IN THE MAGISTRATES' COURT OF THE REPUBLIC OF VANUATU – Port Vila
(Civil Appeal)

Case No. 22/1626 MC/CIVA

IN THE MATTER OF: Efate Island Court Judgment dated 2nd June, 2022 in Case No. 17/2307 IC/CIVL

BETWEEN: Leon Lalie Kalomtak
Erakor Village
Efate

Appellant

AND: **Danny Zacharie**
Erakor Village
Efate

First Respondent

AND: **Waya Tenene (Chief) (deceased)**
Erakor Village
Efate

Second Respondent

AND: **Family Kalmetabil Nmak Kalmet**
Erakor Village
Efate

Third Respondent

AND: **Sual Kalmari**
Erakor Village
Efate

Fourth Respondent

Coram:
Senior Magistrate, B. Kanas Joshua

Counsels:
Ms Mary Grace Nari, for the Appellant
Mr Sakiusa Kalsakau, for the 1st and 3rd Respondents
Mr Roger Rongo, for the 2nd Respondent
Mr James Tari, for the 4th Respondent

JUDGMENT

Background

1. The following table shows the sequence of this case:

REPUBLIC OF VANUATU MAGISTRATE COURT REPUBLIQUE DE VANUATU

Date	Case No.	Outcome
07/8/02	01/2002	Kalmetabil Kalmet Nmak is declared as paramount chief of Erakor.
25/6/03	203/2002	1. An election to resolve dispute. 2. Waya Tenene continues to be chief until vote is held.
07/11/03	16/2003	1. Parties agree that the matter be sent back to the IC. 2. Parties agree to retain answers to 6 questions. 3. IC to determine as to whether an election to choose chief is according to Erakor custom. 4. Tenene remains chief until final determination.
16/4/04	01/2002	Declaration: Election is not part of Erakor custom. Orders: 1. Order of 07/8/02 by EIC is reactivated. 2. Waya Tenene and Sual Kalmarie to pay own costs.
16/12/14	01/2001	Application for review was filed.
11/2/15	08/2009	1. EIC to answer whether choosing a paramount chief by election is an acceptable practice according to Erakor custom. 2. Application for review of IC decisions listed for 11/3/15.
16/5/17	16/3460	1. John Kaluat Thomas is the true spokesman of Waya Tenene (confirmed in Civil Case #01/2002 – 15/5/02). 2. John Kaluat Thomas to prepare submissions on the main issue before the court – whether election of paramount chief is acceptable practice according to Erakor custom. 3. Court allowed Leon Lalie and his group to make any application and file it before supervising magistrate of EIC.
19/5/17	16/3460	Court upholds judgment of 16/4/04, Civil Case #01/2002 and declares that election of paramount chief of Erakor is not an acceptable practice according to Erakor custom.
07/8/17	17/1334	1. Proceeding and claimants' claim is dismissed in its entirety. 2. Interim orders (10/7/17) set aside. 3. Case #17/1334 is struck out in its entirety.
14/9/17	17/2307	Ruling on application for disqualification denied.
11/6/10	08/2009	1. Declaration: Charley Kalmet Mpakus Nmak V is unlawful successor and paramount chief – did not comply with Orders of 07/8/02. 2. Denny Zacharie is rightful son of Kalmetabil Nmak whom this Court declares as paramount chief of Erakor on 07/8/02. 3. Chiefly title is custom property of family Kalmetabil Nmak. Orders: 1. Case sent back to Nmak family. 2. Patrilineal lineage of Nmak have customary right. 3. Matrilineal lineage of Nmak have no rights to interfere.
02/6/22	17/2307	1. John Kalmet is spokesman of Waya Tenene. 2. Leon Lalie must cease to appear on behalf of Waya Tenene. 3. Application for review (Case #17/2307) has no effect and is dismissed in its entirety. 4. Leon Lalie penalized for abuse of court process.

REPUBLIC OF VANUATU MAGISTRATE COURT REPUBLIQUE DE VANUATU

		5. Leon Lalie must pay penalty of VT20,000 for abuse of court process. 6. Entire Nmak family to appoint successor of late Timteo Kalmet.

Introduction

1. This is an appeal on the judgment of the Efate Island Court ("EIC"), dated 2nd June, 2022. The judgment was made on the application for representatives of the applicant and first respondent in that matter.

2. All counsels agreed that Section 22(2) of the Island Courts Act CAP167 need not be complied with as the issue before the Court challenged the legality of the judgment of the EIC so there were no assessors on the bench.

3. The appellant appealed the following in the EIC judgment:
   a. That Leon Lalie must cease from appearing on behalf of late Waya Tenene.
   b. That the application of reviewing the EIC Civil Case No. 17/2307 IC/CIVL, pursuant to Section 21 of the Island Court Act filed by Leon Lalie on 17 December 2014 has no effect and dismissed in its entirety.
   c. That Leon Lalie must be penalized knowing that disputing the matter of representation twice in the same Court is a blatant abuse of Court's process and such penalty is a message of deterrence to other likeminded persons who intend to abuse the Court's process in any event.
   d. That Leon Lalie must pay a penalty of VT20,000 in consequence of abusing the process of the Court. The penalty fine must be paid out within the next 3 months.

