

**BETWEEN: LEIVELE FAMILY represented by James Kaloroa, Georges Munalapa Tauanearu, Emile Kalele, Fred Taula Makomaro and Jack Nearmanu**, all care of Lelepa Island and Havannah Harbour, Northwest Efate, Republic of Vanuatu  
Claimant

**AND: KALSUAK FAMILY represented by Philip Kalsuak** care of Lelepa Island, Northwest Efate, Republic of Vanuatu  
Defendant

**Date:** 29<sup>th</sup> day of April, 2024  
**Before:** Justice W. K. Hastings  
**Counsel:** Mr. S. Hakwa for the Claimant  
Mr. E. Nalyal for the Defendant

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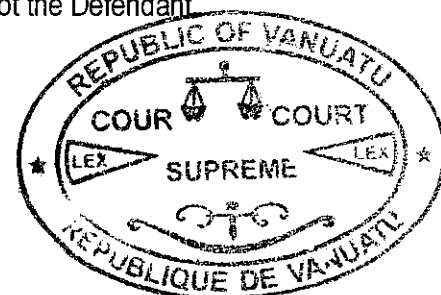
## DECISION

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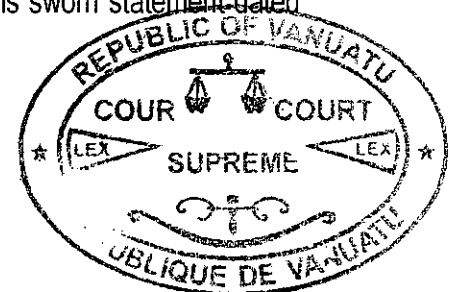
1. This is an application for leave to file an “*amended defence*” out of time.
2. Counsel were content for me to decide this matter on the papers.

### The pleadings

3. On 22 November 2023, the claim was filed and served. It consists of 24 paragraphs not including the prayers for relief. It seeks specific performance of an agreement entered into by the Claimant and the Defendant (both represented at the time by Mr Nalyal) on 23 February 2018 by which the Defendant agreed to include the Claimant as joint and equal custom owner of Filtoka land with the Defendant.
4. The claim alleges that in May 2018 the Defendant applied to the National Coordinator of the Custom Land Management Office for a green certificate that included only the Defendant and not the Defendant and Claimant as was agreed. On 11 May 2018, the National Coordinator issued a green certificate naming only the Defendant as custom owner. The claim alleges that as a result of the Defendant’s misrepresentations to the National Coordinator, the green certificate incorrectly recorded that the Defendant was represented by Lalele Emile, Fred Taulu, Jack Norton, George Tauanearu and James Kalora, all of whom are members of the Claimant, not the Defendant.



5. The Claimant states that repeated requests were made to the Defendant to agree to a new certificate to include both the Claimant and the Defendant as joint custom owners but states the Defendant has not responded to these requests. The Claimant also seeks an order directing the Defendant to apply to the National Coordinator to cancel the green certificate issued on 11 May 2018, to issue a new green certificate recognizing the Claimant as joint and equal custom owner with the Defendant, and to rectify leases 12/0512/007 and 12/0512/008 to reflect the joint and equal custom ownership.
6. On 6 December 2023, a response was filed with the boxes "*I dispute all of the claim*" and "*I want to make a counterclaim*" ticked.
7. On 22 December 2023, a defence was filed. It consists of 2 paragraphs in which the Defendant says:
  1. *He denies all assertions in paragraphs 1-24 of the Claim.*
  2. *A comprehensive Defence will be filed in due course, but files this defence now to protect his position, given the Court is closing today.*
8. On 13 March 2024, the Claimant applied for summary judgment on the grounds that the Defendant had no real prospect of defending the claim based on its two paragraph defence and its failure to file a more comprehensive defence in time.
9. On 15 March 2024, an amended defence was filed without leave. Contrary to what was stated in the defence filed on 22 December 2023, the Defendant admitted paragraphs 1, 2, 4, 6, 7, 8, 9 and 10 of the claim.
10. The amended defence raises issues with respect to the legality of the agreement, and with respect to various nakamal and tribunal decisions concerning the custom ownership of Filtoka land.
11. In the amended defence, the Defendant agrees they signed the agreement with the Claimant but says it is illegal because there are no judgments of any Court or Tribunal declaring the Claimant to be a custom owner of Filtoka land, as now required by the Custom Land Management Act and the Land Reform Amendment Act before a green certificate can issue to the Claimant.
12. Indeed, the Defendant says the West Efate Area Lelema Customary Joint Land Tribunal decided against the Claimant on 24 April 2004. The Claimant appealed that decision to the North West Efate Area Customary Land Tribunal which dismissed the appeal on 29 December 2005. The Claimant appealed that decision to the Efate Island Customary Land Tribunal. That appeal was withdrawn and the agreement of 23 February 2018 was entered into.
13. On 28 March 2018, the Lelepa Island Nakamal convened a meeting purporting to determine the claims of 32 more people to custom ownership of Leosa land including Filtoka land. The Nakamal's decision to recognize these 32 people was appealed to the North West Efate Council Havana Harbour. That Council refused an application by the Claimant to be represented, but this was overturned by the Efate Island Court (Land) in case no. CC22/1390. In his sworn statement dated



