

IN THE COURT OF APPEAL OF NIUE

Application No. 16/14

UNDER

Section 75, Niue Amendment
Act (No 2) 1968

IN THE MATTER

The Land known as Part
Laloai, Avatele and a
decision of the High Court of
Niue (Land Division) made
on 15 January 2014 at Land
Minute Book 18 Folio 126-
143

BETWEEN

NIUMANI MITINI
TULEHEMOANA
Appellant

AND

KETILIGI SANITELI
FERETI
Respondent

Hearing: 15 November 2014
(Heard at Wellington, New Zealand)

Coram: Savage CJ, Coxhead and Reeves JJ

Appearances: M Solomon for the Appellant
P Allan for the Respondent

Judgment: 30 April 2015

DECISION OF THE COURT

Introduction

[1] This appeal is from a decision of the Niue High Court (Land Division) made on 15 January 2014 determining title to land known as Part Laloai, Avatele (the land) and appointing leveki mangafaoa.

[2] The High Court dealt with two separate applications in relation to different portions of the land, both pursuant to ss 12 and 14 of the Land Act 1969 (the Act):

- (a) Niumani Mitini Tulehemoana sought determination of title to the land set out on Provisional Plan No. 10542, comprising 7.3500 ha, together with an order determining Hegotule as the common ancestor of the land, and appointment of Niumani Mitini Tulehemoana and Poimamao Vakanofiti as joint leveki mangafaoa; and,
- (b) Ketiligi Saniteli Fereti, on behalf of Vili Nosa, sought determination of title to the land set out on Provisional Plan No. 10560, comprising 4968 m² (which forms part of the land subject to the first application), together with an order determining Hanatau Hakeagaiki Saniteli as the common ancestor of that part of the land, and appointment of Ketiligi Saniteli Fereti as leveki mangafaoa.

The judgment in the High Court

[3] Isaac J found that it was common ground that Hegotule was the ultimate source of the land and all the parties involved descended from Hegotule. The key question was whether Hegotule divided his land into shares for each child and whether Pativai retained an allocation in the land, or whether this land was solely for Hakeagaiki's allocation.

[4] The first application was dismissed by Isaac J on the basis that Pativai, the first applicant's adoptive mother, was not the sole source of the land, as he initially claimed, and as a result, his claim to title of the whole 7.35000 ha of the land must fail.

[5] Isaac J noted that there was some support for the first applicant's claim that his family have some rights in the land, but not the exclusive rights he first claimed. The first applicant was invited to file an amended application setting out the land area he seeks so as not to interfere with the established rights of other descendants of Hegotule.

[6] In the second application, Hakeagaiki was declared to be the common ancestor for the 4968 m² part of the land that was sought, and Ketiligi Saniteli Fereti was appointed as leveki mangafaoa for that part of the land.

[7] Isaac J found that while the first applicant initially disputed that Hakeagaiki had rights in the land, by the close of the hearing that was no longer in dispute. It therefore appeared to be acknowledged that Hakeagaiki had rights in the land, and his descendants, including the second applicant's family, have worked and continue to work on the land. Further, the appointment of the second applicant as leveki mangafaoa for that smaller part of the land claimed was not contested.

[8] Finally, Isaac J was of the view that naming Hanatau Saniteli as the common ancestor unduly restricted other people's ability to claim rights to the land, and as a result, Hakeagaiki was named as the common ancestor for that part of the land.

Appeal

[9] The appellant, Niumani Mitini Tulehemoana, has appealed the High Court's decision on the basis that:

(a) In relation to his application, the Court erred in finding that:

- (i) The application fails on the basis that Pativai is not the source of the land; and/or
- (ii) Having found that Hegotule is the source of the land, failing to acknowledge the customary title of his granddaughter Pativai as conveying legitimate title to the full 7.3500 ha claimed by the appellant; and/or

(b) The Court failed to correctly identify the genealogy to the land and who is properly entitled to claim the land.

