

(Civil Appellate Jurisdiction)

BETWEEN: Leon Lalie Kalomtak
Appellant

AND: Denny Zacharie Nmak
First Respondent

AND: Chief Waya Tenene (Deceased)
Second Respondent

AND: Family Kalmetabil Nmak Kalmet
Third Respondent

AND: Sual Kalmarie
Fourth Respondent

Date of Hearing: 23rd September 2024
Date of Decision: 30th September 2024
Before: Justice Oliver A Saksak
Counsel: Mrs Mary Grace Nari for the appellant
Mr Sakiusa Kalsakau for First and Third Respondents
Mr Eric Molbaleh for Second Respondent
Fourth Respondent appearing in person- unrepresented

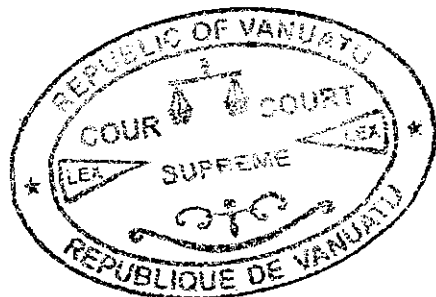
JUDGMENT

Introduction

1. This appeal is against the decision of the Magistrates Court dated 12 September 2023 in Civil Appeal Case No. 22/626 when Senior Magistrate Beverleigh Kanas Joshua (as she was then) dismissed the appellant's appeal.

The Decision appealed

2. The Senior Magistrate said this at paragraph 21-
" the application for review should have been addressed in the first quarter of 2015 by the Supervising Magistrate. The EIC on 11/2/15 listed the matter to be heard on 11/3/15, it was never addressed until it was dismissed on 02/06/2022. This Court cannot revive this review, as the appeal was made out of time."



3. The appeal is against the rulings of the Senior Magistrate in paragraphs 19, 20 and 21 of the judgment.

Relief Sought

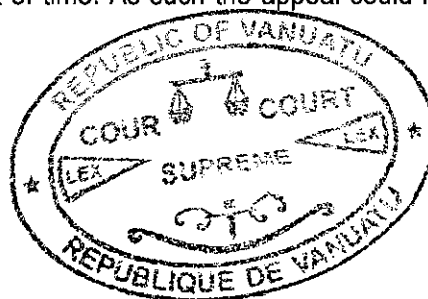
4. The appellant argued the Senior Magistrate was wrong in law and in fact in her findings and seeks the following orders that-
 - a) The appeal be allowed.
 - b) The Judgment dated 12th September 2023 be set aside in its entirety.
 - c) The Ruling of Efate Island Court (EIC) dated 2nd June 2023 be set aside in its entirety.
 - d) The Orders of the EIC dated 16th April 2004 and 11 June 2010 be set aside following the orders of 11th February 2015.
 - e) The Court should enter its own orders that the matter be sent back to the Erakor Village Farea to make its own decision on its paramount chief within 14 days to be supervised by the Malvatumauri Council of Chiefs from Efate Island with a report to EIC for formal orders.
 - f) Costs be paid by the respondents.

Issues and Submissions

5. The appellant raised the following issues for consideration and determination by the Court:-
 - a) Was the appeal of the appellant in the Magistrates Court filed late?
 - b) The application for review could not be addressed because it was filed out of time. Is that position correct?
 - c) Were the orders of the EIC made on 15th February 2015 valid?
6. Mrs Nari submitted that the appeal in the Magistrates Court was not a late appeal and answered the first issue as "No". For the second issue Mrs Nari also submitted the application for review was not filed out of time and answered "No" to this issue. For the third issue Mrs Nari submitted the orders of 15th February 2015 are still valid and answered this issue as "Yes".
7. Mr Kalsakau submitted the appeal was an abuse of process and should be dismissed on all grounds with costs.

Discussion

8. The first issue of whether or not the appellant's appeal in the Magistrate's Court was late? The Senior Magistrate on the information before her found the appeal was a late. Even if her decision on the late appeal is in error, it did not impact on her final decision to dismiss the appeal. This is because the Senior Magistrate found the Review application filed by the appellant on 19th December 2014 was also filed out of time. As such the appeal could not be sustained.



