IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Matrimonial
Case No. 1222 of 2018

BETWEEN: **H**
Applicant/Defendant

AND: **W**
Respondent/Claimant

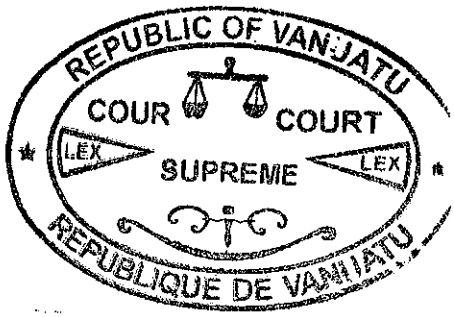
Date of hearing:	***17th July, 2018***
Delivered:	***1st August,, 2018***
Before:	***The Master Cybelle Cenac***
In Attendance:	***Mark Fleming counsel for the Applicant, Viska Muluane holding papers for Marie Noelle Patterson counsel for the Respondent***
Present:	***Parties absent***

JUDGMENT

Headnote
Application to strike out claim - no cause of action - parallel proceedings in two different jurisdictions - whether correct procedure and form followed to file claim - consideration of Section 26 of Matrimonial Causes Act 1973

INTRODUCTION

An application filed on the 5th July, 2018 by the defendant/applicant to strike out claim of the claimant/respondent of the 3rd May, 2018 came up for hearing on the 17th July, 2018. The application was accompanied by a sworn statement in support of the applicant along with a sworn statement by Lynda Kearns filed on the 9th July, 2018. Submissions by the applicant were filed on the 9th July, 2018. Sworn statement in reply to application and submission was filed and served by the respondent on the 16th July, 2018.



PRELIMINARY ISSUE

Before addressing the court any further, counsel for the applicant was asked to address the court on some evidence in the sworn statement of the 16th July, 2018 by the respondent that she had withdrawn the action before the New Zealand court as of the 16th July, 2018.

As a possible discontinuance may have affected the practical continuation of this hearing the court chose to treat this evidence before the court as a preliminary issue.

Counsel for the applicant informed the court that this was a non-issue for him as the purported evidence appeared to be merely an unsealed, unfiled application to the New Zealand court seeking leave to discontinue the proceeding, and further, that there was no accompanying order from the court granting leave to so discontinue.

Further, he stated that if this was in fact a legitimate application before the New Zealand court it would be opposed by his client in the said court in light of the fact that the matter was now at the stage where formal proof had been requested by the said court and was now too far along to lightly concede to its discontinuance.

Counsel for the respondent attempted to convince the court that the said document produced was proven evidence of a discontinuance and that this court had a duty, in the interest of justice, and in furtherance of the overriding objective to adjourn the hearing and await the outcome in the New Zealand court of the said application. Counsel argued that to proceed with this hearing, if the claim was struck out, could effectively deprive her client of a remedy, both in this court and the New Zealand court.

The court informed counsel for the respondent, that in furthering the overriding objective in order to do justice does not demand that the court act more in favour of one party than the other, or the court seek to construct a bridge between what the respondent may have done to disadvantage herself and what she may seek to do to place herself in a more favourable position.

The overriding objective is in place to promote judicial economy and the respondent's responsibility is to get the best advise possible and make the best decision for herself. It is for her to decide whether it is prudent for her to discontinue the matter in New Zealand while an application to strike out her claim in Vanuatu is pending. If she chooses to discontinue one proceeding alongside another pending proceeding in a second jurisdiction that could potentially deprive her of a remedy in both, then that is her legal right, exercised with full knowledge and autonomy. The respondent cannot act to her possible disadvantage and then ask the court to establish an advantage for her by adjourning these proceedings on a wait and see basis. In fact, if the court was to do that, it would not be furthering the overriding objective as it would be in breach of Part 1.2 (2) (a), that is, by placing the parties on an unequal footing.

In the circumstances, I cannot find for the respondent in her bid for an adjournment, on the basis that the evidence of a discontinuance in the New Zealand court presented to this court is unsubstantiated. There is no real evidence by way of a New Zealand court stamp or seal that the document had even been filed or an order from the court discontinuing the matter and therefore the Application by Mr. Mooney is to proceed this morning unobstructed.

APPLICANT SUBMISSIONS

The grounds of the application are based on two limbs put forward by the applicant:

1. That the claim is vexatious, oppressive and an abuse of process; and
2. That the respondent has not pleaded any identifiable cause of action.

Limb 1:

Counsel drew the court's attention to the fact that the CPR rules make no provision for the specific striking out of a claim, but that the case law of Vanuatu does establish such a power in the hands of the court, once it can be established that the claim has no reasonable prospect of success.

