

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

**Application No. 10831**

IN THE MATTER OF      Section 1 Block 1, Part Paliati, Alofi District  
  
BETWEEN                      MALIAGA ERICK  
    Appellant  
  
AND                              TUKALA MAKAMAU HEKAU, ROBIN  
    HEKAU, KAHEALANI HEKAU, TOEPENINA  
    HEKAU AND LE GRAND HEKAU  
    Respondents

Court:                      P J Savage CJ  
    C T Coxhead J  
    S F Reeves J

Appearances:              P Nee Harland for the Appellant  
    T Hekau for the Respondents

Judgment:                20 July 2018

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**DECISION OF THE COURT OF APPEAL**

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**Introduction**

[1]      On 3 July 2013, Maliaga Erick filed an appeal against an order made by the Court on 19 March 2013, appointing additional Leveki Mangafaoa to Section 1 Block 1, Part Paliati, Alofi District.

[2]      The appeal was filed out of time and the appellant sought special leave for the matter to be heard. After hearing the application for special leave on 24 March 2015, we refused leave and the application did not proceed.

[3]      The respondents now seek costs in respect of the appeal proceedings totalling \$5,750.00, being 50 per cent of their total costs.

## Background

[4] On 23 May 2002, the High Court issued orders in relation to Section 1 Block 1 Part Paliati, determining Tautehemata Mokolahi Mokatagaloa as the eponymous ancestor or Mangafaoa and appointing Tukala Makamau Hekau as the Leveki Mangafaoa. On 19 March 2013, the Court appointed four additional Leveki Mangafaoa.<sup>1</sup> They were Robin Hekau, Kahealani Sinahemana Hekau, Toepenina Hekau and Le Grand Hekau.

[5] Ms Erick subsequently filed an appeal on 3 July 2013. She noted that friction arose within the family following the appointment of Tukala Makamau Hekau as Leveki Mangafaoa, likely due to him not being a biological descendant of the common ancestor, whose determination she also disputed. An application was then made to appoint Mr Hekau's children as additional Leveki Mangafaoa, which purported to have the support of the Sionehafa family, one of two lines descendant from Tautehemata Mokolahi Mokatagaloa. Ms Erick argued that she was not aware of any meeting held with the Sionehafa family in New Zealand and believed the original applicant misled the Court. She sought dismissal of the order issued on 19 March 2013 and for a further meeting to be held to consider the appropriate Leveki Mangafaoa to be appointed.

[6] The appeal was opposed by the respondents on the basis that the appellant was attempting to revisit the determination of the common ancestor and the appointment of the original Leveki Mangafaoa completed by the Court in 2002, both of which had not been appealed.

[7] The appeal was filed out of time by approximately six weeks and the appellant sought special leave to appeal pursuant to art 55A(3) of the Niue Constitution. We did not consider there was a valid excuse for the late filing of the appeal or that special or extraordinary circumstances existed to warrant the exercise of the Court's discretion. Leave to appeal was therefore refused and the proposed appeal dismissed on 24 March 2015.<sup>2</sup>

[8] An application for costs was filed by the respondents on 26 March 2015. The appellant has not filed any submissions in response.

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<sup>1</sup> 17 Minute Book 244-248 (17 MB 244-248).

<sup>2</sup> 2 Appeal Minute Book 75 (2 AP 75).

## **Respondents' submissions**

[9] The respondents seek costs in the amount of \$5,750.00, being 50 per cent of their total costs. In her application, Ms Hekau provided an account of the costs incurred throughout the proceedings, separated into three stages. The costs can be summarised as follows:

- (a) Stage 1: Preliminary preparation from September 2013, reviewing and researching material (25 hours).
- (b) Stage 2: Preparing and filing submissions from January to March 2015, updating family members (16 hours).
- (c) Stage 3: Hearing preparation from March 2015, meetings and arrangements with family, hearing attendance (5 hours)

[10] The costs account shows a total of 46 hours at \$250.00 per hour, amounting to \$11,500.00.

