IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Land Appellate Jurisdiction)

Land Appeal Case No.023 of 1997

IN THE MATTER OF: **An appeal from a decision of the Efate Island Court in Land Case No. 09 of 1984**

AND

IN THE MATTER OF: **Customary Land known as ERUITY and EPUEN on Efate.**

BETWEEN: **JOHN KALTAPAU**
Appellant

AND: **JIMMY KAS KOLOU**
First Respondent

AND: **JOHNY KALSONG**
Second Respondent

AND; **KALOTUK ROGOTAL**
Third Respondent

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

Counsel: *Mr. G. Nakou for the Claimant*
Mr. R. Warsal for the First Respondent
Mr T.J. Botleng for the Second Respondent
Mr T.J. Botleng for the Third Respondent

Date of Decision: *03 May 2016*

JUDGMENT

1. This is a long outstanding application to strike out an appeal against the determination of the Efate Island Court ("*EIC*") in Land Case No. 09 of 1984 dealing with a large tract of customary land between the Rentapau river and Eton entitled: "*EPUEN*" and "*ERUITI*" islands ("*LC09/84*").

2. The Claimants in LC09/84 were:

   (1) Chief Jimmy Kas Kolou of Eton Village (First Respondent);
   (2) Mr. Makal Kalsong of Eratap Village (Second Respondent);
   (3) Mr. Kalotuk Rogotal of Eratap Village (Third Respondent);
   (4) John Kaltapau of Erakor Village (Appellant).

3. The original claim was filed in 1984 and was heard by the Efate Island Court in 1989. On 02 June 1989 the EIC delivered its decision principally in favour of Chief Kolou of Eton Village after determining 7 points or issues including: "*Kleim Blong Baontri*"; "*Stamba Tingting Blong Kleim*"; "*Family Tri Blong Each Pati*"; "*Histri Each Parti I Presentem*"; "*Kastom Adoption*"; "*Rileisenship Blong Each Parti*"; and "*Fasin Blong Salem mo Leasim Kraon Insaed Epuen Baontri*". All parties were given 30 days to appeal against the decision expiring on 02 July 1989.

4. On 05 June 1989 the appellant's father Chief Kaltapau (Johnny) Kaltaf lodged an appeal against the EIC decision in LC09/84 and paid VT50,000 appeal fees on 09 June 1989. The appeal case was initially designated as: Land Appeal Case No. 9 of 1995. It was first listed before the then Chief Justice d'Imecourt on 06 April 1995 and again on 05 May 1995 when directions were given for the filing of appeal papers including a direction:

"2. *That this case will be reviewed on the documents before the Court only, no witnesses will be heard save possibly one expert on each side on custom*".

5. On 23 October 1995 the matter was called before Judge Salatiel Lenalia after noting "*... the non-availability of the court file ...*" gave directions who with a view to reconstituting the Court's appeal file. The appeal lay dormant for the next decade until May 2006 when it was resurrected.

6. In the meantime and as an important digression from the chronology of LC09/84, I interpose here a brief reference to Land Case No. 08 of 1993 ("*LC08/93*") which concerns "*Teouma Rentapau land*". The original claimant was "*Family Kalmet*" and there were 9 counter-claimants including "*Family Kalpong*" (No. 1) and "*Jif Kaltapau and descendants*" (No. 6). The EIC delivered its decision on 24 March 2006 in favour of Paramount Chief Bakoa Andrew Kalpoilep V and his people (*ie.* Family Kalmet). This decision was appealed and is Land Appeal Case No. 71 of 2006 which remains undetermined ("*LAC71/2006*"). [*see also:* Family Kalmet v. Family Kalmermer [2014] VUCA 11].

7. On 8 May 2006 the reconstituted appeal was called before Bulu J. who directed inter alia:

"*2. If the appellant's representatives decide to proceed with the appeal, to serve a copy of the Notice and Grounds of Appeal within 14 days thereafter on the Respondents. If the decision is not to proceed with the Appeal, to file an application to discontinue the appeal within that time also*".

The appeal had been handled by 3 judges and was now renumbered as Land Appeal Case No. 23 of 1997 ("*LAC23/1997*") from its earlier designation as Land Appeal Case No. 9 of 1995.

8. On or about 11 October 2006 the First Respondent Chief Kas Kolou filed an application to strike out the appeal for breach of various direction orders and for failure to prosecute the appeal.

9. At another conference before Bulu J. on 01 November 2006 the appellant John Kaltapau is noted as ("*deceased*") with "*Willie Wanemut in*" for the appellant.