In the case of **Ben Tunala v Eric Tabir & Ors.**[1] cited by counsel for the applicant the court referred to the case of **Noel v Champagne Beach Working Committee [2006] VUCA 18**:

> Although .....there is no specific provision in the Civil Procedure Rules to strike out a proceeding on the grounds that there is no reasonable cause of action or that it is frivolous, vexatious or an abuse of process, it was not disputed that such a power exists. Jurisdiction can be found within the broad terms of ss. 28 (1) (b) and 65 (1) of the Judicial Services and Courts Act No. 54 of 2000 and the Civil Procedure Rules themselves provide in Rules 1.2 and 1.7 a basis for exercising the jurisdiction. In practice the existence of such an inherent jurisdiction has been assumed by the Supreme Court.....
>
> However it has always been recognised that the jurisdiction should be exercised sparingly and only in a clear case where the court is satisfied it has the requisite material; the claimant's case must be so clearly untenable that it cannot possibly succeed: .....

Counsel went on to argue that the vexatious and oppressive nature of this claim stems from the fact that (1) the respondent is the party who commenced, not only the proceedings in New Zealand, requesting the court seize itself of jurisdiction, but is also the one who has commenced the proceedings in Vanuatu, (2) by the sworn evidence of L. Kearns supported by the Minute of Justice Burns of the 8th May, 2018 the matter has already been listed before the New Zealand court for a hearing

[1] Civil Case 313 of 2014, para. 5; Reserved judgment of Justice Harrop as to Application to Strike out Claim

requiring formal proof as the respondent had failed to file any affidavits, and (3) that the applicant has incurred significant costs of at least NZ$20, 000 in litigating this matter before the New Zealand court and is still currently owed unpaid costs by the respondent while she has delayed instituting proceedings in the Vanuatu court for some 3 years while actively pursuing the New Zealand case.

Counsel cited the case of **Henry v Henry**[2] in support of his argument that the court deemed it prima facie vexatious to commence and continue proceedings in another country. He also submitted the case of **Chang Wing**[3], positing that it would be unjust, at this late stage to deprive the applicant of his remedies before the New Zealand court.

Limb 2:

Counsel states that the claim as it stands is badly pleaded on its face and should be struck out. That the court must look at the claim as pleaded and determine whether there is an identifiable cause of action and whether, when called to proof, the respondent could prove. Counsel submits that the claim is merely seeking remedies, asking this court to make, vary or amend orders in Vanuatu and New Zealand. He states that a properly pleaded claim will plead material facts, the law identifying the cause of action and the relief. He asserts that this claim does not properly do this.

Counsel goes on to add that the entire claim is made up of verbose and irrelevant facts seeking to have the court discharge current parenting orders in New Zealand and stay certain lawful action undertaken by the applicant in the interest of the company AIP under the Insolvency Act of Vanuatu. That her pleaded cause of action appears to be only, that if the court does not stay steps taken by the applicant under the Insolvency Act she will lose her source of income for herself and her children. Counsel for the applicant submitted the case of **Iririki**[4] in which Justice Geoghegan, hearing an application to stay proceedings and refusing to do so stated that he could not be asked to make an order which sought to negate an Act of Parliament as this would be an unlawful order. In the same vein, the respondent in this case cannot ask for the court to make any order under the Matrimonial Causes Act to stay proceedings in another separate case, involving the same parties, lawfully instituted under the Insolvency Act and lawfully proceeded with.

In conclusion, counsel wished the court to note his objection to paragraphs 2 – 6 and 9 of the sworn statement of the respondent filed on the 16th July, 2018.

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[2] [1996] HCA 51; (1996) 185 CLR 571 (17 April 1996)
[3] Chang Wing (Vanuatu) Ltd v Motis Pacific Lawyers [1998] VUCA 7; Civil Appeal Cse 05 of 1998 (26 June 1998)
[4] Iririki Island Holdings Ltd. v Mocha Ltd. [2017] VUSC 158; company case 3841 of 2016 (12 October 2017)

RESPONDENT SUBMISSIONS

The respondent intended to rely on her sworn statements of the 4th May, 2018 and 16th May, 2018. Counsel for the applicant objected to the use of the statement of the 4th May, 2018 as it was filed in a previous application in support of application to stay any further steps by the applicant in Company Case 685 of 2018 which was dismissed by this court. Counsel for the applicant contended that he had received no notice that there was an intention to rely on this statement and therefore he had had no opportunity to file any appropriate reply. The court agreed with counsel for the applicant and the referral to the said statement was ignored and determined that any further referrals would be disregarded.

