IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

CIVIL APPEAL NO. 42 OF 2014

BETWEEN: **TOLVIS JAMES**
Appellant

AND: **FREDDY REGENMAL**
First Respondent

AND: **EPHRAIM MALMETESO**
Second Respondent

Coram: Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Stephen Harrop

Counsel: Mr Jack Kilu for the Appellant
Mrs Mary Grace Nari for the Respondents

Date of Hearing: 7 November, 2014

Date of Judgment: 14 November, 2014

JUDGMENT

Introduction

1. On 21 May 2004, the Malekula Island Court delivered its judgment in Land Case No. 7 of 1996 which related to a dispute about the customary ownership of land known as Perteprev land on the island of Malekula. The first respondent Freddy Regenmal essentially succeeded and was declared to be the rightful owner of most of the land. The original claimant before the Island Court, Tolvis James, the appellant in this appeal, was along with some counterclaimants, unsuccessful except as to his right to use the land provided proper customary arrangements were reached with the declared owner.

2. The last line of the Island Court judgment said: *"Any appeal must be launched within a period of 60 days from today".*

3. Within that 60-day period Mr James came to Port Vila and paid at the Supreme Court Office the filing fee of Vt 75,000. The receipt dated 5 July 2004 records that the appeal was in respect of the Perteprev Land.

4. On 9 July 2004, Mr James paid Vt 40,000 to Indigene Lawyers. He says this payment was to allow them to carry out his instructions in relation to the appeal.

5. No notice of appeal has ever been lodged.

6. In early 2006 Mr James applied, in Civil Case No.65 of 2006, for leave to appeal out of time and filed a sworn statement dated 7 February 2006 in support. He explained that after paying the filing fee and his lawyers he did not have enough money to continue staying in Port Vila to pursue his appeal and had to return to his home in Pinalum Village, North-East Malekula. He says he was then heavily engaged in another piece of litigation which had twice been appealed by the opposing party from the Magistrates' Court to the Supreme Court. He said that by mid-2005 he instructed Indigene Lawyers but by then the appeal period had long since expired.

7. Mr James set out the legal and factual errors in the Island Court judgment which needed to be addressed in the Supreme Court. The former related to an allegedly improper inspection of the relevant nasaras and a failure to take into consideration the family tree diagram which Mr James had filed. The latter related to the identification of the family through which Mr James was claiming and whether he was legitimately a member of that family.

8. At a conference hearing before Justice Bulu, on 11 October 2006, it was ordered that the applicant Mr James was to file a notice discontinuing the proceedings within 7 days. He is recorded as having been represented by Mr Kiel Loughman at that conference. Costs in favour of the respondents were to be taxed if not agreed.

9. Because the file was lost in the 2007 Courthouse fire it is not clear whether a formal discontinuance was filed, but there is a strong inference that it was because the respondents say that their costs were paid.

10. Mr Kilu was then instructed and on 28 February 2007 he lodged a second application for leave to appeal out of time.

11. On 15 April 2008, the Court allocated a conference before Justice Bulu on 24 June 2008 but it appears this did not take place. Mr Kilu wrote to the Chief Registrar on 23 October 2008 requesting another conference date and one was allocated for 28 November 2008. At that conference Justice Dawson struck the claim out pursuant to rule

9.10 (2) (d) i.e. on the basis that no step had been taken in the proceeding for six months.

12. Mr James' appeal against Judge Dawson's decision was not filed until 21 October 2014. The period since 28 November 2008, nearly 6 years, was largely occupied by an application to set aside Justice Dawson's order and seeking reinstatement of the second application for leave to appeal out of time. That was not filed until 14 September 2009 but there were then substantial delays on the part of Mr James (or his counsel) and the Court in allocating a hearing. Finally the matter came before Justice Aru, who on 5 September 2013 dismissed the application to set aside the striking out order. His Lordship rightly pointed out that there had been no appeal against Justice Dawson's decision and that based on *Jonah v. Kemuel* [2012] VUCA 10, a Supreme Court judge has no jurisdiction to review or set aside a decision made by another Judge, only the Court of Appeal does so under section 48 of the Judicial Services and Court's Act [Cap. 270].

13. It appears that Mr James accepted that ruling but for some reason there was still no appeal lodged for another 13 months, until 21 October 2014.

The Grounds of Appeal

14. Mr James raises four grounds of appeal:
    1) Justice Dawson erred in striking out the application for leave to appeal out of time under rule 9.10 (2) (d) because there had been steps taken by Mr James to advance his application within the preceding six months.
    2) Justice Dawson erred in striking out the application without even requiring him to (or giving him the opportunity to) show cause why the application should not be struck out. Given that this was a very important case from Mr James' perspective, potentially involving the loss of customary land, such an opportunity ought to have been provided;
    3) There was a basis on which the application might succeed, namely that although no notice of appeal had been lodged within 60 days of the Island Court's decision, Mr James had paid the fee to lodge an appeal within the requisite period.
    4) Justice Dawson had no power to strike out the application on his own. Because this was essentially a land appeal case his Lordship was required to sit with two assessors to dispose of such a case under section 22 of the Island Courts Act.

