

**IN THE COURT OF APPEAL
NIUE**

Application No. 10441

IN THE MATTER OF: The land known as Part Fue
Block III Liku District

AND

BETWEEN: VA'AIGA PAOTAMA
TUKUITOGA and
MANUTAGI TAPAO
DESCENDANTS
Appellants

AND ENELE KAIUHA &
AHITAUTAMA CROSS
Respondents

Court: Chief Justice P J Savage, presiding

Justice N F Smith

Justice C T Coxhead

Judgment: 30 January 2013

JUDGMENT OF THE COURT

Introduction

[1] The Appellant seeks to overturn the judgment of Isaac J in the High Court of Niue on 26th May 2011. In that judgment Isaac J made the following determinations:

- (i) Dismissed the applications of Va'aiga Paotama Tukuitong " the applicant " for determination of title for the lands shown as A, and B Part Fue Block III Liku District as shown on Provisional Plan 1005;
- (ii) Dismissed the applications by the applicant for determining the common ancestor and the Leveki Magafaoa for the said lands, upon the grounds that the applicant had been customarily but not legally adopted;
- (iii) Determined that the common ancestor for the lands in dispute to be Tulagi; and
- (iv) Determined title for the said lands, shown as A, B and C accordingly, appointing Ahitautama Makaea-Cross as Leveki Magafaoa for parts A and C, and Eneketama Kaiuha as Leveki Magafaoa for lot B.

Special leave is required

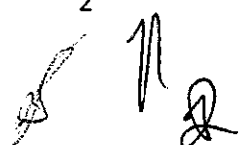
[2] In her Notice of Appeal dated 29th July 2011, the Appellant:

- a) Claimed that the Judge had erred in denying her any rights to these lands;
- b) Claimed that the Judge had erred in that she was representing her sisters and brothers, who she claimed were direct descendants of Tulagi; and
- c) Called into question the evidence of the respondents relating to their respective families' use and occupation of the lands.

[3] Irrespective of the relevance or merits of the Appellant's submissions The Notice of Appeal is a nullity.

[4] Section 75 (3) of the Niue Amendment Act No. 2 1968, provides:

"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."



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[5] The minute of the judgment being challenged is dated the 26th May 2011. The time for filing the notice of appeal would in terms of the above section 75(3) expire on the 27th July 2011. The notice of appeal was filed on the 29th July 2011 and is therefore out of time.

[6] Some relief may be available to Appellants where filing is out of time through the provisions of Article 55A of the Constitution of Niue. Article 55A provides inter alia:

55A Jurisdiction of the Court of Appeal

(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 be commenced, and except where under any Act a judgment of the High Court is declared to be final, 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 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 Act.

*(3) Notwithstanding anything in sub clause (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.

[Emphasis added.]

[7] Chief Justice Savage directed the Appellant's attention to the need to file submissions to support the Court of Appeal exercising its special jurisdiction to grant relief.

[8] On the 31st October 2012, the Appellant filed lengthy submissions highlighting the grounds of her appeal, but with no reference to Article 55A of the Constitution.

[9] She was again reminded of the requirements of Article 55A(3) of the Constitution and on the 30th November 2012 filed further submissions wherein she does little more than recite the provisions of Article 55A.

[10] Further in reciting the provisions of Article 55A(2) she has possibly inadvertently misquoted the provisions of Article 55A(2) by omitting the following :

"shall be commenced, and except where under any Act a judgment of the High Court is declared to be final an appeal"

[11] From the subparagraph between the words "an appeal" and "shall lie". This omission results in a completely erroneous interpretation of the Article. Article 55A(2) does not establish an unequivocal right to appeal. A right of appeal is limited to the time constraints imposed by section 75 of the Niue Amendment Act No 2 1968, with support from Article 55A(3) of the Constitution.

[12] The fact that the Notice of Appeal was only two days out of time does not constitute a ground for a grant of special leave to appeal.

[13] The question as to what circumstances would give rise to the Court of Appeal granting special leave to appeal was considered by this Court in *McCoy v R* CR 26/09, 1 March 2011 (Smith, Carter JJ, Savage CJ), where it is stated at paragraph [8]:

"The decision in New Zealand that has become the touchstone for consideration of whether special leave should be granted is the judgment of the Court of Appeal in Waller v Hider [1998] 1 NZLR 412. At 413 Blanchard J said:

"The appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of further appeal: Rutherford v Waite [1923]GLR 34; Cuff v Broadlands Finance Ltd. [1987] 2NZLR 343 at pp346-347. In the latter case the Court also remarked that in the end the guiding principle must be the requirements of justice. Further authorities of this Court are cited in McGechan on Procedure, para J 67.05."

[14] This Court is constrained to adopt the approach set down by the authorities..

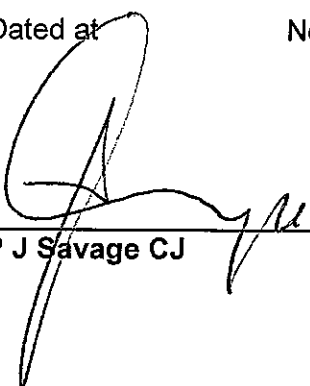
Decision

[15] The judgment of Isaac J was delivered after a full and thorough consideration of the evidence, the law and custom involved.

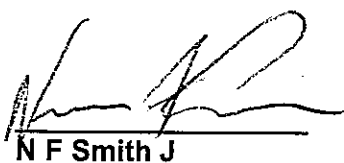
[16] The Appellant has shown no good or sufficient reason for this Court to invoke the provisions of Article 55A(3).

[17] The application for special leave to appeal is dismissed.

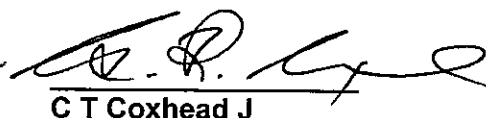
Dated at New Zealand, this day of 2013



P J Savage CJ



N F Smith J



C T Coxhead J