

## IN THE SOLOMON ISLANDS COURT OF APPEAL

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| <b>NATURE OF JURISDICTION:</b> | Appeal from Judgment of The High Court of Solomon Islands (Kouhota J)                     |
| <b>COURT FILE NUMBER:</b>      | Civil Appeal Case No. 06 of 2020<br>(On Appeal from High Court Civil Case No.261 of 2012) |
| <b>DATE OF HEARING:</b>        | 26 September 2022   |
| <b>DATE OF JUDGMENT:</b>       | 4 November 2022   |
| <b>THE COURT:</b>              | Goldsbrough P<br>Palmer CJ<br>Gavara-Nanu JA  |
| <b>PARTIES:</b>                | EDWARD MAKA & ANOR<br><br>-V-<br><br>MALAITA CUSTOMARY LAND APPEAL COURT AND ONOR         |
| <b>ADVOCATES:</b>              |   |
| APPELLANT:                     | Kwana, L  |
| RESPONDENT:                    | Banuve, S<br><br>Kilua, S   |
| <b>KEY WORDS:</b>              | Powers of single judge  |
| <b>EXTEMPORE/RESERVED:</b>     | RESERVED  |
| <b>ALLOWED/DISMISSED</b>       | Application to dismiss withdrawn  |
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## JUDGMENT OF THE COURT

1. The application for dismissal of this appeal has been withdrawn, following discussion between counsel as to whether leave was required. In the event that leave was not required, the application falls away, and it appears that counsel have now determined this to be the case.
2. However, as submissions were requested on whether a single judge of the Court of Appeal has the power to dismiss an appeal, we have decided to issue a short decision on that point.
3. Referring to submissions made on that question by the applicant, the authority of *Williams v Honi* [2009] SBCA 6 does not support the proposition that a single judge may determine an appeal. In that case a single judge dealt with an application for leave to appeal. Leave to appeal was refused and the matter was considered again by a Full Bench. The Full Bench determined that the single judge *was* correct to refuse leave to appeal.
4. Deciding not to grant leave is not determining an appeal. At that stage there is no appeal. Until leave to appeal is granted and a Notice of Appeal filed the appeal has not begun. This is often described as an appeal ‘not being on foot’. Indeed, where leave is required there is no right to file a Notice of Appeal. The correct procedure is to file an application for leave attaching a draft Notice of Appeal to the application. In the event that leave is granted, the draft Notice of Appeal may be deemed to be the actual Notice of Appeal.
5. It does demonstrate that a single judge may determine an application incidental to an appeal. But that is not the issue here. The issue here is whether a single judge can dismiss an appeal. It requires consideration of the qualification “not involving the decision of the appeal”, found in section 19 (g) of the Court of Appeal Act [Cap 6].
6. The submission that “the rule explicitly utters that a single judge in the court of appeal has the power to dismiss an appeal” is, quite simply, wrong. An application which may be described as incidental to an appeal is limited to any matter which does not involve the decision of the appeal. Such an application might be an application to stay an appeal. Such an application and possible subsequent decision of a single judge does not determine the appeal. It means that the appeal remains on foot and could be revived provided there is compliance with the terms of the stay order.
7. But beyond a stay order a single judge may not go. In *Agassi v Jamakolo* [2012] SBCA 3 the Court of Appeal considered an order made by Chetwynd J to order security for costs on an appeal. The order provided that should the security for costs not be complied with, the appeal would be stayed. He did not make any order purporting to dismiss the appeal. If the security for costs was paid as ordered, the appeal could proceed. If the security for costs was not paid, the appeal would be stayed.

8. In the Court of Appeal, noting that the order requiring security for costs had not been complied with, the Court considered whether the making of that security for costs order was reasonable. It determined that it was and confirmed that the order made by Chetwynd J was both reasonable and appropriate. The Court went on to determine the substance of the appeal which was whether to uphold or overturn an order made in the court below to strike out a civil claim. The order striking out the civil claim in the High Court has nothing to do with the striking out of the appeal against that order, for which, through the default of the claimant, then appellant in the Court of Appeal, required leave to appeal which was not properly sought.
9. To characterize that decision of the Court of Appeal as supporting the power of a single judge to dismiss an appeal borders on incompetence or deliberate misrepresentation.

Rule 45 of the Court of Appeal Rules does not assist the applicant. Providing:-

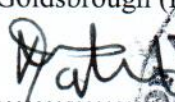
**Judge to sit and act as may be convenient**

45. A judge sitting as a single judge of the Court may sit and act wherever convenient.

It describes the manner and place of a single judge acting as such. It does not define the powers of a single judge, merely the manner in which those powers may be exercised.

10. Nor does section 15 of the Court of Appeal Act assist this applicant. It does no more than prescribe that the Court of Appeal shall not entertain any appeal made under the provisions of this Part of this Act unless the appellant has fulfilled all the conditions of appeal as prescribed by rules of Court. Conditions precedent include, inter alia, a notice of appeal, applications for leave, time limits, special conditions, security for costs and appeal fees. Failure to comply with conditions precedent may result in a stay (Rule 13) but not dismissal, which as the rule further provides, allows for the appeal to be listed for the next sessions of the Court for a formal order of dismissal.
11. As earlier indicated, the application is withdrawn and so no formal order is required but counsel are encouraged to note the above and desist in filing application to dismiss appeals to be heard by a single judge, who lacks the power to hear and determine such a matter.

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Goldsbrough (P)

  
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Palmer (CJ)  
Member

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Gavara-Nanu (JA)  
Member

