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

Civil Appeal Case No. 19 of 2010

BETWEEN: **KANASI MALERE**
Appellant

AND: **ASSET MANAGEMENT UNIT**
Respondent

Coram: **Hon. Chief Justice Vincent Lunabek**
Hon. Justice J. Mansfield
Hon. Justice E. Goldsbrough
Hon. Justice N.R. Dawson
Hon. Justice D. V. Fatiaki

Counsel: **Mr. Saling Stephens for the Appellant**
Mr. F. Laumae for the Respondent

Date of Hearing: **23rd November, 2010**
Date of Judgment: **3rd December, 2010**

JUDGMENT

1. This is an appeal against the Judgment dated 1st July, 2010 of the Supreme Court sitting in Luganville, Santo in Civil Case 8 of 2007.

2. The agreed facts are that on 12th February, 1996 Aime Claude Malere as the registered proprietor of leasehold title 03/OJ74/039 *("the Land")*, mortgaged *("the Mortgage")* the Land to the National Bank of Vanuatu *("NBV")* to secure a loan from the NBV to Society Sowy Leing Limited *("the Third Party")*. The Mortgage was registered on 11th April, 1996.

3. The Mortgage records a principal sum of VT 6,500,000 being advanced to the Third Party and secured against the Land. The Mortgage includes a power of sale of the Land for non-payment of the money secured.

4. In 1998, the Asset Management Unit Act No. 22 of 1998 came into effect. The purpose of that Act was to transfer poorly performing loans from the NBV to the Asset Management Unit *("AMU")*, the Respondent in this case. A Transfer of Mortgage dated 7th March, 2009 transferred the Mortgage from the NBV to the AMU as mortgagee.

5. Following the death of Aime Claude Malere, Letters of Administration granted on 9th July, 2002 appointed his wife, the Appellant as Administrator of his estate.

6. On the 3rd September 2008, the AMU issued a Notice of Demand for Payment and served it on the Third Party due to payments not being made by the Third Party. It was not served on Aime Claude Malere. At some stage, the Land was let out to a tenant by the Appellant. Some time in 2005, the Respondent communicated with this tenant and required the tenant to pay the rental to it as mortgagee. Rent was collected during 2005, 2006, and 2007. The Respondent says VT 386,500 in rental was received.

7. On 18th April, 2008 the Appellant issued proceedings against the Respondent for trespass on the Land, loss of rentals and damages. The Respondent counter claimed for the outstanding loan (then VT 4,887,071) plus interest and for a power of sale of the Land.

8. A hearing was held on 6th April, 2010 in the Supreme Court. Counsel for the Respondent missed his flight from Port Vila to Santo, a couple of days prior to the hearing. He rang the Court leaving a message that he would not be at the hearing. He did not advise opposing counsel, who was present at the hearing.

9. At the hearing the judge dismissed the Appellant's claim, found in favour of the Respondent's counterclaim, and made orders for the sale of the Land pursuant to the Mortgage.

10. The Appellant's first ground of appeal is the submission that the trial judge did not comply with Civil Procedure Rule 12.9(1)(b) which says:-

> *"12.9 (1) If a defendant does not attend when the trial starts:*
>
> *(b) the court may give judgment for the claimant; or..."*

The Appellant submits that there is no similar rule allowing a judge to enter judgment for the defendant.

11. This submission is correct. There is no rule that permits the Court to enter judgment in favour of a defendant in these circumstances. In this case, judgment was entered in favour of a defendant who was not present against a claimant who was present. The defendant may be regarded as the claimant in the counter-claim, but was not present and the counter-claimants non-presence prevents the trial judge from entering judgment in favour of the counter-claimant under Rule 12.9(1). The Appellant, who was the defendant to the counterclaim, might have asked for the counterclaim to be dismissed, but she did not do so; Rule 12.9(2)(c).

12. In the second ground of appeal, the Appellant submits that the trial judge did not comply with Rule 12.6(2) by relying upon the evidence in the Respondent's witness's sworn statements in finding for the Respondent. The Appellant says that notice had been given to the Respondent that their witnesses would be required to attend the hearing as they would be cross examined. Rule 12.6(2) says:

> *"(2) The witness must attend at the trial, if required under Part 11, and may be examined on his or her evidence by all other parties to the proceeding."*

13. The Appellant says that there was evidence in the Respondent's witness's sworn statements that was in dispute, the Respondent's witnesses did not attend the hearing, and the Appellant was denied the opportunity of cross examining those witnesses on their evidence. It is submitted that the trial judge could not in those circumstances then rely upon the sworn statements of the Respondent and it's witnesses and enter judgment in favour of the Respondent.

