

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

Civil Appeal
Case No. 24/997 COA/CIVA

BETWEEN: **MATILDA DAVID**
Appellant

AND: **REHAB DAVID**
First Respondent

AND: **GEORGE HUNGAI**
Second Respondent

Date of Hearing: 13th May 2024

Before: *Hon Chief Justice V. Lunabek*
Hon. Justice J.W. von Doussa
Hon. Justice R. Asher
Hon. Justice O.A. Saksak
Hon. Justice D. Aru
Hon. Justice V.M. Trief
Hon. Justice W.K. Hastings

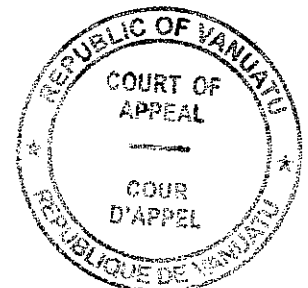
Counsel: *E. Molbaleh for the Appellant*
P. Fiuka for the Respondents

Date of Judgment: 17th May 2024

JUDGMENT OF THE COURT

Introduction

1. On 28th February 2024 the Judge in the Supreme Court entered judgment granting an order for eviction in favour of the claimant and granting an order for compensation for improvements in favour of the defendants on their counter-claim in the sum of VT 3,950,000, inclusive of costs.
2. The appellant appeals against part of the judgment on grounds that-
 - a) No authorisation or permission was given by the appellant and her deceased husband to the respondents to build a permanent house;
 - b) The compensation order is against the will of the appellant because she does not like the house;



- c) The Judge had failed to order the removal of the house;
- d) The house built by the respondent was not approved by the Shefa Provincial Council.

Facts

3. The appellant is the widow of Luke David who died on 30th October 2022 leaving her as the only surviving lessee of a rural residential lease title 12/0911/176.
4. The Lease was registered on 18th July 1997 in the joint names of Luke David (deceased) and Mathilda David (appellant).
5. In 1999 the appellant and the deceased were separated and lived apart for some 16 years. The deceased continued to live on the leasehold property while the appellant left and co-habited with another man.
6. The deceased approached the respondents sometimes in 2007 at their home in Namburu Area and invited them orally onto the Leasehold property and to build a house for them to live in.
7. The respondents accepted the invitation and entered the property. They made plans to build a house. They obtained a building permit and completed the house in 2012. And they all moved in to occupy the house, including the deceased Luke David who lived there uneventfully with the respondents.
8. Sometimes in 2021 the appellant and her defacto partner re-entered the Leasehold property and started having issues and arguments over the property. This led to proceedings issued in the Magistrates Court in 2022.
9. On 30th October 2022 Luke David passed away.
10. On 27th February 2023 the appellant filed her claim in the Supreme Court alleging that the respondents were trespassers on the Lease property since 17 February 2023 and that they had damaged her fruit trees, root crops and other properties on the Leased property.
11. The appellant sought the following relief:
 - a) Eviction against the respondents and their children;
 - b) Damages for trespass- VT 1,000,000;
 - c) Damages for threats-VT 500,000;
 - d) General damages – VT 500,000;
 - e) Costs; and
 - f) 5% interest.
12. On 29th August 2023 the respondent filed a defence stating among others that they entered onto the lease property lawfully and that they had permission from the deceased husband of the appellant to build the house under dispute. They offered to leave the property if they were



compensated for the value of the house they had built and for other expenses. The defence included a counter-claim by the respondents for the sum of VT 3,800,000 being compensation for the building, and personal costs in the sum of VT 150,000 with interest at 5% and costs.

The Decision

13. On 28th February 2024 the primary judge in the Supreme Court entered judgment granting eviction against the respondents in favour of the appellant, and judgment for compensation of VT 3,800,000 plus VT 150,000 on the counter-claim in favour of the respondents simultaneously.

14. At [15] the judge explained:

“These judgments simultaneously means that the Defendants shall move out of the property on the same day immediately upon receiving the full amount of VT 3,950.000 from the Claimant.”

15. The judge did not make any orders for interest and costs.

16. The appellant appeals against that decision.

The appeal hearing

17. In answer to questions from the Court, Mr Molbaleh said there were 2 houses and a bush kitchen on the land and that there was a semi-permanent house which is the appellant's and is currently vacant. Counsel said that all parties except the appellant live on the property. The appellant has been off the property since 17th February 2023. He further submitted that the primary judge did not award the damages claimed in the relief to her Supreme Court claim and failed to grant an order for the removal of the house on grounds she did not give them permission to build and that the house has not been granted the necessary permit by the Shefa Provincial Council. As such, the house is unsafe.

18. Mr Molbaleh submitted that the appellant has no financial means to pay the amount of compensation awarded to the respondents and submitted the appeal should be allowed and remitted to the Supreme Court for damages to be assessed.

19. Mr Fiuka accepted the primary judge did not determine the damages claimed by the appellant and acknowledged that these could be remitted back to the Supreme Court. However, he submitted the eviction order and the order for compensation should be maintained. Counsel submitted that the evidence before the primary judge established that the deceased husband of the appellant had asked the respondent to move onto the property and to build a house for them to live in, and there was no basis to order its removal.

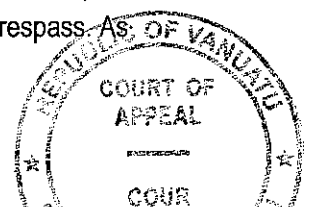
Discussion

20. The evidence of Richard David, the deceased's son confirms his late father gave his consent to the respondents to enter the lease property and to build a house for them to live in together. The



evidence of Rehab David and George Hungai (the respondents) also confirm this position. This occurred sometimes in 2007 when the appellant following their separation in 1999 had left the property to live with another partner. She did not return to the property until about 17th February 2023.

21. The evidence of Rehab David established that the house they built was valued by a registered valuer on 23rd May 2022 confirming the value to be VT 3,800,000. The written valuation was produced.
22. In our view the evidence establishes that the respondents were on the property lawfully. They had moved there with the consent of Luke David.
23. The appellant must have known the respondents were on the land and had constructed the home with consent of Luke David, yet she made no complaint about that for many years. Her complaint only came after the death of Luke David, when she had fallen out with the respondents.
24. As the respondents were on the land lawfully, they were not, and are not now, trespassers. Why then was an eviction order made against them, particularly after the judge supervising the case in the Court below had told the parties that an eviction order could not be made simply by a default judgment? The answer lies in the unusual way the two judgments entered on 28th February 2024 came about. By that time pleadings and sworn statements showed that the respondents consented to them being ordered to leave the property so long as they were appropriately compensated, and by their counterclaim and the undisputed valuation evidence the compensation had been quantified. The respondents' offer to vacate and the evidence supporting their compensation claim justified the orders made by Supreme Court and the judicial explanation set out above at [14] about how their enforcement was conditional upon simultaneous compliance.
25. We consider the material before the Supreme Court supports the orders that were made, and that there is no ground for challenging them.
26. The appellant's Notice of Appeal raised the four grounds recorded at [2] above. They can be dismissed briefly. Ground (a) asserts that the respondents were on the land without permission. The evidence is to the contrary. Ground (b) challenges the judgment on the counter-claim because she does not like the house the respondents built. Her likes are beside the point. The house was lawfully constructed there with her knowledge, it is fixture on the land and in law she must accept that reality. Ground (c) is nonsense. The house is a fixture. It was erected lawfully with consent of the leaseholder. There is no basis in law for ordering its removal. Ground (d) is defeated by the evidence that the house was erected after necessary approval had been obtained, and appropriate council fees paid.
27. The appeal must therefore be allowed, subject to the ancillary issue that the claims pleaded for damages for trespass and for the damages to fruit trees on the property allegedly caused by the respondents. As a matter of strict form their claims will have to be returned to the Supreme Court for determination. However we observe that on the evidence which this Court has discussed, the respondents are on the land with lawful authority so there can be no damages for trespass.



for the fruit trees, the respondents say they were part of their garden and if this is so, the appellant will not establish a claim for damages under that head of loss.

28. In short, it seems any attempt by the appellant to pursue the outstanding money claims in the Supreme Court is very unlikely to result in any meaningful gain by her.
29. The resulting picture is troublesome. The appellant is choosing not to live on the property whilst the respondents remain there. The respondents are prepared to go if they receive the assessed compensation which will allow them to start afresh elsewhere. But the appellant is without funds to pay the compensation judgment. In short there appears to be an insolvable stalemate between the parties.
30. The parties should look for a practical outcome. Spending more money fighting in the Courts will not solve the problem.
31. The obvious solution is for the parties to agree to sell the property. The respondents can then be paid out the compensation judgment and the appellant will receive the balance of the sale price to alleviate her present impecuniosity.
32. The formal orders of the Court are:
 1. Appeal dismissed;
 2. The outstanding claims for damages pleaded in the Supreme Court claim are returned to the Supreme Court for determination;
 3. There is no order as to costs in this Court.

DATED at Port Vila, this 17th day of May 2024

BY THE COURT


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Hon. Chief Justice Vincent Lunabek

