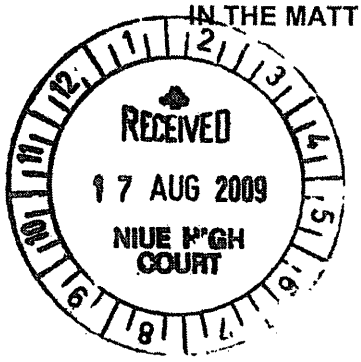
IN THE COURT OF APPEAL OF NIUE

Application No. 9116/8/6

IN THE MATTER An appeal pursuant to section 75 of the Niue Amendment Act (No2) 1969

AND

IN THE MATTER OF The land known as Part Fonuakula Section 1 Block III



PULEIKI TASMANIA aka FILIMONA

Appellant

FIAFIA ALANA REX

Respondent

Coram: Judge W W Isaac, presiding
Judge P T Savage
Judge G D Carter

Hearing: At Alofi on 23 April 2009

Appearances: Mr Toke Talagi for the Appellant
Ms Juliette Rex for the Respondent

DECISION

Background

[1] This appeal is against a decision of Chief Justice Heta Hingston made on 8 April 2006 (Land Minute Book No 13 Folio 133-134) refusing to grant a rehearing of an application heard by the Niue High Court (Land Division) on 1 June 2005. At that hearing the Court made an occupation order in favour of Alana Fiafia Rex in respect of 4496 square metres being Section 1 Block III Alofi District (Section 1) as recorded in Niue Land Register Volume N11 Folio 80 and a further order appointing her Leveki Magafaoa for that land.

[2] Section 1 was originally part of Part 103, Block III Alofi District. Title to Pt 103, Title to Block III Alofi District (Part Fonuakula) was determined on 1 December 1981 with orders determining Magafaoa as Toke and Petelu and appointing Filimona Tasmania and Patricia Tagaloa Rex as Leveki Magafaoa with *the latter's interest to be confined only to the triangle outside Filimona's passionfruit area.*

[3] Title to Section 1 was created on 17 December 1991 by partition out of Part 103, Block III (the 1991 partition). On the title the Magafaoa are noted as Toke and Petelu and Robert Richmond Rex Jnr as Leveki Magafaoa. The application for partition was

originally opposed by Filimona Tasmania on behalf of the family of Toke but the order was eventually made by consent.

[4] Robert Rex's house was badly damaged during Cyclone Ofa during February 1990. The partition of Section 1 Block III was sought to enable him to construct a new house on that site. Mr Filimona, at first, was reluctant to consent as he considered that this was land to which the magafaoa of Toke were entitled and Rex's connection to the land was through Petelu. Later, out of concern for Mr Rex's situation he gave his consent. Mr Rex did not build a house on Section 1 when it became available but a short time later built on a nearby property.

[5] This appeal involves 3 sets of proceedings, namely

(i) the hearing of the applications for occupation order and change of Leveki
(ii) the hearing of the application for rehearing on 8 April 2006 (the application for rehearing)
(iii) the hearing of the appeal on 20 April 2009.

As each hearing has some relevance to the determination of this appeal we set out brief details of those hearings.

The original hearing on 1 June 2005

[6] On 25 November 2004 Alana Fiafia Rex applied for an occupation order for Section 1. As Leveki Magafaoa Robert Rex Jnr supported this application and signed the application as agent for Alana Rex. At the same time he, Robert Rex applied under section 14(2) of the Land Act 1969 for an order changing the Leveki Magafaoa for Section 1 to Alana Fiafia Rex.

[7] The printed application sets out the basis for the order and was completed as follows

(Delete the non-applicable option)

**(a) Pursuant to section 14(2) of the Land Act 1969 [being the majority of the members of the Magafaoa of the Common ancestor Toke as shown on the attachment Marked "A"],*

be the Leveki Magafaoa of the said land.
ALANA FIAFIA REX

**(b) Pursuant to section 14(3) [not the majority of the members of the Magafaoa] of the Land Act 1969,*

as a suitable person to be the Leveki Magafaoa of the said land on the grounds:

[8] The non applying option was not deleted. As option (a) was completed it is apparent that this was the option selected. No attachment marked "A" accompanied the application. No grounds were specified under option (b).

[9] The Court record shows that Filimona Tasmania opposed both applications although very little detail of the grounds of opposition appear in the minutes of the hearing. It is apparent that the major thrust of the opposition was that Part 103 had been partitioned for a particular purpose to enable Robert Rex to build a house on Section 1. That purpose had not been fulfilled and it was argued that Mr Filiomona was

therefore entitled to have the land restored to his control as Leveki Magafaoa rather than being passed on to Mr Rex's family.

