

BETWEEN: Kalsandy Tuilili

Claimant

AND: Tangen Harry

Tino Johnny

Robea Simeon

Nitu Rambay

Kiven Nambay

Lami Denny

Javen Jimmy

Openny Rambay

Ephraim Imben

Kalsaf Reuben

Raymond Reuben

Defendants

Date: Friday, 31 August 2018

By: Justice G.A. Andrée Wiltens

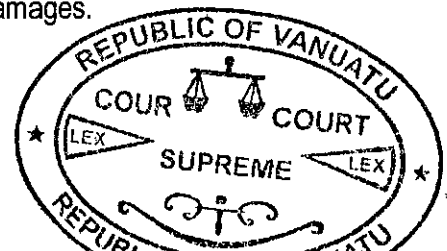
Counsel: Mr G. Boar for the Claimant

Ms M. Nari for the Defendants

JUDGMENT

A. Introduction

1. The case concerns the tort of trespass. Mr Tuilili asserts the defendants went onto the land where he grows mainly kava, and that they destroyed his crops. He accordingly seeks compensation for the loss of his crops and by way of general damages.



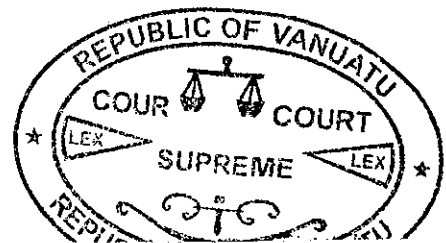
2. This matter was scheduled for trial on 24 August 2018. Unfortunately Ms Nari's clients were unable to obtain flights to Port Vila. There was some discussion regarding whether or not the matter could proceed anyway on the basis of the sworn statements filed. It eventuated that Ms Nari sought an adjournment, which I granted, but for only a week.

B. Preliminary Issue

3. Ms Nari filed a sworn statement by Mr Tele Harry Rambay on 28 August 2018 – in the middle of the two trial dates.
4. Mr Boar took exception that, and sought a ruling that the statement be excluded, relying on Rule 11.6(b) of the Civil Procedure Rules No. 49 of 2002. That rule makes it plain that for a sworn statement that is to be used in a trial, it must be filed and served at least 21 days prior to that date of trial.
5. Mr Rambay's sworn statement is clearly outside that time limit. No explanation for the late filing was provided; and no leave was sought to be permitted to file late. I therefore asked Ms Nari to explain how the statement could possibly be admitted into evidence. She explained difficulties in contacting her clients; but ultimately she had to accept that it was late and in breach of Rule 11.6(b). She was unable to advance any basis on which the statement could be properly considered as part of the evidence.
6. The point of the rule is to enable the parties to be fully prepared for trial and knowing what the opponent's case was, without suddenly new matters being raised which might unfairly catch the other side by surprise and/or necessitate an adjournment. Here, Mr Boar and his client had notice of the new statement only a matter of 3 days ahead of trial –they had no time to deal with any new material contained in the statement.
7. As already noted, this was the second scheduled trial date. To further adjourn this matter, which appeared to me to be the only way of dealing with this issue apart from exclusion, would be unfair to the claimant, who was ready and able to proceed in presenting his case – as he was last week.
8. In the circumstances, the rule simply had to be applied. I therefore excluded the statement.

C. The Evidence

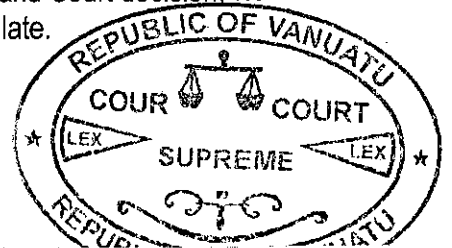
9. By agreement between counsel, the sworn statements of Mr Kalsandy Tuillili and Mr Josiah Tamat in support of the claim, and the sworn statement of Mr Tange Harry in support of the defence and counter-claim were tendered by consent. Both counsel had no desire/need to cross examine any of the witnesses. Accordingly, those 3 statements make up the entire evidence for me to consider.
10. Mr Tuillili deposed to being a farmer and supporting his family by growing taro, banana, yam and island cabbage. He said that in April 2014, the defendants entered onto his garden and uprooted and took away his 54 10-year old kava stems. He stated each 10-year old kava stem fetches VT 20,000. The defendants also damaged other plants, namely 2 yam plants which were worth VT 20,000, a banana plant worth VT 10,000 and a sugarcane plant worth VT 5,000.



