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

Civil Appeal
Case No. 25/856 COA/CIVA
[2025] VUCA 13

IN THE MATTER OF: **AN APPEAL FROM THE SUPREME COURT OF THE REPUBLIC OF VANUATU**

BETWEEN: **FAMILY SOPE**
First Appellant

AND: **FAMILY TORO**
Second Appellant

AND: **FAMILY KALTABANG**
Third Appellant

AND: **FAMILY KALULU**
First Respondent

AND: **FAMILY TOUTAK NARU KALPEAU KALSAKAU**
Second Respondent

Date of Hearing:	***5 May 2025***
Coram:	***Hon. Chief Justice V Lunabek*** ***Hon. Justice J Mansfield*** ***Hon. Justice R Asher*** ***Hon. Justice VM Trief*** ***Hon. Justice E Goldsbrough***
Counsel:	***Mr J Malcolm for the Appellants*** ***Mr SC Hakwa for the First Respondent*** ***Mr DK Yahwa for the Second Respondent***
Date of Judgment:	***16 May 2025***

JUDGMENT OF THE COURT

Introduction

1. This appeal has a regrettable history.

2. On 5 September 1995, the Efate Island Court constituted by a Magistrate and three assessors determined the custom owners of land known as Watarua and Emeltau after a lengthy hearing.

The judgment records that Family Sope, Family Toro and Family Kaltabang were the "*Original Land Claimants*", Family Kalulu of Pango Village was the "*First Land Claimant*" and Family Toutak Naru Kalpeau Kalsakau was the "*Second Land Claimant*".

3. The declarations made by the Island Court were as follows:

> *"(a) That Family Toutak, Family Toro, Family Sope and Family Kaltabang are co-owners of the land at "Watarua" and "Emeltau";*
>
> *(b) The Court is satisfied and declares Family Toutak, Family Toro, Family Sope and Family Kaltabang perpetual custom owners of the land at "Watarua" and "Emeltau";*
>
> *(c) Their rights include right to grow crops, make gardens, build houses and live on the land."*

4. That decision was appealed to the Supreme Court pursuant to the Island Courts Act [CAP. 167] by Family Kalulu on 2 October 1995. The remaining family parties to the Island Court proceeding were named as Respondents.

Appeal out of time

5. The regrettable history is that that appeal was only heard and determined by the Supreme Court on 10 December 2024.

6. It is apparent that some delay after 2007 was the consequence of the Island Court file which had been provided to the Supreme Court for the hearing of the appeal being destroyed when the Supreme Court building was destroyed by fire in mid-2007. It is not clear why the appeal had not progressed in the period between 1995 and 2007. After efforts to restore the file were expended, there was a period of many years when, intermittently, the appeal was considered in the context of proposed further evidence through sworn statements and objections to those sworn statements. There is no real benefit now in exploring the reasons for such a lengthy procedural process in relation to this appeal. They are referred to in the Judgment of the primary Judge of 10 December 2024 when the appeal was finally disposed of.

7. On that date, the Supreme Court made orders that the matter be remitted to the Efate Island Court, and that the Efate Island Court be constituted to re-hear the matter "*but with the same parties*". We refer to that judgment in more detail below.

8. As a result of that order, the three Appellant Families appealed to this Court on 2 April 2025 (documents dated 31 March 2025). Family Kalulu, the First Respondent, and Family Tutak Naru Kalpeau Kalsakau, the Second Respondent, were apparently content with the orders of the Supreme Court.

9. It is acknowledged that the appeal instituted on 31 March 2025 was made out of time. An application for leave to appeal out of time was made on 2 April 2025. Given the prior history, the very significant length of time between the date of the institution of the appeal and its disposition, and the potential significance of that elapse of time due to deaths, evolution of failing memory, and the like it would be difficult to establish that that short period of delay in instituting the appeal caused any real detriment to the Respondents. Nevertheless, Family Kalulu did object to the extension of time in the particular circumstances. That is that the Efate Island Court, following the orders of the Supreme Court on 10 December 2024, has reconstituted and has embarked upon the re-hearing directed by the Supreme Court. The information provided on the appeal is that the Efate Island Court anticipates that it will be in a position to give its final decision in mid-June 2025. In those circumstances, the objection of Family Kalulu to the proposed extension of time is readily understandable.

