

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

Civil
Case No. 21/3317 CVL

BETWEEN: Tarihi Tavue
Appellant

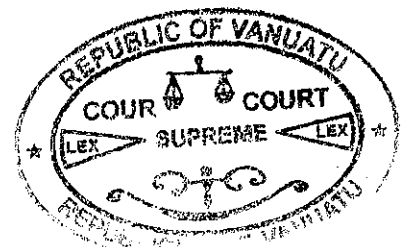
AND: Solomon Tavue
Nancy Tavue
Ken John
Jack Elden
Respondents

Date of Hearing: 20 December 2021
Before: Justice G.A. Andrée Wiltens
Counsel: Mr J. Tari for the Appellant
Ms V. Muluane with Ms B. Emelee for the Respondents
Date of Decision: 23 December 2021

Judgment

A. Introduction

1. This Notice and Grounds of Appeal, filed on 7 October 2021, challenges a decision of the Magistrate's Court of 18 May 2021 which struck out the appellant's appeal against an earlier Island Court decision.
2. There is no accompanying application for leave to file the appeal out of time. Rather, there is an application to extend time to file an appeal, with a sworn statement in support contending that the decision was not served or made known to the appellant until 24 August 2021.

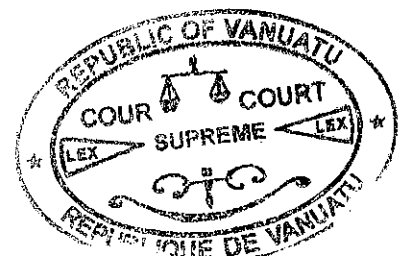


B. Background

3. The Island Court made a decision between the parties on 29 March 2019. The Notice of Appeal challenging the decision was filed in the Luganville Magistrate's Court on 26 April 2019, and that became Civil Case No. 19/1141.
4. The presiding Magistrate scheduled a conference for 8 September 2020, at which both parties attended with certain time-tabling directions were made. The next hearing was then set for 5 November 2020.
5. The respondents complied with the time-tabling directions made; the appellant did not. The respondents also filed an application to strike out the appeal on 20 October 2020. That was served on counsel for the appellants on 22 October 2020.
6. On 5 November 2020, there was no appearance by counsel for the appellant or the appellant himself. Further directions relating to the appellant were made, and orders as to costs. The next hearing was then set for 24 November 2020.
7. The appellant did not comply with those further directions.
8. On 24 November 2020 the appellant again did not appear in person or through counsel. The application to strike out was heard, with the decision reserved.
9. The decision striking out the appeal was published on 18 May 2021. The basis for striking out the matter was that the appellants had taken no steps to progress the matter for more than 6 months.
10. It is common ground that newly instructed counsel for the respondents wrote to the appellant's counsel on 24 August 2021, and that the correspondence referred to the Magistrate's determination to strike out the appeal.
11. On 7 October 2021, the Notice and Grounds of appeal was filed, alleging that the decision had not been served on the appellant, and that the appellant was unaware of the decision until 24 August 2021.
12. On 3 November 2021, following a directions Minute being issued by this Court requiring an application for leave to appeal out of time with supporting sworn statement to be filed, an application for leave to extend time to file an appeal was filed in the Supreme Court, with a supporting sworn statement by the appellant.

C. Hearing

13. Having seen the written submissions filed by Mr Tari in support of his appeal, I required him to respond to 3 issues.
 - Did he accept, contrary to his written submissions, but as evidenced by the sworn statement of Ms S. Mahuk, that the application to strike out had been properly served on his office on 22 October 2020?



- What steps were taken by the appellant between 8 September 2020 and 18 May 2021?
 - What explanation was there for the delay between 24 August 2021 and 7 October 2021.
14. Mr Tari accepted that service of the strike application had been properly made, but submitted that the application was overlooked. He could point to no steps taken by the appellant between his first appearance in the Magistrate's Court on 8 September 2020 and the publishing of the Magistrate's reserved decision on 18 May 2021. He explained that this was as a result of the matter simply being overlooked. Finally, the delay between the appellant becoming aware of the reserved decision remained unexplained; Mr Tari submitted that the matter had been overlooked.

D. Discussion

15. The Notice and Grounds of Appeal was filed out of time. Prior to this Court being able to entertain the matter, leave is required to file out of time. There is no application for such – the application to extend time to file is not the appropriate application. Accordingly, the Notice and Grounds of Appeal document is a nullity.
16. The appellant can have no complaint about the result in the Magistrate's Court. The application to strike out was filed and properly served. The appellant was afforded the benefit of the doubt on 5 November 2020 when he did not appear for the application to be deferred. It was finally heard after his second non-appearance and his failure to file a response to the application.
17. The learned Magistrate's decision is unimpeachable, in that the appellant took no steps to prosecute his appeal between 8 September 2020 and 18 May 2021, despite several prompts. The Civil Procedure Rules specifically permit a strike out in such circumstances.
18. There is no satisfactory explanation for the delay after the appellant became aware of the decision adverse to his interests before he commenced this appeal.

D. Result

19. The appeal is dismissed.
20. Costs are awarded to the Respondents in the sum of VT 50,000, a sum agreed between counsel. They are to be paid within 28 days.

Dated at Port Vila this 23rd day of December 2021
BY THE COURT


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Justice G.A. Andrée Wiltens

