

BETWEEN: GRAYLINE SILAS of Bombua
Area, Santo.

Claimant

AND: KEN & JEANNE JOEL of Big
Bay Area, Santo.

Defendant.

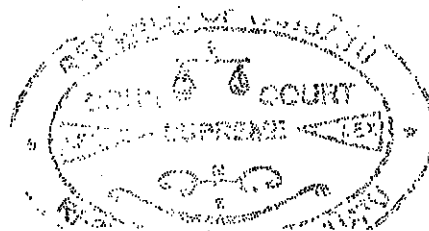
Mr Justice Oliver A. Saksak
Mrs Mandeng John - Clerk

Mrs Marisan P. Vire for the Claimant
The Defendants in persons.

Date of Hearing: 22 May 2009
Date of Oral Judgment: 28 May 2009.

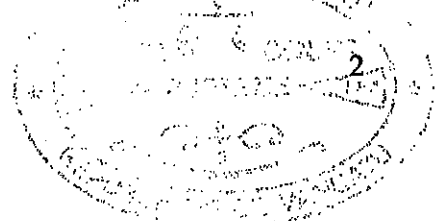
ORAL JUDGMENT

1. Grayline Silas, claimant applied to this Court by way of a Supreme Court Claim filed on 1st October 2008 seeking the following orders –
 - (a) That the Defendants deliver up possession of Benny David to the Claimant,
 - (b) That the Police in Luganville ensure the child Benny David is returned safely to the Claimant,
 - (c) That the Defendants pay the Claimant's traveling expenses of VT20.000,
 - (d) That the Defendants pay VT200.000 as damages for emotional stress,



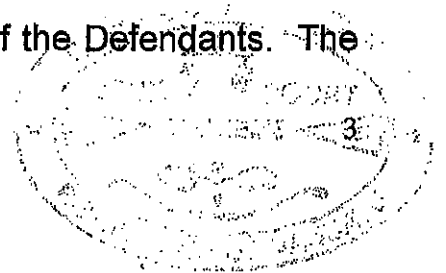
- (e) That the Defendants pay the costs of the proceedings,
- (f) The Court issues any other orders as deemed fit.

2. The Defendants responded to the Claim after service through the Public Solicitor's Office indicating they would dispute part of the claim. They filed a statement of defence and counter-claim on 13 November 2008. They counter-claimed for the sum of VT229.000 with interests of 12% pre annum, and costs.
3. The Defendants filed some sworn statements in response on 8 December 2008. They filed some witness statements on 31st March 2009 from Jean, Jino Bae and Bernadette.
4. Mr Nathan, Counsel filed a notice to cross-examine the Claimant and her witnesses on 18 May 2009.
5. The Claimant filed a further sworn statement and a further further sworn statement on 2nd March 2009 exhibited as C2 and C3. Her sworn statement of 1st October 2008 was tendered as exhibit C1. And that was the evidence before the Court.
6. The matter became difficult at the hearing on 22nd May because the Defendants had failed to pay their trial fees and therefore the Court excluded them from the trial hearing. Further as the Defendants did not pay the filing fees in respect of their counter-claim, the Court struck out their counter-claim. Their defence and sworn statements



however stand but in the absence of cross-examination the Court will not place much weight on those evidence.

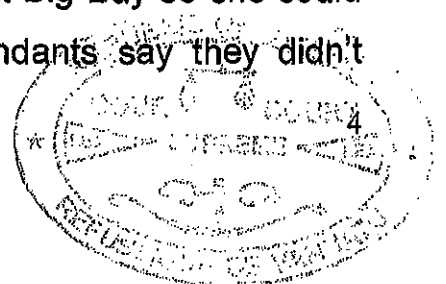
7. This is a civil matter and the claimant is required to prove her claims on the balance of probabilities. That is the required standard in civil cases.
8. This case concerns and involves a male child whom the Claimant claims is hers. That is not in dispute. The child is now in the custody and care of the defendants and the Claimant now wants her child back. The child, from the evidence passed into the Defendants' care since September 2006. In the Defendants' defence they assert there were some discussions made between the Claimant and the Defendants about adoption. As a result therefore the Defendants have kept the child Benny David since then to date.
9. The Claimant however denies there were no such arrangement or discussions about adoption. Her evidence was that she only allowed Benny David to remain with Jeanne Joel for two (2) weeks to enable her to go to Malo and upon her return, she would take Benny back. She also asserted she never consented to any adoption of Benny. Those are the background facts.
10. Benny David has been living in the care of the Defendants for almost four (4) years now. He was just one year in 2006 when he was placed into the hands of the Defendants. The



Defendants assert there was adoption. The Claimant denies it. But adoption is not the issue. The fact and reality is that the child Benny is in the custody of the Defendants and he has been in their custody for over 3 years now. So the issue is whether the Court should order the return of the child.