(c) In relation to the application by Ketiligi Saniteli Fereti, the Court erred in finding that:

- (i) Hakeagaiki has any rights or interests in the land at Laloai; and/or

- (ii) The appellant had accepted or conceded that Hakeagaiki had rights to the land; and/or
- (iii) Hakeagaiki meets criteria to be a common ancestor of the land on the grounds that he is not from Laloai; and/or
- (iv) Ketiligi Saniteli Fereti meets the criteria to be appointed as leveki mangafaoa as she does not have rights to the land; and/or
- (v) The appellant did not contest the appointment of the Ketiligi Saniteli Fereti as leveki mangafaoa of the land.

[10] The respondent, Ketiligi Saniteli Fereti, submits that there is no identifiable error in the High Court decision and the appeal should be dismissed accordingly.

Appellant's submissions

[11] Mr Solomon, counsel for the appellant, submitted the Court did not give enough weight to Niuean custom when determining the correct owner of the land. He said the Court erred on key issues of fact and custom and the decision should be set aside.

[12] It was argued that the application was for appeal by way of rehearing and Hegotule should be named as the common ancestor for the land as set out on Provisional Plan No. 10542, comprising 7.3500 ha, and the appellant and Poimamao Vakanofiti should be named as joint leveki mangafaoa. Alternatively, the appellant sought a direction that the High Court rehear both applications.

[13] We note that by the end of the hearing, Mr Solomon's submission was that the matter be referred back to the High Court for a rehearing so that matters of custom could be fully and properly considered.

[14] It was stated that Isaac J misapplied the matohiaga (genealogy) which resulted in the wrong common ancestor being named. While it is common ground that Hegotule was the source of the land and all the parties involved descend from Hegotule, the matohiaga

shows that the appellant was adopted within the blood and he is linked with Hegotule through both his biological and adoptive parents.

[15] Mr Solomon submitted that the appellant's adoptive mother is a direct descendant of Hegotule's son Tukimata. His biological mother descends from Hegotule's sister. His biological father, Tulemoana Kalauta, is the eldest son of Hanatau Hakeagaiki Saniteli, whose father Hakeagaiki descends from Manapule, the daughter (and fifth child) of Hegotule. Hanatau Hakeagiki Saniteli married twice. There were four children from her first marriage to Poimamao Kalauta; the appellant's biological father Tulemoana Kalauta, and three sisters, one of whom is Agimata Nosa the mother of Vili Nosa, the proposed beneficiary of the land in the respondent's claim. Hanatau's second marriage was to Saniteli, the respondent's father.

[16] It was argued that under Niuean custom, the testimony of the appellant's biological father, Tulemoana Kalauta, as the eldest son should be given significant weight.

Error in finding Pativai was not the sole source of the land

[17] Mr Solomon submitted that Isaac J erred in finding that Pativai was not the sole source of the land. The Honourable Judge asked the wrong question by seeking to determine whether Hegotule divided his land into shares and whether Pativai retained an allocation of the land at Laloai or whether that land was solely Hakeagaiki's allocation.

[18] It was argued that Hegotule didn't divide the land, but rather passed the land down to his elder and favourite son, Tukimata, who then passed it to his granddaughter, Pativai, who had taken care of him during his final years. Pativai cared for her parents in their old age, and a family meeting was called prior to their passing away at which the land was handed over entirely to her. Pativai then passed the land to her adopted son, the appellant. The fact that there is no written record of the transmission to Pativai is consistent with Niuean custom and practice.

[19] Mr Solomon contended that it is accepted Niuean custom for land to be gifted to family members for taking care of elders:¹

[S]ervice beyond the call of obligation could lead to an increased inheritance. The person (invariably a woman in the available cases) who looked after a relative during his old age was, for that reason, on several occasions given particularly favourable consideration on inheritance.

[20] It was argued that Pativai made it known to the appellant that she owned the land and would leave it to him. When he was ten or eleven years old, she took him around the land and pointed out the boundaries. The appellant and his mother worked the land in 1972 and 1973 prior to his departure to New Zealand in 1974 when he was 18 years old.

