IN THE HIGH COURT OF NIUE (LAND DIVISION)

IN THE MATTER	of Part Matalelega / Pokoluo
BETWEEN	Crispina (or Ualiu) Konelio
	Applicant
AND	Halene Kupa Magatogia
	Respondent

DECISION

Introduction

[1] Mr Konelio seeks an award for costs incurred during an appeal to the Court of Appeal heard on 21 April 2009 and a rehearing heard in the Niue High Court on 18 November 2009, both of which were decided in his favour.

Applicant's submissions:

[2] The applicant submits that an award of costs should be made for the Court of Appeal hearing and the rehearing in the Niue High Court, and that it should be 90 percent of the actual costs incurred. The reasons given are:

a) There is no reasonable prospect of the parties achieving an ongoing amicable relationship;

b) The proceedings were lengthy, spanning five years;

c) The proceedings were convoluted and complex;

d) The length of the proceedings meant that the applicant was prevented by an injunction from cultivating his lands for 5 years;

e) The subject matter of the proceedings required counsel to undertake extensive, largely original, research in Niuean customary law;

f) The issues being considered were of significant importance;

g) Counsel had to travel from New Zealand for two separate hearings;

h) The respondent's conduct was unreasonable because he gave evasive answers to counsel's questions, presented irrelevant evidence, and provoked the applicant;

i) There is an imbalance of financial means between the parties. Mr Konelio has an extremely modest income dependent on taro sales whereas the respondent is a successful businessman, church official and politician;

j) The respondent did not seek legal advice, despite being advised to by Niue Department of Justice staff. Instead, he claimed on several occasions that he was disadvantaged by not knowing the legal system. His lack of representation unreasonably extended the duration of the hearing; and

k) The proceedings were conducted on a formal basis.

Respondent's submissions:

[3] The respondent submits that no award of costs should be made. He submits the following:

a) At no time did he attempt to discredit or damage the applicant's reputation. He was only trying to be a spokesperson for the Mahelekiulu families;

b) Fees from overseas lawyers should be covered by those who secure their services. The respondent should not have to pay these costs;

c) The respondent also spent innumerable hours in research and preparation for the case and members of his family took unpaid leave to assist;

d) He did not have the financial means to engage a lawyer. The pro bono assistance of Mr Michael Starling was requested, but nothing was heard from him as he lives in Christchurch and the request was made at the time of the earthquake;

e) Mr Konelio should be prepared to pay for the extreme lengths he went to in order to prove the land was his;

f) The respondent has not been able to cultivate the land during the time from 2005 to 2010;

g) The assessment of the respondent's financial means made by the applicant is very inaccurate. His modest salary as a politician is not guaranteed in the coming

election, his work at the church is not paid and while his wife owns a business, it is heavily in debt;

h) An award of 90 percent of the applicant's costs would be unfair and unjust;

i) The respondent has acted in good faith at all times and did not, in any way, act unreasonably; and

j) Lakepa is a small village and the families all live together so the ongoing relationship needs to be as positive as it can be in the circumstances. An award of costs will make this relationship more acrimonious.

Law

[4] Rule 35 of the Niue Land Court Rules 1969 states:

> 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.

Legal principles

[5] There are no recorded decisions from the Niue High Court concerning costs. The Māori Land Court and Māori Appellate Court in New Zealand deal with issues relating to land entitlement use and occupation. Such issues regularly involve parties with close family connections. As a result, it is my view that it is appropriate to consider principles from the Māori Appellate Court as a guide for determining costs applications to the Niue High Court.

[6] One of the leading cases from the Māori Appellate Court on costs is *Samuels v Matauri X Inc.*[1] That case set out a two-step process to be followed. The first step is to decide whether costs should be awarded. If the answer is yes, the second step is to consider the quantum.[2]

---

[1] *Samuels v Matauri X Inc* (2009) 7 Taitokerau Appellate MB 216 (7 APWH 216).
[2] *Samuels v Matauri X Inc* (2009) 7 Taitokerau Appellate MB 216 (7 APWH 216) at 222.

