IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction) **Civil Appeal Case No. 21 of 2011**

BETWEEN : WALTER JONAH
Appellant

AND: HARRY KEMUEL
First Respondent

AND: JOSEPH VERLILI
Second Respondent

Coram:	Hon. Justice John W. von Doussa Hon. Justice Ronald Young Hon. Justice Daniel Fatiaki Hon. Justice Oliver Saksak Hon. Justice Dudley Aru
Counsel:	Mr. Colin Leo for the Appellant Mr. Edward Nalyal for the First Respondent No- appearance by the Second Respondent
Date of Hearing:	24th April 2012
Date of Judgment:	4th May 2012

JUDGMENT

1. This is an appeal against the Judgment of a Supreme Court Judge who made on 17th October 2011 striking out the appellant's appeal in Land Appeal Case No. 3 of 2009 and awarding costs in favour of the first respondent in the sum of VT50.000.

2. It is essential to understand the background history of the case and for this purpose, we set out the following chronology of events:

    1. On 27th October 2004 the Malekula Island Court delivered its Judgment in favour of the first respondent in Land Case No.10 of 1993. The reasons for

judgment concluded by saying any appeal must be taken within a period of 60 days. Regrettably this statement was incorrect. The Island Courts Act [CAP 167] required an appeal to be made within 30 days, although the Supreme Court was empowered under s.22(5) to grant an extension of time so long as the application was made within 60 days of the decision appealed against.

2. On 20th December 2004, 54 days after the decision, the appellant paid his appeal fee in the sum of VT75.000 to the Malekula Island Court. He then instructed a lawyer to file the appropriate appeal papers, but this did not happen until 4 years later.

3. On 16th December 2008 the appellant through a new law firm filed his appeal which was registered as Land Appeal Case No.5 of 2008. No application for extension of time had been filed or granted. It seems the appellant's counsel later realized that an application for an extension of time was a necessary first step.

4. On 19th February 2009 the appellant through counsel Mr. Kiel Loughman filed an application to seek leave of the Court to file his appeal out of time. This was registered as Civil Case No. 24 of 2009. At the same time a draft Supreme Court Claim was filed which set out the facts referred to in paragraphs 1 and 2 above as reasons justifying an extension of time.

5. On 2nd June Civil Case No. 24 of 2009 was listed for a conference. No parties or counsel attended. Dawson J granted leave to the appellant to filed his Supreme Court Claim out of time. It seems he proceeded on the papers. He did not give reasons for his orders.

6. On 16th June 2009 Dawson J issued an order recording that the appellant had abandoned his appeal in Land Appeal Case No. 5 of 2008, that being the appeal filed before an extension of time had been obtained.

7. On 26th June 2009 the appellant filed his appeal pursuant to the order Dawson J made on 2nd June 2009. It was registered as Land Appeal Case No. 3 of 2009.

8. On 5th February 2010 Dawson J granted leave to the appellant to file an amended notice and grounds of appeal in Land Appeal Case No.3 of 2009. He did so on 9th March 2010.

9. On 30th March 2010 the first respondent filed an application to dismiss the appellant's amended Notice and grounds of appeal in Land Appeal No.3 of 2009.

10. On 17th October 2011 the order now under appeal which struck out Land Appeal No. 3 of 2009 was made.

3. At the hearing of this appeal the Court was advised by Mr. Nalyal counsel for the first respondent that the second respondent had expressed no interest in the matter. This had been the position of the second respondent on 17th October 2011 when the application to strike out the appeal was heard by the Supreme Court Judge.

4. The appellant initially pleaded seven grounds of appeal. However at the hearing the appellant informed the Court that four grounds were abandoned and the only three grounds he advanced were-

   A. That the learned Judge manifestly erred in fact and in law in reviewing the decision of Justice Dawson when the learned Judge had no jurisdiction to do so.

   B. The learned Judge manifestly erred in fact and in law in striking out the appellant's claim when the appellant's initiated his claim pursuant to the allowable leave granted by Justice Dawson.

   C. The learned Judge erred in fact and in law in failing to consider that the time limit prescribed by the Island Court Act for the appeal to the Supreme Court was 30 days which runs upon the receipt of the Island Court Judgment and not 60 days as stipulated in the Island Court Judgment.

5. In respect to grounds A and B Mr. Leo submitted that the Supreme Court Judge did not have any jurisdiction under the Judicial Services and Courts Act (the Act) to review the decision of another single judge sitting as the Supreme Court. He submitted that the proper and only course for the first respondent to set aside Dawson J's orders was pursuant to s 48 of the Act by way of an appeal to the Court of Appeal.

