

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

Civil Appeal Case
No's 20/2824 and 20/3037
SC/CIVA

CAC 20/2824

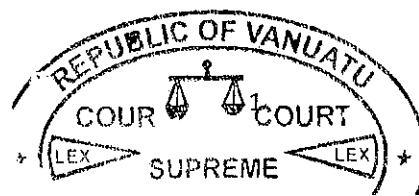
BETWEEN: Matova Toatau & Descendants
Appellant
AND: Henry Cyrel Kalsurai Manlaewia
First Respondent
AND: Ernest Kaloris & Descendants
Second Respondent
AND: Vamele Family
Third Respondent

CAC 20/3037

BETWEEN: Ernest Kaloristu & Descendants
Appellant
AND: Henry Cyrel Kalsurai
First Respondent
AND: Matova Toatau & Descendants
Second Respondents
Vamele Family
Third Respondent

DECISION AS TO FIRST RESPONDENT'S URGENT EX PARTE APPLICATION AND APPLICATION FOR CONTEMPT OF COURT BY THE REPRESENTATIVES OF MATOVA TOATAU & DESCENDANTS, AND APPLICATION TO STRIKE OUT THE FIRST RESPONDENT'S APPLICATION

Dates of Hearing: 8, 13-15 and 19 July 2021, and 9 August 2021.
Before: Justice V.M. Trief
Counsel: Matova Toatau & Descendants, Appellant in CAC 20/2824 – Mrs C.T. Gesa
Henry Cyrel Kalsurai Manlaewia, First Respondent in all CACs – Ms L. Raikatalau, holding papers for Mrs Ferrieux Patterson
Ernest Kaloristu & Descendants, Second Respondent in CAC 20/2824 – Mr S. Kalsakau
Vamele Family, Third Respondent in CAC 20/2824 – no appearance (Mr D. Yawha)
Date of Decision: 24 September 2021



DECISION AS TO FIRST RESPONDENT'S URGENT EX PARTE APPLICATION AND APPLICATION FOR CONTEMPT OF COURT BY THE REPRESENTATIVES OF MATOVA TOATAU & DESCENDANTS, AND APPLICATION TO STRIKE OUT THE FIRST RESPONDENT'S APPLICATION

A. Introduction

1. This decision relates to two Applications by the First Respondent Henry Cyrel Kalsurai seeking orders in relation to abuse of process and contempt of Court, and an Application by the Appellant in Civil Appeal Case No. 2824 of 2020 ('CAC 20/2824') Matova Toatua and Descendants ('MTD') to strike out Mr Kalsurai's Application for Contempt of Court Orders.

B. First Respondent's Urgent Ex Parte Application

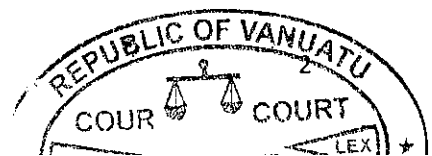
2. By this Application, Mr Kalsurai seeks an injunction preventing the Efate Island Court ('EIC') from considering, hearing or in any way determining EIC Customary Case No. 2507 of 2020 filed by MTD, and orders restraining MTD from pursuing further actions filed separately while the appeals in this matter are on foot.

3. The grounds for the Application are as follows:

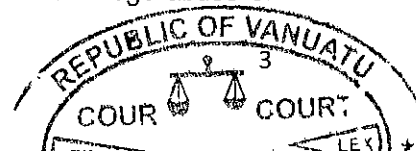
- a) That on 9 September 2020, MTD filed its Claim in the EIC in Customary Case No. 2507 of 2020 for:

A custom declaration of "Kalsurai" mo "Leintass" tufala native mo indigenous tribe blong Tareang Custom Dominion or Namarakiana, North Efate folem bloodline blong "Kalsurai" mo "Leintas" ('MTD's EIC Claim');

- b) That MTD's EIC Claim is a 127-page document, including the following annexures:
 - i. Island Court Malasa Land Case 01 of 1990 (28.01.2001);
 - ii. Supreme Court Malasa Land Appeal Case 01 of 2010 (30.11.2018);
 - iii. Custom Dominion (Namarakiana) long North Efate;
 - iv. System of custom kavanans mo otoritis practiced long olgeta Custom Dominion or Namarakiana long North Efate;
 - v. Family tree blong Kalsurai mo Leintas;
 - vi. Independent supporting evidence blong sapotem claim blong mi, Matova Taotau and Descendants;
 - vii. Nems blong ol natives we oli ko long Kakula Island long 3 January 1884;