14. Hack v. Fondham [2009] VUCA 6 this Court said in paragraph 30:

> *"30. We have already mentioned the procedure adopted by the parties in this case of not cross examining on sworn statements where the facts deposed to are in dispute. Counsel in a trial must appreciate that when a deponent is not cross examined, a trial Judge will not be in a position to reject the deponent's evidence in favour of a different version of the facts where the dispute turns on the credit of the witnesses."*

In the present case the circumstances are even stronger against relying upon the Respondent's witness's evidence, as the Appellant has signalled that this evidence was disputed and cross examination of the witnesses was required. The trial judge could not in these circumstances rely upon that evidence as having been proven and enter judgment relying upon that untested evidence.

15. The third ground of the Appellant is that the trial judge erred in finding in paragraph 9 of the judgment that following the death of Aime Claude Malere the Land remained subject to the Mortgage when the transmission of the land was registered in favour of the Appellant. That submission is plainly wrong in law and was withdrawn by counsel for the Appellant during the appeal hearing.

16. Counsel for the Appellant then submitted that the act of registering the transmission of the Land into the name of the Appellant does not mean that the Respondent's Notice of Demand under the Mortgage can be deemed to have been served on the Appellant.

17. It is accepted by both parties that the Notice of Demand dated 3rd September 1996 was served only upon the Third Party. It was never served upon Aime Claude Malere or the Appellant. The Mortgage documents says:

> *"FIRST SCHEDULE*
> *1. Payment on Demand in Writing*
> *The Mortgagor hereby covenants with the Mortgagee that the Mortgagor will on demand in writing made to the Mortgagor pay or discharge to the Mortgagee all moneys and liabilities....."*

18. The Mortgage clearly records Aime Claude Malere as mortgagor. The Respondent acknowledges that the Notice of Demand was never served upon him or the Appellant, who became the mortgagor after the registration of the transmission. The Respondent had not fulfilled the required preliminary step that it must take under the Mortgage before requiring the tenant to pay the rent to the Mortgagee or to have the Land sold.

19. The primary judge also found in paragraph 9 of his judgment that the Appellant had knowledge of the liability under the Mortgage pursuant to a letter to her dated 17th March 2005 from AMU. That letter is a response to an enquiry from the Appellant asking why the AMU are taking rent from the tenant. It does not purport to be a Notice of Demand or fulfill the basic requirements of a Notice of Demand by telling the Appellant that unless the payments due are paid up to date then mortgagee sale proceedings will follow.

20. The fourth ground submitted by the Appellant is that the trial judge erred in finding that the Mortgage was transferred from NBV to AMU on 27th March 1999. The Respondent submits that the trial judge was correct because by virtue of the passing of the Asset Management Unit Act No. 25 of 1998, the rights of the mortgagee under the Mortgage are deemed to have passed to AMU. The Respondent relies upon s.12 (a) of that Act, which says:

> *"12. As a consequence of enacting the Restructing Plan under section 11 the following consequential amendments are made:*
> *a) Section 3(1) of the National Bank of Vanuatu Act No. 46 of 1989 is amended by inserting after paragraph (y) the following paragraph:*
> *(z) to divest bad or poorly performing loans to the Asset Management Unit and to acquire good or better performing loans from the Development Bank of Vanuatu in accordance with an agreement or agreements entered into between the Bank and the relevant party."*

The Respondent also relies upon s. 13 (1) to (3) which says:-

> *"13. (1) From the date of the agreement to divest or acquire assets and liabilities in the form of a loan or investment or otherwise that loan or investment or security shall vest absolutely in the acquiring party.*

(2) A reference (express or implied) to the securing party in any instrument, register, record, notice, security, document or communication made, given, passed or executed at any time that relates to a transferred asset or transferred liability shall be read and construed as and deemed to be a reference to the acquiring party.

(3) Every contract, agreement, conveyance, deed, lease, licence, or other instrument, undertaking, or notice (whether or not in writing), entered into by, made with, given to or by, or addressed to the securing party, whether alone or with any other person, before it is divested and subsisting immediately before the divesting time, and that relates to a transferred asset or transferred liability, to the extent that it was previously binding on and enforceable by, against, or in favour of the securing party shall be binding on and enforceable by, against, or in favour of the acquiring party as fully and effectually in every respect as if, instead of the securing party, the acquiring party had been the person by whom it was entered into, with whom it was made, or to whom it was given or addressed, as the case may be."

