

IN THE COURT OF APPEAL OF TONGA  
LAND JURISDICTION  
NUKU'ALOFA REGISTRY

AC 4 of 2017  
LA 3 of 2015

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**BETWEEN :** TANIELA FAKALOLO KIVALU

**Applicant**

**AND :** SEMISI TUPOUTO'A TAUFU'I

**Respondent**

**BEFORE PRESIDENT PAULSEN**

**Counsel:** Mr. O Pouono for the applicant

**Hearing:** On the papers  
**Date of Ruling:** 8 June 2017

**RULING**

**An application for leave to appeal**

- [1] This is an application for leave to appeal from consent orders made in proceedings before the Land Court between Uilisoni Kivalu and the applicant as plaintiffs and the respondent as defendant under LA 3 of 2015.

[2] The consent orders were made during the hearing of the action. The applicant was not present in Court when his lawyer sought the consent orders and says that he is disappointed with his lawyer and wants to be heard to present his side of the case.

[3] The application has been dealt with on an *ex parte* basis.

**The relevant facts**

[4] Uilisoni Kivalu (Uilisoni) and the applicant are father and son. Proceedings were commenced by them against the respondent in the Land Court under LA 3 of 2015.

[5] The statement of claim alleged that in 1995 Uilisoni made an agreement with the respondent to pay TOP\$3,000. In return the respondent was to allow Uilisoni to occupy 10 perches of the respondent's town allotment and once the full TOP\$3,000 was paid the 'allocated land will be given' to Uilisoni. The statement of claim goes on to allege that in breach of the agreement the respondent was 'reluctant to give the sole right to use the 10 perches of his land to the plaintiffs'.

[6] The statement of claim also pleads that the applicant 'joins in' the action because Uilisoni was 'of old age' and Uilisoni had empowered the applicant 'to be joined in this proceeding'. No application was made for the applicant to act as Uilisoni's next friend and having heard evidence from Uilisoni it is clear there was no basis to do so.

[7] The action was defended and came on for hearing on 10 January 2017. Mr. Pouono appeared for the plaintiffs. Uilisoni was in

attendance and gave evidence but the applicant was in the United States. I do not need to traverse Uilisoni's evidence except to say that it was plain that Uilisoni had no grievance with the respondent (who he described as a good friend) and was happily living on the respondent's land with his consent. Far from being 'reluctant' the respondent had taken no steps to remove Uilisoni.

[8] Uilisoni said that he had come to court because he had been told to be there and I was left with the clear impression that he had not been consulted about being named as a plaintiff in an action against the respondent and would not have given his consent had he been so. It appears this is not an uncommon occurrence in Tonga particularly in land cases and is a major concern.

[9] After Uilisoni had given his evidence the Court took an adjournment. Unsurprisingly, given Uilisoni's evidence, following the adjournment Mr. Pouono sought consent orders which were made in the following terms:

The claim is withdrawn

Costs are awarded to the defendant in the amount of his return airfare to Tongatapu from Vava'u. I reserve leave for the defendant to apply to fix the amount payable in the event of any dispute.

**The applicant's affidavit**

[10] The applicant's affidavit in support of his application for leave to appeal is a terse and unsatisfactory document. He says that he could not attend the hearing because he had 'some misunderstanding with

Fiji Airlines' but he does not say what the misunderstanding was or how it prevented him from attending the hearing.

[11] The applicant says that he received email advice from Mr. Pouono that because of Uilisoni's evidence the claim must be withdrawn. He also says he communicated with Mr. Pouono but, importantly, does not state the content of the communication.

[12] The applicant says he wants to be heard but does not say what his evidence will be and how it can overcome the evidence of Uilisoni that he has no claim or grievance against the respondent.

[13] The applicant also rather cryptically describes himself as 'the guardian of the land in which the proceeding was related to' without any explanation of what that means.

**The law**

[14] The applicant requires leave to appeal to the Court of Appeal from an order made by consent (section 10(1)(a)(iii) Court of Appeal Act). The application for leave may be made to the Judge of first instance or by a single Judge of the Court of Appeal. This application has been made to the Court of Appeal and under O.7 Rule 1 Court of Appeal Rules, an application made to the Court of Appeal may be made on an *ex parte* application supported by an affidavit and determined without a hearing.

