

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No. 24 of 2012

BETWEEN : GEORGE BOAR
Claimant

AND: DE ROZA INVESTMENT GROUP LTD
Defendant

AND: NATIONAL BANK OF VANUATU
Interested Party

Coram: Justice Aru

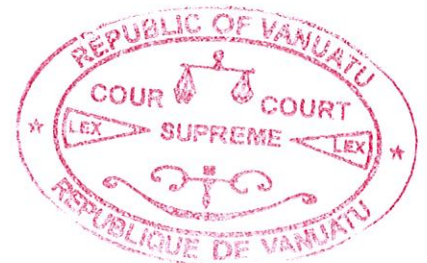
Counsel: Mr. G. Boar for the Claimant
Mr. C. Leo for the Defendant (no-appearance)
Mr. A. Kalmet –for the Interested Party

JUDGMENT

Background

1. On 12 November 2013, Mr Boar as the Claimant obtained an Enforcement Warrant (Money Order) (“the Warrant”) against the defendant. Under the Warrant, the sheriff was to recover a total sum of VT 1,480,000 and he was authorized to:-

“1. Enter the defendant’s property at tasiriki area , being lease title No. 11/OD42/080 and once in occupation of the land to do all that is necessary and sell the land and all movable and immovable property on it whether affixed or not to recover the above said amount .



2. Enter the defendant's property at number 2 area, and once in occupation of the said number 2 property do all that is necessary and including selling the defendant's vehicle registration No 12966."
2. The Warrant expired on 12 July 2014. The application now before me concerns the first of the two orders and more specifically the sale of lease title 11/OD42/080 ("the 080 lease") which I will come to later.

Urgent Application – Interested Party

3. Before the Warrant was renewed, the National Bank of Vanuatu ("the NBV") filed an Urgent Application on 22 May 2014 to be joined as an interested party. The Application was supported by a sworn statement deposited by Ben Dick Dali which was also filed on the same date. Orders sought were to the effect that :

"1. Pursuant to Rules 3.1 and 3.2 the National Bank of Vanuatu be joined as an interested party to the proceedings;

2. The following wording be added after paragraph 1 of the Enforcement Warrant (Money Order) dated 12 November 2013:-

(1A). Leasehold Title No. 11/OD42/080 is to be offered for sale by public tender;

(1B). Pay all proceeds of sale obtained from the sale to the National Bank of Vanuatu Limited until the sum secured by its registered mortgage over that title is paid ; and

(1C). The balance , if any , after payment is made to the National Bank of Vanuatu Limited is to be paid into the court with notice to the judgment creditor and the judgment debtor such payment has been made ."

4. Mr Boar is not opposed to the National Bank of Vanuatu ("the NBV") being joined as an interested party and so orders were made joining the NBV as an interested party on 2 June 2014 and the Warrant was stayed pending further order. The matter was then listed for hearing on the balance of the orders sought and Mr Boar was required to file his response and written submissions.



Claimant's Application

5. Mr Boar's response was to file another application on 23 June 2014 supported by his sworn statement. In brief ,the orders he seeks are:-

"1. The NBV to be directed to disclose by way of discovery, the defendant's other mortgaged properties which mortgages enable the NBV to release to the defendant the sum of VT 14,100,137 but which is now standing at the date of filing of the NBV's application in the sum of VT 19, 947, 832;

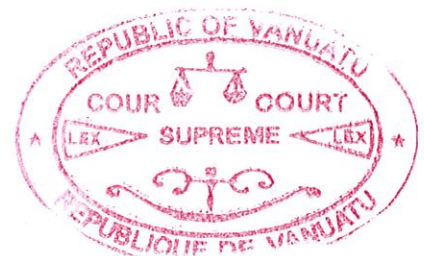
2. The claimant is also a secured creditor having the same standing as the NBV by virtue of obtaining summary judgment on 17 December 2012;

3. The NBV collateral third party mortgage registered on 24 June 2009 at the Land Records Registry for securing the defendant's loans of VT 14,100, 137 is defective and invalid;

4. The NBV is only entitled to recover VT 3 million plus interest secured by way of collateral third party mortgage over the 080 lease but not to recover the sum of VT 14,100, 137 and or VT 19, 947, 832 as sought in the NBV application."

6. Both applications were heard together .In a nut shell, the basis of Mr Boar's objection is not so much the orders sought by the NBV but the amount the NBV is entitled to recover from the sale of the 080 lease. He submits that the NBV should only be entitled to recover VT 3,000,000 and not VT 19,947,832 as deposed by Ben Dick Dali.

