IN THE COURT OF APPEAL NIUE
(LAND DIVISION)

App No. 11346

IN THE MATTER	Part Limu, Namukulu
BETWEEN	RONANOVATINA TAHEGA
	Applicant
AND	POITOGA KAPAGA
	Respondent

Hearing:	1 April 2016 (Heard at Papakura, Auckland, New Zealand)
Coram:	P J Savage CJ W W Isaac J C T Coxhead J
Appearances:	Phillip Allan for the applicant Howard Lawry for the respondent
Judgment:	17 August 2016

DECISION OF THE NIUE COURT OF APPEAL

Introduction

[1] The appeal before this Court is filed by Ronanovatina Tahega against a decision of Reeves J which;

i. Declined to grant a rehearing relating to the appointment of Ieveki Mmagafaoa in respect to Part Limu, Namukulu; and

ii. Declined to grant an injunction to stop building work on Part Limu, Namukulu.

Background

[2] The land which is the subject of this appeal is Part Limu, Namukulu containing 1301m^2.

[3] Title to this land was determined in 1980 with Laufoli being determined as the common ancestor and Ken Fasi being appointed as leveki magafaoa.

[4] It appears that Laufoli had three grandsons and this land was informally divided between them. The relevance of this division for these proceedings is that it has been suggested that one grandson, Leona, was to occupy the inland portion of the land and another grandson, Fasitoga was to occupy the seaward portion of this land.

[5] In 1979 Ken Fasi who descends from Fasitoga expressed a desire to return to Niue to live. As the seaward side was not suitable to build, he approached the Leona family who met and agreed to set aside a portion of land which was titled in 1980 as set out in paragraph 3.

[6] Building of the house did not begin until 2012 when Mr Fasi also applied to the Court under section 14 of the Land Act 1969 to appoint Mr Poitogia Kapaga as leveki magafaoa.

[7] The application was granted by the Court on 19 March 2013.

[8] In October 2014 Ronanovatina Tahega sought a rehearing of that decision and also filed an application for an injunction to stop the building of Mr Fasi's house.

[9] On 24 November 2015 Reeves J refused both applications and found that Mr Kapaga was a suitable person to be appointed as leveki magafaoa and that Mr Fasi was entitled to build on this land with the assistance of Mr Kapaga.

[10] These decisions by Reeves J are now the subject of this appeal.

Appellant's submissions

[11] Togia Sioneholo on behalf of the appellant filed written submissions with the Court on 24 March 2016, which were expanded upon by Mr Allan, counsel for the appellant, at the hearing before us on 1 April 2016.

[12] Mr Allan confirms that the land was titled in 1980 with Laufoli being determined the common ancestor and Mr Fasi the leveki magafaoa. Mr Allan submits that the purpose of doing this was to include Mr Fasi as part of the relevant magafaoa for that land. He also confirms that the Leona family was not excluded from its involvement in the land.

[13] Mr Allan also points out that the 1980 order declaring the ancestor to the land and appointing Mr Fasi as leveki was a bare order. He submits that there were no other orders or directions of the Court made in respect of the land, despite the fact that it would have been open to the Court to make alternative orders such as orders under s 13 regarding relative interests, s 31, regarding occupation orders and s 35 dealing with the apportionment of land to members of magafaoa.

[14] Mr Allan notes that Mr Fasi did not meet the requirements for appointment as leveki magafaoa at the time he was appointed, as he was not domiciled in Niue per s 14(5) of the Land Act, although he acknowledges that it was anticipated that in the very near future Mr Fasi would meet that requirement once he had built his house.

[15] In terms of the rehearing application, Mr Allan submits the court's discretion is not absolute as stated by Reeves J. Mr Allan submits that Reeves J did not take a principled approach to the consideration of whether to grant the rehearing, rather, he submits that, Reeves J simply noted that she considered the Court had an absolute discretion to decide whether or not to grant a rehearing.

[16] Mr Allan submits a more traditional and principled approach is appropriate, and the key two issues which the court ought to consider in an application for rehearing are, firstly, the timeliness of the application and secondly, the genuineness of the issue.

[17] Mr Allan submits that in this case there are two important issues to be determined. Firstly, whether after the significant amount of time had passed, the decisions made in 1980 gave Mr Fasi some "rights" to the land allowing him to build on it, and secondly, who should be the leveki magafaoa of that land. Mr Allan argues that Reeves J accepted that neither issue had had proper consultation with the magafaoa.

