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

Civil Appeal
Case No. 20/3482 CoA/CIVA

BETWEEN: Christian Oska & Family, Joseph Oska, Saky Oska, Lui Lapinpel and Sam Visai & Family
Appellants

AND: George Toa
Respondent

Coram:	***Hon. Justice J. Mansfield*** ***Hon. Justice J.W. Hansen*** ***Hon. Justice D. Aru*** ***Hon. Justice G.A. Andrée Wiltens*** ***Hon. Justice V.M. Trief***
Counsel:	*Mr L.J. Napuati for the Appellant* *Mr D.K. Yawha for the Respondent*
Date of Hearing:	*11 February 2021*
Date of Judgment:	*19 February 2021*

JUDGMENT

A. Introduction

1. The Appellants ('Oska') appeal against the summary judgment dated 8 December 2020 in Civil Case No. 1803 of 2020 granting the Respondent George Toa ('Mr Toa') eviction orders to remove them from Apendihen land at North West Malekula. They allege that there were disputed facts therefore the primary judge should not have entered summary judgment.

B. Background

2. By decision dated 31 December 1990, the Malekula Island Court declared Manaseh Natnaour as custom owner of customary land known as Apendihen.

3. Several affected parties appealed the Island Court decision to the Supreme Court in Land Appeal Case No. 9 of 1998.

4. On 5 July 2004, the Supreme Court (Treston J) with the consent of all parties transferred the appeal to a village land tribunal, pursuant to s. 5 of the *Customary Land Tribunal Act* [CAP. 271].

5. By decision dated 21 May 2009, the Vahas Village Land Tribunal declared Mr Toa as the custom owner of Apendihen customary land.

6. The Vahas Village Land Tribunal's decision was not appealed.

7. Judicial review of the Vahas Village Land Tribunal's decision was sought in *Natnaour v Vahas Village Land Tribunal;* JRC 10 of 2014. By reserved judgments dated 6 March 2015 and 2 October 2015, Harrop J dismissed the application for leave to file the judicial review claim out of time.

8. Manaseh Natnaour and others appealed in Civil Appeal Case No. 823 of 2016 and then discontinued that appeal on 6 July 2016.

9. By Claim filed on 14 July 2020, Mr Toa sought an eviction order against Oska and a restraining order to stop them trespassing onto the land in the future.

10. On 21 October 2020, Oska filed their Amended Defence and Counter Claim.

11. The primary judge heard an Urgent Application for Summary Judgment and then entered the summary judgment dated 8 December 2020.

12. The sole ground in this appeal is that the primary judge erred in granting summary judgment when there were disputed facts as to the boundary of Apendihen land. Oska also filed an application for this Court to receive fresh evidence.

C. Discussion

13. Mr Toa's Claim in the Supreme Court alleges that he is the declared custom owner of Apendihen land and that Oska are trespassing by gardening inside Apendihen land. He seeks an eviction order against Oska and an order restraining them from trespassing.

14. Oska pleaded at para. 2(i) of their Amended Defence that they made gardens outside Apendihen land. They set out at paras 2(ii)-(ix) that the boundary of Apendihen land is not clearly defined in the Land Tribunal decision and in relation to the customary land of Amok; that Apendihen is within other customary lands; that the Land Tribunal was not properly composed; and that Mr Toa does not have a 'green certificate'. These are essentially complaints about the boundary of Apendihen land and the declaration of customary ownership in Mr Toa's favour. Oska's Counter Claim seeks

clarification of the boundary of Apendihen land in relation to Amok, Tinu, Douae and Nivenala.

15. The primary judge entered summary judgment on the basis that Oska could no longer raise the issue of the boundary of Apendihen land. We agree that any issue as to the boundary of Apendihen land had to be raised on appeal of the Land Tribunal decision. It is undisputed that the Tribunal's decision was not appealed. Therefore the Supreme Court may not now determine any issue as to the boundary of Apendihen land, including whether its size was 50 hectares or 200 hectares. We record therefore that what is pleaded in paras 2(ii)-(ix) of the Amended Defence does not provide a basis to defend the Claim. For the same reason, the Counter Claim does not disclose a cause of action and should be struck out.

16. The primary judge had in the evidence the Vahas Village Land Tribunal decision of Apendihen land that Mr Toa relied on. This is a one-page decision titled "Apendihen Kastom Land Disputed "Decision"" dated 21 May 2009 with an attached sketch map. Aphendihen land is described in the decision as being situated inside An-duwai and is about 200 hectares ('hemi aboat 200 hector'). The sketch map shows Apendihen land as a shaded area with the following place names around its circumference: Ablabil Avankrai, Babrival, Alanu, Nabaka Altano, Anmat Unun, Blanus Aratahr, Anawal Aburu, Alboah, Limao Abalian and back to Ablabil Avankrai (attachment "JT1" to the sworn statement of Joel Toa filed on 11 August 2020). That depiction of the boundary of the land is clear and cannot now be disputed.

17. The one remaining aspect of Oska's Amended Defence is para. 2(i) in which Oska pleaded that they made gardens outside Apendihen. This is the sole disputed fact raised by the Amended Defence and it gives Oska a real prospect of defending the Claim.

18. Accordingly, summary judgment should not have been entered. The matter will be remitted to the Supreme Court for the primary judge to hear evidence and determine the sole issue arising which is whether the Appellants are gardening inside or outside of Apendihen land as described in the map attached to the Vahas Village Land Tribunal's decision dated 21 May 2009.

19. Oska applied for this Court to receive evidence obtained from the Customary Land Management Office ('CLMO') after the summary judgment was entered. This consisted of a form signed by the Vahas Village Land Tribunal Chairperson and Secretary recording the Tribunal's decision dated 21 May 2009, pursuant to s. 34 of the *Customary Land Tribunal Act* [CAP. 271]. Mr Napuati submitted that the description of Apendihen land as 50 hectares meant that the boundary of Apendihen land needed to be clarified.

20. This Court set out in *Salwai v Boulekone* [2012] VUCA 19 the cumulative conditions which must be fulfilled by a party seeking to have fresh evidence received by an appellate court. These include that the evidence could not have been procured by the exercise of reasonable diligence for use at the trial, and that the evidence is relevant and otherwise admissible.

21. Mr Napuati properly accepted that no evidence had been filed to explain why the form from the CLMO could not have been procured with reasonable diligence for the hearing of the summary judgment application. He attempted to give an explanation in his submissions however he could not do so without an evidential basis. In the absence of an explanation and because the new evidence is not relevant to the sole issue for determination by the Supreme Court, this Court declines to receive further evidence. Oska's application must be dismissed.

D. Result

22. The Appellants' Urgent Application to Introduce New Evidence is declined and dismissed.

23. The appeal is allowed.

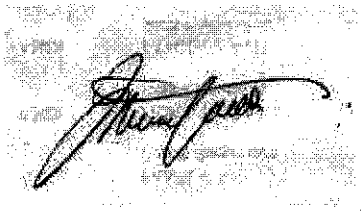
24. The summary judgment dated 8 December 2020 in Civil Case No. 20/1803 is set aside.

25. The sole issue for the Supreme Court's determination in Civil Case No. 20/1803 is whether the Appellants are gardening inside or outside of Apendihen land as described in the map attached to the Vahas Village Land Tribunal's decision dated 21 May 2009. This matter is remitted to the Supreme Court for determination of that one issue.

26. There is no order as to the costs of the appeal.

DATED at Port Vila this 19th day of February 2021

BY THE COURT



Hon. Justice John Mansfield