10. In mid-2007 the Supreme Court building was burnt down and the court file had to be reconstituted again before it could be re-allocated to a judge.

11. On 8 December 2006 Bulu J. ordered the First Respondent to serve his strike out application on the other parties who were given 21 days to respond. A fresh conference date was fixed for 2 March 2007. The appeal then lay dormant for another 4 years.

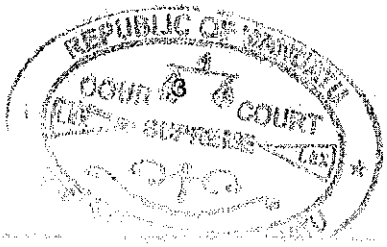
12. In 2009 and 2010 however, there was a flurry of renewed activity on the part of the appellant who filed numerous applications and sworn statements as follows:

- 24 April 2009 – application to strike out respondents' application to strike out appeal as being out of time;
- 25 June 2009 – application for a permanent stay of LC 09/84 and LAC23/1997;
- 02 July 2009 – sworn statement of John Kaltapau comprising a bound volume of 55 pages containing 18 annexures of pre-independence land sale and purchase agreements and determinations of the Joint Court of the New Hebrides ("*JCNH*");
- 20 Mar. 2010 – application for the court to appoint representatives for Chief Kaltapau (died 22 February 1999) namely his son John Kaltapau Korimanu and Willie Wanemut;

And after the appeal was resurrected in early 2011:

- 23 May 2011 – application for extension of time to file grounds of appeal and leave to amend;
- 13 Sept. 2011 – application seeking an order confirming the status of the second and third respondents to apply for interlocutory relief (whatever that may mean);

13. On 11 March 2011 the appeal was called before me and the appellant was ordered to file and serve detailed grounds of appeal by 25 March 2011.



14. On 25 March 2011 the appellant filed a 19 page document containing 26 grounds of appeal with numerous justifications and arguments including a sketch map ostensibly to assist the court understand the location and names of custom lands and places as well as the pre-independence movements of chiefs and their peoples as related in the appellant's numerous sworn statements filed thus far.

15. On 8 April 2011 in the absence of the detailed grounds of appeal the second and third respondents filed an application to strike out the appeal for non-compliance with court orders.

16. On 9 May 2011 the court heard argument on the second and third respondents' strike out application. They were represented by Tom Joe Botleng and the first respondent by Ronald Warsal. The late George Nakou appeared for the appellant. Suffice to say after lengthy discussions with counsels it was generally accepted that the appeal had been lodged within time and should proceed. Appellant's counsel was also directed to re-draft the grounds of appeal using sub-headings and "*reduced to 5 pages*" following complaints from counsels representing the respondents.

17. On 6 June 2011 in purported compliance with the court's direction the appellant filed an amended notice and grounds of appeal consisting of 7 pages and 20 grounds of appeal with the first 13 grounds again providing arguments and justifications in respect of each ground in numbered sub-paragraphs not dissimilar to pleading particulars in an ordinary claim.

18. Be that as it may the grounds of appeal raises a host of errors and complaints against the EIC including:

- Not walking the boundaries of the disputed land(s);
- Not upholding the earlier determination of the Joint Court of the New Hebrides concerning "*Bouffa land*";
- Not declaring the appellant customary owner of the undisputed Rentapao land (whatever this means);
- Exhibiting bias against the appellant in its decision by referring to the appellant being "*adopted*";
- Taking irrelevant matters into consideration; and
- In merely declaring the representative capacity of Chief Kas Kolou to Epuen land including the first and second respondents;

19. On 24 May 2011 the Court granted the appellant's application for a representation order in favour of Johnny Kaltapau and likewise a similar order was granted in favour of Johnny Kalsong to represent the second respondent Makal Kalsong who was deceased. A further application to force the third respondent to instruct separate counsel was refused after Mr. T. J. Botleng

indicated that the third respondent was closely related to the second respondent and they were united in their positions in opposing the appeal albeit that the third respondent was entirely unsuccessful in the Island Court.

