

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

Civil Appeal
Case No. 20/2179 SC/CIVA

BETWEEN: Paul Toame
Appellant

AND: Jacob Toame
Respondent

Date of Hearing: 24 March 2021
Before: Justice V.M. Trief
In Attendance: Appellant – Mr S. Kalsakau
Respondent – Mr J.W. Taiva
Date of Decision: 25 March 2021

JUDGMENT

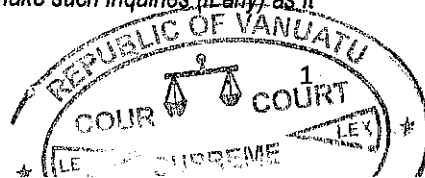
A. Introduction

1. This appeal concerns a Magistrates' Court ruling that the payment of appeal filing fees, without a notice of appeal filed, constituted a valid appeal under s. 22 of the *Island Courts Act* [CAP. 167] (the 'Act').

B. The Law

2. Section 22 of the Act provides:

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 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.*
- (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 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.*

C. Background

3. The Appellant Paul Toame and Respondent Jacob Toame are brothers. Paul Toame is the first born son and Jacob Toame the sixth born child of Robert Toame.
4. By orders dated 24 May 2013, Lunabek CJ transferred the Supreme Court claim in Civil Case No. 1 of 2013 to the Malekula Island Court to determine the parties' succession rights in custom. This became Civil Case No. 6 of 2013 in the Malekula Island Court.
5. By Judgment dated 5 September 2013, the Malekula Island Court held that succession rights followed the blood line so are inherited by the first born in a family and not by custom ceremony or other means. It declared the succession rights from Robert Toame to Paul Toame, his first born son.
6. The 2013 judgment was not appealed. Instead, Jacob Toame commenced Civil Case No. 9 of 2015 in the Malekula Island Court.
7. By Judgment dated 28 November 2019, the Malekula Island Court held that it could not proceed with the case as the parties' succession rights including to the name "Toame" had already been determined by that Court in its 2013 judgment. It dismissed the claim.
8. On 9 December 2019, Jacob Toame paid the Court filing fee to lodge an appeal.
9. On 6 February 2020, he filed Notice of Appeal.
10. Paul Toame filed Application to Strike Out the Appeal on the grounds that the appeal was filed out of time (appeal fees were paid but notice of appeal not filed within 30 days) and that Jacob Toame was estopped from bringing another proceeding.
11. By Ruling dated 10 August 2020, the Magistrates' Court held that the appeal filing fees were paid within the 30-day period in s. 22 of the Act therefore it was a valid appeal. It dismissed the Application to Strike Out the Appeal.

D. Appeal Grounds

12. Mr Kalsakau submitted that the Magistrates' Court erred by wrongly holding that the payment of appeal fees was a proper appeal under s. 22 of the Act contrary to superior Court decisions including *James v Regenmal* [2014] VUCA 35. Further, that the Magistrates' Court erred in doing so despite finding that the notice of appeal was filed on 6 February 2020 after delivery of the judgment appealed from on 28 November 2019.

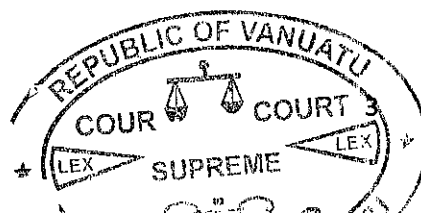


Mr Kalsakau also submitted that the current appeal concerns procedural issues, that is, whether or not the Magistrates' Court was correct to dismiss a strike-out application and is not concerned with any issues of custom therefore this Court did not need to sit with 2 assessors: *Komi v Mafe* [2020] VUCA 34. Finally, he submitted that on appeal this Court has the powers of the Magistrates' and Island Courts (para. 30(2)(b) of the *Judicial Services and Courts Act* [CAP. 270]) therefore this Court should direct Jacob Toame to make a custom fine to Paul Toame as set and witnessed by the Island Council of Chiefs.

13. Mr Taiva conceded first, that payment of appeal fees without filing a notice of appeal does not constitute a valid appeal and secondly, that the issue of customary succession had been dealt with in the Malekula Island Court's 2013 judgment. He formally withdrew the second part of his submissions (paras 1-7). As to an order for custom fine, Mr Taiva submitted that the Court should not so order as the fine may not be made willingly but simply to comply with the Court's Order.

E. Discussion

14. Given the concessions made, the appeal must be allowed.
15. The authorities including *James v Regenmal* [2014] VUCA 35 are clear that payment of the appeal filing fee alone does not constitute the valid lodging of an appeal under s. 22 of the Act. A notice of appeal must also be filed within the 30-day period. The authorities are also clear that s. 22 of the Act must be strictly interpreted and applied. Accordingly, the Magistrates' Court erred in holding that the payment of appeal fees was a proper appeal under s. 22 of the Act. The Ruling dated 20 August 2020 must be quashed.
16. Jacob Toame's notice of appeal was filed out of time. It must therefore be dismissed.
17. This brings to an end the proceeding in Magistrates' Court Civil Appeal Case No. 304 of 2020.
18. The judgments of the Malekula Island Court dated 5 September 2013 and 28 November 2019 stand. They have not been appealed or otherwise successfully challenged.
19. The 2013 judgment determined which of the parties had succession rights in custom from their father, and how succession rights in custom pass from one generation to the next. The succession rights were declared to have passed by bloodline to Paul Toame, the first born son of Robert Toame.
20. The 2019 judgment dismissed Jacob Toame's claim on the basis that the parties' succession rights including to the name "Toame" had already been determined in the 2013 judgment. The Malekula Island Court in effect applied the principles of *res judicata* and Anshun estoppel. These principles mean that the issues that the Malekula Island Court determined in the 2013 judgment cannot be raised again in a future proceeding.
21. There is no material before me as to the applicable custom of Malekula therefore I decline to make an order in relation to custom fine.



F. Result and Decision

22. The appeal is allowed.
23. The Magistrates' Court Ruling dated 20 August 2020 in Civil Appeal Case No. 304 of 2020 is quashed.
24. The Respondent's Notice of Appeal in Magistrates' Court Civil Appeal Case No. 304 of 2020 was filed out of time and is therefore dismissed.
25. The Respondent is restrained from holding himself out as being the representative of Family Toame.
26. The restraining orders dated 7 September 2020 in this matter are set aside.
27. The Respondent is to pay the Appellant's costs of the appeal and in the Magistrates' Court of VT75,000 within 21 days.

DATED at Port Vila this 25th day of March 2021

BY THE COURT

UM Trief
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Viran Molisa Trief
Judge

