IN THE HIGH COURT OF NIUE
(CIVIL DIVISION)

Application No: CV2023-00068

IN THE MATTER OF Application to Declare Order of Adoption a Nullity
Application for Summary Judgment &
Order Striking out applicants.
Application and Costs

BETWEEN

Fenogatao Suamili & Angela Salt
(Applicants)

AND

Paramoa Family
(Respondents)

Date of Court Hearing: 22 March 2024

Date of Judgment: 10 May 2024

JUDGMENT OF JUSTICE W W ISAAC

Introduction

[1] The Court has before it the following applications:

(a) An application to declare an order of adoption made by Chief Justice Stace on 2 October 1962 a nullity.

(b) An application for summary judgement and an order striking out the application with costs.

[2] The application to declare the adoption order a nullity was made on the grounds that at the date of the order, 2 October 1962, the statutory provision in force regarding adoption in Niue was s 461 of the Cook Islands Act 1915. Section 461(1) provided that no order of adoption shall be made unless the Court is satisfied that the child to be adopted is under 15 years.

[3] At the time of the adoption the child being adopted, Neki Palamoa (Neki), was 25 years of age. As the adoption was made when Neki was 25 years old it is maintained that the Judge acted ultra vires of s 461 and this Court can set aside the adoption order under its inherent jurisdiction. It is further stated that it is in the interests of justice and in the public interest to set aside the order, so the public maintains confidence in the Court and the administration of justice in Niue.

[4] Opposition to this application comes from Neki's family, who maintain the nullity application cannot succeed because:

(a) All parties are entitled to rely upon the adoption order which has stood for over 60 years.

(b) The applicants cannot satisfy the requirements of the Family Law Code which sets out the requirements to discharge an adoption order.

(c) There is no evidence that the adoption order was other than validly made.

(d) The Court does not have inherent jurisdiction to make the nullity order.

Background

[5] Neki was born on 2 March 1937. Following his birth he was customarily adopted by Fatai and Meleke and lived with them as a child of the family until his adoption was formalised by the adoption order completed on 2 October 1962.[1]

[6] Neki's birth certificate records Fatai and Meleke as his parents. Neki and Meleke are now both deceased.

[7] The applicant's father, Valamaka Meleke, was the biological child of Fatai and Meleke.

[1] Court Minute Book, No. 2, Folio 328 – 329.

Submission of the Applicant

[8] As stated, the applicants seek the annulment of the adoption of Neki Paramoa upon the ground that the Judge granting the adoption acted ultra vires under s 461 of the Cook Islands Act 1915.

[9] The applicants set out Niue's legal background. Niue was first incorporated together with all the islands forming part of the group as part of the colony of NZ by virtue of the Cook Islands Government Act 1901 (the 1901 Act).

[10] The Cook Islands Act 1915 was enacted by the New Zealand Parliament to make better provisions with respect to the Governments and Laws of the Island incorporated as forming part of New Zealand under the 1901 Act. Also, the phase "The Cook Island" was defined under the 1915 Act as including "all the islands and territories situated within the boundary lines set out in schedule.

[11] Schedule 1 and the boundary lines set out in the 1901 Act is the same meaning. The 1915 Act applied to the same islands as the 1901 Act therefore including Niue.

[12] The words "but does not include the island of Niue" were added by s 2(1) of the Cook Islands Amendment Act 1966 to coincide with the Niue Act 1966.

[13] Section 461 of the Cook Islands Act 1915, regarding adoptions, provides that:

> (1) No order of adoption shall be made unless the Court is satisfied –
>
> (a) That the child to be adopted is under the age of 15 years.

[14] It is noted that the words "21 years" were substituted for the words "15 years" by s 15(a) of the Cook Islands Amendment Act 1963.

[15] As a result of the above, the applicant submits:

(a) That s 461 of the Cook Islands Act 1915 applies to Neki Paramoa's adoption.

(b) That s 461, which states that no order of adoption shall be made unless the

child is under the age of 15 years, is mandatory and the judge is given no discretion.

(c) At the time of the adoption, Neki was 25 years old and therefore the Court acted in contradiction of s 461(1)(a) of the 1915 Act.

[16] As to the next issue raised by the applicants, being whether or not Court has power to annul the adoption order, the applicants rely on the inherent jurisdiction of the Court.

