

## Makoni & Niu v Koloamatangi

Supreme Court, Nuku'alofa

10 Lewis J  
C 1008/94

31 August, 15 September 1995

*Practice and procedure - judgment - enforce against deceased*  
*Execution - Enforcement - judgment - deceased defendant*

20 The Plaintiffs obtained a consent judgment. The defendant in that action subsequently died before payment of the judgment debts. The plaintiffs issued fresh proceedings against the administratrix (the widow).

Held:

1. The original judgment still existed but could be enforced by writ of execution only with leave .
2. Leave, if given, is not a judgment against an administratrix (or executor) but dispenses with the necessity of obtaining such judgment against her.
3. The proper procedure to recover from an intestate estate is to levy execution by leave (and should be done here).
- 30 4. The fresh writ and statement of claim were incompetent and were dismissed.

Cases considered : Stewart v Rhodes [1900] 1 Ch 386

Statutes considered : Civil Law Act ss. 3 & 4

Regulations considered : Rules of Supreme Court (UK) O.46 r2

40 Counsel for plaintiffs : Mr Niu  
Counsel for defendants : Mr Edwards

### Judgment

A little under 11 months before his death in early 1994, the deceased, then a Defendant to proceedings in the Land Court, settled the Action brought against him in the Land Court by Linda Makoni one of the Plaintiffs in the present action.

The terms of settlement bear reciting. They were recorded by Dalgety J.

The Terms were:-

"Considering that this action has been settled extra-judicially and, that accordingly the parties hereto having agreed to judgment being granted in the following terms, of consent it is ordered and adjudged that:-

1. Judgment is given in favour of the Plaintiff in the sum of 6000 Pa'anga in full and final settlement of all debts claims, compensation and damages in respect of (Sic) this or any related matter.
2. The aforesaid sum be apportioned between the Plaintiff and her Counsel Mr. Laki Niu as follows:

Plaintiff	:	4000 pa'anga
Counsel	:	2000 pa'anga

3. Payment of the aforesaid sums shall be made by the Defendant to counsel Laki Niu on or before the 12th February 1994.
4. No order made as to costs.

Ramsay R. Dalgety"

(Signed)

NUKU'ALOFA, 12th February 1993.

The Deceased's widow was granted letters of administration in the intestacy on 31 March 1994 and the estate distributed.

On the 27 January, (prior to the grant of letters of administration), the widow of the deceased Koloamatangi published in a notice in the "Tonga Chronicle" the fact of the passing of her husband, and inviting claimants against the estate to submit their claims within six weeks of the notice. The notice purported to inform claimants that failure on their part to file a notice of claim against the intestacy would extinguish any right to claim which they may possess.

The Plaintiffs to the present action gave no notice to the administratrix within the stipulated six weeks. Mrs. Koloamatangi was granted letters of administration and the estate distributed.

The assets of the estate consisted of a dwelling house and a water tank valued at approximately \$10,000. The deceased had been possessed of a life interest in a town allotment and tax allotment which interests had extinguished upon his death.

The debts of the estate which were proved in the intestacy, were mortgages to a Bank amounting to approximately \$7,700 and a debt to the Commissioner of Inland Revenue the extent of which is not revealed from the evidence before me and is not material to a proper determination of this matter.

By operation of law, the title to the dwelling house which she now occupies vested in the administratrix upon the death of her husband.

The Plaintiffs in the present action claim sums due pursuant to the order of Dalgety J. The Defendant argues that the Plaintiffs claim is "Incomplete and out of time and should be dismissed."

Intestacy is regulated by the Probate and Administration Act Cap.16, an Act "To

amend the law relating to probate and intestacy." Broadly speaking neither the Legislation nor the subsidiary Legislation makes any provision for the form or for the procedure to be adopted by one seeking a grant of letters.

Since the Legislation is silent concerning the issue presently under consideration it is necessary, by virtue of the Civil Law Act Cap.25 ss.3 and 4(a) as amended, to resort to an application of the Common Law of England and the statutes of general application in force in England.

100 I take the law to be that where a Judgment Debtor dies after the date of judgment but before issue of the writ of execution that writ can only be issued by leave - RSC Ord. 46 R 2(1) (b). Leave given under this rule does not operate as a judgment against the executor or administrator. It dispenses with the necessity of recovering judgment against him, Stewart v. Rhodes [900] 1 CH.386.

The rule clearly contemplates that the proper procedure to recover against an intestacy is to levy execution and then only by leave of the court.

Levy of execution was not sought by the Plaintiff in the matter before Dalgety J. In my opinion the writ is incompetent and the claim should be dismissed. Leave to effect Execution should be sought in the action before Dalgety J.