

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

Civil Appeal
Case No. 22/164 SC/CIVA

BETWEEN: Ben Tubuvivi

Appellant

AND: Chief George Masseng

First Respondent

AND: Chief Laan Bongmatur

Second Respondent

AND: Chief Sangul Firmir

Third Respondent

Date of Hearing: 18 August 2022
Before: Justice V.M. Trief
In Attendance: Appellant – Mr J.W. Temar
Respondents – Mr P. Fiuka
Date of Decision: 26 September 2022

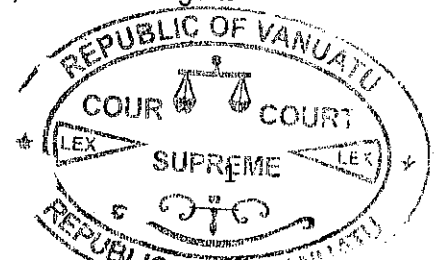
**REASONS FOR DECISION DISMISSING THE APPEAL AND THE APPLICAITON
FOR LEAVE TO APPEAL OUT OF TIME**

A. Introduction

1. On 18 August 2022, I dismissed the appeal against the decision of the Magistrates' Court dated 1 September 2021 in Civil Case No. 823 of 2021 ('CC 21/823') dismissing the Claim and the Urgent Ex Parte Application for Restraining Orders (the 'Urgent Application').
2. I also declined and dismissed the Application to Extend or Appeal Out of Time.
3. I now set out the reasons.

B. Background

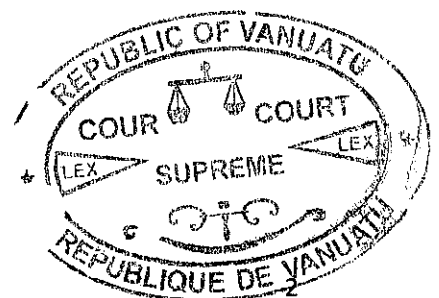
4. On 29 March 2021, the Appellant Ben Tubuvivi filed Claim in CC 21/823 in trespass and for damage to property. Damages of VT50,000 for trespass and VT60,000 for damage to property (trees) were sought.



5. The named Defendants were:
- a. Chief Augusta Kami Magemhal, First Defendant;
 - b. Bongvivi K. Magemhal, Second Defendant; and
 - c. Severi Basil Magemhal, Third Defendant.
6. The following was pleaded at para. 1 and paras 1-8 of the Particulars of the Claim:
1. *The Claimant [Ben Tubuvivi] is from Magam, North Ambrym. He and his families have resided at Magam for years. He is making a claim on behalf of members of his families.*

PARTICULARS

1. *Magam and Lonha was formerly and is currently known a Presbyterian Mission Station.*
 2. *Lonha is part of Magam Land and is where the mission house was constructed during colonial administrations.*
 3. *In 2012 North Ambrym District council of chiefs ruled in favour of the claimant and members of his family to be land owners of Magam and part of Lonha.*
 5. *In Magam Lonha land, where the missionaries were been stationed, there were fruit trees like coconut, mango, breadfruit, nangae, nanrao, kurosol and other trees for firewood.*
 6. *Sometime before and after 2009, the first defendant, second defendant and third defendant moved to Lonha and damaged a lot of the fruit trees, and other trees for firewood without consent of members of the claimant family and local Presbyterian authority at Magam village.*
 7. *The claimant family and local church authority have been upset and expressed concern that the defendants have no respect and have not shown courtesy to make any payment for property of the church and the claimant.*
 8. *From 2009 and up to this year, the defendants continued to damage and destroy some of the fruit trees and trees for firewood.*
7. Also on 29 March 2021, Mr Tubuvivi filed the Urgent Application seeking restraining orders against the respondent members of the Molmolnevere Council of Chiefs of North Ambrym from conducting a local court sitting or meeting for the purpose of hearing a dispute over Magam land.
8. The named Respondents were:
- a. Chief George Maseng, First Respondent;
 - b. Chief Laan Bongmatur, Second Respondent;
 - c. Sangul Firmir, Third Respondent; and
 - d. 6 other Undisclosed chiefs.



9. The grounds of the Urgent Application were as follows:
- a. That in 2012, the Molmolnevere Council of Chiefs declared Mr Tubuvivi and members of his families as the custom owners of Farbu Magam land;
 - b. This has never been appealed to the Ambrym island Malmelemele Council of Chiefs;
 - c. Instead, the losing parties have repeatedly sought 'appeal' from the Molmolnevere Council of Chiefs itself;
 - d. Another alleged appeal hearing before the Molmolnevere Council of Chiefs was to be held on 23 March 2021;
 - e. Accordingly, restraining orders were sought to stop the Molmolnevere Council of Chiefs from meeting for the purpose of hearing a dispute over Magam land.
10. On 1 September 2021, the Magistrates' Court issued a Minute, and then its Findings and Order dismissing the Claim and the Urgent Application.
11. On 31 January 2022, Mr Tubuviv filed Notice of Appeal and Application to Extend or Appeal Out of Time.

C. Magistrates' Court Decision

12. The Magistrates' Court issued its Minute dated 1 September 2021 as follows:

This matter was listed for hearing of the Claim and Restraining Orders on the 12th May 2021 at Nebul Area, North Ambrym. At the hearing the spokesperson for the Defendant Mr Chief Laan Bongmatur and Counsel for the Claimant [Mr Temar] agreed for all the Defendants to join together as the "Defendants".

It is crucial to note that the Defendants did not file neither a response nor a Defence but requested the Court to record in writing their oral response to the Claim and Restraining Orders and that the record/notes be referred to as their Defence and Response to the Restraining Order. Counsel for the Claimant made no objection to this request therefore the Court allowed their request.

