

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

Civil
Case No. 19/2966 SC/CIVL

BETWEEN: Stephen Hrael

Claimant

AND: Numani Ham and Family

Stephen Sapa and Family

Defendants

Date of Hearing: 1st July 2022
Date of Judgment: 23rd August 2022
Before: Justice Oliver Saksak
In Attendance: Mr Henzler Vira for the Claimants
Mr Colin Leo for the Defendants

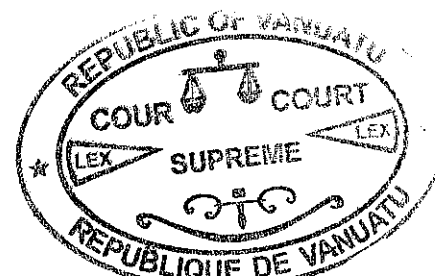
JUDGMENT

Introduction

1. This is a claim for eviction of the defendants from the claimant's leasehold title 11/024/039 and for general damages to be assessed, plus costs.

Background

2. The claimant is the registered proprietor of Lease title 11/024/039 (the Lease) situate at Ohlen Freshwind, Port Via, Efate.
3. The Lease was registered only on 8th July 2015 after the claimant had completed payments by instalments to Calliard Kaddour.
4. Calliard Kaddour was and is the Real Estate Agent of Freshwind Limited as transferor of the Lease.
5. The claimant and Freshwind Limited executed a Sale and Purchase Agreement (the Agreement) on 29th October 2003.



6. The purchase price as agreed was VT 1, 185, 337 requiring a non-refundable deposit of VT 100,000 with monthly instalments of VT 15.280.
7. The claimant made an upfront deposit of VT 20.000 after he was shown a map and subsequently visited the Ohlen subdivisions with a friend, now deceased and he close plot 039. He informed Caillard Kaddour about his choice and paid the VT 20.000 deposit.
8. The claimant then took a loan from the BRED Bank to pay off the outstanding after which the Lease was transferred into his name on 8th July 2015.
9. The claimant then entered the land and fenced off a portion of the land for gardening purposes and resided with his wife on the other portion. The Lease comprises of 23.53 acres of land.
10. It was after the claimant had fenced off the land when the defendants came into the land and settled on it without any claim of right.

The Claim

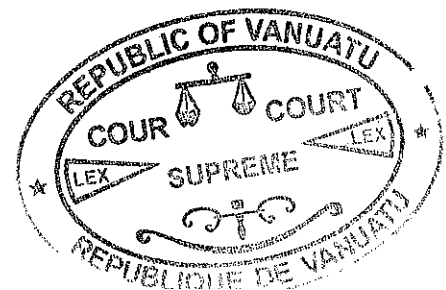
11. The claimant alleges the defendants are trespassers on his lease. They have occupied his lease unlawfully for the last 27 years. He claims orders for their eviction from the Lease and seeks general damages to be assessed, and costs.

The defence and Counter-claim

12. The defendants acknowledge the claimant's Lease however; they assert that they occupied the land first in time before the claimant became the registered proprietor. They therefore assert that they have section 17 (g) rights under the Land Leases Act [Cap.163].

The Evidence

13. The claimant filed evidence by 5 sworn statements dated 25th June 2020, 17th December 2020, 1 November 2019, 26th June 2020 and 14th April 2020.
14. He filed supporting sworn statements from Mathison Dovo dated 19th May 2020, Notis Benjamin and Cooper Hopman dated 25 June 2020, Christly Haruel dated 25th June 2020, Yannick Jacobe of C&K on 22nd June 2020, and Rono Koubak dated 12th August 2020.
15. The defendants filed an amended defence and counter-claim on 20th May 2020 and filed sworn statements from Daniel Vincent Bebe, Stephen Joel, Charleon Falau, Wesley Rawyama on 22nd May 2020, Karu Loty on 24th June 2020 and Ham Numani on 3rd February 2021 in support of the defence and counter-claim. Charlie Namaka also deposed to a sworn statement on 26th May 2020. Reuben Naio also deposed to a statement on 17th July 2020.



The Issues

16. There were only 2 issues. The first is whether the defendants occupy the Lease and are protected by section 17 (g) of the Land Leases Act? Secondly, if so, can the claimant evict them from his Lease for trespass?

Discussion

17. At the hearing on 1st July 2022 Counsel agreed the 2 issues and agreed on filing written submissions without a trial and that judgment be formulated on the papers.
18. The defendants accept that the claimant is the registered proprietor of Lease 039. They however assert that whilst he had knowledge of their being in occupation of 1177 m² of land in the Lease, he proceeded to facilitate the registration of the Lease in his sole name.
19. Section 17 of the Land Leases Act [CAP 163] provides for overriding interests:

“17. Overriding interests

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 –

(a) rights of way, rights of water, easements and profits subsisting at the time of first registration of that lease under this Act;

(b) natural rights of light, air, water and support;

(c) rights to sites of trigonometrical stations and navigational aids conferred by any law;

(d) rights of compulsory acquisition, resumption, entry, search and user conferred by any law;

(e) the interest of a tenant in possession under a sublease for a term of not more than 3 years or under a periodic tenancy;

(f) any charge for unpaid rates or other moneys, which, without the condition of registration under this Act, are expressly declared by any law to give rise to a charge on land;

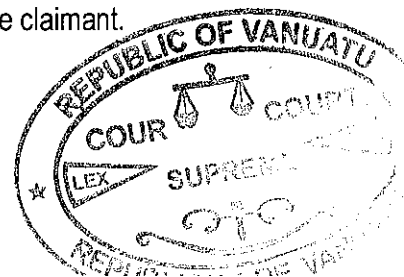
(g) the rights of a person in actual occupation of land save where enquiry is made of such person and the rights are not disclosed; and

(h) rights and powers relating to electric supply lines, telegraph and telephone lines or poles, pipelines, aqueducts, canals, weirs, dams, roads and ancillary works conferred by any law:

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.”

