

BETWEEN: Naneth Vakesa
Appellant

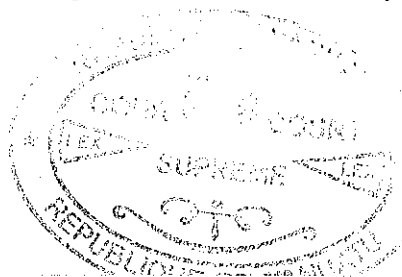
AND: Oga Wariley
Respondent

Coram: Justice Aru

Counsel: Mr. C. Leo for the Appellant
Mr. H. Rantes for Respondent (no appearance)

JUDGMENT

1. This is an appeal against a decision of the Magistrate Court on 20 June 2013 striking out an application to set aside a default judgment which was entered in favour of the claimant Oga Wariley.
2. The background to the proceedings in the Court below are that a claim dated 15 June 2012 was filed in Luganville, Santo against the defendant Naneth Vakesa who resides at Fres Wota 4 in Port Vila, Efate. The claimant alleged the defendant breached an oral contract they entered into for the hiring of the defendant's boat.
3. On 26 November 2012 a request for default judgment was made on the basis that no response or defence was filed within 28 days.
4. On 26 November 2012 default judgment was entered in favour of the claimant.
5. On 17 December 2012 an application to set aside the default judgment was made.
6. On 20 June 2013 the application to set aside the default judgment was struck out.
7. In this appeal, the relief sought by the appellant is to set aside or quash the orders of 20 June 2013. A number of grounds were advanced by the appellant in her amended notice



of appeal. These can be summarized as follows. The Magistrate was wrong to strike out the application to set aside default judgment as a defence was filed on 13 December 2012.

8. Secondly, that the strike out was made contrary to rule 1.2 (2) of the Civil Procedure Rules (CPR) as the appellant who is the owner of the boat is retired and not in a same financial position as the claimant. Furthermore it says that the Senior Magistrate was wrong in law and fact in her decision to strike out. Cost orders should have been made against the defendant pursuant to the Rules for non-compliance with court directions. Finally the appellant says that the judgment sum awarded by the default judgment is baseless and not supported by evidence.
9. The Senior Magistrate in her order set out the history of the matter as follows:-

"1). The statement of claim in this matter was filed on 9 August 2012 for claim for breach of contract in the sum of VT 871,000.

2). The statement of claim was served.

3). Neither response nor defence was filed despite clear direction orders of 20 August 2012.

4). A notice of beginning to act was filed on 27 September 2012 by Mr Colin Leo.

10. Then noted that:-

"5). The direction orders issued on 20 August 2012 were repeated on 22 October 2012, yet neither response nor defence was filed as directed.

6). The application for default judgment (fixed amount) was filed on 26 November 2012 and granted on the same day.

(emphasis added)

11. Then further in relation to the application to set aside said:-

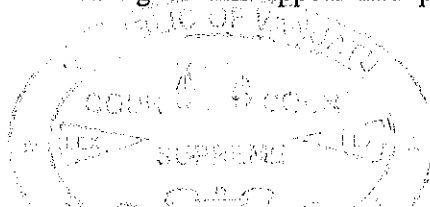
" 7). An application to set aside the default judgment was filed on 17 December 2012 and was listed consecutively on 15 April, 29 April, and 18 June 2013 ; the defendant and his legal counsel continuously failed to appear.

8). The oral application to strike off by the legal counsel for the claimant was heard this morning (18 June 2013) and was granted.

(emphasis added)

Discussion

12. The appeal is against the orders of 20 June 2013 to strike out the application to set aside the default judgment. The hearing of this appeal had previously been deferred on a



number of occasions. On the date of this hearing, I was informed that Mr Rantes was on Tanna and will not be available in Court. I proceeded to hear the appeal as adequate notice was given to counsels of the hearing date. Mr Rantes did file written submissions and those will be considered.

13. It appears from the appeal book filed that not all the documents in the court below which are relevant for consideration of the appeal were filed. Sworn statements filed by the claimant in support of his claim were not in the appeal book. Sworn statements in support of the application to set aside the default judgment although referred to by the appellant are also not in the appeal book.
14. No submissions were made by Mr Leo whether his client's appeal was filed within time. Part 16 of the CPR – Division 9 provides for appeals from the Magistrate Court. Rule 16.28 provides:-

Division 9 – Appeal from Magistrates' Court

16.26 Definition for this Division

In this Division:

“decision” means:

(a) a judgment or final order of the Magistrates' Court; and

.....