[11] Ms Hekau did not provide grounds on which she sought costs. Instead, she referred to the decision of the Court of Appeal in *Sioneholo v Talagi*, where the Court noted that its discretion in relation to costs was broad, but a reasonable contribution will seldom be as little as 10 per cent or as large as 80 or 90 per cent on an objective analysis.<sup>3</sup> Ms Hekau submitted the appellant should be required to bear 50 per cent of the respondents' total costs.

## **The Law**

[12] Rule 35 of the Niue Land Court Rules 1969 provides:

### **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.

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<sup>3</sup> *Sioneholo v Talagi* CA Niue, 1 August 2012.

[13] In *Hekau v Tongahau* this Court noted there is a two-step approach to be followed in determining an application for costs.<sup>4</sup> Firstly, should costs be awarded? Secondly, if costs are to be awarded, what amount should be awarded?

[14] The Court noted the following principles have emerged as influencing factors when considering whether costs should be awarded:<sup>5</sup>

- (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 regards to land ownership, and as such, costs may not be considered appropriate in some circumstances;
- (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; and
- (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.

[15] In determining the level of costs that should be awarded, the following principles are applicable:<sup>6</sup>

- (a) The Court has a broad discretion when deciding the level of costs;

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<sup>4</sup> *Hekau v Tongahai* CA Niue, Application 10305, 14 September 2012. See also *Sioneholo v Talagi* CA Niue, 1 August 2012.

<sup>5</sup> At [13].

<sup>6</sup> At [14].

- (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; and
- (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.

[16] Costs are to be objectively assessed with regard to the above factors and a reasonable contribution will usually fall within the range of 10 per cent to 80 per cent of a reasonable fee.

## **Discussion**

### *Should costs be awarded?*

[17] The appeal was dismissed and the respondents are therefore the successful party. On ordinary principles, costs normally follow the event and a successful party should be awarded a reasonable contribution to costs reasonably incurred. However, as noted, an award is discretionary and the Court can consider several factors.

[18] The proceedings were conducted within a relatively formal framework, with both parties filing submissions and with the involvement of counsel. However, while the proceedings have spanned a period of more than two years, we do not consider the proceedings were particularly difficult or hard fought. There was a single hearing which took less than a day and, as leave to appeal was refused, argument on the substantive issues was not required.

[19] We also note that Ms Hekau is one of the respondents, yet she has purported to charge for her time as counsel. This issue does not appear to have been addressed in any previous authorities in Niue, however, such matter has been addressed by the Māori Land Court of New Zealand, which we find helpful to consider. In *Ngamoki-Cameron – Proprietors of Mangaroa and Other Blocks Incorporated* the applicant sought to recover costs for his own time in

attending the Court, charging \$300.00 per hour for work he undertook in representing himself.<sup>7</sup> The Court found that such costs could not be claimed unless there were exceptional circumstances, noting also that the rate claimed was in excess of an allowance for complex proceedings requiring counsel with special skill and experience. That Court made the following comments:<sup>8</sup>

[27] More importantly, it appears that Mr Ngamoki-Cameron has billed for his own time in attending to both applications. Mr Ngamoki-Cameron largely represented himself in the investigation application however he did appoint counsel to appear on his behalf at the 2 May 2014 hearing. I note that Mr Ngamoki-Cameron submits that he brought the application on behalf of others but it would appear that there is limited evidence of that. Moreover, it was not made clear during the course of these proceedings that he was acting as counsel. I did not understand that he was. This raises an issue as to whether Mr Ngamoki-Cameron's personal costs have been reasonably incurred.

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[29] The general rule is that lay litigants should not be paid for their time and trouble unless there are exceptional circumstances. While I understand Mr Ngamoki-Cameron is a lawyer, as foreshadowed, I did not understand him to assert he was acting as counsel for himself. Indeed, the instructing of Dr Turner suggests otherwise. I find therefore that Mr Ngamoki-Cameron cannot claim for costs for his own time and trouble unless he can demonstrate that there are exceptional circumstances. On the available evidence I do not accept that there were. That said, it is appropriate, that some reasonable allowance be made for the costs Mr Ngamoki-Cameron incurred. ...

