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

Civil Appeal
Case No.17/1769 CoA/CIVA

BETWEEN: DARROT LAL
Appellant

AND: MARK ATI
First Respondent

AND: THE REPUBLIC OF VANUATU
Second Respondent

Civil Appeal
Case No.17/1770 CoA/CIVA

BETWEEN: DARROT LAL
Appellant

AND: EAST SANTO AREA LANDS TRIBUNAL
First Respondent

AND: THE REPUBLIC OF VANUATU
Second Respondent

AND: NEUTHAHAL LEONARD
Third Respondent

AND: MARK ATI
Interested Party

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

Counsel: *Collin Leo for the Appellant*
Jelinda Toa for the State
James Tari for Leonard and Ati

Date of Hearing: *13th Nov. 2017*
Date of Judgment: *17th Nov. 2017*

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

JUDGMENT

1. These two related applications for leave to appeal out of time have been heard together. They concern Latoror customary land at Port Olry, East Santo. This land is presently the subject matter of registered commercial lease 04/0922/002 (the "002" lease). The lease covers in excess of 58 hectares. Mark Ati is the registered lessee. Both applications for leave to appeal out of time are brought by Darrot Lal representing Family Lal.

2. The first application in CAC17/1770 seeks to appeal out of time against the dismissal on 23rd June 2015 of an application for leave to institute a judicial review application (the JR leave application) to quash a decision of the East Santo Lands Tribunal dated 10th March 2005.

3. The second application seeks leave to appeal out of time against a summary judgment entered against Family Lal in Civil Case 27 of 2013 (the summary judgment application). In those proceedings Mark Ati as lessee sought an order for possession and the eviction of Family Lal from the land comprised in the 002 lease. The summary judgment ordered eviction, and dismissed in its entirety a counterclaim filed by Family Lal which sought rectification of the lease to expunge the 002 lease from the register.

4. For the reasons that follow we consider the JR leave application should be refused, but that the summary judgment application should be granted, and the substantive appeal allowed.

5. The background history to the proceedings as disclosed by the papers before the court is as follows. Family Lal say that they and their ancestors have lived and occupied plots within Latoror customary land for a very long time. Their related families have also done

so. A decision of the Port Olry Village Land Tribunal delivered on 3rd November 2003 declared the custom owners of Latoror Land to be Family Lal, Family Tamrock, Family Vohor, Family Lie Nohe, Family Edmong Yerhagh, Family Rellie Shark and Family Kalon Yeth.

6. The decision of the Village Land Tribunal was appealed to the East Santo Area Land Tribunal. On 10th March 2005, that tribunal held that the customary owners were Colan Yet, Lie Nohe, Kamrack Daniel, Vohor Serge, Lal (the applicant) and Neuthahal Leonard. Neuthahal Leonard had not been declared a custom owner in the Village Land Tribunal. Family Edmond Yerhagh and Family Rellie Shark failed in their claims before the Area Land Tribunal.

7. Family Lal contends that Neuthahal Leonard was never a party to the Village Land Tribunal proceedings, and was not a party to the Area Land Tribunal appeal, and was therefore wrongly declared by the Area Land Tribunal to be one of the customary owners. On the other hand Neuthahal Leonard says he was a party in the Village Land Tribunal. This dispute cannot be resolved in this Court as the Land Tribunal files are not before the Court, and remains an issue for the Supreme Court.

8. On 2nd February 2011 the Minister of Lands issued a Negotiator's Certificate to Mark Ati to negotiate for the acquisition of a rural commercial lease over Latoror land with "*custom owner/Neuthahal Leonard*". The land was surveyed and lease 002 was executed by Neuthahal Leonard and Mark Ati on 12th May 2011. The lease was formally registered on 18th May 2012. Mark Ati paid all the administrative and other fees associated with the grant of the lease.

9. Family Lal said they had no knowledge at the time of any of the steps that led to the grant and registration of the 002 lease.

10. On 5th July 2013 Mark Ati commenced Civil Claim 27 of 2013 in the Supreme Court against Family Lal seeking their eviction.

11. On 2nd August 2013 Family Lal filed a defence and counterclaim. The defence asserted their customary ownership and entitlement to occupy their land but made no reference to s.17(g) of the Land Leases Act which protects the rights of a person in actual occupation. The counterclaim (which was slightly amended on 1st October 2013) sought rectification of the register on the ground that lease 002 was registered through fraud or mistake. In particular the counterclaim pleaded that Neuthahal Leonard was not a custom owner of the land, and that the parties to the lease and the Director of Lands were all aware of the Port Olry Village Land Tribunal decision, and should not have registered the lease.

12. The claim was ready for trial by mid-2014, and the trial date was set for 1st August 2014. On the eve of trial, on 31st July 2014, Family Lal issued the JR leave application seeking to quash the decision of the East Santo Area Lands Tribunal on the ground Neuthahal Leonard was not a party in the Village Land Tribunal and should not have been declared the custom owner by the Area Land Tribunal. Darot Lal's sworn statement in support said he was the claimant (by which we understood he was acting as the senior member of Family Lal) that he was aged 70, that he was not able to appeal as he had no funds, but when he talked to Mr. Leo in Santo he had funds to bring the JR leave application.

13. The coincidence between the pending trial date and the JR leave application strongly points to an explanation that at the last moment in the preparation for the trial counsel realized that the defence and counterclaim faced a serious obstacle whilst Neuthahal Leonard remained a declared custom owner.

14. On the appointed trial date, 1st August 2014, the Supreme Court vacated the trial and ordered that the proceedings in CC27 of 2013 be stayed pending the determination of the JR leave application.

15. On 14th August 2014 directions were given for the parties to file evidence in the JR application and to adjourn the application to a date to be fixed.

16. The next step appears to be a notice of conference issued by the court on 11th June 2015 for a hearing on 23rd June 2015.

17. On 23rd June 2015 there was no appearance of Family Lal. Counsel appearing for both Neuthahal Leonard and Mark Ati orally applied pursuant to Rule 9.10(1)(2) of the Civil Procedure Rules for the JR leave application to be struck out. Counsel for the Area Land Tribunal and the Republic supported the application. The Court acted on the oral application and struck out the JR leave application.

18. On 7th July 2015 Mark Ati applied for summary judgment in CC27 of 2013. At a conference hearing on 29 July, with the JR leave application then out of the way, Family Lal was directed to file their responses to the summary judgment application. Their counsel was present when the direction was given, but it was never complied with. The application was in due course set down for hearing on 28 September 2013. There was no appearance that day of Family Lal. In their absence the Court ordered the eviction of Family Lal, and dismissed their counterclaim in its entirety.

19. In reasons for that decision the Court noted that no response had been filed by Family Lal on the application for summary judgment and that their counsel had not attended two conferences leading up to the hearing date. The court said:

"More than sufficient and adequate time and opportunity have been given to the defendants to file their responses. Rule 9.6(5) of the Civil Procedure Rules provide the reasonable discretion to the defendants to file sworn statements setting out the reasons why they have an arguable case.

In this matter the defendants have simply failed to comply with Rule 9.6(5) of the Rules. It means in effect that the first defendant has no challenge or opposition to the application by the claimant. The issue does not concern or involve the second defendant.

That being the position the court allowed the application for summary judgment and enters judgment summarily in the favour of the claimant."

20. Against this background we turn to the two applications now before this Court for leave to appeal out of time.

Application in CAC17/1770 – Leave to appeal against the dismissal of the JR Leave application

21. The factors to be considered on an application to extend time are well established: Laho v. QBE Insurance [2003] VUCA 26. The Court needs to consider the length of the delay, the reason for it, possible prejudice to other parties, and the prospect of the appeal succeeding if time is extended.

22. The delay between the dismissal of the JR leave application and the application to this Court is some 14 months (23rd June 2015 to 25th August 2016). There is no satisfactory explanation for this delay.

23. Possible prejudice to the respondents and others cannot be altogether dismissed, but there is no evidence before the Court of actual prejudice that will be suffered by allowing a late appeal.

24. The most significant consideration must be the prospect of success if leave to appeal out of time is granted. On this question we consider there are two separate matters that need consideration. The first is whether the court correctly exercised its discretion to dismiss the application under Rule 9.10(1) and (2) of the Civil Procedure Rules because the applicant

had failed to file and serve statements in support of the application as first directed a year earlier on 18th August 2014. The second is whether, if the JR leave application were reinstated there is any realistic possibility that judicial review could lead to the decision of the East Santo Area Land Tribunal made in 2005 being overturned. If there is not, there is no point in reinstating the JR leave application.

25. On the first point we consider the Supreme Court was in error in striking out the JR leave application under Rule 9.10 when it did. That rule reads:

"(1) This rule applies if the claimant does not:

(a) take the steps in a proceeding that are required by these Rules to ensure the proceeding continues; or

(b) comply with an order of the court made during a proceeding.

(2) The court may strike out a proceeding:

(a) at a conference, in the Supreme Court; or
(b) at a hearing; or
(c) as set out in subrule (3); or
(d) without notice, if there has been no step taken in the proceeding for 6 months."

