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

**Civil Appeal**
**Case No. 21/1454 CoA/CIVA**

**BETWEEN: Family Jeffrey Sul and Family Tangis**
Appellants

**AND: Rachel Molsakel and Molsakel (both deceased)**

Respondents

**AND: Mathias Isaac (aka Molsakele)**
Interested Party

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| ***Date of Hearing:*** | ***7th July 2021*** |
| ***Before:*** | ***Hon. Chief Justice Vincent Lunabek***<br>***Hon. Justice John Mansfield***<br>***Hon. Justice Ronald Young***<br>***Hon. Justice Dudley Aru***<br>***Justice Gus Andrée Wiltens***<br>***Hon. Justice Viran M Trief*** |
| ***Counsel:*** | ***Mrs. M. Vire for the Appellant***<br>***Mr. S. Kalsakau the Respondents*** |
| ***Date of Decision:*** | ***16th July 2021*** |

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## JUDGMENT

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### Introduction

1. Rachel Molsakel was the widow of late Chief Molsakel. Both are now deceased. They had no children of their own. Following the death of Chief Molsakel, Rachel Molsakel raised Mathias Isaac Molsakel from the age of 7 years as her son by custom adoption. The sworn statement of Mathias suggests that he was brought up by Rachel and the deceased Chief Molsakel for some time since 1954 before Chief Molsakel died. There was a customary adoption ceremony performed in 1992 and another in 1994.

2. In 2001 when Mathias Isaac Molsakel was 54 years old Rachel Molsakel applied to the Supreme Court for formal recognition of the custom adoption. The application was apparently made under the Adoption Act 1958 (UK) then applicable in Vanuatu in the absence of legislation of the

Parliament of Vanuatu dealing with adoption. The Supreme Court granted the application on 6 July 2001. We set out below in full the terms of the Orders issued which are now the subject of this appeal:-

***"ORDER***

***UPON*** *hearing Mr Saling Stephens on behalf of the Applicants herein in respect of the adoption of* ***MATHIAS ISAAC*** *an adult born on 28 August , 1947 and who has been in the care and custody of the applicants since 6 March 1954 , and pursuant to a customary adoption ceremony dated 6 March 1992 ,and a customary ceremony performed by the Adoptee on 21 February 1994,*

***AND SATISFYING*** *myself that there is no issue or objection by any person to the application herein,*

***IT IS HEREBY DECLARED AND ORDERED THAT -***

*(1) Mrs Rachel Molsakel is a fit and proper person to be given adoption rights over the said* ***MATHIAS ISAAC;***

*(2) The customary adoption is hereby formally recognised as proper and legal for all purposes of the law;*

*(3) Mrs Rachel Molsakel be given adoption of the said* ***MATHIAS ISAAC*** *surnamed* ***MOLSAKEL,*** *who shall for all purposes of the law and relationship be deemed the Applicant's own son.*

***Dated at Luganville this 6th day of July, 2001.***
***BY THE COURT***
***Oliver A Saksak***
***Judge."***

3. These Orders (Adoption Orders) were challenged in 2002 by five (5) applicants namely Peter Natu, Solomon Amelee, James Tamata, Mol Vatol all from Mavea Island in Santo and John Tari from Surander on Santo . Their application was to vacate or set aside the adoption order made on 6 July 2001. The Chief Justice dismissed this application on the basis that the Supreme Court lacked jurisdiction to determine the matter as the adoption order was a final decision, and he directed that any challenge to the Adoption Order could only be by way of an appeal to this Court. There was no appeal from that decision of the Chief Justice. There was no attempt at that time to seek leave to appeal out of time from the adoption order itself.

4. No appeal was filed until 7 May 2021 when an application for extension of time to appeal and a notice and proposed grounds of appeal were filed in this matter. Some twenty odd years have now lapsed since the rejection of the Supreme Court challenge in 2002 and the indication that any challenge to the Adoption Order was by appeal to the Court of Appeal. Even at that time in 2002, any such appeal would have been out of time so leave to appeal would have been necessary.

