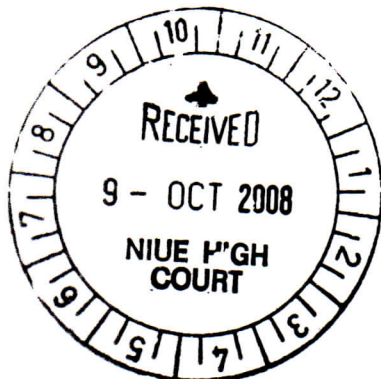


IN THE HIGH COURT OF
NIUE (LAND DIVISION)



DECISION

IN THE MATTER

BETWEEN

AND

Application Nos. 9649/22/6,
9650/22/6, 9721/23/6 & 9721/23/6

of Part Feutu, Hikutavake District

Tutogia Makatogia, Moka
Tongakilo and A Kalauni

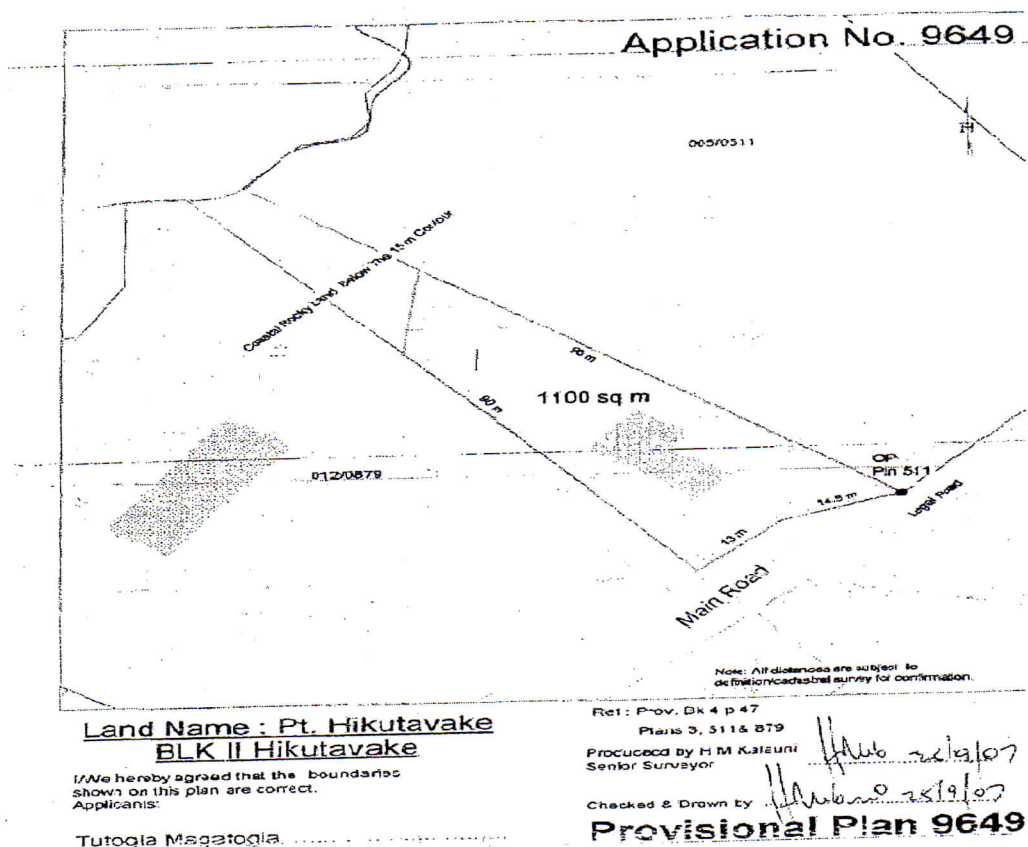
Applicants

Tuhipa Niutama

Respondent

Applications

- [1] The applications before the Court relate to the determination of title and appointment of Leveki for Part Feutu, Hikutavake, containing 1100 square metres set out in Provisional Plan 9649 as follows:



[2] The applications in date order are as follows:

- (i) Application 9649/22/6 by Tutogia Makatogia dated 1 June 2007, to determine title and declare the common ancestor to be Makatogia.
- (ii) Application 9650/22/6 by Tutogia Makatogia dated 1 June 2007, to appoint Tutogia (Sam) Makatogia the Leveki Magafaoa.
- (iii) Application 9721/23/7 by Tuhipa Niutama dated 17 September 2007, to determine title and declare Tuhega as the common ancestor.
- (iv) Application 9722/23/7 by Tuhipa Niutama dated 17 September 2007, to appoint Tuhipa Niutama as Leveki Magafaoa.

