

**IN THE COURT OF APPEAL
NIUE**

Application No. 10303

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

Court: W W Isaac, N Smith and C T Coxhead JJ

Hearing: 19 March 2012

Appearances: Mr Toailoa for the appellants
Ms Hekau for the respondent

Judgment: 15 May 2012

JUDGMENT OF THE COURT

A The notice of appeal is dismissed

Introduction

[1] The appellants appeal the decision of Chief Justice P J Savage, delivered on 23 December 2010 and minuted on 5 January 2011.

[2] Before considering the substantive matters on appeal the first issue this Court needs to address is whether we can hear this appeal, given the notice of appeal has been filed out of time.

Appellants' submissions

[3] The appellants ask that the Court of Appeal exercise its jurisdiction under Article 55A of the Constitution of Niue and s 77(a) of the Niue Amendment Act (No2) 1968 and grant this appeal as matters raised are of public interest. They claim the magnitude of the Niue High Court decision on the lapeta descendants will deprive both current and future generations of accessing this pool of land.

[4] The appellants rely on Article 55A(2)(d) of the Niue Constitution. In relying on Article 55A(2)(d) of the Constitution, the appellants in summary contend that:

- (a) The judiciary and its processes are a rare consideration for Niuean society and for many the system and its processes are largely a foreign concept. Therefore, when a notice is received from the Court. it is easily and reasonably to be construed in an everyday manner that the important date for the filing of an appeal is from the date of service or receipt of the notice.
- (b) The Niuean context should be provided for, in that s 75(3) should be construed as providing for two months after the date of service. Therefore the understanding of the public versus the law is a matter of public interest.
- (c) The timing of the appeal is taken at face value as the receipt of notice, and any reasonable Niuean would make the same conclusion given the rare exposure to Court processes.



- (d) Land determination is a highly sensitive issue for many Niueans and many still hold on to the Niuean custom of their ancestors, that land should be used by families based on knowledge and mutual respect of what each family is entitled to in each of their katofia/neighbourhoods. Any land that is titled under the wrong tupuna will affect the rights of the wider magafoa and the interest of these groups making up the wider magafoa should be considered to be of public importance.
- (e) Niuean land is to be determined in accordance with Niuean customs and usages.

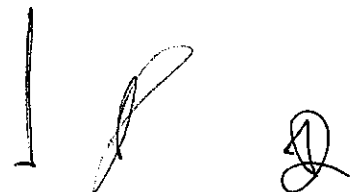
[5] The appellants make a number of other submissions which go to the substance of the appeal rather than the preliminary issue to be decided.

[6] In relying on Article 55A(2) the appellants have not looked to invoke Article 55A(3) for a grant of special leave.

Respondent's case

[7] The respondent takes a different approach. The respondent refers to Article 55A(3) and has not mentioned Article 55A(2). In summary the respondent submits:

- (a) The notice of appeal was filed out of time;
- (b) The Court of Appeal does have jurisdiction, as per Article 55A(3), to grant special leave to appeal for any decision of the High Court in any case in which it thinks fit;
- (c) No application has been made by the appellants for special leave to enlarge the time for filing their notice of appeal;
- (d) The grounds of appeal are without substance and constitute an abuse of the Court's process; and

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- (e) In balancing all the factors the Court should not exercise its discretion and grant special leave and the appeal should be dismissed.

Section 75 Niue Amendment Act (No. 2) 1968

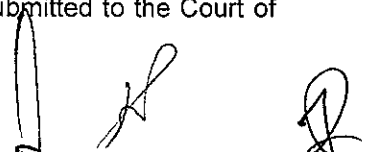
[8] The relevant law with regards to the filing of appeals is Section 75 Niue Amendment Act (No2) 1968 which states:

- (1) Except as expressly provided to the contrary in this Act, the Court of Appeal shall have jurisdiction to hear and determine appeals from any final order of the Land Court, whether made under the principal Act or this Act or under any other authority in that behalf.
- (2) Any such appeal may be brought as of right at the suit of any party to the proceedings in which the order is made, or at the suit of any person bound by the order or interested in it.
- (3) Every such appeal shall be commenced by notice of appeal given in the prescribed manner within two months after the *date of the minute* of the order appealed from. *[Emphasis added]*

