IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU

Civil Appeal
Case No. 18/2618 CoA/CRMA

BETWEEN: **Timothy Wass**
Appellant

AND: **The Republic of Vanuatu**
Respondent

Date:	14 February 2019
Before:	Justice J. von. Doussa
	Justice J.W. Hansen
	Justice D. Fatiaki
	Justice G.A. Andrée Wiltens
	Justice S. D. Felix
In Attendance:	Mr S. Stephens for the Appellant
	Mr T. Loughman for the Respondent
Decision:	22 February 2019

JUDGMENT

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1. On 24th August 2018 at the first conference hearing on a constitutional application filed by the appellant a Judge of this Court struck it out on the basis that it was a misapprehension of the constitutional rights claimed. The appellant seeks orders from this Court setting aside that decision, and reinstating his constitutional application.

2. The background facts are that on 11th March 2004 Rose Mala executed a Will which provided that on her death all her real property, being lease title number 03/K103/007 (the lease) would pass to the appellant absolutely.

3. Rose Mala died on 10th June 2006. The executor named in the Will did not apply for probate. The appellant applied for letters of administration with the Will annexed which were granted to him on 2nd October 2007. By the time the letters of administration were granted the appellant had discovered the following facts.

4. On 7th October 1995 Rose Mala had transferred the lease to Francois Tari and the transfer was duly registered by the Director of Land Records.

5. On 18th March 2002, Francois Tari transferred the lease to Gideon Charlie. That second transfer was also duly registered by the Director.

6. On 22nd June 2004, Gideon Charlie transferred the lease to John Knox. That third transfer was also duly registered by the Director.

7. On the face of the land register at the date of death of Rose Mala, she held no interest in the lease and nothing passed under the Will to the appellant.

8. The appellant commenced proceedings in the Supreme Court seeking to set aside the transfers of the lease and to have his interest as the beneficiary of Rose Mala reinstated on the register. He claimed that the first transfer to Francois Tari was made by fraud and without the knowledge and consent of Rose Mala. He alleged the second and third transfers were also fraudulent. The Director of Land Records was a party to the proceedings and allegations were raised that irregularities in the registration process had occurred. The Supreme Court found against these allegations and dismissed the substantive claims made by the appellant: Wass v. Tari [2009] VCSC112: Civil Case No. 16 of 2007. The appellant appealed this decision. The Court of Appeal on 30th October 2009 dismissed the appeal: Wass v. Tari [2009] VUCA 41: Civil Appeal Case No. 14 of 2009.

9. On 10th August 2010 the appellant filed the constitutional petition now under consideration. The application summarized the facts set out above concerning the Will, the death of Rose Mala, the grant of letters of administration, and the three transfers of the lease. The applicant alleged that servants or agents of the respondent within the Department of Lands office had wrongly assisted in effecting each of the three transfers thereby grossly violating the provisions of the law and constitution. The appellant alleges breaches of his constitutional rights under Article 5 (1) and in particular his right to protection of the law - Art. 5 (1) (d); his right from unjust deprivation of property- Art. 5 (1) (j); and his right to equal treatment under the law - Art. 5 (1) (k). The pleadings in the application make no reference to the proceedings and their outcome in the Supreme Court or in the Court of Appeal.

10. The remedies sought were a declaration that each of the three transfers of lease were invalid and a nullity, that the respondent restore the appellant's name to the register, and that compensation be awarded to him.

11. The constitutional application named the Republic as respondent as required by rule 4.2 (1) of the Constitutional Application Rules 2003 (the Rules) and was duly served on the Attorney General as

required by Rule 2.6 (1). Under the Rules the next step is for the Court to fix a date for the first conference; Rule 2.5 (2) (a). This occurred, but there was a long delay before the first conference came on for hearing. The delay was brought about by the Respondent seeking and obtaining a stay order requiring the appellant first to pay the substantial costs awarded against him in the Supreme Court and in the Court of Appeal. There seems to have been some confusion as to when the costs were finally paid in full, but that was no earlier than 12th August 2016. During the period of delay the appellant's lawyer suffered ill health and there seems to have been periods when communications with the applicant about the progress of the constitutional application broke down.

12. The first conference was eventually conducted on 24th August 2018 pursuant to rule 2.8. The appellant, his counsel and the Attorney General were present. This Court was informed on the hearing of the appeal that the Judge first endeavoured to explain for the benefit of the appellant the process leading up to the hearing of the first conference, and why there had been delays. Counsel for the appellant was then questioned by the Judge about the claim. After hearing the appellant's counsel, and without calling on the Attorney General, the Judge struck out the application. Costs of Vt 20,000 were awarded against the appellant in favour of the respondent.

