

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

Civil Appeal Case No. 41 of 2012

BETWEEN: JOEL TAWI & STEVEN JOEL
Appellants

AND: THE REPUBLIC OF VANUATU
First Respondent

AND: PACIFIC AUTRONICS LIMITED
Second Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Mansfield
Hon. Justice Daniel Fatlaki
Hon. Justice Robert Spear
Hon. Justice Dudley Aru*

Counsel: *Mrs. Mary Grace Nari for the Appellants
Mr. Frederick Gilu for the First Respondent
Mr. Jack Kilu for the Second Respondent*

Date of Hearing: 19 October 2012

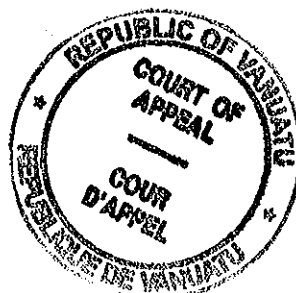
Date of Decision: 25 October 2012

JUDGMENT

Introduction

1. This is an Appeal from the decision of Saksak J dated 6th September 2012 and the Appellants now seek the following orders:
 - a) That the Judgment of the Court below be set aside in its entirety;
 - b) That the Court enter judgment in favour of the Appellants as sought in the Supreme Court claim;
 - c) An order for costs; and
 - d) Any other orders deemed for by the Court.

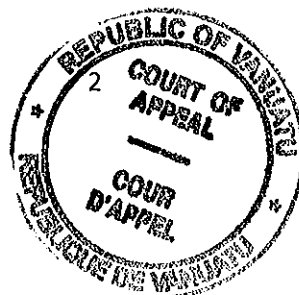
2. The grounds advanced by the Appellants are:



- (a) The Court erred in law when finding that a claim for debt recovery in the Magistrates Court may be used to lodge a caution against a registered lease under section 93 of the Land Leases Act.
- (b) The Court erred in law when it found that the Director acted lawfully and in good faith when he registered the caution lodged by the Second Defendant.
- (c) The Court erred in law when finding that the Magistrate Court had powers to issue warrant for seizure and sale of real property as specified under rule 14.13(2) and 14.6 of the Civil Procedure Rules. No consideration was given to the application of the Land Leases Act.
- (d) The Supreme Court erred in law and procedure by assuming the responsibility of the Magistrate Court and the parties concerned in ordering that Civil Case 29 of 2004 which involves warrants for sale and seizure of lease title 04/3024/011 be transferred to the Supreme Court together with Civil Case No. 72 of 2006. The parties in Civil Case 72 of 2006 had settled their matter and had nothing to do with the other matter involving the Second Respondent.

Background

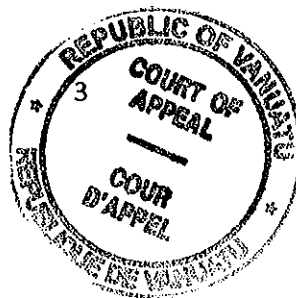
3. The background to this appeal stems from two civil cases commenced in the Magistrate's Court at different times by both the appellant and the second respondent against one Ernest Faatauira.
4. In Civil Case 29 of 2004 Pacific Autronics Limited v. Ernest Faatauira and Donald Restutune, the second respondent sued both Ernest Faatauira and Donald Restutune. In Civil Case 72 of 2006 Joel Tawi v Ernest Faatauira the appellant sued Ernest Faatauira alone.
5. The chronology of how these events unfolded are as follows:
 - 03 March 2004 – The second respondent commenced its proceedings in the Magistrate Court in Civil Case 29 of 2004 against Ernest Faatauira and Donald Restutune for the sum of VT778, 723.
 - 7 April 2004 – A caution was registered in favour of Arvin Lal against title 04/3024/011 of which the registered proprietor was Mr. Ernest Faatauira.
 - 11 May 2004 – Judgment was entered in favour of the second respondent in the sum totaling VT748, 723.
 - 20 September 2005- an enforcement warrant was issued by the Magistrate Court which was to end on 20th October 2005.



