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IN THE COURT OF APPEAL
LAND JURISDICTION
NUKU'ALOFA REGISTRY

AC 10 of 2020
(LA 21 of 2018)

BETWEEN:

[1] SIONE MA'AKE KAUFUSI
[2] SITIVENI KAUFUSI

Appellants

-and-

[1] LORD MA'AFU TUKUI'AULAHI
[2] MINISTER OF LANDS

Respondents

Appellants' application to reopen the decision on the appeal and to re-examine section 82(e) of the Land Act

Applications and cross-applications for costs

RULING

BEFORE:	PRESIDENT WHITTEN QC LCJ
Appearances:	Mr D. Corbett for the Appellants and Mr P. Piukala (as 'friend' of the Appellants) Mr S. Taione for the First Respondent Ms L. Macomber for the Second Respondent
Hearing:	18 August 2021
Ruling:	31 August 2021

The applications

1. On 8 July 2021, the Appellants' application for a single judge of this Court to reopen the Court's judgment dated 30 March 2021 ("***reopening application***"), in which the appeal was dismissed with costs, and to revisit the interpretation of s 82(e) of the *Land Act*, was dismissed as legally incompetent and misconceived: *Kaufusi v Tukui'aulahi* [2021] TOCA 7.

2. At the conclusion of that Ruling, I directed that any application for costs of the application, including any order requiring the Appellants and/or Mr Piukala to be jointly and severally liable for same, be filed within 14 days of the date of issue of the Ruling. In the absence of any such application, there would be no order as to costs.

3. On 19 July 2021, Mr Taione applied for an order for costs against the Appellants "and/or Mr Piukala". The basis for the order sought was not stated. The First Respondent was therefore directed to file any affidavit/s and submissions in

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support of his application for costs by 27 July 2021. Further, that if the application for costs was opposed, the Appellants and/or Mr Piukala were to file notices of opposition together with any affidavit/s and submissions upon which they wished to rely by 6 August 2021.

4. In response to the Court's direction, the Appellants indirectly opposed the costs orders sought by the First Respondent, but went further by filing what was described as an "Application to Vary Costs". In it, the Appellants sought orders that the costs orders made in the Land Court proceedings below and on the appeal before this Court be varied to each party bear its own and that the same order be made in respect of the reopening application ("***the cross-application***").

5. The cross-application was supported by affidavits from each of the Appellants as well as an affidavit by Mr Piukala. They each reiterated the substantive ground for the cross-application, which is discussed below.

6. The First Respondent opposed the cross-application.

7. The Second Respondent did not seek any order for costs on the reopening application and otherwise took a neutral stance on the Appellants' cross application.

8. A hearing was conducted on 18 August 2021.

Appellants' submissions

9. The bases for the Appellants' cross-application were submitted as:

   (a) Order 13 of the Supreme Court Rules; and

   (b) the decision of the Land Court in *Veikune v Kingdom of Tonga* [2008] Tonga LR 60 ("***Veikune***").

10. In *Veikune*, on 13 December 2007, Andrew J dismissed the plaintiff's action against the Crown with costs.[1] The plaintiff later applied to vary the order as to costs to each party bearing its own. The basis for that application was that the case involved a "unique Constitutional matter" that had not previously been decided in any court. On 18 March 2018, his Honour allowed the application on the basis advanced, and that the position in law had been unclear thus making it necessary for the plaintiff to bring the action.

11. Mr Corbett submitted that the statement in the judgment of this Court at [7] that "*...this precise point about the construction of s 82(e) has not been addressed by a Court in the Kingdom...*" required, by analogy, that the approach taken in *Veikone* should now be applied to vary the costs outcomes in the Land Court proceedings below and the appeal before this Court.

12. On the assumption that, in the intervening three months between the primary judgment in *Veikone* being entered and the application to vary the costs order

[1] *Veikune v Kingdom of Tonga* [2007] TOLC 6; LA 09 of 2007 (13 December 2007).

being granted, the former had been perfected, Mr Corbett was asked what power Andrew J had to vacate the earlier order as to costs. He was unable to assist.

13. When asked a similar question in relation to any power this Court now has to entertain the cross-application in respect of the orders for costs made in the Land Court proceeding below and on the finalised appeal before this Court, Mr Corbett was also unable to assist.

First Respondent's submissions

14. Mr Taione submitted, in summary, that:

    (a) the Appellants' case against the First Respondent has been on foot since 2018;

    (b) the case had taken him "a lot of time" in investigation and research;

    (c) the trial in the Land Court took four days after numerous directions hearings;

    (d) the Appellants did not appeal against the costs order of the Land Court;

    (e) Mr Piukala had previously indicated to this Court that he was "prepared to take the risk of paying any costs ordered by this Court"; and

    (f) the issue concerning s 82(e) of the *Land Act* decided by this Court was not a "unique constitutional issue" and therefore the decision in *Veikune* is irrelevant.

Consideration

15. The respective applications call for separate consideration of the Appellants' cross-application in respect of the costs orders already made, on the one hand, and the issue of costs of the reopening application, on the other.

Costs orders already made

16. For the reasons which follow, and like the reopening application, the cross-application for variation of the costs orders already made is incompetent and misconceived.

17. First, the Appellants were given leave by direction to apply for an order for costs of the reopening application. They did not seek at the time, and were not granted, leave to seek to have this Court reopen the costs orders that have been made in the Land Court proceeding and the appeal before this Court. Order 13 of the Supreme Court Rules does not apply to the instant case, nor does it provide a procedural vehicle for the cross-application directed to varying the costs orders made below or on the substantive appeal. Applications in an appeal are governed by Order 7 of the Court of Appeal Rules. The rules within that Order presuppose that the appeal, in respect of which an application is to be made, is still on foot, meaning that it has not yet been determined. Save for a ruling on the extant question of costs of the failed reopening application, the Appellants' proceeding before this Court has been determined. On that basis, the Appellants' cross-claim

in respect of the costs orders already made is procedurally incompetent.

18. Second, the decision to file the cross-application in that regard appears to have ignored the statements contained in the last ruling,[2] in relation to the very limited circumstances in which this Court, as a final court of appeal, will consider exercising its inherent jurisdiction to recall its orders, particularly once perfected. The Appellants have not identified any special circumstance which might support the exercise of that jurisdiction. Rather, they, as unsuccessful litigants, have sought to impermissibly use it as a 'backdoor method' by which to reargue their cases on costs by way of afterthought.[3]

19. Third, the varied costs order now sought in relation to the Land Court proceeding, and the novel basis for it, was not raised before that Court. That failure has not been explained on this application.

20. Fourth, apart from the general appeal against the judgment of the Land Court, the Appellants did not advance any ground of appeal before this Court to effect that the trial judge erred in making the costs order that he did.

21. Fifth, any appeal against the costs order below required leave of this Court.[4] The Appellants did not then, nor have they now, sought that leave.

22. Sixth, even if the Appellants had attempted to challenge the costs order below on the basis now advanced, as the issue was not raised before the Land Court, and it did not involve an exceptional matter such as the jurisdiction of that Court,[5] they would likely not have been permitted to raise the issue on appeal: *Taufa v Tahaafe* [2015] TOCA 7 at [21]. *A fortiori*, they should not be permitted to belatedly raise it as part of the determination of costs on the reopening application.

23. Seventh, at no time during the substantive appeal before this Court did the Appellants raise the form of order for costs on the appeal now being sought. Again, no explanation has been proffered for why they failed to do so. Therefore, and again, they should not be permitted to belatedly raise it as part of the determination of costs on the reopening application.

24. Eighth, the reliance on *Veikune*, as a purported basis for revisiting the costs orders already made, was misplaced. That case concerned the interpretation and effect of clause 44 of the Constitution[6] and s 37 of the *Land Act.*[7] As noted, some

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[2] Paragraphs 30 and 31.
[3] *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300, 303; *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119.
[4] s 10(1)(a)(iii) of the Court of Appeal Act.
[5] *Cocker v Palavi* [1997] Tonga LR 203.
[6] The King's prerogative to give titles of honour and to confer honourable distinctions and to deprive anyone who had an hereditary title of his title only if that holder of the hereditary title is convicted of treason.
[7] Any holder of any hereditary estate convicted of an indictable offence or certified by a medical officer to be insane or imbecile shall as from the date of such conviction or certificate cease to hold such title and the estate

months after judgment had been entered, the trial judge entertained and granted an application by the unsuccessful defendant to vary the costs order made to one requiring each party to bear their own because the case involved a "unique Constitutional matter" that had not previously been decided in any court. The following observations may be made:

(a) The decision of a single judge of the trial division has, with respect, no binding authority on this Court.

(b) The decision has not been referred to in any other case in the Kingdom since.

(c) His Honour referred to previous cases "*where the legal position was unclear i.e. in another matter involving the interpretation of the constitution, costs were ordered to be borne by each party*" but did not cite any. Nor was there any reference to when such costs orders were made relative to the primary judgment.

(d) There is no indication in the primary judgment as to whether the judge gave any consideration to the issue of costs prior to making the order other than that they follow the event.

(e) There is no evidence as to whether the primary judgment had been perfected or authenticated and entered in the records of the court at the time of the subsequent application and order to vary costs. The passage of three months between and the publication of the primary judgment would strongly suggest that it was.

(f) If it was, then again with respect to His Honour, it is doubtful that the decision to vacate the earlier perfected order was supported by principle. Based on the published reasons, it is even more doubtful that his Honour gave consideration to the relevant principles. With the possible exception of calling back a case during the same session in order to correct an error, once a court has pronounced a decision, it is functus officio and has no right to alter it.[8] Correction or alteration thereafter is for an appellate court.[9] Further, from what is recorded in the reasons, there is no indication that the basis for the decision was, for instance a misapprehension of the facts or relevant law which could not be attributed solely to the neglect or default of the party seeking the variation,[10] or that it fell within any of the other limited common law exceptions by which a superior court may exercise its inherent power to re-open a case as discussed in the last decision of this Court on the reopening application. See also *Kaukauloka v*

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[8] *Polynesian Airlines Ltd v Moin* [1981-1988] Tonga LR 61 (Privy Council).
[9] *Bourke v Police* [1999] TOSC 67; *Booth v R* [2017] 1 NZLR 223 at 228.
[10] *Autodesk Inc v Dyason (No 2)* (1993) 176 CLR 300, per Mason CJ at [4], recently applied in *Fuller v Albert (No 2)* [2021] NSWCA 183 (23 August 2021).

Luna'eva & Sons Co Ltd [2021] TOLC 4.

(g) Finally, even if, as a matter of general principle, *Veikune* presented a form of special circumstance by which a court could recall and vary a perfected order, the instant case is distinguishable. The issue on the appeal concerning the interpretation of s 82 of the *Land Act* was not a Constitutional issue. Nor could it be regarded as 'unique' in the sense that it had never been decided before. For when read in full, the relevant passage of the judgment of this Court on appeal stated:

> *"While this precise point about the construction of s 82(e) has not been addressed by a Court in the Kingdom (as far as we are aware), it is consistent with the construction of s 82 and other provisions of the Land Act, adopted in earlier proceedings on slightly different issues: see, for example, Fifita v Minister of Lands [1981-1998] Tonga LR 65."* [emphasis added]

25. For those reasons, *Veikune* does not provide a sound basis for the cross-application in respect of the costs orders already made.

26. Finality in litigation is important. "Controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances".[11] In *Fonua v Tonga Communications Corporation Ltd* [2009] TOCA 3, this Court emphasised the fundamental importance in the Tongan legal system and other common law systems of finality in litigation, including appeals:[12]

> *" ... An appeal is a statutory right. It is a remedy given by statute and it is not a common law proceeding...*[13] *The statutory right of appeal from a judgment of the Supreme Court of Tonga in civil cases is conferred by s 10 of the Court of Appeal Act (Cap 10). The section speaks of 'an appeal' lying to the Court of Appeal. That is, it speaks of an appeal in the singular. It is tolerably clear that the section confers a statutory right to appeal but to do so once only. Putting it slightly differently, there is no statutory right to maintain a second or subsequent appeal against a judgment where the statutory right to appeal has earlier been exercised and the first appeal has been heard and determined. There can be, of course, special and limited circumstances in which a Court of Appeal (and particularly a final Court of Appeal) can reopen a final appeal judgment disposing of an appeal...*[14] *But those circumstances provide an exception to the general and well established rule that there needs to be finality to litigation not only at a trial level but also an appellate level."*

27. Accordingly:

(a) the application to vary the costs orders in the Land Court proceeding below is incompetent; and

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[11] *D'Orta-Ekenaike v Victoria Legal Aid* [2005] 223 CLR 1 at 17, [34].
[12] [5] and [6].
[13] Citing *Da Costa v Cockburn Salvage and Trading Pty Ltd* (1970) 124 CLR 192 at 202 and *Building Licensing Board v Sperway* (1976) 135 CLR 616 at 619.
[14] Citing *Autodesk Inc v Dyason (No 2)*, ibid.

(b) no special circumstances have been demonstrated which might enliven this Court's inherent jurisdiction to reopen or vary its decision on costs of the principal appeal.

Costs of the reopening application

28. During submissions, Mr Corbett conceded, with commendable candour, that if the cross-application was unsuccessful, costs should follow the event and his clients should pay the First Respondent's costs of the reopening application.[15]

29. So much was unlikely to be controversial.[16] The conduct of a party in, relating to, or leading up to, proceedings may be reflected in an appropriate costs order.[17]

30. However, the question here is whether Mr Piukala should also be liable for those costs.

31. The genesis for the suggested possibility of an order against Mr Piukala was his involvement in the trial below. He filed documents and submissions on behalf of the Appellant plaintiffs during the proceeding. For all intents and purposes, he conducted it for them. When the matter came to trial, Niu J granted Mr Piukala leave to appear as the plaintiffs' 'friend' and to present their case. In doing so, his Honour explained:

> *"[14] Before the trial continued on 7 September 2020, I required evidence to be given as to why Mr. Piukala, who is not a law practitioner, should represent the plaintiffs. The first plaintiff (55) said that he had paid 3 lawyers to do his case and had asked 2 other lawyers but they did not want to do it. He said that he preferred Mr. Piukala because of his explanation. He said he could pay him but he must not do so and has not done so otherwise he would not be allowed to represent them in this case.*
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> *[15] The second plaintiff (65) said that he and his wife rely mainly on their children's remittance from overseas for their maintenance, although they have some crops. He said he has not paid Mr. Piukala and would not pay him for his help with their case otherwise he would not be allowed to represent them in this case.*
>
> *[16] Mr. Piukala gave evidence that he has not charged and he would not charge any fee or reward and he has not received and that he will not receive or accept any money or goods of any kind from anyone in respect of his work in connection with this case. He said that he only wants to help the plaintiffs because he thought they have rights to this land under the law."*

32. From there, Mr Piukala was single-handedly responsible for the form and content of the Appellants' notice of appeal and submissions on the appeal. He was granted a limited right of audience at the hearing of the appeal.

33. Mr Corbett then filed the reopening application. At the hearing of it, Mr Piukala

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[15] Tx 5.

[16] *Garnett v Bradley* (1878) 3 App Cas 944 at 950 per Lord Hatherley, at 959 per Lord O'Hagan; *Petar v Macedonian Orthodox Community Church St Petka Inc (No 2)* [2007] NSWCA 142 at [28].

[17] *Attorney-General (SA) v Marmanidis (No 2)* [2019] SASCFC 77.

appeared with Mr Corbett at the Bar table.

34. Finally, it was Mr Corbett who filed the cross-application in relation to costs. As noted above, that application was also supported by an affidavit from Mr Piukala. In it, he deposed that *he* was applying and asking the Court to vary the costs orders made and for an order that each party bear his own costs of the reopening application.

35. That unusual level of involvement for a 'friend' of the Appellants elicited questions as to whether Mr Corbett had in fact received his instructions for the reopening application from the Appellants themselves or from Mr Piukala. During the most recent hearing, with less alacrity than the first concession referred to above, Mr Corbett eventually informed the Court that, although he attended a number of meetings with the Appellants and Mr Piukala, his instructions came from Mr Piukala.

36. Mr Taione's written application did not state why costs should be ordered against Mr Piukala. During oral submissions, he explained that Mr Piukala should be liable for his client's costs because:

    (a) the proceeding below was prolonged unnecessarily due to Mr Piukala's lack of procedural knowledge;

    (b) Mr Piukala was the author of the Appellant's submissions on appeal;

    (c) Mr Piukala had been adversely vocal on social media since the outcome of the appeal to further his political interests; and

    (d) Mr Piukala had indicated at the conclusion of the hearing on the reopening application that he was prepared to 'take the risk' on costs if that application was found to have been misconceived.

37. During the costs hearing, Mr Piukala (who on that occasion sat behind Mr Corbett in the public gallery) was given an opportunity to be heard. He stated, in summary, that:

    (a) the Appellants originally approached him for help;

    (b) Niu J decided the case below on s 82(e) even though it had not been raised by the defendants;

    (c) he was not given full leave to argue the issue on the appeal;

    (d) as such, he felt that the Appellants had not received a fair trial;

    (e) the motivation for the cross-application was the receipt of the Second Respondent's bill of costs on the appeal for some $16,000;

    (f) he felt it was 'very unfair' that the Appellants had lost the subject land that belonged to their grandfather's brother and were then 'hammered' with a heavy costs claim;

    (g) before deciding to file the reopening application, he and the Appellants

intended to petition for a Royal commission in relation to s 82(e); and

(h) Mr Corbett informed him that there was an avenue 'to exhaust the court system' by effectively further appealing this Court's decision.

38. Mr Corbett did not demur from that last proposition.

39. The Ruling on the reopening application concluded with the following:

> *"[33] On the question of costs, if any, during the hearing, it was indicated to Mr Piukala that if the applicants wished to maintain their application, as authored by him, and if it was ultimately determined that the application was misconceived, the Court would entertain any application for costs against Mr Piukala personally. In that regard, the parties are referred to s 11 of the Court of Appeal Act and the following passage from the decision in Latu v Magistrates Court of Tonga [2020] TOSC 81:*
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> > *'[43] ... s.15 of the Supreme Court Act provides, relevantly, that 'the costs of every proceeding in the Court shall be in the discretion of the Court as regards the person by whom they shall be paid'. As discussed recently in Jurangpathy v Tonga Communications Corporation [2020] TOSC 2, even that apparent limitation to the discretion is to be interpreted broadly and consistent with the Supreme Court's inherent jurisdiction.[18] Further, and in the context of whether a court has jurisdiction to order costs against a non-party, it has been held that the phrase 'determine by whom ... costs are to be paid' is not to be read as if it were 'determine the party by whom ... costs are to be paid': Oshlack v Richmond River Council (1998) 193 CLR 83 at [38].[19]'*

40. The statutory sources referred to above, together with this Court's inherent jurisdiction to regulate its own procedure, provide the foundation for a discretionary power to order costs against a non-party. The issue, however, is whether that discretion should be exercised in this case.

41. The general rule is that an order for costs against a non-party may only be made in exceptional circumstances.[20] Such an order may be made, if in all the circumstances, it is just to do so.[21] Generally, the non-party must have some connection with the proceedings.[22] A non-party who plays a role in the management of litigation is at greater risk but it is usually necessary to show that

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[18] *Uata v Kingdom of Tonga* [2006] Tonga LR 205.
[19] Referring to *Knight v FP Special Assets Ltd* (1992) 174 CLR 178, per Gaudron J at [2] and *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965.
[20] *Locabail (UK) Ltd v Bayfield Properties Ltd (No 3)* (2000) Times, 29 February; *Gardiner v FX Music Ltd* [2000] All ER (D) 144; *Cormack v Washbourne (formerly t/a Washbourne & Co (a firm))* [2000] All ER (D) 353, CA.
[21] *Globe Equities Ltd v Globe Legal Services Ltd* [1999] BLR 232, [1999] All ER (D) 226, CA; *Re Aurum Marketing Ltd (in liquidation)* [2000] 2 BCLC 645, sub nom *Secretary of State for Trade and Industry v Aurum Marketing Ltd* [2000] All ER (D) 1009, CA.
[22] *Murphy v Young & Co's Brewery plc and Sun Alliance and London Insurance plc* [1997] 1 All ER 518, CA.

the third party did so in bad faith or with an ulterior motive.[23] For example, in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2005] 4 All ER 195, costs orders were made against a non-party where it was considered that appeals would not have been made without its assistance.

42. Ultimately, after considering the evidence and the principles referred to above, I am not convinced that it is just to order costs against Mr Piukala for two reasons. Firstly, notwithstanding Mr Taione's assertion, there was no evidence that Mr Piukala's involvement in the litigation, the appeal and, more specifically, the reopening application, was instigated by any ulterior or political motive on his part. Secondly, the decision to file the reopening application was the product of Mr Corbett's advice.

43. Overall, the Appellants have incurred significant costs as a result, initially (and ironically), of following Mr Piukala's advice, and more recently, by indirectly following Mr Corbett's. It will be a matter for them if they wish to pursue their rights, if any, to recover those liabilities against one or both advisors.

Result

44. For the reasons stated:

    (a) the Appellants' cross-application to vary the costs orders below and on the appeal is refused; and

    (b) the Appellants are to pay the First Respondent's costs of and incidental to:

        (i) the reopening application; and

        (ii) opposing the Appellants' cross-application for costs.

NUKU'ALOFA
31 August 2021

SUPREME COURT TONGA

M. H. Whitten QC LCJ
PRESIDENT

[23] *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 All ER 418, CA.