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

Civil Appeal
Case No. 18/2618 CoA/CIVA

BETWEEN: ELI MISEV AND FAMILY
First Appellant

AND: JEAN MARC YORLEY AND FAMILY
Second Appellant

AND: SALMA MALITES AND FAMILY
Third Appellant

AND: STEVE ELSIEM REPRESENTING FAMILY TOLSIE AWOP
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens

Counsel: *Mr. S. Stephens for the Appellant*
Mrs. M. G. Nari for the Respondent

Date of Hearing: *8th November 2018*
Date of Judgment: *16th November 2018*

JUDGMENT

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1. This is an appeal against a judgment issued by the Supreme Court on 20 August 2018 granting the respondent's uncontested application filed on 12 July 2018 and supported by a sworn statement of Bruce Elsiem for an eviction order and damages.

2. In the original claim the respondent as the declared custom owner of "*Amelprev Land*" situated at Rano mainland, North East Malekula, sought an eviction order and damages for unpaid rentals against the appellants. Despite service of the claim and sworn statements in support, the appellants neither responded nor filed any defence within the time given under the Civil Procedure Rules. The original claim and sworn statements in support were personally served on each of the named appellants in October 2017 and June 2018 respectively.

3. In July 2018 the Respondent filed what is described as an application for summary judgment with a sworn statement in support which deposed to the truth of the claim and the defendant's belief that appellants had no defence to the claim.

4. The application and sworn statement was not served on the appellants as required of such an application in terms of Rule 9.6(4) (c) of the Civil Procedure Rules. This apparent failure does not appear to have been brought to the judges' attention nor is it adverted to in his judgment which emphasized the absence of any activity or defence filed by the appellants.

5. In his summary judgment the judge noted that each of the appellants had no lawful basis for occupying any of the land involved in the claim and had simply ignored the respondent's letter demanding they vacate the land. The judge concluded that the appellants had no available defence nor had they taken any steps to demonstrate that they had an arguable defence. Accordingly judgment was entered for the respondent. A copy of the judgment was personally served on each of the appellants on 31 August 2018.

6. On 10 September 2018 in the Supreme Court the appellants sought a stay and the setting aside of the judgment for breach of the rules of service in particular

Rule 17.7 and 9.6 of the Civil Procedure Rules. The application was dismissed in a judgment delivered on 1 October 2018.

7. On 2nd November 2018 seven (7) grounds of appeal were advanced against the the judgment and against the various orders made in it. The appellants ask for the judgment and orders to be quashed and the matter be returned to the Supreme Court to be dealt with afresh.

8. Appellants' counsel accepted that the appellants had done nothing after having been served with the claim and sworn statements in support. Counsel submitted however that the appellants were entitled to wait for the normal process to occur with the fixing of a *"first conference".* We disagree. What's more Rule 6.3 (1), which deals with fixing of the *"first conference"* clearly states that such a conference will be arranged *"when a defence has been filed by a defendant"* and none has yet been filed in the present case. There is therefore no basis for the submission.

9. The situation that faced the respondent (as claimant) and the judge on 20 August 2018 was one where the appellant (as defendants) had failed to file any response or defence and were accordingly in default. The Rules dealing with such a default situation are Rules 9.1 to 9.4 of the Civil Procedure Rules. In particular Rule 9.2 enables claimant to request a judgment against a defaulting defendant where the claim is for a fixed or liquidated (see: Rule 9.2). Similarly Rule 9.3 enables a claimant to request judgment for damages to be assessed where the claim is for unliquidated damages and Rule 9.4 provides the procedure for the subsequent assessment.

10. In the present claim the primary remedy sought against the appellant is an eviction order. Such an order is neither a claim for a liquidated sum nor is it a claim for damages to be assessed and therefore judgment cannot be obtained under the above-mentioned default judgment Rules. Furthermore invoking the

summary judgment procedure under Rule 9.6 is not appropriate as no defence has yet been filed.

11. Is the respondent left without a remedy against the defaulting appellants? We do not think so the overriding objective of the Civil Procedure Rules is to enable the Court to deal with cases justly and where there is a lacuna in the Rules then the Court is to deal with the matter accordingly to *"substantial justice."* . Rule 1.7 is clear that where there is a lacuna in the Rules then the Court is to determine the matter *"according to substantial justice"*. What does this latter expression entail in the present case?

12. We accept that the appellants were not served with the respondent's application and sworn statement in support but that is an irregularity. It does not make the application and the judgment granting it, a nullity (see: rule 8.10). We also accept that there was a mis-description of the application which in other jurisdictions is described as an application for judgment or an application for formal proof where a defaulting defendant is not entitled to be served with the papers.

