

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Civil Jurisdiction)

Civil Case No. 1330 of 2017

BETWEEN: EREVOKE TAMUMU

Applicant

AND: VEMERISIN EVIEVI

First Respondent

AND: DIDIER & MOISE EREVUKE

Second Respondents

Before:

Justice Daniel Fatiaki

In Attendance:

Counsel – R. T. Kapapa for the Claimant

Counsel – PSO for the Defendants

Date of Ruling:

8th day of December 2017

RULING

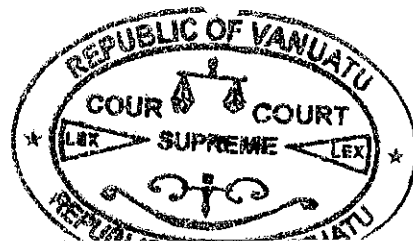
1. This case arose out of a long-standing unresolved family dispute between a son (the claimant) his elderly mother (first defendant) and his 2 brothers (second defendants). In form it is a claim "for trespass and damage to property" and seeks damages in the sum of VT850,000 together with costs and interest. The claim was initially filed in the Magistrates Court, Luganville, Santo. There is also a "status quo" injunction granted on 20 May 2017 restraining both parties from assaulting, threatening, swearing, intimidating and harassing each other.
2. By Order dated 11 May 2017 the Senior Magistrate transferred the case to the Supreme Court. The order reads:

"TRANSFER ORDER

This is a dispute over customary land belonging to the late father of both parties. Orders sought from this Court are dependable on the ownership of the customary land which is strongly disputed.

Having heard the Application for Restraining Orders and the Response to such application, and having considered the need for an order to maintain the Status Quo between the parties, the Court issued Restraining Orders for both parties.

The Court lacks jurisdiction to determine the claims, accordingly, the Court hereby transfers the matter to the Supreme Court for its inherent jurisdiction and appropriate determination of the same".



3. No reference is made in the Order to any statutory provision(s) that permits or authorizes the transfer or prohibits the Magistrates Court from hearing the claim other than an assertion that the "... *dispute (is) over customary land belonging to the late father (and husband) of both parties*".
4. Section 2 of the Magistrates Court (Civil Jurisdiction) Act [CAP. 130] ("*the Act*") expressly provides:

"Restriction on jurisdiction of the Magistrates' Court in civil matters

The Magistrates' Court shall not have jurisdiction to try a suit concerning wardship, guardianship of minors and persons of unsound mind, interdiction, appointment of a conseil judiciaire, adoption, civil status, succession, wills, bankruptcy, insolvency or liquidation of corporate bodies."

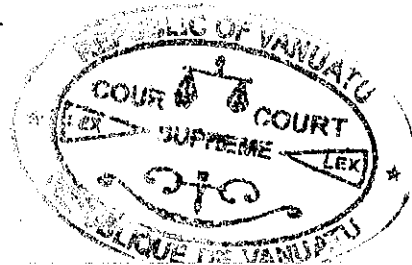
Nowhere in the above provision is any mention made of a suit concerning "*trespass*" or "*damaging property*" nor are claims for an injunction or requiring assessment of damages excluded from the jurisdiction of a Magistrates Court nor is the total sum claimed beyond the civil jurisdiction of the Magistrates Court.

5. Even if it could be said that the claim was a suit concerning "*succession*" (which is nowhere pleaded in the claim), and which is "*ex facie*" beyond the Magistrates jurisdiction, that would still not enliven the limited referral power that the Magistrate has under the Act.
6. In addressing a somewhat similar claim in National Housing Corporation v. Okau [2013] VUCA 21 the Court of Appeal said (at paras. 13 and 14):

"The issue about succession arose as the respondent pleaded in the Magistrates' Court that he was applying for probate of his mother's property. A grant of probate or letters of administration would have perfected his status to claim as a beneficiary of his mother's estate, and in turn to claim as a successor in title to his interest under the Agreement. The Magistrate's Court undoubtedly has no jurisdiction to try a suit concerning succession: s. 2 of the Act.

In our opinion the claim in the Magistrates Court did not turn on any issue about succession, and was not a suit about succession. The possible entitlement of the respondent to a grant of probate or letters of administration of his mother's estate was quite separate from the issue before the Magistrates' Court. It would have been open to the Magistrates' Court if it otherwise had jurisdiction to adjourn the eviction proceedings so that the respondent could pursue a grant in the Probate jurisdiction of the Supreme Court, but this did not make the matter in the Magistrates' Court a succession matter. The matter before the Magistrates Court was a straightforward claim for an eviction order".

Likewise in this case the suit is a straight-forward claim for liquidated damages of VT850,000 for trespass and damaging property.




7. The sole referral power given to a Magistrates Court in the Act is to be found in Section 3(4) which provides:

*"A magistrate may (**not** must) refer a case where the counterclaim exceeds the original claim to the Supreme Court for hearing."*

8. Plainly the existence of a "counterclaim (which) exceeds the original claim" (in value), is a pre-condition to the exercise of the referral power and in the present case there is no counterclaim by the defendants. The condition precedent to the exercise of the referral power is therefore unfulfilled and accordingly the referral is "ultra vires" and cannot be sustained (see: Joseph v. Japhet [2010] VUSC 123).
9. Whatsmore, the above description or categorization of the claim is both inaccurate and wrong. I accept that the defendants also assert ownership rights over the land in question but that does not transform the claim or dispute into a dispute about the ownership of customary land. The challenge to the claimant's standing to assert "trespass" is a denial of his exclusive possession not of his title to the land, since "trespass" *per se* is not concerned with ownership, and "possession" is a factual matter to be determined on the evidence [see: Vuroese Family v. Ave [2010] VUCA 22).
10. Finally, even if the underlying dispute could be categorized as involving the ownership of "customary land", the determination of such a dispute is exclusively vested by the Custom Land Management Act 2013 ("CLMA") in a "nakamal" or "Custom Area Land Tribunal" and the Supreme Court is only vested with a limited supervisory power over decisions of the Island Court (Land) under PART 8 of the CLMA. On that basis also the referral was incompetent.
11. In light of the foregoing the Transfer Order is quashed and the Magistrates Court papers are directed to be returned to the Santo Magistrates Court to be determined. There will be no order as to costs.

DATED at Port Vila, this 8th day of December, 2017.

BY THE COURT


D. V. FATIAKI
Judge.

