

IN THE HIGH COURT OF TUVALU 2023

CIVIL CASE 6/2023

CHARLES SWEENEY

PLAINTIFF

BETWEEN A N D

ATTORNEY GENERAL AND OTHERS

DEFENDANT

Before Hon Judge Sir John Muria

Hearing 21st November 2023

Mr Charles Sweeny

Ms Laingane Italeli Talia Attorney General

JUDGEMENT

Muria J: On 5th September 2023, Parliament passed the Constitution of Tuvalu Act 2023, Act No.6 of 2023 to alter the Constitution of the Tuvalu. The Act was assented to by the Governor General on 19th September 2023 and the new Constitution of Tuvalu came into force on 1st October 2023.

2. Following the passage of the new Constitution into law the plaintiff filed an *ex parte* application on 18th September 2023 seeking a number of *ex parte* Orders as contained in the application. The plaintiff's *ex parte* application formally came before me on 29th September 2023 and on 6th October 2023 I dealt with the *ex parte* application and granted the following *ex parte* orders:

1. That pending further order, the Court orders;

- (1) EACH OF THE MEMBERS OF CABINET, MINISTERS, ATTORNEY GENERAL, OTHER LEGAL OFFICERS AND CIVIL SERVANTS EMPLOYED BY THE GOVERNMENT, THE GOVERNOR GENERAL BE AND IS HEREBY RESTRAINED AND ENJOINED FROM DOING ANY OF THE ACTS IDENTIFIED IN THESE ORDER:
- (2) TAKING ANY STEP BASED UPON THE CONSTITUTION BILL 2023 OR THE CONSTITUTION ACT 2023 BEING A VALID CONSTITUTION OR LAW OF TUVALU;
- (3) TAKING ANY STEP INCLUDING BUT NOT LIMITED TO SUBMITTING THE BILL FOR THE APPROVAL OF THE GOVERNOR GENERAL, THE GOVERNOR GENERAL APPROVING THE BILL, THE PROCLAMATION FOR THE BILL AS AN ACT OR AS THE CONSTITUTION;

- (4) TREATING THE TENURE OF THE CHIEF JUSTICE AND ANY OTHER JUDGE OF THE HIGH COURT AS LIMITED OTHER THAN BY THE TERMS OF THEIR RESPECTIVE INSTRUMENTS OF APPOINTMENT;
- (5) MAKING ANY APPOINTMENTS AS A JUDGE OF THE HIGH COURT BASED UPON THE TERMS OF THE BILL;
- (6) EACH OF THE PERSONS IDENTIFIED BY THESE ORDERS DELIVER TO THE COURT WITHIN SEVEN DAYS ALL DOCUMENTS NOT THE SUBJECT OF CABINET OR LEGAL PROFESSIONAL PRIVILEGE WHICH REFER TO THE BILL, ANY PROVISION CONTAINED IN IT, OR THE EFFECT OF THE BILL OR ANY OF ITS PROVISIONS;
- (7) EACH OF THE PERSONS IDENTIFIED BY THESE ORDERS DELIVER TO THE COURT WITHIN SEVEN DAYS ALL DOCUMENTS CONSTITUTING COMMUNICATIONS WITH LOCAL AUTHORITIES OR OTHER CONSULTATIONS REFERRING TO THE BILL OR TO ANY POSSIBLE AMENDMENT TO THE CONSTITUTION OF TUVALU MADE SENT OR RECEIVED AFTER 1 JANUARY 2020;
- (8) EACH OF THE PERSONS IDENTIFIED BY THESE ORDERS DELIVER TO THE COURT WITHIN SEVEN DAYS DOCUMENTS WHICH CONTAIN OR REFER TO SPEECHES OR INTENDED SPEECHES IN PARLIAMENT REFERRING TO THE CONSTITUTIONAL AMENDMENTS;
- (9) THESE ORDERS APPLY TO ALL THE PERSONS IDENTIFIED IN THESE ORDERS AS SOON AS THE ATTORNEY GENERAL HAS BEEN NOTIFIED OF THESE ORDERS WITHOUT THE NEED FOR ANY FURTHER SERVICE;
- (10) THESE ORDERS APPLY WITHOUT THE NEED FOR ANY FURTHER SERVICE TO ANY PERSON ACTING UPON THE INSTRUCTIONS OF OR AT THE REQUEST OF ANY OF THE PERSONS IDENTIFIED IN THESE ORDERS AS IF SUCH PERSON HAD BEEN SPECIFICALLY IDENTIFIED IN THESE ORDERS.

