IN THE COURT OF APPEAL NIUE
(LAND DIVISION)

Application No. 11684

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

Judgment: 28 November 2018

JUDGMENT OF THE COURT

Introduction

[1] This is an application for special leave to appeal a decision issued in 2006. Special leave is required if this matter is to be heard by the Court of Appeal given the appellant has filed their appeal out of time. The appeal is 11 years out of time.

Background

[2] A basic background is helpful in terms of understanding the issues before the Court.

[3] The common ancestor for Section 109C, Part Togalupo, Alofi North was determined by Chief Justice Dillon in 1986 as Mafa.

[4] In 2006 Chief Justice Hingston dealt with an application for eviction from the land. He did not hear any challenge to the common ancestor. In 2009 the Court of Appeal heard an appeal against the order of eviction. There is no evidence that Hingston J was required to consider the correctness or otherwise of the 1986 determination of the common ancestor. However, it appears that by consent of the parties the Court of Appeal directed the High Court to reconsider the matter and determine a new common ancestor – despite there already being a common ancestor on the title.

[5] In 2009 Justice Isaac was asked to determine a common ancestor on an application for a re-hearing. The decision of Isaac J for all practical purposes purported to cancel the 1986 determination and replace the common ancestor for this land.

[6] The 2009 decision of Isaac J was appealed. On 3 July 2017, the Court of Appeal decided to uphold the appeal and annul Isaac J's decision determining a new common ancestor, given the irregularities and in the interest of justice. The common ancestor remained as Mafa, who was determined in 1986 by Dillion CJ. The Court of Appeal also noted that a Leveki Mangafaoa would need to be appointed.

[7] The 2017 decision did not address the issues which appeared to have initiated the application seeking the determination of a new common ancestor. While the Court was not fully cognisant of all the issues, there did appear to be an argument as to how the definition of the Mangafaoa declared in the 1986 order was intended to be ascertained with reference to Mafa. The Court could not resolve the matter because it was not one

of the appeal issues put before it. It was signalled as an issue that may need to be resolved.

Application for special leave

[8] There are two appeals to be heard in March 2019. One of the appeals - application 11685 - appears to relate to orders and perhaps a series of orders made many years ago, to that extent the appeal is out of time.

[9] Chief Justice Savage (as he then was) issued directions on 27 June 2018 with regards to the two appeals - 11684 and 11685. Those directions included that:

(a) Any application for special leave to appeal out of time is to be filed and served on the respondents before the end of August 2018.

(b) The respondents are to file, serve submissions and reply before the end of December 2018.

[10] Finally, Savage CJ noted that the Court would then consider whether the special leave matter can be dealt with on the papers or at the hearing.

[11] The appellant filed submissions with regards to special leave to appeal received by the Court on 27 August 2018.

[12] The respondents filed a response received by the Court on 26 September 2018.

Submissions of the appellant

[13] The appellant seeks special leave to appeal the decision of Hingston CJ on 28 October 2006, which ordered the eviction of the appellant from Section 109C, Part Togalupo, Alofi North.

[14] The submission sets out the grounds for special leave as follows:

(a) There is an incomplete record as to the minutes of the hearing on the eviction order, that the appellant now seeks to appeal. The appellant submits that the minutes of the hearing did not appear to disclose the full extent of the hearing or the issues that were discussed at the hearing.

(b) As a result of an incomplete record of the minutes relating to the eviction order, the strict rules governing appeals should not be applied.

(c) As the appellant has been prejudiced, an out of time special leave appeal is the only legal avenue available to her to seek justice.

(d) A strict application of the rules governing appeals will cause the appellant to suffer a grave injustice, as she will be deprived of the land.

[15] The appellant's case can be summarised as:

(a) The appeal against the eviction order was filed in 2006.

(b) It was not until 2009 that the appeal was referred to the High Court.

(c) A record of the 2009 proceedings are incomplete.

(d) As a consequence of an incomplete record the appellant is now seeking special leave to appeal.

(e) The system has failed the appellant.

[16] The appellant also seeks to set aside the 2006 eviction order and for the question of blood relation to Mafa and exclusive right of Mafa and her Mangafaoa to Section 109C, Part Togalupo land to be re-determined by the High Court.

Submissions of the respondents

[17] The respondents submit that special leave should not be granted as:

(a) The present application constitutes a fresh appeal against Hingston CJ's decision of 28 October 2006. The appeal is well outside the statutory limitation for filing an appeal.

(b) The appeal is contradictory and therefore defective. On the one hand the appellant states that her original appeal against the eviction order was accepted by the Court of Appeal in 2009 yet she is asking this Court for leave to appeal against the same eviction order.

(c) The appeal is barred under s 77 of the Niue Amendment Act (No.2) 1968. The present appeal would constitute a successive appeal concerning the same order because it can be inferred from s 77 that one person cannot bring successive appeals against the same order.

(d) The appeal does not satisfy any of the criteria required for granting of special leave.

(e) The appeal does not raise a question of law.

(f) The appeal is not a matter of a question of general importance or principle.

(g) There is no reasonable prospect of the appeal succeeding.

(h) There is a need for finality of litigation, which is fundamental to any systems of justice.

(i) While the appeal is directed at the 2006 eviction order by Hingston CJ, it fails to state any reasons for challenging Hingston CJ's decision. There is no reference to any errors of law or fact, on the part of the trial Judge.