[17] The applicants submits that the Niuean High Court has inherent jurisdiction in addition to any other jurisdiction provided by statue. In support of this position, the applicants refer to *Tongahai v Kifoto:*[2]

> 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.

[18] In support of this point, the applicants also refer to *Puletama v Kapaga*:[3]

> Judicial review is part of the inherent jurisdiction of the High Court. It has been developed by superior Courts to fulfil their supervisory function of administering justice according to law. It is a means to hold those who exercise public power accountable for its exercise, especially when those decisions lie outside the control of the political process.
>
> Counsel for the respondent acknowledges that the Court has an inherent jurisdiction to uphold principles of natural justice and to deal with judicial reviews. However, counsel for the respondent submits that the Court has no specific power outlined in the Act with respect to judicial review of a closed electoral roll after the elections. However, judicial review is an inherent jurisdiction, not a statutory right like the right to appeal. Therefore it is of no consequence that the Niue Assembly Act 1966 does not specifically make provision for judicial review of an electoral roll. I can think of no substantial reason why

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[2] *Tongahai v Kifoto* [2022] NUHC 2; Application 2022-00061 (7 September 2022) at [14].
[3] *Puletama v Kapaga* [2011] NUHC 3 (5 July 2011) at [21]-[22].

> this should not come within the Court's inherent judicial review powers. Of course it would have been preferable that the application came before the electoral roll was closed, and before the elections. However, I do not consider it a bar that this application came afterward.

[19] The applicants also refer to the Māori Land Court decision of *Maruera v Te Runanga o Ngati Maru (Taranaki) Trust*, where Judge Harvey referred to an article by Master Jacob, which stated:[4]

> …the inherent jurisdiction of the Court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular, to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[20] As a result of these authorities, the applicants submit that they are entitled to have the adoption annulled under the Court's inherent jurisdiction and the Court has no discretion to refuse.

[21] The respondents has argued that the to strike out application is an abuse of process as the nullity application in that it is a collateral attack on the decision of the Court in *Asemaga v Suamili*.[5] In response to this argument, the applicants submit that they are not challenging the determination of the Court in that case.

[22] The applicants say that they have always been concerned with the status of Neki's adoption, especially when the Court found Neki to be formally adopted. The applicants submit that it was not until 3 March 2023 that copies of Neki's adoption orders were made available and instructions were received to file the present application.

[23] The applicants maintain their application is well founded and not an abuse of process.

[24] There was no application for rehearing or appeal of the adoption order.

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[4] *Maruera v Te Runanga o Ngati Maru (Taranaki) Trust* (2018) 385 AOT 7 at [16], citing Jacobs (1970) 23 *Current Legal Problems* 23 at 51.
[5] *Asemaga v Suamili* [2020] NUHC 15; Application 11345 (17 April 2020).

[25] In the hearing, counsel for the applicants, Mr Toailoa, confirmed that he was aware of the Niuean legislation to change or cancel an adoption order but chose not to rely on it because he maintains that the legislation does not cover the situation that applies to his clients.

[26] Mr Toailoa says that s 68 deals with cancelling an adoption order because of a mistake of fact, not a mistake of law, as is the case here.

[27] Mr Toailoa goes further to say that the Court has an inherent jurisdiction to overturn any decision that is made, regardless of the timeframe.

[28] Mr Toailoa also submits that there would not be an injustice to the adopted child because he was with the family as if legally adopted and also his genealogy would not be affected as it just reverts back to what it was before the adoption.

Submissions for the Respondents

[29] The respondents submit that s 399 of the Cook Islands Act 1915 sets out that no order of the Native Land Court should be invalid because of any error or irregularity or defect or that the order was made with or without jurisdiction. Section 399 sets out:

> **399. Validity of orders**
>
> (1) No order of [the Land Court] shall be invalid because of any error, irregularity, or defect in the form thereof or in the practice or procedure of the Court, even though by reason of that error, irregularity, or defect the order was made without or in excess of jurisdiction.
>
> (2) Nothing in the foregoing provisions of this section shall apply to any order which in its nature or substance and independently of its form or of the practice or procedure of the Court was made without or in excess of jurisdiction.
>
> (3) Every order made by [the Land Court] shall be presumed in all Courts and in all proceedings to have been made within the jurisdiction of the Court, unless the contrary is proved or appears on the face of the order.

