

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

Civil Appeal
Case No. 19/1833 SC/CIVA

BETWEEN: Morris Amos
Appellant

AND: Jimmy Alick
Respondent

Date of Hearing: 31 March 2020
Before: Justice V.M. Trief
In Attendance: Appellant – Mr J.I. Kilu
Respondent – Mr D. Yawha
Date of Decision: 30 April 2020

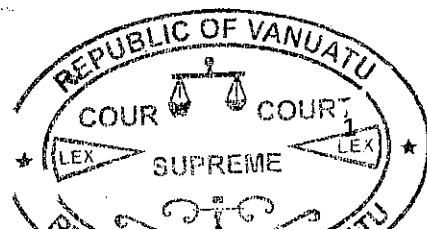
RESERVED JUDGMENT

A. Introduction

1. This case involves the discontinuance of an appeal by counsel.
2. The Magistrates' Court dismissed both attempts to revive the proceeding.
3. That is challenged by way of final appeal to the Supreme Court. This is the result of that appeal.

B. Background

4. The Tongoa/Shepherds Island Court in Civil Case ('CC') 16/2485 determined a chiefly title dispute. Its Judgment dated 13 June 2017 determined a strike out application and made timetabling orders. The Judgment dated 12 July 2018, delivered after trial, set out the Island Court's substantive decision.



5. The Appellant appealed to the Magistrates' Court.
6. On 6 November 2018, the Magistrates' Court made timetabling orders including for the filing of the appeal book within 30 days.
7. The Appellant did not comply with those orders. On the day before the appeal hearing, Appellant's counsel Mr Kilu filed a Notice of Discontinuance of the appeal.
8. The Appellant applied to reinstate the appeal. The Magistrates' Court heard and dismissed that application. Mr Kilu then filed an amended application for leave to appeal out of time. This was so that the Appellant could file a fresh appeal.
9. The current appeal is against the Chief Magistrate's dismissal on 2 July 2019 of the application to appeal out of time.

C. The Decision

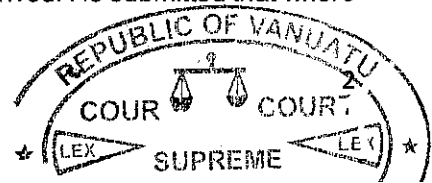
10. The Acting Chief Magistrate stated that the Court's dismissal on 25 April 2019 of the Application to reinstate the appeal was in accordance with r. 9.9(4)(a) of the *Civil Procedure Rules*. She stated further that after consideration of the Respondent's Response filed on 3 June 2019, s. 22 of the *Island Courts Act* [CAP. 168] and the Court of Appeal decision in *Rombu v Family Rasu* [2006] VUCA 22, the Application to appeal out of time was dismissed.

D. Grounds of Appeal

11. Mr Kilu advanced 7 grounds of appeal. He stated that Grounds 3, 4 and 6 were repetitions of earlier grounds.
12. Mr Kilu submitted that the Magistrates' Court erred in dismissing the Application to reinstate the appeal as r. 9.9(4) of the *Civil Procedure Rules* is meant for cases which have been "genuinely" discontinued. Thus it did not apply in the present case where the appeal was "mistakenly" discontinued by counsel. Mr Kilu could not provide any authority for this proposition.
13. Mr Kilu further submitted that the Magistrates' Court erred in dismissing the two Applications as the real dispute should be dealt with rather than dismissing the case on procedural grounds. Finally, Mr Kilu submitted that no prejudice would be caused by reinstating the appeal.

E. Response

14. Mr Yawha submitted that the Magistrates' Court correctly declined to reinstate the appeal pursuant to r. 9.9(4)(a). He cited the Court of Appeal judgments in *Nalpini* and *Kalsakau* as authority that discontinued proceedings could not be revived. He submitted that where



negligence of counsel is involved the Appellant's remedy lay against the counsel personally.

15. Mr Yawha submitted that there is no rule of procedure that provides that genuine mistake of counsel is a ground to set aside a discontinuance. Mr Yawha further submitted that determinations of chiefly title are important. The Island Court delivered its judgment after a full hearing. Allowing the appeal would prejudice the Respondent in terms of preventing him from enjoying the fruits of the judgment and incurring further costs. Mr Yawha submitted that the appeal must be dismissed with costs of VT65,000 for the Respondent.

F. The Law

16. Rule 9.9(4)(a) of the *Civil Procedure Rules* provides:

9.9 ...

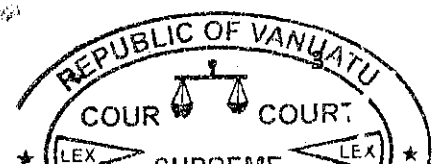
(4) *If the claimant discontinues:*

(a) *the claimant may not revive the claim*

17. The Court of Appeal considered this rule in *Nalpini v President of the Republic of Vanuatu* [2019] VUCA 68. The appellant had filed a Notice of Discontinuance discontinuing the judicial review proceedings. He commenced a second Judicial Review case. The Supreme Court struck out the second case based on r. 9.9(4)(a) and *Anshun* estoppel. The Court of Appeal upheld the Supreme Court decision, stating that the effect of the Notice of Discontinuance under r. 9.9(4)(a) means that the appellant had discontinued all matters that belonged to the subject of litigation in the first proceedings.
18. In *Kalsakau v Director of Lands* [2019] VUCA 33, appellants' counsel had sought an order for reinstatement of the judicial review proceedings on the basis that the Notice of Discontinuance was filed by mistake. The Supreme Court dismissed the application as r. 9.9(4)(a) expressly prohibited the revival of a discontinued claim. The Court of Appeal observed that whilst it had declined to hear the appeal until the question of representation of the parties was resolved the outcome of the appeal may not lead to the judicial review proceedings being reinstated.
19. *Hapsai v Albert* [2012] VUCA 5 concerned discontinuance of an appeal. The appellant applied to reinstate the Land Appeal Case. The Court of Appeal held that the primary Judge was correct in identifying that the applicable rule of law dealing with discontinued proceedings is r. 9.9(4)(a) which in unequivocal terms, expressly prohibits the revival of the discontinued appeal by the appellant. The Court went on to hold that there was no reason to dwell on the grounds of appeal as the appeal is clearly misconceived therefore leave to appeal must be refused.

G. Discussion

20. Rule 9.9(4)(a) of the *Civil Procedure Rules* is the applicable rule of law dealing with discontinued proceedings.



21. Once an appeal has been discontinued by filed Notice of Discontinuance, it may not be revived. *Hapsai v Albert* [2012] VUCA 5 is authority for that proposition.
22. Accordingly, the Magistrates' Court was correct in dismissing the Appellant's applications to reinstate the appeal and for leave to appeal out of time.
23. I reject Mr Kilu's submissions to the contrary.

H. Result

24. The appeal is dismissed.
25. The Appellant is to pay the Respondent's costs of VT100,000 for both the Supreme Court and Magistrates' Court proceedings, within 21 days.

**DATED at Port Vila this 30th day of April 2020
BY THE COURT**

VM Trief
.....
Viran Molisa Trief
Judge

