IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Land Appellate Jurisdiction)

Land Appeal Case No. 01 of 2010

IN THE MATTER OF: MALASA LAND DISPUTE

IN THE MATTER OF: A decision of the Efate Island Court in Land Case No. 01 of 1990 dated 28 January 2010

BETWEEN: CHIEF HENRY MANLAEWIA
First Appellant

AND: (FAMILY MAALU) CHIEF MANAILALU and CHIEF LAKELEOWIA and Descendants
Second Appellant

AND: CHIEF MARIPOPONGI FAMILY and FAMILY TANMIALA
Respondents

Coram: ***Justice D. V. Fatiaki***

Counsels: *Mrs. MN Patterson for Chief Manlaewia*
Mr. B. Kalotiti for Family Maalu
Mr. W. Daniel for Chief Maripopongi & Family Tanmiala

Date of Ruling: *31st August 2015.*

RULING

1. There are two matters before the Court for decision:

   (a) An application to lead further evidence at the hearing of the appeal; and

   (b) A preliminary procedural question of law concerning the nature of an appeal to this Court under Section 22 of the Island Courts Act [CAP. 167].

2. As to (a) the First Appellant seeks to lead evidence of a hand-written statement of Kalorongo Kaltonga dated 6 September 1987 expressing his

"... belief that chief Manlaewia is the custom owner of the ground called Malasa and of Kakula. I believe that my family also has some right inside the same ground in Malasa and kakula".

3. The second item of evidence sought to be led at the appeal is the audio recording and written transcript of an interview conducted between Rose Banga and Island Court justice chief Edie Karis who was a member of the Efate Island Court which declared: "*Chief Maripopongi and the Tanmiala Family are custom owners of the Malasa land"* in a judgment dated 28 January 2010.

4. The admission of both items of evidence was opposed by the respondents on the basis that the statement of Kalorongo Kaltonga is not "*new*" as it was already included in the appeal book as part of Chief Kalronga's statement before the Efate Island Court (*see*: paras 4 to 9) and also because Rose Banga's sworn statement is undoubtedly hearsay and is the product of a wholly improper and contemptible interview conducted with a justice of the Efate Island Court after the Island Court had delivered its unanimous judgment and when the justice who had signed the judgment was clearly "*functus officio*".

5. In this regard I refer to the case of Ellis v. Deheer [1922] 2KR 113 where the Court of Appeal affirmed the longstanding rule that once a verdict has been given it is not open to a juror to challenge it or to attempt to support it if it is challenged. Bankes LJ expressed the reasons for and consequences of the rule in the following terms (at pp 117/118):

> *"I desire to make it clear that the court will never admit evidence from jurymen of the discussion which they may have had between themselves when considering their verdict or of the reasons for their decision, ... It has for many years been a well accepted rule that when once a verdict has been given it ought not to be open to an individual juryman to challenge it, or to attempt to support it if challenged. I have spoken of this as a rule of law, but it has also been generally accepted by the public as a rule of conduct, that what passes in the jury room during the discussion by the jury of what their verdict should be ought to be treated as private and confidential."*
>
> *At p 121 Atkin LJ said that the rule prohibits the leading of evidence as to what took place in the jury room by way of explanation of the grounds upon which the verdict was given or by way of a statement as to what the juror believed its effect to be. He added this explanation as to its rationale:*

"The reason why that evidence is not admitted is twofold, on the one hand it is in order to secure the finality of decisions arrived at by the jury, and on the other to protect the jurymen themselves and prevent their being exposed to pressure to explain the reasons which actuated them in arriving at their verdict. To my mind it is a principle which it is of the highest importance in the interests of justice to maintain, and an infringement of the rule appears to me a very serious interference with the administration of justice."

6. More recently in reinforcing the confidentiality of jury deliberations Lord Hope of Craighead said R v Connor and R v Mirza [2004] UK HL 2 (at para. 142):

> "*The confidentiality is not temporary: it is permanent and not capable of waiver. Thus the duty of the juror to respect that confidentiality continues, indeed it especially applies, after the case is over and the jury has been discharged and dispersed. Nothing could be more destructive of the duty of confidentiality than the juror coming out of court and communicating his or her views about the jury's deliberations to the media or to persons who are likely to disagree with the verdict which was returned. The rationale of the rule includes the need for finality*".

7. Although the court was there discussing a juror, in my view, the rule is equally relevant and applies to a justice of the Island Court.

