

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

**Civil Appeal
Case No.16/2972 CoA/CIVA**

BETWEEN: BERNARD ITAI LAUTO
Appellant

AND: THE EFATE ISLAND COURT
Respondent

AND: SMITH RICHARD LAUTO
Interested Party

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice John Mansfield
Hon. Justice Oliver Saksak
Hon. Justice Dadley Aru
Hon. Justice David Chetwynd

Counsel: *Mr Robert Sugden for Appellant*
Mr Arnold Kiel Loughman, Attorney General for Respondent
Mr Justin Ngwele for Interested Party

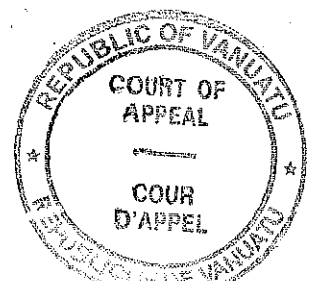
Date of Hearing: *08th November 2016 at 3 pm o'clock*

Date of Judgment: *18th November 2016 at 4 pm o'clock*

JUDGMENT

Introduction

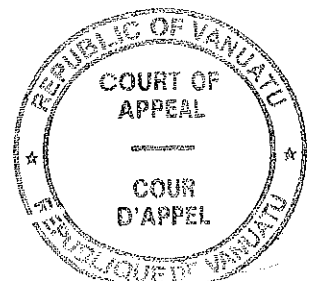
1. This is an appeal filed by the Appellant against the whole of the Judgment of the Supreme Court dated 29th June 2016 dismissing the claim of the Appellant.
2. The Appellant seeks for the following orders:
 - (i) That the Appeal be allowed and the Judgment be set aside in its entirety.



- (ii) That the Appellant have judgment on his claim for Judicial Review.
- (iii) That the Respondent pay the Appellant's costs of the Appeal and of the claim.

Background

3. The background events are contained in the Judgment under appeal. A summary of these events is provided below.
4. The issue at the heart of this matter is the custom ownership of land at Erakor village held by the Appellant's late father Itai Lauto on behalf of family Itai Lauto.
5. Itai Lauto died in 1995. Upon his death, his oldest son Gerald Itai Lauto, assumed custom ownership of the land from his father. The Appellant is the brother of Gerald Itai Lauto, the father of Smith Richard Lauto, the Interested Party.
6. Gerald Lauto died on August 30th 2009. Upon his death, Bernard Lauto applied to the Efate Island Court in Civil Case 15/2010 for the "Grant of Customary Right" to take care and protect Family Itai Lauto's properties.
7. The Appellant sought the following in the Efate Island Court:
 - "a) An order to give right to Claimant on behalf of Family Itai Lauto to take care and protect custom properties of family Itai Lauto that exist today at Erakor village, South Efate."
 - "b) An order restraining any other families other than the Lauto Itai Family to enter into Family Itai Lauto's customary land and including all lease titles that belong to Family Itai Lauto."
8. This application was not the subject of a defended hearing. During the course of the hearing of this appeal, Mr Sugden confirmed that this is like an application for the administration of the deceased's property when the deceased had no will and



because it was about the customary lands, it was made before the Island Court pursuant to section 10 of the Island Courts Act.

9. On 26 April 2011, the Efate Island Court issued the following orders:

“ 1. Claimant Bernard Itai Lauto was hereby granted the customary right on behalf of Family Itai Lauto of Erakor village, to take care and have the right to distribute the custom properties that belongs to his father, late Itai Lauto.

2. That any dealings within Family Itai Lauto's customary land, claimant must give his consent before development may be carried out.

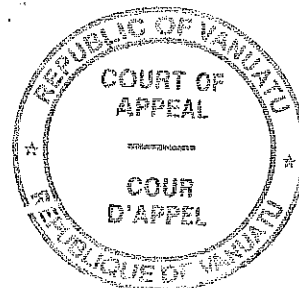
3. No order as to costs.”

10. No appeal has been instituted against these orders.

11. In December 2014 a claim was filed in the Efate Island Court by four (4) of the late Gerald Itai Lauto's seven children seeking a declaration from the Court that one of them, Smith Richard Lauto, was the first born son of Gerald Lauto and to determine family customary birth rights in accordance with custom and tradition of Erakor, South Efate.

12. The Efate Island Court conducted a hearing on June 8th and June 9th and delivered its judgment on June 12th 2015. In that judgment the Court made the following declarations:

- 1) Declaring Smith Richard Lauto as the oldest son of the late Gerald Itai Lauto.
- 2) Declaring that Smith Richard Lauto and his other brothers Francois Lauto, David Lauto and Raphail Itai Lauto are the biological blood line sons of the late Gerald Itai Lauto.

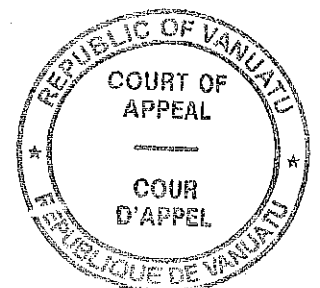


3) Declaration that Smith Richard Lauto as the “right person” to “inherit” the “Family Customary Properties” of Family Itai Lauto that Gerald Itai Lauto inherited from his father late Itai Lauto according to custom and traditions of Erakor Village, South Efate.

13. The Efate Island Court also made the following additional orders:

- i) An order that the defendant Bernard Itai Lauto return every Family Customary birth right of the late Gerald Itai Lauto back to Smith Richard Lauto of Erakor Village, South Efate, within 30 days starting from Friday June 12th 2015.
- ii) An order that any man or woman inside and outside of family Itai lauto must consult Smith Richard Lauto concerning any development and those to happen in the future inside any custom properties like “Ewenesu, Elak Mparum, Entenmap and Elak Naperik.”
- iii) An order that Smith Richard Lauto must recognize and work together with his other brothers and also with every Family Itai Lauto concerning sharing of custom properties and any interests and any future developments that arose from these custom properties.
- iv) That every party must respect and love each other.
- v) That the Claimants and defendants together with Family Lauto must go back together in custom and reconcile to be back as one family.

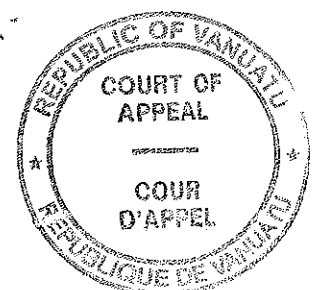
14. The Appellant says that declaration 3 together with orders (i), (ii) and (iii) of the 12 June 2015 Judgment cannot co-exist with the orders in favour of the Appellant made in 2011. The Appellant says the Efate island Court had exhausted its jurisdiction when it made the orders in 2011. For this reason it had no jurisdiction to make any further or inconsistent orders at a later date. For this reason the latest orders should be quashed.



15. The Appellant applied before the Supreme Court to review the Judgment of the Efate Island Court of 12 June 2015.
16. The Supreme Court heard the Appellant's application and handed down its Judgment on 29th June 2016 dismissing the Judicial Review claim of the Appellant.
17. The Appellant now appeals to this Court against the whole of the Judgment of the Supreme Court of 29th June 2016.

Grounds of Appeal

18. The Appellant advances his appeal on the following grounds:
 1. The Judge erred in law in dismissing the Judicial Review claim No.18 of 2015.
 2. The Judge erred in law in failing to hold that the Island Court jurisdiction had been exhausted by the judgment dated 26 April 2011 and that the later decision (of 12 June 2015) was ultra vires.
 3. The Judge erred in law in holding that there was a revocation of the powers conferred on the Appellant under the earlier order.
 4. The Judge erred in law in refusing the relief sought on the basis that the Respondent in 2015 was not considering the same issue as in 2011.
 5. The Judge erred in law and in facts in forming and relying on the claimants to the right to control the lands of family Itai Lauto.
 6. The Judge erred in law in basing his decision that the issues in the two cases were not the same on a conclusion that the 2011 decision was not a declaration of custom ownership.



Considerations

19. We consider each and all grounds of appeal together and when the need arises for an emphasis to be placed on a particular ground, we will do so.

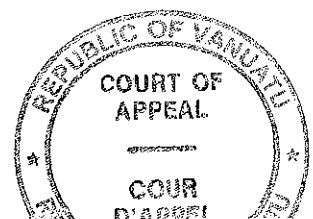
20. We note that after the death of Gerald Itai Lauto, his brother (the Appellant) applied to the Efate Island Court for a grant of customary right in CC15 of 2010 seeking orders from the Court to give him right on behalf of family Itai Lauto to take care and protect custom properties of family Itai Lauto that existed in Erakor Village.

21. The parties to Efate Island Court in Civil Case No.15 of 2010 were the Appellant and Mrs Timaima Lauto, the wife of Gerald Itai Lauto and the step mother of the Interested Party. Mr Sugden conceded that the proceeding was like a hearing on an application for administration of the estate of Gerald Itai Lauto but here for the management of custom properties, namely custom lands at Erakor village. From the outset there were no advertisements. It is said the Appellant must have known that the Interested Party had a legitimate claim to all lands owned by late Itai Lauto and late Gerald Itai Lauto (his father). The Interested Party was never aware about the said proceeding and was never asked, requested or invited to be part of the proceeding.

22. The issue remains as to who in the custom of Erakor village, will succeed Gerald Itai Lauto to take care and protect the custom properties including custom lands and lease titles on behalf of Family Itai Lauto.

23. On 26 April 2011, the Efate Island Court granted the customary right to the Appellant on behalf of Family Itai Lauto of Erakor Village to take care and have right to distribute the custom properties that belong to the Appellant's father, late Itai Lauto. The Court also made an order that the Appellant must give his consent before any development may be carried out within Family Itai Lauto's customary lands.

24. We are of the view that the orders made by the Efate Island Court on 26 April 2011 were of administrative nature in respect to the management and protection of



the custom lands of Family Itai Lauto after the death of Gerald Itai Lauto who was the last successor in custom.