13. The appeal against this decision is based on 5 grounds, but grounds 1 and 3 raise the same issue, and grounds 2 and 4 also raise the same issue. Ground 5 challenges the award of costs made against the appellant.

Grounds 1 and 3

14. These grounds alleged that before dealing with the merits of the constitutional application, the Judge said words to the effect:-

> ***"yu ia nao time Lawyer blong yu I bin sick last year, mi bin harem olgeta long front ia oli sei yu stap kam oltaem pressurisem olgeta. Mi bin tempted blong kam luk yu be mi save emi wok blong wan lawyer blong talem long yu."***

15. The appellant believes these words were directed specifically to him, not to his counsel, as the Judge was looking at him as he spoke. The grounds of appeal say that the appellant believes that for a Judge to utter these words may not promote impartiality on his part, and that the Judge ought to have withdrawn himself from dealing with the application as the remarks about his conduct at the Registry were *"a clear inclination of dislike of the applicant"*.

16. Mr Loughman does not dispute that words to the effect quoted were spoken by the Judge but they were said in the course of the explanation the Judge was giving to the appellant for the delay. It is plain from correspondence on the Court file and from the comments of counsel in argument that the appellant was frustrated by the delay and there is no denial that he was a seeking to pressure the Registry staff to have the matter listed. In these circumstances it was reasonable and appropriate that the Judge seek to explain the delay to the appellant, and the remarks must be taken and understood in that context.

17. We do not share the appellant's belief that the remarks indicate any dislike by the Judge towards him, and we do not consider they give any basis for a reasonable apprehension of bias.

18. More importantly however, if the appellant believed that the words of the Judge gave rise to a belief that the Judge could be biased against him, he should through his counsel have asked the Judge to recuse himself. A litigant who believes that a Judge may be biased must raise the issue at the earliest possible time. A litigant who does not do so will be taken to have waived the point. A litigant cannot sit on the point, await the outcome, and then complain if the result is adverse.

19. The applicant's counsel urges the Court to take a different view in this jurisdiction as, he says, it is not the Vanuatu culture to raise a criticism of this kind in the face of a senior person. Inside the Court parties are of course expected to be courteous and not be rude to a Judge, but it is not rude for a party or counsel to point out to a Judge in Vanuatu that there appear to be facts that could give rise to an apprehension of bias, and to ask for recusal. This is an accepted and well understood part of the litigation process. Judges will not be offended. In this case counsel for the appellant is a very experienced and fearless lawyer. If there was any reason to be concerned about the implications of the Judge's remarks, he should have raised that concern at that time. He did not do so. The hearing went on and it is now too late to raise a concern. But as we have already said, we do not think there was any good reason to believe that the Judge was showing any bias.

20. These grounds of appeal are without substance.

Grounds 2 and 4

21. These grounds contend that the Judge wrongly proceeded to strike out the constitutional application when there was no application from the Respondent to do so, and without first directing the respondent to file a response. In the absence of an application from the respondent, the Judge was duty bound to issue directions to the parties to file further statements to assist the Court to make an enquiry into the circumstances of the alleged breaches of constitutional rights.

22. Rule 2.8 deals with the first conference. The rule reads:-

> *"2.8 At the first Conference, the Court may:*
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> *(a) deal with any application to strike out the Constitutional Application; and*
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> *(b) order the respondent to file a response; and*
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> *(c) issue a summons under Rule 2.9; and*
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> *(d) order that a person may be legally represented; and*
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> *(e) decide if the Constitutional Application needs to be served on anyone else, and state how it is to be served; and*
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> *(f) fix a date for another Conference, if one is necessary, or fix a hearing date; and*
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> *(g) make orders about:*
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> *(i) filing and serving a response; and*

(ii) *filing and serving sworn statements by the parties, their witnesses and anyone else; and*

(iii) *disclosure of information and documents, in accordance with Part 8 of the Civil Procedure Rules; and*

(iv) *filing and serving written submissions and lists of authorities to be relied on; and*

(v) *giving notice to witnesses to attend the hearing; and*

(vi) *any other matter necessary to assist in furthering the enquiry into the application."*

23. Rule 2.8 (a) expressly recognises the Court's power to deal with a strike out application, and by implication recognises the power to order that the application be struck out at that early stage. The Court so held in Mass v. The Republic [2018] VUCA 11; Civil Appeal Case No. 373 of 2018 at [17].

24. However the appellant argues that without an application being made by the respondent, the Court is not empowered to strike out an application of its own motion. Rather, the Court is obliged to require that a response be filed and to give directions for the further process of the matter.

