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

CIVIL APPEAL CASE No.24 OF 2015

BETWEEN: **JAMES NGWANGO**
Appellant

AND: **VICTOR RON**
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Bruce Robertson
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Mary Sey
Hon. Justice Stephen Harrop
Hon. Justice David Chetwynd

Counsel: *Stephen Tari Joel for Appellant*
Saling Stephens for Respondent

Date of Hearing: *20 July 2015*
Date of Judgment: *23 July 2015*

JUDGMENT

Introduction

1. This is another appeal where the failure of counsel for the appellant to act promptly and effectively in the interests of the client has meant that the position for the client has become much worse than it should have been. There may be an explanation for those failures, but it is not apparent on the material before this Court.

2. It is also necessary to record that, when this appeal was called over at the start of the current Court of Appeal session, counsel for the respondent Victor Ron told the Court that counsel for the appellant James Nwango was unwell and wanted the appeal to be listed on the second week of the session. It was accordingly listed for hearing on 20 July 2015.

3. The appeal book was filed only on the preceding Friday. It was incomplete, as it omitted the reasons for judgment of the primary Judge of 4 September 2009 and the further sworn statement of Mr Ron of 5 November 2010 and its annexures, supporting his claim for damages.

4. At the commencement of the hearing, the Court had the written submissions of both parties. Counsel for Mr Ron appeared, but counsel for Mr Nwango did not appear. The Court decided to proceed on the basis that Mr Nwango wished to proceed on his written submissions. After judgment was reserved, the Court received a medical certificate that counsel for Mr Nwango's Mother was unwell and hospitalised. Nevertheless, it is appropriate in the circumstances for this judgment to be delivered.

5. The appeal is to be allowed, and the orders of the Supreme Court entering judgment for Mr Ron for VT 3.970.763 are set aside. Given the limited role of Counsel for Mr Nwango, there is to be no order as to costs of the appeal. As the findings of the primary judge on liability are maintained and in light of the limited assistance counsel for Mr Nwango provided at the trial, the orders for costs made by the primary Judge are to stand with the qualification set out below.

6. The appeal was instituted on 8 July 2015, well out of time, but an order was made by the primary Judge on 3 July 2015 extending the time to appeal. It appears that the application for an extension of time to appeal and the appeal, was only prompted by enforcement processes taken by Mr Ron. These had reached the point at which an enforcement warrant to remove Mr Ngwango from his own property in Chapuis was in the process of being executed. The primary Judge

suspended the enforcement processes pending the hearing and determination of this appeal, and permitted Mr Ron to stay on the land in issue in the meantime.

THE PROCEEDING IN THE SUPREME COURT

(a) The amended statement of claim

7. The introductory sentence of the amended statement of claim says (the claim), is for rectification of Commercial / Tourism Lease Title 04/3024/043 (Lease 043) and / or damages for Improvement on the land.

8. There were a number of defendants. Firstly, Esline Turner, the person to whom Lease 043 had been granted in competition with or over the claim of Mr Ron; Second, Mr Nwango, who had undertaken some survey work in relation to the land covered by Lease 043 or a different lease; third ,Zebedee Molvatol and Morris Molvatol who claimed to be, (disputed by Mr Ron) the custom owners of the land the subject of Lease 043; and fourth and fifth the Minister of Lands and the Director of Land Records, because of the processes by which they came to accept Mrs Turner as the proper person to receive Lease 043 and to grant Lease 043 to her. The primary claim for relief was for rectification of the register to have Lease 043 cancelled and the land covered by it granted to Mr Ron. Alternatively, there was a claim for damages and improvements on the land against all the defendants jointly and severally.

9. The claim then alleges Mr Ron's interest. He paid cash to Moses Moli who, on behalf of the custom owners, agreed to lease him the land on Title 4115, now (it is said) Title No. 04/3022/243 (Lease 243), and since then he has occupied and improved the area of Lease 243. He says that he applied for a lease over that land, that it was approved by the Land Management and Planning Committee, and on 1 July 2005 he was given a negotiator's certificate to procure that lease.

10. He says he then requested Mr Nwango to survey, " the subject land" to arrange registration of the proposed lease. He claims Mr Nwango did the survey, but refused to give it to him.