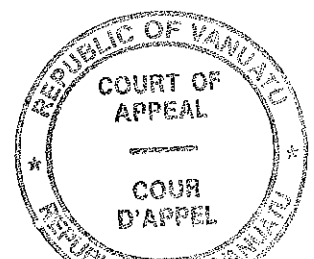
25. We treat and consider the orders of 26 April 2011 as administrative management of the custom properties of Family Itai Lauto.

26. That conclusion flows from the nature of the orders made, and the procedure adopted by the Island Court before it made those orders. In particular, its procedure did not follow the course that would have been followed if the Island Court was intending to determine whether, for all purposes and for the future, Bernard Lauto was the custom owner of the Land on behalf of the family Itai Lauto. It did not advertise the claim. It did not require notice of the application to be given to the family of late Gerald Itai Lauto, in particular his children. It proceeded on the basis of Bernard Lauto saying he had the support of the whole of Family Itai Lauto. He may well have been in that position, with a proper administrative role to manage his brothers' estate. The process, however, was clearly not one the Island Courts could have followed if it considered it was hearing and deciding, according to custom, the Custom owner of the land in succession to Itai Lauto and then Gerard Lauto.

27. We note there were differences between the Appellant, the wife of late Gerald Itai Lauto and the seven children of late Gerald Itai Lauto, the successor in custom of the custom properties of Itai Lauto.

28. We note that apart from the restraining orders, the orders made by the Efate Island Court on 29 April 2011, are of general administrative management of the custom properties of Itai Lauto. We consider and treat them as interim or of temporary type administrative management orders over the custom properties of Itai Lauto at Erakor village.

29. On 12 December 2014, Smith Richard Lauto, Francois Lauto, David Lauto and Raphael Itai Lauto filed a claim in the Efate Island Court seeking for declaration to the effect that Smith Richard Lauto is declared the biological and first born son of late Gerald Itai Lauto and in accord with the custom and tradition of Erakor, Smith Richard Lauto be declared as the successor in inheritance to his father late Gerald



Itai Lauto. They also sought a declaration that he has the right to distribute and share the custom properties of his father, late Gerald Itai Lauto.

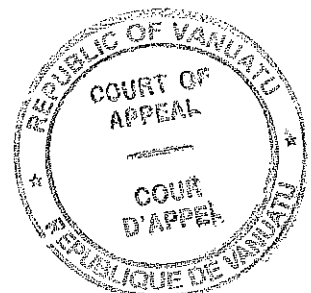
30. The Efate Island Court heard the claim. The Court heard the evidence in custom in respect to the declarations sought by the claimants (Interested Party) in their claim in CC001 of 2014.

31. On 12 June 2015, the Efate Island Court made its judgment in CC019 of 2014 making orders that Smith Richard Lauto is the First born son of late Gerald Itai Lauto and that he is the right person to inherit the custom properties of family Itai Lauto in accordance with the custom of Erakor.

32. We consider that the Efate Island Court jurisdiction had not been exhausted by the judgment dated 26 April 2011 as the judgment issued on that date was not a contested one. There were no evidence provided to testify the custom position on the issue. We consider that the Efate Island Court Judgment of 12 June 2015 reflected the correct and accurate position of the custom in respect to succession and inheritance in the land laws of Erakor.

33. Whilst the issue dealt with in the decision of the Island Court on 29 April 2011 is in some respect the same as the issue dealt with by the same court on 22 June 2015, it is within the jurisdiction of an Island Court to revisit an issue of custom where the merits of an earlier decision need to be reviewed to take into account the interests of the parties or custom that was not brought to the Court's attention when the earlier decision was made. We are of the view that the issue of res judicata has no application. Here, the orders of 29 April 2011 were of temporary nature while the orders of 12 June 2015 were definite and conclusive after proper evidence was adduced, assessed and findings of appropriate custom were made and applied.

34. We consider that the Primary Judge was correct in his decision to dismiss the Judicial Review claim No.18 of 2015. We arrive at the same conclusion as the Primary Judge but for different reasons.

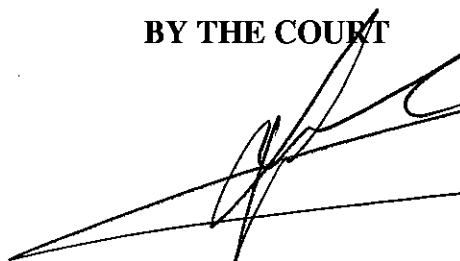


Conclusion

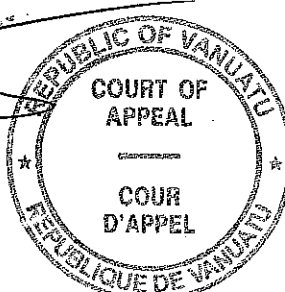
1. The appeal is dismissed.
2. The Appellant is to pay costs of the Respondent and Interested Party. Such costs are on normal standard. They are to be agreed or taxed.

DATED at Port-Vila this 18th day of November, 2016

BY THE COURT



Hon. Vincent Lunabek
Chief Justice


The seal is circular with the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom, separated by two stars. In the center, it reads "COURT OF APPEAL" and "COUR D'APPEL" with a horizontal line between them.