[21] Mr Solomon pointed to the evidence of the appellant's biological father, Tulemoana Kalauta, which supports Pativai's claim. It is submitted that in terms of Niuean custom because Tulemoana is the eldest son and spokesman for his family, his evidence of these matters should be given greater weight than the evidence of his sister, the respondent.

[22] It was further submitted that Tulemoana Kalauta's evidence should also be preferred in relation to the respondent's claims that Hanatau Hakeagaiki Saniteli is the source of part of the land at Laloai. Tulemoana states that his mother Hanatau was not the source of the land, but she had been given limited rights to use the land by the appellant. It was argued that as the eldest and only son of Hanatau, Tulemoana Kalauta would have a superior claim to the land over his sister, the respondent. However he does not seek to claim the land; Tulemoana affirms it was owned by Pativai and passed down to the appellant, his biological son.

Error in finding that Hakeagaiki is the common ancestor for the part of the land subject to the respondent's application

[23] Mr Solomon stated that Hakeagaiki is a direct descendant of Manapule who married Sionepaea. Counsel further submitted that in accordance with Niuean custom,

¹ Ron Crocombe "Traditional and colonial tenure in Niue" in Solomona Kalauni (ed) *Land Tenure in Niue* (Institute of Pacific Studies, University of the South Pacific, Suva, 1977) 14 at 19.

Manapule cannot claim rights to the land through her father, but only through her husband. It was submitted that Hegotule gifted land to his son-in-law Sionepaea, but Laloai was not part of the land gifted.

[24] It was argued that because Manapule could not claim rights in Laloai that neither her child Hakeagaiki nor his descendants can claim rights in Laloai. Therefore neither the respondent nor Agimata Nosa have a right to claim the land. As Tulemoana Kalauta stated in his affidavit, his sisters are married and therefore should be taken care of by their husband's families.

[25] Mr Solomon submitted that it is established Niuean custom that a daughter who marries outside the family forfeits her right to claim land through her birth parents. However, a daughter can still inherit land if it is specifically given to her.

[26] It was argued that even though the respondent's mangafaoa have ample lands upon which to live and cultivate, including the block adjacent to Laloai, which was part of the land gifted to Sionepaea by Hegotule, that they are attempting to claim land which is not rightfully theirs.

[27] Mr Solomon contended that only two descendants of Hakeagaiki's 16 children are claiming rights in the land. They are both younger children of Hanatau Hakeagaiki. Her eldest son, Tulemoana Kalauta is opposed to the claim. There are over 150 living descendants of Hakeagiki and not all of them support the respondent's claim.

Error in finding that Hakeagaiki had rights in the land

[28] It was submitted that the appellant does not and never has conceded that Hakeagaiki had any rights in the land. Counsel argued that it is unclear whether his representative Mr Talagi made such a concession on behalf of the appellant at the High Court hearing, but if he did, it was without the appellant's authority.

[29] Mr Solomon submitted that whereas hypothetically the appellant may be prepared to share the land, which is different to acknowledging Hakeagaiki as the common ancestor of part of the land. From the appellant's point of view he owns all of the land under Niuean custom, and the proper common ancestor is Hegotule, not Hakeagaiki.

[30] Mr Solomon argued that the "will" of Hakeagaiki that was before by the High Court was neither signed nor dated and is not legally valid. The evidence is that Hakeagaiki could neither read nor write, and it is unclear who wrote it. It also appears that pages are missing. It does not mention transfer of the land at Laloai, but rather lists places that his children could work. The appellant stated that the document appears to be an entreaty from Hakeagaiki to his children "to be kind to one another and not squabble". Mr Solomon argued that having a right to work on land does not equate to ownership of the land, and therefore the document cannot be relied on as evidence of rights being conferred and should have been given little weight by the Court.

