IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU

(Civil Appellate Jurisdiction)

CIVIL APPEAL NO. 6 OF 2014

BETWEEN: **ANDIPURA LIPES**
Appellant

AND: **JOINT AREA LAND TRIBUNAL OF SOUTH SANTO, FANAFO, CANAL AND MALO**
First Respondent

AND: **JAMES ARU**
Second Respondent

AND: **FAMILY BULURAVE**
Third Respondent

AND: **Ms VOMULE AND PETRO**
Fourth Respondents

AND: **Ms VOMBANICI, MR MOLI BOETOKRUA and MR EVEHI**
Fifth Respondents

AND: **SAWA ORO**
Sixth Respondent

AND: **FAMILY ANTAS**
Seventh Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Daniel Fatiaki
Hon. Justice Mary Sey
Hon. Justice Stephen Harrop
Hon. Justice Dudley Aru

Counsel: James Tari for the Appellant
Frederic Gilu for the First Respondent
George Boar for the Seventh Respondent
No appearance for the other Respondents

Date of Hearing: Tuesday 1 April, 2014

Date of Judgment: Friday 4 April, 2014

JUDGMENT

Introduction

1. The appellant, Chief Andipura Lipes, appeals against Justice Saksak's decision on 3 February 2014 to strike out his application to have his claim reinstated, it having previously been struck out for want of prosecution by the same Judge on 24 March 2010.

2. Because Chief Lipes' appeal was filed some 6 days late, he requires and has sought, leave to appeal out of time. While that application is opposed by the first respondent, the delay is brief and an explanation, relating to the time involved in obtaining relevant

documents by Mr Tevi who lodged the appeal, has been provided. There is no prejudice arising from the delay. The primary ground of opposition to leave relates to the prospects of success which begs the question as to the merits of the appeal generally. In the circumstances we grant leave to appeal out of time.

Background

3. On 9 September 2008 the Joint Village Land Tribunal for South Santo, Fanafo Canal and Malo made a decision declaring the family Antas to be the custom land owners of certain land known as the Jingonaru land. This is land in which Chief Lipes claims to have a custom interest. He lodged an appeal with the relevant Joint Area Land Tribunal on 10 December 2008, which we note was well beyond the 21 days permitted for appeal (with no possibility for extension) under s. 12 (1) of the Customary Lands Tribunal Act [Cap. 271].

4. On 13 May 2009, the first respondent advertised a hearing scheduled for 15 June 2009 seeking claims by custom owners in respect of certain custom areas in what is known as the Belmol Cattle Project land area. The Jingonaru land was not mentioned in the advertisement.

5. After the hearing on 15 June 2009 but before a decision had been issued, Chief Lipes made an application to the Supreme Court for an order that the first respondent be directed to hear his appeal against the 9 September 2008 decision of the Joint Village Land Tribunal. He was concerned that the Tribunal may make orders that affected his interest in the Jingonaru land.

6. Although the appellant's application was described simply as an *"application"*, it was in reality an application for judicial review of the first respondent's failure at the hearing it held in June 2009 to consider the appeal he had lodged on 10 December 2008 and his claim to customary interest in the Jingonaru land generally. The primary order which Chief Lipes wanted the Supreme Court to make was, although not couched in this way, one under rule 17.9 (1) (b), namely a mandatory order requiring the first respondent to hear his December 2008 appeal.

7. On 24 March 2010, Justice Saksak struck out Chief Lipes' application in its entirety because in the 5 months since the filing of the application and on both listings of the case, Chief Lipes had failed to appear to prosecute his application. Justice Saksak said: *"He has not shown any seriousness in pursuing his application despite him having legal representation."* At that hearing on 24 March 2010, four members of the first respondent tribunal were present and they informed the Court that they had only received the notice of hearing but had not been served with any of the documents in relation to the application made by the appellant.

8. On learning of the striking out, Chief Lipes complained that he had not received any notice regarding the hearing on 24 March 2010. On 26 April 2010 he filed an application to reinstate the case together with a sworn statement in support.

9. On 1 July 2010, the Supreme Court sat for the first time to hear Chief Lipes' application but there was no appearance by either side and the Court adjourned the case to 30 September 2010.

10. According to the Court records nothing transpired on that date, or indeed any other date until 24 September 2013, nearly 3 years later and some 3 ½ years after Chief Lipes' application for reinstatement had been lodged.

11. A conference was arranged for 30 September 2013 but there was no attendance on that date either. A further conference was arranged for 15 October 2013, when the appellant and Chief Frankie Stevens appeared. The latter was appearing as his spokesman. Ms Lahua appeared for the first respondent and Chief James Tangis, Chairman of the first respondent, was also present.

12. Ms Lahua told the Court that she had not been served with any application and sworn statement in support. The Court issued a Minute ordering (by consent) Chief Lipes to serve his documents on the State Law Office and the hearing was adjourned to 4 November 2013. By then there had still been no service as required. Chief Stevens

explained that the appellant had instructed Mr Stephen Joel to act on their behalf but that he had done nothing for them. However, Mr Joel had not filed any notice of beginning to act and Justice Saksak was therefore sceptical of this explanation for the failure to serve.

