

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

Matrimonial Case No. 7 of 2015

BETWEEN : EUNICE AMKORI

Petitioner

AND: WILLIE AMKORI

Respondent

AND TO: MONIQUE HINGE

Co-Respondent

Coram: Justice Aru

Counsel: Ms. P. Kalwatman for the Petitioner
Mr. W. Daniel for the Respondents

JUDGMENT

Introduction

1. The petitioner, Eunice Amkori applies for divorce on the grounds of adultery and filed her petition originally in the Magistrate Court on 23 April 2015 seeking the following relief:-
 - i) Dissolution of marriage;
 - ii) custody of the child Nevin Amkori;
 - iii) maintenance in the sum of VT 4,000 per fortnight;



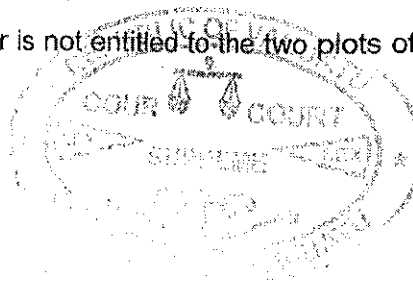
- iv) matrimonial property at Ernas Erakor Half Road to be held in trust for Nevin Amkori or that the property be sold and proceeds shared between the respondent and petitioner;
- v) damages to be paid by the respondent and co respondent in the sum of VT 1,000,000;
- vi) Costs.

Background

2. Eunice and Willie Amkori were married in Port Vila on 1 November 1996. They have two daughters namely Rachel Amkori now aged 21 and Nevin Amkori who is now 15 years old. On or around 2002 the parties started having difficulties in their marriage which eventually led to the filing of the petition.
3. The respondent agreed to the dissolution of the marriage but disputed the balance of the relief sought and so orders were issued accordingly and final orders dissolving the marriage were issued 13 August 2015. The matter was then referred to the this court to deal with the remaining issues. At this stage both children remained with their father, the respondent.
4. At a pre-trial conference on 30 May 2017, the petitioner informed the Court that she would not be pursuing her claim for custody of Nevin Amkori but only wants access to be able to see the child. Having made this concession, her claim for maintenance was also not pursued. Orders were then issued accordingly. The only remaining issues for determination were in relation to damages and matrimonial property.

Defence

5. The respondent filed a defence on 15 February 2016. On the issue of matrimonial property, he says that the petitioner is not entitled to the two plots of



land at Ernas as they are for the two children and the land is still unregistered custom land as he is yet to complete the purchase of the two plots. On the issue of damages, the respondent says that the petitioner is not entitled to any compensation as she also contributed to the dissolution of the marriage.

Evidence

6. The evidence in support of the petition was filed by the petitioner herself on 19 May 2015 and a further three sworn statements were filed on 22 January 2016, 24 January 2016 and 4 August 2016 respectively. Evidence in support of the defence was filed by the respondent himself on 4 August 2016 and a second sworn statement was filed by Nevin Amkori also on the 4 August 2017.
7. A trial was listed but the parties indicated that they would not require any cross examination and so the hearing proceeded on the submissions filed.

Submissions

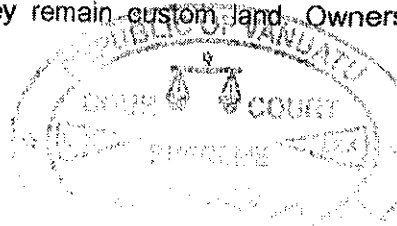
8. The petitioner concedes that the two plots of land at Ernas, Erakor Half road are unregistered and are valued at VT 1, 300, 000. She submits that although the land is still unregistered they are nevertheless part of matrimonial property. It was submitted that she is entitled to one of the plots to be held in her name in trust for the children. She supports her submissions by relying on what the courts have said in *Linda Yagen John v. Yagen John Fred Matrimonial Case No 11 of 2013*, *Joli v. Joli [2003] VUCA 27* and *Hanghangkon v. Hanghangkon [2010] VUSC 117*. The petitioner further submits that although she did not contribute to the ongoing payments towards the land, they had an arrangement that she pays for the school fees whilst the respondent pays for the land and upon completion, both plots of land would be registered in both their names.

