

**Sione Tu'ifua Vaikona v Teisina Fuko (No. 3)**

Supreme Court, Nuku'alofa  
Webster J.  
Civil case No. 14/1990

29 June, 5 July 1990

- <sup>10</sup> *Election – election petition – stay of execution pending appeal*  
*Procedure – stay of execution pending appeal – principles applicable*

The Respondent appealed against the decision of the Supreme Court determining his election as people's representative to be void, and applied for a stay of execution of that decision until the appeal was heard.

**HELD:**

- <sup>20</sup> (1) A successful litigant should not be deprived of the fruits of his litigation without good reason, but the court may stay execution if justice requires that a party have this protection;
- (2) It was in the public interest that the people of the electorate be properly represented in the Legislative Assembly, and that proceedings in the Legislative Assembly should not be placed in danger of being invalidated;
- (3) Having regard to these factors a stay of execution should not be granted.

**NOTE**

<sup>30</sup> On 12 September 1990 the Court of Appeal dismissed an appeal by the petitioner.

Counsel for the Petitioner : Mr W. C. Edwards and Mrs F. Vaihu  
Counsel for the Respondent : Mr L. M. Niu  
Amicus Curiae : Mr 'A. Taumoepeau (Solicitor-General)

### Judgment

On 22nd May the Respondent Teisina Fuko appealed against the decision of this Court on 24th April determining his election as No. 1 People's Representative for Ha'apai to be void.

On 20th June the Respondent applied for a stay of execution of that determination until the appeal is decided, on the grounds that the appeal contains grounds of substantial importance and is meritorious; that if the appeal is successful the damage done will be irreparable; and that if the appeal is unsuccessful the people of Ha'apai would be under-represented in the Legislative Assembly for 4 or 5 months.

Counsel for the Respondent, Mr Niu, explained that the Respondent had not originally intended to appeal until it became clear that a by-election might be likely to give rise to further court proceedings. Nor, even then, did he intend to seek a stay of execution as it was hoped that the appeal would be heard by a special sitting of the Privy Council in June. That had not transpired and the new Court of Appeal would not sit until September, so he had decided to seek a stay of execution. Due to the introduction of the Court of Appeal on 1st July he submitted that 1990 was an unusual year and it was proper for the Court to grant the stay.

Counsel for the Petitioner, Mr Edwards, opposed the application on the grounds that the Respondent had not established an adequate case for appeal; that the people of Ha'apai must be properly represented and if Mr Fuko entered the Assembly he would be doing so under a question mark; that Mr Fuko should wait for the decision of the Court otherwise the situation could appear chaotic to the public; and that the Court should follow the decision in a similar application in *Paasi v Sanft and Siale (Case No. 5/87)*.

The Solicitor-General, appearing for the Attorney-General as *amicus curiae* in the public interest in relation to this application, gave a careful and detailed analysis of the position. He submitted that the Court's decision depended very much on the possibility of success of the Respondent's appeal and that the principles applied in *Paasi v Sanft and Siale* applied in this case also. Whether the Respondent had been properly elected had not yet been decided and until that had been decided in his favour he could not be a properly elected representative for Ha'apai.

The general principles to be applied by the Court in deciding whether to grant a stay of execution are straightforward. They are set out in the *White Book at 59/13/1* and *Halsbury's Laws (4th Ed) Vol. 37 para. 699*. A successful litigant should not be deprived of the fruits of his litigation without good reason, but the Court has power to stay execution if justice requires that a party should have this protection (*Odger's Pleading and Practice (22nd Ed) page 367*). The Court ought to see that the appeal if successful will not be nugatory. The decision is within the Court's discretion.

In *Paasi v Sanft and Siale*, Mr Justice Martin applied these principles to an election petition and as usual went to the heart of the matter very succinctly. The people should be represented in the Assembly, but only by a representative properly elected - and clearly properly elected.

Therefore applying all these principles to the present case, in some matters it is possible to grant a stay of execution on terms which will preserve the fruits

both of litigation and of a possibly successful appeal. Sometimes the money in question can be deposited with the Court, or the Court can order the safe-keeping of the property under dispute.

But in an election petition that cannot be done. If a stay is granted the Petitioner is deprived of his success, at least for one or two months. Likewise if a stay is refused, the Respondent will lose for a time the right to sit in the Assembly which might possibly be his if his appeal was successful. So whatever decision this Court makes, it is bound to harm one or other of the parties. In these circumstances  
90 justice will be done by this Court taking a decision which will not harm the party who has been successful on the full hearing of the case at first instance, i.e. the Petitioner. The Court should therefore refuse the stay.

If this simple balancing of interests and consideration of justice is not enough, the result is fully supported by the public interest consideration that the people of Ha'apai should only be represented in the Legislative Assembly by a person who has clearly been properly elected. Otherwise there might be the chance of the proceedings of the Assembly being invalidated. As this Court has already decided that the election was void, the Respondent cannot be said to have been properly  
100 elected, even although he has appealed.

I am reluctant to pass any view on an appeal from one of my own judgments, but it has to be noted that the appeal does not raise major questions of fact, as the facts were largely undisputed. It raises what I believe are technical points of law. In as much as the decision on this application for a stay has to depend to some extent on my view of the appeal, I have to say that it does not appear to have great prospects of success. So that weights the balance further against Mr Fuko.

Nor can it be said that, if this is proved wrong and the appeal is successful,  
110 it would be nugatory if a stay is refused. Mr Fuko may have lost the right to sit in the Assembly for 2 or 3 months, but if the appeal were to be allowed he would still be entitled to sit for another 2 1/2 years until the next election.

There are two further factors related to timing, both of which are against Mr Fuko. Firstly it is normal for a stay of execution to be applied for almost immediately judgment is given, with an appeal being lodged at the same time. Although I can see that there were some reasons for what happened in this case, the appeal was not made until a month after judgment and a stay applied for a month after that. Meantime the Assembly has been sitting without Mr Fuko for a month. It does  
120 not give the Court any strong indication that Mr Fuko is intent on seeing that the people of Ha'apai are fully represented in the Assembly. I accept that if the Court were to grant a stay now, it could cause real confusion to the public as to how the law is applied in practice. While this matter is not decisive, it cannot help Mr Fuko's application. 1990 may be a special year in terms of electoral law and with the advent of the Court of Appeal, but it is not so special as to justify a stay of execution in the face of other compelling reasons.

Secondly, the Court of Appeal is expected to sit at the beginning of September, i.e. in just 2 months time. Mr Fuko has already missed 1 month of this session  
130 of the Assembly. In all the circumstances there would be no sense in the Court

granting a stay for such a relatively short period. The people of Ha'apai are represented by one other representative who can put forward their views. The position is no different in effect from one where a representative is taken seriously ill and cannot attend.

Mr Niu also submitted that, because of the overall under-representation of the people resulting from this Court's earlier decision in this case, the voice of the people in the Assembly was less effective. The inference was that the balance of voting in the Assembly was or could be affected. I have to make it clear that I believe that this is a political and not a legal consideration and that it would be quite wrong of this Court to take it into account in dealing with this application. This Court must confine itself to legal issues in reaching its decision.

For all these reasons the Court refuses the application for a stay of execution.