

(Civil Jurisdiction)

**BETWEEN: MATHEW NDAI & EDWARD SUMBE**

Claimants



**AND: NELSON SESE AND SILAS SESE**

First Defendants

**AND: RATUA ISLAND DEVELOPMENT LIMITED**

Second Defendants

**AND: DIRECTOR OF LAND RECORDS**

Third Defendant

**AND: TOM JOE BOTLENG**

Interested Party

Mr Justice Oliver A. Saksak

Mr Felix Laumae for the Claimants

No appearances by the First Defendants

Ms Jennifer La'au – Agent for Mr Morrison for Second Defendant

Mr Kevin Nathan for Third Defendant

No appearance by Interested Party

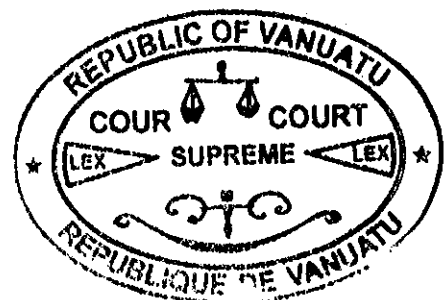
Date of Conference Hearing: 2<sup>nd</sup> August 2012

Date of Decision: 16<sup>th</sup> August 2012

## DECISION

1. On 2<sup>nd</sup> July 2012 the Court issued new directions requiring –

(a) The Claimants to file and serve their evidence by sworn statements within 14 days;



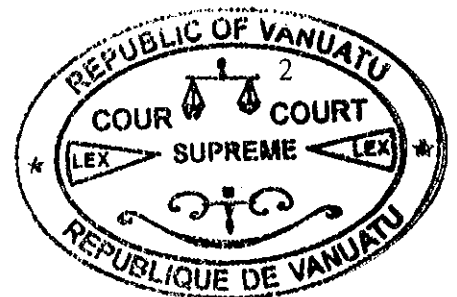
(b) The Second and Third Defendants to file and serve their responses within a further 14 days thereafter;

(c) A pre-trial conference returnable on 2<sup>nd</sup> August 2012.

2. On 2<sup>nd</sup> August 2012 Ms La'au informed the Court they had now been provided with a copy of the decision of a Lands Tribunal declaring the First Defendants as custom land owners of Ratua Island. Counsel handed up a copy of the said decision and made reference to paragraph 1 thereof at page 2 which states:-

*"Joint Island Land Tribunal Court today date 16<sup>th</sup> July 2012 hemi stap declarem se Nelson and Silas mo Famili Silas Varituai se yufala custom landowner blong Ratua smol aelan long Aore. Hemia folem custom land right blong South East Area "Buentumbu."*

3. Counsel then contended that the Claimants had failed to file their evidence as required by the orders of 2<sup>nd</sup> July 2012 which was infact a re-issuing of the orders of 14<sup>th</sup> May 2012 (paragraph 3(a)). Further, Counsel contended that the Claimants had since 14<sup>th</sup> May 2012 not made any progress whatsoever and they had not paid the wasted costs of VT10.000 as previously ordered against them on 16<sup>th</sup> April 2012. Counsel therefore orally applied and submitted that the Claimants' claims should be struck out on those grounds, and further on grounds that in light of the decision of 16<sup>th</sup> July 2012, the Claimants had no standing.
4. Mr Nathan referred to the Orders of 2<sup>nd</sup> July 2012 and in particular paragraph 6(b) which required his client to file and serve responses



within 14 days. He contended this could not be done because the Claimants had not complied with the earlier direction which required them to file and serve their evidence. He further contended those orders were in place since 12<sup>th</sup> March 2012 and the Claimants had not complied.

5. Mr Laumae in response acknowledged the concerns raised by Ms La'au and Mr Nathan and pointed out to the Court that the Claimants had complied in part with previous orders by –

(a) Filing and serving an Amended Claims pursuant to the leave sought and granted on 24<sup>th</sup> September 2008.

(b) As a result, the State Law Office and First Defendant had served their respective amended defences.

6. Mr Laumae conceded –

(a) The Claimants had not filed their evidence as directed; and

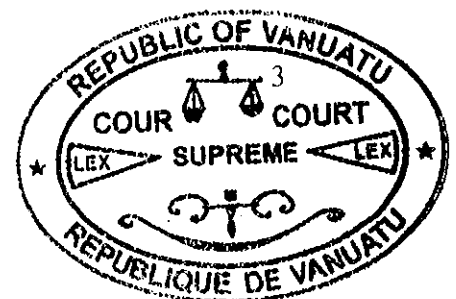
(b) They had not paid wasted costs as previously ordered.

Counsel argued that further adjournment was necessary to enable the Claimants to file their evidence. As regards the issue of costs, Counsel conceded and undertook to sort the matter out.

7. Mr Laumae further argued that –

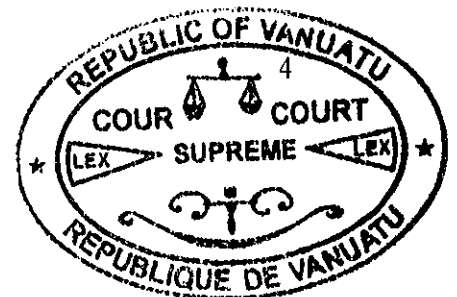
(a) The Claimants also have a valid decision of a Lands Tribunal declaring them part-owner of Ratua Island.

