

BETWEEN: NATIONAL BANK OF VANUATU
LIMITED
Claimant

AND: 1. ESTATE OF THE LATE COLIN
PIERRE VENTER
2. RITANA BRENDA JEURSEN
Defendants

Date of hearing: 25th October, 2019
Delivered: 12th November, 2019
Before: *The Master Cybelle Cenac-Dantes*
In Attendance: *Mark Hurley counsel for the claimant,*
Mark Fleming counsel for the second
defendant

JUDGMENT

Headnote

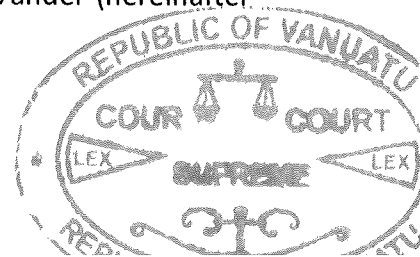
Application for substituted service - Service on estate of deceased - Request for default judgment for non-money orders - Entitlement to a default judgment against a defaulting defendant and a non-defaulting defendant

INTRODUCTION

1. This is an application filed on the 1st October, 2019 requesting default judgment against both defendants following an order of the court to serve the defendants by substituted service. The second defendant argues that she could not and does not accept service for the first defendant.

CLAIMANT'S CASE

2. The claimant obtained an order from this court granting leave to serve the defendant in her personal capacity and for the estate of Pierre Vander (hereinafter called "the deceased") via email.



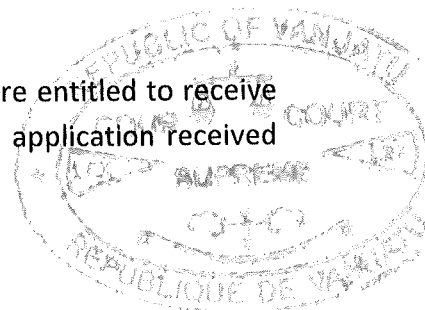
3. The basis for having requested that the second defendant be served for the estate of the deceased was twofold: (1) she is a joint proprietor with the first defendant of the leasehold and (2) by her admission, she is the named executor of the Will of the deceased.
4. The claimant filed a request for default judgment for a section 59 order under the Land Leases Act on the ground that there was proper service and that the defendants had not put in a defence within time.

SECOND DEFENDANT'S CASE

5. The second defendant states that while she can answer for herself, she is unable to accept service for the defendant as she has renounced her executorship, and more so, that she is not a joint proprietor with the first defendant, but a tenant in common.
6. She argues that because the circumstances of her case and that of the deceased are intertwined, the justice of the case demands that default judgment should not be entered against the deceased's estate as she has filed a defence, which must be ventilated, and any judgment against the first defendant would affect her ability to adequately defend herself if the leasehold is subject to a power of sale order without contest.

FACTS

7. The Supreme Court Claim was filed on the 8th August, 2019 with sworn statement in support, and exhibits attached. Simultaneously with the claim, an application was filed with sworn statement in support, for leave to serve the defendants outside the jurisdiction. The first defendant had died about the middle of this year and the second defendant was living in South Africa. Leave was granted on the 29th August, 2019.
8. The second defendant filed a defence in the Santo Registry on the 24th September, 2019, 3 days shy of the expiration date. The account of counsel for the claimant is that they were unaware of, and were not served with this defence before the 27th September. The request for default judgment was consequently filed on the 1st October, with sworn statement in support. The matter was listed for hearing for the 24th October, 2019.
9. At the hearing, counsel for the claimant indicated that they were entitled to receive orders as requested, as they had not, at the time of filing the application received



notice of the defence, and further, that the first defendant had filed no defence and his client would, at the least, be entitled to receive judgment against the deceased's estate.

10. Counsel argued further, that the service aforementioned was proper in consideration of the facts which were available at the time of the hearing, and that if the second defendant was of the view that she was not the proper person to have been served then she was always free to make an application to set aside the order. She did not do so, and still had not done so up to the hearing. Counsel reiterated that they stood by their ground that she was, by her admission, the named executor under the Will and a joint proprietor as the Bank knew it, based on representations to the Bank at the time of the loan arrangement.
11. Counsel for the second defendant argued that his client had renounced her executorship and that the son of the first defendant was applying for administration. He argued, that even if the court were to deem service on the second defendant proper service then it would be improper to enter judgment against the first as it would very likely compromise the defence of the second.

