

BETWEEN: George Toa and Carlos Toa

Claimants

**AND: Christian Oska & Family, Joseph Oska,
Saky Oska, Luwi Lapinpel and Sam Visai &
Family**

Defendants

Date of Hearing: 2nd August 2021
Date of Judgment: 20th August 2021
Before: Justice Oliver.A.Saksak
In Attendance: Mr Daniel Yawha for the Claimants
Mr Philip Fiuka for the Defendants

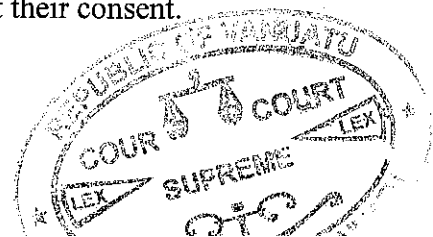
JUDGMENT

Introduction

1. This is a claim by the claimants who alleged the defendants are (a) illegally occupying and (b) trespassing onto their customary land of Apendihen for the purposes of building houses and doing gardening and forming on their land without their consent and authorisation.
2. They seek orders of (a) eviction, (b) mesne profits to be assessed, (c) restraining the defendants from trespassing and entering onto the land, and (d) costs on an indemnity basis.

Background Facts

3. On 21st May 2009 the Vahas Village Land Tribunal issued a judgment declaring that the claimant was the custom landowner of Apendihen custom land.
4. Subsequent to that declaration the defendants in 2010 trespassed onto the land and built houses, made gardens and did farming on their land without their consent.



Issues

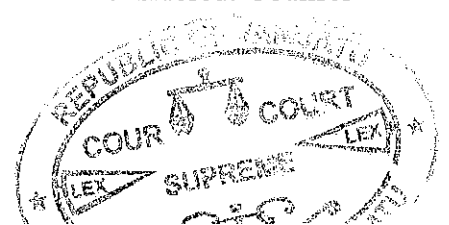
5. There are 2 issues namely (a) whether the defendants are occupying the claimant's land and (b) whether the defendants have trespassed and are gardening and farming on the claimant's customary land?

Evidence

6. The claimants produced evidence from Jack Toa and Bruce Toa relying on the sworn statements filed on 15th March and 12 April 2021 (Exhibits C1 and C2).
7. The defendants on the other hand produced evidence from Kenneth Visai and Virambath Nisai relying on their sworn statements of 7/10/20 (Exhibit D1), 21/01/21 (Exhibit D2), 28/04/21 (Exhibit D3 and of 13/10/ (Exhibit D4).

Discussion

8. First Mr Yawha raised objections to paragraphs 3, 5, 6, and 7 to the sworn statement of Kenneth Visai dated 28/04/21. Mr Fiuka conceded and these were excluded as inadmissible evidence. Mr Yawha also objected to paragraphs 6, 7 and 12 of Virambath Nisai's statement dated 13/10/20. With Mr Fiuka's concessions these paragraphs also were inadmissible as evidence on behalf of the defendants.
9. Second, Mr Yawha submitted that the balance of the evidence of Kenneth Visai should be rejected on the basis of it being hearsay and that Virambath Nisai's evidence was purely based on his belief and not by what he saw.
10. There is force in those submissions. None of the two witnesses are named as the defendants in this case. Their evidence standing alone without the evidence of any of the named defendants render their evidence as hearsay. As such the Court must reject their evidence.
11. Mr Fiuka on the other hand filed quite extensive submissions. First he submitted only one sole issue of whether the defendants are gardening inside or outside the Apendihen land. Counsel argued the claimant has not pleaded residing or living on the land and that the issue should be irrelevant and should not be considered. Counsel

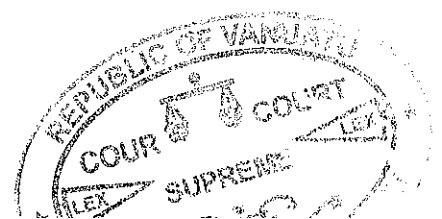


finally submitted the claimants have not disclosed any cause of action against the defendants and have not proved their case on the balance of probabilities, and that their claims should fail, with costs.

12. Those submissions raised the question by the Court as to who are the claimants? The named claimants on the claim filed on 14/07/20 are George Toa and Carlos Toa. Yet at trial none of them gave evidence in support of their claim. The claim is not issued in the name of the family as for example "George Toa & Family", rather it is instituted in the name of individuals. As such it was incumbent on George Toa and Carlos Toa to give their evidence in support of their claim. Instead Jack Toa and Bruce Toa gave evidence but the problem and difficulty they have is that they are not the named claimants. There appear to me to be strength and force in the submission of Mr Fiuka that the claimants have not established a cause of action and the evidence to prove their claims.
13. Jack Toa referred to the map annexed as JK1 and JK2. Bruce Toa on the other had referred to Google Maps annexed BT1. Neither of them identified on those maps where (a) George Toa or Carlos Toa's house is and (b) where their own houses are on those maps. Unless George Toa or Carlos Toa and Jack Toa or Bruce Toa established where their residents are on those maps, how could they be sure the defendants have trespassed on to their land and built houses and/or doing gardening and farming?
14. It is all very well instituting a claim based on a declaration of a Lands Tribunal but that is not the end of the process. One has then to obtain a Certificate of Registered Interest in the land as declared. And further to protect their customary interest, a fence of the boundary or even better, a survey map by a registered surveyor made and produced as security. There is none of these in the evidence before this Court. And this are the defects and concerns the Court has about this claim.

Conclusion

15. For the foregoing reasons I have reached the conclusion that the claimants have not established their case against the defendants. As such their claim is dismissed in its entirety.



16. In the circumstances of the case there will be no order as to costs. Each party bears its own costs.

DATED at Port Vila this 20th day of August 2021

BY THE COURT




OLIVER.A.SAKSAK

Judge