[18] Mr Allan goes on to argue that despite the fact the timeliness of the application for rehearing is not a contested issue, it is relevant that Ms Tahega did not become aware of the 2012 decision until October 2015. Following that, Mr Allan submits that the appellant filed the application for injunction and rehearing.

[19] It is argued that although the application for rehearing was made in a timely manner, it is submitted there was a failure to consult with the Leona side of the family which meant that they were unaware of the 2012 decision until further matters had transpired.

[20] As regards the appointment of Mr Kapaga, Mr Allan submits that Reeves J swept aside the concerns expressed in the application by not properly considering the breach of leveki magafaoa duties, in particular the failure to consult. Mr Allan says there is a statutory obligation on the leveki magafaoa to make all members of the magafaoa aware of any applications made about the land and to consult with them and obtain their views.

[21] In addition, Mr Allan argues that Reeves J unduly focused on the rights of Mr Fasi to build his house and as a result read down Mr Fasi's duties and obligations to the wider magafaoa, to consult and to attempt to obtain some degree of consensus if at all possible.

[22] Mr Allan submits there are three key reasons why there should have been consultation. Firstly, the delay in building, secondly, the change of leveki and third the change in the circumstances of the wider magafaoa.

[23] In terms of the building, Mr Allan asks the Court to take into account the fact that where occupation orders have been granted under s 31(8)(a) the land cannot be left for a period of greater than two years. That two year limit, Mr Allan says, can be read into the idea of a reasonable amount of time in which to build or in which to take action. Mr Allan submits that now, after 30 plus years, Mr Fasi cannot assert rights over the land by virtue of an agreement that was made back in 1980.

[24] Mr Allan further submits that Mr Fasi decided to appoint his nephew of Mr Kapaga, who was not a member of the magafaoa of the land for the purpose of getting the building project up and running. Mr Allan submits the reference in the hearing before Isaac J in 2012, to there being no objection in the minutes is misleading as there was no one present to object to the application because they were unaware of the application.

[25] Mr Allan submits that the appointment of Mr Kapaga breached s 15(2) of the Land Act as neither Mr Fasinor Mr Kapaga consulted with the magafaoa. Mr Allan submits the failure to consult not only cuts across the duties of the leveki magafaoa in this situation, but whether intentional or otherwise, it may even reach the threshold under s 54 of the Act (the fraud exception) on the basis that the Court is being misled as to the situation that applies. Further, the failure to consult is a failure to give adequate notice and therefore when the magafaoa affected by the decision find out about it, they are entitled to apply for a rehearing.

[26] Mr Allan also points out that Mr Kapaga has repeatedly said that he is acting for Mr Fasi. Mr Allan says this demonstrates a misunderstanding of Mr Kapaga's duties and obligations as

leveki magafaoa. Mr Allan submits that as leveki magafaoa, Mr Kapaga must act for the magafaoa – being all the descedants of Laufoli. Mr Allan argues that this misunderstanding has flowed into the decision of Reeves J. It is submitted that the purpose for which Mr Kapaga was appointed as leveki magafaoa was not to represent the interests of the wider Magafaoa, but to pursue the building plans of Mr Fasi.

[27] Mr Allan submits that evidence before Isaac J in 2012 did not disclose any reasons as to why Mr Kapaga was suitable for appointment as leveki magafaoa.

[28] In addition, Mr Allan submits that Reeves J preferred the appointment of Mr Kapaga over the suggestion by the Leona family that three representatives be appointed. Mr Allan says Reeves Jdid not consider a letter by the Leona family in its entirety. Mr Allan asks the Court to consider the letter subsequently received by the Leona family in support of the fact that these issues have not been properly considered by the magafaoa and that is reason for a rehearing.

[29] Further, Mr Allan submtted that Reeves J further erred in picking up on the view point that Mr Fasi could build his house, but then ignoring the further position of the Leona family that they sought representation for their family for that land, notwithstanding their allowance of his building on the land.

Respondent's submissions

[30] Mr Lawry, for Mr Kapaga, submits that there was full consultation before the November hearing and there has been no evidence before the Court to suggest otherwise.

[31] In addition, Mr Lawry states that by the time the matter came before Reeves J, there had been various discussions with the family concerning the building of the house and the appellant was kept informed of this.

[32] Mr Lawry further submits that the land is not land of the division Leona, but rather it belongs to the wider family. He says this is not land that has been divided between the three brothers, it is land that belongs to the magafaoa so that Mr Fasi has as much right to it as any member of the Leona family, and conversely, the Leona family have the right to approach the magafaoa and say we would like to have a parcel of the land so that we could build a house.

