

IN THE HIGH COURT OF  
NIUE (LAND DIVISION)

Application No. 9579, 9580 and  
9324

IN THE MATTER

of Part Matapa, Section 2, Block  
1, Hikutavake District

BETWEEN

Niutama Tuhipa and Dick Hipa  
Tuhipa

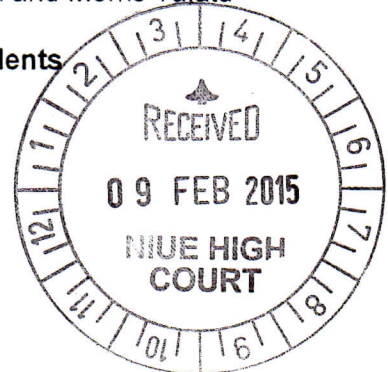
Applicants

AND

Dick Hipa and Morris Tafatu

Respondents

DECISION



Introduction

- [1] The applications before the Court are as follows:
- (i) an application dated 10 April 2008 to annul an order Judge E Williams dated 12 February 1975 which determined title to the above block and declared the common ancestor to be Taoafe and the Leveki Mangafaoa to be Rousalina Tafatu;
  - (ii) an application to amend title to the above block by Niutama Tuhipa dated 2 November 2006;
  - (iii) an application dated 2 November 2006 by Tuhipa Niutama to appoint himself as Leveki;
  - (iv) an application dated 8 March 2006 to change the Leveki for the above block to Hipatama Dick Hipa, Morris Hemu Tafatu and Richard Tafatu Hipa in place of Liliola Jackson (deceased).
- [2] It is proposed to deal with the application for annulment in the first instance as the determination of this application will have consequences for the remaining applications.

Application for the Annulment Order

- [3] This application came before the Court on 4 October 2007 at which time I referred the parties to the direction of the Chief Justice Heta K Hingston of 13 April 2006 which stated:

*"There is no jurisdiction whereby the Court can amend or change the Magafaoa (common ancestor). Application to do this cannot be accepted by Registry."*

- [4] I instructed the parties to address the issue of the Court's jurisdiction and this was done by written submission and also at the Court hearings on 29 April 2008 (Land MB No.14 Folio 65 to 67), 30 April 2008 (Land MB No.14 Folio 95) and 1 May 2008 (Land MB No.14 Folio 124 to 131).

#### **The Niutama Tuhipa Case**

- [5] In essence the Niutama Tuhipa case is that the determining order title to this land was obtained by a fraud perpetrated by Rousalina Tafatu.
- [6] Mr Tongatule, counsel for Niutama stated that section 54 of the Niue Amendment Act (No.2) 1968 provides for the annulment of any order obtained by fraud. He stated that fraud can be actual or constructive. Actual fraud being defined as something said, done or omitted by a person with the design of perpetrating what he must have known to be a positive fraud. Constructive fraud being acts, statements, or omissions which operate as virtual frauds on individuals or if permitted would be prejudicial to public welfare and yet may have been unconnected with any selfish or evil design.
- [7] Mr Tongatule also stated that in terms of the Land Transfer Act 1952 'fraud' means actual fraud i.e. dishonesty of some sort.
- [8] The fraud committed by Rousalina he submitted was that when she applied knowingly for the determination of this title in 1975 she presented an incorrect genealogy to the Court which named Taoafe (m) who it is alleged was not from Hiutavake as the common ancestor of this land. This was done when her cousin Tuhipa was not present and amounted to deceitfulness and was contrary to Niuean custom.
- [9] Evidence was presented from Dick Tuhipa as to what his father Tuhipa had told him about an oral agreement reached between his father Tuhipa and Rousalina sometime before the Court in 1975 that Tuhega was the common ancestor.
- [10] The issue was first raised in 1986 after Rousalina had died and an application made to replace her as Leveki. Tuhipa objected at this time and discovered the common ancestor was Taoafe and not Tuhega.

#### **The Hipa/Tafatu Case**

- [11] The respondents were represented by Mr Toailoa who stated that the powers of the Court to annul an order pursuant to section 54 should be exercised with care as such an order would have far reaching implications. The standard of proof must be high and akin to that required in criminal matters.
- [12] Actual fraud must be shown and in this case the applicants rely on hearsay evidence as there is no documentation to prove the discussions between Tuhipa and Rousalina prior to the 1975 Court hearing.

- [13] In addition, Mr Toailoa stated that although the families came from a different ancestor, this did not amount to fraud as there has been nothing to say that the Taofe genealogy is false.
- [14] This order has been in place for 33 years and Tuhipa had the opportunity to question the order in 1986, 1987 and also when he was titling his own land and did nothing.
- [15] Rousalina is deceased and cannot defend herself.
- [16] In addition the family of Rousalina, Dr Dick Hipa and Morris Tafatu in response to the allegations state amongst other things that:
- (a) The allegations are offensive and insulting to the Taoafe family.
  - (b) The Taofe and Tuhega are from different genealogies and live in different areas. The Taofe genealogy demonstrates that Taofe and Tifahamotu are direct descendants of Tupualeo, the ancestral Tupuna of the whole coastal land from Matapa to Namukulu and are the real owners of Matapa.
  - (c) The Tuhega line came from the top plateau called Vaha and there is no connection to the lower terrace land of Matapa.
  - (d) As a result of the above there was no need for Rousalina to consult with Tuhipa and there were no discussions between the Tafatu and Tuhipa families on the common ancestor issue.
  - (e) No objections have been made for thirty three years and the application now made amounts to fraud by the Tuhipa family and is a grasping desperate attempt to claim this land.