6. Mr. Nalyal did not make any submissions in response in relation to these two grounds.

7. The relevant passage complained about is paragraph 14 of the Judgment where the Judge said:

   "Consideration has been given to whether it is appropriate for a Judge of this Court effectively to review the decision of another Judge of this Court-that is the

decision to grant leave to appeal out of time when it is clear that the Judge had no jurisdiction to so grant leave. Should this Court effectively review that decision or should it leave it for the first defendant to take steps to overturn that decision in the Court of Appeal? With some hesitation, indeed reluctance, I consider that it is necessary for an obvious mistake such as this to be corrected without putting any of the parties to the added expense of the Court of Appeal proceedings. I feel comfortable taking that approach given that the order was made to grant leave out of time on the papers, the statutory time limits and the relevant cases do not appear to have been brought to the Judge's attention, and no reasons are recorded to have been given to explain the decision."

8. The powers bestowed on the Supreme Court to review decisions is strictly limited to decisions of the Magistrate Court under ss. 30 and 31 of the Act.

9. We agree with Mr. Leo that the Act does not give a single Judge jurisdiction to review or set aside a decision made by another Judge. Only the Court of Appeal has that jurisdiction under s.48 of the Act.

10. Having formed the opinion that Dawson J made the order granting an extension time without jurisdiction, it is understandable that the Supreme Court Judge looked for a way to rectify the position without putting the parties to the cost and trouble of an appeal to the Court of Appeal. However, it is important that the process for reviewing a judgment or order of the Supreme Court laid down in the Act is observed. The order of Dawson J, unless and until it is set aside on appeal by the Court of Appeal, is an order of the Supreme Court that remains in force and effect according to its terms.

11. There is a further reason why the order under appeal should not have been made. In our opinion it is anything but clear that the order of Dawson J was made without jurisdiction. We think it is likely that Dawson J was aware of the time limits set out in s.22 of the Island Courts Acts, and the strict interpretation which this Court had placed on the section in Kalsakau v Jong Kook Hong CAC 30 of 2003 and Rombu v Family Rasu CAC 7 of 2006. We consider it more likely that Dawson J was aware that in Kalsakau the Court of Appeal had left open the question whether the payment of the Court fee for an appeal made within the s.22 time limit effectively initiate an appeal within time. If this was the understanding of Dawson J, the order now under appeal may have been made on the footing that the payment made by the appellant in this case should be treated as sufficient to meet the time limits imposed by s.22. As we understand it, this is the point intended to be raised by ground C of the appeal.

12. In this case, when the appellant paid fees to the Malekula Island Court on 20th December 2004 he was issued with a receipt saying "for Land Appeal Case- transmit to Sup Court". Whether the payment of a fee on 20th December 2004 and the steps thereafter taken by the appellant validly commenced an appeal to the Supreme Court against the decision in Land Case No. 10 of 1993 is a question that can only be resolved by the Court of Appeal.

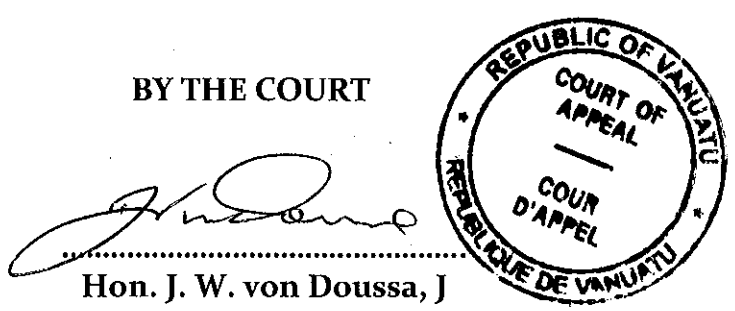
13. This Court was given encouragement by counsel for the first Respondent to deal with this question on this appeal. However, the Court of Appeal, like the parties, must adhere to the basic jurisdictional and procedural requirements of the Act. The appeal presently before this Court is an appeal against the order of the Supreme Court Judge made on 17th October 2011, and no more. It is not an appeal against Dawson J's order, nor against the validly of any steps taken in Land Appeal Case No. 3 of 2009. This appeal against the Supreme Court order gives this Court no jurisdiction to deal with these different questions.

14. As the Supreme Court order striking out Land Appeal Case No. 3 of 2009 was made without jurisdiction, the appeal must be allowed and the order set aside. For reasons just given that is the only issue the Court of Appeal can resolve at this stage.

15. The appeal is allowed. The order of the Supreme Court made on 17th October 2011 is set aside. The matter is returned to the Supreme Court. Given the unfortunate history of this matter we consider no costs should be allowed on the appeal. Each party must pay their own costs.

DATED at Port Vila this 4th day of May, 2012

BY THE COURT



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Hon. J. W. von Doussa, J