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

Civil Appeal
Case No. 22/672 COA/CIVA

BETWEEN: **Willy Hocten, Reffin Hocten, David Nianu, Manikat Mlikem, Remi Wilson, Charles Iapud, Christ Elakntani, Eggar Elakntani** and **Laf Rep**
Appellants

AND: **Tony Nicholls** and **Lily Nicholls**
Respondents

Date of Hearing:	***10 May 2022***
Before:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice J. Mansfield*** ***Hon. Justice R. Asher*** ***Hon. Justice O. Saksak*** ***Hon. Justice D. Aru*** ***Hon. Justice V. M. Trief*** ***Hon. Justice E. Goldsbrough***
Counsel:	***Mr Leon Malantugun for the Appellants*** ***Mr Roger Rongo for the Respondents***
Date of Decision:	***13 May 2022***

JUDGMENT

Introduction

1. This is an appeal against the summary judgment in the Supreme Court on 16 March 2022 granting eviction and costs against the appellants.

Preliminary Issues

2. The appellants did not comply in a timely way with the Court orders made on 14 April 2022, although belatedly the required documents were filed. The respondents on 5 May 2022 filed an application to strike out the appeal for non-compliance with court orders dated 14 April 2022.

3. The strike out application however was not served on the appellants prior to the hearing of the appeal. Mr Rongo for the respondents conceded in that circumstances that he could not proceed with it. The appellants were not aware of the application and could respond to it. For that reason the Court simply put the application to one side and proceeded to hear the merits of the appeal.

Background

4. The respondents (claimants) obtained Lease 12/0914/100 by formal transfer of lease on 9 September 2010 from Silvie Kalsrap.

5. Formal consent to transfer the lease was given by Marc Kalsrap, Herve Kalsrap, Lauren Kalsrap and Markson Kalsrap on 26 August 2010.

6. The respondents filed proceedings on 26 October 2021 alleging the appellants had moved onto the leasehold title from about 2013 and had occupied portions of it illegally.

7. The respondents claim they have issued warning letters and advised the appellants to leave their property but the appellants had refused to do so.

8. The respondents alleged the appellants are trespassers and claimed an order for eviction with costs.

Management Process

9. On 28 October 2021 the primary judge considered an application by Mr Malantugun for the appellants to have all the appellants removed and to have Makete Kaltak substituted as the defendant. She was the person who, the appellants said, had authorised their occupation of the property.

10. The application was dismissed with wasted costs of VT10,000 payable within 21 days. The only significance of that step is the fact of the order for costs.

11. The primary judge then issued directions requiring the appellants to file and serve a defence by 30 November 2021 and their evidence by 23 December 2021. Trial was scheduled for 3 and 4 February 2022. That order was not complied with.

12. On 2 February 2022 Mr Malantugun for the appellants filed a defence with a proposed draft counterclaim together with an application to add the original lessors of the lease Marc Kalsrap, Herve Kalsrap, Lauren Kalsrap and Markson Kalsrap as well as Makete Kaltak (the administratrix of the estate of James Kalsrap) as parties to the proceeding. Ms Kalsrap was said to be the custom owner of the land in Leasehold Title 12/0914/100. The appellants filed sworn statements by Willy Hocten

and Joseph Kasso in support of the application on the same date. The intention was to join those parties so that the appellants could allege that both transfers of the property could be said to have been procured by fraud or mistake, and so to have the Register corrected. A memorandum was also filed.

13. On 3 February 2022 when the Court sat to hear the case the primary judge noted in the Minutes of 3 February 2022 that the directions of 28 October 2021 had not been complied with but noted also that a defence, an application to add parties, supporting statements and a memorandum had been filed by Mr Malantugun for the appellants on 2 February 2022. It was obviously much too late for the respondents to have a fair hearing on their claim.

14. An application for default judgment was made to the judge but it was dismissed.

15. Mr Malantugun advised it was his fault the documents were not filed in time, giving rise to the adjournment of the hearing, and another wasted costs order for VT50,000 to be paid within 14 days, failing which the primary judge said that the documents filed on 2 February 2022 would be rejected. Put another way, the primary judge required the outstanding costs, totalling VT60,000 to be paid within 14 days or he would not accept the documents filed on 2 February 2022; see Rule 4.14 of the Civil Procedure Rules.

16. Meanwhile counsel for the respondents advised the Court about their intention to file an application for summary judgment and an application to strike out the defence.

17. The primary judge scheduled the hearing of those applications together with the application to add parties to 4 March 2022.

18. The primary judge recorded that if costs were not paid within 14 days the documents filed by the appellants on 2 February 2022 would be rejected as late.

19. On 22 February 2022, as the costs had not been paid within the 14 days specific, Mr Rongo for the respondents filed an application for summary judgment together with a sworn statement in support.

20. On 23 February 2022 the Court issued a Minute informing counsel that all applications would be heard on 3 March 2022 together with the application for summary judgment.

21. On 3 March 2022 the Court issued another minute recording that Mr Malantugun for the appellants was not present at the conference, that he could not be reached by telephone but that he had advised he was engaged in making arrangements to do with the death of his daughter in France.

22. On that date the judge rejected the appellants' defence, application to add parties, the sworn statements and the memorandum filed on 2 February 2022.

23. As there had been no personal service of the application for summary judgment the judge adjourned the hearing to 16 March 2022.

The Decision

24. On 16 March 2022 the judge dealt with the summary judgment application.

25. Mr Malantugun for the appellants reported that he was unwell with a sore foot and could not attend the hearing. He could not get treated because of Covid restrictions. He sought for a rescheduling which the judge refused.

26. The judge recorded the Minute of 3 February 2022 rejecting all the appellants' documents filed on 2 February 2022 on the basis of the unsatisfied wasted costs orders. He decided nothing could be gained by rescheduling. The judge concluded "*the claim with the supporting statement stood alone without anything to the contrary*".

27. The judge found at [5] that the evidence of Mr Nicholls was compelling and issued a summary judgment for eviction. He said that there was nothing useful which the appellants, through Mr Malantugun could have added for the Court's consideration if he had attended.

28. The judge at [8] then found there to be no competing claim pursuant to Section 17(g) of the Land Leases Act to afford the appellants a right to remain on the respondents' leasehold property. Having excluded the material filed on 2 February 2022, that was a proper assessment of the material before him.

29. The judge awarded the costs of VT150,000 against the appellants.

30. An enforcement conference was scheduled for 8 April 2022.

31. On 7 April 2022 the appellants paid VT60,000 as wasted costs pursuant to the orders of 28 October 2021 and 3 February 2022 combined.

The Appeal

32. The appellants appeal against that judgment advancing seven grounds of appeal. As the thrust of their appeal, the appellants attacked paragraph 3 of the judgment where the judge said:

"However as recorded in my Minute of 3 February 2022, the documents filed belately by Mr Malantugun, namely the Defence, application to add parties, the sworn statements of Mr Kasso and Mr Hocten and Mr Malantugun's memorandum were rejected as a wasted costs order remained unsatisfied".

33. Mr Malantugun submitted that although the appellants had failed to comply with the direction orders of 28 October 2021 and the wasted costs orders of 3 February 2022, sufficient reasons were given for the failures. Further the documents filed late on 2 February 2022 contained facts which warranted a different decision by the judge in the exercising of his discretion to reject the documents pursuant to Rule 4.14 of the Civil Procedure Rules. Counsel submitted the judge had focussed on the procedural aspects rather than the substance and justice of the case.

34. Mr Malantugun also submitted that the delays and non-compliance by either himself and/or his clients did not fall under the category of persistent or critical non-compliance to warrant the making of a summary judgment against the appellants. This submission was made based on observations in Ferrieux Patterson v Vanuatu Maritime Authority [2004] VUSC 69, CC117 of 2003 (the Patterson case). And counsel sought to distinguish that case.

35. Mr Malantugun further submitted the respondents were not prejudiced as the costs of VT60,000 were paid, though belatedly on 7 April 2022.

36. Mr Rongo for the respondents submitted that given the history of non-compliance with court orders by the appellants the appeal should be struck out with costs. The summary judgment in their favour would then stand.

Discussion

37. First the appellants and their counsel's non-compliance with court's directions. Mr Malantugun frankly accepted that he or his clients failed to comply with the orders of 28 October 2021 and of 3 February 2022. But he provided reasons being his difficulty getting full instructions from his clients due to deaths in the family and his own situation of his daughter's passing in France, and his sore foot.

38. We agree that in the Patterson case, the level of non-compliance and the explanation for the non-compliance was different from the present circumstances. In this case Mr Malantugun gave four reasons referred to above. However, that does not justify all the non-compliance by the appellants. For instance, they should have returned to the Court to seek an extension of time rather than simply ignore the orders. They did not offer any sworn statements to explain their non-compliance with those orders. The delays in producing the documents required for the initial proposed hearing are not

acceptable. The difficulties the appellants now confront are of their own making (whether through their own default or, as partly suggested, through the default of their lawyer).

39. However that is not the end of the matter. In circumstances where there is proposed evidentiary material, and an application for the addition of parties for reasons which are apparent and identified in the proposed sworn statements, the Court should be slow to grant summary judgment. It is a discretionary remedy. That is unlike a trial, where, or course, a final decision must be and is made on the evidence.

40. In exercising that discretion, the relevant provisions of the Civil Procedure rules may be relevant.

41. Rule 4.14 provides for late filing of documents:

> *(1) A party may file a document after the time fixed by Rule 4.13;*
>
> *(2) The court may decide whether or not the document is effective for the proceeding;*
>
> *(3) In deciding whether a late filed document is effective, the court may have regard to:*
>
> *(a) The reasons why the document was filed late; and*
>
> *(b) Any additional expense or inconvenience incurred by the other parties to the proceeding and the disadvantage to the first party of the late filing is not allowed.*
>
> *(4) If the Court decides the filing of the document is not effective, the Court may:*
>
> *(a) Make any order that is appropriate for the proceeding; and*
>
> *(b) Make an order about the costs incurred by a party because of the late filing.*

42. It is noted that there is no requirement for leave to be sought for filing of late documents. It is a matter of discretion for the Court whether, in the circumstances not accept them. In addition, it is noted that that rule does not extend to require Mr Malantugun filing the application to add parties. In the case of a late application to add parties, the Court may decide to refuse the application, but we do not think that Rule 4.14 permits the Court to treat the application as not having been made at all. That refusal, if it is done, would have to consider the conduct of the parties, the timing of the application, the reasons for the application, and the significance of the proposed addition of parties, among other things.

43. The Minute of the Court dated 3 February 2022 states at [10] that the application for summary judgment and the application to strike out the defence would be heard together with the application to add parties at 1:30pm on 4 March 2022. Also there appears to be inconsistencies with the scheduled dates because on 23 February 2022 the Minute issued records that:

> "*The applications scheduled for hearing at 2pm on 3 March 2022 will now include the application filed for summary judgment*".

44. On 3 March 2022 the Court recorded at [3] that "*the documents filed late by Mr Malantugun, namely the Defence, application to add parties, the sworn statements of Mr Kasso and Mr Hocten, and Mr Malantugun's memorandum are rejected*". So it appears that the primary judge did treat the application to add parties as within the compass of Rule 4.14.

45. Adding and removing parties to a proceeding is provided for in Rule 3.2 as follows:

> *"(1) The court may order that a person becomes a party to a proceeding if the person's presence as a party is necessary to enable the court to make a decision fairly and effectively in the proceeding.*
>
> *(2) The court may order that a party to a proceeding is no longer a party if:*
>
> *(a) the person's presence is not necessary to enable the court to make a decision fairly and effectively in the proceeding; or*
>
> *(b) for any other reason the court considers that the person should not be a party to the proceeding.*
>
> *(3) A party may apply to the court for an order that:*
>
> *(a) a person be made a party to the proceeding; or*
>
> *(b) a person (including the party applying) be removed from the proceeding.*
>
> *(4) A person affected by a proceeding may apply to the court for an order that the person be made a party to the proceeding."*

46. Adding parties to a proceeding can be necessary to enable the Court to make a decision fairly and effectively in a proceeding.

47. In this case the judge was aware of the appellants' proposed defence, so as to activate and fall within section 17(g) of the Land Leases Act, and the allegations that the registration of the transfers of the property should be set aside for fraud or mistake. It is correct that the sworn statements say very little about the foundation for that allegation. The primary judge was only able to say that the claim

of the respondents was clear and on the evidence, unchallenged. This was because he had treated the appellants' documents as non-existent for the purposes of determining the application.

48. In the circumstances, in our view, there was no proper hearing of the appellants' application to add parties to ensure a just and effective decision be made by the Court.

49. The sworn statements by Mr Kasso and Mr Hocten in support of the application to add parties were available to the judge. A proposed draft counterclaim was annexed. It appears to us the judge considered that he should not turn his mind to those statements but focused solely on Mr Nicholls' evidence which he found compelling in paragraph 5 of his decision. In his reasons, as noted, he had assumed that counsel for the appellants, even if present, could not have added anything to the decision making process on the summary judgment application. But there were matters which might properly have been put to the primary judge by counsel. In all the circumstances we are satisfied an error had been made.

50. Rule 9.6(a) of the Civil Procedure Rules is clear that the Court must not give judgment against the defendant where there exist substantial issues of facts and law. In our view, the only basis for concluding that requirement was met was the ruling that all the appellants' documents should have be received for the reasons noted above. The case is not one where the defending party has simply chosen to adduce no material after being given an opportunity to do so, or has simply failed to participate in the proceeding after being properly served. It is one where the defending parties had indicated an intention to defend the claim against them, and had provided material in support of that claim.

51. To reject the appellants' application to add parties without a proper hearing and simply on the basis of an "*unless*" order was a denial to them of the opportunity to be heard so that a fair and effective decision could be made on the proceeding in order to achieve a fair and final outcome of their claim.

52. Whatever the result of the appeal, the need for the appeal rests entirely with the appellants' failure to comply properly with directions aimed at getting the claim heard efficiently and without undue delay. They must pay the costs of the appeal in any event.

The Result

53. The application by the respondents of 5 May 2022 is therefore dismissed.

54. The appeal is allowed to the extent of setting aside the summary judgment. The costs order then made in favour of the respondents stands.

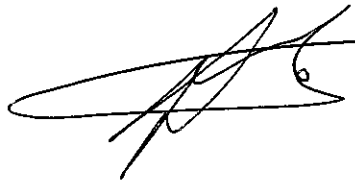
55. The matter is remitted to the Supreme Court for further management and if necessary, further hearing.

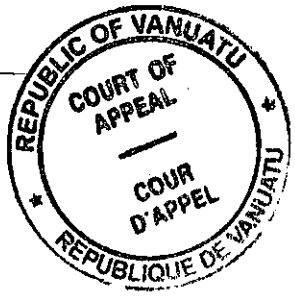
56. The appellants are to pay to the respondents costs of the appeal at VT75,000.

57. We note with concern the failures of the appellants and/or their lawyers to comply with the orders of the Court in the past. Continued indulgences of such orders will expose them to the risk of them not being permitted to maintain a defence and counterclaim. One of the objectives of the Civil Procedure Rules is to ensure the speedy and efficient disposition of cases in the public interest. It is not within the discretion of parties to conduct proceedings in the time that suits them. They have to ensure that they, and their legal representative, do comply with directions and Orders of the Court, including the timetables fixed for the filing and service of documents.

DATED at Port Vila, this 13th day of May 2022

BY THE COURT





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Hon. Chief Justice V. Lunabek