**The Application for Extension of Time to Appeal and Appeal**

5. This application to challenge Mathias's adoption has apparently been instituted because questions as to entitlement to custom land have arisen. Mathias may have rights to such custom land. The proposed appellants also apparently have claims to this land. Their contention then is that the adoption of Mathias was not lawful or effective and so he has no claims to the custom land

6. In an application for extension of time to appeal the proposed appellants will need to establish the strength of their claim together with an explanation for the very long delay and the degree of possible prejudice to the respondent (see **Chen Jinqiu v Ly Nu Loung** [2020] VUCA 10: at [34]).

7. The essence of the asserted merits of the proposed appeal is that the custom adoption in 1992 and again in 1994, and as recognised by the Court in 2001, were not in conformity with the requirements of customary adoption of the people of the area concerned, and could not have been validated or effective by the Order of the Supreme Court in 2001 for that reason and because the Adoption Act 1958 (UK) did not authorise the adoption of an adult. At the time Mathias was clearly an adult.

8. The application for leave was filed by the appellants with four sworn statements in support. Jeffery Sul asserts that his family was not aware of the 'Adoption case". He does not say who is comprised in his family, or what he has done to be able to assert that on behalf of all the existing generations of his family. He does not refer to the two custom law adoption ceremonies, so he does not say he (or his family) were not aware of them. Newman Tangis also only refers to the adoption case in 2001. Victor Moltures does not even say that he was unaware of the adoption case in 2001. James Surai, Secretary to the Council of Chiefs in Santo SANMA Province, acknowledges that he had heard of the adoption case in 2001.

9. A number of matters are raised as a basis for the application; that they were not aware of the Adoption Orders until recently; that Rachel Molsakel did not have the right to adopt under customary law; that the procedures of customary law for adoption were not properly followed; and that they wanted to protect their customary rights in Land Case No 5 of 1992 currently before the Santo Malo Island Court for determination and to preclude Mathias from being entitled to be declared the custom owner of or get any rights in, the land in issue.

10. The respondents in response also filed an application to strike out the application for leave on the basis that the Adoption Orders are final as the appeal is twenty years out of time and was only filed to nullify Land case No 5 of 1992. Furthermore, that the application for leave is an abuse of process and should be struck out. A sworn statement of Mathias Isaac Molsakel was filed in support.

**Discussion**

11. First we consider the reasons for the delay in filing the appeal and as part of this consideration the possible prejudice to Mathias. The appellant's case is that they were not aware of the adoption of Mathias until recently when the issue arose in the context of a land claim. But, as noted below, their attack is also on the validity of the two customary adoption ceremonies.

12. We consider that material is inadequate to show a good reason for the very lengthy delay in making the application.

13. Rachel Molsakel had looked after Mathias since he was approximately seven years old from 1954. The Judge in his decision in 2001 noted that custom ceremonies had been performed regarding the adoption in 1992 and 1994. There is no direct evidence that those custom ceremonies were not known to the community at the time. The evidence also shows that the relevant land claim to the Santo/Malo Island Court was commenced by Rachel, as at least one of the claimants, by application in 1992. We think it highly unlikely that those living in the same village as Mathias and belonging to the family of the appellants who were alive at the time would have been unaware of the custom ceremonies.

14. The assertive sworn statements of the Applicants, whilst they may be correct in relation to the personal awareness of the two persons who address the topic, do not establish that those who are or were the forbears of the present applicants did not have knowledge of the custom adoption ceremonies in 1992 and 1994. By way of indication, the material indicates that Jeffrey Sul is the grandson of the male person Sul, who married Rachel after the death of Chief Mosakel, and he is the son of Saniel Sul who is one of the children of that marriage. There is obviously a generational structure whose knowledge is relevant.