Article 55A of the Niue Constitution

[9] Article 55A of the Niue Constitution provides for the jurisdiction of the Court of Appeal. It states:

- (1) Subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction to hear and determine any appeal from a judgment of the High Court.
- (2) Subject to the provisions of this Constitution, and such time limits as may be prescribed by enactment within which an appeal shall lie to the Court of Appeal from a judgment of the High Court –
 - a. As of right, if the High Court certifies that the case involves a substantial question of law as to the interpretation or effect of any provision of this Constitution;
 - b. As of right, from any conviction by the High Court in the exercise of its criminal jurisdiction whereby the appellant has been sentenced to death or to imprisonment for life or for such term, or to such fine, and from any such sentence (not being a sentence fixed by law) as shall be prescribed by Act;
 - c. As of right, when the matter in dispute on the appeal amounts to not less than such value as shall be prescribed by the Act;
 - d. With the leave of the High Court in any other case, if in the opinion of that Court the question involved in the appeal is one which by reason of its general or public importance, or of the magnitude of the interest affected, or for any other reason, ought to be submitted to the Court of Appeal for decision;



e. In such other cases as may be prescribed by the Act.

(3) Notwithstanding anything in subclause (2) of this article, and except where under any Act a judgment of the High Court is declared to be final, the Court of Appeal may, in any case in which it thinks fit and at any time, grant special leave to appeal to that Court from any judgment of the High Court, subject to such conditions as to security for costs and otherwise as the Court of Appeal thinks fit.

(4) In this Article the term 'judgment' includes any judgment, decree, order, writ, declaration, conviction, sentence or other determination.

[10] The Court of Appeal has jurisdiction to hear an appeal from a decision of the High Court as of right in terms of Article 55A(2)(a), (b), (c) and in any case when an appeal is provided for by statute.

[11] The Court of Appeal has jurisdiction to hear an appeal from a decision of the High Court with the leave of the High Court in terms of Article 55A(2)(d) or by special leave of the Court of Appeal, as per Article 55A(3).

Was the appeal filed late?

[12] It is important to set out the timeframes with regards to this appeal. These timeframes are:

- (a) 23 December 2010 - Savage CJ delivered his decision.
- (b) 5 January 2011 - The decision was minuted in the minute book.
- (c) 10 January 2011 - The decision was received by the appellants.
- (d) 10 March 2011 - The notice of appeal was filed with the Court.

[13] These timeframes are not disputed.

[14] We purposely set out the timeframes as these are crucial points from which the time to file an appeal starts and ends.

[15] In this matter the starting date, when the order was minuted into the minute book, is 5 January 2011. The period for filing an appeal, being two months from 5 January 2011, is 5 March 2011.



[16] The appeal was filed on 10 March 2011 and was therefore filed late.

[17] Even with the date of service being 10 January, this is still five days after the decision was minuted in the minute book. The appellants still had 55 days in which to lodge the appeal.

[18] With regards to s 75(3) the appellants submissions are noted above. The appellants submitted that they received the decision of Savage CJ on 10 January 2011. They knew that they had two months to file the appeal. It was their view, and one they say would be reasonably expected of a reasonable person within the Niue context, that the time for filing an appeal started from receipt of the decision.

[19] Counsel at hearing also submitted that the late filing was an oversight on her part, and that while she is a lawyer she lacked experience. She submitted that a reasonable person would expect the appeal to run from the date it was received by the party.

[20] Counsel further submitted that she has a true belief that the area in question with regards to the substantive matter means that they, the appellants, should be given leave to appeal. She submitted that genealogy gives them the right to their land.

[21] When asked from the Bench as to why the decision was not filed earlier, counsel could only submit that they looked at the date that the decision was received and were aware of a two month timeframe but were not aware that it ran from the date other than the date of receipt of the decision. Further, she said that due to work, family and village commitments she did not have time to file the appeal earlier.