[15] The application does not identify the principles that determine whether it is appropriate to grant leave to appeal. I recently dealt with an application for leave to appeal from an interlocutory order in *Siasi*

*Tokaikolo 'Ia Kalaisi v Tu'ionetoa & Ors* (Land Court, LA 22 of 2015 31 January 2017, Paulsen LCJ) and made the following comments which are apposite in this case:

It is implicit in the fact that leave is required to appeal from an interlocutory order that the granting of leave should not be given as a matter of course. The circumstances where leave is granted are likely to be uncommon (*'Utoikamanu v Lali Media Group Ltd* [2003] Tonga LR 184). This is particularly so given the desirability of the expeditious resolution of court proceedings and the elimination of unnecessary delay.

#### **Discussion**

[16] The thrust of the applicant's case is that Mr. Pouono should not have agreed to withdraw the action. Based on the limited evidence before me I am satisfied that Mr. Pouono had authority to withdraw the action. The issue was dealt with by the Court of Appeal in *Vaitu'ulala v 'Iongia* [2011] Tonga LR 75 at [8] and [9] where the Court said:

The general rule, as a matter of law, is that if counsel is briefed to appear for a party in litigation, then counsel has an implied authority to conduct the litigation as counsel thinks fit (though plainly he or she must do so having regard to the interests of the client) and has authority to settle or compromise litigation without express instructions to do so: see generally Halsbury's Laws of England, 4th ed, Vol 3(1), Barristers, para 517 and following. That is not to suggest it is not a regular and desirable practice for counsel to get express instructions to settle on particular terms before doing

so. It has been, in our experience and knowledge of practices of the bars of common law countries, usually the case that counsel does get those express instructions. But these practices do not derogate from the legal rule that counsel has general authority to conduct and settle litigation notwithstanding the absence of particular instructions to settle on specific terms.

There is, however, a qualification to this legal rule, namely counsel has no authority to settle on specific terms if counsel has express instructions which would preclude the settlement on those terms, such as express instructions not to settle at all or express instructions not to settle on specified terms which are different from those that are proposed (for example express instructions not to settle for less than a specified sum). There is precedent which suggests counsel's apparent authority to compromise cannot be limited by instructions, not even the withdrawal of instructions, unknown to the other party: *Taylor v Cogswell* (1965) 109 S.J. 495. But it is unnecessary for us to consider whether this is correct because, on the appellant's own affidavit, it is not apparent that counsel appearing for him in the appeal before us had express instructions which prevented him from agreeing to the terms on which the appeal was settled and the consent orders which were made.

[17] Mr. Pouono correctly sought instructions from the applicant before withdrawing the action notwithstanding the hopeless position he faced. Nowhere in the applicant's affidavit does he say that he gave

Mr. Pouono instructions that he was not to settle the action or that he gave express instructions not to settle on specified terms. I am satisfied therefore that Mr. Pouono had authority to settle on the terms reflected in the consent orders and there is no basis for them to be set aside justifying the grant of leave to appeal.

[18] But that is not an end of the matter and I would refuse leave for other reasons in any event.

[19] The action is based on an alleged agreement between Uilisoni and the respondent. The applicant was not a party to that agreement and he has no right to sue on it. He should never have been a party to the action and has no standing to bring an appeal.

[20] Secondly, even if the applicant had standing there is nothing in his affidavit to indicate that if the action is reheard it has any prospect of success. The applicant says he wants to be heard but not what he wants to say. The prayer for relief in the statement of claim seeks 'An order of [sic] directing the parties to carry on what was agreed between them' and in the alternative the cancellation of the agreement and repayment of the TOP\$3,000. Uilisoni made it plain that he is happy with how the parties are presently carrying on.

[21] Finally, the amount of money at stake is very modest and the case does not raise any issue of public importance. The interests of the applicant in pursuing an appeal are outweighed by the public interest in ensuring finality of litigation.

[22] Having given careful consideration to the application I refuse leave to appeal for the following reasons:

[22.1] I am satisfied that Mr. Pouono had authority to settle the action.

[22.2] Even if the consent orders were to be set aside the applicant has no standing to bring the action and the action has no merit in any event.

[22.3] Uilisoni has given evidence that he has no grievance with the respondent.

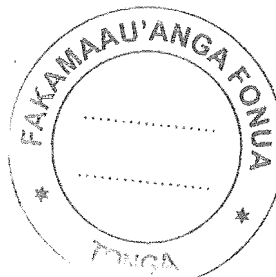
[22.4] The amount at stake is modest and does not justify the costs of an appeal.

[22.5] No issues of public importance or principle arise.

**Result**

[23] The application for leave to appeal is dismissed.

**NUKU'ALOFA: 8 June 2017**



**O.G. Paulsen**  
**PRESIDENT**