

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

Civil Appeal Case No.51 of 2012
Civil Appeal Case No. 13 of 2013

BETWEEN: CHIEF TAPUAKOROLIU KALMETABIL NMAK and
JOHN KALUAT representative of Kalomtak of Erakor
Village, South Efate
First Appellants

AND: FAMILY KALMERMER & OTHERS
First Respondents

AND: JEAN FERRARI and ANNA FERRARI and ANTONY
FERRARY
First Respondents

AND: STÉLLA MARE LIMITED
Second Respondent

AND: SEAVIEW HOLDINGS LIMITED
Third Respondent

AND: MINISTER OF LANDS, GEOLOGY & MINES
Fourth Respondent

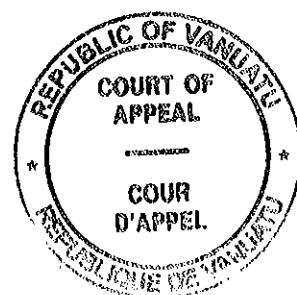
AND: DIRECTOR OF LANDS
Fifth Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver A. Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Mary Sey

Counsel: Mr. G. Nakou for the First Appellants
Second Appellants – no appearance
Mr. K. Loughman for the First and Second Respondents
Mr. R. T. Kapapa for the Third Respondent
Mr. T. Loughman for the Fourth and Fifth Respondents
Mr. F. Laumae for Kalmet Family

Date of Hearing: 19 April 2013

Date of Decision: 26 April 2013

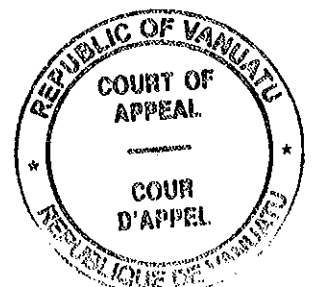


JUDGMENT

1. Argument on these two civil appeals has raised an important issue about the meaning, scope and application of Rule 3.12 of the Civil Procedure Rules, No. 49 of 2002.

Background

2. The first appellant has filed two notices of appeal which challenge a succession of orders made in the Supreme Court on 13th November 2012, 17th December 2012 and 4th March 2013. The first two orders are interlocutory and an appeal from them requires leave. The challenge to these orders is the subject of Civil Appeal Case No. 51 of 2012. The order of 4th March 2013 purported to strike out the substantive proceedings in the Supreme Court in their entirety. The notice of appeal was filed out of time and requires leave to extend time. The challenge to the order of 4th March 2013 is subject of Civil Appeal Case No. 13 of 2013. The first appellant seeks the necessary leave in each instance from this Court.
3. The substantive proceedings, Civil Case No. 142 of 2012, were commenced by the first appellants against the parties named as respondents in this appeal. The proceedings concern custom land known as Bouffa/Bellevue custom land (the land). The first appellants claim to be persons who are included in the custom ownership group. Custom ownership of the land is disputed and the resolution of that dispute remains before various courts. The pleadings in the Supreme Court say that the claim is brought on behalf of the custom owners of the land, whoever they are, to preserve the rights of the custom owners in the circumstances pleaded in the claim and enlarged upon in the application for leave to appeal in Civil Appeal Case No. 51 of 2012. Those circumstances are:
 - On 22nd September 1997 the Minister of Lands, acting under section 8 of the Land Reform Act granted the principal lease 12/0921/106 (Lease 106) over the land to the first and second respondents. This transaction is said to be a "*massive sale of land*" and one that occurred without payment of the full value of the land. The grant of Lease 106 and its registration are pleaded to be in consequence of fraud or mistake on the part of the fourth and fifth respondents such that the lease should be set aside and the register rectified under section 100 of the Land Leases Act;
 - On or about 1st August 2008 Lease 106 was surrendered by the first and second respondents and a number of new leases issued included lease 12/0921/263 (Lease 263) to the third respondent as lessee. It is



pleaded that the third respondent acquired Lease 263 and its registration with notice of the facts which constituted the fraud or mistake of the fourth and fifth respondents leading to the impugned registration of Lease 106. Hence, in Civil Case 142 of 2012 it is alleged that the registration of Lease 263 should be cancelled. It is further alleged that the third respondent failed to pay to the custom owners the full value of the land the subject of that lease, and a claim is made for unpaid value VT10,200,000. The claim seeks an order that this sum be paid into Court or into a trust for the benefit of the true custom owners;

- Other new titles issued on the surrender of Lease 106 to parties other than the third respondent which are the subject to parallel proceedings in Civil Cases 160 of 2012, 168 of 2012 and 170 of 2012. The Court was informed that numerous other new leases have been or are to be issued where the issues raised in Civil Case 142 of 2012 by the first appellants are likely to arise.
4. It is apparent from these proceedings that the first appellants by their claim are seeking to protect the common interest of all the custom owners, whoever they are eventually held to be.

