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

Civil Appeal Case No. 02 of 2013

BETWEEN: LUGANVILLE MUNICIPAL COUNCIL

Appellant

AND: PETER MANASSEH

Respondent

Coram: *Mr. Justice Oliver A. Saksak*

Counsel: *Mr. Felix Laumae for Intended Appellant*
Ms Jane Tari for Respondent

Date: *6th February 2014*

DECISION

1. In relation to the appellant's application for leave to appeal out of time which the Court heard Counsel's submissions on in the morning of today, decision was orally delivered in the afternoon.

2. The Court effectively refused leave and dismissed the application with nominal costs in the sum of VT5.000 in favour of the respondent.

3. The appellant relied on the grounds stated in their Notice of Appeal filed on 15th October 2013 and upon the sworn statement of Peter Sakita which are that –

   (a) The Magistrate's Court erred in law and procedure in granting summary judgment on 12th July 2012 when there was no application made pursuant to Rule 9.6 of the Civil Procedure Rules No. 49 of 2002 (the Rules).

(b) The Magistrate's Court erred in law in failing to observe requirements of Rule 9.6 of the Rules when it granted the judgment.

(c) The Magistrate's Court erred in law in summarily disposing of the claim when there was a defence filed disclosing substantial question of fact and question of law.

4. Mr. Laumae relied on the Court of Appeal Case of Gallo v. Bernard and Others [2013] VUCA 19 in support of the appellant's grounds in (a) and (b). Mr. Laumae made oral submissions only in support of all grounds.

5. Ms Tari opposed the application for leave and relied on her written submissions filed earlier today at 8.45 am. Basically Counsel argued that –

(a) The intended appellant was out of time by 2 ½ months and the delay was their own fault.

(b) The appellant (LMC) was well represented by legal counsel and there can be little or no excuse for not adhering to the appeal period of 30 days.

(c) The Magistrate had discretion to issue a Summary Judgment based on the evidence before the Court at the time and that Section 14(1) of the Judicial Services and Court's Act Cap. 270 gave the Court such jurisdiction.

(d) There was non-compliance with Court Orders by the appellant to file sworn statement and to pay wasted costs.

6. The Court accepted Ms Tari's submissions –

(a) First, on delay there was a delay of some 2 ½ months from 16th July 2013 to 15th October 2013 when the Notice of Appeal was filed. I accepted that a delay of 2 ½ months was considerable delay especially in a case where the appellant was represented by Senior Legal Counsel, there could hardly be

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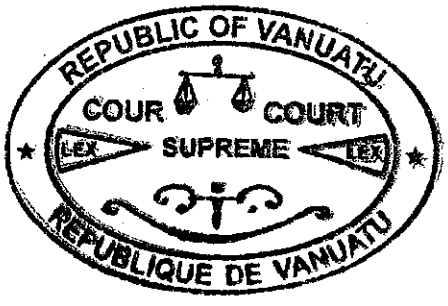
any excuse for not complying with the 30 days period. The Court of Appeal has applied this rule strictly in cases of land where decisions of Island Courts are appealed. There is no reason that such an approach cannot be adopted in this case.

(b) Secondly, the appellant was represented by legal counsel during the proceedings in the Court below. The appellant was served with the process. However, the judgment indicates at paragraph 12 that they failed 3 times to attend when the case was called. Further, it is recorded at paragraph 13 that the appellant failed to attend twice for the hearing of their application to strike out. The Court takes judicial notice of the judgment dated 19th July 2013.

(c) The Court takes judicial notice of previous orders of this Court that ordered specifically that the appellant pays wasted costs of VT5.000 and to file sworn statements which they sought to rely upon in support of their application and intended appeal. The appellant did not comply. How could they expect to get assistance from the Court whose orders they had defied? The appellant as it were, has come to Court with unclean hands.

(d) Thirdly, the Court agrees with Ms Tari that the Magistrate was correct when the Court issued Summary Judgment against the appellant. Section 14(1) provides for that jurisdiction. The Court below had the evidence before it and based on the evidence the Magistrate had formed the view that there were no substantial issues of facts of or law in the pleadings to warrant another adjournment. The only course open to the Court under those circumstances when the matter was listed on three occasions and the defendant (LMC) failed to appear was to enter judgment against the defendant despite there was no application for summary judgment made under Rule 9.6. When the Magistrate exercised discretion to issue judgment where there was a failure to attend by the defendant, the Magistrate had correctly exercised that discretion under Rule 12.9 (b) of the Rules. (See paragraph 19 of Judgment). Having



done so, the Magistrate was exercising her jurisdiction under Section 14 (1) of the Judicial Services and Court's Act hence the judgment issued summarily.

(e) Finally, as to substantial issues of facts or issues of law of contract, the Magistrate recorded at paragraph 15 of the judgment that there was none. In the defence of the appellant filed in the Court below at paragraph 4 the appellant denied having any contracts with the respondent. As such, they could not now on appeal rely on section 27 of the Municipalities Act as a substantial issue of law to seek leave to appeal out of time. The Council denied having any liability for acts of the Independence Celebration Committee. Peter Sakita in his sworn statement dated 28th March 2013 at paragraph 3 specifically confirmed that the Committee is not the Official Committee of the Council.

Elizabeth Tasso deposed to a statement on 30th January 2013 as former Vice Coordinator that the Committee had approved the respondent's quotation of VT400.000 and had paid over that amount in return for his provision of music and sound system during the Celebration. At paragraph 7 the deponent said everything was clear to them at the time.

These were some of the evidence available to the Magistrate at the time of issuing of judgment which led her to conclude at paragraph 15 of the judgment that there were no issues of contract. The Magistrate could not have been more right. There were no issues of fact and/or of law. The case of Gallo is distinguished because (a) there was a contract, (b) the money involved was of substantial amount and (c) the object sold was a wreck.

7. The amount of VT400.000 had been approved and paid to the respondent by the Committee independently. The respondent then used that money to purchase two speakers as part of the sound system he had agreed with the Committee to provide as services. Those speakers became his property. The Council could not claim a right over the VT400.000 allocated to the respondent or the speakers. They have specifically denied that the Committee was part of the Council in the

sworn statement of Peter Sakita. Their custody of the respondent's speakers therefore in law amounts to conversion. Those properties should be returned to resolve this matter.

8. For reasons stated in the preceding paragraphs, leave was refused and the application was dismissed.

9. Mr. Laumae had advanced his submissions on the same grounds as the appeal itself. As such it was inevitable for the Court not to deal with the substantive appeal simultaneously. Therefore, even if leave had been granted, the appeal would have failed anyway. For a cause which the amount of money involved was only VT400.000 to allow leave for the appeal to proceed would only attract legal costs to the Council at least which would far exceed the amount being claimed. And that would not be a sensible thing to do. So it is to the Council's benefit and advantage that leave is refused today. But they must pay the VT5.000 wasted costs as ordered on 20th November 2013. That is the only costs the Council has to pay.

DATED at Luganville this 6th day of February 2014.

BY THE COURT

OLIVER A. SAKSAK
Judge

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