IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

CIVIL APPEAL CASE No.12 OF 2010

BETWEEN: **DAVID VUROESE FAMILY AND MANITY JIMMY FAMILY** of Sarakoron Village, South Santo
Appellants

AND: **VARI AVE, KAMI TUVOKE, TAVI MELE, JOHN TIT AND NOEL TIEYA**
First Respondents

AND: **SEREMELE TANOMALUM, BEN JAMI, NAVIRA, LULU TAVUSI MOLI, TELEPOE TAUKA, LAJEMOLI VULESI, KNOE TOA VAKE AND CHIEF SAI VANUA**
Second Respondents

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Nevin Dawson
Hon. Justice Daniel Fatiaki

Counsel: *Mr Colin Bright Leo for the Appellants*
Mr Saling Stephens for the First and Second Respondents

Date of hearing: *9th July 2010*
Date of Judgment: *16th July 2010*

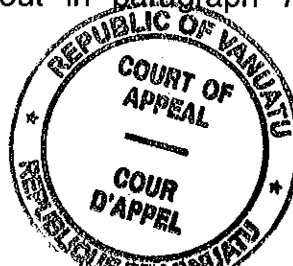
JUDGMENT

This appeal challenges the final Orders made by the Supreme Court on 9th October, 2009 against the Appellants which read:

"(a) The Claimants are entitled to judgement.

(b) The Defendants will pay damages to the Second Claimants in the total sum of VT1,840,010.

(c) The Second Claimants will divide the sum of VT1,840,010 amongst themselves in the manner set out in paragraph 7 of the this judgment.



(d) The Defendants will deliver up vacant possession of Vakaria Land within 30 days from the date of this judgment.

(e) The Defendants by themselves, their servants and agents are hereby restrained from re-entering Vakaria Land after delivery of same to the Claimants.

(f) The Defendants will pay Claimants' costs of and incidental to this action to be agreed, or taxed by the Masters."

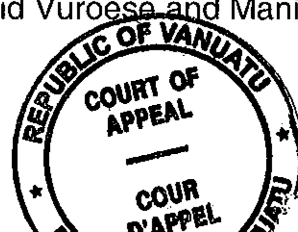
The Supreme Court Claim alleged that the First Respondents (the First Claimants) are the customary owners in possession of various plots within Vakaria Land located in South Santo, and that the Second Respondents (Second Claimants) are residents of the Vakaria Land by licence from the First Respondents. The Appellants (the Defendants) as named in the Supreme Court Claim are "David Voroese Family and Manity Jimmy Family of Sarakoron Village, South Santo".

The claim alleged that the Appellants had trespassed onto the Respondents' land causing vandalism and conversion of the Respondents' property. Although monetary damages were claimed by the Second Respondents counsel explained to this Court that the real purpose of the proceedings was to remove the Appellants' families from the parts of the Vakaria Land which they were occupying.

Four separate issues are raised by the grounds of appeal and were argued in this Court on behalf of the Appellants. We deal with them in turn.

1 - The proceedings were never properly served

We are satisfied that there is no substance in this ground of appeal. Service of the Supreme Court Claim on David Vuroese and Manity Jimmy was established by sworn statement evidence from the process server. The Supreme Court Claim together with 13 sworn statements deposing to the customary ownership of the Vakaria land by the First Respondents, to the licence granted to Second Respondents and to alleged trespasses and damage by members of the Appellants' family were served personally on David Vuroese and Manity Jimmy on



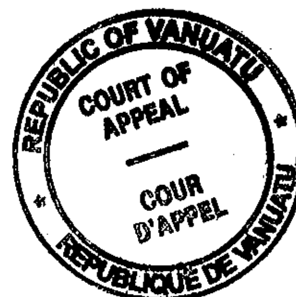
11 May 2008. This service is not disputed, and there is correspondence on the Court file received from David Vuroese and Manity Jimmy which confirmed that they had received the proceedings.

David Vuroese and Manity Jimmy did not file a response or defence to the Claim.

On 17th October, 2008 counsel for the Respondents appeared before the primary Judge in Chambers seeking Directions to prepare the matter for trial. The Judge gave leave to the Respondents to file additional witness statements, extended time for the Appellants to file a defence and sworn statements in response, and set a hearing date on 11 November 2008.

This Order was served on 24th October, 2008 on Chief Uremelo David and Chief Ulia Maniti in Sarakoron Village. The Appellants contend that as the Order of 17th October, 2008 was served on Chiefs other than David Vuroese and Manity Jimmy there was a failure to properly serve the proceedings, and all that followed in the Court should be set aside.

