

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

Judicial Review Case No. 18 of 2015

BETWEEN: BERNARD LAUTO
Claimant

AND: THE EFATE ISLAND COURT
Defendant

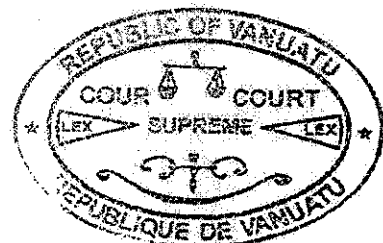
Hearing Tuesday 3rd May 2016 at 9 am
Before: Justice JP Geoghegan
Appearances: Robert Sugden for the Claimant
Lennon Huri (SLO) for the Defendant
Justin Ngwele for the affected party, Smith Richard Lauto

JUDGMENT

1. This case involves an application by Bernard Itai Lauto for judicial review. That review is in respect of orders made in the Efate Island Court on June 12th 2015 which Mr Lauto claims the Court could not have validly made as the issue which the court was determining was *res judicata*. Mr Lauto claims that the issue the Court was determining was finally determined by means of an order made in Mr Lauto's favour by the Efate Island Court on April 26th 2011.

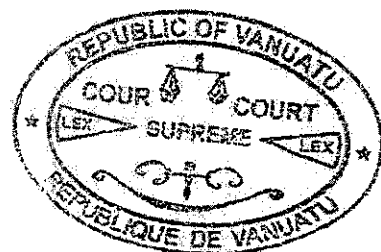
Background

2. The issue at the heart of this matter is the custom ownership of land at Erakor held by Bernard Lauto's late father Itai Lauto on behalf of family Itai Lauto.
3. It is not disputed that the late Itai Lauto died in 1995. There appears to be no dispute either that upon the death of Itai Lauto his eldest son Gerald Itai Lauto



assumed custom ownership of the land from his father. The claimant is the brother of Gerald Itai Lauto.

4. Gerald Itai Lauto died on August 30th 2009.
5. As a result of the death of Gerald Lauto, Bernard Lauto applied to the Efate Island Court in Civil Case 15/2010 for the "grant [of] customary rights". Mr Lauto's application referred to the apparent agreement of Family Itai Lauto to appoint him to "take care of Family Itai Lauto's properties". The stated basis for that agreement was "to protect Family Itai Lauto's custom property". Mr Lauto sought the following:-
 - a) "An order to give right to claimant on behalf of Family Itai Lauto to take care and protect custom properties of family Itai Lauto that exist today at Erakor Village, South Efate".
 - b) "An order restraining any other families other than the Lauto Itai family to enter into Family Itai Lauto's customary land and including all lease titles that belong to Family Itai Lauto".
6. It is not clear whether there was any defended hearing of this application as no such details have been placed before the Court. However, on April 26th 2011, the Efate Island Court issued the following orders:-
 1. Claimant Bernard Itai Lauto was hereby granted the customary right on behalf of Family Itai Lauto of Erakor Village, to take care and have the right to distribute the custom properties that belongs to his father, late Itai Lauto.
 2. That any dealings within Family Itai Lauto's customary land, claimant must give his consent before development may be carried out.
 3. No order as to costs".
7. In December 2014 a claim was filed in the Efate Island Court by four of the late Gerald Itai Lauto's seven children seeking a declaration from the Court that one of



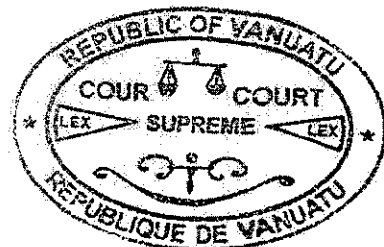
them, Smith Richard Lauto was the first born son of Gerald Lauto and to determine family customary birth rights in accordance with the custom and traditions of Erakor, South Efate.

