IN THE HIGH COURT OF NIUE
(LAND DIVISION)

APPLICATION NO: 11920

IN THE MATTER OF:	Section 45, Niue Amendment Act (No.2) 1968
AND	
IN THE MATTER OF:	of the land known as Part Fakafaleloto, Toi district
BETWEEN	MOKA TALENI SEU Applicant
AND	HARE HARESIMELIKA PAKA Respondent

Hearing: On the Papers

Date: 27 October 2021

JUDGMENT OF COXHEAD CJ

Introduction

[1] On 18 July 2019, Moka Taleni Seu filed an application seeking a rehearing of the decision of Justice Isaac of 4 July 2019.

[2] In that decision, Justice Isaac dealt with two applications to determine title of Part Fakafaleoto Toi district; one from Mrs Seu and the other from Dr Hare Haresimelika Paka.

[3] Mrs Seu's application sought to determine Togiavale Logolea as the common ancestor and to appoint herself as leveki mangafaoa.

[4] Dr Paka's application sought to determine Fakalito as the common ancestor and to appoint Audrey Anama as leveki mangafaoa.

[5] After considering all submissions and evidence before the Court, Justice Isaac determined that the common ancestor is Fakalito and he appointed Audrey Anama as the leveki mangafaoa.

Procedural History

[6] There has been some confusion with the rehearing application. Although the application was filed as a rehearing, the grounds for the application appeared to be for an appeal.

[7] This matter was mistakenly referred to a Judge for hearing in March 2020.

[8] It was then referred to me on 24 February 2021, on the basis that it was an appeal.

[9] On 12 March 2021, I sought clarification as the application filed was for a rehearing. However, on reviewing the application I was of the same view as Court staff; that it looked like an appeal. I therefore asked the applicant to confirm whether the application filed was for a rehearing or an appeal.

[10] On 29 March 2021, Mrs Seu confirmed by letter to the Court that "I confirm my application [is] for a rehearing not an appeal".

[11] I then issued a minute on 10 May 2021 noting that the applicant had confirmed to the Court that the application is for rehearing and I directed:

a) The application and supporting documents were to be served on Dr Paka;

b) Dr Paka was to file a response to the application;

c) The applicant would have an opportunity to file a reply to Dr Paka's response;

d) The matter would then be referred back to me, to see if I could complete this matter based on the papers or whether it needs to go to hearing.

Submissions of the applicant

[12] The reasons given for a rehearing are, in summary:

a) Mrs Seu and her family had waited longer than expected for the ruling;

b) She feels that justice was not served in this case and reasons for the ruling are unjust and unfair;

c) Her family is disappointed with the decision and therefore wish to apply for a rehearing and also intend to appeal the ruling;

d) The reasons Justice Isaac gave for his ruling are inconsistent with the evidence and statements that she and her counsel provided to support their case;

e) Hare Paka and his son Dr Paka did not reside on the land in question and the connection that his father had to the family was through adoption into the family;

f) Dr Paka was adopted out of their family and has no further connection to the land;

g) None of the Paka ancestors are buried on the land and there is no evidence of building foundations of their ancestors on the land; and

h) Mrs Seu's ancestor's building foundations still remain on the land.

[13] Mrs Seu repeats what appears to be much of the evidence she and her counsel put before Justice Isaac at hearing.

[14] She also provides a statement of the Honourable Dion Taufitu dated 26 April 2018. This statement was made after the 19 March 2018 hearing before Justice Isaac. It appears to be in response to Dr Paka's written submission filed post hearing as directed by Justice Isaac.

Submissions of the respondent

[15] Dr Paka submits, in summary, that:

a) In considering the applicant's grounds supporting the application, there is nothing new that was not already presented and considered by Justice Isaac making his final decision.

b) Mrs Seu, in essence, reiterates her original statement that has been considered by the Court.

c) He notes that the issues raised in the statement of Dion Taufitu attached to the application had already been dealt with by the Court.

Applicant's reply

[16] In reply, Mrs Seu states that there is more evidence that needs to be heard and makes a number of statements about Dr Paka in relation to other land dealings.

[17] She then reiterates a number of claims that she made in her original application.

Law on Rehearings

[18] Rule 30 of the Land Court Rules 1969 states that an application for rehearing under s 45 must be filed within 14 days of the order or determination in respect of which it is sought.

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

> **Rehearings**
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> (1) On the application of any person interested, the Land Court may, if it thinks fit, grant a rehearing of any matter either wholly or as to any part thereof.
>
> (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.
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> (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.

[20] These provisions contemplate a two-step approach; first, the applicant must have made the application within 14 days of the order, and then the Court will consider whether a rehearing should be granted.

[21] In *Tuineau v Talagi – Pt Faleapuna, Makefu*, Isaac J adopted the reasoning of *Tasmania v Rex*, which applied *Ladd v Marshall*, *Dragicevich v Martinovich* and *Almeida v Opportunity Equity Partners Ltd* (The Cayman Islands). Isaac J held that the granting of a rehearing application is limited to the following circumstances:[1]

> (i) Where further material evidence of a credible nature has been discovered which was not available at the original hearing;

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[1] *Tasmania v Rex* [2009] Application 9116/8/6 (NUCA); *Ladd v Marshall* [1954] 3 All ER 745 (EWCA); *Dragicevich v Martinovich* [1969] NZLR 306 (CA); *Almeida v Opportunity Equity Partners Ltd* [2006] UKPC 44.

