

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

Civil Case No.20 of 1998 and
Civil Case No.25 of 1998
(Consolidated)

(Civil Jurisdiction)

RECEIVED

18 JUL 2001

BETWEEN: BRUNO BEN

Plaintiff

AND: HENRY TOKYO

First Defendant

AND: MINISTER OF LANDS

Second Defendant

**AND: DIRECTOR OF LANDS
RECORDS**

Third Defendant

AND: LEOUNG MANSAN

Fourth Defendant

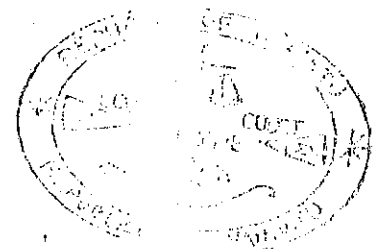
Coram: Mr Justice Oliver A. Saksak
Clerk: Ms Cynthia Thomas

Counsel: Mr Hillary Toa for the Plaintiff.
Mr Tom Joe for the Second and Third Defendant.
Mr Bill B. Tamwata for the Fourth Defendant.
No Appearance for or by the First Defendant.

Date of Hearing: 4th July, 2001, 3 p.m.

ORAL JUDGEMENT

By way of background, the Plaintiff issued an originating summons in proceedings No.20 of 1998 against the First, Defendant and Third Defendants. He seeks the following orders that:-



1. Leasehold Title Number 04/2641/003 dated 30th April 1984 be transferred into Mr Bruno Ben's name.
2. Damages in the sum of VT3,961,200, and
3. Costs.

The Originating Summons was filed on 9th November, 1998.

Subsequently on 26th April, 2001 pursuant to some Direction Orders the Plaintiff filed an Amended Originating Summons under Orders 17 of the High Court Rules amending slightly the original summons by including the Fourth Defendant, as Mr Manwah Leoung. It seeks the following Orders that:-

1. Leasehold Title Number 04/2641/003 dated 30th April 1984 be transferred into Mr Bruno Ben's name.
2. Rectification of the Land Leases Register by the Third Defendant, in erasing the Fourth Defendant's name and entering the name of the Plaintiff over Leasehold Title No.04/2641/003 as the new uncompensated Leaseholder by the First Defendant.
3. Cancellation of the said Lease by the Second Defendant that was signed by the First Defendant and the Fourth Defendant.
4. A Declaration that the current Lease entered into by the First Defendant and the Fourth Defendant is null and void as it was effected and entered into by Fraud, and/or Trick, the First Defendant knowing fully well that the Plaintiff has shown great interest in the property in purchasing it, through maintenance of the property commitments, and expenses.
5. Damages in the sum of VT3,961,200.
6. Costs.



There are three Applications before the Court for determination which the Court heard yesterday 4th July, 2001. The first is an Application by way of a Notice of Motion dated 20th December, 2000 filed by Mr Bani on behalf of the Fourth Defendant seeking the following Orders:-

- (1) Default Judgment be entered in favour of the Plaintiff, Mr Manwah Leoung as pleaded in the statement of claim.
- (2) The Defendant vacate the Leasehold property within seven (7) days.
- (3) The Defendant be ordered to pay the Plaintiff's costs of this action.
- (4) Any other orders as the Court deems just.

The grounds relied upon by Mr Bani are as contained in the supporting affidavit of Mr Leoung Mansan filed on 10th January 2001.

The Second Application was filed by the State Law Office on behalf of the Second and Third Defendants. They applied by way of a Summons (General Form) dated 28th June, 2001. They seek the following orders:-

1. That the entire cause of action contained in the Amended Originating Summons should be struck out upon the grounds:-
 - (a) That it does not disclose a reasonable cause of action.
 - (b) It is oppressive and vexatious and its meaning is unclear.

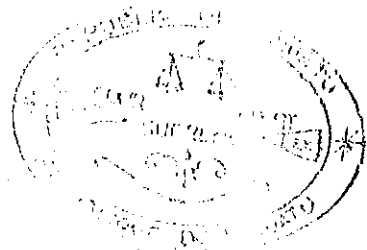


- (c) Further the Amended Originating Summons is stale and invalid as against the Second and Third Defendants. Actions that have been abandoned and/or put on hold by either the defendant or the plaintiff are subject to Order 64 r.9 of the High Court Rules 1964. If any party intends to continue the action after a period of one(1) year, the intending party must give one month notice.