26. As a matter of construction as sub-rule (2)(d) expressly provides that the power may be exercised without notice, by inference the powers under sub-rules (2)(a), (b) and (c) are exercisable only on notice.

27. Further, Rule 9.10(2) must also be read with Rule 18.11 paragraph (1) to (3) which reads:

"(1) This rule applies if a party fails to comply with an order made in a proceeding dealing with the progress of the proceeding or steps to be taken in the proceeding.

(2) A party who is entitled to the benefit of the order may require the non-complying party to show cause why an order should not be made against him or her.

(3) The application:
(a) must set out details of the failure to comply with the order; and
(b) must have with it a sworn statement in support of the application; and
(c) must be filed and served, with the sworn statement, on the non-complying party at least 3 business days before the hearing date for the application."

28. In the present case no notice had been given by the respondents requiring Family Lal to show cause why the JR leave application should not be struck out. We consider the order for dismissal should not have been made without first giving notice.

29. As to the second consideration the decision of the Area Land Tribunal sought to be reviewed had been made 13 years and 4 months before the application to challenge it was made (10th March 2005 to 31st July 2014). Although no evidence has been placed before the Court as to the reliance of any party on the Tribunal's decision, whether successful or unsuccessful, it is inevitable that over so long a period people will have moved on in their lives believing that the decision is final. Other people in the community are also likely to have relied on it. Although Family Lal appear to be most unfortunately disadvantaged by what has happened, it is simply too late to turn back the clock to allow the decision to be attacked. Whether Family Lal can redeem their customary rights to occupy portions of the land will have to be explored in other ways. They have already given notice of a claim under Section 100 of the Land Leases Act for rectification.

30. As we think there is no reasonable prospect that the Area Land Tribunal decision can be overturned at this point in time the application for leave to appeal against the refusal of the JR leave application should be dismissed even though there was a procedural error in making that order.

The application for leave to appeal against the Summary Judgment in CC27 of 2013

31. Family Lal argued that their counterclaim should not have been dismissed, and their eviction should not have been ordered as the counterclaim as pleaded showed that there was a dispute between the parties about a substantial question of fact and a difficult question of law such that there was a real prospect of defeating the claim for eviction. Certainly the counterclaim as pleaded sought rectification of the register on the basis that

Family Lal was a custom owner and Neuthahal Leonard was not, but it is an open question whether the pleadings in the counterclaim (as they now stand) show a real prospect that a defence against the eviction could succeed and the role of the trial judge was made difficult as there was no response on the file from Family Lal. However as we think there is another reason why the application for leave to appeal out of time should be granted and the appeal allowed, there is no need for this Court to decide upon the merits of the summary judgment application as it stood before the trial judge.

32. Mr. Leo on behalf of Family Lal contended that leave to appeal should be allowed as the material before this Court establishes that neither he nor Family Lal were aware that the hearing of the application for summary judgment was to occur on 25th September 2015. Mr. Leo says that other counsel and the court must have known that he was wholly engaged in a very public and well reported criminal trial at that time, and the Court should have adjourned the matter, probably with a costs order against him. That in our opinion is not a satisfactory excuse. If counsel is unable to attend to a court commitment because of the pressure of other engagements, counsel must make other arrangements. Counsel should consider instructing someone else to argue the case. If that is not feasible counsel should inform the court and the other parties in advance, and have someone else attend to seek an adjournment.

33. It became clear in the course of argument before this Court that there are very serious issues that the Supreme Court should consider that were not disclosed in the material before the trial judge, and which were not brought to his attention.

34. It now appears that the decision of the Area Land Tribunal was misunderstood by the contesting parties and by the officer of the Department of Lands whose sworn statement had been filed on behalf of Mark Ati. That officer interpreted the decision as finding that the customary owner was Vista Rak. It has now been explained that Mr. Rak was the ancestor of those who were claiming custom ownership in the Land Tribunals, and that

each of those persons who were declared custom owners by the Area Land Tribunal, including Neuthahal Leonard, are his grandchildren. When the merits of the matter are in due course considered by the Supreme Court this explanation will have to be confirmed by sworn evidence, but for present purposes we accept it as correct.

35. The Court was further informed that each of the declared custom owners and their families have historically occupied different portions of the Latoror land. Neuthahal Leonard occupied only a portion of the land covered by the lease, and does not have rights of occupancy and usage over other portions occupied and used by the other declared custom owners. The individual rights of occupancy and usage held by each of the declared custom owners are the very kind of rights that s.17(g) of the Land Leases Act is intended to protect.

