

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Civil Appellate Jurisdiction)

Civil Appeal Case No. 13 of 2010

BETWEEN: TIMOTHY WASS
Appellant

AND: JOHN KNOX
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Nevin R. Dawson
Hon. Justice Daniel Fatiaki*

Counsel: *Mr. Saling Stephens for the Appellant
Mrs. Marisan Vire for the Respondent*

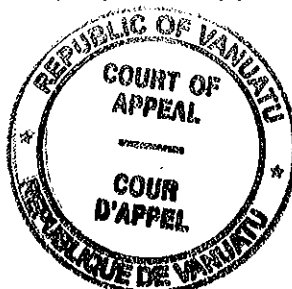
Date of Hearing: 7th July 2010

Date of Decision: 16th July 2010

JUDGMENT

The Appellant, Timothy Wass, seeks to appeal against an eviction order made against him by the Supreme Court in favour of the Respondent, John Knox. The Appellant contends that the Supreme Court erred in entertaining the application for eviction as it was made by the Respondent in Supreme Court Civil Case No. 16 of 2007 instead of by instituting separate proceedings, and also in ordering indemnity costs against the Appellant.

The Appellant's Notice of Appeal was filed one day out of time, and the Appellant seeks an extension of time within which to appeal. The Respondent opposes this application. After hearing argument on this application the Court deferred ruling on it until the substantial issues in the proposed appeal had been considered.



For reasons which follow we consider that leave to appeal should be granted, that the appeal should be allowed in respect of the order for indemnity costs made against the Appellant, but otherwise should be dismissed.

The dispute between the parties and the resulting litigation has a long history. Briefly, the Appellant as legal representative of the late Rose Mala claimed to be entitled to occupy and use the land comprised in lease title No. 3/K103/007 situated at Chapis Area, Luganville, Santo (the lease). In the principal proceedings, Civil Case No. 16 of 2007, the Appellant sought declarations that transfers of the lease from Rose Mala to François Tari, and then from François Tari to Gideon Charlie, and then from Gideon Charlie to the Respondent, who is presently the registered lessee, were all null and void due to fraud. The Appellant sought consequential orders for rectification of the land lease register to record him as the lessee. The underlying purpose of the proceedings seems to have been for the Appellant to establish his entitlement as against all others to be in possession of the land.

The several defendants in the principal proceedings denied the Appellant's claim. The Respondent also counterclaimed against the Appellant for an order for possession and damages for the Appellant's unlawful occupation of the lease after the Respondent became the registered lessee.

Shortly before the trial in the principal proceedings the Respondent discontinued the counterclaim, but continued to defend the claim.

At trial the primary judge held that fraud in relation to the transfers of the lease was not established, and dismissed the claims for rectification. A further order was made about the administration of the estate of Rose Mala but that order and its fate on appeal is not presently relevant.

The Appellant appealed against the dismissal of his claims to the Court of Appeal. The Court of Appeal in CAC No. 14 of 2009 upheld the dismissal of the claims for rectification. The Respondent therefore remained the registered



proprietor of the lease. However the Appellant remained unlawfully in occupation of the land and refused to deliver up possession to the Respondent.

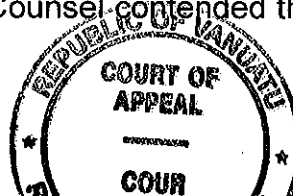
The lawyers for the Respondent then filed in Civil Case No. 16 of 2007 a document entitled "*Application for eviction*". The document described the present Respondent as "*The Applicant*", and sought an order against the present Appellant that he immediately vacate the land.

This "*Application*" was duly served on the Appellant who filed a "*Defence to Application for eviction*", the grounds for which were that the Respondent should not use Civil Case No. 16 of 2007 as his vehicle to seek relief as no live issue remained for the Court's determination in those proceedings. The defence pleaded that the Respondent should seek relief by commencing a new action.

When the matter came on for hearing before the primary judge the Appellant opposed the making of the eviction order on these grounds.

The primary judge in his reasons for judgment referred to the history of the proceedings. He accepted the submission of counsel for the Respondent that the decision of the Court of Appeal meant that the Appellant is now a trespasser on the land. He noted that the Respondent had earlier filed a counterclaim, paying the appropriate fees, but later had discontinued it. To the extent that counsel for the Appellant contended that issues raised in the counterclaim were therefore no longer live issues before the Court he accepted that submission. Nevertheless, he held that there remained issues of eviction and costs which he then proceeded to determine by ordering eviction and awarding indemnity costs relating to the eviction order. The primary judge did not state a reason why indemnity costs were ordered.

Before this Court counsel for the Appellant conceded that there were no grounds on which the Appellant could resist an order for eviction in proceedings regularly brought for that purpose. However, he contended, again, that this required the Respondent to commence another action. Counsel contended that as the correct



procedure had not been followed by the Respondent, the order made by the primary judge should be set aside.

In short, the Appellant's conceded that on the substantial merits of the claim the Respondent was entitled to an eviction order, but contended that procedural form should prevail over the substantial justice of the matter.

Rules of procedure are prescribed to regulate the orderly and efficient conduct of proceedings. The rules carefully prescribe processes to ensure that the rules of natural justice are observed, in particular that parties to a dispute are given notice of contentious issues requiring determination, and an adequate opportunity to answer claims against them. In Vanuatu the rules and procedures are contained in Civil Procedure Rules No. 49 of 2002. The Court expects the Civil Procedure Rules to be followed and will strictly insist on due observance when a failure to follow them could frustrate the requirements of natural justice. However, it is common experience that occasions arise in the course of litigation where failures to observe procedural rules occur. Often the failures are ones that can be cured by direction to ensure compliance. Where this occurs, the Court will ordinarily require the party responsible for the failure to bear the costs incurred in bringing about compliance.

