

**BETWEEN: HENDON KALSAKAU**  
Claimant

**AND: REPUBLIC OF VANUATU**  
Defendant

**Coram:** *Mr. Justice Oliver A. Saksak*

**Counsel:** *Daniel Yawha for the Claimant*  
*Jelinda Toa for the Defendant*

**Date of Hearing:** *28<sup>th</sup> September 2017*  
**Date of Judgment:** *20<sup>th</sup> December 2017*

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## **JUDGMENT**

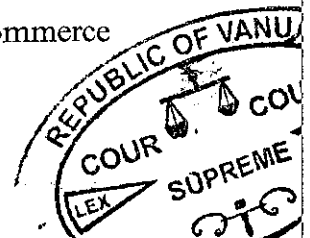
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### **Introduction**

1. The Claimant filed an original claim on 12<sup>th</sup> July 2016 and an amended claim on 23<sup>rd</sup> August 2016 seeking-
  - a) A declaration that the Port Wharf Traffic Management Plan ( the Plan) 2016 is unlawful and is null and void.
  - b) An Order that the defendant and their agents be restrained from implementing the Plan until final determination of the Land Appeal Case No. 1 of 2009 by the Supreme Court.
  - c) An Order that the defendant and their agents be restrained from interfering with the daily business and market stalls of the claimant and his family.
  - d) Loss and damages to be assessed, and
  - e) Costs of the proceeding.

### **Facts**

2. The Claimant was one of the 300-plus persons who operated open market stalls at the side of the tarsealed road at the Port Vila wharf during Cruise ships visits to Port Vila. On 5<sup>th</sup> April 2016 the Government through its Minister of Tourism, Trade, Commerce



and Ni-Vanuatu Business ( the Minister) approved a 60 days trial Management Plan. The Plan was to accommodate safety to tourist market vendors and tourists along the road to the Lapitasi Wharf currently under construction.

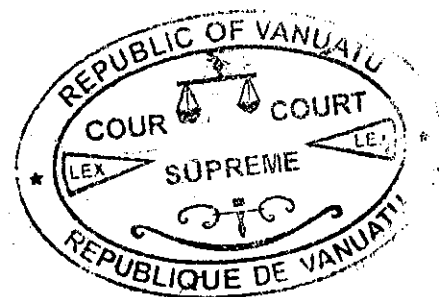
3. The Government considered it unsafe for tourists and for the market vendors to continue to operate while construction was taking place at the same time. On 3<sup>rd</sup> June 2016 the Minister wrote to Chief Mantoï Kalsakau III to advise him of the Plan for permanent relocation to the main wharf. The Plan was implemented. The other vendors complied and relocated their stalls to the main wharf. The Claimant refused. The Minister then instructed the Acting Police Commissioner at the time on 28<sup>th</sup> June 2016 to take steps to relocate the Claimant's stall to the wharf. The Police acted in accordance with the instructions and removed the claimant's stall and had it relocated.

#### **Allegations**

4. The Claimant alleged that-
  - a) The Plan was unlawful in that it encroached on his customary land.
  - b) He was deprived of the use of his customary land.
  - c) The instructions to relocate his market stall was not an order of the Court.
  - d) The Claimant and his family members suffered as a result of the defendant's unlawful action.
  - e) Loss of use of property and loss of business and income.
  - f) The claimant has suffered stress.

#### **Defence**

5. The defendant denies all the claims of the claimant in their defence filed on 30<sup>th</sup> September 2016. They say-
  - a) The land referred to by the Claimant in his claim has been declared public land by Order No. 26 of 1981.
  - b) The Claimant has no locus standi to pursue this action.
  - c) The Claimant has not disclosed any cause of action and that his claim is an abuse of process and should be struck out.



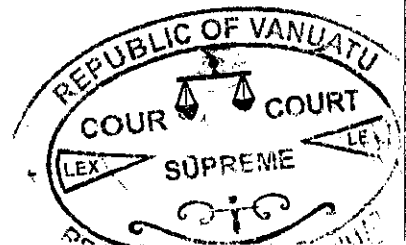
- d) The claimant is not a member of the Ifira Women's Sikotau Association who made arrangement to operate market stalls in the area concerned.
- e) The claimant is not entitled to any of the reliefs he seeks.