(b) The Joint Island Land Tribunal that made the decision of 16<sup>th</sup> July 2012 was constituted of adjudicators who were not qualified,



resulting in his clients walking out to boycott the sitting. However, despite the boycott the Tribunal proceeded with the hearing.

- (c) The decision is the subject of a judicial review issued under a separate proceeding which is currently being managed by this Court. It is registered as Judicial Review Case No. 4 of 2012.
  - (d) The Claimants have relied on the 1982 ministerial declarations as the basis for initially lodging their claims to give them standing.
  - (e) In the amended claims of the Claimants they plead and allege fraud and/or mistake by the First, Second and Third Defendants.
  - (f) Tom Joe Botleng as Interested Party and the First Defendants were not in Court to be heard, therefore an adjournment was necessary.
  - (g) Failure by them to comply with previous orders could be rectified by costs instead of a strike out.
  - (h) Integrity of the process should be maintained and as such a stay of the proceedings should be the way forward. Counsel referred and relied on the recent decision of the Court of Appeal in Peter M. Paraliyu v. Peter N. Parakulwo [2012] VUCA 1.
8. In reply, Ms La'au refuted every argument raised by Mr Laumae and insisted the Court should strike the proceedings out with costs.
9. The issue is whether this proceeding should be struck out?
10. The answer must be in the negative for the following reasons –

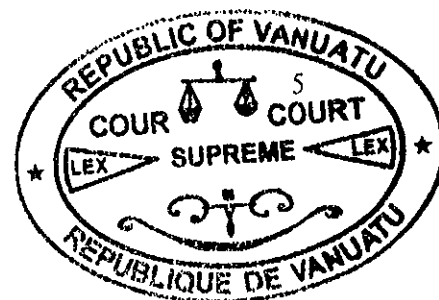


(a) No proper application was made by the Second Defendant seeking a strike out therefore the oral application was an abuse of process.

(b) No proper evidence by sworn statement was before the Court. To simply hand up a Lands Tribunal Decision to the Court with an oral application on a pre-trial conference date can never be an accepted practice. Indeed it is contrary to the Rules. Applications to strike out a proceeding should never be treated lightly. It should always require proper written application made under Rule 7.2(3) with proper evidence by sworn statement (Rule 7.2 4(a) and (b), and be served at least 3 clear days before the time set for the hearing of the application (Rule 7.3). This is to ensure all parties are present at the hearing to be heard and to ensure they are not taken by surprise by being unprepared.

In this case, the First Defendants and Interested Party were not present.

(c) The Orders dated 7<sup>th</sup> September 2009 stayed this proceeding pending final determination of customary ownership of Ratua Island by a Lands Tribunal. The second order granted liberties to the parties to apply for a re-listing of the proceedings after the matter has been determined. The Claimants boycotted the Tribunal sitting and therefore were not aware of the decision of 16<sup>th</sup> July 2012. The First Defendants were present as can be safely assumed by the Court and that through them the Second Defendant came to have a copy of the decision which Counsel handed up to the Court. Be that as it was, the Court cannot accept the document as evidence of declared customary ownership unless and until it is deposed to by the maker in a properly sworn statement. To assert that the First Defendants have ownership on an un-sworn document cannot be



accepted as the basis or ground for orally seeking to strike out a proceeding such as this one.

(d) It was therefore incumbent on the First and Second Defendants to apply properly seeking a re-listing pursuant to Order 2 of 7<sup>th</sup> September 2009. Having failed, the applicants were also in non-compliance.

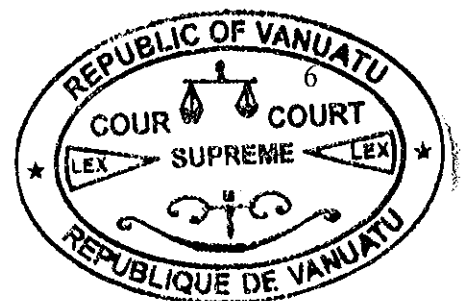
11. For the forgoing reasons, the oral application by Counsel for the Second Defendant that this proceeding be struck out with costs is hereby dismissed.

12. The Court accepts Mr Laumae's submissions that the way forward is to stay this proceeding further pending the Court's determination of the Claimant's challenge as to the validity of the decision of 16<sup>th</sup> July 2012 in Judicial Review Case No. 4 of 2012. This matter has a return date on Friday 17<sup>th</sup> August 2012. I so Order.

13. As for costs I Order that –

(a) The Claimants must pay wasted costs of VT10.000 to State Law Office as ordered on 16<sup>th</sup> April 2012 forthwith.


(b) The Claimants are entitled to their costs of the application fixed at VT20.000 to be paid by the Second Defendants. I Order that VT10.000 be off-set against the VT10.000 that the Claimants were to have paid to the Second Defendants pursuant to the orders of 16<sup>th</sup> April 2012. The balance of VT10.000 must be paid forthwith.



(c) Upon determination of Judicial Review Case No. 4 of 2012, the Claimants must make a written request for a re-listing of this proceeding within 7 days from the date of resolution or decision.

DATED at Luganville this 16<sup>th</sup> day of August 2012.

BY THE COURT

  
OLIVER A. SAKSAK  
Judge

