

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

Civil Appeal
Case No. 25/683 COA/CIVA
[2025] VUCA 22

BETWEEN: PATRICK WELLS
Appellant

**AND: KAPTEN NAISER, KEVIN JOHN NAISER, JOE NAISER and
REMY NAISER**
First Respondents

AND: REPUBLIC OF VANUATU
Second Respondent

Date of Hearing: 8 May 2025

Coram: Hon. Justice J. Mansfield
Hon. Justice R. Asher
Hon. Justice D. Aru
Hon. Justice V.M. Trief
Hon. Justice E.P. Goldsbrough

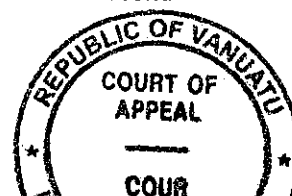
Counsel: Mr Frederick Loughman for the Appellant
Mr Sakiusa Kalsakau for the First Respondent
Mr Freddie Bong for the Second Respondent

Date of Judgment: 16 May 2025

JUDGMENT OF THE COURT

Introduction

1. This is an appeal against a Supreme Court judgment dated 6 February 2025. In that proceeding the claimant, Patrick Wells, (now the appellant), had brought a claim against Kapten Naiser, Kevin John Naiser, Joe Naiser and Remy Naiser as defendants (now the first respondents). The proceeding filed in February 2021, was based on the entitlement of Patrick Wells and his brothers as the registered proprietors of lease title 04/1832/001 located on the eastern part of Santo. It was alleged in the statement of claim that the first respondents who are all members of the Naiser family, were trespassing onto the Wells' lease title, threatening them and cutting fences. Damages were sought.
2. The claim was denied by the Naiser family defendants, who lodged a counterclaim which we discuss below. Ultimately the Republic of Vanuatu was joined also, because the Naiser family defendants sought cancellation of the Wells family lease. The Republic of Vanuatu is second respondent in this appeal.



3. The Supreme Court entered judgment for the Naiser family members on their counterclaim, and Mr Wells' claims were dismissed.
4. There is an application for an extension of time to file the appeal, and an informal application for leave to file a further affidavit of Patrick Wells.

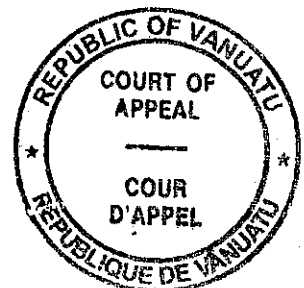
Background

5. The background to this dispute involves the efforts of Patrick Wells and his family over many years to prevent the Naiser family from trespassing on lands that are claimed to be owned by the Wells family, and efforts by the Naiser family to cancel the Wells family lease entitlement to the land.
6. There was an initial round of proceedings commenced in 2017, where a family member of the Naiser family, Naiser Nwarmokos sought orders to stop members of the Wells family from mortgaging or dealing with their leasehold title 01/1832/001 (the Wells leasehold title) pending a hearing and determination by a Land Tribunal. Orders were sought directing the Director of Lands to cancel the defendants' leasehold title, or in the alternative, permitting Naiser Nwarmokos to remain on the relevant land. It was alleged by Naiser Nwarmokos that the Wells leasehold title had been obtained by fraud or mistake.
7. In a decision of the Supreme Court dated 8 October 2018 the Wells family succeeded, and Naiser Nwarmokos failed¹. The Naiser claims were dismissed in their entirety. It was found specifically that there was no evidence of fraud or mistake in obtaining the lease of the Wells family dated 27 June 2011 (the Wells lease). The Republic of Vanuatu was a party to that decision. It was found that Naiser Nwarmokos was not in occupation of the relevant land on which the leasehold was located.
8. We will call the 2018 proceedings the first set of proceedings, and this proceeding the current set of proceedings.
9. This current set of proceedings was issued in 2021, this time in a reversal of parties by Patrick Wells, one of the members of the Wells family. He had previously been a party to the first set of proceedings. Naiser Nwarmokos, the defendant in the first set of proceedings, was not a party. The Naiser family members in the current set of proceedings were not defendants in the first set of proceedings.
10. Despite the identical issue, the doctrines of *res judicata* and issue estoppel have not been raised by the appellant. This was a correct decision. While *res judicata* generally has been accepted and applied in Vanuatu in *Family Kalmet v Kalmet*² the requirement that the same parties are involved has been expressly confirmed in *Molsir v The Teaching Service Commission*³.

¹ *Naiser Nwarmokos v Wells and others* 17/735 SC/CIVL, 8 October 2018

² [2017] VUCA 20; Civil Appeal Case 3627 of 2016 (21 July 2017)

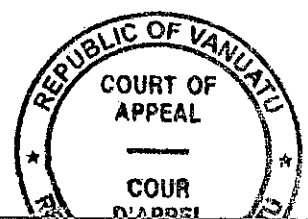
³ [2024] VUCA 34; Civil Appeal Case 1689 of 2024 (16 August 2024).



11. As well as filing a statement of defence in the current proceedings, the Naiser family members counterclaimed. They claimed that the Wells' lease had been registered by fraud and/or mistake and that the defendant was being unjustly deprived of customary land and had suffered loss. In his reply, Patrick Wells asserted that the Naiser family members could not rely on the customary land claim, and further that the lease was validly registered in relation to the relevant land and should not be cancelled as sought in the counterclaim.
12. The Republic filed a pleading saying that the lease document in favour of Patrick Wells and other family members had been registered and the lease document spoke for itself. However, contrary to its position in the first proceeding it acknowledged there was no Negotiator Certificate, Custom Owner Declaration or Certificate of Recorded Interest in land in the lease documents, and that the Land Management Planning Committee had no record of any application being processed through it. It asserts that the lease was registered in good faith based on the information supplied.
13. From 2021, when proceedings were filed, until last year, there were various interrogatories and court directions. There was a short initial affidavit of Patrick Wells, and an affidavit filed by the Republic from the Director of the Department of Lands Records, dated 1 October 2024. That affidavit from the Director, largely echoed the Naiser family statement of defence and counterclaim, acknowledging the signing of the lease and the various alleged omissions that were set out in the counterclaim. It is to be noted that the Director had, in apparent contradiction to this, also sworn an affidavit in the first set of proceedings where he had affirmed that there was a valid lease, and had not referred to the various alleged omissions that are relied on by the Naiser parties.
14. Prior to the current proceeding being heard the Naiser family had sought summary judgment of their counterclaim. It appears from the file that the lawyer for Patrick Wells only appeared at some of the conferences. He attended the summary judgment hearing by telephone, and his attendance is recorded by the judge as follows:

[10] Mr [...] conceded over the telephone. He accepted that on the evidence of the Director of Lands, [...], it was difficult for the claimant to by-pass or rebut it. Counsel accepted the requirements were not followed and left it entirely for the Court to decide.

15. In the judgment under appeal dated 6 February 2025 it was held under the heading "Summary Judgment" that Mr Wells' claims failed. Reliance was placed on the sworn statement of the Director, and the judge found that the Wells lease was obtained fraudulently and by mistake. It was ordered that the Director of Lands rectify the Land Register by cancelling the Wells lease within 30 days.
16. Since then Mr Wells has filed in support of his appeal a Sworn Statement dated 28 March 2025. In that statement he stated that he did not know of the counterclaim allegations and had no opportunity to respond to them. His lawyer had failed to inform him of them. The judgment was a surprise given the earlier Court decision that went the other way, and given his earlier sworn statement in the first set of proceedings which had led to the earlier Court dismissing the claim that the Wells lease was registered by fraud or mistake. He swore that in registering the Wells lease he had followed all the steps required by the Department of Lands.



Assessment

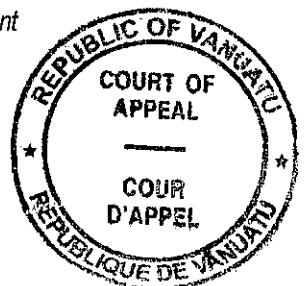
Leave to appeal out of time and to file an affidavit on appeal

17. If Mr Wells account of events is correct he has been badly let down by his counsel. The remarks made by him on the telephone appear to have been capricious and made without instructions from Mr Wells who he had not informed of the hearing. His counsel effectively abandoned any opposition to the counterclaim.
18. We are far from convinced on the strength of his very general sworn statement that Mr Wells is not free from fault in not contesting the counterclaim at the summary judgment hearing. But plainly the attendance of his lawyer by phone, and the lack of reference to the earlier judgment upholding the lease, raise serious questions about the lawyer's performance.
19. Further there is nothing to disprove the sworn statement of Mr Wells that he did not know of the summary judgment against him until 25 March 2025.
20. In these circumstances, given the evidence of Mr Wells that he did not know of the hearing and was not immediately informed of the judgment, and because as we set out below we consider that the appeal has merit, we grant an extension of time to file the appeal, and we will hear it.
21. Also, we accept the affidavit of Mr Wells filed in support of the appeal, first because he appears to have been let down by his lawyer who failed to draw crucial relevant matters to the Court's attention, as we set out below. We have also decided to accept it because it contains vital information that should have been considered by the Learned Judge when the decision of 6 February 2025 was issued.

The relevance of the first proceeding

22. In the decision appealed from there is no reference to the earlier decision which dismissed the allegations of fraud or mistake. In that decision it was found that Mr Naiser Nwarmokos was not in occupation of the land.
23. The Court now has the benefit of the affidavit filed in support of the appeal by Patrick Wells. He stated that he followed all due process in advising the Department of Lands. He has now deposed in his statement of 28 March 2025 that:

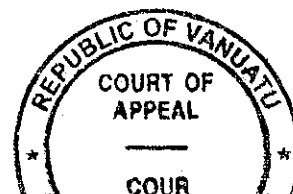
In any event, I verily believe that the ruling is wrong because I had followed all due process as advised by the Department of Lands paying all the fees and following all steps as advised [and] required to procure the lease. I have a copy of my Negotiator Certificate, Custom Owner Declaration and Department of Lands' Complete Checklist which I assume contains the LMPC approval. I have checked the lease file here in the Department of Lands in Luganville, Santo and have found out that the same documents exist in the file. I don't believe that a Green Certificate was necessary to procure a lease nor was I advised by the Department of Lands that I needed such certificates.



24. He goes on to say that he believed that the Department of Lands Records approval was done as it was included in the Department's own checklist and requirements, and that he did not need to procure the lease by any fraud or mistake.
25. The evidence of Mr Wells appears to be supported by exhibits attached to Director's affidavit of 1 October 2014. The lease is signed off by the Minister responsible for Lands. The extensive check-lists of the Department are ticked, and there is nothing to indicate that there was anything missing at the time of registration.
26. Against this background, we have concerns that the judgment was entered in ignorance of the earlier conflicting evidence and judgment about the alleged fraud or mistake in registering the Wells family lease. The exhibits we have referred to do not appear to have been brought to the Judge's attention. There is a danger here of a grave injustice being done to the Wells family, with their apparently valid lease being cancelled without full evidence and consideration. One way or another counsel should have reminded the Supreme Court judge before he entered summary judgment on the counterclaim, of the decision in the first set of proceedings. However, it was not brought to the attention of the Supreme Court Judge.
27. A Court cancellation of a lease will often have drastic results, and the Republic should ensure that all the relevant material is before the judge. We have no confidence that this relevant material was brought to the attention of the Supreme Court judge. He does not appear to have been aware when he wrote the decision, of the earlier conflicting decision, or the apparent contradiction in the Director's sworn statements.
28. The lack of reference in the judgment under appeal to the earlier decision and earlier affidavit of the Director in the first proceeding, and the real doubt that must exist as to whether the Wells' lease is in fact invalid, leads us to the conclusion that the judgment as entered must be quashed, and for the claim and counterclaim to be heard preferably with evidence in the Supreme Court.
29. We express no view on what the final outcome should be. But at the very least the parties, and in particular the unsuccessful party Mr Wells, must have an opportunity to put all relevant matters to the Court. It would be very unjust to let this judgment stand in the face of the material we have referred to. It seems that this material was not considered in the judgment under appeal.

Further sworn statement of Director

30. We have considered a sworn statement of 12 May 2024 filed by the Director after these issues were raised in the hearing of this appeal. We accept that affidavit as it is a reply in part to Mr Wells sworn statement of 28 March 2025.
31. In that sworn statement the Director states that after the twin tropical cyclones, and a suspected cyber attack, a lot of material has been lost, and that his sworn statement in the second proceeding reflected the current records of the Department. We are unable to place much weight on this, and we have referred already to what appears to be copies of the process conducted by the Department when the lease was registered. It seem to us that if there is to be a re-hearing the Director should explain those records and what they mean. Mr Wells should have the opportunity to answer the claim of irregularities.



Result


32. The appeal is allowed.
33. The case is remitted back to the Supreme Court for hearing on the respective claim and counterclaim of the appellant Patrick Wells and the various Naiser family members, and the Republic of Vanuatu.

Costs

34. As to costs, we note the fact that Patrick Wells can be seen as not having done enough to ensure that he was represented or present at the hearing. We are equally critical of the Republic for presenting what appears to have been conflicting sworn statements, and not addressing this, and not addressing the first proceeding and the different view taken, before the Supreme Court judge. The first respondents have not been at fault.
35. Accordingly, having enquired of counsel as to their views of an appropriate amount, we order in favour of the first respondents costs in the sum of VT75,000, to be paid by the appellant and the Republic equally.

DATED at Port Vila, this 16th day of May, 2025.

BY THE COURT


Hon. Justice John Mansfield

