IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal Case No. 16 of 2010

BETWEEN: TAMATA DUMDUM
Appellant

AND: EAST MALO ISLAND LAND TRIBUNAL
First Respondent

AND: NIKE NIKE VUROBARAVU
Second Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John Mansfield
Hon. Justice Edwin Goldsbrough
Hon. Justice Nevin R. Dawson
Hon. Justice Daniel Fatiaki

Counsel: *Mr. Saling Stephens for the Appellant*
Mr. Avock Godden for the First Respondent
Mr. Ronald Warsal for the Second Respondent

Hearing Date: *23 November 2010*

Decision Date: *3 December 2010*

JUDGMENT

1. The Appellant who was the Claimant in the court below, seeks orders allowing the appeal, setting aside the decision of the Supreme Court dated 5 June 2010 in its entirety and remitting the matter for trial before the Supreme Court.

2. The decision of 5 June 2010 included a refusal of the Appellant's application for an adjournment of the trial and the summary dismissal of the claim with costs.

3. The original substantive claim sought to invalidate the decision of the East Malo Island Land Tribunal of 31 January 2007 declaring Nike Nike Vurobaravu and his brother and their respective children custom owners of land known as

Anaonebaravu situated within a leasehold title No. 04/3344/0022 on East Malo Island.

4. The Appellant had previously been declared custom owner of the same land by the Moli Tahe Na Vanua Lands Tribunal but the declaration was successfully challenged by the Second Respondent's brother in a judgment of the Supreme Court dated 4 April 2005 which also ordered the rehearing of the competing claims before a "*... proper Land Tribunal registered on East Malo ...*"

5. Despite the Court's order for a rehearing of the competing claims, the Appellant for one reason or another, decided not to take part in the rehearing before the newly constituted East Malo Island Land Tribunal. In the result the Second Respondent's claim was uncontested and ultimately was granted on 31 January 2007. No appeal or review was pursued against this decision at the time until two years later on 14 October 2009, when the Appellant sought to challenge the East Malo Land Tribunal's decision by way of a Supreme Court claim.

6. A brief chronology of the case is as follows:

- 7 May 2004 – Decision of **Moli Tahe Na Vanua Island Tribunal** declaring Tamata Dumdum (the Appellant) the custom owner of land known as Naonebaravu;
- 4 April 2005 – Decision of **Supreme Court in Civil Case No. 29 of 2004** setting aside the Tribunal's decision in favour of the Appellant and ordering a rehearing;
- 31 January 2007 – Decision of **East Malo Island Land Tribunal** declaring Nike Nike Vurobaravu a custom owner of Naonebaravu land;
- 14 October 2009 – Appellant filed Supreme Court Civil claim No. 33 of 2009 challenging the decision of the East Malo Island Land Tribunal together with a sworn statement in support;
- 2 February 2009 – Defence filed by the Second Respondent;

- 25 March 2010 – Supreme Court judge gave directions for the filing of sworn statements and fixed 6 May 2010 as the trial hearing date;

- 3 May 2010 – Second Respondent filed 5 sworn statements as directed;

- 6 May 2010 – Appellant's application for an adjournment of the hearing/trial was granted with costs of VT78,110.00 ordered to be paid in equal shares by the Appellant and his counsel by 31 May 2010. The trial was adjourned to 4 June 2010;

- 3 June 2010 – Appellant sought a further adjournment of the trial in order to enable him to file sworn statements in response to the Respondent's sworn statements filed on 3 May 2010;

- 4 June 2010 – Appellant's adjournment application refused and Civil Case No. 33 of 2009 was dismissed with costs;

7. The Appellant now appeals against the order dismissing his claim on the following grounds:

> "*(1) the trial judge failed to give any consideration and/or weight to the Appellant's evidence but rather dwelled (sic) on the issue of costs which consequently predominates his mind to dismiss the Claimant's claim;*
>
> *(2) the trial judge failed to provide any reasons why he has awarded costs on an indemnity basis on 6th May 2010 when it should have been an adjournment costs of only VT5,000. In particular, the Appellant was not given an adequate opportunity to cross-examine the respondent, as to the particular of the costs that was placed in the sum of VT78,110 and further that the costs application should have been determined at a future date when the Appellant's counsel was present in court.*
>
> *(3) that the trial judge erred in his discretion by relying on a costs order in another matter in Civil Case NO. 29 of 2004 to influence his mind to dismiss the claim in Civil Case No. 32 of 2009;*
>
> *(4) the trial judge erred in his discretion by not granting the Appellant another adjournment to get prepared before conducting his trial when a proper application was made to that regard thus the denial of his right to a fair hearing.*"

8. At the outset, although counsel attempted to include an appeal against the VT78,110 costs order of 6 May 2010, we do not accept that he is entitled to do so. In the first place the Appellant's Notice of Appeal clearly identifies the decision being appealed from as "*the whole judgment of the Supreme Court sitting in Luganville on 4th June 2010*" and does not refer to the interlocutory orders including costs made on 6 May 2010 and, secondly, an appeal against the costs order of 6 May 2010 would require leave of the Court to extend the time for filing an appeal as well as leave to appeal against what is plainly an interlocutory order under the Rules. Neither was sought by counsel either orally or in writing.