11. It is at that juncture in the claim that the confusion over the areas of Lease 243 (proposed) and Lease 043 arises. More accurately; it is at that point in the claim that it is said – wrongly- that the area of the two leases is the same. Counsel for Mr Ron started the appeal by pointing out the different areas of the two leases. Para 15 of the claim says;

" **Whilst the claimant was desperately attempting to convince the second Defendant to hand deliver to him the original copy of his survey plan, the Second Defendant secretly and without notifying the Claimant of his hidden Agenda, collaborated with the Third Defendants thereby cheated the Claimant and sold the Survey plan to the First Defendant whom after having been shown the Survey plan and had negotiations with the Second and the Third Defendants thereafter showed her interest in acquiring the said land."**

12. That is, Mr Nwango sold the survey he had done to Mrs Turner, who wanted to get the lease of the same land.

13. The claim then says Mr Nwango re-surveyed "the same plot of land" for Mrs Turner, that she got a negotiator's certificate "on the same plot of land" and that a new Title No.04/3024/043 (it obviously means 04/3022/043) was issued. Then it says on 19 June 2006, Lease 043 (again there is confusion as it also refers to Lease 243) was wrongly granted to Mrs Turner.

14. On that basis, and because he was (he claimed) in occupation of the area of Lease 043, Mr Ron brought the claim seeking an order under section 17(g) of the Land Leases Act (Cap 163) to protect his occupation interest, and under section 100 of that Act to set aside the grant of Lease 043 to Mrs Turner because of mistake or fraud.

(b) **The Judgment on liability**

15. The matter proceeded to trial on the issue of liability. Mr Ngwango filed a defence. He said he had agreed to do a survey of " the subject land" and had done so, but had refused to hand it over because Mr Ron would not pay his full survey fees. He denied para 15 (set out above), but agreed he had been asked to resurvey the land and had done so for Mrs Turner. He also says that there is no basis for any claim against him.

16. Mr Nwango did not, however, file any witness statements or attend the trial on liability. He had ample opportunity to do so.

17. The primary Judge announced his decision and made orders on 20th August 2009. The reasons for decision were given on 4 September 2009.

18. Before referring to them, it should be noted that the closing submissions of Mr Ron on the claim on liability, made on 20 August 2009, repeated the claims in the claim. That is he treated the areas of Lease 043 and Lease 243 as the same. That mistake is reflected by the attribution of Lease 243 to Mrs Turner at one point, and the final assertion that she was granted Lease 043 by fraud or mistake.

19. The primary Judge concluded, on the evidence, that Mr Ron had no valid interest in the area of Lease 043, as appears in effect to have been acknowledged by his Counsel. Consequently, on 20 August 2009, the claims based on either section 17(g) or section 100 of the Land Leases Act were rejected and the claims against all the defendants except Mr Nwango were dismissed.

20. Because Mr Nwango did not attend the hearing, the claim against him based on the uncontested evidence of Mr Ron was unsuccessful and judgment was entered against him for damages to be assessed.

21. The primary Judge gave reasons on 4 September 2009 for the orders made on 20 August 2009.

22. It is important to note that the primary Judge, as we do, regarded the amended statement of claim as claiming that Mr Ron:

- Wanted an order under section 17(g) of the Land Leases Act in respect of Lease 043, as he claimed to be its occupier,

- Claimed Lease 043 was procured through fraud or mistake, so its registration should be cancelled and a lease over that land given to Mr Ron.

This is set out in the reasons of the primary judge at [4]

23. The primary Judge recorded the responses and defences, the sworn evidence (including that Mr Nwango did not file any sworn statements), the course of the hearing (which Mr Nwango did not attend), and the submissions.

24. The evidence showed that Mr Ron did not have possession of any of the land in Lease 043, and so no interest as an occupier of that lease area which could attract section 17(g). It also showed Mr Ron had not been allocated the same lease area under his unregistered Lease 243, so Mr Ron had no standing to claim under section 100 of the Land Leases Act that Lease 043 was procured by fraud or mistake.

25. In relation to Mr Nwango, the primary Judge at [10] noted that the evidence of Mr Ron showed that:

    1. He engaged Mr Nwango to provide a survey plan of Lease 243,
    2. The application for a lease was approved by the Land Management and Planning Committee,
    3. He was allocated Lease 243, and
    4. Lease 243 has not been registered in the absence of a survey plan.

26. On the basis of that unchallenged evidence, Mr Ron succeeded on his claim against Mr Nwango, for damages to be assessed.

27. That is the first point at which the fact that the areas of Lease 043 and Lease 243 were recognised as different.

(c) **The Judgment on damages**

28. On the issue of damages, the case for Mr Ron was that, based on the findings in [10] of the liability judgment (set out above), the refusal of Mr Nwango to provide his survey meant Mr Ron could not get Lease 243 registered. The survey plan, it is said, was sold to Mrs Turner.