Whilst the Order of 17th October, 2008 was served on other Chiefs in the David Vuroese and Manity Jimmy families, it is clear from comments made by the persons served, as deposed to by the process server, that these people were familiar with the proceedings against their families. Further, the Court received a letter in Bislama signed by "Jif blong Sarakoron Jif Maniti mo David" which directly addressed the substance of the Supreme Court Claim. The letter was dated "18.10.208" but seems to have been written in consequence of receiving the Order dated 17th October, 2008. The letter asked the Supreme Court to order the Respondents to compensate the Appellants families for their agricultural crops and hard work undertaken on Vakaria Land, and said that they were awaiting an agricultural field assistant to value their crops for the Respondents to pay them before the Appellants left Vakaria Land. We are satisfied that David Vuroese and Manity Jimmy received the Supreme Court Claim and were aware of the proceedings as were other members of their families including the two Chiefs who were served with the Order of 17th October, 2008.



As the two named Appellants had not filed a Response or Defence to the Supreme Court Claim after it was served on 11th May, 2008 it was not necessary for the Respondents to get leave to file additional statements by way of evidence to establish their claims. They could have proceeded directly to a hearing and called their evidence to establish their entitlements without further notice to the Appellants. However, paragraph 2 of the Order of 17th October allowed the Appellants further time to file a Defence and sworn statements, and this Order was brought to the attention of their family groups by the service of the Order which occurred on 24th October, 2008. As the Appellants and their families did not respond to the Order by filing a Defence or statements, the Respondents were entitled to proceed with the hearing in their absence and to obtain judgment: See Civil Procedure Rules 9.3 and 9.4 in relation to the award of damages and Civil Procedure Rules 12.9(1) in relation to the Orders for possession.

The complaint about service made to this Court on the Appellants' behalf is not that the families of David Vuroese and Manity Jimmy were included as parties, but that the Order of 17th October, 2008 was served on different chiefs. It is plain from the pleadings in the Supreme Court Claim that David Vuroese and Manity Jimmy were sued as the representatives of their families. Strictly, the Supreme Court Claim should have expressly stated that they were sued as representatives of their families, although this is implicit in the pleadings.

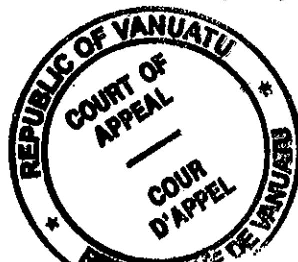
Civil Procedure Rules 3.12 provides:

"3.12 (1) A proceeding may be started and continued by or against one or more persons who have the same interest in the subject-matter of the proceeding as representing all of the person who have the same interest and could have been parties in the proceedings.

(2) At any stage of the proceeding the court may appoint one or more parties named in the proceeding, or another person, to represent, for the proceeding, the persons having the same interest.

(3) When appointing a person who is not a party, the court must also order that the person is to become a party.

(4) An order made in a proceeding against a representative party may be enforced against a person not named as a party only with the court's leave.



(5) *An application for leave to enforce the order must be served on the person against whom enforcement is sought as if the application were a claim."*

Rule 3.12(2) empowers the Court at any stage to appoint a party named in the proceedings to represent persons having the same interest. During argument before us the Court suggested that representative orders should now be made to regularise what is already implicit in the pleadings, and each party agreed that should happen. We shall so order.

2 - If the proceedings were served, the Appellants did not sufficiently understand them.

It was contended that the Appellants are illiterate uneducated people who live in a remote area, and who do not speak English or understand litigation. Counsel argued that the Appellants were not sufficiently aware of their rights. We infer that this Court is being asked to hold that the Appellants have not been properly sued as they are under a legal disability such that they can only sue or be sued through a litigation guardian.

We are unable to accept the factual basis for this argument. The correspondence sent to the Court by the Appellants, and statements made by the parties served with the order of 17th October, 2008 show that the Appellants and their families well understood the nature of the claims, and moreover, said that they would vacate the land when their claim for compensation for their crops had been assessed and paid. In one of their letters they quantify the compensation which they sought.

The hearing of the proceedings in the Court below took place in two parts. The hearing commenced on 10th November, 2008 and was adjourned to enable the Respondents to file written submissions. This did not occur, so the Judge issued an interlocutory Judgment on 20th May, 2009 in favour of the Respondents for damages to be assessed, and adjourned the assessment of damages and the granting of other reliefs to a future date, again to allow the Respondents to file submissions. Ultimately the final Judgment including the Orders now under appeal

was delivered on 9th November, 2009. On 18th May, 2009, just before delivery of the Interlocutory Judgment, Ms Marisan Pierre Vire filed a Notice of Beginning to Act for the Appellants, and she remained as the lawyer on the Court record for them until their present lawyer commenced to act on 7th May, 2010. The inference must be that the Appellants became aware of the Interlocutory Judgment and that they had the benefit of legal advice about its significance, and about the claim generally. The material before the Court does not show that the Appellants are under a legal incapacity.

