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

Civil Appeal
Case No. 24/3175 COA/CIVA

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

BETWEEN: **NASSE KUARANGKIRI**
Appellant

AND: **REMY KUNUAN**
First Respondent

AND: **RAYMOND NASSE**
Second Respondent

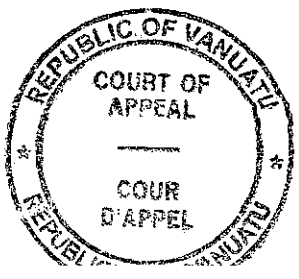
AND: **NISAN ITATA**
Third Respondent

Date of Hearing:	***8 November 2024***
Coram:	***Hon. Chief Justice V Lunabek*** ***Hon. Justice M O'Regan*** ***Hon. Justice R White*** ***Hon. Justice D Aru*** ***Hon. Justice V M Trief*** ***Hon. Justice E Goldsbrough*** ***Hon. Justice M A MacKenzie***
Counsel:	***D Yawha for the Appellant*** ***J Mesao for the First Respondent*** ***Second Respondent-deceased*** ***Third Respondent- self represented***
Date of Decision:	***15 November 2024***

JUDGMENT

Introduction

1. The proceeding presently before the Court purports to be an appeal against the Supreme Court judgment dated 20 June 2024 in which it was declared that Family Kunuan (the first respondent) has been "*recognized and confirmed by the Lonvuu Nakamal of North East Tanna as custom landowners of Enkahi land by the Memorandum dated 28 April 2021*" - see *Kunuan v Nasse* [2024] VUSC 140.



2. There are unusual aspects to the '*appeal*'. The first is that it is brought by a person using the name "*Nasse Kuarangkiri*" who was not a party to the proceedings in the Supreme Court and there was an issue raised on the appeal as to Mr Kuarangkiri's true identity. Counsel for the first respondent went so far as to describe the appellant as an "*impostor*" and a "*ghost*".

3. The second is that the proceedings giving rise to the judgment on 20 June 2024 were not the first time that the custom ownership of the Enkahi land has been before the Courts. In *Kunuan v Tamata* [2020] VUCA 3, this Court considered an appeal brought by Mr Kunuan against a decision dismissing a judicial review application made by him. His substantive appeal ground had been that he had been recognized as the Custom owner of Enkahi land pursuant to s.6 of the Customary Land Tribunal Act and that the primary Judge had been wrong to find that there had been no basis for that decision. The appeal was dismissed.

4. Then in *Kunuan v Andrew* [2021] VUSC 193, Andrée Wiltens J dismissed a judicial review application in which Mr Kunuan sought a declaration that he was the custom owner of the Enkahi Land. In dismissing the application, the Court said that custom ownership of land is not an issue with which the Supreme Court can deal.

5. The third matter is that the judgment of 20 June 2024 was obtained without the Supreme Court being informed that the same issue had been considered and decided against Mr Kunuan in *Kunuan v Andrew* [2021] VUSC 193. Counsel for Mr Kunuan conceded that this was so.

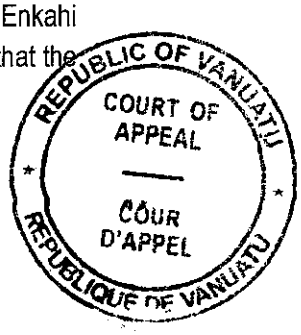
6. A fourth matter is that the primary judge in the judgment giving rise to the present appeal accepted that the Supreme Court lacks jurisdiction to hear and determine customary land disputes but nevertheless considered that the Supreme Court has "*inherent jurisdiction to make confirmation of declarations or pronouncement[s] of a competent Court or tribunal established under the Island Court, Land Tribunal, and the Customary Land Management Act*".

7. A consequence of the second and third matters is that there are currently two conflicting decisions of the Supreme Court involving the same subject matter, the Enkahi land. They are the declaration made by the primary judge on 20 June 2024 and the decision made by Andrée Wiltens J 3 years earlier.