13. On 4 November 2013, the Court granted a further adjournment in favour of the appellant but in clear terms, in Bislama, directed him to effect service on the State Law Office within 14 days. A conference to review the position was allocated for 3 February 2014.

14. On that day the appellant and Chief Stevens were present with Mr Lent Tevi as counsel representing them, he having filed a notice of beginning to act on 29 January 2014. Mr Tevi sought an adjournment to reassess the position. Ms Lahua objected and sought, in the event the Court was minded to grant the adjournment, wasted costs. Mr Tevi did not oppose the granting of costs.

15. Justice Saksak said at paragraphs 13 to 15 of his decision:-

> *"13. Having considered the request for adjournment the Court declines to grant the adjournment. Instead the Court dismisses the application of the claimant in its entirety. The reasons being one of considerable delay in serving the application and the sworn statement on the State Law Office despite very clear directions issued first on 15th October 2013 and again on 4th November 2013.*
>
> *14. The rules are clear. A proceeding that is filed and remains un-served for 3 months is no longer effective pursuant to rule 5.3.*
>
> *15. The application by the claimant lacks merit and any legal basis. It has put the defendant Tribunal to unnecessary costs. For this reason (sic) it is necessary to award costs to the defendant. These are costs of and incidental to the application as agreed or be determined by the Court. Accordingly, I order the claimant liable to pay those costs."*

The Appeal

16. In his notice of appeal the appellant seeks orders that the Supreme Court judgments dated 13 February 2014 and 24 March 2010 both be set aside in their entirety and further that the Tribunal orders in issue be set aside and a direction made that another land tribunal hearing occur, with a differently composed tribunal. The grounds set out in the notice of appeal relate to the underlying decisions rather than the decisions and reasoning of Justice Saksak. However in the written submissions filed by Mr Tari on 26 March 2014 he submits that the Court ought to have granted the adjournment sought by Mr Tevi, albeit with costs against the appellant being awarded, as Mr Tevi had indicated costs could not be opposed.

17. Essentially Mr Tari submits that the important customary land issues raised by Chief Lipes should be considered on the merits.

18. The first respondent points out that after all this time Chief Lipes' September 2009 application and supporting affidavit have *still* not been served on the Tribunal. It submits that the blatancy of the appellant's disregard for repeated Court orders meant Justice Saksak was entirely justified in his decision of 3 February 2014.

19. The respondents other than the first respondent were not parties to the Supreme Court case but were included on this appeal by Mr Tevi, probably from an abundance of caution given that in part Chief Lipes seeks a rehearing of various Joint Village Land Tribunal decisions. We are satisfied however that this appeal may be properly determined without their input. With one exception none of them has taken any step.

20. The seventh respondents, Family Antas, have through Mr Boar made submissions opposing the appeal. He notes that this appellant has made no attempt to apply to be joined to Civil Case 2 of 2012, which has been the subject of an appeal (CAC 45/13 *Sua* v *Antas* and others) heard on the same morning as this appeal. He submits this appellant could still apply under s.39 of the Customary Land Tribunal Act, though noting that the extensive delay in this case would weigh against any belated application for review.

Discussion and Decision

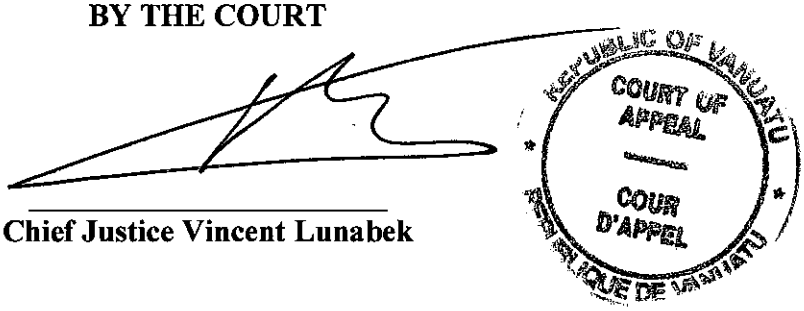
21. The underlying application which Chief Lipes made to the Supreme Court has in our view no prospect of success simply because he did not appeal against the decision of the relevant Village Tribunal dated 9 September 2008 within the 21 days allowed for him to do so. The 21-day appeal period in s.12 is mandatory and may not be extended. That means that the first respondent could not be directed to hear his appeal as he was asking the Supreme Court to order.

22. Accordingly, even if this Court were of the view that Justice Saksak should not have struck the claim out for failure to serve it and for breaches of several Court orders that the appellant do so, there would be no practical point in allowing the appeal because the claim ultimately cannot possibly succeed.

23. The appeal is therefore dismissed with costs on a standard basis to the first and seventh respondents.

Dated at Port Vila this 4th day of April, 2014

BY THE COURT



Chief Justice Vincent Lunabek