[30] Likewise, as per s 53 of the Niue Amendment Act 1968, no order of the Land Court shall be invalid because of any such error or irregularity:

> **53 Validity of orders**
>
> (1) No order of the Land Court shall be invalid because of any error, irregularity, or defect in the form thereof or in the practice or procedure of the Court even though by reason of that error, irregularity, or defect the order was made without or in excess of jurisdiction.
>
> (2) Nothing in subsection (1) shall apply to any order which in its nature or substance and independently of its form or of the practice or procedure of the court was made without or in excess of jurisdiction.
>
> (3) Every order made by the Land Court shall be presumed in all courts and in all proceedings to have been made within the jurisdiction

[31] If the adoption order is annulled, it would be severing genealogy and, in the respondents' submissions, all parties were entitled to rely on the order, and they had relied on it for 60 years. Furthermore, all the adoption order did was legalise a position that had been in place for 25 years. So in effect, if the orders are made it would sever 85 years of family history. It would disenfranchise the respondents, their father, their children and all subsequent generations.

[32] The respondents also submit that the land in question can be traced back to Fatai's (their mother) family and in Fatai's evidence in on the adoption she said that "it is my wish that Neki should share in my lands … we all live in Makafotu at Tamakautoga, and the adoption is well known … we have only one natural child … I wish my two children to share equally in my land Meleke [her husband] has the same wish … I can assure the Court that Valamaka has no objection to this adoption. He has regarded Neki as a brother."

[33] The respondents state that an adoption order is a very delicate matter which requires great care and cannot be lightly undone. Any adoption is a complete break for the child from their biological parents and servers all ties to the biological family. Instead it sets up new

family relations through the adoptive parents.

[34] Neki relied on his adoption his entire life and setting it aside would deny him his rights to a magafaoa and any benefits that flowed from that belonging.

[35] The current law is the Family Court code, which at s 36 provides as follows:

> **36. Adoption order may be varied or discharged**
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> (1) The Land Court may vary or discharge any adoption order subject to such terms and conditions as it thinks fit, on the application of any adoptive parent or of the adopted child.
>
> (2) The Land Court may, subject to such terms and conditions as it thinks fit, discharge any adoption made in any place outside Niue either before or after 1 November 1969 if –
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> (a) The person adopted is living and is domiciled in Niue; and
>
> (b) Every living adoptive parent is domiciled in Niue.
>
> (3) No application for discharge of any adoption shall be made without the prior approval of Cabinet and no adoption order or adoption shall be discharged unless the adoption order was made by mistake as to a material fact in consequence of a material misrepresentation to the Land Court or to any person concerned.
>
> (4) Where the Land Court discharges an adoption order or adoption as aforesaid, it may confer on the person to whom the order or adoption related such surname with such first or Christian name as the Land Court thinks fit; but, if it does not do so, the names of the person shall not be affected by the discharge of the order.

[36] It is submitted by the respondents that the applicants have not applied under the Family Law Code and any application could not succeed because:

(a) The applicants have no standing;

(b) Neki Paramoa and his adoptive parents are deceased;

(c) Cabinet has not approved the application; and

(d) There was no mistake as to a material fact.

[37] As discussed, the adoption order was raised in the 2020 lease decision of *Asemaga v Suamili* which found that 70 per cent of the lease proceeds be shared between the parties to

this proceeding. The applicants did not appeal the 2020 decision, instead they initiated these new proceedings. The respondents maintain that the application is therefore an abuse of process. The applicants cannot raise issues for the first time in a new proceeding when the same issues were part of earlier litigation. If they wanted to dispute the issues, they should have raised them in the 2020 proceedings, but they did not do so.

[38] To reiterate this point, the respondents also refer to the decision of *Suamili v Malietoa* which referred to Paramoa Neki's relationship to the land.[6] Again, the Valamaka family took no issues at that time with the reference to Paramoa Neki's right to deal with the land alongside Mr Valamalea.

[39] In light of these proceedings the respondents say the issue is res judicata because it has been dealt with in previous decisions which the applicants have not appealed. Where a party seeks to relitigate the same issue in a different proceeding, it brings the administration of justice into disrepute and is an abuse of process.[7] To now challenge by seeking to declare the adoption a nullity is without foundation, improper and an abuse of Court process.

[40] In relation to the applicants' submissions regarding inherent jurisdiction raised, the respondent submits that inherent jurisdiction can only be exercised where the interests of justice require and –

(a) It is necessary;

(b) Has the aim of avoiding injustice; and

(c) Exists in the absence of explicit statutory regulation.

