IN THE COURT OF APPEAL OF NIUE

App No: 11898

UNDER	Section 75 of the Niue Amendment (No. 2) Act 1968 and Rule 12(3) of the Niue High Court (Land Division) Rules 1969
IN THE MATTER OF	An application for a partition – PART LAMEA, ALOFI
BETWEEN	CHARLIE TONGAHAI Appellant
AND	SONIA TAFATU AND IKIVALE KIFOTO Respondents

Hearing:	12 March 2024 (Niue time)
Appearances:	Mr Toailoa for the appellant Mr Allan for the respondents
Judgment:	8 April 2025 (NZ time)

JUDGMENT OF THE COURT OF APPEAL

Introduction

[1] On 19 March 2019, Coxhead CJ granted an order partitioning Part Lamea in the Alofi District. He also appointed Sonia Tafatu and Ikivale Kifoto as joint leveki for the newly partitioned area.[1] Charlie Tongahai appeals that decision.

[2] We heard that appeal on 12 March 2024. When the hearing commenced, Mr Toailoa, for the appellant, made an oral application seeking that Isaac J recuse himself from hearing the appeal. Isaac J declined to recuse himself with reasons to follow.

[3] This judgment:

(a) Sets out the reasons why Isaac J declined to recuse himself; and

(b) Determines whether the appeal should be upheld.

Why did Isaac J refuse to recuse himself?

[4] Mr Toailoa argued that Isaac J determined an earlier application involving the same parties, and similar issues. Mr Toailoa submitted that, as a result, Isaac J had formed a view of the appellant and should recuse himself.

[5] Bias is unfairly regarding, with favour or disfavour, the case of a party to the issue under consideration. There are three main types of bias: actual, apparent and presumptive bias. Actual and apparent bias involves the principle that a decision-maker should not favour one side over another. Presumptive bias involves the principle that it is improper for a decision-maker, who has an interest in the outcome of a case, to decide that case.[2]

[6] The test for apparent bias was considered by the Supreme Court of New Zealand in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*.[3] A judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an

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1 *Tafatu v Tongahai – Part Lamea, Alofi District* 2019, App 12204, 12205, 11347

2 Laws of New Zealand Administrative Law: Procedural Impropriety: The Rule Against Bias (online ed) at [87]

3 *Saxmere Company Limited v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35.

impartial mind to the resolution of the question the judge is required to decide. Two steps are required:

(a) First, the identification of what it is said might lead a judge to decide a case other than on its legal and factual merits; and

(b) Secondly, there must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.

[7] The fair-minded lay observer is presumed to be intelligent and to view matters objectively. The observer must also be taken to understand three matters relating to the conduct of judges:[4]

(a) The first is that a judge is expected to be independent in decision-making and has taken the judicial oath to do right to all manner of people according to the law without fear or favour, affection or ill will;

(b) Secondly, a judge has an obligation to sit on any case allocated to the judge unless grounds for disqualification exist; and

(c) Thirdly, the judicial system functions on the basis of deciding between litigants irrespective of the merits or demerits of their counsel.[5]

[8] Although Isaac J previously heard an application involving these parties, this is clearly not grounds for recusal. Generally, a Judge has an obligation to hear all applications allocated to him or her. Isaac J heard the application in question as it was allocated to him. He made findings of fact and law based on the evidence before him as part of his judicial function. This does not demonstrate that Isaac J formed a view about Mr Tongahai, or that he favours one side over another.

[9] This is particularly emphasised in the Niuean context. There are only four judges who sit in the High Court of Niue. Three of those judges sit together to hear appeals to the Court

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4 *Saxmere Company Limited v Wool Board Disestablishment Company Ltd* [2010] 1 NZLR 35.

5 Counsel acting was directly in issue in *Saxmere*, it is not an issue here.

of Appeal. Land in Niue is an important part of Niuean culture and identity. Disputes in the Land Division of the High Court are often hard fought and applications are frequently filed involving the same parties and similar issues. If a judge had to recuse him or herself because they had previously heard a similar issue involving the same parties there would be no judges left to hear the repeated applications filed by some of the more active Niuean families.

[10] That is not to say that where genuine grounds exist, a judge should still refuse to recuse him or herself. However, this underscores that in the Niuean context there must be proper grounds of recusal before a judge will do so.

[11] As there were no proper grounds for recusal here, the application for recusal was declined.

What is the approach on appeal?

[12] Granting a partition involves an exercise of discretion.[6] When hearing a general right of appeal, the Court of Appeal must consider the issues under appeal and come to its own decision.[7] However, on an appeal against an exercise of discretion, it is not relevant that we may have exercised the discretion differently. Rather, the appellant must demonstrate that the lower Court:[8]

(a) Erred in law or principle;

(b) Took into account an irrelevant matter;

(c) Failed to take into account a relevant matter; or

(d) Was plainly wrong.

