

**BETWEEN: MATHEW DAE, EDWARD SUMBE, RICARDO
COLMAN & SILAS VARI**

Appellants

AND: NICKSON MOLI

Respondent

Date: 7th August 2023

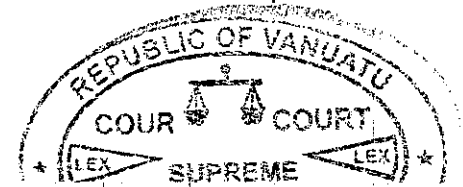
Before: Justice W.K. Hastings

Distribution: Mr P Fiuka for the Appellants
Mr L Tevi for the Respondent

JUDGMENT

Introduction

1. This is an appeal from the summary judgment of the Magistrate Court dated 1 November 2022 awarding the respondent Mr Moli VT 500,000 damages for trespass and damage to property. Spear J granted the appellants leave to appeal out of time on 19 May 2023. The appellants ask that the summary judgment be set aside and the matter returned to the Magistrate for trial.
2. In the Magistrate Court, the claimant Mr Moli (now respondent) was represented by Mr Tevi. Mr Moli claimed damages for trespass and unauthorised logging by the defendants on custom land the claimant said he owned by virtue of a decision of the Sanma Joint Sub Area Land Tribunal to that effect dated 18 August 2009. The defendants filed a defence saying the Mr Moli had no right to the land because that decision is pending appeal. Indeed, the National Co-ordinator of the Custom Land Office cancelled the claimant's Certificate of Recorded Interest in Land ("green certificate") on 5 June 2020 as a result of an appeal from the Tribunal's decision that was lodged to the Santo Island Court (Land) on 14 May 2020. The defendants' lawyer, Marisan Pierre Vire, attended court on 21 April 2021. On that day, both counsel sought a stay of proceedings pending the outcome of the appeal. The stay was granted.
3. The Magistrate records in the judgment which is the subject of the present appeal that the claimant's counsel appeared in Court twice more in the absence of the defendant's counsel: first on 21 June 2021 to seek an extension to the stay which was granted; second, on 28 September 2021, to confirm the appeal was still unresolved, and also, it seems, to advance the matter. The Magistrate did not record if defendants' counsel was given notice of these two hearings. There is no sworn statement of service of notice of these hearings in the file from the Magistrate Court. Claimant's counsel advanced the matter by persuading the Magistrate that until the appeal was resolved, the declaration of ownership made in



2009 “stands final” until another court of law rules otherwise. The matter was then listed for trial “without avail” (the sworn statement of Edward Sumbe in support of the application for leave to appeal out of time refers to two additional court dates, 9 February 2022 and 1 November 2022, for which he received no notice) until an application for summary judgment was filed on 23 February 2022. There is no sworn statement of service of notice of the application for summary judgment on file.

4. The Magistrate granted summary judgment on the basis of argument from the claimant’s counsel, in the absence of the defendants’ counsel, that as a result of the appeal from the Tribunal remaining unresolved, and despite the cancellation of his green certificate, the claimant remained the custom owner of the land.

Submissions

5. Mr Fiuka submitted five grounds of appeal:

Ground 1: The Magistrate erred by granting summary judgment when there was a dispute between the parties about a substantial question of fact, or a difficult question of law, contrary to r.9.6(9) of the Civil Procedure Rules 2002;

Ground 2: The Magistrate erred by granting summary judgment when the application for summary judgment, supporting sworn statement, and notice of hearing were not served on the appellants or their then lawyer;

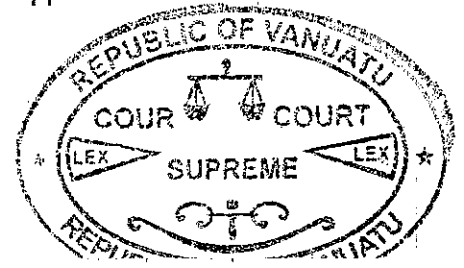
Ground 3: The Magistrate erred by relying on a misstated legal principle, that a decision of any court that a person is an owner of land “stands final” until another court of law rules otherwise;

Ground 4: The Magistrate erred when he stated the decision of the Sanma Joint Area Land Tribunal declaring Mr Moli to be the land owner was final, because it was still subject to review or appeal. The Magistrate also erred by stating Mr Moli continued to be the declared custom owner of the land despite cancellation of his “green certificate”. Mr Fiuka submitted this was an error because a green certificate functions merely as evidence of custom ownership – only a final decision of a court or tribunal can create a recordable interest.

Ground 5: The Magistrate breached natural justice by granting summary judgment when the appellants had not been served with the application for summary judgment, supporting sworn statement and notice of hearing, and as a result, did not have the opportunity to be heard and to present their case.