28 March 2024 in support of the application to amend the defence, Philip Kalsuak states that the dispute over custom ownership of Leosa land continues (Mr Hakwa objects to the admissibility of this statement). According to the further sworn statement of Georges Tauanearu in support of the Claimant dated 15 April 2024, the only issue left for the newly constituted North West Efate Area Council of Chiefs is the custom ownership of Leosa land but not Filtoka land.

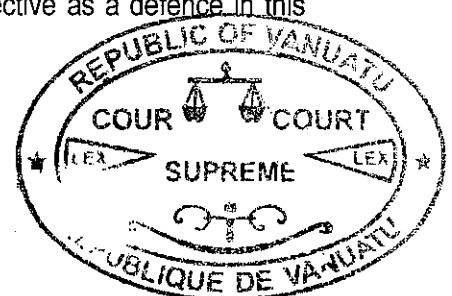
14. The Defendant says the agreement was made because, at the time, the Defendant was negotiating with Royal Caribbean Cruises to invest USD 6 million in Filtoka land. The Defendant says the Claimant was concerned that a third party would be joined in their appeal to the Efate Island Customary Land Tribunal, compromising their chances of success and any share of the Royal Caribbean investment. The Defendant says the Claimant ended their appeal in return for payment of 40% of the proceeds of the Royal Caribbean investment.

### The application for leave to file a defence out of time

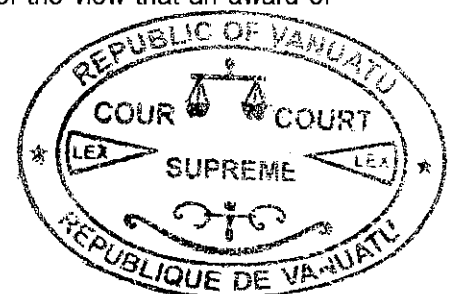
15. Mr Nalyal applies under r.4.14 of the Civil Procedure Rules 2002. In deciding whether or not the amended defence is effective, r.14.4 states the Court may have regard to the reasons why the amended defence was filed late, any additional expense and inconvenience incurred by the Claimant/Respondent, and any disadvantage to the Defendant/Applicant if the late filing is not allowed.
16. Mr Nalyal submits he *"had many cases to deal toward the end of 2023, at the time the Claim was filed, however, filed a holding defence on 22 December 2023."* He also submits that *"substantial justice"* requires the late filing to be allowed, that there are serious questions of law and fact raised in these proceedings, and that *"the Defendant and his Counsel will pay reasonable costs to remedy the delay he has caused in filing his defence."*
17. Mr Hakwa opposes the application and submits there is no such thing as a *"holding defence"* in the Rules. He submits that the Supreme Court Registry was only closed between 22 and 29 December 2023, and between 2 and 5 January 2024 inclusive. He denies the allegations with respect to custom land ownership and the legality of the agreement, and denies there are serious questions of law and fact to be tried which, in any event, are not part of the criteria the Court may take into account in terms of r.4.14(3).