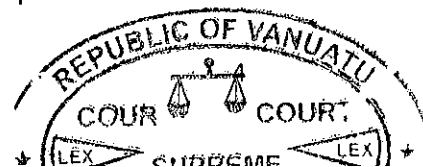


- viii. First group blong natives we oli kam back long Paunangisu;
 - ix. Toktok blong Chief Simeon Kalnagis Mantaure Tapangtamate blong Paunangisu Village North Efate wea I sapotem claim blong family blong mi, Matova Toatau se chiefly title ia Manlaewia I blong mifala;
 - x. Toktok blong Chief Elder Silas Manavilalu blong Emua Village North Efate wea I sapotem claim blong family blong mi, Matova Toatau se chiefly title ia Manlaewia I blong mifala;
 - xi. Toktok blong Chief Kalosike Taripamata blong Siviri Village North Efate wea I sapotem claim blong family blong mi, Matova Toatau se chiefly title ia Manlaewia I blong mifala; and
 - xii. Findings mo Declaration blong Efate Island Court Chiefly Title Case 19/412 IC CHFT dated 31.05/2019 (written decision issued October 2019); and
- c) That the matters raised for the EIC to determine in MTD's EIC Claim are currently before this Court to determine, including matters of history, family lines, and customs of North Efate that determine the rightly Chief Manlaewia;
 - d) That these matters came before the Courts below in the Chiefly title dispute for the Manlaewia title, in EIC CHFT 412/2019 (filed by MTD) and Magistrates' Court CAC 2586/2019 (successful appeal against MTD), and is now before this Court to determine; and
 - e) That MTD is now seeking to re-litigate the same issues in the MTD even while the current appeals are on foot in this Court which is an abuse of process and shows a wilful disregard for the authority of this Court now sitting as an appellate Court, one of which appeals was filed by MTD itself.
4. Mr Kalsurai relied in support on his Sworn statements filed on 17 February 2021 [**"Exhibit R7"**] and on 17 May 2021 [**"Exhibit R8"**]. Mr Kalsurai evidenced in **"Exhibit R8"** that it is clear from MTD's EIC Claim and the nature of the declaration sought that MTD's EIC Claim is seeking to raise matters currently on appeal in CAC 20/2824. These matters include matters of history, family lines and customs of North Efate that determine the rightful Chief Manlaewia, which have been considered in in EIC CHFT 412/2019 and in the Magistrates' Court CAC 2586/2019 and are now before this Court on appeal.
 5. The Application was opposed by both MTD and the Appellant in CAC 20/3037 Ernest Kaloris & Descendants ('EKD').
 6. Mr Kalsakau, counsel for EKD, submitted in effect that this Court as an appeal Court did not have jurisdiction to order the removal of MTD's EIC proceeding and Mr Kalsurai as a party to that proceeding should instead file an Application in the EIC for orders to stay the EIC proceeding. Mr Kalsakau submitted that the legal avenue open to Mr Kalsurai is to seek orders in the EIC staying the proceeding commenced by MTD's EIC Claim. Further, that it was an abuse of process to allege abuse of

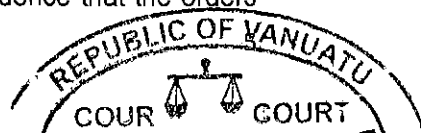


process in this Court when Mr Kalsurai had not yet exhausted the legal avenues open to him.