10. In our view, topic of the appeal – custom ownership is clearly important and there are clearly arguable issues on the part of the Appellants. The Respondents can suffer no detriment in terms of the delay. The status of the reconstituted Efate Island Court depends on the issues to be agreed. We will therefore grant the extension of time sought.

The Supreme Court Judgment

11. The judgment of 10 December 2024 set out briefly the procedural history of the conduct of the appeal, including a ruling made by a Judge of the Supreme Court on 17 June 2015 concerning the admissibility of a number of sworn statements filed in the Court by that time, and the conditions upon which that material might be adduced at the hearing. Subsequent to that time, there were additional sworn statements adduced by one or other of the parties to that appeal which also attracted objections to their utilisation on the hearing of the appeal.

12. The primary Judge then conducting the management of the appeal referred to their respective submissions of the Appellants and of the Respondents concerning the admissibility of those statements at the hearing of the appeal. Having referred at a little length to those submissions, the primary judge turned to the consideration of them. His Honour ruled that the material in the sworn statements should be received as new evidence in view of the circumstances.

13. The final two paragraphs of that judgment indicate that the primary Judge did not then given directions to ensure that the appeal proceeded in the way in which, apparently, the parties had contemplated to that time. Those paragraphs 37 and 38 read:

> *"Section 22 (3) provides that the Court hearing an appeal (from the island court) shall consider the records (if any) relevant to the decision and receive such evidence (if any) and may make such inquiries (if any) as it thinks fit. This Court is given discretionary powers under s.23 and can make an order as the Island Court could have made in any matter or can order that any such cause or matter be reheard before the same Court or before any other island Court.*

The appeal seriously challenges the findings made by the Efate Island Court in awarding custom ownership to the respondents. The appellant wants the appeal heard in line with Fatiaki J's ruling or for the matter to be remitted to the Island Court for a re-hearing in view of the circumstances. This is opposed by the respondents. However, as no records are available and given the respondents strong objections to a rehearing with all the witnesses and objections to any cross examination of witnesses, I am of the view that justice in this can only be best achieved by returning the matter to the Efate Island Court to rehear the matter but restricted to the same parties given that the initial record of their proceedings are unavailable.

14. Accordingly, the orders referred to above were then made, that is remitting the matter to the Efate Island Court to be re-constituted and to re-hear the matter with the same parties.

The Appellants' Contentions

15. The Appellants' contentions on the appeal, broadly speaking, were first that the primary Judge erred in proceeding to make that determination without giving the parties an opportunity to be heard and to present their material and to make submissions. In effect, that is a procedural fairness complaint, because (it is said) on 10 December 2024 they were anticipating a ruling on the admissibility on certain proposed evidence, and the fixing of a hearing date for the hearing of the appeal. Aligned with that was the submissions that the primary Judge in making rulings as to the admissibility of the material in the sworn statements had failed to apply the conventional rules as to the circumstances in which "*fresh evidence*" is allowed to be adduced after the primary factual hearing conducted [in this instance] by the Efate Island Court. Thirdly, it was said, that on the material the primary Judge had failed properly to consider the detailed reasoning of the Efate Island Court and the material on which it had relied (as appears in its lengthy judgment), and the extremely lengthy period of time between that hearing and the consideration by the primary Judge in December 2024 in deciding that the matter should simply be remitted to the Island Court for re-hearing.

16. In addition, the Court requested the parties to make additional written submissions on whether the primary Judge contravened Section 22(2) of the Island Courts Act in determining the outcome of the appeal in the manner he did without the participation of two assessors in doing so.