20. Returning now to the actual application before the Court which is an application to strike out the appeal filed by the second and third respondents on 19 August 2011 urging the following grounds:

> "1. *That the appellant did not seek the leave of the Court to appeal out of time pursuant to Section 22 of Island Courts Act [CAP. 167];*
>
> 2. *That the appellant is introducing new evidence in his grounds of appeal that has been raised in Land Case No. 9 of 1984;*
>
> 3. *The evidence in support of grounds of appeal is hearsay;*
>
> 4. *The evidence in the sworn statement of Mr. John Kennedy Kaltapau Koriman dated 18 August 2011 is hearsay;*
>
> 5. *The proceeding is vexatious and an abuse of process".*

21. On 19 September 2011 counsel for the respondents/applicants filed a written outline of submissions identifying the Court's inherent power to strike out a proceeding based on dicta to be found in 2 cases: Noel v. Champagne Beach Working Committee [2006] VUCA 18 and Kalses v. Le Manganèse de Vaté Ltd. [2005] VUCA 2 and the provisions of Rule 1.4 of the Civil Procedure Rules which deals with the Court's power to actively manage cases. The substantive submission is advanced however under 3 sub-headings: "*Limitation Act*"; "*Res Judicata*" and "*Estoppel*".

22. I say at once that the submission based on Section 3 of the Limitation Act is wholly misconceived in so far as the provision only has application to "*actions*" based on a "*causes of action*" and has no application to appeals that are based on a final judgment or decision.

23. With regards "*Res judicata*" and "*Estoppel*" counsel submits:

> "*... it is open for this Honourable Court to make a finding that the part of Teouma Rentapau Land (coloured in orange and attached to Johnny Makal statement) has been determined in Land Case no. 8 of 1993 wherefore the second and third respondents submit that once an issue has been raised and distinctively determined between the parties in Land Case No. 08 of 1993, neither party can be allowed to fight that issue all over again*".

24. In this regard on 11 August 2011 the parties had earlier been directed to file a map disclosing:

> "*(a) All the area of land involved in the original claim before the Island Court in Land Case No. 09 of 1984;*

(b) *The parties to represent in different colours the various lands and boundaries claimed;*

(c) *the parties to separately outline on the map the names and lease titles (if any) of the different lands claimed;*

(d) *the parties to agree and set out the particular orders decided by the Island Court in Land Case No. 09 of 1984".*

by 16 August 2011. Unfortunately as at the present date no such map has been filed as directed.

25. Given the above submission the respondents should have at least provided a composite map to clearly demonstrate the location and boundary of the land determined by the EIC in LC08/93 which counsel claims includes part of the land already dealt with in LC09/84 seventeen (17) years earlier and whilst the present appeal was pending. LC08/93 was later appealed to the Supreme Court in LAC71/2006 and also remains undetermined.

26. Be that as it may there are some sworn statements in the present appeal file which provides some information and assistance namely:

(1) Sworn statement of Johnny Kalsong dated 19 September 2011 with a map "*JK2*" attached;

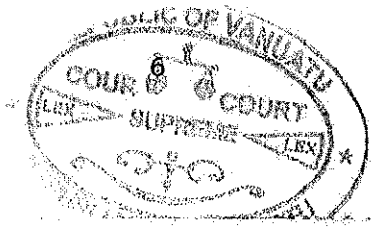
(2) Sworn statement of Kalotuk Rogotal dated 19 September 2011; and

(3) Sworn statement of Johnny Kalsong dated 19 August 2011 attaching a copy of the EIC decision in LC08/93 concerning "*Teouma/Rentapau land*" with map "*A4*" attached and a second map "*JK5*".

27. There is also the brief judgment of the Supreme Court in LAC71/2006 in Timatasomat v. Family Kalpoi [2007] VUSC 23 which dealt with an unsuccessful application to join in the appeal and which clearly indicates that "*Chief Kaltapau and Descendants*" are named as the sixth respondent in the appeal. They were also "*counter-claimant 6*" before the EIC in LC08/93 and were represented by Mr N. Morrison who also appeared for Family Kalsong the first counter-claimant in LC08/93.

28. Finally in this regard, appellant's counsel in his response submissions opposing the strike out application writes, after setting out relevant dates relative to LC09/84 and LC08/93:

"*... the declaration of the EIC in respect of Land Case No. 08 of 1993 extends over to area of land subject of Land Case No. 09 of 1984 which is on appeal in LAC No. 023 of 1997 and there is a legal problem concerning the declaration of Land Case No. 08 of 1993 which is also subject of another appeal which is recorded as LAC No. 71 of 2006*".



And further:

"the appellant says that although there is a legal problem arising out of Land Case No. 08 of 1993 concerning the declaration extending to the area of land subject of Land Case No. 09 of 1984 this problem or legal problem does not affect the rights of the appellant".