In the context of this case, AMU is the *"acquiring party"* and NBV is the *"securing party"*. The Respondent submits that s. 13 (2) and (3) imply that the transfer of mortgagee rights occurred on the passing of this Act.

21. We cannot agree. S. 13 (10) says:

"(10) From the date of transfer the securing party shall cease to have the benefit of and obligations under any contract with a customer and the benefit thereof shall vest in the acquiring party and the customer shall be bound to the acquiring party in the same manner and on the same terms and conditions as applied between the customer and the securing party prior to transfer."

The Subsection (10) says that the securing party (NBV) remains the mortgage under the Mortgage until the date of the transfer. The Transfer of Mortgagee document is dated and registered on 27th March 2009, and therefore AMU had no power to act under the Mortgage until that date. Prior to the date, apart from the operation of s. 13(10), there is no evidence of any agreement between NBV and AMU as contemplated by s. 13(1), so there is no reason why the transfer date is not the critical one.

22. The Appellant's fifth ground of appeal is that the trial judge erred in finding in paragraph 9 (c) of the judgment that the Appellant had knowledge of and was

aware of liability under the Mortgage due to the letter dated 17th March 2005 from AMU by virtue of her power of attorney (granted to her by Aime Claude Malere on 16th October 2001).

23. A power of attorney conveys an authority to the appointed attorney to act on behalf of the grantor. It does not and cannot impute knowledge without notice to the attorney. Powers of attorney only exist until the date of revocation of the power of attorney or the death of the grantor. Mr. Aime Claude Malere died on 27th March 2002 nearly three years before the date of the letter. As already noted in paragraph 18 above, no Notice of Demand was served on Aime Claude Malere or the Appellant, neither can be deemed to have received notice, and knowledge of the Notice cannot be inferred because of a defunct power of attorney.

24. The Appellant's sixth ground is that the trial judge erred by finding in paragraph 9 (d) of his judgment that there was no trespass committed by the Respondent. Paragraph 9 (d) makes no such finding. However, in paragraph 10 (a), the trial judge does reach that conclusion.

25. The Respondent has not itself or by its employees or agents physically trespassed upon the Land. The Land was in the possession of a tenant placed there by the Appellant. At some stage in 2005, the Respondent began collecting the tenant's rental to offset payments due under the Mortgage. As the Respondent was not the mortgagee under the Mortgage until 27th March 2009, it was not entitled at that time to those rental payments. Technically, a trespass has been committed by changing the status of the tenant. The tenant has become the tenant of AMU as AMU were collecting the rent.

26. The seventh ground of appeal is that the trial judge erred in finding in paragraph 9 (f) of his judgment that it was not necessary for the Respondent to have the Court's sanction to enter the property. The Respondent submits that the power of sale in the Mortgage does permit this. Clause 5 in the First Schedule of the Mortgage says:

"5. Power of Sale

The Mortgagor hereby acknowledges that the statutory power of sale contained in Section 58 of the Land Leases Act No 4 of 1983 shall arise on and be exercisable at any time after the Mortgagee has demanded the repayment of the moneys hereby secured and the Mortgagor has failed to repay the moneys so demanded."

27. The statutory power of sale in Section 58 Land Leases Act No. 4 of 1983 must be considered alongside s. 59 of the same Act. They say:

"58. Action for recovery of debt

Any principal sum or interest due under a mortgage may, subject to the provisions of section 59(4), be recovered by action in any competent court.

59. Enforcement of mortgages

(1) Except as provided in section 46 a mortgage shall be enforced upon application to the Court and not otherwise.

(2) Upon any such application, the Court may make an order –

(a) empowering the mortgagee or any other specified person to sell and transfer the mortgaged lease, and providing for the manner in which the sale is to be effected and the proceeds of the sale applied;

(b) empowering the mortgagee or any other specified person to enter on the land and act in all respects in the place and on behalf of the proprietor of the lease for a specified period and providing for the application of any moneys received by him while so acting; or

(c) vesting the lease in the mortgagee or any person either absolutely or upon such terms as it thinks fit but such order shall, subject to subsection (5), not take effect until registration thereof.

(3) The Court shall, in exercising its jurisdiction under this section, take into consideration any action brought under section 58 and the results thereof.

