

BETWEEN: JENNY GARO AND BILL GARO
Appellants

**AND: ALLAN MILLER, MAKI MILLIER, JAMES
KALO, MERIAM FRED, JOE PHILOMON
AND NOELLA JOE**
Respondents

Date of Hearing: 6 November 2024

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice Mark O'Regan
Hon. Justice Richard White
Hon. Justice Oliver A. Saksak
Hon. Justice Dudley Aru
Hon. Justice Viran M. Trief
Hon. Justice M. A. MacKenzie*

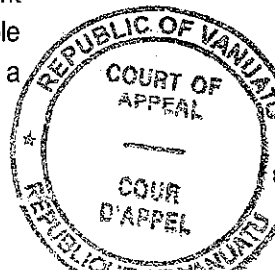
Counsel: *Mr Colin B. Leo for the Appellants
Mr James Kalo (Third Respondent in person unrepresented
No appearances for Allan Miller, Maki Miller, Meriam Fred, Joe Philimon and Noella Joe*

Date of Judgment: 15 November 2024

JUDGMENT

Introduction

1. This appeal is against the strike out order made by a Judge of the Supreme Court on 29 April 2024 in Civil Case 22/3014.
2. In the struck out proceedings, the appellants had sought an order for the eviction of the six respondents from land which they (the appellants) had acquired on 8 June 2022 by the transfer of a lease. The respondents had refused to comply with requests from the appellants that they vacate the premises.
3. The appellants had commenced their proceedings in the Supreme Court on 26 October 2022. Thereafter they had attended a number of conferences in the Supreme Court but it seems that the respondents, who were unrepresented, had attended very few. The appellants had sought judgment by default but the Judge had expressed concern about that course given the possible application of s.17(1)(g) of the Land Leases Act, ie, the possibility that the respondents had a



"right" amounting to an overriding interest in the land. The Judge's concern seems to have arisen because the respondents had been, to the knowledge of the appellants, in actual occupation of the land at the time they acquired it.

4. At the conference on 18 October 2023, the Judge set the matter down for trial, ordered that a defence be filed by 15 November 2023 and adjourned the matter for trial on 22 February 2024 at 9:00 am. It seems that the respondents had attended that conference.
5. The trial did not proceed on 22 February 2024. Mr Leo for the appellants attended but there was no attendance by the respondents. They had still not filed a defence; the appellants had not paid the trial fees; the first appellant Jenny Garo was not present being overseas: there was no proof that her statement had been served on the respondents: and there was no statement dealing with the possible application of s.17(1)(g) of the Land Leases Act. The Judge adjourned the matter for trial on 29 April 2024, made orders for the filing and service of evidence of material addressing the possible application of s.17(1)(g) and ordered the appellants to serve notice of the adjourned hearing on each respondent.

The Striking Out

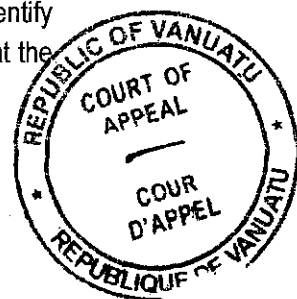
6. Neither Mr Leo for the appellants nor any of the respondents attended the hearing on 29 April 2024.
7. The Minute issued by the Judge indicates his concern as to whether the respondents had been served with notice of the hearing and whether the trial fees had been paid. The Judge recorded that Mr Leo had not arrived in Court by 10.10am, that there was no evidence of service of notice of hearing on the respondents and there had been non-compliance with the Orders made on 22 February 2024. The Minute continues:

Given the failure of counsel for the claimant to appear or explain the failure to comply, matter is struck out under Civil Procedure Rules 9(10)(1)(b).

