

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

Civil
Case No. 19/2097 SC/CIVL

BETWEEN: Gideon Mael
Claimant

AND: Augustine Kalorib
Defendant

Date: 8 September 2020
Before: Justice V.M. Trief
Counsel: Claimant – Mr H. Vira
Defendant – Ms T. Matas

JUDGMENT

A. Introduction

1. The Claimant Gideon Mael is seeking to evict the Defendant Augustine Kalorib, his former wife, from leasehold title no. 11/OG33/040 (the 'property'). The Claim is defended on the basis that the property is matrimonial property and the Court is requested to consider Ms Kalorib's contribution.

B. The Law

2. Subsection 21(2) of the *Matrimonial Causes Act 1973 (UK)* (the 'Act') provides:

21. ...

- (2) *The property adjustment orders for the purposes of this Act are the orders dealing with property rights available (subject to the provisions of this Act) under section 24 below for the purpose of adjusting the financial position of the parties to a marriage and any children of the family on or after the grant of a decree of divorce, nullity of marriage or judicial separation, that is to say -*

- (a) *any order under subsection (1)(a) of that section for a transfer of property;*



- (b) any order under subsection 1(b) of that section for a settlement of property; and
- (c) any order under subsection 1(c) or (d) of that section for a variation of settlement.

3. Section 24 of the Act provides:

24. (1) On granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation or at any time thereafter (whether, in the case of a decree of nullity of marriage, before or after the decree is made absolute), the court may make any one or more of the following orders, that is to say –

- (a) an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion;
- (b) an order that a settlement of such property as may be so specified, being property to which a party to the marriage is so entitled, be made to the satisfaction of the court for the benefit of the other party to the marriage and of the children of the family or either or any of them;
- (c) an order varying for the benefit of the parties to the marriage and of the children of the family or either or any of them any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the parties to the marriage;
- (d) an order extinguishing or reducing the interest of either of the parties to the marriage under any such settlement;

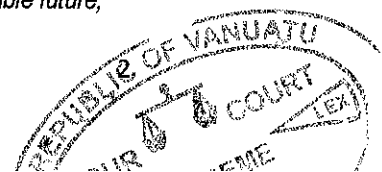
subject, however, in the case of an order under paragraph (a) above, to the restrictions imposed by section 29(1) and (3) below on the making of orders, for a transfer of property in favour of children who have attained the age of eighteen.

- (2) The court may make an order under subsection 1(c) above notwithstanding that there are no children of the family.
- (3) Without prejudice to the power to give a direction under section 30 below for the settlement of an instrument by conveyancing counsel, where an order is made under this section on or after granting a decree of divorce or nullity of marriage, neither the order nor any settlement made in pursuance of the order shall take effect unless the decree has been made absolute.

4. Subsection 25(1) of the Act provides:

25. (1) It shall be the duty of the court in deciding whether to exercise its powers under section 23(1)(a), (b) or (c) or 24 above in relation to a party to the marriage and, if so, in what manner, to have regard to all the circumstances of the case including the following matters, that is to say –

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;



- (c) *the standard of living enjoyed by the family before the breakdown of the marriage;*
- (d) *the age of each party to the marriage and duration of the marriage;*
- (e) *any physical or mental disability of either of the parties to the marriage;*
- (f) *the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family;*
- (g) *in the case of proceedings for divorce or nullity of marriage, the value to either of the parties to the marriage of any benefit (for example, a pension) which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring;*

and so to exercise those powers as to place the parties, so far as it is practicable and, having regard to their conduct, just to do so, in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial obligations and responsibilities towards the other.

