IN THE SUPREME COURT OF

THE REPUBLIC OF VANUATU

(Civil Appellate Jurisdiction)

Civil Appeal Case No. 20/2511

BETWEEN: **Joel Monsal, Jai Lee Kailick, John Lee Kailick and Chilly Kailick**

Appellants

AND: **Frederick Biagk for Famly Biagk**

Respondent

Date of Hearing: 19 July 2021

By: Justice G.A. Andrée Wiltens

Counsel: Mr T.J. Botleng for the Appellants

Mr A. Bal for the Respondent

Date of Judgment: 19 July 2021

Judgment

A. Introduction

1. On 14 July 2020, the Respondent filed a civil Claim against the Appellants in the Magistrate's Court.

2. In brief, the allegation was that the Appellants occupied certain land in South West Malekula called Windua Village. Incidentally, the family also claimed to be the custom owner of that land. Last century, in around 1980, the Biagk family had co-operated with the Vanuatu Forestry Department to plant an Cordia forest on that land comprising some 72 hectares,

which the Biagk family had then looked after following planting and pending eventual harvesting of the trees.

3. In 2018-2020, it was alleged the Appellants had moved onto this land, clearing it for the purposes of building residential dwellings and gardens for themselves, and felling some of the Cordia timber for economic gain. Attempts to deal with this new development by means of custom negotiation, allegedly failed.

4. The Respondent accordingly filed a claim in trespass, seeking damages. The family also sought interim restraining orders to keep the Appellants off the land and away from the Respondent. The interim restraining order was granted the same day by the presiding Magistrate.

5. The Appellants promptly filed a Response and a Defence to the Claim, denying trespass, and contesting that they had been logging or gardening. They asserted that the Respondent was not the custom owner of the land.

6. By consent, the restraining orders were later varied to enable inspection by the Appellants of alleged damage to their crops. At the same time an application to strike out the Claim was filed, with numerous supporting sworn statements. The application also sought complete removal of the restraining orders. It was submitted that as the Respondent was not the custom owner, the Biagk family had no standing to bring the Claim. It was further contended that the Respondent's claim to be custom owner was incorrect and challenged. Additionally, costs of VT 80,000 were sought.

7. The strike out application was duly heard on 21 August 2020, with a written decision produced 3 days later.

8. The learned Magistrate held that the Respondent had standing to bring the Claim, and he set the matter down for a hearing of the case on 15 September 2020. He noted that the Claim was not regarding ownership of the land, but a Claim for damages arising from trespass. He further amended the restraining orders to make them apply to both parties as opposed to only the Respondent. He also awarded costs in favour of the Appellants, in the sum of VT 20,000 to be paid prior to the trial hearing.

9. This Notice of Appeal was filed, very shortly prior to trial, on 15 September 2020. Accordingly, the trial did not proceed and the matter remained unresolved with neither party taking any active steps pending the hearing of the appeal.

10. Of his own volition, the learned magistrate dismissed the Claim on 9 June 2021, citing Civil Procedure Rule 9.10(2)(d).

B. Hearing

11. Counsel appeared before me in Chambers. By consent, the Claim was re-instated.

12. The dismissal of the Claim, without application from either party, ignored the fact that an appeal was on foot. I accept that the dismissal of the Claim was clearly done erroneously and it is set aside.

13. Counsel were then afforded the opportunity to produce submissions in support of/opposition to the appeal, and the matter was scheduled for full argument later in the day.

C. The Appeal

14. Mr Botleng advanced 3 grounds of appeal. Firstly he contended that the learned magistrate had erred in law in considering evidence Family Biagk had tendered to show that the family was the custom owner of the land in issue. The submission was that the evidence was incorrect, and that it could not be relied on.

15. Secondly, Mr Botleng submitted the learned Magistrate had erred in law and fact when granting the interim restraining orders. He urged this Court to consider the evidence produced by the Appellants to the effect that the orders had caused them great prejudice due to damage and loss of crops.

16. Thirdly, Mr Botleng submitted that the learned Magistrate had erred in law and fact to hold that the Respondent had locus standi.

17. If successful, Mr Botleng rather optimistically sought to set aside the restraining orders, and for this Court to award damages to the Appellants for the alleged damage to their crops as a result of the restraining orders being in place. He sought that the decision as to standing by the learned magistrate be quashed, that the Claim be dismissed, and his clients awarded costs of VT 100,000.

D. Discussion

18. Mr Botleng agreed that the issue of ownership was not before the Court, only the issue of occupation. He questioned whether Family Biagk had established this in evidence. He maintained Family Biagk had no standing to bring the Claim, despite agreeing that the issue would need to be aired at trial before a final decision was able to be made. He was unable to argue against Mr Bal's authority of *Kippon v Attorney General* [1994]VUSC 1, which sets out that a breach of occupancy rather than ownership is the core ingredient of trespass.

19. The learned Magistrate found that Family Biagk had standing to bring the Claim. There is nothing before the Court to show that was an error. There is no merit in this point.

20. The learned magistrate's decision, dealing with the strike out application, did not address the correctness or otherwise of the restraining orders. Accordingly, this is not a valid point to raise on appeal. I comment that such orders are a matter of discretion, and Mr Botleng needed to demonstrate either that the learned Magistrate had taken into account an irrelevant matter or not taken into account a relevant matter. He did not advance any submissions relating to this. There is nothing in this ground of appeal.

21. Mr Botleng's arguments against Family Biagk's customary ownership of the land may well be correct. However, that is not something the Court will need to determine in deciding whether the Claim is made out or not. It is simply not relevant to the Claim.

22. This Court is unable to make a determination whether the Appellants are entitled to damages for the depleted crops. It is not part of this appeal; nor is it currently part of the pleadings before the Magistrate's Court. No comment can be made regarding this.

23. The learned magistrate's decision is not set aside. It is upheld. There will be no order of costs in favour of the Appellants in respect of this appeal.

E. Result

22. The appeal is dismissed.

23. Counsel agree that the costs of this appeal should lie where they fall. That is on the basis that although the Respondent was successful, the re-instatement of the Claim was by consent. That is a pragmatic outcome.

24. The Claim is remitted to the Magistrate's Court for trial. That should be dealt with as soon as possible. Prior to trial, the Appellants are to pay the VT 20,000 costs awarded against them by the learned Magistrate on a joint and several basis.

Dated at Malekula this 19th day of July 2021

BY THE COURT

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Justice G.A. Andree Wiltens