IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
AOTEA DISTRICT

A20170003321
APPEAL 2017/10

UNDER	Section 58 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Estate of Ngapiki Waaka Hakaraia (also known as Hipera Ngapiki or Hipera Waaka or Ngapiki Hakaraia)
BETWEEN	JAMES TIORO Appellant
AND	CLARK JAMES McCALLUM First Respondent
AND	MĀORI TRUSTEE Second Respondent

Hearing:	10 August 2017 (Heard at Whanganui)
Coram:	Judge S Te A Milroy (Presiding) Judge S R Clark Judge M P Armstrong
Appearances:	Mr John Dean for the Appellant Mrs Leone Farquhar for the First Respondent
Judgment:	17 October 2017

JUDGMENT OF THE COURT AS TO COSTS

Copies to:

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[1] James Tioro's appeal against the decision of the Māori Land Court in respect of the estate of Ngapiki Waaka Hakaraia was heard at the Aotea Māori Land Court on 10 August 2017. In an oral decision the Court dismissed the appeal and gave leave to the successful respondent to file submissions in respect of costs.

[2] Counsel for the first respondent filed submissions as to costs on 24 August 2017, and the appellant filed submissions in response on 8 September 2017. Reply submissions from the first respondent were received on 15 September 2017.

[3] The issue for determination is whether costs should be awarded, and if so in what amount.

Submissions for the first respondent

[4] Mr McCallum's counsel submitted:

a) Mr Tioro pursued a case that had no merit or prospect of success because pursuant to the Māori Affairs Amendment Act 1967, the applicable legislation in this case, there is no provision for whāngai to succeed to the Māori land interests of whāngai parents because Māori customary adoptions had no legal effect during the relevant period;

b) Mr McCallum has incurred significant debt payable to the Ministry of Justice in respect of the legal aid he has received to defend his position and that of his whānau;

c) The appellant failed to comply with a number of procedural directions of the Court, including failing to file written submissions as originally directed by the Presiding Judge, and failing to seek an extension of the timeframe, and then failing to comply with a further revised timetable which required that the appellant's submissions be filed no later than 4.00pm on 3 August 2017. The appellant's submissions were in fact filed at 5.01pm on 3 August 2017;

d) As a result of the revised timetable, counsel for the first respondent was required to file submissions within 4 working days, as compared to 10

working days in the original timetable. Counsel for the first respondent was therefore put under significant pressure unnecessarily;

e) The appeal was unreasonably pursued by Mr Tioro, given that there was considerable evidence against his position that he was a whāngai of the deceased's son;

f) Even if the appellant is awarded legal aid or special aid the Court may still award costs against that person if there are exceptional circumstances, which apply in this case;[1]

g) If a costs award is not granted in this case it will set a dangerous precedent because other applicants who are in receipt of legal aid or special aid will have little disincentive to pursue claims that lack merit;

h) In terms of quantum the first respondent seeks $8,642.00 plus GST in legal costs and $1,641.00 in disbursements – a total of $11,580.22 including GST and disbursements.

Submissions for the appellant

[5] Counsel for the appellant submitted:

a) The appellant does not accept that the appeal lacked merit, especially as the deceased's Will has been contested since at least 1997. Moreover the whānau had agreed to incorporate a whānau trust in respect of the land but the first respondent's mother reneged on that agreement;

b) The appellant has not the ability or means to meet any award for costs;

c) The most appropriate order for costs is that they should lie where they fall because of the whāngai connection between the appellant and the first respondent.

[1] *Gemmell v Gemmell – Mohaka A4 Trust* [2015] Māori Appellate Court MB 657 (2015 APPEAL 657).

The law

[6] Section 79(1) of Te Ture Whenua Māori Act 1993 allows the Court to award costs to a party in a proceeding.

[7] The leading Māori Land Court authorities in respect of costs are *Samuels v Matauri X Incorporation* (2009) 7 Taitokerau Appellate MB 216 (7 APWH 216), *Nicholls v Nicholls – Part Papaaroha 6B Block* [2011] Māori Appellate Court MB 64 (2011 APPEAL 64), *Riddiford v Te Whaiti* (2001) 13 Takitimu Appellate MB 184 (13 ACTK 184), *Manuirirangi v Paraninihi Ki Waitotara Incorporation – Paraninihi Ki Waitotara* (2002) 15 Aotea Appellate MB 64 (15 WGAP 64) and *De Loree v Mokomoko–Hiwarau C* (2008) 11 Waiariki Appellate MB 249 (11 AP 249).

[8] In dealing with this case we have applied the following principles set out in the leading authorities:

a) the Court has an unlimited discretion in the award of costs;

b) costs follow the event and a successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred;

c) 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 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; and

e) an award of costs at the 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.

Should costs be awarded in this case?

[9] Counsel for the appellant has advised that Mr Tioro's application for legal aid was unsuccessful, and as far as this Court is aware, no application for special aid has been made.

[10] The starting point is that costs follow the event and a successful party should be awarded a reasonable contribution to the costs that were actually and reasonably incurred. This application was conducted before us in a manner akin to civil litigation in the mainstream courts.

[11] We do not need to consider whether there are any extraordinary circumstances in this case, as neither legal aid nor special aid has been granted.

[12] Although we have considered whether, given the whānau relationship between the parties, it would be better to let costs lie where they fall, we have concluded that costs should be awarded.

[13] Our reasons for coming to this conclusion are that the appeal was misconceived and bound to fail because the Chief Judge did not have jurisdiction to make an order in favour of a whāngai, since at the relevant time the legislation did not allow for the recognition of the whāngai relationship. The alleged failure of the first respondent's mother to constitute a whanau trust in relation to the land is irrelevant to the issues in the appeal, as is the length of time that the deceased's Will has been contested. The appeal therefore lacked merit and it is important that this Court does not encourage such appeals. We also take into account the appellant's failure to comply with a number of timetable directions. Although Mr McCallum is legally aided a costs award may still be made in the appropriate circumstances.

Quantum

[14] The first respondent has asked for costs of $11,580.22. Taking into account all the circumstances, including Mr Tioro's financial position, we consider that an award of 50 percent is appropriate.

Decision

[15] Pursuant s 79(1) of Te Ture Whenua Māori Act 1993 there is an order requiring James Tioro to pay costs of $5,790.22 to Clarke James McCallum.

This judgment will be pronounced at the next sitting of the Māori Appellate Court.

S Te A Milroy (Presiding)	S R Clark	M P Armstrong
JUDGE	**JUDGE**	**JUDGE**