8. On both objections, I agreed with the submissions of the Respondents' counsel. The application to lead further evidence at the hearing of the appeal was dismissed with costs to the respondents in a ruling delivered on 5 June 2013.

9. The second matter concerns a preliminary procedural question agreed as follows:

"What are the parameters* (if any) *of an appeal to the Supreme Court under Section 22 of Island Courts Act with particular reference to subsection (3) and the cross-examination of witnesses called before the Island Court?"

10. This question has not been previously ruled upon although the Island Courts Act has been in existence since 1983 and there have been different approaches adopted by different judges of the Supreme Court in the past in exercising the Supreme Court's appellate jurisdiction under Section 22. It is

desirable therefore that the matter be considered and determined to avoid that inconsistency continuing.

11. The appellants' primary submission on the question posed is that the Supreme Court has a "*total discretion*" (whatever that means) to either hear a case "*de novo*" or accept new evidence or rehear the case as it may deem fit as the statutory provision of subsection (3) provides a wide power for the Court to hear the evidence which is not limited to "*new*" evidence but can include "*... any evidence (even if already heard) from the Island Court*".

12. Furthermore relying on several past precedents including Malas Family v. Songoriki Family Land Appeal Case No. 1 of 1985; Daniel Loy v. Timothy Mulbarav, Paul Ligo and Tangis Sisi Land Appeal Case No. 12 of 1986; and Manie v. Kilman [1988] VUSC 9, the appellant submits that "*... this present case through the list of the grounds of the First Appellant justifies such* (de novo) *rehearing to correct the errors of the judgment in the Island Court*".

13. Part of the appellant's submissions in support of a "*de novo*" hearing is that the "*Island Court is a Court of no record a court of statute*". Whatever that may mean I cannot agree with the submission. In this regard and contrary to the appellant's submissions, Section 28 of the Island Courts Act provides:

> "*(1) So far as practicable an island court shall keep a record of its proceedings in the prescribed form;*
>
> *(2) Such record of proceedings shall be certified as correct by the Island Court clerk, and when so certified is prima facie evidence of the matters set out in it*".

14. More particularly, Clause 1 of the **Island Court (Powers of Magistrate) Order No. 1 of 1990** imposes on a Magistrate presiding over a land ownership dispute in the Island Court pursuant to Section 2A (2) of the Island Courts Act (as amended by Act No. 35 of 1989) the duty:

> "*(f) to keep an English record of all the evidence taken and submit the same to the Supreme Court where an appeal has been filed; and*
>
> *(g) to submit to the Supreme Court within one month of the hearing, a true copy in English of all the proceedings before him in the particular case on appeal*".

15. Plainly, an Island Court hearing a dispute as to the ownership of land is a "*court of record*" and that is the context within which section 22 must be considered and construed. Likewise the provisions of section 13 (c), (d) and (f) have a bearing on the meaning and construction of Section 23 which deals with the orders that the Supreme Court can make when hearing an appeal.

16. Respondents' counsel in opposing a "*de novo*" hearing submits that the appellants must first establish error on the part of the Island Court as this is an appeal and this Court can only deal with the law and facts which the appellants say the Island Court did not determine or apply correctly in its judgment of the case. The appellants' cannot "*... simply ask this Honourable Court to rehear the whole matter all over again*".

17. Counsel further submits that "*... the Appellants do not have the right in law to require the Respondent to also call evidence and place their witnesses in the witness box to be cross-examined by them*". In other words the Respondents have nothing to prove in this appeal and will not call any evidence unless the arguability of the Appellants' appeal has been established first.

18. Finally, the Respondent submits concerning Section 22 (3):

"*All the evidence filed in the Island Court will be considered by the Supreme Court together with the trial notes of the presiding magistrate and justices and is why we have had all these documents copied and contained in the Appeal Books*".

19. The full text of Sections 22 and 23 of the Island Courts Act provides:

"***APPEALS***

22. (1) ***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 therefrom to –***

(a) the Supreme Court, in all matters concerning disputes as to ownership of land;

(b) the competent magistrates' court in all other matters.

