

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

Constitutional Case No. 1404 of 2016 SC/CNST

**BETWEEN: THOMPSON WELLS**  
*Applicant*

**AND: THE REPUBLIC OF VANUATU**  
*Respondent*

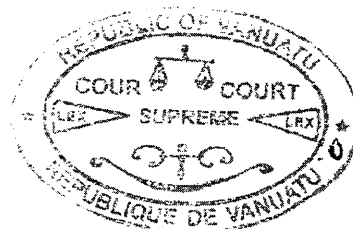
*Hearing: Friday October 14<sup>th</sup> 2016*  
*Before: Justice JP Geoghegan*  
*In attendance: Mr Colin Leo for the Applicant*  
*Mr Kent Tari (SLO) for the Respondent* \*

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**JUDGMENT**

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1. This judgment is to determine an application by the respondent to strike out Mr Wells' Constitutional Application.
2. On April 27<sup>th</sup> 2016 Mr Wells filed a Constitutional Petition pursuant to which he sought orders as follows:-
  - "a) An order that the advice from the Republic of Vanuatu via the National Land Tribunal Office and the State Law Office which certifies that the decision of the Supe Natavui Tano Council of Chiefs, made on 5 November 2001 in favour of Mr Wells was lawful, infringes the rights of Mr Wells when Mr Wells was advised by the National Land Tribunal Office not to attend any Customary Land Tribunal hearing upon the basis of the decision of 5 November 2001 in relation to Belbarav, Palekula and Bobua customary land.
  - b) An order that the rights of the applicant, Mr Wells have been infringed upon the basis that when Mr Wells was cautioned by the Republic of Vanuatu not



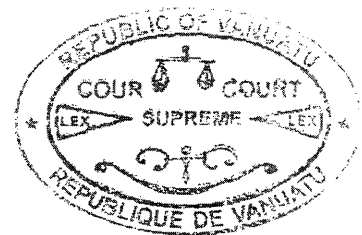
*to attend the Tribunal by the Republic of Vanuatu's advice, however, the Republic of Vanuatu advised the Veriodale Village Land Tribunal to proceed with the hearing without giving any opportunity to the applicant to be heard in the Tribunal."*

3. The background to this matter is that Mr Wells alleges that on November 5<sup>th</sup> 2001, he was declared by the Supe Natavui Tano Island Council of Chiefs to be the declared customary owner of Belbarav, Palekula and Bobua customary land.
4. There appears to have been some concern over the legitimacy and validity of that decision and its relationship to another claim to be heard before the Canal/Fanafo Area Land Tribunal. Mr Alick Kalmetlu Motoutorua, the National Co-ordinator of the Customary Land Tribunal, sent a memorandum headed "HIGH PRIORITY" and dated October 7<sup>th</sup>, 2004, to a number of persons including the Director of Lands, the Minister of Lands, the Director of Land Records, the Chairman of the Veriodale Area Land Tribunal and the Chairman of the Supe Natavui Tano Council of Chiefs:-

*"RE - CUSTOMARY LAND OWNERSHIP DECLARATION OF PELINPARAV.BOMBUA AND PALEKULA (SANTO) IS FINAL AND SHOULD NOT BE CHALLENGED.*

*The Head Office of the Lands Tribunal in Port Vila would to ensure (sic) claimants in the Pelinparav Land Case due to go before the Canal/Fanafo Area Lands Tribunal covering the area of South East of Santo (Canal, Mavea, Tutuba, Aore and Fanafo) that the public notice from the Chairman of South East Area Land Tribunal Joseph Riri, is inconsistence (sic) with section 7 (1), (2) and (3) - Customary Land's Tribunal Act.*

*Subsequently, the former Santo/Malo Council of Chiefs headed by Soro Molinoso of Tassiriki South Santo and the present Santo/Malo Council of Chiefs (Supe Natavui Tano Council of Chiefs) headed by Chairman Joseph Lamp of Fanafo have given their decisions and declaration of the customary land owner (s) of Palinparav including Bombua and Penikula (Palekula). The declaration was dated 5<sup>th</sup> of*



November 2001 (before the Act came into force) and endorsed by the present Supe Natavui Tano Council of Chiefs on the 28<sup>th</sup> September 2004.