13. In rejecting a not dissimilar argument as that advanced by appellants' counsel in the present appeal this Court said in Wass v. Knox [2010] VUCA 24:

> *"In short, the appellant's conceded that on the substantial merits of the claim the respondent was entitled to an eviction order, but contended that procedural form should prevail over the substantial justice of the matter.*
>
> *Rules of procedure are prescribed to regulate the orderly and efficient conduct of proceedings. The rules carefully prescribe processes to ensure that the rules of natural justice are observed, in particular that parties to a dispute are given notice of contentious issues requiring determination, and an adequate opportunity to answer claims against them. In Vanuatu the rules and procedures are contained in Civil Procedure Rules No. 49 of 2002. The Court expects the Civil Procedure Rules to be followed and will strictly insist on due observance when a failure to follow them could frustrate the requirements of natural justice. However, it is common experience that occasions arise in the course of litigation where failures to observe procedural rules occur. Often the failures are ones that can be cured by direction to ensure compliance. Where this occurs, the Court will ordinarily require the party responsible for the failure to bear the costs incurred in bringing about compliance.*
>
> *The Civil Procedure Rules recognize the importance of promoting substantial justice over form in the Overriding Objectives set out in Rule 1.2. Importantly rule 18.10 recognizes the need to ensure that proceedings do not fail where irregularity due to failure to observe procedural rules does not result in injustice".*

14. Rule 18.10 (1) provides:-

"A failure to comply with these Rules is an irregularity and does not make a proceeding, or a document, step taken or order made in a proceeding, a nullity."

Then Rule 18.10 (2) ensures that the Court has ample discretionary power to ensure that substantial justice is achieved notwithstanding the irregularity.....

15. In the present case, the filing of the "Application for eviction" in Civil Case No. 16 of 2007 was an irregular procedure. The correct procedure would require the issue of separate proceedings to constitute the vehicle with which to seek the eviction. However Rule 18.10 saves this irregularity from nullity, and the ultimate order made will be valid unless the Court in the exercise of its discretionary powers under Rule 18.10 (2) orders otherwise.

16. Here, an eviction order against the appellant was the inevitable consequence of the outcome of the litigation in Civil Case No. 16 of 2007 and the subsequent appeal. Such an order was in the nature of an enforcement order giving effect to this decision.

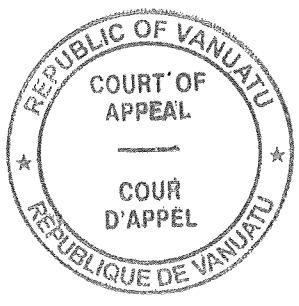
17. Had the Court acceded to the argument of the appellant, the consequence of dismissing the respondent's application would have been fresh proceedings in which inevitably an eviction order would have been made, and costs on an indemnity basis would have been ordered against the appellant. In practical terms the eviction order which was made had the effect of saving the appellant considerable costs which would have been ordered against him in the new proceedings.

18. The making of the eviction order in Civil Case No. 16 of 2007 was consistent with the Overriding Objective in Rule 1.2.

19. In our opinion the procedure followed by the Court below was irregular but by Rule 18.10 (1) was not a nullity. Likewise, the eviction order was not a nullity, and in our opinion the appellant has not demonstrated any reason based on the justice of the case, either in the procedure that was followed or in the result, why the eviction order made should be set aside."

20. In light of the foregoing we dismiss grounds of appeal (1), (2) and (3) as being without merit.

21. As for ground (4) which challenges the eviction order, we note that the Malekula Island Court dismissed the appellants' respective extended family's claims to ownership of the *"Amelprev land"*.



22. In doing so, the Malekula Island Court recognized the appellants respective families right to occupy and use the land *"to maintain their existing properties"* but, such a right was not unconditional in so far as it is given..... *"subject to the authority of the declared owners of the land"*, namely, Family Tolsie Awop the respondent in his appeal. We reject this ground of appeal.

23. Grounds (5) and (6) concern monetary awards ordered against the appellants as compensation for the rental value of the lands wrongly occupied by them. The amounts awarded were claimed in the Supreme Court Claim, but these amounts were not alleged to be due under rental agreements, but were damages claims to be assessed according to the rental value asserted by the respondent.

24. The moneys claimed require formal proof, but this aspect of the case was not dealt with in the sworn statements. The monetary awards should therefore be set aside along with the awards of interest thereon. These claims are returned to the Supreme Court. The respondent will be at liberty to apply to have the damages assessed on these claims.

25. Ground 7 alleged that the award of costs against the appellants was wrongly made. The central issue was the claim for eviction. The respondent succeeded on that claim. The damages claims were peripheral. Even though the sums awarded have been set aside, the respondent has still succeeded on the central issue. The order for costs should not be disturbed.

26. The formal orders of the Court are therefore:

1. Appeal against the monetary award VT2,700,000 against the first appellant is allowed and that award is set aside.

2. Appeal against the monetary award of VT900,000 against the second and third appellants is allowed and that award is set aside.

3. The appeal is otherwise dismissed and the following order made in the case below is confirmed:

"All the defendants, their families and extended relatives, associates and agents vacate the land known as Amelperv custom land within 21 days from the date of this judgment".

4. The appellants are to pay the respondents costs of this appeal fixed at VT50,000.

DATED at Port Vila this 16th day of November, 2018.

BY THE COURT

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Hon. Vincent Lunabek

Chief Justice

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