4. The grounds of appeal are:
   a. That the learned magistrate erred in fact and law when he overlooked Section 21(2) of the Island Court Act regarding issue of 'standing' in review cases;
   b. That the Court erred in fact and law referring to 'representations' while not addressing directly the basis and substance of the 'application for review';
   c. That the Court has erred in fact and law by dismissing the application for review without hearing the substance of the said review application.

5. The orders sought were:
   a. That the appeal be allowed;
   b. That the EIC judgment of 2/6/22 be set aside in its entirety;
   c. That the Orders of EIC of 16/4/04 and 11/6/10 be set aside following Orders of 11/2/15;
   d. That the matter be sent to the Erakor Farea to make its own decision on its paramount chief within 14 days (to be supervised by a representative of Malvatumauri Council of Chiefs from Efate Island) and report to EIC for formal orders to be issued;
   e. That parties to bear their own costs.

Ground 1: Whether the learned magistrate erred in fact and law when he overlooked Section 21(2) of the Island Courts Act regarding issue of 'standing' in review cases

MAGISTRATE COURT

1. The ruling on 2/6/22 was on an application for representation between the following parties to represent Waya Tenene (deceased):
    a. Dispute between Mr John Kalwat and Mr Leon Lalie in representing Waya Tenene in reviewing the judgment of EIC Case No. 17/2307; and
    b. Dispute between Mr Yan Tapang Amos and Mr Timteo Kalmet in representing Family Kalmetabil Nmak Kalmet in reviewing the judgment of EIC Case No. 17/2307.

2. Section 21(2) of the Island Courts Act CAP167 provides that,

    [O]n the application of ***any person or on his own motion*** *such supervising magistrate may –*

    a. *Revise any of the proceedings of an island court, ..., and may make such order or pass such sentence therein as the Island court could itself have made or passed:*

        Provided that no sentence of fine or imprisonment shall be increased without first giving the accused an opportunity to be heard:

        And provided further that if any such sentence shall be increased upon the revision by the magistrate, there shall be an appeal from the order of the magistrate to the Supreme Court which may reduce, remit or increase any such sentence;

    b. *Order any case to be retried either before the same court or before any other Island court of competent jurisdiction for which he is the supervising magistrate or may at any stage of the proceedings, either before or after judgment has been delivered transfer any case for hearing before him.*

3. In the ruling, the EIC ordered that John Kalwat is the designated spokesperson representing Waya Tenene in the proceeding, and Leon Lalie must cease from appearing on behalf of late Waya Tenene. Furthermore, family Nmak was ordered to appoint another person to replace the late Timteo Kalmet who was representing them in court proceedings.

4. In applying the orders in the ruling, this means that Leon Lalie cannot be seen to represent Waya Tenene after 02/6/22 in any court proceeding. The application for review was filed on 17/12/14 between Leon Kalsaur Kalomtak and Danny Zacharie. For clarity, Leon Kalsaur Kalomtak is the same person as Leon Lalie.

5. In understanding Section 21(2) we must also look at the Rules of a supervising magistrate. Rule 6 of the Island Court (Supervising Magistrate) Rules 2005 provides for revision of decisions of Island courts and states that –

    (1) The supervising magistrate of each Island court must regularly revise the decisions of that Island court, at intervals of not more than 3 months.

    (2) The supervising magistrate of each Island court must make appropriate arrangements with the clerk of that Court for all the decisions of that Court to be made available for inspection and revision by the magistrate.

REPUBLIQUE DE VANUATU MAGISTRATE COURT REPUBLIQUE DE VANUATU

6. The first respondent submitted that Section 21(2) is only for the supervising magistrate and should not be used as a license that can be invoked at any time. Rule 6 of the Island Court (Supervising Magistrate) Rules 2005 states that a supervising magistrate must regularly revise the decisions of an Island court at intervals of 3 months.

7. Section 21(2) allows for revision of proceedings to be made in 2 ways – firstly, "on the application of any person" and secondly, on the supervising magistrate's own motion. In this case, Leon Lalie had filed an application. Upon filing such an application, the supervising magistrate should have taken note of it and applied Rule 6 and heard the application after 3 months. Technically, this revision should have occurred at the end of the first quarter of 2015, as the application was filed in December 2014.

8. The application for review was dismissed in its entirety on 2/6/22. No reasons were given for this dismissal.

9. In revising a proceeding of an Island court the supervising magistrate may make such order as the Island court could itself have made. The supervising magistrate may order the case to be retried before the same court or another court, or he may transfer the case. Revising a proceeding means to look back on a proceeding. If an application is filed then it must be heard. If after hearing the application it is found that the proceeding is occurred properly then that proceeding should be affirmed by the supervising magistrate and the outcome of it should be upheld. If it is found otherwise, then orders to have it retried should be made. Section 21(2) does not allow the supervising magistrate to dismiss an application for review.