[31] Mr Solomon also referred to Isaac J's consideration of the investigation into the makasea pits on the land, which the respondent relied on as conferring ownership rights to the land. Counsel submitted that the minutes do not demonstrate ownership rights in the land. At best they are proof of ownership rights in the small makasea pits on the land. It was submitted that in Niuean custom, makasea pits are viewed differently to land which can grow crops and sustain families.

[32] Counsel also submitted that Isaac J placed too much weight on evidence of the cultivation of the land at Laloai by the respondent's family as proof of their claim to ownership rights. The appellant argued that in normal circumstances this might be the case but the evidence before the Court does not support such a finding in this case.

[33] It was contended that while the respondents have been cultivating the land at Laloai for a number of years with the permission of the appellant, as a matter of Niuean custom that does not entitle them to claim ownership of the land. It was only in 2004 that the appellant reluctantly gave Hanatau Hakeagaiki conditional consent to continue cultivation on the understanding that the land still belonged to him. This is supported by Tulemoana Kalauta's testimony, and also by Poimamao Vakanofiti, the grandson of

Hanatau Hakeagaiki, who the appellant has elected to be leveki mangafaoa if his application succeeds.

[34] Counsel submitted that a conditional usufructuary interest does not equate to ownership of the land and the respondent should not be permitted to use this “foothold” to claim ownership of the land. It was argued this is a particular problem for absentee owners. The appellant left Niue as a young man in the 1970s, but intends to move back in the near future.

[35] It was contended that the appellant does not claim the land through his biological father from Hakeagaiki because the land is his through his inheritance from his adoptive mother Pativai. While the area of land sought by the respondent is quite small, the appellant sees it as the tip of the iceberg, that if granted will lead to the respondent’s mangafaoa claiming ownership of all the land at Laloai, and possibly other lands owned by Pativai in the Avatele district. If Hakeagaiki is named as the common ancestor, this could potentially exclude the appellant from any claim to rights in that land.

Error in the appointment of the respondent as leveki mangafaoa

[36] The appellant stated that the very act of opposing the respondent’s application shows that he opposes her appointment of leveki for that part of the land. In addition, according to s 14(2) of the Land Act 1969:

If the application is signed by members who in the Court’s opinion constitute a majority of the members of the Mangafaoa whether resident in Niue or elsewhere the Court shall issue an order appointing the person named in the application as the Leveki Mangafaoa of that land.

[37] It is unclear from the Court record whether the respondent’s application to be appointed leveki mangafaoa had any written support from her mangafaoa. It did not have the majority support required by the legislation.

[38] In summary, Mr Solomon submitted the appellant seeks for the matter to be referred back to the High Court for a rehearing so that matters of Niuean custom can be fully and properly considered.

Respondent's submissions

[39] Mr Allan, counsel for the respondent, submitted that there is no identifiable error in the High Court decision and the appeal ought to be dismissed accordingly.

[40] It was submitted that the criticism of the weight given by the Court to evidence of fact and custom misunderstands the court's role. It is up to the court that sees and hears from witnesses and evidence to determine the facts. Isaac J made findings on the evidence before him and there is nothing before this Court to suggest his findings were wrong. Accordingly, the appellant submits that criticism of the decision on this ground must fail.

[41] Mr Allan submitted that evidence of custom must be given by an expert witness. This would involve an application to the Court to determine that person's qualifications and experience to act as an expert witness. No such application was made in this case. Although the respondent accepts that the appellant's biological father, Tulemoana Kalauta, is an elder son, no evidence was presented to suggest he had any specialist knowledge of Niuean custom.

[42] Counsel referred to the appellant's submission that his representative at first instance, Mr Talagi, did not make the concessions recorded in Isaac J's decision, or alternatively, if he did, he was outside the instructions given. It was submitted that although Mr Talagi is not a lawyer, he is well experienced in acting in such matters. And given that he is not a lawyer, leave was given by the Court to Mr Talagi to appear. It was submitted the appellant did not raise any concerns about his representation at the hearing when the concessions were made, nor subsequent to the hearing. The decision was reserved and the appellant could have at any time sought to resile from the position and he did not do so.

