IN THE NAURU COURT OF APPEAL

AT YAREN

CIVIL APPELLATE JURISDICTION

Civil Appeal No. 1 of 2025

Supreme Court Civil Case No. 3 of 2024

BETWEEN

LEO SCOTTY of Boe District, Nauru

APPLICANT

AND

Milton Dube of Aiwo District, Nauru

RESPONDENT

BEFORE: **Justice R. Wimalasena,**

President

DATE OF HEARING: **13 June 2025**

DATE OF RULING: **28 July 2025**

CITATION:	**Leo Scotty v Milton Dube**
KEYWORDS:	Application for leave to appeal out of time; Interlocutory injunction; Strike out; Abuse of process
LEGISLATION:	S.19, 20 & 26 of the Nauru Court of Appeal Act; Rule 17 of the Nauru Court of Appeal Rules; Order 15 Rule 19 of the Civil Procedure Rules 1972
CASES CITED:	Dongabir v Adumar [2023] NRCA 1; Civil Appeal 03 of 2020 (14 February 2023); Harris v Doweiya [2023] NRCA 15; Civil Appeal 1 of 2023 (30 June 2023); Alona v Narayan [2022] NRCA 1; Civil Appeal 4 of 2019 (26 August 2022)
APPEARANCES:	
COUNSEL FOR the Applicant:	**V. Soriano**
COUNSEL FOR the Respondent:	**M. Degei**

RULING

1. The intended Appellant (Respondent) filed an application for leave to appeal out of time against a ruling delivered by the Supreme Court on 28 June 2024, which refused the Respondent's application for an interim injunction. The

Respondent's application to appeal out of time, filed on 08 January 2025 seeks the following orders:

a) Leave to appeal out of time the decision of the Supreme Court delivered on the 28 day of June 2024;
b) The Intended Appellant to file the Notice of Appeal within 7 days of the grant of leave;
c) Pursuant to the leave granted under paragraph (a) the decision or order of the Supreme Court be stayed (in the interim pending this application) or (until final determination of the Appeal);
d) Costs of this application be costs in the cause.

2. On 28 April 2025, the intended Respondent (Applicant) filed a notice of motion to strike out the application for leave to appeal out of time filed by the Respondent. Accordingly, the parties were requested to file their written submissions in relation to the strike-out application, and the matter was taken up for hearing on 13 June 2025. Counsel for the parties argued the matter and made oral submissions. This is the ruling on the said strike-out application.

3. I have considered the submissions filed by the parties, as well as their arguments at the hearing. The Applicant submitted that the application for leave to appeal amounts to an abuse of process, as it does not comply with section 19(4) of the Nauru Court of Appeal Act 2018 (the Act).

4. The Applicant made this application to strike out pursuant to Rule 17 of the Nauru Court of Appeal Rules 2018 (the Rules), read with Order 15, Rule 19(1)(d) of the Civil Procedure Rules 1972. Rule 17 provides that "subject to these Rules, the Civil Procedure Rules shall apply to an appeal under Part 6 of the Act."

5. The Respondent's counsel argued that the Rules do not provide a procedure for bringing an application to strike out. Furthermore, counsel submitted that

the strike-out application filed by the Applicant is itself an abuse of process, as the Civil Procedure Rules do not apply to matters before the Court of Appeal. It was contended that the Civil Procedure Rules apply only to suits, as stated in Order 15, Rule 19, and that the said provision does not extend to appeals.

6. This argument must be considered in the full context of the purpose of Rule 17. It is clear that such provisions are intended to fill procedural gaps and must be applied with the necessary modifications to serve their intended purpose. I am not inclined to accept the Respondent's argument, in light of the express wording of Rule 17. While it is correct that neither the Rules nor the Act contains an explicit provision addressing an application of this nature to strike out, the law has clearly provided an avenue to be followed in situations where no specific provision exists, namely by resorting to the Civil Procedure Rules for appeals brought under Part 6 of the Act. It should also be noted that it has been the consistent practice of this Court, even in earlier cases, to adopt this approach.

7. Rule 19(1) of the Civil Procedure Rules 1972 provides:

> 19(1) The Court in which any suit is pending may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ of summons in the suit, or anything in any pleading or in the indorsement, on the ground that:
>
> ...
>
> (d) it is otherwise an abuse of the process of the court;
>
> And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> ..."