[41] It is submitted that the applicants cannot exercise it because –

(a) There is explicit statutory regulation about annulling or varying adoption orders set out in the Family Law Code;

(b) The application is bought for an ulterior purpose; and

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[6] *Suamili v Malietoa* [2020] NUHC 12; Application No 11304 (17 December 2020)
[7] *Ashmore v British Coal Corporation* (1990) 2 All ER 981.

(c) The exercise of it would create an injustice for the Paramoa family.

[42] Counsel for the Paramoa family refers to the following to support her position:[8]

> Inherent power should not be used though it were the joker in a pack of cards, possessed of no specific designation and used only when one [does] not have the specific card required. The same might be said of 'doing justice' because one means justice can be another man's injustice. 'Inherent power' does not mean unlimited power, and if a substantive power to reopen a case on [the] merits is to be given, it must come expressly from the legislature.

[43] So the applicants' inability to satisfy the legislative requirements does not satisfy the test for the Court to exercise its inherent jurisdiction.

Discussion

[44] The issues to determine in this case are as follows:

(a) Does the Court have jurisdiction to grant the nullity application?

(b) If it does have jurisdiction, should the nullity application be granted?

Does the Court have jurisdiction to grant the nullity application?

[45] Section 36 of the Family Code of Niue provides jurisdiction to the High Court to consider an application to discharge an adoption order.

[46] The relevant provisions of s 36 state:

> (3) The Land Court may vary or discharge any adoption order subject to such terms and conditions as it thinks fit, on the application of any adoptive parent or of the adopted child.
>
> …

[8] Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd [2010] SGCA 39 at [9].

> (3) No application for discharge of any adoption shall be made without the prior approval of Cabinet and no adoption order or adoption shall be discharged unless the adoption order was made by mistake as to a material fact in consequence of a material misrepresentation to the Land Court or to any person concerned.

[47] None of the conditions set out in s 36 have been met. In particular, the application has not been made by the adoptive parent or the adopted child, Cabinet has not approved the discharge and there is no mistake as to a material fact as Neki's age was disclosed at the time of adoption.

[48] As the statutory provisions of s 36 have not been satisfied, on its face the adoption should be dismissed.

[49] Even if the provisions of s 36 had been satisfied, then s 53 of the Niue Amendment Act 1968 confirms that no order of the Land Court shall be invalid because of an error or irregularity.

[50] Notwithstanding these express statutory provisions, the applicants maintained that the current legislation does not apply and relied on the inherent jurisdiction of this Court to cancel the adoption order. Thus the question arises as to whether or not the Court has the inherent jurisdiction to grant the nullity application?

[51] The short answer to this question is no.

[52] The order in question was made on 2 October 1962. It formalised a customary adoption that has been in place for 25 years, and it remained unchallenged for 62 years.

[53] So there was no application to rehear the adoption order and there was no appeal of that order.

[54] Further, as set out above, the express statutory provisions relating to the discharge of an adoption order have not been used and if they were relied upon, would fail.

[55] As pointed out by the respondent, relying on *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd,* "'Inherent power' should not be used though it

were the joker in a pack of cards, possessed of no specific designation and used only when one [does] not have the specific card required."

[56] As stated above, there is the specific card available in that there is express statutory power to discharge. Therefore, in the presence of this specific jurisdiction the applicant cannot rely on the Court's inherent jurisdiction.

[57] Also, to do so would render the provisions relation to rehearing and appeals essentially meaningless and it would have the same effect on the express provisions relating to the discharge of the adoption order.

[58] The applicant's reliance on the Court's inherent jurisdiction in these circumstances is akin to an abuse of Court process, procedure and time.

[59] Also, this application, whichever way you look at it is no more than an attempt to determine who should benefit from the proceeds of land leased by the Matavai resort and those entitled to the proceeds of payments under that lease.

[60] These matters were the subject of a Court decision in 2020 and have not been appealed. This challenge to the adoption order is an attempt to undermine that process and decision and relitigate it through another procedure.

[61] These actions by the applicant are also akin to an abuse of Court process.

Decision

[62] For the reasons set out above, the application is dismissed.

[63] The respondent is invited to file submissions as to costs within 21 days with the applicant's response within 21 days of receipt of the applicant's submissions.

Dated at Gisborne, New Zealand this 10th day of May 2024.

W W Isaac
JUSTICE