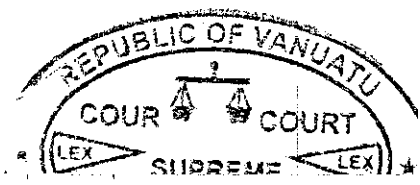
6. Mr Tevi made oral submissions. With respect to grounds 1, 3 and 4, Mr Tevi submitted that the appeal from the Sanma Joint Area Land Tribunal to the Santo Island Court (Land) Review Case No 1121 of 2020 was no longer pending when this appeal was filed and had been decided with a declaration that Mr Moli was the land owner. With respect to grounds 2 and 5, Mr Tevi explained that service on the respondents’ then lawyer, Marisan Pierre Vire, was, and is, difficult. His practice is to drop documents in her pigeon hole in the courthouse. He said he did not make an application for substituted service because he relied on past practice.

7. In reply Mr Fiuka said he had received instructions from his clients to appeal the Island Court decision.



Discussion

8. I agree with Mr Tevi that the five grounds of appeal can be consolidated into two. The first is with respect to the existence of a substantial question of fact or a difficult question of law, namely whether the claimant has standing, as custom owner of land, to bring an action for damages for trespass when his claim to ownership is not yet finally determined. Rule 9.6(9) requires the court not to give judgment in either of those circumstances. The second is whether or not the Magistrate erred in granting summary judgment when the appellants had not been served, and were unaware of the application for summary judgment, supporting sworn statements and the notice of hearing.
9. Turning to the first ground, the Magistrate relied on two judgments he identified as *Kalsakau v Director of Lands* and *Solomon v Turqus* for the proposition that a determination of land ownership “stands final” until another court of law rules otherwise. Counsel have ascertained that the Magistrate was likely referring to the Court of Appeal’s judgment in *Turquoise Limited v Kalsuak, Solomon and the Director of Lands* [2008] VUCA 22.
10. That case concerned an appeal from Tuohy J who ordered the register for leasehold title be rectified because the registration was obtained by mistake on the part of the Minister of Land. The mistake was that under s 8 of the Land Reform Act the Minister should have consulted with Kalsuak who had been declared custom owner of the land in a judgment which was the subject of an appeal at the time of the trial before Tuohy J. It was conceded by that custom owner that the existence of an appeal against the decision of the North West Efate Area Customary Land Tribunal meant “that there was still a live dispute as to the custom ownership of the land.” Having been told by officials and Kalsuak’s solicitor that Kalsuak was a person with an interest in the land, the existence of a live dispute over its ownership meant that the Minister should have consulted him before granting the lease to someone else in the exercise of his s 8 powers. The judgment is not authority for the proposition asserted by the Magistrate. It stands for the proposition that the Minister must take into account all relevant matters when exercising his s 8 powers. Indeed, and perhaps more relevantly, in *Kwirinavanua and the Republic of Vanuatu v Toumata Tetrau Family* (Civil Appeal Case No 18/771, 27 April 2018), the Court of Appeal was asked whether declarations made by an Island Court were final if there is an appeal on foot. The Court of Appeal said, “We are of the view that that simply cannot be the case as there is an appeal on foot. A final decision can only be made once the appeal is determined in the Court below.”
11. It therefore appears to me that this was not a suitable case for summary judgment given the discussion above. I turn now to the second ground of appeal.
12. Of more immediate concern than the first ground is the absence of proof that the appellants and their then lawyer were served with notices of the steps taken by the claimant in this proceeding, the application for summary judgment and supporting sworn statement after their first appearance on 21 April 2021. Leaving these documents in the appellants’ then lawyer’s pigeon hole in the Courthouse, which Mr Tevi said is often overflowing with documents, does not satisfy the requirements of the rules.
13. The appellants’ then-lawyer provided an address for service in her defence dated 27 September 2019 which was not filed until 14 October 2019. Providing an address for service complies with r.5.4(2). It does not appear however that r.5.5 was complied with. Rule 5.5 states that service is effected by serving a document other than a claim on a party personally, by leaving it at the party’s address for service, or by sending it to the party’s address for service by prepaid post or fax. This appears not to have been



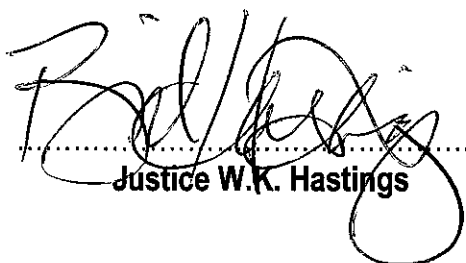
done, nor was any application for substituted service to the lawyer's pigeon hole in the courthouse ever made under r.5.9. This means that proceedings with respect to a claim the appellants wished to defend were carried on without their knowledge and in their absence. This determines the appeal.

Result

14. The appeal is allowed. The summary judgment of the Magistrate Court dated 1 November 2022 is set aside. The matter is returned to the Magistrate Court for trial.
15. Costs follow the event. In this case the costs of this appeal are awarded to the appellants, and are to be taxed if agreement cannot be reached.

Dated at Port Vila this 7th day of August 2023

BY THE COURT


Justice W.K. Hastings

