I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O TĀKITIMU
In the Māori Appellate Court of New Zealand
Tākitimu District

A20220005362 & A20220005502
APPEAL 2022/3 & 2022/4

WĀHANGA *Under*	Section 58 of Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	Patangata 2F Section 2B Block
I WAENGA I A *Between*	AMBER LOGAN Kaitono pīra *Appellant*
ME *And*	SANDRA ERENA MAKIANA LOGAN Kaiurupare pīra *Respondent*

Nohoanga: *Hearing*	29 April 2022 (Heard at Wellington via AVL)
Kooti: *Court*	Judge S F Reeves (Presiding) Judge M P Armstrong Judge T K T A R Williams
Kanohi kitea: *Appearances*	L Thornton for the appellant L Watson for the respondent
Whakataunga: *Judgment date*	14 October 2022

TE WHAKATAUNGA Ā TE KOOTI
Judgment of the Court as to Costs

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Hei tīmatanga kōrero
Introduction

[1] This costs decision follows the substantive decision issued by the Court on 3 August 2022 in which the appeal of Ms Amber Logan was dismissed by this Court. Counsel for the parties were to file and serve submissions on costs in accordance with the timetable issued in the substantive decision.

[2] Mr Watson filed his submissions on costs on the 28th of August 2022 for and on behalf of the respondent, Sandra Logan. Ms Thornton filed submissions on costs on the 15th of September 2022 on behalf of the appellant, Amber Logan.

[3] We now proceed to decide the issue of costs.

What legal principles apply?

[4] The decision for this Court to make, having issued the substantive decision, is whether the Court should now award costs. If our decision is to award costs, then what amount of costs should be awarded. The relevant principles to be applied in considering cost awards have been set out in *Trustees of Horina Nepia and Te Hiwi Piahana Whānau Trust v Ngāti Tukorehe Tribal Committee and Tahamata Incorporation,* a decision issued by Judge Harvey (as he then was) which outlines the following:[1]

> [11] The principal authorities concerning costs are considered in *Nicholls v Nicholls – Part Papaaroha 6B Block*.[2] Those decisions include *Riddiford v Te Whaiti*,[3] *Manuirirangi v Paraninihi ki Waitotara Incorporation*[4] and *De Loree v Mokomoko and Ors – Hiwarau C*[5] and they identify the following principles:
>
> (a) the Court has an unlimited discretion as to costs;
>
> (b) Costs follow the event and a successful party should be awarded a reasonable contribution to the costs that were actually and reasonably occurred;
>
> (c) the Court has an important role in attempting to facilitate amicable relationships between parties who are invariably connected by whakapapa to

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1 *Trustees of Horina Nepia and Te Hiwi Piahana Whānau Trust – Ngāti Tukorehe Tribal Committee and Tahamata Incorporation* (2014) 319 Aotea MB 238 (319 AOT 238).
2 *Nicholls v Nicholls – Part Papaaroha 6B Block* (2011) Māori Appellate Court MB 64 (2011 APPEAL 64).
3 *Riddiford v Te Whaiti* (2001) 13 Tākitimu Appellate MB 184 (13 ACTK 184).
4 *Manuirirangi v Paraninihi ki Waitotara Incorporation* (2002) 15 Whanganui Appellate MB 64 (15 WGAP 64).
5 *De Loree v Mokomoko and Ors – Hiwarau C* (2008) 11 Waiariki Appellate Minute Book 249 (11 AP 249)/

> both the land and each other and on occasion that aim will be frustrated by an award of costs. Even so, where litigation has been pursued in accordance with conventional principles then the starting point will be that costs are appropriate;
>
> (d) if a party has acted unreasonably – for instance by pursuing a wholly unmeritorious and hopeless claim or defence – a more liberal award may well be made in the discretion of the Judge, but there is no invariable practice;
>
> (e) an award of costs at a level of 80% was warranted in the *Riddiford* case due to the difficult nature of the arguments, their lack substance, the unsuccessful party's lack of realism, the parties' legal situation, the degree of success achieved by the respondent and the time required for effective preparation;
>
> (f) there is no basis for departing the ordinary rules where the proceedings were difficult and hard fought, and where the applicants succeeded in the face of serious and concerted opposition; and
>
> (g) where the unsuccessful party has not acted unreasonably it should not be penalised by having to bear the full party and party costs of his/her adversary as well as their own solicitor and client costs.