The Decisions under challenge

5. After issuing the substantive proceedings in the matters before the Supreme Court the first appellant sought an order of the court under sub-Rule (1) and (2) of Rule 3.12 authorising them to bring the actions in a representative capacity.

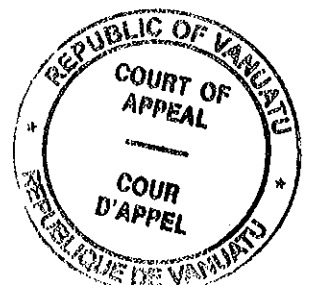
6. Rule 3.12 in its entirety reads:

"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 persons who have the same interest and could have been parties in the proceeding.

(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.

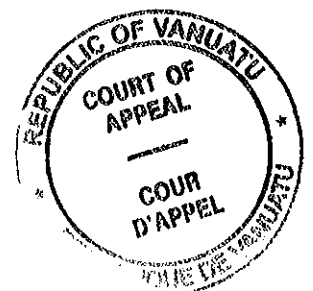
(4) An order made in a proceeding against a representative



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."

7. The sworn statement of the first named first appellant, Denny Sakarie, who seeks to use the title Chief Tapoakoriliu Kalmetabil Nmak in the proceedings, deposes as to his standing as chief of Erakor village and his chain of title claimed through various land claim proceedings and chiefly title proceedings past or continuing in the court. He asserts that the status gained in these ways entitles him in custom to represent the custom owners. Additionally he relies on Rule 3.12 as authority for one or more persons (being himself and his fellow first appellant) to initiate proceedings in a representative capacity for and on behalf of all persons who have the same interest in the subject matter.
8. The judge below on 13th November 2012 dismissed the application and made the following orders:
 - "1. The First Applicants application for orders that Chief Tapuakoroliu and John Kaluat bring action in a representative capacity or maintain this action in a representative capacity is dismissed.*
 - 2. The Respondents are entitled to their costs on a standard basis to be taxed failing agreement.*
 - 3. These orders are consequential to Civil Case No. 160 of 2012, Civil Case No. 168 of 2012 and Civil Case 170 of 2012.*
 - 4. All these proceedings are adjourned to 3.30 pm on 17th December 2012.*
 - 5. The parties are given liberty to file any further applications before the next conference."*
9. In written reasons later given, the judge said that the Nmak chiefly title on which Denny Sakarie relies was still before the courts for final determination, and that the area of land in question is still subject to pending cases including Land Appeal Case No. 71 of 2006. He said that the first appellants are not parties to Land Appeal Case No. 71 of 2006 and therefore could not be declared to be custom owners. Moreover he considered the substantive proceedings in the Supreme Court were

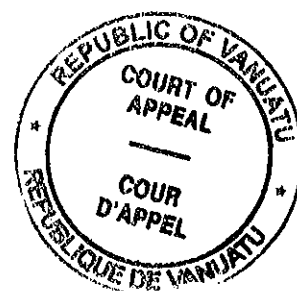


premature until the outstanding court cases concerning title and custom ownership were finished.

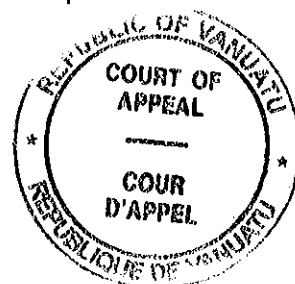
10. Sworn statements and submissions by the parties before this Court disclose that there are nine disputing parties involved in LAC 71 of 2006, and that there are other proceedings including Land Claim No. 1 of 1995 and a pending review of the decision in that matter which, potentially at least, can substantiate that the first appellants have an interest in the land as custom owners. Before this Court no party asserted that there was no potential for the first appellants to be held to be persons within the true custom ownership group.
11. Before the further conference which the judge had listed for 17 December 2012 the first appellants without leave filed a notice of appeal against the interlocutory orders made on 13th November 2012. The judge considered the notice of appeal issued without leave to be a nullity and further adjourned the conference to 4th March 2012 with a direction that the first appellants file a proper application for leave to appeal by 15th February 2013. However when the further conference took place on 4th March 2013 no application for leave to appeal had been filed. The first and second respondents sought to have the substantive claim dismissed as there was no basis for the first appellants to bring the proceedings once they had been refused leave to bring them in a representative capacity. The judge agreed, and made orders striking out Civil Case 142 of 2012 and the parallel cases Civil Case 160 of 2012, 168 of 2012 and Civil Case 170 of 2012. This order is now the subject of Civil Appeal Case No. 13 of 2012.