11. Mr Tuilili further said that a criminal prosecution for theft of the kava plants and damage to the other plants resulted in the defendants being convicted on 15 May 2017 and sentenced to terms of 18 months imprisonment but suspended for 2 years. He appended a copy of the Magistrate's Court's decision.
12. Mr Tuilili stated that he had permission to farm that particular land from Mr Josiah Tamat, which permission was never withdrawn.
13. Mr Tuilili sought recompense for the loss of his plants in the sum of VT 1,115,000. He also claimed general damages of VT 1 million resulting from the defendants' conduct and arising from his labour costs, transport costs and general distress.
14. Mr Tamat deposed to being custom owner of Tervaut land on north-west Malekula, and appended a copy of the Island Court's 2004 decision declaring that. He confirmed that he had permitted Mr Tuilili to farm his land. He stated that a Kemuel Harry had "represented [his] customary history and family tree to Tervaut land, and that the defendants could not hold themselves out as custom landowners" of that land.
15. Mr Harry, in his statement, deposed to being a declared custom owner of Tervaut land. He appended the Island Court decision to demonstrate that, and alleged that Mr Tuilili was trespassing on that land. He stated that in 2005 his family had warned all trespassers on that land to make alternative arrangements and appended a Notice to demonstrate that. He maintained that Mr Tuilili ignored that notice. The Island Court decision was appealed, but the appeal was struck out in August 2013. His family served more notices on those occupying the land on 4 September 2013, and he appended a copy of the notice. He stated that a later notice was also issued in February 2014. He maintained that Mr Tuilili ignored all the notices and continued to farm the land.
16. Mr Harry counter-claimed that his family was unable to improve their land due to the presence of trespassers, and he sought to claim damages of VT 300,000 p.a. for 13 years from Mr Tuilili, whom Mr Harry maintained had never obtained permission from any one in the family to farm the land. He sought an eviction order against Mr Tuilili and his family and associates; and he also sought interest on the rent not paid.

D. Discussion

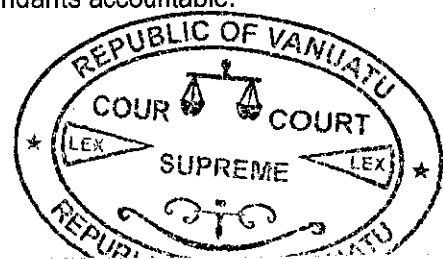
17. The Island Court decision declared "counter claimant 1 Kemuel Harry representative of Family Tamat" as the rightful custom owners of the land. It is variously described at Tervaut and Tervaut, but I am satisfied it is the same land. Mr Tuilili is correct when he says Kemuel Harry was simply representing the Tamat family. It is unclear to me from the decision whether Mr Harry is a custom owner.
18. The notice that Mr Harry stated was served in 2005 is undated, and addressed to: *Olgeta Chief, Olgeta Jioj Lida, Olgeta Comminit Lida, and Olgeta Pipol we o stap ia tedei*. The document is signed by 4 persons, one of whom is Kemuel Harry – the other names I cannot make out. While I accept that the list of addressees would include Mr Tuilili, there is no evidence before me as to how this document was brought to anyone's attention or actually served. Ms Nari submitted that everyone knew of it, and of the Island Court decision; however I am constrained by what the evidence reveals, and I cannot speculate.



