

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

Civil Case 15 of 2010

(Civil Jurisdiction)

BETWEEN: MR KEN HUTTON of Port Vila.

Claimant

**AND: MS SERAH TARI of Luganville,
Santo.**

Defendant

Mr Justice Oliver A. saksak

Ms Jennifer La'au for the Claimant
Mr Britten Yosef for the Defendant

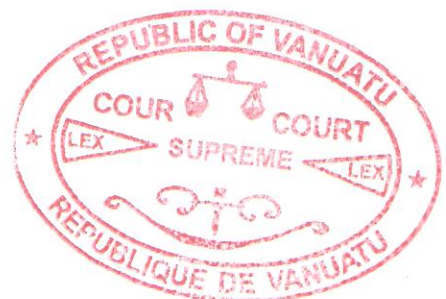
Date of Hearing: 13th and 14th February 2012.
Date of Judgment: 19th March 2012.

JUDGMENT

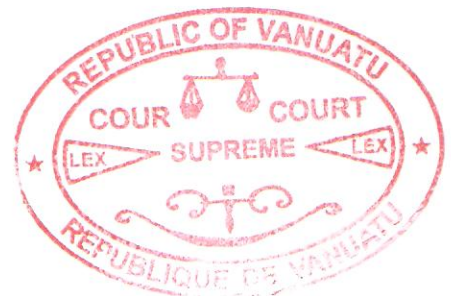
Introduction:

1. This is a claim for eviction, damages and costs.
2. The Claimant filed his claims on 9th April 2010 alleging that the defendant is a trespasser on his property comprised in Leasehold Title 03/0174/018 situated in Luganville, Santo.

Facts



3. The Claimant is an Australian Citizen and a dental surgeon by profession who resided in Port Vila under residency permit. He has since returned to Australia due to old age and illness.
4. The defendant is a Ni-Vanuatu and a former employee of the Claimant who resides on the Claimant's property in Luganville, Santo.
5. The Claimant owns properties located in Luganville under Leasehold Title No 03/0174/018 which comprises of -
 - (a) Flat on the Messanine floor of the metal block
 - (b) Building now used as a motel with reception, 8 rooms, bathroom and sundry and other rooms. 5 rooms complex on the street front of the house which used to be the dental surgery, now used as a hair dressing salon.
6. Whilst in the employ of the Claimant the defendant had the benefit of managing and occupying all the Claimant's properties as outlined in paragraph 4 above.
7. On 26th January 2010 the Claimant dismissed the defendant on grounds of serious misconduct and failure to account. Subsequent to her dismissed the defendant was served with a Notice to Quit and deliver up possession of all the properties of the Claimant dated 17th February 2010. However to date the defendant has failed and/or neglected to vacate and deliver up property.



8. The defendant has continued to wrongfully manage and occupy all of the properties of the Claimant.

Reliefs Sought

9. The Claimant seeks the following reliefs -

- (a) An Order that the defendant deliver up immediate possession of Leasehold Title 03/0174/018 to the Claimant.
- (b) Damages for trespass at the rate of AUS\$1,500 per month from date of expiry of the Notice to Quit until the property is delivered up.
- (c) Costs.

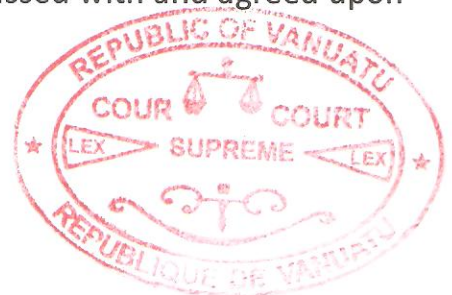
Undisputed Facts

10. The defendant acknowledges and accepts that the Claimant is the registered proprietor of Leasehold Title 03/0174/018 and all the properties comprised therein. She also agrees with the facts in paragraphs 4, 5 and 6 of this judgment.

Defence and Counter-Claim

11. She denies the claims in paragraphs 3, 7 and 8 of the judgment and asserts that her dismissal was unlawful because she had entered into an agreement in 2006 with the Claimant that -

- “(i) upon the demise of the Claimant the defendant would be given priority to purchase the property comprised in Leasehold Title 03/0174/018.
- (ii) The intended arrangement had been discussed with and agreed upon by the Claimant’s family in Australia.



(iii) The defendant and the Claimant agreed for a 10% deposit to be paid by the Claimant. Following the Agreement, the respondent requested a deposit of 10% of the total amount agreed upon being VT15,000,000.

(iv) The defendant accepted to pay the 10% and made eight (8) installment payments totaling up to VT700,000.

12. Her Counter-Claims are for -

- (a) Orders of specific performance.
- (b) Stress in the sum of VT500,000; and
- (c) Costs.