[7] That case also outlines a number of authorities which are said to support the following principles:[3]

a) The Court has an absolute and unlimited discretion as to costs;

b) Costs normally follow the event;

c) A successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred;

d) The Māori Land Court has a role in facilitating amicable, ongoing relationships between parties involved together in land ownership, and these concerns may sometimes makes awards of costs inappropriate. However, where litigation has been conducted similarly to litigation in the ordinary Courts, the same principles as to costs will apply; and

e) There is certainly no basis for departure from the ordinary rules where the proceedings were difficult and hard fought, and where the applicants succeeded in the face of serious and concerted opposition.

[8] As to the quantum of costs awarded, the principles emanating from previous authorities were summarised as follows:[4]

a) The Court has a broad discretion;

b) The Court should look to what is just in the circumstances and in doing so, should have regard to the nature and course of the proceedings; the importance of the issues; the conduct of the parties; and whether the proceedings were informal or akin to civil litigation;

c) If a party acted unreasonably – for instance by pursuing a wholly unmeritorious and hopeless claim or defence – a more liberal award may well be made in the discretion of the Judge, but there is no invariable practice;

---

[3] *De Loree v Mokomoko – Hiwarau C* (2008) 11 Waiariki Appellate MB 249 (11 AP 249); *Niao v Niao* (2004) Waiariki Appellate MB 263 (10 AP 263); *Mauirirangi v Paraninihi Ki Waitotara Inc* (2002) 15 Whanganui Appellate MB 64 (15 WGAP 64) and *Riddiford v Te Waiti* (2001) 13 Takitimu Appellate MB 184 (13 ACTK 184).

[4] See footnote 3. A number of these principles are drawn from *Holden v Architectural Finishes Limited* [1997] 3 NZLR 147 (HC) and *Kuwait Asia Bank v National Mutual* [1991] 3 NZLR 457 (CA).

d) Where the unsuccessful party has not acted unreasonably, it should not be penalised by having to bear the fully party and party costs his/her adversary as well as their own solicitor and client costs;

e) The Court's discretion as to the level of contribution is a broad one but a reasonable contribution will seldom be as little as 10% and a contribution as large as 80% or 90% will seldom be reasonable on an objective analysis;

f) Where proceedings involve counsel and are comprehensively pursued and contested within a relatively formal framework in a similar manner to civil litigation then an award of costs should be made.

Discussion

[9] While these proceedings were family related, they were long, hard-fought and dealt with complex and important issues. The respondent was successful in the first instance and did not seek costs. The applicant was successful in the appeal to the Niue Court of Appeal and in the rehearing to this court, the Niue High Court. This court cannot award costs for the proceedings in the Court of Appeal; that must be the subject of a separate application. However, for the costs associated with the rehearing in this court, I see no reason why the Court should depart from the ordinary rule that costs follow the event.

[10] The quantum of these costs requires further analysis. In assessing the level of costs appropriate, I am assisted by the swathe of case law of the Māori Appellate Court.[5] In *Eriwata v Trustees of Waitara SD Sections 6 & 91 Land Trust* the Māori Appellate Court made a distinction between cases where the unsuccessful party proceeded without representation and those who are legally represented.[6] They stated that parties without representation are usually given greater latitude; there is a different between parties who know, or ought to know, that their case is hopeless but still pursue it, and parties who, without legal assistance, genuinely believe that their case has merit.[7]

---

[5] *De Loree v Mokomoko – Hiwarau C* (2008) 11 Waiariki Appellate MB 249 (11 AP 249); *Niao v Niao* (2004) Waiariki Appellate MB 263 (10 AP 263); *Mauirirangi v Paraninihi Ki Waitotara Inc* (2002) 15 Whanganui Appellate MB 64 (15 WGAP 64) and *Riddiford v Te Waiti* (2001) 13 Takitimu Appellate MB 184 (13 ACTK 184).

[6] *Eriwata v Trustees of Waitara SD Sections 6 & 91 Land Trust* (2007) 15 Aotea Appellate MB 261 (15 WGAP 261) at 262.

