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

Civil Case No. 12 of 2008

BETWEEN: AARON HANGHANGKON
Claimant

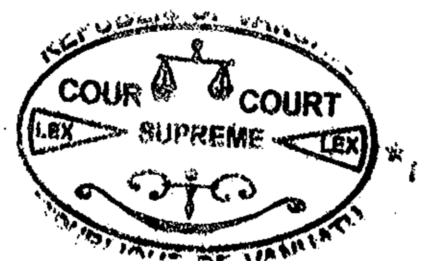
AND: KESAIA HANGHANGKON
Defendant

Coram:	*Justice N. R. DAWSON*	
Date of Hearing:	*9th August, 2010*	
Date of Decision:	*31st August, 2010*	
Counsel:	*Claimant:*	*Mr. J. Kilu*
	Defendant:	*Mr. J. Malcolm*

DECISION

1. This is a dispute concerning the division of matrimonial property between the parties.

2. The agreed facts are:
   a) The parties married on 13th May, 1983
   b) There are five children from the marriage, namely:-
      i) Tufui Adi Hanghangkon (female) born 22nd March 1984;
      ii) Elizabeth Talei Hanghangkon (female) born 9th December 1985;
      iii) Tabisa Lifan Hanghangkon (female) born 23rd August 1987;
      iv) Hermon Viliame Hanghangkon (male) born 7th September 1991; and
      v) Aaron Bongmial Hanghangkon (male), born 7th September 1991.



c) The parties separated on 8th March, 2002

d) On 2nd September, 2002, the Fiji Magistrates Court granted a dissolution of marriage, a decision that was upheld by the High Court of Fiji on 23rd January, 2004.

e) The original pleadings reference to custody and access to the children is no longer relevant due to their present ages.

3. It is also agreed that only the division of the following assets are in dispute:-

   a) Leasehold Title No.11/OB22/067 located at Nambatu Area, Port Vila (Claimant's residence);
   b) Leasehold Title No.11/OD42/053 located at Tassiriki Area, Port Vila (Vacant lot);
   c) Leasehold Title No.11/OD42/054 located at Tassiriki Area, Port Vila (Vacant lot);
   d) A motor vehicle (Mitsubishi Double Cabin) Registration No.2411; and
   e) A fixed Term Deposit held at the ANZ Bank Account No.387145.

4. The assets in paragraph 3, using the same sub paragraph letters, are held in the name/s of:-

   a) The Claimant's sole name.
   b) The joint names of the parties.
   c) The joint names of the parties.
   d) A joint account for both parties.

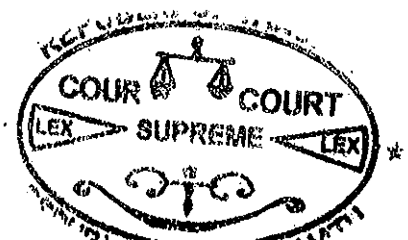
5. The Claimant's residence listed in paragraph 3 (a) (hereinafter referred to as the *"Nambatu house"*) is on a parcel of the land purchased by the Claimant, he believes, sometime in the 1980's, before the marriage on 13th May, 1983. Mortgage finance was obtained and a family home built on the land at about 1992, 1993, where the parties lived with their children. At some time the property was subdivided, part of it was sold, the sale proceeds used to reduce the mortgage, with remaining land, the Nambatu house, staying in the name of the

COUR COURT LEX SUPREME LEX

Claimant. The Lease Register shows the Nambatu house registered in the name of the Claimant on 6th October, 1992, after the subdivision had taken place. At that time it was mortgaged to Westpac Banking Corporation for VT 12,500,000. On 13th October, 1995 the Nambatu house was then mortgaged to Vanuatu National Provident Fund for a principal sum of VT4,320,000. On 26th November, 1997 the principal was increased to VT 5,500,000. On 18th July, 2001 the mortgage was transferred into the name of National Bank of Vanuatu as mortgagee and had a principal sum of VT5,182,680.

