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

Civil Appeal
Case No. 18/2700 CoA/CIVA

BETWEEN: **TANGEN HARRY**
ROBEA BILL
OBED HARRY
LUI HARRY
EPHRAIM AMBON
LAMI DENY
SAMUEL SIMON
MAKLEN JOSEPH
LAMY RAMBAY
KALSAF REUBEN
TIRO JOSEPH
REMO REUBEN
NITU RAMBAY
JOHNESY RAMBAY
Appellants

AND: **KALSANDY TULILI**
Respondent

Coram:	***Hon. Justice John von Doussa*** ***Hon. Justice Oliver A. Saksak*** ***Hon. Justice Daniel V. Fatiaki***
Counsel:	*MG Nari for the Appellants* *G. Boar for the Respondent*
Date of Hearing:	*11th February 2019*
Date of Judgment:	*22nd February 2019*

JUDGMENT

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1. This is an appeal against the decision of the Supreme Court that awarded against the appellants damages in favour of the respondents for trespass, and dismissed the appellants' claim for eviction and damages for unlawful occupation by the respondent of land which the appellants' family claim to be their custom land.

2. The facts can be shortly stated. The respondent for many years had cultivated land occupied by him. By April 2014 he had growing on the land fifty four (54) 10 year old kava plants, and yam plants, bananas and sugar cane. The respondent said that he occupied the land with the consent of Josiah Tamat who he believed was the custom owner of the land in question.

3. On 14th April 2014 the respondent's garden was destroyed and his kava, yams, bananas, and sugar cane plants taken and carried away by the appellants. The respondent brought proceedings against the appellants in the Supreme Court claiming damages for trespass and theft of his plants.

4. In their defence the appellants by implication conceded that they, as a group, were responsible for taking the respondent's plants, but pleaded they were provoked by the respondent to uproot the plants and carry them away as the respondent had taken sides with an opposing land claimant.

5. The claim proceeded at trial as one based on trespass, and the trial judge so held. This finding is not directly challenged by the appellants, but even if it were challenged on the basis that as custom owners their right to possession was greater than of the respondent, that could be no answer to the alternate claim based on theft. The appellants' liability to pay damages is therefore not an issue.

6. The damages claimed in the statement of claim included special damages as follows:

- 54 x 10 years old kava stems @ VT20,000/stem VT1,080,000
- 2 yam plants @ VT10,000 .....VT20,000
- Banana plants @ VT10,000.....VT10,000
- Sugarcane VT5,000

General damages were also claimed for time effort and labour including the land and weeding kava plants for 10 years VT1,000,000

7. In support of his claim the respondent filed a sworn statement deposing that he was a farmer and the current market rate for a kava stem was VT20,000, and that the yam, banana and sugarcane plants cost the amounts claimed in the pleadings. He also deposed that the general damages claim was to cover his labour and transport costs and distress suffered as a result of the appellants' actions.

8. The trial judge records in his reasons that when the matter came on for trial:

"By agreement between counsel, the sworn statements of Mr Cassidy Tulili and Mr Josiah Tamat in support of the claim and the sworn statement of Mr Tangen Harry in support of the defence and counterclaim were tendered by consent. Both counsel had no desire/need to cross examine any of the witnesses. Accordingly those three statements make the entire evidence for me to consider".

9. Mr Tamat confirmed that he had given permission to the respondent to farm the land in question. Mr Tangen Harry asserted that his family were declared custom owners of the subject land, and identified a decision of the Malekula Island Court which he said established this. He said that the respondent was therefore a

trespasser. He said Mr Tamat was not a custom owner and had no authority to let the respondent use the land.

10. Mr Harry's evidence then described steps that his family had taken to move trespassers off the land by notices to chiefs in the area and by public notices all of which were ignored by the alleged trespassers, including the respondent. Mr Harry's statement supported a counterclaim made by the appellants as a family which sought the eviction of the respondent from the land and alleged damages for trespass against the respondent for 13 years at VT300,000 per year, in all VT3,900,000. The counterclaim gave further details of the notices said to have been served on people from villages within the boundaries of the custom land requiring them to make alternative arrangements.

11. Mr Harry's sworn statement did not address the respondent's claim for damages.

12. Having found liability against the appellants the trial judge said:

> "*There is no evidence to counter Mr Tulili's statements to the effect of the size and value of his crops. The particularization of the number of plants and stems is indicative he is a careful, honest and reliable witness ... It is clearly established that he had suffered loss when the kava was taken and other plants damaged. It is more likely than not that his evidence regarding the size and value of the crops is accurate*".

13. The judge awarded the amount claimed as special damages and a further sum of VT150,000 for general damages in respect of great consternation and stress caused by the appellants' actions. In all, damages awarded were VT1,115,000. Interest was allowed on that sum at 5%, from the date when the plants were taken.

14. The counterclaim was dismissed in its entirety. On the counterclaim for eviction the judge said that it was unclear to him on the Island Court decision whether Mr Harry was a custom owner but without deciding that question he held that in any event the claim for eviction failed as the evidence did not establish that the notices on which the counterclaim rested had been brought to the respondent's attention, let alone served on him.

15. Counsel for the appellants at trial argued that everyone in the area was well aware of the Island Court decision and of the appellants' public notices, but, as the judge pointed out, the case had to be decided on the evidence, not on statements from the bar table, and the evidence failed to establish that the respondent was aware of the notices.