8. As is apparent, The Judge made the strike out order because of Mr Leo's failure to appear at the hearing.

The Appeal

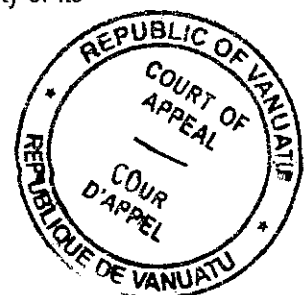
9. The appellants challenged the strike out on the ground that no sufficient notice had been issued in accordance with Rule 9.10(3) of the Civil Procedure Rules. A second ground of appeal was that the Judge had failed to grant their request for a default judgment and had instead raised the possibility that the respondents may have an overriding interest which the respondents had not raised themselves, whether by filed defence or otherwise. The ground of appeal did not identify the order about which the complaint was made. However that does not matter because at the appeal hearing the appellants abandoned this ground.



10. The appeal was filed out of time and therefore the appellant also filed an application seeking leave to appeal out of time. The application for leave was heard together with the appeal.

Discussion

11. In order for leave to be granted the appellants must establish that there is merit in their appeal.
12. At the hearing of the appeal, there was uncertainty as to whether the respondents had been served with notice of the appeal hearing. Initially the Court adjourned the hearing on this account but, it appearing subsequently that there had been adequate service, revoked that order and proceeded with the hearing. The first respondent, Allen Miller, was in Court when the matter resumed but did not make any submissions.
13. Rule 9.10 of the Civil Procedure Rules provides (relevantly):
- (1) *This rule applies if the claimant does not:*
 - (a) *take the steps in a proceeding that are required by these Rules to ensure the proceeding continues; or*
 - (b) *comply with an order of the court made during a proceeding.*
 - (2) *The court may strike out a proceeding:*
 - (a) *at a conference, in the Supreme Court; or*
 - (b) *at a hearing; or*
 - (c) *as set out in subrule (3); or*
 - (d) *without notice, if there has been no step taken in the proceeding for 6 months.*
 - (3) ***"If no steps have been taken in a proceeding for 3 months, the Court may:***
 - (a) ***give the claimant notice to appear on the date in the notice to show cause why the proceeding should not be struck out; and***
 - (b) ***if the claimant does not appear, or does not show cause, strike out the proceeding."***
14. Sub-rule (1) in Rule 9.10 indicates the circumstances in which the Rule has application. The Judge purported to invoke Rule 9.10.1(b) but that sub-rule applies when a claimant fails to comply with an order of the Court. It does not apply to the circumstance in which a party or its counsel fail to attend a hearing.



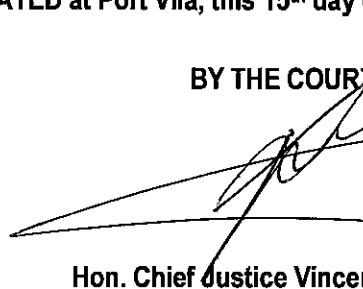
15. The Judge's reference to non-compliance with the orders made on 22 February may suggest that he may have intended to rely on that failure by itself as the basis for his order. However, while there is no doubt that strike out orders may be made at a hearing, sub-Rules (2) and (3) limit the circumstances in which that power can be exercised without notice to a claimant. Sub-Rule (2) requires that no step have been taken in the proceeding for six months. Sub-Rule (3) requires that no step have been taken for three months and a show cause notice issued.
16. Neither of those circumstances existed in this case. By 29 April 2024 when the case was struck out, only two months had elapsed since 22 February. In any event, no notice to show cause had been given.
17. In short, Rule 9.10(1)(b) did not authorize the strike out order made by the Judge. Accordingly, the appellants have established that there is merit in their appeals.

Conclusion

18. For the reasons set out above, we grant the appellants an extension of time in which to commence the appeal, grant leave to appeal to the extent that that is necessary and allow the appeal. The orders of the Judge dated 29 April 2024 are set aside.
19. The matter is remitted to the Supreme Court for continuation before the primary Judge.
20. Given the contribution by Mr Leo to the circumstances on 29 April before the Judge, there will be no order as to costs.

DATED at Port Vila, this 15th day of November, 2024.

BY THE COURT



Hon. Chief Justice Vincent Lunabe

