

**IN THE COURT OF APPEAL
NIUE (Land Division)**

Application No. 10305

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

BETWEEN TUKALA M HEKAU, PATRICK DESMOND
JACOBSEN, SIFAHEGATAMA
PAHETOGIA, VAIOLA VASE, ANTHEA
HARDING, MIRIAM NEMIA, LOUSIANA
FANEVA KAKAUHEMOANA, ETENA LOVI
TAGELAGI being descendants of IAPETA,
Appellant

AND CHARLIE FUKU TONGAHAI
Respondent

COSTS DECISION

Background

[1] On 15 May 2012 the Court of Appeal dismissed the appellant's application made pursuant to s 75 of the Niue Amendment Act (No2) 1969.

[2] The Court gave the respondents 14 days from the date of the decision being minuted, to file the total costs sought to support the submissions that had already been made.

[3] The appellants were given 28 days from the date of the decision being minuted to reply to the respondents' submissions.



Respondent's submissions for costs

[4] Full recovery of costs incurred is sought by the respondent, totalling \$5170.00, including disbursements. This amount is for counsel's fee of \$4,200 and 1/3 of counsel's airfares, accommodation and incidentals totalling \$970. Airfares and accommodation are claimed on a 1/3 basis given counsel travelled to Niue for three court matters.

[5] It is submitted that the appeal has been an expensive process and created undue financial hardship for the respondent. Unlike the applicant who has two family members that are qualified lawyers, the respondent has had to seek legal counsel from Samoa to represent them as there was no counsel available locally.

[6] The respondent asserts that the grounds of appeal were without substance and amounted to an abuse of Court process. Furthermore they were filed out of time with no application made for special leave to enlarge the time for filing the Notice of Appeal.

[7] It is submitted that the respondent and his family have suffered ongoing unnecessary distress and mental anguish since the matter was first heard in 2005, and this has been aggravated by the subsequent re-hearings and the present appeal.

Appellants' submissions for costs

[8] The applicants submit that the Court give due consideration to the circumstances of the applicants, particularly the high costs associated with living on Niue.

[9] The applicants submit that as they are elders of the Magafaoa, most are pensioners and therefore this financial burden will fall to other family members. However as most have young families and other obligations to their church and village, they will be unable to assist.

[10] It is further submitted that the Court has already considered the costs associated with the respondent counsel's airfares and incidentals, as costs have



been awarded against the appellants in a different land matter, that of *Lamea*, which was heard in the same week as the present application.

Discussion

[11] Costs are a discretionary measure available to the Court, and should amount to a reasonable contribution of the costs actually and reasonably incurred by the successful party.

[12] The approach to determining costs is a two step basis. Firstly should costs be awarded? If the answer is yes, the second step is to determine the amount of costs that should be awarded.

[13] The law relating to costs in Niue was set out in the recent case of *Hekau v Tongahai* (2012) (Land Appeal MB 2, 23-41). The following principles have emerged as influencing factors when considering whether costs should be awarded:

- (a) Costs usually follow the event;
- (b) Costs are a discretionary measure available to the Court;
- (c) In a community such as Niue, the Court plays a role in facilitating amicable and ongoing relationships between parties, particularly in regards to land ownership, and as such costs may not be considered appropriate in some circumstances;
- (d) A successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred;
- (e) Where proceedings involved counsel, and where parties pursued and contested litigation within a relatively formal framework, an award of costs should be made;
- (f) There is no basis for a departure from the ordinary principles of costs, where the proceedings were difficult and hard fought, and where a party succeeded in the face of serious and concerted opposition;

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[14] If the Court determines that an award of costs is appropriate, the level of costs that should be awarded must then be determined. The following principles were applied by the Court in *Hekau*:

- (a) The Court has a broad discretion when deciding the level of costs;
- (b) The Court should have regard to the nature of the court proceedings; whether the proceedings were formal or informal; the importance of the issues; and the conduct of the parties;
- (c) If a party has acted unreasonably, for example by pursuing a wholly unmeritorious and hopeless claim or defence, it is within the Court's discretion to award a higher level of costs against them;
- (d) Where the unsuccessful party has acted reasonably, it should not be penalised by having to bear the full costs of their adversary as well as their own solicitor/client costs.

[15] Costs are objectively assessed with regard to the above factors and a 'reasonable contribution' will usually fall within the range of 10% - 80% of a reasonable fee.

Should costs be awarded?

[16] The respondent was successful and the appeal was dismissed.

[17] The application was contested, involved counsel, and operated within the formal legal framework.

[18] There are no meritorious reasons in this case not to follow the overarching principle that costs follow the event.

What will be the level of costs?

[19] As stated, the Court has a broad discretion when awarding costs.



[20] This appeal was late and dismissed as a result because of a misunderstanding of the legislation by counsel for the applicants.

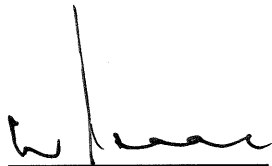
[21] All land matters are important for those involved and we see this case as being no different.

[22] As we stated in our substantive decision, it is not the duty of the Court to advise counsel how to run their case. In this case counsel for the applicants simply got it wrong and the respondent should not have to bear the cost.

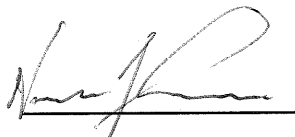
[23] As a result we set the costs payable towards the higher end of the scale.

[24] We grant the respondents 60% of the total costs claimed, being \$3102.00.

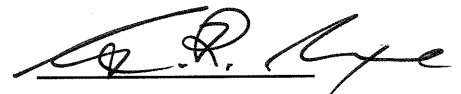
Dated at Wellington, New Zealand this 14th day of September 2012.



W W Isaac
JUDGE
(Presiding)



N Smith
JUDGE



C T Coxhead
JUDGE