

IN THE SUPREME COURT OF
REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 152 OF 1996

In the Matter of the Land Leases Act 1984 [CAP 163]
And
In the Matter of Lease Title No. 11/OG31/004

BETWEEN: API TOARA

Plaintiff

AND: KALO SIMBOLO

Defendant

Date of Hearing : 15th September, 1998

Coram : Mr Justice Oliver A. Saksak
 Ms Evelyn Sawia Clerk

Counsel : Mr Saling N. Stephens for the Plaintiff
 Mr John Timakata for the Defendant

JUDGMENT

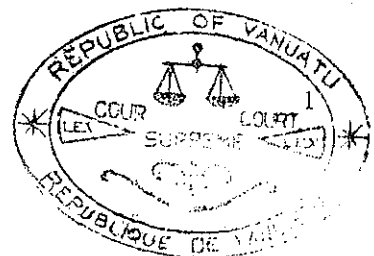
Action

This action is brought by the Plaintiff by way of an Originating Summons dated and filed 21st November 1996. This summons was subsequently amended by an Amended Originating Summons dated and filed 24th April 1997.

Claims

The Plaintiff's claims are for Declarations and Orders against the Defendant as follows:-

- (1) That the Plaintiff has an equitable interest in the property title No.11/OG31/004 situate at Namburu Area, Port-Vila to the extent of the value of improvements made by the Plaintiff.



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- (2) That the Plaintiff is entitled to remain on property until compensated for the improvements made by the Plaintiff on the property made with the knowledge and consent of the Defendant and in expectation of the transfer of the property.
- (3) That the Plaintiff is entitled to specific performance of the agreement to have the said Title 11/OG31/004 transferred to him.
- (4) In the alternative, that the defendant be ordered to pay the Plaintiff compensation in the sum of VT12,085,751 for improvements made on the property.

Facts

It is alleged by the Plaintiff that on or about First September 1993 the Plaintiff and the Defendant entered into an oral Agreement that the Plaintiff would take over property No. 11/OG31/004 situate at Namburu, Port-Vila and to manage it to the extent that the Plaintiff on eventual repayment of the sum of VT2,156,220 owing by the Defendant to Westpac Banking Corporation in making a monthly repayment of VT75,000. It is further alleged by the Plaintiff that the Plaintiff and the Defendant had agreed that upon the Plaintiff repaying the above sum, the Defendant would transfer the property to the Plaintiff for his sole ownership.

The Plaintiff completed repayment of the outstanding loan on or about end of February 1996.

The Defendant however refused to transfer the said property and that is claimed by the Plaintiff as a breach of agreement.

It is further alleged that during the duration of the said property the Plaintiff had expended the sum of VT12,085,751 on extension and upgrading of the property and other incidental expenses.

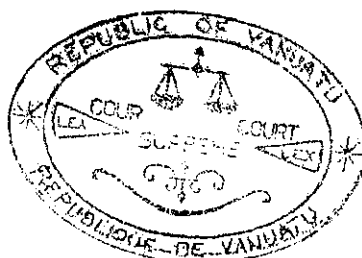
Evidence

The Plaintiff gave oral evidence in addition to his affidavit sworn 15 July 1996 and filed on 21st November 1996. In the course of his evidence the Plaintiff tendered documents admitted into evidence as Exhibits P A – P S.

Counsel for the Defendant objected to certain copies of the documents tendered and called for original copies particularly of invoices showing purchases of materials by the Plaintiff. Original invoices were tendered by Counsel for the Plaintiff.

The Defendant gave oral evidence in addition to his affidavit sworn and filed on 9th December 1996. In the course of his evidence the Defendant tendered documents admitted into evidence as Exhibits D1 – D11.

Burden of Proof



Being a civil claim the Plaintiff has the burden of proof and the standard is on the balance of probabilities.

Findings

From the evidence before the Court I find as follows :-

1. The Plaintiff and Defendant are "brothers". This is a relationship in the Vanuatu sense of the word. It connotes a relationship of cousins but in the Vanuatu sense it also connotes two male persons born out of the one and the same mother. This is a fundamental factor in determining this case.
2. The Plaintiff's claim that there existed an oral agreement between him and the Defendant is unfounded. He says it was an oral agreement. The Defendant says it was merely an arrangement. The Plaintiff had to prove his allegation. He has not done so.

