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

Judicial Review
Case No. 19/2683 SC/JUDR

BETWEEN: **Kalsua Momo Masaii** representing Masaii family and tribes

Claimant

AND: **Nakmau Sampo** representing Lakeota Manawora family

First Defendant

AND: **Mahit Chili** representing Narewo Kaltolu Lulu family (Sopuso family)

Second Defendant

AND: **Simon Poilapa** representing Mariki Langani Vate Lapa

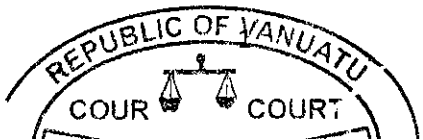
Third Defendant

Date of Hearing:	16 June 2020
Before:	Justice V.M. Trief
In Attendance:	Claimant - Ms J. Bani
	First Defendant – Mr L. Malantugun
	Second and Third Defendants – Mr P. Fiuka; Mr J. Tari excused
Date of Decision:	16 June 2020

JUDGMENT

A. Introduction

1. This is a Claim for judicial review. The matter proceeded today by way of a Conference under r. 17.8 of the *Civil Procedure Rules* ('CPR') and the Hearing of the Defendants' Strike-Out Applications. At the conclusion of the hearing, I delivered my decision and reasons. I set them out in this written judgment.



B. Background

2. On 31 August 1987, a meeting of the Mele Village Farea recognised Masaii and Family as the owners of Malawora Land, Pre-Independence Title No. 122 and elected family representatives to deal with that land (the '1987 decision').

3. Based on the 1987 decision, the Minister of Lands Maxime Carlot Korman issued a Certificate of a Registered Negotiator dated 15 June 2000 recognising the Masaii Family as the authorised representative of the custom owners for the purpose of negotiating a lease over Pre-Independence Title No. 122 and other land.

4. On 2 April 2004, the Efate Island Court issued its judgment in Land Case No. 10 of 1993 (the '2004 Island Court judgment').

5. On 1 November 2005, the Supreme Court allowed an appeal – see *Masaii Family v Lulu* [2005] VUSC 124.

6. The matter came back before a differently-constituted Island Court and its judgment was issued on 22 July 2011 (the '2011 Island Court judgment'). That judgment determined the custom ownership of land including Pre-Independence Title No. 122.

7. On 18 February 2016, the Supreme Court upheld the 2011 judgment – see *Uritalo v Chilia* [2016] VUSC 9; Land Appeal Case No. 2 of 2011.

8. The matter was further appealed to the Court of Appeal in Civil Appeal Case No. 586 of 2016. On 6 July 2016, that appeal was struck out for non-compliance with Court Orders and for want of prosecution.

9. On 23 July 2017, the Third Defendant was issued a Certificate of Recorded Interest in Land pursuant to the 2011 Island Court judgment.

10. The Claimant filed the Claim, the Sworn statements of Maukovkor, Kalpaperes Vatoko, Rongo Fenua, Jimmy Meto Chilia and Kalsua Momo Masaii in support, and written submissions.

11. The First Defendant filed a Strike-Out Application on 21 November 2019 and then the Sworn statement of Nakmau Sambo in support.

12. On 3 December 2019, the Third Defendant filed a Defence, the Sworn statement of Chief Simeon Poilapa, an Application to Strike Out the Claim and submissions.

13. By Memorandum filed on 15 June 2020 and 7 May 2020 respectively, the First and Second Defendants adopted the Third Defendant's Defence, Strike-Out Application, sworn statement and submissions, and sought costs on an indemnity basis.

C. Rule 17.8 matters

14. Rule 17.8(3) of the CPR provides that the judge will not hear the claim unless he or she is satisfied that:

(a) the Claimant has an arguable case;

(b) the Claimant is directly affected by the decision;

(c) there has been no undue delay in making the claim; and

(d) there is no other remedy that resolves the matter fully and directly.

15. If the judge is not satisfied about those matters, he or she must decline to hear the claim and strike it out (r. 17.8(5)).

D. Arguable Case

16. The Claimant seeks the following orders on the grounds set out in the Claim:

(a) An Order that the Island Court Judgment dated 22 July 2011 declaring Supuso family and the Lakelotaua and Mariki Langa Ni-Vatelapa families as custom owners of the Malawora Custom Land be set aside or quashed;

(b) An Order declaring the 1987 Malawora Land Declaration be upheld and the Negotiator's Certificate be changed to Family Masaii; and

(c) In the event that Order under para. (b) is refused, an Order that the Custom ownership of Malawora Land Dispute be re-determined under the Customary Land Management Act.

17. Having heard counsels and considered the papers filed in the proceeding, I am satisfied that the Claimant does not have an arguable case for these reasons:

a) The Claim does not challenge a decision by any Defendant. In Ms Bani's own words, the decision being challenged is the 2011 Island Court judgment. That is not a decision of the Defendants. The Efate Island Court is not even a party to this proceeding.

b) The second Order sought in the Claim suggests that the decision challenged is that of a Minister of Lands in relation to a Certificate of a Registered Negotiator. Such decision too is not a decision of the Defendants. The Minister of Lands is also not a party to this proceeding.

c) The Claimant relies on the 1987 decision for the second and third Orders sought in the Claim. The Claimant completely overlooks that when that decision was made in 1987, the Island Court was the body authorized by law to determine custom ownership of land. Ms Bani accepted that this was the position in law, but has seen fit to nevertheless file the Claim in the terms that she has.

d) Not only was the Island Court the body to determine custom ownership of land, but the Efate Island Court has actually determined the custom ownership of Malawora Land, Pre-Independence Title No. 122 by its 2011 judgment. On appeal, the Supreme Court upheld the 2011 Island

Court judgment. It was further appealed in the Court of Appeal, which appeal was struck out. The entire appeal process has been exhausted and the 2011 Island Court judgment stands.

e) In the circumstances, it is highly irresponsible of Ms Bani to file the Claim seeking orders from this Court to uphold the 1987 decision, when that decision pre-dates the Island Court judgment determining the custom ownership of the very land in question. Further, since the commencement of the *Customary Land Management Act* and the Constitution (6th Amendment) Act No. 27 of 2013, such final substantive decision of the Island Court is binding in law and is not subject to appeal or any other form of review by any Court of law (art. 78(3), Constitution).

f) Just because the Minister of Lands once recognized certain persons as custom owners for the purpose of negotiating a lease, this cannot trump an Island Court judgment determining custom ownership of the land in question. A Certificate of Registered Negotiator by the Minister of Lands pursuant to the *Land Reform Act* is not determinative of custom ownership and it is irresponsible of Ms Bani to make such submission.

g) Ms Bani submits that the 1987 decision is a decision of a customary institution. She completely overlooks that the 1987 decision was made **prior to** the commencement of the *Customary Land Management Act.* This submission is roundly rejected.

E. Balance of r. 17.8 matters

18. There is no decision by the Defendants challenged in the Claim therefore I need not consider the balance of the r.17.8 matters.

19. Not being satisfied about the matters in r. 17.8(3) of the CPR, I decline to hear the Claim and strike it out.

F. Abuse of Process

20. For the reasons already set out above, the Claim is an abuse of process.

21. In addition:

a) The First Defendant submitted that by filing the Claim, the Claimant is attempting to by-pass subs. 22(5) of the *Island Courts Act* and launch another attack on the 2011 Island Court Judgment. This is an abuse of process. I agree.

b) Mr Fiuka submitted that the Claimant is prohibited by art. 78(3) of the Constitution from attacking the 2011 Island Court judgment as it has become a recorded interest in land (to the Third Defendant on 23 July 2017). He relied on *Kalsakau v Director of Lands* [2019] VUCA 70 (at

paras 38 and 39) for this proposition. I accept this is a further reason why the Claim is an abuse of process.

22. The Defendants' Strike-Out Applications are granted.

G. Indemnity costs

23. The Defendants sought indemnity costs.

24. Ms Bani's responded that the Claimant had sought today to amend his claim and thereby improve his case. There was no proposed amendment attached to the Application filed this morning to enable me to assess whether or not the amendments would better identify the issues between the parties or better provide facts about each issue. When I put this to Ms Bani, she withdrew that Application.

25. In any event, I do not see how any amendment can identify a decision by the Defendants when the decision challenged is the 2011 Island Court judgment. The first of the Defendants' Strike-Out Applications was filed on 21 November 2019 and the Third Defendant's extensive submissions on 3 December 2019. The Claimant and Ms Bani have sat on their hands, and then filed an unsubstantiated Application to amend the Claim on the morning of the r. 17.8 Conference.

26. For the reasons already set out in this judgment, the Claimant brought the proceeding in circumstances that amounted to a misuse of the litigation process.

27. I therefore order that the Defendants' costs be paid on an indemnity basis pursuant to r. 15.5(5)(b) of the CPR.

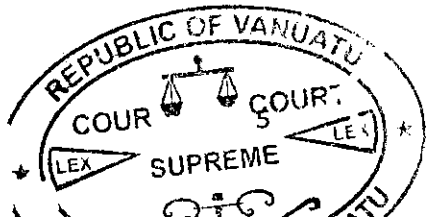
H. Costs to be paid personally by lawyer

28. Rule 15.26(1) of the CPR provides:

> *15.26 (1) The court may order that the costs of the whole or part of a proceeding be paid by a party's lawyer personally if the party brings a proceeding that:*
>
> *(a) has no prospect of success, is vexatious or mischievous or is otherwise lacking in legal merit; and*
>
> *(b) a reasonably competent lawyer would have advised the party not to bring the proceeding.*

29. This proceeding had no prospect of success and was completely lacking in legal merit. Consequently Ms Bani should have advised the Claimant not to bring the proceeding.

30. I therefore asked Ms Bani if there was any reason why she should not personally pay the whole or a part of the Defendants' costs of this proceeding. She responded that she had advised her client as to the merits of the Claim and her client instructed her to file the Claim.



31. As members of the legal profession, lawyers have professional responsibilities to uphold. Their overriding duty is as an officer of the Court, to assist the Court and to facilitate the administration of justice. I was not assisted by Ms Bani's conduct of this proceeding. This Claim was doomed to failure, and should not have been filed.

32. Having given Ms Bani the opportunity to be heard, I order that the Claimant pay half of each Defendant's costs and that the other half be personally paid by Ms Bani.

I. Result and Decision

33. Having heard counsels and considered the papers filed in this proceeding, I am satisfied that the Claimant does not have an arguable case.

34. Not being satisfied about the matters in r. 17.8(3) of the CPR, I decline to hear the Claim and strike it out.

35. The Defendants' Strike-Out Applications are granted.

36. The Claimant having brought the proceeding in circumstances that amounted to a misuse of the litigation process, I order that the Defendants' costs be paid on an indemnity basis pursuant to r. 15.5(5)(b) of the CPR.

37. Having given Ms Bani an opportunity to be heard and having heard counsels as to quantum, I order that the Claimant pay half of each Defendant's costs and that the other half be personally paid by Ms Bani, which costs I hereby set as follows:

    a) The First Defendant's costs of VT80,000;

    b) The Second Defendant's costs of VT50,000; and

    c) The Third Defendant's costs of VT150,000.

38. These costs are to be paid within 21 days.

DATED at Port Vila this 16th day of June 2020
BY THE COURT

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Viran Molisa Trief
Judge

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