8. In view of the provisions outlined above, it is evident that there is no bar to a party bringing an application to strike out on the grounds of abuse of process in a matter before the Court of Appeal. Rule 17 of the Court of Appeal Rules

expressly permits recourse to the Civil Procedure Rules in circumstances where the Rules are silent, thereby filling procedural gaps. Accordingly, I find that the present application has been properly brought in accordance with the applicable procedural law. I am not persuaded by the argument that the strike-out application constitutes an abuse of process.

9. I will now consider the nature of the appeal that the Respondent intends to file, for which the application for leave to appeal out of time was made. In this context, it is pertinent to examine the order of the Supreme Court that the Respondent seeks to challenge. The first paragraph of the Supreme Court's ruling states that the Respondent (who was the plaintiff in that case) "filed a summons supported by his affidavit seeking an interim injunction...". It is therefore clear that the matter before the Supreme Court was an application for an interim injunction. The Supreme Court ultimately ordered; "The application for an interlocutory injunction by the plaintiff (the Respondent) is dismissed. Costs will be in the cause."

10. Furthermore, when this application was taken up for hearing, I inquired from counsel whether the substantive matter, in relation to which the interlocutory injunction was sought, had been concluded. Counsel confirmed that the substantive matter had not yet been determined. It is therefore evident that the intended appeal to be filed by the Respondent, following the application for leave to appeal out of time, relates solely to the refusal of the interlocutory injunction. This Court has previously addressed at length the distinction between interlocutory and final orders in Dongabir v Adumar [2023] NRCA 1; Civil Appeal 03 of 2020 (14 February 2023), where a somewhat similar issue arose concerning the refusal of an application for leave to appeal out of time by the Supreme Court. In that judgment, it was stated:

> [27] It is clearly discernible that the application for appeal out of time in the court below was merely an interlocutory application which was not an appeal, action, suit or other original proceeding commenced in

the District Court or the Supreme Court. The counsel for the Appellant also submitted in his oral submissions during the hearing that the proceedings before the lower court was an interlocutory proceeding. The substantive matter commenced in the Nauru Lands Committee and what was before the Supreme Court was merely an interlocutory application.

[28] In the circumstances, we are not inclined to accept that the refusal of appeal out of time application against a determination of the Nauru Lands Committee amounts to a final determination of a civil proceeding within the scope of Part 6 of the Nauru Court of Appeal Act. Therefore, we decide that section 20 of the Nauru Court of Appeal Act has no relevancy to a refusal of an application for appeal out of time in respect of a determination by the Nauru Lands Committee.

[29] Be that as it may, it is vividly clear that the proper construction of the legislation is to prefer the order approach instead of application approach in determining if an order is final or interlocutory. In so far as the instant case is concerned the court must objectively look at the nature of the ruling to apply the order approach test. In that regard the court must consider the legal effect rather than the practical effect of the ruling.

11. Nevertheless, the counsel for the Respondent argued that the ruling of the Supreme Court on the interlocutory injunction fully determined the rights of the parties. Therefore, the Respondent counsel submits that the ruling given by the Supreme Court should be considered a final order, and section 20 of the Act should become applicable to his application for leave to appeal out of time. Section 20 of the Act stipulates:

> "A judgment, decision or order which results in the final determination of a civil proceeding, despite the application being interlocutory in

nature, shall not be constituted as an interlocutory order for the purposes of section 19(3)(f)."

12. It should be noted that an interlocutory application does not determine the substantive rights of the parties. Even if the reasoning for granting or refusing an interlocutory injunction involves a consideration of issues related to the final rights of the parties, such a ruling remains effective only until the final determination of the matter. At the conclusion of the substantive proceedings, the court may either dissolve the interim injunction or grant a permanent injunction, and that final outcome is independent of the earlier interlocutory ruling. Therefore, I am not inclined to accept the argument advanced by the Respondent's counsel that the Supreme Court's ruling on the interlocutory injunction amounted to a final determination of the parties' rights.

13. Furthermore, counsel for the Respondent submitted that this matter involves an issue of public interest and that the Supreme Court's ruling on the interlocutory injunction is repugnant to the customs and usages of Nauru. I acknowledge that matters relating to customs, and usage are indeed delicate and of national importance. However, it must be noted that the present strike-out application is not intended to extinguish the Respondent's right of appeal. Rather, it challenges the procedural propriety of the respondent's failure to comply with the relevant provisions by not first seeking leave from the Supreme Court before appealing against the interlocutory order. Even if the applicant were to succeed in this strike-out application, it would not preclude the Respondent from pursuing the appropriate course and advancing arguments on the merits of the appeal through the proper procedural channels.