The Head Office of the Land Tribunal Office would like to advise the public and interested parties that the declaration made by the Supe Natavui Tano Council of Chiefs of Santo/Malo is in accordance with section 6 "arrangements outside this Act" - subsection (1) "Nothing in this act prevent a person or persons resolving a dispute about customary land in accordance with the rules of custom or in any other lawful way" and subsection (2) "Subsection (1) applies even if the way in which the dispute is resolved is inconsistency )sic) with the procedures made under this Act for resolving disputes".

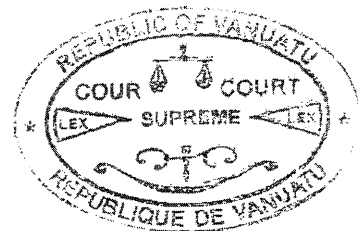
5. The memorandum contains a final paragraph as follows:-

*"And finally, The Head Office of the Lands Tribunal would like to clarify that having obtained LEGAL ADVICE concerning the land ownership question, the decision of the Supe Natavui Tano Council of Chiefs of SANTO/MALO is FINAL AND SHOULD NOT BE CHALLENGED.*

6. The memorandum is clearly not simply a memorandum intended for the specific persons to whom it was addressed but was also intended to convey the views of the author to the public at large.

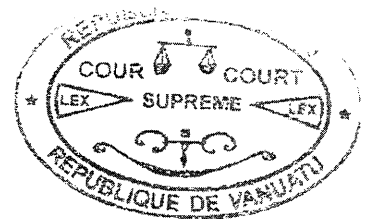
7. In keeping with the statements referred to in the above memorandum Mr Motoutorua deposed in a sworn statement that he advised Mr Wells not to attend any Tribunal hearing given that the council's decision was lawful and correct according to his assessment. Mr Wells says that it is this advice which effectively prevented him from becoming involved in a further Tribunal hearing and which is a breach of his constitutional rights.

8. Even if the decision of the Council of Chiefs appears valid it is subject of course to a parties' right of appeal where such a right is granted.



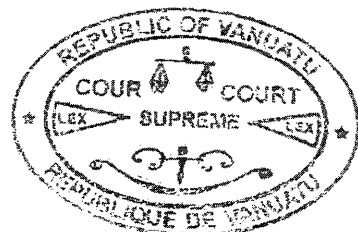
9. The land which is at the heart of the dispute giving rise to this application has been the subject of a number of decisions in the Supreme Court and the Court of Appeal. Relevant to these proceedings is the decision of the Court of Appeal in Molbarav v. Wells [2014] VUCA 13. That decision involved an appeal against two interlocutory orders which had the effect of restraining a distribution to the appellant of part of the purchase price due to the custom owners of the land. In paragraphs 10 to 14 of the decision the Court of Appeal stated:-

- "10. Essential to [Mr Wells'] claim that he is the custom owner of Belbarav is a decision to that effect by the Council of Chiefs made on 5<sup>th</sup> November 2001. That decision was made shortly before the Customary Land Tribunal Act [Cap. 271] (the Tribunal Act) came into force on 10<sup>th</sup> December 2001.*
- 11. This Court held in Valele Family v. Tauau [2002] VUCA 3 that prior to the Tribunal Act, a body such as the Council of Chiefs which sat on 5<sup>th</sup> November 2001, had no lawful authority to determine disputed claims for custom ownership of land. That authority before the Tribunal Act was vested in the Island Courts which had been given the necessary jurisdiction by the Island Courts Act [Cap. 167], a jurisdiction which have been anticipated in the Constitution.*
- 12. After the Tribunal Act came into force, the jurisdiction to hear and determine land claim matters became vested exclusively in the Land Tribunal system established by the Tribunal Act. The Veriodali Village Land Tribunal was a tribunal constituted under the Customary Land Tribunal Act with jurisdiction to make decisions over land in the location of the Belbarav land.*
- 14. [Mr Wells'] attack on the custom ownership of the appellants must therefore be directed to the validity and finality of the decisions of the Veriodale Village Land Tribunal of 20<sup>th</sup> May 2005 and 16<sup>th</sup> April 2012".*