6. No valuation for the Nambatu house as at the date of separation has been produced in evidence. It was submitted by counsel for the Defendant that it is not possible to now obtain a valuation as at the date of separation and therefore the Nambatu house should be sold and the net proceeds divided between the parties. There are a number of difficulties with that approach. First, it would be a distribution of an asset over eight years after the date of separation and may be financed on a basis that could be significantly different from the reasons the mortgage finance was originally obtained. From the evidence given during the hearing, mortgage finance was originally obtained to buy the land, and later another mortgage was entered into to build a family home on the land. It is unclear whether the money owing under the mortgage is the balance of that last loan or whether that mortgage now provides security for other borrowing by the Claimant to support his business dealings. Secondly, it does not allow for any improvements which may have been made to the Nambatu house by the Claimant after separation. Such an approach could result in a very unfair outcome for one or other of the parties.

7. The Claimant submits that he originally purchased the land, the balance of which is now the Nambatu house, with his own money and that he has been paying the mortgage over the property. He submits that the Nambatu house and the two vacant lots of land referred to in paragraph 3(b) and (c) should be transferred into a trust for the two sons Hermon and Aaron with himself as trustee.

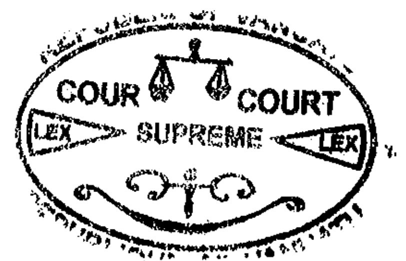


8. To transfer the three lots of land into such a trust would effectively be giving a controlling power over all the land for the life of the Claimant. No reasons have been put forward in support of this submission and there are no apparent needs of the sons that should be met in this manner. This case is a claim over the division of matrimonial property and unless there is some unmet need or obligation on the parents to care for some children by way of a trust, then the division of property should take place between the spouses with the children of the marriage coming into any bequest after the death of each of their parents. No need or obligation has been presented in evidence that renders it desirable for the two sons to inherit from their parents at this time. Nor is there any need that distinguishes the sons from their four older sisters.

9. The Claimant also submits that if the assets are to be divided between the spouses, then the Defendant should only get one-third of those assets. It is submitted that the marriage was only *"a marriage of convenience"*, that the marriage had broken down because the Defendant began seeing other men, and as the Claimant had been prepared to take her back the Defendant caused the marriage to break down.

10. The Defendant submits that a marriage of nineteen years duration and five children cannot be described as *"a marriage of convenience"*, that when she could she worked, earned an income and used all of that income upon the family, and also says that the Claimant was seeing other women.

11. Over eight years after the separation the emotions arising from the breakdown of this marriage are still raw. That is regrettable but not unusual in cases of marital breakdown. However this Court cannot divide matrimonial property between the parties based on their real and sincere hurt feelings and emotions. This division of property between them must be based upon applicable law.



12. The current position of the law in Vanuatu with regard to the division of matrimonial property is set out in the Court of Appeal decision of Joli v. Joli [2003] VUCA 27. In that case the Court of Appeal said:-

"there is no presumption of law that matrimonial assets are beneficially owned jointly, no matter whose name they are in and who paid for them".

The Court of Appeal then went on to say:-

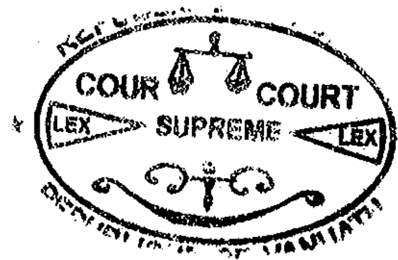
*"Depending on the length of time the parties have lived together, and their respective contributions the Court might reach a conclusion, as a matter of fact in the circumstances of the case, that matrimonial assets should be divided in a roughly equal fashion. However such a result is **not** because of any presumption of law, but because of the respective positions and contributions of the parties. Even where parties have never been married, the application of similar considerations in equity may lead to the imposition of a trust on assets such that assets acquired by the parties during their co-habitation will be divided roughly equally."*

The Court of Appeal observed that:-

"A law applied in Vanuatu already makes provision for the manner in which the power to adjust proprietary interests between the parties is to be exercised. That is contained in s. 25(1) of 1973 English Act, and in a host of cases that have been decided by English Courts in the application of that law. It was not necessary nor appropriate for his Lordship to seek to reformulate the principles to be applied."