(2) *The court hearing an appeal against a decision of an island court shall appoint two or more assessors knowledgeable in custom to sit with the court.*

(3) ***The court hearing the appeal shall consider the records (if any) relevant to the decision and receive such evidence (if any) and make such inquiries (if any) as it thinks fit.***

(4) ***An appeal made to the Supreme Court under subsection (1) (a) shall be final and no appeal shall lie therefrom to the Court of Appeal.***

(5) *Notwithstanding the 30 day period specified in subsection (1) the Supreme Court or the magistrates' court, as the case may be, may on application by an appellant grant an extension of such period provided the application therefore is made within 60 days from the date of the order or decision appealed against.*

23. POWER OF COURT ON APPEAL

The court in the exercise of appellate jurisdiction in any cause or matter under section 22 of this Act may –

(a) ***make any such order or pass any such sentence as the island court could have made or passed in such cause or matter;***

(b) *order that any such cause or matter be reheard before the same court or before any other island court.*

20. The origin of the Island Courts Act is not in doubt and may be traced to Articles 52, 76 and 78(2) of the Constitution. The object and purpose of the Island Courts Act is described in the following terms by the Court of Appeal in Taftumol v. Lin [2011] VUCA 30 at para. 38:

> *"The starting point must be s. 22 of the Island Court Act, and in particular s. 22 (4). The evident intent of the Island Courts Act is that questions of customary ownership of land will be decided in the first instance by an Island Court constituted by a Magistrate and by justices who by reason of their chiefly status and knowledge in custom will ensure that relevant custom is applied. That philosophy is maintained in s. 22 as the Supreme Court hearing an appeal in a matter concerning a dispute as to ownership of land will sit with two assessors knowledgeable in custom. The purpose of s. 22 (4) in providing both that the decision of the Supreme Court is 'final', and that no appeal shall lie to the Court of Appeal is to protect the decision of the Supreme Court both from general review by other Courts or public*

authorities, and from an appeal to the Court of Appeal. This double protection must be construed so as to further the philosophy that decisions about custom land ownership will be made by a Court which includes members relevantly knowledgeable in custom. ..."

21. More particularly, in Loparu v. Sope [2005] VUCA 4 the Court of Appeal said of Section 22 of the Island Courts Act:

> "*Section 22 sets out a process for appeal subsequent to an Island Court decision the wording of Section 22 does not restrict an appeal to parties in the Island Court hearing but can include "any person aggrieved by an order or decision". Such an appeal would be to the Supreme Court as the matter concerned a dispute as to ownership of land*".

22. With the enactment of the **Customary Land Tribunals Act [CAP. 271]** in 2001 the jurisdiction of the Island Court to hear and determine disputes as to the ownership of land was vested exclusively in Land Tribunals established under the Customary Land Tribunals Act save for existing proceedings then pending before the Island Court. Consequential amendments were also passed to remove appeals direct from the Island Court to the Supreme Court under Section 22 including the Island Courts powers to make orders in civil proceedings touching upon the use and occupation of disputed land [***see:*** the provisions of the Island Courts (Amendment) Act No. 15 of 2001].

23. In considering the preliminary issue I am also guided by the persuasive judgment of the High Court of Australia in Coal and Allied v. AIRC [2000] HCA 47 where the court relevantly observed:

> "*11. ... the 'nature of [an] appeal must ultimately depend on the terms of the statute conferring the right [of appeal]. The statute in question may confer limited or large powers on an appellate body; it may confer powers that are unique to the tribunal concerned or powers that are common to other appellate bodies. There is, thus, no definitive classification of appeals, merely descriptive phrases by which an appeal to one body may sometimes be conveniently distinguished from an appeal to another.*
>
> *12. It is common and often convenient to describe an appeal to a court or tribunal whose functions is simply to determine whether the decision in question was right or wrong on the evidence and the law as it stood when that decision was given as an appeal in the strict sense. An appeal to this Court under s. 73 of the Constitution is an appeal of that kind. In the case of an appeal in the strict sense, an appellate court or tribunal cannot receive*

further evidence and its powers are limited to setting aside the decision under appeal and, if it be appropriate, to substituting the decision that should have been made at first instance.

