

BETWEEN: Abiu Joseph, Obed Joseph, Liu Joseph and
Kaluat Joseph

Appellants

AND: Ernest Joseph and Michael Joseph

Respondents

Date of hearing: 5 June 2019.
Before: Justice G.A. Andrée Wiltens
Counsel: Mr J. Kilu for the Appellants
Mr J. Ngwele for Respondents (absent)
Date of Decision: 10 June 2019

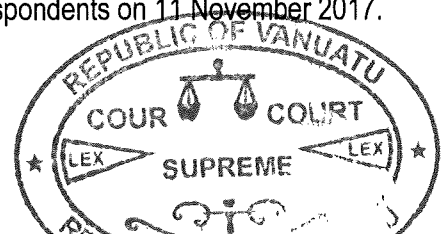
JUDGMENT

A. Introduction

1. This is a matter concerning land. An original Island Court decision was appealed in the Magistrate's Court. The appeal was unsuccessful, and the matter now comes before the Supreme Court on appeal from the Magistrate's Court decision.
2. Mr Ngwele for the Respondents had fallen on the morning of the hearing and was unable to attend. He apologised and advised the Court that he was content to rely on his written submissions. An application for Security for Costs was received too late to be considered ahead of the appeal hearing – there is accordingly no order as to that.

B. Background

3. The original Island Court decision was delivered on 17 October 2014. The Notice of Appeal was filed on 17 November 2014 – within the permitted time to appeal.
4. The Grounds of Appeal and the supporting submissions were not filed until 26 September 2017, and it appears they were only served on the Respondents on 11 November 2017.



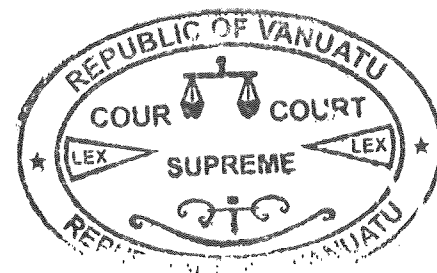
5. Mr Ngwele filed a Notice of Commencing to Act for the Respondents on 2 November 2017 and filed his Response to the Notice of Appeal on 22 March 2018.
6. On 5 June 2018, the appeal was listed for hearing before the Magistrate on 20 July 2018. At the same time Mr Kilu was directed to file his Appeal Book within 30 days.
7. The hearing did not eventuate on 20 July 2018 for reasons that remain unknown to this Court. Instead the matter was put off until 30 August 2018. Again, there was a Court direction that the appellant file the Appeal Book. Although this Court does not have the benefit of seeing that direction, Mr Kilu recalls having seen the direction – however he has been unable to locate a copy of it.
8. On 30 August 2018, the matter came before the Magistrate for hearing, and the decision was published that same day. The appeal was dismissed.
9. The current appeal is against the Magistrate's decision of 30 August 2018 dismissing the appeal from the Island Court decision. In the course of case-managing this appeal, the appellant was directed to file submissions in support of the appeal by 10 May 2019. They were eventually filed on 21 May 2019 without explanation for the delay, and comprise 5 grounds of appeal.

C. The Magistrate's Decision

10. The decision spelled out the history of the pleadings, which involved lengthy delays, especially between filing the appeal and providing the grounds for the appeal. There was also an application to strike-out filed by the Respondents, but that was dismissed for want of prosecution prior to the scheduled date of the appeal being heard due to the absence of counsel in support.
11. The scheduled hearing date of the appeal in the Magistrate's Court was 30 August 2018. Two days prior to that Mr Kilu sought, by email to the Clerk of the Court, an adjournment – it was declined. On the day itself, neither Mr Kilu nor his clients made an appearance.
12. The Magistrate was accordingly invited to deal with the matter by way of dismissal, due to the non-appearance of counsel for the appellants. That was primarily on the basis that the appellants had still not filed an Appeal Book, despite having been directed to do so by the Court on 20 July 2018. There was reliance also on the 3 years delay by the appellants in formulating the grounds for the appeal. The invitation was accepted and the appeal was dismissed for the appellants not advancing their appeal and by the “non-complying with a direct order of the Court”.

D. Grounds of Appeal

13. Mr Kilu submitted that, as there was no order/direction of the Court stipulating by when the grounds of appeal were to be filed, there was nothing amiss in the delay. He pointed on the contrary to the absence of such directions as a failure by the Court to properly case-manage the appeal. He submitted it was not appropriate to hold this point against his clients, as they had not been in breach of any Court order.



14. Mr Kilu submitted that rather than the appellants making no attempt to advance the appeal, in fact they were hindered in doing so by the Island Court which did not release the necessary material so that the appellants could compile the Appeal Book.
15. Grounds 3, 4 and 5 were in fact all addressed to the same point – the submission being that the Magistrate had erred, in such an important case affecting land rights, by applying procedural faults and not dealing at the merits of the case to the prejudice of the appellants.

E. Discussion

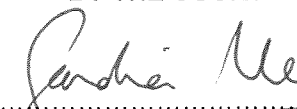
16. Mr Kilu had to concede that an earlier Court order (of 5 June 2018) to produce the Appeal Book within 30 days had also not been complied with. He also accepted that the appellants could have been pro-active and not simply waited for Court directions. He attributed the failure to do so on his position as a sole practitioner, with a heavy case load. There is nothing in this point. The case has clearly been in the Court system for far too long, and much of the cause for that can properly be attributed to his clients.
17. Mr Kilu's attribution of delays by the Island Court, was a submission only – there was no evidence to support the contention. This Court cannot act on that basis.
18. The Court notes Rules 6.8(2) of the Civil Procedure Rules which enables the striking out of a claim or a defence for non-compliance of Court orders. Also, Rule 9.10(2)(d) of the Civil Procedure Rules where the Court is empowered to strike out the proceedings if no steps are taken for 6 months. In light of those provisions, Mr Kilu's implied submission that only the merits should enable a Court to dismiss an appeal is clearly unsupportable. The notion that Court directions/orders are merely trivial matters is wrong. Court orders of this nature are to be designed to ensure fairness between the parties. Non-compliance is a serious consideration and in the right circumstances can clearly warrant dismissal of the case. This case is one where the circumstances did warrant dismissal.

F. Decision

19. For the reasons detailed above, the appeal is dismissed.
20. Although not personally present to advance oral submissions, Mr Ngwele is entitled to costs. If they cannot be agreed between counsel, they are to be taxed by the Master.

Dated at Port Vila this 10th day of June 2019

BY THE COURT


Justice G.A. Andree Wiltens