[20] Although the submissions made by the respondents do appear in the form of submissions made by counsel, we did not understand Ms Hekau to be acting throughout the proceedings in the capacity of counsel, as separate from her role as a respondent, or at least if she was, this was not made clear to us. We consider she was therefore acting in her capacity as a party and we do not find exceptional circumstances exist which would allow her to claim for costs for her own time.

[21] We also record that Ms Hekau has a significant family interest in the matter, given the other respondents are her father and siblings, and all are current Leveki Mangafaoa of this land. In addition, both the applicant and respondents all descend from the common ancestor and are therefore Mangafaoa who have interests in common in the land. This case is therefore one

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<sup>7</sup> *Ngamoki-Cameron – Proprietors of Mangaroo and Other Blocks Incorporated* (2015) 119 Waiariki MB 225 (119 WAR 225).

<sup>8</sup> At [27] – [29]. See also other New Zealand authorities: *Reeves v Gardiner - Waikawa Village Sections 15A, 15B and 15C* (2011) 8 Te Waipounamu MB 194 (8 TWP 194); *Riddiford v Te Whaiti* (2001) 13 Tākitimu Appellate MB 184 (13 ACTK 184); and *Te Hapeta – Whakapoungakau 3B1B Trust* (1996) 9 Waiariki Appellate MB 96 (9 AP 96).

involving an ongoing relationship between the parties, which should be preserved as far as possible.

[22] We find that, given the respondents are the successful party, they are entitled to some measure of costs. However, the quantum of such costs will need to take into account those matters which we have identified above.

*What level of costs should be awarded?*

[23] In terms of determining the appropriate level of costs to be awarded, we reiterate that this Court has a wide discretion. Relevant matters for consideration include the nature of the proceedings and the conduct of the parties.

[24] As we have already noted, the proceedings were conducted on a relatively formal basis. The appeal proceedings purported to raise issues concerning the appointment of Leveki Mangafaoa, the determination of the common ancestor, and matters of adoption. Such issues are important for Niuean residents and for those outside Niue who seek to retain their interests in ancestral lands. Despite this, the matter was not overly complex and did not progress to consideration of the substantive issues signalled. [Although leave was not granted to pursue the appeal, we do not consider the appellant's conduct warrants an increased level of costs.]

[25] In the account of costs provided by Ms Hekau, she has recorded a total of 46 hours at the rate of \$250.00 per hour, mostly comprised of preliminary work together with the preparation and filing of submissions. Unhelpfully, Ms Hekau has not provided any invoices or a more detailed breakdown of the costs, beyond the calculation of her time. A full assessment of whether the costs are reasonable is therefore difficult.

[26] In examining the actual steps involved in the proceedings, we note that the appellant filed the application on 3 July 2013, followed by two submissions on 12 August 2013 and 20 March 2015. The respondents also filed two submissions, firstly on 26 February 2015 with further submissions in reply on 23 March 2015. The appeal was then heard on 24 March 2015 and dismissed. We acknowledge there was a delay in proceedings, caused by the passing of Justice Smith, and the matter was adjourned until a quorum was available. However, we do not consider that this put the parties to additional work.

[27] The respondents seek a contribution of 50 per cent of their total costs, amounting to \$5,750.00. However, taking into account all matters, we conclude that the amount claimed by the respondents [both in terms of the time and the rate charged] is excessive, particularly as Ms Hekau has acted in her own interest and given the family nature of the proceedings. We consider an appropriate award of costs to be \$1,500.

**Decision**

[28] Costs are awarded to the respondents jointly payable by the appellant in the sum of \$1,500.

Pronounced in Wellington at 10.55am on Friday the 20<sup>th</sup> day of July 2018.

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P J Savage CJ

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C T Coxhead J

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S F Reeves J