

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

**Civil**  
**Case No. 20/1405 SC/CIVL**

**BETWEEN: Hezekiah Loloi**  
First Claimant

**AND: Mathew Vuraina**  
Second Claimant

**AND: Harry Loloi**  
Third Claimant

**AND: Hopkins Vuraina**  
Fourth Claimant

**AND: Luke Loloi**  
Fifth Claimant

**AND: Ellis Vuraina**  
Sixth Claimant

**AND: John James Vira Leo**  
Defendant

*Date of Hearing:* 21 October 2021

*Before:* Justice V.M. Trief

*In Attendance:* Claimants – no appearance (Mrs C.T. Gesa)  
Defendant – in person

*Date of Decision:* 26 October 2021

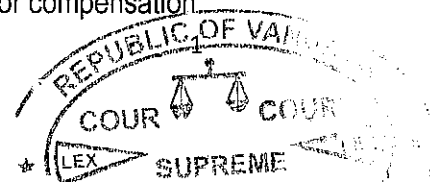
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**DECISION AS TO SUMMARY JUDGMENT APPLICATION**

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A. Introduction

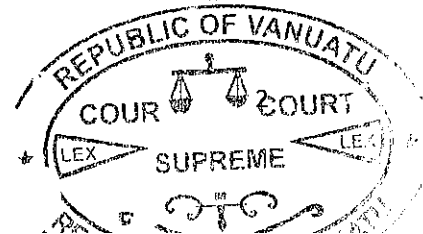
1. This is an Application for summary judgment on the basis that the Defendant John James Vira Leo has no prospect of defending the Claimants' Claim for compensation.



2. The Application is opposed on the basis that Mr Leo was acting under customary law in accordance with art. 95(3) of the Constitution.
3. Mrs Gesa was unavailable to attend the hearing as she was unable to return from Tongoa. However, Mr Leo having filed a response document on 31 August 2021, I took the opportunity to hear him as to the matters set out in the response. This decision determines the Application.

B. Background

4. The parties were at all material times resident on Pentecost island.
5. On or about 10 December 2015, Mr Leo alleged that the Claimants had breached a customary ban imposed on the collection of *beche de mer*, a breach which was denied by the Claimants, and committed various acts against the Claimants.
6. Mr Leo was subsequently charged in Criminal Case No. 2745 of 2016 with the following 44 allegations of criminal misconduct:
  - *Forcible Entry, contrary to section 71 of the Penal Code [CAP. 135] (x1);*
  - *Intentional Assault, contrary to section 107(b) of the Penal Code (x1);*
  - *Threatening to Kill, contrary to section 115 of the Penal Code (x12);*
  - *Rioting, contrary to sections 68(3) and 70 of the Penal Code (x1);*
  - *Unlawful Entry, contrary to section 143(1) of the Penal Code (x14);*
  - *Malicious Damage, contrary to section 133 of the Penal Code (x6)*
  - *Arson, contrary to section 134(1) of the Penal Code (x8); and*
  - *Theft, contrary to section 122(1) of the Penal Code (x1).*
7. By judgment dated 28 May 2018 in *Public Prosecutor v Leo* [2018] VUSC 75, Justice Andrée Wiltens rejected the preliminary submission that the Supreme Court had no jurisdiction to hear the criminal trial.
8. After trial, Mr Leo was convicted of the following charges:
  - *1x Rioting, contrary to section 70 of the Penal Code – maximum penalty 10 years imprisonment;*
  - *12x Malicious damage, contrary to section 133 of the Penal Code – maximum penalty 1 year imprisonment;*
  - *7x Arson, contrary to section 134 of the Penal Code – maximum penalty 15 years imprisonment;*
  - *6x Threatening to kill, contrary to section 115 of the Penal Code – maximum sentence of 15 years imprisonment;*



- 1x Intentional assault, contrary to section 107 of the Penal Code – maximum sentence of 5 years imprisonment; and
  - 12x Unlawful entry, contrary to section 143 of the Penal Code – maximum sentence of 20 years imprisonment.
9. On 22 February 2019, Mr Leo was sentenced to the following sentences of imprisonment, imposed concurrently:
- Rioting: 18 months imprisonment;
  - 12x Malicious damage: 9 months imprisonment;
  - 7x Arson: 3 years 9 months imprisonment;
  - 6x Threatening to kill: 3 years imprisonment;
  - Intentional assault: 6 months imprisonment; and
  - 12x Unlawful entry: 2 years imprisonment.
10. The Claimants' Claim is for compensation for the loss of 7 burnt houses and damage to personal belongings, damages for psychological trauma suffered and costs. The Claim is opposed.
11. The Claimants seek summary judgment on the basis that Mr Leo has no prospect of defending the Claim.

