

(Civil Jurisdiction)

**BETWEEN: MATHEW NDAI &  
EDWARD SUMBUE**

Claimants

**AND: NELSON SESE & SILAS  
SESE**

First Defendants

**AND: RATUA ISLAND  
DEVELOPMENT LIMITED**

Second Defendant

**AND: DIRECTOR OF LAND  
RECORDS**

Third Defendant

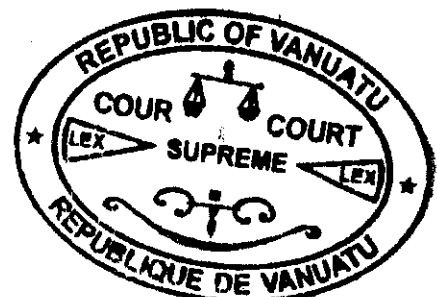
**AND: TOM JOE BOTLENG**

Interested Party

Mr Justice Oliver A. Saksak

Mr Felix L. Kabini for the Claimants not appearing  
Mr George Boar for Second Defendant  
Mr Fredrick Gilu for the third Defendant  
Mr Kiel Loughman for the Interested Party  
No appearance by First Defendants

Date of Hearing: 21<sup>st</sup> November 2006  
Date of Judgment: 19<sup>th</sup> March 2007

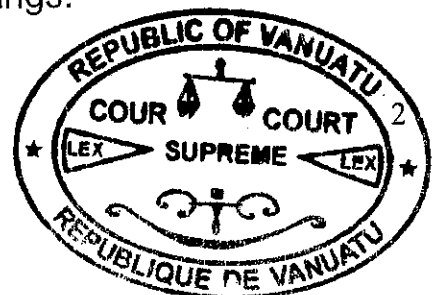


## JUDGMENT

This case was adjourned from 19<sup>th</sup> October 2006 when Mr Kabini, Mr Loughman and Mr Gilu did not appear. The Court adjourned the hearing of the Second Defendants application to 21<sup>st</sup> November 2006 with directions that written submissions in response should have been filed within the next 14 days thereafter. When Mr Kabini did not again appear on 21<sup>st</sup> November 2006, Mr Boar pressed the Court for a hearing. The Court proceeded to hear submissions in relation to some preliminary issues raised from the counsels present. Mr Kabini did not file any written submissions as directed. The first Defendants also did not file any written submissions as directed.

The Second Defendant filed an Application on 26<sup>th</sup> April 2006 seeking the following orders:-

- (1) That the Claimants do not have standing to challenge the Second Defendant's registered lease title 04/3321/001 and that their claims should be struck out.
- (2) Alternatively, for an order directing the Claimants to lodge a claim in the Lands Tribunal for determination of their customary land rights to Ratua Island before they could challenge the registered lease of the Second Defendant.
- (3) Costs of and incidental to the proceedings.

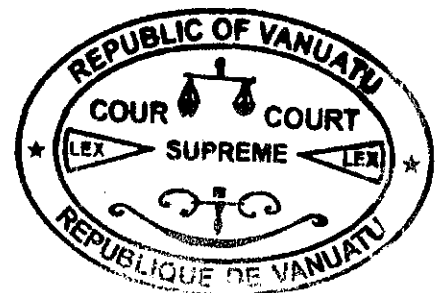


In their written submissions the Second Defendants sought two additional orders:-

1. That a caution lodged by the Claimants and registered on 20<sup>th</sup> October 2005 be uplifted and removed.
2. Alternatively, that the Claimants pay VT 20,000,000 by way of security into the Court within seven days failing which, the action be struck out.

Mr Boar for the Applicants raised basically three grounds or preliminary issues for determination by the Court as follows:-

- (1) That from the pleadings and sworn statements filed in this matter, the real issue to be determined is customary ownership of land upon which title 04/3321/001 is located. He relied on the case of James Tura v. Valele Trust to support his contention that no decision of village council and or the Minister could convey rights of ownership of land on a person except a Land Tribunal, the Island Court or the Supreme Court on appeal.
- (2) That the Claimants have not shown any reasonable cause of action and further that the claims are frivolous and vexatious. He relied on the case of John Noel v. Obed Toto CC App. 26 of 2006 to support his contention to this effect.

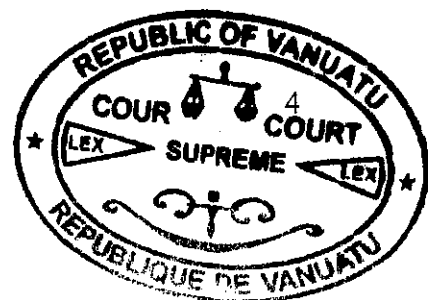


(3) That the Claimants in this case had no locus standi. He relied on the case of Naru Kalsakau v. Daniel Kalorib & Others, CC App. 31 of 2003. Further that on the basis of the above case the Claimants may have only equitable rights, but provided that they were substituted as Lessors of the title, and upon them being declared custom land owners by a land tribunal or court of competent jurisdiction.

(4) That there was an abuse of process.

Mr Loughman responded on behalf of the Fourth Defendant basically objecting to the application indicating that his client's interest is the same as the Claimants. He argued that the cases of Tura and Kalsakau were distinguished from this case in that they dealt with customary ownership, whereas this case is concerned with allegations of fraud and mistake, and the Court is being asked to exercise its powers under section 100 of the Land Leases Act Cap. 163.

He further argued that Probate Case No. 2 of 2006 was not concerned with customary ownership but as to who is to administer the estates of the deceased, John Molvono. He argued that as his client was granted letters of administration by the Court, he had come to be a party to the proceedings as a result.



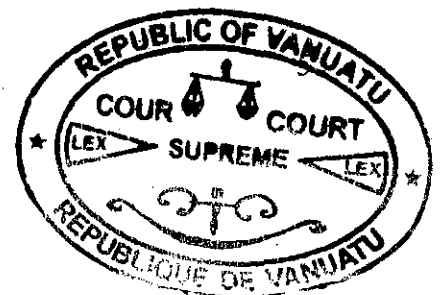
Mr Gilu informed the Court that no defence had yet been filed by the Third Defendant. As for the issues raised by Mr Boar, he had no instructions but informed the Court that they would simply abide by any orders of the Court.

In determining the issues raised, the Court makes the following findings –

(1) Whether the real issue to be determined is customary ownership of Land?

The Court accepts the submissions by Mr Boar in relation to this issue.

In paragraph 1 of their claim the Claimants say they are the custom owners of land at Ratua Island on which title 04/3321/001 is located. The First defendants deny that assertion. Paragraph 6 of their defence deny that the claimants are the lawful custom land owners. The Claimants base their claims on the letter of the then Minister of Lands dated 1<sup>st</sup> May 1985. That letter was made about a year after the same minister had declared Willy Moli Sesia and John Molivono as custom owners representative. The letter of 1<sup>st</sup> May 1985 identified Frank Joe, Willie Molisesia, Edward Sumbe and Mathew Ndai as custom owners of land on Ratua Island. Mr Boar argued that by virtue of what the Court of Appeal said in Tura Case the Minister had no power to make such declaration of identity. The Court agrees and accepts that submission. That being so, it is clear that the main issue to be resolved is that concerning customary ownership. That has to be done by an appropriate Land Tribunal or by the Island Court.



(2) Whether or not the Claimants have any reasonable cause of action?

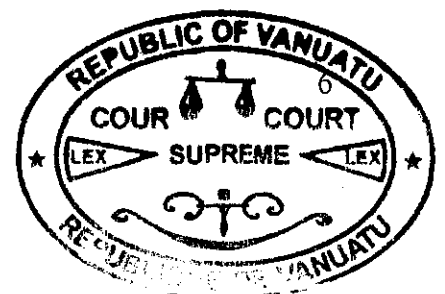
The Claimants claims hinge on customary rights which they thought they had as a result of the Minister's letter of 1<sup>st</sup> May 1985. Customary rights are still to be determined by a Lands Tribunal or by the Island Court. Until such time as that is done, the Claimants could claim under section 100 for rectification of lease by cancellation on the basis of customary ownership because they can demonstrate that they have an interest in the lease. That is what the Court of Appeal said in Naru's case. (See the passage cited below). And that includes Tom Joe Botleng, the Third Defendant or Interested Party. The case of John Noel does not assist the Applicants.

The answer to this issue is in the affirmative.

(3) Whether or not the Claimants have locus standi?

There are two limbs to this issue. The first concerns standing. The second concerns equitable rights. As to standing, the Court acknowledge what the Court of Appeal said in the case of Naru Kalsakau as follows:-

***“.....Mr Kalsakau in each of those cases had no cause of action as he is neither a declared custom landowner nor a party to the lease nor does he have any present interest in relation to either of the leases. He has no standing to have the leases set aside.”(emphasis added).***



The Court agrees and accepts that the Claimants have standing to lodge this claim.

Secondly as to rights in equity the Court of Appeal went on to say –

***“..... Should he ultimately be a party to ..... and should he succeed he would have rights in equity in relation to the recovery of any benefits which the present custom owner right have gained.”***

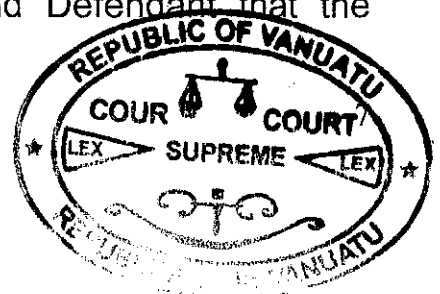
The principle is the same. The dispute as to ownership must be brought before a Lands Tribunal or the Island Court. All persons disputing should be made parties. And any party that succeeds would have rights in equity to recover any benefits that are presently being gained by the First Defendants, if and only if, they have proven fraud and mistake under section 100. But in the Court’s opinion this does not prevent the Claimants from taking legal proceedings challenging the validity of a lease before the issue of ownership is finally decided. If they can demonstrate adequately that they have an interest in the lease, they are entitled to bring a section 100 claim.

The answer to this issue is in the affirmative.

(4) Whether or not by filing the case the Claimants had abused the process?

For the reasons given above, this issue is answered in the negative.

The additional orders sought by the Second Defendant that the



caution be uplifted and removed and that a security of VT20,000,000 be paid into Court by the Claimants are declined.

For the foregoing reasons the Application of the Second Defendant is hereby struck out. The formal orders of the Court are:-

- (1) Civil Case No. 52 of 2005 will remain on foot and be listed for hearing on a date to be fixed and notified.
- (2) The Second Defendants will pay the costs of the Claimants, and the Fourth Defendants costs of and incidental to this Application to be agreed if not, be determined by the Court.
- (3) All parties claiming ownership or having an interest in the land at Ratua Island be required to file their claim formally with the appropriate Lands Tribunal.

**DATED at Luganville this 19<sup>th</sup> day of March 2007.**

**BY THE COURT**

  
**OLIVER A. SAKSAK**

**Judge**