[22] These are simply excuses and while Ms Toepenina Hekau is a party she was also counsel in this matter. Her sister, Ms Sinahemana Hekau, is also a lawyer. She is also a member of the Bar. Our reading of the notice on appeal it was actually Ms Sinahemana Hekau, who assisted in filing the notice of appeal. Either way we have two lawyers involved in this matter who should be well aware of the details of the law as provided in the legislation.



[23] Section 75(3) is clear and unambiguous. An appeal shall commence within two months after the *date of the minute* of the order appealed from. The date of the minute is clearly distinct from the order appealed from. Furthermore the date of the minute is a separate act, setting out the date the order is entered into the minute book. Therefore, the crucial start date from when the period runs for filing an appeal, is the date when the order is minuted in the minute book.

[24] To read the words differently would to bring a meaning to the section not intended by Parliament.

[25] The appellants are asking this Court to give an interpretation to words which are unambiguous. To do so would be to read beyond the clear meaning of the words, to a point of essentially ignoring the clear intention of law.

[26] It is not in the public interest to reinterpret a clear law that Parliament has obviously set with a clear intention.

Can this Court extend the time for the filing of a notice to appeal?

[27] Given the appellants reliance on Article 55A(2)(d) it is important that we consider this Article.

[28] As noted, the appellants rely on Article 55A(2)(d) and state that this “provides guidance for the Court to grant leave where the question on appeal constitutes: general or public importance; or the magnitude of the interest affected; or for any other reason ought to be submitted to the Court of Appeal”.

[29] Firstly, Article 55A(2)(d) contemplates the High Court granting leave, not the Court of Appeal. Leave will be granted by the High Court if, in the opinion of that Court, being the High Court, the question involved in the appeal is one which by reason of its general or public importance, or of the magnitude of the interest affected, or for any other reason, ought to be submitted to the Court of Appeal for decision.

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[30] This Court is not the High Court and therefore cannot grant leave as per Article 55A(2)(d).

[31] Second, Articles 55A(2)(a) to (e) are subject to provisions of the Constitution, and any time limits which may be prescribed. Therefore the High Court can only grant leave if the appeal is filed within the time frames as prescribed by s 75 of the Niue Amendment Act (No2) 1968.

[32] It is not our responsibility to advise the appellants as to how they should run their case. Unfortunately for the appellants their submissions are misguided and reliance has been put on Article 55A(2)(d) of the Niue Constitution which applies to the High Court granting leave within time limits, not this Court of Appeal.

Decision

[33] Given our findings at paragraphs [12] to [27] in regards to s 75(3), and our conclusions at paragraphs [28] to [32] with regard to Article 55A(2)(d), the appeal is dismissed.

Article 55A(3)

[34] We note that the respondents correctly submit that the appellants could have applied for special leave pursuant to Article 55A(3) of the Niue Constitution. Every application filed under this Article would be considered on a case by case basis. As no such application has been made, no decision can be made by us in terms of this Article.

Costs

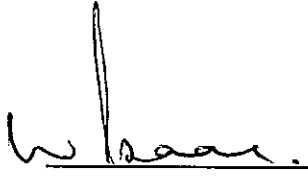
[35] The respondent seeks costs. While providing extensive submissions with regards to costs they have not provided an invoice or an indication of the amount of costs they seek, other than the travel costs of their lawyer.

[36] The respondents are to file with the Court the total costs they seek within 14 days of this decision being minuted.

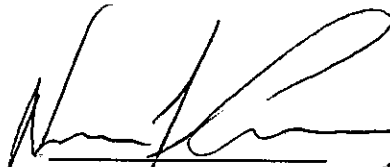


[37] The appellants have 28 days from the date of this decision being minuted to reply to the respondent's submission.

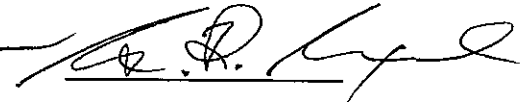
Dated at Wellington, New Zealand this 15th day of May 2012



W W Isaac
JUSTICE
(Presiding)



N Smith
JUSTICE



C T Coxhead
JUSTICE