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

CIVIL APPEAL CASE No. 3546 OF 2016

BETWEEN:	**FAMILY ABSOLOM VANAF AND APULWYN TULA AND FAMILY** Appellants
AND:	**FAMILY JOHN ASHWIN WETELWUR** First Respondent
AND:	**FAMILY VAVAK** Second Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice John Mansfield*** ***Hon. Justice Daniel Fatiaki*** ***Hon. Justice Mary Sey*** ***Hon. Justice David Chetwynd*** ***Hon. Justice Paul Geoghegan***
Counsel:	*Mr. R Tevi for the Appellant* *Mr D Yawha for the First Respondent* *Mr E Nalyal for the Second Respondent*
Date of Hearing:	*14 November 2016*
Date of Judgment:	*18 November 2016*

JUDGMENT

1. In this matter the Court is concerned with applications for leave to appeal. There are applications filed by the Appellant ("Family Vanaf") and there are also applications filed by the Second Respondent ("Family Vavak") in support of their intended cross appeal.

2. There has been a history of litigation between all the parties in this appeal in respect of Tavlavere Land on Gaua Island. The Banks and Torres Island Court ("BTIC") heard a disputed claim for ownership of the land and gave judgment in

November 2005. The decision was appealed to the Supreme Court and by a consent order dated 20th March 2012 the BTIC decision was set aside and the matter was listed for hearing again. Directions were also given by the Supreme Court in an effort to ensure a speedy resolution of the dispute. The case was promptly re-heard and BTIC handed down its new judgment on 30th May 2012. The Island Court restated the decision it made after the first hearing and again decided the First Respondent in this appeal ("Family Wetelwur") was custom owner of Tavlavere land. The 30th May 2012 judgment was appealed by Family Vanaf and Family Vavak. The appeal came before the Supreme Court in Land Appeal case 06 of 2012. The appeal was heard by Justice Aru and two assessors (Chiefs Abraham Fred and Abel Patteson) on Gaua over two days on 19th and 20th September 2016. The decision was read out on 20th September and type written reasons published a short while later. The Supreme Court dismissed the appeals by Family Vanaf and Family Vavak and they now seek to appeal the decision of the Supreme Court.

3. Section 22(4) of the Island Courts Act [Cap167] provides;

> *"An appeal made to the Supreme Court under subsection (1) (a) shall be final and no appeal shall lie therefrom to the Court of Appeal."*

That section does not provide for any further appeal, whether by leave or otherwise. Despite what is said in section 22(4) Family Vavak apply for leave and variously seek to rely on sections 30, 48(3), and 65 of the Judicial Services and Courts Act [Cap 270] ('the Act") to provide a route for an appeal to the Court of Appeal. Family Vavak also seek leave to appeal on the basis of the apprehended bias on the part of the judge in the Court and seek to rely on section 38 of the Act. Family Vanaf seek leave to appeal on the basis that they have suffered prejudice because they were not represented at the appeal before the Supreme Court and thus denied their fundamental rights to a fair hearing and natural justice. They seek to rely on section 48(3) of the Act to support their arguments.

4. This is not the first time that this court has considered the restriction on an appeal from the Supreme Court set out in section 22(4) of the Island Courts Act. The issue was examined in the case of *Matarave v Talivo* [2010] VUCA 3; Civil Appeal Case 01 of 2010 (30 April 2010) when this court considered four questions:

> *" a) Do the terms of s. 22 (4) of the Island Courts Act prevent this Court in all circumstances, however exceptional or serious alleged errors by the Supreme Court might be, from entertaining an appeal from the decision of the Supreme Court where the Supreme Court has exercised the function committed to it under s.22 (1) of the Island Courts Act to hear an appeal from an Island Court?*

(b) Are there circumstances which can render the apparent exercise of the function granted to the Supreme Court under s.22 (1) an invalid exercise of the function? If so, was there apprehended bias on the part of the judge or an assessor in such a case?

(c) If yes, to the preceding question, does the evidence placed before this Court establish apprehended bias on the part of the judge or the assessors?

