

BETWEEN: SAMUEL TOARA
Appellant

**AND: MARIANE LOUGHMAN trading as NM
TRADING**
Respondent

Date of Hearing: 6 August 2024

Before: Hon. Chief Justice V. Lunabek
Hon. Justice J. Mansfield
Hon. Justice R. Young
Hon. Justice O. Saksak
Hon. Justice D. Aru
Hon. Justice V.M. Trief

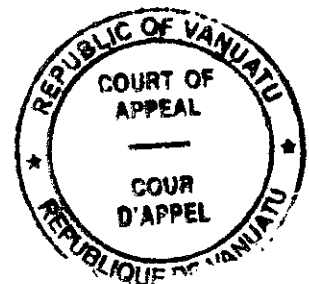
In Attendance: S.T. Joel for the Appellant
A. Kalmet for the Respondent

Date of Decision: 16 August 2024

JUDGMENT OF THE COURT

A. Introduction

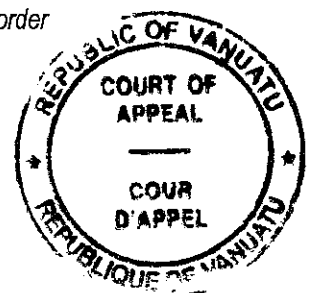
1. This was an appeal against the Supreme Court judgment dated 26 March 2024 granting an order for the eviction of the appellant Samuel Toara from lease title no. 12/0922/009 owned by the respondent Mariane Loughman trading as NM Trading and Iesul Nalau (deceased): *Loughman v Toara* [2024] VUSC 41.
2. It was alleged in Mr Toara's Defence that he occupied the leased land from 1992 with the express consent of the custom owner and therefore had an overriding interest pursuant to s. 17(g) of the *Land Leases Act* [CAP. 163] (the 'Act'). In addition, that sufficient enquiry about any actual occupation of the land had not been made prior to execution of the lease. Finally, that he would file a new claim under s. 100 of the Act to challenge the first registration of the lease and its transfer to Mrs Loughman as having been obtained by fraud or mistake.



3. Both parties filed sworn statements and the matter was listed for trial. A notice to cross-examine Mr Toara was filed on behalf of Mrs Loughman. No such notice was filed on Mr Toara's behalf to cross-examine Mrs Loughman's witnesses.
4. Mr Toara did not turn up for the trial. His counsel Mr Fiuka had not brought his file to Court so the matter was stood down to allow him to get the file. On resumption of the hearing, Mr Fiuka confirmed that Mr Toara had been told of the hearing date.
5. The primary Judge held as follows at [6]-[10] of the judgment:
 6. *Satisfied that the defendant has been told of the hearing today, the matter proceeded. The sworn statements relied upon are that of the claimant, her husband Bob, the officer who accompanied Tom Loughman on site visits in the due diligence process, Rono Davide, the Manager of the firm of Estate Agents involved in the transaction, Catherine Boudier -Contant and Kathy Matariki, ANZ Bank Officer. None of the evidence was challenged given the lack of instructions from the defendant to his counsel on how to do so.*
 7. *The evidence for the defendant was nothing but his sworn statement. It is in evidence, as it was filed in these proceedings, but notice to cross-examine was given, and the defendant was not available for cross-examination. That reduces the probative value of his statement, given that it could not be the subject of cross-examination.*

Discussion

8. *The evidence for the claimant is unchallenged. A lease was executed after due diligence failed to throw up any actual occupation of the land, which might give rise to a section 17(g) right. There was no sign of actual occupation. The defendant cannot rely upon that provision in the Land Leases Act as a defence. Other than that, the defendant puts forward no other defence. On the evidence, when the lease was executed, about which there was no challenge, the due diligence procedure undertaken by the claimant, her family, and others showed no pre-existing overriding interest and therefore entitled her to all the rights given to a lease, occupation, and indefeasible title.*
9. *In his sworn statement, the defendant alleges fraud in the execution of the lease and indicates that the lease will be challenged on that ground, but nothing has come of that threat. He asserts his overriding interest based on a prior arrangement with a person he says is the custom owner. No evidence from that alleged custom owner is in evidence, and the authority relied upon granting ownership to that individual is the subject of a stay and pending appeal. Notice to vacate the premises was given to the defendant after the lease in favour of the claimant had been executed after he placed namele leaves on the property when he saw the claimant starting work on her land.*
10. *In the event a finding is made in favour of the claimant and an order evicting the defendant from property title no. 12/0922/009 and an order*



