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

Civil Appeal
Case No.16/2528 CoA/CIVA

BETWEEN: **DADDEE LAPENMAL**
First Appellant

AND: **FAMILY UTISETS**
Second Appellant

AND: **FAMILY KILETEIR**
Third Appellant

AND: **TOLSIE AWOP**
First Respondent

AND: **CERILO LOLINMAL**
Second Respondent

AND: **FAMILY LOLINMAL**
Third Respondent

AND: **MARCEL SORONGUEE**
Fourth Respondent

AND: **JEAN CLAUDE MULUANE**
Fifth Respondent

AND: **JOARA KEN**
Sixth Respondent

AND: **FAMILY LESINES**
Seventh Respondent

AND: **FAMILY BAIPA**
Eight Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice John Mansfield
Hon. Justice Oliver Saksak
Hon. Justice Mary Sey
Hon. Justice David Chetwynd

Counsel: *Mr Collin Leo for First Appellant*
Mr Saling Stephens for Second Appellant
Ms Kayleen Tavoa for Third Appellant
Mrs Mary Grace Nari for First Respondent

Date of Hearing: *12 and 15 November 2016*

Date of Judgment: *18 November 2016*

JUDGMENT

1. The First and Third Appellants apply for leave to appeal against a Land Appeal decision of the Supreme Court delivered on 8 July 2016. The Second Appellants apply directly against the same judgment of the Supreme Court without an application for leave. The applications are dealt with together as they raise same issues.

2. The Supreme Court in its judgment of 8 July 2016, dismissed the appeals of the First, Second and Third Appellants and confirmed the judgment and declarations of customary ownership of land known as "Amelprev" situated on the Rano mainland coast at North East, Malekula, made by the Malekula Island Court on 15 October 2007 in Land Case No.10 of 1984.

Background

3. The Malekula Island Court sat from 13-31st August 2007 to hear a Customary Land dispute on Amelprev Land. A total of eleven (11) parties disputed the custom ownership of the said land.

4. The Malekula Island Court was composed of a Presiding Magistrate and three (3) Justices of Island Court to hear the said land dispute. The members of the Malekula Island Court sat and heard the dispute over the said land at Orap village, North East Malekula.

5. The Malekula Island Court delivered its judgment on 15 October 2007 in favour of the First Respondent (Tolsie Awop and Family) and issued the following declarations:

"DECLARATION

In the light of the foregoing deliberations, it is hereby this day adjudged in the following words:

1. *That Tolsie David and family be the custom owner of the land of Amelprev as advertised therein.*

2. *That the claim by Jean Claude Muluane is dismissed.*

3. *That all other parties to the case have the right to use the land. Such granted right is given effect in the light of the fact that Claimants to the land have for many years caused development to it. It is for that reason, they will continue to maintain their existing properties but are subject to the authority of the declared owners of the land.*

   For ease of clarity, it is noted that some parties have no properties in their claimed land. The conferred right will not mean that they are now given the mandate to use such land save in consultation with the owners.

   All costs necessitated by this proceeding will fall as found. Any aggrieved party wishing to appeal this decision must do so within a period of 30 days from date."

6. Daddee Lapenmal (First Appellant), Family Utissets (Second Appellants) and Family Kiliteir (Third Appellants) appealed against the judgment of the Malekula Island Court of 15 October 2007 before the Supreme Court pursuant to section 22(1) of the Island Courts Act [Cap 167].

7. Tolsie David and family was the only Respondent in the land appeal. All other Respondents did not participate in the land appeal in the Supreme Court.

8. The Supreme Court sat from 26 March 2012 to 30 March 2012 to hear the appeals of each of the Appellants and gave judgment on these appeals on 8 July 2016 confirming the judgment and declarations of the Malekula Island Court issued on 15 October 2007 in favour of Tolsie David and Family.

9. In the Supreme Court, the Appellants raised, among other matters, the issue of apprehended bias against the Presiding Magistrate based on five (5) distinct complaints:

(a) The Presiding Magistrate slept at Orap village in the same location as the spokesman for the First Respondent;

(b) The Presiding Magistrate was given an "umbrella" by the spokesman of the First Respondent during the Island Court's visit to the disputed land;

(c) The spokesman of the First Respondent was seen building a "victory shelter" a few days before the Island Court delivered its decision;

(d) A son of the spokesman of the First Respondent was overheard claiming success at a nakamal a few days before judgment was delivered by the Island Court; and

(e) The Presiding Magistrate had a close "Family relationship by marriage with Eli Masiv. "

10. The Supreme Court heard evidence on the issue of apprehended bias against the Presiding Magistrate and made a ruling dismissing each and all grounds of the apprehended bias. The Supreme Court conducted a separate hearing on the other grounds of appeal and dismissed them all.

