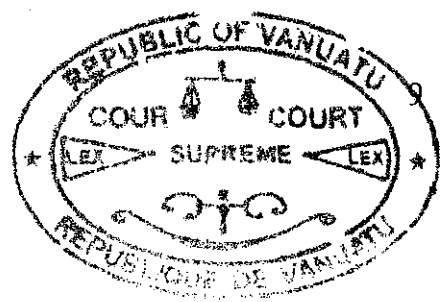
The Court's rulings on these submissions are as follows:

Firstly the Court accepts that for the Claimant to enforce a valid judgment in or by a completely different set of proceedings seeking orders for compensation and for contempt of Court are an abuse of process. The Claimant and the other two families are entitled to pursue enforcement proceedings under the new rules but they should be mindful of Rule 14.9(1) which places a 6 years limit for enforcement. This case is more than 6 years old. In the that regard the only other alternative perhaps is for the Claimants to institute judicial review proceedings, but that is entirely a matter for them.

Secondly on the jurisdiction point, the Court agrees with the submissions of Mr Bani. What the Claimant is basically and essentially trying to do is seeking to enforce the judgment of 5th July 1988 under the disguise of a new proceeding seeking the indulgence of the Court exercising its original jurisdiction. Again that is not the proper and appropriate process.

Costs

As regards costs, they normally follow the event and they are made on the sole discretion of the Court. In the normal course of events, the Defendants were put to great expenses as a result of this proceedings instituted against them. Now that they have successfully defended themselves against it, they



are entitled to all their costs on the standard basis to be agreed, if not determined by the Court.

These are the reasons for the decisions and orders reached and delivered on 24th November 2004.

PUBLISHED at Luganville this 16th day of December 2005.

BY THE COURT



OLIVER A. SAKSAK
Judge.