[13] We adopt this approach.

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6 Section 34 and 36 of the Land Act 1969.

7 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103.

8 *Kacem v Bashir* [2010] NZSC 112.

What happened in the lower Court?

[14] Prior to the partition, Part Lamea was 16.8392 hectares in size. Tauhogofulu Logolea is the magafaoa (common ancestor) for the land. The appellant, Mr Tongahai, was the leveki for the land.

[15] Sonia Tafatu and Ikivale Kifoto are siblings. They also descend from the common ancestor. Sadly, they have a long history of dispute with Mr Tongahai. This played out in numerous applications heard in the lower Court.

[16] Coxhead CJ found that there was an irreconcilable dispute between the families. He also considered that Ms Tafatu and Mr Kifoto had demonstrated a sufficient connection to the proposed partition area. He granted a partition of an area of 5,254m2 and appointed Ms Tafatu and Mr Kifoto as joint leveki for that area. The common ancestor remained Tauhogofulu Logolea.

What are the issues on appeal?

[17] The appellant argues that Coxhead CJ erred as:[9]

(a) He determined that the blood link to the land cannot be broken; and

(b) He failed to take into account whether it is inexpedient to the wider magafaoa, unjust or inequitable to grant the partition.

[18] We consider these issues in turn.

Can the blood link be broken?

[19] Mr Toailoa argues that Ms Tafatu and Mr Kifoto breached their obligations to their kaumatua and the wider magafaoa and so, pursuant to Niuean custom, they were removed as magafaoa to this land. He relies on evidence from Mrs Tuiolo Tongahai who he says is a kaumatua for the magafaoa. Mr Toailoa submits that it is within her customary rights to disown Ms Tafatu and Mr Kifoto given the gravity of their actions and she did so according to

[9] Mr Tongahai raised other issues in the notice of appeal but did not pursue those issues at the hearing.

those customs. Mr Toailoa submits that as a result they are no longer part of the magafaoa and so are not entitled to a partition.

[20] This is not a new issue. Mr Tongahai, and his supporters, raised this in the lower Court. Coxhead CJ relied on an earlier decision of the High Court which found that a person's blood connection to the land cannot be broken. He found that the same applied here.[10]

[21] Mr Toailoa has not argued that Coxhead CJ failed to take this into account. Rather, he raises "[w]hether the Trial Judge was correct in adopting th[at] view'. This is not a general appeal. It does not matter that we may have taken a different view on this issue. It was for Coxhead CJ to consider this as part of exercising his discretion. He did so.

[22] This is not a proper ground of appeal against an exercise of discretion.

Did Coxhead CJ fail to take into account whether it is inexpedient to the wider magafaoa, unjust or inequitable to grant the partition?

[23] Mr Toailoa argues that Coxhead CJ did not consider whether it was inexpedient to the wider mangafaoa, unjust or inequitable to grant a partition in this case.

[24] In his judgment, Coxhead CJ set out the relevant legal principles that apply to a partition, he summarised the evidence and arguments for both sides and analysed those when deciding to grant the partition.

[25] We asked Mr Toailoa what are the relevant factors that Coxhead CJ should have taken into account, but failed to do so, when considering this issue. Mr Toailoa referred us back to paragraph 17.2 of his submission. That part of his submission refers to the various disputes that occurred between the parties.

[26] Coxhead CJ did take this into account. He referred to the evidence and arguments on this from both sides and found that there was an irreconcilable dispute between the members of this family. He considered this supported the partition.

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[10] *Tafatu v Tongahai – Part Lamea, Alofi District* 2019, App 12204, 12205, 11347 at [39] and [41].

[27] Once again, Mr Toailoa has not demonstrated that Coxhead CJ failed to take a relevant matter into account. It is clear that Coxhead CJ considered these issues. Mr Tongahai simply disagrees with the outcome. This is not a proper ground of appeal against an exercise of discretion.

Decision

[28] The appeal is dismissed.

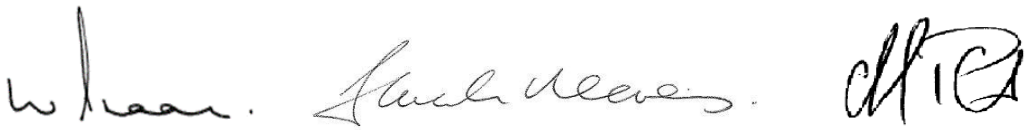
[29] If the respondents seek costs, we issue the following directions:

(a) The respondents are to file and serve submissions on costs within 1 month;

(b) The appellant is to file and serve submissions in response within 1 further month; and

(c) We will determine costs on the papers.

Pronounced at 10:00am in New Zealand on the 8th day of April 2025.



WW Isaac
JUSTICE

SF Reeves
JUSTICE

M P Armstrong
JUSTICE