Discussion

12. At the outset, we observe that the status of the persons named as "*second appellants*" (second claimants in the substantial proceedings) has not been considered in the orders under challenge. Counsel for the first appellants acknowledge to this Court that he does not act for them, but that he included them in the proceedings as they were parties in the Land Case No. 1 of 1995 and for this reason have an interest in the proceedings. No lawyer has represented the second appellants at any stage in the proceedings. If, the people identified as second appellants have an interest as custom owners, we cannot understand why it was necessary to name them at all if the first appellants are to represent the interest of all custom owners. If it were the case that although they are custom owners they have some commercial or other interest which differentiates their attitude to the proceedings from that of the first appellants, the correct procedure would have been for the first appellants to name them as defendants/respondents not as claimants/appellants. However nothing in the matter now before this Court turns on the second appellants being included as parties.

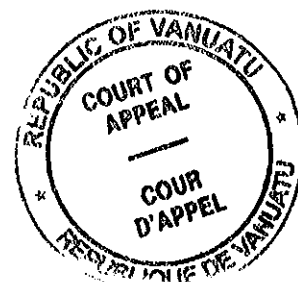


13. The effect of the orders now under challenge has been to restrict the legal capacity of the first appellants to raise before the Supreme Court the matters of concern to custom owners about the grant and registration of Lease 106 and all the derivative transactions that have followed. Before this Court Mr. Laumae appeared with leave of the Court for the Kalmat Family who are not named as a party in the proceedings but who in other land claim proceedings claim to be custom owners of land within the area the subject of Civil Case No. 142 of 2012. Although Mr. Laumae's clients dispute the first appellants' status to bring these substantive proceedings in the Supreme Court, they apparently share the view that Lease 106 was granted without payment of full value and improperly registered. In other words they have the same interest in the subject matter of the dispute as the first appellants.
14. If there is substance in the allegations made in the pleadings in Civil Case 142 of 2012 it will be a matter of concern to custom owners whoever they are. The longer the dispute remains unresolved, the more complex will be the ultimate litigation necessary to resolve it. In the meantime a very large sub-division of land will continue. New leases or sub-leases will issue. Difficult questions are likely to arise in later proceedings challenging those leases or sub-leases about the application of section 100 (2) of the Land Leases Act which protects lessees' interests where the lessees are bona fide purchasers for value.
15. Civil Case No. 142 of 2012 and the parallel proceedings in respect of different leases derived from the surrender of Lease 106 were intended to get the dispute about Lease 106 before the Court for resolution without further delay. The orders now under challenge prevent the proceedings advancing this purpose. In short, Rule 3.12 has been applied so as to be an obstacle to the earlier resolution of a dispute that is of major importance to a wide group of people including custom owners, developers, ultimate purchasers of the new leases, and the fourth and fifth respondents.
16. In our opinion the purpose of Rule 3.12 is to facilitate the resolution of disputes, not to provide a procedural obstacle to bringing proceedings before the Court. Sub-rule 1 stands as an independent power enabling one or more people in a representative capacity to commence proceedings and thereafter continue them to have a dispute resolved by the Court where that dispute involves a matter in respect of which many people share a common interest.
17. The commencement of the proceedings submits the dispute to the processes of the Court. If other people claim to have a different or competing claim to the legal interest the subject matter of the proceedings they can seek leave from the Court to intervene either as a party or otherwise so that their position is duly considered. However, the assertion of a different or conflicting interest does not prevent the person or persons



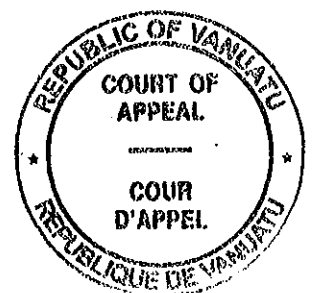
who commence the proceedings under Rule 3.12.1 from maintaining the action. If it is ultimately held by the Court that the persons who brought the representative action are not within the group of people who hold the common interest before the Court, the Court will substitute as claimants someone who is within the group, and if necessary invoke Rule 3.12.2 to make an order that another person represented the true custom owners.

