IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal Case No. 13 of 2008

BETWEEN: ARIPAEA SALMON
Appellant

AND: JACQUES AND MICHEL TRONQUET
Respondents

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John W. von Doussa
Hon. Justice Ronald Young

Counsels: *Mr. Saling Stephens for the Appellant*
Mr. Jack Kilu for the Respondent

Date of Hearing: *28 November 2008*

Date of Decision: *4 December 2008*

JUDGMENT

On 24 June 2008 Saksak J. on an application by the Respondents for Summary Judgment made the following orders:-

(1) The Claimant be entitled to Summary Judgment against the Defendant for the sum of VT1,091,000 being arrears of unpaid rents outstanding to December 2007 including unpaid rents for the months of January to June 2008 inclusive.

(2) The Defendant pays to the Claimant damages for trespass at the rate of VT3,000 per day from the date of issuance of the notice to quit until the date of his actual leaving of the property.

(3) The Defendant peaceably removes himself and his family and all their personal belongings and properties without any interference or destruction of the claimant's properties within 7 days from the date of this order.

(4) Failure by the Defendant to comply with Order (3) above will result in an Eviction Order being issued without further notice.

(5) Reasons to be published.

The orders were made after a hearing where the Respondents were represented by counsel, but neither the Appellant nor his counsel were present.

Reasons for the orders made on 24 June 2008 were published the following day. The primary judge recounted the history of the matter, noting that the Respondents' counsel had been duly notified of the hearing and warned in correspondence from the Respondents that any adjournment would be opposed. His Lordship was satisfied that the procedural requirements of rule 9.6 of the Civil Procedure Rules, No. 49 of 2002 (the Rules) had been complied with, and that the affidavit evidence on file showed that the Respondent's had no real prospect of defending the claim or making out any part of a counterclaim which had been filed "*by way of further defence*". Accordingly the above orders were made giving judgment in the Respondents' favour on the claim and effectively dismissing the counterclaim.

The Appellant now appeals. His notice of appeal raises nine specific grounds of appeal. Grounds 1 – 6 allege failure to comply with particular rules in the Civil Procedure Rules; ground 7 alleges that the primary judge erred by not giving the Appellant an adequate opportunity to be heard; ground 8 alleges that the primary judge "*wrongly seized of the matters in this proceedings from within the Magistrate's Court*"; and ground 9 is the corollary of grounds 1 – 6 as it alleges error in the finding that the Respondents had complied with the procedural requirements of the Rules when seeking Summary Judgment.

It will be noted that the grounds of appeal are based solely on alleged procedural irregularities. The grounds of appeal do not seek to address the finding that on the merits of the case the Appellant had no real prospect of defending the claim.

The Respondents' claim was commenced in the Magistrate's Court in November 2007. The claim was for recovery of unpaid rent due under a written tenancy

agreement dated 15 January 2002, for damages for trespass following a notice to quit, and for possession.

On 13th November 2007 counsel for the Appellant filed a notice that he had commenced to act, and on 14th November 2007 a senior magistrate gave directions requiring the filing of a defence and standing the matter over to 7th December 2007 for what would have been the first conference hearing.

On 6th December 2007 the Appellant filed a defence and counterclaim which admitted the tenancy agreement but did not admit the quantum of the money claims or the notice to quit. The counterclaim merely read "*The defendant (now counterclaimant) claims against the claimant (now the defendant in the counterclaim) for improvement had on the said lease totaling the sum of VT5,866,900.*"

On 7th December neither party attended before the senior magistrate, presumably as the Appellant's counsel had advised the Court that he could not attend because of a family matter. The senior magistrate adjourned the case to 20th March 2008.

On 18th February 2008 an acting registrar of the Magistrate's Court issued a notice to the parties calling the proceedings on for hearing on 20th March 2008, the date which had earlier been fixed by the senior magistrate.

