

BETWEEN: TOM HIWA
Appellant

AND: FAMILY NOLAN NIATGEI, FAMILY MOUKAIH,
FAMILY HIWA APENG, FAMILY NAUKA NIMISA
AND FAMILY YALULU REPRESENTED BY STEVE
DAN OF TANNA ISLAND
First Respondent

AND: THE REPUBLIC OF VANUATU
Second Respondent

Date of Hearing 7 August, 2024

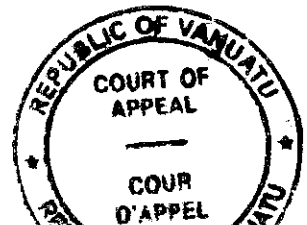
Coram: Hon. Chief Justice V. Lunabek
Hon. Justice J. Mansfield
Hon. Justice R. Young
Hon. Justice D. Aru
Hon. Justice V. M. Trief
Hon. Justice E. P. Goldsbrough

In Attendance: Fiuka, P. for the Appellant
Nari, M.G. for the First Respondent
Huri, L. for the Second Respondent

Date of Decision: 16 August, 2024

JUDGMENT OF THE COURT

1. The Supreme Court published a decision on 11 June 2024, finally determining a claim filed in September 2021 in favour of the claimants, now the first Respondents to this appeal.
2. The claim alleges that a lease Title No 14/2412/016 was irregularly issued in favour of the 1st defendant, now the Appellant, and should be cancelled on the grounds of fraud and/or mistake. It was issued, as the 1st Respondent asserts, at a time when there was a matter pending in the

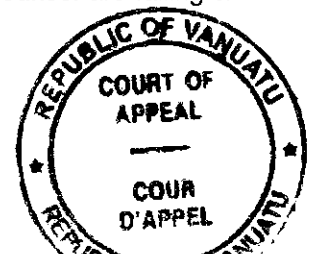


Supreme Court against a custom ownership decision of the Tanna Island Court and when a stay order was in force pending that Supreme Court decision.

3. The matter was listed for trial on 31 October 2022 and 23 February 2023. A trial invoice was issued on 6 October 2022. In an email of 4 October 2022, counsel Mrs. Nari made the first suggestion that the matter could be heard following the filing of evidence and based on submissions. That, presumably, was suggested given the difficulty of getting all the witnesses and counsel together in one place for a full hearing.
4. Clearly, the judge did not accept Mrs Nari's suggestion, as he thereafter set the matter down for trial, not once but twice. It seems that he was eventually persuaded to adopt that course following an intervention by counsel for the Republic, who raised the question of standing of the 1st Respondents to bring such a claim as a preliminary issue.
5. That preliminary question of standing was set down for determination on 30 June 2023. There was a further hearing on 23 September 2023, and a written decision was published on 11 June 2024. As the judge said in paragraph 12 of his decision: -

"Whilst the Court was asked by Mr Aron on 30th June 2023 to consider only the preliminary issue of standing of the claimants on the papers, the information before me by way of sworn statements filed by the claimants and first defendant permit the determination of the other issues involving fraud and or mistake as well on the papers."

6. The judge may have been led to consider the merits of the substantive claim by the earlier suggestion from Mrs Nari in her email of 4 October 2022, the fact that no counsel had filed a notice to cross-examine any witness and the expressed difficulty at the time of the claimants attending a hearing in Port Vila. We do not accept the submission of counsel for the Appellant or the Respondents that they were but passive participants in the mode of hearing.
7. The judge considered the question of standing of the claimants (1st Respondents) and decided that they had standing. He was able to do so because he only had to consider their allegations as to facts and not to decide any disputed question of facts. There is no appeal from that decision.
8. Regardless of that, we disagree with the judge's conclusion that the "other issues" could be properly determined on the papers. The matter involves disputed questions of fact, as shown in the defence filed on 17th May 2022. They cannot be determined by reading sworn statements. In allowing contested material to be admitted without any attempt at cross-examination, counsel are failing to



act in their client's best interest and failing to comply with the rule set out in *Browne v Dunn* (1893) 6 R 67 H.L.

9. It is worth noting that counsel for the Republic, who first raised the issue of standing, failed to submit any submission on that very question.
10. For the reasons set out above, the Supreme Court's decision published on 24 June 2024 cannot stand and is hereby quashed. The matter is remitted to the Supreme Court for a trial on the issues to take place. Given the circumstances, no order for costs is made on this appeal.

DATED at Port Vila this 16th day of August, 2024.

BY THE COURT



Hon. Chief Justice Vincent Lunabek

