

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

Civil Appeal
Case No. 3408/2023 COA/CIVA

BETWEEN: DAVID WILLIE, DAVINA DAVID, PETER REMON,
DONALD BERRY, SERAH DONALD, NORSIE
SEULE, SANDRA DONALD, MOISE SANDRA,
EVELYNE WALLY, KABI WILLY, SANELEO
JOSEPH, SELLY JOSEPH,
First Appellants

AND: JACK WILLIE, LEIPALO ANNIE, KALSAVE JACK,
MARIANE JACK, SIRELYN JACK
Second Appellants

AND: JIMMY TOARA, LEWIA JIMMY AND LILLY JIMMY
Third Appellants

AND: FINA LUEN, BELMA LUEN, JOANNA LUEN
Fourth Appellants

AND: GEORGE DAVID BULE
Respondent

Coram: *Hon Justice Ronald Young*
Hon Justice Richard White
Hon Justice Olive A. Saksak
Hon Justice Edwin P. Goldsborough
Hon Justice William K. Hastings

Counsel: *A Godden for the First and Second Appellants*
No appearance for the third and fourth appellants
B Livo for the Respondent

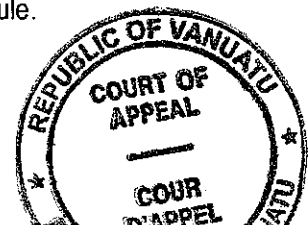
Date of hearing: 7 February 2024

Date of Decision: 16 February 2024

JUDGMENT OF THE COURT

Introduction

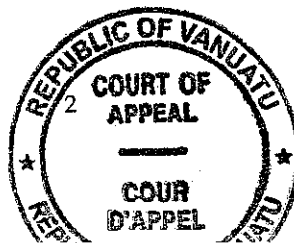
1. On 7 August 2023, the Supreme Court ordered all the appellants to vacate leasehold title number 12/0431/045 in Northern Efate (lease 045) to remove their houses, fences and crops, and personal property and ordered damages and costs in favour of the respondent Mr Bule.



2. The 7 August judgment was given after a hearing on 25 July 2023. Mr Bule the claimant in the Supreme Court was represented by counsel however none of the appellants appeared either on their own, or through counsel. None of the appellants had filed a defence to the claims.
3. On 12 December 2023, a Notice and Grounds of Appeal were filed on behalf of the first and second appellants. Although also including the third and fourth appellants as named appellants they have not taken any step in the appeal.
4. Subsequent to the filing of notice and grounds of notice of appeal, the first and second appellants (although no leave has currently been granted we refer to them as the appellants) realised that they were out of time to file their appeal as of right (R20) On 12 January 2024 they sought leave of this court to extend time for filing the appeal (R27).
5. Mr Bule opposed leave being granted extending time for filing of the appeal but if granted, opposed the appeal.

Background

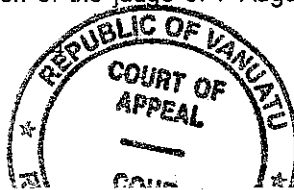
6. Mr Bule became the lessee of lease 045 in March 2020, after transfer from Roger Japhet. We understand there may be a challenge to the validity of Mr Bule's lease. However, currently and at the time of the decisions of the Supreme Court in this case, Mr Bule was the registered lessee and accordingly we proceed with this judgment on that basis.
7. On 29 June 2021, Mr Bule instructed the Public Solicitors office on his behalf to give notice to David Willie, Willie Seule, Jimmy Toara, Johnson Luen, Jack Willie and their families to remove their fences and "*stop entering his (Mr Bule's) land*". Notice was given however the occupiers did not leave the land or remove their structures.
8. On 26 February 2022, Mr Bule filed proceedings in the Supreme Court seeking an eviction order, damages and costs with respect to those identified in the pleadings as David Willie and families, Willie Seule and families, Jimmy Toara and families, and Jack Willie and families. Sworn statements of service indicated that this claim and supporting documents were served only on David Willie, Jimmy Toara and Jack Willie.
9. On 27 October 2022, Mr Kilu filed a Notice of Beginning to Act. In the notice he said he had "*begun to act for the defendants in this matter*". The defendants were listed as the four individuals and "*families*" as mentioned above.
10. On 2 December 2022, the matter came before a judge of the Supreme Court. The judge noted that the only persons who had been served with the proceedings were the three male members of the families. The judge said that service of the eviction proceedings in this way was "*fundamentally flawed*". She said that all adults allegedly wrongfully occupying the land should have been named as parties and should have been served with the proceedings (*laus v Noam* [2017] VUCA 40 at [12]).
11. The judge therefore ordered that Mr Bule "*file and serve an amended claim naming all adult occupants of the land*".



12. On 5 April 2023, the amended claim was filed. The amendments identified the first, second, third and fourth appellants as individuals, as described in this judgment.
13. During April 2023, Mr Bule's counsel filed sworn statements of service relating to the proceedings. One sworn statement of service said that the first and second appellants were served with, the amended claim and sworn statement of Mr Bule in support of the claim, "*through their lawyer Mr Jack Kilu in Port Vila*".
14. As to the third and fourth appellants, they were served with the same document personally during April 2023.
15. On 24 May 2023, a further Supreme Court chambers hearing was held. The judge recorded that "*proof of service had been filed showing service of all the defendants*". There was no appearance by the defendants at that hearing. The judge ordered that a copy of her minute relating to that hearing and the orders made, be served on all defendants. The orders were that the defendants were to file and serve their defence by 28 June 2023, and the claimant could file and serve sworn statements in reply. It was necessary for Mr Bule to file proof of service of the minutes and orders, on all defendants. A hearing date for the claim was set for 25 July 2023 in the Supreme Court.
16. On 25 July 2023 Mr Bule was represented by counsel but the defendants did not make any appearance, personally or through counsel and none had filed statements of defence.
17. The matter proceeded as a formal proof of claim. The judge noted that no defence had been filed "*despite the service of the claim and of the court orders giving them time to do so and informing them of the date of hearing*".
18. After considering the evidence the judge was satisfied that Mr Bule had legal entitlement to the land and the appellants had continued to occupy the land, despite being given a notice to quit. She therefore ordered as relevant:
 - (a) *The Defendants, their families and/or agents are to vacate leasehold title number 12/0431/045 including removing their fencing, houses, personal, properties and garden crops leaving the land vacant within three months from the date of service of this Judgment.*
 - (b) ...
 - (c) *The Defendants are jointly and severally to pay the claimant VT 100,000 damages; and the Claimant is entitled to costs, fixed summarily at VT 100,000, to be paid within 28 days of service of this Judgment on the Defendants.*
19. On 16 October 2023, Mr Godden, asserting that he acted for the first and second appellants applied for an order staying the enforcement of the judgment until 7 August. At the hearing of that application, the judge ordered Mr Godden to file a notice of Beginning to Act, (which he did so in early November 2023) and ordered Mr Kilu, who had previously been identified as counsel, to file a notice that he was no longer acting on behalf of the first and second appellants.
20. On 12 January 2023, the first and second appellants sought leave of this court to appeal out of time against the eviction orders of the Supreme Court of 7 August 2023.