29. Despite the claim against Mrs Turner having already failed, there is also a claim for damages made against her, as she erected a fence across Mr Ron's property (it is said) so he could not enter it, and others destroyed his house and caused damage to his property (as set out in paras 11 to 14 of Mr Ron's statement of 5 November 2010. That is the same loss as claimed against Mr Nwango)

30. The loss claimed by Mr Ron was for VT 7.170.703. It is hard to understand how that claim was worked out.

31. In his sworn statement, there is an appraisal report of Tanonda Real Estate (Tanonda) which may provide that basis, and was in fact partly adopted by the primary Judge.

32. The Tanonda appraisal of 14 October 2009 was to give a fair market value of Lease 243 and its improvements, including 5 buildings, a well, sea walls and fencing. The open market value is VT 7.977.000 and it said the "claim for damages observed on 9th October 2009 'As is where is' is VT 3.970.463." There is no explanation for the difference between those two amounts. Nor is there any explanation about how the second amount called 'As is where is' was arrived at.

33. The obvious point is that either the " loss or the valuation of Lease 243 and its improvements represents the present value of Lease 243.

34. The sworn statement of Mr Ron gave particulars of the claim totalling VT7,170,703, almost all of which was under three headings:

General damage	VT 1,500,000
Exemplary damage	VT 1,500,000
Claim for damage	VT 3,970,763
Total:	VT 6,970,763

35. The balance of that claim, totalling a little under VT200, 000, is supported by receipts. A number of them related to disbursements in the conduct of the proceeding in the Supreme Court, rather than to any loss suffered by any conduct on the part of Mr Nwango.

36. That sworn statement also gave particulars of a claim asserting trespass, but of course it was not said in the claim that Mr Nwango had trespassed on the land.

37. The judgment on the issue of damages did not accept the claim as expressed, but gave judgment against Mr Nwango for VT3,970,763 plus costs. That was based upon the ' As is where is' figure proposed by Tanonda.

38. Most of the judgment of the primary Judge of 19 February 2014 deals with Mr Nwango's attempts to re-open the liability findings. They were properly rejected. Then the primary Judge, in the absence of any other evidence, adopted the 'As is where is' asessement in the Tanonda Report. The damages were therefore fixed at VT 3.970.763.

CONSIDERATION OF APPEAL

(a) Liability

39. Mr Ron first says that the appeal against liability is too late. That is not correct. The judgment on liability, given on 20 August 2009, was interlocutory only as it did not finally decide the rights of the parties. The final judgment was given on 19 February 2014, when damages were assessed.

40. The appeal against that judgment was made within the time as extended by the primary Judge.

41. However, it is not possible to conclude that the primary Judge erred in entering judgment against Mr Nwango for damages to be assessed, He was entitled to do so, based on the evidence adduced by Mr Ron. Mr Nwango did not appear or present any evidence.

42. It is unfortunate for Mr Nwango that he did not do so. As appears above, it emerged at or as a result of the hearing that the dispute between Mrs Turner and Mr Ron related to two different areas of land. Mr Nwango may have explained that earlier, and more effectively than others with his knowledge as a surveyor. He may have surveyed both areas. He may have explained with acceptable

reasons why he did not provide the survey he carried out for Mr Ron as requested. His defence is not itself evidence.

43. His non-participation is his choice. He must live with its consequences. To the extent that his submissions, either on the damages hearing or on the appeal, try to go behind or re-open the findings made against him in the liability judgment, his appeal is not successful.

(b) the damages judgment

44. The position is different in relation to the damages judgment.

45. Once it become clear that the areas of Lease 043 and Lease 243 are different, it was necessary for Mr Ron to prove his claimed loss to show (on the basis of the findings of the primary Judge in the liability judgment) that:-

    1. The failure of Mr Nwango to provide the survey of Lease 243 is the reason why he is not the registered lessee of Lease 243, and

    2. By not yet being registered lessee of Lease 243, he has suffered the loss claimed or some of it.

46. In our view, on the material before the primary Judge, Mr Ron did not prove either of those things.

47. As to the first point, there is simply no evidence that the reason why Mr Ron is not, and cannot become, the registered lessee of Lease 243 is the failure of Mr Nwango to provide the survey he had contracted to supply. That is probably because that cannot be proved. It is noted above that the Tanonda report has an annexed survey of Lease 243. In any event, if independent survey was necessary, Mr Ron has had since August or September 2005 to get another surveyor's report. He has chosen not do so. If that were critical, it was quite unreasonable for him not to have done so. He may still do so. There is no evidence that a delay of a

month or two in about August to September 2005 was critical, or that even now he could not, by getting a fresh survey, become the registered lessee of Lease 243.

