

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

Civil Case No.208 of 2010

BETWEEN: FAMILY HIVOLILIU
Claimant

AND: AMBAE ISLAND LAND TRIBUNAL
Defendant

AND: JOHN ROLL TARIHEHE
Interested Party

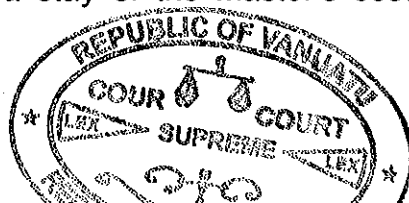
Coram: *Justice D. V. Fatiaki*

Counsels: *Mr. F. Laumae for the Claimant*
Mr. A. F. Obed for the Defendant
Mr. S. Hakwa for the Interested Party

Date of Judgment: *5 April 2012*

RULING

1. This is an opposed application by the interested party against the claimant for security for costs in the sum of **VT3 million** upon the sole ground that "*the justice of the case requires the making of an order for security for costs*".
2. Although the background to this application dates back to 2007, for present purposes it is only necessary to refer to the court proceedings that were instituted by the claimant which commenced on **25 July 2008** with a claim for judicial review in **Civil Case No. 121 of 2008** of a decision of the **Tokatava West Ambae Area Land Tribunal** (on appeal) declaring the interested party the customary owner of **Sarakokona land** situated at **West Ambae**.
3. On **12 February 2009** the claim in **Civil Case No. 121 of 2008** was dismissed by **Dawson J.** at a conference hearing and costs were awarded in favour of the interested party and his mother, to be determined if not agreed. On **25 May 2009** the Master determined the costs in the sum of **VT192,800**.
4. On **23 July 2010** the claimant filed an application in a new **Civil Case No. 103 of 2010** seeking a stay of the Master's cost determination and an



order setting aside **Dawson J's** dismissal and for the re-instatement of the judicial review claim in **Civil Case No. 121 of 2008**. It is unclear why these applications were not made in **Civil Case No. 121 of 2008** as they should have been, but, in any event, they were eventually dismissed on **24 March 2011** by **Spear J.**

5. In the interim on **29 October 2009** the defendant Tribunal gave its decision against the claimant's appeal and awarded costs in favour of the interested party and his mother. This resulted in a further claim for judicial review by the claimant filed on **21 December 2010** being the present **Civil Case No. 208 of 2010**.
6. The claim seeks an order quashing the determination of the defendant Tribunal and an order prohibiting it "*from hearing or determining any appeal in respect to ownership of customary land known as Sarakona Land, West Ambae pending determination of matters in Civil Case No. 121 of 2008*". This latter order was plainly an attempt to return matters to the situation that existed in **February 2009** before **Dawson J's** dismissal of the case.
7. Counsel for the interested party submits that the prohibition order has been rendered redundant by the order of **Dawson J.** dismissing **Civil Case No. 121 of 2008** which has not been appealed, and **Spear J's** order dismissing the claimant's application in **Civil Case No. 103 of 2010** for the reinstatement of **Civil Case No. 121 of 2008**.
8. At the hearing of the application counsel for the interested party accepted that security for costs was being pursued on the basis that "*(f) the justice of the case requires the making of the order*". This is broadest "*catch-all*" ground set out in **Rule 15.19** and the applicant bears the burden of satisfying the Court of the "*justice of the case*". Counsel also accepted that the court exercises a discretion in making an order for security for costs.
9. In his written submissions counsel highlighted several features of the case including what might be described as personal characteristics of the claimant in pursuing his claim. In particular:
 - (1) "*That the claimant is a vexatious litigant who persistently and without reasonably cause had started proceedings that disclose no or any reasonable cause of action*".
10. I am satisfied that most of the claimant's applications since instituting **Civil Case No. 121 of 2008** were a result of **Dawson J's** summary dismissal of the claim in the absence of the claimant or his counsel and are aimed at re-instating the claim in **Civil Case No. 121 of 2008**.



11. In this regard the dismissal order is based on an apparent breach of the requirements of **Rule 4.2 (1) (b)** of the **Civil Procedure Rules** which requires "*all the relevant facts*" to be set out in a claimant's statement of the case. However the claim in **Civil Case No. 121 of 2008** was one for judicial review under **Part 17** of the Civil Procedure Rules which subjected all other rules to those in **Part 17**. In this regard **Rule 17.4 (3)** provides that a claim for judicial review must set out the grounds for making the claim, have with it a sworn statement in support and "*be in Form 34*" as opposed to a normal claim which does not require a sworn statement, must "*be in Form 5*" and must "*contain a statement of the case*".
12. Furthermore the instituting of the present case whilst **Civil Case 103 of 2010** was still pending was a response to an appeal decision rendered by the defendant tribunal in spite of the several attempts by the claimant to postpone or prevent the hearing of the appeal. The particular decision also included an eviction order which must be considered doubtful if not unlawful.
- (2) "*The claimant is a person who does not comply with court orders; does not make any attempt to negotiate or agree costs; does not take part in proceedings as to costs; and does not pay costs even where such costs have been determined by the Court*".
13. Counsel for the interested party forcefully submits that the present proceedings are not genuine [**Rule 15.20 (b)**]; has prejudiced the interested party by denying him the fruits of his success before three customary land tribunals [**Rule 15.20 (g)**]; and already has given rise to unpaid costs orders and will incur substantial costs in the future [**Rule 15.20 (g)**].
14. In this regard I am satisfied that there is considerable merit in the submissions of the interested party who was made a party to **Civil Case No. 208 of 2010** by the claimant including him in the claim.
15. **Rule 17.4 (2)** states that a claim (for judicial review):
"*... must name as defendant*

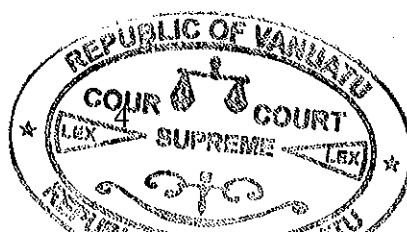
(b) for an order about a decision, the person who made or should have made the decision".
- which, in this instance, is the defendant tribunal.
16. **Rule 17.6 (2)** then requires the claim (for judicial review) and sworn statement in support to be served:



“(a) on any person who is directly affected by the claim, within 28 days of filing”

which, in this case, was the interested party who was the successful respondent before the defendant tribunal.

