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

Civil Case No. 167 of 2010

BETWEEN: CHIEF MASONGOMAPULA and ASSISTANT CHIEF JOHN ATAVI MASENAWOTA
Appellants

AND: EDDIE KALOWIA
Respondent

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mr. J. Kilu for the Appellants*
Mr. D. Yawha for the Respondent/Applicant

Date of Decision: *16th September 2011*

RULING

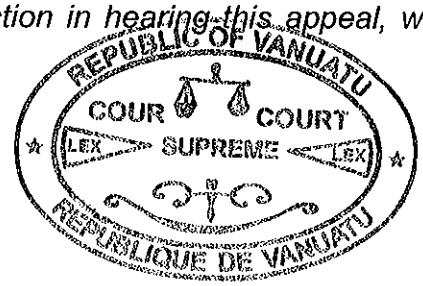
1. This is an application to strike out a **Notice of Appeal** filed against a Magistrate's Court decision in Civil Case No. 3 of 2010 delivered on 9 September 2010. The very bare **Notice of Appeal** is dated 29 October 2010 and foreshadows that "*detail grounds of appeal and the relief sought*" will be provided at a later date. As of the date of this Ruling **no** grounds of appeal have been provided by the appellant but that may be because the present application has somewhat overtaken the need to do so.

2. Be that as it may the application to strike is based on the following grounds:

> "*(1) The appellants are appealing the decision of the Magistrate Court dated 9th day of September 2010 which sat and exercised its appellate jurisdiction on that date.*

[Note: The exact nature and contents of the decision of 9 September 2010 has **not** been provided to the Court and remains unknown other than what counsel says about it.]

> *(2) It appears the appellants are now seeking to afford a second opportunity to an appeal process in the Supreme Court, which is unlawful.*
>
> *(3) The appellants are seeking this Court to exercise its appellate jurisdiction in hearing this appeal, which this*



Court does not have the jurisdiction to hear an appeal of an appellate court decision.

(4) That the appeal is contrary to the fundamental appeal process that a person is only afforded one and final right to appeal.

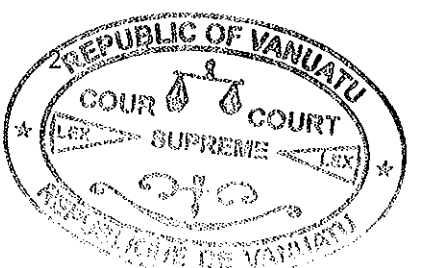
(5) To seek the second right to appeal is an abuse of process and contrary to recognition of the finality of Court judgment exercising its appellate jurisdiction.

(6) The decision dated 9th September 2010 which is appealed against is final and not appealable."

3. In summary, the applicant's grounds assert a lack of jurisdiction in this Court to entertain what tantamounts to an appeal against an appeal decision where **no** such right of appeal is provided for under the relevant legislation. It constitutes in counsel's submission "*an abuse of process which this Court should not countenance*".

4. The brief chronology of proceedings leading up to this appeal is conveniently summarized by the applicant's counsel as follows:

> "***2005*** *– Chief Masongomapula v. Eddie Kalowia EIC CC19 of 2005*
>
> *This matter was heard in the village of Siviri and the Island Court ruled in favour of Chief Masongomapula. Eddie Kalowia appealed the decision of Efate Island Court at the Magistrates Court.*
>
> ***2006*** *– Chief Masongomapula v. Eddie Kalowia CAC 4 of 2006 (Magistrates Court)*
>
> *In the appeal, the Magistrates Court ruled in favour of Eddie Kalowia on the basis there was apprehension of bias. As a result the Magistrates Court ordered the case be remitted to the Efate Island Court to be tried afresh by a different* (sic) *constituted Island Court.*
>
> ***2009*** *– Chief Masongomapula v. Eddie Kalowia EIC 8 of 2008*
>
> *In the fresh hearing of the Island Court, it was ruled that Chiefly Title Taripoamata belongs to Eddie Kalowia.*
>
> ***2010*** *– Chief Masongomapula v. Eddie Kalowia CAC 167 of 2010 (Supreme Court)*



Chief Masongomapula seek "Leave to Appeal" the decision of Island Court but the Chief Magistrate dismissed the leave.