[33] In terms of Mr Kapaga's appointment, it is submitted that Mr Kapaga believed he was to be appointed jointly, together with Mr Fasi, given that the land is not his and he does not have an

interest in it. Mr Lawry submits that Mr Kapaga is assisting Mr Fasi on all matters which includes not just building but, of course, any obligation to consult.

[34] Mr Lawry rejects the proposal to appoint three leveki magafaoa on the basis that this is not a block where land is being used for cultivation. He submits that in this case given that the land is for a house, it would be as inappropriate to appoint three leveki magafaoa.

[35] Mr Lawry submits that the use of the land where a person's dwelling is constructed has slightly different considerations from land that has continued to be used by the magafaoa. He says that once the land was surveyed and made available for Mr Fasis to build upon and his appointment as leveki magafaoa was made then the house site would be a house that the wider family generally would have no inerest in because it would be Mr Fasi's house.

[36] Further, Mr Lawry argues that an occupation order at the time was not appropriate and points out that in many cases land is either surveyed or partitioned and then a house is built and then an occupation order is sought because the person does not have a place to live in Niue until the house has been built.

[37] Mr Lawry advises that Mr Fasi had no desire to withdraw any of his obligations or advantages of being leveki magafaoa, he simply wanted somebody in Niue who could look after the land while the house is to be built.

[38] In terms of the rehearing application, Mr Lawry submits that the court has a discretion whether or not to grant a rehearing after consideration of all of the factors. Mr Lawry submits that in this case Reeves J had before her a situation where the Magafaoa, as long ago as 1980, had confirmed Mr Fasi could be leveki magafaoa of that site so he could build his home and there was nothing to suggest that Mr Kapaga was an unsuitable person for appointment as leveki magafaoa. Mr Lawry argues that nothing has been provided to show that Mr Kapaga has not protected the interests of the magafaoa.

[39] Mr Lawry further submits that Reeves J was correct to find that Mr Kapaga was a suitable person for appointment as leveki magafaoa. He argues that the only ground put forward as to Mr Kapaga being unsuitable was the fact that Mr Kapaga does not have a bloodlink to the land. Mr Lawry points out that the law does not require such a link.

[40] In the circumstances Mr Lawry argues that a rehearing is not appropriate, the court properly considered whether Mr Kapaga was an appropriate person to be appointed leveki

magafaoa and in addition Reeves J was correct in finding that there was no time restriction placed on the building of the house.

[41] As regards the injunction application, Mr Lawry submits that the basis for the injunction suggested that they were trespassers on land which clearly is not right given that they are descendants of the family. He says that at no time have any of the magafaoa taken action to query why the building had not taken place over the years.

[42] Mr Lawry argues that these applications have delayed and added to the substantial expenses in relation to the house being built. Mr Lawry submits that it is inappropriate for an injunction to prevent building when the famliy all confirmed that the house should proceed. Mr Lawry submits that the sole issue is the appointment of leveki magafaoa and that issue should not affect whether the house is built.

The Law

[43] Rule 30 of the Niue Land Court Rules 1969 provides as follows:

> That no application for rehearing under s 45 Niue Amendment Act (No 2) 1969 shall be after the expiry of fourteen (14) days after the making of the order sought to be reheard.

[44] Section 45 of the Niue Amendment Act (No 2) 1968 states:

> (1) On the application of any person interested, the Land Court may grant a rehearing of any matter either wholly or as to any part of it.
>
> (2) On any such rehearing the Court may either affirm, vary, or annul its former determination, and may exercise any jurisdiction which it might have exercised on the original hearing.
>
> (3) When a rehearing has been so granted, the period allowed for an appeal shall not commence to run until the rehearing has been disposed of by a final order of the Court.
>
> (4) Any such rehearing may be granted on such terms as to costs and otherwise as the Court thinks fit, and the granting or refusal of it shall be in the absolute discretion of the Court.

(5) No order shall be so varied or annulled at any time after the signing and sealing of it.

[45] In *Tuineau v Talagi - Pt Faleapuna, Makefu* Justice Isaac expressed the law relating to rehearings as follows:[1]

> [16] Also, as set out by the Niuean Court of Appeal in *Tasmania v Rex*, which followed *Ladd v Marshall*, *Dragicevich v Martinovitch* and *Almeida v Opportunity Equity Partners Ltd (The Cayman Islands)*, the Court determined that the granting of a rehearing application is limited to the following circumstances:
>
> (i) Where further material evidence of a credible nature has been discovered which was not available at the original hearing;
>
> (ii) Where 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;
>
> (iii) Where judicial error is involved, a party is entitled to a retrial if the result of the error is a fundamental miscarriage of justice.

