IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal
Case No. 24/2302 COA/CIVA

BETWEEN: **FAMILY MOLTARUSA WELLS represented by TOM MOLTARUSA, THOMPSON WELLS, PATRICK WELLS, TOMMY WELLS, KEN WELLS, JULIAN WELLS, ROBERT TOKA, ROBERT SALE**
Appellants

AND: **JOHN NALWANG – NATIONAL COORDINATOR OF LAND DISPUTE MANAGEMENT**
Respondent

Date of Hearing:	***6 November 2024***
Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice M. O'Regan*** ***Hon. Justice R. White*** ***Hon. Justice D. Aru*** ***Hon. Justice O. Saksak*** ***Hon. Justice E. P. Goldsbrough*** ***Hon. Justice M. A. MacKenzie***
Counsel:	***J. Wells for himself and as representative of the Appellants*** ***N Robert for the Respondent***
Date of Decision:	***15 November 2024***

REASONS FOR JUDGMENT

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1. This is an application for leave to appeal a decision of the Supreme Court dated 26 June 2024, declining to hear a Judicial Review claim following a Conference held under Rule 17.8 of the Civil Procedure Rules (C.P.R.) No. 49 of 2002, made under the Judicial Services and Courts Act [Cap 270]. The application for leave is made considering the decision to be interlocutory. The Respondent to this intended appeal makes no submission on the question of leave, and it is, therefore, granted. Related issues, such as a stay of the decision and costs, are dealt with in the course of our reasons on the substantive appeal.

2. The appellants were represented on the appeal by one of their members, Julian Wells. Subsequent to the hearing, he provided a sworn statement evidencing his authority to represent all the appellants.

3. The application for Judicial Review concerns the decision of the Customary Land Management National Co-ordinator to refuse to grant a Certificate of Recorded Interest in land known as Bombua, Belbarav, and Palekula on South East Santo.

4. The applicants' alleged basis of ownership is a decision of the Supenatavuitano Island Land Tribunal of 12 August 2004. The applicants described that decision as final and binding under Article 78(3) of the Constitution of the Republic of Vanuatu.

5. The Customary Land Management National Co-ordinator is appointed under the Customary Land Management Act 2013 (CLM Act). His obligation to issue a Certificate of Recorded Interest in the land (Green Certificate) arises pursuant to section 19 of the CLM Act, which provides: -

> ***"19 Creation of a recorded interest in land***
>
> *(1) Where the custom owners are determined by a nakamal, the custom land officer must ensure that the written record of the determination is filed with the office of the National Coordinator;*
>
> *(2) When a determination is filed with the office of the National Coordinator, the written record of the custom owner determination and the area of land that is owned by the group will become a recorded interest in land that may not be challenged except on the grounds of improper process or fraud;*
>
> *(3) The National Coordinator is responsible for maintaining a list of all of the decisions that have become recorded interests in land and, where requested by a custom owner, will provide a certification of the names of the custom owners and the representatives of the custom owners."*

6. The decision relied upon by the applicants (Appellants in these proceedings) is of a Supenatavuitano Land Tribunal, and that decision itself is based upon a hearing which took place before the Supenatavuitano Council of Customary Chiefs of Sanma Province in 2001. There was no hearing before the Land Tribunal, nothing more than an endorsement of the decision of the Chiefs. This became necessary because of a decision of this Court in Valele Family v Touru [2002] VUCA 3, in which it was said that a Council of Chiefs could not make a binding decision regarding ownership of custom land and that such authority or jurisdiction lay with the Island Court and, by extension, the Land Tribunals.

7. The proceedings before the Supenatavuitano Council of Chiefs culminated in a decision that the Appellants were the custom owners of Bombua, Belbarav, and Palekula lands. However, the following declaration of ownership was restricted to the land known as Bombua because the remaining two customary lands (Belbarav and Palekula) were already the subject of proceedings in the Island Court.

8. '*Endorsements*' such as that by the Supenatavuitano Land Tribunal have been considered valid in earlier proceedings. That is not the issue in this appeal. The issue, as agreed between th

parties to the appeal, is whether the endorsement by the Land Tribunal can effectively alter, amend or go beyond the decision on which it is based.

9. The Appellants submit that, on its face, the recorded decision of the Supenatavuitano Land Tribunal under section 34 of the Customary Land Tribunal Act, the predecessor to CLM Act, in Form 3 "*constitutes an accurate record of the decision for all purposes*" in accordance with section 34(1) and that, if not appealed or if there is no rehearing, the decision should be sent to the Director (the predecessor to the current CLM National Co-ordinator).

10. The Respondent submits that the decision by the Supenatavuitano Land Tribunal, made otherwise than by following the procedure outlined in Part 6 of the Customary Land Tribunal Act, can be no more than an endorsement of the decision of the Council of Chiefs and may not, absent further hearing, extend such a decision to include land not otherwise included.

11. The Respondent places further evidence to support the finding of the Council of Chiefs that the other two customary lands have been, and currently are, the subject of other proceedings. That can be found in the defence filed to the Judicial Review claim supported by the sworn statement of the CLM National Co-ordinator. It is submitted in those circumstances, that the CLM National Co-ordinator could not issue a Green Certificate in respect of land in dispute. There is and has never been any application solely for Bombua customary Land, only for all three customary lands (Bombua, Belbarav and Palekula).

12. Part 17 of CPR deals with applications for Judicial Review, and Rule 17.8 provides for a conference to be held after a defence has been filed and served. At that conference, the judge must consider certain matters as set out in CPR rule 17.8(3) and may not hear the claim unless he or she is satisfied that:

    (a) the claimant has an arguable case; and
    (b) the claimant is directly affected by the enactment or decision; and
    (c) there has been no undue delay in making the claim; and
    (d) there is no other remedy that resolves the matter fully and directly.

13. To base any conclusion, the judge is to consider the papers filed in the proceedings and hear argument from the parties (CPR Rule 17.8 (4)). If the judge is not satisfied, he or she must decline to hear the claim and strike it out (CPR Rule 17.8 (5)). That is what was done in this case. A conference was held on notice, and the parties were heard.

14. The application raised a complaint that insufficient notice was given to the Appellants. Still, on the papers, we do not find that the Appellants were not afforded ample opportunity to prepare for the Conference, which is required to be heard under the rules as soon as practicable after a defence has been filed and served. From hearing Minutes within the Appeal Book, it is apparent that several adjournments of the conference were granted. The final adjournment was granted on the basis, put forward by the present Appellants, that an impending Island Court (Land) hearing in the Molsakel case would determine whether the Appellants would proceed with the Judicial Review claim.

15. In the event, no decision was forthcoming in the Molsakel case. The parties informed us that there is now an appeal to the Supreme Court from an interlocutory decision of the Island Court (Land).

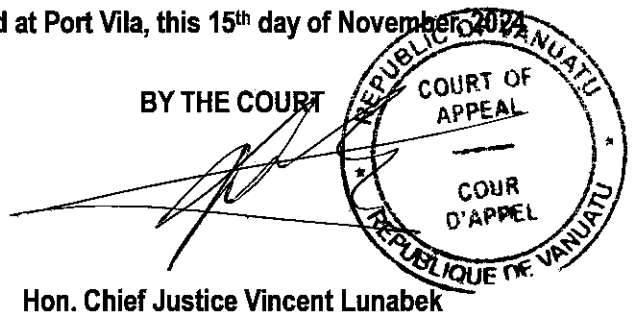
16. At the Rule 17.8(3) conference in this case, the judge determined that the present Appellants did not have an arguable case and consequently struck out the claim.

17. The judge's decision was made on 26 June 2024. In that decision, the judge set out the question to be determined, the material considered, and the reasons for her conclusion that the present Appellants do not have an arguable case. We can find no error in the material she considered or the conclusion she drew that the appellants could not rely on the endorsement of the Supenatavuitano Land Tribunal to entitle them to a Green Certificate in respect of each of the Bombua, Belbarav and Palekula lands.

18. For those reasons, this appeal is dismissed. The Appellants are ordered to pay the costs of and incidental to this appeal of the Respondents of VT 75,000.

Dated at Port Vila, this 15th day of November, 2024

BY THE COURT



Hon. Chief Justice Vincent Lunabek