7. Mr Kalsakau also informed the Court that the same issues before this Court are being re-litigated in MTD's EIC Claim because MTD was not happy with Mr Kalsurai's evidence given in the litigation leading to the appeals before this Court in relation to his bloodline. Therefore MTD now want to re-litigate in the EIC to get a different order as to Mr Kalsurai's bloodline. I of course then queried with Mr Kalsakau that given his submissions, how was that not MTD seeking to re-litigate the issues before this Court? Mr Kalsakau responded that this Court as an appeal Court had no jurisdiction to order the removal of the MTD's EIC proceeding but at the most, could only order that the EIC proceeding be stayed pending the outcome of the appeals in this Court.
8. Mrs Gesa, counsel for MTD, submitted that Mr Kalsurai's application was itself an abuse of process as it was seeking this Court to make an order about a proceeding before a different Court.
9. In reply, Ms Raikatalau submitted that the evidence of MTD's witnesses confirmed that MTD's EIC Claim relied on both the chiefly title case of Manlaewia as well as on MTD's claim to the Manlaewia chiefly title. She submitted that the Court could take judicial notice that the matters of family history in MTD's EIC Claim are identical to MTD's grounds of appeal in CAC 20/3037. Finally, Ms Raikatalau submitted that there is an abuse of process as the matters in relation to Mr Kalsurai's family tree are argued in these Appeals and in MTD's EIC Claim therefore this Court in its inherent jurisdiction had the power to stop that abuse to protect its processes and the integrity of its processes: *Republic of Vanuatu v Natonga* [2016] VUCA 28 and *Vanuatu National Council of Women v Bani* [2016] VUCA 13. She submitted that if Mr Kalsurai were to apply to the EIC to stay the proceeding, it would preserve the abuse complained about but the abuse needed to be stopped altogether which this Court could order.
10. My reading of both MTD's Notice and Grounds of Appeal filed on 19 January 2021 in CAC 20/2824 (grounds 6 and Findings 4, 8-14, and grounds 12 and 15) and of EKD's Notice and Grounds of Appeal filed on 5 November 2020 in CAC 20/3037 (grounds 2 and 3) shows that the Magistrates' Court judgment under appeal is challenged in relation to its findings of Mr Kalsurai's bloodline as a descendant of Kalsurai (whose wife was Leintass).
11. Mr Kalsakau openly submitted that that the same issues before this Court are being re-litigated in MTD's EIC Claim because MTD was not happy with Mr Kalsurai's evidence given in the litigation leading to the appeals before this Court in relation to his bloodline. Therefore MTD now want to re-litigate in the EIC to get a different order as to Mr Kalsurai's bloodline. The only purpose for doing so that I can surmise is to challenge Mr Kalsurai's right to the chiefly title "Manlaewia".
12. The declaration sought in MTD's EIC Claim is already in issue in the appeals CAC 20/2824 and CAC 20/3037 in this matter therefore to re-litigate them in MTD's EIC Claim completely undermines the principle of finality of litigation, disregards that those matters are already before this Court and are an abuse of process.



13. I accept Ms Raikatalau's submission that if Mr Kalsurai were to apply to the EIC to stay the proceeding, it would preserve the abuse complained about but the abuse needed to be stopped altogether which this Court could order in its inherent jurisdiction and to protect the integrity of its processes. I reject the submissions to the contrary.
14. Accordingly, it is ordered that:
- a) The First Respondent's Urgent Ex Parte Application is **granted**;
 - b) The proceeding in the Efate Island Court Customary Case No. 2507 of 2020 is **permanently stayed** for abuse of process in re-litigating matters already the subject of the appeals on foot in CAC 20/2824 and CAC 20/3037 in this Court; and
 - c) The Appellant Matova Toatau and Descendants are **restrained** from commencing any further actions filed separately pending the outcome of the appeals in CAC 20/2824 and CAC 20/3037.
- C. First Respondent's Application for the Representatives of Matova Toatau & Descendants to Show Cause why an Order for Contempt of Court Orders should not be entered against them and MTD's Application to Strike Out the First Respondent's Application for Contempt of Court Orders
15. By his Application, Mr Kalsurai sought a declaration that by filing the MTD's EIC Claim, MTD's representatives' actions are in contempt of Court by failing to comply with this Court's orders dated 17 February 2021 which stayed the Efate Island Court decision dated 31 May 2019 in Chiefly Title Case No. 19/412 and the Magistrates' Court judgment dated 9 October 2020 in CAC 19/2856 pending the determination of the appeals in CAC 20/2824 and CAC 20/3037.
16. By its Application, MTD applied for an order that Mr Kalsurai's Application for Contempt of Court Orders be struck out on the ground that MTD's EIC Claim seeks determination of the true bloodline of "Kalsurai" and "Leitass" who are husband and wife and natives of Tareang land whose chiefly title is "Marpongi" ('pig' tribe) whereas the case pending before this Court is to do with the "Manlaewia" chiefly title ('bird' tribe). Further, that these are clearly 2 different cases that deal with 2 totally different boundaries, chiefly titles and 2 different tribes.
17. Mr Kalsakau submitted that civil contempt is prospective and not retrospective. This Court's orders staying the EIC and Magistrates' Court judgments were made on 17 February 2021 therefore any breach of those Orders must have been committed after 17 February 2021 and not before to constitute contempt of Court. MTD's EIC Claim was filed well before 17 February 2021 therefore it cannot be held to have been filed in contempt of this Court's orders dated 17 February 2021.
18. Mr Kalsakau submitted also that this Court's orders are not injunctive: *Quinto v George* [2019] VUCA 63. He submitted that this Court's orders merely stayed the 2 judgments concerned but did not include any order that MTD or any other party not commence a new proceeding. Further, that there was no evidence that the orders