Burden and Standard of Proof.

13. It is common ground that in Civil Cases he who alleges a fact has the duty of proof on the balance of probabilities. In this case the Claimant has the burden of proof in respect of the main claim and the defendant has the duty of proof on her Counter-Claims.

Evidence

14. On 13th February 2012 the Court heard oral evidence by Ms Wendy Hutton as a witness and acting under a power of attorney given by her father the Claimant dated 24th December 2009 on behalf of her father. She explained to the Court amongst other things that her father is currently too old and unwell to travel to Vanuatu to give oral evidence in Court in respect to his claims. She relied on the evidence by sworn statement of Mr Ken Hutton, the Claimant dated 4th May 2010 but filed on 29th June 2010.

15. The defendant gave oral evidence and relied on her sworn statements dated 23rd August 2011 (Exhibit D1) of 4th November 2011 (Exhibit D2) and of 13th February 2012 (Exhibit D3).

The Issues by the Claimant

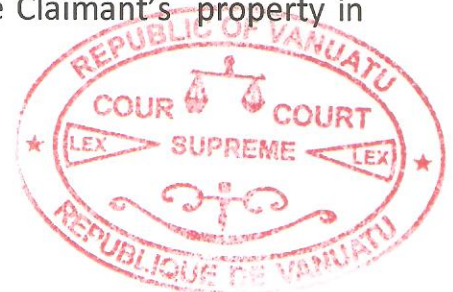
16. The Claimant, raised the following three issues :-

- (a) Whether the Claimant entered into a binding Agreement with the defendant to sell Leasehold Title 03/0174/018? (the Leasehold Title)
- (b) Whether the defendant has a legal right to remain on the Leasehold Title?
- (c) Was sufficient notice given to the defendant to deliver up possession of the Leasehold Title?

Discussions

17. Mr Hutton in his sworn statement dated 4th May 2010 filed on 29th June 2010 strenuously denied entering into any such agreement as asserted by the defendant. It was incumbent upon her to prove the existence of the agreement. Having failed and/or omitted to do so, the defendant has not discharged the burden that was upon her to the required standard. The Court therefore agrees with the submissions of Ms La'au that this issue must be answered in the negative.

18. Having failed or omitted to produce the alleged agreement, it follows that the defendant has no legal right to remain on the Claimant's property in



Leasehold Title 03/0174/018. The Court agrees with Counsel's submission that the answer to this issue is in the negative.

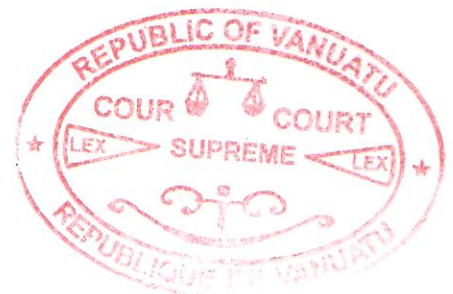
19.As to the issue of notice, the defendant clearly acknowledged being served with the Notice to Quit. The Court agrees with Counsel's submission that this issue must be answered in the affirmative. Despite receiving notice, the defendant had without any lawful authority deliberately delayed vacation of the property. She must now bear the costs of that delay.

20.Ms La'au submitted Section 15 of the Land Lease Act Cap 163 and Section 4 (1) of the Law of Property Act 1925 and the cases of Nutley v. Kam [2003] VUCA 29 and Prasad v. Prasad [2009] VUCA for consideration and application. These are relevant and applicable only where a title is challenged. In this case the Leasehold Title is not challenged by the defendant therefore these sections and the cases cited are not applicable.

The Issues By Defendant

21.The defendant raised three issues as follows -

- (a) Whether Ms Wendy Hutton have standing to represent her father, Mr Ken Hutton to seek eviction orders against the defendant?
- (b) Whether the defendant have equitable interest in Leasehold Title 03/0174/018 ?
- (c) Whether Ms Wendy Hutton has the authority to close down Santo Gas Company and take over the management of the Claimant's property?



22. In relation to the first issue in (a) above Mr Yosef submitted that Rule 3.8 of the Civil Procedure Rules was not complied with. Further he submitted that there was no medical report about the Claimant's health to confirm Mr Hutton is very sick.

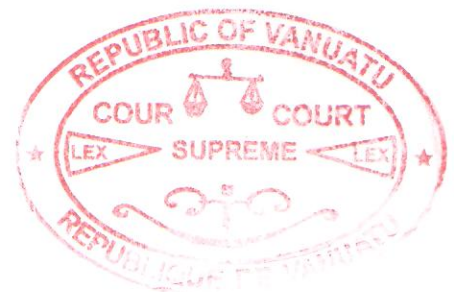
23. The evidence of Mr Hutton, the Claimant in his statement on Oath dated 29th June 2010 annexes a Medical Certificate dated 12th May 2010. It was issued by Associate Professor Tuly Rosenfeld. The last sentence reads –

".... He is currently too unwell for overseas travel and subsequent court appearance."