5. Subsections 29(1) and (3) of the Act provide:

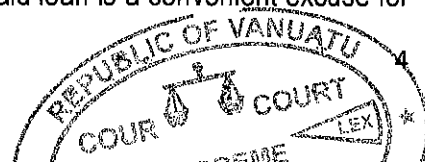
- 29. (1) *Subject to subsection (3) below, no financial provision order and no order for a transfer of property under section 24(1)(a) above shall be made in favour of a child who has attained the age of eighteen.*
- (2) ...
- (3) *Subsection (1) above, and paragraph (b) of subsection (2), shall not apply in the case of a child, if it appears to the court that –*
 - (a) *the child is, or will be, or if an order were made without complying with either or both of those provisions would be, receiving instruction at an educational establishment or undergoing training for a trade, profession or vocation, whether or not he is also, or will also be, in gainful employment; or*
 - (b) *there are special circumstances which justify the making of an order without complying with either or both of those provisions.*
- (4) ...

C. Discussion

6. It is undisputed that:

- Mr Mael and Ms Kalorib married on 1 June 1990 and have three children namely Lekita Shirley Mael aged 32, William Kalokul Mael aged 30 and Terrence Mael aged 26.
- They and the children lived together on the property until Mr Mael left in 2010/2011 to live elsewhere with a new partner. Ms Kalorib and the children continue to live there.
- Mr Mael is the sole registered proprietor of the property, since the transfer of the lease to him by the National Housing Corporation on 28 May 1993.

- The property contains a house and 4 rental units.
 - The property is subject to a registered mortgage in favour of the National Bank of Vanuatu Limited ('NBV'), which is the security for a joint loan to Mr Mael and Ms Kalorib.
 - In December 2014, Mr Mael decided to stop making payments towards the loan.
 - Mr Mael's last payment towards the loan was in January 2015.
 - The arrears incurred since February 2015 mean that even though Ms Kalorib has been repaying the loan since February 2017, the loan continues to be in arrears and the NBV has issued notices to seize the property.
 - On 13 February 2017, the marriage was dissolved.
 - On 26 May 2017, Mr Mael married his new partner and they have two children, aged 7 and 2.
7. Mr Mael seeks eviction of Ms Kalorib from the property, and damages and costs.
 8. Mr Mael is the sole registered proprietor of the property, which is occupied by Ms Kalorib, and she is unwilling to vacate the property. Further, they obtained a joint loan from the NBV that is secured by a mortgage over the property. Mr Mael has not made any payments towards the loan since January 2015. Despite Ms Kalorib's continuing payments towards the loan, it is in arrears and the NBV has issued notices to seize the property.
 9. Mr Mael's stated reason for seeking Ms Kalorib's eviction is the unpaid loan so he wants her evicted so that he can refinance the loan and complete it. It is not explained in the evidence why Ms Kalorib's eviction is necessary for him to obtain refinancing for the loan.
 10. Ms Kalorib's evidence is that from 2011-2015 she undertook law degree studies which were funded by one then another scholarship. From July 2015-March 2016 she completed her law studies in Fiji. She did not have sufficient funds to repay the loan. Mr Mael did not let her or the NBV know of his change of employment in 2014 and that he would no longer be repaying the loan. She did not find out until June 2015 when the Bank contacted her. She and the Bank agreed that once she returned from Fiji and upon her employment, she would make repayments. In 2016 on her return to Vanuatu, she received both the divorce petition from Mr Mael and the first Notice of Demand from the NBV. She approached the Bank that she would deal with the divorce issue first and the Bank agreed on condition that she would find employment by February 2017. She states that she kept her word and found a job in February 2017. She commenced loan repayments in April 2017.
 11. Mr Mael does not come to the Court with clean hands. His action of ceasing payments towards the loan in January 2015 without putting in place measures to ensure the continued repayment of the loan caused it to fall into arrears. He has not made any payments to the loan since. I conclude that the unpaid loan is a convenient excuse for



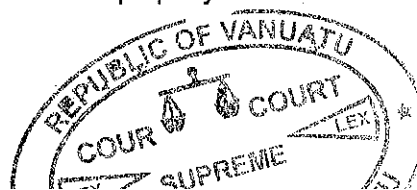
Mr Mael to seek Ms Kalorib's eviction from the property before he takes any steps to settle the loan, although no reason is given in the evidence why her eviction is necessary before he does so.

