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

Civil Appeal Case No. 09 of 2010

BETWEEN: CHIEF TESBI KAITES
Appellant

AND: TATNEL KAISING
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver A. Saksak
Hon. Justice Daniel Fatiaki

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

Date of Hearing: *7th July 2010*

Date of Decision: *16th July 2010*

JUDGMENT

Introduction

In early March 2006 the Malekula Island Court, after a hearing contested by the parties to this appeal, said that "*Tatnel Kaising is hereby declared the custom owner of the Ofmoba Land*". The Appellant did not agree with this decision. On 30th March 2006 he filed an appeal to the Supreme Court. He said in his notice of appeal he would provide his grounds of appeal "*on a later date*".

Just over three years later the Respondent Tatnel Kaising applied to strike out the appeal on 31st March 2010. The Supreme Court Judge struck out the appeal. He said a Supreme Court Order of 11th December 2006, that the Appellant file and serve his notice of appeal within 28 days, had not been complied with. Further the Judge said the Appellant had been "*extremely dilatory in progressing*

this appeal". And finally the Judge said the appeal grounds of 28th February 2006 did not reveal "*any legal basis for the appeal*".

The grounds of appeal are:-

(a) Contrary to the Judge's conclusion the Appellant did comply with the Supreme Court Order of 11th December 2006;

(b) In concluding the Appellant was dilatory the Judge failed to take into account the special difficulties counsel had in communicating with his client;

(c) The Judge could not have assessed the merits of the 28th February 2007 appeal grounds without hearing counsel;

(d) It was unfair to strike out the appeal for the Appellant's failings when the Respondent had failed to comply with court orders; and

(e) Other land appeals before the Supreme Court had been slower to progress through the Court system without being struck out.

Background facts

After the appeal from the Island Court was filed the Supreme Court made an order that the Appellant file his grounds of appeal by 19th January 2007 and the Respondent in reply by 28th February 2007. A further conference was ordered for 2nd March. On 26th February (over a month late) the Appellant filed detailed grounds of appeal. When the case was called again on 2nd March the Court gave the Respondent further time to file its response extending that time to 28th March. Again a further conference was noted for 20th April.

The Respondent did not file a response before the conference of 20th April. By then it seems the Appellant had been given leave to file amended grounds of appeal and the Respondent extended time to reply to these amended grounds. Mr. Kaising was told that he needed to be at Court at the next conference on 7th June 2007. At that stage Mr. Kaising was not represented by counsel.

On the 7th June, the date for the next conference, the Port Vila Court House burnt down destroying this and many other court files. Nothing further happened on this file until, on 7th August 2008, Mr. Saling Stephens filed a notice that he had begun to act for the Respondent. Then on 4th May 2009 the Respondent filed an application to strike out these proceedings. The application was called on 1st February 2010 and adjourned on several occasions until finally on 31st March 2010 it was heard. The day before the hearing on 30th March 2010 the Appellant filed further amended grounds of appeal.

Submissions and discussion

The Respondent claimed that section 22 (4) of the Island Courts Act [CAP. 167] prohibited an appeal from the Supreme Court to the Court of Appeal because that section provided that a decision of the Supreme Court was final after an appeal from the Island Court. However in the course of discussion with counsel regarding the application of section 22 (4) the relevance of section 22 (2) of the Act became apparent. Section 22 of the Island Courts Act in full provides:-

> "***22. Appeals***
> *(1) Any person aggrieved by an order or decision of an island court may within 30 days from the date of such order or decision appeal from therefrom to –*
>
> *(a) the Supreme Court, in all matters concerning disputes as to ownership of land;*
>
> *(b) the competent Magistrate's Court in all other matters.*

(2) *The court hearing an appeal against a decision of an island court shall appoint two or more assessors knowledgeable in custom to sit with the court.*

(3) *The court hearing the appeal shall consider the records (if any) relevant to the decision and receive such evidence (if any) and make such inquiries (if any) as it thinks fit.*

(4) *An appeal made to the Supreme Court under subsection (1) (a) shall be final and no appeal shall lie therefrom to the Court of Appeal.*

(5) *Notwithstanding the 30 day period specified in subsection (1) the Supreme Court or the Magistrates' Court, as the case may be, may on application by an appellant grant an extension of such period provided the application therefore is made within 60 days from the date of the order or decision appealed against.*

The Appellant had filed his appeal to the Supreme Court within the 30 day period (ss (1)). Subsection 2 requires a court consisting of a Judge of the Supreme Court and two or more assessors to hear any such appeals from the Island Court. In this case the application was to strike out the appeal from the Island Court to the Supreme Court. Although an interlocutory application, if the application was successful it would determine the appeal.