[7] At 262.

[11] I consider that this falls within the second category. Further, it cannot be said that, as it could in *Eriwata v Trustees of Waitara SD Sections 6 & 91 Land Trust*, that the appeal lacked merit on an objective basis. The respondent's case had definite merits and it was reasonable for him to take the case on appeal. This was a complicated matter and the final result was finely balanced. Further, contrary to the applicant's submission, the Mr Mangatogia's actions and behaviour have not been unreasonable.

[12] The applicant's submission seems to infer that because Mr Mangatogia did not engage legal counsel and consequently has no solicitor costs to bear, he should pay more of the respondent's costs. I disagree. The Maori Appellate Court, in *Riddiford v Te Waiti* recognised the work by applicants in whakapapa (matohiaga) and other matters before the court.[8] They stated:

> We think it appropriate that the different, and more active, role that an applicant may, and often does, and arguably should, play in litigation in the Maori Land Court be recognised for the purposes of costs.[9]

[13] I consider this to also be the case in the Niue High Court (Land Division).

[14] There is no authority for disparity of means between parties to be a relevant consideration for the quantum of a costs award.

[15] Both parties suffered from the effect of the injunction and were not able to cultivate their lands, therefore I will not take this factor into consideration in favour of either party.

[16] I view these proceedings as being largely in the nature of a whānau, or family dispute. While the proceedings were hard-fought, this is nevertheless a dispute between families about which common ancestor is of the land, and therefore who should be appointed as Leveki. Further, the two families involved will continue to live and work together in the same village. A high award of costs would not assist this ongoing relationship, which has already been considerably strained by these long proceedings.

[17] Taking all these matters into consideration, I consider that an award of costs at the level of 15 percent of the successful party's solicitor costs is appropriate.

---

[8] *Riddiford v Te Waiti* (2001) 13 Takitimu Appellate MB 184 (13 ACTK 184) at 189.
[9] At 190.

Costs included

[18] I now consider whether all the costs comprised within the total were properly included in the costs total.

[19] Mr Konelio's solicitors' fees for the rehearing amounted to $9 668. Of this, $5 320 were legal fees for Maui Solomon. These were at a discounted rate. This rate for fees is reasonable. A further $1 500 fee was claimed for Mr Levi's research, interviews and presentation. These fees should have not been included in the costs total. Especially when the expense of counsel flying from New Zealand is incurred, it is not reasonable to expect fees for secondary personnel.

[20] The remaining $2 848 comprised disbursements, including a return flight from New Zealand, accommodation in Auckland and Niue, rental, meals, departure tax, photocopying and printing. There is no doubt that the Court's discretion as to costs extends to disbursements.[10] However, I see no need to include accommodation in Auckland, when domestic flights in New Zealand provide the flexibility of not having to take this option. Further, it is not the practice of this Court to pay costs for food. Disbursements, in this instance, should cover the reasonable costs relating to transport, accommodation in Niue, photocopying and printing. Accordingly, I consider the total sum for disbursements to be $2 369.

[21] I therefore consider that the total sum subject to an award of costs, is $7 689. The award of costs, at a level of 15 percent is $1 153.35. This is to be paid by the respondent directly to Mr Solomon, counsel for the applicant.

---

[10] *Martelli McKegg Wells & Cormack v Commbank International NV* (1996) 10 PRNZ 153 (CA) at 155.

Orders

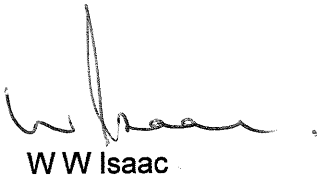
[22] I make the following order pursuant to the Niue Land Court Rules 1969:

a) Rule 35 for costs against Halene Kupa Magatogia in favour of Crispina (or Ualiu) Konelio for the amount of $1 153.35.

[22] I also make an order for the Justice Department to refund the security for costs to Crispina (or Ualiu) Konelio, being $1 000.

Copy of minute to all parties.

Signed at Wellington on the 13th day of May 2011.



W W Isaac

JUSTICE OF THE HIGH COURT