tender years is to be sent out of the jurisdiction to live with, if I may say so with respect, a stranger in law and equity, whose fitness for custody or guardianship has not been tested out of her own lips in the witness box. If, however, her custody was given to her maternal grandmother, the respondent, in my view several advantages would flow from such arrangement. She would not only be living in the country of her birth, but in a village where she would enjoy the company of her younger sister and several other of her maternal relations. Her education in my view ought to improve, and if an order is made for reasonable access by her father, their natural relationship would be far more strengthened than if she were permanently estranged from him.

These are the considerations which have compelled this court to come to the conclusion that the best interests and welfare of the child will be served if I were to refuse the application for the delivery of the child to the applicant, and order that the child remain in the custody of the respondent. I now so order. And I also further order that the applicant be afforded access to his child at all reasonable times. In the circumstances of this case I make no order as to costs.

Order accordingly.

KAMAL and BOMBALI SEBORA CHIEFDOM COUNCIL *v.* STEVENS and KOROMA

COURT OF APPEAL (Cole, Ag. C.J., Dove-Edwin, J.A. and Marke, J.): December 2nd, 1965
(Civil App. No. 14/65)

[1] **Civil Procedure — appeals — appeals against interlocutory orders — leave to appeal—where judge making order refuses leave, application lies to Court of Appeal:** Where the judge making an interlocutory order in the Supreme Court refuses an application for leave to appeal against the order, the applicant may make a fresh application to the Court of Appeal for leave to appeal (page 286, lines 21–32).

[2] **Civil Procedure—appeals—procedure—enlargement of time—Court of Appeal may enlarge times appointed by Court of Appeal Rules:** The Court of Appeal has jurisdiction to enlarge the time appointed by the Court of Appeal Rules (*cap.* 7) for doing any act or taking any proceeding (page 287, line 40—page 288, line 12; lines 30–34).

[3] **Civil Procedure—appeals—times appointed by rules—enlargement of time—Court of Appeal may enlarge times appointed by Court of Appeal Rules:** See [2] above.

[4] **Civil Procedure — enlargement of time—guiding principle whether enlargement necessary in order to do justice:** In considering an application for enlargement of time, the guiding principle is whether the necessity of the case requires it in order that justice may be done (page 288, lines 36–39).

[5] **Constitutional Law — fundamental rights—enforcement—courts to adjudicate with minimum delay, expense and technicality:** Constitutional matters involving fundamental human rights should be dealt with by the courts with the minimum delay, the minimum of expense and whenever possible with freedom from technicalities at all steps (page 289, lines 3–5; lines 22–25).

[6] **Courts—Court of Appeal—procedure—appeals against interlocutory orders of Supreme Court—leave to appeal—where leave refused in Supreme Court application lies to Court of Appeal:** The jurisdictions to grant leave to appeal against an interlocutory order of the Supreme Court, conferred by the Courts Act, 1965, s.56(1)(b), on the judge making the order and the Court of Appeal respectively, are not mutually exclusive and if the judge refuses leave to appeal the intending appellant may make a fresh application to the Court of Appeal (page 286, lines 21–32).

[7] **Courts—Supreme Court—appeals—leave to appeal against interlocutory orders—where leave refused, application lies to Court of Appeal:** See [6] above.

[8] **Jurisprudence—reception of English law—incorporation of English law—Rules of the Supreme Court, O.LXIV, r. 7, applies to interlocutory matters in Court of Appeal:** By the Court of Appeal Rules (*cap.* 7), r.42, O.LXIV, r.7 of the English Rules of the Supreme Court applies to interlocutory matters in the Court of Appeal and the expression "these Rules" in r.7 means the Court of Appeal Rules (page 288, lines 20–33).

[9] **Time—times prescribed by law—enlargement—Court of Appeal may enlarge times appointed by Court of Appeal Rules:** See [2] above.

[10] **Time — times prescribed by law — enlargement — guiding principle whether enlargement necessary in order to do justice:** See [4] above.

The applicants applied to the Court of Appeal composed of three judges for an order reversing the decision of a single judge of the court dismissing their application for an enlargement of time to apply for leave to appeal, and leave to appeal, against an interlocutory order in an action in the Supreme Court in which they were defendants and the respondents were plaintiffs.

