

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

Civil Appeal
Case No. 16/1283 SC/CIVA

BETWEEN: DANIEL KAMISAK
ANDREW KAMISAK
Appellants

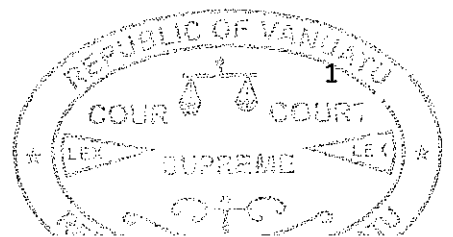
AND: SETH KAURUA NIANGAN
TASSI LOMANI
NAUMU LOMANI
JOHN KAURUA
TUMAS KAKOU
SAWE LOMANI
SAMSON LOMANI
SAM NARIAN
SETH LOMANI
NAPENU LOMANI
AMOS LOMANI
Respondents

Before: *Justice Chetwynd*

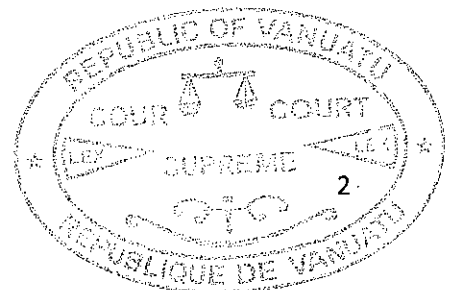
Counsel: *Mr Brittien B. Yosef for the Appellants*
No appearances by the Respondents

Date of Hearing: *25th August 2016 at 2:00pm*

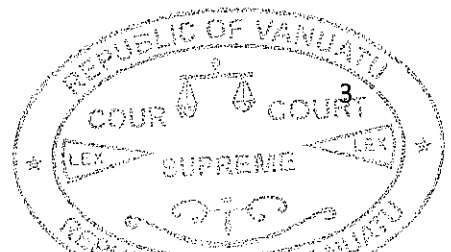
DECISION ON APPEAL



1. This is an appeal from the Magistrates' Court. It is from a decision dated 22nd March 2016.
2. The appeal relates to an application by the Kamisak Tribe from South Tanna. A claim for relief from trespass was filed following a decision of the Tassa Village Land Tribunal in respect of Nahabaumene Land. The tribunal had made a decision (on 15th July 2013) that Kamisak Tribe were the custom owners of the land.
3. The Respondents in this appeal were the Respondents in the Magistrates' Court. They did not lodge an appeal against the decision of 15th July 2013 and had, since that date, *"erected fences, dug railways, plant sandalwood, sea blockage, build houses and gardening on said land"*. The claim in the Magistrates' Court was for damages and eviction.
4. It is not clear when the claim was first served. However, according to evidence filed in the Magistrates' Court, the Respondents filed a defence on 2nd May 2014.
5. On 21st October 2014 there was a directions hearing at Isangel. Mr Yosef appeared for the Claimants (the Appellants in this case) and Mr Takau for the Defendants. The Magistrate granted leave to amend the claim and have it filed with supporting documents. The Appellants were given 14 days to file those amended documents. In fact the documents were not filed until 25th November some 35 days later or 20 days late. They were not served on the Respondents until 27 November 2014.
6. On the 21st October the Magistrate had fixed another hearing for 8 December 2014. On that date again the legal representatives attended Court. The Magistrate gave the Respondents 7 days to file and serve a defence to the amended claim (and supporting sworn statements). The Magistrate also made an order that, *"in the event that a party does not comply with the orders Rule 18.11 of the CPC....may apply"*. The Court also made a wasted costs order against the Respondents. The matter was adjourned to 8 April 2015.



7. The Appellants lawyer tried to serve the papers on the lawyer for the Respondent. That was on 22nd December 2014. Mr Takau told Mr Yosef he was no longer acting for the Respondents and would not accept service.
8. That was clearly unprofessional and unethical. Mr Takau was the counsel of record. He was obliged to accept service.
9. The Appellants tried to effect service through another person who was related to the Respondents.
10. The hearing on 8 April 2015 did not eventuate. The simple reason for this is Cyclone Pam which struck Tanna on 11 March. The Court did not re-open until 8 June.
11. It is not clear how it got into the lists but an application for default judgment was listed for hearing on 22 July 2015. According to the Appellant no one appeared for the Respondents. Mr Takau was still the lawyer of record and had filed no notices about ceasing to act. Although there is no evidence to show how the application arrived in Court it is likely that at the hearing on 22nd July 2015 the Appellants lawyer applied for a default judgment.
12. The Magistrate ordered a default judgment to be entered. The Respondents must have received a copy because on 18 August 2015 Kapapa Lawyers surfaced and said they were acting for the Respondents. In the meantime Mr Takau had filed a notice of ceasing to act dated 28 July but received some days later by both the Court and the Appellants lawyers.
13. Kapapa Lawyers filed an application to set aside the default judgment. In a supporting sworn statement by Mr Seth Kaurua it is confirmed the file was removed from Mr Takau's office sometime in March.
14. In the decision being appeared the Magistrate recites the history of the matter. The Magistrate says Kapapa Lawyers filed a notice of beginning to act on 12th February. Mr Kaurua says it was 4th March. The Magistrate notes that following Cyclone Pam the Magistrate's Court on Tanna ceased all operations. Judicial note can be taken on the disruption and damage on Tanna following Pam. The Magistrate also notes that



Kapapa Lawyers did not appear on 22nd July despite serving a notice of acting, and the Court also notes no copy was served on the Appellants' Lawyer.