9. Furthermore in reference to counsel's submissions, we do not accept that the VT78,110 costs order was awarded "*on an indemnity basis*" as asserted. On the contrary, having perused the relevant ruling (which was not included in the appellant's appeal book), we are satisfied that the judge's order was made pursuant to **Rules 15.25** and **15.26** of the **Civil Procedure Rules** being costs for time wasted and is not shown to have been outside a proper exercise of the costs discretion.

10. We turn then to consider the substantive grounds of appeal which may be conveniently summarized as:

    (1) the refusal of an adjournment; and

    (2) the dismissal of the claim;

11. As to the refusal of the adjournment, counsel complains that the judge did not consider the merits of the claim and, by refusing the adjournment, he effectively denied the Appellant the opportunity to properly prepare his case by filing further sworn statements in response. The fact that the complaining party is the Claimant in the proceedings is in our view significant.

12. The power to adjourn proceedings at or before a trial is clearly recognized by **Rule 12.3** of the **Civil Procedure Rules** and is plainly a discretion vested in the Court. It is not a right of litigants to be had in the asking, however formal or

informal the request. An applicant for an adjournment bears the burden of persuading the Court to exercise its discretion in his or her favour and a Claimant (or for that matter counsel) who assumes that an adjournment application will always be granted does so at his/her own risk and peril. What is more even if an application for an adjournment is successful, costs will almost inevitably be a consideration or consequence. As was said by this Court in **Coconut Oil Production (Vanuatu) Ltd. v. Tavoa** [2005] VUCA 24; Civil Appeal Case No. 16 of 2005 (at p. 2 of the judgment):

> *"It needs hardly be stated that, once a firm date had been given for any hearing, it is imperative that it be maintained and not overlooked or ignored except with the agreement of the judge. Counsel do so at their peril."*

13. Consequently, where a belated adjournment application is made, and it is opposed, the Court will normally expect the person seeking the adjournment to produce material to show some good purpose would be served by the adjournment. In other words that that person's case has reasonably arguable merits, and why the adjournment is necessary (in this case, why the witness statements were not filed earlier and in accordance with the Court's directions), as those things are necessary to determine the justice of the case, having regard to the interests of the other parties. Of course, that is not an exhaustive list of possibly relevant matters.

14. Furthermore an order granting an adjournment, being a discretionary order, will not be lightly overturned or set aside on appeal unless it is clearly established that the decision was wrong in that the judge took into account irrelevant matters which he ought not to have done or failed to take into account relevant matters or misdirected himself with regard to the relevant principles applicable to the exercise of the discretion. In other words, it will only be set aside if it is shown that the discretion miscarried or there was a miscarriage of justice.

15. Principal to counsel's submissions in support of the adjournment is a claim that the Appellant wished to file additional sworn statements in the proceedings.

Counsel was however unable to identify any Rule of court that permitted, without leave, the filing of sworn statements during the actual trial or hearing of an action. In this regard **Rule 11.6** of the **Civil Procedure Rules** clearly requires service of a sworn statement "***... intended to be used during a trial, at least 21 days before the trial***". Accordingly, if the requirements of the Rule are to be strictly complied with by the Appellant, then the trial in this case would have had to be adjourned for at least 21 days and, more likely, in excess of a month given the Appellant's apparent lack of preparedness at the relevant time. No reasons for the proposed late filing of sworn statements were given. This is not a case where the Appellant had complied with the direction of 25 March 2010 to file his sworn statements, and simply wanted leave to respond to additional fresh matters raised in the Respondent's sworn statements (filed in accordance with that direction). The Appellant had to the time fixed for the trial filed no sworn statements at all.

16. We are of course mindful of the overriding objective of the Civil Procedure Rules which is "*to enable the Court's to deal with cases justly*" which in turn includes dealing with cases speedily, economically and fairly and with a view to saving unnecessary expense.

17. In the present case counsel submits that the appropriate and just order would have been for the judge to grant the adjournment and order costs against the Appellant. We cannot agree.

18. In **Thames Investment and Securities P/C v. Benjamin and Others** [1984] 3 ALL ER 393 Goulding J. in staying proceedings in the case and in ordering the payment into court of a sum of money to secure an earlier order to pay costs, said (at p. 394):

> "*Quite apart from authority, two propositions would seem to me plain as a general rule. The <u>first</u> is that where an application has been made for particular relief and has been dismissed with costs because of some fault or lack of success on the part of the applicant, then, generally speaking, the applicant ought not to be allowed to apply again for identical or equivalent relief if he is*

guilty of failure to pay the costs of the previous application. The second proposition that would seem generally clear is that it cannot be said that the applicant has failed to pay the costs in question until they have been quantified and their amount is known". (our underlining)

19. Although that was a case where a stay of proceedings was ordered, we are satisfied that the principle is equally applicable to the present case where relief (an adjournment) was granted (not dismissed) as sought by the Appellant and costs were ordered and quantified (VT78,110) and remained unpaid at the time of a second application by the Appellant for '*identical or equivalent relief*'.