[43] In response to the appellant's submission that Isaac J should not give any weight to the will of Hakeagaiki, counsel submits that the will and other historic documents do not have any legally binding status, but by virtue of their age and content, they were useful to assist the Court to understand what was generally accepted by those who made the documents about the status of the land.

[44] It was submitted that because the appellant did not challenge the appointment of the respondent as leveki in the earlier proceedings, this issue cannot now be pursued on appeal. The appellant was clearly given the opportunity to do this in the earlier proceedings and did not do so.

[45] Mr Allan submitted that the appellant's submission that the respondent's family has ample land for their needs is a one-sided submission, and could apply equally to his own family. Further, the appellant's 'tip of the iceberg' argument does not bear scrutiny given the findings of Isaac J. It is the appellant seeking the greater portion of land.

[46] Mr Allan noted that Isaac J found that there are a number of people with interests in the land and had suggested that the appellant file a more specific application for a part of the land. The lower Court did not accept that Pativai is the sole source of all the land. The original application was for Hegotule to be named as the common ancestor. If Hegotule were named as the common ancestor, then the respondent, as a descendant of Hegotule, would have interests in the land.

[47] In summary it is submitted on behalf of the respondent that a rehearing is not warranted in relation to the full area of the land. The appellant is able at any time to make an application for a smaller portion of that land, as he was invited to do by Isaac J. The lower Court decision should stand and the appeal should be dismissed.

Discussion

Was the High Court in error in accepting the appellant's concession that Hakeagaiki had rights to the land?

[48] Near the end of the lower Court hearing in Niue on 21 March 2013, Mr Talagi made a concession on behalf of Mr Tulehemoana. It appears from the judgment that the concession was that others had rights in the 7.35 ha block to which he was seeking title. This was in effect an acknowledgement by Mr Tulehemoana that his claim of sole entitlement to that land could not succeed. The concession was made in his presence by his advocate.

[49] Now, on appeal, he seeks to withdraw that concession, asserting that it was not made in accordance with his instructions.

[50] Mr Solomon pointed out that Mr Talagi is not legally qualified. However, Mr Talagi regularly appears in the High Court of Niue. He has considerable experience and is reasonably well versed in the practice and procedure of the Court and the law in relation to Niuean land matters.

[51] It is telling that the concession was made after considerable evidence contrary to the appellant's case, at the end of the hearing, and in his presence. At any time later that day, a Thursday, or on the morning of the next day, his concerns could have been made known to the Court. In fact, it was almost a year to the day afterward that hearing that the matter was first raised when the Notice of Appeal was filed.

[52] In our view, Isaac J was right to accept the concession. There is no evidence whatsoever that it was made wrongly by Mr Talagi. We find that the concession stands and cannot now be withdrawn.

Did the High Court fail to consider Niuean custom?

[53] Mr Solomon, in his written submissions and oral argument, advanced the proposition that under Niuean custom a woman who marries outside the mangafaoa cannot claim land through her birth parents; she forfeits her rights in that regard. At the hearing, Mr Solomon amended his assertion slightly to provide for an exception where a woman may claim land if it was specifically granted to her.

[54] If this were indeed the custom we would expect the lower Court to have received evidence of it; the proposition advanced by Mr Solomon on behalf of the appellant would have had far reaching consequences and these would have been evident in many findings in relation to land title in Niue. The Court's attention should have been drawn to written sources where experts have examined the position, such as Crocombe, Kalauni and others' *Land Tenure in Niue*.² The minute books of the Court would also disclose the situation quite clearly. In addition, we would expect evidence to have been given by an

² Solomon Kalauni (ed) *Land Tenure in Niue* (Institute of Pacific Studies, University of the South Pacific, Suva, 1977).

expert in this regard who had established his or her expertise in the usual way, then established the facts upon which the opinion is based so that they could be assessed by the Court for relevance and a decision reached. That person would then have been available for cross examination and questions from the bench.