**Evidence for the Claimant**

6. The Claimant produced evidence from three witnesses namely:

- a) Morris Phung. He confirmed his sworn statement dated 19<sup>th</sup> April 2017 (Exhibit C1). He is a registered surveyor. He did a survey plan marked "MP1". He confirmed the width of the road being 10 meters and that the claimant's open vendor business being outside the public road.
- b) Betty Kalsakau, the Claimant's wife. She confirmed her sworn statement dated 12<sup>th</sup> July 2016 ( Exhibit C2). Relevantly she said the vendors met with the defendant's agents or representatives on short notice on 24<sup>th</sup> May 2016 when they were informed about the 60 days trial management plan annexed as " HK" to the claimant's sworn statement. On 25<sup>th</sup> May 2016 the members of the Association resolved they opposed the Plan for the eight reasons stated in paragraph 4 of her sworn statement. Subsequently they wrote a letter annexed as " HK2" to the statement of the Claimant, to the representatives of the defendant. One reason why the vendors did not want to relocate is due to the Declaration dated 26<sup>th</sup> January 1981 annexed as " HK3" to the sworn statement of Hendon Kalsakau. Another reason is due to the pending Land Appeal Case No. 1 of 2009 before the Supreme Court.
- c) Hendon Sigari Kalsakau the Claimant. He confirmed his evidence by sworn statements dated 12<sup>th</sup> July 2016 ( Exhibit C3) of 11<sup>th</sup> August 2016 ( Exhibit C4), of 7<sup>th</sup> September 2016 (Exhibit C5) and of 20 September 2016 ( Exhibit C6).

In Exhibit C3, the Claimant confirms he is one of the disputing parties of the land covered in the plan under appeal in Land Case No. 1 of 2009 still pending



determination in the Supreme Court. He tells of the 5<sup>th</sup> April 2016 plan (“HR1”) which was made known to the Vendors only on 24<sup>th</sup> May 2016.

He says on 25<sup>th</sup> May 2016 the vendors wrote a letter of grievance to the representatives of the defendant (“HK2”) giving the same eight reasons stated by Betty Kalsakau. He tells of the Declaration made on 26<sup>th</sup> January 1981 and annexed a copy (“HK3”).

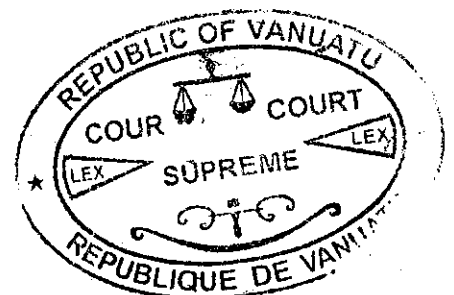
In Exhibit C4 the Claimant testifies as to the damage done to his properties on 24<sup>th</sup> May 2016. He says the Police took clothes, necklaces, carvings, souvenirs and others to their custody and have not returned them despite his demands. He estimates the value at around VT 1 million.

He annexed photographs of his house under repairs partly destroyed by TC Pam (“HSK 2”). He states his claims for AUS \$ 12, 370 for family booking with Escape Travel Garden City and a deposit of AUS \$ 9000 made by telegraphic transfer (“HSK 6”). He deposed to a bank loan of VT 500.000 (“HSK 7”). He finally deposed to a payment of AUS \$ 3730 made on 8<sup>th</sup> August 2016 being money borrowed from the BRED Bank (“HSK 8”). He says his business has suffered because of the Rhen and will continue to suffer as long as they are not allowed back on the land.

d) In Exhibit C5 the Claimant deposed to other losses which he terms as :-

- a) Prospective loss to business over 12 months period from August 2016 to August 2017.
- b) Business loss per week at \$ 88,2000 x 52 weeks = \$ 4,586,400.000
- c) Stress = VT 100.000