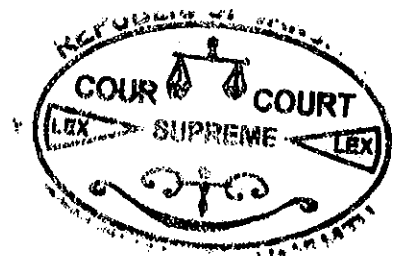
13. Section 25(1) of the 1973 English Act provides:

"(1) It shall be the duty of the court in deciding whether to exercise its powers under section 23 (1) (a), (b) or (c) or 24 above in relation to a party to the marriage and , if so, in what manner, to have regard to all circumstances of the case including the following matters, that is to say-



> (a) *the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;*
>
> (b) *the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;*
>
> (c) *the standard of living enjoyed by the family before the breakdown of the marriage;*
>
> (d) *the age of each party to the marriage and the duration of the marriage;*
>
> (e) *any physical or mental disability or either of the parties to the marriage;*
>
> (f) *the contributions made by each of the parties to the welfare of this family, including any contribution made by looking after home or caring for the family;*
>
> (g) *in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;*
>
> *And so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other."*

14. Section 25 (1) (f) is of the most relevance to this case. The evidence before the Court indicates that neither party had many assets at the time of the marriage, both have worked and supported each other in each others work and the continuing education of the Claimant placing him in a position to earn more. They were in a marriage for 19 years, raised 5 children, provided for their education,

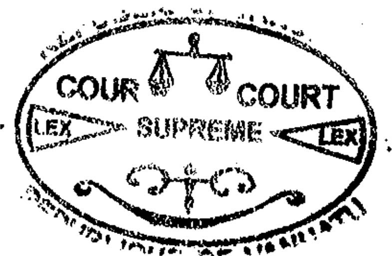


and accumulated substantial matrimonial assets from their joint efforts and contributions. They have much to be proud of. Regrettably, the marriage broke down and the parties have become consumed by the need to allocate blame for the marriage breakdown. There is no evidence before the Court as to the cause of the breakdown other than the allegations and cross allegations of the parties themselves and the alleged infidelities are not factors under Section 25 (1) to be taken into account regarding the division of matrimonial property in this case.

15. Taking into account the circumstances of the case as set out in Section 25 (1) it is appropriate for the Nambatu house asset to be divided equally between the parties, notwithstanding that it is registered only in the name of the Claimant. The Claimant purchased the block of land, within 3 years at most prior to his marriage to the Defendant, and much of the purchase price was financed by way of a mortgage. The later subdivision of the block of land, the retention of the lot upon which the family home was built, the subsequent refinancing of the Nambatu house (three times) all took place during the course of the 19 year marriage during which both parties worked hard to build their total matrimonial assets.

16. The equal division of the Nambatu house between the parties is appropriate as at 8th March, 2002, the date of separation. The parties are now left with the two choices:-

    (a) They agree between themselves as to an acceptable valuation of the Nambatu house as at 8th March, 2002 reduce the value by the principal amount of the mortgage as at 8th March, 2002 and divide the net balance in half to ascertain their equal shares in the net equity. The Claimant (who is in possession of the Nambatu house with his new family) would then pay out the Defendant her share of that net equity plus interest upon it at the rate of 5% per annum from 8th March, 2002 until the date of payment.



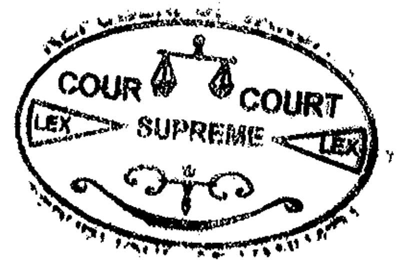
(b) The parties agree upon a current value of the Nambatu house, deduct the principal sum of the mortgage debt as at 8th March, 2002, deduct the value of any improvements for any additions or upgrading made by the Claimant to the Nambatu house since 8th March, 2002 and divide the balance in half to calculate each parties net equity. Either party could then buy out the other party for the amount of the other party's net equity, or the Nambatu house would be sold with each party to receive their net equity as calculated herein. The Claimant would receive the amount assessed for any of the additional improvements in value since 8th March, 2002, but would pay for any additional borrowings under the mortgage after 8th March, 2002.

17. The parties have the opportunity of negotiating their own settlement on either basis. If they cannot agree, then either party has leave to bring the matter back to Court for a hearing on evidence for a decision to be made.