9. As to damages, she submits that she will not be pursuing her claim for damages in the sum of VT 1million but instead will be seeking a total sum of VT 500,000 being VT 250,000 each from the respondent and co respondent for the adultery. She relies on **Nguyen v. Nguyen** [2013] VUSC 204 and **Banga v. Waiwo** [1996] VUSC 5 to submit that she was injured emotionally as a result of the respondent's adulterous affair with the co respondent.
10. The respondent on the other hand submits that there are no matrimonial property of the marriage. That during the marriage the parties have always lived at the Police barracks at Independence Park. There is no property registered in either of their names. The two plots of land at Ernas are still custom land and can only be registered upon completion of purchase. He further submits that he has custody of both children of the marriage and the two plots of land will be registered in their names upon completion of the purchase price.
11. As to damages, he submits that the issue of adultery has been resolved through custom processes between them and their respective families. Secondly, he submits that he should not be blamed for the dissolution of their marriage as the petitioner was also responsible for acts of cruelty during their marriage by running away for long periods of time, harassing him from time to time and getting pregnant to another man before the marriage was dissolved.
12. It was finally submitted that both parties are now in new relationships and rather than stirring things up again, the claim for damages should be dismissed.

Discussions

Matrimonial Property

13. The parties accept that the two plots of land at Ernas are both unregistered. No leases have been created as yet and they remain custom land. Ownership

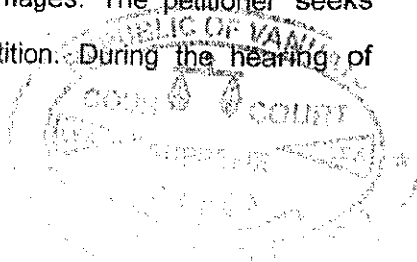


remains with the custom owner. The question is whether they become part of the matrimonial assets which should be divided in "equal fashion" [see: Joli v. Joli]. The petitioner submits that she is entitled to one of the plots and relies on what this Court said in Linda Yagen John v. John Fred. The Court in that case accepted that the land located at Erakor Half Road which was the subject of the dispute was unregistered. Although the parties disputed the total contribution that each of them paid towards the land, the Court accepted that each had made some contributions towards payment of the land and ordered that the land be either registered in both their names in trust for the children or alternatively the land be registered in both their names and be sold and the proceeds be placed in an account in trust for the children.

14. Eunice Sarai at paragraph 10 of her sworn statement filed on 24 March 2016 says that the land belongs to both herself and the respondent. She says that she did not contribute towards payment of the land as they had an arrangement that she will pay the children's school fees and the respondent will make payments towards the complete purchase of the two plots of land. This arrangement is not denied by the respondent in his defence nor in his evidence except to say that the land is custom land and he is yet to complete the purchase.
15. I cannot ignore the fact that there was an arrangement to acquire the land for the family. The respondent in my view could not now rely on that arrangement which he does not dispute to say that the petitioner did not make any contribution towards payments for the land. In that respect I will direct that whenever the payments are completed both plots of land should be registered in both names, Eunice Sarai and Willie Amkori in trust for the two children of the marriage namely Rachel and Nevin Amkori.

Damages

16. The remaining issue concerns the claim for damages. The petitioner seeks damages in the sum of VT 1million in her petition. During the hearing of



submissions it was submitted by the petitioner that she will only be seeking half the amount, VT 500,000 being VT 250,000 each from the respondent and co respondent. The petitioner has not specified in her petition or in her submissions what type of damages she is seeking. In her sworn statement filed on 9 May 2015 at paragraph 24, she says that she *"claims damages against both the respondent and co respondent for ruining her marriage"*. It was submitted that as the petitioner and the co-respondent are related, the petitioner's feelings and pride were deeply injured and she was emotionally tortured through unstoppable acts of adultery by the respondent. It was further submitted that the conduct of the co respondent was treacherous and damages must follow accordingly.

17. Section 8 and 17 of the Matrimonial Causes Act [CAP 192] are relevant as they allow the petitioner to claim damages for adultery in addition to any other relief if she elects to.

18. Section 8 states:-

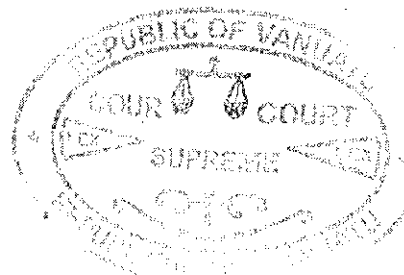
"8. Provision as to making adulterer co-respondent

Where adultery is alleged in a petition or by a respondent, the petitioner or respondent as the case may be shall make the alleged adulterer a co-respondent unless he or she is excused by the Court on special grounds from doing so."

And section 17 provides:-

"17. Damages for adultery

- (1) A petitioner may on a petition for divorce claim damages from any person on the ground of adultery with the respondent.*
- (2) The Court may direct in what manner the damages recovered on any such petition are to be paid or applied."*

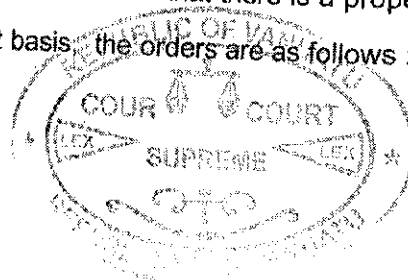


19. The basis upon which damages can be awarded have been discussed extensively by this court in **Banga v. Waiwo** and **Nguyen v. Nguyen**. In brief the court has to take into account the conduct of all the parties concerned.
20. The respondent's position is that the issue of adultery has been resolved through custom processes between them and their respective families and that he should not be blamed alone for the breakdown of their marriage as the petitioner was also responsible for acts of cruelty during their marriage by running away for long periods of time, harassing him and getting pregnant to another man before the marriage was dissolved.
21. Given the disputed sets of facts from the petitioner and the respondent, the evidence was not tested. Although a trial was listed no notice to cross examine witnesses were given by either party as they indicated to the Court that they did not intend to do any cross examination of the witnesses and will instead proceed by making submissions. The co respondent and the respondent were both represented by Mr Daniel in this matter. No evidence was filed by the co respondent. In any event, I am of the view that she would be unfairly prejudiced if she were ordered to pay damages without testing the evidence at trial. When dismissing the award of VT 100, 000 ordered by the Magistrate Court in **Banga v. Waiwo**, the then Chief Justice Vaudin d' Imecourt said:-

"Our divorce courts are not courts of morality, but courts of law. It does not follow that therefore that in every case where adultery is relied upon as a ground of divorce and succeeds, that awards of exemplary damages will follow. Damages have to be proved..... All the facts on both sides must be gone into, including any mitigating circumstances that there may be. Furthermore, in the present case, the co-respondent, it seems, was not afforded any opportunity of mitigating her damages."

(emphasis added)


22. Without testing the evidence in this case I am not satisfied that there is a proper basis to make an award for damages. On that basis, the orders are as follows :-



- i) The two unregistered plots of land at Ernas Erakor Half Road when fully purchased shall be registered in both the names of the petitioner and the respondent as trustees for the two children of the marriage namely Rachel and Nevin Amkori;
- ii) The claim for damages is dismissed;
- iii) Each party to bear their own costs.

DATED at Port Vila this 22nd day of August 2017.

BY THE COURT



D. ARU
Judge

