IN THE HIGH COURT OF NIUE
(LAND DIVISION)

App No: 2022-00061

UNDER	Section 44(22) of the Niue Amendment Act No 2 1968 and Rule 12(1) of the Land Court Rules 1969
IN THE MATTER OF	An application for injunction – PART LAMEA, ALOFI
BETWEEN	CHARLIE FUKU TONGAHAI Applicant
AND	IKIVALE KIFOTO AND FAMILY Respondents

Hearing:	15 August 2022 (Niue time) by Zoom
Appearances:	Mr Toailoa for the applicant Mr Allan for the respondents
Judgment:	7 September 2022

JUDGMENT OF JUSTICE M P ARMSTRONG

Introduction

[1] On 19 March 2019, Coxhead CJ granted a partition of land at Lamea and appointed Mr Kifoto and Mrs Tafatu as joint leveki of that land.

[2] Mr Tongahai has appealed Coxhead's J decision to the Court of Appeal. Mr Tongahai has also filed an application seeking an interim injunction to prevent Mr Kifoto and Mrs Tafatu from carrying out any further work on the land until the appeal has been determined.

[3] This decision determines whether the interim injunction should be granted. The first question is whether I have the jurisdiction to grant the order sought.

Do I have jurisdiction to grant the interim injunction?

[4] The applicant seeks an interim injunction per s 47(1)(f) of the Niue Amendment Act (No.2) 1968 ("the 1968 Act"). This provides that the Land Court shall have exclusive jurisdiction to grant an injunction prohibiting any person from dealing with or doing any injury to any property which is the subject matter of any application to the Land Court.

[5] Section 2 of the 1968 Act defines the Land Court as the Land Division of the High Court. The appeal was not filed in the High Court it was filed in the Court of Appeal. I have no jurisdiction to grant an interim injunction per s 47(1)(f) of the 1968 Act pending the determination of an appeal in the Court of Appeal.

[6] Counsel for the applicant, Mr Toailoa, accepts that, prima facie, the definition of Land Court excludes an appeal to the Court of Appeal. However, Mr Toailoa argues that an injunction can still be granted in this case.

[7] Firstly, in a supplementary submission filed after the hearing, Mr Toailoa submits the Court can grant the injunction per s 47(1)(e) of the 1968 Act as the respondents have injured the land. In that submission, Mr Toailoa seeks leave to amend the application to a proceeding per s 47(1)(e).

[8] It is not appropriate to grant the leave sought. The applicant brought this proceeding as an interlocutory application seeking an interim injunction pending the determination of the

appeal. An application per s 47(1)(e) of the 1968 Act is not an interlocutory application nor does it seek an interim injunction. Section 47(1)(e) relates to a substantive application seeking a permanent injunction. Such an amendment in this case would change the very nature of the proceeding, the grounds relied on and the relief sought. Changing the application in such a significant way at this very late juncture would prejudice the respondents.

[9] Also, at present the respondents have the benefit of Coxhead's J order granting a partition and appointing Mr Kifoto and Mrs Tafatu as joint leveki of that land. It would be difficult for the applicant to demonstrate that the respondents have injured the land, which refers to someone acting without authority, when they have the benefit of the existing orders.

[10] Alternatively, Mr Toailoa argues that the definition of Court under section 2 of the Niue Land Act 1969 states:

> "Court" means, as the case may require, the Land Court [now the High Court] or the Land Appellate Court [now Court of Appeal]

[11] Mr Toailoa argues I should incorporate this definition by "implied amendment" into s 47(1)(f) of the 1968 Act.

[12] I do not accept Mr Toailoa's argument. Firstly, this is not what the relevant definition says. It appears Mr Toailoa is referring to the Land Act 1969 as there is no Niue Land Act 1969. Section 2 of the Land Act 1969 defines Court as the Land Court. It further defines the Land Court as the land division of the High Court. The definition referred to by Mr Toailoa is not contained in the Land Act 1969.

[13] Even if there was some alternative legislation that contained the definition Mr Toailoa referred to, I cannot rely on a definition in an alternative piece of legislation to directly contradict the plain and ordinary meaning of the 1968 Act. To do so is contrary to all conventional principles on interpreting legislation.

[14] Finally, Mr Toailoa argues that I can grant an interim injunction pursuant to my inherent jurisdiction. I accept that the Niue High Court has an inherent jurisdiction. However, I cannot exercise that inherent jurisdiction in a way that directly contradicts an

express statutory provision. To do so would circumvent the intention of Parliament as expressed clearly and unambiguously in legislation. The Court's inherent jurisdiction supplements its statutory powers but cannot directly contradict those powers.

The appropriate proceeding was to seek a stay

[15] Where an order is under appeal, the conventional approach is to seek a stay of execution pending the appeal. This allows the Court to grant a stay to prevent the respondent from relying on the order until the appeal has been determined.[1] Coxhead J raised this in his minute of 10 June 2022:

> When the injunction was first brought to my attention, I emailed Court staff advising them that it is not the Court's role to advise applicants and/or respondents as to matters, but it did appear that the applicant was actually seeking a stay of proceedings, pending the appeal rather than an injunction.

[16] Despite that, the applicant did not seek to amend the proceeding to a stay nor did he file a new application. Instead, he continued with the application seeking an interim injunction and has maintained that approach in the face of this jurisdictional bar. The applicant must now bear the consequences of that approach.

Decision

[17] I do not have the jurisdiction to grant the interim injunction sought. The application is dismissed.

Pronounced at 3:00pm in Whangārei on the 7th day of September 2022.

M P Armstrong
JUSTICE

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1 *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* (1999) 13 PRNZ 48.