(4) After the Court has made an order under paragraphs (a) or (c) of subsection (2) or while an order under paragraph (b) of subsection (2) is in force, no action may be commenced or judgment obtained under section 58 in respect of the mortgage except with the leave of the Court and subject to such conditions (if any) as the Court may impose.

(5) Any order made by the Court under this section shall for the purpose of subsection (4) be effective from the time when it is made."

28. In order to exercise the power of sale, the mortgagee would need to enter the property, for the practical purpose of displaying it to potential purchasers. That forms part of the mortgagees enforcement action. Section 59 (1) explicitly requires the sanction of the Court to be first obtained and s. 59 (2) sets out the

orders the Court may make. No such orders were obtained by AMU prior to its technically entering the land by taking over the tenant and the rental payments.

29. In the eighth ground, the Appellant submits that the trial judge erred in paragraph 9 (g) of his judgment by finding that the amount due and owing under the Mortgage as at July, 2005 was VT4,887,071 when there was no evidence suggesting she was privy to the loan agreement and a Notice of Demand was not served upon her.

30. The trial judge observes in paragraph 9 (h) *"the Claimant has not denied that the liability exists and that she as registered proprietor and administratix of the estate, has assumed those liabilities."* No evidence has been produced by the Appellant at any time disputing the amount due under the loan secured by the Mortgage. The Appellant became a party to the Mortgage upon registration of the transmission placing the Land in her name. The failure to serve a Notice of Demand upon the Appellant does not extinguish the loan arrangements. It merely prevents the mortgagee from continuing any action to have the property sold pursuant to the powers of the Mortgage until the Notice of Demand is properly served. Consequently, there is no merit n this ground of appeal. There is no material to suggest the claimed debt is not in the correct amount, even if its recoverability under the Mortgage depends on giving a demand to the Appellant.

31. In the ninth ground of appeal the Appellant submits that the trial judge erred in finding in paragraph 9 (i) of his judgment that the Appellant had not been able to meet the liabilities in accordance with the terms of her power of attorney.

32. As has already been observed in paragraph 23 above, the power of attorney ceased on 27th March 2002 upon the death of the grantor of the power of attorney. That power of attorney is irrelevant to these proceedings after that date. However, the loan debt secured by the Mortgage remains and when it has not been paid by the Appellant after a number of years the trial judge is entitled to come to the conclusion that the Appellant lacked the means to pay.

33. Ground ten advanced by the Appellant alleging trespass by the Respondent has already been addressed in paragraph 25 above.

34. The eleventh ground advanced by the Appellant is that the trial judge erred in awarding costs to the Respondent when the Respondent failed to appear to prosecute its counter-claims. This ground of appeal is addressed in paragraph 39 below.

35. This appeal is allowed. The judgment and orders made on 1 July 2010 must be set aside. Neither NBV or AMU served a proper form of Notice of Demand upon Aime Claude Malere or the Appellant and could not to assert any of its rights as a mortgagee pursuant to the Mortgage until this step was taken. From the date the Respondent started to take rent from the tenant, the tenant became the tenant of the Respondent, and the Respondent was technically in possession of the land. As the Respondent was not entitled to possession at the time, the Respondent was committing a trespass. In addition, until the transfer of the Mortgage on 27 March 2009, the Respondent was not entitled to exercise rights under the Mortgage.

36. The winning of this appeal may be a pyrrhic victory for the Appellant. The loss on this appeal may not prevent the Respondent issuing and serving Notices of Demand which would, but for the events referred to in paragraph 37, ultimately result in the property being sold by mortgagee sale. The Appellant may not be able to show any loss, except the loss of rental payment to her. It could be argued that by receiving the rent and applying it in reduction of the amount owed, the Respondent has saved the Appellant from some penalty rates of interest. In addition, no other damage presently has been proved by the Appellant.

37. Respondent's counsel informed this Court that at a pre-trial conference on 27th October 2010, he told the Court that in reliance upon the judgment of the Supreme Court dated 1 July 2010, the property had been sold. The

supplementary material referred to in the paragraphs below shows that the property was sold before the notice of appeal was served on the Respondent.

38. This court can find no basis for reversing the mortgagee sale of the Land at this late stage. That may be a matter for the Supreme Court if the Appellant chooses to raise it. However, the Appellant has not throughout all of these proceedings produced any evidence that the financial obligations secured by the Mortgage could be met by her. She apparently has no practical resort against the Third Party as (we were told) that company has been defunct for some years.