18. The assets in paragraph 3 (b) and (c) can be considered together as the evidence is the same for both. Both are vacant lots of land, adjacent to each other in Tassiriki, were purchased on 13/8/1999, are owned jointly by the parties and together are valued at VT 11,500,000. The parties accept that each lot has the same value as the other.

19. The Claimant has submitted that the properties should have been registered in his name alone. He submits that the Defendant has through fraudulent means and without his knowledge or consent caused her name to be included on the two lease titles.

20. The evidence does not support the Claimant's contention. The *"Transfer of Lease/Sublease"* document shows the names of the Transferees in type print as *"Aaron & Kesaia HANGHANGKON"*. After *"Aaron"*, *"HANGHANGKON"* has been added by someone writing it in. That amendment, and other deletions throughout



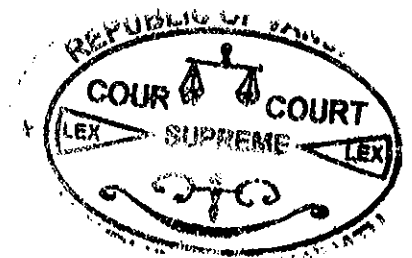
the Transfer are initialed by both Mr. and Mrs. Hanghangkon and at the signing part of the document, both have signed as Transferees in the presence of a solicitor in Fiji who has also signed as the witness to both Transferees signatures. The Claimant also acknowledged that both he and the Defendant were in Fiji at the time, and they were together and saw each other initial and sign the Transfer. There is no evidence of the fraud claimed by the Claimant, other than him saying so, and there is independent evidence which indicates there was no fraud. This Court is satisfied that no fraud occurred.

21. For the same reasons set out in paragraphs 12 to 15 above, it is appropriate for the parties to share in these two properties equally. As the properties are to all intents and purposes identical, Leasehold Title No. 11/OD42/53 is to be transferred into the sole name of the Claimant, and Leasehold Title No. 11/OD42/54 is to be transferred into the sole name of the Defendant. These transfers are to be effected forthwith.

22. The Mitsubishi motor vehicle Registration No 2411 *("the vehicle")* is registered in the joint names of the parties and has been in the possession of the Claimant since the date of separation and he has had the use of the vehicle throughout. It was purchased in 1997 for the sum of VT 3,500,000. At the date of separation, the Claimant estimates that it would have had a value of VT 1,200,000. He estimates that it would now be worth VT 800,000. The Defendant accepts the Claimant's estimate of value of VT 1,200,000 as at the date of separation.

23. For the same reasons set out in paragraphs 12 to 15 herein, it is appropriate for the parties to share the vehicle equally as at the date of separation. The Claimant is to pay the sum of VT 400,000 to the Defendant plus interest from 8th March, 2002 on that sum at the rate of 5% per annum up to the date of payment.

24. The fixed Term Deposit held at the ANZ Bank under Account No. 387145 was in their joint names *("the joint account")*. At the date of separation it contained



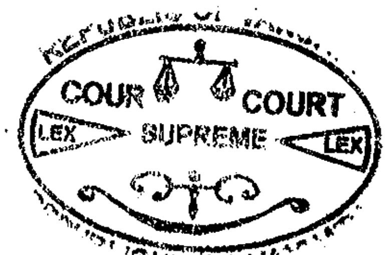
NZ$158,238-27. After the date of separation, the Claimant without any reference to and without the knowledge of the Defendant, closed the joint account and transferred all the funds to a current account in his sole name.

25. In approximately January 1997, the Claimant received A$350,000 from a Mr. Hermon Slade. These funds were placed by him in an account with Westpac Bank in his sole name. Later he transferred the funds a current account held jointly with the Defendant, at the ANZ Bank. The funds were then transferred to the joint account which is now in issue.

26. In evidence, the Claimant said that it was his decision to transfer the funds into the joint account, and it was his decision to remove those funds after the date of separation. He said that at the time he put the funds into the joint account the marriage was normal, but after the separation it was not, so he took the money back.

27. The Claimant said in evidence that the joint account funds originated from an inheritance of A$350,000 from Mr. Slade and those funds were used also to purchase the two Tassiriki sections and for family purposes. A balance of NZ$158,238-27 remained in the joint account as at the date of separation. The Claimant said that he had known Mr. Slade for about 30 years before the funds were received.