16. The counterclaim for 13 years damages for trespass was dismissed on the ground that the respondent was entitled to take Mr Tamat's statements giving him permission to farm at face value, and he was entitled to be confident in that

as he had occupied and farmed the land without challenge until the events in question in 2014. The judge said:

> *"The counterclaim fails. It is inconceivable to the court that if the defendants were entitled to rent over a 13 year period they have done nothing to collect it except by counter-claiming now. They have demonstrated a willingness to deal with their issues, as they see them, with a very much hands-on approach. They have in fact taken the law into their own hands, if their various contentions are correct".*

17. The notice of appeal seeks to set aside the Supreme Court judgment in its entirety, and for an order remitting the matter to the Supreme Court for re-trial to allow relevant evidence to be placed before the Court to enable a proper assessment of damages. Three grounds of appeal are advanced:

Ground One: The learned judge erred in law and facts on the amount of quantum when there was no evidence to support the same;

18. Whilst there was no independent or other evidence to support the respondent's damages claim, the respondent's sworn statement was itself evidence of value of his crops. He was a farmer conducting a kava business and could be expected to know about current market rates. In the absence of any other evidence on value, and without any challenge on cross-examination being made to his evidence, it was open to the judge to accept it. Whilst the respondent's evidence as to value was self-serving and the possibility of favourable exaggeration was there, in the absence of even a challenge in cross-examination it is understandable that the respondent's evidence was accepted.

19. Counsel for the appellants sought to inform this court from the bar table that kava is sold in the market by the kilogram and not by the stem, and has a much lower market value than the respondent claims. However if that is the situation, it should have been put to the respondent in cross-examination, and evidence led on the topic by the appellants. This case illustrates how important cross-examination is where the evidence of a witness is to be challenged. Allowing a sworn statement simply to be admitted without cross-examination will have the consequences that the evidence will be accepted as being unchallenged, and the court will be entitled to act on it on that basis.

20. This case is also a good example of why in a damages case each party should put on the file evidence from competent (preferably expert) witnesses about the value and the assessment of the losses claimed.

21. Counsel for the appellants referred to the recent decision of this Court Misev v Elsiem [2018] VUCA 49 arguing that it was a similar case which support the appellants' argument that their assessment under appeal should be set aside

and the matter remitted to the Supreme Court. The Misev decision however was based on entirely different facts, and as the judgment notes the rental loss claimed in that case required formal proof, but the topic was not dealt with at all in the sworn statements (see at [24] – [25]). Here the topic was dealt with in the sworn statement and the evidence adduced, though not expert evidence of the highest quality, was evidence from a competent witness (ie. one who had some knowledge of the topic) which the court was entitled to act on in the absence of any better evidence.

22. This ground of appeal fails.

Ground Two: The learned judge erred in law and facts by awarding another head of damages that was not claimed.

23. This submission fails to recognize that the statement of claim contained a plea for general damages that was supported by the respondent's sworn statement which based the general damages claim partly on the stress caused to him by the appellants' actions. The award falls squarely within the ambit of the pleadings.

24. This ground of appeal is without substance.

Ground Three: The learned judge erred in law and facts by refusing the counterclaim when evidence was provided to support the counterclaim.

25. The evidence identified by the appellants said to support the counterclaim concerned the evidence led by them about the Island Court decision, about their custom ownership of the land, and their argument that Mr Tamat was not a custom owner holding authority to permit the respondent to farm on the land.

26. However the trial judge did not refuse the counterclaim on the ground that the custom ownership and the custom rights asserted by the appellants were in doubt. Whilst the judge said that it was unclear to him whether Mr Harry was a custom owner, the counterclaim for eviction was refused not for that reason but for the quite separate reason that even if the appellants were the custom owners they had not given effective notice to the respondent to vacate the land. The reasons given by the trial judge for holding that the notices were inadequate have not been challenged in this court. In our view the conclusions of the trial judge were plainly right on the evidence before the Court.

27. The counterclaim for rent was refused as the judge thought the appellants had slept on their rights, if they had any, and had sought another remedy by taking the law into their own hands. These reasons for the decision were not the subject

of submissions by the appellant on appeal. Whatever the legal merit of the judge's reasons on this aspect of the case, the counterclaim for rent must fail anyway for the reasons given in Misev v Elsiem: the respondent's sworn statement does not give any basis for the amount of rent claimed.

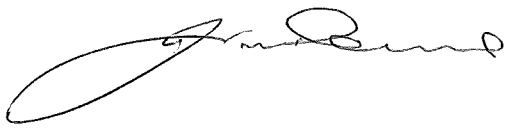
28. Submissions on the third ground of appeal also complain that the trial judge rejected a sworn statement made by Tele Harry Rambay. The statement was rejected as it was not filed when it should have been and was not produced until just before trial. At that stage the respondent could have been prejudiced if it were admitted. We find no error in the ruling rejecting the statement. Moreover, the content of the statement is directed to the statement of Mr Tamat to give permission to the respondent to use the land. That evidence if it were before the court would not alter the result as counterclaim fails as no proper notice was given to the respondent to vacate, and there was no evidence to support the counterclaim for rental.

29. As this Court observed in argument it remains open to the appellants to serve personally an appropriate notice to vacate the land, and if they are the true custom owners with full possessory rights as they assert, they will be entitled then to seek to enforce those rights. The refusal of the counterclaim does no more than hold that appropriate steps to enforce the appellants' alleged rights to possession had not been followed.

30. This ground of appeal also fails. The appeal is therefore dismissed. The appellants must jointly and severally pay the respondent's costs in this court fixed at VT35,000.

DATED at Port Vila, this 22nd February, 2019.

BY THE COURT



Hon. John von Doussa
Justice.