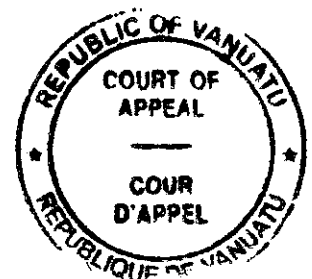
restraining him from re-entering the property or interfering with her quiet and peaceful enjoyment of the land. An order for costs is made for VT 100,000 against the defendant, payable to the claimant, and an Enforcement hearing is scheduled for 11.00 a.m. on 29 April 2024...

B. Appeal Grounds and Submissions

6. The appeal was advanced on two grounds. First, that the Court was wrong to proceed with trial given the obvious lack of Mr Toara's former counsel Mr Fiuka's preparedness for trial, and that there was confusion whether Mr Toara had been told of the trial date. Secondly, that given the issues raised in the Defence about occupation of the leased land, the Judge should have adjourned the trial for a full evidential hearing.
7. The respondent's counsel Mr Kalmet submitted in response that the trial date was given 5 months in advance therefore Mr Fiuka had had more than ample time to alert the Court as to any difficulties. He submitted that on the trial date itself, the primary Judge did give Mr Fiuka an opportunity to explain why Mr Toara was not there and also an adjournment to retrieve his file and confirm whether or not Mr Toara had been informed of the trial date. Mr Kalmet also submitted that the Judge considered both parties' evidence and reached his decision as set out at [7]-[9] of the Judgment and it would not have made any difference if Mr Toara had been present at the trial.

C. Discussion

8. We deal first with the submission that the Court was wrong to proceed with the trial when former counsel Mr Fiuka was obviously not prepared for trial. Appellant's counsel Mr Joel submitted that no notice of intention to cross-examine Mrs Loughman's witnesses had been filed, Mr Fiuka attended Court without his file, there was an adjournment to allow him to collect his file from his office and the contradictory information from Mr Fiuka as to whether Mr Toara had been advised of the trial date shows that Mr Fiuka was not prepared for trial.
9. On the other hand, Mr Kalmet is correct in his submission that the parties had had 5 months to prepare for trial. Counsel for both parties were present at the pre-trial conference held on 15 September 2023 when the primary Judge set the trial date of 27 February 2024. The parties had therefore had 5 months' notice of the trial date. They had had ample time in which to prepare for trial. Mr Toara now raises Mr Fiuka's lack of preparedness for trial however Mr Fiuka did not at any time apply on Mr Toara's behalf to adjourn the trial because he or Mr Toara were not prepared for trial. There is no record of Mr Fiuka otherwise raising with the Court that he had difficulties preparing for trial therefore the matter should be adjourned. As there was no application made for adjournment, no error has been shown in the Court proceeding with the trial on 27 February 2024.



