

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

Civil Appeal Case No. 21 of 2014

BETWEEN: JAMES ARU
Appellant

AND: JIMMY VIRA
First Respondent

AND: REPUBLIC OF VANUATU
Second Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Mary Sey
Hon. Justice Stephen Harrop*

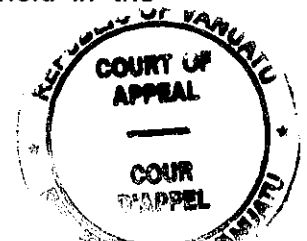
Counsel: *Marisan Vire for the Appellant
George Boar for the First Respondent
Kent Ture Tari for the Second Respondent*

Date of Hearing: 14 July, 2014

Date of Judgment: 25 July 2014

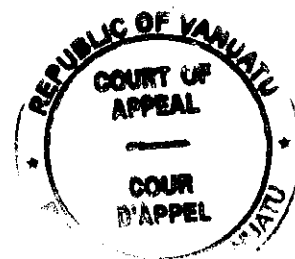
MEMORANDUM

1. The matter comes before us today as an application by James Aru for a stay to prevent the Republic from paying the money that it is presently holding in respect of the grant of a lease interest made by the Minister under Section 8 of the Land Reform Act [CAP. 123].
2. The application has been precipitated by orders made by Justice Saksak on 11 July 2014. He was asked to consider two applications. One by Mr. Boar's client, Jimmy Vira and those he represents and the other by James Aru. Jimmy Vira was seeking an order, in effect, which compelled the Republic to pay to him for the benefit of those he represented, all the monies that are presently held in the



Customary Land owners Trust Account for the benefit of the custom owners of "Belbura" land (*the COTA money*). The application by James Aru on the other hand, was to stay the order directing payment pending the determination of an appeal which James Aru had filed in respect of the judgment given sometime earlier by Justice Saksak in Civil Case No. 35 of 2011.

3. The two applications that were before the judge sought diametrically opposed orders. The learned judge was informed that counsel for James Aru could not be present in Port Vila because of difficulties with transport. Accordingly, the judge adjourned the application made by James Aru for a stay. He then proceeded to deal with the application by Jimmy Vira and made the order directing the Republic to pay out the COTA money to Jimmy Vira
4. With the greatest of respect to the judge there is a problem with the way in which he dealt with the competing applications, because, unless he determined the application by James Aru he could not, in reality, determine the application by Jimmy Vira. Either one application or the other was to succeed. He could not have one succeeding and the other one left pending determination. It seems to us that the orders made by the judge need to be revisited by this Court.
5. It is plainly within the jurisdiction of this Court to deal with an application by an appellant in the appeal who seeks an order preserving the subject matter of the appeal. That is exactly what James Aru was trying to do in the Supreme Court. We have difficulty following the argument that was put to us by counsel for Jimmy Vira, to the effect that James Aru does not have standing to make such an application. In our opinion, plainly there is standing for either party to the disputed funds, to seek orders either restraining payment or directing payment.
6. We are of the opinion that this is a case where the overwhelming justice of the matter requires that there be an order restraining the Republic from paying out the money which it presently holds. We are satisfied from the submissions we heard today that there is a live and real issue to be heard in the underlying appeal from

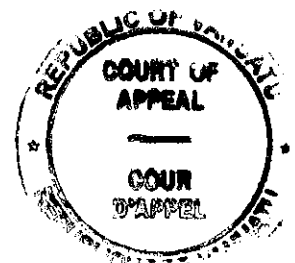


the judgment of Justice Saksak as to who is or are the custom owners entitled to that money.

7. Until that appeal is resolved the money should be retained by the Republic. Accordingly we make an order staying the payment of the COTA money by the Republic to either of the disputing parties until the underlying appeal is determined.
8. We mentioned to Mr. K. Tari who appears for the Republic, in the course of argument, that steps should be taken by the Republic to ensure that this money is invested in a way that earns interest. Whatever the internal mechanisms of the Finance Department and financial management legislation might be, the reality is that this Court has the power to order payment of interest in addition to the principal sum. Therefore in its own interest the Republic should be taking steps to ensure that interest is being earned which can be eventually passed on to the declared custom owner.
9. An issue which has caused us concern is whether we should be taking steps to have the hearing of the appeal expedited. Justice Saksak has already made an order in the review of the proposed appeal, adjourning the matter to the November session of the Court of Appeal. Mr. Boar is concerned that delays of that magnitude may adversely affect the ability of the custom owners, whoever they turn out to be, to negotiate the best terms of a proposed subdivision. We are conscious of the commercial interests that lie behind that concern and, if it were possible to expedite the appeal, we would be disposed to do so.
10. However, having heard the parties we are of the view that the appeal raises some complicated issues and will require a considerable amount of papers to be filed so that the Court can analyze and determine the real issues in dispute. To that end it seems to us that the preparation of the material for the appeal needs to be closely managed and this is a case where it is appropriate to make some unusually detailed orders about the management of the appeal.



11. We direct that James Aru in the first instance files an appeal book containing all the documents that he considers necessary for the proper determination of the appeal within 21 days. We further direct that Mr. Boar's client and the Second Respondent, the Republic, within 14 days thereafter file, if necessary, a supplementary appeal book adding any other materials which either of them thinks necessary to determine the issues in the appeal.
12. Following those two periods of 21 days and 14 days the review judge, who will be the Chief Justice, will list the matter to consider whether the papers are sufficient for a decision to be made on the issues that we have heard about today.
13. By way of assistance to counsel, it seems to us that the appeal papers will need to include the originating proceedings and pleadings in relation to the underlying case No. 35 of 2011. There may well be statements that need to go with that and obviously there will be the judgment of Justice Saksak determining that particular case i.e. the judgment given in June 2014. Then it will be necessary for the papers to include not only the decisions of the village tribunal and the area land tribunal but the application(s) that initiated those proceedings and the supporting documents that served to identify to each of those tribunals the issues which the tribunals were meant to determine.
14. Those papers are necessary so that the Court can consider the arguments that one or other of the tribunals did not adequately consider issues that should have been considered to determine custom ownership and including, in that exercise, issues about the custom adoption of James Aru. As it will obviously take time to get all those necessary papers together, it seems to us quite impossible to try and list the appeal next week and we abandoned any further thought of doing so.
15. We publish this memorandum which sets out directions to the parties which are intended to have this matter ready for a hearing in November or thereabout to determine the appeal and hopefully, to finally resolve the issues as to the custom ownership of the disputed land.

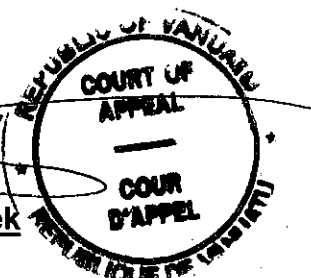



16. In the meantime there will be an order staying the order made in favour of Mr. Boar's client directing the Republic to pay out the disputed money and an order staying the payment by the Republic to any other party of the disputed monies pending resolution of the appeal.

17. In addition there will be a direction to the parties that when they file their appeal books they should also include their submissions on the applicability or otherwise of the new Custom Land Management Act No. 33 of 2013, to the issues involved in these proceedings. By way of comment none of us has had the opportunity to very closely examine the application of the provisions of that Act but it may be that some of the issues that are still perhaps unresolved by the tribunals would fall to be determined by an entirely different process and, of course, the sooner that is identified the better for everyone.

18. So far as the costs of today are concerned, those costs should be reserved to be determined when the appeal is determined.

FOR THE COURT



Hon. Vincent Lunabek
Chief Justice.