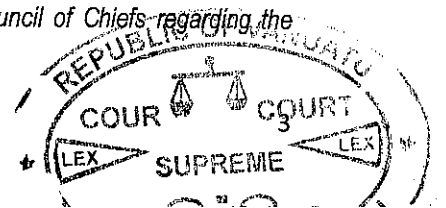
The Court then proceeded to hear both the parties and issued its Findings and Order.

13. The Magistrates' Court issued its Findings and Order dated 1 September 2021 in the following terms:

Having heard from Counsel for the Claimant [Mr Temar] and Mr Chief Laan Bongmatur for the Defendants, I make the following Findings and Order:

Findings:

1. *The issue in the Claim and Restraining Orders concerns the ownership rights and usage rights of the custom land boundary known as "Magam Lonha Land".*
2. *The damages Claimed was for trespass and damages to fruits trees and dry woods mainly used to make fire to cook and used for other purposes.*
3. *The parties have copies of the decisions made by Council of Chiefs regarding the ownership of that custom land boundary.*



4. *There was no previous hearing regarding the custom ownership of that land boundary in any recognised Courts of Law or the Customary Land Tribunal.*
5. *This Court cannot uphold the decisions made by the Council of Chiefs regarding the ownership of the said Land AND have NO jurisdiction to hear and decide on issues relating to custom land ownership and usage rights.*

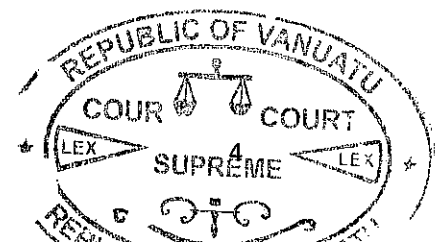
Order:

I therefore hereby Order that:

1. *The entire Claim and Restraining Orders issued by the Court be dismissed.*
2. *Parties are encouraged to pursue their Claim for custom land boundary Ownership with the Customary Land Management Office and to maintain peace amongst each other until such time the issue of Land Ownership is decided.*
3. *No cost Order.*

D. Discussion

14. The subject matter of each of the Claim and the Urgent Application was completely different. It is therefore difficult to understand why they were filed in the same proceeding. Mr Temar was unable to explain why they were.
15. Both the Claim and the Urgent Application were listed for hearing on 12 May 2021 at Nebul Area, North Ambrym.
16. Mr Temar appeared at the hearing. He and the Defendants' spokesperson Chief Laan Bongmatur agreed that all the Defendants would be joined together as the "Defendants" as recorded in the Magistrates' Court Minute dated 1 September 2021.
17. It is also difficult to understand why Mr Temar and the Defendants agreed to this as the Defendants named in the Claim and the Respondents to the Urgent Application were completely different. However, that is what they chose to do.
18. The learned Magistrate then heard the parties and issued his Findings and Order.
19. Mr Temar submitted that the learned Magistrate erred in his ruling when he ordered that the Restraining Orders were dismissed as neither the Ambrym Island Court or the Magistrates' Court had ever issued Restraining Orders against the chiefs.
20. It was obviously an error by the learned Magistrate to refer to "Restraining Orders" in his Minute and Findings and Order as no restraining orders had ever been issued. This was obviously an erroneous reference to the Urgent Application. Nothing turns on this therefore I have treated the references to "Restraining Orders" in the learned Magistrate's Minute and Findings and Order as referring to the Urgent Application.
21. Mr Temar also submitted that the learned Magistrate erred in failing to hear the Urgent Application as he had sufficient time to do so and obviously did not out of fear or bias.



22. As already stated, the subject matter of the Claim and the Urgent Application were different but both were premised on the purported declaration by a Council of Chiefs of Mr Tubuvivi and his families as the custom owners of Magam land.
23. The Court of Appeal confirmed in *Valele Family v Touru* [2002] VUCA 3 that the Courts of law can only uphold decisions as to the custom ownership of land made by the recognised Courts of law or a Customary Land Tribunal. They cannot uphold custom ownership decisions by a council of chiefs. Indeed, Mr Temar accepted that the Magistrates' Court could not uphold a council of chiefs' decision as to custom ownership of land.
24. It makes no difference that the learned Magistrate had sufficient time to hear the Urgent Application as it was premised on a council of chiefs' decision which the Magistrates' Court could not uphold.
25. No material has been put before this Court as to the allegations that the learned Magistrate acted out of fear or bias.
26. In the circumstances, no error has been demonstrated on the part of the learned Magistrate to dismiss the Claim and the Urgent Application. He was correct to do so. The appeal was dismissed.
27. The appeal had no prospect of success as both the Claim and the Urgent Application were made in reliance on a council of chiefs' decision as to custom ownership of land. Accordingly, the Application for Leave to Extend or Appeal Out of Time was declined and dismissed.

E. Costs

28. Costs must follow the event.
29. Mr Fiuka sought VT50,000 costs. Mr Temar submitted that this was excessive. He submitted that half of that would be reasonable.
30. An Appeal Book was filed as were sworn statements and extensive submissions. There were 3 Court attendances including the appeal hearing that lasted nearly 2 hours. In the circumstances, I fix the costs of the appeal at VT50,000.

F. Result and Decision

31. For the reasons given, the appeal was **dismissed** and the Application for Leave to Extend or Appeal Out of Time was **declined and dismissed**.
32. The Appellant is to pay the Respondents' costs fixed at VT50,000 **by 4pm on 24 October 2022**.

DATED at Port Vila this 26th day of September 2022

BY THE COURT


Justice Viran Molisa Trief