8. Bernard Itai Lauto was the named defendant in the proceedings and he participated in those proceedings, or at least on the first day of the hearing before, (according to the judgment) leaving the Court at 9:15 am during the morning session and not returning. It appears clear from the judgment that Bernard Itai Lauto was unhappy with the process or some aspect of it and chose to absent himself from the proceedings. The Court conducted a hearing on June 8th and June 9th and delivered its judgment on June 12th. In that judgment the Court made the following declarations:

- 1) Declaring Smith Richard Lauto as the eldest son of the late Gerald Itai Lauto.
- 2) Declaring that Smith Richard Lauto and his other brothers Francois Lauto, David Lauto and Raphail Itai Lauto are the biological blood line sons of the late Gerald Itai Lauto.
- 3) Declaring that Smith Richard Lauto as "right person" to "inheritance" of "Family customary properties" of Family Itai Lauto that late Gerald Itai Lauto inherited from his father late Itai Lauto according to custom and tradition of Erakor Village, South Efate.

9. In addition to those declarations the Court made a number of orders as follows:

- a) An order that the defendant Bernard Itai Lauto return every family customary birthright of the late Gerald Itai Lauto back to Smith Richard Lauto of Erakor Village, South Efate within 30 days starting from Friday June 12th 2015.
- b) An order that any man or woman inside and outside of Family Itai Lauto must consult Smith Richard Lauto concerning any development and investment taking place and those to happen in the future inside any



custom properties like "Ewenesu, Elak Mparum, Entenmap and Elak Naperik".

- c) An order that Smith Richard Lauto must recognize and work together with his other brothers and also with every Family Itai Lauto concerning sharing of custom properties and any interests and any future developments that arose from these custom properties.
- d) That every party must respect and love each other.

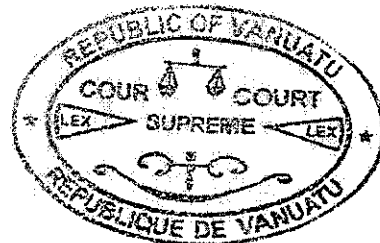
10. The Court also directed that the claimants and defendant together with Family Lauto must go back together in custom and reconcile to be back as one family.

11. It is the case for Bernard Lauto that declaration 3 together with orders 1, 2 and 3 of the June 2015 Judgment cannot co-exist with the orders in favour of Mr Lauto made in 2011 and as the issue of res judicata applies the latter orders should be quashed. Mr Lauto does not seek to disturb declarations 1 and 2 and indeed would not be in a position to do so.

Discussion

12. It is an unfortunate feature of the scheduling/rostering of cases in the Supreme Court, and in particular cases involving land that various cases involving the same land or parties can be allocated to different judges. This case is one example. Under civil case 152 of 2012, Mr Lauto applied by way of summary judgment for an order to cancel a lease registered in the name of the late Mr Gerald Lauto's second wife Timaima Lauto and her son Raphail Itai Lauto (Raphail having been one of the claimants in the Efate Island Court case mentioned above). Both parties were claiming customary ownership of the disputed land. With reference to the order made in the Efate Island Court on April 26th 2011, Fatiaki J stated at paragraph 2 that:

"In my view the above orders are not a declaration of customary ownership of land nor does it affect succession rights to land belonging to Gerald Lauto. Rather it is



in the nature of a representation order concerning Lauto lands not unlike the earlier certification in favour of Gerald Lauto by the Erakor Council of Chiefs. Although undoubtedly in Bernard's favour where the sole competing claimant was Timaima Lauto who was Gerald's wife, it does not reflect the position of Itai Raphail Lauto who was Gerald's legitimate son nor does it specifically referred to lease title number 12/0914/026".

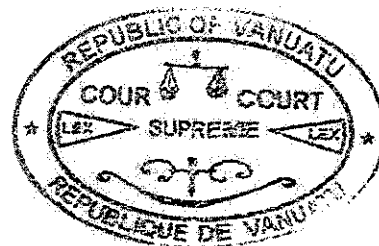
13. Further in his judgment Fatiaki J also referred to the decision of Spear J in Robert & Ors. v. Gerald Lauto and Bernard Lauto [2011] VUSC 347, a case which involved a dispute over land in Erakor where Spear J stated at paragraph 11:

"At the background of this counter claim is land at Erakor. There has been no determination by either the Courts or a land tribunal as to custom ownership but it is clear that the first defendant, Gerald Lauto was at all material times treated as the custom owner. Gerald Lauto, the first defendant, has since died and there remains outstanding an issue as to succession of custom ownership."