In Matarave v. Talivo and others CAC 01/2010 (judgment 30/04/2010) this court considered the interrelationship between S 22(2) and (4). Matarave involved an appeal from the Supreme Court to the Court of Appeal on an Island Court matter. This court was satisfied that apprehended bias on the part of the Supreme Court Judge hearing the appeal from the Island Court had been established. The Court then said (p. 6):-

> *"The question in substance raises the meaning s.22 (4) of the Island Courts Act. Stated bluntly, we consider this statutory provision means exactly what it says: the decision of the Supreme Court is final and cannot be the subject of an appeal to the Court of Appeal. However, the limitation imposed by s.22 (4) is in relation to an "appeal made to the Supreme*

Court". This requirement is only met if the body hearing the appeal is a court validly constituted by a Supreme Court Judge and two or more assessors appointed by the Judge as required by s.22 (2). That requirement will not be met if any one of those persons is subject to any matter that disqualifies them from exercising their statutory functions."

And it said (p. 18):-

"For these reasons the Court finds that apprehended bias on the part of the Judge has been established and declares that the decision of the Supreme Court is void because the Court had become compromised at the time that it delivered judgment. Having declared the decision void, the Court in its inherent jurisdiction directs that the appeal from the Santo/Malo Island Court be returned to the Supreme Court to be heard afresh by another Judge and assessors."

There are parallels between Matarave and this case.

Subsection (2) by its language anticipates that the court *"hearing the appeal"* will consist of a Judge and two assessors. We consider *"hearing the appeal"* will encompass circumstances where the result of an order made by the court will finally determine the proceedings. This approach will ensure, as the legislature intended, that any appeal to the Supreme Court pursuant to s.22 is only finally determined by a Judge and two assessors.

The subsection therefore required the Court hearing the strike out application to be constituted as a single Supreme Court Judge and at least two assessors. In this case it was not so constituted. The Supreme Court Judge sat alone. In those circumstances we consider he did not have authority to finally determine the appeal from the Island Court to the Supreme Court. The Court was not therefore validly constituted as required in terms of section 22 (2). The decision was therefore void.

This approach will allow a single Judge to manage such appeals. Procedural orders will be able to be made by a single Judge to ensure the just determination of the appeal. However if a party seeks an order, procedural or otherwise which has the potential to finally determine the appeal then the full court of a judge and assessors must sit to determine the matter.

The proper course therefore is to quash the order of the Supreme Court to strike out the proceedings and remit the appeal to the Supreme Court for trial according to law.

Several further issues also arise. For reasons we identify later in this judgment we do not consider there was merit in any event in the Respondent's application to strike out. Thus any temptation to bring a further strike out application based on the facts currently before this Court but before a properly constituted Supreme Court should be resisted. Secondly we expressly leave unresolved the question of whether section 22 (4) prohibits an appeal to this Court from an order striking out proceedings when the Supreme Court is properly constituted.

To return then to the merits of the strike out. We are satisfied the Judge erred when he struck out these proceedings. Contrary to the Judge's observation the Appellant had complied with the Supreme Court Order of 11th December 2006 by filing the grounds of appeal (although late). And also contrary to the Judge's observations these grounds of appeal from the Island Court did raise substantive issues. They included:-

(a) evidential challenges as to the sufficiency and understanding of the evidence;

(b) an alleged confusion between custom land ownership and chiefly title;

(c) an alleged failure to visit the disputed land;

(d) alleged bias in the decision makers.

The Respondent failed to respond to these grounds of appeal and was himself therefore in default of the Judge's orders. The Appellant has been slow to progress this case. Little has happened since the appeal was filed in 2006. Such lack of progress is, we consider, better dealt with by a firm time table to trial rather than striking out proceedings dealing with the sensitive and often difficult issues of customary land.

For reasons given therefore the appeal is allowed. The order of the Supreme Court striking out these proceedings itself is quashed. The proceedings are re-instated.

The Appellant should have costs in these proceedings and in the Supreme Court strike out application.

DATED at Port Vila, this 16th day of July, 2010.

BY THE COURT

.....
Chief Justice Vincent Lunabek

.....
Justice John von Doussa

.....
Justice Ronald Young

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

.....
Justice Oliver A. Saksak

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Justice Daniel Fatiaki