The third Application by way of a summons issued under Order 57 r.1 in respect of Civil Case No.20 of 1998 is brought by Mr Bani on behalf of the Fourth Defendant dated 4th July, 2001. It seeks the following Orders:-

1. That the Plaintiff's Amended Originating Summons be struck off upon the grounds –
 - (a) It does not disclose a reasonable cause of action against the Fourth Defendant.
 - (b) The Plaintiff's claim is frivolous and vexatious and is an abuse of process.
2. Any other orders as the Court deems fit.
3. Costs of and incidental to the action.

Taking them in the Order as they come beginning with the Notice of Motion dated 20th December, 2000 in relation to Civil Case No.25 of 1998 in which Mr Mansan is Plaintiff and Mr Ben is Defendant. It is argued that the Defendant did not and has never filed a Defence in response to the writ of summons issued by the Plaintiff dated 27th November 1998 claiming as follows:-

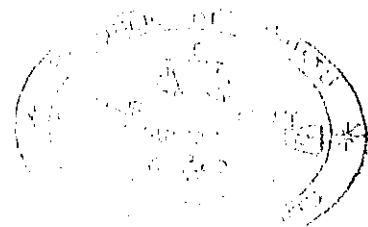


1. An order that the Defendant forthwith deliver up vacant possession of the said land and premises to the Plaintiff.
2. Damages or mesne profits for the period from 25th July, 1997 until vacant possession is delivered up.
3. Interests.
4. Such further or other relief as the Court deems fit.

It is further argued that even if there was such a defence it is not a good defence on which the Defendant can successfully defeat the Plaintiff's title to the property in question. Currently the Lease is registered in favour of the Plaintiff. Annexed to Mr Mansan's affidavit are –

- (a) Advice of Registration of Dealing dated 23rd June, 1998 (Annex "C")
- (b) Transfer of Lease dated 1st December, 1997; and
- (c) Consent dated 23rd July, 1997.

By law the Plaintiff has an indefeasible title and he has a good title against the whole world. And the only way the Defendant can defeat that title is to show that registration of that Leasehold was done through fraud or by mistake under the provisions of section 100 of the Land Leases Act Cap. 163. Further, pursuant to section 15 of the Act, the Fourth Defendant having first acquired title for valuable consideration holds all rights and privileges on that title and is "free from all other interests and claims whatsoever..." There are two specific requirements and a proviso which this right is made subject to but they are not of relevant consideration here.



Concerning the arguments and submission by Mr Bani that the Defendant has not filed any defence to Mr Mansan's statement of claim in Civil Case No. 25 of 1998, and that even if there was such a defence, it was not a good defence. The Court accepts that submission.

For the Defendant to show that he has a good defence he has to show some evidence of fraud or mistake. Since filing his Originating Summons in November 1998 and secondly the Amended Originating Summons in April 2001, the Plaintiff has only filed one affidavit in support of the orders that he seeks. He did not and has not filed any additional affidavit in support of his amended Originating Summons. When he amended his Originating Summons the Plaintiff included the Fourth Defendant as a new party to the proceedings. He is solely relying on his affidavit of 9th November 1998. On record the Court confirms that there has never been a defence in relation to Civil Case No.25 of 1998.

The Defendant has always lived in Santo for this period and he has not filed a defence up until now. Even if there is such a defence the Court has not seen it and therefore in my view there is no defence as far as Civil Case No. 25 of 1998 is concerned. And the Plaintiff has appropriately applied seeking default judgment. From 1998 until 2001 there is no defence. The Plaintiff is therefore entitled to a default judgment.

The second Application by the Fourth Defendant was issued as of yesterday 4th July, 2001. Mr Bani applied to the Court to abridge time and leave has been granted to that effect. Basically the Fourth Defendant seeks an order to strike out the Plaintiff's claim in Civil Case No.20 of 1998 for reason that it discloses no reasonable cause of action against the Fourth Defendant. Further that it is a frivolous and vexatious action amounting to an abuse of process.



The Court has heard submissions from both Mr Bani and Mr Toa. And the court has looked again at the originating summons issued in November 1998 that is really against the First Second and Third Defendants. Upon its amendment in April, 2001 he included the Fourth Defendant. As indicated earlier that since the dates of filing of the Originating Summons and the Amended Originating Summons, the Plaintiff has only filed one affidavit in support of them. The affidavit shows clearly that if there is any valid claim by the Plaintiff, it is against the First Defendant, Mr Henry Tokyo. There is nothing in place or in evidence to show that the transfer was done through fraud or mistake and I so rule.