10. In this instance, the supervising magistrate erred in law when he dismissed the application for review, without hearing the application.

Ground 2: Whether the Court erred in fact and law when referring to 'representations' while not addressing directly the basis and substance of the 'application for review'

11. The ruling of 02/6/22 was on the application for representations. The supervising magistrate did not err in fact and law when he referred only to representations and did not address the substance of the application for review.

Ground 3: Whether the Court has erred in fact and law by dismissing the application for review without hearing the substance of the said review application.

12. The supervising magistrate erred in law when he dismissed the application for review, without the application.

Appeal out of time

13. The first respondent submitted that the appeal was filed out of time. Section 22(5) of the ICA provides that any appeal may be filed within 30 days of the date of a decision. An extension of 60 days may be sought. The following cases were cited:

MAGISTRATE COURT REPUBLIQUE DE VANUATU

a. *Bangalulu v. Malasikoto*[1]; the Court emphasized that Sections 22(1) and (5) must be applied strictly.
b. *Naru Kalbeau Kalsakau v. Jong Kook Hong*[2]; any application for grant of an extension of the 30 days period must be made within 60 days. No relief can be sought or granted outside of the 60 days period.
c. *Loparu v. Sope*[3]; the appellants did not follow the statutory process by appealing within 30 days period, nor was an extension granted by the court.
d. *Vanua Rombu v. Family Rasu*[4]; Section 22 does not permit any exception to the strict time frames given.
e. *Family Mete v. Family Wolu*[5]; the application seeking an extension of the period to file an appeal outside of 60 days was denied, as it was filed 1 year and 5 months outside of the 60 days period.

14. In the current case, the appeal was filed on 04/7/22. The decision being appealed was made on 02/6/22. The 30 days period lapsed on 02/7/22. The appeal was filed 2 days after the period lapsed. There were no application seeking an extension.

Frivolous, vexatious and abuse of process

15. It was submitted by the first respondent that this appeal is an attempt to re-litigate matters that have been properly determined and adjudged by the Island court. Reasons given in Ground 1, above, have outlined why the supervising magistrate erred in law when he dismissed the application for review, without hearing the application.

16. It was also submitted that the decision made on 11/2/15 overturned the decision of the EIC in 2004. The first claimant was Kalmetabil Kalmet Nmak, and the second claimant was Charley Mpakus Nmak. The first defendant was Waya Tenene and the second defendant was Sual Kalmari. The decision of 11/2/15 was on an application for enforcement where the supervising magistrate made the following orders:
    a. That specific pleadings on the question only of whether choosing a paramount chief by election is an acceptable practice according to Erakor custom be filed before, heard and decided by the EIC within 28 days from the date of this order.
    b. That the application for review of the Island court decision filed by the respondents be listed for hearing on 11/3/15, at 2pm.
    c. That a further enforcement conference will be called as soon as the issues in order 1 and 2 above are determined.
    d. In the interim, parties are ordered to keep the peace and to work together and in consultation with each other in all matters and affairs of the community for the interest of everyone in the Erakor community.

17. The EIC stated in the decision of 11/2/15 that the Court of Appeal decision[6] is the "guiding decision" for the parties and EIC to follow. I find that the orders made by the supervising magistrate is in line with the Court of Appeal decision.

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[1] [2008] VUSC 40
[2] [2004] VUCA 2
[3] [2005] VUCA 4.
[4] [2006] VUCA 22.
[5] (2006) VUSC 68.
[6] Civil Case No. 16 of 2003.

MAGISTRATE COURT REPUBLIQUE DE VANUATU

18. It was declared in the EIC decision of 16/4/04, between Waya Tenene as the original claimant and Sual Kalmarie and Kalmetabil Kalmet Nmak, as the cross claimants, that an election is part of Erakor custom. Following this, it was ordered
    a. That the decision of 07/8/02 be reactivated and to come into effect.
    b. That parties Waya Tenene and Sual Kalmarie shall pay costs of VT50,000 to Kalmetabil Kalmet Nmak within 1 week of that decision.
    c. That parties have the right of appeal.

Conclusion

19. In addressing all the points made in the hearing of the appeal, grounds 1 and 3 would have been successful as the learned supervising magistrate erred in law when he dismissed the application for review without hearing the application for review. Ground 2 would not have succeeded.

20. The submission on appeal out of time is considered. The appeal was filed 2 days after the 30 days period, at which point the appellant should have applied for an extension of this period. No such application was made. This Court does not have the discretion to make an extension of the 30 days period if no proper application was made. It is bound by rules and procedures, and precedents set in previous cases.

21. The application for review should have been addressed in the first quarter of 2015 by the supervising magistrate. The EIC, on 11/2/15, listed this matter to be heard on 11/3/15, however, it was never addressed until it was dismissed on 02/6/22. This Court cannot revive this review, as the appeal was made out of time.

22. Given the above, this appeal is dismissed.

Dated at Port Vila, on this 12th day of September, 2023

BY THE COURT

Beverleigh Kanas Joshua
SENIOR MAGISTRATE