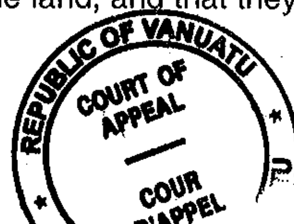
3 - The First Respondents failed to prove they were declared custom owners pursuant to the Customary Lands Tribunal Act [CAP.160].

The Appellants contended that the First Respondents were required to prove that they were the declared custom owners of the Vakaria Land, and as they failed to do so they had no standing to give a licence to the Second Respondents who in turn had no standing to claim damages for trespass. Further, it was contended that neither the First nor the Second Respondents were entitled to an order for possession.

The First Respondents concede that they have no declaration of custom ownership from either an Island Court or a Land Tribunal. However they say their custom ownership of the land is public knowledge, and is known and respected in the location. They gave evidence by sworn statements, and orally, about the custom ownership.

As a matter of law it is not necessary for a plaintiff in a trespass case to prove actual ownership of the land. An action in trespass protects a plaintiff's immediate right to possession. A plaintiff with only a leasehold interest in land, or a licence to occupy land, can bring an action in trespass against someone coming onto the land and using it without his authority. The relevant question is not whether the plaintiff is the owner of the land, but whether the plaintiff's right to possession of the land is superior to that of the defendant.

In this case the uncontradicted evidence before the primary Judge was that the First Respondents were the custom owners of the land, and that they had granted



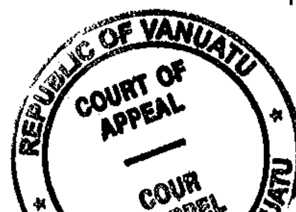
a licence to the Second Respondents to use the land onto which the Appellants had moved. Such a licence need not be a written one. Even a verbal licence would be sufficient. The evidence established the standing of the Respondents to obtain the reliefs claimed.

4 - The persons who caused the trespass damage were not served with the proceedings.

In our opinion, this ground of appeal is made out. Some of the Respondents' statements identify members of the Appellants' families who were said to have caused damage, but those identified persons were not named as Defendants and were not served with the proceedings.

Whilst a group of people can be sued through a representative named to represent them under Rule 3.12, this can only occur where the members of the group have a common interest, and the relief claimed affects their rights in a common way. Whilst the claims against David Vuroese and Manity Jimmy as representatives of their families were possible in respect of the claims for possession of the land, a representative claim cannot include a claim for damages caused by individual members of the group. Claims for damages caused by the conduct of individual members of the group must be brought against those members individually, and they must be specifically named and served. If the claims proceed, judgment would then be given against the named individuals, and the judgments would be capable of being enforced.

There is no suggestion that either David Vuroese or Manity Jimmy personally caused damage to the crops on land farmed by individual members who were named as Second Respondents. The award for an aggregate amount of damages suffered by the Second Respondents is not possible in the representative proceedings, and the award in the Court below is not capable of enforcement against either David Vuroese or Manity Jimmy personally. As the damages award was made against David Vuroese and Manity Jimmy in their representative capacities for the aggregated damages suffered by all the Second Respondents, the award must be set aside. Counsel for the Respondents conceded that the Judgment for damages in the form that it was entered could not be upheld.



The appeal therefore succeeds in this respect but in all other respect it fails. However, as a matter of form we think paragraph (d) of the Order under appeal needs slight amendment so that it accords with the pleadings.

We consider that as the Appellants have been only partially successful in the appeal there should be no order as to costs on the appeal.

The formal Orders of the Court are:

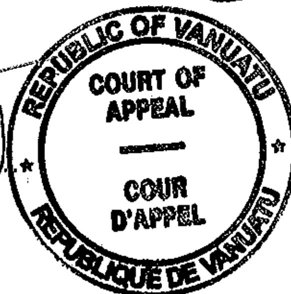
1. David Vuroese and Manity Jimmy are appointed to represent, for the purpose of the proceeding, the members of their families.
2. The appeal is allowed for the purpose of setting aside paragraphs (b) and (c) of the Orders made on 9th October, 2009.
3. Paragraph (d) of the Order made on 9th October, 2009 is varied to read: *"The Defendants will deliver up vacant possession of those plots of the Vakaria Land occupied by them on 6th May 2008 (the date of the Supreme Court Claim) within 30 days of the date of the Order."*
4. The appeal is otherwise dismissed.
5. No order as to costs on this appeal.

DATED at Port-Vila this 16th day of July 2010

BY THE COURT

Chief Justice Vincent LUNABEK

Justice John von DOUSSA



Justice Ronald Young

Justice Nevin DAWSON

Justice Daniel FATIAKI