On 20th February 2008 the Respondents' counsel gave advance notice to the Appellant's counsel that an application for summary judgment was to be made, and forwarded both a copy of the application for summary judgment and of the affidavit by the First Respondent which was to be filed in support. These documents were formally filed in the Magistrate's Court on 6th March 2008 and served on the Appellant's counsel on 7th March 2008.

On the morning of 20th March 2008 counsel for the Respondents advised the Court that he was flying to Santo from Port Vila and would be appearing to argue

the application for summary judgment. However before he arrived at Court, counsel for the Appellant appeared before the senior magistrate and requested that the proceedings be transferred to the Supreme Court because of the nature of the issues arising out of the lease. No application for an order for transfer had been filed by the Appellant, and no notice of the proposed application had been given to the Respondents or their counsel. The senior magistrate made the order sought, even though the Court was aware that counsel for the Respondents was on his way to the hearing. Given the procedural irregularities by which the Appellant gained the order for transfer, which had the effect of derailing the application for summary judgment which should have been heard that day, it is ironic that the Appellant is now seeking to appeal on grounds confined to procedural irregularity.

The procedural irregularities alleged in the grounds of appeal are all premised on the argument that steps taken in the Magistrate's Court – the service of the claim, the holding of a first conference hearing, and the steps required under rule 9.6 to obtain a summary judgment – should have been repeated anew in the Supreme Court once the proceedings were transferred. This premise is misconceived. What was transferred from the Magistrate's Court to the Supreme Court was the proceeding brought by the Respondent. There is only one proceeding. It remained the same proceeding after transfer. The transfer did not operate as if it were a discontinuance of the proceeding in the Magistrate's Court and the commencement of a new proceeding in the Supreme Court. The proceeding commenced in the Magistrate's Court remained on foot, but after the transfer, the Supreme Court was required to pick up where the Magistrate's Court left off.

The primary judge was therefore correct to consider the steps taken in the Magistrate's Court and the documents filed there in deciding that the procedural requirements of rule 9.6 had been complied with.

The Appellant has not demonstrated any significant departure from the requirements of the rules leading up to the order for summary judgment, and the grounds of appeal numbered 1 to 6 and 9 therefore fail.

Ground 8 can be shortly disposed of. The Supreme Court did not become "*wrongly seized of the matters in these proceedings from within the Magistrate's Court*". The proceedings had been transferred by order of a senior magistrate at the specific request of counsel for the Appellant. Transfer of a proceeding from the Magistrate's Court to the Supreme Court is permitted where the counterclaim exceeds the jurisdiction money limit of the Magistrate's Court by s.3 (3) - (5) of the Magistrate's Court (Civil Jurisdiction) Act [CAP. 130]. Thereafter the matter was within the jurisdiction and responsibility of the Supreme Court. The primary judge plainly had jurisdiction to decide the application before him on 24th June 2008.

The remaining ground of appeal, ground 7, alleges that the Appellant was not given an adequate opportunity to be heard. After the matter was transferred, it was necessary for the Supreme Court to appoint another time to hear the outstanding application for summary judgment. This was done by the Santo Registry on 19th June 2008 when a notice of hearing was sent to the parties listing the matter for 10 a.m. on 24th June 2008. It is clear that counsel for both parties received the notice as each of them exchanged letters by fax on 20th June 2008 about the hearing date.

Prior to the issue of the notice of hearing by the Santo Registry, other unrelated Land Appeal matters had been listed on 23 June 2008 before the Chief Justice and assessors for directions in Port Vila in which counsel for both parties in this case were involved. By his letter dated 20th June 2008 to counsel for the Appellant, counsel for the Respondents said that he had made arrangements in relation to the matters in Port Vila so as to allow him to be excused from attendance. He said he would be in Santo to argue the application for summary judgment, and he gave reasons why counsel for the Appellant could also absent himself from the scheduled hearings in Port Vila so as to be present in Santo. The letter went on to say that any adjournment of the matter beyond 24th June 2008 would be opposed, and that if counsel for the Appellant could not be present at that time he should arrange for other counsel to attend.

