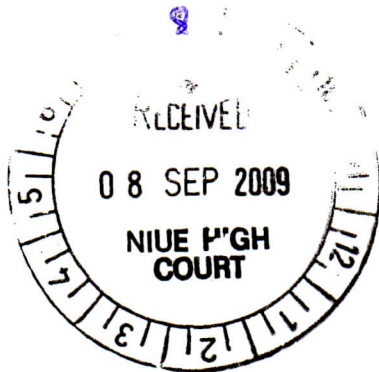


IN THE HIGH COURT OF
NIUE (LAND DIVISION)

Application Nos. 10039/32/6, 9735/24/6,
9708/23/7



IN THE MATTER of Niuean land being Part
Togalupo Section 109C

BETWEEN FILIENIKE PEAUVALE
MISIKEA

Applicant

AND ASEKONA FAMILY

Respondents

DECISION

Introduction

[1] The application before the Court concerns the land known as Togalupo 109C comprising 1544 m² and contained in Certificate of Title volume N9 Folio 76.

[2] On the 21st of April 2009 the Niuean Court of Appeal heard an appeal against an order of Justice Hingston dated 28th October 2006 which ordered that:

"...Mrs Filienike Misikea and any members of her extended family also known as the Peauvale Fakapuna family or Misikea family be evicted from the land Sections 109C Togalupo Block Alofi North".

[3] With the consent of the parties the appeal was allowed and referred back to the Niuean High Court to consider the following matters:

- (i) to determine a new common ancestor for Togalupo 109C;
- (ii) to appoint Leveki Magafaoa for this land; and
- (iii) to consider the eviction order of Judge Hingston and who is entitled to occupy this land.

[4] On the 24th of April 2009 the High Court heard evidence and submissions from the parties on these matters. The position of the parties is summarised below.

The Asekona Case

[5] The Asekona case is based on genealogy and blood link to the land. They maintain that blood is all important and that occupation does not determine bloodline.

[6] They state that approximately 9 generations ago the magafaoa warrior ancestor Foutoa came from Paluki and claimed this land and named it Foutoa land.

[7] The Foutoa genealogy started when Foutoa married Ogotuhekula. They had four sons and one daughter, namely Vesevihi Panapa, Ikipule, Manuao, Iakopo Tiaoti and Malamatu.

[8] The Asekona family descended from Vesevihi Panapa and Iakopo Tiaoti. Foutoa divided his land as Togalupo, Fuahu, Vakoto and Omahi. Vesevihi Panapa inherited the Togalupo lands, Ikipule the land Vakoto lands, Manuao the land in front of Togalupo uta and Iakopo Tiaoti was given Section 108. Although the children were apportioned different portions of land they had free access to all the Togalupo Lalo lands.

[9] The Asekona family homestead is situated on Section 108 on the land apportioned to Iakopo Tiaoti and they had free access to all other family lands including Section 109C where they used the resources which included bread fruits, mangoes, coconut trees, Mexican plum trees, avocados, passion fruit, lychees, paw paw, banana trees, giant taros pigsties, long drop toilet areas and uga hunting grounds.

[10] Vesevihi Panapa the eldest son had the larger portion of the land amongst his siblings stretching from Laloni to Fuahu. He married twice. With his first wife Tapuakitau, they had one daughter named Tapaita Lakafoulua who married Ikitagaloa Timoteo and had ten children.

[11] Vesevihi Panapa remarried Vaitu Luta and they had seven children. He wanted his two families to live a peaceful life so he divided the Togalupo land to cater for his two family's needs.

[12] The two parcels of land are called Togalupo Uta and Togalupo Lalo. Vesevihi Panapa declared that descendants from his first wife Tapuakitau were to live and stay in Togalupo Uta and the descendants from his second wife Vaitu Luta were to live and stay in Togalupo Lalo.

[13] Vesevihi Panapa's daughter, Tokopala married Iosefa Taulaiki a man from the bush. Iosefa Taulaiki brought his sister Haele and her husband with him and they were offered some land on a temporary basis. Vesevihi Panapa named this land Fotoku located in Togalupo Uta. Foto means thorn and Ku means short – which is translated to mean that if the thorn becomes a nuisance then you pull it out. The Asekona submission is that this indicates that Haele was not of the Togalupo bloodline and could be removed from the land.

[14] Vesevihi Panapa and his wife Vaitu Luta raised their children within the boundaries of Togalupo Lalo. They lived in their home that was built on Section 109C. Two of the family contracted leprosy and they were isolated at the back of Section 109C. They were buried amongst the rock on the land now identified on Section 109C where they lived so that their illness would die with them and not be transferred to their young nieces and nephews.