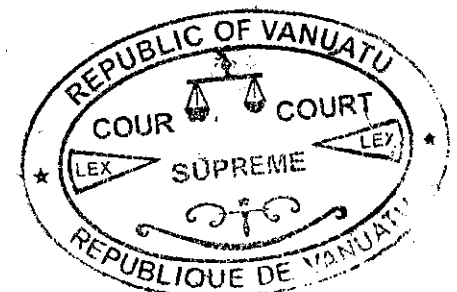
e) In Exhibit C6 the Claimant deposed to the Declaration made on 7<sup>th</sup> September 2016 pursuant to the Land Acquisition Act No. 5 of 1992 which is annexed as “HSK”.



## Evidence for the Defendant

7. The defendant produced evidence from 5 witness in their defence from:-

- a) George Borugu- His sworn statement dated 30<sup>th</sup> September 2016 was confirmed and tendered as Exhibit D1. He deposed to the Plan, the notice given to Chief Mantoi Kalsakau III, the meeting with the vendors, the relocation by the vendors, the refusal by the Claimant and how his stall was relocated by the Police and the risks of the vendors continuing operate with the construction of the Lapitasi wharf being undertaken simultaneously.
- b) Jean Marc Pierre. He confirmed his statement dated 30<sup>th</sup> September 2016 tendered as Exhibit D2 and that of 11<sup>th</sup> October 2016 tendered as Exhibit D2 (a). In Exhibit D2 the deponent deposed to the Land Reform ( Declaration of Public Land) Order 26 of 1981 ( “ JMP 1”) showing the sides of the tarsealed road shaded “yellow” on the Map has been declared public land. By agreement reached in July 1992 the Government paid compensation totally VT 275.400.000 for the declared lands to custom owners from Ifira, Pango and Erakor communities.
- c) In Exhibit D2 (a) the deponent deposed to 2 leases 11/0A14/009 and 11/0A13/007 which have been entered into are both within the Declaration of Public land Order 26 of 1981.He explains Titles numbered 11/..... indicate it is an urban lease while the number 12/..... indicate it is a rural lease.
- d) Paul Gambetta- He confirmed his statement dated 7<sup>th</sup> June 2017 responding to the evidence of Morris Phung, refuting the correctness of this witness’s evidence.
- e) Martin Sokomanu. He confirmed his sworn statement dated 6<sup>th</sup> June 2017 (Exhibit D4) in response to Morris Phung’s statement. He too for the same reason as Mr Gambetta refuted the correctness of Mr Phung’s evidence and survey plan.

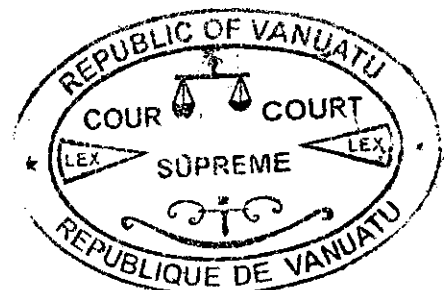


- f) Finally Jimmy Pierre. He confirmed his statement dated 7<sup>th</sup> June 2017 (Exhibit D5). He supports and confirms the evidence of Jean- Marc Pierre.

### **The Issues**

8. The issues raised by the Parties for the Court's consideration and determination are:-

- a) Whether or not the land area where the Mama Markets had been located along the side of the road to Ifira Wharf (the land subject to this proceeding is) public land?
- b) Whether or not the claimant is entitled to operate his business at the sides of the tar sealed road to Ifira Wharf?
- c) Whether or not the Claimant has suffered loss and damages when the defendant evicted him from the sides of the tarsealed road to Ifira wharf?
- d) Whether or not the defendant is liable for the loss and damage suffered by the Claimant?
- e) Whether or not the claimant can claim customary ownership over the land area the subject of this proceeding?
- f) Whether or not the claimant has locus standi to pursue this proceeding?
- g) Whether or not the claimant has disclosed a cause of action in his claim?
- h) Whether or not the claimant is entitled to the damages claimed in the proceeding?



## Discussions and Considerations

9. I deal first with the issue of standing. This issue was raised by the defendant. I consider all the other issues hinge on this issue.