15. The respondents oppose the appeal setting out the very extensive delays and noting that Mr James chose to devote his time and resources to the other piece of litigation in which he was involved. They further submit that if the original application for leave had not

been discontinued then the Court would have dealt with the matter some eight years ago, in 2006.

Primary Issue - Does paying the appeal filing fee to the Supreme Court constitute the making of an appeal to that Court?

16. Section 22 of the Island Courts Act [Cap. 167] 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 therefrom to-*
>
> *(a) the Supreme Court, in all matters concerning disputes as to ownership of land;*
>
> *(b) the competent magistrates' court in all other matters.*
>
> *(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 magistrate's court, as the case may be, may on application by an appellant grant an extension of such period provided the application therefore is made within 60 days from the date of the order or decision appealed against."*

17. As the Island Court decision of 21 May 2004 concerned a dispute as to the ownership of land, any appeal had to be to the Supreme Court. Although there is a 30 day period for the lodging of such an appeal, that may under section 22 (5) be extended by a further 30 days. In effect in the last sentence of its judgment the Island Court ran these two periods together and told the parties that they had 60 days to lodge an appeal. There is no doubt that the payment of the Vt 75,000 filing fee was made within that 60-day period and that if paying the filing fee is sufficient then leave ought to be granted to extend the 30-day period to 60 days, particularly because that was the period mentioned at the end of the judgment. There was however no notice of appeal lodged then or since. Mr Kilu submits that the paying of the filing fee was sufficient. Mrs Nari submits that a notice of appeal needed to be lodged.

18. This was an issue which the Court of Appeal briefly considered but did not need to decide in *Kalsakau* v. *Jong Kook Hong* [2004] VUCA 2. In its judgment the Court emphasized the need for strict compliance with the time limits in section 22; see paragraph 25 below. Mr Kalsakau had undoubtedly paid the requisite filing fee within the 60-day period. The Court noted that section 22 (1) *"does not require a notice of appeal as such to be filed."*

19. The Court further noted that although Mr Kalsakau had applied for leave to file a notice and grounds of appeal out of time he may not have needed to do so. The Court did not find it necessary to determine the point in the circumstances of that case. It is however a matter which arises squarely for consideration here because if Mr James's payment of the filing fee constitutes the valid lodging of an appeal, then that appeal has still not been heard and it should be.

20. We note that although section 22 does not expressly refer to a notice of appeal, it is common practice for an appeal of any kind from a first instance Court to an appellate Court to involve the lodging of a notice of appeal. This of course is because both the appellate Court and the respondent need to know which part or parts of the judgment appealed from are challenged and on what grounds.

21. We note too that rule 16.34 of the Civil Procedure Rules, which governs appeals from Island Courts to the Supreme Court, makes it mandatory for an appellant to file a notice of appeal in the Supreme Court and to give a copy of the notice to each other party together with an address for service. The Island Court is required under rule 16.34 (4) to ensure that the notice of appeal and all supporting documents are given to a Judge who must then fix a date for the first conference. At that conference the Judge must then appoint two or more assessors knowledgeable in custom as required by section 22 (2) of the Act.

22. There is an implication from rule 16.34 that a notice of appeal must be filed both at the Supreme Court and at the Island Court. Though there is no stipulation as to *when* this must be done in relation to the appeal period, there is a strong implication, coinciding with common sense and practice in relation to other types of appeal, that appealing to the Supreme Court requires the lodging of such a notice of appeal. There is a further implication from section 22 that it is this step which must be taken within the 30, or 60, days referred to in section 22.

23. We conclude that the paying of filing fee without more and in particular without the filing of a notice of appeal does not constitute the making of a valid appeal from the Island Court to the Supreme Court under section 22 (1) (a) of the Act.

24. Although it is certainly not determinative of this question, there is no doubt that Mr James himself and Mr Loughman and Mr Kilu all thought that no valid appeal had been lodged within the 60 days and that therefore an application for leave to file an appeal out of time was required. By their conduct they showed that they did not believe the appeal had been lodged in time, though it is possible the applications were made because the filing fee had not been paid within the 30-day period, thereby necessitating leave. The problem is that it is clear that any such application must be made within 60 days from the date of the decision appealed against i.e in this case by 21 July 2004.

25. As the Court of Appeal said in the *Kalsakau* case: *"We are of the clear view that strict compliance with the terms of subsections (1) and (5) in relation to an appeal and in relation to an application seeking an extension of time for an appeal is essential. In short, the person aggrieved by an order or decision of the Island Court must appeal within 30 days from the date of such order or decision to the Supreme Court in relation to a matter concerning a dispute as to ownership of land. We consider that the "date of such order or decision" commencing the timeframe within which the 30 days for an appeal must be made, commences from the date on which the reasons for the decision duly signed and sealed are made available to the parties. Likewise the further 30 days period as specified in section 22 (5) runs from that date.* ***Further any application for grant of an extension of the 30 day period must be made within 60 days. Outside the 60 days no relief can be sought or granted."*** (emphasis added)

26. Accordingly, unless the paying of the filing fee amounts to the lodging of an appeal or an implicit application for leave to appeal out of time beyond the 30-day period, the current appeal must be dismissed. That is because, even if one assumes for present purposes that Justice Dawson was quite wrong to strike the case out because he wrongly concluded there had been no activity within the preceding six months, succeeding on that point does not take Mr James anywhere, because at best he would revive an application for leave to appeal out of time which was lodged on 28 February 2007 nearly three years after 21 July 2004, which was the immutable deadline for making such an application.

27. We have concluded that the paying of the relevant filing fee in respect of an appeal does not constitute the valid lodging of an appeal to the Supreme Court: It is obviously a necessary *part* of doing so but in addition the appellant must file a notice of appeal within the 30-day period or within a further 30 days if an extension is granted.

28. Because of this conclusion it is clear that this appeal must be dismissed.

Another reason for dismissing the appeal - serial and extraordinary delays

29. We recognize that this is an important case for Mr James and his family and that it relates to customary land which is of vital importance to all ni-Vanuatu people. It may be that Mr James was let down by his solicitors over the years. If so, he might have a claim against them although any such claim would now face obvious Limitation Act difficulties. However he must take his share of the blame for focusing on the other piece of litigation at a critical time and for not doing more to ensure that the lengthy delays were avoided.

30. The interests of Mr James in pursuing his appeal are however not the only interests at play: the respondents were entitled to finality and certainty in the matter. They were entitled to expect that any appeal would be lodged promptly and expeditiously pursued. The substantial effluxion of time since the expiry of the maximum possible time for appealing on 21 July 2004 is in no way their fault. On the contrary they opposed the first application for leave to appeal out of time on its merits and as Mrs Nari points out that would have been determined by the Supreme Court (by way of dismissal on our view of the matter) in 2006 if Mr James had not discontinued his application. Rule 9.9 (4) (a) of the Civil Procedure Rules says that a claim once discontinued by a claimant may not be revived. By analogy an interlocutory application seeking an indulgence of the Court must be subject to the same stricture.

31. Furthermore the discontinuance was in 2006, more than eight years ago. The lengthy delay since then including the failure to challenge the striking out in any way for some ten months and the failure to do it in the correct way for some six years, points strongly against Mr James being entitled to the benefit of any discretion the Court may have had at this point.

32. There have been no less than four occasions when the respondents were entitled to treat the Island Court decision as confirmed and as unchallenged , or no longer challenged, by Mr James:

(a) On 22 July 2004 when the 60-day period for appeal/leave to appeal expired;
(b) On or soon after 11 October 2006 when Mr James discontinued his first application for leave to appeal out of time;
(c) On 28 November 2008 when Justice Dawson struck out the second application for leave to appeal out of time:
(d) On 5 September 2013 when Justice Aru refused to review Justice Dawson's order.

33. Each of these events was followed by a lengthy period of inactivity by Mr James which can only have reinforced the respondents' belief that they and their families could order their lives on the basis of the 2004 judgment.

34. For these reasons, if there were a discretion for this Court now to grant leave to pursue an appeal, we would not exercise it in Mr James's favour.

Conclusions

35. Returning to the grounds of appeal, while we accept that because there had been some activity by Mr James in the preceding six months Justice Dawson ought not to have struck out the second application for leave to appeal out of time in the way that he did under rule 9.10 (2) (d), he would have been entirely justified in doing so as being without jurisdiction. That is because it was not filed before 21 July 2004 as required; alternatively the discontinuance of the first application precluded the second. Both applications for leave to appeal filed by Mr James were made without jurisdiction and liable to be struck out at any time. This means the first two grounds of appeal must be rejected.

36. We have held that Mr James' paying of the filing fee did not amount to the making of an appeal in the way required, if not in so many words then in practice, by section 22 (1) of the Island Courts Act. This requires rejection of the third ground of appeal.

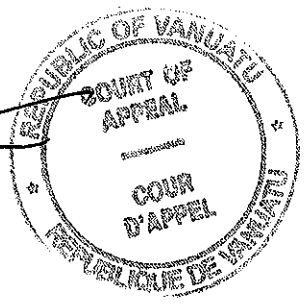
37. For completeness, we reject Mr Kilu's submission on the fourth ground of appeal that Justice Dawson was not empowered to strike out the claim because he was not sitting with assessors. This was not a land appeal case but a civil case in which leave was being sought to file such an appeal case out of time.

Result

38. The appeal is dismissed. We award standard costs in favour of the respondents against Mr James as agreed or fixed.

Dated at Port Vila this 14th day of November, 2014

BY THE COURT



Hon. Justice Bruce Robertson