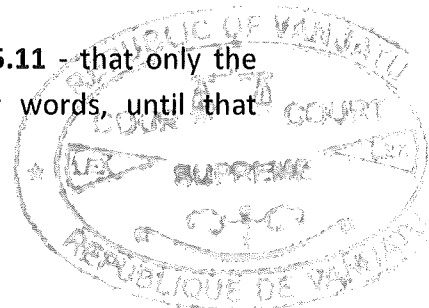
ISSUES

12. Was the service on the second defendant good and proper service for the first defendant.
13. If service on the second defendant was good, does the justice of the matter demand that a default judgment not be entered against him.

DISCUSSION

14. The purpose of service is to bring to the attention or notice of the party concerned a matter in which they have an interest and would wish to be heard. The preferred mode of service is always actual or personal service, but in its absence, the Civil Procedure Rules (CPR) allows for alternative means to be used. It also allows for service on other persons for the stated individual. **Jenshel on Civil Court Practice** at p. 74 states that the proviso is, that there is the probability of the document coming to the attention of the party to be served, e.g a wife for her husband, in a conspicuous place on land, and even on lawyers who have previously acted for the individual.

15. Counsel for the second defendant referred the court to **Rule 5.11** - that only the legal representative of an estate could be served. In other words, until that



representative was named, the claim could not be served, and no other person could be served on behalf of.

16. I accept that this is correct providing the legal representative is not known. In this case we are aware, by the admission of the second defendant that she is the named executrix of the Will of the deceased, albeit she has indicated that she does not intend to accept the executorship. Her statement was not accompanied by proof of this fact to the court.

17. **Hughes on Succession Law in the South Pacific**¹ states that “renunciation requires the renouncing executor to file signed documentation with the court,” and “will only be effective in the jurisdiction of the court in which it is filed and takes effect when it is recorded by the court,” and that, “if it is filed in a foreign jurisdiction, it will not be regarded as binding in the local jurisdiction.”

18. The case of **Meyappa Chetty v Supramanian** referenced at **Hughes**² provides:

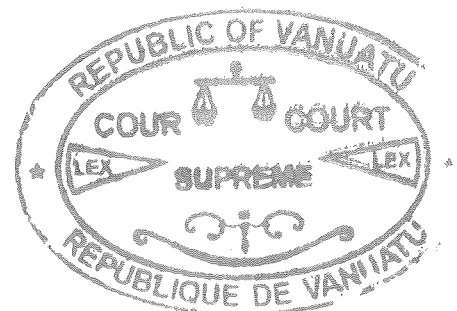
It is quite clear that an executor derives his title and authority from the Will of the testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator’s death, and the consequence is that he can institute an action in the character of an executor before he proves the Will. He cannot, it is true, obtain a decree before probate, but this is not because his title depends upon probate, but because the production of probate is the only way which, by the rules of court, he is allowed to prove his title. An administrator, on the other hand, derives his title solely under his grant, and cannot, therefore, institute an action as administrator before he gets his grant.

19. Therefore, the second defendant would have had to produce, at the very least, some form of official court documentation, signed by her, renouncing her executorship, as that executorship attached to her immediately upon the death of the deceased and not upon any grant. Even were I to ignore the Bank’s submission that the defendants were joint proprietors, which would justify service upon the second defendant, it cannot be avoided that the second defendant stands, still, as the executor of the estate of the deceased until such time as she officially renounces the title.

20. I am satisfied that the second defendant received notification of the claim and that the service on her was proper service for herself and for the first defendant.

¹ P.244, Robert A. Hughes and Helen J. Menard, 2nd ed.

² Ibid, p.234



21. Counsel for the second defendant posited the view that it would be unjust to grant a judgment or order against the first defendant as it would vicariously affect the defence of the second defendant. I would agree with counsel.