19. The notice that Mr Harry stated was served on 4 September 2013 purports to be from Tauta Village and is signed by 7 persons, one of whom is the defendant Robea Bill – while some of the other names listed are similar to those of some of the defendants, I cannot be sure they are one and the same. The notice is unaddressed to anyone in particular. There is again no evidence before to suggest how this document was distributed, served on anyone or made known to anyone – and certainly no evidence that Mr Tuilili was aware of it.
20. The same issues arise in relation to the final notice appended to Mr Harry's sworn statement.
21. I discussed with Ms Nari, during her oral submissions, that the tort of trespass was concerned with an unjustified direct interference with land in the possession of another – it was not concerned with ownership of the land. Ms Nari submitted that as Mr Tamat was not a custom owner he could give permission to Mr Tuilili to farm the land – in her view of the matter Mr Tuilili was a trespasser of long standing who needed to pay for outstanding rent due as well as be evicted.
22. Incredibly, given the way the hearing progressed, Ms Nari complained to me of never having been served with Mr Tuilili's sworn statement, which had been filed in October 2017. She also complained of the lack of expert evidence regarding the value of Mr Tuilili's plants. In the circumstances, it can only be seen as a dereliction of her duty to her clients to then accept the sworn statement into evidence without the need to cross-examine the witness. Several times I felt it necessary to remind counsel to not give evidence from the bar, and to focus her submissions on the material properly before the Court.
23. Mr Tuilili was supported in his evidence by Mr Tamat. Even if the defence position is correct that Mr Tamat was not in a position to give him permission to farm the land, Mr Tuilili was entitled to take Mr Tamat's statements at face value. He must have been comforted in that over the ten plus years he occupied and farmed the land.
24. Mr Tuilili is supported further by the fact that the defendants were criminally convicted after trial for the theft of his kava and damage to his other crops. It is telling also that there is no denial of the allegation that the defendant's were responsible for those things.
25. There is no evidence to counter Mr Tuilili's statements to the effect of the size and value of his crops. The particularisation of the number of plants and stems is indicative he is a careful, honest and reliable witness.
26. There is nothing to support the statement given by Mr Harry; and as already discussed there are serious short-comings within his account.

E. Result

27. I accept it is more likely than not that Mr Tuilili was entitled to occupy the land in question with his farming operation. It is clearly established that he has suffered loss when the kava was taken and the other plants damaged. It is more likely than not that his evidence regarding the size and value of his crop is accurate. There is no challenge to his evidence that the defendants are responsible for his loss – indeed, there is very good support for that contention in the evidence of the criminal prosecution holding these defendants accountable.



28. Mr Tuilili is entitled to be fully compensated for the trespass and for the loss occasioned thereby. Therefore he is entitled to the following:

- VT 1,080,000 for the kava,
- VT 20,000 for the yams,
- VT 10,000 for the banana, and
- VT 5,000 for the sugarcane.

29. The further VT 1,000,000 general damages claimed cannot however be sustained. Whatever labour and transport costs that had been occasioned in creating the crops to the position they were in at the time of the trespass, are not general damages. Mr Tuilili would have incurred those anyway in the usual course of his farming operation.

30. The trespass is *per se* actionable. I accept there must have been great consternation and stress occasioned to Mr Tuilili and his family once the results of the trespass were discovered. I am prepared to award VT 150,000 by way of damages for that. While the trespass was of short duration, the acts undertaken by the defendants were underhand, deliberate and designed to upset and to force Mr Tuilili to stop farming there.

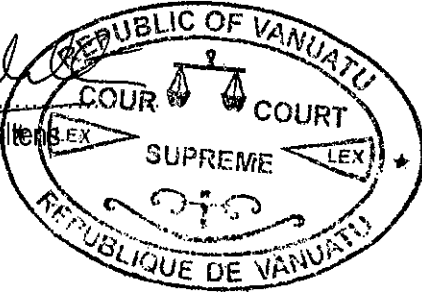
31. Mr Tuilili is entitled to his costs for this case – if they cannot be agreed, they must be taxed.

32. He is also entitled to interest on the sum of VT 1,115,000 as from April 2014 to the present – that is set at the usual Court rate of 5% per annum.

33. The counter-claim fails. It is inconceivable to the Court that if the defendants were entitled to rent over a 13 year period they have done nothing to collect it except by counter-claiming now. They have demonstrated a willingness to deal with their issues, as they see them, with a very-much hands-on approach. They have in fact taken the law into their own hands, if their various contentions are correct.

**Dated at Port Vila this 31st day of August 2018
BY THE COURT**

Gardie Williams
Justice G.A. Andrée Williams

The seal of the Supreme Court of Vanuatu is circular. It features a central emblem of a scale of justice. The words "REPUBLIC OF VANUATU" are written in an arc at the top, and "REPUBLIQUE DE VANUATU" at the bottom. In the center, the words "COURT" and "COURT" are positioned on either side of the scale, with "SUPREME" written below it. The words "LEX" and "LEX" are written on the left and right sides of the seal, respectively.