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

Civil Appeal
Case No. 20/1100 COA/CIVA

BETWEEN: **Morris Amos**
Appellant

AND: **Jimmy Alick**
Respondent

Date of Hearing:	***13 July 2020***
Before:	***Justice V. Lunabek*** ***Justice B. Robertson*** ***Justice J. Mansfield*** ***Justice D. Aru*** ***Justice G.A. Andrée Wiltens***
In Attendance:	***Mr J. Kilu for the Appellant*** ***Mr D. Yahwa for the Respondent***
Date of Decision:	***17 July 2020***

Judgment

A. Introduction

1. This appeal focusses on discontinuances of proceedings and Rule 9.9(4)(a) of the Civil Procedure Rules No. 49 of 2020 ("CPR") which reads as follows:

> ***"Discontinuing proceeding***
> *9.9(4) If the claimant discontinues*
> *(a) the claimant may not revive the claim; ..."*

B. Background

2. The Tongoa Shepherds Island Court, by a decision of 12 July 2018, determined that Mr Jimmy Alick was the rightful holder of the paramount chiefly title "Timatasomata" – and that Mr Morris Amos, the other applicant, was not.
3. Mr Morris Amos appealed this decision to the Magistrate's Court by Notice of Appeal dated 26 July 2018. The appeal was scheduled to be heard on 22 March 2019.

4. However, a Notice of Discontinuance was filed in the Magistrate's Court dated 21 March 2019. The Notice recorded:

> *"The dispute as to the rightful owner of the chiefly title "Timatasomata" is presently before the Tongoa Shepherds Island Court as directed by the Tongoa Shepherds Island Court in it's judgment of 13 June 2017."*

5. The Magistrate's Court recorded the discontinuance of the appeal in a formal one line decision of 22 March 2019.

6. On 5 April 2019, Mr J. Kilu, as counsel for Mr Morris Amos, sent a letter to the Magistrate's Court clerk, pointing out that the discontinuance of appeal had been mistakenly filed. He appended an application to reinstate the appeal, together with a sworn statement by Mr Michel Renevier in support explaining the mistake and how it had occurred.

7. The application to reinstate was heard on 25 April 2019 and dismissed "...in accordance with Rule 9.9(4)(a) of CPR. Thus, it appears that the Magistrate thought there was no residual discretion allowed under Rule 9.9(4)(a).

8. Mr Kilu next filed an application for Leave to Appeal out of time, so that a different appeal against the 12 July 2018 Island Court decision might be heard. He again pointed to the mistaken filing of the discontinuance. That application was dismissed, with costs, on 2 July 2019.

C. The Decision

9. The Magistrate's Court decision of 2 July 2019 was then appealed by Notice of 16 July 2019. It is important to note that the grounds of appeal referred to the decision of the Magistrate on 25 April 2019 refusing to reinstate the appeal as being made in error, as well as the decision of 2 July 2019. That appeal was heard in the Supreme Court on 31 March 2020, with a reserved judgment issued dated 30 April 2020, dismissing the appeal.

10. Mr Kilu maintained that the discontinuance had been filed due to a genuine mistake, and that in such circumstance reinstating the appeal and having the substantive issue tried was the appropriate remedy – he was critical of a dismissal on mere procedural grounds when the issue in dispute remained unresolved. The primary judge recorded that Mr Kilu was unable to provide any precedent authority to support his submission that mistakenly entered discontinuances were able to be set aside.

11. In response, Mr Yahwa had submitted that Rule 9.9(4)(a) was authority for the absolute inability to revive a proceeding once discontinued. He submitted that negligence rather than mistake had been behind the discontinuance. He pointed to the lack of specific rules allowing for mistakenly filed discontinuances to be set aside – such lack, in his submission, being determinative.

12. The primary judge considered Rule 9.9(4)(a) and the authorities presented to the Court of *Nalpini v President of the Republic of Vanuatu* [2019] VUCA 68, *Kalsakau v Director of Lands* [2019] VUCA 33 and *Hapsai v Albert* [2012] VUCA 5. The primary judge concluded, relying mainly on *Hapsai* that once a Notice of Discontinuance has been filed, the matter cannot be revived. Accordingly, on that basis, the appeal was dismissed.

D. The Appeal

13. Mr Kilu was consistent in advancing his argument that there was a discretion, despite the apparent wording of Rule 9.9(4)(a), for the Court to set aside a discontinuance where, as here, it was filed by genuine mistake. However, on this occasion, he had found authority to support his submissions. It is unfortunate he did not present these authorities to the primary judge or earlier to the Magistrate's Court.

14. The position on this appeal also changed the position of the respondent significantly. When asked directly if he maintained the strict interpretation he had adopted in the Magistrate's Court, namely that there could be no exceptions for genuine mistake as Mr Kilu submitted, Mr Yahwa acknowledged that on reflection such was an exception in law to the general position.