(Underlining for emphasis)

20. Of the two defendant families, only Numani Ham deposed to sworn statement. Stephen Sapa did not depose to any statement but his son Stephen Joel deposed to a statement on 22nd May 2020.
21. Stephen Joel deposed that in 1992 and 1993 they started clearing the land at Ohlen area, the land claimed by the claimant and they moved onto it in 1993. He stated that the claimant was not around at the time. He also stated he was the one who divided the whole plot into two process after Bob Namaka had approached his father at the request of the claimant.



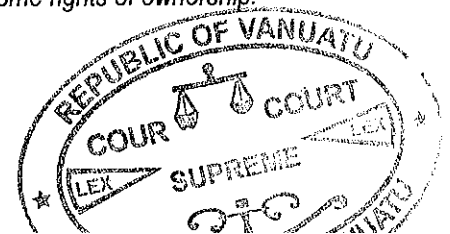
22. Stephen Joel did not annex the plan of the divided plot he said he produced. His evidence is contradictory to the evidence of Numani Ham who deposed in his statement of 3rd February 2021 that it was he who requested a surveyor to prepare a plan he annexed as "NH1". The plan shows Lease 039 has been divided into Lots 1 and 2. Lot 1 has 1176 m² and Lot 2 has 1177 m² of land.
23. This witness has not disclosed the name of the surveyor. Annexure "NH1" is a Draft plan. It does not indicate who was the surveyor. It has not been checked and approved. It has no stamp whatsoever on it to show it was or is an official plan. There are no dates given on the draft plan.
24. For the defendants to succeed on their counter-claim that they have a section 17 (a) right, they had to show evidence of who gave them the right to occupy the Lease in 1992 or 1993 when they assert they entered onto the land and cleared it.
25. The Lease now registered in favour of the claimant since July 2015 was transferred by Freshwind Limited as transferor for valuable consideration.
26. The Lessor is the Minister of Lands on behalf of the Republic. The land comprised in the Lease is State land. The defendants do not have any evidence to show that they had the consent or permission from the Minister of Lands in 1992 or 1993 to move onto the land or that they were on the land prior to 1982.
27. This is because of the decision of the Supreme Court in the case of Combera and others v Sope [2015] VUSC 14 as upheld by the Court of Appeal in 2016, what Chetwynd J said:

" As I indicated in my decision on the preliminary issue, all that was left was a claim the claimants had overriding interests pursuant to section 17 (g) of the land leases Act. The argument was they were in actual possession of the land when the lease to the second defendant was created. As I pointed out, the case of William v William would defeat that argument. The evidence in this case was the earliest that some went onto the land was 1982. That was after the Land Reform (Declaration of Public Land) Order effect No. 26 of 1981 dated 26th January 1981 came into effect. If they had been on the land prior to that they may have been able to have invoked the protection of section 17 (g) but all the evidence pointed to actual occupation from 1982 (sic) onwards. That in simple terms, meant they went into the land as squatters and their status remains as squatters. They had no rights which could be protected by section 17 (g). that is what William v William says.

28. This was repeated in Kalomtak Wiwi Family v Minister of Land [2005] VUCA 29.

29. In Williams v Williams [2005] VUCA the Court of Appeal said:

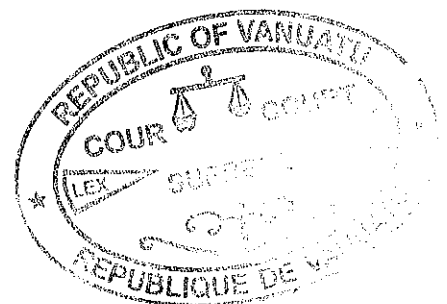
" Rights under section 17 (g) can never be greater on a transfer of a lease than they were prior to such transfer. Rights of actual occupation can thus never become rights of ownership."



30. In the Combera Case CC No. 1 of 2012, Ham Nimani was one of the claimants. He is the same person known as Ham Numani in this case. Since 2012 he had been declared as a squatter. He still is and is a trespasser on the claimant's Lease.
31. The defendants Numani Ham and Family and Stephen Sapa and Family are clearly squatters and trespassers on the claimant's lease. It is not enough for them to say they were on the land prior to the claimant in 1992 or 1993 or 1995. According to the case authorities of Combera and Bebe [2019] VUCA 8 they should establish that they were on the land prior to 1982. And they clearly have not.
32. Further there is a proviso in section 17 (g) of the Land Leases Act that states:
- " 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 it."*
33. What this means I think is that the defendants claiming any of those section 17 (g) rights from (a) to (h) inclusive should require the Director to register those liabilities, rights and interests in the transfer advice document.
34. The defendants do not have any evidence showing their asserted interests have been registered by the Director.


The Results

35. The end result is that the defendants are squatters and trespassers on the claimant's Lease.
36. The claimant is entitled to judgment.
37. The defendants counter-claims are dismissed.
38. The claimant is entitled to an eviction order but his claim for damages are declined. In the circumstances of his case with the defendants, it is best that damages should be forgone so it does not have hamper the eviction process.
39. The Court hereby orders the Defendants, Ham Numani and Stephen Sapa and all their families and relatives to remove all their properties fixed to the land with all personal properties and vacate the land within 30 days from the date of this judgment.



40. The claimant is entitled to his costs of and incidental to this proceeding on the standard basis to be taxed if not agreed.

**DATED at Port Vila this 23rd day of August 2022
BY THE COURT**


OLIVER.A.SAKSAK
Judge