[10] The High Court (Land Division) on 1 June 2005 granted both applications. No reasons are given in the decision. However it is clear from the minutes that the Court accepted the submission on behalf of the applicant that Robert Rex as leveki was not restricted as to what he might do with the title and therefore made the orders as sought.

Application for rehearing on 8 April 2006

[11] Filimona Tasmania applied for a rehearing. It is apparent from the record that he again argued strongly that as the land was partitioned as a site for a house for Robert Rex and not used for that purpose he, Filimona Tasmania, should be appointed Leveki Magafaoa for that land. It is also apparent that he also continued to oppose the occupation order and appointment of Alana.

[12] The application for rehearing was heard on 8 April 2006. The High Court dismissed the application for rehearing on the grounds that no new evidence or argument was put before the Court. It is against that dismissal that this appeal has been filed.

Hearing by the Court of Appeal

[13] The arguments before this Court do not differ greatly with the arguments presented at the original hearing and the application for rehearing. The Appellant however does make particular reference to the provisions for appointment of Leveki Magafaoa in section 14 of the Land Act 1969 and says that the Court failed to recognise the rights of Toke in making such appointment for Section 1.

[14] The Appellant again sought to revisit the 1991 decision to partition Section 1 on the grounds that the land was not used by Robert Rex Jnr for the purpose it was provided, namely for a house and that by custom Filimona Tasmania should be reappointed as Leveki Magafaoa. This Court is asked to grant leave for the Appellant to file an application for rehearing of the 1991 partition proceedings in the High Court. It is not clear as to the authority relied upon for this Court to take that step but there is reference to the Court's powers under Section 55A of the Constitution of Niue Act 1974 in the Appellant's submissions and it may be that these are the provisions relied upon.

[15] Ms Juliette Rex for the Respondent reiterates the argument that title to Section 1 was established in 1991 and the parties with interests in that title are entitled to rely on that title; that this Court cannot revisit that title. She supports the decision of the High Court to refuse a rehearing and seeks dismissal of the appeal.

[16] In her submissions she claims that no injustice arises because the Respondent's father, Robert Rex Jnr received a definite allocation of land and his descendants have perpetual rights to that portion. We cannot agree entirely with the latter statement. There has been a partition and Robert Rex Jnr has been appointed Leveki Magafaoa. He has no formal rights to that title but a common understanding that he can build a house there and his appointment as Leveki Magafaoa enhances that position. When it comes to other use and occupation of the land the magafaoa and the provisions of the Land Act 1969 have to be considered.

Leave to apply for rehearing of the 1991 partition order

[17] The Appellant seeks, as part of this appeal, leave from this Court to file an application for rehearing of the 1991 partition order. As this is a completely different matter from the substantive issues to be considered at this hearing we deal with it first.

[18] This appeal is against the refusal of the High Court on 8 April 2006 to grant a rehearing of orders made on 1 June 2005. The issue on appeal is the simple question as to whether the High Court was correct in its decision to refuse to grant a rehearing. The merits of the applications determined on 1 June 2005 and the actions of the Court in granting orders are not matters for consideration by this Court and are relevant only insofar as they may impact on the issue as to whether a rehearing should be granted or not.

[19] The powers conferred on this Court are set out in Section 117(a) of the Niue Act 1966-

On any appeal from the High Court, the Court of Appeal may affirm, reverse, or may vary the judgment appealed from, or may order a new trial or may make any such order with respect to the appeal as the Court of Appeal thinks fit, and may award such costs as it thinks fit to or against any party to the appeal.

[20] As can be seen this Court is restricted to dealing with the judgment appealed from; in this case the refusal to grant a rehearing. It is therefore hard to envisage this Court, in the circumstances of this appeal doing other than affirming or reversing the decision of the High Court. The section does provide that the Court *may make any such order with respect to the appeal as the Court of Appeal thinks fit.* The words *with respect to the appeal* mean that this power is limited to the issues on appeal and by the context of the proceedings. By way of example one could say that this Court could, if it were to grant a rehearing, make procedural orders to facilitate the efficient disposal of the rehearing.

[21] The Appellant seeks that this Court grant leave to apply for a rehearing in respect of the decision on partition of Section 103 in 1991. This is not the judgment appealed from. This Court has no jurisdiction to make such an order and declines to do so.

Grounds for rehearing

[22] There are limitations to the granting of a rehearing which have been established by judicial precedent. Generally speaking it is limited to those cases where further material evidence of a credible nature has been discovered which was not available at the original hearing or there has been a breach of process or procedure which may have disadvantaged one of the parties to the extent that there has been a miscarriage of justice or a breach of natural justice– see *Ladd v Marshall* [1954] 3 All ER 745 and *Dragicevich v Martinovich* {1969} NZLR 306 (CA). Where judicial error is involved a party is entitled to a retrial if the result of the error is a fundamental miscarriage of justice: *Almeida v Opportunity Equity Partners Ltd* [2006] UKPC 44 (PC).

