IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Appeal Case No. 1097 of 2015

BETWEEN: CHIEF TOM NUMAKE, MERIAN NUMAKE AND SAMUEL TOM NUMAKE
Appellants

AND: JIMMY IALAMEI, TOM NAIU, TRENOLD TOM NAIU AND TREVOR IALAMEI
Respondents

Conference/Hearing in Chambers: Friday 19 February 2016 at 9:30 am

Before: ***Justice Stephen Harrop***

Appearances: ***Wilson Iauma for the Appellants***
Willie Kapalu for the Respondents

ORAL JUDGMENT

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1. On 28 August 2015, the appellants appealed against the decision of Magistrate Kanas at Isangel on 20 July 2015 in which the learned Magistrate ordered that this claim would be struck out pursuant to rule 9.10 (2) (d) without notice, there having been no step taken in the proceeding for six months.

2. Present at the hearing on 20 July was Mr Kapalu for the defendants, the current respondents, but there was no appearance for the claimants, the current appellants. However, on their behalf a letter had been written on 1 July 2015 to the Court and that was acknowledged by the Magistrate. This requested that the case be adjourned until sometime in August because Mr Kapapa and his firm were unable to arrange representation on 20 July. He apologised for any inconvenience caused.

3. Unfortunately the file in relation to this appeal was only referred to me last week. I convened a conference today to discuss the case and arranged for Mr Iauma and Mr Kapalu to be informed of this. They have both duly appeared.

4. Mr Kapalu says that his clients have never been served with the appeal and the document containing grounds of appeal. He was however handed a copy of these documents by Mr Iauma during the hearing. Mr Iauma is unable to provide me today with any proof of service of the appeal.

5. Regardless of the short notice Mr Kapalu has had, it seems to me this appeal can and should be dealt with immediately. That is because it is obvious from the Court file that the jurisdiction sought to be exercised by the Magistrate could not properly have been exercised. There *had* been not one but two steps taken in the proceeding by the claimants within the six months before 20 July 2015. As I have noted already, they had expressly sought an adjournment of the hearing on 20 July. Furthermore, on 25 February 2015, again well within the six-month period before 20 July 2015, they had filed an application for contempt orders in respect of alleged conduct by the defendants in breach of earlier restraining orders which had been made by the Court on 14 October 2014.

6. In light of the existence of those steps taken within the requisite six-month period, Mr Kapalu is unable to make any submission in support of the Magistrate's decision and opposing the allowing `of the appeal. I am, with respect, unable to see how that decision could possibly have been made in these circumstances; the qualifying criteria for the exercise of the power in rule 9.10(2)(d) simply were not present. It would have been possible for the Magistrate to decline the application for adjournment and then to proceed to deal with the matter in the absence of the appellants, but that is not what she did. The appeal must therefore be, and is, allowed.

7. Incidentally, having written to the Court requesting an adjournment but not had a response, the appellants were required to arrange an appearance of counsel, regardless of whether someone from Mr Kapapa's firm was available. There are far too many Vanuatu counsel who seem to think that merely asking for an adjournment is enough and that if they have no response they may assume their application has been granted.

That is not the case: counsel are only excused attendance if the Court expressly grants an application for adjournment or otherwise so orders.

8. The Magistrate's Court file is to be returned to Tanna as soon as possible so that the matter can be progressed on its merits. I have raised with Mr Iauma the procedural point that the claimants do not appear to have been those who were the victims of the alleged assaults which is the basis for the claim, rather it appears to have been two of their grandchildren. My understanding is that they are, or were at the time, both minors and in those circumstances an application should be made by the claimants for an order under rule 3.8 for a person - and this could well be one of the current claimants - to act as litigation guardian for the two children.

9. In principle, the appeal having been allowed the appellants are entitled to costs against the respondents. However, in circumstances where there is no proof of service of the appeal the reality is that there has been no opportunity for Mr Kapalu to review the position and if he thought fit perhaps to consent or at least not object to the appeal being allowed. He has certainly not attempted to dispute the merits of the appeal today.

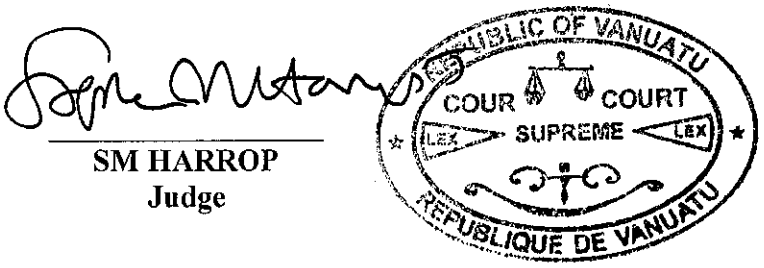
10. I have therefore decided to reserve costs pending receipt of any sworn statement proving service of the appeal on Mr Kapalu shortly after it was filed. If such proof is filed, and a copy of that should of course be served on Mr Kapalu, then I will receive submissions from both parties on the question of costs.

11. Any such proof of service and submissions are to be filed and served no later than 16 March 2016. If that is not done, costs in relation to this appeal will lie where they have fallen.

12. It may be that the appellants will decide not to bother pursuing the question of costs given the absence of any opposition from the respondents today and the inevitable incurring of further costs in arguing about costs. That is a matter for them to decide assuming they are in a position to file proof of service. Subject to that possibility the file will be closed.

Dated at Port Vila, this 19th day of February, 2016

BY THE COURT



SM HARROP
Judge