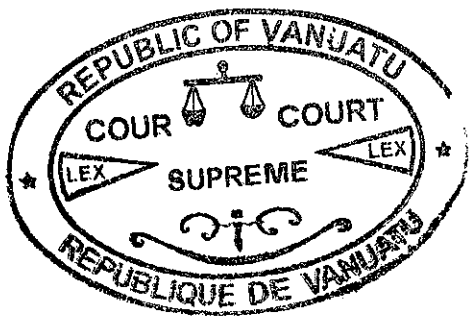
Counsel for the respondent, in support of her argument that it was possible to have the same case heard in concurrent jurisdictions cited the case of **Naylor v Kilman**[5]. She sought to align the facts of the respondent's case with those of **Naylor** by stating that:

(i) Almost all of the assets of the marriage are in Vanuatu;
(ii) That the liquidation of one of the assets is currently underway in Vanuatu;
(iii) That only the court in Vanuatu can make an order to liquidate that company and call for its accounts;
(iv) That the respondent now resides in Vanuatu for the purpose of protecting the assets of the marriage, more specifically the company AIP.

Counsel went on to add that the main reason necessitating the respondent's filing of a claim in Vanuatu was because she felt compelled to move herself and the children of the marriage to Vanuatu to oversee the operations of AIP, and because the applicant had filed a claim for liquidation of the said company which she opposed, it was now inconvenient to pursue the matter in New Zealand.

While the respondent had earlier informed the court of her pending application to discontinue the proceedings in New Zealand, she did offer, in her submissions, that there had been no urgency to seek to discontinue the proceedings in New Zealand until the applicant had filed his application to strike out her claim under the present action and consequently, she was not being vexatious or oppressive in her filing of a duplicate claim in Vanuatu.

When asked by the court why the respondent did not seek to discontinue the New Zealand action long before the 16th July if, as she submits, her main reason for doing so now was because she had changed residence and it was more convenient, counsel was unable to offer any satisfactory answer, save to say that the court can infer that the reason for her asking for a change of jurisdiction is because of her change of residence.



[5] [1999] VUSC 11; Civil Case 054 of 1998 (12 March 1999)

In response to the applicant's argument that the claim pleaded no cause of action, counsel for the respondent proffered that there had been a divorce and both parties were agreed that there had yet to be a division of the matrimonial assets and it was logical that the court look at that now.

The court asked counsel why the respondent chose to proceed by way of claim in this matter. Counsel was unable to offer an answer. The court referred both counsel to **section 26 of the Matrimonial Causes Act [1973]**, suggesting that the respondent may have needed leave to proceed to court before filing any such matter and asked both counsel to address it on whether this was likely the proper procedure or not.

Counsel for the respondent referred the court to CPR 2.2 which says that a proceeding is started by filing a claim, stating that this was the normal procedure for lodging a claim for ancillary relief in Vanuatu. Counsel for the applicant indicated that he could offer the court no assistance in relation to its better understanding and interpretation of that section of the Act.

DISCUSSION

While I have taken the time to set out the submissions of both parties, my decision will be based on the singular limb of the applicant that the claim pleads no identifiable cause of action. Once this is established I see no reason to venture further into a disquisition of limb 1 of his argument.

I accept the submission of the applicant that the claim pleads no identifiable cause of action, but not for the reasons exclusively set out in his defence and/or sworn statements or submissions. I accept his argument in part only.

The reason for my decision is based on the following:

1. It is legally defined that a cause of action *"is a set of facts sufficient to establish a right to sue for money, property, etc and encompasses both the legal theory upon which a claimant brings suit e.g. breach of contract, battery, etc. and the remedy."* In other words, the claimant pleads or alleges facts which have resulted in the damage claimed.

   In the present case, the only set of facts that justify the claimant asking for the remedy of the division of assets, custody of the children etc. is that the marriage of the parties has broken down irretrievably. Without the establishment of and proof of those facts there is no justification to seek the relief she does in her claim.

   In a divorce, you must state a cause of action which is the legal reason why you believe a divorce is appropriate. This is commonly established in the

grounds of divorce. Your cause of action requires that you prove to the court that your spouse acted improperly, and once proved, will impact custody, property division, spousal support, child maintenance, etc.

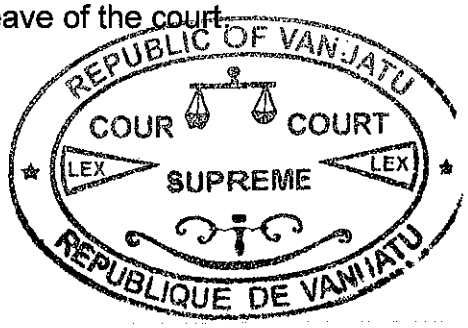
The claim of the respondent seeks relief from the applicant as it relates to the matrimonial assets. This relief must be predicated upon a cause of action, which cause of action would have been the breakdown of the marriage.