From the Claimant's claim at paragraph 1 the claimant is one of the 19 disputing custom owners of the land the subject of this action and that it is subject to an appeal in Land Appeal Case No. 1 of 2009 and is pending before the Supreme Court.

The Claimant has no evidence to show he has been declared by an Island Court or a Land Tribunal as the sole custom land owner of the land he alleges the Plan to have encroached on.

I accept the defendant's submission that the claimant cannot rely on the Land Appeal Case No. 1 of 2009 as the basis of his claim of custom ownership of the land in question.

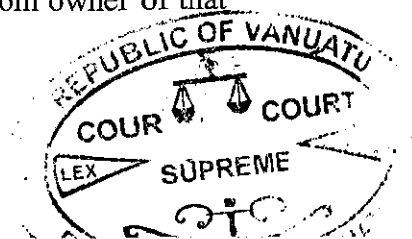
I therefore answer the issue in (f) in the negative.

10. Second, the issue in (e) whether the claimant can claim customary ownership over the land the subject of this proceeding?

The claimant raises breaches of his constitutional rights under Article 5 (1) (d) and (j), and Articles 73, 74, 75, 76, and 77 of the Constitution.

I do not consider these relevant for two reasons: (a) the claimant does not plead any such breaches in his claims and ( b) this is not a Constitutional Application or proceeding.

Furthermore the land on which the Claimant is claiming custom ownership of has been declared public land by the Declaration Order dated 26<sup>th</sup> January 1981. I take judicial notice of that Order. I take judicial notice of the fact that the custom owners of those land have been compensated. And I accept the defendant's submission that the case of Kalsakau.v. Dinh [ 2005] VUCA 7 is clear authority that this claimant cannot continue to root his claim on the allegation that he is the custom owner of that



land. The Court of Appeal clearly said that the claim “cannot survive the order made in 1981.....”

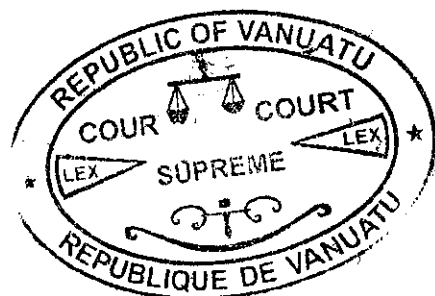
For those reasons I answer this issue in the negative.

11. Third, the issue in (g): Whether or not the claimant has disclosed any cause of action in his claim? To answer this issue I examine the claimant’s pleadings in his claim as amended and filed on 23 August 2016 as follows:-

- a) Paragraphs 1, 12 and 13 – He pleads he is one of the 19 custom land owners disputing the ownership of land in question and the pending Land Appeal Case No. 1 of 2009. I have found and ruled this gives him no cause of action.
- b) Paragraphs 2 and 10. The Claimant pleads the action of the police to remove his stall was not an order of the Court and that it contravened his rights as custom owner of the land. I repeat his appropriate course was to issue a judicial review application to challenge the lawfulness of the police action and a constitutional application to enforce his constitutional right.
- c) Finally paragraph 14. He pleads he and his family suffer from the unlawful actions of the Police. But the claimant has no evidence to show what force was used against him and his family members, his property and no medical report to show he or any of his family members, suffered any stress or loss of business.

12. From those findings, I accept the defendant’s submission that the claimant has not disclosed any reasonable cause of action against the defendant. I therefore answer the issues in paragraph 7 (a), (b), and (c) in the negative.

13. Finally the issues in paragraph 7 (d) and (h) are also answered in the negative.





**The Result**

14. The Claimant is unsuccessful in his claims and therefore the Court dismisses his claims in its entirety.

**Costs**

15. The Claimant has put the defendants to costs. I order the claimant to pay the defendant's costs of this proceeding on the standard basis as agreed or taxed by the Master.

**DATED at Port Vila this 20<sup>th</sup> day of December, 2017**

**BY THE COURT**

  
**OLIVER A. SAKSAK**

**Judge**

