

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

**Civil Appeal
Case No. 22/563 SC/CIVA**

BETWEEN: Family Kalsakau
Appellant

AND: Chief Maramara Manrealima
First Respondent

AND: Nareo Marik Atlangi
Second Respondent

AND: Family Bakokoto
Third Respondent

AND: Richard Kaltonga
Fourth Respondent

AND: Family Saurai
Fifth Respondent

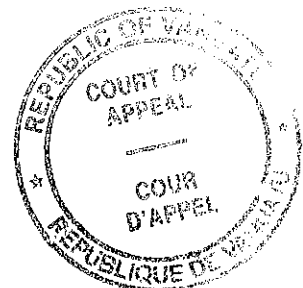
Date of Hearing: 10th August 2022

Date of Judgment: 19th August 2022

Before: Hon. Chief Justice Vincent Lunabek
Hon. Justice John Mansfield
Hon. Justice Mark O' Regan
Hon. Justice Oliver A Saksak
Hon. Justice Viran Molisa Trief
Hon. Justice Edwin Goldsbrough

Counsel: Mr Sakiusa Kalsakau for Appellant
Mr Philip Fiuka for First and Second Respondents
Mr Jack Kilu and Mr Kent T. Tari for (each group of) Third Respondent
Mr Daniel Yawha for Fourth Respondent
No appearance or attendance for Fifth Respondent

JUDGMENT OF THE COURT



Introduction

1. This was an appeal as filed but we treated it as an application for leave to appeal against a judgment of the Supreme Court made on 3rd February 2022 pursuant to section 22 of the Island Court Act (Cap 167).

Background

2. The claims over the custom land of Biritano and Sumalapa which are situated at Malapoa Point, Efate Island, were registered in the Efate Island Court (EIC) in the year 1996.
3. The EIC heard and determined these custom land claims on 20th February 2015. In its judgment, the EIC made declarations as to who were declared custom owners and who may have custom rights to use the said land subject to the authority of the custom owner(s). The EIC also, amongst other orders, dismissed the claims of other parties on the said disputed custom land including the claim of the Appellant, *Family Kalsakau*.

1. The Appellant, Family Kalsakau, filed an appeal against the decision of the EIC dated 20th February 2015 before the Supreme Court under section 22 of the Island Courts Act.

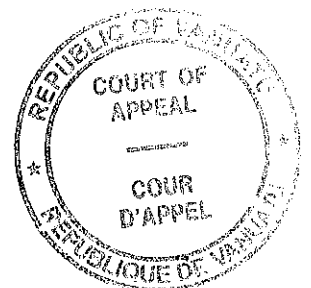
2. The Supreme Court heard that appeal and delivered its judgment on 3rd February 2022. In its judgment, the Supreme Court considered that there were sufficient reasons to allow the appeal and there was no need to consider the remaining grounds. The Supreme Court then issued the following orders:

- "1) *Appeal allowed;*
- 2) *The judgments of the Efate Island Court dated 20th February 2015 is hereby quashed;*
- 3) *The parties are liberty to have their dispute determined pursuant to the provisions of the custom Land Management Act;*
- 4) *Each part to bear their own costs."*

4. The Judgment of the Supreme Court dated 3rd February 2022 was subject to this appeal by Family Kalsakau.

The Appeal

5. The Appellant sought the following orders and declarations from this Court:



- 1) *"That order (4) made in the judgment of the Supreme Court dated 3rd February 2022 in Land Appeal Case No. 1567 of 2016 be set aside;*
- 2) *That Family Kalsakau be declared as custom owner;*
- 3) *Alternatively, that the matter be remitted back to the Supreme Court for a rehearing and determination of custom ownership or to a differently constituted Island Court;*
- 4) *Such order(s) deemed necessary and just."*

6. The Appellant proceeded with this appeal upon two grounds:

- "1. *That the Supreme Court erred in law or fact or both when it exceeded its jurisdiction by failing to fully and properly consider family Kalsakau's submissions and to determine whether or not they have established their claim of custom ownership over the disputed land.*
2. *Alternatively, that the Supreme Court erred in law of fact or both by exceeding its jurisdiction when it ordered that the dispute be dealt with under the custom land management Act when its power was limited to referring the dispute back to the same Island Court or a different Island Court."*

Issues

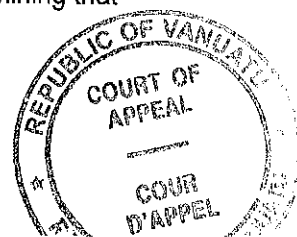
7. There were three issues plus costs to address:

- 1) Jurisdiction of the Court of Appeal;
- 2) Whether there is jurisdictional/reviewable error in not determining issue of Custom ownership by Family Kalsakau;
- 3) Whether there is error in sending matter to Nakamal under Custom Land Management Act regime.

