

**IN THE NIUE COURT OF APPEAL**

**Application No: 11259**

IN THE MATTER OF      The land known as Tumau, Section 2 Block IV,  
Plan 248 CT N5/39, Alofi District

BETWEEN                      SENUOLA FATIAKI, MANASOFAI TALAGI  
AND MICHELLE TAULAMOKA POUMALE  
**Appellants**

AND                              MORRIS HEMU TAFATU  
**Respondent**

Hearing:                      On the papers

Coram:                        Armstrong J (Presiding)  
Coxhead CJ  
Reeves J

Appearances:                Mr Solomon and Mr Sioneholo for Appellants  
Mr Toailoa for Respondent

Judgement Date:          30 October 2024 (NZT)

---

**JUDGMENT AS TO COSTS**

---

## **Background**

[1] On 19 November 2014, Justice Isaac heard an application to change the common ancestor of the lands at Tumau Section 2 Block IV Plan 248 CT N5/39 Alofi district from Tutakitoa to Tetaia Manatau Sotaia. He determined at the hearing that the Court did not have jurisdiction to change the common ancestor of the Tumau lands, and that allegations of fraud regarding how the common ancestor was originally appointed would require a separate application with evidence to support these claims.

[2] That decision was appealed and was originally set down for hearing on 12 March 2019. The matter was adjourned to allow for a re-hearing application to be heard in the High Court. The rehearing matter was dismissed in November 2023.

[3] Following the dismissal of the High Court application, the appeal was scheduled for hearing on 19 March 2024. A further adjournment was granted to allow new Counsel for the Appellant time to review the appeal.

[4] The appeal was heard on 20 March 2024. At the hearing, the appeal was dismissed.

[5] The respondent was granted leave to file an application for costs within 21 days.

## **Respondent's submissions**

[6] The Respondent seeks 80% of the total costs incurred, totalling \$5,024.80 including disbursements. The total amount includes \$4,400.00 for counsel's fees and \$624.80 for disbursements for travel and accommodation. Airfares and accommodation are claimed on a 1/5 basis for the appearance in March 2019 and on a 1/6 basis for the appearance in March 2024.

[7] The Respondent seeks reimbursement on the higher end of the scale. He submits that his charges are more than reasonable given his level of expertise and years of experience in the Courts of Niue.

[8] The Respondent submits the following:

- (a) The appeal was dismissed after a full hearing by the Court and therefore costs should follow the event;
- (b) There has never been an ongoing relationship between the parties which needs to be preserved and which may be adversely affected by an award of costs;
- (c) The costs were actually and reasonably incurred by the Respondent and his magafaoa. This is reflected in the Legal Assistant's Note of Costs that was filed with the Court, which has been paid in full;
- (d) The appeal proceedings were filed by Mr Solomon, Counsel for the Appellants, and given the nature of the application, the Respondent and his magafaoa were forced to engage the services of Mr Toailoa to assist them, as the Respondent and his magafaoa are not trained lawyers; and
- (e) Whether the proceedings were initiated as a result of the Appellants' instructions to their Counsel, or on the basis of Counsel's advice, is irrelevant as the Respondent was forced to defend a further proceeding on a matter that has been fairly settled by the High Court.

### **Appellants' submissions**

[9] The appellants have not provided a response to the costs application.

### **Law**

[10] The law as it relates to costs is provided in s 35 of the Niue Land Court Rules 1969, which provides the Court with a wide discretion to grant costs "as it sees fit" as follows:

#### **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 party to the proceedings, whether the parties be and to whom all costs are so made payable are parties in the same or different interests.

[11] There is a two-step approach to determining costs. The first step is to determine whether costs should be awarded and the second is to determine the appropriate amount of costs.<sup>1</sup>

[12] The Court of Appeal has also found the following principles to be relevant when considering whether costs should be awarded:<sup>2</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 regard to land ownership. 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 principle of costs, where the proceedings were difficult and hard-fought, and where a party succeeded in the face of serious and concerned opposition.

[13] Where it is clear that costs should be awarded, *Hekau v Tongahai* provides that the Court should determine the level of costs to be awarded using the following principles:<sup>3</sup>

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

---

<sup>1</sup> *Hekau v Tongahai* CA Niue, Application 10305, 14 September 2012.

<sup>2</sup> *Hekau v Tongahai* CA Niue, Application 10305, 14 September 2012 at [13].

<sup>3</sup> *Hekau v Tongahai* CA Niue, Application 10305, 14 September 2012.

- (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, they should not be penalised by having to bear the full costs of their adversary as well as their own solicitor/client costs.

[14] Costs are assessed objectively with regard to the above principles. A reasonable contribution as to the fees will fall within the range of 10 per cent to 80 per cent.

[15] Section 80 of the Niue Act 1966 states:

**80 Right of audience in the High Court**

In any proceedings, whether civil or criminal, any party may be represented either by a barrister or solicitor of the High Court of New Zealand, or, with the leave of the Court, by any other agent, but such leave may at any time be withdrawn.

[16] *Lui v Tafatu* discusses the eligibility to receive costs where a counsel does not hold a practicing certificate:<sup>4</sup>

[28] Counsel for the appellant has noted that at the time this case was proceeding, Mr Toailoa did not hold a Practising Certificate issued by the New Zealand Law Society. I accept counsel's submission that this puts Mr Toailoa on the wrong side of s 80 of the Niue Act 1966...

[29] Notwithstanding, I am prepared to accept Mr Toailoa appeared as agent in this case and entertain his costs application in this case. Whilst seeking leave to appear brings into play s 80, I consider that it is well-known in Niue that Mr Toailoa represents land owners. Should he wish to appear in the future as an agent for an owner, I remind him that he must seek leave to do so.

[17] *Konelio v Magatogia* affirms that disbursements can be included in an award of costs and that these costs should be reasonable.<sup>5</sup>

---

<sup>4</sup> *Lui v Tafatu* [2019] NUHC; Application 11251, 11258 (11 December 2019); see also *Niue Lawn Bowls Association Incorporated v Niue Island Sports and Commonwealth Games Association* [2023] NUHC; Application CV2022-00084 (20 March 2023).

<sup>5</sup> *Konelio v Magatogia* [2011] NUHC (13 May 2011) at [20].

## Decision

[18] The respondent being successful with the dismissal of the appeal is in our view entitled to a reasonable contribution to their cost.

[19] While the respondent's agent was required to prepare and then attend Court, the appeal was ultimately dismissed. While a hearing was held it was not a new or novel issue but an issue that is settled in terms of law.

[20] While being important to the appellant it was somewhat misguided. As Mr Toailoa has submitted the respondents were forced to defend proceedings on a matter that has been fairly settled by the High Court. That is the Court lacking jurisdiction to change the common ancestor of land except in the case of fraud. We do not think costs at the higher end of 80% are justified in these circumstances.

[21] A reasonable contribution towards costs would be 60% of total cost including disbursements.

[22] Therefore, the Court orders the appellant to pay \$3,014.88 in costs to the respondent.

Dated at Whangarei Aotearoa/New Zealand on this 30<sup>th</sup> day of October 2024.



M P Armstrong  
**JUSTICE**



C T Coxhead  
**CHIEF JUSTICE**



S F Reeves  
**JUSTICE**