The respondents applied *ex parte* to the Supreme Court for an order for the issue of a writ of summons against the applicants with a statement of claim endorsed claiming a declaration in terms of s.22 of the Constitution (which is concerned with freedom of assembly and association) and an injunction. The order was granted and the writ was issued and served. The applicants applied to the Supreme Court to set aside the *ex parte* order and the issue and service of the writ. They contended that the order was made without jurisdiction. The application was dismissed. Their application to the Supreme Court for leave to appeal against the dismissal was dismissed, mainly on the grounds of irregularity in form. The time for applying for leave to appeal had then expired. They applied to the Supreme Court for an enlargement of time and leave to appeal and the application was dismissed.

They then filed a motion in the same terms in the Court of Appeal. The Chief Justice sitting as a single judge of the Court of Appeal refused the motion. They brought the present application to reverse this decision and grant an enlargement of time and leave to appeal.

The respondents took the preliminary objections (a) that the jurisdictions to grant leave to appeal against an interlocutory order, conferred by the Courts Act, 1965, s.56(1)(b) on the judge making the order and the Court of Appeal respectively, were mutually exclusive and therefore the matter had been concluded by the Supreme Court's refusal of an enlargement of time and leave to appeal and the appellant's remedy was to appeal against that refusal, not to renew the application before the Court of Appeal; and (b) that the court had no power to enlarge time in interlocutory matters and hence had no power to enlarge the time for obtaining leave to appeal.

Statutes and rules construed:

Chiefdom Councils Act (Laws of Sierra Leone, 1960, *cap.* 61), s.19(2), as amended:

> "No suit shall be commenced against a Chiefdom Council until three months at least after written notice of intention to commence the same shall have been served upon the Chiefdom Council by the intending plaintiff or his agent. Such notice shall state the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims."

Interpretation Act, 1965 (No. 7 of 1965), s.10(1):

> "An adopted law shall be read with such verbal alternatives as to names,

localities, courts, officers, persons, moneys and otherwise as may be necessary to make the same applicable in the circumstances."

Courts Act, 1965 (No. 31 of 1965), s.37:
The relevant terms of this section are set out at page 285, lines 4–15.

s.56(1): The relevant terms of this section are set out at page 285, line 36—page 286, line 2.

Court of Appeal Rules (Laws of Sierra Leone, 1960, cap. 7), r.13(1), as amended:
The relevant terms of this rule are set out at page 287, lines 16–19.

r.32: The relevant terms of this rule are set out at page 286, lines 4–9.

r.42, as amended: The relevant terms of this rule are set out at page 287, lines 32–37.

Rules of the Supreme Court, O.LXIV, r.7:
The relevant terms of this rule are set out at page 288, lines 3–9.

B. Macaulay, Att.-Gen., and *Tejan-Cole* for the applicants;
C. N. Rogers-Wright and *Smythe* for the respondents.

COLE, Ag. C.J.:

This motion is brought before this court by the defendants-applicants pursuant to proviso (b) of s.37 of the Courts Act, 1965, applying for the following orders:

1. An order reversing the decision of Bankole Jones, C.J., given on October 15th, 1965 dismissing an application contained in a notice of motion to this court dated October 8th, 1965.

2. An order granting the orders sought which are contained in the notice of motion by the defendants-applicants to this court dated October 8th, 1965.

The full history of this application is contained in the further affidavit in support of the motion sworn on October 16th, 1965 by Nasiru Deen Tejan-Cole, a Crown Counsel of the Law Officers' Department, Freetown and junior counsel for the applicants. The relevant portion of the affidavit reads as follows:

"1. That on October 15th, 1965 I swore to an affidavit in the above matter and I now set out in the succeeding paragraphs the history of the proceedings in this matter both in the Supreme Court and in this honourable court.

2. That on August 18th, 1965 the plaintiffs-respondents without notice to the defendants-applicants filed a motion before the Supreme Court, *ex parte,* seeking, *inter alia,* a direction that a writ of summons be issued against the defendants-applicants, with a statement of claim endorsed

thereon claiming a declaratory judgment in terms of s.22 of the Constitution and an injunction restraining the said defendants-applicants from contravening the said s.22.