(d) If apprehended bias is established what remedy is available, and when should a court exercise its power to grant a remedy? "

5. Dealing with the first question the court said:

"This question in substance raises the meaning s.22 (1)(Sic, s22(4)) *of the Island Courts Act. Stated bluntly, we consider this statutory provision means exactly what it says: the decision of the Supreme Court is final and cannot be the subject of an appeal to the Court of Appeal. However, the limitation imposed by s.22 (4) is in relation to an "appeal made to the Supreme Court". This requirement is only met if the body hearing the appeal is a Court validly constituted by a Supreme Court judge and two or more assessors appointed by the judge as required by s.22 (2). That requirement will not be met if any one of those persons is subject to any matter that disqualifies them from exercising their statutory functions. Moreover, the "matter" the subject of the appeal must be one concerning disputes as to the ownership of land (see: s,22(1)(a)), that is, a particular area of land identified by the disputants as the land subject to the dispute. It follows that if the court which purports to exercise the appellate functions under s.22 (1) (a) is not properly constituted, or if the court properly constituted purports to decide custom ownership of land which is not subject to the dispute submitted to the Island Court, the Court will not be validly exercising its statutory function. For example, if the Court was constituted only by a judge and one assessor, the Court would not be validly exercising the statutory function. Nor would it be if it purported to decide ownership of land outside the area of the disputed land the subject of the appeal.*

Subject to this qualification, the direction in s.22 (4) that the appeals to the Supreme Court shall be final and not subject to appeal to the Court of Appeal, means that the resolution of the dispute as to the ownership of the land is finally ended by the decision of the Supreme Court regardless of errors that may have been made by the Supreme Court in the exercise of its function, and whether the errors might be described as errors of law, or errors of fact. Thus, if the Supreme Court misapprehends an aspect of the evidence, and makes a finding of fact which is wrong, or fails to follow strictly the laws of evidence the error does not expose the decision of the

Supreme Court to review or appeal. In our opinion all the possible errors by the Supreme Court alleged in the applications for leave to appeal and the draft notices of appeal, save for the allegations of apprehended bias, are errors of this kind."

6. The court then went on to consider whether there was any possibility that by excluding a right of appeal from the Supreme Court to the Court of Appeal there was inconsistency between Articles 50, 73, 74 and 75 of the Constitution and section 22 of the Island Courts Act. The conclusion was there was no inconsistency.

> *"In any system of governance under the rule of law, there must be a dispute resolution system administered by courts, and this system must impose finality on the resolution of disputes at some point. Wherever that point may be in the process for the resolution of disputes, there will be both winners and losers. The losers are likely to be dissatisfied with the outcome. However finality requires that they have no further avenue available to perpetuate the dispute. Even where a disputed claim ends with a decision of the Court of Appeal, one of the parties at least is likely to be dissatisfied. However that is a feature of the system. The fact that for disputes over ownership of land the legal structures allows only one level of appeal after a hearing by the primary court established by Parliament to meet the requirements of Articles 76 and 78 of the Constitution does not render a limitation on further appeal unconstitutional."*

7. In seems to us that the appeals now being pursued by Family Vavak are being pursued on the basis the Supreme Court erred in its judgment and that the errors alleged are those which, *"might be described as errors of law, or errors of fact"*. In other words, they were asserted errors made by the Supreme Court whilst acting within its jurisdiction, and were not errors as to existence of jurisdiction under 22(1) of the Island Courts Act. Apart from the issue of bias the case of *Matarave* does not support the contention that the Family Vavak are entitled to appeal on the basis of supposed errors of law or facts.

8. Counsel made specific references to other sections of the Act which need to be considered. First, Counsel argued there was a right of appeal because of the provisions of section 30 of the Act. Section 30 states:

> *30. Appeals from Magistrates' Court*
>
> *(1) Subject to the provisions of any other Act, the Supreme Court has jurisdiction to hear and determine appeals from judgements of the Magistrates' Court on all or any of the following:*
>
> *(a) a question of law;*
> *(b) a question of fact;*

(c) a question of mixed law and fact.