14. In Harris v Doweiya [2023] NRCA 15; Civil Appeal 1 of 2023 (30 June 2023) the requirement of seeking leave from the Supreme Court was discussed as follows:

[8] I prefer the submissions made by Ms Lekanaua and accept that the construction of these provisions of the Court of Appeal Act, an appeal against an injunction granted in an interim application by the Supreme Court is interim and interlocutory and leave is necessary. First reason I give is of because of the fact that the substantive matter is still pending in the Supreme Court. In the interim, the respondent had applied before the Supreme Court for an injunction and was granted and injunction to preserve the status quo until the matter is determined by the Supreme Court..."

[10]... it is clear to me that an interim injunction is not covered by Section 19(3)(f) of the Court of Appeal Act and the converse of that is, where an appellant seeks to appeal an interim injunction granted by the Supreme Court, leave is necessary and the first place to go to seek leave to appeal to grant of an interim injunction is the Supreme Court pursuant to Section 20."

15. Section 19(3)(f)(ii) provides that no appeal shall lie without leave of the Supreme Court or the Court from which an interlocutory judgment, decision or order given by the Supreme Court except in cases; where an injunction is granted or refused.

16. The counsel for the Applicant submitted that the Respondent failed to comply with the correct procedural requirements for appealing against the Supreme Court's ruling that refused the interlocutory injunction. In view of the above judgment, it is clear that leave is required before appealing a refusal of an interlocutory order. However, the Respondent proceeded to apply directly to the Court of Appeal for leave to appeal out of time, without first seeking leave from the Supreme Court. It appears that section 19(4) of the Act provides that:

"Where leave is required of the Supreme Court to appeal to the Court, the order in which the application shall be made is first to the Supreme Court and if declined, to a single justice.

17. Furthermore, the counsel for the Applicant submitted that the Respondent's non-compliance with the prescribed procedural steps must be treated seriously by this Court. In support of this submission, the counsel drew the Court's attention to section 26 of the Act, which provides that the Court shall not entertain any appeal made under this Part unless the appellant has fulfilled the conditions prescribed by the Act or the Rules of the Court. In light of this provision, I am not inclined to accept the Respondent's argument.

18. In Alona v Narayan [2022] NRCA 1; Civil Appeal 4 of 2019 (26 August 2022) it was stated:

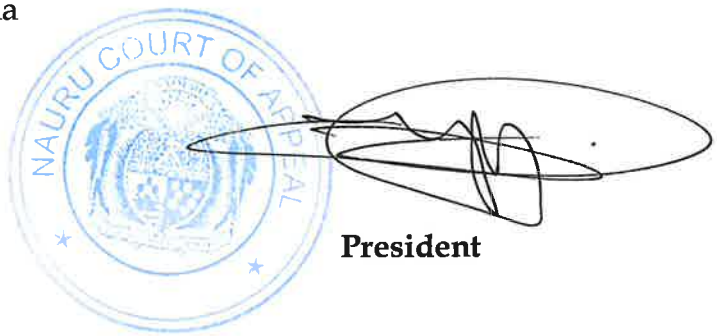
> [8] The Nauru Court of Appeal Rules, 2018, provides for the orderly, expeditious and inexpensive disposal of applications and appeals and enables the parties to an application or appeal to prepare and present their cases and responses to the other parties, comprehensively and in a fair manner.
>
> [9] It is imperative to note that the Rules should be complied with, unless waived by the Court.

19. In the circumstances, I am of the view that section 20 of the Act does not provide an exception applicable to the Respondent's case. As discussed above, it is clear that the Respondent should have first sought leave to appeal from the Supreme Court, and only if such leave was refused could an application have been made before a single justice of the Court of Appeal. I am not convinced by the arguments advanced by the Respondent. There is no apparent obstacle preventing the Respondent from first applying to the Supreme Court for leave.

20. Accordingly, I order that the application for leave to appeal out of time be struck out, as it amounts to abuse of process. The Respondent is ordered to pay costs summarily assessed in the sum of 200 dollars to the applicant.

Dated this 28 July 2025.

Justice Rangajeeva Wimalasena



President