

**BETWEEN: COLETTE TOA**

Petitioner

**AND: WILLIAM NEPREI**

Respondent

*Coram:* Mr. Justice Oliver A. Saksak

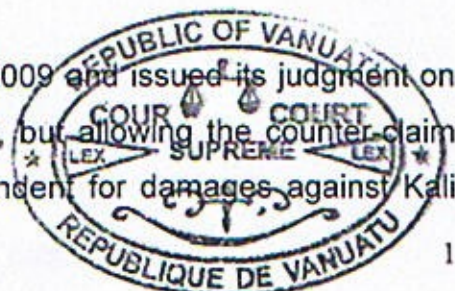
*Counsel:* Ms. Tatavola Matas for the Petitioner  
Ms. Jane Tari for the Respondent  
No appearances by First and Second Co-Respondents

*Date of Hearing:* 28<sup>th</sup> August 2013  
*Date of Decision:* 6<sup>th</sup> September 2013

## **DECISION**

### Background – Matrimonial Case No. 01 of 2008

1. On 8<sup>th</sup> February 2008, the Petitioner filed for dissolution of marriage in the Magistrate's Court seeking orders that –
  - (a) the marriage between her and the respondent be dissolved;
  - (b) she be given custody of the children of the marriage; and
  - (c) such further and other reliefs as may be just.
2. The Petition was contested, therefore the Court below transferred the case to this Court.
3. The Respondent filed a counter-claim for damages against Co-Respondent Kali and Gilbert Meltenoven.
4. This Court heard the matter on 18<sup>th</sup> August 2009 and issued its judgment on 18<sup>th</sup> September 2009 dismissing the Petition, but allowing the counter-claim and giving judgment in favour of the Respondent for damages against Kali



and Gilbert. The Court awarded damages in the sums of VT100.000 each making a total of VT200.000. On 28<sup>th</sup> September 2009, the Court issued an enforcement order against the Co-Respondents for payment within 6 months on or before 31<sup>st</sup> March 2010.

5. The Petitioner and the Co-Respondents did not appeal that judgment. The Co-Respondents have not complied with the judgment and the Court Order.

#### Matrimonial Case No. 2 of 2012

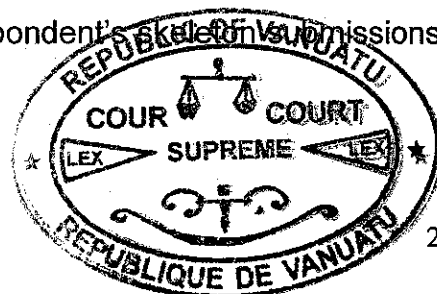
6. On 23<sup>rd</sup> May 2012 after some 2 years and 8 months had gone by the Petitioner filed Matrimonial Case No. 2 of 2012 in the Magistrate's Court seeking the following orders that –

- (a) the marriage between her and the Respondent be dissolved;
- (b) she be given custody of all the children of the marriage;
- (c) the matrimonial property at Banban be given to her and the children; and
- (d) such further and other reliefs as may be just.

7. The Respondent again contested the Petition and the Court below transferred the case to this Court by Order dated 29<sup>th</sup> June 2012.

8. The Respondent filed an amended response on 28<sup>th</sup> June 2012 alleging the Petitioner had extra-marital affairs with Gilbert Meltenoven and claimed damages against the Petitioner and Gilbert Meltenoven jointly and severally for the sum of VT800.000. He sought orders also for the custody of the son Mahana Geoffrey and that the Matrimonial property be transferred to Mahana Geoffrey.

9. On 8<sup>th</sup> February 2013, both Counsel consented to the two Matrimonial Cases being heard together and further that written submissions be filed within 21 days by the Petitioner in response to the Respondent's skeleton submissions filed on the same day.



10. The Petitioner did not file any written submissions until 1.45pm on 28<sup>th</sup> August 2013. At 2 O'clock pm, the Court sat to hear Counsel in relation to their written submissions and reserved its decision.