(2) The Supreme Court in hearing an appeal:

(a) is to proceed on the face of the record of the Magistrates' Court; and

(b) may exercise such powers as may be prescribed by or under this Act or any other law; and

(c) has the powers and jurisdiction of the Magistrates' Court; and

(d) may review the procedures and the findings (whether of fact or law) of the Magistrates' Court; and

(e) may substitute its own judgement for the judgement of the Magistrates' Court; and

(f) may receive evidence.

(3) (Repealed)

(4) The Supreme Court is the final court of appeal for the determination of questions of fact. However, an appeal lies to the Court of Appeal from the Supreme Court on a question of law if the Court of Appeal grants leave.

After some discussion counsel conceded that section 30(4) could not be read in isolation and that he could not pursue a grant of leave to appeal pursuant to that section. The section was clearly limited to appeals from the Magistrates' Court and was not authority for the right of appeal to the Court of Appeal from an Island Court via the Supreme Court.

9. Both counsel for Family Vavak and counsel for Family Vanaf referred to section 48 of the Act which reads:

48. Appellate jurisdiction

(1) Subject to the provisions of this Act and any other Act, the Court of Appeal has jurisdiction to hear and determine appeals from judgements of the Supreme Court.

(2) The Chief Justice must, in consultation with the other judges of the Supreme Court, decide the composition of the Court of Appeal for the hearing of proceedings before the Court.

(3) For the purpose of hearing and determining an appeal from the Supreme Court, the Court of Appeal:

(a) may exercise such powers as may be prescribed by or under this Act or any other law; and

(b) has the powers and jurisdiction of the Supreme Court; and

(c) may review the procedure and the findings (whether of fact or law) of the Supreme Court; and

(d) may substitute its own judgement for the judgement of the Supreme Court.

(4) The Court of Appeal may deal with the appeal on the notes of evidence that were recorded in the Supreme Court without hearing the evidence again. However, the Court of Appeal may receive further evidence.

(5) In the exercise of the appellate jurisdiction of the Court of Appeal, any judgement of the Court of Appeal has full force and effect, and may be executed and enforced, as if it were an original judgement of the Supreme Court.

Given the proviso set out in subsection 1, neither of the applicants for leave can rely on this section to obtain leave for the reasons set out in *Matarave*. The operation of section 48(3) of the Act is clearly subject to the provisions of section 22(4) of the Island Courts Act.

10. Mr Nalyal on behalf of Family Vavak also sought to rely on the powers to be found in the inherent jurisdiction of the Court as set out in section 65 of the Act. That section reads:

65. Inherent powers of Supreme Court and Court of Appeal, and custom

(1) The Supreme Court and the Court of Appeal have such inherent powers as are necessary to carry out their functions. The powers are subject to:

(a) the Constitution; and
(b) any other written law; and
(c) the limitations of each Court's jurisdiction.

(2) For the purpose of facilitating the application of custom, a provision of any Act or law may provide that it may be construed by the Court of Appeal, the Supreme Court or the Magistrates' Court with such alterations and adaptations as may be necessary.

(3) The Supreme Court and the Court of Appeal have the inherent and incidental powers as may be reasonably required in order to apply custom.

(4) The Magistrates' Court has the incidental powers as may reasonably be required in order to apply custom.

However, once again there are provisos in the section which prevent it operating as an avenue for appeal. Subsections 1(b) and 1(c) plainly restrict the powers of the Court of Appeal to become involved as an appellate court because of the exclusive jurisdiction of the Island Court. There is no route to an appeal relying on the inherent jurisdiction of the court except in the circumstances set out in *Matarave*.

11. Reference was also made to section 38 of the Act; it deals with a situation where there is actual or apprehended bias on the part of judicial officers hearing a case. We do not need to address whether or how s.38(3) should or could apply in the face of s.22(4) of the Island Courts Act. It is clear from the cases referred to above, and from the decision of the Court of Appeal in *Lapenal v. Family Tolsie Awop* Civil Appeal Case No. 16/2528, delivered at the same time as this judgment, that s.22(4) means what it clearly says. It is only in the rare circumstances where the Supreme Court does not have jurisdiction to do what it has purported to do in relation to an appeal under s.22(1)(a) of the Island Courts Act that the Court of Appeal may intervene.