25. The power of the Court to strike out a constitutional application of its own motion has been considered by single Judges of the Supreme Court who have upheld the submission that the Court has inherent jurisdiction to do so which is not limited by the provisions of rule 2.8 (a). In Benard v. Republic of Vanuatu [2007] VUSC 68: Constitutional Case No. 01 of 2007 Tuohy J held:

> *The Constitutional Procedure Rules of 2003 do not contain a specific provision empowering the Court to strike out an application on the grounds that it is without foundation or vexatious or frivolous. Such a provision was previously found in s 218 (4) of the Criminal Procedure Code act which was contained within Part XIII of that Act which the Constitutional Procedure Rules replaced.*
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> *However, nor is such a provision found in the Civil Procedure Rules No. 49 of 2002 but the Court of Appeal has recognized in Noel –v- Champagne Beach Working Committee [2006] VUCA 18; CAC 24 of 2006 that such a power exists under the Court's inherent jurisdiction in relation to civil claims. In that case, the Court of Appeal pointed out that Rules 1.2 and 1.7 of the Civil Procedure Rules provide a basis for exercising the jurisdiction. Both those rules have been imported into the Constitutional Procedure Rules by Rules 1.3 and 1.4 of the latter Rules. So I am in no doubt that the jurisdiction does exist in relation to Constitutional Applications also. That conclusion is strengthened by the specific reference in Rule 2.8 (a) to the Court's power at first conference to deal with any application to strike out.*

26. In Nari v. Republic of Vanuatu [2015] VUSC 132: Constitutional Application No. 05 of 2015 at [16] Fatiaki J cited this passage with approval.

27. We agree with the analysis of the statutory provisions made by Tuohy J, and for those reasons confirm that the Supreme Court has inherent jurisdiction to strike out a constitutional application of its own motion where the application fails to meaningfully identify a constitutional breach capable of being

redressed in accordance with the Constitution, or where the application is otherwise an abuse of process.

28. The point was made in Noel v. Champagne Beach Working Committee, which we again endorse, that this jurisdiction is one that should be exercised sparingly and only in a clear case where the Court is satisfied that it has the requisite material on which to act. The claim must be so clearly untenable that it cannot possibly succeed.

29. If a constitutional application fails to identify an arguable claim or is an abuse of process the proper course is for the Court to put an end to the application at the first conference. In this situation there is no requirement that the respondent be called on to respond to the application. If the application fails to identify an arguable claim, there is nothing the respondent can respond to. To seek a response would be pointless. This Court held in Mass v. Republic of Vanuatu at [35], that a respondent is not called upon to answer the application until the Court is satisfied that it should order a response.

30. The notice of appeal neither in grounds 2 and 4 or elsewhere pleads that the Judge was wrong to hold that the application was a misapprehension of the Constitutional Rights claimed. Plainly the Judge reached that conclusion as the rights at law of the appellant had been finally determined according to law by the Court of Appeal at the end of the earlier litigation. That decision held that the 3 transfers were valid, and accordingly when the Will operated upon the death of Rose Mala, the lease had long since ceased to be part of her estate. In short, no legal right of the appellant had been infringed and there was no basis to allege a breach of a constitutional right. Counsel for the appellant when pressed conceded that the intended purpose of the application was to make a second attack on the transfers on the same grounds that had failed first in the Supreme Court and then in the Court of Appeal. Counsel argued that the Constitution permits the appellant to have a second attempt to establish the rights he asserts. Counsel relied on Article 6 (1) to support that submission. Article 6 (1) provides:

> *"Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right."*

31. Articles 6 (1) recognises the jurisdiction of the Supreme Court to receive and decide a constitutional application, but it does not create a guaranteed right. Relevant to this case, the guaranteed right that is said to be broken must be one of the rights created by Article 5. But the Supreme Court and the Court of Appeal have already finally determined facts which demonstrate that no guaranteed right under Article 5 has been infringed.

32. To file a constitutional application for the purpose of seeking to relitigate issues that have already failed in civil litigation is an abuse of process, and Article 6 does not alter that position.

Ground 5

33. This ground of appeal contends that the Order for costs against the appellant should not have been made as the Attorney General just sat through the conference hearing and was not called on to say

anything. That argument overlooks the requirement in the Rules that the application is to be served on the Attorney General who is then expected, as for any other conference, to attend that Court. The Attorney General needs to read and understand the application and to be in a position to respond to questions from the Court if asked to do so. It was entirely proper that costs be awarded to the respondent.

34. For these reasons the appeal is dismissed. The appellant must pay the respondent's costs fixed at Vt 30,000.

Dated at Port Vila this 22nd day of February 2019
BY THE COURT

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Justice J.von. Doussa