10. The most important passages of the Court of Appeal decision as they relate to this application however, commence at paragraph 29 where the Court of Appeal stated:

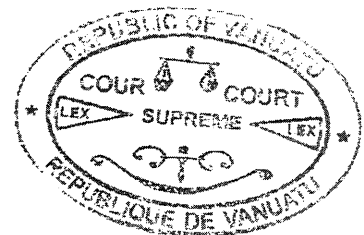
"29. *In this case the factual context is as follows. In September 2004 the Chairman of the South East Santo Land Tribunal gave notice that the Veriodale Village Land Tribunal would sit to determine the custom ownership of Pelbarav (referred to in the notice and sometimes is "Pelparav"). It seems that the notice was widely published and 13 counter claims were received. This is not a case where a putative claimant did not receive notice of the proposed Tribunal hearing and was not aware of it at any stage before decision. The first respondent was well aware of the notice and the subject matter of the proposed hearing. However, he chose not to participate and not to file his claim with the Tribunal. The affidavits of [Mr Wells] show that in late 2004, after he would have become aware of the public notice, he engaged in frequent communications with an officer of the Customary Lands Tribunal, with the Council of Chiefs, and with others, asserting that the decision of the Council of Chiefs made 5<sup>th</sup> November 2001 in his favour had finally determined the question of custom ownership. He contended that the Veriodali Village Land Tribunal should not be "reopening" disputes about the Belbarav land. On this evidence, his choice not to participate in the hearing before the land tribunal was a deliberate decision, made, apparently, on the advice of a certain officer from the National Lands Tribunal Office to the effect that custom ownership had already been determined in his favour. If that was the advice he was given, it was plainly wrong in light of the Court of Appeal decision in *Valele Family v Tura*, and in light of the provisions, first of the Island Courts, and secondly those of the Tribunal Act all of which were well known to [Mr Wells]. The decision not to participate, but rather to take the high handed position that the matter was already resolved in his favour, is a decision for which he must bear responsibility.*



30. *His decision not to participate was a surprising one as his affidavit of 14<sup>th</sup> November 2013 discloses that the same officer on whose advice he says he relied by letter on 19<sup>th</sup> August 2003 recommended to him that he lodge an application to the Area Land Tribunal to look into the land ownership of Belbarav (and other lands as well in which in claimed custom ownership rights).*
31. *This is a case where a person has deliberately chosen not to become a party to the land tribunal proceedings, and not to participate in them. In these circumstances we consider that [Mr Wells] is very clearly not a person who was a party to the Veriodali Village Land Tribunal Decision, and therefore is not a person who has a right of appeal under section 12 (1) of the Tribunal Act. The contention of [Mr Wells] to the contrary must be dismissed."*

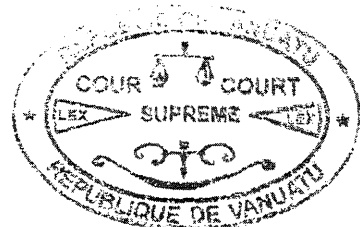
### **Discussion**

11. For Mr Wells Mr Leo argues that the Constitutional Rights which in breached are those set out in Articles 5 (1), (j) and (k), 73, 74, 75 and 78 (2).
12. The submission on behalf of the State is that the decision made by Mr Wells to rely on the advice of Mr Kalmelu without seeking legal advice was a deliberate choice on his behalf and given that there was no fiduciary relationship between the defendant and the claimant, no reasonable cause of action has been disclosed. The State stresses that the claimant was free at all times to seek independent legal advice and should have done so.
13. Not surprisingly the State places considerable emphasizes on the Court of Appeal decision in Molbarav v. Wells.
14. Article 5 (1) (j) and (k) provides:-  
“(j) *Protection of the privacy of home and other property and from unjust deprivation of property.*