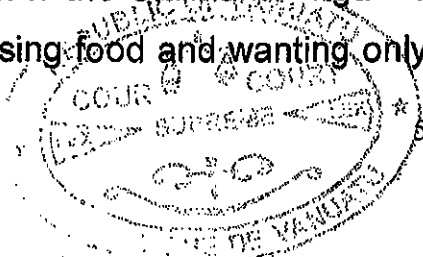
11. There is no dispute that the Claimant is the mother of the child. During the course of the proceeding the Claimant has been appearing and prosecuting her claims without her husband who she named as Silas. When the Court enquired as to why her husband was not supporting her with her case, the answer given was that he felt the case did not concern him and therefore he did not feel he was part of the case.

12. The circumstances around the meeting and handing over of the child Benny is still not clear to the court. The Claimant asserts she and her children were on their way to Malo and were waiting for transport to Naoneban point. In her evidence she said she is from Malekula. The Court asks what connection does she have with Malo? One of the witnesses statement in support of the defence states the Claimant had told him they had come down from Nambauk that day. In her evidence she said she and her family live at Bombua. Where exactly was the Claimant living at the time is not clear from these conflicting evidence. Further if she had gone to Malo, when did she return? And when she returned and found out the Defendants were no longer at BP Burn, how did she know they were at Big Bay so she could follow them there, when the Defendants say they didn't



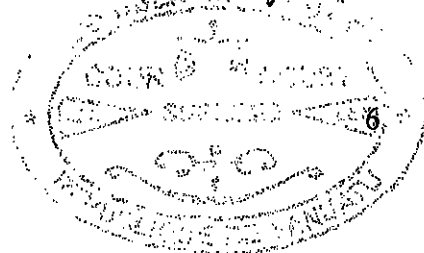
know who she is? These cast doubt on the credibility of the Claimant's evidence.

13. If the Claimant is interested to have Benny returned to her, would she be caring for Benny by herself or with her husband as well? Why has Silas not made a statement to show that he is willing for the child to be returned and that he would support the Claimant in caring and maintaining him. They have three children including Benny. But both are unemployed.
14. In cases involving children or minors, the Court is concerned mainly about the child's welfare and interests as of paramount consideration. The Court would ask itself as to where the child's future would well be catered for.
15. In this case Benny appears to be the victim of some broken relationships so that now he finds himself with a different family and his mother now wants to have him back. But if Benny should be returned, would he sleep well, eat well and fit well into a family he has not grown up with for 3 years or so? What guarantee is there that he will not cry a lot for the Defendants with whom Benny has developed a love as his parents for the last 3 years? For this period of time Benny has felt the warmth and love of the Defendants and have attached himself to them as his family. What will happen today therefore if the Court were to remove him from the Defendants and give him back to the Claimant? I guess tonight he would cry all night refusing food and wanting only



to be with the Defendants. And how would Benny feel in front of Silas whom he has not seen and grown up with? Silas has not deposed to any statements showing that he would be glad to see Benny home. These are facts and circumstances the Court has to weigh up in order to decide who is to have custody of Benny. It all boils down to this final issue: In which of these parties would the paramount interests of Benny be well maintained?

16. And for the foregoing reasons today the Court is of the opinion that the paramount interest of Benny David is best catered for by the Defendants Ken and Jeanne Joel.
17. The Court wishes to reiterate that this is not a claim for adoption, rather it is a claim for custody of a child. And the Court is not satisfied that the Claimant should succeed in her claims. Rather the Court will grant judgment in favour of the Defendants. The Court will issue an order granting custodianship over Benny David but it will not be a permanent order. It will be made pending further orders of the Court or until Benny has attained the age of 18 years old.
18. Further the Court will grant an order allowing access to the Claimant to see her son at any time either at the home of the Defendants or to invite them to her own home to spend a day or so in order that she can have access to Benny.
19. The Court will issue a further order requiring the Claimant to pay VT1.000 in cash or in kind every month to the Defendants to help them support and maintain Benny whilst in their custodianship.



20. The Court wishes to make it clear to the parties that this is not an adoption. It may be that at the end of the day the Claimant would agree to the Defendants adopting Benny. If that happens, an appropriate application needs to be filed and the Court would consider it appropriately.
21. The conclusion of the matter is that the Court dismisses the claims of the claimant in its entirety. There will be no order as to costs and these should lie where they fall.
22. That is the decision of the Court.

DATED at Luganville this 28th day of May 2009


OLIVER A. SAKSAK

Judge.

