

**Kapaga v
IN THE COURT OF
APPEAL OF NIUE**

Application No. 10084/33/6

IN THE MATTER

An appeal pursuant to section 75 of the
Niue Amendment Act (No2) 1969

AND

IN THE MATTER OF

The land known as Part Gutupahua,
Lotovao, Valikulu, Taupa District

PONI KAPAGA

Appellant

SIONE POKAU SIONETAMA

Respondent

Coram: Justice W W Isaac, presiding
Justice N Smith
Justice C T Coxhead

Hearing: At Alofi on 16 March 2012

Appearances: Mr H.D.M Lawry for the Appellant
Dr G. McCoy QC for the Respondent

DECISION

Background

- [1] This is an appeal by Poni Kapaga against Sione Pokau Sionetama in respect to a decision by Justice Savage, signed and dated, 7 May 2009, relating to lands known as Part Gutupahua, Lotovao, Valikulu, Taupa District.
- [2] The order of the Lower Court was entered into the minute book on 25 May 2009 and the appellant was made aware of the decision on 28 May 2009 and received a copy of the decision on 5 June 2009.
- [3] On 24 July 2007 the appellant filed his Notice of Appeal dated 20 July 2009.
- [4] On 19 March a teleconference was held with the parties and submissions were received by counsel for the appellant dated 21 March, and for the respondent, dated 22 March 2012.
- [5] The issues to be considered were set out concisely in Dr McCoy's submission as follows:
 - (i) Whether the appellants filed their appeal within the time prescribed by s 75(3) Niue Amendment Act (No 2) 1968?

- (ii) If not, whether special leave should be granted under the provisions of article 55A(3) Niue Constitution Act 1974?
- (iii) If so, upon what conditions, and where should the appeal be heard?

The Law

[6] Section 75 Niue Amendment Act (no2) 1968 provides:

- (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 2 months after the date of the minute of the order appealed from.

[7] Article 55A Niue Constitution 1974 provides:

- (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.

Case for the Appellants

- [8] The appellant submits that the legislation intends that parties should have time to consider a Court's decision and to then decide whether or not to pursue an appeal.
- [9] The appellant disputes the respondent's submission that the two month filing period commences from the date the order is signed, on the grounds that it is contrary to the wording of s75 of the Act, which intentionally does not specify the start date as the date of the order, nor the date of the order being signed.
- [10] It is submitted that the phrase "within two months of the date of the minute of the order appealed from" means that in this instance, where the order was signed on 7 May 2009 and minuted 25 May 2009, the two month period commenced on 25 May 2009. Therefore the appellant had until 25 July 2009 to file a notice of appeal. To interpret the section in any other way would be to ignore the specific wording of the legislation.
- [11] The appellant accepts that the two month period does not start from the date of service of the decision because there may be delays in serving a copy of the decision on parties. Similar reasoning may be adopted when considering the date of the order being signed as the commencement of the two month period. As illustrated in this case, there was an 18 day delay between the date the order was signed and the date it was minuted.
- [12] It is further submitted, that in the alternative, article 55A of the Constitution Act can be relied upon because the appellant should not be denied the right to appeal because his counsel believed that he had until the 25 July 2009 to file his appeal.
- [13] Consequently, the appellant submits that the Notice of Appeal was filed in time and in the instance that the Court does not agree, then it is submitted that special leave to appeal be granted in terms of article 55A(3).
- [14] The appellant notes that the respondent's submissions were filed outside the prescribed time limit, but does not suggest that the Court should not receive these submissions.
- [15] The appellant is in favour of an appeal being held on the basis that there are numerous documents which need to be explained to the Court. There is no issue with the hearing being held in Niue or in New Zealand.
- [16] The appellant asks that counsel be notified in a timely manner when cases are to be heard so that arrangements can be made in time, in order for counsel to be present at Court.

Case for the Respondents

- [17] The respondents submit that there are only three issues for consideration, as summarised at paragraph [5].
- [18] The respondent states that the phrase "minute of the order" pertains to the judicial decision of the judge, and not to the administrative decision of the Registrar, therefore the two month appeal period begins from when the judgment is signed.
- [19] The respondent does acknowledge that if an unsuccessful party did not learn of the judicial decisions existence within the two month period, and in those circumstances

the intended appellants were 'blameless', then there would be such extenuating circumstances as to give rise to a grant of special leave.

- [20] It is submitted that in this instance the appellant was well aware of the two month time limit, yet he took no steps to comply with it. The respondents submit that such failure to act within the time period should not give rise to a grant of special leave on the grounds that special leave provides relief where there are extenuating circumstances, beyond the control of the intended appellant, which is not the case in this situation.
- [21] Counsel submits that the appellant's failure to file an appeal has prejudiced the respondent, who believed the judgment to be final, and that he now possessed an "insuperable title" to the land.
- [22] In the event that the Court does grant special leave, then the respondents submit that the appeal should be set down for hearing in Wellington, on the basis that this is likely to be more convenient for the judges, and is a halfway point for both parties counsel. Furthermore the appellant should be liable for the respondent counsel's travel and accommodation costs, by way of relief in terms of article 55A(3) Constitution Act, which states that the Court may grant special leave to appeal "*subject to such conditions as to security for costs and otherwise as the Court of Appeal thinks fit*".

Discussion

- [23] We agree with the interpretation given by Mr Lawry. The wording of s 75 Niue Amendment Act (No2) 1968 is clear and unambiguous.
- [24] Section 75(3) states that an appeal shall commence within two months after the date of the minute of the order appealed from.
- [25] The date of the minutes is clearly distinct from the order appealed from.
- [26] Furthermore, the date of the minute is a separate act, setting out the date the order is entered into the minute book.
- [27] If the legislation had intended a different date, for example the section could have read that the time for filing is within two months of the date of the order or the signing of the order. It did not do this and we are of the clear view that there can be only one interpretation of s 75(3). That is that the time prescribed for filing an appeal is within two months of the date of the minute.
- [28] We therefore find that as this appeal was entered in the minute book on 25 May 2009, and the appeal was filed on 24 July 2009, it was within the two month period allowed by s 75(3).
- [29] As a result we need not consider issue (ii) identified in paragraph [5] above, and turn now to consider upon what conditions and where the appeal should be heard.
- [30] To enable these matters to be determined, the registrar is to convene a teleconference between Justice W W Isaac and counsel for the parties, as soon as possible.

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

Dated the _____ day of _____ 2012

Justice W W Isaac, Presiding

Justice N Smith

Justice C T Coxhead