3. That on August 20th, 1965 the motion referred to in the foregoing para. 1 was heard by Mr. Justice Dobbs in the Supreme Court, *ex parte.*

4. That on August 21st, 1965 Mr. Justice Dobbs sitting in the Supreme Court made an order upon the motion referred to in the foregoing para. 2 directing the issue of a writ of summons against the defendants-applicants. A true copy of his order has been exhibited to an affidavit which I swore to on October 8th, 1965 and appears at pages 10 and 11 in the bundle of documents for the notice of the motion dated October 15th, 1965.

5. That on August 26th, 1965 the plaintiffs-respondents issued a writ of summons in this matter and served the same on the same day.

6. That on August 27th, 1965 a motion was filed by the solicitor for the defendants-applicants for (i) an order to set aside the order of Mr. Justice Dobbs referred to in the foregoing para. 4 and (ii) for setting aside the issue and service of the writ referred to in the foregoing para. 5, *inter alia,* on the following grounds:

(a) That there was no jurisdiction to grant the said order under the provisions of s.24 of the Constitution of Sierra Leone, Public Notice No. 78 of 1961, as purported to have been made or granted.

(b) That the application for the making or granting of the said order was by motion *ex parte,* which motion should not have been made without previous notice to the parties affected thereby and is therefore null and void.

7. That on August 28th, 1965 the motion for setting aside the order of August 21st, 1965 and the writ of summons was heard before Mr. Justice Dobbs sitting in the Supreme Court.

8. That on September 16th, 1965 the motion referred to in the foregoing para. 6 and heard on August 28th, 1965 was dismissed by Mr. Justice Dobbs sitting in the Supreme Court.

9. That on September 28th, 1965 the solicitor for the defendants-applicants entered a conditional appearance without the Master's certificate for the same endorsed thereon; that on the same day a notice of conditional appearance was served

on the solicitor for the plaintiffs-respondents; that also on the same day a summons for leave to appeal against the decision of Mr. Justice Dobbs referred to in the foregoing para. 8 was issued and served on the same day on the solicitor for the plaintiffs-respondents.

10. That on September 30th, 1965 the time limit for applying for leave to appeal against the decision of Mr. Justice Dobbs on September 16th, 1965 referred to in the foregoing para. 8 expired; that on the same September 30th, 1965 the plaintiffs-respondents filed a motion for judgment in default of defence.

11. That on Friday, October 1st, 1965 the summons for leave to appeal against the decision of Mr. Justice Dobbs dated September 16th, 1965, which was issued within the time limits for application for leave to appeal pursuant to r.13 of the Court of Appeal Rules, was heard and dismissed mainly on the ground of irregularity in form.

12. That on Monday, October 4th, 1965 a motion for enlargement of time to apply for leave to appeal, leave to appeal, and stay of proceedings was filed by the defendants-applicants; that on the same day, that is, October 4th, 1965, the defendants-applicants delivered a defence which was not on the merits in order to save judgment being against them; that the defence raised the questions of jurisdiction which had been the subject of the motion referred to in the foregoing para. 6; that there is now produced and shown to me a copy of the defence and marked 'NDTC7'; that on the same October 4th, 1965 the motion for judgment by the plaintiffs-respondents referred to in the foregoing para. 10 came up for hearing and an application was made that the Attorney-General could not be heard on behalf of the plaintiffs-respondents.

13. That on October 5th, 1965 the preliminary objection referred to in the foregoing paragraph was overruled and the motion for judgment was dismissed.

14. That on October 6th, 1965 the plaintiffs-respondents delivered a reply to the defendants-applicants which read as follows:

> 'The plaintiffs in reply to the statement of defence herein say that s.19(2) of the Chiefdom Councils Act (*cap.* 61), being a mere matter of procedure, is limited to the class of actions therein envisaged and being in conflict

with procedure and/or law contained in the Constitution is void to the extent of the conflict and consequently cannot govern the action herein';

that on the same October 6th, 1965 the plaintiffs-respondents took out a summons, which was served on the defendants-applicants on the same day, for the purpose of striking out para. 3(b) of the defence, herein marked as exhibit 'NDTC8' and referred to in the foregoing para. 12; that the said summons was supported by an affidavit, a true copy of which is now produced and shown to me and marked 'NDTC8.'