20. In similar vein Isaacs J. in **Hutchinson v. Nominal Defendant** [1972] 1 NSWLR 443 said (at pp 448/449):

> "*... the discretion of the court to stay proceedings which are either vexatious, unjust, oppressive, malicious or frivolous in the particular circumstances, and the courts have taken the view that it is certainly unjust and oppressive for a defendant who has already faced an action by the plaintiff and succeeded and has not been paid his costs to run the risk of having to face a second action on the same subject matter with probably the same result and risk that if the plaintiff fails in that second action the defendant will be unable to recover his costs or may be left lamenting in respect of them. And it is partly for this reason that such special orders are made.*
>
> *Another aspect or facet which is relevant to be considered by a judge in exercising his discretion in the making of such an order is whether the plaintiff in any event has any merits and whether the action may be said to be vexatious, oppressive, unjust, malicious or frivolous because of the lack of any such merits.*"

21. In the present case the trial judge was clearly entitled to consider whether the Claimant's action had any merits and whether it would be unjust and oppressive for the Respondent who had not been paid an earlier adjournment costs order, to run the risk that if the appellant is ordered a second time to pay

costs for the further adjournment of the trial, he would be unable to recover his costs in both instances in the event that the claim fails.

22. A perusal of the judge's ruling on the adjournment application indicates that he was aware that the earlier VT78,110 costs order on 6 May 2010 had not been paid as ordered. Plainly that failure by the Appellant would not have been an attractive position for the Appellant to be in when seeking a second adjournment. But having said that, it is inaccurate to suggest, as Appellant's counsel submits, that the judge unduly dwelt on prior unpaid costs or that it formed the basis for his dismissal of the Appellant's entire claim.

23. More importantly, the trial judge quite properly, in our view, turned his mind to the Appellant's substantive claim in order to satisfy himself as to whether it would be fair and just to adjourn the trial for a second time. After recording the answers (such as there were) of the Appellant's then counsel to various pertinent questions as to the merits of the Appellant's claim, the primary judge concluded, again correctly in our view, that the claim should be dismissed with costs to the Respondent. The Appellant did not produce to the judge below any material to show he had an arguable case, and his counsel's answers to the primary judge suggested that no arguable case could be explained even orally. The judge below understandably considered he could not show his case had any merits.

24. During the hearing before us, when asked what was the substance of the claim, counsel for the Appellant (who was not counsel in the lower court) responded that the additional sworn statements that the Appellant wished to file were intended to establish that **sections 35, 36** and **37** of the **Customary Land Tribunals Act [CAP. 271]** had **not** been complied with in the appointment of the members of the East Malo Island Lands Tribunal.

25. The difficulty with that submission however, is that **section 39** of the **Customary Lands Tribunals Act** which provides for the supervision of land tribunals by the Supreme Court limits or confines an applicant to the Supreme

Court to "***a party to the dispute***" which has been determined by the Land Tribunal in question. In this regard it is common ground in this case, both as a matter of pleading and by admission in the Appellant's sworn statement filed in support of the claim, that the Appellant was "***not a party in the proceedings before the East Malo Island Lands Tribunal ...***" and therefore unqualified to invoke section 39, albeit that he was a prior successful claimant before the Moli Tahe Na Vanua Lands Tribunal which declared him custom owner of Naonebaravu land.

26. In this latter regard it is well to bear in mind the warning of this Court in **Valele Family v. Touru** [2002] VUCA 2 where it said:

> "*Unless an ownership dispute is determined through the Court system, in the manner provided for in the Constitution, a descendant of a party to an ownership dispute that has been "settled" outside the Court system may reopen the dispute by claiming a custom entitlement under Article 73. This kind of difficulty is not unknown in the law. Where the interests of children and future generations relating to land arise, the general law provides that their interests can only be affected by a settlement if the terms of the settlement are approved by a Court as being in the interests of the present and future children.*
>
> *It follows that neither the Utalamba Committee and its associated "Area Land Court" or Committee (which was in no sense a court established under the Constitution) nor the council of chiefs that sat at Deproma had any jurisdiction or authority to make a determination of custom ownership which bound claimants who disagreed with their ruling.*"

27. *A fortiori* where there has been a judgment of the Supreme Court declaring the decision of the Moli Tahe Na Vanua Lands Tribunal "*... null and void and is of no legal effect*" as occurred in this instance, the same considerations apply.

28. For the foregoing reasons we are not persuaded the trial judge erred in the exercise of his discretion to refuse the application to adjourn the trial in the matter. There was then no evidence to support the Appellant's claim at the hearing and it was proper to dismiss it.

29. Accordingly the appeal is dismissed with costs awarded against the Appellant on the usual basis if not agreed.

DATED at Port Vila, this 3rd day of December, 2010.

BY THE COURT

.....
Chief Justice Vincent Lunabek

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Justice J. Mansfield

.....
Justice E. Goldsbrough

.....
Justice Nevin R. Dawson

REPUBLIC OF VANUATU
COURT OF APPEAL
COUR D'APPEL
REPUBLIQUE DE VANUATU

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Justice Daniel Fatiaki