48. Consequently, accepting Mr Nwango breached his contract to provide a survey as he agreed to do, Mr Ron has not shown that he has thereby suffered loss of the character he claims. It appears that he is still in occupation of the area of that Lease, and there are not shown to be any competing occupiers or putative lessees.

49. The second point flows from the first. It has not been shown that Mr Ron is not still in occupation of the area of Lease 243, so that he is (or may be) entitled to become the registered lessee. He will then have the lease and the improvements. He has not shown that he has lost them.

50. The basis on which the primary Judge assessed the damages treats Mr Ron as having an entitlement to occupy the area of Lease 243 and to enjoy its improvements, but for the reasons given that is an erroneous starting point. It may be that the primary Judge was still proceeding on the basis of the claim, which (as we have concluded) wrongly treats the areas of Leases 043 and 243 as the same. Certainly Mr Ron has no entitlement to occupy the area of Lease 043, but the breach of the survey contract in any event could not have deprived him of what he was not entitled to in any event.

51. There are other problems with the damages claim. We have pointed out that the Tanonda report does not really explain the 'As is where is' conclusion or what it really represents. In addition, it suggests that any diminution in the value of the improvements on Lease 243 is due to vandalism. That loss, if it was of that character, is not a compensable consequence of any conduct of Mr Nwango. Also, if the damages were to be assessed in the much looser way that Mr Ron suggested, there is simply no evidence to support general damages of that magnitude attributable to the conduct the primary Judge found in the liability

judgment. Mr Ron's evidence on damages does not really focus on the consequences of the failure of Mr Nwango to provide the survey in a timely way.

52. The proposition that the surveyor should be liable for all the losses allegedly suffered by the failure, to this point, to get the status of the registered lease of Lease 243 or of Lease 043 is not really sustainable.

53. It has not been necessary, for this part of the reasons, to decide whether Mr Ron, by reason of the terms of the claim, should be confined to claiming losses caused by being ineligible to become the registered lessee of Lease 043. Strictly speaking, that is the pleaded case. In view of the findings in the liability judgment, he had no such entitlement (with or without the survey) so any failure on the part of Mr Nwango to provide the survey could not have caused him loss.

CONCLUSION

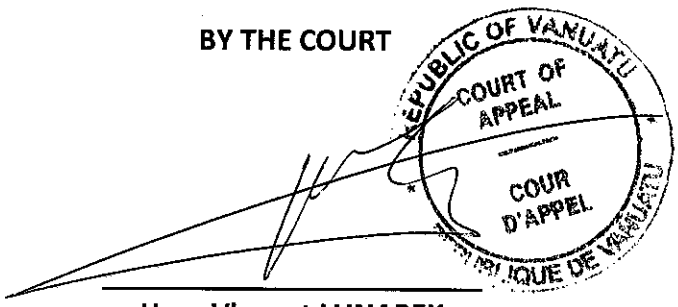
54. For those reasons, the appeal is allowed. The orders of the primary Judge made on 19 February 2014, except as to costs but including all enforcement orders are set aside. On the evidence, Mr Ron could not have succeeded in recovering damages on the basis he claimed, so the matter is to end there. It is not remitted to the Supreme Court.

55. However, costs is a different issue. As the appeal became necessary only because of the way Mr Nwango conducted the proceedings at first instance, we consider he should pay Mr Ron's costs of the appeal. They are fixed at VT 50.000. In addition, as the problem confronting the primary Judge was also largely of Mr Nwango's making, we think the order of the primary Judge that he should pay the costs in the Supreme Court should stand, except that we confine those costs to the costs of and incidental to the claim against him. We do not see why the costs incurred by Mr Ron's claim against the other defendants should be paid by Mr Nwango.

56. Finally, we note that this judgment is not intended to prevent Mr Ron from claiming from Mr Nwango recovery of the fees he paid Mr Nwango for the survey he did not receive. It would be wise for Mr Nwango to repay those fees without any proceeding, as he is bound by the findings of the primary Judge that he agreed to provide a survey and did not provide it, although he had no good reason to refuse to provide it. He cannot re-dispute that, because he did not take the opportunity to present his evidence on that issue at the trial on liability.

DATED at Port-Vila this 23rd day of July, 2015

BY THE COURT



Hon. Vincent LUNABEK
Chief Justice