12. Ms Kalorib evidences that she has negotiated with the NBV to refinance the loan however cannot do so when the title to the property is in Mr Mael's name.
13. Mr Mael asserted in his sworn statements that the property is for "the children" and is an investment for them. This does not ring true compared with Ms Kalorib's evidence. She attached to her sworn statement letters dated 4 December 2015 to their eldest and youngest children from the Public Solicitor, acting for Mr Mael, demanding rent failing which eviction will occur. She also attached Magistrates' Court Orders dated 27 June 2016 purporting to be restraining orders that required her and the two children to vacate the property and a Notice to Quit dated 1 September 2017 addressed to the 3 of them.
14. Further, Mr Mael also stated that the beneficiaries of the investment are 'the children as registered in the Civil Registry'. He goes on to say that the property was 'procured for Family Mael and will rest with Family Mael'. This wording is general enough to include the children from his second marriage. In light of Mr Mael's attempts to remove Ms Kalorib and their children from the property, I do not believe that he is telling the truth that the property is an investment for his and Ms Kalorib's 3 children.
15. Ms Kalorib also evidences that Mr Mael's other previous attempt to evict her and the children from the property was in 2013 when he attempted to sell the property. This resulted in a letter dated 6 February 2014 to Mr Mael from the Public Solicitor (who now acts for Mr Mael) asserting that the property is matrimonial property and it is not proper to sell it without Ms Kalorib's consent.
16. In her Defence, Ms Kalorib disputes that she be evicted from the property on the basis that it is matrimonial property and that she has an equitable interest in the property. Further, it is requested that the Court consider the contribution that she has made.
17. The Court of Appeal defined 'matrimonial property' in *Joli v Joli* [2003] VUCA 3 as:

... [the] assets held by both parties to the marriage at the time of their separation, whether the relevant proprietary interests are legal or equitable in nature.
18. I consider that the property is matrimonial property as it was an asset owned by Mr Mael at the time of their separation in 2010/2011. Further, Mr Mael, Ms Kalorib and their children lived together on the property (I assume since they married in 1990) until Mr Mael left them in 2010/2011.
19. In the circumstances, it would be unjust to evict Ms Kalorib from the property and accordingly I decline and dismiss Mr Mael's Claim.
20. The other matter raised in Ms Kalorib's Defence is that the Court consider the contribution that she has made. Counsel's submissions make clear that this pleading refers to ss 24 and 25 of the Act. Given Mr Mael's two previous attempts and the attempt

in this matter to evict Ms Kalorib and the children from the property, I now consider those provisions.

21. I have the power under s. 24 of the Act to make a property adjustment order adjusting proprietary interests in assets owned by one or both parties. Property adjustment orders are defined in s. 21 of that Act as orders dealing with the property rights available under s. 24 for the purpose of adjusting the financial position of the parties to a marriage and any children of the family on or after the grant of a decree of divorce, nullity of marriage, or judicial separation. Section 25 prescribes the matters to which the Court is to have regard in deciding how to exercise its power under s. 24.
22. The Court's duty pursuant to s. 25 is to have regard to all the circumstances of the case including the contributions made by each party to the welfare of the family, including any contribution made by looking after the home or caring for the family.
23. I consider the following circumstances of the case:
 - The matters set out at para. 6 above.
 - Both parties have salaried income. Mr Mael has had salaried income throughout but chosen not to make any payments towards the loan since January 2015.
 - The property is the only property disclosed by the evidence to be owned by Mr Mael; there is no evidence of any leasehold property owned by Ms Kalorib.
 - Both parties have a financial obligation and responsibility to service the loan as it is a joint loan and secured by the property. However, Mr Mael has chosen not to since January 2015. Moreover, his doing so without putting in place measures to ensure the continued repayment of the loan is what caused the loan to fall into arrears. He willingly ran the risk of losing the property due to default in the loan and it being seized by the NBV. Ms Kalorib was only able to start making payments towards the loan in April 2017 and continues to do so.
 - Mr Mael and Ms Kalorib married in June 1990. They separated in 2010/2011, some 20 years later. Mr Mael left to live elsewhere with his new partner. Mr Mael and Ms Kalorib divorced in February 2017, after nearly 27 years of marriage. Mr Mael married his new partner in May 2017.
 - Mr Mael and Ms Kalorib have an acrimonious relationship, evident in what they say in their sworn statements. That said, Ms Kalorib attributes the breakdown in their relationship to Mr Mael's numerous extra-marital affairs throughout their marriage, his drinking, gambling and domestic violence against her and the children. This is not denied by Mr Mael.
 - Given Mr Mael's previous attempts to evict Ms Kalorib and the children from the property, I do not accept that he was being truthful in his assertion that the property is for the children and is an investment for their future. Given Ms Kalorib has lived with and looked after their children throughout, I believe her assertion that her contributions to the loan are to secure the property for the children.