15. That on October 7th, 1965 the motion for leave to apply for an enlargement of time and for leave to appeal and stay of proceedings, referred to in the foregoing para. 12, came up for hearing before Mr. Justice Dobbs.

16. That on October 8th, 1965 the motion referred to in the foregoing paragraph was dismissed; that on the same October 8th, 1965 a motion was filed in this honourable court for enlargement of time and for leave to appeal; the said motion appears at pages 4–6 of the bundle of documents in respect of the notice of motion in this court dated October 15th, 1965.

17. That on October 11th, 1965 the summons by the plaintiffs-respondents to strike out para. 3(b) of the defence, which summons has already been referred to in the foregoing para. 14, was struck off.

18. That on October 12th, 1965 the motion to this honourable court referred to in the foregoing para. 16 was heard by the learned Chief Justice; that on October 12th, 1965 the plaintiffs-respondents took out a motion to strike out para. 3(b) of the defence and gave notice that they will rely on the affidavit referred to in the foregoing para. 14 which has been produced and marked 'NDTC8.'

19. That on October 15th, 1965 the motion referred to in the foregoing paras. 16 and 18 was dismissed, and on the application of the Attorney-General the learned Chief Justice ordered a stay of proceedings on the Attorney-General's undertaking that he would make an application that the same motion be reheard before the full Court of Appeal."

The defence marked "NDTC7" referred to in the aforesaid affidavit reads as follows:

"1. The second defendant is a chiefdom council of which

the first defendant is principal member, he being the Paramount Chief of the Bombali-Sebora Chiefdom; the first plaintiff is a member of the House of Representatives and the Leader of the Opposition in that House as well as the leader of the All People Congress, a political party. Save as admitted in this paragraph, the defendants deny the allegations contained in para. 1 of the statement of claim.

2. The defendants admit paras. 2 and 3 of the statement of claim.

3. The defendants will object that the proceedings have been irregularly commenced by the plaintiffs in that—

(a) no written notice of intention to commence them has been served on the defendants as required by s.19(2) of the Chiefdom Councils Act (*cap.* 61) and

(b) the order of the Supreme Court dated August 21st, 1965, giving them leave to commence these procedings, was bad in law.

Save as hereinbefore admitted, the defendants deny each and every allegation in the statement of claim as if the same were set out herein and traversed *seriatim.*"

The affidavit marked "NDTC8" reads as follows:

"I, Cyrus Rogers-Wright, Barrister-at-Law, of 18 Bathurst Street, Freetown make oath and say as follows:

1. I am the solicitor for the plaintiffs herein.

2. The paper writing hereunto annexed and marked 'A' is a copy of the statement of defence filed by the defendants herein. Thereon appears para. 3 sub-para. (b), the portion complained of.

3. The paper writing hereunto annexed and marked 'B' is an office copy of the order dismissing the application made on the part of the defendants to set aside an order previously made by Mr. Justice Dobbs on August 21st, 1965.

4. The defendants by their defence at para. 3(b) seek to put in issue and to have decided again by the Supreme Court in the course of a trial, an issue already decided against them by the Supreme Court.

5. That it is impossible to meet this situation by pleadings, and the summary method herein adopted is best.

6. That the said attempt to re-litigate and put in issue a matter already decided by a court of co-eval jurisdiction is scandalous and is an abuse of process.

7. I make this affidavit in support of the application that the said para. 3 sub-para. (b) be struck out."

Section 37 of the Courts Act, 1965, reads as follows:

"A single Judge of the Court may exercise any power vested in the Court not involving the determination of an appeal:

Provided that—

(a) in criminal matters, if a single Judge refuses an application to exercise any such power in favour of the person making the application, that person shall be entitled to have his application determined by the Court, composed as provided by section 83 of the Constitution:

(b) in civil matters, any order, direction or decision made or given by a single Judge may be varied, discharged or reversed by the Court, composed as aforesaid."

At the hearing of this application before us learned counsel for the plaintiffs-respondents took the following preliminary objections, namely:

"(i) Having regard to the provisions of r.13 of the Court of Appeal Rules this court has no jurisdiction to entertain this application.

