IN THE HIGH COURT OF NIUE
(LAND DIVISION)

APPLICATION NOS: 11684, 11685, 11845, 11845A

IN THE MATTER OF	Section 109C, Part Togalupo, Alofi District
BETWEEN	FILIENIKE PEAUVALE-MISIKEA Applicant
AND	HALO ASEKONA AND OTHERS Respondents

Hearing: 11 March 2019

Counsel: I Tongatule for the Applicant
P O'Halloran for the Respondent

Judgment: 10 September 2019

JUDGMENT OF CHIEF JUSTICE C T COXHEAD

Copies to:
I Tongatule, Tongatule Law, Unit 1F, 9 Upper Queen Street, Auckland, New Zealand ikipa.tongatule@xtra.co.nz
P O'Halloran and R Toailoa toalaw@outlook.com

Introduction

[1] On 11 March 2019, I heard submissions from the applicants and respondents concerning an application opposing the enforcement of an eviction notice and an interim injunction. I dismissed the applications and reserved the issue of costs. The matter was appealed and subsequently dismissed by the Court of Appeal. The applicants have now filed an appeal in the Privy Council.

[2] On 12 April 2019, the respondents filed an application for costs in this Court, seeking costs totalling $102,501.60 covering the period from 1963 to 2019.

[3] The applicants oppose costs and now submit that the issue of costs in relation to applications 11845 and 11845A should be reserved pending determination of the appeal in the Privy Council. The applicants further submit that costs should be reserved on all matters relating to the period of 3 December 1986 to 28 November 2018.

Respondents' submissions

[4] The respondents submit that:

(a) Since 1963, the land at Togalupo, Section 109C has been the subject of Court hearings and communications between the respondents, Vesevihi Pamatatau's descendants (who are direct descendants of Vesevihi Panapa and Foutoa, the original land owner of Togalupo), and the applicant and her extended family (who are not descendants).

(b) The applicant and her extended family have illegally lived on the land since the applicant's father evicted Hinerangi Drake (a descendant of Vesevihi Panapa and Foutoa) from the land in 1951.

(c) The respondent mangafaoa have been forced to respond to false accusations by the applicant and her extended family and incorrect statements about ownership and genealogy in relation to Togalupo since the 1960s.

(d) Various members of the mangafaoa have attended Court hearings over the years at considerable cost and expense to defend their ownership of the Togalupo lands.

[5] The respondents provided a timeline of events, which included summarised costs for legal representation, flights, accommodation, vehicle hire and various incidentals. An assumption of costs was made in the absence of invoices over the timeline of events, but where possible invoices were provided and applied as an average for the described cost.

[6] The respondents argued that the actual and estimated costs relate to all of the events for the disputed land at Togalupo since 1951. They say the costs should be considered holistically as reasonable costs incurred in connection with the legal proceedings and in attending Court hearings as a direct result of the Peauvale-Misikea family.

[7] Further, it was submitted that the costs are all reasonable and would not have been incurred if it were not for the Togalupo land dispute that was commenced by Peauvale-Misikea families. It was also submitted that not all costs incurred have been claimed, as the respondents' expenditure is considerably higher.

[8] Therefore, the respondent mangafaoa is seeking to recover the cost of $102,501.60 for expenses and effort expended since 1963.

Applicants' submissions

[9] The applicants submit applications 11845 and 11845A were about the enforcement and eviction notice recently applied for and granted by the Court on 4 December 2018.

[10] As it transpired, the eviction notice was executed and actioned well before the expiry of the appeal rights of the applicant. In short, the Court brought finality to proceedings without due consideration of the proposed filing of an appeal to the Privy Council. On 15 March 2019 in Niue, the respondent Halo Asekona was served with appeal documents already filed with the registry judicial committee of the Privy Council.

[11] The applicant makes a number of submissions which can be summarised as follows:

(a) Costs will not assist in facilitating amicable and on-going relationships between these people who are related;

(b) The imposition of costs should be reserved until the outcome of the Privy Council appeal;

(c) The proceedings were conducted by the parties themselves until the Court matters of 2009;

(d) The cost being claimed by the respondents are punitive in nature and are intended to prevent the Privy Council appeal from proceeding; and

(e) The respondents are seeking costs for matters all the way back to 1951.

The Law

[12] Section 35 of the Niue Land Court Rules1969 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 particles in the same or different interests.

[13] The fundamental rule is that all questions relating to costs fall within the discretion of the Court. The fixing of costs is quintessentially the exercise of a judicial discretion. The underlying rationale for costs is that a party should be able to recover a reasonable contribution towards their legal expenses. Except in rare cases, a successful party can only expect to receive a contribution towards the actual legal expenses reasonably incurred.

[14] The aim of costs is not to fix solicitor or counsel remuneration but to impose on the unsuccessful party an obligation to make good the burden of bringing or defending the matter carried by the successful party.

[15] In *Hekau v Tongahau* the Court of Appeal adopted the two-step approach to costs.[1] Firstly, should costs be awarded? Secondly, if costs are to be awarded what is an appropriate amount?