- Mr Mael's contribution to the welfare of this family (being Ms Kalorib and their three children) was to purchase the property from the National Housing Corporation. He, Ms Kalorib and the children lived together on the property from 1990 (I assume) to when he left in 2010/2011. Since then, the children have lived only with Ms Kalorib. Ms Kalorib evidences that Mr Mael sent money every so often for her and the children's living expenses until 2014. He has not made a contribution since.
- Ms Kalorib's contribution to the welfare of the family is that as a wife, she lived with and looked after Mr Mael, and lived with and looked after the children since their births. She has continued to live with and look after the children since 2010/2011 when Mr Mael left them, and continues to do so. She evidences that since they were young, she was solely responsible for their school fees because Mr Mael said the school that they attended was not of his choice. Mr Mael has not denied this.
- Ms Kalorib's further contribution to the welfare of the family is that she has looked after the property through her continued occupation of it.
- In addition, Ms Kalorib has made payments to the loan since April 2017 and continues to do so.
- Ms Kalorib is willing to refinance the loan but cannot do so with the title solely in Mr Mael's name.
- There is no evidence that the children have the financial capacity to make payments towards the loan. Ms Kalorib does and is willing to do so. I accept her evidence that she will do so for the benefit of the 3 children and that it is an investment for their future.

25. In the circumstances, having regard to the parties' conduct, I consider it just to exercise my power under s. 24 of the Act so as to place Ms Kalorib in the financial position that she would have been if the marriage had not broken down and Mr Mael had properly discharged his financial obligations and responsibilities towards her and their 3 children. I do so by making an order that Mr Mael is to forthwith transfer the property to Ms Kalorib for the benefit of their children Lekita Shirley Mael, William Kalokui Mael and Terrence Mael. This is to enable Ms Kalorib to obtain the refinancing required in relation to the loan and secure the property for the children.

26. The children are all over the age of eighteen however I consider the circumstances of the case constitute special circumstances which justify the making of an order without complying with subs. 29(1) of the Act, pursuant to para. 29(3)(b) of the Act.

D. Result and Decision

27. Leasehold title no. 11/OG33/040 (the 'property') is matrimonial property from Mr Mael and Ms Kalorib's marriage, which lasted from June 1990-February 2017.

28. Accordingly, it would be unjust to evict Ms Kalorib from the property and accordingly I decline and dismiss Mr Mael's Claim.



29. I order pursuant to para. 24(1)(a) of the *Matrimonial Causes Act 1973 (UK)* that the Claimant is to forthwith transfer leasehold title no. 11/OG33/040 to the Defendant Augustine Kalorib for the benefit of their children Lekita Shirley Mael, William Kalokul Mael and Terrence Mael. This is to enable Ms Kalorib to obtain refinancing in relation to the loan and I trust she will take steps to do so forthwith as the transfer of the lease can only be registered with the consent of the mortgagee Bank (either the current mortgagee or other bank which provides Ms Kalorib with the refinancing required).
30. Costs should follow the event. The Claimant is to pay the Defendant's costs as agreed, or taxed by the Master. Once settled, the costs are to be paid within 21 days.

**DATED at Port Vila this 8th day of September 2020
BY THE COURT**

.....
UMTrief
Viran Molisa Trief
Judge