The Appeal

8. Despite these unusual features, the fate of the appeal turns on whether the appellant has a right of appeal. Because the appellant's counsel did not file submissions as directed, he failed to focus on, and to prepare submissions concerning, the issue of whether the appeal was incompetent by reason that the appellant had not been a party to the proceedings in the Supreme Court.

9. The appellant argues that he is a party "*aggrieved*" by the decision and therefore has a right to appeal. That is because the Appellant says he is a party to another proceeding involving the Enkahi land. Pursuant to a Consent Order dated 29 February 2024, the Supreme Court[1] directed that the Island Court urgently list Island Court land case No 2 of 1984 for rehearing.



[1] *In civil case no 2454 of 2023 Kuarangkiri v Napati Iti and Peter Talfa*

10. The appellant's case is that the Island Court Judgment in land case no 2 of 1984 declared the Enkahi land in favour of Family Kuarangkiri.[2] He asserts that his grandfather Nasse Kuarangkiri represented their family in the Island Court in 1984 in relation to the Enkahi Land dispute. The Enkahi land surrounds the Yasur volcano, declared to be a national monument to the people of Tanna. However, a declaration in relation to the Enkahi land is still pending.

Position of the Respondents

11. Only the first respondent Mr Kunuan opposed the appeal. The second respondent is deceased and the third respondent filed a memorandum conceding the appeal.

12. Mr Kunuan argued that the appellant has no standing to bring the appeal. Counsel's primary argument was that the appellant has misrepresented himself as an authorized representative of Nasse Kuarangkiri, because the Nasse Kuarangkiri who took part in Island Court land case no.2 of 1984 is deceased, as is his son (who had the same name). Counsel noted that, until changing his name to Nasse Kwarangiri on 18 January 2024, the appellant's name had been Jimmy Namtegas, which was his birth name.
13. The first respondent's argument is that the appellant's misrepresentation of himself as Nasse Kuarangkiri means that the order he obtained in the Supreme Court on 29 February 2024 could not be relied on to make him an aggrieved person.

14. Sitting as the Court of Appeal, we cannot resolve the question of whether the appellant is the grandson of Nasse Kuarangkiri. In any event, it is not necessary to do so for the disposition of this appeal.

Is there a competent appeal?

15. A right of appeal can only be found in statute. In *Brysten v Dorsen* [1997] VUCA 3, this Court said:

> *"A right of appeal from the decision of a court is the creature of statute. In the present case a right of appeal to the Court of Appeal can exist only if it is provided by legislation."*

16. Article 50 of the Constitution required Parliament to provide for appeals from the original jurisdiction of the Supreme Court. In accordance with Article 50, the appellate jurisdiction of the Court of Appeal is found in s.48 of the Judicial Services and Courts Act [Cap 270], which says:

> *(1) Subject to the provisions of this Act and any other Act, the Court of Appeal has jurisdiction to hear and determine appeals from judgements of the Supreme Court.*
>
> *(2) The Chief Justice must, in consultation with the other judges of the Supreme Court, decide the composition of the Court of Appeal for the hearing of proceedings before the Court.*

[2] *Paragraph 3, Sworn Statement if Nasse Kuarangkiri filed on 11 September 2024 in support of an application to clarify the Judgment dated 20 June 2024 in civil case no 2184 of 23*

(3) *For the purpose of hearing and determining an appeal from the Supreme Court, the Court of Appeal:*

(a) *may exercise such powers as may be prescribed by or under this Act or any other law; and*

(b) *has the powers and jurisdiction of the Supreme Court; and*

(c) *may review the procedure and the findings (whether of fact or law) of the Supreme Court; and*

(d) *may substitute its own judgement for the judgement of the Supreme Court.*

(4) *The Court of Appeal may deal with the appeal on the notes of evidence that were recorded in the Supreme Court without hearing the evidence again. However, the Court of Appeal may receive further evidence.*

(5) *In the exercise of the appellate jurisdiction of the Court of Appeal, any judgement of the Court of Appeal has full force and effect, and may be executed and enforced, as if it were an original judgement of the Supreme Court.*

17. Section 48 provides for an appellate jurisdiction. However, unlike statutory provisions in other jurisdictions, s.48 is silent as to who has a right of appeal.[3] This appears to be a gap in the legislation. Rather, the focus of s.48 is on what can be appealed, as s48(1) provides that the Court of Appeal has jurisdiction to hear and determine appeals from *judgments* of the Supreme Court.

