IN THE COURT OF APPEAL OF THE COOK ISLANDS CA 5/04
HELD AT AUCKLAND

IN THE MATTER	**of Article 60 of the Constitution and Rule 17 of the Court of Appeal Rules**
AND	
IN THE MATTER	**of S 390A, Cook Islands Act 1915**
AND	
IN THE MATTER	**of HOUSESITE SECTION 172, AVARUA**
AND	
IN THE MATTER	of an application to rehear the order granting Right of Occupation to **TEKURA KAMANA** on 16 May 1991
AND	
IN THE MATTER	of a judgment made by Greig CJ in respect of this application on 16 April 2003
BETWEEN	**TEEU KAMANA** on behalf of **TEKURA KAMANA**
	Applicant/Appellant
AND	**IOANA WILLIAMS and GEORGE (MAGGIE) ANGENE**
	Respondents
Coram:	**Barker JA (presiding)** **Henry JA** **Smellie JA**
Date of hearing:	12 November 2004
Counsel:	Mr N George for applicant Ms T Browne for respondents
Date of judgment	12 November 2004

JUDGMENT OF THE COURT

Solicitors
Norman George
Browne Gibson Harry

[1] This is an application for leave to appeal out of time to this Court, against a judgment delivered by Greig CJ in the High Court at Rarotonga on 16 April 2003.

[2] During the course of the hearing before us, Mr George for the appellant sought leave to include an application for special leave to appeal against a cognate judgment of Smith J, delivered in the High Court on 19 March 2003.

[3] The application before the Chief Justice had been to cancel an order made in 1991 in respect of certain land, on the grounds there had already been an occupation right granted in 1908, or alternatively, the majority of landowners had not supported the grant of the occupation right, and thus the Court erred in granting the later order.

[4] In accordance with the procedures required by s 390A of the Cook Islands Act 1915, the Chief Justice had referred this application to Smith J for a report which he duly provided to the Chief Justice, and on which the Chief Justice based his judgment.

[5] The decision of Smith J was really a report, but it appears in the record as a separate judgment. However, there seems to be no prejudice to the respondents if the appeals from the two judgments should be heard together.

[6] The application for special leave was made under Article 60(3) of the Cook Islands constitution. It was filed on 7 November 2004, 18 months in one case and 17 months in the other, after the decisions were given in the High Court. The reasons for the delay are stated in a separate affidavit of Mr Kamana, saying that the appellant had not been represented by counsel at the earlier hearings; that the deponent was unaware of any time limits, that he consulted counsel well after the 21 day time limit for appeal had expired, and that it required considerable time and effort to raise the necessary finance for the appeal.

[7] We do not regard the statement of reasons for the delay as altogether satisfactory. For example, there is no statement as to when counsel was consulted. One would have expected that confirmation because if counsel were consulted

relatively soon after the judgment and yet no step were taken thereafter, that circumstance might have been a factor in deciding whether to grant or refuse special leave. The statement about lack of money is not necessarily a ground for not filing an appeal, as distinct from prosecuting an appeal.

[8] Normally, the Court would expect somewhat better reasons to be given than were advanced in the present case.

[9] In a number of cases, the attitude of this Court to granting special leave to appeal out of time has been to adopt the words of Roper CJ in *Harmon v Kikorio* (27 July 1989) where His Honour said of Article 60(3) of the Constitution:

> If Article 60 stands alone, an appeal could be brought at any time after judgment be it months or years and with the result that respondents would be left to bear their own costs on unmeritorious appeals. The Constitution could not have intended those unjust results. Furthermore, express words would be necessary to deprive the Court of reasonable control of its process, and here they are lacking.

[10] We also note the statement of Richmond J in the Court of Appeal of New Zealand in *Avery v No.2 Public Services Appeal Board* [1973] 2 NZLR 86, 91:

> When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances, the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal.

[11] As counsel for the respondents acknowledged, the Court has a wide discretion and delay is but one of the factors to be taken into account.

[12] In the present case, we are prepared to grant leave to appeal on conditions. Had there been only an appeal against the judgment of the Chief Justice, we might have been prepared to hear the substantive appeal today, since both counsel were prepared to meet that eventuality. However, with the addition of an appeal from the decision of Smith J, the record is incomplete. More importantly, counsel for the

respondents is not ready to argue that additional appeal. There is no prejudice to the respondents, as we have ascertained from counsel. This is an important factor.

[13] We consider that there are reasonable questions regarding customary or native land in the Cook Islands to be argued on this matter. We do not think it appropriate to go any further into our reasons for thinking so. We do not wish in any way to offer any pre-judgment on the matter, which may subsequently come before the Court. However, there is a reasonable point to be argued on a topic of considerable importance to people in the Cook Islands.

[14] Therefore, leave to appeal against both judgments is given on the following conditions:

[a] Any additional record is to be filed by the appellant in the office of the Court of Appeal in Avarua within 28 days;

[b] Within a like period, the sum of $2,500 is to be paid by the appellant into an interest-bearing trust account on condition that this money is only to be paid out, either by consent of the parties, or by order of the Court. The identity of the trust account can be agreed between the parties. Failing that, the money is to be paid into the Court.

[c] The appeal should be set down for hearing at the next sessions of the Court of Appeal, whenever that may be. The appeal is to be prosecuted with all diligence and promptitude;

[d] Liberty to apply is reserved to both parties, particularly if there is non-fulfilment of these terms.

Costs

[15] Costs in any event are payable to the respondents. The appellant has received an indulgence from this Court. The delay has been considerable. It is not to be thought this Court condones delays of the magnitude shown in this case.

[16] Costs are awarded to the respondent which must be paid by the appellant within 28 days are $1000 plus disbursements to be fixed by the Registrar in case there is no agreement.

I Barker JA **Henry JA** **Smellie JA**