15. After considering the matter further the Magistrate found that:

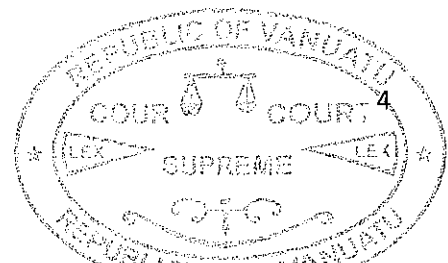
"The proper Court procedures were not followed when Indigene Lawyers failed to file a notice of ceasing to act on time, in order for the Claimants counsel to serve Court documents to the right legal representative, and The defendants were not given a chance to be party heard in Court. The Court then set aside the default judgment on terms."

16. I have great sympathy for the Appellants. Even though they were late in filing an amended claim they did all they could to bring it to the attention of the Respondents. However, I must refuse the appeal because the Magistrate had no choice but to allow the application to set aside the default judgment. The Magistrate said the default judgment was set aside because the Defendants had not been given a chance to be heard. I would have to agree with that finding. That is not to say the blame was with the Claimant in the Magistrates' Court, the fault was entirely that of the lawyer previously acting for the Defendants.

17. Even if I did not agree with the Magistrate on the reasons given, the default judgment would have had to have been set aside simply because the Court could not order the entry of a default judgment on 22nd July 2015. The Respondents were *not* in default because a defence had been filed. It is true this was a defence to the original claim but they were not in default in the terms of Rule 9.1 of the CPC. The Appellants could have applied for summary judgment if they thought the defence did not adequately deal with the Amended Claim.

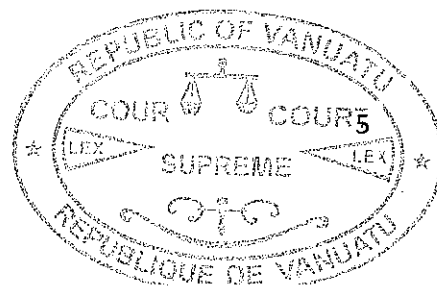
18. It is undoubtedly the case the Defendants were in breach of orders made by the Magistrate, in particular the order for the filing of a defence made on 8th December 2014. The proper procedure would have been applications and orders under Rule 18.11. That possibility was recognized by the Magistrate in clause 3 of the Directions Order made on 8th December. However it is clear from the case of *Esau v. Sur*¹ that if

¹ *Esau v. Sur* [2005] VUCA 16: CAC 28 of 2005



a litigant wants a an order striking out their opponents case the procedure in Rule 18.11 must be followed.

19. There is no evidence on the file that the Appellants as Claimants in the Magistrates' Court made an application for the Respondents to show cause, filed any sworn statement in support of an application or served any application or sworn statement. Unfortunately, the case of *Esau* requires all those steps to be taken even though, as in this case, the Respondents must have been aware (because of the order made by the Court) that there might be consequences for failing to comply with what the Court had ordered. In my view the Magistrate was misled by the Respondents' blatant disregard of the authority of the Court and their apparent refusal to comply with orders or the rules of the Court. They, and indeed any litigant, should remember that Rule 18.11(5) says Rule 18.11 does not limit the Courts' power to punish for contempt. Unfortunately though the Magistrate could not use the procedure set out in Rule 9.1 to make a decision under Rule 8.11.
20. The appeal must be dismissed. The order made by the Magistrate on 22nd March 2016 is confirmed with the following amendments:-
- (a) The default judgment be set aside.
 - (b) If not already done, the Appellant/Claimant shall file the amended claim and any supporting sworn statements within 7 days; and shall serve the Defendants by delivering to the office of Kapapa Lawyers sealed copies of the Amended Claim and sworn statements.
 - (c) The Appellant/Claimant shall file a sworn statement giving details of service in accordance with (b) above within 7 days of such service.
 - (d) The Respondents shall file and serve defence to the Amended Claim within 14 days of service as accordance with clause (b) above.
 - (e) The Respondents shall pay the sum of VT60,000 being the amount of the wasted costs orders of 8th December 2014 and 22nd July 2015 and sum shall be paid within 14 days.



- (f) The Respondents/Defendants shall pay security for costs in the sum of VT30,000 to the Magistrates Court or the Registrar of the Supreme Court.
- (g) If the Respondents/Defendants fail to comply with order (d) above the Appellant/Claimant shall be entitled to make an application to require the Respondents/Defendants to show cause why any claim should not be struck out and judgment entered for the Appellant/Claimant. Such application can be heard on 3 days written notice by filing and serving such application and sworn statement confirming non-compliance with order (d) above.
- (h) Until further order of Court the variation of restraining orders dated 4th August 2014 shall continue to be effective to maintain peace between all parties.
- (i) If the Respondents/Defendants do not pay the wasted costs set out in (e) above
- (i) The Defence shall be stayed until payments meaning the matter may proceed on the Appellants/Claimants Amended Claim only;
 - (ii) An enforcement conference shall be fixed, and
 - (iii) The costs of the appeal shall be costs in the cause.

21. The matter is remitted to the Magistrates Court to proceed as above.

DATED at Port Vila this 25th day of August 2016.

BY THE COURT


.....
D. CHETWYND

Judge