2. The applicant shall give the usual undertaking in damages in writing and file in Court.
 3. The applicant or his counsel to undertake to issue a Writ by Thursday 26th October 2023 and that such undertaking shall be satisfied by delivery to the Registrar of a Draft writ for filing.
 4. The Registrar shall serve copies of this Ruling and Order to all the parties in this case.
3. Following the Undertaking given by the plaintiff on 11th October 2023, the plaintiff filed the Writ of Summons with a Statement of Claim on 26th October 2023 pursuant to the amendment of Order 3 (above) made on 11th October 2023. Copies of the Orders and Writ of Summons and Statement of Claim were served on the defendant (Attorney General).

Defendants Motion to Strike Out

4. On 26th October 2023, the Attorney General filed a Motion to strike out "the application by the plaintiff" which I take that to mean the plaintiff's application for *ex parte* orders filed on 18th September 2023 and heard by the Court on 6th October 2023. I am afraid that the application had already been dealt with and cannot be the subject of a striking out motion. The defendant's application is therefore, to be taken as an *inter partes* hearing to challenge the *ex parte* orders made and for the Court to determine whether the *ex parte* orders should continue or ought to be struck out pending the determination of the plaintiff's substantive case. That substantive case is now set out in the writ with

the accompanying Statement of Claim filed on 26th October 2023 and can only be challenged at the trial or by an application to strike out the plaintiff's writ of summons and Statement of Claim.

5. The plaintiff's notice of motion seeks the following orders:

- “1. That the application by the Plaintiff against the Defendants is struck out;
2. That the Second Defendants whom are not named properly by the Plaintiff shall be properly named as a Party against the Plaintiff in this matter;
3. That the Plaintiff imposing and dictating how Tuvalu's democratic system of government enacts its laws is an infringement of Tuvalu's desire to constitute itself as a free and democratic sovereign nation as reaffirmed in the Preamble of the Constitution.
4. That the application is unreasonable, frivolous, vexatious and there is no reasonable cause of action.”

6. In support of her application the learned Attorney General relied on a number of grounds. I shall consider each of the grounds seriatim. In like manner I shall also consider the plaintiff's response to the defendant's arguments.

7. I also note that in their submissions both parties have raised issues concerning the removal of the plaintiff as Chief Justice of Tuvalu. I must point out that this present case (Civil Case 6/23) is not concerned with the legality of the removal of the plaintiff as Chief Justice of Tuvalu. This case is about the constitutionality of the Constitution of Tuvalu Act 2023 (Act No.6 of 2023) and in particular, the focus is on section 9 of Schedule 5 to the Constitution of Tuvalu 2023, which in due course, the Court will have to determine. In the meantime the defendant's application is of limited scope and the issues are also limited.

8. In the nature of the defendant's application, it is my view that there are only two issues that fall for the Court to determine. The first issue is whether or not the *ex parte* orders issued on 6th October 2023 should be struck out or discharged; and secondly, whether the plaintiff's application for *ex parte* Orders discloses reasonable cause of action

9. With these issues in mind I shall now turn to the grounds and submissions made in support and against the grounds relied upon in the application.

I. Challenging the parliamentary prerogative to pass Constitution.

10. This ground raises the issue of whether the Court has the power to determine or question Parliament's Constitutional making power. The learned Attorney General contended that the legislature is constitutionally vested with the law-making power and the judiciary cannot intrude into the domain of Parliament. As such it is suggested that

the Court cannot issue orders restraining the taking of any step to bring the Constitution into effect and the taking of any action under the Constitution. It is therefore said that such orders should not continue and ought to be struck out.

11. The plaintiff on the other hand submitted that the Court's authority to examine the legislative power of Parliament cannot be ousted unless expressly stated to be so. The plaintiff cited the case of *Attorney General –v- Lambourne* [2022] KICA 6, 7, 8 and 9 decisions of the Court of Appeal of Kiribati.
12. As I have said earlier, that at the center of the plaintiff's case is the challenge to the constitutionality of section 9 of Schedule 5 to the Constitution. The question of whether the Court is precluded from determining the validity of Parliament's power to make laws will be an important consideration when the Court comes to determine the validity of section 9 of schedule 5. At this stage it is sufficient for the purpose of this application to say that an issue of constitutional importance is very much alive between the parties in this case. It certainly is not frivolous or vexatious. It cannot simply be brushed aside.
13. I must also add that the challenge to the constitutional validity of section 9 of schedule 5, by its nature, cannot be resolved by the present application. It must be tried.

II - Unnamed Parties

14. The learned Attorney General's next argument is that the plaintiff has failed to properly name or identify the second defendant but simply refers to them as "AND OTHERS." It is suggested that the failure to properly identify the parties (the "Others") as second defendant's is a ground for striking out the plaintiff's case. The learned Attorney General cited O.17, r12 of the *High Court (Civil Procedure) Rules* in support of her contention.
15. The rules require that the parties to an action must be clearly identified for the proper resolution of the dispute between rivaling interested parties. The rules, O.17 r11 states that a cause or matter cannot be defeated by reason of misjoinder or non-joinder of parties. The Court has the discretionary power to order names of the parties to be added or struck out. Rule 12 permits parties to apply to the Court to add or strike out or substitute a plaintiff or defendant any time before or at the trial.
16. The plaintiff's argument on this point is that the plaintiff will identify the names of the additional defendant's as soon as the Attorney General provides the names of "each of the Ministers at the relevant time and identifies each of the members of Parliament also promoted and voted for the inclusion of section 9 of schedule 5." The plaintiff further contends that if necessary, orders of discovery may be sought to identify all relevant parties.
17. I feel it is within the ambit of the present application that the Court now directs that the plaintiff should identify and name of the "Others" defendants before the trial of the plaintiff's substantive case in this action. In this regard, I agree to the learned Attorney General's argument that the plaintiff must identify who the "Others" defendants are, if he still wishes to add other defendants as parties in this case. In order to aid the plaintiff

to identify those defendants, the *ex parte* Orders Nos. 1(6), (7) and (8) are to continue.

III. Failure to submit Affidavit in support of the Application at the time of moving the *ex parte* motion

18. The argument by the learned Attorney General is that the plaintiff filed his *ex parte* application on 17th September 2023 but the plaintiff's sworn affidavit in support was filed on 26th September 2023. Thus, it is argued, is in breach of O.40 r19 of the *High Court (Civil Procedure) Rules 1964* which provides that:

"except by leave of the Court, no order made ex-parte in Court founded on any affidavit shall be of any force unless the affidavit on which the application was made was actually made before the order was applied for, and produced or filed at the time of making the motion."

19. The short answer to the contention by the learned Attorney General is that the crucial time for the filing of the affidavit in support of an *ex parte* Order is "*before the order was applied for, and produced or filed at the time of making the motion.*" The plaintiff filed his application on 17th September 2023 and stamped with the High Court stamp on 18th September 2023. The application was dated 17th September 2023.
20. The plaintiff's affidavit in support of his *ex parte* application was sworn – to on 26th September 2023 and filed on the same day 26th September 2023. The *ex parte* application was fixed for 6th October 2023 at which time the application was moved at 9:30 am in the Court (on papers) seeking the *ex parte* orders. There can be no argument that the plaintiff has satisfied O.40, r19 of the *High Court (Civil Procedure) Rules*.

IV- The Plaintiff's false Claim as the Chief Justice of Tuvalu

21. The status of the plaintiff as the Chief Justice of Tuvalu is a matter that is presently still pending before the Court in High Court Civil Case No.1 of 2020. It is still *sub judice* and I cannot comment on it under this ground.
22. The other point raised by the learned Attorney General under this ground is the allegation that the plaintiff is in breach of section 14 of the *Legal Practitioner's Act 2017* of Tuvalu by practicing in the Courts of Tuvalu without a practicing certificate. It is, also suggested that by representing himself, the plaintiff is acting contrary to the *Legal Practitioners Act 2017*. This point is plainly without merit. There is nothing to prevent a litigant from representing himself in Court. Just because a person is self-representing himself or herself in his or her case in Court, he or she cannot be regarded as practicing law in the Courts.
23. A self-represented litigant does not need a practicing certificate to come to act to conduct his or her own case before the Court. The plaintiff in this case is a self-represented litigant and does not need admission to the Bar in Tuvalu and to possess a Practicing Certificate in order to represent himself in this case or any other case. This is a bad point and has no merit.

V- Ex parte application is unreasonable, frivolous and vexations

24. The learned Attorney General's argument on this ground is that it is unreasonable for the plaintiff to claim that section 9 of schedule 5 of the Constitution purports to remove the existing tenure of the Chief Justice and Judges of the High Court and replace it with tenure of three (3) months. It is also contended by the learned Attorney General that the plaintiff's argument that the provision (section 9 of schedule 5) would destroy the security of tenure and independence of the Judiciary is unreasonable, frivolous and vexatious. This, it is said, is because the overarching aim of the amendment is to promote and strengthen the three arms of the democratic government to be more independent. This, it is said, is shown by the fact that the appointment of the Chief Justice is done by the Head of State on advice from the Judicial Service Commission, (JSC) an independent commission.
25. The plaintiff's response on this ground of the application is that the terms of section 9 of schedule 5 introduces a serious interference on the independence of the Judiciary, which is a fundamental attack on the constitutional structure of Tuvalu. This is a serious issue raised by the plaintiff. I agree that the issues raised in relation to section 9 of schedule 5 of the Constitution are serious issues. They cannot be resolved in an application of this nature. They must be tried, as I have earlier indicated. The plaintiff's *ex parte* application was clearly not unreasonable, frivolous or vexatious.

Which ex partes Orders to remain effective and which ones to be discharged

26. As I have also indicated earlier, the main controversy in this case is centered on section 9 of schedule 5 of the Constitution. It is therefore necessary that any of the *ex parte* orders made on 6th October 2023 directly relevant to the section 9 controversies are to remain on-foot.
27. To determine which of the *ex parte* orders should continue and which ones ought to be discharged, in view of the fact that the plaintiff's case is centered on the constitutionality of section 9 of schedule 5 to the Constitution, the question that must be asked and answered is whether the disputed provision (section 9 of schedule 5) is capable of being considered and determined on its own without affecting the entire Constitutional instrument in this case. The answer to that question must clearly be "yes."
28. This case is not about challenging the power of the people of Tuvalu to make and adopt a new Constitution for themselves. The authority to do so, remains with them and it is exercised on their behalf by Parliament, which it did on 5th September 2023 and formalized into law on 17th September 2023 through the Assent by the Governor General. No question has been raised as to the authenticity of the legal process as required under the law to enact the Constitution of Tuvalu Act 2023 being complied with. Being lawfully passed into law, the Constitution of Tuvalu 2023 must be set to work, including the presentation of the Government's Budget for the first half of 2024

which is presently before the House. It is in the national interest of Tuvalu, the Government's administration and services to the people of Tuvalu that the new Constitution be allowed to function. Save for section 9 of schedule 5, the legality of which is yet to be severally considered and determined, there can be no impediment to the constitutionality and lawful operation of the Constitution of Tuvalu 2023. Consequently the *ex parte* Orders 1.(1) and (3) must be discharged.

29. The following *ex parte* orders made on 6th October 2023 are to continue to remain effective until the substantive claim of the plaintiff is determined, in so far as they relate to section 9 of schedule 5 :

Orders 1. (1)
(4)
(5)
(6)
(7)
(8)
(9)
(10)

30. The following *ex parte* orders made on 6th October 2023 are discharged with effect from the date of this judgment:

Orders 1. (2)
(3)
2.
3.
4.

31. In order to expedite the hearing and determination of this case, the Court directs that:
1. The plaintiff identify and add the "Others" defendants within 14 days from the date of this Order.
 2. The defendant to reply to the plaintiff's Statement of Claim, which was served with Writ of Summons, within 14 days from the date of this Order.
 3. Further written submissions (if any) or affidavits (if any) to be filed by both parties on the substantive case/issue (section 9 of schedule 5) by 15th December 2023.
 4. The case is to be dealt with as an expedited matter and as if it was a judicial review proceedings brought under O.61 of the High Court (Civil Procedure) Rules 1964.
 5. The hearing (on papers) of the substantive case is fixed for 19th December 2023.

32. In the circumstances, the Attorney General's application for striking out is accordingly determined. The plaintiff's case challenging the constitutionality of section 9 of schedule 5 to the Constitution to proceed.

Dated 24th November 2023



Sir John Muria
Judge of the High Court