[46] In that case Isaac J noted that while the court has an absolute discretion to grant a rehearing, this discretion can only be exercised if one of the criteria set out above has been satisfied and not simply to allow an unsuccessful party the opportunity to re-litigate the case.[2]

[47] The refusal to grant a rehearing is an exercise of discretion. In order to overturn an exercise of discretion it must be shown that the decision contains an error of law or principle, or irrelevant considerations have been taken into account or relevant considerations have not been taken into account, or the decision is plainly wrong.[3]

Discussion

Rehearing

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1 *Tuineau v Talagi - Pt Faleapuna, Makefu* HC Niue, 26 May 2011

2 Ibid at [16]

3 See *K v B* [2010] NZSC 112, [2011] 2 NZLR 1 (SC) and *Austin, Nicholas & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 (SC)

[48] Mr Allan has submitted that Reeves J erred in her approach by not taking a principled approach to the application and relying on what she considered was an absolute discretion of the Court to grant or refuse rehearing applications.

[49] Mr Lawry supported the exercise of the Court's discretion to grant or refuse the rehearing after consideration of all the factors of the case.

[50] Section 45 Niue Amendment Act (No2) 1968 clearly gives the Court a discretion to grant or refuse to grant a rehearing application, but this discretion must, in our view, be exercised in a principled manner with the fundamental consideration being whether there has been a miscarriage of justice sufficient to justify the granting of a rehearing.

[51] In her decision Reeves J said this;

> [7] ...Mr Kapaga has stated by way of declaration he is in effect acting on behalf of Ken Fasi to facilitate the building project. He has no wish to acquire an interest in the block and he expects that Ken Fasi wishes to resume the leveki position once he returns to Niue to reside. It would have been more politic for Ken Fasi to consult with the mangafaoa regarding his intentions. This could well have avoided some of the present opposition.
>
> [8] However, the Court has an absolute discretion whether to grant a rehearing. In the present case, I consider that the granting of a rehearing of the leveki appointment would jeopardise Mr Ken Fasi's legitimate plans to build his house. I consider Mr Kapaga is a suitable person for appointment as leveki and taking into account all the circumstances I decline to grant a rehearing of the leveki appointment.

[52] Mr Allan submits that Reeves J failed to adequately consider the genuine matters raised by the appellant in terms of the appointment of Mr Kapaga, namely, the fact that Mr Kapaga was appointed without consultation with the magafaoa and was only appointed for the purpose of overseeing the building project.

[53] In addition, Mr Allan argues that Isaac J, in did not have proper regard to the suitability of Mr Kapaga as required under s 14 of the Act and alleges that the reference to there being no objections to the appointment was misleading.

[54] Mr Lawry submits that Mr Kapaga was under the impression that he was to be appointed joint Leveki Magafaoa with Mr Fasi. He says that despite the fact Mr Kapaga has made

statements to the effect he is acting for Mr Fasi, he is aware he is assisting Mr Fasi on all matters which includes not just building, any obligation with consultation.

[55] At the hearing we discussed with the parties whether the application to appoint Mr Kapaga was one made by the majority of the magafaoa. It appears that it was not. The application was made solely by Mr Fasi with no indication of support from the magafaoa.

[56] Under s 14 of the Land Act 1969 where an application for the appointment of leveki magafaoa is made by the majority of Magafaoa, the Court shall issue the order appointing the person named in the application. Where the application is made by less than a majority the court may appoint a suitable person to be leveki magafaoa. Per s 14(5) any person who is domiciled in Niue and who the court is satisfied is reasonably familiar with the geneaology of the family and the history and locations of magafaoa land may be appointed as leveki magafaoa of any land.

[57] Reeves J was clearly cognisant of the issue of consultation with the magafaoa and weighed that factor against the possible impacts that the granting of a rehearing would have on Mr Fasi's building plans. We find that in doing so Reeves J failed to take into account the very relevant fact that the application to appoint Mr Kapaga was made by Mr Fasi solely, and in the absence of evidence of support of the magafaoa.

[58] We also find that in weighing the impact of the rehearing on the building plans Reeves J did not consider whether Isaac J had fully considered matters as to suitability, rather, Reeves J simply moved to make her own findings on the suitability of Mr Kapaga.

