IN THE COURT OF APPEAL OF NIUE

APPLICATION: 11253

	UNDER	Rule 35, Niue Land Court Rules 1969
	IN THE MATTER OF	Part Matapa, Provisional Plan 9388, Hikutavake District
	BETWEEN	DICK HIPA TUHIPA AND NIUTAMA TUHIPA Appellants
	AND	DICK HIPATAMA HIPA AND MORRIS TAFATU Respondents
Court:	Coxhead CJ Reeves J Armstrong J	
Hearing:	On the papers	
Judgment:	18 November 2020 (NZ)	

DECISION OF COURT OF APPEAL

Copies to: R Toailoa, toalaw@outlook.com

Introduction

[1] On 20 March 2015, Justice Isaac made orders in relation to Part Matapa, Hikutavake district ("the land"), determining the common ancestor to be Taoafe and appointing Morris Tafatu and Richard Hipa as leveki mangafaoa for the land.

[2] Mr Tuhipa appealed the decision of Justice Isaac to the Court of Appeal. He claimed the lower Court was wrong in its determination of the common ancestor and leveki mangafaoa.

[3] On 13 March 2019, the Court of Appeal dismissed the appeal on the basis that no error was found in the lower Court's decision. Leave was granted for Mr Toailoa, as counsel for the respondents, to file a memorandum as to costs within 30 days from the date the decision issued. The appellant, Mr Tuhipa, was then given 30 days to file any response.[1]

[4] This decision considers whether costs should be awarded and, if so, the amount of that award.

Background

[5] Three competing applications were before Justice Isaac in relation to Part Matapa, Hikutavake District. They were:

(a) An application dated 31 July 2007 by Tuhipa Niutama to determine the common ancestor as Matilatau and the leveki mangafaoa as Tuhipa Niutama;

(b) An application dated 20 September 2013 by Frank Fakaotimanava Lui to determine the common ancestor as Emile Poakihesifa and the leveki mangafaoa as Frank Fakaotimanava Lui; and

(c) An application dated 27 May 2014 by Morris Tafatu and Richard Hipa to determine the common ancestor as Taoafe and the leveki mangafaoa as Morris Tafatu and Richard Hipa.

---

1 *Tuhipa v Hipa – Part Matapa, Provisional Plan 9388, Hikutavake District* CA Niue, Application 11253, 13 March 2019.

[6] The land includes the Matapa trails, leading to Matapa Chasm, and part of Talava trails, leading to Talava Arches. Both these areas are of immense cultural and historical importance to the Hikutavake community and are important areas for Niue tourism.

[7] Justice Isaac found that the Hipa claim had the most merit of the three applications and set out a direct descent line from Taoafe to the applicants, Morris Tafatu and Richard Hipa. He found the genealogical link to be supported by constant occupation of the land from Taoafe to those applicants and therefore found Taoafe to be the common ancestor of the land.[2]

[8] Justice Isaac acknowledged that the land has historical and cultural significance to the people of Matapa and he reiterated that all Hikutavake families recognised the land's immense tourism importance. He was assured that the land would continue to remain available for public, family and village use with his decision that the common ancestor was Taoafe.

[9] The Taoafe family held a meeting with all the Hikutavake community to determine the appropriate leveki mangafaoa for the land. The outcome of that meeting was that the Hipa family unanimously supported Morris Tafatu and Richard Hipa as leveki mangafaoa, with the majority of the Hikutavake and Matapa communities also in support. With this evidence, Justice Isaac appointed Morris Tafatu and Richard Hipa leveki mangafaoa of the land.[3]

[10] In the Court of Appeal, no mistake was found in the lower Court's assessment of the evidence and the Court considered the appellant was merely seeking to re-run his unsuccessful case of first instance.

Case for the Respondents

[11] Counsel for the respondents submitted that a higher level of costs should be awarded than those that were ordered in *Hekau v Tongahai* for the following reasons:

---

2 *Tuhipa v Hipa – Part Matapa, Provisional Plan No 9388, Hikutavake District* HC Niue, Applications 9579, 9580, 9324, 20 March 2015 at [53].

3 At [54]-[57].

(a) The appeal grounds were simply a restatement of the same arguments put forward by the respondents in the lower Court;

(b) There was no reasonable prospect of the appeal being successful and it bordered on being frivolous and vexatious;

(c) The appellants previously failed in litigation in respect of adjoining land involving the same parties, and should therefore have realised that their appeal would also be futile; and

(d) The respondents had to engage legal counsel to assist with the appeal, to prepare responses and submissions on their behalf, and to appear at the hearing of the appeal.

[12] The respondents stated that they have thereby incurred legal costs in the sum of $10,884.49 and seek the maximum contribution of 80 per cent from the appellants towards their legal costs.

Case for the Appellants

[13] The appellants submitted that they filed their appeal, not to re-run the lower Court proceedings, but because they sought justice. In addition, they argued that anyone in the same situation would have pursued this matter to the end.

[14] The appellants noted previous litigation they had been involved with, highlighting:

(a) Those cases against Tuhipa mangafaoa, which pertained to the Hikutavake district, where parties were unsuccessful in seeking costs;

(b) Those cases where the Tuhipa mangafaoa were successful in their applications and did not seek costs from the unsuccessful parties involved; and

(c) A case where the Tuhipa mangafaoa were unsuccessful in their application, which they stated to be “long and hard”, but no compensation claim was filed against them by the successful party.

[15] The appellants noted the two applications the Tuhipa mangafaoa have been involved with regarding this matter have been difficult, with heavy costs incurred by both parties. They submitted their understanding that, where Land Court matters involve close family members and relatives, to award compensation to one single party would be unfair.

The Law

[16] Section 35 of the Niue Land Court Rules 1969 states:

> **35 Costs**
>
> In any proceedings the Court may make such order as it thinks fit for the payment of the costs thereof, or of any matters incidental or preliminary thereto, by or to any person who is a party to the proceedings, whether the parties by and to whom all costs are so made payable are particles in the same or different interests.

[17] In *Hekau v Tongahai* the Court of Appeal noted there is a two-step approach to determining costs. Under this approach, the Court firstly determines whether costs should be awarded. If it determines that costs should be awarded, the second step is to determine the appropriate amount of costs.[4]

[18] The Court of Appeal found the following principles to be relevant when considering whether costs should be awarded:[5]

(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 regard to land ownership. 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 reasonably incurred;

---

4 *Hekau v Tongahai* CA Niue, Application 10305, 14 September 2012. See also *Sioneholo v Talagi* CA Niue, August 2012; and *Oloapu v Vilitama* CA Niue, Application 11001, 19 June 2018.

5 *Hekau v Tongahai* CA Niue, Application 10305, 14 September 2012, at [13].

(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.

[19] In determining the level of costs that should be awarded the following principles are applicable:[6]

(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.

[20] Costs are objectively assessed with regard to the above factors and a reasonable contribution will usually fall within the rang of 10 per cent to 80 per cent of a reasonable fee.

Discussion

The fundamental rule is that all questions relating to costs fall within the discretion of the Court. The fixing of costs is quintessentially the exercise of a judicial discretion. The underlying rationale is that a party should be able to recover a reasonable contribution towards their legal expenses, with the aim not to fix solicitor or counsel remuneration but

6 *Hekau v Tongahai* CA Niue, Application 10305, 14 September 2012, at [14].

to impose on the unsuccessful party an obligation to make good the burden of bringing or defending the matter carried by the successful party. However, except in rare cases, a successful party can only expect to receive a contribution towards the actual legal expenses reasonably incurred.

[21] With very few exceptions, an award of costs is for legal costs – costs of a lawyer. Where all parties in a proceeding are not represented, costs will not be an issue. However, when a party is represented and are successful, a costs award becomes a real issue for the unsuccessful party, particularly if they are not legally represented. In that regard, the prospect of an award of costs may deter people from accessing the Courts to file or oppose applications. The Court would not like to see a situation where the prospect of a costs award being made against them prevents genuine parties from filing contestable applications or opposing applications for good reason. Conversely however, the Court does not want to encourage people bringing or opposing, applications that have little or no merit of succeeding and therefore unreasonably burdening genuine parties with the costs of such litigation.

[22] It is also important that the Court recognise the Niuean context when deciding costs matters. Firstly, there are few lawyers in Niue. Most parties who appear in the Court are self-represented. Where a party is represented, it is common for only one side to be represented by counsel and often that counsel will reside outside of Niue. While the prospect of an award of costs against an unsuccessful party is a normal consideration when deciding to file or oppose an application, that may not necessarily be the case within the Niuean context where most parties are self-represented.

[23] Secondly, the Court plays an important role in facilitating amicable and on-going relationships between parties, particularly in regard to land ownership, where parties to the proceedings are inevitably related through genealogy. As such, costs may not be considered appropriate in some circumstances.

Should costs be awarded?

[24] The respondents were successful in this appeal and costs would normally follow the event. While we acknowledge that the appeal had little chance of success, we do not consider it to be frivolous or vexatious.

[25] It is clear from the decision of Judge Isaac that the land involved in these proceedings is of immense cultural and historical importance to the Hikutavake community and is also important to tourism in Niue. The appellants noted that the Tuhipa mangafaoa have been involved in this matter for a substantial period of time, with their application having been filed in 2007. Understandably, this was clearly a matter of significant importance to the appellants.

[26] In the broader context, the appellants noted that heavy costs were incurred on both sides and they highlighted that there have been occasions when they have been successful in land applications and have not sought costs from the unsuccessful party, although it was unclear whether those situations involved lawyers. The appellants also argued that where the proceedings involved close family members and relatives, to award costs to one party would be unfair.

[27] Taking the Niuean context into account and balancing the competing arguments, we are of the view that costs should not be awarded. These were long outstanding applications involving people of the same communities. An award of costs will not facilitate amicable and on-going relationships between parties.

Decision

[28] The Court declines to award costs and this matter is concluded.

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

Dated at Rotorua, Aotearoa/New Zealand this 18th day of November 2020.