Approach of the Appeal Court

[23] It is now accepted law that the approach of a Court on appeal should not be to merely pay deference to the lower Court's assessment but to make its own assessment of the underlying factual and legal questions (see decision of NZ Supreme Court in Austin, Nicholls & Co. Inc v Stitching Lodestar [2008] 2NZLR 141). It is appropriate for this Court to consider the issues arising at the hearing of the decision appealed from, any questions of jurisdiction and the exercise of judicial discretion.

[24] The decision appealed from is the refusal to grant a rehearing on 8 April 2006. The lower Court should have had regard to the process and procedure of the original hearing in those areas which may have been relevant to the determination as to whether there were grounds for the grant of a rehearing. We need to do likewise so as to make our own assessment a rehearing should have been granted.

Discussion

[25] The Appellant opposed both applications at the original hearing on 1 June 2005. The basis of his argument was:

> Section 103 has as its magafaoa Toke and Petelu
>
> Each magafaoa have their defined areas under the title
>
> In 1991 the Appellant as Leveki Magafaoa representing Toke agreed to a partition order for section 1 to allow Robert Rex Junior to build a house on this area
>
> The magafaoa for Section 1 on the title remain as Toke and Petelu
>
> Section 1 was in the area defined for Toke
>
> The arrangement to accommodate Robert Rex Junior was special because he had lost his home in Cyclone Ofa and needed land to build a new home.
>
> Robert Rex Junior did not use the land to build a house but built elsewhere
>
> The land had not been used for the purpose given and should according to custom be returned for the use of Toke
>
> Robert Rex Junior should be removed as Leveki Magafaoa and the Appellant appointed in his stead
>
> There has been no consultation with the magafaoa in respect of either application.

[26] The request to appoint the Appellant as Leveki Magafaoa was not an order the Lower Court had jurisdiction to make in the context of the proceedings before it. Robert Rex Junior was appointed Leveki Magafaoa out of the 1991 partition. That order was a final order and was not qualified or subject to any conditions. The lower Court ruled that it could not revisit that order and appoint the Appellant Leveki Magafaoa. We agree with the submission of the Respondent before the Court of Appeal that the learned Judge was correct in coming to that decision.

[27] Having made that determination the lower Court gave no further consideration to the arguments of the defendant or the implications arising therefrom and proceeded to grant orders as sought. It seemed that the Court accepted that the Leveki Magafaoa had the unfettered power of management of this land and was entitled to seek the orders as of right.

[28] A brief consideration of the legislation applying to both applications, the submissions of the Appellant and the facts of the cases indicate that there were questions of law that needed to be addressed by the lower Court. In the case of the Occupation Order section 31 of the Land Act 1969 applies. Also relevant is section 15 relating to the powers and functions of the Leveki Magafaoa.

[29] Section 31 of the Land Act includes –

a. The Court may under this section make in respect of any Niuean land to a member of the Magafaoa or the spouse or surviving spouse of a Member or a Member and spouse jointly an occupation order on such terms and conditions not inconsistent with this section as may be specified in the order.

b. Application for an occupation order shall be made by the Leveki Magafaoa or by the member of the magafaoa desiring the order, or by both and shall be accompanied by a description and a plan of the area to be occupied.

[30] The Common Ancestors for Section 1 are recorded on the title as Toke and Petelu. However the Appellant has pointed to the settlement of defined areas for the magafaoa of Toke and Petelu in the section 103 partition in 1981 (see para 2 of this decision). It is apparent that the magafaoa have accepted this division of interest and an examination of the various partitions and other orders relative to section 103 over the years show members of Petelu Magafaoa obtaining partition orders in the Kaimiti road end of the parent block and Toke Magafaoa in the remaining area.

[31] The only exception to this is 1991 partition of section 1. That hearing including the rehearing when the area of partition was reduced at the Appellant's insistence seems to further evidence the accord between Toke and Petelu as to their respective areas.

[32] Section 31(1) authorises the Court to make an occupation order to a member of the magafaoa. It is discretionary. It allows the Court to take into account the circumstances surrounding the application and whether in those circumstances an order is appropriate.