16.27 Right of appeal

(1) A party to a proceeding in the Magistrates' Court may appeal from a decision of the Magistrates' Court.

(2) The appeal may be made on a question of law or fact or mixed law and fact.

[NOTE: Filing an appeal does not result in a stay of enforcement unless the appellant applies for a stay; see rule 13.4.]

16.28 Procedure for appeal

(1) An appeal is made by filing and serving an application within 28 days of the date of the decision.

(2) The application must:

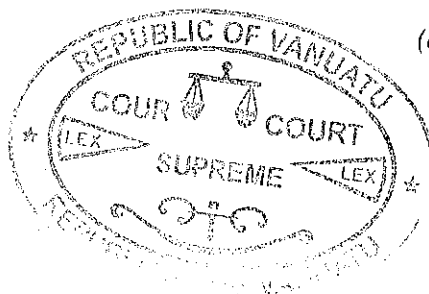
(a) set out the grounds of the appeal; and

(b) be in Form 33.

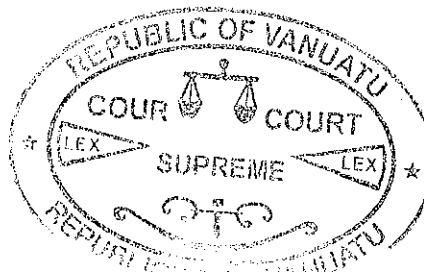
(3) The court must write the first hearing date on the application.

...”

(emphasis added)



15. An appeal from a final decision of the Magistrate must be made within 28 days of the date of the decision.
16. The decision striking out the application to set aside was a final order as it ended the challenge to the default judgment. That decision was given on 20 June 2013. On 15 June 2017 a notice of appeal was filed and subsequently an amended notice of appeal was filed on 29 August 2017. This was three (3) years after the decision appealed was made.
17. As this issue was not addressed in their submissions, the parties were recalled to address it. Mr Vohor on behalf of Mr Leo informed the Court that their client was retired and was unable to be contacted hence the late filing of the appeal on 15 June 2017. Ms Kalwatman for the respondent said the appeal is out of time.
18. There is no evidence shown of leave being granted to appeal out of time, therefore the appeal is 3 years out of time.
19. As to grounds 1 and 2, directions was issued by the Magistrate on 20 August 2012 for the appellant to file and serve a response and defence but nothing was done . The appellant then engaged Mr Leo as Counsel. On 27 September 2012 Mr Leo filed his notice of beginning to act. Mr Leo did nothing further to file a response or defence. Not even a holding defence if he was out of time. A further direction was issued on 22 October 2012 for the defendant to file her defence but nothing was done.
20. Mr Rantes submits that a defence was only filed on 19 December 2012 .This was after default judgment was entered.
21. As to grounds 3 and 4. The application to set aside was filed by Counsel and was listed for hearing on three occasions. Mr Leo was expected to appear and pursue the application but no steps were taken by counsel. The Senior Magistrate acted within her powers to strike it out for non-compliance with the directions issued. The appellant was not self-represented but was represented by Counsel.
22. Regarding the fifth and final ground it was submitted by the appellant that the default judgment is without basis and consists of an inflated figure not supported by evidence.

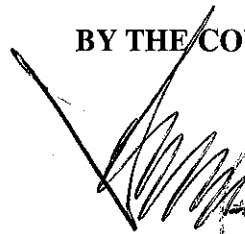


This is an argument that should have been made in arguing the application to set aside the default judgment had counsel attended to pursue the application.

23. The respondent on the other hand submits that there was sufficient evidence filed by the claimant in his sworn statement dated 9 August 2012 to support a claim for damages. As there was no evidence filed by the appellant to challenge the quantum of damages, the respondent's evidence was unchallenged and it was open to the Magistrate to rely on the evidence before him and determine the amount of damages before issuing the default judgment. The respondent relies on **Kalpoi v Mael** [2012] VUSC 115 to support his submissions.
24. In any case this appeal is not against a determination of damages by default judgment. The appellant must first show that the Magistrate was wrong in striking out his application to set aside the default judgment. If he is successful then he gets a chance to make the above argument if the matter is sent back to the Magistrate Court.
25. Having heard argument from Mr Leo and considering the submissions filed by Mr Rantes, the appellant was given the opportunity to pursue the application to set aside but on all occasions counsel was not in attendance to make the application. The senior Magistrate was correct in striking out the application to set aside. In any event, the appeal was filed out of time.
26. The appeal is therefore dismissed with no order as to costs.

DATED at Port Vila this 18th day of May, 2018

BY THE COURT



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D. Aru
Judge

