

**BETWEEN:** Dahmasing John Salong  
Claimant  
**AND:** Republic of Vanuatu  
Defendant

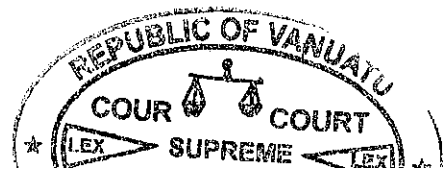
*Date of Decision:* 19<sup>th</sup> October 2022  
*Before:* Justice EP Goldsbrough  
*Distribution:* Leo, C for the Claimant  
Loughman, T for the Defendant

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**JUDGMENT**

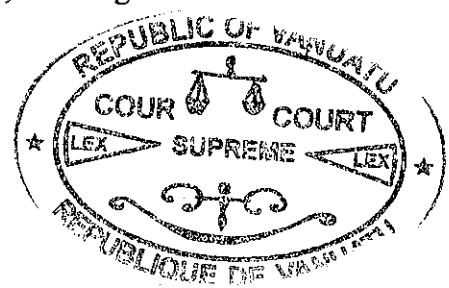
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1. On 21 July 2022, counsel for both the claimant and the defendant Republic agreed that all the evidence in the claim for both parties had been filed, that there was no requirement to cross-examine and that the only remaining issue was the filing of written submissions setting out closing arguments for each party. An order was made that submissions on behalf of the claimant should be filed on or before 18 August 2022 and for the defendant by 9 September 2022.
2. As of today, 19 October 2022 no submission has been filed by way of closing by the claimant and rather than a closing submission, counsel for the defendant Republic has filed an application that the claim is struck out for various reasons including non-compliance with orders made and lack of *locus standii*.
3. The claim is an application for an order disallowing the seizure of a quantity of kava as it was about to be exported from Vanuatu. It was confiscated from travellers who all confirmed that they were carrying quantities of kava, a prohibited export, each in small quantities of 5kg or less, on behalf of others but not on behalf of themselves. The others are said to be employed as seasonal workers in Australia and the scheme devised was for new workers to carry the allowed quantity of kava for the benefit of fellow seasonal

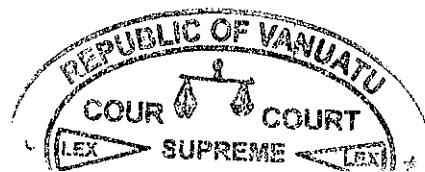


workers. They were to hand over the kava on arrival in Australia for it to be given to workers who were already in Australia. The scheme had been devised by the present applicant, previously involved in a recruitment company known as Melanesian Seasonal Employees for the benefit of those seasonal workers.

4. The scheme involved asking new recruits to take up to 4kgs of kava that did not belong to them on the journey to Australia for the benefit of those existing workers. The new passengers neither owned nor had any other control of the kava. It is known that on leaving Vanuatu an ex officio allowance is customarily granted to travellers to export kava, which is otherwise a prohibited import, for their own personal consumption.
5. This scheme took advantage of that ex officio scheme and extended it in a way that the relevant department (Customs & Excise and Department of BioSecurity) does not believe is permissible and so the passengers were required to hand over the kava which they were carrying on behalf of others at the airport. Each of them cooperated with the authorities in the seizure exercise and freely admitted that they were carrying the kava on behalf of others, not themselves.
6. It is for the applicant to show that the kava both belonged to him and was being exported in accordance with either the law or other enforceable rights. He must do that on the balance of probabilities.
7. The material which must be considered in this matter is the application which began the process, the evidence in support and the evidence filed by the defendant Republic in response. The applicant filed four sworn statements on 20 December 2021, 9 May 2022, 1 July 2022 and 21 July 2022. The defendant Republic filed one sworn statement, that of Adrian Reynolds filed 5 May 2022. In support of the most recent application for strike out, there is a sworn statement from counsel in the Attorney General's Chambers but it does not deal with the substance of the application merely the failure of the applicant to comply with direction orders and makes a submission on the question of standing.
8. The application itself asserts that the applicant does not own the confiscated kava (see paragraph 6.10 on page 3) which gives rise to the issue of standing. It admits to the notice of seizure being served and was filed within the time allowed for an appeal but if the applicant is not the owner of the seized goods, what right does he have to seek release of the goods to himself?



