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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY LA 22 of 2015

BETWEEN: SIASI TOKAIKOLO 'IA KALAISI

Plaintiff

AND: POHIVA TU'I'ONETOA

First Defendant

AND: KAVA FA'OLIU

Second Defendant

AND: SIONE HAVILI MAILE

Third Defendant

AND: MO'UIFO'OU 'IA KALAISI FELLLOWSHIP

Fourth Defendant

BEFORE THE PRESIDENT PAULSEN

Counsel: Mr. L. Niu SC for the defendants

Date of Hearing: Ex parte application on the papers

Date of Ruling: 30 January 2017

RULING ON APPLICATION FOR LEAVE TO APPEAL

recd 06/02/17

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY **LA 22 of 2015**

An application for leave to appeal

[1] On 1 December 2016 I issued a ruling granting in part the defendants' application for leave to file an amended statement of defence. In the exercise of my discretion I refused the defendants leave to raise new defenses contained in paragraphs 35-37 and 39 of their proposed amended statement of defence. The defendants have sought leave to appeal from that decision.

[2] The defendants require leave to appeal to the Court of Appeal from an interlocutory ruling of this Court (section 10 Court of Appeal Act). The application for leave may be made to the Judge of first instance or the Court of Appeal.

[3] 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. In this case the application seeks leave of the Judge of first instance, but curiously it has been filed in the Court of Appeal. The application should have been filed in the Supreme Court. I am treating the application as having been made to me in the Supreme Court and not as a Judge of the Court of Appeal.

[4] The application does not identify the principles that the Court should apply in deciding whether it is appropriate to grant leave. Unfortunately, the requirements of O.13 Rule 3(c) Supreme Court Rules that applications state the rule, statutory provision or principles of law relied upon is invariably ignored by Counsel.

This imposes an unacceptable burden on the Court to do research that it can reasonably expect Counsel will have undertaken before the application was filed.

[5] 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.

[6] It is not sufficient that the application for leave establish an error of fact or law in the decision that is challenged. The error must be one which threatens real detriment or raises an important point of law or is a matter of public importance. The Court is likely to refuse leave where the issues to be decided on the proposed appeal will be overtaken by the substantive proceeding ('*Utoikamanu* (supra)).

[7] The defendants argue that leave ought to have been granted to them to pursue all of the proposed defenses because they are all substantial and arguable.

[8] First, the defendants argue that the plaintiff's application for registration under the Charitable Trusts Act 1993 (the Act) was not accompanied by a Constitution approved by its Conference so that the plaintiff 'failed to become incorporated' and cannot hold property or sue (paragraphs 35, 36 and 37 of the draft amended

statement of defence and paragraphs 2 and 3 of the application for leave and paragraph 1 of the draft notice of appeal). The failure to observe a procedural requirement does not render registration under the Act a nullity. There is nothing in the Act or in case law to suggest such a radical approach and no authority was provided by Mr. Niu in support of this submission. Pursuant to section 7(2) of the Act, from the date of incorporation the Board "shall be a body corporate". Its status as an incorporated body remains until the Board has been dissolved (section 22). It is unarguable that the plaintiff is an incorporated body able to both hold property and bring an action.

[9] The defendants then argue that I made an error in finding that unincorporated religious bodies are recognised by clause 108 and ss. 17 and 18 of the Land Act (paragraph 37 of the draft amended statement of defence and paragraph 2 of the notice of appeal). As the plaintiff is incorporated the rights of unincorporated religious bodies in Tonga are moot in the context of this action.

[10] It is not at all clear to me what the defendants intend by paragraph 2 of the draft notice of appeal which states that ss. 17 and 18 of the Land Act and clause 108 of the Constitution do not recognise unincorporated religious bodies. I can only assume the defendants contend that those provisions apply only to incorporated bodies. That is clearly not the law of Tonga. It is beyond dispute that unincorporated religious bodies are recognised under Tongan Law (*Fotofili v Free Wesleyan Church of Tonga* (Unreported Court of Appeal, [1995] Tonga LR. 101).

[11] The next two grounds advanced by the defendants are related. They argue that the plaintiff did not dispute the validity of the proposed ground of defence that the plaintiff was not validly incorporated and that I had no right therefore to reject that defence on its merits. The defendants also argue that they were not afforded a proper opportunity to make full submissions on their application (paragraphs 3 and 4 of the draft notice of appeal). The defendants were seeking an indulgence and were obliged (regardless of the arguments of the plaintiff) to satisfy the Court that it was appropriate to grant the indulgence. Furthermore, Mr. Edwards argued that all of the new defenses were scandalous and frivolous. It could not have been clearer that the defendants carried the onus to satisfy the Court that the proposed defenses were meritorious. They failed to do so by a considerable margin except in one case. There is no evidence before me to support the submission that the defendants were not afforded a fair hearing and I do not consider there is any basis for that submission.

[12] The next two grounds are also related (paragraphs 5 and 6 of the draft notice of appeal). The defendants argue that the lease cannot be regarded the property of the plaintiff because it was registered in the plaintiff's former name, Feohi'anga Tokaikolo 'ia Kalaisi, and not the name under which the plaintiff was incorporated, Siasi Tokaikolo 'ia Kalaisi (paragraph 39 of the proposed amended statement of defence). The argument is obviously without merit. However, nothing in my ruling prevents the defendants from arguing that the lease was granted to the

them and not the plaintiff or that any changes of the plaintiff's name represented major departures from its core tenets and beliefs. The defendants have pleaded both matters in their amended statement of defence filed on 5 January 2017.

[13] Having given careful consideration to the defendants' application I refuse them leave to appeal from my ruling on the following grounds:

a. I am satisfied that none of the proposed defenses have any merit or are even arguable.

b. It appears that the defendants have misunderstood my ruling for the reasons given in paragraph 12.

c. This case has been set down for hearing on two previous occasions and adjourned each time. On the last occasion the adjournment was necessary because the defendants had failed to adequately prepare. The action has now been set down for hearing very soon after the first Court of Appeal session. Should leave be granted there would be every likelihood that Counsel will be distracted from their preparations for the trial and the case further adjourned. That is not justified in circumstances where the defendants proposed grounds of appeal are so weak.

d. No important points of law or matters of public interest arise in this case.

Result

[14] The defendants' application for leave to appeal is dismissed.

NUKU'ALOFA: 30 January 2017 **PRESIDENT**

N. 'Inafo
30/01/2017.