

**Bank of Tonga v Kolo, Vete & Ma'u (No.2)**

Supreme Court, Nuku'alofa

Hampton CJ

10 C 1019/92, 836/92, 701/93

2 February &amp; 8 March 1996

*Appeal - application for leave - interlocutory judgment*

This was, in effect and as treated, an application for leave to appeal the judgment reported immediately above.

20 Held:

1. The application for leave was necessary because the judgment was an interlocutory one, and not final, dealing as it did with "an order made for or relating to the enforcement of an earlier order (whether such order is final or interlocutory)".
2. Leave was declined as (a) the applicant had other avenues available and unexplored; (b) the appeal hearing would be by way of written argument only; (c) yet further delays would result; (d) the stance of the judgment creditor was misconceived. Proper originating documents seeking the relevant orders for possession must be filed (or properly amended before judgment) and judgment made thereon before execution is sought.

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Statutes considered:

Court of Appeal Act, ss10, 15

Regulations considered:

Court of Appeal Rules 1990 O.4 r.1, O.7 r.1

Rules of the Supreme Court (UK) O.59 r.1A

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Counsel for judgment creditor :	Mr Macdonald & Ms Osmundsen
Counsel for Kolo & Ma'u :	Mr Hoha
Counsel for Vete :	Mr Kaufusi

**Judgment**

The substantive Motion on Appeal was filed within the prescribed time limit (42 days - s.10(2) Court of Appeal Act, as amended).

I accept that the Applicant did not realise leave was required, but thought the appeal was as of right.

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If required I extend the time prescribed to include the 26 January 1996, the day this

Application for leave was filed (Court of Appeal Rules 1990, O.4 r.1 O.7 r.1).

From either of two points of view leave to appeal is required and must be sought initially from the Judge at first instance.

If the judgment appealed from is a final judgment, and I do not find that this judgment under review fits that description, in any event it is not a judgment where the sum awarded is, or exceeds, \$1000. It is not a judgment for any sum at all. Therefore leave would have to be sought under s.10(1)(a) Court of Appeal Act.

If it is an interlocutory judgment, and that, in my judgment, is the correct view, then leave must be sought (s.10(1)(b)). I say that that is the correct view having regard:-

- (a) to the lack of definition of the terms "final" and "interlocutory" in our law (whether in any relevant Act or in our Supreme Court Rules and Court of Appeal Rules).
- (b) therefore to the rules of procedure in England and in particular to the Rules of the Supreme Court 1991 O.59 r.1A and the definitions of those terms "final" and "interlocutory" in the appellate context contained therein and especially r.1A(6)(cc) where "interlocutory" orders are extended to include "an order made for or relating to the enforcement of an earlier order (whether such order is final or interlocutory)....".

Leave having been properly sought, I now turn to the exercise of my discretion as to whether leave should be granted.

I am influenced by these factors:-

- (a) that this is an interlocutory judgment appealed from and, as outlined in the judgment itself, it is not the end of the matter from the Applicant's point of view. Over and above any appeal it, the Applicant, still has other avenues unexplored (and on 2nd February I adjourned this application for a further 5 weeks to enable the Applicant to further consider some of those avenues, although on the 8th March Mr. Macdonald continued the argument and tendered written submissions).
- (b) that the appeal, if leave were given, would be regulated by the provisions of s.10(3) and s.15 of the Court of Appeal Act i.e. the appeal would be conducted on written argument only and there would be no oral hearing.
- (c) that the Applicant has taken a long time to get this far in these proceedings. Allowing leave to appeal is only going to further delay matters and its turning, if it so desires, to the other avenues I have already referred to.
- (d) the reasons set forth in my Judgment which is sought to be appealed against. In my view the stance on behalf of the Bank is misconceived. Proper originating documents (on writ and statement of claim) seeking the orders for possession (whether of land or chattels) must be filed (or properly amended before judgment); and judgment made thereon before execution is sought (as is being done here, in an attempted short-circuit in effect).

I decline to grant leave to appeal.