(ii) Having regard to the provisions of r.32 of the Court of Appeal Rules and to the provisions of s.56(1)(b) of the Courts Act, 1965 motion is not the proper manner of bringing this matter for review before this court."

I propose at this stage to dispose of the second ground of objection. The Courts Act, 1965 came into operation on October 7th, 1965. Before that date matters relating to appeals were governed by the provisions of the Courts (Appeals) Act, 1960. I have mentioned this because on reading the history of this matter it will be seen that at some stage the provisions of the Courts (Appeals) Act, 1960 are of relevance.

Section 56(1)(b) of the Courts Act, 1965 is *ipsissima verba* the provisions of s.18(1)(b) of the Courts (Appeals) Act, 1960. The relevant portion provides as follows:

"(1) Subject to the provisions of this section, an appeal shall lie to the Court of Appeal—

. . .

(b) by leave of the Judge making the order or of the Court of Appeal, from any interlocutory judgment, order or other

decision, given or made in the exercise of any such jurisdiction as aforesaid."

Rule 32 of the Court of Appeal Rules provides as follows:

"Whenever under these rules an application may be made either to the Court below or to the Court it shall be made in the first instance to the Court below, but if the Court below refuses the application the applicant shall subject to the provisions of rule 14(4) be entitled to have the application determined by the Court."

I need not add that the expression "the Court" in this rule means "the Court of Appeal." I understand the objection to be this: In the further affidavit already set out it is clearly stated that application for leave to appeal as well as for enlargement of time within which to appeal had already been made to Dobbs, J., the judge who made the *ex parte* order of August 21st, 1965, against which it is intended to appeal. That application was refused. The defendants-applicants having elected to apply to the judge who made the order, they are by the provisions of s.56(1)(b) of the Courts Act, 1965 precluded from again making a fresh application to this court—either to a single judge under the provisions of s.37 of the Courts Act, 1965 or to the full court. The plaintiffs-respondents argue that although s.56(1)(b) of the Courts Act, 1965 confers concurrent jurisdiction in such matters on both the judge who made the order to be appealed against and this court (single judge or full court), such jurisdiction is mutually exclusive. In other words, they contend that once an application has been made to the judge who made the order and refused, the only way this court can review such a refusal is by way of appeal and not by way of a fresh application. The defendants-applicants having applied to the judge who made the order and the application having been refused, this court has no jurisdiction to review that order of refusal by way of motion.

With the greatest respect, I cannot agree with such a proposition. If such was the intention of the legislature, it would have expressly said so. To interpret s.56(1)(b) of the Courts Act, 1965 in the manner suggested by the plaintiffs-respondents would lead to this untenable situation: *A*, who is dissatisfied with an interlocutory order made by a judge, applies to the judge who made the order for leave to appeal; the judge refuses such an application. In refusing the application the judge may have acted on wrong principles. In order to bring the matter for review before this court (single judge or full court), *A*, having elected to apply to the judge who made the order, could not

come to this court except by way of appeal. Rule 32 of the Court of Appeal Rules would not be applicable because such a matter is not one provided for by the Court of Appeal Rules. A would therefore have no alternative but to go back to the judge who made the interlocutory order and who refused leave to appeal, to again apply for leave to appeal against the order refusing leave to appeal. The judge may again refuse leave and so the would-be appellant suffers in more than one way. Surely that cannot possibly be said to be the intention of the legislature? In my view to construe s.56(1)(b) of the Courts Act, 1965 in the manner suggested by the plaintiffs-respondents would be to curtail the exercise of jurisdiction conferred by the legislature. This I cannot do. This ground of objection therefore fails.

I now come to the first ground of objection. Rule 13(1) of the Court of Appeal Rules provides as follows:

> "(1) Where an appeal lies by leave only any person desiring to appeal shall apply to the Court by notice of motion for leave within fourteen days from the date of the decision against which leave to appeal is sought."