24. In cross-examination by Mr Yosef Ms Hutton confirmed that last year (2011) Mr Hutton had fits while travelling in a car and had he not taken to hospital quickly for medical attention, he would have died.

25. On those evidence it is apparent to the Court that Mr Hutton has a legal incapacity not to attend his Court hearing and give evidence himself. The Court has accepted Ms Hutton as her father's litigation guardian and she does not need to be appointed as such by the Court. Rule 3.8 (2) is a discretionary power and not a mandatory one.

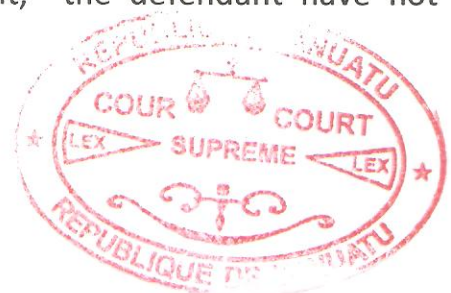
26. Mr Yosef then submitted that the Power of Attorney relied on by Ms Hutton is not valid as it is not registered in accordance with Section 82 of the Land Lease Act Cap 163 in order to have the effect specified under Section 83 of the Act.



27. The relevant document is dated 24th December 2009. It was prepared by Ridgway Blake Lawyers and executed before Mr Garry Blake as witness. It is a general power of attorney and very wide and extensive power given by the Claimant to his daughter, Ms Hutton. It is a public domain document which has been disclosed to the defence and it is part of the record and evidence which the Court has accepted as part of the evidence for the Claimant.

28. Upon careful reading of Section 82 of the Land Leases Act, there is no legal requirement that the Power of Attorney given by Mr Hutton on 24th December 2009 be registered. Whilst it is mandatory for the Director under Section 82 (1) to maintain an index of powers of attorney, the Director is only obliged to register donors or donees who apply under Section 82 (2). And those who apply shall apply in the prescribed form as required by Section 82 (3).

29. Ms Hutton in her oral evidence testified she did not know whether or not the power of attorney made in her favour was registered. But having proved she is the donee of these Powers of Attorney, it was incumbent upon the defendant to disprove it or rebut it by producing the extract of the Director's index kept in accordance with Section 82 (1) of the Act in relation to the relevant period between 24th December 2009 and 24th December 2010. But Counsel and his client, the defendant have not discharged that duty.



30. For those foregoing reasons the Court concludes that Ms Hutton has locus standi. The answer to the first issue by the defendant is "Yes".

31. In relation to the defendant's equitable interest, all submissions made by Mr Yosef in relation to this issue are rejected. There cannot be any equitable interest without the defendant establishing there was any written agreement which she had the legal and evidential burden to prove. She has not produced any receipts at all to show she made any or all payments that totaled up to VT700,000. Mr Hutton denied any of these arrangements and the Court accepts his evidence as the truth of the matter. It is hard to accept that in transactions of this nature and significance the defendant was not able to keep her own record of moneys she paid out and received by the Claimant. The defendant lacks credibility. On 16th April 2010 the Court ordered her to pay all revenues in respect to the motel into Court. She has paid only twice the sum total of VT9,010 and nothing more to date.

32. In relation to the third issue by the defendant, Ms Hutton had authority to shut down the Santo Gas Company. Her authority came from her Powers of Attorney dated 24th December 2009. The defendant herself had the burden to rebut Ms Hutton's evidence by producing an extract from the Financial Services Commission showing the names of the shareholders and names of members of the Board of Directors. But she did not. It is also interesting to note there has not been any complaints by any shareholders or board of directors. In the absence of these, there is only one inference.



That is that there were and are no shareholders and there is no board. The defendant's submissions on this issue are therefore rejected.

Conclusions

33.The Claimant succeeds in his claims and judgment is entered in his favour but, only in respect of an Order for immediate possession and costs. Damages must be further assessed at the option of the Claimant or alternatively be withdrawn by him against the Claimant.

34.As for the Counter-Claims of the defendant, they do not succeed and are all rejected and dismissed.

35.A separate order for eviction and immediate deliver up of vacant possession will be issued by the Court.

36.The Claimant is entitled to his costs of an incidental to this action on an indemnity basis as agreed or taxed.

DATED at Luganville this 19th day of March 2012.

BY THE COURT


OLIVER A. SAKSAK

Judge.