18. A judgment binds only the parties to the proceeding in which the judgment was made. Judgments are made in order to quell the controversy between the parties in the litigation to which the judgment relates. These two considerations are an indication that, in the absence of a statutory extension of rights of appeal to a non-party, it is only parties to the proceeding or intervenors who have rights of appeal.

19. This interpretation could be said to be supported by the scheme of legislation in Vanuatu more generally. In at least some instances, Parliament has provided a right of appeal or review of decisions by provisions which, on their face, do not restrict the right to parties to a proceeding. One such provision is s.22(1) of the Island Courts Act[4] which provides that "*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*". The absence of such a provision in s.48 could support an inference that it does not contemplate appeals by non-parties. However, there are limitations on

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[3] *See for example, in New Zealand, s 124 of the District Court Act 2016 which provides that a party to a proceeding may appeal. Further, s 60 of the Senior Courts Act 2016 which provides that a decision of the High Court from the District Court, the Family Court or the Youth Court is final, unless a party, on application, obtains leave to appeal against the decision from the Court of Appeal*

[4] *Another statutory provision conferring a broad right of review of decisions is s45 of the Custom Land Management Act*

the extent to which it is permissible to construe one enactment by reference to the terms of another, so this is not a comparison which we regard as of much significance presently.

20. In summary, the judgment dated 20 June 2024 determined the claim between the parties to that proceeding. The appeal rights were those of the parties to the proceeding. The appellant was not a party. Whether or not the appellant be aggrieved or affected by the judgment, he cannot point to any statutory provision giving him, as a non-party, the right to appeal the judgment of 20 June 2024.

21. Absent a right of appeal, the appeal of the appellant is incompetent and must be dismissed for that reason alone.

22. That makes it unnecessary to consider whether the Supreme Court has the inherent jurisdiction which the judge believed to be the case. We say only that there is considerable reason to doubt the correctness of the view of the Judge and this decision is not to be understood as an endorsement of the Judge's view on that topic.

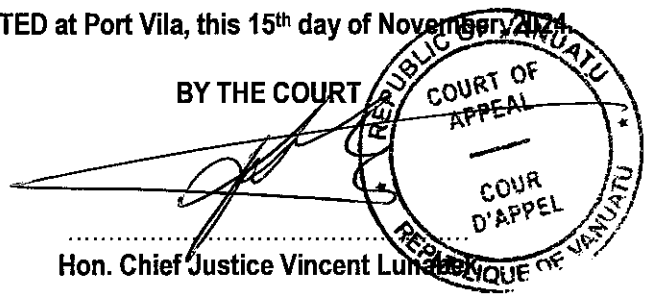
Disposition of the appeal

23. The appeal is dismissed as incompetent.

24. Given Mr Kunuan's contribution to the circumstances giving rise to this appeal, costs are to lie where they fall. While the appeal is dismissed, this appeal has brought to light that there are conflicting Supreme Court judgments relating to declarations of custom ownership of the Enkahi land. We note that the primary Judge has not yet dealt with all the claims for relief sought by Mr Kunuan in the proceedings at first instance. Given that circumstance, the current inconsistency between judgments in the Supreme Court, the fact that the primary Judge was not informed of the earlier decisions of this Court and of the Supreme Court in *Kunuan v Andrew*, and the reasons in this decision, the primary Judge may consider it appropriate to allow the appellant to renew the interlocutory application he filed in the proceedings below on 24 September 2024 (if it is still open to do so).

DATED at Port Vila, this 15th day of November, 2024.

BY THE COURT



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Hon. Chief Justice Vincent Lunabek