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

Civil Appeal
Case No. 19/3461 CoA/CIVA

BETWEEN: **Family Mokono & Charlie Tomate**
Appellants

AND: **Chief Peter Orah**
Respondent

Coram:	**Hon. Justice J.W. Hansen** **Hon. Justice R.C. White** **Hon. Justice O. Saksak** **Hon. Justice D. Aru** **Hon. Justice G.A. Andrée Wiltens** **Hon. Justice V.M. Trief**
Counsel:	Mr R.T. Kapapa for the Appellant Family Mokono Mrs M.G. Nari for the Respondent
Date of Hearing:	17 February 2020
Date of Judgment:	20 February 2020

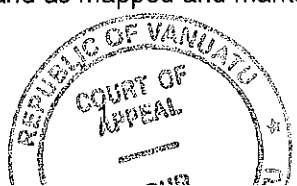
JUDGMENT

A. Introduction

1. This is an appeal against the striking out of the Land Appeal Case for the appellants' failures to progress the matter and to appear to show cause why the appeal proceeding should not be struck out.

B. Background and Decision

2. The Epi Island Court by its judgment dated 17 October 2003 in Land Case No. 01/2000 determined the custom ownership of Velague land at Lamen Bay, Epi. It determined that the respondent representative of the 4 nasara of Lamen Bay Community was the rightful owner of Velague and Bourgue land as mapped and marked in their claim.



3. By letter dated 30 October 2003 the appellant Charlie Tomate, spokesman of Family Tomate, appealed the decision of the Epi Island Court. Mr Warsal, counsel for the appellant filed a Notice of Appeal dated 17 November 2003 in Land Appeal Case No. 50 of 2004 attaching that letter.

4. On 18 May 2007, the Court ordered the service of the Notice of Appeal. Regrettably in June 2007 the Court House fire destroyed the Court file. In March 2009, the respondent reconstructed the Court file. In 2017 the Court gave this file a new case number Land Appeal Case No. 2173 of 2017 generated by the new electronic Courts Management System. The Court's minute dated 25 September 2017 records that the respondent's representative informed the Court that they did not agree that the appeal be withdrawn to be dealt with by the Nakamal in accordance with the *Customary Land Management Act.* Any withdrawal required the consent of all parties.

5. By minute dated 26 July 2019 the Court noted that the appellants had failed to comply with the orders dated 18 May 2007. Thereafter the Court issued a notice to show cause dated 10 September 2019 requiring the appellants to take steps to progress the matter and to show cause why the appeal proceeding should not be struck out. On 16 September 2019 the Deputy Sheriff in Santo filed a sworn statement of service of the notice dated 10 September 2019. The appellant Charlie Tomate's signature appeared on that statement of service, accepting service on 16 September 2019. The Court issued a further notice to show cause dated 22 October 2019.

6. The appellants took no steps to progress the matter. On 8 November 2019, the Court struck out Land Appeal Case 2173 of 2017 for want of prosecution by the appellants. Felix J recorded that he was satisfied that the appellant had been informed about the hearing of his appeal but failed to take active steps to progress the matter and had also failed to appear and explain why this matter should not be struck out.

7. On 20 December 2019, the appellant Family Mokono filed their Notice and grounds of appeal, and an application for leave to appeal and for extension of time to appeal.

C. Grounds of Appeal

8. Mr Kapapa for the appellant Family Mokono submitted that the Notice to show cause was only ever served on the appellant Mr Tomate and not on Family Mokono. Mr Kapapa asserted that Mr Tomate represented himself but not the full Family Mokono. He relied on *Dunstan Hilton v Republic of Vanuatu* [2014] VUCA 18 as authority that the Court cannot strike out a matter unless an opportunity has been given to the party to be heard. Accordingly Felix J erred in striking out the matter when Family Mokono had not been served the Court's notices.

9. Secondly, Mr Kapapa submitted that there was merit in Family Mokono's appeal given that Chief Tomate who is the son of Mokono was the person who entered a deed of

sale/purchase in 1886 at Epi island in relation to Velague land. Accordingly the merits of the land appeal case needed to be heard fully in the Supreme Court.