[33] The evidence suggests that the partition of section 1 was a special arrangement to allow Robert Rex Junior to build a house on his land. It was not used for that purpose. The Appellant claims the magafaoa for section 1 is, by accord Toke, although the title records Toke and Petelu. This raises the following issues –

(i) is Alana Rex a member of the magafaoa of Section 1 for the purposes of section 31(1) of the Land Act 1969,

(ii) should Robert Rex Jnr as Leveki Magafaoa have used his power to support the continued occupation by Petelu of Section 1 instead of Toke,

(iii) should Robert Rex Jnr have consulted the magafaoa of section 1 over the proposed occupation order pursuant to section 15 of the Land Act 1969,

(iv) did Robert Rex Jnr consult with the magafaoa?

[34] The above issues arise out of the nature of the application and the nature of the opposition to it. They should have been identified and considered by the lower Court and were not.

[35] We turn now to the application for change of Leveki Magafaoa. This application relies on section 14(2) and/or (3) of the Land Act 1969. As we noted in para [8] the form of application was not properly completed and the consent of members of the magafaoa was not supplied. Section 14)2) and (3) appear to relate to an appointment of a Leveki as opposed to a change of Leveki Magafaoa.

[36] This is a case where the Leveki Magafaoa seeks to be replaced by his daughter. Section 16 of the Land Act 1969 may have some bearing as it covers removal of a Leveki Magafaoa and in such case requires that the provisions of section 14 apply to the new appointment.

[37] The provisions in sections 14 and section 16 do not appear to provide for the change of a Leveki Magafaoa in the manner proposed by the applicant. This is another issue that should have been identified and considered by the lower Court.

[38] The failure of the lower Court to identify the various issues we have identified amounts constitutes is a breach of procedure and process which might have been prejudicial to the case of the Appellant. It amounts to a fundamental miscarriage of justice. In these circumstances this Court has no alternative but to order a rehearing.

[39] In this decision we referred to various facts and arguments presented to the lower Court as well as to aspects of law. These have only been mentioned for the purpose of identifying the issues that are apparent in the 2 applications and need to be resolved on rehearing. Such reference is not to be taken as acceptance or approval by this Court. Although we have ordered a rehearing this is no reflection on the merits of the case for either party. It is over to the lower Court on rehearing to make its own determination on the facts, evidence and submissions presented to it.

Observations

[40] The Common Ancestors for Section 103 are Toke and Petelu. The original order ostensibly defined Petelu's interest as being at the Kaimiti road area of this block. Over the years there have been a number of partitions and 2 areas totalling almost 3 hectares at the Kaimiti road end have been allocated to members of the Petelu family.

[41] It may be that the magafaoa are agreed that, leaving aside the land subject of the present dispute, the rest of the land has been split according to the entitlements of Petelu and Toke. If such is the case they may consider by agreement to apply for an order changing the magafaoa form Toke and Petelu to Toke for those lands awarded to Toke and Petelu for those lands apportioned to him.

[42] It has to be said that the Court is averse to further applications in respect of magafaoa where ownership has been determined. The reason for this is that the decision on ownership has been made and must stand. However the situation is somewhat different where joint Common Ancestors have been determined and the owners then agree to areas of separate interest. This type of application does not involve relitigation of the original ownership.

Notice

[43] The notice of appeal provided an address for service – Peleni Talagi, solicitor, Fonuakula, Alofi South. Notices were sent not to this address but to the Appellant, Puleiki Tasmania. Letters were sent on 15 December 2008 advising that the hearing would be in April 2009 and on 13 January 2009 advising the date of hearing as 18 April 2009. A meeting with the Appellant was held at the Court on 16 January 2009 where he was told to prepare his case for the hearing.

[44] The Appellant failed to turn up at the hearing on the pretext that notice had not been given to his solicitor. The appeal had to be adjourned for 2 days to allow the Appellant to prepare. While the Court was at fault in not notifying the solicitor at the address for service the Appellant had over 3 months notice of the date of hearing and should have notified his solicitor and arranged for his case to be prepared. It

appeared that he was trying to use a technicality to delay his case coming before Court. The Court considers his action discourteous and he is lucky his appeal was not struck out for non-appearance.

Decision

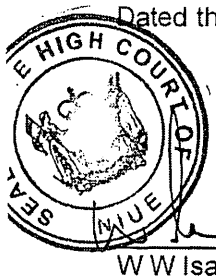
[45] The appeal is allowed. There is an order under section 117(a) of The Niue Act 1966 granting a rehearing.

Costs

[46] We make no order as to costs. In doing so we take into account the main thrust of the Appellants case sought to reopen the partition decision of 1991 and generally ignored the issues of jurisdiction which we found relevant in our decision. We also take into account the attitude of the Appellant and the inconvenience caused to both the Court and the Respondent.

[47] A copy of this decision is to be sent to all parties.

Dated the 17th day of August 2009



W W Isaac Judge

P T Savage Judge

G D Carter Judge

Land Appeal Minute Book 2 Folio 10 - 17.