

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

Civil
Case No. 24/1092 SC/CIVL

**BETWEEN: Jannet Molbarav, Coline Molbarav,
Pauline Molbarav, Serah Molbarav &
Marie Molbarav**
Claimants

**AND: Republic of Vanuatu
Director of Lands**
Defendant

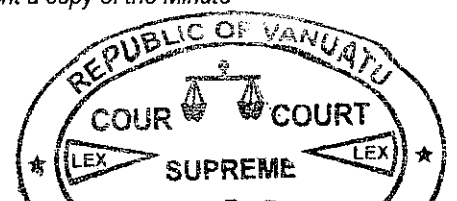
Date of Hearing: 29 October 2024
Date of Decision: 1 November 2024
Before: Justice M A MacKenzie
Distribution: Claimants – Mr W Kapalu
Defendant – Mr T Loughman

DECISION AS TO APPLICATION TO STRIKE OUT CLAIM

Application

1. On 24 April 2024, the Defendant filed an application seeking that the claim filed on 10 April 2024 be struck out. The application was served on Mr Kapalu on 16 October 2024, and a proof of service has been filed.
2. On 16 October 2024 the application was listed for hearing. The Minute setting down the interlocutory hearing was sent to the Claimant's counsel, Mr Kapalu. The Claimants were to file a response to the strike out application by 4pm 24 October 2024, but have failed to do.
3. Mr Kapalu did not appear at the hearing. He was contacted by telephone but did not answer his phone. In all the circumstances, the claimants have had a reasonable opportunity to respond to the application.¹

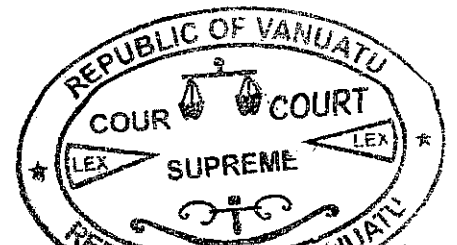
¹ Pursuant to rule 7.3 of the Civil Procedure Rules, the application must be served at least 3 days before the date set for the hearing of the application. It was served, as detailed above. Mr Kapalu was sent a copy of the Minute setting down the hearing of the strike out application.



4. The application to strike out the claim is made on the following grounds:
1. The claimants have no standing to bring the claim. That is because according to the decision of Nambuloaru Nakamal issued on 13 September 2016, John Tari Molbarav was declared as the custom owner of the land and not the Claimants or the Family Molbarav. John Molbarav is now deceased, and there is no evidence that the Claimants are the administrators of John Molbarav's estate.
 2. The claim is on abuse of process because it seeks the same relief and concerns the same subject matter of civil cases 21/1631 and 21/1713, which are currently before the Court. The Defendant submits that res judicata applies.

The Claim

5. In order to consider whether to strike out the claim, some context is needed. The Claimants are the siblings of the deceased, John Molbarav. As noted however, there is no evidence before the court that they are the administrators of his estate.
6. The claim is that:
1. The Family Molbarav are the custom owners of Nambuloaru land, a portion of which is leased to Vanuatu Agriculture Research and Training Centre (VARTC). This is comprised in lease title 04/2641/016.
 2. The Claimants assert that VARTC is located on Nambuloaru land and not Sarautu land which belongs to Family Loy.
 3. The Defendant acquired VARTC lease title 04/2641/016 for public purposes and entered into a deed of release on 12 March 2021 to compensate Family Loy for the land comprised in lease title 04/2641/016. The compensation sum is VT 435,690,000.
 4. That the deed of release is wrong, irregular and incompetent because VARTC is located on Nambuloaru land, whose custom owners are Family Molbarav, the claimants.
 5. The Claimants seek relief as follows: -
 - a) A declaration that the deed of release is null and void.
 - b) An Order compensating the Claimants for the acquisition of the VARTC lease in the sum of VT 200 million.



- c) An Order compensating Timothy Molbarav, Kerry Molbarav and Jason Molbarav in the sum of VT 235,690,000.²

Civil Cases 21/1631 and 21/1713

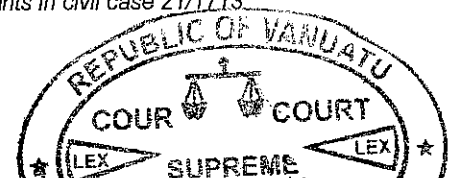
7. Civil cases 21/1631 and 21/1713 have been consolidated.
8. The Claimant in civil case 21/1631 is Family Loy. The claim seeks specific performance of the deed of release relating to VARTC lease title 04/2641/019.
9. The Claimant in civil case 21/1713 is Family Molbarav represented by Timothy Molbarav, Kerry Molbarav and Jason Molbarav. They are John Malbarav's children. As set out at paragraph 1 of that claim, there is a long history of proceedings relating to custom ownership, and the Nambuloaru land. The history is expanded on in detail in Jason Molbarav's sworn statement filed on 23 August 2021. I refer to his sworn statement when considering whether the Claimants have standing to bring their claim in this case.
10. The claim relates to the deed of release dated 12 March 2021 relating to lease title 04/2641/019. As relief, a declaration is sought declaring the deed of release dated 12 March 2021 as null and void, together with an order directing the First and Second Defendants to account for monies released under the deed of release dated 12 March 2021.

The Law

11. The jurisdiction to strike out a proceeding should be exercised sparingly, and only in clear cases where the Court is satisfied that it has both the material and the assistance from the parties to reach a definite conclusion.
12. The relevant principles are discussed by the Court of Appeal in *Hocten v Wang* [2021] VUCA 53. The Court of Appeal said (at 11-13);

11. There is no jurisdiction to strike out a Claim in the Civil Procedure Rules, apart from a narrow provision in rule 9.10. However, pursuant to s 28(1)(b) and s 65(1) of the Judicial Services and Courts Act [Cap 270], the Supreme Court has jurisdiction to administer justice in Vanuatu, and such inherent powers as are necessary to carry out its functions. Rules 1.2 and 1.7 of the Civil Procedure Rules give the Supreme Court wide powers to make such directions as are necessary to ensure that matters are determined in accordance with natural justice. The jurisdiction to

² These parties are not Claimants in relation to this claim. They are however the Claimants in civil case 21/1713



strike out is essential and must exist to enable the Supreme Court to carry out its business efficiently, so that hopeless or vexatious claims, causing unreasonable costs, do not prevent the Court from hearing proper claims. Such jurisdiction was recognised by this Court in Noel v Champagne Beach Working Committee [2006] VUCA 18.

12. *The basis for striking out a proceeding is recognised in jurisdictions throughout the Pacific; see the New Zealand High Court Rules, r15.1, and McNeely v Vaai [2019 WSCA 12]. A pleading will be struck out:*

- a) if there is no reasonably arguable cause of action;*
- b) the claim is frivolous or vexatious;*
- c) it is otherwise an abuse of the process of the court.*

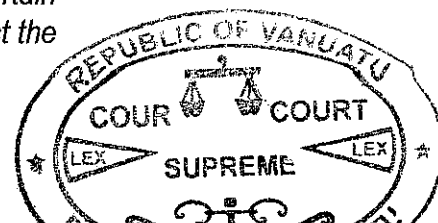
13. *The jurisdiction should be exercised sparingly, and only in clear cases where the Court is satisfied that it has both the material and the assistance from the parties required to reach a definite conclusion. A claim should only be struck out when despite this material and assistance, and the chance to amend the pleadings to reflect that material, it cannot possibly succeed.*

13. Striking out any statement of a case has been described by the Supreme Court as a “draconian remedy”. In *Hungtali v Kalo* [2024] VUSC 136, Hastings J said at 15;

“Striking out any statement of a case is a “draconian remedy” (Asiansky Television plc v Bayer Rosen [2001] EWCA Civ 1792). Although striking out a claim is not inherently contrary to the Constitution’s guarantee of protection of the law, and equal treatment under the law or administrative action, in Article 5, the Court must nevertheless be cautious to ensure its exercise of discretion to strike out a claim does not violate those guarantees. A claim will not be suitable for striking out if it raises a serious factual issue which can only be properly determined by hearing oral evidence (Bridgeman v McAlpine-Brown [2000] LTL January 19, CA). Nor should a claim be struck out unless the Court is certain that the claim is bound to fail (Hughes v Colin Richards & Co [2004 EWCA Civ 266). In short, if a pleading raises a serious contested issue, then it should not be struck out and the issue should be determined after trial”.

13. In *Gouras v NACA Ltd* [2020] 53, the Court of Appeal made the following observation about disputed facts in the context of an interlocutory application at 22:

“The outcome of interlocutory applications such as the present will rarely be successful when there are matters of disputed fact. The admissibility of certain evidence and the weight to be given to certain evidence are matters for trial. Parties and counsel cannot expect the

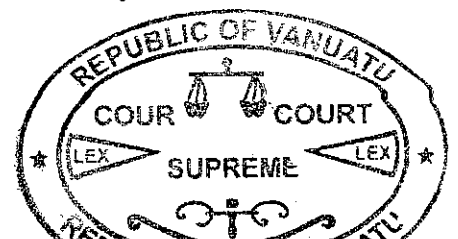


Court on such applications to hear a 'mini-trial' or to make a decision based on contested factual material..."

Discussion

14. The current claim does not relate to the correct lease title. It may simply be a typographical error. The correct lease title is 04/2641/019.³
15. The Claimants are the siblings of the deceased, John Molbarav. The Family tree is set out in Marie Molbarav's sworn statement filed on 18 June 2024. She also confirms that the Claimants in civil case 21/1713 are John Molbarav's children.
16. The primary issue is whether the Claimants have standing to bring the claim? I am conscious that for whatever reason the Claimants have not responded to the application. The claim refers to the Family Molbarav. However, in the claim itself, the Claimants provide no information or particulars as to their standing to bring a claim on behalf of Family Molbarav. For reasons explained below, an amendment of the claim would not cure this issue.
17. It is not in dispute that the Claimants are members of the Family Molbarav. But that, in and of itself, does not give them standing to bring the claim. The application to strike out the claim is predicated on John Molbarav being the declared custom owner of the Nambuloaru land by virtue of a decision of the Nambuloaru Nakamal made on 13 September 2016. While the sworn statement filed in support of the strike out application makes that assertion, the Nakamal decision was not annexed to the statement.
18. I have however reviewed the pleadings filed in civil case 21/1713, filed by Family Molbarav. The pleadings provide considerable assistance in respect of the question of standing. Helpfully, Jason Molbarav's sworn statement filed on 23 August 2021 in civil case 21/1713 sets out a chronology of decisions (with the decisions attached) made in various jurisdictions about custom ownership of Nambuloaru land. The decisions establish that the custom owner of the Nambuloaru land is either John Molbarav or Family John Tari Molbarav.
19. On 23 November 2007, the Southeast Santo Village Lands Tribunal declared John Molbarav custom owner of Nambuloaru land. A copy of the declaration is annexed to Jason Molbarav's statement as JM 3. Then, annexed to his statement as JM 7 is a copy of the decision of the Nambuloaru Nakamal dated 13 September 2016, which confirms John Molbarav to be the declared custom owner. Finally, annexed as JM 8 of Jason Molbarav's statement, is a Certificate of Recorded Interest in land dated 3 November 2016. It relates to Nambuloaru land and confirms Family John Tari

³ refer to the defence filed on 23 April 2024 and civil cases 21/1631 and 21/1713.



Molbarav as custom owners. The representatives recorded are John Molbarav, Timothy Molbarav, Kerry Molbarav and Jason Molbarav.

20. The difficulty for the Claimants is that they are neither the declared custom owners of Nambuloaru land or the lease in question, nor are they the authorized representatives of Family Molbarav, having regard to the various decisions annexed to Jason Molbarav's sworn statement. The decisions speak for themselves. Notably, the Claimants are not recorded as representatives on the Certificate of Recorded Interest in land. There is no evidence at all either that they are the administrators of John Molbarav's estate. To be clear, the decision regarding standing is based on the decisions annexed to Jason Molbarav's statement and not simply his assertions.
21. Therefore, the Claimants have no standing in relation to bring a claim in relation to Nambuloaru land in any capacity- there is no evidence that they are the custom owners, authorised representatives of the custom owner, or that they are the administrators of John Molbarav's estate.
22. Further, the claim is an unnecessary duplication. Family Molbarav represented by John Molbarav's children filed a claim involving the same lease title and seeking exactly the same relief on 28 May 2021. The Claimants recognise that the claim involves the same subject matter as civil case 21/1713 as they made an application to consolidate the proceedings.
23. The Defendant submits that the claim is res judicata because it involves the same subject matter. However, res judicata does not apply as there has not been a determination of civil claim 21/1713.

Result

24. The claim is therefore struck out. The primary reason is that the Claimants do not have standing to bring the claim for the reasons set out above. While I recognise that the jurisdiction to strike out a claim is to be exercised sparingly, the claim cannot be brought if the Claimants have no standing.
25. I make an order for costs in favour of the Defendant as either agreed or taxed.

DATED at Port Vila this 1st day of November 2024.
BY THE COURT

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Justice M A MacKenzie

