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

Civil Appeal
Case No. 22/2626 CoA/CIVA

BETWEEN: **Rodrick Tula, Danstan Tula, Donald Tula, Vira Jack, Basil Frank, Joseph Saltons, Atkin John, Godden Fanai, Patrick Ventul, Andrea Salvenal, Jonas Philip, Robert Wengel, Laisa Marau, Timothy Fanai, Marian Roquaillis & Hillary Frazer**
Appellants

AND: **Jeffrey Weul, Mofresher Wenamar, Family Wemal, Sawon Family, Harold Nais Hopkins, Keith Sawon and Frank Bollen**
Respondents

AND: **Donald Tula, Basil Frank, Joseph Salto, Atkin John, Jonas Philip and Robert Wengel**
First Interested Party

AND: **Jonas Philip of Gaua Island**
Second Interested Party

Before:	***Hon Chief Justice V Lunabek*** ***Hon Justice J Hansen*** ***Hon Justice R White*** ***Hon Justice D Aru*** ***Hon Justice V M Trief*** ***Hon Justice E P Goldsbrough***
Appearances:	*Sugden, R for the Appellants* *Yawha, D and Kaukare, J for the Respondents* *No appearance of First or Second Interested Parties*
Date of Hearing:	*8th February 2023*
Date of decision:	*17th February 2023*

JUDGMENT OF THE COURT

1. In November 2005, the Island Court for the Banks and Torres Islands sitting at Lawanda on the island of Gaua issued orders declaring the custom ownership of land known as Nebeklave and Aworor. Families Jeffrey Wenel and Frezier Womanar were declared custom owners of Nebeklave. Family Harold Naes was declared the custom owners of Aworor.

2. At the same time, the family Simeon Roy Tula were identified as not owning either Nebeklave or Aworor. That same family, though, were acknowledged in the Island Court

Declaration C as having a right to work on part of Nebeklave land. That right, as recorded by the Island Court, came from the decision of family Jeffrey Wenel to give it to them. The area within which the family could work was set out in the same declaration. Within this judgment, we will refer to this as the Declaration C land.

3. Appeals to both the Supreme Court and the Court of Appeal were unsuccessful.

Background

4. In March 2017 the Respondents to this appeal filed a claim in the Supreme Court seeking the eviction of the present Appellants from their customary land, an order for mesne profits and costs. Following a hearing on 3 October 2018 and in a decision dated 10 October 2018 the Supreme Court determined that claim.

5. The order of the Supreme Court was made in the absence of the Appellants and based on sworn statements filed and submissions from counsel for the Respondents at a hearing scheduled to deal with various applications made by, inter alia, the present Appellants. The applications to strike out were all dismissed and, following an oral application by counsel for the present Respondents, judgment was entered on the claim against the Appellants. In particular, the orders said: -

> (a) *All the First, Second and Third Defendants by themselves, their family members and relatives, agents or representatives be hereby evicted from the claimants' customary land within a period of 30 days from the date hereof (by 10 November 2018).*
>
> (b) *The Order in (a) is stayed for a period of 30 days from the date hereof to allow all the named defendants to vacate the claimants' land voluntarily and amicably.*
>
> (c) *In the event of failure by the defendants or any of them to voluntarily vacate the claimants' land in the period specified, the Sheriff with the assistance of the Police Officers (including the Vanuatu Mobile Force) be hereby authorised to evict all the defendants named in this action after receiving a Warrant of Enforcement endorsed by the Court, upon formal application and sworn statements filed by the Claimant.*
>
> (c) *The assessment of mesne profits of the claimants be adjourned to a date to be fixed at the request of the claimants after the eviction has been completed.*
>
> (e) *The claimant are entitled to their costs VT 20,000 awarded as wasted costs, and to the costs of and incidental to this action on the standard basis and agreed or be taxed by the Master.*

6. It is against those orders made by the Supreme Court on 10th October 2018 that this application for enlargement of time to appeal is brought. Enlargement of time to appeal is required before the filing of an appeal given that the time allowed for appeal under Rule 20 of the Court of Appeal Rules (the Rules) has long since lapsed. The application

for enlargement of time under Rule 9 of the Rules was filed on 21st September 2022 together with a (draft) Notice of Appeal. Subsequently, an application to amend the draft Notice of Appeal was filed.

The Application for Enlargement of Time to Appeal.

7. The proposed appeal seeks to raise both a substantive and a procedural issue. The procedural issue is the Court proceeding to judgment in the absence of the present Appellants at a hearing scheduled for the strike out applications. The substantive issue is whether the Court failed to acknowledge the declared rights of the Appellants on Nebeklave land when ordering their eviction.

8. Several issues arise in the consideration of an application for enlargement of time. Firstly, the length of delay and the reasons for it. Secondly, the prejudice that may be caused to the parties as a result of the decision either to grant or refuse the application. Thirdly, the strength or otherwise of the proposed appeal, sometimes referred to as the prospects of success. After that, more general questions arise relating to the administration of justice, in particular the notion of finality.

9. The delay is almost four years and the reasons put forward for the delay were acknowledged by counsel for the Appellants to be the best available but still not strong. Whilst previous lawyers were put forward as having some responsibility for the situation, nothing specific was set out.

10. The prejudice to the Appellants that would follow a refusal to grant leave flows from the notion that the decision of the Supreme Court appears to deny the rights of the Appellants declared in the Island Court. Counsel for the respondents did not seek to raise any issue of prejudice that the Respondent would face if the enlargement of time were to be granted.

11. The strength of the argument on appeal is linked to the same notion of the potential denial of rights. Counsel for the Respondents does not seek to submit that the strength is weak, given their position that they do not dispute the rights declared.

Discussion

12. Whilst the Respondents opposed the grant of enlargement of time to appeal, they indicated that they did not seek to dispute the right of the Appellants to work within the Declaration C land. In submissions, it became clear that what the Respondents sought was no more than the Appellants be ordered not to stray from the Declaration C land, thus expanding that area. The Appellants did not seek anything other than the right to work in the Declaration C land area.

13. If this is an issue as to what the boundaries of the Declaration C land are, that can only be determined by the Island Court. Neither this Court nor the Supreme Court has jurisdiction to determine that question.

14. The concession made by counsel for the Respondents that the order obtained evicting the Appellants from the whole of their customary land and thereby defeating the undisputed right to work on part of it suggests some change to the breadth of the order. That may only happen with the grant of enlargement of time to appeal.

15. Again acknowledging a concession, made by counsel for the Appellants that they seek nothing more than to rely upon the Island Court declaration, a variation of the eviction order to exclude the Declaration C land is all that is expected from this appeal. They assert no further rights, at least within this appeal.

16. The relative weight of the procedural issues raised reduces their significance on this appeal. They were never strong. There was no attempt to show that the denial of procedural rights had any practical effect. Given the history of failure on the part of the present Appellants to take required steps or even attend hearings of their applications, it was incumbent on them to show that, if any procedural right had not been afforded them, it might have affected the outcome. There was, in this appeal, no attempt to do that.

17. Granting an enlargement of time to appeal to allow the eviction order to be amended to reflect the relative positions of the parties to this appeal is relatively straightforward. The question of the outstanding assessment of mesne profits is less so. The original claim sought eviction from the entire land area owned by the Respondents. It did not simply seek eviction from that part over which the Appellants had no declared rights.

18. Given that, mesne profits could be assessed on that part of the land outside of the Declaration C land only. The finding of trespass outside of the Declaration C land was found when the trial judge considered the evidence in the absence of the present Appellants. That they have trespassed on that land is a finding this Court is not prepared to set aside. That, perhaps, dictates that the outstanding order for assessment of mesne profits must be remitted to the trial judge to complete excluding the Declaration C land. The fault here lies with the original claim as pleaded. It should have sought orders only about trespass on land other than the Declaration C land. With that in mind, the order granting mesne profits to be assessed over the whole area should be quashed and sent back to the trial judge for an assessment relating only to land outside of the Declaration C land.

19. The Appellants, in the conduct of the claim in the Court below, were ordered to pay various amounts of wasted costs. This Court is told that those wasted costs orders have not been complied with and all amounts remain outstanding. As the Appellants come to this Court to seek an indulgence, it is incumbent upon them to settle the outstanding orders. An order was also made for the costs of the action to be paid to the present

Respondents by the present Appellants. Given that the claim sought more than was intended, a more just solution might be that each party pay their own costs incurred in the Court below, other than those which are the subject of previous court orders.

Decision

20. Time be enlarged to file an appeal.

21. The order of eviction from the customary lands belonging to the Respondents is set aside and in its place an order evicting the Appellants and the First and Second Interested parties from the customary lands belonging to the Respondents save from that in Declaration C on which the Appellants have acknowledged rights to work as declared in the Island Court decision of November 2005. That area is described in the declaration of the Island Court at paragraph C as "*graon we istat long Lembal kam kasem drae krik blong Lear iblong famili Simeon Roy mo olgeta igat raet blong wok ko antap long hil kasem baondri we famili Jeffrey italem.*" We understand that to mean the land starting at Lembal leading to the Lear dry creek that family Simeon Roy and the others have the right to work going upward until reaching the boundary as set by family Jeffrey.

22. The order for mesne profits is set aside.

23. The matter be remitted to the Supreme Court for an assessment of the mesne profits, if any, resulting from the trespass by the Appellants and the Frist and Second Interested Parties on the customary land of the Respondents other than the Declaration C land.

24. The order for costs of the action, other than the order for wasted costs, in the Court below, is set aside.

25. In its place, there be an order that there be no order as to costs of the proceedings at first instance.

26. Costs on this appeal to be paid by the Appellants to the Respondents of VT 50,000

DATED at Port Vila this 17th day of February, 2023

BY THE COURT

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Hon Justice Hansen J

REPUBLIC OF VANUATU COURT OF APPEAL — COUR D'APPEL REPUBLIQUE DE VANUATU