18. Sub-rule 3.12.2 operates according to its terms and is not to be read as a limitation on the wide words of Rule 3.12.1. Proceedings can be commenced under Rule 3.12.1 by a person without an order under Rule 3.12.2. The words of Rule 3.12.2 recognize this.
19. Rule 3.12.2 provides an independent power for the Court to appoint a person to represent others who have the same interest where it is necessary to do so to enable the proceedings to go ahead. For example, in probate matters if an adult person claims personal property rights as one of the issue of the deceased, the Court can apply Rule 3.12.2 if there are infants who have similar interests to appoint someone to represent them. In proceedings involving liquidation of companies, or involving enforcement of deeds of trust, Rule 3.12.2 may be used by the Court to appoint a person to represent a group of creditors or beneficiaries who have the same interest in the question before the Court. In this way Rule 3.12.2 enable the Court to make orders that facilitate the purpose of the proceedings by ensuring that all persons who have a common interest in the matter before the Court are bound by the decision.
20. In the present case, for example, if Mr. Laumae's clients were to seek to be joined in the proceedings because they contend that their interest as custom owners would not be the same as the custom owner interests asserted by the first appellants, or because they wish to argue for a different remedy to enforce the same interest, the Court under Rule 3.12.2 could appoint one or more persons from within the Kalmet Family to represent all those people who take that different position.
21. In our opinion there was no need for the first appellants to obtain an order under Rule 3.12 enabling them to commence proceedings in a representative capacity, and once commenced the proceedings should have advanced under the Civil Procedure Rule without preliminary consideration of Rule 3.12.
22. In the court below the sworn statements filed by the first appellants which unnecessarily sought an order under Rule 3.12 led counsel and the judge to focus on the merits of the claim for chiefly title by Danny Sakarie and on the stage reached in the land cases. These considerations, as well as the application for an order under Rule 3.12.2 were irrelevant, and unfortunately led to the order being made on 13th November 2012 which wrongly denied



the capacity of the first appellants to commence and maintain Civil Case 142 of 2012 and the other parallel cases.

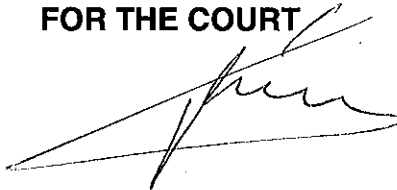
23. The order of 13th November 2012 led on to the subsequent orders of 17th December 2012 and to the ultimate order of 4th March 2013 which dismissed the civil claims.
24. We consider that leave to appeal against the interlocutory orders of 17th November 2012 and 17th December 2012 should be given and that time to appeal against the orders of 4th March 2013 should be granted. The appeals against each of these orders should be allowed. In this way the civil claims can proceed and the underlying allegation about the grant and registration of Lease 106, and the derivative leases arising from its surrender, will remain before the Court.
25. However as counsel for the parties before this Court emphasized, the ultimate award of remedies in the civil proceedings will depend on the Court being able to identify the true custom owners in whose favour the award should be made, or if the case fails against whom other orders should be made. Counsel agreed that if the appeals were to be allowed, further interlocutory applications in Civil Case 142 of 2012 (and presumably in the parallel proceedings) should continue, including, if necessary, applications by other parties seeking to intervene and applications by the appellants or others to secure the potential fruits of the proceedings. However the trial of the merits of the substantive claims made by the first appellants should be stayed pending the resolution of Land Appeal Case 71 of 2006.
26. The remaining issue concerns the costs of these appeals. On the one hand the matters before this Court had their origins in an unnecessary application brought by the first appellants. On the other hand the respondents encouraged the judge below to make the orders which he did. In all the circumstances we conclude that there should be no orders for costs for or against any party to the appeals.
27. The formal orders of the Court will be:
 1. Leave to appeal against the interlocutory orders made on 13th November 2012 and 17th December 2012 are granted;
 2. Time to appeal against the order dated 4th March 2013 extended to 15th April 2013 when the Notice of Appeal was filed;
 3. The appeals against the orders dated 13th November 2012, 17th December 2012 and 4th March 2013 are allowed;
 4. Civil Claims 142 of 2012, 160 of 2012, 168 of 2012 and 170 of 2012 are re-instated;



5. Trial of the merits of the substantive claims in Civil Cases 142 of 2012, 160 of 2012, 168 of 2012 and 170 of 2012 is stayed until the determination of Land Appeal Case 71 of 2006 or until further order of this Court;
6. No orders as to costs.

DATED at Port Vila, this 26th day of April, 2013.

FOR THE COURT



Hon. Vincent LUNABEK
Chief Justice.