[16] The following principles are relevant when considering whether costs should be awarded:[2]

(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, 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;

(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.

[17] In determining the level of costs that should be awarded the following principles are applicable:[3]

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

---

1 *Hekau v Tongahai* CA Niue Application 10305, 14 September 2012. See also *Sioneholo v Talagi* CA Niue, August 2012; and *Oloapu v Vilitama* CA Niue Application 11001, 19 June 2018.
2 *Hekau v Tongahai* CA Niue Application 10305, 14 September 2012, at [13].
3 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;

(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.

[18] Costs are 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

[19] I consider that there are a number of issues which need to be clarified or addressed with regards to this matter.

[20] Firstly, this decision only deals with costs in relation to the current applications that were before me. When inviting the parties to file submissions regarding costs, that was not an opportunity for the claimants to claim costs dating back to 1951. The respondents therefore seek costs beyond the application. That is inappropriate. The Court is focussed on those costs associated with the present applications, which the respondent was successful in defending. I also note it appears the parties were self-represented until approximately 2009 and that previous applications brought before the Court on this matter have already considered the issue of costs.[4]

[21] Secondly, it is unclear to me whether Mr Romero Toailoa has been engaged as a solicitor. It is clear that he has been giving legal advice on a consultant basis, however, the Court is aware that he does not currently hold a practising certificate. Costs are normally awarded to reimburse a party for the legal cost of going to Court.

---

4 See *Misikea v Asekona Family* HC Niue (Land Division) Applications 10039/32/6, 9735/24/6, 9708/23/7, 4 September 2009; and *Asekona v Misikea* CA Niue Application 10130/5, 3 July 2017.

[22] The third issue is the level of the costs award sought. The respondents seek an award for indemnity costs.

[23] As noted above, the Court has a broad discretion in determining the level of costs to be awarded and will take into account several factors. Ordinarily, a successful party will be entitled to a reasonable contribution to costs actually and reasonably incurred. As there are no decisions of the Niue courts which specifically address the issue of indemnity costs, it is helpful to consider the approach of the Māori Land Court of New Zealand.

[24] In *Riddiford v Te Whaiti*, the Māori Appellate Court reinforced the established rule regarding a reasonable contribution, referring to the following quote from the Court of Appeal decision in *Kuwait Asia Bank v National Mutual Life Nominees Ltd*:[5]

> … the guiding principle has been that, except where there is special reason for awarding costs on a solicitor-and-client basis, orders should be limited to a reasonable contribution towards the successful party's costs on a party-and-party basis. This principle is represented in the prescribed scales and has been followed for many years. It reflects a philosophy that litigation is often an uncertain process in which the unsuccessful party has not acted unreasonably and should not be penalised by having to bear the full party-and-party costs of his adversary as well as his own solicitor-and-client costs. If a party has 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.

[25] In *Phillips v Trustees of Mohaka A4 Trust* the Māori Appellate Court also considered indemnity costs, referring to provisions for such in the High Court Rules and noting that a high threshold must be passed before an order for indemnity costs is made, which was reserved for cases with exceptional circumstances. [6]

[26] The respondents are claiming full indemnity costs, encompassing costs for dealings between the parties in relation to the disputed land dating back to 1951. As I have already found however, any costs award must be limited to those applications presently being dealt with by the Court. Any costs which relate to the time prior to the present applications cannot be considered. In addition, I note that a lot of the costs that have been claimed are non-legal costs and are essentially reimbursement for the respondents having to attend Court and prepare for the proceedings. The costs even extend so far as the cost of a printer ink cartridge.

---

5 *Riddiford v Te Whaiti* (2001) 13 Tākitimu Appellate MB 184 (13 ACTK 184) at 186-187 citing *Kuwait Asia Bank v National Mutual Life Nominees Ltd* [1991] 3 NZLR 457 at 460.

6 *Phillips v Trustees of Mohaka A4 Trust* [2010] Māori Appellate Court MB 425 (2010 APPEAL 425) at [29] – [31]. See also High Court Rules 2016 (NZ), r 14.6.

Such costs however are expenses generally borne by litigants in the ordinary course of bringing proceedings and are not usually those which form the basis of a costs award.

[27] While I acknowledge that the issues with the present land have existed between the parties for some time, I reiterate that it is only in very exceptional circumstances that the Court could grant increased or indemnity costs. In my view, the present case does not meet the high threshold to satisfy the Court that there are exceptional circumstances which would justify an award of indemnity costs.

[28] In terms of whether any award of costs should be made, it is important to consider the Niue context. Niue has a small population on a small island. It is a close community and the Court should attempt to facilitate amicable relationships between parties who are invariably connected by genealogy to both the land and each other. An award of costs does not help family or community relationships.

[29] While the respondent was clearly successful in the proceedings before me, I consider that this is in not a situation where the Court should impose costs. Certainly not costs of a punitive nature. In my view therefore, costs should not be awarded and all parties should bear their own costs.

Decision

[30] The application for cost is therefore dismissed.

Pronounced at 1.00pm in Rotorua, Aotearoa/New Zealand on this 10th day of September 2019.

C T Coxhead
CHIEF JUSTICE