[5] The Court proposes to adopt this approach.

Should the Court award costs?

[6] The general proposition is that costs follow the event. In this event, at the substantive hearing of the Appeal, Counsel for the applicant withdrew the Appeal on the Stay Application on the day of the hearing. A decision on the Appeal of the Stay application was therefore not required.

[7] This Court then went on to consider the substantive appeal. This Court decided to dismiss the Appeal on the basis that the Notice of Appeal filed by the appellant was defective as it failed to comply with r 8.8 of the Māori Land Court Rules ("the Rules"). As such the appeal was set aside pursuant to r 2.4(4)(a) of the Rules.

[8] The decision to dismiss the Appeal due to the defect in the pleadings occurred despite notice having been provided to the appellant's counsel by Judge Stone in the lower Court that the Notice of Appeal was defective. Regardless of this, Counsel for the Appellant failed to amend the Notice of Appeal.

[9] However, the Court then went on to consider the remaining issues on appeal and in doing so, dismissed the remaining issues.

[10] As such the appellant's application before this Court failed in its entirety. This proceeding was also conducted in a manner akin to civil litigation in the mainstream courts. Therefore we find that it is appropriate that costs should be awarded in this case.

What amount of costs should be awarded?

[11] Mr Watson argues that costs actually and reasonably incurred by the respondent totalled $20,550.51 and seeks an award of $16,000.00 which sits in a range between 75-80% of the costs incurred by the respondent. Mr Watson submits the proceeding was conducted akin to the normal procedures and rules of civil litigation where both parties were legally represented and as such was comprehensively pursued and contested. Further that the importance of the issues at stake meant that the respondents had to take the appeal seriously and in this situation the appeal impacted upon the completion of the sale and purchase agreement with a third party. The appeal could have derailed the entire sale and this is an aggravating factor.

[12] Finally, Mr Watson submits that the appeal was wholly unmeritorious as all matters in the appeal were dismissed and while the Stay Application was withdrawn on the day of the hearing, he had no notice that the Stay was going to be withdrawn. Therefore he had prepared substantive submissions on the Stay application in anticipation of arguing the matter.

[13] For these reasons Mr Watson submits that the extent of the costs award sought is justified.

[14] In response, Ms Thornton opposes the request for costs on the basis that the litigation involved Māori land among family members and maintains that the Court in accordance with *Nicholas v Kameta* the Court has an important role in attempting to facilitate amicable relationships between parties who are invariably connected by whakapapa to both the land and each other and that aim may be frustrated by an award of costs.

[15] Further Ms Thornton asserts that there was no legal obstacle to the respondent Sandra Logan giving effect to the sale of the land which would have had the effect of depriving her client the ability to file progress an appeal and assert rights in relation to that property.

[16] Finally, it appears that Ms Thornton has submitted that as her client has paid her fees and costs associated with her own unsuccessful application, and given that the respondent has received funds from the sale of the property, that those matters should be taken into consideration in the Court's determination for costs.

Kōrerorero
Discussion

[17] It is understood by both parties that generally a successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred. If a party has acted unreasonably, a more liberal award may be made (in other words an uplift) but there is no invariable practice.

[18] It is clear that there are no scale costs in the Rules and that the scale costs outlined in the District Court and High Court Rules do not apply but may provide a useful guide to assess what is reasonable. We have not considered either as a helpful guide in this matter.

[19] Mr Watson has included the Conveyancing Solicitor Fees of $3,320.63 in his claim for costs in respect of this matter. However, Mr Watson has not identified specifically where and to what extent the conveyancing fees have increased or were uplifted as a result of these appeal proceedings.

[20] Mr Watson has suggested that the respondent had to engage a solicitor to handle the complexities of conveyancing on a land transaction involving Māori land with a third party and that this was significantly impacted by the appeal. However the respondent would have had to engage a solicitor in any event to deal with any sale of land, and that would be no different with what is always a complex conveyancing matter when Māori land is involved.

[21] As there has been no detail provided about how the appeal significantly impacted on the conveyancing costs incurred we find that those costs sought by Mr Watson should be excluded from this costs award determination.

[22] Therefore, that leaves the sum of $17,229.88 which Mr Watson has asserted were the costs incurred of engaging legal counsel on the appeal.

[23] The issue becomes what contribution to those costs should be awarded by this Court. In this appeal there are several aggravating factors.

[24] The first is that despite clear advice from the lower Court to both the Appellant and Counsel for the Appellant about the deficiencies in the Notice of Appeal, those deficiencies were not remedied and that continued deficiency resulted in the appeal being dismissed due to a failure to comply with r 8.8 of the Rules.

[25] There is a view that competent Counsel should have remedied that situation prior to the matter proceeding. Once again, Mr Watson filed substantive submissions seeking to dismiss the appeal due to the defect in the pleadings and had prepared to argue the matter.

[26] Secondly, the application for stay was withdrawn on the day of the hearing. Whilst this meant that the Court did not have to deal with that application, it is clear that Mr Watson spent considerable time in drafting submissions responding to the stay application. The withdrawal at the late stage did not mitigate the costs incurred by the Respondent in preparing to address that matter.

[27] The third aggravating fact is that not only was the appeal dismissed for the failure to remedy the deficiency in the notice of appeal, but all other components of the appeal were also dismissed.

[28] Therefore in our view the starting point of 80% contribution to costs is warranted.

Suggested Mitigating Factors

[29] In terms of the submission by Ms Thornton that a mitigating factor is that the Court should attempt to facilitate amicable relationships between parties who are connected by whakapapa to both the land and each other, whilst it is accepted that the parties are related, the respondent was not an owner in the land and while she is a member of the preferred class of alienees, that simply provides her with the ability to give effect to the right of first refusal. We do not see that a decision to contribute to costs will impose further strain on the

relationship between the parties and has not mitigated against the conventional starting point. Given the approach and outcome, again we do not accept that it mitigates against the 80% level of contribution to costs.

[30] Secondly, whilst Ms Thornton suggests that there was no legal obstacle to the respondent Sandra Logan giving effect to the sale once the initial stay application had been dismissed, the reality is that a further stay application and appeal was filed in this Appeal Court in a very short time. The respondent, acting prudently resiled from progressing the sale with a pending appeal on the record. Therefore, we do not find that this is a justification for a reduction in costs.

[31] Likewise, we find highly unpersuasive the suggestion that as the respondent has received money for the sale that this somehow mitigates an obligation on the unsuccessful party to contribute to the costs incurred by the respondent in defending what was a wholly unsuccessful appeal. Certainly, it would appear from paragraph 12 of Ms Thornton's submissions that the appellant is capable of meeting the costs sought by the respondent.

[32] Therefore we consider that an award of 80% of Mr Watson's actual costs of $17,229.88 is appropriate in this case.

Kupu Whakatau
Decision

[33] Per section 79 of the Act we grant an order requiring Amber Logan to pay costs to Sandra Logan in the amount of $13,783.90.

I whakapuaki i te tekau karaka i Te Taitokerau o te rā tekau ma whā o Whiringa-ā-rangi te tau 2022.

S F Reeves	M P Armstrong	T K T A R Williams
PRESIDING JUDGE	**JUDGE**	**JUDGE**