11. The Appellants now intend to appeal the Supreme Court Land Appeal Judgment dated 8 July 2016 before the Court of Appeal.

12. Two questions are raised. The first is about the jurisdiction of the Court of Appeal. The second is whether the circumstances of this case are so special to warrant the intervention of the Court of Appeal.

Jurisdiction of the Court of Appeal

13. This question is already answered by this Court in Taftumol –v- Lin [2011] VUCA 30 when the Court discussed in great detail section 22 of Island Courts Act and in particular s.22 (4). The Court stated:

"[38] The starting point must be s.22 of the Island Court Act, and in particular s.22 (4). The evident intent of the Island Courts Act is that question of customary ownership of land will be decided in the first instance by an Island Court constituted by a Magistrate and by justices who by reason of their chiefly status and knowledge in custom will ensure that relevant custom is applied. That philosophy is maintained in s.22 as the Supreme Court hearing an appeal in a matter concerning a dispute as to ownership of land will sit with two assessors knowledgeable in custom. The purpose of s22(4) in providing both that the decision of the Supreme Court is 'final', and that no appeal shall lie to the Court of Appeal is to protest the decision of a Supreme Court from both review by other Courts or public authorities, and from an appeal to the Court of Appeal. This double protection made by a Court which includes members relevantly knowledgeable in custom. However, to gain that protection a decision of the Supreme Court must be one made by a properly constituted bench of the Supreme Court exercising the Jurisdiction given by s.22.

[39] The terms of s.22 of the Island Courts Act plainly prevent an appeal to the Court of Appeal: see Matavare v. Talivo [2010] VUCA, decision delivered 30th April 2010. However, the Appellants seek to avoid the prohibition in s.22 (4) by submitting that the Supreme Court did not properly exercise its appellate jurisdiction under s.22. In support of that submission the Appellants refer to Family Molivakarua v. Family Worahese [2011] VUCA, decision delivered 8th April 2011. Both these decisions of the Court of Appeal require careful consideration.

...

[45] Molivakarua v. Worahese, like Matarave v. Talivo, are exceptional cases and, must be recognized as such. They lend no support to the proposition that the inherent jurisdiction of the Court of Appeal recognised in Matarave v. Talivo will be exercised when the Supreme Court has made an error of law in the consideration of

an appeal. The inherent jurisdiction (perhaps more properly classified as supervisory) will be enlivened only where the jurisdiction under s.22 of the Island Courts Act has not been exercised, and the appeal in reality has not been heard."

14. In support of the Appellants' submissions, they say the Court of Appeal has jurisdiction under section 48 (1) of the Judicial Services and Courts Act. Section 48 (1) provides:

> *"48. Appellate jurisdiction*
>
> *(1) Subject to the provisions of this Act and any other Act, the Court of Appeal has jurisdiction to hear and determine appeals from judgments of the Supreme Court..."*

15. We pointed out to the Appellants' Counsel that s.48 (1) makes reference to the provision of this Act and the provision of "any other Act" which refer back to section 22 (4) of the Island Court.

16. Counsel for the First Appellant (Mr Leo on behalf of the First Appellant in particular) seemed to concede this point.

17. Counsel for the First and Third Appellants further support their submissions by referring to the cases of Enbue –v- Family William Bras [2011] VUCA 12 and Matarave –v- Talivo [2010] VUCA 3.

18. In Enbue –v- Family William Bras the appellant sought leave to appeal against a decision of the Supreme Court exercising jurisdiction under s.39 of the Customary Land Tribunal Act. The Supreme Court issued orders on 18 November 2010 which finally disposed of the matter. These orders went beyond the powers of the Supreme Court to make at a trial preparation conference. Rule 6.6 generally shows that the making of final orders, except by agreement, could not be made at such a conference. The Appellants were deprived of natural justice by the Land Tribunal because the two chiefs participated in its decision making. A contested hearing should routinely take place in open Court. The orders made on 18

November 2010 were beyond the powers of the Supreme Court to have made at that time.

19. In Matarave v. Talivo the appellants sought leave to appeal against a decision of the Supreme Court given in a Land Appeal matter. The appellants sought to raise a number of errors in the Supreme Court which was prohibited by s.22 (4). However, evidence advanced by the parties established a case of apprehended bias on the part of the presiding Supreme Court Judge which by law disqualified the Judge. The Court of Appeal held that in those circumstances the jurisdiction of the Supreme Court to hear the appeal had not been validly invoked. The purported hearing that preceded the Supreme Court's decision was a nullity. In reality the appeal had not been heard at all by a validly constituted bench of the Supreme Court. The Court of Appeal held that whilst it could not entertain an appeal it could in the exercise of inherent jurisdiction declare that the appeal jurisdiction of the Supreme Court had not been validly exercised. The Court of Appeal so declared and directed that the Supreme Court proceed to hear the appeal.

20. The law is clear that the Court of Appeal has no jurisdiction to hear an appeal from a land appeal decision of the Supreme Court pursuant to section 22(4) of the Island Courts Act. The next question is whether the circumstances of the present case justify an intervention of the Court of Appeal in any event?

The contentions before the Court of Appeal and considerations.

21. The First Appellant complained about the decision of the Supreme Court of 8 July 2016. He asked for the Supreme Court Judgment to be called up and quashed on the following basis:

1. The learned Judge's findings and observations were inaccurate given the lengthy delay of 4 years after which Judgment was issued.

2. Since the hearing of the land appeal case in March 2012 the learned Judge exceeded his jurisdiction in failing to consider that decisions of the

Court to be given as soon as practicable in accord with Rule 13.2(2) of the Civil Procedure Rules.

3. The learned Judge was wrong in failing to give reasons or compelling reasons for the lengthy delay and the late delivery of the judgment of 8 July 2016.

22. We note the nature and content of the complaints. The complaints are all about the delay. They are regrettable. However, they do not affect the jurisdiction of the Supreme Court to deliver its judgment after the hearing. The delay has no material effect on the jurisdiction of the Supreme Court.

23. The Second Appellants did not file an application for leave to appeal. They filed an application for review of the Supreme Court judgment in Land Appeal Case No.076 and orders and costs made therein. They say that the judgment of the Supreme Court is irregular and inconsistent with the entire custom land laws of Malekula Island.

24. We asked Mr Saling Stephens to identify any irregularity in respect to the Supreme Court judgment of 8 July 2016. He was unable to do so. His complaints on behalf of the Second Appellants were about the merit of the case. This Court has no jurisdiction to entertain such complaints. [see Taftumol –v- Lin and others [2011] VUCA 3].

25. The Third Appellants filed an application for leave to appeal the judgment of the Supreme Court dated 8 July 2016. They acknowledged the limitation of jurisdiction imposed by section 22(4) of the Island Courts Act. They advanced their application on the basis of section 48(1) of the Judicial Services and Courts Act. However, they recognised that subsection (1) of section 48 brings them back to section 22(4) of the Island Courts Act.

26. They say that they were not formally represented in the Supreme Court. They refer and rely on the case of Enbue –v- Family William Bras [2011] VUCA 12. During the course of hearing, the Court was informed that the Third Appellants were parties to this land dispute in the Island Court. They filed an appeal in the Supreme

Court. Their legal Counsel was not present and never appeared in the Supreme Court. A representative of the Third Appellants (Jean Andre Pascal) appeared in the Supreme Court as their spokesman. The Third Appellants were heard by the Supreme Court. They were raising factual issues in the Supreme Court.

27. They say they turned up in the Supreme Court but their legal Counsel did not, and that as a result, the Judge was biased.

28. We are of the view that this is nonsense. The Third Appellants have been heard by the Learned Judge in the Supreme Court. They have given opportunity to raise factual issues. The learned Judge heard their case before he issued his judgment on 8 July 2016. They were not deprived of their rights of natural justice. The case of Enbue –v- William Bras is distinguishable to the Third Appellants' case and as such it is not applicable.

29. We accept Ms Nari's submissions on behalf of the Respondent that the applications and purported grounds of appeal do not raise errors of law and procedure and they should be dismissed with costs.

30. In light of the above considerations, we are of the view that the applications and purported grounds of appeals are without merit and they are accordingly dismissed.

31. We award costs in favour of the Respondent against the First, Second and Third Appellants in the sum of 75,000 VT to be shared equally amongst them.

DATED at Port-Vila this 18th day of November, 2016

BY THE COURT

Hon. Vincent Lunabek
Chief Justice