Consideration

17. To address those contentions, it is useful to set out in full the terms of Sections 22 and 23 of the Island Courts Act. They are as follows:

> ***"22. Appeals***
> *(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 from it to the Magistrates' Court.*

(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 Magistrates' Court, as the case may be, may on application by an appellant grant an extension of such period provided the application therefor is made within 60 days from the date of the order or decision appealed against.*

23. Power of court on appeal

The court in the exercise of appellate jurisdiction in any cause or matter under section 22 of this Act may –

(a) *make any such order or pass any such sentence as the island court could have made or passed in such cause or matter;*

(b) *order that any such cause or matter be reheard before the same court or before any other island court.*

18. It is of course necessary to recognise that there is no appeal from the Supreme Court to the Court of Appeal by reason of Section 22(4) of the Island Courts Act. The decision of the Supreme Court (properly constituted) on the merits of an appeal under that section is final. But that must be read with Section 30(4) of the Judicial Services and Courts Act [CAP. 270]. As the Court of Appeal indicated in *Numake v Iopil* [2019] VUCA 60 at [17] this Court's role is simply to ensure that the Supreme Court does not exceed the jurisdictional limits which the relevant legislation imposes upon it. That does not include reviewing and making a qualitative assessment of the factual findings made by the Supreme Court on the hearing of an appeal. No doubt, in some cases, there may be an issue as to whether the asserted "*error*" on the part of the Supreme Court is jurisdictional in character, but of course it is only appropriate to address such issues as they specifically arise.

19. As the very helpful submissions of all counsel indicate, there have been a number of earlier decisions of this Court and the Supreme Court which consider the operation of Section 22(2) of the Island Courts Act.

20. *Kaltapau v Kolou* [2016] VUSC 56 concerned the power of a Judge of the Supreme Court to strike out a purported appeal to the Supreme Court from the Efate Island Court. The Supreme Court Judge decided that he had that power, without engaging with any assessors, as the order he made was not a hearing of the purported appeal but a hearing of the question whether there was a valid appeal at all: see [35].

21. That distinction was also recognised, and applied, by the Court of Appeal in *Kemuel v Nato* [2022] VUCA 14. There a Supreme Court Judge had refused an applicant seeking leave to appeal out of time from an Island Court decision: see at [16]. Those decisions relate to circumstances different from the present circumstances.

22. As we have indicated, we propose to extend the time for the Appellants on this appeal to appeal from the Supreme Court decision of 10 December 2024. Indeed, we are not hearing an appeal from the Efate Island Court or from the Supreme Court by doing so. We are taking the preliminary step of deciding whether to extend the time within which any such appeal might be instituted.

23. The decision of this Court in *Komi v Mafe* [2020] VUCA 34 is more directly relevant. That case concerned an appeal to the Supreme Court from the Island Court first to a Magistrate's Court (sitting as a Magistrate with assessors) and then to the Supreme Court on a decision about the use of the chiefly title. The Supreme Court Judge managing the conduct of the appeal ultimately dismissed the appeal because of persistent procedural failings by the Appellant: see at [11]. The primary Judge did not engage assessors for the purposes of that order, which obviously had the effect of finally disposing of the appeals.

24. The Court of Appeal concluded that, although the primary Judge did not sit with assessors in making that order, Section 22(2) did not require him to have done so. That was because, as stated at [15], the Judge was:

> *"... not dealing with any issues of custom pertaining to the chiefly title aspect."*

It is clear, on the other hand, that Section 22 clearly required the Supreme Court to sit with assessors when determining an appeal where the assessors might be providing invaluable insight and a meaningful contribution to the appropriate hearing and assessment in disposition of the appeal.

25. That approach was foreshadowed in the earlier Court of Appeal decision in *Numake v Iopil* [2019] VUCA 60. That decision has some factual similarities to the present appeal, as the relevant Island Court decision by the Malekula Island Court was made in 1993. But, in that case, the appeal to the Supreme Court was made from a subsequent 2014 Island Court decision, that is some 21 years later, where it was apparent that the purpose of that application to the Island Court was to subvert the 1993 decision as to the custom owners of the particular land.

26. In that case, the 2014 Island Court decision involve an attempt to go behind the earlier Island Court decision on a "*true bloodline*" test. On that basis, the 2014 Island Court decided that it could re-visit or qualify the decision of the 1993 Island Court on the basis that the earlier decision identified as the custom owner a person who was not on the evidence presented to the 2014 Island Court the "*true bloodline*" of the custom owners. The custom owner of the land, as determined by the 1993 Island Court, appealed then to the Magistrate's Court under Section 22 of the Island Courts Act. His appeal to that Court (duly constituted, including with assessors),

was unsuccessful. He appealed to the Supreme Court which, without sitting with assessors, dismissed the appeal, apparently also on the same basis.

