

BETWEEN: **GILBERT NIRAMBATH of
Tenmaru, Malekula
Appellant**

AND: **GORDON ARNHAMBATH of
Tenmaru, Malekula
Respondent**

Coram: *Chief Justice Vincent Lunabek*

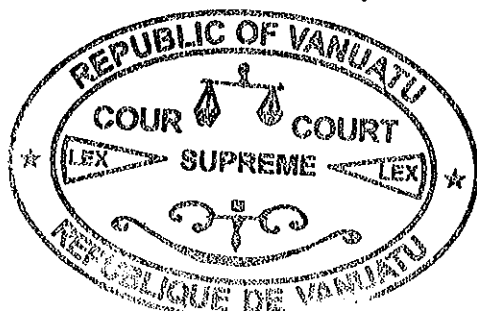
Counsel: *Mr Felix Laumae for the Appellant
Mr Gordon Arnhambat, Respondent in person*

**REASONS FOR ORAL DECISION
GIVEN ON 26 October 2008**

This is an appeal filed 19 July 2007 by the Appellant against a decision of the Magistrate's Court dated 19 June 2007 in the Lakatoro Magistrate's Civil Appeal Case No.38 of 2006 striking out the Appellant's Notice of Appeal in the Lakatoro Magistrate's Court for want of prosecution.

The Notice of Appeal seeks an order from the Supreme Court to quash the decision of the Magistrate's Court dated 19 June 2007.

On 26 October 2007, the Supreme Court made an oral decision allowing the appeal and quashed the striking out decision of the Magistrate's Court sitting at Lakatoro dated 19 June 2007 and remitted the Magistrate's Court Appeal Case No.38 of 2006 before a Magistrate's Court different composed. Below are the reasons of such decision. A dispute arose in the village of Tenmaru, Malekula as to who is the rightful custom Chief of that village. The Appellant and the Respondent disputed the chiefly title of that village. The matter was taken to Malekula Island Court at Lakatoro as it was a custom issue and to be determined in accordance with the customary law.



The Malekula Island Court heard the dispute between the disputed parties and on 18 July 2006, the Malekula Island Court found and declared that the Chief of Tenmaru is Gordon Arhambath (the present Respondent).

The Appellant (Gilbert Nirambath) appealed that decision to the Magistrate's Court at Lakatoro, Malekula. On 19 June 2007, the Magistrate's Court struck out the Appeal for want of prosecution. This is the decision which is now appealed against.

The Appellant's grounds of appeal are contained in the Notice of Appeal filed 19 October 2007 before the Magistrate's Court at Lakatoro. They are summarised in four (4) points:

First, the Magistrate's Court erred in procedure and law when it proceeded to hear the oral application by the Respondent's counsel to strike out the Appellant's appeal for failure to attend without notice on the other side for the application to strike out.

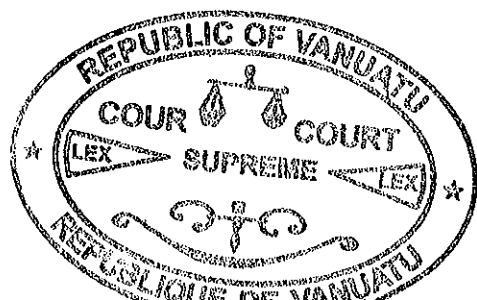
Second, the Magistrate's Court erred in failing to make an inquiry to ascertain why the Appellant or his counsel was not present before it made orders that foreclose the opportunity of the Appellant to continue with the appeal.

Third, the Magistrate's Court erred in failing to have any consideration on the substance of the Appellant's appeal which if the Learned Magistrate did would appreciate the contentious custom issues raised by the Appellant which requires a proper and just resolution.

Fourth, the Magistrate's Court erred in that the Magistrate's Court sitting in its appellate jurisdiction was not properly constituted.

Points 1, 2 and 3 are considered and dealt with together.

It is apparent from the material on the Court file records that conferences were conducted by the Magistrate's Court in Port-Vila before the Notice of appeal was

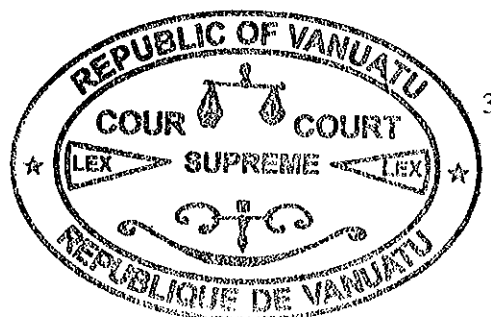


heard. The Notices of the hearing of the Notice of Appeal in the Magistrate's Court at Lakatoro were served. The Appellant and the Respondent were legally represented. It is apparent that at the hearing at Lakatoro on 19 July 2007 by the Presiding Magistrate, the Appellant and his counsel did not attend the hearing. Counsel for the Respondent applied orally for the Magistrate's Court to strike out the Notice of Appeal. It was struck out by the Presiding Magistrate sitting alone.

From the outset, there is no rational explanation as to why counsel for the Appellant did not attend the Magistrate's Court hearing on 19 July 2007 at Lakatoro. The Appellant filed sworn statement to show that he was not aware of the hearing date of 19 July 2007 until his agent informed him at 3.00pm the day before the hearing. He lives far away from Lakatoro Center. The transport service truck departed every time at 4.00am in the morning to go to Lakatoro and there was very few trucks from his area. The nearest truck to his house was about 3 kilometres. He had tried his best but he could not get to Lakatoro to attend the hearing at the date and time as scheduled. In addition, he explained that because of his financial situation, it would be impossible for him to charter a service truck alone which would cost him about VT18,000 from his house to Lakatoro.

It is noted that pursuant to Rule 9.10(2) of the Civil Procedure Rules, the Magistrate's Court has power to strike out a proceeding at a hearing. However, Rules are made to guide the Courts. They should not be applied mechanically without any consideration of the interest of justice and common sense in any case before the Courts.

In the present case, the Presiding Magistrate erred when she proceeded to hear the oral application to strike out the appeal, without notice to the other side of such an application. In such a circumstance, an adjournment would be required with directions to the Respondent to file such an application and served it on the other side. Directions will also be required to direct the Appellant to file his response to it and finally a date and time for its hearing. If these steps were taken, there will be no question as to how the power to strike out a proceeding had been exercised as it was wrongly exercised here.



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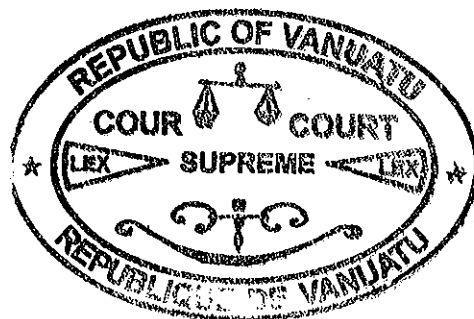
The fourth point of appeal is more critical. The dispute between the parties was over the title of a custom chief of their village. It is a custom matter and it is to be resolved pursuant to the custom of the parties, village or area. That dispute was decided by the Malekula Island Court in July 2006 in favour of the Respondent. As it was mentioned earlier, the Appellant appealed that decision before the Magistrate's Court in Lakatoro. For the Magistrate's Court to deal with that Appeal from a decision of the Island Court, the Magistrate's Court sitting at Lakatoro must be properly composed pursuant to Section 22(2) of the Island Courts Act [CAP.167]. Section 22(2) of the Act provides:

"(2) The Court hearing an appeal against a decision of an Island Court shall appoint two or more assessors knowledgeable in custom to sit with the Court."

In the present case, the Appellant says that the Magistrate's Court was not properly composed on 19 July 2007 when it struck out the Notice of Appeal of the Appellant. On that date, the Appellant submitted the Presiding Magistrate sat alone. No assessors were appointed to compose the Court before the Court struck out the appeal.

The Respondent submitted in response that during the course of the conferences in Port-Vila, both parties have selected two assessors. However, the Respondent submitted that assessors have the role to assist the Court dealing with custom. But when dealing with Court procedures and processes, the assessors do not have the capacity and jurisdiction to hear application to strike out proceedings.

The Respondent's submissions will have merit only in the circumstance where the striking out decision does not have the effect of finally determining the substantive matter, namely, the custom dispute over the chiefly title between the Appellant and the Respondent so that the custom dispute is still to be determined by the Magistrate's Court through the Notice of Appeal. In the present case, the Notice of Appeal has been struck out. There was no longer a dispute pending before the Magistrate's Court on appeal from the Malekula Island Court Judgment of 18 July 2006.



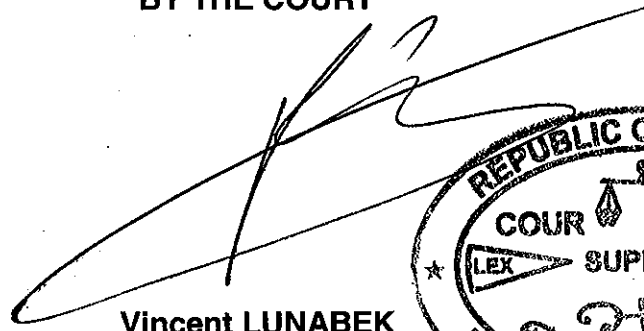
The striking out decision by the Magistrate's Court at Lakatoro on 19 July 2007 has the effect of finally determining the custom dispute over the chiefly title of Tenmaru village. The learned Magistrate is incompetent to do so. It was an error in law. Subsection 2 of section 22 of the Island Courts Act is a mandatory provision. It has to be complied with.

These are the reasons of the following Orders made on 26 October 2007:

1. That the Appeal is allowed.
2. That the decision of the Magistrate's Court dated 19 June 2007 striking out the Notice of Appeal of the Appellant filed 11 August 2006 in the Magistrate's Civil Case No.38 of 2006, is quashed.
3. That the Notice of Appeal of the Appellant filed 11 August 2006 in the Magistrate's Civil Case No.38 of 2006 is remitted before the Magistrate's Court properly composed.
4. That the Applicant is entitled to costs to be agreed or taxed.

DATED at Port-Vila this 26th day of October 2008

BY THE COURT



**Vincent LUNABEK
Chief Justice**