28. The Defendant said in evidence that she first knew Mr. Slade through her ex-husband, but she had known him for about 20 years by the time the funds were received. She also claimed to have a close friendship with Mr. Slade. She also said that when she was working in Vanuatu, she made contributions to the Vanuatu National Provident Fund *("VNPF")*. When she stopped working in Vanuatu, her contributions to the VNPF withdrawn and deposited into the joint account, and those contributions were part of the funds taken by the Claimant



when he unilaterally closed the joint account and took all the funds. This evidence was not disputed by the Claimant.

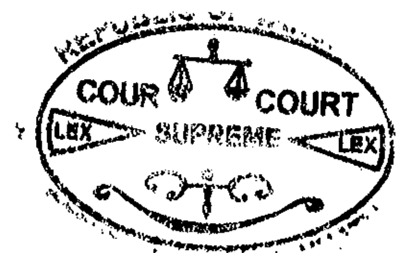
29. Evidence produced by the Claimant in his sworn statement dated 2nd February, 2010 Annexure AH1 shows that he did not inherit the money as such from Mr. Slade. The letter dated 1st January, 1991 says that he intended to leave A$350,000 to the Claimant in his will, but then he says:

"I have decided to pay the funds to you now. I realize that trying to raise a young family entails considerable financial responsibility. I think that there is no better time than now when children's expenses can be a drain on your resources. I give this donation with much pleasure and happiness. I hope that will be put to good use that will enrich you and your family in future."

30. The funds received from Mr. Slade were used for a variety of purposes, including buying the two Tassiriki sections, the Mitsubishi vehicle, mortgage payments, travel, for the parties' children's education and maintenance, and other family purposes. The Claimant's views were clear, he regarded the account as a joint account. Only when the marriage was failing did he decide that he would take the remaining money in the joint account for his own purposes.

31. The money in the joint account did not come solely from Mr. Slade. The Defendant's VNPF contributions were also uplifted and placed in that account. She too appears to have regarded the joint account as a genuine joint account for the benefit of them both.

32. After the date of separation both parties shared custody of the children, and both parties contributed financially to the maintenance and education of the children. The gift from Mr. Slade was intended to assist with the expenses of the parties children and to *"enrich you and your family."*



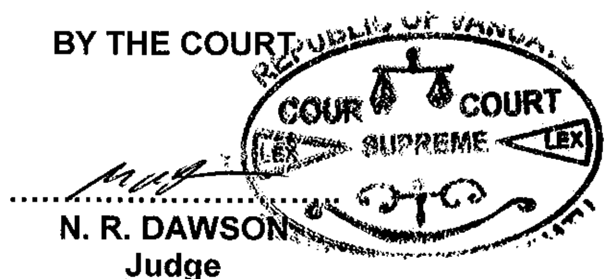
33. For years both parties treated the funds in the joint account as belonging to them jointly. The Claimant is not entitled to go back in time and change the intention that he had at the time he set up the joint account due to his dissatisfaction with the failure of his marriage. The letter from Mr. Slade makes it clear that he was giving the money to benefit the Claimant and his family. For years it was used for that purpose. In addition, the money from Mr. Slade was intermingled with the Defendant's refunded VNPF contributions. In every sense, the joint account was operated as an account owned by them jointly.

34. For the reasons set out in paragraphs 12 to 15 above, the funds in the joint account should have been distributed to the parties in equal shares as at the date of separation. The Claimant is to pay to the Defendant the sum of NZ$79,119-15 plus interest at the rate of 5% per annum from the 8th March, 2002 up to the date of payment.

35. This case has raised some issues in respect of which counsel were not able to refer to earlier precedents for guidance. Notwithstanding that, the Claimant has frequently adopted an attitude to this case that had no likely basis in law. Had he not done so, a much earlier settlement short of a Court hearing might have been possible. The Claimant is therefore ordered to pay his own costs, and a third of the costs at a standard basis of the Defendant. The costs shall be agreed upon by the parties or failing agreement, as taxed by this Court.

DATED at Port Vila, this 31st day of August, 2010

BY THE COURT



N. R. DAWSON
Judge