### Discussion

18. The *"holding defence"* filed on 22 December 2023 goes no further than the response, and is not a defence because it does not comply with r.4.5. It does not contain a statement of the case, it denies the Claimant's claim generally, and it does not deal with each fact of the claim. I agree with Mr Hakwa in this respect – it is not a document known to the Rules. The only document that can be considered a defence which complies with r.4.5 is the *"amended defence"* which was filed well out of time on 15 March 2024. This leads to consideration of whether it is effective as a defence in this proceeding in terms of r. 4.14(2).



19. I also agree with Mr Hakwa that the reasons why the defence was filed late are unpersuasive. Apart from weekends, the Supreme Court Registry was closed for only 10 of the 84 days between the date of service of the claim and the date of filing of the "amended defence." Pressure of work does not explain this delay.
20. Mr Hakwa has not indicated or quantified what additional expense or inconvenience the Claimant would incur if the late filing is allowed. I accept that there will be additional expense in having to prepare and file an opposition and submissions opposing this application, and if the application is granted, continuing this litigation. I also accept that there will have been considerable inconvenience to the Claimant in the lack of progress of this matter caused by the Defendant's delay.
21. Mr Nalyal has indicated what the disadvantage to the Defendant would be if the late filing is not allowed. In his application he relies on rr.1.7(b) (which only relates to gaps in the rules), 1.2 (the overriding objective rule) and 18.2 (which relates only to claims for urgent relief – the extension of time rule in r.18.1 seems more appropriate). The gist of his submission is that the Court should grant this application to enable it to deal with this case justly in terms of r.1.2(1). If the application is not granted, the Defendant would "*not be afforded adequate opportunity to present their case*" and the Defendant's claim that the agreement is not enforceable would not be "*the subject of proper inquiry by this Court.*"
22. It is a mystery to me why the issue of enabling the Court to deal with the case justly only arises 84 days after service of the claim and did not motivate Defendant's counsel to file and serve the defence on time. Unlike the case in *Shing v Tapangararua* [2007] VUSC 75, I have no evidence that the Defendant in this case was personally aware of filing deadlines. Indeed, in his sworn statement of 28 March 2024 he blames Mr Nalyal for the delay.
23. The learned author of *Jenshel's Civil Court Practice* states that "*where a party seeks an extension due to delay or other error on the part of the party's lawyer, the court may be more willing*" to grant an application for leave to file out of time. In *Salter Rex & Co v Ghosh* [1971] 2 QB 597 at 601, Lord Denning said "*we never like a litigant to suffer by the mistake of his lawyers.*" In such situations, if costs are adequate compensation for the delay, then the Court will be more amenable to granting the application, particularly when not doing so risks preventing a party from fully defending a claim that has a real, rather than a fanciful, prospect of success, thereby causing an injustice. Not to grant the application in this case would mean the much more comprehensive "amended defence" would not be considered, paving the way for a summary judgment application (which has been filed) for specific performance of a possibly unenforceable agreement without testing the evidence in a full hearing of the issues.
24. Much as I view Mr Nalyal's inaction for nearly 3 months as inexplicable and inexcusable, I am inclined to grant the application so that his client has the opportunity to fully defend the claim. I am of the view that the "*amended defence*" discloses factual disputes that require a full hearing and which make a summary judgment procedure inappropriate. I am also of the view that an award of costs is adequate compensation for the delay.



**Result**

25. For these reasons, the application for leave to file a defence out of time is granted. The "*amended defence*" is effective as a defence. For the reasons set out in paragraphs 22 and 23 above, the application for summary judgment is declined. Costs in favour of the Claimant are reserved. Today's conference will be used to timetable this matter to trial.

**DATED at Port Vila this 29<sup>th</sup> day of April, 2024  
BY THE COURT**