C. The Law

12. Article 47(1) of the Constitution provides as follows:

47. (1) *The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the issue according to substantial justice and whenever possible in conformity with custom.*

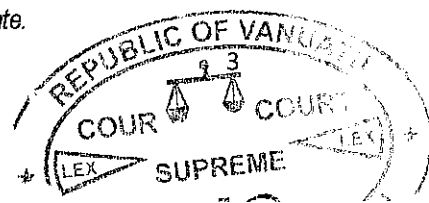
13. Article 95(3) of the Constitution provides as follows:

95. (3) *Customary law shall continue to have effect as part of the law of the Republic of Vanuatu.*

14. Rules 9.6(7) and (9) Civil Procedure Rules provide as follows:

9.6 (7) *If the court is satisfied that:*

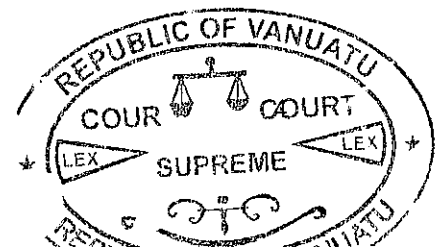
- (a) *the defendant has no real prospect of defending the claimant's claim or part of the claim; and*
- (b) *there is no need for a trial of the claim or that part of the claim, the court may:*
- (c) *give judgment for the claimant for the claim or part of the claim; and*
- (d) *make any other orders the court thinks appropriate.*



- ...
- (9) *The court must not give judgment against a defendant under this rule if it is satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law.*

D. Discussion

15. By the Application for Summary Judgment, the Claimants seek summary judgment on the basis that Mr Leo has no prospect of defending the Claim as he has not denied that the Claimants suffered loss from his actions. Further, that the judgment in *Public Prosecutor v Leo*; Criminal Case No. 2745 of 2016 confirms the damage suffered by the Claimants. Finally, that Mr Leo is basing his arguments on custom which has no basis in law. It is also asserted that the Defence and Counter Claim are 'a mere fishing expedition, frivolous and vexatious'.
16. The Claimants alleged in the Amended Claim (filed on 4 February 2021) that on 10 December 2015, Mr Leo committed various tortious acts against the Claimants including threats to kill, rioting, trespass, burning down their houses and destroying and stealing their personal belongings causing them great physical and psychological pain and loss. Further, that the liability of Mr Leo has been demonstrated in Criminal Case No. 2745 of 2016. The Claimants seek compensation for the loss of 7 burnt houses and damage to personal belongings, damages for psychological trauma suffered and costs.
17. Mr Leo filed Defence and Counter Claim by way of the following 3 documents:
- a. Following Amended Supreme Court Claim by the Defendants, filed on 16 February 2021;
  - b. Dispute and Counterclaim against the claimants, filed on 16 February 2021; and
  - c. Second Part of Claim in the Counterclaim and Compensation for Lost, filed on 8 March 2021.
18. Mrs Gesa's submission is correct that none of these documents contain a denial of the damage caused by Mr Leo to the Claimants. I agree therefore that Mr Leo has no prospect of defending the Claim as he has not denied that the Claimants suffered loss and damage from his actions.
19. The pleadings do not raise any substantial question of fact nor any difficult question of law.
20. It was also asserted in the Application for Summary Judgment that the Defence and Counter Claim are 'a mere fishing expedition, frivolous and vexatious'. I cannot determine this on an application for summary judgment; that is a matter for a strike-out application.



