

**IN THE COURT OF APPEAL OF NIUE  
(LAND DIVISION)**

**App No: 11615**

UNDER Section 14 of the Land Act 1969, section 47(1)  
of the Niue Amendment Act (No 2) 1969 and  
section 35 of the Niue Land Court Rules 1969

IN THE MATTER OF the land known as Part Limu, Section 1, Block  
II, Namukulu District

BETWEEN RONANOVATINA LEONA TAHEGA  
Appellant

AND POITOGIA KAPAGA  
Respondent

Hearing: On the papers

Court: Isaac J  
Reeves J  
Armstrong J

Appearances: Mr Sioneholo for the Appellant  
Mr Toailoa for the Respondent

Judgment: 27 July 2020 (NZ Time)

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**DECISION OF THE COURT OF APPEAL ON COSTS**

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## Introduction

[1] On 19 May 2020, we dismissed this appeal by majority decision. The respondent seeks an award of costs which is opposed by the appellant. This decision determines whether costs should be awarded and if so, in what amount.

[2] The background to this proceeding is set out in detail in the aforementioned majority decision and we do not repeat it here.

## The Law

[3] The principles that apply when considering an award of costs was summarised by this Court in *Oloapu v Vilitama*:<sup>1</sup>

[17] Section 35 of the Niue Land Court Rules 1969 provides:

### **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 parties in the same or different interests.

[18] In *Hekau v Tongahai* this Court adopted the two-step approach to costs. Firstly, should costs be awarded? Second, if costs are to be awarded what amount of costs should be awarded?

[19] The following principles are relevant 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 regard 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;

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

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<sup>1</sup> *Oloapu v Vilitama* [2018] NUCA 1; Land Division 11001 (19 June 2018).

- (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;

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

[4] We adopt that approach.

### **Submissions for the respondent**

[5] Mr Toailoa, for the respondent, argues that this litigation has been protracted and the respondent was successful. Mr Toailoa submits that Mr Fasi, whom the respondent supports and was acting for, has incurred significant costs. He argues the costs claimed were actually and reasonably incurred and that the proceedings were complex and hard fought.

[6] Mr Toailoa submits that the Court should award a contribution of 85 percent of actual costs.

### **Submissions for the appellant**

[7] The appellant does not address the relevant principles concerning an award of costs. The appellant submits any damage to the building equipment is the respondent's responsibility.

### **Should we award costs?**

[8] We accept Mr Toailoa's submission that this proceeding has been protracted and that the respondent was ultimately successful. However, while the appeal was not successful, it cannot be described as frivolous or vexatious.

[9] The issues raised were important for all members of the mangafaoa who associate with this land. The appeal had merit as demonstrated by the split decision from the Court of Appeal Bench.

[10] We are also conscious of the fact that the parties have an ongoing relationship with each other concerning the use and administration of the land which was the subject of this appeal. While the parties have been in conflict over the use of this piece of land, the majority decision has resolved that dispute and has provided the parties with an opportunity to move forward in a collective and constructive manner. We consider an award of costs in this case may jeopardise the ongoing relationship between these families.

[11] For these reasons, we consider that it is not appropriate to award costs in this case and costs should lie where they fall. As we have not awarded costs it is not necessary to consider the issue of quantum.

### **Decision**

[12] We decline to grant an award of costs in this case.

Pronounced at 2:30pm in Whangarei on the 27<sup>th</sup> day of July 2020.

WW Isaac  
**JUSTICE**

S F Reeves  
**JUSTICE**

M P Armstrong  
**JUSTICE**