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

Civil Case No.1335 of 2016

BETWEEN: LY NU LOUNG
Claimant

AND: CHEN JINQIU
First Defendant

AND: THE REPUBLIC OF VANUATU
Second Defendant

AND: JEAN MARC PIERRE
Third Defendant

AND: LOUNG FONG
Second Counter-Defendant

AND: BRED BANK (VANUATU) LIMITED
Interested Party

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mr. N. Morrison for the Claimant*
Mr. R. Sugden for the First Defendant
Mr. H. Tabi for the State
Mr. A. Godden for JM Pierre
Mr. J. L. Napuati for Luong Fong
Mr. J. Malcolm for Bred Bank (no appearance)

Date of Ruling: *17 February 2017*

RULING

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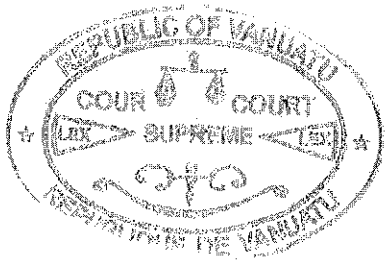
1. There is before the Court three (3) separate applications filed by the first defendant **viz**: (A) seeking the postponement of the trial dates fixed in the case; (B) leave to amend his pleadings; and (C) security for costs. The applications and supporting sworn statements were filed on 1st February 2017 (adjournment) and 08 February 2017 (leave to amend and security for costs).

2. All three (3) applications were heard on 9 February 2017 and are opposed by counsel for the claimant.



(A) Application for leave to amend defence and counterclaim

3. Rule 4.11 of the Civil Procedure Rules relevantly provides:

> *"(1) A party may amend a statement of the case to:*
>
> *(a) better identify the issues between the parties; or*
> *(b) correct a mistake or defect; or*
> *(c) provide better facts about each issue.*
>
> *(2) The amendment may be made:*
> *(a) with the leave of the court; and*
> *(b) at any stage of the proceeding.*
>
> *(1) In deciding whether to allow an amendment, the court must have regard to whether another party would be prejudiced in a way that cannot be remedied by:*
>
> *(a) awarding costs; or*
> *(b) extending the time for anything to be done; or*
> *(c) adjourning the proceedings."*

4. It is clear from subrule (2) that amending one's case is not a right but a matter of leave for the court. Furthermore subrule (3) requires the court to consider any prejudice to another party that cannot be remedied by awarding costs, extending the time, or adjourning the proceedings. The present application was filed on 8 February 2017 barely a month away from the trial dates that were fixed on 12 December 2016.

5. Having said that I accept that the proposed amendments especially to the counterclaim comes within the ambit of Rule 4.11(1) and mindful that an amendment may be made at any stage of the proceeding and in the absence of any real opposition, I grant the application and order the first defendant to pay any costs arising out of the amendment.

6. The first defendant's amended defence and amended counterclaim (if not already served) is to be served on all counter-defendants by 4pm today and all counter-defendants are ordered to file and serve defences to the amended counterclaim by 28th February 2017 and any additional sworn statement(s) in support of the defence to the amended counterclaim is to be filed and served by 6th March 2017.

(B) Security for costs

7. In his application the first defendant seeks security of VT2,5 million for his estimated costs on the sole basis that the claimant is "*ordinarily resident outside Vanuatu in the United States of America*". There is no suggestion of impecuniosity or absence of sufficient assets belonging to the claimant in Vanuatu to meet the applicant's costs in the event that his claim succeeds.

8. Although Rule 15.19 (d) lists a claimant who "*is ordinarily resident outside Vanuatu*" as a ground for ordering security for costs, the grant of the order remains discretionary and Rule 15.20 directs the court's attention to matters that the court may have regard to in exercising its discretion including the genuineness and prospects of success of the proceedings and whether the order would be oppressive or would stifle the proceedings.

9. The applicant's so-called "*proof*" of the singular ground advanced is said to be the sworn statement of Millie Ogden which no-where deposes that the claimant is "*ordinarily resident outside Vanuatu*". The expression "*ordinarily resident outside Vanuatu*" is undefined and is to be distinguished from a person who is a permanent or full-time resident of Vanuatu. The adjective "*ordinarily*" reinforces the distinction and makes clear that mere absence from Vanuatu is not sufficient to disprove residency. It is invariably a question of fact and degree on which the applicant has failed to adduce any evidence.

10. In this latter regard claimant's counsel disclosed during the hearing of the application that the claimant had a permanent residency permit for Vanuatu.

11. In passing I also note that the first defendant seeks as part of the relief against the claimant in the event that he succeeds in his counterclaim, "*damages for breach of contract to be registered as a charge against* (lease titles) *071 and 070 ...*" which real estate assets the claimant presumably owns in Vanuatu.

12. Given the requirements of Rule 15.18(2) and the unexplained very late application and the absence of any evidence or submissions addressing the numerous matters in Rule 15.20 and given that the claimant has already made arrangements to attend the trial at considerable personal cost and expense, I exercise my discretion by refusing the application for security for costs.

(C) <u>Application for Postponement of Trial Dates</u>

13. On 11 October 2016 this Court in the presence of the then counsel for the first defendant (Mr. Hurley), adjourned the matter to 12 December 2016 at 9.30 a.m. to "*fix trial dates for early 2017*".

14. On 12 December 2016 again in the presence and with the concurrence of Mr. Hurley trial dates were fixed for 3 months hence on 07th to 10th March 2017. At the same conference the Court gave pre-trial orders as well as directions concerning a tape recording that was attached to a sworn statement filed by Millie Ogden the claimant's daughter on 6 December 2016. The statement had attached to it 20 annexures (***see:*** Orders 1 and 2) including a 34 page typed English translation of the tape recording (***see:*** MO "*10*").