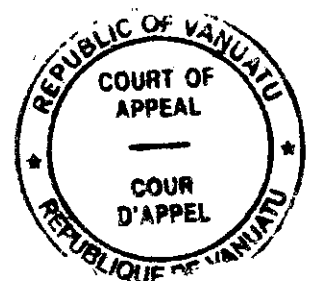
10. The inter-related ground of appeal was that there was confusion whether Mr Fiuka had told Mr Toara the trial date. Mr Fiuka indicated to the Court that he believed that he had told Mr Toara the trial date but had nothing to support that as he had not brought his client file with him to Court. The primary Judge then adjourned the matter to allow Mr Fiuka to get his file from his office.
11. When the hearing resumed, Mr Fiuka confirmed that Mr Toara had been told the trial date. Mr Fiuka told the primary Judge this having had the opportunity to get his client file and to confirm that from his file. The Court was entitled to rely upon what Mr Fiuka said. Accordingly, no error has been shown in the Court proceeding with the trial after Mr Fiuka told the Judge that Mr Toara had been told of the trial date.
12. We add that these grounds of appeal alleged lack of preparedness by Mr Toara's former counsel Mr Fiuka and what his legal advice to Mr Toara was. Where allegations are made as to a lawyer's conduct, as has occurred in these grounds of appeal, a waiver of legal professional privilege must be obtained from the client as well as a sworn statement from the lawyer responding to the allegations made against him or her: *Willy v Public Service Commission* [2023] VUCA 3 at [6] & [15]; *Wikeley v Trustees International Ltd* [2019] VUCA 74 at [25]; *Saltukro v Teaching Service Commission* [2021] VUCA 11 at [29]-[32]; *Siply v Public Prosecutor* [2015] VUCA 50 at [5]; and *Morkro v Public Prosecutor* [2018] VUCA 40 at [11] & [20]. This ensures procedural fairness as the lawyer concerned will have the opportunity to respond to the allegations made against him or her, and the allegations could be looked at in the light of the instructions received and advice given. However, Mr Toara did not grant a waiver of legal professional privilege and did not obtain a sworn statement from Mr Fiuka therefore this Court has considered the allegations made on the material before it.
13. As to the remaining ground of appeal, Mr Joel submitted that given the issues raised in the Defence about occupation of the leased land, the Judge should have adjourned the trial for a full evidential hearing. The allegations in the Defence included that Mr Toara had occupied the land since 1992 pursuant to an agreement with the custom owner, and that a visit to the leased land prior to registration of the lease would have uncovered his occupation of the land which gave rise to an overriding interest under para. 17(g) of the Act which provides as follows:

17. *Unless the contrary is expressed in the register, the proprietor of a registered lease shall hold such lease subject to such of the following overriding liabilities, rights and interests as may, for the time being, subsist and affect the same, without their being noted on the register –*

...

(g) *the rights of a person in actual occupation of land save where enquiry is made of such person and the rights are not disclosed; and*

...



Provided that the Director may direct registration of any of the liabilities rights and interests herein before defined in such manner as he may think fit.

14. There was evidence from both parties as to the matters pleaded in the Defence. Mrs Loughman's witnesses' evidence was that the lease was executed after due diligence failed to uncover any actual occupation of the land. There was no evidence from Mr Toara contradicting this. The primary Judge took this into account in the judgment at [8] and concluded that Mr Toara could not rely upon para. 17(g) of the Act as a defence. As to the alleged agreement with the custom owner, the primary Judge set out in the judgment at [9] that there was no evidence from the alleged custom owner in evidence, and the authority relied upon granting ownership to that individual is the subject of a stay and is pending appeal. The primary Judge considered, therefore, all of the issues raised in the Defence.
15. It was also pleaded in the Defence that Mr Toara would file separate proceedings under s. 100 of the Act to challenge the registration of the lease and its transfer to Mrs Loughman. Mr Toara still has not done so. The primary Judge recorded this in the judgment at [9].
16. There was no application made on Mr Toara's behalf to file more evidence in support of his defence and there was no application made to adjourn the trial. There was no application made at trial to cross-examine Mrs Loughman's witnesses. A notice to cross-examine them had not been filed. A full evidential hearing occurred, in circumstances where no application was ever made to adjourn the trial. Accordingly, there is no merit to the second ground of the appeal and it is dismissed.

D. Result and Decision

17. For the reasons given, the appeal is dismissed.
18. The Appellant is to pay the Respondent's costs fixed at VT50,000 within 28 days.

DATED at Port Vila, this 16th day of August, 2024

BY THE COURT

Hon. Chief Justice Vincent Lunabek

