

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

**Civil Appeal
Case No. 22/572 CoA/CIVA**

BETWEEN: Harry Kemuel
Appellant

AND: Josiah Nato
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John Mansfield
Hon. Justice Raynor Asher
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice Viran M Trief
Hon. Justice Edwin Goldsbrough*

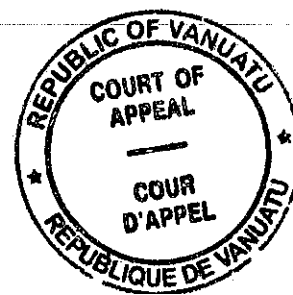
Counsel: *P. Fiuka for the Appellant
W. Kapalu for the Respondent*

Date of Hearing: 3 May 2022

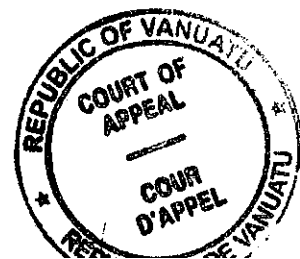
Date of Judgment: 13 May 2022

JUDGMENT THE OF COURT

1. A question arose as to who was entitled to the name Tamat. The dispute came before the Island Court (Malekula Island Court CC 1849/2020). That Court declared the true bloodline of Tamat was Josiah Nato and his family, not Kemuel Harry and his family. That Court also restrained Kemuel Harry and his family from using the name Tamat. The current applicant, appealed against the Island Court ruling to the Magistrate's Court but that Court dismissed his appeal.
2. Kemuel Harry then filed an appeal in the Supreme Court from this decision. Kemuel Harry's appeal was on several grounds including that:-
 - (i) Mr Nato had the opportunity and obligation to state his claim when Land Case No. 93/10 was being litigated which declared that Kemuel Harry representative of Family Tamat as the rightful custom owners of the land of Tarvaut.
 - (ii) The issue of bloodline of Tamat was res judicata.



- (iii) The Magistrate's Court was not asked to consider the restraint of the use of the name Tamat.
3. The Supreme Court in its judgment dated 5 January 2022, rejected all grounds of appeal from the Magistrate's Court decision of 25 June 2021 and dismissed that appeal.
 4. In this application Kemuel Harry seeks leave to appeal out of time against the judgment of the Supreme Court of 5 January 2022 on the ground that the Supreme Court erred in law when it failed to comply or be properly constituted under section 22 (2) of the Island Court's Act [CAP 167] when it dismissed the appeal from the Magistrate's Court on 5 January 2022.
 5. We heard the application for leave to appeal out of time. Counsel for the Appellant referred to the Judgment of this Court in *Laho Ltd v. QBE Insurance (Vanuatu) Ltd* [2003] VUCA 26 which sets out the factors guiding leave to appeal out of time. They include: (a) the length of the delay; (b) the reasons for the delay; (c) the chance of the appeal succeeding if time for appealing is extended; and (d) the degree of prejudice to the potential respondent if the application is granted.
 6. We consider the submissions of the Appellant on the factors and we reach the conclusion that the application should not be granted on the basis that the appeal seeks to raise only one question, and the Appellant's counsel failed to raise the question before the Supreme Court. No other points of substance were put to us.
 7. We note that the appellant's case is that section 22 (2) of the Island Court Act [CAP 167] provides an appeal to the Supreme Court from the Magistrate's Court decision, but that the Supreme Court had to sit with two assessors. Counsel for the Appellant asked the Supreme Court to proceed, sitting as a single judge, and also to decide the appeal on the papers. Counsel for the Respondent agreed to that process.
 8. The present ground of appeal was not argued in the Supreme Court. Consequently, the appeal ground is inconsistent with the conduct of the appeal to the Supreme Court. Had this issue been properly raised at that time, the Supreme Court judge may have reconstituted sitting with assessors, or may have sought the assistance of counsel for the Republic on an important issue of construction of the Act. The Court of Appeal also did not then have sufficient material to assess the prospects of the Appellant succeeding on his appeal to the Supreme Court, even if the matter is remitted to the Supreme Court for rehearing. When a party takes a procedural course in the Supreme Court followed by that Court and the opposing parties, it cannot come before this Court and seek a new hearing to the disadvantage of the other parties on the basis that the procedure it adopted was wrong.



9. The Respondent contended that the Appellant did not seek leave to appeal to the Court of Appeal from the Appellate jurisdiction of the Supreme Court as required under Section 30 (4) of the Judicial Services and Courts Act. The Respondent's counsel supports his arguments on the original version of Section 22 of the Island Courts Act which has already been amended by Parliament in December 2001.
10. There may well be an argument whether an appeal from the Island Court and to the Magistrates Court and then to the Supreme Court under the Island Courts Acts requires that the Supreme Court be constituted as a single judge, or as a judge sitting with assessors, but that is a matter to be considered when it is properly raised and fully argued. For future reference, Counsel may refer to the Judgement of this Court in *Bob v. Mala* [2015] VUCA 3; CAC 02 of 2015 (8 May 2015).

Disposition

11. The application for leave to appeal out of time is refused and dismissed.
12. The Respondent is entitled to his costs in this appeal. We assess and fix it at 80,000 vatu to be paid within 30 days.

DATED at Port Vila this 13th day of May, 2022

BY THE COURT



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Vincent Lunabek
Chief Justice