7. The gist of Mr Boar's submission centers around the registration of the 080 lease. He submits that the following chronology of events indicate that the 080 lease was only registered when ordered by the court on 18 August 2010:-



- Around 2009 / 2010 – the defendant applied and got a loan from the NBV for a sum of VT14,100,137
 - 24 June 2009 – Director of Lands purports to register the defendant's collateral mortgage over the 080 lease as security over a loan of VT 14,100,137; (**Annexure "GB2"**)
 - 18 August 2010 – the Chief Justice in **CC No.15 of 2010** directed the Director of Lands to register the defendant's 080 lease ; (**Annexure "GB1"**)
 - 29 December 2010 – the defendant and the NBV varied the terms of the then existing mortgage to enable the defendant to secure additional loans of VT3 million by NBV having additional mortgage over the 080 lease. (**Annexure "GB3"**)
8. Mr Boar submits that the collateral mortgage over the 080 lease can only be to secure the additional loan of VT 3 million and that should be the only amount recoverable by the NBV if the 080 lease is sold . Given the orders of 18 August 2010 in **CC No.15 of 2010**, it was further submitted that the 24 June 2009 registration of the 080 lease is a farce, and is defective and invalid to secure the loans of VT 14,100,137 as registration was only effected following the 18 August 2010 Orders of the court.
9. Finally, Mr Boar submits that the summary judgment he obtained in this matter on 17 December 2012 now elevates his status to that of a secured creditor on a par with the NBV as secured creditor under a mortgage.

Discussion

10. The submissions made by Mr Boar are in my view misconceived and so is his application filed in "opposition". Firstly there is no evidence that the 080 lease registration was challenged at any time between the period 24 June 2009 to 18 August 2010. As it was never



challenged the registration whether before or later grants indefeasibility of title to the proprietor who is entitled to enjoy the protection afforded by s 14 and s15 of the Land Leases Act [CAP 163] .(Ratua Development Limited v Ndai [2007] VUCA 23)

11. The submission that the judgment elevates the judgment creditor to the same status as a secured creditor under a mortgagee must also be rejected. The following passages from the Court of Appeal decision in **Tawi v Republic of Vanuatu** [2012] VUCA 27 clearly illustrate the point that a judgment debt cannot be elevated to the status as an interest in land :

"...the genesis of the second respondent's claim in the Magistrate's Court is a straight forward money or debt claim. It was not a claim by the second respondent in respect of an "interest" as defined by the Act. At the time the caution was lodged there was no connection between the money which was alleged to be owing and a particular piece of land. That situation did not alter when Judgment was entered. The necessary connection still did not exist."

12. Later at paragraph 23 to 27 it said:

23. *"Part 14 of the Civil Procedure Rules deals with the enforcement of Judgments and orders. Enforcement warrants issued under this part be they for money orders or for seizure and sale of real property are a means by which Judgments are enforced so that parties in whose favour a Judgment is delivered can enjoy the fruits of their Judgment.*

24. *Enforcement warrants do not create any rights but empower enforcement officers to take certain steps to enforce or execute Judgments. It is the culmination of the Civil Procedure process and needs to be understood in the context of the Civil Procedure Rules as a whole.*

25. *Under the Land Leases Act an "interest" in relation to land is a defined term which includes a lease, sublease, mortgage, easement restrictive agreement and profit. Although the definition is not exhaustive*



there can be no denying that the identified interests have a direct and immediate relation to land.

26. *In Ratua this Court made it very clear that Section 93 (1) (a) must be read as a whole with the rest of section 93 (1) and not in isolation when it said:-*

"This makes it clear that the interest which is claimed must be one which is transferable and registrable under the Act."

27. *Accordingly we are not satisfied that an enforcement warrant creates an "interest in land" sufficient to support a caution under section 93 (1) (a) of the Land Leases Act.*

13. The Warrant in this case was to enable the sheriff to undertake enforcement of the summary judgment by selling the 080 lease so that the claimant can recover his debt from the proceeds of sale. In light of what the Court of Appeal said in Tawi above, the Warrant does not create any right that would override a registered interest under the Land Leases Act ie. a mortgage.

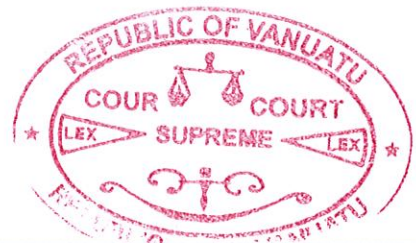
14. Consequently, I make the following orders:-

ORDERS

(1) The Claimant's Application is refused and is hereby dismissed.

(2) The Urgent Application to vary the Enforcement Warrant (Money Order) dated 12 November 2013 is granted by adding after paragraph 1:-

- 1A. Leasehold titled no.11/OD42/080 is to be offered for sale by public tender;
- 1B. Pay all proceeds of sale obtained from the sale to the National Bank of Vanuatu Limited until the sum secured by its registered mortgage over that title is paid; and



1C. The balance, if any after payment is made to the National Bank of Vanuatu Limited is to be paid into the Court with Notice to the Judgment Creditor and the Judgment Debtor such payment has been made.

(3) The claimant shall file the amended warrant for sealing immediately.

(4) The interested party is entitled to wasted costs on a standard basis to be taxed failing agreement.

DATED at Port Vila, this 15 day of September, 2014

BY THE COURT



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D. Aru

Judge

