

BETWEEN: Elsiem Harry
Appellant

AND: Niar Batick
Respondent

Date: 29 March 2021
Before: Justice G.A. Andrée Wiltens
Counsel: Mr J. Tari for the Appellant
Mr W. Kapalu for the Respondent

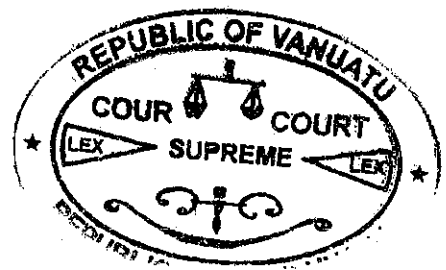
Judgment

A. Introduction

1. The Lakatoro Magistrate's Court heard a Chiefly title appeal and published its decision on 14 August 2020. The decision reversed an earlier Magistrate's Court decision as to who is the person entitled by custom to hold the Chiefly title. Mr Elsiem Harry now appeals the latest decision.

B. Jurisdiction

2. The first issue raised is whether there is jurisdiction for the Supreme Court to hear this appeal. Mr Kapalu focussed on the provisions of section 22 of the Island Courts Act, which differentiates between appeals from the Island Court regarding issues of ownership of land and all other issues. Mr Kapalu submitted that appeals from the Island Court to the Supreme Court are permitted only where issues relating to ownership of land are involved. As this matter is not related to any dispute regarding ownership of land, he maintained the appeal was incompetent.
3. Mr Tari did not directly address the point.



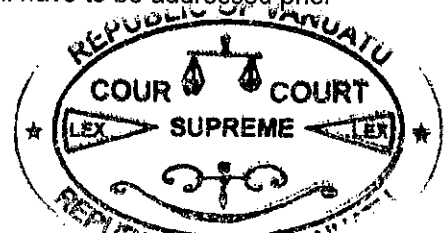
4. The position is that all Island Court decisions are appealable. Section 22 of the Island Courts Act makes it plain that where land ownership is disputed, there is a direct appeal available from the Island Court to the Supreme Court. In relation to all other disputed matters, the proper course is for the appeal to be made to the Magistrate's Court.
5. However, the real issue is whether, once the Magistrate's Court has dealt with an appeal from the Island Court, can the matter progress further on appeal to the Supreme Court? Not surprisingly, the Island Courts Act is silent as to this.
6. The Judicial Services and Courts Act is however not silent as to this. It provides, in section 30, that appeals from a Magistrate's Court decision on matters of law, matters of fact and mixed questions of law and facts can be advanced in the Supreme Court for determination.
7. Mr Kapalu's argument accordingly fails. This present appeal is competent.

C. Determinative Issue

8. Mr Tari advanced 3 grounds of appeal. I need only deal with one, as it is accepted by Mr Kapalu as being determinative of the appeal.
9. Once the Magistrate's Court was seized of the appeal from the latest Island Court decision, counsel then acting for the appellant made application for leave to adduce fresh evidence. The application was opposed and Mr Tari filed formal opposition grounds. The matter was not addressed by the Magistrate's Court, but the fresh evidence was accepted.
10. That briefly sets out the procedural unfairness Mr Tari complains of. Mr Kapalu accepts this to be unfair. Further, like the Court, he is at a loss to explain what was "fresh" about the evidence sought to be adduced as per the application. The sworn statement in support of the application was from Mr George Batick. He gave evidence in the Island Court. There is no explanation as to why the matters addressed in his sworn statement were not adduced before the Island Court. This appears to have provided the appellant in the Magistrate's Court a second platform from which to advance his case. That too is unfair to the then Respondent.
11. The appropriate remedy to rectify the procedural unfairness is for the matter to be remitted back to the Magistrate's Court for reconsideration of the appeal, without reference to the further material provided by Mr Batick.

D. Result

12. The appeal is allowed.
13. The matter is remitted back to the Magistrate's Court. The Court is to comprise of a different Magistrate and two different assessors. The appeal is to be considered afresh, without reference to the further sworn statement of Mr Batick.
14. If there is another application to adduce fresh evidence, that will have to be addressed prior to the hearing of the appeal.



15. Mr Kapalu accepted that costs were appropriate. He consented to an order of VT 20,000 being imposed, which is to be paid within 21 days.

Dated at Port Vila this 30th day of March 2021
BY THE COURT

G.A. Andree Wiltens
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Justice G.A. Andree Wiltens