22. While the CPR does not explicitly allude to such a case, that is, that a claim against a non-defaulting defendant should be dealt with separately to the claim against a defaulting defendant, it would be my considered view that the just and equitable approach of dealing with judgments in such situations would be for the court to enter judgment against the defaulting defendant after disposing of the claim against the non-defaulting defendant if the case of the defendants are so entwined as to affect the non-defaulting party.

23. I am persuaded by the thinking of Zuckerman on Civil Procedure:³

Where the claimant has sued a number of defendants, but only some of them have opted to defend, the rules distinguish between situations where the claim against the defaulting defendants can be dealt with separately from the claim against the other defendants, and situations where it cannot be dealt with separately ...

In the latter situation, where this is impossible, the court will not deal with the request for default judgment until it has first disposed of the claim against the defaulting defendants.

24. While the CPR does not specifically provide for this scenario, rule 1.7 would allow the court to make just such a ruling.

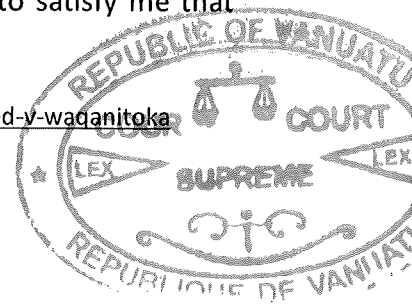
25. Although the claimant only received notice of the second defendant's defence after they had filed their request for default judgment, I am unable to grant the request as the defence of the second defendant was filed within time. Further, pursuant to my judgment of the 17th October, 2019 in **Civil Case 1132 of 2019**⁴ I would not be able to grant a request for a power of sale order by way of request for default judgment.

26. For the purpose of the request for a power of sale order made under the claim, the said claim will be treated as an application under section 59 of the Land Leases Act and the defence of the second defendant as a reply thereto. The parties will be hereafter referred to as the applicants and the respondents.

27. As the reply of the second defendant would impact the estate of the deceased, and Matilda and Denis Cole who may have an overriding interest in the property it would be inappropriate for me to grant a power of sale order to the claimant against the first defendant, though they would be entitled. There is enough to satisfy me that

³ P. 273, Adrian Zuckerman, 2nd ed.

⁴ <https://courts.gov.vu/court-activity/judgments/304061-national-bank-of-vanuatu-limited-v-waganitoka>

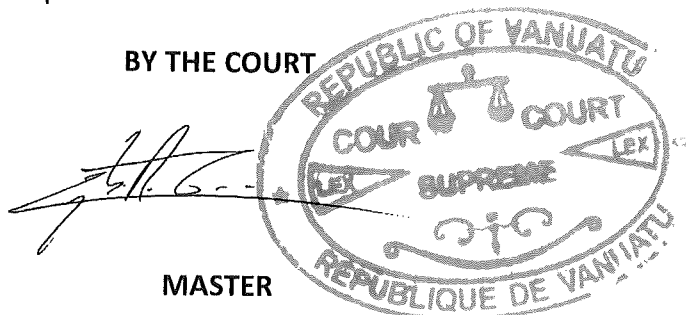


Matilda and Denis Cole may have an interest in the property and I will add them as interested parties to the application.

28. My order is as follows:

1. That service of the claim/application on the second defendant for herself and the estate of the first defendant is deemed good and proper service
2. That until official documentation is filed with this court regarding the executrix or administrator of the estate of the deceased, the second defendant will be the person who will continue to be served, via her email address ladyshallot1@gmail.com with all documents requiring personal service on the first defendant, and until the court is informed otherwise, Mr. Fleming will be deemed counsel responsible for receiving all other documents on behalf of the second defendant. In the event an administrator is appointed who is different from the second defendant she is to inform the claimant and the court immediately of the contact information including email and postal address of the individual, forwarding any relevant documentation to the court.
3. That the request for default judgment against the first defendant for a power of sale order is not granted.
4. That the claim is hereafter to be treated as an application and the claimant referred to as the applicant and the defendants the respondents.
5. That Matilda and Denis Cole are added as interested parties and are to be served with a copy of the claim/application together with the defence/reply of the second defendant and a copy of this judgment by the 20th November, 2019.
6. That a reply is to be filed by the first defendant and the interested parties by the 29th November, 2019.
7. That the matter is listed for a case management conference on the 4th December, 2019 at 2 p.m.

BY THE COURT



MASTER