Discussion

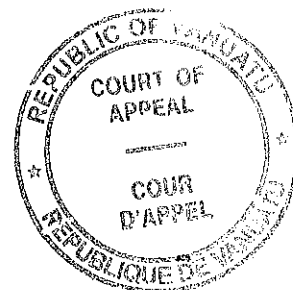
8. We will discuss and deal with the above issues one after the other.

9. As to issue 1), it was quite clear that there is no right of appeal to the Court of Appeal from a judgment of the Supreme Court relating to custom land (section 22 (4) Island Courts Act). We note that in this case, the Supreme Court is properly composed (the learned Judge below sat with assessors). Here, the alleged jurisdictional error that the Supreme Court erred in not considering and determining that



Family Kalsakau were Custom Owners was to fail. The heading of the document filed in the Court of Appeal states that it is an appeal, but the document correctly states that the Court of Appeal will be moved for orders to set aside the Supreme Court by way of an application. The Court of Appeal could not substitute the decision it thinks the Supreme Court should have made, but only to send it back to the Supreme Court to determine the issue if it was obliged in exercise of its jurisdiction to do so. We adopt what the Court has said on this issue in another judgment delivered today, Sorinmal v Makelon Case no. 22/603 at [13] – [15].

10. As to issue 2), we asked Mr Kalsakau to show us where in the Appellant's grounds of appeal it is alleged that the Supreme Court failed to exercise its jurisdiction. Mr Kalsakau informed the Court that the attack on the Supreme Court judgment was related to the reasoning in the judgment that "*there is no need to consider the remaining grounds*" as contained in ground 1 of the appeal. The Court pointed out to Mr Kalsakau that the appeal was not made against the results of the judgment but the reasoning in the judgment. It was not appropriate as the reasoning of a judgment is not an appealable point or question where the decision was made within jurisdiction.
11. More importantly, two points can be advanced against issue 2:
 - (a) First, the appeal to the Supreme Court did not seek the decision that Family Kalsakau were Custom Owners, but only the setting aside of the EIC judgment and remittal under the Custom Land Management Act [See Supreme Court judgment at Para 4]. There cannot be jurisdictional error in giving the Appellant the orders they sought in their application;
 - (b) Second, we noted that Family Kalsakau did assert in its submissions to the Supreme Court that it was the proper Custom Owner of the said land. But in the absence of an amendment to the grounds of appeal to that court, once the Supreme Court decided to grant the appeal, it is not a jurisdictional error not to proceed to consider all of the other arguments presented. It is common for a judge to work through the arguments, and once the result is clear, the Court need not address the other arguments (if they are directed to the same outcome). So, the fact that many arguments were put forward did not mean they all had to be addressed. In the circumstances, no jurisdictional error is shown.
12. As to issue 3), we observe that referral may be made to Custom Land Management Act by consent of all parties, and counsel on behalf of all parties did consent, so that the order made by the Supreme Court can stand. That was part of the relief claimed by Family Kalsakau in its appeal to the Supreme Court so it cannot complain that it got what it asked for. Here too, no jurisdictional error is shown.
13. We note further that the first order sought by the appellant was "*Order (4) made by the Supreme Court in its decision of 3 February 2022 to be set aside*" was a complaint about the costs. We did not see, and the Appellant did not show, the Court where the judge erred in law in exercising his discretion to make such an order.

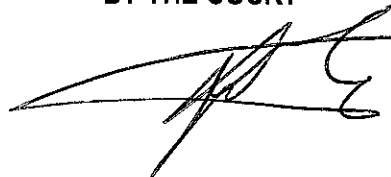


Result

1. We dismiss the application (intended appeal);
2. The costs of the application are made against the Appellant, Family Kalsakau; they are assessed and determined at: -
 - (c) VT30,000 for First and Second Respondents together;
 - (d) VT10,000 for the Third and Fourth Respondents each. The Fifth Respondent took no part in the case before the Court so no award is made in favour.

DATED at Port Vila this 19th day of August 2022

BY THE COURT



Chief Justice, Vincent Lunabek

