

BETWEEN: REMO WAEN
THOMAS NGISA
KENNY NGISA
YANKE COLEN
Appellants

AND: ANDERSON WELLS
PATRICK WELLS
EDWIN WELLS
NORRIS WELLS
Respondents

Date of Hearing: 11 August 2023

Coram: *Hon Chief Justice V Lunabek*
Hon Justice JW von Doussa
Hon Justice R Asher
Hon. Justice OA Saksak
Hon Justice D Aru
Hon Justice E Goldsbrough

Counsel: *Appellants in persons*
R Tevi for the Respondents

Date of Decision: 18 August 2023

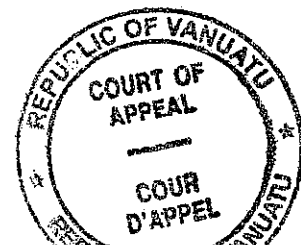
JUDGMENT OF THE COURT

1. The appellants have two applications before the Court of Appeal seeking relief. Both arise out of the same ongoing dispute between the parties over custom ownership of land, and we deal with both matters together. The first seeks leave to appeal out of time against a refusal of a Supreme Court judge to set aside a default judgment entered on 11 August 2022 in Civil Case 20/1274. The second so-called appeal is against the refusal of the Deputy Master to grant a stay of enforcement proceedings relating to an adverse costs order made against the appellants on 2 February 2023 when their application to set aside the default judgment was refused. The second matter no longer needs this court's attention. Since the papers were lodged a judge in the Supreme Court has granted a stay of the enforcement proceedings pending the outcome of the first application.
2. In both matters papers filed by the appellants have been prepared by them without the assistance of lawyers. The papers are confused and show a misunderstanding about past events and about the situation in which they presently find themselves. We have endeavoured to clarify what has



happened, relying partly on information in the papers filed in this Court and partly from the Supreme Court file in CC 20/1274.

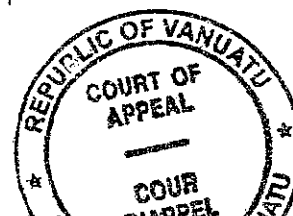
3. It is convenient to refer to the appellants as the Waen Family and the respondents as the Wells Family. Both families have been in dispute for many years over the boundary of custom land ownership located in the eastern part of Santo.
4. In 2015 the Wells Family sought an order in the Magistrates Court against the Waen Family to prevent them trespassing on the land. The Waen Family filed a defence alleging that they had been declared custom owners by a Supenatavuitano Council of Chiefs. These proceedings were referred to the Supreme Court and became Civil Case 17-1083. The Supreme Court pointed out that only a competent Court set up by law can determine custom ownership; *Valele Family v Touru [2002] VUCA 3*. There being no such decision the Wells Family lacked standing to bring their claim, and it was dismissed.
5. It now appears that there were proceedings on foot in the Island Court in Land Case 3 of 1998 concerning the land. Those proceedings remain unresolved and have now been brought under the provisions of the Custom Land Management Act, 2013. Notwithstanding the proceedings in Land Case 3 of 1998 the Wells Family obtained rural agricultural lease 04/1832/001 registered on 18 January 2016. The lessor is Anderson Wells Vaso and the Wells Family are the lessees. The lease covers the disputed land.
6. On 25 May 2020 the Wells Family claiming as lessees issued further proceedings in the Supreme Court (CC 1274/2020) alleging that in May 2020 the Waen Family trespassed onto their lease property and caused disturbances by threatening their servants and placing *namele* leaves on the property. A statement of claim was filed on 2 June 2020 along with an *ex parte* application for restraining orders which were made against the Waen Family on 3 June 2020.
7. In their statement of claim, the Wells Family alleged they had suffered damages and sought the following relief:
 - a) VT250,000 for trespass;
 - b) VT250,000 for threatening their servants;
 - c) VT1,500,000 for financial loss;
 - d) VT200,000 for General loss;
 - e) Interest at 5% per annum; and
 - f) Costs.
8. The Waen Family filed a defence pleading that as there was no declaration of custom ownership of the area covered by the lease the Wells Family lack standing to bring their claim.
9. On 14 August 2020 the Wells Family applied for a default judgment on their monetary claims totalling VT2,200,000 plus interest. On 17th August 2020 a default judgment was entered in favour of the Wells Family for damages to be assessed. How that occurred, as there was a defence on the file is not apparent.



10. The Waen Family obtained legal assistance from the Public Solicitor. On 25 September 2020 they applied to set aside the default judgment. On 1 April 2021 the default judgment was set aside and a series of conferences then followed.
11. On 3 September 2021 the Wells Family were given leave to file an application for summary judgment and directions were given for the filing of statements by both sides.
12. On 1 March 2022 the Wells Family filed an application for summary judgment but the application did not specify what particular relief was sought. The statement in support filed by Anderson Wells referred to the restraining order made back on 3 June 2020 and deposed that *"the defendants do not have an arguable case to answer to the Court as they do not challenge our lease title."*
13. On 20 June 2022 the Public Solicitor ceased to act for the Waen Family. A letter on the Court file from the Public Solicitor indicates that the Waen Family were told that to defend the action they would need to bring proceedings challenging the lease held by the Wells Family either by applying to have it set aside or by reviewing the decision to grant it. The Waen Family would need to seek private legal advice for these purposes.
14. Sworn statements were filed by the Waen Family in opposition to the application for summary judgment. On 11 August 2022 the application was listed for hearing. There was no appearance by the Waen Family. The Court was satisfied that the Waen Family had no real prospect of defending their claim and entered judgment which reads;

"Result

Accordingly the application for summary judgment is granted. The claimants are also entitled to costs to be agreed or taxed."
15. That decision was served on 16 August 2022. The Waen Family acting without legal assistance, filed an application to set aside the summary judgment on the ground that they had not received any communication from the Public Solicitor about the hearing and did not receive the Wells Family statement in support.
16. There is a dispute whether the notice of the application and supporting statements were given to the Waen Family. Patrick Wells says they were given to a relative of one of the Waen Family with instructions to pass the papers on. For present purposes there is no need to resolve this dispute.
17. The application to set aside the summary judgment came on for hearing on 3 February 2023. The Court refused to set aside the judgement. The Court held that in the absence of a formal declaration of custom ownership by a Court the Waen Family could not defeat the lease. The application was dismissed with costs fixed at VT50,000.
18. Enforcement proceedings to cover those costs were taken. The Deputy Master refused to stay the enforcement proceedings pending the appeal. Hence the second application to this Court.



19. In support of their appeal against the summary judgment entered on 11 August 2020, the Waen Family assert, as they always have, that they are the true custom owners and that their rights have not been recognised and enforced by the legal system. They call in aid Article 47(1) of the Constitution which provides:

"The administration of justice is vested in the judiciary who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the matter according to a substantial justice and whenever possible in conformity with custom."

20. The Waen Family argument completely overlooks that there are applicable rules of law which govern their situation which Courts in the Republic are obliged by Article 47 (1) to apply. In particular the Land Leases Act [CAP. 163] provides for the registration of leases, and sets out the rights which in law attach to the proprietor of a leasehold interest. That Act also sets out the circumstances in which a registered lease can be set aside on proof that its registration was obtained, made or omitted by fraud or mistake; see section 100(1).

The Appeal

21. Whilst the Wells Family remain the registered proprietors of their lease, the Waen Family's asserted claim to custom ownership cannot defeat the Wells Family's rights as lessee.
22. Against this background we turn to the appeal now before this Court which, in effect, seeks to set aside the summary judgment.
23. As we have recorded above the stated result of that judgment was simply:

"The application for summary judgment is granted."

24. No more formal or detailed judgment has been entered. It is not clear exactly what rights are being granted by this judgment.
25. The ex parte restraining orders made on 3 June 2020 were still in force when the summary judgment was entered. In the normal course a Court would deal with continuing interlocutory orders and injunctions, and consider whether to grant permanent relief appropriate to the situation existing at that time of final judgment. The summary judgment fails to address this although the implication from the pleadings and the supporting statements is that injunctive relief is still sought. A final judgment should state the extent of any injunctive relief granted with sufficient precision that it can be enforced in the event of an alleged future breach.
26. In so far as the summary judgment purports to award monetary relief, was the judgment for each or only some of the claimed amounts? This is not stated. But whatever the meaning of the judgment, the statements filed in support of the application for summary judgment failed to



provide any evidence at all of loss to enable it to be quantified, and failed to show circumstances from which general damages could be assessed.

27. In our opinion the summary judgment is deficient and must be set aside. It lacks certainty, and in so far as it was intended to award monetary compensation no loss has been assessed. To this end, leave extending time to appeal will be granted.
28. The matter should be returned to the Supreme Court for further consideration, in particular to consider what monetary relief if any is now sought and to assess that loss. In so far as restraining orders are sought it may be necessary to amend the pleadings to claim a permanent injunction.
29. The appeal will be allowed and the consequential orders for costs will be set aside. As the Waen Family has acted as litigants in person in their applications to this Court they are entitled only to the Court fees they have incurred by way of costs.
30. We have set out the history of this matter at length as it is probable that litigation between the parties will be ongoing. We also repeat again that whilst the lease remains registered the Waen Family must respect the rights of the leaseholders. If they wish to challenge the lease they must take action themselves, and to that end it will be difficult for them to do so without proper legal assistance which they must arrange with a qualified lawyer. Further, if there are still matters to be resolved in the Island Court or under the Custom Land Management Act, they should take steps to have the proceedings progressed. In short, the Waen Family must take action themselves, and they need legal assistance to do so.
31. The orders of the Court:
 - a) Extension of time for filing an appeal against the summary judgment entered on 11th August 2023 granted;
 - b) Appeal allowed.
 - c) The summary judgment is set aside.
 - d) The respondents are to pay the appellants' costs equal to the appellants' out of pocket Court fees incurred in filing the two applications before the Court.

DATED at Port Vila, this 18th day of August, 2023.

BY THE COURT



Hon. Chief Justice Vincent Lunbabe