21. In *Laho Ltd v QBE Insurance (Vanuatu) Ltd* [2003] VUCA 26 this court identified four key factors in considering an application to extend time for filing an appeal; extent of delay, reasons for delay, chance of successful appeal and prejudice to the respondent.
22. The delay in this case was between 7 August 2023 and the filing of the Notice to Appeal on 12 December 2023 although the appellants through counsel had advised the respondent in early November of their intention to appeal.
23. As to delay the appellants explained that the delay in appealing arose through a combination of uncertainty about legal representation, difficulty in obtaining alternative legal representation and their distance from the court at Pt Vila.
24. They had been represented previously by Mr Kilu in the proceedings who they understood was representing their interests. However sometime after the case for eviction began, Mr Kilu advised them that he could not continue to act for them. He said that he was focusing on challenging the appropriateness of the transfer of the lease to Mr Bule and that he could not continue to act for them. We note that Mr Kilu did not file a Notice of Ceasing to Act in the Supreme Court and remained on the Supreme Court record as counsel until November 2023.
25. In his sworn statement Mr David Willie said that after they had been told by Mr Kilu that he could not represent them, the family had tried to find an alternative lawyer. They had struggled to do so. Their family lived at the far side of Efate from Pt Vila and because of the distance to Pt Vila it was difficult for them to travel to Pt Vila to see lawyers and the Court. Eventually they did find counsel and instructed Mr Godden. Mr Willie said that he and his family had to bring Mr Godden up-to-date regarding the proceedings. They asked him to file this appeal.
26. The respondent opposed the application for leave to appeal out of time. Mr Bule says that the length of delay was significant, from August 2023 until they received advice of a challenge to the judgment of the Supreme Court in November 2023 and the filing of the Notice of Appeal in December. They said that the reasons given by the appellants for delay were not an adequate explanation. The appellants had a lawyer representing them throughout the proceedings.
27. The respondent accepted that an important factor in deciding whether there should be leave to extend the period for appeal was whether this was likely to be a successful appeal. He submitted that there was little or no chance of a successful appeal in the circumstances.
28. We agree that the pivotal point in this case will be the view that we take of the merits of the appeal against the eviction orders. We do not consider the delay in this case is of such an extent that, by itself, it would be a basis to refuse leave to extend the time. We accept that the delay was significant. However the first and second appellants were entitled to think that Mr Kilu was looking after their interests for at least some of the period of the delay. There were difficulties in getting legal assistance. When they did get legal assistance, they acted swiftly to at least give notice to Mr Bule that they were challenging the judgment of the Supreme Court to evict them and they sought a stay of execution of the eviction orders (unsuccessfully). We therefore consider the substance of the appeal.
29. The appellant's challenge to the decision of the judge of 7 August 2023, evicting them and the



consequential orders, identified eight errors by the judge on questions of law and fact. However, the submissions of the appellants on this appeal reduced the appeal grounds, essentially to the following points:

- (a) There was no evidence that all of the first and second appellants had been properly served with the proceedings as required by the Civil Procedure Rules.
 - (b) Unless all of the first and second appellants had been served with the proceedings, service was fundamentally flawed with regard to all the first and second appellants.
 - (c) Not all of the adults occupying the lease land 045 had been named as parties or served with the proceedings (contrary to *laus v Noam* (supra)), and that failure was fatal to the right to require all others to leave the land. All persons occupying the land had a right to be named as parties to the proceedings. (*Rorua v The Electoral Commission of the Republic of Vanuatu* [1999] VUCA 13).
30. The appellants submitted that a significant number of persons occupying the land had not been named as a party to the proceedings and filed a sworn statement in support of the leave application identifying a number of individuals they said were occupying the land who were not party to the proceedings.
31. We consider the central question is whether there was evidence of service of the initial or amended claim on the first and second appellants, on an individual basis that complied with the judge's order of 2 December 2022 and the Civil Procedure Rules. If service had not been affected according to law then the eviction order(s) could not be maintained.
32. Rule 5.2 of the Civil Procedure Rules provides.

"Service of claim

5.2 *The claim and response form must be served on the defendant personally, unless:*

- (a) *Rule 5.9 applies (Rule 5.9 deals with other ways of service), or*
- (b) *The court orders that the claim may be served in another way"*

33. And rule 5.8 defines personal service as:

"5.8 A document is served personally on an individual:

- (a) *By giving a copy of it to the individual"*

34. Neither the third or fourth appellants participated in this appeal. We are satisfied that those appellants were personally served with the amended claim and no issue arises with respect to the order for their eviction.

35. As to the first and second appellants, the evidence establishes that David Willie and Jack Willie were served personally with the first claim. After the filing of that claim (September 2022), Mr Kilu filed a Notice of Beginning to Act on (1 November 2022). Mr Bule arranged service of the amended claim



on Mr Kilu in April 2023 as the lawyer for David Willie and Jack Willie he was entitled to do so. The two men had already been served with the original claim and Mr Kilu was on the record as their lawyer and so could be served with the documents in the litigation affecting them.