The respondent's cause of action is patently absent from her claim and it does not serve her cause to suggest that the filing of a claim for ancillary relief is the usual and normal procedure in Vanuatu. Because a bad or incorrect procedure has been continually maintained in the jurisdiction does not legally justify it being sustained.

2. **Section 26 of the Matrimonial Causes Act 1973** under the heading **"Commencement of proceedings for ancillary relief, etc.,"** relevant law for the jurisdiction of Vanuatu states:

> (1) Where a petition for divorce, nullity of marriage or judicial separation has been presented, then, subject to subsection (2) below, proceedings for maintenance pending suit....., for a financial provision order....., or for a property adjustment order may be begun, subject to and in accordance with rules of court, at any time after the presentation of the petition.
>
> (2) Rules of court may provide, in such cases prescribed by the rules –
>
> (a) That applications for any such relief as is mentioned in subsection (1) above shall be made in the petition or answer; and
>
> (b) That applications for any such relief which are not so made, or are not made until after the expiration of such period following the presentation of the petition or filing of the answer as may be so prescribed, shall be made only with the leave of the court.

This section very clearly provides in its title that it is the designated procedure for commencing proceedings for ancillary relief. I understand it to mean, that when a petition for divorce is presented to the court any requests for ancillary relief such as maintenance etc. can be done at any time after the presentation of the petition, provided that any application for this relief is initially made in the petition or answer, and that if the relief is not sought in the petition or answer at the time of presentation of the petition then such application can only be made with leave of the court.



The respondent presented no petition for divorce in Vanuatu that the court is aware of. At all times she represented that the parties had been divorced in New Zealand. Having not submitted that petition into evidence the court could not determine that any relief was claimed in the petition for divorce and therefore the court could not proceed on the presumption that any relief had been claimed. Nonetheless, even had it been claimed, this court would have no jurisdiction to continue on from a proceeding already commenced in the New Zealand court. Even had she filed her petition for divorce in this jurisdiction and had claimed relief then the proper procedure would have been to file for that relief by way of application predicated upon her petition. Had she filed her petition in Vanuatu without claiming relief then the proper procedure would have been to file an application for leave to file application for ancillary relief.

Following the above premise, that the cause of action in a divorce is set up in the grounds for the petition for the divorce, and once granted, would justify the request for ancillary relief, this court would have to find that the procedure employed by the respondent to bring this matter before this court is so defective as to make it unsalvageable by a mere order of the court to treat it as an application for relief rather than a claim. I say this in light of CPR 13.5 which deals with the enforcement of foreign judgments, and would entail the respondent strictly adhering to its requirements. In so doing, she would have been able to subsequently proceed by way of application for relief under the cover of her claim to enforce the judgment of the divorce court in New Zealand or seek leave of this court to file application for relief.

Parliament sets out laws and procedures to be followed and they are not to be lightly taken or applied. The CPR are rules of court, promulgated by a Commission[6], to act as a guide to counsel, litigants and courts on how matters are best to be conducted. In the application of these rules the court can exercise a certain flexibility in order that substantial justice is done. The rules though cannot repudiate an Act of Parliament which designates a specific procedure to be followed. The Commission[7] which makes the rules is subordinate to Parliament and her Statutes and cannot therefore be wholly disregarded.

I therefore find that the respondent has shown no identifiable cause of action and the claim consequently cannot stand.

IT IS HEREBY ORDERED:

1. That the application to strike out claim is granted.
2. That the claim is struck out without prejudice.

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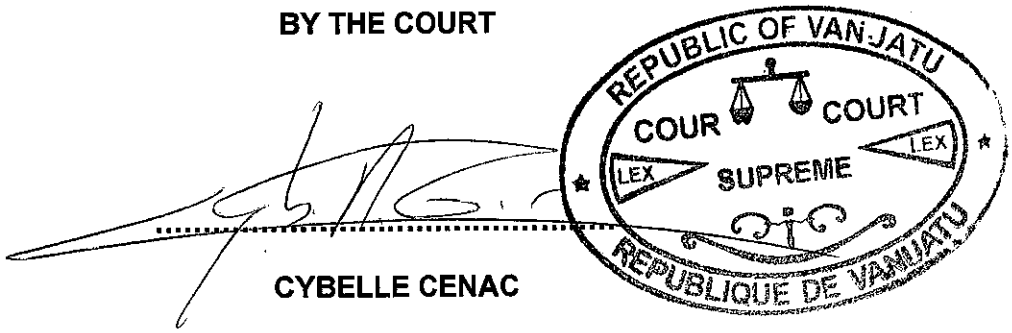
[6] Section 66 of the Judicial Services and Courts Act, Cap. 270 of the Revised laws of Vanuatu Consolidated Edition 2006

[7] Ibid

3. That standard costs to the respondent to be taxed if not agreed.

BY THE COURT



CYBELLE CENAC

MASTER