15. There are no sworn statements from the persons who in 2002 attempted unsuccessfully to have the Court adoption order set aside, and who obviously were aware of the 1992 and 1994 custom adoption ceremonies (as referred to in the reasons of the judge recorded above) about how they learnt of the adoption order, or to explain how or why their knowledge was not well known through the community at the time. Moreover, the judge has noted in his Order on 6 July 2001 that he is 'satisfied that there is no issue or objection by any person to the application'. There was obviously some material relevant to the judge reaching that satisfaction. James Surai knew of the adoption case. Given the lengthy elapse of time, it is not sufficient explanation for two persons only to explain the delay in that context.

16. It is not a sufficient explanation for the delay in making the present application, where the knowledge of the forbears of the persons who made the sworn statements and community more broadly and those involved now over many years in the land claim, and those generally in the relevant community would be significant. There is really no evidence that the two custom law adoption ceremonies were not known to the community generally, or to the applicants.

17. Nor would it be sufficient to show that the adoption order alone was not known to the community generally. The foundation for the application involved the two customary adoption ceremonies also.

18. The applicants submit that the adoption was not in accordance with custom. They recognise that the adoption order was premised on the customary adoption ceremonies, so they seek to attack the validity of those ceremonies. As we noted the ceremonies were performed some 29 years and 27 years ago. There is no evidence presented by the applicants of their presence at the ceremonies and an identification as to why those present did not consider the adoption was according to custom. It is not enough now for them to say the ceremonies were not effective. It would be necessary to show who conducted the ceremonies, how they were conducted, who was present, and why at the time the ceremonies were not seen or should not have been seen by the community as effective and valid. And why their status should not have been challenged at the time or soon thereafter. None of that material has been presented.

16. Further it is not now possible given more than 20 years have passed for a Court to be certain about what in fact happened at the custom ceremonies. The Court file from 2001 that may have contained statements about the custom process is no longer available. All this court is left with on appeal is the Judge's conclusion that the adoption was according to custom with no clear evidence to the contrary.

17. On the material presented, we are not satisfied that there is a real prospect of the applicants showing that, at the time of the two customary adoption ceremonies, they were not valid and effective.

18. Finally, prejudice to Mathias. That issue presents the obverse side of the applicants showing that they have a real prospect of showing that the customary adoption ceremonies were not valid and effective. That is because it would be unfairly prejudicial to Mathias if he could not now have a proper opportunity to confront such allegations. Matthew lived with his adopted mother from 7 years of age. He went through two custom adoption ceremonies. He was the subject of an order of the Supreme Court making the adoption order. He was the subject of an unsuccessful challenge in 2002 to the adoption order made in 2001. He is now a 74 year old man who is entitled to believe his adoption is now beyond challenge. He could not possibly now be in a position to establish the nature and detailed structure of those two ceremonies. If there is challenge to their effectiveness and validity, he could not fairly be put in a position to contest that, with the benefit of the evidence of all those who participated in those ceremonies. Many would now be deceased, or have less than adequate memories of the events.

19. We consider therefore that the application for an extension of time to appeal should be refused.

20. In summary: the facts on which the challenge is proposed do not establish adequate grounds for delay; the delay of over 20 years means that establishing the facts of what occurred in 1992 and 1994 regarding the custom adoption are unlikely to be reliable and therefore the challenge

is unlikely to succeed; there is considerable prejudice to Mathias having to resist a challenge to his custom adoption which began when he was a young boy.

21. We observe that this decision is not any indication to the Santo/Malo Island Court as to how it should make its determination, save for the fact that we are refusing an application to reopen the legal validity of the two custom law adoption ceremonies and of the Order of the Supreme Court made on 6 July 2001. How those ceremonies and that order should inform the decision of the Island Court is a matter for that Court.

**Result**

22. The application for extension of time to appeal is refused.

23. The Interested party is entitled to costs which we fix at VT100,000.

**DATED at Port Vila this 16th day of July, 2021**

**BY THE COURT**

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**Hon. Vincent Lunabek**
**Chief Justice**

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU