

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

**Civil**  
**Case No. 19/1982 SC/CIVL**

**BETWEEN: Michael Namaka Iati**  
Applicant

**AND: Ileen Nishai**  
Respondent

*Date of Hearing:* 28 January 2021  
*Before:* Justice V.M. Trief  
*In Attendance:* Applicant – Mr H. Rantes, by phone link from PSO, Tanna  
Respondent – no appearance (Ms T. Matas)  
*Date of Decision:* 3 March 2021

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**JUDGMENT**

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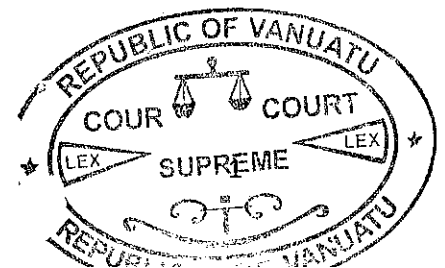
A. Introduction

1. The Applicant Michael Namaka Iati seeks custody of his and the Respondent Ileen Nishai's 4 year old biological daughter Susana Namaka Iati born in March 2016 (the 'child').
2. There was no appearance for Ms Nishai at the hearing of the Application. Having considered Mr Rantes' submissions at the hearing and the parties' written submissions, I now set out my decision.

B. The Law

3. Section 9 of the *Guardianship of Minors Act 1971* (UK) provides:

9. (1) *The court may, on the application of the mother or father of a minor (who may apply without next friend), make such order regarding –*
  - (a) *the custody of the minor; and*



(b) *the right of access to the minor of his mother or father,*

as the court thinks fit *having regard to the welfare of the minor and to the conduct and wishes of the mother and father.*

*(my emphasis)*

4. Section 1 of the of the *Guardianship of Minors Act 1971* (UK) provides:

1. Where in any proceedings before any court (whether or not a court as defined in s. 15 of this Act) –

(a) the custody or upbringing of a minor; or

(b) the administration of any property belonging to or held on trust for a minor, or the application of the income thereof,

is in question, the court, in deciding that question, shall regard the welfare of the minor as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, upbringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father.

*(my emphasis)*

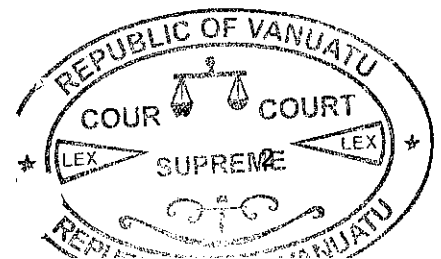
5. A primary consideration for the Court is the best interests of the child, in accordance with subarticle 3(1) of the *Convention on the Rights of the Child 1989* ('CRC').

C. Discussion

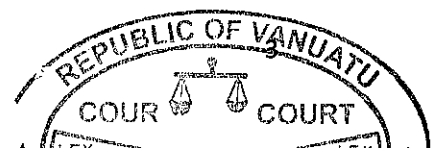
6. Mr lati applies for an order that he be given custody of the child and that Ms Nishai have reasonable access to the child on the grounds that:

- a) He is the biological father;
- b) He has sufficient means to care for the child including being self-employed (owns a vehicle and operates a public transport business, sells kava and owns a shop) and he owns a big house at Kwansiwi Village on Tanna island where the child would have her own bedroom;
- c) His house is very close to a school;
- d) He has a new partner who is supportive of the Application and who is willing to care for and support the child;
- e) He and his new partner cared for the child for 8 months (from when she was 7 months old) and celebrated her first birthday with her, before the child was removed from them by the Police under a Magistrates' Court domestic violence protection order which granted temporary custody; and
- f) Ms Nishai is not employed so she cannot support the child's welfare.