Counsel for the Appellant responded simply that he would not be attending on 24th June 2008 as he would be in Port Vila. He suggested the case should be adjourned for a week or two.

In these circumstances it is not correct to say that the Appellant and his counsel were not given an adequate opportunity to be heard. The opportunity was given, but counsel for the Appellant chose not to take it up. If counsel is confronted with obligations in two different places which clash, it is the obligation of counsel to arrange alternative representation for his client to fulfill one of those obligations whist he attends to the other obligation, unless it is possible to have one of the obligations postponed with the consent of all parties involved.

It was open to the primary judge on the material before him to refuse to further delay the determination of the application for summary judgment. The matter had an element of urgency about it as the Respondents had sold the property and were under pressure to complete the sale by giving vacant possession. As the hearing of the summary judgment application had been put off by the unilateral action of the Appellant's counsel in March 2008, we think the primary judge correctly exercised his discretion not to adjourn the matter again.

On the merits, the application for summary judgment was supported by comprehensive sworn evidence from the First Respondent. His evidence had been in the possession of the Appellant's counsel since late February 2008, but no answering evidence had been filed. The First Respondent's evidence demonstrated a straight forward claim for past rent, for damages following the notice to quit at a claimed rate less than the rent, and for possession. The only possible defence lay in the counterclaim which was raised as a defence by way of set off. The counterclaim was pleaded in the bearest terms and gave no particulars or indication of the nature of the "*improvement*". No evidence to support the counterclaim was filed. The primary judge considered the terms of the tenancy agreement and the sworn evidence of the First Respondent that the Appellant had built certain improvements on the land in breach of the tenancy

agreement (as no consent has been given by the Respondents), and also that the Appellant had breached the agreement by making agricultural or botanical improvements which the tendency agreement prohibited. On the material before the Court, we consider the primary judge was correct to hold that the counterclaim had no real prospect of success, and could not provide an arguable defence to the claim.

Although the grounds of appeal do not seek to attack the merits of the summary judgment, the material before this Court does not disclose any reason to doubt the conclusion reached by the primary judge on the counterclaim.

After the hearing of the appeal was complete, counsel for the Appellant delivered to the Court a letter attaching a valuation of the Respondents' property as at 2nd March 2007. For whom the valuation was prepared and for what purpose is not disclosed. The Court cannot act on unverified information of this kind which in any event is produced in breach of the rules which govern the reception of fresh evidence on an appeal. However, even if the valuation had been before the primary judge properly supported by affidavit, it would not have assisted the Appellant's claim.

The valuation shows that two bungalows with a total value of VT1,656,000 were on the land of the date of the valuation, and there were two vanilla plantations said to be worth VT5,154,400. The valuation provides no evidence that these improvements were authorized by the tenancy agreement. Even if they were authorized, the Appellant's remedy lay in his right to remove his tenants improvements provided he did so before the termination of his tenancy. If the improvements remained there after the tenancy came to an end, the improvements by law became the property of the lessor.

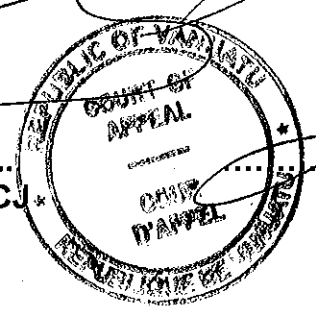
Counsel for the Appellant in oral agreement also sought to challenge the award of costs that had been made by the primary judge in favour of the Respondents in relation to the proceedings both in the Magistrate's Court and in the Supreme Court. The costs order is not challenged in the notice of appeal, but in any event

the costs order followed the success of the Respondents' claim. It was entirely proper for the primary judge to make the costs order; indeed there was no basis on which he could have exercised his discretion differently.

For these reasons the appeal is dismissed. The Appellant must pay the Respondents' costs of the appeal which shall be determined failing agreement.

DATED at Port Vila, this 4th day of December, 2008.

BY THE COURT



Hon. Vincent Lunabek CJ **Hon. John W. von Doussa J.**

Hon. Ronald Young J.