

BETWEEN: **TERRENCE KERR and CLARENCE NGWELE**
Appellants

AND: **REPUBLIC OF VANUATU**
Respondent

Dates of Hearing: **8 August 2024**

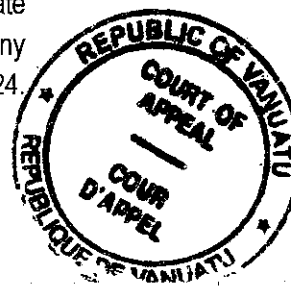
Coram: **Hon. Chief Justice V. Lunabek**
Hon. Justice J. Mansfield
Hon. Justice R. Young
Hon. Justice O.A. Saksak
Hon. Justice D. Aru

Counsel: **J. Ngwele for the Appellants**
J. Wells for the State

Date of Decision: **16 August 2024**

JUDGMENT OF THE COURT

1. This appeal is one which was doomed to fail. It is hard to understand why it was pursued.
2. The appellants' only point was that the claim in the Supreme Court had under Civil Procedure Rules 5.3.1 come to an end, because the claim had not been served on the appellants within the 3 month period specified. The reason for that is understandable. The claim issued on 1 September 2022 was served on a lawyer then representing one of the appellants in separate proceedings, and sometime later that lawyer indicated that he was not acting for the appellants in this proceeding.
3. On 6 November 2023 the Court made an order pursuant to Rule 4.15 of the Civil Procedure Rules renewing the claim. The appellants were aware of that order. After that order, the matter proceeded in a normal way by the exchange of pleadings, including a defence filed on behalf of the appellants. The appellants' have simply chosen to ignore that order.
4. In the light of that defence, the respondent applied for summary judgment on the basis that the defence did not disclose any material sufficient to avoid the appellants' liability. Appropriate directions were given by the judge to decide that issue. The appellants did not file any responsive materials. The appellants did not appear at the hearing listed on 19 January 2024.

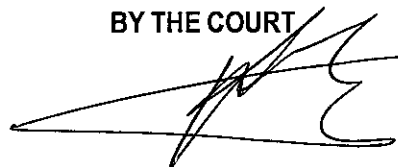


No explanation was given. The hearing was adjourned to 2 February 2024, to enable them yet a further opportunity to appear on the hearing of that application. Again they did not appear.

5. The judge then proceeded with the hearing and, after considering the material before him, entered judgment in favour of the respondent. It is appropriate to note that, through some administrative oversight, that judgment was entered for VT138,132,045 damages, but because that assessment of damages was for unliquidated damages, it required further evidence to be given and considered by the judge. Accordingly the judgment which was formally entered was simply for damages to be assessed. That is the judgment appealed from.
6. This appeal seeks to set aside that judgment for damages to be assessed. It is said that the trial judge was in error by failing to recognise that the claim had not been served within 3 months of its issue as required by Rule 5.3(1) of the Civil Procedure Rules and so the claim was at an end. That is wrong. It was recognised that service had not been made within that time, and the extending power in Rule 4.15(2) of the Civil Procedure Rules was invoked to re-enliven the claim. That was done, as noted, on 6 October 2023.
7. It is worth noting briefly the facts giving rise to the claim. The appellants leased from the respondent a site on South Efate called in their submissions "*the Quarry Site*". They had permits to mine and extract lime stone from the Quarry Site on conditions, including as to the depth to which they could excavate the site and their obligation to rehabilitate the quarry site following the excavations. The claim by the respondent is that they breached the conditions of the permits by excavating to unauthorised levels and by failing to undertake rehabilitation as prescribed. Consequently, their lease was terminated and they were sued for outstanding rental payments and for the damages to the site.
8. The appellants were served with the claim. They understood the claim. They filed their defence. They were aware of the application for summary judgment. They failed to attend either of the hearing dates for that application. They have not presented any material to suggest they have a real defence to the claim. They now simply complain on a false procedural technicality to have that judgment set aside.
9. Consequently, the appeal is dismissed. The appellants are to pay the respondent's costs of the appeal fixed at VT100,000.

DATED at Port Vila, this 16th day of August, 2024.

BY THE COURT



Hon. Chief Justice Vincent Lunabek