[55] The appellant did none of the above; he simply made assertions in written briefs, notably by himself and his biological father.

[56] We have no material before us upon which to make a finding that Niuean custom operates in this way. Neither did Isaac J. In any event, the proposition advanced is somewhat startling in that it does not accord with any of our knowledge of Polynesian custom. Be that as it may we can take the matter no further than to say that there was no evidence, expert or otherwise, in this particular case that could or should have led the Court to give the appellant's assertion any serious weight.

[57] In the lead up to the hearing of this appeal, Mr Solomon sought to call further evidence on the issue. That application was declined. The short point is that that evidence should have been called at the hearing of first instance. The proposition advanced would have been of some public importance and would have had consequences for the nation as a whole, had it been accepted. There are minute books of the Court which show previous examples of custom in action, and people who have expertise in the matter.

[58] Evidence of custom was therefore always reasonably accessible, and there is no suggestion that any new evidence has been discovered subsequent to the lower Court hearing. The grounds for the admission of further evidence are therefore not substantiated. This ground of appeal cannot succeed.

Was the High Court in error in finding that Hakeagaiki has any rights in the land?

[59] Given our view that Isaac J was right to accept the appellant's concession, and given the lack of expert evidence as to Niuean custom, it was clearly open to Isaac J to conclude that it was common ground that Hegotule was the ultimate source of the land and that Pativai, the appellant's adoptive mother was not the sole source of the land. It

was therefore also open to him to declare Hakeagaiki the common ancestor for the 4986 m² part of the land subject to the second application.

[60] The Judge had before him evidence regarding the use of the land, previous claims to makasea pits on the land, ownership of nearby lands by the respondent's mangafaoa, as well as evidence of genealogy. The lower Court was entitled to consider and weigh all this evidence and to make findings of fact. Based on the evidence, Isaac J found that while the appellant initially disputed that Hakeagaiki had rights in the land, by the closing of the hearing that was no longer in dispute. It therefore appeared to be acknowledged by the appellant that Hakeagaiki had rights in the land.

[61] There is nothing before this Court to suggest those findings of fact were incorrect. A court must make findings based on the evidence before it.

[62] Isaac J recognised that there was some support for the appellant's claim that his mangafaoa have rights in the land, but not the exclusive rights he first claimed. What must be remembered is that land in Niue is held in an ancestor's name for the benefit of the mangafaoa. This is significantly different to other land title systems where individuals obtain individual interests and individual rights. The appellant's claim was very much presented on the basis that the land in question had belonged solely to his adoptive mother and had then been transferred to him solely – and was not for the mangafaoa as a whole.

Was the High Court in error in finding that the appellant did not contest the appointment of the respondent as leveki mangafaoa of the land?

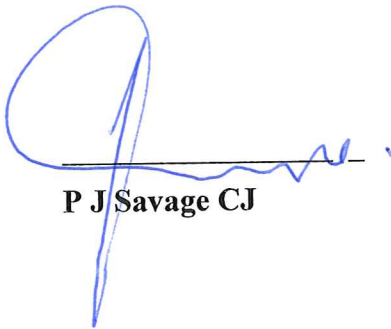
[63] As noted in the Notice of Appeal set out at paragraph [9] above, the appellant has challenged the decision to appoint the respondent as leveki. There were no submissions from the appellant on these points.

[64] The appellant clearly had the opportunity in the High Court to make submissions in relation to the appointment of the respondent as leveki. He did not. And nor were these issues raised before us on appeal, other than as stated in the Notice of Appeal.

Decision

[65] For the reasons set out above, the appeal is dismissed pursuant to s 78 of the Niue Amendment Act (No 2) 1968.

Dated at Wellington, New Zealand this 30th day of April 2015.



P J Savage CJ



C T Coxhead J



S F Reeves J