17. Although such a person is not required to be named as a defendant plainly he is *“a person directly affected by the claim”*, and, in terms of **Rule 17.7 (2)** *“... must file a defence”* if he wants to take part in the proceedings. A *“defendant”* is defined as *“a person against whom a claim is filed”*. Although this does not exactly describe the interested party, **Rule 4.5 (1)** clarifies that it is *“the defendant”* who *“must file and serve a defence”*. I am satisfied that the applicant, although named by the claimant as an *“interested party”* is, more correctly, a *“defendant”* for the purposes of the Rules.
18. In light of the foregoing the claimant’s first ground for opposing the application, namely, that the applicant is an interested party (which is the description chosen by the claimant) and not a *“defendant”* for the purpose of **Rule 15.18 (1)**, is self-serving, erroneous and must be rejected. Interestingly, the claimant described the interested party as a *“defendant”* in the earlier cases **Civil Case Nos. 121 of 2008** and **103 of 2010**.
19. I turn next to consider claimant’s counsel’s opposition to the application on its merits. Before doing so however, I record that counsel accepted that since the filing of the present claim, events have over-taken the utility of a prohibition order which counsel properly withdrew along with **grounds 1 to 16** which allegedly supports such an order.
20. The remaining grounds, which read more like submissions, identifies the following possible basis for challenging the decision of the defendant tribunal, including:
 - *“conflict of interest”* (whatever that may mean);
 - The existence of an (undisclosed) close family relationship between the chairman of the defendant tribunal and the interested party;
 - Misconduct on the part of some of the defendant tribunal members drinking kava with the interested party before the hearing of the claimants’ appeal presumably giving rise to perceived bias; and
 - Ignoring a Supreme Court application to stay or discontinue the hearing of the challenged appeal.



21. Suffice it for present purposes to say that the above grounds, if sustained, would render the decision of the defendant tribunal at least, voidable if not void. On that score the claim for judicial review cannot be categorized as “*not genuine*” [see: **Rule 15.20 (b)**]
22. As far as the interested party’s complaints about the claimant’s past behaviour and, in particular, in relation to costs, claimant’s counsel submits that **Dawson J**’s cost order was made in the absence of the claimant or his counsel and might even be based on an incorrect reading of the **Civil Procedure Rules**. Furthermore, the Master’s determination of the costs in **Civil Case No. 121 of 2008** is made in a separate proceeding and should therefore be the subject matter of an enforcement process independent of and unrelated to the present claim for security for costs. In short, the Master’s cost determination forms no part of “*the costs of the proceeding*” envisaged in **Rule 15.20 (h)** which the Court may have regard to in determining the present application.
23. Whilst the submission has an attractive simplicity, I do not agree with it in so far as the existence of an unsatisfied cost order, reflects on the past behaviour of the claimant which in my view, is a relevant consideration of what the “*justice of the case requires*”. Nor can I ignore the unrestricted right of a defendant to apply to the Court for an order for security for costs from the claimant.
24. In not dissimilar circumstances the Court of Appeal recently said in rejecting an appeal against the refusal of the Supreme Court to grant a second adjournment of a trial where there was an unpaid costs order made at an earlier adjournment application in **Dumdum v. East Malo Island Land Tribunal** [2010] VUCA 32 at **paragraphs 17, 18 and 19**:
- “17. *In the present case counsel submits that the appropriate and just order would have been for the judge to grant the adjournment and order costs against the Appellant. We cannot agree.*
18. *In Thames Investment and Securities P/C v. Benjamin and Others* [1984] 3 ALL ER 393 *Goulding J. in staying proceedings in the case and in ordering the payment into court of a sum of money to secure an earlier order to pay costs, said (at p. 394):*

“Quite apart from authority, two propositions would seem to me plain as a general rule. The first is that where an application has been made for particular relief and has been dismissed with costs because of some fault or lack of success on the part of the applicant, then, generally speaking, the applicant ought not to be allowed to apply again for identical or equivalent relief if he is



guilty of failure to pay the costs of the previous application. The second proposition that would seem generally clear is that it cannot be said that the applicant has failed to pay the costs in question until they have been quantified and their amount is known". (our underlining)

19. *Although that was a case where a stay of proceedings was ordered, we are satisfied that the principle is equally applicable to the present case where relief (an adjournment) was granted (not dismissed) as sought by the Appellant and costs were ordered and quantified (VT78,110) and remained unpaid at the time of a second application by the Appellant for 'identical or equivalent relief'."*
25. Accordingly, I order the claimant within **14 days** to provide security for costs in the form of a bank cheque for the amount of **VT500,000** payable to the **Chief Registrar's Trust Account for Civil Case No. 208 of 2010**. Such security to be retained until the final determination of the claim for judicial review including the payment of any costs orders that the Court may make in the matter.

DATED at Port Vila, this 5th day of April, 2012.

BY THE COURT


D. V. FATIAKI
Judge.

