

IN THE MATTER OF: The Malekula Island Court Judgment dated 26th
November 1993.

And

IN THE MATTER OF: The Constitution of the Republic of Vanuatu

BETWEEN: KALRONG KALWATSIN

Claimant

AND: ESAU WILLIE

Respondent

Coram: Mr Justice Oliver A. Saksak
Mrs Anita Simon - Clerk

Counsel: Mr Saling N. Stephens for the Claimant
The Defendant appearing in person unrepresented.

Date of Hearing: 25th August 2004 at Lakatoro, Malekula

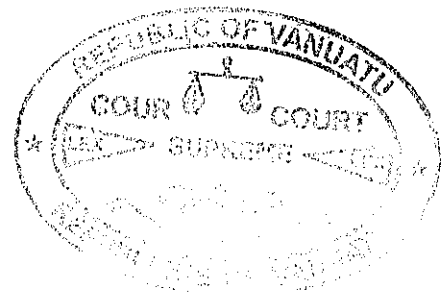
Date of Judgment: 12th November 2004 at Luganville, Santo

JUDGMENT

Background and Reliefs Sought

The Claimant proceeded against the defendant by way of an originating summons under the old rules. He sought the following reliefs -

- "1. For a declaration that the defendant only acted in as representative capacity in the Island Court Judgment dated 26th November 1993 and not on his own accord.
2. In the alternative, that the land being the subject of the Island Court Judgment is land owned in custom by Thomas and his live blood descendants.
3. That the defendant has never been declared the custom owner and/or sole custom owner of the subject land.



4. That the defendant cannot in law compromise with chief Persi Timothy who is a party in the island Court case to have joint exclusive ownership of the subject land.
5. For such further or other relief as shall be just.
6. That the defendant may be ordered to pay the costs of this application."

Burden of Proof

The general principle is that he who asserts a fact must prove it by relevant and admissible evidence. In Civil Cases, the balance of proof is on the balance of probabilities.

Evidence

On 25th August 2004 the Court heard oral evidence. From the Claimant's side, Kalrong Kalwatsin himself and his aunt, Lekolan Gongi.

On the defendant's side, Donel Malingmen and George Cain. All the witnesses were cross-examined by either party.

Issues

1. Whether Defendant acted in a representative capacity in the Island Court?

The Claimant did not call any evidence from the Island Court Clerk or a chief who presided as a justice of the Court to confirm his allegation. In his sworn statement Exhibit P1, the Claimant annexes as "B" a copy of the Judgment of the Island Court dated 26th November, 1993. It is headed "LAND CASE No. 02/93". It states clearly that it is -

"BETWEEN: ESAU WILLIE
(Plaintiff)

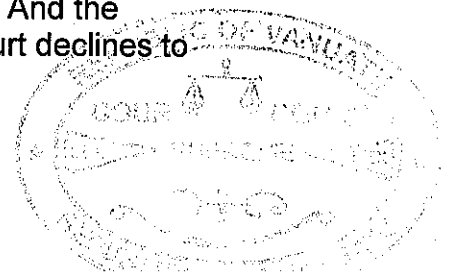
AND: CHIEF BERSI TIMOTHY
(Defendant)"

In his oral evidence, the Claimant confirmed this. I am therefore not satisfied that the Defendant acted in a representative capacity.

Therefore the declaration sought by the Claimant is declined.

2. Whether the land in question is owned by Thomas and his lifeblood descendants?

This Court does not have original jurisdiction to determine issue as to ownership of land. It only has appellate jurisdiction. And the Claimant's case is not an appeal. Therefore the Court declines to make the declaration sought by the claimant.



3. Whether the defendant has been declared custom – owner and/or sole custom-owner?

Again for the same reason as in (2) above, this Court declines to make the declaration sought.

4. Whether the defendant can compromise with Chief Persi Timothy?

Again for the same reason as in (2) and (3) above, the Court declines to make the declaration sought.

Findings

I have in writing this judgment, given considerations to the evidence of the claimant and of his witness. They do not lend any assistance to his case to the extent that they are not relevant to the issues before the Court. I have also considered the matters submitted by Counsel but with respect, reject them as not relevant to the issues raised for the Court to determine.

I have also considered the defendant's written submissions. The outcome of this judgment reflects those submissions.


Conclusions and Orders

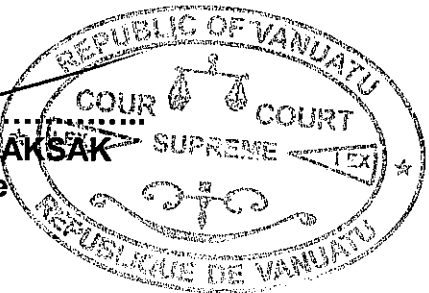
My view is that the Claimant's proceedings is an abuse of process. Accordingly all declarations sought are declined. The originating summons is dismissed.

I order that the Claimant pays the defendant's costs of and incidental to successfully defending himself in this proceedings.

DATED at Luganville this 12th day of November, 2004.

BY THE COURT


.....
OLIVER A. SAKSAK
Judge



The seal is circular with the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom. In the center, it says "COUR SUPREME" and "COURT SUPREME" with a scale of justice and a star.