36. Regrettably the statutory rights granted by s.17(g) were not pleaded in the defence, and the above facts were not made known to the trial judge. Had they been, those facts would have disclosed arguable grounds of defence to Mark Ati's claim for eviction.

37. The facts now revealed could also be relevant to the pleaded claim for rectification under s.100 of the Land Leases Act. We are told that Family Lal for their part wish to prosecute the claim for rectification. It may be that other declared custom owners would wish to make similar applications. However a claim under s.100 is likely now to be complicated by the fact that the lessee on 13th September 2013 granted a mortgage over the lease for a very large sum of money, and there will be an issue whether the mortgagee is a bona fide purchaser for value.

38. We consider that the justice of the matter requires that the Family Lal should be given the opportunity to amend their defence in CC27 of 2013 to plead s.17(g), to amend their counterclaim to refer to the decision of the Area Land Tribunal rather than the Village

Land Tribunal, and to set out the facts which they assert show that the lease was registered by mistake. If they continue to allege fraud they must give particulars of that allegation. It will be necessary for them to join the mortgagee to the counterclaim as a necessary party to the rectification claim.

39. As each of the declared custom owners and their families claim to occupy and use specific portions of Latoror, to protect those rights under s.17(g) it will be important, if not essential, for them to be able to identify the area or areas covered by their occupancy rights. To this end they should consider marking out their boundaries and having them agreed or if necessary determined as a new dispute by an appropriate body, and thereafter, if possible, surveyed. This will be a time taking and expensive exercise but the importance of it in the protection of their rights cannot be over stressed. Once this is done they will be in a much better position to defend their rights against claims for possession by the lessee or by others who claim rights over the lease.

40. On the explanation of the facts given to this Court it would appear that each declared custom owner should have been involved in the negotiation of any lease or other transaction concerning Latoror land, and each declared custom owner would be entitled to share in whatever benefits arose from the grant of a lease or other interest. It appears that the benefits accruing to the lessor under the 002 lease have been received by Neuthahal Leonard alone.

41. In law, it is probable that he has become a trustee of the benefits received in respect of the interests of the other declared custom owners and is liable to account to them for their share. This is an issue that each of the declared custom owners may now wish to consider and take up, perhaps in Family Lal's case in their counterclaim.

42. For the above reasons we consider that the matters now before the Court should be disposed of as follows:

(1) Application for leave to appeal out of time in CAC17/1769 should be dismissed;

(2) The application for leave to appeal out of time in CAC17/1770 should be granted, and the appeal should be allowed;

(3) The summary judgment entered against the first defendant in CC27 of 2013 should be set aside in its entirety;

(4) Civil Case No. 27 of 2013 will be returned to the Supreme Court.

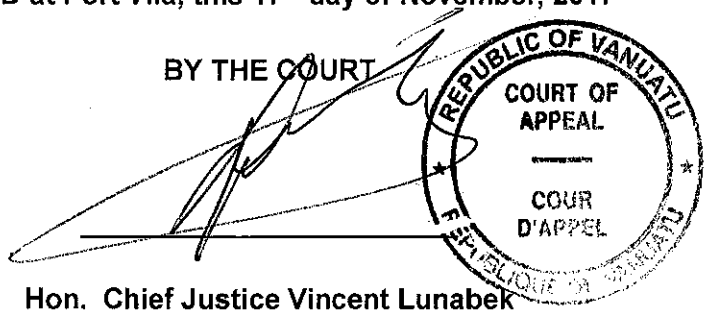
43. On the question of costs, the contesting parties have failed in one application and succeeded in the other and as between them we consider there should be no orders for costs;

44. The Republic has filed extensive submissions in the summary judgment matter. The submissions include a very detailed and helpful chronology to assist the court. In a case like this the Republic, representing the Lands Department and the government, would normally adopt a neutral position, and confine its submissions to placing a chronology and background information before the Court to assist it in understanding the issues argued by the parties. In so far as their submissions achieve that purpose the Republic should ordinarily be compensated by an award of costs. In this case the Republic has sought an award of VT100, 000. That would be a very reasonable sum were it not for the fact that the submissions in this case go further than merely providing the chronology and background facts. The submissions conclude with arguments in favour of upholding the decision of the Court below on its merits. Those submissions exceed the normal role adopted by a neutral party in proceedings, and for that reason we think the claim for costs by the Republic should be reduced. In these circumstances we award the Republic VT75, 000 as costs against Family Lal in CAC17/1770.

45. There will be orders accordingly.

DATED at Port Vila, this 17th day of November, 2017

BY THE COURT



Hon. Chief Justice Vincent Lunabek