

BETWEEN: George Toa & Carlos Toa
Appellants

AND: Christian Oska & Family, Joseph Oska, Saky Oska,
Lui Lapinpel and Sam Visai & Family
Respondents

Coram: Hon. Justice J.W. von Doussa
Hon. Justice R. Asher
Hon. Justice D. Aru
Hon. Justice G.A. Andrée Wiltens
Hon. Justice Viran Molisa Trief

Counsel: Mr D.K. Yawha for the Appellants
Mr P. Fiuka for the Respondents

Date of Hearing: 9 November 2021

Date of Judgment: 19 November 2021

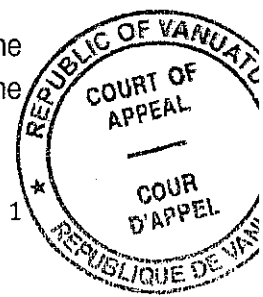
JUDGMENT

A. Introduction

1. The Appellants ('Toa') appeal against the judgment dated 20 August 2021 in Civil Case No. 1803 of 2020 dismissing their Claim.

B. Background

2. By Claim filed on 14 July 2020, Toa sought orders evicting the Respondents ('Oska') from Apendihen land at North West Malekula and restraining them from trespassing onto the land in the future.
3. On 21 October 2020, Oska filed their Amended Defence and Counter Claim. The sole disputed fact pleaded was that Oska made gardens outside Apendihen.
4. The primary Judge heard an Urgent Application for Summary Judgment and then entered summary judgment dated 8 December 2020.
5. This was appealed. The Court of Appeal in *Oska v Toa* [2021] VUCA 12 allowed the appeal and set aside the summary judgment as the disputed fact pleaded in the Amended Defence gave Oska a real prospect of defending the Claim.



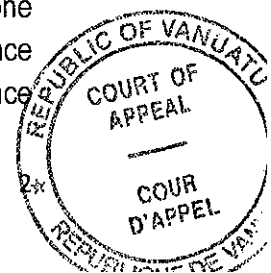
6. The Court of Appeal noted that the primary Judge had in the evidence the Vahas Village Land Tribunal decision of Apendihen land that Toa relied on. This was a one-page decision titled "Apendihen Kastom Land Disputed "Decision"" dated 21 May 2009 with an attached sketch map. Apendihen land is described in the decision as being situated inside An-duwai and is about 200 hectares ('hemi about 200 hector'). The sketch map shows Apendihen land as a shaded area with the following place names around its circumference: Ablabil Avankrai, Babrival, Alanu, Nabaka Altano, Anmat Unun, Blanus Aratahr, Anawal Aburu, Alboah, Limao Abalian and back to Ablabil Avankrai (attachment "JT1" to the sworn statement of Joel Toa filed on 11 August 2020). That depiction of the boundary of the land was clear and could not now be disputed.
7. Accordingly, the matter was remitted to the Supreme Court for the primary Judge to hear evidence and determine the sole issue which was whether Oska were gardening inside or outside of Apendihen land as described in the map attached to the Vahas Village Land Tribunal's decision dated 21 May 2009.
8. A trial was held. The primary Judge then entered the judgment dismissing Toa's claim.

C. The Judgment

9. In the judgment dated 20 August 2021, the primary Judge rejected the evidence of Toa's two witnesses Bruce Toa and Jack Toa because they were not named claimants. The Judge also pointed out that in their evidence, they had not identified the location of their houses or the claimants' houses, shown that they had obtained a Certificate of Recorded Interest in Land, shown that the land was fenced or shown a survey map produced by a registered surveyor. For those reasons, the primary Judge concluded that the Toas had not established their case against Oska and dismissed the claim.
10. The primary Judge also ruled as inadmissible some parts of the evidence of Oska's two witnesses Kenneth Visai and Virambath Nisai. The Judge then stated that without evidence from any of the named defendants, Mr Visai and Mr Nisai's evidence was hearsay and rejected it.

D. The Appeal

11. The judgment is appealed on the grounds that the primary Judge erred in concluding that Toa had not established its case in the face of the overwhelming evidence from its witnesses' Bruce Toa and Jack Toa, and in failing to take into account that none of the named defendants (Oska) had given evidence to rebut the Toas' evidence other than Oska's two witnesses Kenneth Visai and Virambath Nisai whose evidence was not reliable.



12. Mr Fiuka submitted in response that the primary Judge was correct to reject evidence from witnesses who were not party to the case and to reject the evidence about Oska residing on the land because the issue for determination concerned gardens only. He also submitted that Bruce and Jack Toa's evidence was contradictory and could not be relied on.

E. Discussion

13. First, there is no requirement in law that a witness must be a named party or their evidence will be rejected. A party is free to give evidence or not, and to file evidence by way of sworn statement from any person it wishes including from those who are not party to the proceeding. Therefore the primary Judge erred in rejecting the Toas' evidence because neither witness was a named claimant.
14. Secondly, there is no requirement in law that a named defendant must give evidence or the evidence that he has brought will be rendered hearsay. Therefore the primary Judge erred in rejecting Oska's evidence on that basis.
15. Given the errors made and because the primary Judge has not made any findings of credibility, the appeal must be allowed and the matter remitted to the Supreme Court for re-trial. After trial, there must be findings of credibility made and then the issue before the Court determined on the evidence.
16. Although Mr Yawha submitted that Toa's evidence was overwhelming, even though the primary Judge had ruled inadmissible portions of Kenneth Visai and Virambath Nisai's evidence, there still remained competing evidence from both sides relevant to the issue for the Court's determination. However, there is no way to determine which of the witnesses is to be believed over the other because the primary Judge has not made any findings of credibility.
17. As to the second ground of appeal, Mr Yawha submitted that the primary Judge erred because Oska's two witnesses Kenneth Visai and Virambath Nisai were not reliable and there was no evidence from any of the named defendants to rebut Toa's evidence. This is asserting a credibility finding about Oska's two witnesses. However, as already stated, the primary Judge has not made any such findings.
18. As to the observations made in the judgment about defects in Bruce Toa and Jack Toa's evidence, we comment only that those may be matters of assessment of the evidence but the primary Judge needs to first make findings of credibility and then secondly, assess on the evidence whether or not the Respondents were gardening inside or outside of Apendihen land as described in the map attached to the Vahas Village Land Tribunal decision.

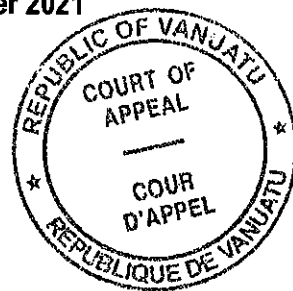
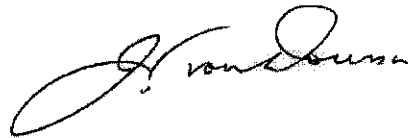


F. Result

19. The appeal is allowed. The judgment dated 20 August 2021 is set aside.
20. The matter is remitted to the Supreme Court for re-trial on the sole issue for determination.
21. The costs of the first trial and of the appeal are reserved, and are to be assessed and determined by the trial judge on the basis of the result in that Court.

DATED at Port Vila this 19th day of November 2021

BY THE COURT



Hon. Justice John William von Doussa