12. The short answer to the submissions in this matter is that those rare circumstances, where the Supreme Court did not have the jurisdiction to hear and determine the appeal, are not made out.

13. In the present case the allegation was that the judge was a father of the Anglican Church of Vanuatu as was John Ashwin from the Family Wetelwur. It was said that a decision made by the judge in an earlier conference which seemed to be in favour of the Family Wetelwur gave rise to a reasonable apprehension of bias because of that relationship. An application under section 38(2) was made by the Family Vavak and was heard by the judge. He gave his written decision on 15th September 2016. He applied the test in *Matarave* and dismissed the application. The judge commented that he was not a father or priest of the Anglican Church. He also pointed out that the decision complained about was based on the evidence noted in the BITC decision where one Simeon Vavak had earlier told the BITC that the Family Vavak had changed their family tree 3 times and had purchased land from the Family Wetelwur. On that basis the judge had suggested that counsel for the Family Vavak might like to consider whether the family ought to pursue their appeal. There is no question that the applications to this Court by the Family Vavak should be refused. No basis exists for a finding of bias, real or apprehended. Nothing has been said by or on behalf of the Family Vavak which would support such a finding of apprehended bias. There is nothing which could show that the Supreme Court did not have the jurisdiction which it exercised and no reasons have been put forward which would require this court to invoke any inherent jurisdiction to interfere with the decision of the Supreme Court.

14. Turning to the Family Vanaf's application, it is based on the fact that it was not represented at the appeal before the Supreme Court. The reasons for judgment in the Supreme Court record :

> *"Prior to the hearing, the Second Appellants (Family Vanaf) through counsel informed the Court that they were no longer pursuing their appeal as they recognised the respondent as the declared custom owner of Tavlavere land. They therefore did not participate in the appeal hearing."*

The family submits that it did not instruct its counsel to withdraw the appeal. Because it was not represented at the hearing and because, nonetheless, the Court acted on information from its counsel, it has suffered prejudice. It has been deprived of its right to a fair hearing or, as set out in its written submissions, the right to equal treatment under the law. That right is guaranteed by the Constitution (Article 5(1)(k)) and, so they argue, it cannot be taken away by the provisions of section 22 (4) of the Island Courts Act which prevents the family from appealing the decision.

15. We do not agree that the Family Vanaf did not have the opportunity to participate in the hearing. As the file shows, Family Vanaf was represented by Mr Stephens as counsel of record all the way through the proceedings. Whilst attending a conference on 31st March 2016 counsel instructed by the family apparently advised the judge that Family Vanaf would not be pursuing the appeal. The judge was entitled to rely on that information. It would place an intolerable burden on the Court if judges were unable to accept as accurate what was conveyed to them by counsel of record. Counsel are the representatives of the parties and judges must proceed on the premise that counsel are acting on the instructions of their clients.

16. The "appellants" have no right to appeal. Nor are they entitled to any declaration in respect of the decision of the Supreme Court acting in its appellate jurisdiction under the Island Courts Act.

17. The upshot is that the decision in the appeal to the Supreme Court dated 20th September 2016 is not disturbed in any way. It remains the final decision in the matter of the dispute about custom ownership of Tavlavere Land on Gaua Island between Absolom Vanaf and Apululwyn Tula, Family John Ashwin Wetelwur and Family Vavak.

18. The order for costs in the Supreme Court deals with costs there. So far as costs in this Court are concerned, the First Respondent (Family John Ashwin Wetelwur) is entitled to be paid its costs in this court by the Appellant and the Second Respondent in equal shares. Those costs are to be taxed on a standard basis if not agreed.

DATED at Port Vila this 18th day of November 2016

BY THE COURT

Hon. Vincent LUNABEK
Chief Justice.