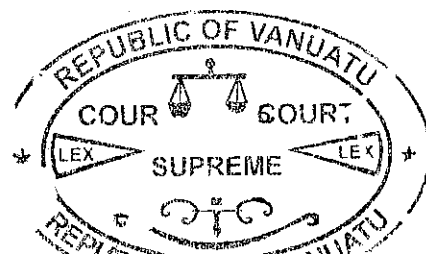
21. Finally, it was asserted that Mr Leo is basing his arguments on custom which has no basis in law.
22. Mr Leo in his response to the Application for Summary Judgment relied on art. 95(3) of the Constitution which provides that customary law "shall" continue to have effect as part of the law of the Republic of Vanuatu therefore (as I understand it) summary judgment should not be entered and his Counter Claim must stand.
23. Mr Leo also stated in his response that the judgments in Criminal Case No. 2745 of 2016 were wrong. Mr Leo appealed both his conviction and sentence in the Court of Appeal. The Court of Appeal dismissed both aspects of the appeal and upheld the sentence imposed by the sentencing judge: *Leo v Public Prosecutor* [2019] VUCA 50. Mr Leo had the opportunity to raise such arguments in the Court of Appeal and indeed, has already done so. The Court of Appeal's judgment is final and binding.
24. As to Mr Leo's argument that this Court must take into account that art. 95(3) of the Constitution provides that customary law continues and therefore this Court decline to enter summary judgment, I adopt the words of the Court of Appeal in *Leo v Public Prosecutor* [2019] VUCA 50 at [12]-[13]:

12. *We agree with the prosecution submissions that "custom" and "customary" law are subservient to the Constitution and legislations enacted by Parliament. Customary law cannot be inconsistent with the Constitution and legislations enacted by Parliament. Customary law only applies if there is no rule of law applicable.*
13. *We endorse the statement made by the learned Judge in his judgment in Public Prosecutor v Leo [2018] VUSC 75; Criminal Case 2745 of 2016 ( 28 May 2018) where he said at paragraph 31:*

*"Customary considerations would only be a factor in the Supreme Court's considerations if there were no rules of law applicable to what it was determining; and if it were possible to determine the matter on the basis of substantial justice. It is at that point that customary considerations would come into play, such that, if possible, the Court's determination on the basis of substantial justice would also conform with custom. Of the three bases on which the Court must make a determination, customary considerations are the least significant or compelling. The most compelling basis requires the Court to determine the matter in accordance with law; if no rules of law are in place, then the next basis of determination is substantial justice. If the matter is to be determined on the basis of natural justice, it is only then, if possible, that conformity with custom is to be considered"*

*and at paragraph 34 and 35:*

*"Article 95 of the Constitution was inserted into the document to deal with transitional matters. What it plainly says is that customary law will continue to have effect as part of the laws of Vanuatu. Pre-independence, customary law played a relatively minor part in the way the laws were administered. Some thirty-eight years later, that continues to be the position. Article 95 was not ever intended to give greater prominence to customary considerations – just to maintain the status quo.*



*There has been no diminution of significance; neither has customary law taken on added significance; except in one area and that relates to ownership and use of land. Had Parliament wished, customary law in the area of alleged criminal misconduct could also have been devolved to the Chiefs – that has not occurred. There cannot be a clearer message of Parliament's intent than 38 years of silence in the face of many calls for change."*

25. Article 95 of the Constitution was not ever intended to give greater prominence to customary considerations. Accordingly, if the Court is satisfied of the matters set out in rules 9.6(7) and (9) of the *Civil Procedure Rules*, then it can enter summary judgment. Mr Leo's arguments in reliance on art. 95(3) cannot prevent the entering of summary judgment.

E. Result and Decision

26. For the reasons given, I am satisfied that Mr Leo has no real prospect of defending the Amended Claim and that there is no need for a trial of the claim. Accordingly, summary judgment is **entered** for the Claimants for an amount to be determined.
27. The Claimants are to file and serve sworn statements as to the quantum of damages **by 4pm on 18 November 2021**.
28. The Defendant is to file and serve sworn statements in response **by 4pm on 15 December 2021**.
29. The Claimants are to file and serve any sworn statements in reply and submissions **by 4pm on 19 January 2022**.
30. The Defendant is to file and serve submissions in response **by 4pm on 9 February 2022**.
31. This matter is listed for Hearing as to quantum of damages **at 9am on 23 May 2022** at Dumbea Courtroom.
32. The Claimants are to serve a copy of this decision on the Defendant and file proof of service **by 4pm on 2 November 2021**.

**DATED at Port Vila this 26<sup>th</sup> day of October 2021  
BY THE COURT**

*VM Tref*  
Justice Viran Molisa Tref

