IN THE HIGH COURT OF NIUE
(LAND DIVISION)

App No. 11565

IN THE MATTER	Section 45, Niue Amendment Act (No 2) 1968
AND	
IN THE MATTER	of the land known as Part Lalosiale Makefu
BETWEEN	VIVALIATAMA ELESONI TALAGI **Applicant**
AND	ATIANA M KALAUNI **Respondent**

Appearances: Mr Emeritus Talagi for the Applicant
Mr Togia Sioneholo for the Respondent

Decision: 9 November 2020

DECISION OF JUSTICE W W ISAAC

Introduction

[1] This is an application for rehearing against the decision of Justice Reeves made on 4 September 2018.

[2] It concerns the lands known as Part Lalosiale Block 1, Makefu District and the determination of title and appointment of Leveki Magafaoa.

Procedural History

[3] The original application to determine and appoint Leveki first came before the Court on 4 April 2017 but was adjourned as one of the parties was unable to attend due to family matters.

[4] The application was then heard by Justice Reeves on 14 November 2017, where she reserved her decision and issued directions allowing further time for filing submissions.

[5] On 4 September 2018, Justice Reeves granted the application and appointed Mr Togia Sioneholo as Leveki Magafaoa of the abovementioned land. This was decided on the basis that the claims of Atiana Mataifi Kalauni had more merit and were supported by evidence of genealogy, ownership and occupation.

[6] On 17 September 2018, Vivaliatama Elesoni Talagi, filed an application for rehearing against the decision of Justice Reeves on the basis that a serious miscarriage of justice had occurred due to the misuse of a letter of Ikimana filed with the Court.

Background

[7] The applicant originally sought determination of title in favour of the Tauetule family, naming their common ancestor as Ahoua Tauetule Hekepe.

[8] The family lost their home after Cyclone Heta in 2004, so the purpose of the application was for the family to rebuild on the same piece of land.

[9] Vivaliatama Talagi appeared as an objector on behalf of the Falemaka family, who claimed that they had a stronger claim because they are connected to Mulio, the source of the land, through marriage. She also claimed that Ikimana, the grandson of Mulio, had gifted the land to his daughter Hakatagaloa.

Submissions of the Applicant

[10] The applicant filed an application for rehearing based on the misuse of evidence by the respondent submitting that the misuse of evidence constitutes a miscarriage of justice.

[11] The applicant claims that the letter put forward by the respondent at the 2018 hearing, which was accepted by the Court as evidence, constitutes a miscarriage of justice.

[12] In addition, they argue that the letter should not have been issued to the respondent by the Justice Department in the first instance. Instead, the applicant submits that the letter should have been in their possession to present to the Court at their own discretion, irrespective of its relevance to the hearing at hand.

Submissions of the Respondent

[13] Mr Sioneholo for the respondent submits that the letter that was presented as evidence is in fact a document accessible by the public and is held on file by the Court office. He argues that it was crucial to the finding of fact in the case.

[14] The respondent also makes a claim to dismiss the application for rehearing in its entirety on the basis that there is no new evidence being brought forward by the applicant, but more so a rehashing of the original issues, already concluded by the court.

Law

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

> That no application for rehearing under section 45 of the Niue Amendment Act (No 2) 1969 shall be made after the expiration of 14 clear days after the making of the order or determination in the matter in respect of which the rehearing is sought.

[16] Section 45 of the Niue Amendment Act (No 2) 1968 (the NAA) provides:

> **45 Rehearings**

> (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 to the Land Appellate Court shall not commence to run until the rehearing has been disposed of by a final order of the Court.
>
> (4) Any such rehearing may be granted on such terms as to costs and otherwise as the Court thinks fit, and the granting or refusal thereof shall be in the absolute discretion of the Court.
>
> (5) No order shall be so varied or annulled at any time after the signing and sealing thereof.

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

[18] The Niue Court of Appeal has determined a rehearing may be granted only in the following circumstances:[1]

> 1. Where further material of a credible nature has been discovered which was not available at the original hearing;
> 2. Where there has been a breach of process or procedure which may have disadvantaged one of the parties to the extent that there has been a miscarriage of justice; and
> 3. Where judicial error is involved, a party is entitled to a retrial if the result of the error is a fundamental miscarriage of justice.

[19] Grant of a rehearing remains subject to the absolute discretion of the Court, even when one of the above criteria is met. It is not an opportunity to relitigate. The fundamental principle for consideration is whether there has been a miscarriage of justice that justifies granting a rehearing.[2] In order to overturn an exercise of discretion it must be shown that the decision contains an error of law or principle, or irrelevant considerations have been taken into account or relevant considerations have not been taken into account, or the decision is plainly wrong.[3]

Issues

[20] The issue to determine in this case is whether or not a rehearing should be granted.

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[1] *Koligi v Iakopo* [2017] NUHC 1; Land Division 11213 (12 October 2017) at [26].
[2] *Tahega v Kapanga – Part Limu Namukulu* NUCA; 11346 (17 August 2016) at [50].
[3] *Tahega v Kapanga* at [47].

Discussion

[21] The principles set out above require the Court when considering rehearing applications to find that the circumstances of the case have led to a miscarriage of justice.

[22] The applicant maintains that the letter of Ikimana sent to the Deputy of Justice was their letter and it should not have been used by the respondent to support their claim. In their view the use of the letter by the respondent and Department of Justice in permitting the respondent to read the letter led to a miscarriage of justice.

[23] The respondent says the letter was on the Court record and therefore was accessible by the public. The respondent says there is no new evidence and the applicant is simply wanting the Court to consider the same issues which have already been dealt with.

[24] Firstly, the application for rehearing was filed within the statutory time limits so can be considered.

[25] Next, as Mr Sioneholo has said, no new evidence has been discovered which was not available at the original hearing. As stated the applicant considers the obtaining of Ikimana's letter by the respondent from Department of Justice and the presentation of this letter to the Court was a miscarriage of justice.

[26] I do not agree. The letter was written by Ikimana to the Department of Justice. It was correctly placed on the Court record. The Court record is a public record and can be accessed by the public and in particular the parties to the present case.

[27] More importantly, as the letter was important to this case, the Court was entitled to see and consider it.

[28] All parties to the Court have a duty to place before the Court all relevant information, which will lead to the Court finding the truth of a particular matter. The

respondent cannot pick and choose what the Court should read, especially when the document is on the Court record.

[29] In short, there has been no miscarriage of justice suffered by the applicant and in my view, if the letter was not presented to the Court, this might have constituted a miscarriage of justice for the respondent.

Decision

[30] Accordingly, the application for rehearing is dismissed and there will be no order as to costs.

[31] A copy of this decision is to go to all parties.

Dated at Gisborne this 9th day of November 2020.

W W Isaac
JUSTICE