

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

Civil Appeal
Case No. 20/1206 CoA/CIVA

BETWEEN: Paramount Chief Ringiau Komi
Appellant

AND: Chief Ringiau Nasse Iakewwei Mafe
Respondent

Coram: *Hon. Chief Justice V. Lunabek*
Hon. Justice B. Robertson
Hon. Justice O. Saksak
Hon. Justice J. Mansfield
Hon. Justice D. Aru
Hon. Justice V. M. Trief

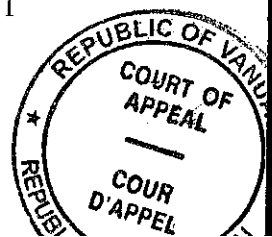
Counsel: *Mr. E. Molbaleh for the Appellant*
Mr. M. Hurley for the Respondent

Date of Hearing: *9 July 2020*
Date of Judgment: *17 July 2020*

JUDGMENT

Introduction

1. This appeal concerns a judgment of the Court below allowing an appeal from the Magistrates' Court in a dispute over the chiefly title "*Ringiau*".
2. The subject of these proceedings initially begun before the Tanna Island Court (TIC). Three Island Court justices who composed the TIC heard the matter and on 19 July 2013 determined the appellant "*Chief Ringiau Komi olsem rightful custom owner long name ia Ringiau*". That decision was appealed to the Magistrates' Court. On 11 March 2019, the Senior Magistrate on Tanna sitting with two assessors upheld the TIC decision and dismissed the appeal.
3. On 8 April 2019 the respondent filed a notice of appeal in the Supreme Court appealing the decision of the Magistrates' Court. The orders sought were for the decision of 11



March 2019 to be set aside and for the matter to be remitted for hearing of the appeal from the TIC decision by a differently constituted Magistrates' Court.

Judgment under Appeal

4. On 28 April 2020 the primary judge allowed the appeal and set aside the decision of the Magistrates' Court. He directed that the matter be returned for rehearing before a differently constituted Magistrates' Court.
5. The main issues before the primary judge were complaints by the respondent about breaches of the rules, and procedural fairness and non-compliance by the TIC with rule 6 (6) b) and c) of the Island Court Civil Procedure Rules. These rules provide as follows:-

“Rule 6 – Conduct of hearing

(6) When the defendant does not answer, or denies the claim or summary of facts

If the defendant does not answer or denies the truth of the statement of claim or the summary of facts made by the claimant:

...

(b) Evidence for the claimant

The chairperson shall then ask the claimant to provide evidence in support of the claim. After the claimant has given evidence he or she may be questioned by the defendant and the justices.

The claimant may then call witnesses in support of the evidence of the claimant, and each witness may be questioned by the defendant and the justices.

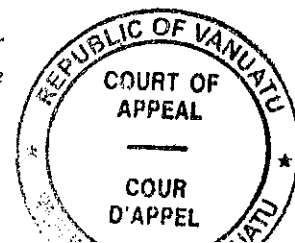
(c) Evidence for the defendant

After the witnesses for the claimant have completed giving evidence, the defendant may give evidence against the claim, and then may be questioned by the claimant and the justices.

The defendant may call witnesses to give evidence in opposition to the claim, and each witness, after giving evidence, may be questioned by the claimant and by the justices. ”

6. It was submitted by the respondent that there was a real risk of miscarriage of justice as witnesses giving evidence before the TIC were not cross examined. The primary judge at paragraphs 17 and 18 of the judgment said:-

“17. The Island Courts (Civil Procedure) Rules 2005 are premised on a fair procedure being adopted for all. If a witness is to be called, the other side must have



the opportunity of being able to cross-examine that witness; and if necessary, be given time to prepare so as to remove the prejudice of being caught by surprise.

18. It cannot be fair to rely solely on evidence-in-chief, unless the right to cross-examine is waived. It is equally unfair to call witnesses by surprise. In such circumstance, time is to be afforded to remove the prejudice. These elementary principles were not adopted in the Island Court, nor corrected in the Magistrate's Court."

7. And the Judge concluded that:-

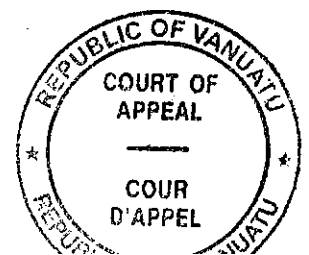
".. in this particular case, fairness of process and overall justice have not been given due weight in both the Island Court and the Magistrate's Court."

Appeal Grounds

8. The appeal was originally pursued with ten grounds. In the course of exchanges with the bench, Mr Molbaleh conceded that he will only be pursuing ground 4 of his appeal points that the primary judge erred by sitting alone without the assistance of assessors. The rest of the grounds were abandoned. His primary submission was that the issues relate to matters of custom and since the primary judge did not sit with assessors he should have adopted the decision of the TIC and the Magistrates' Court and dismissed the appeal.
9. When pressed to identify a statutory basis for his submission and whether he raised his objections to the primary judge on this point, Mr Molbaleh conceded that what he was relying on was as a matter of fairness and the issue was never raised with the primary judge.
10. Mr Hurley submitted in response that as the matter was not raised before the primary judge Mr Molbaleh needed leave to raise it on appeal. His submission is that leave should not be granted. It was further submitted that section 22 (2) of the Island Courts Act [CAP167] (the Act) does not assist the appellant as the primary judge was not dealing with the merits of the case therefore assessors were not required to sit with him.

Discussion

11. Given the concessions made by the appellant's Counsel, this appeal boils down to a very narrow point which was one that was never raised before the primary judge. That he should not be sitting alone to hear the appeal from the Magistrates' Court. We note that the appellant has also not made any application for leave to raise this issue now.
12. Section 10 of the Act vests the administration of customary law in the Island Court. And s22 (2) provides:-



"22. Appeals

.....
(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."

13. In **Numake v Iopil** [2019] VUCA 60 this Court said that:-

"Section 22 then requires that, when an appeal is heard by a Court which may look at the merits of the case, the Court should do so with the benefit of assessors."

14. Mr Hurley submitted that the primary judge was not dealing with a merits issue but a matter of procedure .We accept that submission. The primary judge was considering procedural issues raised in relation to the non-application of rule 6 (6) b) and c) by the TIC whose decision was upheld by the Magistrates' Court.

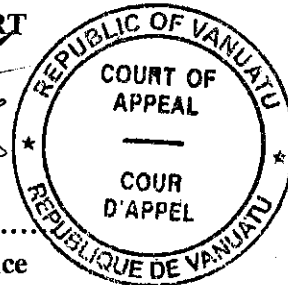
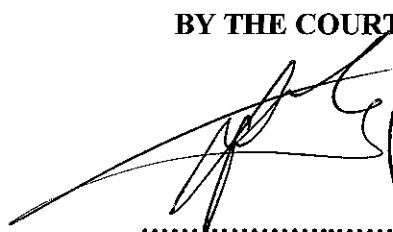
15. The primary judge's conclusion accords with the consideration given to the application of this rules. We find no error on the part of the primary judge as he was not dealing with any issues of custom pertaining to the chiefly title dispute.

Result

16. The appeal is therefore dismissed and the respondent is entitled to costs on an indemnity basis.

DATED at Port Vila this 17th day of July, 2020

BY THE COURT



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**Hon. Chief Justice
Vincent Lunabek**