14. It would seem unusual that if Bernard Lauto had been granted a declaration of customary ownership in April 2011 that the Court would be unaware of that in September 2011, however there may be other issues present in that particular case that I am unaware of.

15. A perusal of the Efate Island Court judgment issued on June 12th 2015 shows that the Court made a number of findings as follows:

- a) The issue in respect of which judgment was entered by the Efate Island Court on April 26th 2011 was a different issue compared to the issue in the present case which was a "birth right case".
- b) In the earlier case Bernard Lauto had "abused the word" on behalf of "Family Lauto of Erakor village".
- c) Court procedures and processes could not defeat the right of a person like Smith Richard Lauto, something that is only recognized by custom.



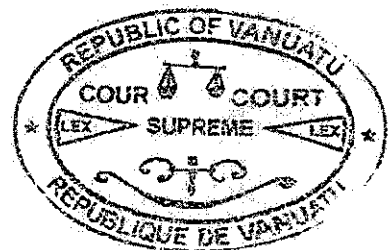
- d) Mr Bernard Itai Lauto had removed all the custom rights on the death of his brother Gerald without notifying the claimants and that Bernard Lauto did not perform any custom ceremony to remove the family customary birthrights of his late brother Gerald following the custom and tradition of Erakor Village.
- e) The biological sons of the late Gerald Lauto were not aware and were not present at the meetings that took place during and after their father's death regarding their custom properties.
- f) The late Gerald Lauto's biological sons did not benefit "at all" from the custom properties of Family Itai Lauto of Erakor.
- g) There was no custom ceremony that Bernard Lauto performed at his late brother Gerald's funeral to prove that he was the one who could carry out and take care of family customary birthrights of the late Gerald Lauto.

16. For these reasons the Court declared that Smith Richard Lauto was the "right person" to inherit "Family Customary Properties" of Family Itai Lauto that his late father Gerald had inherited from his late grandfather Itai Lauto. The Court accordingly ordered the return of Family Customary Birthrights of the late Gerald Lauto to his son Smith Richard Lauto.

17. I consider that that order for return would include the rights granted to Mr Bernard Lauto in April 2011 to "take care" of and "to distribute" the custom properties belonging to the late Itai Lauto.

18. The orders made in June 2015 would appear to be entirely consistent with the general considerations to be applied by the Court to define custom land ownership as referred to in Family Sope Imere (Mele Village) v. Mala [1994] VUIC 2.

19. I accordingly do not consider that the Efate Island Court was determining the same issue in its judgment in June 2015 as it had determined in Mr Bernard Lauto's application in April 2011. If anything the order of the Efate Island Court in June



2015 could be seen as a revocation of the order made in April 2011. At the very least it was a revocation of the powers conferred on Mr Bernard Lauto under the earlier order.

20. The Efate Island Court considered the position in the full knowledge of the earlier order and reached its conclusions as to Mr Smith Richard Lauto's customary birthrights. It was not considering the same issue and res judicata did not apply in this situation. Quite apart from that, the claimant could, and should, have made any submissions regarding the effect of the earlier order in his favour to the Island Court at the conclusion of the Court's hearing. As a party to the proceedings he was entitled to do so. Instead, he chose to absent himself from those proceedings. In my assessment the appropriate course for the claimant to have adopted was an appeal against the decision of the court rather than an application for judicial review. For these reasons the application for judicial review is dismissed.

21. The respondents are entitled to costs and awarded costs in the course which if not agreed between the parties within 14 days, are to be taxed.

Dated at Port Vila, this 29th day of June 2016

BY THE COURT