9. The application for review was filed pursuant to section 21 of the Island Courts Act Cap 167. In paragraph 1 of the application the applicant sought:

" An Order pursuant to section 21 of the Island Court Act that the Court review the decision of the Efate Island Court dated 16th April 2004 and 11 June 2010 in respect to paramount Chiefly title of Erakor Village."

10. Section 21 of the Island Court Act provides for Revision-

"21. Revision

(1) The supervising magistrate of an island court shall at all times have access to the island courts in his jurisdiction and to the records of such courts.

(2) Subject to subsection (3), on the application of any person or on his own motion such supervising magistrate may –

(a) revise any of the proceedings of an island court, whether civil or criminal, and may make such order or pass such sentence therein as the island court could itself have made or passed:

Provided that no sentence of fine or imprisonment shall be increased without first giving the accused an opportunity to be heard:

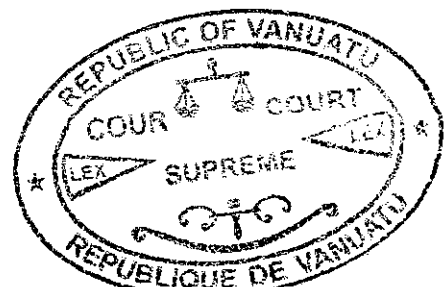
And provided further that if any such sentence shall be increased upon revision by the magistrate, there shall be an appeal from the order of the magistrate to the Supreme Court which may reduce, remit or increase any such sentence;

(b) order any case to be retried either before the same court or before any other island court of competent jurisdiction for which he is the supervising magistrate or may at any stage of the proceedings, either before or after judgment has been delivered transfer any case for hearing before him."

11. There are three difficulties for the appellant. First there is no specific power given to the Island Court in section 21 for the Island Court to revise the orders it made in April 2004 and June 2010. Second, revisions of those orders are not legally possible because they could only be done through appeals made within 30 days or 60 days period stipulated in section 22 (5) of the Island Court Act.

And thirdly, the applicant/ appellant appeared to me to have no standing as he was not a party (independently) to those proceedings in 2004 and 2010.

12. The application for review filed in 2014 therefore lacked foundation and legal basis and the Supervising Magistrate reached the correct conclusion at paragraph 26 (3) of the Decision to dismiss it on 2nd June 2022 contrary to what the Senior Magistrate found in her decision of 12th September 2023 at paragraph 10. The Supervising Magistrate was under no obligation to hear an application that lacked proper legal foundation.



13. Therefore with the review application having no legal basis, the only avenue available to the applicant was to have appealed the orders of 2002 and 2004. But that was an impossible avenue because the application was well outside the appeal periods of 30 and 60 days in section 22 of the Act which was strict periods. That being so, the appeal in June 2022 dismissed by the Senior Magistrate was technically filed out of time and was correctly dismissed. There was no error by the Senior Magistrate.
14. Therefore the first and second issues are answered "Yes"
15. Finally the third issue of whether the orders issued on 15th February 2015 were valid?
16. Those Orders were only interim orders alive for 28 days (paragraph 1) to 11th March 2015 (paragraph 2). There is no evidence by the appellant that he sought an extension of those orders. Therefore by 2nd June 2022 those orders had long expired and were not valid to be considered by the Supervising Magistrate. Those orders are now superseded by the orders of 2nd June 2022. The answer to this last issue is therefore "No".

The Result

17. Ultimately this appeal fails and is dismissed.
18. The decisions of the Island Court dated 16th April 2004 and of 11 June 2010 are upheld and confirmed as to who the paramount chief of Erakor Village is.
19. However it remains that for completeness order 6 of the Orders dated 2nd June 2022 is yet to be complied with. Orders 4 and 5 of the Island Court Decision of 11th June 2010 are also of specific note. If it is the case that these orders have not been complied with yet by those concerned, they need to be done to bring this long standing issue to finality.
20. The respondent is entitled to his costs of and incidental to the proceeding on the standard basis as agreed or taxed.

DATED at Port Vila this 30th day of September 2024

BY THE COURT


Hon. Oliver A Saksak
Judge