[59] In addition it is difficult to accept that Mr Kapaga's appointment was for anything other than to act on behalf of Mr Fasi. He has after all made a sworn statement to that effect. A leveki magafaoa has a duty to act on behalf of the magafaoa, that is all the descendants of Laufoli not just Mr Fasi.

[60] Having regard to the above we grant the appeal in respect to the refusal to grant the rehearing and we refer the application back to the lower Court to be reheard.

Injunction

[61] In her decision regarding the injunction Reeves J stated;

> [9] Having determined that there will be no re-hearing of the leveki appointment, I also dismiss the injunction application. Mr.Fasi is entitled to build his house on this block with the

assistance of Mr.Kapaga, and there is no necessity or grounds to halt those works, including the location of the containers on the land.

[10] In relation to the third issue raised, Mrs Tahega says it is now unreasonable for Mr Keni Fasi to build, as he has delayed so long since the original grant in 1980. She says the land should go back to the Leona family. I refer to the letter of 22/9/15 to the Court from Afeletama Leona a brother of the late Tautulu Togiafulu Leona. In that letter he recognises, albeit reluctantly, that the section referred to in the 1980 court minute by Tautulu Togiafulu Leona is for Keni Fasi to build on. Mr Leona says he speaks for the Leona families in New Zealand and in Niue on this issue.

[11] I have also reviewed the court minutes of 1980, and the grant of title to Ken Fasi is not made conditional on building being complete within a certain time period or any other condition.

[12] For these reasons I dismiss the applications before the court for re-hearing and injunction.

[62] Mr Allan argued that given the length of time that has elapsed since the 1980 agreement to build Mr Fasi cannot now assert he has rights to build relying on that agreement.

[63] Mr Lawry argues that the basis for the injunction was that Mr Fasi and Mr Kapaga were trespassers on the land, which is not correct.

[64] Mr Lawry also considers that it is inappropriate for the injunction to prevent the building as the sole issue is the appointment of leveki magafaoa and this should not stop the building of the house.

[65] In an injunction application the Court is required to consider whether there is a serious case to be tried, where the balance of convenience lies and whether the overall justice of the case supports the grant of an injunction.[4]

[66] In *Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited* the Court of Appeal as stated:[5]

> The principles applicable to the grant of an interim injunction are well known. The Courts in this country have generally followed the decisions in *American Cynamid Co v Ethican Ltd* [1975] AC 396 and *Fellowes v Fisher* [1975] 2 All ER 829. The threshold question in each case must be whether the plaintiff has established that there is a serious question to be tried. In order to determine that question the Court must consider – first, what each of the parties claims the facts to be; second, what are the issues between the parties on these facts; third, what is the law applicable to those issues, and, fourth, is there a tenable resolution of the issues of fact and law on which the

[4] *Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited* [1985] 2 NZLR 129.
[5] ibid

plaintiff may be able to succeed at the trial: see *Shotover Gorge Jet Boats Ltd v Marine Enterprises Ltd* [1984] 2 NZLR 154, 157.

[67] The balance of convenience requires balancing the injustice that will be caused to the applicant of an interim injunction is refused and the applicant's case ultimately succeeds, against the injustice to the respondent that will result of the judgement is made, but then discharged in the substantive judgement.[6]

[68] In her decision Reeves J stated that as she had determined there would be no rehearing, she would also dismiss the injunction.

[69] There did not appear to be any assessment or finding of where the balance of convenience lay. Also, there did not appear to be any evidence given to the Court on this issue.

[70] This is a matter which is inextricably linked to the use and occupation of this land and with the change in circumstance from 1980 to the present day. In our view the Court required evidence of these circumstances to make an informed decision.

[71] Having regard to the above, we consider the application for the injunction should be sent back for a hearing before the lower Court alongside the rehearing of the application for the appointment of the leveki magafaoa, and the appeal s granted to that extent.

[72] We appreciate the inconvenience to Mr Fasi in relation to his building plans but note that the next sitting of the lower Court will be November 2016.

[73] In these circumstances we direct the Registrar to contact the parties to ensure that the matter is set down for hearing at that time.

[74] A copy of this decision is to go to all parties.

Dated at Wellington this 17th day of August 2016.

P J Savage	W W Isaac	C T Coxhead
CHIEF JUSTICE	**JUSTICE**	**JUSTICE**

[6] *Wellington International Airport Limited v Air New Zealand Limited HC Wellington CIV-2007-485-1756, 30 July 2008.*

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