

BETWEEN: SANTO EARTHWORKS

Claimant

**AND: RANIHAL SCRAP & METAL
COMPANY**

First Defendant

AND: YOON (KOREAN NATIONAL)

Second Defendant

**AND: KYEONGSIK JANG trading as JK
GENERAL MACHINERY**

Third Party

Coram: *Mr. Justice Oliver A. Saksak*

Counsel: *Mr. James Tari, Agent for Bill Bani for the Claimant
Mr. Godden Avock for Third Party Applicant.
No appearances by First and Second Defendants*

Date: *14th April 2014*

JUDGMENT

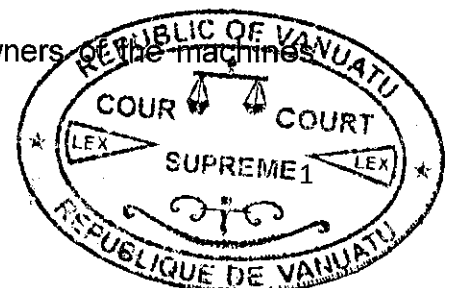
1. Kyeongsik Jang trading as JK General Machinery applies under Rule 14.50 seeking the following orders that –

(a) The applicant be made a party to the proceedings.

(b) The Enforcement Warrant issued on 7th March 2013 be suspended until further Orders of the Court.

(c) All machineries subject of the Enforcement Warrant dated 7th March 2013 in favour of Steven Remy, be repossessed by the Assistant Sheriff and returned to the Supreme Court premises for safe-keeping until further Orders of the Court.

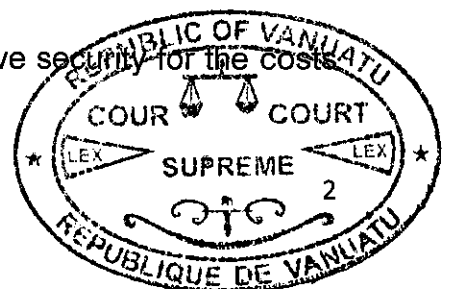
(d) The First and Second Defendants were not the owners of the machines namely:



- (i) One Daewoo Forklift, Model D35S;
 - (ii) One Flat Deck Rhino Truck Serial KN3LAPO 20976; and
 - (iii) One Doosan excavator, Model DX LCA
- (e) The Claimant returns all the said machineries in the same manner and condition they were in on arrival in the Republic of Vanuatu.
- (f) Costs of the application be paid by the Claimant.
2. This application is dismissed with costs agreed at VT25.000 payable by the applicant to the Claimant.
3. The Court publishes its reasons.

Discussions

4. The applicant relies on Rule 14.50 as the basis of the his application. This rule states –
- “Application by Third Party.
- (1) The Third Party must file an application within 7 days of giving notice to the Sheriff.
 - (2) The application must:
 - (a) Describe the goods or money; and
 - (b) State where they were when they were seized; and
 - (c) State why the Third Party claims goods or money; and
 - (d) Have with it a sworn statement in support of the application.
 - (3) The application and sworn statement must be served on the person on whose behalf the enforcement warrant was issued.
 - (4) The Court may require the Third Party to give security for the costs of the proceeding.



(5) An enforcement debtor may not make an application under this Division.”

5. This rule does not assist the applicant. Rule 14.50 must be triggered by the giving of a notice by the applicant to the Sheriff under Rule 14.49 which states-

“Notice of Claim –

(1) A person (“the third party”) who claims ownership of goods or money seized under an enforcement warrant must notify the sheriff in writing of the claim.

(2) The notice may be given to the Sheriff personally or by filing it in the office of the Court.

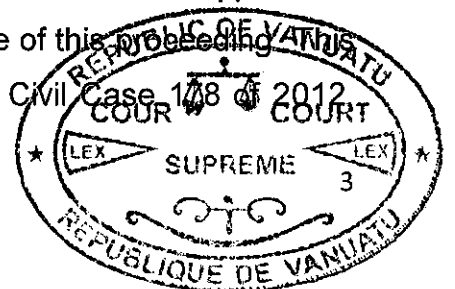
(3) The Sheriff must not seel or otherwise dispose of the goods or money for 7 days after being given the notice.”

6. The applicant relied on his evidence by sworn statement dated 3rd February 2014. However, he does not provide any evidence of the notice he gave to the Sheriff under Rule 14.49(1). That rule is mandatory that this notice must be given.

7. The reason presumably for not giving notice under Rule 14.49(1) is because the enforcement warrant has been acted upon and the machines have been seized and distributed to make good the debt due to the Claimant. The applicant deposes to this at paragraphs 27 and 28 of his statement.

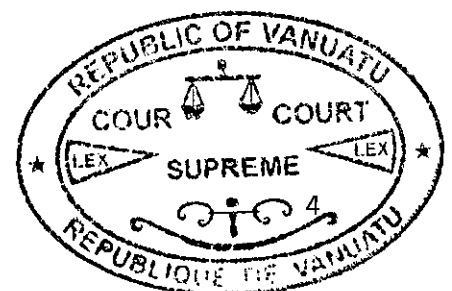
8. In other words Civil Case No. 39 of 2012 has been brought to its end. And the applicant cannot use Rules 14.50 or 14.49 as the basis of applying to be joined as a party.

9. The court agrees with Mr. Tari’s submission that the action of the application is an abuse of process. The applicant was fully aware of this problem. This is clear from paragraph 13 of his amended claim in Civil Case 178 of 2012



Despite his knowledge, the applicant did not apply to be joined as a party then and/or seek a stay of the enforcement warrant. He did nothing. For the applicant to then submit under paragraph 3.2 of his written submissions that he was not aware of the Enforcement Warrant is bizarre and that submission cannot be sustained but rejected out- right.

10. The applicant filed Civil Case 178 of 2012 around April 2012 about the same time the matter was being dealt with by the Court in this proceeding. That case was struck out pursuant to rules 9.10 and 18.11. The applicant as Claimant named Niscol and Steven Remy as Defendants. He failed to name Ranihal and Yoon as Defendants. If he has any recourse for losses, his claims appear to be against Ranihal and Yoon. For some unknown reason, the applicant has not pursued any claims against these parties.
11. At all material times Ranihal Scrap & Metal Company held itself out as the owner of the machines. When they were sued by the Claimant Santo Earthworks, the First and Second Defendants did not file responses and/or defences. Had they done so, the situation today might have been avoided. But at all material times, Ranihal held themselves out as proprietors of the machines. For instance in the evidence of Steven Remy dated 21st September 2012 he deposes to a letter by a Joseph Kalo dated 18th September 2012 as Branch Workshop Manager of Asco Motors that Ranihal Scrap & Metal is the "owner" of the Doosan Excavator – See Annexure "I" and also as owner of the Daewo Forklift – Annexure "J" and as owner of the Rhino Truck – Annexure "K".
12. From those evidence which were unchallenged by the Defendants there was no issue of ownership. Ranihal and Yoon did not appeal or apply to set aside the default judgment and so the matter has been drawn to its end.
13. Counsel argued that the applicant would not have any other recourse if the orders sought by the applicant was not granted. That is incorrect and that argument is rejected.



14. All the orders sought are refused and the application is dismissed with costs fixed at VT25.000 to be paid to the Claimant by the applicant, Mr. Jang.

DATED at Port Vila this 14th day of April 2014.

BY THE COURT


OLIVER A. SAKSAK
Judge