13. *If an appellate tribunal can receive further evidence and its powers are not restricted to making the decision that should have been made at first instance, the appeal is usually and conveniently described as an appeal by way of rehearing. Although further evidence may be admitted on an appeal of that kind, the appeal is usually conducted by reference to the evidence given at first instance and is to be contrasted with an appeal by way of hearing de novo. In the case of a hearing de novo, the matter is heard afresh and a decision is given on the evidence presented at that hearing.*

14. *Ordinarily, if there has been no further evidence admitted ... a court or tribunal entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was error on the part of the primary decision-maker. That is because statutory provisions conferring appellate powers, even in the case of an appeal by way of rehearing, are construed on the basis that, unless there is something to indicate otherwise, the power is to be exercised for the correction of error. However, the conferral of a right of appeal by way of a hearing de novo is construed as a proceeding in which the appellate body is required to exercise its powers whether or not there was error at first instance.*

15. *The provision considered in Brideson [No 2] conferred power on the Commission to take further evidence, a provision which is indicative of an appeal by way of rehearing. It also required the Commission to "make such order as it [thought] fit". The latter requirement indicated that the Commission's appellate powers were not constrained by the need to identify error on the part of the primary decision-maker, but, rather, that the Commission was obliged to give its own decision on the evidence before it.*

In this latter regard, the Supreme Court hearing an appeal under section 22 of the Island Courts Act is constrained in terms of Section 23 (a), "*... to make such order ... as the Island Court could have made ... in such cause or matter*".

24. Unlike Section 30 (2) (a) of the Judicial Services and Courts Act No. 54 of 2000 which expressly described the nature of the appeal before the Supreme Court as a "*hearing de novo*", section 22 does <u>not</u> clearly state that in respect of an appeal from the Island Court as it could have done if that was the lawmaker's intention.

25. Significantly, the legislature perhaps realizing the onerous and duplicitous nature of a "*de novo*" hearing, almost immediately repealed the paragraph in Section 30 and replaced it with two different paragraphs that required the Supreme Court hearing an appeal "*... to proceed on the face of the record of the Magistrates Court*" and "*may receive evidence*" which is the traditionally recognized formulation of an appeal by way of "*rehearing*" under the afore-mentioned High Court classification [***see:*** Judicial Services and Courts (Amendment) Act No. 4 of 2003].

26. After careful consideration of the provisions of Sections 22 and 23 of the Island Courts Act and the repeal of Sections 13(c), (d) and (e) in the Amendment Act No. 35 of 1989 which substantially reduced the Island Courts' powers to make orders dealing with the use and occupation of land, I am of the firm view that the appeal hearing under Section 22 is not a hearing "*de novo*" but a rehearing based on the Island Court record and supplemented by further evidence and inquiries that the Supreme Court may in its discretion permit and "*as it thinks fit*".

27. To accept the appellant's submission that an appeal under Section 22 requires the Supreme Court to conduct a "*hearing de novo*" would in my view:

    (a) Deny the losing party a right of appeal against the Supreme Court's "*de novo*" determination [***see:*** Section 22 (4)];

    (b) Ignore the mandatory requirement ("*shall*") for the Supreme Court hearing an appeal "*to consider the records* (of the Island Court) *relevant to the decision*" and renders the phrase "*(if any)*" meaningless and redundant;

    (c) Be incongruent with the intent and purpose of the legislation which vests the original jurisdiction to hear and determine disputes as to the ownership of land in an Island Court presided over by a legally qualified Magistrate and 3 justices [***see:*** Section 2A (2) and 3 (4) of the Island Courts (Amendment) Act No. 15 of 2001]; and

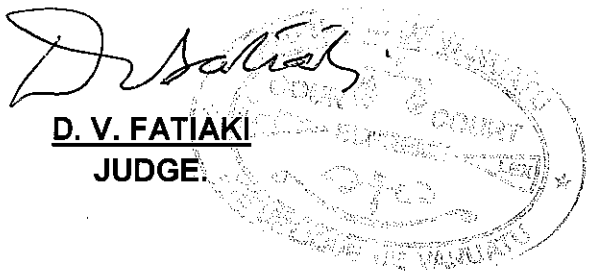
    (d) Given the potentially unlimited scope of persons who can invoke Section 22 ("*any person aggrieved*"), a hearing "*de novo*" would be unduly onerous and duplicitous and could well involve persons who were not the original parties before the Island Court appealed from. Needless to say even unsuccessful claimants before the Island Court

who did not appeal might be forced to participate at the "*de novo*" hearing.

28. Finally, if it was the intention of the legislature when enacting Section 22 that the appeal before the Supreme Court would always be a "*hearing de novo*", then there would be no need to have included para. (b) of Section 23 which empowers the Supreme Court in exercising its appellate jurisdiction under Section 22 to "*order that any such cause or matter be reheard before the same court or before any other island court*".

DATED at Port Vila, this 31st day of August, 2015.

BY THE COURT



D. V. FATIAKI
JUDGE