7. The Application is opposed.

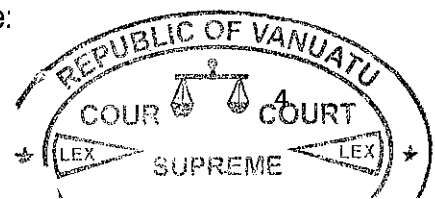


8. All but the last of the grounds are evidenced by 2 sworn statements from Mr lati and one from his new partner Meriam Namaka Maliwan.
9. Mr lati also deposed that Ms Nishai removed the child from him under a temporary protection order from the Magistrates' Court which granted her temporary custody and him access. Mr lati attached copies of the Magistrates' Court Orders dated 19 January 2018 and 16 February 2018. By the Orders dated 19 January 2018, the Police were permitted to remove the child from Mr lati. The Orders dated 16 February 2018 granted temporary custody of the child to Ms Nishai and access to Mr lati.
10. Mr lati deposed that contrary to the Magistrates' Court order, Ms Nishai did not allow him access. He lodged a complaint with the Police because Ms Nishai breached the Orders dated 16 February 2018 by taking the child to Port Vila without his knowledge. He stated that Ms Nishai was charged, pleaded guilty and sentenced to community work.
11. Finally, that he has not had access to his daughter since 2018 when Ms Nishai moved the child with her to Port Vila.
12. Ms Nishai in her sworn statement evidences that she and Mr lati separated before she gave birth to the child and he went to live with his new partner, now wife Meriam. She stated that they have not received any financial or material support including money, clothes or food from Mr lati since. She and the child have been supported throughout by her relatives. She stated that she is capable of looking after the child's welfare which she has done since birth. She said that she has in the past 4 years made sure that the child is taken care of and she is living with Ms Nishai and her new partner. With her family's continuous support, they continue to care for, support and provide the child with shelter, food and clothes and will enrol her in school in 2021.
13. She deposed that the child did not stay with Mr lati and his wife as claimed but that Mr lati kidnapped the child sometime in 2018 without her knowledge or that of her uncle Mr Bosco. She had left the child, then about 2 years old, in Mr Bosco's care while she travelled to Port Vila to care for her sick mother who was admitted at the Vila Central Hospital. A few months later, she received news of the kidnapping so returned to Tanna and obtained a Domestic Violence Protection Order enabling the Police to remove the child from Mr lati.
14. The starting point for my consideration is the welfare of the child and the conduct and wishes of the mother and father: subs. 9(1) of the *Guardianship of Minors Act 1971 (UK)*.
15. I will consider the parties' wishes and conduct and then the child's welfare.
16. As to Mr lati and Ms Nishai's wishes, it is clear that both parties wish to have custody of the child. Ms Nishai deposed at the end of her sworn statement that she should have custody of the child and reasonable access be granted to Mr lati.
17. As to the parties' conduct:
  - a. Ms Nishai deposed that she and Mr lati separated before she gave birth to the child and that Mr lati then went to live with his now wife Ms Maliwan. Mr Rantes



submitted that the child was living under Mr lati's roof until the parties separated and Ms Nishai took the child with her. However, I reject that submission as Mr lati does not address this anywhere in his evidence. Accordingly, I accept that the parties separated before Ms Nishai gave birth to the child.

- b. Both parties in their evidence reference a period when the child lived with Mr lati and Ms Maliwan. The latter describe this as an 8-month period during which they celebrated the child's 1<sup>st</sup> birthday and then the child was removed by the Police under a Magistrates' Court Order. From the evidence, that must have been the Magistrates' Court Order 16 February 2018. I am left to wonder then that the child must have been with Mr lati and Ms Maliwan for longer than 8 months if they did celebrate her 1<sup>st</sup> birthday together and then she was only removed from then in February 2018, a month shy of her 2<sup>nd</sup> birthday. Ms Nishai's evidence on the other hand is that she had left the child in her uncle Mr Bosco's care when she travelled to Port Vila to care for her sick mother who was admitted to hospital. She stated that Mr lati then kidnapped the child without her knowledge. When she found out, she returned to Tanna and obtained the Magistrates' Court Order. I cannot determine from the evidence how long the child was with Mr lati and Ms Maliwan but accept only that she lived with them for an unknown period of less than 12 months.
  - c. It is obvious in the circumstances that Ms Nishai using a Magistrates' Court Order to regain custody of the child showed that she did not consent to the child being with the father.
  - d. Mr lati complained in his evidence that despite the Magistrates' Court granting him access to the child, he has not had had access to his daughter since 2018 when Ms Nishai moved the child with her to Port Vila. I would expect that he then apply to the Magistrates' Court for contempt of Court. However, Mr lati's evidence is that he lodged a Police complaint resulting in Ms Nishai's conviction. There was no evidence to the contrary from Ms Nishai. I accept that Ms Nishai has not complied with the Magistrates' Court Order dated 16 February 2018 to allow Mr lati access to the child.
  - e. It is unsurprising then that there is ill will between the parties.
  - f. It is undisputed that but for the period when the child lived with Mr lati and Ms Maliwan, that she has lived with Ms Nishai and it has been Ms Nishai, Ms Nishai's new partner and Ms Nishai's relatives who have cared for her. Mr lati has not provided any other material or financial support.
18. As to the child's welfare, there is no evidence to the contrary that she has not been well taken care of by Ms Nishai and her relatives. However, that has been achieved in circumstances of non-compliance with a Court Order. It is important for the child that she have time with both parents.
19. I also consider the following factors from the Master's decision in *Nakamura v Dalley* [2018] VUSC 134 because Mr lati's Application seeks to remove the child from Ms Nishai's custody whom she has lived with for the most time:



- a. The likely effect on the child of any change in their circumstances or disruption to the continuity of their care. I consider that removing the child from Ms Nishai given the relatively short time that the child has lived with Mr lati, and that she may well not remember because she was only 1 year old at the time, would have a negative effect on the child. In the circumstances, I consider that there should be minimal disruption to the continuity of care for the child.
- b. The likely effect on the child of any separation from either parent... or other person with whom they have been living. Given how much time that the child has spent with Ms Nishai, I consider that separating her from Ms Nishai would have a negative effect.
20. In the circumstances, I consider that it is in the best interests of the child and for her welfare that she remains in Ms Nishai's custody.
21. However, Mr lati has demonstrated his willingness and capacity to care for the child. Further, it is in the best interests of the child and for her welfare that her father Mr lati have access to her. I will so order.
- D. Result and Decision
22. The Application for Child Custody is declined and dismissed.
23. The Respondent is granted custody of the child Susana Namaka lati.
24. The Applicant is granted the right of access to the child Susana Namaka lati during school holidays and at other times with the prior agreement of the parties.
25. Given the conduct of the parties, there is no order as to costs.
26. This judgment must be personally served on the Respondent, and proof of service filed.

**DATED at Port Vila this 3<sup>rd</sup> day of March 2021  
BY THE COURT**

.....  
Viran Molisa Trief  
Judge

