

IN THE MATTER OF: GRAHAM MARSH
(PLAINTIFF)

AND PAESE McMOORE
(RESPONDENT)

ORAL DECISION

[1] This is an appeal from the Civil Division of the High Court of Niue. It is probably not necessary, but from an abundance of caution we grant special leave pursuant to Article 55A (3) of the Niue Constitution.

[2] The action in the lower Court was in private nuisance. It concerned a tree on the Respondent's land. The present Appellant was the Plaintiff who failed before that Court. The parties are immediate neighbours.

[3] The minute of the hearing in the lower Court is abridged but what happened at the hearing and subsequently, is accepted by Mr Talagi who in his usual frank way accepts, that he made mistakes, which means that the appeal must be allowed.

[4] Now the facts are not an issue before us, neither are the merits of the two sides as claimed. The concern that we have is with process and natural justice. The problem has its roots in Mr Talagi appearing as advocate for his client but also purporting to give evidence as a witness.

[5] In the lower Court, after the Plaintiff had given evidence Mr. Talagi cross-examined him on a number of matters. He did not call his client then. That was his right. He did not call any other evidence, that was his right.

[6] But then in his closing address he began putting forward matters to the Court that he had not cross examined the Plaintiff upon and for which there was absolutely no evidence. It was improper to make closing submission on that basis.

[7] The matters that he put forward were, first, that the pods were harvested for pillows, and by that I mean the pods from the tree. Secondly, that the tree provided food for bats. Thirdly, that the stem of the tree is good for canoes.

[8] As I say there was not a jot of evidence before the lower Court upon which he could probably make those submissions.

[9] Now in a small isolated community with lay advocates we could possibly be persuaded to cast a kindly eye on the error. But it didn't stop there.

[10] Also an issue of law relating to the significance of previous litigation between these parties arose during the course of the hearing.

[11] The learned Judge ended the hearing this way:

“Mr. Guest to provide submissions on res judicata and why this should not apply here as it relates to the 1999 land case. Mr Talagi to provide submission in relation to the law that has been quoted by Mr. Guest. Each party has 2 weeks to provide submissions and then refer to me in chambers.”

[12] The Appellant filed submissions as were required and confined himself to the legal issue that the Judge had asked for submission upon. He did stray into the facts at one point, but not in relation to a new matter.

[13] Then the Respondent filed his submissions. On page 3 he made further assertions for which there was no evidence. The first was, and I quote:

“Fourth, the trade wind in Niue is predominantly North East which, given the location of the applicant’s spouse’s family property (North) would not be affected.

[14] There was no evidence for that and because the decision followed the submission there was no opportunity for the Appellant to be heard.

[15] Secondly and I quote:

“There are adjoining houses to Mrs McMoore’s land but no complaints have been made by the owners, again no evidence for that and no opportunity to be heard.”

[16] And last, at the foot of the page:

“Where the kapok tree is growing are unmarked graves and any disturbance by people other than family members to their resting place is not acceptable”

Again a new matter for which there was no evidence and no opportunity to be heard.

[17] We cannot know the extent, if any, that the issue about the failure to complain by other people influenced the Judge. It is referred to in the description of the Respondent’s case but not referred to in the discussion part of the judgment.

[18] But if we look at paragraphs [33] and [35] of the judgment it is clear that the issues relating to the unmarked graves and the issue of the direction of the prevailing wind, did carry weight with the learned Judge.

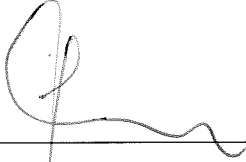
[19] In a procedural sense the hearing in the lower Court has misfired. The decision must be overturned and the appeal allowed.

[20] There is an order accordingly and the matter is to be re-heard in the lower Court and I direct that the matter be listed for hearing in the next session of the Civil Division of the High Court of Niue.

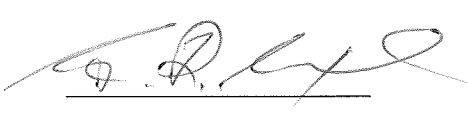
[21] There will be no Order for costs they will lie as they are.

A copy of this decision is to be served on both parties.

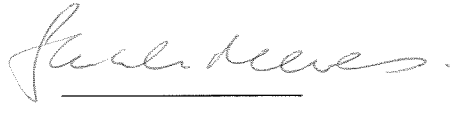
Dated at Alofi, Niue on the 26th March 2015



P J Savage CJ



C T Coxhead J



S F Reeves J