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

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| **APPLICATION No:** | 9579, 95808 & 9324 |
| **IN THE MATTER** | of Part Matapa Section 2, Blk 1, Hikutavake District |
| **BETWEEN** | NIUTAMA TUHIPA & DICK HIPA TUHIPA |
| | **Applicants** |
| **AND** | DICK HIPA & MORRIS TAFATU |
| | **Respondent** |

## Introduction

[1] This is an application for a rehearing dated 15 October 2008, filed by Niutama Tuhipa and Dick Hipa Tuhipa, against a decision dated 8 October 2008.

[2] That decision related to an application to annul an order of Judge E William, dated 12 February 1975, which determined title to the above block and declared the common ancestor to be Taoafe, and the leveki magafaoa to be Rousalina Tafatu.

[3] The decision of 8 October 2008 found that actual fraud would need to exist to annul the title and amend the title order. The applicants failed to prove this to be the case and the application was dismissed.

[4] As stated, this application before me seeks to rehear my decision of 8 October 2008 and if it is successful it would require the applicants to prove that actual fraud existed. The application is not to rehear the 1975 case which established the title.

## Case for the Applicants

[5] The application was filed within the 14 day time limit as provided in Rule 30 of the Niue Land Rules 1966.

[6] The applicants submit that after the hearing on 29 April 2008, the applicants became aware of a will of Sifahemotu, the mother of Rousalina, which might contain relevant information as to the genealogy and entitlement to land of the respondents. It was submitted that the detail of this will may have lead to a different decision by the Court if it had been presented at the time of the Court hearing.

[7] Counsel for the applicants acknowledges that certainty of tile is important and title should not be altered lightly.

**Case for the Respondents**

[8] Counsel for the respondents confirmed that to enable the title to be annulled, the applicants were required to prove actual fraud.

[9] The will now produced cannot establish that the party accused of fraud actually committed fraud. The will in itself provides no further evidence of fraudulent intent than was produced to the Court in 2008.

[10] It is submitted that it is difficult to accept that this will was not known about in 1975 when the title determination was made.

**The Law**

[11] Rule 30 of the Niue Land Court Rules 1969 states:

> *"That no application for rehearing under s.45 Niue Amendment Act (No.2) 1969 shall be after the expiry of fourteen (14) days after the making of the order sought to be reheard."*

[12] Section 45 Niue Amendment Act (No.2) 1968 provides:

> *(1) "On the application of any person interested, the Land Court may grant a rehearing of any matter either wholly or as to any part of it.*
>
> *(2) On any such rehearing the Court may either affirm, vary, or annul its former determination, and may exercise any jurisdiction which it might have exercised on the original hearing.*
>
> *(3) When a rehearing has been so granted, the period allowed for an appeal shall not commence to run until the rehearing has been disposed of by a final order of the Court.*

[13] This provision makes it clear that the Court has an absolute discretion as to whether or not to grant a rehearing.

[14] The principles relating to rehearing cases are set out in the cases of *Grove Broadcasting Co. Limited v Telesystems Communications Limited* (2000) GENDND 1496 (10 November 2000), *Ladd v Marshall* (1954) All ER 745, 748, and *Dragicevich v Martinovich* (1969) NZLR 306, 308. The principles include:

i) There has been serious misconduct on the part of a judge, juror, witness or lawyer;

ii) Perjured evidence has been offered to the court;

iii) There has been discovery of credible and material evidence which could not have been reasonably foreseen or known at the trial;

iv) There has been a breach of natural justice; or

v) There has been fraud or corruption; and

vi) The court is satisfied that there has been a miscarriage of justice.

[15] An application for a rehearing will not be allowed merely for the purposes of repairing omissions in the presentation of the earlier case or for reshaping that case (Realtycare Corporation Ltd v Cooper) 1989 2 PRNZ 426.

**Discussion**

[16] As set out above, the principles to be applied when considering rehearing applications essentially requires the Court to find that the circumstances of the case have lead to a miscarriage of justice.

[17] In this case, Counsel for the applicant argues that the will of Sifahemotu was relevant and if it had been produced, it may have lead to a different outcome.

[18] The will was not produced in evidence at the hearing in 2008 and the issues for consideration include:

i) Whether it was known to the parties and simply not produced as evidence; and

ii) If it had been produced as evidence would it have been able to show actual fraud existed.

[19] In relation to the first issue, I accept that the will was not in the possession of the applicants at the time of the hearing.

[20] The will however came to light very soon after the hearing and prior to the decision being issued. This tends to indicate that with reasonable inquiry the will, if it had been considered relevant at the time by the applicant, could have been obtained. Also if the will was known about in 2008, it would be reasonable to assume that the parties closer to the application for title in 1975 may have had greater knowledge of it.

[21] Notwithstanding these comments, I do not have sufficient evidence to make a finding as to whether with reasonable diligence the will could have been produced at the 2008 hearing.

[22] I now turn to consider whether if the will had been produced, it would have made a difference to the outcome of the case.

[23] For the will to make a difference, it would have to demonstrate that actual fraud was committed by Rousalina. When the will is examined it refers to land, the boundary of lands, and the use and occupation of that land. The document does not disclose actual fraud, and as stated in paragraph 4, if the rehearing application was successful the applicant would have to prove actual fraud. The will does not advance this position and as a result the application should be dismissed.

[24] Further, the document now produced as the will of Sifahemotu has no binding effect in relation to the Niuean Land Act. Section 489 states that no will made by a Niuean shall have any force or effect with respect to his interest in Niuean Land. As a consequence, a will is not determinative in relation to the vesting of Niuean land.

[25] Having regard to the above discussion, this application for rehearing is dismissed.

Dated at Wellington in New Zealand this 16th day of January 2012.

W W Isaac
**JUDGE**