(ii) 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;

(iii) Where judicial error is involved, a party is entitled to a retrial if the result of the error is a fundamental miscarriage of justice.

[22] In *Mautama v Sionetali – Part Fumei/Lalovi, Hakupu District*, Isaac J expanded on these principles and noted that grounds for rehearing include:[2]

(i) That 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.

The Court's jurisdiction as set out in s 45 Niue Amendment Act (No.2) 1968 makes it clear that the Court has an absolute discretion as to whether or not to grant a rehearing.

In exercising this discretion the Court must apply the principles above and in essence determine whether in a particular case a miscarriage of justice has occurred.

[23] Even if one of the above criteria is met, grant of a rehearing is still subject to the absolute discretion of the Court, and is not an opportunity to relitigate, to fix omissions in the presentation of an earlier case, or to reshape that case.

The issue

[24] The issue for consideration is whether there has been a miscarriage of justice that justifies granting a rehearing.

Discussion

[25] The application for rehearing was received within 14 days of the decision, satisfying Rule 30 of the Land Court Rules 1969.

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2 *Mautama v Sionetali – Part Fumei/Lalovi, Hakupu District* HC Niue (Land Division), App 5071,5072, 10668 and 10669, 12 February 2016 at [9]-[11].

[26] Turning to whether there are circumstances that would justify a rehearing, I note that Mrs Seu was assisted by counsel, Mr Howard Lawry, in the hearing before Justice Isaac.

[27] The grounds justifying a rehearing are often procedural. For example, where a person did not receive notice about a hearing and therefore did not attend the hearing, or where a person did not see a document and therefore didn't have an opportunity to make comment about the document. Further common grounds for hearing are where an existing piece of relevant evidence, such as a Court minute, was not put before the Court.

[28] Mrs Seu clearly received notice and attended the hearing. Assisted by a lawyer, she was given plenty of opportunity to put her case to the Court. Much of what has been presented to support this rehearing application were matters put before Justice Isaac and were considered by him when he made his decision of 4 July 2019.

[29] Having reviewed the grounds supporting the rehearing application, the only matter which comes within the grounds for rehearing per *Mautama v Sionetali* is the evidence of Dion Taufitu dated 26 April 2018 and received by the Court on 30 April 2018.[3]

[30] Hearings for this matter were held on 5 April 2017, 14 November 2017 and 19 March 2018. At the Court hearing on 19 March 2018, Judge Isaac directed Dr Paka to file a written submission to the Court. That submission was filed on 9 April 2018.

[31] Mrs Seu filed a response on 30 April 2018. Mr Taufitu's evidence was submitted to the Court, along with Mrs Seu's filed response, on 30 April 2018. Dr Paka's written submission of 9 April 2018 and Mrs Seu's response of 30 April 2018 were referred to Justice Isaac on 18 May 2018. It is unclear whether Mr Taufitu's evidence was referred to Justice Isaac at this time.

[32] The reasons the Court can consider granting a rehearing include "[w]here further material evidence of a credible nature has been discovered which was not available at the original hearing." [4] It is a requirement that this evidence "could not have been reasonably foreseen or known at the trial." [5]

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3 *Mautama v Sionetali*, above n 2.
4 *Tuineau v Talagi,* above n 1.
5 *Mautama v Sionetali,* above n 2.

[33] In *Ladd v Marshall*, a decision from the England and Wales Court of Appeal adopted by the Niue Court of Appeal, Lord Denning held:[6]

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

[34] The question in relation to this rehearing application is whether, with reasonable diligence, the evidence of Dion Taufitu could have been presented to the Court at the hearings of 5 April 2017, 14 November 2017 or 19 March 2018. It seems that it could have been. It is unclear why Mrs Seu did not call Mr Taufitu as a witness to support her case before Justice Isaac.

[35] The evidence of Mr Taufitu has been made following the hearing. It is in response to matters raised in Dr Paka's closing submissions of Monday 19 April 2018. It is not material that existed at the time of hearing which had not yet been discovered. The grounds for a rehearing are not made out, as with reasonable diligence this evidence could have been produced at the hearing by way of having Mr Taufitu appear as a witness.

[36] In my view there were no issues with the hearing process. All information Mrs Seu had to put before the Court was put before the Court. I further note that Mrs Seu's application was originally made in 2012, which demonstrates that in all likelihood Mr Taufitu's evidence regarding historical events could have been provided to the Court much earlier.

[37] Further, Mr Taufitu's evidence covers the ancestor and genealogy matters that Mrs Seu put before Justice Isaac. It also covers matters, as noted by Dr Paka, that had already been dealt with by the Court.

[38] A rehearing requires a balancing of two considerations – ensuring there is a proper administration of justice and balancing that with a need for finality of Court proceedings,

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6 *Ladd v Marshall* [1954] 3 All ER 745 (EWCA) at 748 per Lord Denning; *Tasmania v Rex*, above n 1.

rather than allowing an unsuccessful party another opportunity to argue their case without good reason.

[39] The application is dismissed

Dated at Wellington, Aotearoa/New Zealand this 27th day of October 2021

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C T Coxhead CJ
CHIEF JUSTICE