29. Given the above acceptance of counsel that the land boundaries in LC09/84 and LC08/93 over-lap to some extent, then, to the extent of that over-lap, the determination of the EIC in LC09/84 which is first in time is "*res judicata*" and the EIC's inconsistent decision in LC08/93 to the extent of the over-lapping boundary, cannot be sustained.

30. In other words to the extent of the over-lapping boundary, the common issue of the customary ownership had already been determined in the EIC's earlier decision in LC09/84. It created an "*issue estoppel*" and should not have been re-determined in the later EIC decision in LC08/93 in which the present parties were unsuccessful counter-claimants.

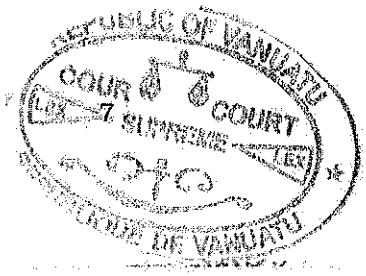
31. During the oral hearing of the application counsel for the respondents accepted that his written submission only addressed ground (5). After extensive discussion counsel withdrew grounds (2), (3) and (4) which complains that the grounds of appeal introduced evidence which was not before the EIC and should be rejected. The acceptance of further evidence however is a consideration that arises where an appeal is to be or being heard and cannot be the basis for striking out an appeal.

32. Similarly, in relation to ground (1) after it was clearly demonstrated that the appellant had filed a written appeal notice dated 5 June 1989 and paid an appeal fee of VT50,000 on 9 June 1989, counsel for the respondent accepted that ground (1) could not succeed and it is therefore dismissed.

33. As for ground (5) – "*abuse of process*" respondent's counsel relying on the more recent judgment in LC08/93 and the map attached thereto, strongly argued that the matter was "*res judicata*" between the parties and the custom ownership of at least part of Epuen Land raised an estoppel between the appellant and the respondents.

34. Appellant's counsel in opposing the respondent's submissions argues that "*res judicata*" can't apply because –

    (1) There has been <u>no</u> final judgment by a competent court in relation to LC08/93 in so far as there is an appeal against it pending in the Supreme Court LAC71/2006;



(2) There is no identity between the parties in both land cases or in respect of the land boundaries dealt with by the EIC in in LC09/84 which is entitled: "*EPUEN and ERUITI ISLANDS*" and in LC08/93 which dealt with "*TEOUMA/RENTAPAU*" land;

(3) The strike out application can only be granted by a Court comprised of a Supreme Court judge together with two assessors knowledgeable in custom in terms of Section 22(2) of the Island Courts Act;

35. I deal firstly with the last argument concerning the required composition of a Court striking out an appeal. Section 22 (2) is concerned with the composition of "*the court hearing an appeal...*". It has no application where the Court is not "*hearing an appeal*" nor does it apply to interlocutory steps and applications that are determined before any "*hearing*" of the appeal occurs. In simple terms, the Court in this case is not "*.. hearing an appeal against a decision of an Island Court..*" but rather it is hearing an application to determine whether or not an "*appeal*" exists against the decision.

36. In my view the subsection assumes that a valid and lawful "*appeal*" exists and therefore, unless and until the existence of an "*appeal*" has been established or determined, no "*appeal*" exists which can be heard by a court constituted under Section 22(2). Needless to say a successful application striking out an appeal tantamounts to a determination that no valid or allowable "*appeal*" exists to be heard.

37. For instance, if the basis for striking out is that the appeal has been filed in breach of the time limits imposed by Section 22(1) and 22(5), the mere filing and acceptance of appeal papers and filing fees by the Supreme Court registry does not and cannot override the mandatory time limits imposed by the law, nor does it establish the existence of a valid appeal.

38. In other words, an appeal which is struck out or dismissed for breach of the mandatory time limits at an interlocutory stage, is not a valid "*appeal*" within the contemplation and meaning of the term in Section 22(2) and therefore need not be heard by a court compliant with Section 22(2) albeit that the strike out order has brought the purported "*appeal*" to an end without there being a hearing.

39. I do not construe Section 22(2) as requiring non-legally qualified assessors to be present and to hear and determine an application to strike out an appeal where most if not all of the argument would revolve around the application of established legal principles to often undisputed facts. If the subsection was to be construed as appellant's counsel urges then the assessors would have to attend every conference because an appeal could potentially be struck out at any conference [***see:*** Rules 9.10(1) and (2)(a) of the Civil Procedure Rules]. That cannot be correct.

