

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU**
(Other Jurisdiction)

**Land Appeal
Case No. 12/4 SC/LNDA**

BETWEEN: Frango Warsal
First Appellant

AND: Fred Isaiah
Second Appellant

AND: Estate of Jerome Naliupis
Third Appellant

AND: Chief Kavcor Wass
First Respondent

Petro Rite
Second Respondent

Coram: Justice Aru

Counsel:
Mr. J. Tari for the First Appellant (Frango Warsal)
Mr. R. Willie for the Second Appellant (Fred Isaiah)
Mrs. M. G. Nari for the third Appellant (Estate of Jerome Naliupis)
Mr. L. Tevi for the First Respondent (Chief Kavcor Wass)
Mr. J. W. Taiva for the Second Respondent (Petro Rite)

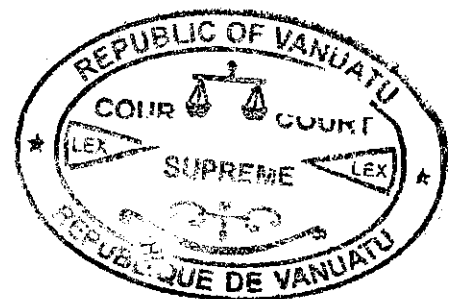
DECISION
(Application to strike out)

Introduction

1. The first and second respondents apply to strike out notices of appeals filed outside the appeal periods specified in s22 (1) and (5) of the Island Courts Act [CAP 167].

Background

2. On 6th July 2012 the Santo Malo/Island Court (SMIC) gave its decision regarding the dispute over custom ownership of Sakau Island on the east coast of Santo.
3. Three parties appealed. The first appellant (Franco Warsal) filed his notice and grounds of appeal on 7 August 2012. The second appellant (Fred Isaiah) filed his notice of appeal on 31 July 2012 and the third appellant now deceased (Jerom Naliupis) and represented by his estate filed his notice of appeal on 19 December 2012.
4. The appeal is yet to be heard.



Applications to strike out

First respondent

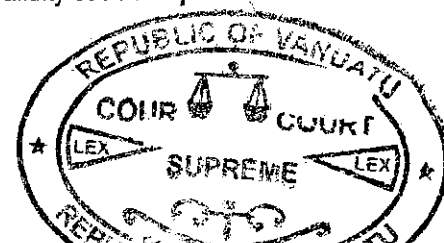
5. On 22 November 2019 the first respondent filed his application to strike out the notices of appeal filed on the basis that they were filed outside the appeal periods specified in s22 (1) and (5) . This application is supported by a sworn statement filed by Mr Wass.

Second respondent

6. On 19 November 2019 the second respondent also filed an application to strike out pursuant to rule 9.10 of the Civil Procedure Rules (CPR). The basis of this application is that the appellants have failed to comply with the directions to file and serve their appeal books as directed by the Court. The application is supported by a sworn statement filed by Mr. Rite.

Submissions

7. Mr Tevi made brief submissions in support of his application to the effect that the first and third appellants filed their notices of appeal outside the 30 days appeal period (s22 (1) and no application to extend time (s22 (5) was ever filed to get leave to appeal out of time after the 30 days had expired.
8. The first respondent in his sworn statement deposed that when the SMIC gave its decision, all the parties were informed that they had 30 days to appeal if they were not satisfied with the decision. He was not aware of any appeal until after the 7 August 2012 when he was served with the first appellant's notice of appeal He was later served with the third appellant's notice of appeal after it was filed on 19 December 2012.
9. For those reasons Mr. Tevi submitted the first and third appellants appeals should be struck out.
10. Mr Taiva in relation to the second respondent's application did file brief submissions in support but did not pursue the non-compliance with Court orders point. He adopted Mr Tevi's submissions for the same reasons.
11. Mr Tari in response did not dispute Mr Tevi's submissions as he submitted that the law regarding (s.22) appeals in custom land dispute cases is quite clear. In response to Mr Taiva's submissions, Mr Tari submitted that if rule 9.10 of the CPR is to be applied, the Court must be fully composed with two assessors. I agree with that submission, however Rule 9.10 was not pursued.
12. Mrs Nari filed written submissions in response and submitted that on 27 July 2012 the third appellant died. His family paid his appeal fees on 31 July 2012 and filed their notice of appeal on 19 December 2012 which was amended in 2013 and an amended notice of appeal was filed on 16 October 2013. She accepted that if the Court records showed that no application to extend time was filed within time (s22 (5) and no leave was granted then the third appellant's appeal was not a valid appeal and should be struck out.
13. In respect of the composition of the Court when hearing land appeals, it was submitted that where there is non-compliance with s 22 (1) and (5), the appeals filed are not valid appeals therefore assessors were not required to sit with the Court when determining their validity see *Kaltapau v Kolou* [2016] VUSC 16.



Discussions

14. At the outset, it needs to be said that the first and second respondents' applications to strike out in this case only relates to appeals filed outside the appeal period.

"22. Appeals

(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 from it to the Magistrates' Court.

(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.

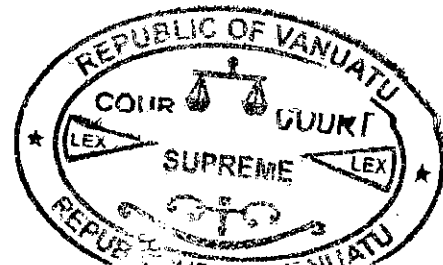
....

(5) Notwithstanding the 30 day period specified in subsection (1) the Supreme Court or the Magistrates' 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. "

15. In my orders of 19 March 2024, the first and third appellants were put on notice that unless they could show that they complied with s22 (5) to file their appeals out of time, their appeals could not be sustained and were liable to be struck out.
16. To date there is no evidence on record that the appeals were filed within 30 days or that s.22 (5) was complied with by the first and third appellants.
17. It was submitted that the third appellant paid their fees to appeal the judgment on 31 July 2012. In my view, the payment of fees alone could not amount to a notice of appeal. Payment must be accompanied by the filing of the notice of appeal. If payment is made after the 30 days appeal period but within 60 days of the decision, the payment must in my view be accompanied by an application for leave to extend time to appeal.
18. The third appellant paid the appeal fees on 31 July 2012 but only filed their appeal some five (5) months later. No application to extend time was filed within 60 days from the date of the decision.
19. I agree and adopt what Fatiaki J said in *Kaltapau* that I am not required to sit with assessors when dealing with appeals filed contrary to s22 (1) and (5). At [35] to [38] of the judgment he said:-

"35. ...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.

...."

Result

20. I allow the respondents' applications to strike out the first and third appellants' appeals as they were filed contrary to s 22 (1) and (5). These two appeals will be struck out. The second appellant has filed a notice appeal within time but with no grounds in support. Twelve (12) years have now lapsed since the filing of the notice. Unless immediate steps are taken by the second appellant to file and serve his grounds of appeal, he may face a similar application to strike out his notice of appeal as well.

Orders

- a) The first and third appellants notices of appeal are hereby struck out.
- b) The first and third appellants will remain in the proceedings as third and fourth respondents respectively.
- c) The second appellant has 21 days to file and serve their grounds of appeal by 31 October 2024.
- d) A further review is listed for **1 November 2024 at 11.00am**.
- e) No orders as to costs

DATED at Port Vila this 11th day of October, 2024

BY THE COURT

Dudley
Judge