The Law

[18] Section 75 of the Niue Amendment Act (No. 2) 1968 states:

> **75 Appeals from Land Court**
>
> (1) Except as expressly provided to the contrary in this Act, the Court of Appeal shall have jurisdiction to hear and determine appeals from any final order of the Land Court, whether made under the principal Act or this Act or under any other authority in that behalf.
>
> (2) Any such appeal may be brought as of right at the suit of any party to the proceedings in which the order is made, or at the suit of any person bound by the order or interested in it.
>
> (3) Every such appeal shall be commenced by notice of appeal given in the prescribed manner within two months after the date of the minute of the order appealed from (whether before or after the commencement of this Act).

[19] Article 55A of the Niue Constitution states:

> **55A Jurisdiction of Court of Appeal**
>
> (1) Subject to the provisions of this Constitution, the Court of Appeal shall have jurisdiction to hear and determine any appeal from a judgment of the High Court.
>
> (2) Subject to the provisions of this Constitution, and such time limits as may be prescribed by enactment within which an appeal shall lie to the Court of Appeal from a judgment of the High Court –
>
> (a) As of right, if the High Court certifies that the case involves a substantial question of law as to the interpretation or effect of any provision of this Constitution;

> (b) As of right, from any conviction by the High Court in the exercise of its criminal jurisdiction whereby the appellant has been sentenced to death or to imprisonment for life or for such term, or to such fine, and from any such sentence (not being a sentence fixed by law) as shall be prescribed by Act;
>
> (c) As of right, when the matter in dispute on the appeal amounts to not less than such value as shall be prescribed by the Act;
>
> (d) With the leave of the High Court in any other case, if in the opinion of that Court the question involved in the appeal is one which by reason of its general or public importance, or of the magnitude of the interest affected, or for any other reason, ought to be submitted to the Court of Appeal for decision;
>
> (e) In such other cases as may be prescribed by the Act.
>
> (3) Notwithstanding anything in subclause (2) of this article, and except where under any Act a judgment of the High Court is declared to be final, the Court of Appeal may, in any case in which it thinks fit and at any time, grant special leave to appeal to that Court from any judgment of the High Court, subject to such conditions as to security for costs and otherwise as the Court of Appeal thinks fit.
>
> (4) In this Article the term 'judgment' includes any judgment, decree, order, writ, declaration, conviction, sentence or other determination.

[20] The Court of Appeal in *Hipa v The Crown* noted that there were three general questions to be considered on an application for special leave to appeal. That three-step approach required the Court to ask itself:[1]

(a) Does the appeal raise a question of law?

(b) Is it a matter of general importance or principle?

(c) Is there a reasonable prospect of success?

Discussion

[21] In seeking to appeal the 2006 order, it is clear that the appellant has a number of obstacles before them.

Does the appeal raise a question of law?

[22] On its face the appeal does not raise a question of law. In fact, the appellant fails to identify any errors of law or fact made in the 2006 order.

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1 *Hipa v The Crown* CA Niue, 9 July 2012 at [3].

Is it a matter of general importance or principle?

[23] The appellant seeks to appeal a decision issued in 2006. The matter has in some respects already been considered by the Court of Appeal in 2009, then at a re-hearing decision in 2009 before Isaac J.

[24] During the proceeding Court cases and in the submissions before the Court, no question of law of sufficient public interest nor of general importance has been raised that requires our consideration.

Is there a reasonable prospect of success?

[25] It is always difficult to assess whether there is a reasonable prospect of success for any case. As stated above, in this situation, the appellant has failed to state any reasons as to why Hingston CJ's decision of 2006 is incorrect or to provide any reference to any errors of facts or law on the part of the trial Judge. The general submission put forward by the appellant is that there has been an injustice. Based on the information before the Court, which is sparse, it is difficult to see how the appellant has any reasonable prospect of success with the appeal.

Decision

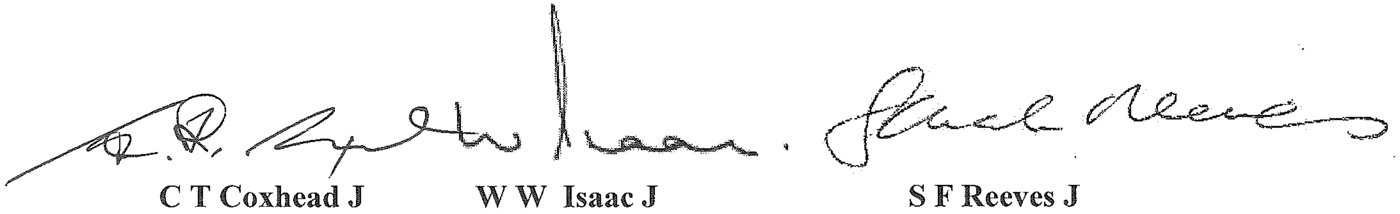
[26] The fact that special leave is required is significant and ought not to be granted as a matter of course. Special leave is retained for "special" circumstances.

[27] The general principle is that special leave should only be granted if a material error of law is shown, which must have materially affected the challenged decision. That has not been shown to be present in this case.

[28] The appellant has shown no good or sufficient reason for this Court to invoke the provisions of Article 55(a)(3).

[29] The application for special leave to appeal is dismissed.

Dated at Rotorua, New Zealand, on 28 November 2018.



C T Coxhead J **W W Isaac J** **S F Reeves J**