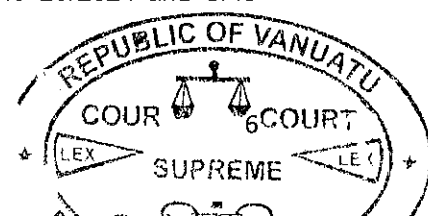


dated 17 February 2021 were served on the representatives of MTD before Mr Kalsurai's application was filed, nor any evidence that they understand the restraints and obligations placed on them by the Order especially when English is not their first language.

19. Mrs Gesa also submitted that contempt of Court cannot be retrospective therefore MTD's filing of its EIC Claim does not constitute contempt of this Court's orders dated 17 February 2021.
20. MTD filed Sworn statements of Jean-Luc Tawi ["**Exhibit A1**"], Tom Eric ["**Exhibit A2**"] and Kennedy Kalfau ["**Exhibit A3**"]. Mr Tawi, Mr Eric and Mr Kalfau were cross-examined by Ms Raikatalau.
21. Mrs Gesa submitted that given Mr Tawi and Mr Eric's evidence including their answers in cross-examination, they have nothing to do with the case before the Court and should never have been summonsed to answer to the Court. She submitted that there was no evidence that this Court's orders dated 17 February 2021 had ever been served on Mr Tawi and Mr Eric for them to be aware of the content of the stay orders.
22. In reply, Ms Raikatalau submitted that the evidence of MTD's witnesses confirmed that MTD's EIC Claim relied on both the chiefly title case of Manlaewia as well as on MTD's claim to the Manlaewia chiefly title. She said that the Court of Appeal's judgment in *Quinto* must be distinguished as in that case, the party applying for restraining orders had a duty to inform those who were in breach of the orders, however here, MTD applied for the 17 February 2021 orders therefore it cannot rely on the *Quinto* judgment. as
23. I agree with Mr Kalsakau and Mrs Gesa's submissions that civil contempt is prospective and not retrospective. It follows that the filing of MTD's EIC Claim before this Court's orders dated 17 February 2021 does not constitute contempt of those Orders. Accordingly, the First Respondent's Application for the Representatives of Matova Toatau & Descendants to Show Cause why an Order for Contempt of Court Orders should not be entered against them is **declined and dismissed**.
24. The Appellant Matova Toatau & Descendants' Application to Strike Out the First Respondent's Application for Contempt of Court Orders is also **declined and dismissed** as there was no pleading to be struck out.

D. Result and Decision

25. For the reasons given:
 - a) The First Respondent's Urgent Ex Parte Application is **granted**;
 - b) The proceeding in the Efate Island Court Customary Case No. 2507 of 2020 is **permanently stayed** for abuse of process in re-litigating matters already the subject of the appeals on foot in CAC 20/2824 and CAC 20/3037 in this Court;



- c) The Appellant Matova Toatau and Descendants are **restrained** from commencing any further actions filed separately pending the outcome of the appeals in CAC 20/2824 and CAC 20/3037;
- d) The First Respondent's Application for the Representatives of Matova Toatau & Descendants to Show Cause why an Order for Contempt of Court Orders should not be entered against them is **declined and dismissed**;
- e) The Appellant Matova Toatau & Descendants' Application to Strike Out the First Respondent's Application for Contempt of Court Orders is also **declined and dismissed** as there was no pleading to be struck out; and
- f) Given the outcome of the Applications, the costs of the Applications will lie where they fall.

**DATED at Port Vila this 24th day of September 2021
BY THE COURT**


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Viran Molisa Trief
Judge