The Civil Procedure Rules recognize the importance of promoting substantial justice over form in the Overriding Objectives set out in Rule 1.2. Importantly rule 18.10 recognises the need to ensure that proceedings do not fail where irregularity due to failure to observe procedural rules does not result in injustice. Rule 18.10 (1) provides:-

"A failure to comply with these Rules is an irregularity and does not make a proceeding, or a document, step taken or order made in a proceeding, a nullity."

The Rule 18.10 (2) ensures that the Court has ample discretionary power to ensure that substantial justice is achieved notwithstanding the irregularity. In the



exercise of these powers, where irregularity cannot be cured without injustice, the Court can set aside all or part of the proceeding.

In the present case, the filing of the "*Application for eviction*" in Civil Case No. 16 of 2007 was an irregular procedure. The correct procedure would require the issue of separate proceedings to constitute the vehicle within which to seek the eviction. However Rule 18.10 saves this irregularity from nullity, and the ultimate order made will be valid unless the Court in the exercise of its discretionary powers under Rule 18.10 (2) orders otherwise.

Here, an eviction order against the Appellant was the inevitable consequence of the outcome of the litigation in Civil Case No. 16 of 2007 and the subsequent appeal. Such an order was in the nature of an enforcement order giving effect to this decision. Importantly, though following a course that did not comply with the usual procedural form, the Respondent served on the Applicant an application which precisely stated the relief sought. The Appellant filed a defence to the application. The parties then appeared and argued their cases before the Court. The merits of the claim for eviction were considered and correctly identified by the Court. The Appellant's objection to the irregularity in procedure was noted, but in the circumstances the primary judge overlooked the irregularity in favour of making an order that would settle the issues remaining in dispute between the parties.

Had the Court acceded to the argument of the Appellant, the consequence of dismissing the Respondent's Application would have been fresh proceedings in which inevitably an eviction order would have been made, and costs on an indemnity basis would have been ordered against the Appellant. In practical terms the eviction order which was made had the effect of saving the Appellant considerable costs which would have been ordered against him in the new proceedings.

The making of the eviction order in Civil Case No. 16 of 2007 was consistent with the Overriding Objective in Rule 1.2.



In our opinion the procedure followed by the Court below was irregular but by Rule 18.10 (1) was not a nullity. Likewise, the eviction order was not a nullity, and in our opinion the Appellant has not demonstrated any reason based on the justice of the case, either in the procedure that was followed or in the result, why the eviction order made should be set aside. If the validity of the eviction order were the only issue in the appeal we would be minded to simply refuse leave to appeal. However there is also the Appellant's complaint about the costs order which must be considered.

Costs are ultimately in the discretion of the Court, but counsel for the Respondent informed us that before the primary judge she asked only for "costs", and did not seek costs on an indemnity basis. Nor did the judge indicate to counsel for the Appellant that indemnity costs were in the Court's contemplation. Where indemnity costs are to be awarded the Court must be satisfied as to one or other of the grounds set out in Rule 15.5 (5), and indicate that finding in its reasons. No such finding is referred to in the judgment under appeal.

Where eviction is sought against a trespasser who has unsuccessfully exhausted available legal avenues to resist eviction, yet defiantly remains on the land, the inevitable eviction order would normally attract an order for indemnity costs. However, even then, the Defendant should be warned of that possibility and be heard. It appears that did not happen here.

Unusually in the present case the application for eviction was irregularly made, and we do not consider the Respondent should suffer an order for indemnity costs because he sought to raise the irregularity. In the circumstances we consider the order for indemnity costs should be set aside and an order for costs on the standard scale substituted. To enable that to occur it is necessary that leave to appeal be granted. However this is a victory for the Appellant on an incidental aspect of the case. The Appellant has failed on the substantial issue and should bear the costs of the appeal.



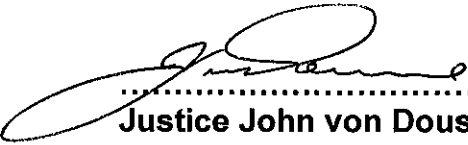
The Orders of the Court are therefore:-

- 1) Leave to appeal granted;
- 2) The order for indemnity costs made on 14th May 2010 is set aside and an order for costs in the Court below at the standard rate is substituted;
- 3) The appeal against the eviction order made on 14th May 2010 is dismissed;
- 4) The order made on 28th June 2010 staying the Enforcement Warrant is extended to Friday 13th August 2010 to allow the Appellant to remove himself and his property from the leasehold land and to voluntarily deliver up possession;
- 5) The Appellant is to pay the Respondent's costs of the appeal at the standard rate;

DATED at Port Vila, this 16th day of July, 2010.

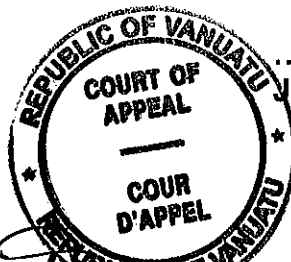
BY THE COURT


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Chief Justice Vincent Lunabek


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Justice John von Doussa


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Justice Ronald Young


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Justice Nevin R. Dawson




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Justice Daniel Fatiaki