10. Mrs Nari submitted that the Court had served the Notice to show cause dated 10 September 2019 and so it was correct to strike out the appeal as the appellants had not progressed the matter nor attended Court. Further, that there was no merit to Family Mokono's appeal as they had not filed any evidence as to the merits of their appeal. Mrs Nari submitted that Family Mokono were relying on a deed of sale that the Epi Island Court had already considered and dismissed in its judgment as insufficient to prove custom ownership of Velague land. She submitted that the respondent is entitled to finality and certainty in the matter, that the respondent had a valid declaration of custom ownership by a competent court, and should be able to enjoy the fruit of their judgment delivered back in 2003.

D. Discussion

11. It is accepted that on 16 September 2019 Mr Tomate was served with the Notice to show cause dated 10 September 2019 requiring the appellants to take steps to progress the matter and to show cause why the appeal proceeding should not be struck out. He took no steps to progress the matter despite the elapse of two months. He also did not attend Court to explain why the proceeding should not be struck out.

12. Mr Kapapa also accepted that there is no evidence that Mr Hungai ever informed the Supreme Court that he was the representative for Family Mokono. In those circumstances, the only person that the Court was aware of as representing the appellants was Mr Tomate who had signed the letter dated 30 October 2003 that was attached to the Notice of Appeal filed in the Supreme Court. That is a complete answer to the first ground of appeal that the Court should have served Family Mokono in addition to serving Mr Tomate. This ground fails.

13. The appellants' failure to prosecute the appeal is exacerbated by the lengthy and inordinate delay since the filing of the Notice of Appeal in 2003. The appellants bear the obligation to prosecute their appeal. In all that time neither appellant progressed the matter including the very first step required of serving the Notice of Appeal. The orders made in May 2017 for such service were never complied with, nor was any other step taken to progress the matter. The appellants must bear the burden themselves for their failures to progress the matter, in this case, for a period of over 16 years. Those failures to prosecute include Family Mokono's failure to inform the Supreme Court who its representative was.

14. The interests of the appellants in pursuing the appeal are not the only interests at play; the Court must also take into account the interests of the respondent. He is entitled to finality and certainty in the matter. Given the substantial effluxion of time since 2003, he is entitled to expect the Court to take the steps that it did to require the appellants to show cause.

Given the appellants' failure to prosecute their appeal, it was inevitable that the appeal proceeding was struck out.

15. The final consideration we take into account is that we are satisfied that there is no merit in any event in the appeal filed in the Supreme Court. Mr Tomate's letter refers to the document dated 15 March 1886 showing Tomate's sale of land to M. Gaspard, a French citizen. The appellants had already relied on that instrument of sale in the Epi Island Court. That Court noted that the appellants had placed heavy reliance on the documents certifying the sale of the subject land. However, such documents could not be construed or admitted as proof of ownership. The appellants could only succeed if they could prove custom rights. Moreover, the instrument of sale was not a decision of a competent Court. The Epi Island Court ruled that the appellants' case must entirely fail. The second ground of appeal also fails.

16. We recognise that this is an important case for Family Mokono and that it relates to customary land which is of fundamental importance to all Ni-Vanuatu people. We reiterate that there is no possibility in law for the instrument of sale that the appellants have relied on to be accepted as proving customary ownership of the subject land. Up to 2001, the appellants required a declaration of custom ownership by an Island Court and after that by a Customary Land Tribunal. In the event they have neither, the appellants must now prove any claim they may have by undertaking the processes prescribed by the *Customary Land Management Act.*

17. For completeness, we record that given that both grounds of appeal failed, we decline to grant the application for leave to appeal and for extension of time to appeal.

E. Result

18. The appeal is dismissed.

19. There is no order as to costs.

DATED at Port Vila this 20th day of February 2020

BY THE COURT

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Hon. Justice John Hansen

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU