

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

App No. 11251, 11258

IN THE MATTER Niue Land Ordinance Act 1969 Part II, Section 45 of the Niue Amendment Act (No 2) 1968 and Rule 30 of the Land Court Rules 1969

AND
IN THE MATTER the land known as Part Matapa, Hikutavake

BETWEEN FRANK FAKAOTIMANAVA LUI
Applicant

AND MORRIS HEMU TAFATU and RICHARD HIPA
First Respondents

AND DICK TUHIPA and RICHARD TUHIPA
Second Respondents

Hearing: On the papers

Appearances: Mr M Solomon for the applicant
Mr R Toailoa for the respondents

Decision: 11 December 2019

DECISION OF JUSTICE W W ISAAC ON COSTS

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Introduction

[1] On 20 March 2015, I made orders determining the common ancestor of Part Matapa in Hikutavake district (the land) to be Taoafe and appointed Morris Tafatu and Richard Hipa as leveki magafaoa.

[2] Mr Frank Lui, a party to the matter, filed an application to have it reheard shortly after the orders issued. For reasons that are not clear, that matter was not set for hearing by the Court until March 2019.

[3] In January 2019, Mr Lui sought to withdraw his application due to health reasons.

[4] On 11 March 2019, at a sitting of the court, I dismissed the application by consent of the parties. I advised that counsel for the respondent had 30 days to file on costs if they wished and that I would also invite submissions on costs from counsel for the applicant.

Submissions of the First Respondents

[5] Mr Toailoa is seeking costs of 80% of his fees. His evidence shows he charged 9 ¼ billable hours at a rate of \$250.00 per hour for a total \$2,312.50 plus an additional \$459.49 for disbursements such as flights.

[6] Counsel submits that costs follow the event, even in the case of a withdrawal and the Court has previously awarded costs for the withdrawal of an appeal.¹ The first respondent had engaged legal representation and incurred associated costs up to the time the application was dismissed and therefore a costs award against the applicant is necessary.

[7] Mr Toailoa submits that the rehearing application lacked merit and was unreasonably brought and that as the Court has previously granted costs for withdrawal of a meritorious case, there is no reason not to do so here.²

[8] With regard to the lack of merit, counsel notes that the alleged errors of fact were in fact discussed in Court, if the applicant had not had enough time to prepare, he ought to

¹ *Oloapu v Vilitama* [2018] NUCA 1.

² Above n 1.

have informed the Court at the time and, in essence, the applicant is seeking to relitigate a matter that did not go his way.

Submissions of the Applicant

[9] Counsel for the applicant, Mr Solomon, filed submissions objecting to the costs sought.

[10] It has been noted that Mr Toailoa does not have a current legal practising certificate nor did he have one at the time of the 2015 proceedings. As he did not request leave to appear as an agent in front of the Court, he does not meet the requirements for right of audience under s 80 of the Niue Act 1966.

[11] Without a practising certificate or leave of the court to appear as agent, Counsel submits that Mr Toailoa did not have a right of audience and therefore is barred from seeking costs.

[12] Mr Solomon further submits that Mr Toailoa has charged his time at the rate of a registered lawyer in Niue and as he is not registered this rate is unreasonable. He suggests that \$100 to \$125 per hour is a reasonable rate for unregistered agent.

[13] Counsel submits that the application for rehearing was not lacking in merit but was brought on legitimate grounds with supporting evidence. Despite this, the applicant was required to withdraw due to serious health issues as evidenced by the supplied medical certificate.

[14] According to *FM Custodians Ltd v Pati*, the Court need not consider the merits of the case unless there are obvious matters that influence costs and that is not the case here.³

[15] Counsel refutes the argument that the findings of fact were correct at the first hearing, noting this is a matter to be determined by the Court on rehearing and therefore irrelevant to the costs in question.

³ *FM Custodians Ltd v Pati* [2012] NZHC 1902.

[16] Mr Solomon does submit further on his lack of preparation, providing evidence from the transcript of the original hearing and noting that he was not instructed until his arrival in Niue shortly before the Court sitting.

[17] Because of the above reasons, counsel submits that, if the Court should find that Mr Toailoa can receive costs, these should only be 10% of costs reasonably incurred. Furthermore, the costs should be reassessed at a rate of \$125 per hour.

[18] For 9 ¼ hours work charged at \$125, plus \$409.49 for airfares and accommodation, minus \$50 for unspecified sundry and at 10%, Counsel submits costs come to \$197.52.

Law

[19] Costs are governed by s 35 of the Niue Land Court Rules 1969:

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.

[20] The approach to determining costs has two steps:⁴

- (a) Should costs be awarded? And if so,
- (b) What amount of costs should be awarded?

[21] In *Oloapu v Vilitama*, the Court of Appeal listed the considerations for whether to grant costs: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, and as such costs may not be considered appropriate in some circumstances;

⁴ *Hekau v Tongahai* [2012] NUCA 5. See also *Sioneholo v Talagi* [2012] NUCA 4.

⁵ Above n 1 at [19].

- (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;

[22] The Court also listed some considerations for the level at which to set costs:

- (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

[23] Finally, the Court of Appeal had regard to New Zealand case law for principles regarding the award of costs when an application has been discontinued. The Court in *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* made the following observation on r 15.23 of the High Court Rules (NZ):⁶

[12] The Judge correctly stated the law on r 476C. She referred to *North Shore City Council v Local Government Commission* (1995) 9 PRNZ 182, noting that the presumption in favour of awarding costs to a defendant against whom a proceeding had been discontinued may be displaced if there were just and equitable circumstances not to apply it. A court would not speculate on respective strengths and weaknesses of the parties' cases. The reasonableness of the stance of both parties, however, had to be considered. She also referred to *Oggi Advertising Limited v McKenzie* (1998) 12 PRNZ 535 which recognised that the discretion reposing in r 46 could override the general principles relating to discontinuance.

[24] And in *FM Custodians Ltd v Pati*:⁷

[11] The Court is not limited in the factors that can be taken into account when considering whether the presumption is displaced, but the following are matters which are taken into consideration:

⁶ *Kroma Colour Prints Ltd v Tridonicatco NZ Ltd* [2008] NZCA 150 at [12].

⁷ *FM Custodians Ltd v Pati* [2012] NZHC 1902 at [11] to [12].

- (a) As the general rule the Court will not consider the merits of the respective cases (unless they are so obvious that they should influence the costs issue).
- (b) The Court will consider the reasonableness of the stance of both parties in the proceeding (whether it was reasonable for the plaintiff to bring and continue the proceeding, and for the defendant to oppose and continue to oppose it, up to the point of discontinuance).
- (c) Conduct prior to the commencement of the proceeding may be relevant (for example, if any conduct by a defendant has precipitated the litigation), as may be the reason for discontinuing (for example, where a change of circumstances has made the proceedings unnecessary).

[12] The Courts general discretion in relation to costs can also override the general principles in relation to discontinuance.

Discussion

[25] As stated, the Niuean courts have adopted the New Zealand approach to costs on withdrawal of a proceeding and the associated principles. While there is a presumption in favour of costs, I retain a discretion to weigh the facts of the case against that presumption.

[26] It is also important to note what the Supreme Court of New Zealand termed the “primary rule” as relates to costs and disbursements.⁸ This rule, dating back to the early years of the English Common Law system, states that recoverable costs are limited to the legal costs of the claim and is most commonly referenced for the principle that costs are not available to a litigant in person.

[27] In the United Kingdom and Canada, this rule awarding costs only to parties represented by counsel has been overturned. The intention behind limiting costs in this way is to prevent parties from bringing frivolous litigation that occupies court time and puts other parties to expense. This reasoning did not hold in the UK and Canada, however, there is nothing before me to indicate that Niue has adopted a similar approach to those jurisdictions. It appears, on that basis that the rule in Niue is that legal costs are only recoverable where a party is legally represented.

⁸ *McGuire v Secretary for Justice* [2018] NZSC 116.

[28] Counsel for the appellant has noted that at the time this case was proceeding, Mr Toailoa did not hold a Practising Certificate issued by the New Zealand Law Society. I accept counsel's submission that this puts Mr Toailoa on the wrong side of s 80 of the Niue Act 1966. I note that it is Mr Toailoa's usual custom to seek leave of the Court to appear as an agent representing his clients in order to trigger his right of audience under s 80. No such leave taking is recorded in the transcript from the hearing, so I assume it was overlooked in this instance.

[29] Notwithstanding, I am prepared to accept Mr Toailoa appeared as agent in this case and entertain his costs application in this case. Whilst seeking leave to appear brings into play s 80, I consider that it is well-known in Niue that Mr Toailoa represents land owners. Should he wish to appear in the future as an agent for an owner, I remind him that he must seek leave to do so.

[30] Considering the application, I find the rate charged is excessive for an agent and should be set at \$125.00 per hour. I am also of the view that the request by Mr Lui to withdraw the application for health reasons was reasonable and that there was no requirement for me to consider the respective merits of each party's case.

[31] For these reasons I consider that the respondent should receive 30 per cent of costs based on 9 ½ hours work at a rate of \$125.00 per hour.

Decision

[32] At the request of the applicant, this rehearing application is dismissed.

[33] The applicant, Mr Lui, must pay the first respondent costs of \$356.25.

Dated at Wellington this 11th day of December 2019.

W W Isaac
JUSTICE