- 17 February 2006 – A stay of registration was registered by the first respondent in favour of the second respondent against title 04/3024/011.
- 3 May 2006 – The enforcement warrant was renewed and issued by the Magistrate's Court which was to end on 31 October 2006.
- 2006 – The appellant Joel Tawi commenced his proceedings in the Magistrate Court in Civil Case 72 of 2006 against Ernest Faatauiria for a sum of VT678, 128.
- 28 January 2008 – A summary judgment was given in favour of Joel Tawi and it ordered that the defendant Ernest Faatauiria pay the sum of VT 578,128 with general damages assessed at VT100, 000.
- 17 April 2008 – The appellant Joel Tawi reached an agreement with Ernest Faatauiria for the transfer to him of title 04/3024/011 in settlement of the summary judgment.
- 17 July 2008 – Consent for the transfer to lease title 04/3024/011 from Ernest Faatauiria to the appellant was obtained.
- 17 September 2009 – A transfer of lease document between the appellant and Ernest Faatauiria was prepared and signed in respect of title 04/3024/011.
- 25 January 2011 – The appellant applied to the first respondent to withdraw the second respondent's caution on title 04/3024/011.
- 16 February 2011 – The first respondent issued a notice to Arvin Lal pursuant to Section 97 (3) of the Land Leases Act to remove the caution.
- 14 March 2011 – The second respondent's enforcement warrant was extended by the Magistrate's Court stating that the warrant ends on "*execution of this warrant*".
- 17 March 2011 – The second respondent's solicitor informed the first respondent not to remove the caution as the enforcement warrant was renewed for one year and will expire on 14 March 2012.
- 24 May 2011 – The appellants Joel Tawi and Steven Joel commenced proceedings in the Supreme Court against the first and second respondents in Civil Case 23 of 2011 which is now the subject of this appeal.

6. The appellants in their claim before the Supreme Court sought the following orders:

- (1) An order that the Defendant remove the caution dated 7 April 2004 and register the transfer of lease title 04/3024/011 to the claimant within 14 days after the date of Judgment;



- (2) An order to set aside Enforcement Warrant (money order) dated 14 March 2011 issued by the Magistrate Court as it was made ultra vires its powers and is null and void;
- (3) An order for damages against the Defendants to be paid equally and severally in the sum of VT 430,000 within 21 days after the date of judgment;
- (4) An order for costs;
- (5) An order for interest at the rate of 5% from the date of judgment to final settlement of the judgment amount.

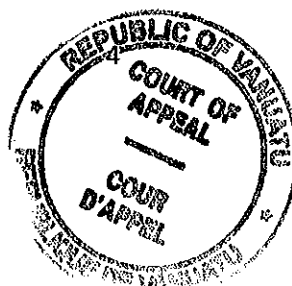
Discussion

7. The issues surrounding this matter right from the beginning arise as a result of the lodging of a caution in 2004 against lease title No. 04/3024/011 which was registered to Mr. Faatauira.
8. The caution was lodged roughly a month after the second respondent commenced an action in the Magistrate's Court for a debt against Mr. Faatauira and Donald Restutune.
9. The caution on the face of it appears defective for the simple reason that the Claimant in Civil Case 29 of 2004 who is now the second respondent is a limited company or legal entity, whereas the cautioner is a Mr. Arvin Lal, the managing director of the company but not the Claimant.
10. Before dealing with issues identified with respect to enforcement warrants, a preliminary issue to be determined is whether Arvin Lal or the second respondent can lodge a caution against lease title No. 04/3024/011.
11. Section 93 (1) of the Land Leases Act [CAP. 163] provides as follows:

"93. Lodging of cautions

(1) Any person who –

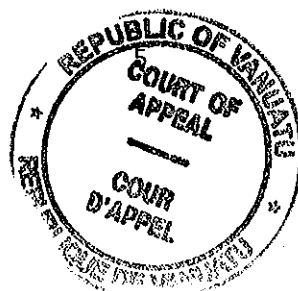
- (a) claims any interest in land under an unregistered instrument or otherwise;*
- (b) claims a benefit under a trust affecting a registered interest;*
- (c) claims a licence affecting a registered interest; or*
- (d) has presented a bankruptcy or winding up petition against the proprietor of a registered interest.*



may lodge with the Director a caution in the prescribed form forbidding the registration of any person as transferee of, or any instrument affecting, that interest, either absolutely or conditionally.

12. Disputes involving the interpretation and application of this particular provision have been the subject of cases before this Court in the past and decisions on this point have been made. Ratua Development Limited v. Ndai [2007] VUCA 28 although factually different from the current case dealt with the question of whether a claim for custom ownership could be an interest in land under Section 93 (1) (a) which is capable of sustaining a caution. This Court answered that question in the negative on the basis that *"the interest which is claimed must be one which is transferrable and registrable under the Act (Land Leases Act). A right of custom ownership is not registrable or transferrable under the Act"*.
13. It went further to say that "any interest in land" in section 93 (1)(a) must be read as meaning *"any interest in a registered lease i.e. any interest in land under the Act."*
14. The term *"interest"* under the Land Leases Act is a defined term and means:

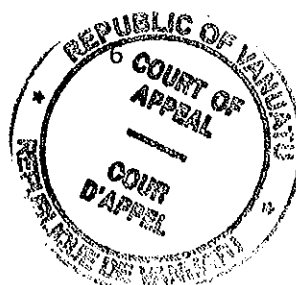
"in relation to land includes a lease, sublease, mortgage, easement, restrictive agreement and profit and 'person interested' has a corresponding meaning".
15. In dealing with the preliminary issue this question must be answered in the negative. Mr. Lal was not the claimant in the proceedings in the Court below therefore he could not by law be the cautioner.
16. Secondly, the genesis of the second respondent's claim in the Magistrate's Court is a straight forward money or debt claim. It was not a claim by the second respondent in respect of an *"interest"* as defined by the Act. At the time the caution was lodged there was no connection between the money which was alleged to be owing and a particular piece of land. That situation did not alter when Judgment was entered. The necessary connection still did not exist.
17. The next consideration is whether the position changed when the Judgment became the vehicle to achieve payment of the debt. In other words, can an enforcement warrant of a Judgment debt be a cautionable interest in land under section 93 (1) (a)?
18. The first respondent submits that an enforcement warrant is an order of the Court and falls within the definition of *"instrument"* under the Land Lease Act which is capable of registration.
19. Secondly, they submit that the enforcement warrant provides a link between the debt and the debtor's leasehold title therefore it is an unregistered instrument



which is capable of sustaining a caution under section 93(1) (a) as an “*interest in land*”.

20. The second respondents rely on Rule 14.16(1) of the Civil Procedure Rules and submit that the term “court” in Rule 1.6 (3) means both the Magistrate and Supreme Court.
21. They submit that once a warrant is issued identifying a land title and authorizing its sale then the warrant creates an interest in land in favour of the creditor and the attachment of the debt to the land by the warrant amounts to a cautionable interest under Section 93(1) a).
22. Secondly, they submit that the definition of “*interest*” in relation to land is not exhaustive as it uses the word “*inclusive*” therefore it may include a warrant which clearly identifies the land in question and attaches the debt to the land which would amount to an interest capable of supporting a caution.
23. Part 14 of the Civil Procedure Rules deals with the enforcement of Judgments and orders. Enforcement warrants issued under this part be they for money orders or for seizure and sale of real property are a means by which Judgments are enforced so that parties in whose favour a Judgment is delivered can enjoy the fruits of their Judgment.
24. Enforcement warrants do not create any rights but empower enforcement officers to take certain steps to enforce or execute Judgments. It is the culmination of the Civil Procedure process and needs to be understood in the context of the Civil Procedure Rules as a whole.
25. Under the Land Leases Act an “*interest*” in relation to land is a defined term which includes a lease, sublease, mortgage, easement restrictive agreement and profit. Although the definition is not exhaustive there can be no denying that the identified interests have a direct and immediate relation to land.
26. In Ratua this Court made it very clear that Section 93 (1) (a) must be read as a whole with the rest of section 93 (1) and not in isolation when it said :-

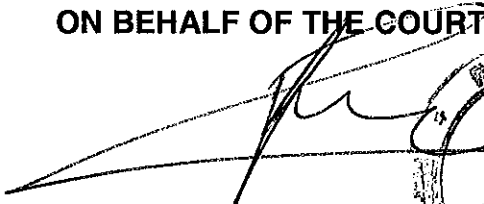
“This makes it clear that the interest which is claimed must be one which is transferable and registrable under the Act.”
27. Accordingly we are not satisfied that an enforcement warrant creates an “*interest in land*” sufficient to support a caution under section 93 (1) (a) of the Land Leases Act.
28. Although we find that none of the steps create an interest to support a caution we make the following observations on the second issue. Under the Land Leases Act the term “court” is defined to mean the Supreme Court. Therefore the only proper forum for all matters pertaining to the Land Leases Act is the Supreme Court.



29. In addition, Section 1 of the Magistrate's Court (Civil Jurisdiction) Act [CAP 130] limits its civil jurisdiction to VT 1,000,000, and, Section 4 provides a mechanism to the court in any given situation to assess its jurisdiction whether or not to refer a matter to the Supreme Court. What was purported to be done here, even if it could have been done here, in the Magistrate's Court, was beyond its jurisdictional limit.
30. We note that the Chief Justice in allowing an appeal from the Magistrate's Court in Civil Appeal Case No 7 of 2012 Peter Kapen & Ors v DD Investment Limited said that –
- "The Magistrate's Court has no jurisdiction to deal with any matter or issues under the Land Leases Act."*
31. The Appeal is allowed. The Appellants are entitled to costs on a standard basis to be paid by the first and second respondents in equal shares.

DATED at Port Vila this 25th day of October, 2012

ON BEHALF OF THE COURT


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Hon. Chief Justice Vincent Lunabekel