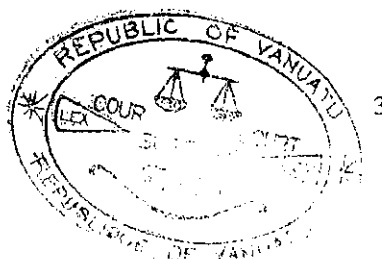
But if there was such an agreement, did the parties intend it to be legally binding? As indicated previously their relationship was one of brothers. The scenario is one of the Plaintiff a successful businessman who runs coastal shipping services, and the Defendant, a simple individual whose livelihood depends only on what he has on the said property which are 8 rent houses and a commercial building.

In the mind of a successful businessman he perhaps would have wanted the so-called oral agreement to have a legally binding effect. To the defendant however, it was only one arrangement to be tried out for a certain period or on certain conditions. Any binding arrangements would be looked at subject to the Plaintiff observing and fulfilling certain conditions. In the meantime the arrangement was privy to both parties as "brothers" and as such this Court cannot see that such arrangement could have been intended to have a legally binding effect.

It is with regret that the Plaintiff has seen fit to institute legal action against his "brother" over what was and is a family arrangement. As a family arrangement it should have been proper for the parties to deal with the matter in the Vanuatu way: the nakamal way; this is to sit down and talk things over and attempt to come to terms as brothers. The arrangement was made as brothers and I do not understand why they could not come to terms as brothers as well.

Indeed the Defendant has shown that he did take certain measures to achieve this end but it seems clear that the Plaintiff was determined to "hang" his brother's neck if I may use the term. All that this action has done is put the parties to unnecessary legal costs and expenses and in my view be one which the Plaintiff ought to be held responsible for.

Having said what I have said, I come to the conclusion that the Plaintiff's action is frivolous and vexatious.



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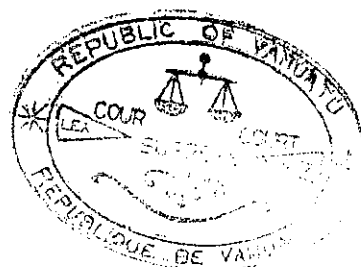
3. I find that the Plaintiff does not have equitable interest in the property Title No. 11/OG31/004. He has not proven to this Court that there was a Mortgage over the loan by the Westpac Bank to the Defendant by which the Defendant mortgaged the said property as security. In my opinion there can be and is no equitable interest over any property over which there is no registered mortgage.

It goes to the credit of the Plaintiff when he failed to make full and frank disclosure to the Court concerning the vehicle for which the Defendant obtained the loan in question. In the Defendant's evidence he told the Court that the truck is now in the hands and use of the Plaintiff. The Plaintiff said nothing about this in his evidence. I am therefore inclined to accept the Defendant's evidence as the truth. The declaration sought in that regard is therefore refused.

4. The Plaintiff seeks a declaration that he is entitled to remain on the property until compensated for the improvements made by him on the property of the Defendant with his knowledge and consent. The Plaintiff is not entitled to this declaration because the claim has no legal basis. The Plaintiff is not an alienator within the meaning of the word as defined in section 1 of the Land Reform Act [CAP 123]. Compensation is an alienator's entitlement under section 3 of the Act but the Plaintiff not falling within the definition has no right under that provision. I have already held that he has no equitable interest and therefore his claims here are not established in law or in fact. The invoices he tendered in evidence were objectionable on the basis that there were fraudulent. I accept that submission. I find that most invoices issued are issued to "A. Toara", "Api Toara", "Toara", "Captain Api Toara", "T.C.S.", "Toara General Services", "Toara Shipping" ect. There are many inconsistencies in customer names. On most if not all invoices are hand written in different ink and hand-writing the name "Simbolo". Some items purchased were items normally used on vessels or ships.
5. The Plaintiff further seeks a declaration entitling him to specific performance of the agreement to transfer the above title. In his evidence he told the Court that he has in his custody the original lease hold Title No. 11/OG31/004 and that this was given to him by the Defendant. There is no legal basis in granting this declaration to the Plaintiff and therefore it is refused. It is my view however that the Plaintiff should return the original lease to the Defendant forthwith.
6. The Plaintiff claims for an Order against the Defendant to pay the sum of VT12,085,751 being payment for improvements made on the property. I hold that there is no legal basis for his claim. Further it is a frivolous and vexation claim. This relief is refused.

The Court there fore orders that:-

- (1) The Plaintiff's Originating Summons be and is hereby dismissed.




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(2) The Plaintiff will pay the Defendant's costs of an incidental to these proceedings.

DATED AT PORT-VILA, this ^{1st} *October* *OAS.* DAY OF SEPTEMBER, 1998

BY THE COURT


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OLIVER A. SAKSAK
Judge