### The Issues

11.1. Counsel for the Petitioner raised two issues namely:

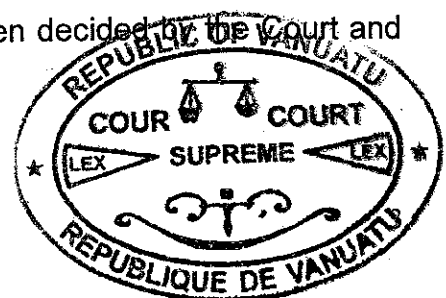
- (a) Whether the Petitioner is entitled to divorce on grounds of separation for 3 years?
- (b) Whether or not the Petitioner is severally liable to pay VT800.000 for damage of marriage?

11.2. Counsel for the Respondent raised three issues namely:

- (a) Whether the Petitioner is entitled to divorce on grounds of separation for 3 years and to the other reliefs sought?
- (b) Whether the Respondent is entitled to relief on grounds of adultery?
- (d) Whether the First and Second Co-Respondents (Kali and Gilbert) should be imprisoned under Section 20 of the Matrimonial Causes Act Cap. 192?

12. The Court posed several questions to both Counsel during the submissions hearing two of which were essential as follows:-

- (a) What Section of the Matrimonial Cause Act Cap 192 specifically gives power to a Petitioner to file another Petition seeking the same reliefs which were previously sought in another Petition which was heard and dismissed?
- (b) Whether the Petition of the Petitioner has been decided by the Court and is therefore res judicata?



13. Ms. Matas did not provide adequate answers to both questions. In relation to the first question Counsel appeared to simply rely on Section 5 (a) (ii) and Section 13 (1) of the Matrimonial Causes Act (the Act). Section 5 (a) (ii) states-

*"Subject to the provisions of Section 6, a Petition for divorce may be presented to the Court either by the husband or the wife –*

*(a) On the ground that the Respondent –*

*(i) .....*

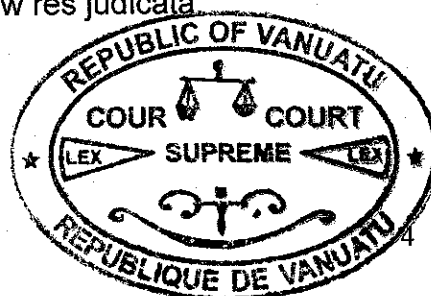
*(ii) Has deserted the Petitioner without just cause for a period of at least 3 years immediately preceding the presentation of the Petition."*

14. Section 13 (1) of the Act states –

*"When any married person has been continually absent from the other spouse for a period of 7 years or more and such other spouse throughout such period received no information directly or indirectly concerning the whereabouts or existence of the absent spouse, such other spouse may Petition the Court for a degree of presumption of death and dissolution of marriage."*

15. From the facts in evidence which are not disputed, there is no desertion by the Respondent. He still lives in the Matrimonial home while the Petitioner is not. Therefore Section 13 does not assist the Petitioner. Section 5 of the Act makes reference to Section 6 which states that no Petition for divorce should be presented unless at the date of the presentation 2 years had passed since the date of marriage. The Petitioner had that opportunity in Matrimonial Case No. 1 of 2008 and she failed. She did not appeal. She could not come back 5 years later in 2013 to have a second bit at the same cherry.

16. Ms. Tari agreed with the Court that the issue of dissolution of marriage between the Petitioner and the Respondent is now res judicata



17. The Petitioner sought three reliefs in her Petition No. 1 of 2008, she repeated the same three reliefs in her Petition No. 2 of 2012 and added the fourth seeking the property of Banban to be transferred to her and the children.

18. The Court is of the view that the Petition in Matrimonial Case No. 2 of 2012 is an abuse of process. The matter is now res judicata therefore the Petition must be dismissed.

19. Concerning the second issue raised by the Petitioner, the answer is in the negative. The reason is simple. The Respondent also did not appeal the judgment of the Court dated 18<sup>th</sup> September 2009. Therefore, to file a response raising the amount of his claim for damages to VT800.000 against the Petitioner and Gilbert Meltenoven is also an abuse of process. His damages have been decided and the matter is now res judicata. His claims and reliefs sought are also dismissed.

20. As regards the third issue raised by the Respondent, it is open for the Respondent to take appropriate steps to enforce the judgment and orders of the Court in relation to Matrimonial Case No. 1 of 2008. This proceeding remains on foot.

21. The end result is that Matrimonial Case No. 2 of 2012 is an abuse of process and is hereby dismissed. There will be order as to costs.

**DATED at Luganville this 6<sup>th</sup> day of September 2013.**

**BY THE COURT**