9. In his sworn statement dated 1 July, the applicant asserts that he is the owner of the kava, yet in an exhibit attached to his statement of 20 December 2021 a letter written by him to the Director of the Department of BioSecurity he again asserts that he is not the owner.
10. If he is not the owner of the confiscated property, he is not entitled to seek an order for it to be returned to him. If he is, he may be so entitled if the application otherwise has any merit.
11. It is part of the case for the applicants that a general concession is available to travellers to export a limited (5kgs) of kava regardless of the general prohibition on its export. In his evidence, he simply asserts that this is known to everyone. He does not attempt to produce any official guidance on that concession or any evidence of it save his own belief. It could indeed be a concession that has been made and permitted given the number of Ni-Vanuatu now employed overseas as seasonal workers and no doubt it is valued by those who take advantage of it.
12. Evidence for the defendant exhibits the law prohibiting the export of kava without a licence and the statements made by the travellers who were found to be in possession of the kava. Variousy the total weight of the kava is described as 51kgs, 52 kgs and 56 kgs. But little turns on that quantity. In his evidence, there is no mention of any extra-statutory concession. Each of the travellers answered the officers questioning them with the story that they were transporting kava on behalf of others and were under an obligation to hand that product over to another person on arrival in Australia. That, in the view of the author of the sworn statement, amounted to an attempt to avoid the prohibition on the export of kava without a licence for commercial purposes. Thus the question of an extra-statutory concession available to individuals to carry small quantities for their own use was not applicable.
13. It is important to note that the applicant did not react well to being told that the kava, whether it belonged to him or others, was the subject of an order for seizure. He collected the names of officers involved and effectively threatened them in their jobs with the warning “mi karem name blo yutufala finis, yutufala lukaot gud yutufala nomo”. It is to be hoped that these officers receive the protection from their employers that they are entitled to when doing nothing more than their duty.
14. It is for the application to demonstrate on the balance of probabilities that his application to set aside the order for seizure is made out. To succeed he must show that the item or



items confiscated belong to him and that the seizure was done otherwise than in accordance with the law.

15. This applicant has failed to do that. He has failed to show unequivocally that he is the owner of the confiscated kava and he has also failed to show that the circumstances in which the kava was to be exported fell within any exemption from the requirement to obtain an export permit in accordance with the Customs (Prohibited Export) Regulations Order No 114 of 2014 made under the Customs Act No 7 of 2013.
16. It seems unnecessary to recite the number of Direction Orders that were not complied with by the applicant and/or his counsel as the Court does not propose to rely on the powers contained in the Civil Procedure Rules to strike out the claim as submitted by counsel for the defendant. It should suffice that in addition to any power the Court may have to dismiss the claim through lack of evidence, there is ample evidence of failure to comply with orders which itself could result in a dismissal of the claim other than on its merits. But the evidence has been received and it seems appropriate to deal with the matter on the merits.
17. The application for an order disallowing seizure pursuant to sections 187 and 188 of the Customs Act No 7 of 2013 is dismissed as the applicant has failed to establish on the balance of probabilities that the order for seizure was not made in accordance with the law. An order for costs is made against the applicant. Counsel are invited to file and exchange written submissions within 7 days of receipt of this judgment on the amount of costs or agree on the same failing which the Court will determine the amount.

**Dated at Port Vila on this 19<sup>th</sup> day of October 2022**

**BY THE COURT**

*EP Goldsbrough*

EP Goldsbrough

Supreme Court Judge

