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

Civil Appeal
Case No. 18/2008 CoA/CIVA

BETWEEN: JEHU BONGNAIM AND FAMILY, JIMMY JEHU AND FAMILY, RICKSON SAMSON AND FAMILY, LEONARD LEINKONE AND FAMILY, JESSY HIVIR AND FAMILY

First Appellants

AND: WORWOR GABRIEL AND FAMILY, FREDDY MAXWELL AND FAMILY, JONATHAN HULHUL AND FAMILY, ALILI MOL AND FAMILY

Second Appellants

AND: ANDREW WELWEL AND FAMILY (FAMILY RORIRI), JEREDY TATAO AND FAMILY (FAMILY RORIRI), CHIEF LEINGKON GIDEON AND FAMILY, JESSY HIVIR AND FAMILY

Respondents

Coram: ***Hon Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru

Counsel: ***Mr Felix Laumae for the Appellants***
Mr George Boar for the Respondents

Date of Hearing: ***7th November 2018***
Date of Decision: ***16th November 2018***

JUDGMENT

Introduction

1. These long running proceedings involving this Court, the Supreme Court, a Village Land Tribunal and the Magistrates Court, all in multiple hearings, are ultimately about who are the custom land owners of the Melwe – Metamli land on Ambrym Island.

2. In 19 December 2013 the Supreme Court dismissed a judicial review claim brought by the appellants (No. 12 of 2013). The review claim had sought an order that the Metamli Village Land Tribunal in a 2010 decision had made reviewable errors when it declared the Family Roriri (here the respondents) the custom owners of the Melwe – Metamli Land. Subsequent to this decision, in 2014, the Supreme Court made eviction orders requiring the appellants to leave the land (No. 61 of 2011).

3. In these proceedings the appellants seek leave to appeal the decision of 2013 and the decision of 2014 by the Supreme Court. Leave is required because the appellants are many years outside of the 30 days allowed for an appeal from these decisions.

4. The appellants case is that accepting there was significant delay in filing an appeal there are reasons for the delay; the merits of the appeal significantly favour the appellants and there is no prejudice to the respondents if leave was given. At the hearing before us we heard detailed submissions from the appellants particularly relating to the merits of the proposed appeal.

Background

5. To understand the appellant's reasons for delay and its submitted merits of the proposed appeal it is necessary to set out the background of the litigation involving

this land. To this end we adopt in part the helpful chronology set out in the respondent's submissions.

6. In May 2007 the Island Court declared Jehu Bongnaim (the appellants) the custom owners of the land. The Supreme Court, in December 2009, by consent quashed this Island Court Judgment. In 2010 the Metamli Village Land Tribunal declared Family Roriri the custom owners. During 2010 and 2011 the Magistrates Court made a series of orders restraining and later banning Jehu Bongnaim and associated families from the land. There was no appeal from these decisions.

7. In 2011 (61 of 2011) the Roriri family filed proceedings in the Supreme Court seeking orders evicting the Bongnaim family from the land and damages for property and crops damage. The Bongnaim family sought summary judgment claiming the Roriri family had no right to the land. The application for summary judgment was refused and orders evicting the Bongnaim family were made.

8. The Bongnaim family appealed. This Court, in 2012 allowed the appeal and set aside the eviction order. The Court concluded as to the composition of the 2010 Village Land Tribunal:
"In the present case, there was no evidence of an approved list of adjudicators as required under S.37(1) of the Act. Mr Boar conceded that there was no such list of approved adjudicators. It is a mandatory requirement. So what appeared to be a Customary Land Tribunal was not so constituted that it could be treated as such."

9. Following the Court of Appeal decision in 2012 in July 2013 the Bongnaim family filed judicial review proceedings challenging the lawfulness of the decision of the Metamli Village Land Tribunal's decision of February 2010 declaring the Roriri family the custom owner of the land. The essence of the claim was that the Tribunal had not been lawfully constituted as the Court of Appeal had noted in 2012.

10. The Supreme Court dismissed the judicial review claim. It concluded the Bongnaim family had no arguable case.

11. The evidence before the Supreme Court was that contrary to the evidence before the Court of Appeal, the Metamli Village Land Tribunal had been properly constituted.

Indeed those who had made sworn statements before the Court of Appeal said these statements had been untrue and one deponent said he had been forced to give a false statement because of threats made.

12. An officer of the Customary Lands Tribunal set out in detail how the Tribunal had been lawfully constituted. The Bongnaim family's evidence in support of the review was said to be no more than assertions by a deponent without proof. It is this judgment which the appellants now seek leave to appeal.

13. Since the decision of the Supreme Court refusing the judicial review there have been proceedings enforcing the orders of the Land Tribunal and eviction orders. The Bongnaim family have persistently refused to obey the orders. They have accumulated significant unpaid Court costs.

14. We note in proceedings before the Supreme Court in 2014 where the Roriri family sought an eviction order the Bongnaim family claimed that the Court of Appeal in its 2013 decision had cancelled the 2010 decision of the Village Land Tribunal. The Judge noted that submission was "misconceived". He said the Court of Appeal had done no more than allow the appeal against the Supreme Court decision to refuse summary judgment. The Court Appeal judgment therefore only affected the Supreme Court decision.

The Application for Leave

15. The appellants accept (as they had to) that this application is long out of time, some 4 years. The reasons for the delay are identified as a failure of a previous lawyer to advise them "that the Supreme Court enforces the decision of the Land Tribunal"; and "finance to pay lawyers".