The Makatogia Case

- [3] The Makatogia case was presented by Mr Toailoa as Counsel for Sam Makatogia, with supporting evidence from Sam Makatogia, Morris Tafatu, Mata Okesene, Pamela Togiakona, Lalomanogi Togiakona and Bill Motufoou.
- [4] Sam Makatogia filed this application for the use of the land and building, for and on behalf of the village of Hikutavake.
- [5] His application was based on his genealogical connection to the land through blood and the authority his adoptive father Makatogia had over this land.
- [6] His evidence and those of his supporters stated that this land came from Kulatau whose grandmother was the ancestor Matatagaloa. The applicant's adoptive father Makatogia also descended from Matatagaloa as she was his great grand mother.
- [7] It was accepted that Sam Tutogia was not legally adopted by Tutogia but that he has blood connections to Tutogia in that his natural father Togaiki and Kulatau were first cousins. Pahetogia Enoka being Togaiki's father, and Halafeutu being Kulatau's father.
- [8] Makatogia gave permission to Poimafti to build on this land in 1960.
- [9] Poimafti was married to Hilifakihega and she is buried on this land.
- [10] There were no buildings on this land prior to Poimafti's house being built.
- [11] The people of Hikutavake village and Village Council use this land and the house. They have used them since 2002 when Sam gave permission for its use. At that time, there was no objection from the Tuhipa family.
- [12] It is further acknowledged that the use of this land by the village of Hikutavake benefits the descendants of those people with blood links to this land.
- [13] Mr Toailoa in closing submissions stated that the Court should look to Niuean custom for the answer. He referred to Ron Crocombe's writings on

"Traditional and Colonial Tenure in Niue" which maintains that custom is flexible but the land should go to a person within the Magafaoa and that occupancy including relevant occupation is important when determining the common ancestor. He also stated that in accordance with custom, Makatogia should be appointed common ancestor with Sam being appointed as Leveki. Further he stated that Tuhipa has no rights because of his legal adoption out of the Tuhega family. Sam can rely on custom, Tuhipa can not.

Tuhipa Case

- [14] The Tuhipa case was presented to the court by Dick Hipa Tuhipa, supported by Niutama Tuhipa, Richard Tuhipa and Lapasitama T Talagi.
- [15] Their case is that this land belonged to Tuhega, the common ancestor proposed by the Tuhipa family. Tuhega lived on this land, he received the land from his father, Masilatau.
- [16] The land passed to Tuhipa Niutama who gave permission to Poimafiti to build and live on this land.
- [17] The Tuhipa family live on the land next door and Dick Hipa wakes up to look at this land every day. Normally there is no one on this land except him. The village people only use the land on Sundays.
- [18] There is also concern that Tuhipa's family were not involved in discussions about the village using Poimafiti's house.
- [19] Dick did not accept the legal adoption of his father Tuhipa.

The Law

- [20] The relevant legislation in this case is as follows:

- (i) Determining title and declaring a common ancestor:

Section 10 Land Act 1969

(1) The Court shall determine every title to and every interest in Niuean land according to the customs and usages of the Niuean people, as far as the same can be ascertained.

(2) The Court may refuse to proceed with any application for investigation of title for the determination of the Mangafaoa or relative interests in that land, until it has before it a plan of the survey of the land affected by it.

(3) The Court may at any stage of the proceedings require that all claims relating to such land, whether by the applicant or by any other person, shall be made in writing to the Court within a time to be fixed by the Court, after which

time no further claims for inclusion will be admitted, except by the leave of the Court and upon such terms as the Court determines.

Section 11 Land Act 1969

The Court may require any person having an interest in any application under this Part to lodge with the Court a statement in writing setting out any one or more particulars of the following matters –

- (a) The boundaries of the portion of the land which he claims;
- (b) The grounds of the claim;
- (c) The genealogical tables showing descent from the ancestor or ancestors through whom title is claimed down to and including all persons admitted by the claimant as entitled with him under his claim;
- (d) The names and the approximate location of cultivations, villages, burial places, with the names of relatives of the claimant and persons included in his claim who have been buried there, and any other places or marks of historical interest;
- (e) Any other proof or signs of occupation of or connection with the land by the claimant and other persons included in his claim.

Section 12 Land Act 1969

The Court shall determine the ownership of any land by ascertaining and declaring the Mangafaoa of that land by reference to the common ancestor of it or by any other means which clearly identifies the Mangafaoa.

- (ii) Appointment of Leveki

Section 14 Land Act 1969

(1) When the ownership of any land has been determined any member of that Mangafaoa who was reached the age of 21 years may apply in writing to the Court for an order appointing a Leveki Mangafaoa of that land.

(2) 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.

(3) If no such application is received within a reasonable time, or applications are each signed by members who, though having attained the age of 21 years, constitute less than a majority of the Mangafaoa who have attained such age the Court may appoint a suitable person to be Leveki Mangafaoa of that land.

(4) The appointment of a Leveki Mangafaoa shall not be questioned on the grounds that any member of the Mangafaoa was absent from Niue, but the Court may consider any representation made in writing by any member so absent.

(5) Any person who is domiciled in Niue, and whom the Court is satisfied is reasonably familiar with the genealogy of the family and the history and locations of Mangafaoa land, may be appointed as a Leveki Mangafaoa of any land, but if he is not a member of the Mangafaoa he shall not by virtue of such appointment acquire any beneficial rights in the land.

(6) In appointing any Leveki Mangafaoa the Court may expressly limit his powers in such manner as it sees fit.