27. The Supreme Court sitting as a single Judge without assessors thus, effectively, meant that the custom owner of the subject land as determined in the 1993 Island Court was no longer the custom owner.

28. The Court of Appeal concluded that the Supreme Court Judge, sitting alone, did not have the jurisdiction to dismiss the appeal because Section 22(2) required the Supreme Court Judge to sit with assessors.

29. That was a straight forward application of Section 22(2) of the Island Courts Act. That position applies equally to the present decision. The Judge in the Supreme Court made an order finally disposing of the appeal in circumstances where he was required to sit with assessors. He referred expressly to the evidentiary material, and to the original Island Court decision, and to the particular provision of Section 23(a) of the Island Courts Act about the powers of the Supreme Court when determining an appeal. The "*justice*" of the case was said to require that. There can be no doubt that the primary Judge was deciding the merits of the appeal on a qualitative assessment of the material then available to him. Such an assessment must be made by the Supreme Court Judge with assessors.

30. The consequence is that the appeal, must be allowed and the orders made on 10 December 2024 set aside. The matter will be remitted to the Supreme Court for re-hearing.

31. It is regrettable that, as we have noted, the Efate Island Court has been reconstituted and has progressed with the purported re-hearing. We assume that it did so without being aware of this appeal, and awaiting its outcome. The result of the orders we make is that its reconstitution and hearing have no legal significance and cannot do so. Of course, if the result of the re-hearing in the Supreme Court is that the order of the Supreme Court (sitting with assessors) is to the same effect as the orders now appealed from and set aside, the parties to any re-hearing before a re-constituted Island Court may choose to adopt the composition of, and evidence before, that re-constituted Island Court and proceed with the completion of its hearing. That is a matter for them.

32. There is an additional feature of the Supreme Court decision which, in our view, also involves jurisdictional error on the part of the Supreme Court.

33. It is apparent that the process agreed upon by the parties was for the Supreme Court to make a determination as to whether new evidence on the hearing of the appeal might be adduced, and upon what terms. It was then expected by the parties that they would come before the Judge to determine whether any other pre-hearing steps were necessary, and to fix a date for the hearing of the appeal. It was not indicated to the parties that when outcome of the Judge's consideration about the admissibility of the contentious sworn statement might be the final disposition of the appeals. Clearly, procedural fairness required that the parties would have been put on notice of that possible outcome, and given their opportunity to make submissions about it. Had that

possible outcome been drawn to their attention, it is likely that the parties themselves would have drawn to the Court's attention the requirements of Section 22(2) of the Island Courts Act.

34. We are confirming that the parties did not have the opportunity to make submissions in relation to the ultimate hearing and resolution of the appeal because, as it was argued in the written contention of the First Respondent by counsel, there was no final determination of the appeal because the point had only been reached where the parties were expecting a date for the hearing to be fixed. The contention then was made that the decision to remit the matter to the Efate Island Court to be re-heard was not a hearing of the appeal at all but a procedural step rather than a qualitative assessment of the then available material to determine what orders to make to dispose of the appeal under Section 23(a) and (b). We have rejected that contention as the Judge of the Supreme Court expressly indicated that he was deciding what to do by reference to the powers of the Court expressly under Section 23(a) when deciding that he had the power to remit the matter to a re-constituted Island Court.

35. The orders are:

(1) The time within which the Appellants may appeal from the decision of the Supreme Court of 10 December 2024 is extended to 2 April 2025;

(2) The appeal instituted on 2 April 2025 be allowed and

(a) the orders made by the Supreme Court on 10 December 2024 are set aside; and

(b) the matter be remitted to the Supreme Court for hearing and determination in accordance with the Island Courts Act.

36. Having regard to the points on which the Appellants and the First Respondents are agreed, namely that they did not expect the Supreme Court to proceed to make the orders which it did at that time, it is appropriate that there be no order as to the costs of this appeal.

DATED at Port Vila, this 16th day of May, 2025.

BY THE COURT

Hon. Chief Justice Vincent LUNABEK

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