36. We are satisfied therefore that in terms of both R5.2 and the judge's order of 2 December 2022 both David Willie and Jack Willie were personally served with both claim and amended claim.
37. As to the other first and second appellants, in her order of 2 December 2023, the judge required that the claim be amended by describing all of the individuals who were said to be occupants of the land for which Mr Bule sought orders of eviction. The judge noted that Mr Bule was required to serve the amended claim on all those occupying the land, including the female occupants. At 2 December 2022 those persons had not all been identified in the claim. The pleadings as we have noted described the various male members of a family, David Willie, Willie Seule, Jimmy Toara and Jack Willie with the addition of the words " & families". Mr Bule was therefore required by the judge's order to identify those additional family members, include them as defendants in the amended claim and then serve them in person.
38. Mr Bule drafted his amended claim identifying a number of particular persons as first, second, third and fourth defendants but affected service on the first and second appellants only by serving it on Mr Kilu.
39. Mr Bule submits that, given Mr Kilu had filed a Notice of Beginning to Act for the "defendants" this was sufficient to satisfy both the judge's order for service and R 5.2 of the CPR. The "defendants" were said to include all the first and second appellants.
40. Contrary to Mr Bule's submission service of the amended claim on Mr Kilu with respect to the first and second appellants (other than David and Jack Willie) did not comply with the orders of the judge of December 2022 nor did it comply with R5.2. The Notice of Beginning to Act filed by Mr Kilu in 2022 did not cover representation of these defendants at the time it was filed and could not do so without amendment after the amended claim was filed.
41. The judge's order of December 2022 required that the newly identified defendants in the amended claim be served with the claim. At the time of that order there was no identification of the members of the "families". Mr Kilu's Notice of Beginning to Act for the "defendants" from November 2022 could not have related to the defendants not named in the original claim and only later identified in the amended claim of April 2023. It could have related only to named defendants at the time he filed the Notice in November 2022. Other than David and Jack Willie none of the other first and second defendants subsequently named in the amended claim were then identified.
42. We therefore reject the submission that service of the amended claim on Mr Kilu did comply with the judge's order and met the requirements of R 5.2 for personal service on the defendants.
43. For the reasons given, we are satisfied that personal service on the first and second appellants, other than David Willie and Jack Willie was required. No such service occurred. Without proper service of the claim there could be no eviction nor any order against those particular appellants.
44. We briefly deal with the other grounds of appeal. The second ground of appeal claimed that unless



all of the first, second, third and fourth appellants had been served with the proceedings then none of those occupying the land could be evicted. In support of that proposition the appellants cited *laus v Noam* (supra).

45. The Court of Appeal decision in *laus* does not support that proposition. The Court then observed that a claimant could not file eviction proceedings against a defendant as a family or group. Individuals had to be identified in the claim and individuals had to be served with the proceedings. The right to evict an individual will depend upon the evidence relevant to that individual. It will not depend upon the position of any other individual. Whether all or fewer than all of the defendants are served with the eviction notice and proceedings will not affect an individual defendant's liability to have judgement entered against them. We dismiss this ground of challenge.
46. The third ground of appeal is that not all of the adults occupying the land have been named parties or served with the claim. That may be correct. However, that does not assist these appellants. It is for a claimant in proceedings to elect who they wish to proceed against. We dismiss this ground of challenge.
47. In summary therefore, we are satisfied that the third and fourth appellants were properly served with individual proceedings and that therefore they are liable for eviction from the land. They did not challenge the decision of the Supreme Court judge in this court. We are also satisfied that both David Willie and Jack Willie were properly served.
48. Given our conclusions regarding the merits of the appeal we extend time for the filing of the appeal to 12 December 2023 when the notice of appeal was filed.
49. The appeal is therefore allowed in part. We set aside all the orders of the Supreme Court of 7 August 2023 as they related to named first and Second Appellants except for David Willie and Jack Willie.
50. The appeal against the orders of the Supreme Court of 7 August 2023 as it relates to David Willie and Jack Willie is dismissed.
51. The First and Second Appellants other than David Willie and Jack Willie will have costs of VT50,000 against the respondent Mr Bule.
52. The respondent will have costs of VT25,000 payable jointly and severally by David Willie and Jack Willie

DATED at Port Vila, this 16th day of February, 2024

BY THE COURT


.....
Hon. Justice Richard WHITE