As to whether or not it was an abuse of process that the Plaintiff issued his claims by way of an originating summons, the Court notes that there is a claim of damages in the sum of VT3,961,200.

Under O.58 of the High Court Rules only declarations are sought through Originating Summons. The proper cause of action where the Plaintiff claims damages would have been to issue a writ of summons. This is to allow the defendant(s) to enter into proper pleadings. In originating process there is only the requirement to file an appearance and not for a defence. Here it is not proper for the Plaintiff to claim damages under an originating process. Therefore in relation to Civil Case No.20 of 1998 the action is dismissed as against the Fourth Defendant.

In relation to the Application by the State Law Office on behalf of the Second and Third Defendant. It was deferred on 28th June, 2001 because of the two-clear days service requirement under the Rules. Mr Toa was not available on that date also.

As regards the first ground relied upon that the case was stale, that the Plaintiff has not prosecuted his claim within a period of 12 months. This argument cannot be sustained. On record it appears that Plaintiff filed his claims on 9th November, 1998. The first time the case was listed for hearing was in July 1999. That was within the 12 months period.



Secondly that the Plaintiff has not disclosed a reasonable cause of action against the Second and Third Defendants, I find there to be no evidence of fraud or mistake by the Second and Third Defendants. For that matter, I am prepared to rule that the action is frivolous and vexatious also against the Second and Third Defendants. The action is therefore dismissed as against the Second and the Third Defendants.

In summary these are the findings of the Court –

1. In relation to the Fourth Defendant in Civil Case No.20 of 1998:-
 - (a) There is no reasonable cause of action against him.
 - (b) The action against him is frivolous, vexatious and amounts to an abuse of process.
2. In relation to the Fourth Defendant in Civil Case No.25 of 1998 –
 - (a) There is no defence by the Defendant. That even if there is a defence, it is not an arguable defence on which the Defendant would succeed.

ORDERS

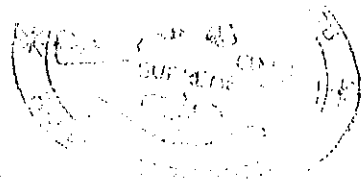
- (i) In Civil Case No.20 of 1998 the action is dismissed as against the Fourth Defendant.
- (ii) There will be no order as to costs.
- (iii) In Civil Case No.25 of 1998, the Fourth Defendant as Plaintiff has judgment in default against the Defendant, Mr Bruno Ben.



- (iv) Mr Ben shall vacate the property and deliver up vacant possession of all that land and premises comprised in Leasehold Title No.04/2641/003 to Mr Leoung Manwah within 21 days from today.
 - (v) The Defendant will pay Mr Manwah's costs of and incidental to Civil Case No.25 of 1998.
3. In relation to the Second and Third Defendants in Civil Case 20 of 1998 –
- (a) There is no reasonable cause of action against them.

ORDERS

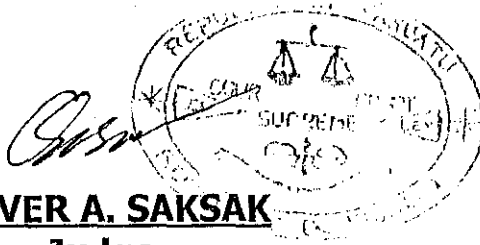
- (i) The action is therefore dismissed as against the Second and Third Defendants.
 - (ii) There will be no order as to costs.
4. In relation to the First Defendant, Mr Tokyo –
There has been no defence and/or response from him since 1998. He has never appeared in any of the previous hearings or sittings of the Court. Under Order 57 r.8 the court has discretion to proceed ex parte and may require service. I treat yesterday's hearing as such. The First Defendant has left or put the Plaintiff Mr Ben in a very awkward position. If the Plaintiff has any remedy at all, it is against Mr Tokyo, the First Defendant solely. For the reasons stated I am prepared to award the Plaintiff judgment in default in the sum of VT3,961,200, and I so order. I further award costs against the First Defendant in favour of the Plaintiff. These are costs of and incidental to Action 20 of 1998.



The First Defendant however has liberty to apply to have these orders set aside on 48 hours notice to the Plaintiff.

DATED at Luganville, this 5th day of July, 2001.

BY THE COURT



OLIVER A. SAKSAK
Judge