[15] Vesevihi Panapa's son, Kuo Pamatatau to his second wife inherited all of Vesevihi Panapa lands in Togalupo Lalo. Kuo Pamatatau's sister Tokopala married Iosefa Taulaiki and had a son, Nike who married Mago and left to live in Anamotuku about 500 metres outside Togalupo Lalo. Tokopala and Iosefa Taulaiki had one child named Mafa. Mafa had no issue. Mafa and her first husband, Fanafiti, a man from Makefu travelled from Samoa. Fanafiti then died and Mafa married Pikiga, a Samoan. She then returned to Niue with her husband and lived at Anamotuku before leaving for Avatele to serve as missionaries.

[16] The generations that followed that are now in their 50's and 60's, also cared for the land by weeding it and keeping it clear and clean. They also marked it for tennis courts, netball courts and other tabloid sports.

[17] Niutolu, Iakopo and Vesevihi Pamatatau brought their cousin Mafa home to Togalupo to live in an old house that was eventually destroyed by the hurricane. Mafa brought Maatapi Peauvale onto the land. The Asekona submission is that Maatapi was later expelled by Mafa to live with her husband Peauvale Peni at Vailoa for theft and dishonesty.

[18] The Asekona family objected to Maatapi having the lands titled because they maintain that she had no blood relationship to land. Vesevihi Pamatatau also sent an eviction letter to Maatapi. The Peauvale family over the years has tried to deny the magafaoa of the land the use of the access to seaside lands. Also over the years Mrs Misikea has erected stone and stick barricades this having been unlawfully placed between the Nuku Club and the side of the Village Hall thereby successfully preventing the village

people from gaining access to the back of both properties. These unacceptable actions have led to the Asekona magafaoa recommencing the original eviction instigated by Vesevihi Pamatatau.

[19] Members of the Asekona family and their descendants and other members of the magafaoa have been to New Zealand and educated their children there and now they wish to return to their homelands and build for their future generations. It is expensive for the magafaoa to travel to Niue to fight these battles in court. Mrs Misikea continues to remain on the land to which she has no right. The Asekona's maintain that a child of an adoptee is conferred no right to land and any rights of the adopted parent do not filter down to that child. To allow Mrs Misikea to remain on the land goes against established Niue custom.

[20] The definition of Magafaoa must be exclusive for the purpose of good order and proper self-government of lands as they pertain to family members. In 1986 the common ancestor in respect of Section 109C was declared as Mafa who had no issue. The Asekona family accepted that name because Mafa was blood but not that of the adoptee Maatapi Peauvale.

[21] Going further back in the genealogy would be intervening and denying the rights of the individuals of Foutoa who is the original owner of the land.

[22] They maintain that after careful consideration Judge Hingston saw the merit of the Asekona case granted an order to evict the Peauvale Misikea family from this land.

[23] Maatapi Peauvale was not legally adopted and therefore does not come within Magafaoa as defined in the Niue Land Act 1969 and she has no rights to Magafaoa land. Finally in a desperate attempt to claim connections to the land, Mrs Misikea is trying to claim blood connections. Maatapi Peauvale is not a descendant of Foutoa. Her blood connections are to Iosefa Taulaiki who was Mafa's grandfather by marriage to Tokopala the women of the land.

[24] Furthermore, Counsel for the Asekona family submitted that Maatapi Peauvale was not of this land and had no standing to propose a common ancestor and that the true blood link to the land should have precedence in proposing the common ancestor.

[25] It was also submitted that Section 92 Niue Amendment Act 1968 rules out customary adoption and that also Maatapi Peauvale who was born on 4 December 1920 is ruled out of

obtaining rights under customary adoption which applies to a child adopted before 1 April 1916.

[26] Maatapi Peauvale is not a descendant of Foutoa or his grand daughter Tokopala. Her connections are from Iosefa Taulaiki who married Tokopala who was described as the Kelemutu of the land. Iosefa was described as a man from the bush and it was said that Vesevihi Panapa offered the children of Fakapuna a temporary dwelling.

[27] Tokopala and Iosefa were Mafa's grand parents and in 1986 Mafa was appointed the common ancestor of this land.

[28] Based on the above evidence and submissions the Asekona family seek the following:

- (i) To appoint Kuo Pamatatau as the common ancestor who was the only son of Vesevihi Panapa, who was the eldest son of Foutoa.
- (ii) To appoint Mrs Ofania Tafatu, Mr James Tafatu, Ms Cherie Tafatu, Mrs Georgina Tafatu and Mrs O'Love Jacobsen as Leveki Magafaoa.
- (iii) To uphold the eviction order against Maatapi Peauvale and her family.
- (iv) To award costs in their favour.