(iii) Adoption

Section 99 Niue Amendment Act (No2) 1968:

"99. Effect of adoption order - Every adoption order shall have [both in Niue and in New Zealand] the same operation and effect as an adoption order made under the Adoption Act 1955 has in New Zealand by virtue of subsections (1) and (2) of section 16 of that Act."

Section 16 (1) Adoption Act 1955 confers on the adopted child a surname by the adopted child a surname by the adoption order.

Section 16(2) Adoption Act 1955 states that the Adopted child shall be deemed to be the child of the adoptive parent and ceases to be the child of his/her natural parents and the adoptive parents shall be deemed to be the parent of the adoptive child.

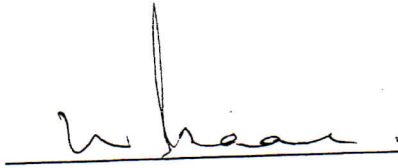
Discussion

- [21] This case presents as a conflict over who has the authority to make decisions as to the utilisation and occupation of this land.
- [22] This authority is gained from the genealogical connection to the land and the authority exercised over it for past occupation.
- [23] On the one hand, Sam Makatogia says he has this authority, passed to him from his adopted father Makatogia who is his blood relation and adopted him in accordance with Niuean custom. He wants the village of Hikutavake to use the land for the benefit of all descendants of the proposed common ancestor.
- [24] On the other hand, Dick Tuhipa says that he has the authority derived from his common ancestor Tuhega who passed this authority to his father Tuhipa. He wants this land to be used by his family.
- [25] Dealing firstly with the Tuhipa case, a number of difficulties arise.

- [26] The first is centred around the adoption of Tuhipa.
- [27] The adoption records at Adoption Minute Book 1A Folio 124 clearly show that Tuhipa was legally adopted by Litohetifa on 23 July 1923.
- [28] Although this was not accepted by Dick Tuhipa, the court record is clear and unambiguous. Tuhipa was legally adopted by Litohetifa whom, it was accepted by Dick Tuhipa, had no blood connection to Tuhega and as a result to this land.
- [29] In terms of section 99 Niue Amendment Act (No. 2) 1969 which incorporates sections 16(1) & (2) Adoption Act 1955, an adopted child loses the rights he has to his natural parent. Therefore Tuhipa, because of the legal adoption, loses his legal rights to this land which he may otherwise have had through Tuhega.
- [30] The second area of difficulty for the Tuhipa case, is that because Tuhipa has no legal rights to this land as a result of the adoption, he could not authorise Poimafiti to build on this land. He simply had no legal right to do so.
- [31] In the Makatogia case, Sam was not legally adopted but adopted in accordance with Niuean custom.
- [32] In terms of section 92 Niue Amendment Act (No. 2) 1969, this means that he does not legally become the child of his adopted family. If Sam had no blood connection to this land, this point may have proved decisive but he is blood connected through genealogy, as shown in the genealogical tables presented to the court. Therefore, the fact that he was not legally adopted does not affect the strength of his case.
- [33] The effect of the findings set out above, is that the Tuhipa case must fail. It is built around Tuhipa who has no legal rights because of the adoption order of 23 July 1923.
- [34] Turning now to consider the appointment of Makatogia as the common ancestor to this land and Sam Makatogia as the Leveki Magafaoa.
- [35] The genealogical tables are not in dispute. This land started from Goegoeiki. From here it came down to both Tuhega and Matatagaloa.
- [36] Matatagaloa was Kulatau's grandmother whom we heard owned and occupied this land. Matatagaloa was Makatogia's great grandmother.
- [37] This genealogical evidence supports the Makatogia case and supports the contention that Makatogia had the authority in 1960 to allow Poimafiti to build on this land.
- [38] When this genealogical evidence is linked to the evidence, we heard in court from people who were present in 1960 when Poimafiti built the house on the land. Makatogia clearly had the authority to give permission to Poimafiti to build.

- [39] The Makatogia case is on behalf of the village of Hikutavake. It would appear that many of those in Hikutavake can link by blood to this land and as a result of this application will be able to use this land. As a result this application was supported by the majority of the Hikutavake village.
- [40] The same cannot be said of the Tuhipa application which lacked support from the Hikutavake people.
- [41] As a consequence of the above, I make the following orders:
- (i) Determination of title for Part Feutu, Hikutavake containing 1100 square metres on Provisional Plan 9649 and declaring the common ancestor to be Makatogia (section 10 & 12 of the Land Act 1969).
 - (ii) Appointing Tutogia (Sam) Makatogia as the Leveki Magafaoa (section 14 of the Land Act 1969).
 - (iii) Dismissing applications 972/32/7 and 9722/23/7 by Tuhipa Niutama.
- [42] A copy of this decision is to be sent to all parties.

Dated the 30th day of September 2008


JUDGE WILSON ISAAC

Minute Book 14 Folio 274 - 280

Copies - Mr S Tutogia
Mr M H Tafatu
Mrs L Togiakona

Copy: Richard Tuhipa
5/11/08