39. For those reasons, the appeal is allowed. The judgment and orders of the Supreme Court made on 1 July 2010 are set aside. The matter is remitted to the Supreme Court for reconsideration. The Appellant has been successful in her appeal and although that may not change the effective outcome, she is entitled to costs in the Supreme Court of and incidental to the hearing and in this Court on a standard basis, to be agreed by the parties, or failing agreement, as taxed.

40. Following the preparation of these reasons for judgment, the Respondent provided two documents to the Court. One is entitled 'Supplementary Submission' and the other is a sworn statement of the Chief Executive Officer of the Respondent. Those documents go well beyond the leave given to the Respondent to provide the Court with details of the time of sale of the property. When leave is given to file a supplementary submission on a limited topic, the parties and their legal representatives must ensure that they confine that submission to the topic or topics allowed. Otherwise, there should be an application for leave to file a further supplementary submission so that the other parties may be heard in relation to it.

41. The material provided in response to the Court's request (as noted in paragraph 37 above) is that the land was agreed to be sold on 19 August 2010 for VT 1,800,000 with a deposit of VT 400,000 following an expression of interest from a third party to buy the property for that sum by letter of 18 August 2010. It is not clear how the third party came to know the property was for sale. The agreement to sell is most curious: the confirmatory letter of 19 August 2010 simply accepts the offer and asks for the deposit *"to assist us transfer the property into your*

name". There is no other contract produced. There is no arrangement indicated as to how the balance of the purchase price is to be paid. There is no suggestion that it will be funded by a bank, secured by a mortgage. It is not clear that the transfer has been registered, or when it was lodged. It is highly irregular that a vendor of a property would be prepared to transfer it to the purchaser without payment of the full purchase price.

42. The mortgagee's duty to the mortgagor, when exercising a power of sale, is to obtain the best price reasonably obtainable in the circumstances. That is because, if the sale yields a surplus above the debt, the mortgagee holds the surplus for the mortgagor; and if the sale does not yield enough to pay off the debt, generally the mortgagor remains liable to the mortgagee for the balance outstanding. See generally ***Cuckmere Brick Co Ltd v Mutual Finance Co Ltd*** [1971] Ch 949; ***Commercial and General Acceptance Corp Ltd v Nixon*** (1982) 152 CLR 491; ***Downsview Nominees Ltd v First City Corp Ltd*** [1993] AC 295. An example of the lengths the Court may go to in the case of a breach of that duty is provided by ***Forsyth v Blundell*** (1973) 129 CLR 477.

43. In the normal course, the duty of a mortgagor is discharged by having advice as to the best way of selling a property and by acting on that advice, for instance as to the amount or advertising and whether the sale is by auction, by public offer or by private tender. The Court is not in a position to comment on whether the duty to the mortgagor was satisfied or not in this instance. That course of action may have been followed, and the third party, the only tenderer. It may not have been followed, but there may have been sound reasons for that. Those are matters for the Appellant to consider.

44. Apart from that matter, the Court has not had regard to the additional information for the reason given. It could be unfair to the Appellant. We note, however, that there is an additional (and unproven) factual assertion in the supplementary submission as well as assertions about the time of the service of the notice of appeal. It is fundamental that submissions be based on factual material be properly proved (generally at the trial, or in exceptional circumstances on the appeal). No court can or will act on unproved factual assertions, unless they are

agreed. The Court also observes that the belated additional material is indicative of the way the Respondent or its counsel has conducted this matter at first instance. The appeal stems from the failure of the Respondent and its witnesses, and its counsel, to attend the hearing. A telephone message to the Registry that counsel had missed a flight to Santo is insufficient. That does not explain why the Respondent's witnesses did not attend. Nor is it proper professional courtesy not to notify counsel for the opposing party; often, in such circumstances, an adjournment is granted by agreement. It saves the cost of trial preparation by the other party, and witnesses' inconvenience. These matters will, no doubt, be taken into account by the Supreme Court when it considers any other costs orders to be made in those proceedings.

Dated at Port Vila, this 3rd December, 2010

BY THE COURT

Hon. Chief Justice V. LUNABEK

Hon. Justice J. MANSFIELD

Hon Justice E. GOLDSBROUGH

Hon. Justice N. R. DAWSON

COURT OF APPEAL — COUR D'APPEL — REPUBLIC OF VANUATU

Hon. Justice D. FATIAKI