

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

Judicial Review
Case No. 20/1628 SC/CIVL

BETWEEN: Clarence Ngwele

First Claimant

AND: Teouma Holdings Limited

Second Claimant

AND: The Master of the Supreme Court

Defendant

AND: The BRED (Vanuatu) Limited

Interested Party

Date of Hearing: 20th October 2020
Date of Decision 22nd October 2020
Before: Justice Oliver Saksak
In Attendance: Mr Robert Sugden for the First and Second Claimants
Mr Lennon Huri for the Defendant
Ms Stephanie Mahuk for the Interested Party

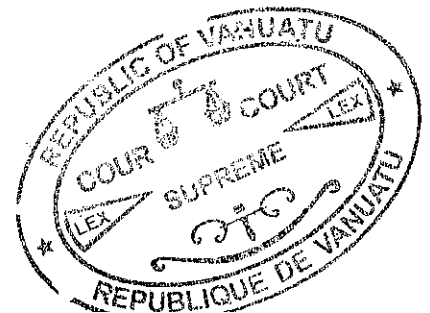
JUDGMENT

Introduction

1. The First and Second Claimants are claiming a prohibition order against the Master of the Supreme Court prohibiting the Master from hearing or taking any further step in Civil Case No. 276 of 2020.
2. The Attorney General opposes the claim and Ms Mahuk of Counsel for the BRED Bank, joins issue with the Attorney General.

Facts

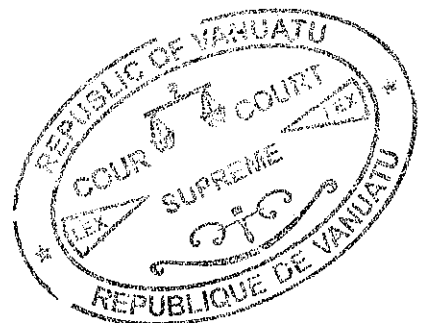
3. The First Claimant is the director of the Second Claimant, a local private company duly registered in Vanuatu.
4. The Second Claimant is alleged to have given a mortgage to BRED (Vanuatu) Limited (the BRED over registered Lease No. 12/0923/394 as security for a bank loan of VT 25.426.416.



5. The Second Claimant obtained the loan in 2013 and executed a mortgage agreement as security for the repayments of the loan. The second claimant defaulted in making repayments.
6. BRED issued a Notice of Demand in accordance with the terms of the Mortgage agreement on 17 January 2020 for payment of the total of VT 34,388,109. This comprised of VT 21,140,715 as the principal amount and VT 13,247,394 as accrued interests.
7. The First and Second Claimant did not make any payments.
8. As the result BRED filed an application pursuant to section 59 of the Land Leases Act on 12th February 2020 seeking orders that among others, BRED as Mortgagee be empowered by such manner it sees fit, to sell and transfer Lease hold Property Title No. 12/0923/394.
9. The claimants now claim the procedures being conducted by the Master on the application by BRED are ultra vires and void.

The Grounds

10. The Claimants claim-
 - (a) The application filed by BRED purports to be a Supreme Court claim but is not, as it does not contain any pleadings to which the claimants can respond to, but merely orders.
 - (b) The application does not comply with the requirements set out in the Civil Procedure Rules and in particular Rules 2.1 a), 2.2, 2.3, 2.6 (1) and 4.3 (c) (1) and (3).



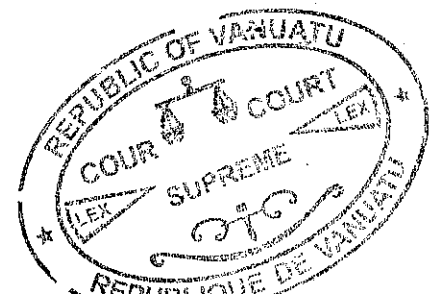
- (c) The Master is conducting inter-partes hearings in relation to the application, but does not intend to allow the claimants to dispute the entitlements of BRED to the orders pursuant to its mortgage and section 59 of the Land Leases Act CAP.163 (the Act), thereby denying natural justice to the claimants.
- (d) The powers given by Parliament under section 59 of the Act is a power given to the Supreme Court to use in exercise of Article 49 (1) of the Constitution, with a consequent right to appeal ultimately to the Court of Appeal pursuant to Article 50.
- (e) The Supreme Court by Article 49 (2) consists of the Chief Justice and up to 12 judges and the Master as not one of the judges of the Supreme Court. As such the power under section 59 of the Act does not extend any jurisdiction to the Master.

Submissions

11. The claimants relied on their written submissions filed by Mr Sugden on 24th September 2020. I heard Mr Sugden orally in respect of those submissions in support of the grounds as stated in the preceding paragraph.
12. Mr Huri for the Defendant relied on the written submissions filed on 16th October 2020. In summary the Attorney General relied on Articles 16 and 49 of the Constitution, section 42 of the Judicial Service and Courts Act [CAP.270], section 59 of the Land Leases Act, Rule 1.7 of the Civil Procedure Rules, and the Practice Directions sections 2(xiii) No. 1 of 2015 to submit that the master has jurisdiction to hear applications in relation to enforcement of mortgages.
13. Ms Mahuk submitted in supported of the Attorney General's submissions and referred the Court to the case authorities of NBV v Waqanitoka [2019] VUSC 143 and Kekei v BRED (Vanuatu) Limited [2018] VUSC.

Discussion

14. Facts are not in dispute but there are legal issues. To resolve the issues before the Court in my view the starting point has to be the Practice Directions No. 1 of 2015. This Document is separated into 2 Parts as Part A and Part B. It has 4 sections altogether.



15. Part A provides for Guidelines as to the Matters within the Master's jurisdiction. Section 1 refers back to section 42 (3) (a) of the Judicial Services and Courts Act which clarifies that the Master or deputy Master.

" (3) (a) may hear and determine all or any of the following matters:

- (i) Application for direction relating to matters of procedure,*
- (ii) Taxation of Bill of costs,*
- (iii) Application or probate,*
- (iv) Preliminary matters in relation to applications for adoption."*

16. Section 2 refers to section 42 (3) (b) and provides that the Master or deputy Master:

"(b) may exercise such of the powers, functions and jurisdiction of the Supreme Court as may be prescribed by the Rules of Court." (my emphasis).

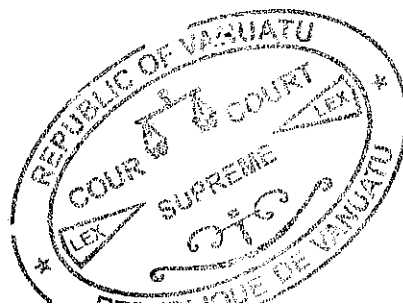
17. Section 2 thereafter specifies the matters which the Master or deputy Master currently has jurisdiction to hear. These are listed from (1) – (XIV).

18. The relevant matter is listed in (XIII) *"Application for approval of sale in foreclosure proceeding (Enforcement of a mortgage)" (my emphasis).*

19. Section 42A of the Judicial Services and Courts Act gives power to the Master or deputy Master to deal with mediation and section 3 of the Practice Direction restates that jurisdiction.

20. Part B, section 4 lists matters over which the master has no jurisdiction.

21. It is obvious there are no specific reference(s) to section 59 of the Land Leases Act in the Practice Direction. The State however submitted that the master's jurisdiction stems from section 2 (XIII): *"Applications for approval of sale in foreclosure proceeding (Enforcement of a mortgage)."*



22. Next I examine the Mortgage agreement annexed as part of RK1 to the sworn statement of Ritchie Kalmet. Clause 17 of the Mortgage Agreement provides for Foreclosure as follows:

"The Mortgagor hereby acknowledges and agrees that in the event of default by the Mortgager here under, the Mortgagee shall have the right to obtain foreclosure of the subject Lease and in particular obtain an order from the Supreme Court of Vanuatu pursuant to section 58 of the Land Leases Act [Cap 163] vesting the Lease in the Mortgagee or any person either absolutely or upon such terms as the Court may determine are just." (my emphasis).

23. The foreclosure provision in the mortgage makes specific reference to section 58 of the Land Leases Act. This provision is clear that in the event of default under the mortgage, the mortgagee shall have the right to obtain foreclosure and to obtain an order from the Supreme Court. And the process of doing so shall be as provided in section 58 of the Act.

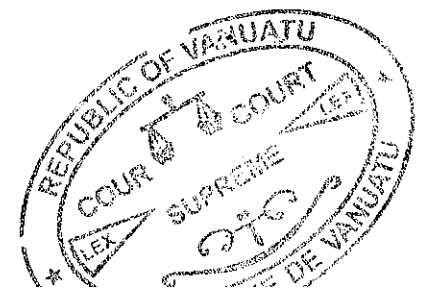
24. Section 58 of the Act states:

"58. Any principal sum or interest due under a mortgage may, subject to the provisions of section 59 (4) be recovered by action in any competent Court." (my emphasis).

25. From the facts in evidence, as at 17th January 2020 when BRED issued its Notice of Demand, it was for the principal debt of VT 21,140,715 and accrued interest of VT 13,247,394. These were debts and interest due under the mortgage between the claimants and BRED. Section 58 of the Act is clear that where that is the case, the process is that an "action" be instituted in the Supreme Court for Orders. This is the first step in the process.

26. After having obtained the orders from the Supreme Court, the Bank, in this case BRED was then required to have the orders of Mortgagee power of sale or "foreclosure" enforced. And that is done by filing an "application" for its enforcement under section 59 of the Act.

27. Section 59 (1) provides for Enforcement of Mortgages:



“I Except as provided in section 46 a mortgage shall be enforced upon application to the Court and not otherwise.” (my emphasis).

28. The application filed on 12th February 2020 is Headed:

“Application Pursuant to Section 59 Land Leases Act [CAP 163].

The first order sought is:

“I An Order that the Applicant, as Mortgagee, be empowered by such manner as it shall deem fit, to sell and transfer the Leasehold Property contained and described or titles 12/0923/394.”

(my underlining).

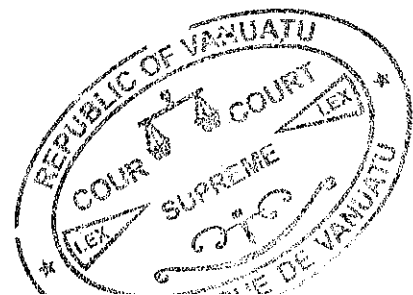
29. The application is contrary to the foreclosure provision in Clause 17 of the Mortgage Agreement and it is not an **“action”** as required by section 58 of the Land Leases Act.

30. The applicant BRED could only apply to enforce the orders sought and obtained in an action brought under section 58 of the Act. The applicant could not apply directly to the Master to get the orders and to enforce them simultaneously, for to do so would be a denial of the claimant’s right to natural justice and a fair process.

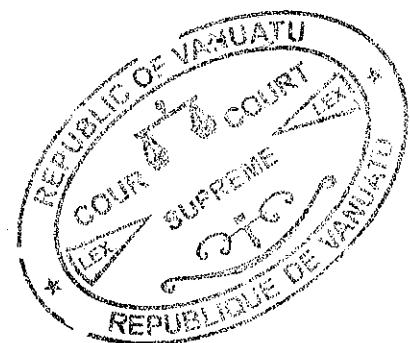
31. The **“application”** referred to in section 59 of the Act is an application to enforce a mortgage. It is not and cannot be an application to obtain mortgagee powers of sale. This is an original jurisdiction that only a judge can exercise.

32. The **“action”** required by section 58 of the Act is equivalent to a **“proceeding”** within the ambit, context and scheme of the Civil Procedure Rules. Within the **“action”** or **“proceeding”** is a claim or statement of claim within the context and scheme of Rule 2.1, 2.2, and 2.3 of the Civil Procedure Rules No. 49 of 2002.

33. Applications within the context and scheme of the rules are for interlocutory orders made during a proceeding or action. See Rule 2.7.



34. The application required by section 59 of the Land Leases Act is not a stand-alone application made as an originating action. It is an application made pursuant to an ongoing and continuing proceeding, but in the enforcement stages, which by Practice Direction No.1 of 2015 falls within section 2 (XIII), and which is allocated to the Master.
35. Section 59 of the Land Leases Act does not provide or facilitate a quicker route or avenue or a license to bank foreclosure on a mortgage agreement. Rather it provides for the process of enforcement after an order of the Supreme Court is first obtained pursuant to an “action filed under section 58 of the Land Leases Act and under clause 17 of the Mortgage Agreement.
36. Ms Mahuk referred to and relied on the cases of **NBV v Waqanitoka** [2019] VUSC 143 and **Serah Kekei v Bred** CC 18/1815. Those cases are persuasive but do not bind my Court. The cases are distinguishable. NBV’s case was unchallenged as the defendants were never present before the Master to argue their application. **Serah kekei’s** case was an appeal which is now rested because the judge’s decision is final. She has been denied the right to appeal to the Court of Appeal. I beg to differ from the Master and the judge in those two cases.
37. Finally, I am persuaded by the submissions of Mr Sugden to accept his conclusions that applications under section 59 (1) of the Land Leases Act must be governed by the Civil Procedure Rules. Further that pursuant to Clause 17 of the Mortgage agreement, foreclosure is began by an action under section 58 of the Act. That requires a statement of claim with pleadings to which a response and defence are required from defendants. This action is filed before the Supreme Court and is an originating action within the jurisdiction of a judge.
38. Only after a judge of the Supreme Court hears the claim and grants orders in favour of the Mortgagee, can the matter proceed to enforcement before the Master by way of applications under section 59 of the Act.



39. Accordingly I declare that the application by BRED filed on 12th February 2020 is void and that Civil Case 276 of 2020 has not been validly commenced.
40. The order sought is hereby granted. The defendant herein is hereby prohibited from hearing or taking any further steps in Civil Case No. 276 of 2020.
41. I consider it is not necessary to consider the other issues raised by Mr Sugden.
42. On the question of costs, the Claimants are entitled to their costs of the proceeding in this Court on the standard basis as agreed, or taxed.

DATED at Port Vila this 22nd day of October 2020

BY THE COURT


OLIVER.A.SAKSAK

Judge