16. After the Court of Appeal set aside the enforcement judgment of the Supreme Court the appellants elected to bring judicial review proceedings to challenge the Metamli Village Land Tribunal decision. And so it is clear the appellant's were well aware that the Court of Appeal judgment related only to the Supreme Court judgment. It did not directly affect the Metamli Village Land Tribunal's decision. The appellants therefore understood they had to challenge the Tribunal's decision to reverse the conclusion as

to who was the customary land owner. Further the appellants also continued to try to challenge the Tribunal's decision in the various enforcement proceedings.

17. As we have noted the Bongnaim family raised the Court of Appeal decision and the Supreme Court judicial review case before the Supreme Court as a defence in the enforcement proceedings. The Supreme Court judge in his 2014 judgment (No. 61 of 2011) made it clear the judicial review decision of the Supreme Court resolved the challenge to the Village Land Tribunal.

18. The Bongnaim family would clearly have known that unless they could challenge the 2013 judicial review no further challenge to the customary land ownership decision of 2010 was possible. We therefore reject the appellants' claim they were unsure of the process to challenge the 2010 decision.

19. There is no evidence from any lawyer as to what advice was or was not given to the appellants. We are satisfied the appellants were well aware of their rights and the need to challenge the 2010 decision.

20. As to the claim that the appellant's did not have the money to pay a lawyer to challenge the 2013 and 2014 decisions there is no significant evidence to support this submission. To establish inability to pay the appellants would have required financial information from the various families who make up the appellants. No such evidence was provided.

21. We conclude the appellants have not established any excusable reasons for delay in this proposed appeal.

22. We do not consider there is any real prospect of success in this appeal. The judicial review proceeding before the Supreme Court in 2013 was based on the claim that the judges and therefore the Tribunal was not properly appointed for the 2010 hearing. This claim was rejected by the Supreme Court. As we have noted the evidence for the respondents was given primarily by Mr Arnhambat, the Senior Land Tribunal Officer of the Customary Lands Tribunal Office. He said there was a validly appointed Tribunal. In his sworn statement he explained why.

23. Before us the appellants also claimed that the 2010 Tribunal had a conflict interest within its members and should not have been allowed to sit. Some background is necessary to understand this claim.

24. In 2009 the Supreme Court made an order by consent of both the appellants and respondents that the parties would have their dispute about the land heard by the Ambrym Land Tribunal.

25. On 12 February 2012 the appellants and respondents consented to a hearing of the claim by the Metamli Village Land Tribunal (on Ambrym) on 16 February 2010. The consent was signed by the two parties and was witnessed by the Chairman and a member of the Tribunal. There is nothing to suggest the appellants objected to the appointment of the Tribunal or to the Chairman and member who witnessed Mr Bongnaim's consent signature at this time. As it turned out the hearing was held on 18 February 2010. A sworn statement of June 2011 by one of the appellants was filed in the 61 of 2011 proceeding. That statement claimed that at the 18 February hearing Mr Bongnaim objected to the Tribunal hearing the case because a number of the members of the Tribunal were associated with the respondents and therefore had a conflict of interest. When the Tribunal rejected his allegation the appellant left the hearing.

26. This claim of conflict of interest with respect to the Tribunal has not been subsequently raised by the appellants. We note it is quite different than the challenge mounted relating to the proper appointment of the Tribunal in the judicial review proceedings of 2013.

27. The question of conflict of interest with respect to the Metamli Village Land Tribunal was not a basis for challenging the Tribunal's decision before the Supreme Court in 2013. It cannot therefore be raised now in this appeal.

28. We are satisfied therefore that there was evidence on which the Judge in his 2013 decision properly concluded the Metamli Village Land Tribunal of 2010 was constituted according to law.

29. We consider the merits of the proposed appeal therefore favour the respondents.

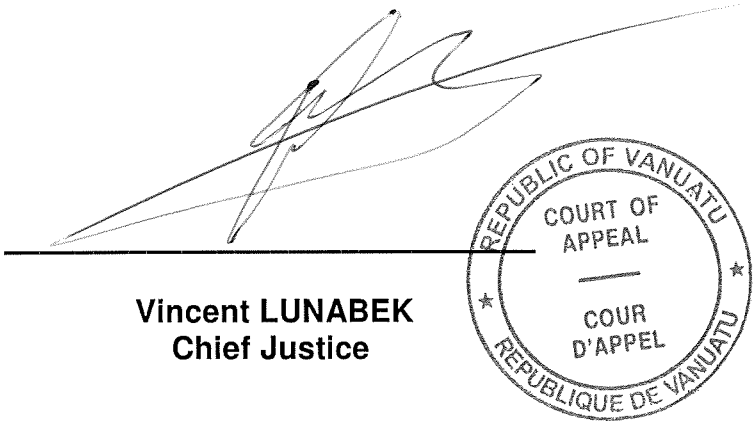
30. Finally prejudice to the respondents. The respondents have sought to enforce the orders of the Supreme Court since 2014 without apparent success. The appellants have simply ignored multiple orders to leave the land. Costs ordered against them remain unpaid. Further delay in resolving this dispute which has been before the Courts since 2009 would inevitably cause further prejudice.

31. In summary therefore there has been a long, over four year, delay in bringing this proposed appeal. The delay is unexplained. The appeal has little merit. For these reasons we refuse the application to bring the proposed appeals out of time against review case no. 12 of 2013 and civil case no. 61 of 2011.

32. The respondents are entitled to costs on the application of VT50,000.

DATED at Port Vila 16th November, 2018.

BY THE COURT



Vincent LUNABEK
Chief Justice