[**Note:** The exact nature and basis for the application for leave has not been provided to the Court and remains a matter of conjecture at the date of this Ruling.]

2011 *– Chief Masongomapula v. Eddie Kalowia CAC 167 of 2010 (Supreme Court)*

Chief Masongomapula issued a notice of appeal without being served on me.

With all due respect to Chief Masongomapula, we think that his intention to appeal is an abuse of Court process and the Court should not entertain such kind of appeal. This appeal should be dismissed."

5. It is sufficiently clear from the above that the underlying dispute between the parties relates to their competing claims to the chiefly title: "***Taripoamata***" which is a customary title that designates the high chief of Siviri Village in the northern part of Efate.

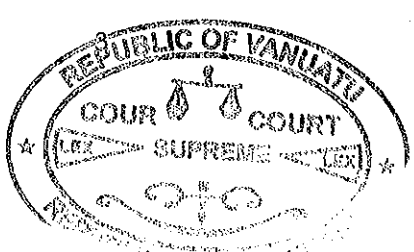
6. Equally, the chronology discloses that the title dispute was the subject of two (2) decisions of the **Efate Island Court**, the first, in favour of the appellant, and, the second, in favour of the respondent/applicant with a successful intervening appeal to the Magistrate's Court. Whatsmore an attempt to appeal the second Island Court decision in favour of the respondent, to the Magistrate's Court was summarily aborted by the Chief Magistrate when he refused leave to appeal. That decision gave rise to the present **Notice of Appeal**.

7. The underlying substantive matter being a chiefly title dispute, counsel for the applicant submits that the Court should be guided by the provisions of the **Island Court's Act** [CAP. 167] which vests the original jurisdiction in such disputes in an Island Court constituted of "*three justices knowledgeable in custom*".

8. In particular counsel submits that **Section 22** of the **Island Court Act** provides a relevant and exclusive procedure for appeals from Island Court decisions. That section provides:

"***APPEALS***

22. (1) Any person aggrieved by an order or decision of an island court may within 30 days from the date of such order or decision appeal therefrom to-



(a) the Supreme Court, in all matters concerning disputes as to ownership of land;

(b) the competent magistrates' court in all other matters.

(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.

(3) The court hearing the appeal shall consider the records (if any) relevant to the decision and receive such evidence (if any) and make such inquiries (if any) as it thinks fit.

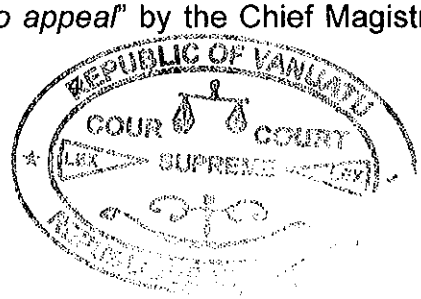
(4) An appeal made to the Supreme Court under subsection (1)(a) shall be final and no appeal shall lie therefrom to the Court of Appeal.

(5) Notwithstanding the 30 day period specified in subsection (1) the Supreme Court or the magistrate's court, as the case may be, may on application by an appellant grant an extension of such period provided the application therefor is made within 60 days from the date of the order or decision appealed against."

9. Appellant's counsel in opposing the application whilst conceding the nature of the underlying chiefly title dispute, nevertheless, forcefully submits with references to the **Constitution** (Article 51) and the **Judicial Services and Courts Act** No. 54 of 2000 (Sections 30 and 65), that this Court has "*jurisdiction to hear appeals from the Magistrate's Court on matters of custom*".

10. It is immediately obvious from the foregoing that the decision being appealed to this Court is **not** one "*... concerning disputes as to ownership of land*" where the appeal jurisdiction is vested in the Supreme Court pursuant to Section 22 (1) (a) of the Island Courts Act. Accordingly, the initial appeal concerning the chiefly title dispute was properly filed in the Magistrate's Court and there can be no dispute about that. But the present appeal concerns **neither** a customary land dispute **nor** a customary chiefly title dispute.

11. The appeal in this instance concerns and arises as a direct result of the summary refusal of "*leave to appeal*" by the Chief Magistrate. That ruling



was not one on the merits, but rather, a ruling on a procedural matter within the discretion of the Chief Magistrate to make in terms of **Section 22 (5)**. The particular application and supporting sworn statement (if any) has **not** been placed before me as it should have been, nor was a copy of the Chief Magistrate's actual ruling furnished to the Court.

12. In the absence of the above information, it is unclear why the appellant sought leave to appeal as there is **no** such requirement in Section 22 of the Island Courts Act. The only other possibility is that the appellant was out of time and sought an extension of time to appeal under Section 22 (5) and it was that application ("*for leave to appeal out of time*") which was refused by the Chief Magistrate.

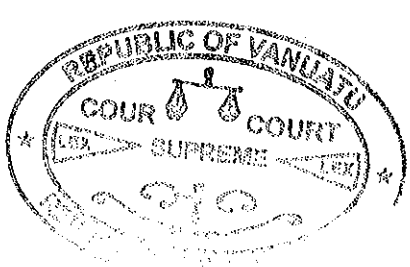
13. Concerning the time limits for an appeal under Section 22 of the Island Courts Act, the Court of Appeal said in **Kalsakau v. John Kook Hong** [2004] VUCA 2:

> "*We are of the clear view that strict compliance with the terms of subsection (1) and (5) in relation to an appeal and in relation to an application seeking an extension of time for an appeal is essential. In short the person aggrieved by an order or decision of the Island Court must appeal within 30 days from the date of such order or decision to the Supreme Court in relation to a matter concerning a dispute as to ownership of land. We consider that the "**date of such order or decision**" commencing the time frame within which the 30 days for an appeal must be made, commences from the date on which the reasons for the decision duly signed and sealed are made available to the parties. Likewise the further 30 days period as specified in section 22 (5) of the Act runs from that date. Further any application for grant of an extension of the 30 day period must be made within 60 days. Outside the 60 days no relief can be sought or granted.*"

It might be that the Chief Magistrate had that dicta in mind when he refused the appellant "*leave to appeal*" but, in the absence of the actual decision, the matter remains mere conjecture.

14. I have also had my attention helpfully drawn to two decisions of this Court in **Tenene v. Nmak** [2003] VUSC 2 (*per* Coventry J.) where the Court appeared to entertain a second appeal in a chiefly title dispute, and the recent decision in **Poilapa IV v. Masaai** [2011] VUSC 69 (*per* Spears J.) delivered on 6 June 2011 where the Court refused to entertain such an appeal.

15. Having said that, it is sufficiently clear to my mind that **both** counsels misunderstood what was being appealed in the present case.



16. In light of the foregoing I am satisfied that the appellant has a right to appeal to this Court against the Chief Magistrate's refusal of "*leave to appeal*" and the present application must be dismissed.

17. It could well turn out on a perusal of the materials hereafter ordered to be provided, that the Chief Magistrate misdirected himself as to the applicable legal principles **or** he might have misunderstood the nature of the application seeking leave to appeal **or** he might have failed to appreciate the factual circumstances that gave rise to the application. But whatever the error might have been, if it is established then clearly his decision would be wrong and must be set aside. Again this Court is hampered by the absence of relevant material.

18. Accordingly, if the appellant decides to continue with this appeal he will need to:

    (a) file and serve by **23 September 2011** appropriate grounds of appeal challenging the Chief Magistrate's ruling; **together with**

    (b) a sworn statement annexing copies of the application and sworn statement (if any) filed in the Magistrate's Court and the decision of the Chief Magistrate refusing leave (hereafter "*the reconstituted appeal*").

19. By way of further directions, the respondent is ordered to file and serve a response to the reconstituted appeal by **7 October 2011** together with a sworn statement in support (if desired) and thereafter the reconstituted appeal is fixed for argument on **12 October 2011 at 8.30 a.m.**

20. Liberty is reserved to counsels to prepare and file a written memorandum/submission for the Court's consideration by **10 October 2011**.

21. Given the common error of the parties in this application I make no order as to the costs of this application.

DATED at Port Vila, this 16th day of September, 2011.

BY THE COURT

REPUBLIC OF VANUATU COURT SUPREME LEX

D. V. FATIAKI
Judge.