By the Court of Appeal (Adaptation of the Sierra Leone and the Gambia Court of Appeal Rules 1960) Rules, 1963, r.5, "the Court" in the Court of Appeal Rules means "the Court of Appeal." The plaintiffs-respondents argue that the terms of this rule are strict and mandatory and non-compliance with its provisions is fatal and this court would consequently have no jurisdiction to entertain any application which does not come within the ambit of that rule. They further argue that no provision exists in the Court of Appeal Rules for this court to enlarge time in matters of this kind. I would readily have agreed with the propositions put forward if there had been no provision in the Court of Appeal Rules in terms of r.42 which reads:

> "Where no other provision is made by these rules the procedure and practice which were in force in the Supreme Court in England immediately before the twenty-seventh day of April, 1961, shall apply in so far as it is not inconsistent with these rules, and the forms in use therein may be used with such adaptations as are necessary."

I agree that no provision is made in the Courts Act, 1965 or in the Court of Appeal Rules for dealing with enlargement of time by this court in interlocutory matters. In the Supreme Court Rules in force in England on April 27th, 1961, I find provision made by

O.LXIV, r.7 for dealing with applications for enlargement or abridgement of time in these words:

> "A Court or a Judge shall have power to enlarge or abridge the time appointed by these Rules, or fixed by an order enlarging time, for doing any act or taking any proceeding upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

I have to consider whether this rule is by the provisions of r.42 of our Court of Appeal Rules incorporated in our Court of Appeal Rules. The plaintiffs-respondents have argued that it is not. They argue that the expression "these Rules" in O.LXIV, r.7 means what it says. Before O.LXIV, r.7 could apply, they say, the "time appointed" must be the time appointed by the Supreme Court Rules in force in England on April 27th, 1961. Since the time appointed by r.13(1) of the Court of Appeal Rules is not a time appointed by the Supreme Court Rules, O.LXIV, r.7 would not apply. With respect, I disagree with such a proposition.

In considering whether O.LXIV, r.7 applies one has to consider whether (a) no similar provision exists in the Court of Appeal Rules and (b) whether its provision is not inconsistent with those rules. As I have already pointed out, and as is agreed by both sides, no provision exists in the Court of Appeal Rules for dealing with enlargement of time by the Court of Appeal in interlocutory matters. In my view I do not think O.LXIV, r.7 is inconsistent with the Court of Appeal Rules. In the circumstances, I hold that it is applicable. Having so held, by virtue of s.10(1) of the Interpretation Act, 1965 (No. 7 of 1965) O.LXIV, r.7 would have to be read with such adaptations and modifications as may be necessary. That being the case, O.LXIV, r.7 being part of the Court of Appeal Rules I hold that the expression "these Rules" in O.LXIV, r.7 means the Court of Appeal Rules. I further hold that in the circumstances this court has jurisdiction to entertain the application. The second ground of objection therefore fails.

I now come to the merits of the application. In considering an application for enlargement of time the guiding principle is whether the necessity of the case requires it in order that justice may be done. From the history of this matter as set out in the further affidavit it is clear that the only benefit that would accrue to the defendants-applicants if their intended appeal is allowed is that the

plaintiffs-respondents would have to start their action *de novo*. On the other hand the plaintiffs-respondents would thereby suffer the undue hardship of having lost time—this being a Constitutional matter involving fundamental human rights, which require prompt action—and also of having to pay costs. By refusing the application the defendants-applicants would not in any way thereby be debarred from raising all possible defences open to them at the trial of the main action. In fact they have already done so according to their further affidavit. The learned Attorney-General expressed the proposition that since the decision of Dobbs, J. of September 16th, 1965 dismissing the application to set aside his order of August 21st, 1965 was binding on the parties hereto, the matters raised in that application cannot be raised again. With respect, I do not agree with that proposition. The order of September 16th, 1965, although made *inter partes,* did not conclude the whole legal rights and obligations of the parties. The matters complained of have in fact been raised in para. 3 of the defence. The learned Attorney-General pointed out that there is an application pending before the court below by the plaintiffs-respondents applying to set aside para. 3(b) of that defence. Mr. Smythe, leading counsel for the plaintiffs-respondents, has given an undertaking to this court to withdraw that application. It is my considered view that the needs of society do require that matters of this nature should be dealt with by the courts with the minimum delay, the minimum of expense and whenever possible with freedom from technicalities at all steps. Taking all the circumstances into consideration, I do not think the justice of this case requires that the application should be granted. I would therefore refuse it.

DOVE-EDWIN, J.A. and MARKE, J. concurred.

Application dismissed.