### **The Law**

- [17] Section 54 of the Niue Amendment Act (No.2) 1968 provides as follows:

"54. Annulment of orders obtained by fraud – The Land Court may at any time annul any order obtained by fraud."

- [18] It should also be noted that in the discussion section this decision reference will be made to the law relating to rehearings and appeals. Relevant case law will also be referred to.

### **Discussion**

- [19] It should be stated at the outset that if a person objects to an order of the Court he/she would normally apply for a rehearing or an appeal of the decision of the Court.
- [20] An application for rehearing must be filed within 14 days after the hearing and an appeal is required to be filed within 28 days of the decision. (Niue Land Court Rules 1969)

- [21] The decision complained of in this case was made on 12 February 1975 and the applications to annul this decision were filed on 30 January 2008 and amended on 10 April 2008. That is thirty three years after the decision and clearly well outside the rehearing and appeal periods. Therefore the only avenue left for the applicants was to seek to annul the decision pursuant to section 54 Niue Amendment Act (No.2) 1968 by claiming that Rousalina Tafatu had committed a fraud in her application to title this land in 1975.
- [22] As has been stated by Counsel for the applicants in terms of the Land Transfer Act 1952 (N.Z) actual fraud must be proven to exist to question indefeasibility of title. Actual fraud requires dishonesty of some sort. *Assets Co Ltd v Mere Roihi* [1905] AC 176.
- [23] Further it was stated in the case *Kukutai v Dyer* [unreported] 9 July 2008, Allan J, HC Auckland, CIV-2006-404-3945 that the applicants must establish on the balance of probabilities that actual fraud was committed.
- [24] This case before us is requiring a title order to be amended. The consequences are significant and in my view the legal requirements of the Land Transfer Act 1952 (NZ) must be fulfilled. That is the applicant must prove on the balance of probabilities that actual fraud was committed.
- [25] Therefore, did actual fraud exist and has this been proven by the applicants? With respect to the applicants the evidence presented does not in my view establish that fraud existed. This is in part due to the fact that the Court did not receive any evidence from the two major players – Rousalina Tafatu and Niutama Tuhipa. Rousalina died in 1984, Tuhipa was too ill to come to Court, and I understand he has died following the Court sitting. As a result, the Court had to rely on hearsay evidence from the applicants. This was further complicated because Rousalina could not respond to the allegations.
- [26] The other difficulty faced by the applicants is the acceptance that in 1986 and 1987 Tuhipa was in a position to make an application to challenge the 1975 order and he did nothing.
- [27] Evidence close to the event in question from the parties directly involved is always better than evidence from people who are only relying on what they have been told. This evidence is of limited value.
- [28] As stated the evidence presented by the applicants was not sufficient to prove on the balance of probabilities that actual fraud existed.
- [29] Furthermore the Court must ensure there is stability in the Niuean title system. This title has been in place for 33 years and unless clear documentary evidence existed to corroborate the allegations as to what took place prior to the 1975 order being made the Court will not interfere with the title.
- [30] As a result the application to annul the order of 12 February 1975 is dismissed.

### **Appointment of Leveki**

- [31] The next application to consider is the appointment of Leveki for this land.
- [32] The application by Niutama Tuhipa cannot succeed for two reasons. Firstly Mr Tuhipa is now deceased. Secondly the consents required to support the application in terms of section 14 Land Act 1969 do not exist.
- [33] As to the application to change the Leveki from Liliola Jackson to Hipatama Dick Hipa, Morris Hemu Tafatu and Richard Tafatu Hipa, this application is granted as it complies with section 14 of the Land Act 1969 in that it is supported by the descendants of the Matapa land, the village council and the majority of the families of Hikutavake.
- [34] The Leveki, as appointed, are to act as guardians of this land in the interests of those who link to it for their common use and enjoyment.
- [35] As a result of my decisions as set out above there is no need to consider the issues of adoption and the legitimacy of Rousalina.

### **Conclusion**

- [36] I therefore summarise the orders referred to above as follows:
- (i) The application to annul the decision of Judge Williams of 12 February 1975 is dismissed.
  - (ii) The application to amend the title is dismissed.
  - (iii) The application to appoint Tuhipa Niutama as Leveki is dismissed.
  - (iv) The application to change the Leveki from Liliola Jackson to Hipatama Dick Hipa, Morris Hemu Tafatu and Richard Tafatu Hipa is granted.
- [37] A copy of this decision is to go to all parties.

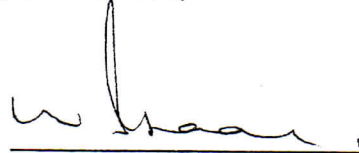
Dated the

*14th*

day of

*October*

2008



**JUDGE WILSON ISAAC**