15. Mr Yahwa then sought to submit that the appellant had throughout this litigation been delinquent in complying with the pre-hearing directions of the Magistrate's Court and his counsel negligent. He submitted that the discontinuance was filed for reasons other than genuine mistake. He was prevented from advancing this fresh argument not previously raised.

E. Discussion

16. In *Christodoulu v Disney Enterprise Inc.* [2006] FCAC 183, *R. v Moore* [1957] 2 All ER 703, *R v Essex Quarter Sessions Appeals Committee ex parte Larkin* [1961] 3 All ER 930 and *R v Medway* [1976] 1 All ER 527 the Courts' inherent jurisdiction, in certain circumstances, to set aside discontinuances was discussed. Such circumstances include where the act constituting the discontinuance was a nullity in the eyes of the law by reason of fraud or mistake. These decisions make plain that a discontinuance may be set aside where the fraud or mistake renders the discontinuance a complete nullity, such that it cannot be described as a deliberate act.

17. These decisions were not brought to the attention of the Magistrate's Court or to the primary judge in the Supreme Court. The Court of Appeal decision in Hapsai does say that Rule 9.9(4)(a) is fixed and finite, but in that decision there was no claim in that case that the discontinuance under review was, in essence, a nullity because it proceeded on the basis of a clearly erroneous nature of the proceeding being discontinued. It is not therefore directly applicable to the present circumstances

18. The wording of the discontinuance in this case, set out in paragraph 4 above, illustrates Mr Kilu's submissions on this point to be apparently insurmountable. To date (apart from the submissions of Mr Yahwa just referred to) the fact of such a mistake has had no significance as it has been taken that Rule 9.9(4)(a) leaves no residual discretion.

19. Mr Kilu submitted that the mistake came about in this fashion. His clients verbally instructed him to appeal the 12 July 2018 Island Court decision, which he duly did but with grounds to be later settled. Subsequently, Mr Kilu's clients erroneously gave him a decision of the same Island Court dealing with the same matter but dated 13 June 2017. When the appeal was about to be heard, Mr Kilu studied the 13 June 2017 decision to find that it was not a final decision, but a decision setting out time-tabling directions. Mr Kilu saw no need to appeal the time-tabling directions and therefore filed his discontinuance. Only shortly later did it come to Mr Kilu's attention that he had been dealing with the incorrect decision.

20. We consider that what he recorded in the discontinuance makes it clear that Mr Morris Amos was not conceding the chiefly title to Mr Jimmy Alick, and that the discontinuance was a genuine mistake.

21. It is relatively straight forward after the event to characterise the mistake as negligence, but in the Court's view there is a strong basis for being satisfied that what occurred was a genuine mistake by Mr Kilu's client and also by him. If so, this was clearly not a premeditated discontinuance by Mr Morris Amos of his claim; nor was it a deliberate step taken on his instructions to concede his claim to be declared the rightful holder of the chiefly title.

22. With the inadequacies of the submissions to the Court, we consider the primary judge erred in determining that Rule 9.9(4)(a) must be applied strictly and without exception. We consider that

genuine mistake of that character is a valid basis on which the Court's inherent discretion may be exercised to set aside a discontinuance.

F. Result

23. We allow the appeal. We set aside the primary judge's decision including the order as to costs, and we set aside the orders of the Magistrate's Court of 25 April 2019 and 2 July 2019.

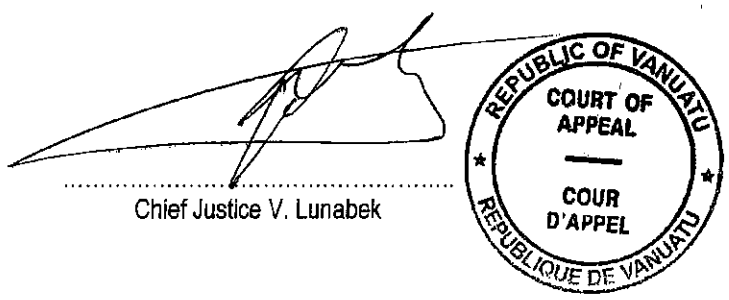
24. This case is remitted to the Magistrate's Court for the merits of Mr Kilu's application to reinstate the appeal against the 12 July 2018 Island Court decision to be determined. It is preferable that the initial appeal from the Island Court decision be reinstated, and dealt with (if that be the decision of the Magistrate's Court on that application, having regard to the apparently clear mistake and the other relevant circumstances).

25. Although much of what has transpired can be traced back to Mr Kilu and his client, we are of the view that he has been compelled to undertake this and other steps in order to attempt to resuscitate his client's claim. Accordingly we are of the view that Mr Kilu is entitled to the costs of this appeal, but on a moderate basis. Accordingly costs of VT 25,000 are awarded in favour of the appellant. The costs are to be paid within 28 days.

26. There is no order as to costs in the Supreme Court proceeding, as the authorities regarding the discretion we have accepted to exist were not referred to at that stage.

Dated at Port Vila this 17th day of July 2020

BY THE COURT



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Chief Justice V. Lunabek