40. I am not unmindful of the observations of the Court of Appeal in Kaites v Kasing [2010] VUCA 19 when it said in quashing an order of the Supreme Court striking out an appeal from an Island Court decision on customary land and in construing Section 22 (2) of the Island Court Act:

"Subsection (2) by its language anticipates that the court "hearing the appeal" will consist of a Judge and two assessors. We consider "hearing the appeal" will encompass circumstances where the result of an order made by the court will finally determine the proceedings. This approach will ensure, as the legislature intended, that any appeal to the Supreme Court pursuant to s.22 is only finally determined by a Judge and two assessors.

The subsection therefore required the Court hearing the strike out application to be constituted as a single Supreme Court Judge and at least two assessors. In this case it was not so constituted. The Supreme Court Judge sat alone. In those circumstances we consider he did not have authority to finally determine the appeal from the Island Court to the Supreme Court. The Court was not therefore validly constituted as required in terms of section 22 (2). The decision was therefore void.

The approach will allow a single Judge to manage such appeals. Procedural orders will be able to be made by a single Judge to ensure the just determination of the appeal. However if a party seeks an order, procedural or otherwise which has the potential to finally determine the appeal then the full court of a judge and assessors must sit to determine the matter."

41. In my respectful view the Court of Appeals' observations are confined to a hearing of the appeal on the merits where there is a subsisting valid appeal. It does not refer to a purported appeal lodged in breach of the mandatory time limits for filing an appeal nor to an appeal which is an abuse of process or defeated by the principle of "*res judicata*" and/or "*issue estoppel*".

42. Whatsmore the *"appeal"* which is contemplated by Section 22 (2) is an appeal "*against the decision of an Island Court*". An interlocutory application to strike out an appeal which has been filed in breach of the mandatory time limits imposed in Section 22 or, by an officious observer who is not aggrieved by the decision of the island court, is self-evidently not "*... an appeal against the decision of an island court*" and, if granted, is not an exercise of the court's appellate jurisdiction but an exercise of an inherent power of the Supreme Court. Although the decision of the Supreme Court has the undoubted effect of ending the proceedings it is, in my view, not a decision that would be protected by sub-Section (4) of Section 22 and is therefore appealable.

43. Respondents' Counsel whilst accepting that the parties or claimant in LC09/84 and LC08/93 are not identical, nevertheless submits that, for present purposes, the parties are the same. In particular, Counsel submits that although the respondents are not named as claimants in LC08/93 they were the spokespersons before the EIC on behalf of **Family Kalpong** (counter claimant No 1) and **Family Kalmet** (original claimant) respectively. They also claim

membership of those families through a maternal bloodline and accordingly are affected and bound by the EIC decision in LC08/93 as is the appellant who is a direct descendant of Jif Kaltapau who was counter-claimant No. 6.

44. In similar vein, respondents' Counsel accepts the difference in the customary names and boundaries of the disputed lands but counsel forcefully submits that *"... in combination they cover all the land that the appellant seeks to claim"* (whatever that means).

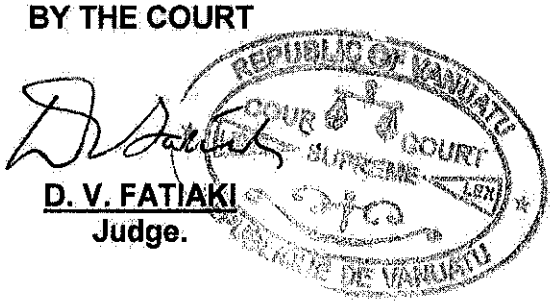
45. Having said that I note that map '*A-4*' attached to the Island Court's decision in LC08/93 covers land bounded by the Rentapau river on the East and the Teouma river on its western boundary and *prima facie* does not over-lap the boundary of the land determined by the EIC in LC No 9/84 which has the Rentapau river as its eastern-most boundary and thereafter extends Westward To Enam Bay.

46. To establish the claimed "*commonality*" or overlap of the land boundaries dealt with in the two island court cases was the duty of the respondents as applicants. Unfortunately they both failed to produce any map or evidence that clearly establishes this and accordingly I reject counsel's submissions based on "*res judicata*" and "*issue estoppel*".

47. The respondents application to strike out the appeal is dismissed with costs of VT30,000 to be paid to the appellant within 21 days.

DATED at Port Vila, this 3rd day of May, 2016.

BY THE COURT



D. V. FATIAKI
Judge.