(k) *Equal treatment under the law.*"

15. There can be no arguable case that Mr Thompson's constitutional rights as set out under Article 5 (1) (j) (k) have been breached. The advice was not intended to deprive Mr Wells of property or ensure that he received unequal treatment under the law and it had no such effect. Mr Wells was perfectly free, once he obtained notice of the Veriodali Land Tribunal case to participate in that case and to file a claim. He simply chose not to do so. It would have been blindingly obvious to any reasonable person that despite the advice of the Customary Lands Tribunal, once notice of the Veriodali Lands Tribunal hearing was received then that person should participate in it to promote or protect their position. The decision not to do so was entirely Mr Wells'.
16. Article 73, 74, 75 and 78 all apply to custom land. Article 73 simply stipulates that all land in the Republic of Vanuatu belongs to the Indigenous custom owners and their descendants. Article 74 stipulates that the rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu. Article 75 simply stipulates that only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with the recognized system of land tenure shall have perpetual ownership. Article 78 and specifically 78 (2) requires the Government to arrange for the appropriate customary institutions or procedures to resolve disputes concerning the ownership of custom land.
17. Mr Wells' allegations cannot amount to a breach of his rights under the Constitution under those Articles.
18. I consider that the findings of the Court of Appeal must be fatal to this Constitutional Petition. The statement by Mr Wells at paragraph 4 of his sworn statement of April 26<sup>th</sup> 2016 that *"I am not well educated in the advices I obtained from the National Coordinator of the Customary Lands Tribunal Office are adhered by me as true and correct"*, flies in the face of the Court of Appeal's unequivocal finding that his decision not to participate was



a deliberate and calculated one. It could not be said in any way that he was prevented from engaging in the hearing of the Veriodale Village Land Tribunal or that the advice that he received from the Customary Lands Tribunal had the effect of preventing him from participating. The fact that the advice was wrong does not establish a constitutional breach which is actionable by Mr Wells.

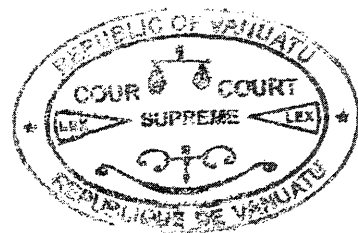
19. While Mr Leo submits on behalf of Mr Wells that the advice Mr Wells received was advice that he should not attend the Veriodali Village Land Tribunal that was not the advice received by Mr Wells. The advice (albeit incorrect) appears to be to the world at large that the decision of the Council of Chiefs should not be challenged. Once the decision was challenged it should have been abundantly clear to Mr Wells that he needed to do something about it. He did not, and as the Court of Appeal observed, that is something for which he should bear responsibility.

20. It is clear that the Court has an inherent jurisdiction to strike out a claim in appropriate circumstances.

21. In Benard v. Republic of Vanuatu [2007] VUSC 68 at paragraph 2 and 3, Tuohy J said:-

*"The Constitutional Procedure Rules of 2003 do not contain a specific provision empowering the Court to struck out an application on the grounds that it is without foundation or fictitious or frivolous. Such a provision was previously found in section 218 (4) of the Criminal Procedure Code Act which was contained within part XIII of that Act which the Constitutional Procedure Rules replaced."*

*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 the 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 struck out".*


22. Benard v. Republic of Vanuatu was cited and relied upon by Fatiaki J in Nari v. Republic of Vanuatu [2015] VUSC 132.

23. For the reasons set out in this judgment I am of the view that Mr Wells' Constitutional Petition can have no reasonable prospect of success and is without foundation. It is struck out accordingly.

24. The State is entitled to costs and costs are to be agreed within 21 days failing which they are to be taxed.

**Dated at Port Vila, this 8<sup>th</sup> day of November, 2016**

**BY THE COURT**

  
JP GEOGHEGAN  
Judge