15. On the same day the first defendant instructed Mr. Sugden in this case. A week later Mr. Hurley filed a formal Notice of Ceasing to Act for the first defendant. Two weeks later on 03 January 2017 Mr. Sugden filed a Notice of Beginning to Act for the first defendant. On 22 December 2016 Mr. Sugden left for overseas and returned on 26 January 2017.

16. The grounds advanced for the adjournment refers to the withdrawal of Mr. Hurley and the receipt of instructions that occurred on 12 December 2016 and thereafter obtaining the relevant files and materials from Mr. Hurley by 21 December 2016. There is also reference to the sworn statement of Millie Ogden filed on 6 December 2016 including unidentified factual material not previously available and an unverified English transcript of the tape recording and lastly, a ground that counsel has insufficient time to prepare for the trial which had been fixed 6 weeks earlier and which wasn't to take place until 5 weeks hence. No explanation or clarification has been given for defence counsel's absence overseas for over 4 weeks after obtaining the first defendant's files.

17. The claimant opposes the adjournment application on the basis that the trial dates were fixed in mid-December 2016 with the agreement of the first defendant's then counsel and travel tickets for the claimant and her accompanying children were booked and paid for on 6 January 2017. The claimant's health is also deteriorating due to a progressive illness (Alzheimer's disease) requiring her to be accompanied on her travels by her sons who in turn have to re-arrange their affairs to be available for the duration of the claimant's travels.

18. During the hearing of the application, when asked by the Court, defence counsel was unable to give a firm commitment that the first defendant agreed to meet any additional costs that might be incurred by the claimant and her accompanying children having to alter their travel dates from USA to Vanuatu via Fiji (return) should an adjournment be granted. That was unfortunate.

19. This is a case that has had a lengthy gestation and a somewhat chequered court history including a judgment of the Court of Appeal in related proceedings in Civil Appeal Case No. 16/922 Loung Fong v. Chen Jinqui and others which clearly involved some of the parties to the present case. It was also concerned with a lease title 03/0183/07/071 which is the subject matter of the present claim. There is also a related Civil Case No. 15/142 an eviction action which was consolidated with the present case involving the claimant and her estranged husband Luong Fong who was added as a defendant to the original claim filed in the present proceedings after consolidation.

20. The present claim in its amended form invokes the court's power under Section 100 of the Land Leases Act and alleges amongst others, negligence, mistake, fraud and collusion between the defendants to secure the registration of the

transfer of a leasehold title to the first defendant including the wrongful withholding and mistaken removal of cautions lodged on the claimant's behalf before registration of the first defendant's transfer. The claim seeks rectification of the first defendant's leasehold title and damages against the defendants jointly and severally.

21. If I may say so this is not an unusual or unknown type of claim in this Court nor are the pleaded facts overly complex albeit that they extend over a lengthy period of time dating back to 1982. Whatsmore the first defendant has filed a defence to the amended claim denying the claimant's entitlement to any relief and invoking the provisions of Section 100(2) of the Land Leases Act as a bona fide purchaser for value without notice of the disputed leasehold title. Noteworthy in the defence is the assertion in almost all paragraphs that: "*... no allegations are made against the first defendant and he is not required to and does not plead to it*".

22. The first defendant's counterclaim repeats the circumstances surrounding the first defendant's acquisition of the disputed leasehold title and seeks an order that the claimant and her estranged husband (the second counter defendant) jointly and severally pay him the sum of all his losses and damages to be assessed. The counterclaimant nowhere pleads a positive cause of action against the counter-defendants other than to refer to the uncertain future event of the claimant succeeding in her claim and/or the first defendant being unsuccessful in his defence.

23. The future event if I may say so is, at this stage, a mere possibility and does not provide the first defendant with a cause of action or any basis for a valid counterclaim. This is easily demonstrated by considering the alternate possibility of the claimant failing in her claim, then, presumably, the condition precedent to the pleaded counterclaim would fail along with it.

24. In this regard Rule 4.8(1) relevantly provides that if a defendant wants to make a claim against the claimant (a "*counterclaim*") he must include details of it in the defence. In my view the counterclaim envisaged by the Rule is one that exists notwithstanding the original claim and is capable of being pursued independently of it whatever might be the outcome of the original claim. In other words a counterclaim that depends and is conditional on the result of the original claim is not a valid pre-existing "*claim against the claimant*" within the contemplation of the Rule. Furthermore in the present inchoate circumstances, the first defendant cannot be said to have sustained or suffered any loss or damages nor can it be said that a yet-to-be delivered judgment of this court is attributable to the claimant to make her legally liable for its consequences.

25. The Court's power of rectification under Section 100(1) of the Land Leases Act is discretionary ("*may*") and is subjected to the provisions of subsection (2). A

finding of fraud or mistake is merely one factor for the Court to consider along with the protective provisions of subsection (2). Needless to say if the claim succeeds and the first defendant's title is ordered to be rectified or cancelled in the present case, the court would necessarily have concluded that the first defendant was incriminated in the proven mistake or fraud or had substantially contributed to it by his own neglect or default. In those circumstances the first defendant would have no possible counterclaim against the claimant.

26. After considering the application and the competing submissions and mindful that defence counsel received instructions on 12 December 2016 and despite being aware of the trial dates and after obtaining the first defendant's files from his previous lawyer, defence counsel nevertheless decided to go overseas for over a month between 22 December 2016 and 26 January 2017, I refuse the application to postpone the trial dates.

27. In summary, the application for leave to amend is granted on terms. The applications for security for costs and for a postponement of the trial dates are refused. The claimant is awarded standard costs of successfully opposing the first defendant's applications.

DATED at Port Vila, this 17th day of February, 2017.

BY THE COURT

D. V. FATIAKI
Judge.