The Misikea Case

[29] As with the Asekona case, the Misikea case is based on genealogy and blood link to the land. The Misikea case also relies heavily on occupation of this land by their immediate family for approximately 100 years.

[30] The genealogy of this family is traced from Atumatagi and Manogimana Manogimua Havea who are the parents of Foutoa, Fakapuna, Tagelagi and others. The Misikea Magafaoa come down the Fakapuna line.

[31] Fakapuna in his union with Fineikihega gave birth to Ahukele in Togalupo. Ahukele and his wife Manimoka a woman from Liku had four natural birth children all born in Togalupo. They were Iosefa Taulaiki, Tinotagalua, Maumo and Toaki Fanamoka.

[32] Iosefa Taulaiki married Tokopala from the Foutoa line. Tokopala was born in Laloni adjacent to Togalupo. The marriage as can be seen on the genealogy as referred to later

was in fact a union of second cousins. Iosefa and Tokopala gave birth to Vaitu Nike Taulaiki. She married Mago III of the Fotuga ancestry one to which Peauvale Peni Puleoti is also linked.

[33] Their union gave birth to Haelehemotu Mafa Kulukulu. Mafa had two marriages. First to Fanafiti of Makefu and second to Tuaga Pikiga of Alofi. Both marriages were without natural children. Haelehemotu Mafa Kulukulu adopted Tamatiaki from the Tagelagi lineage with linkages to Makefu Village. Tagelagi is noted on the genealogy as a brother of Foutoa I and Fakapuna. On Tamahiki lineage of her mother Mapua this is traced back to Manimoka the mother of Iosefa Taulaiki. In Iakpotioti lineage his son Manuhiku Tioti remarried Manimoka the wife of Ahukele. Niutolu, Ukufia, Mokatogia and Tukuaho were their children.

[34] The adoption of Tamahiki by Mafa Kulukulu was in keeping with re-establishing the rights for the Tagelagi lineage in Alofi to the family lands. Tamatiaki Tamahiki married Laufoli of Avatele who also had blood connections to Alofi.

[35] The first born of that union was Maatapi who was adopted by Mafa and Pikiga upon birth in 1920. Mafa and Pikiga returned to Alofi and brought their adopted child Maatapi with them to live in her land at Togalupo on Section 109 which was legally titled by consent to Mafa in 1986 naming Maatapi as the Leveki.

[36] In 1936 Maatapi married Peauvale Peni Puleoti a descendant of Tinotagaloa one of the three sisters of Iosefa Taulaiki. The continued to live with Mafa on Section 109C until her natural death in 1959. Maatapi and Peauvale had eight children, some of whom were named by Mafa after her ancestry. They are Fakapuna, Iosefa, Filienike, Vasu Puleosiuva, Lagasifa, Reno rover, Feoakiloto and Noumea. All of the children were born and raised in Section 109C part Togalupo.

[37] Filienike Peauvale married Petaia Misikea and continued to live on Section 109C but in 2006 the Niuean High Court Land Division ordered the eviction of Filienike Peauvale and her husband Petaia Misikea from Section 109C on the application of the Asekona family which lead to the appeal and to this Court hearing.

[38] The Asekona children were all born at Omahi in Alofi. Their claim to ownership of the lands in Togalupo is made out of desperation to identify something to call their own. This is very different to the Misikea family because all Mrs Misikea's brothers and sisters were born on Section 109C and we are related by blood to Mafa. Also it took 50 years after the death

of Mafa Kulukulu for the Asekona family to make a claim under the wrong assumption that the adoptions of Tamahiki and Maatapi by Mafa were outside the bloodline. The genealogy suggests otherwise and therefore the assumption is wrong.

[39] Also Counsel for Misikea submitted that when looking at genealogy one should look at the earliest common ancestor. This is the inclusive approach. The exclusive approach adopted by the Asekona's is to choose one ancestor over another so that members of a family can be excluded.

[40] What is important is blood and occupation and it is important to note the customary adoption of Tamahiki by Mafa in 1902. This was not excluded by Section 92. It is lawful and also suitable because it is in the bloodline.

[41] Therefore with the blood link and occupation of over 100 years, the Court should be reluctant to disturb this.

[42] Mafa died in 1959 and when this matter came before the Court in 1986, there was consent between the family as to how Section 109C was to be used.

[43] There are no grounds to evict Mrs Misikea.

[44] Based on the above evidence and submissions the Misikea family seek the following:

- (i) That the common ancestor be Iosefa Taulaiki;
- (ii) That Filienike Peauvale Misikea, Tutuli Heka Manuako and Vasu Puleosiu be appointed Leveki Magafaoa.

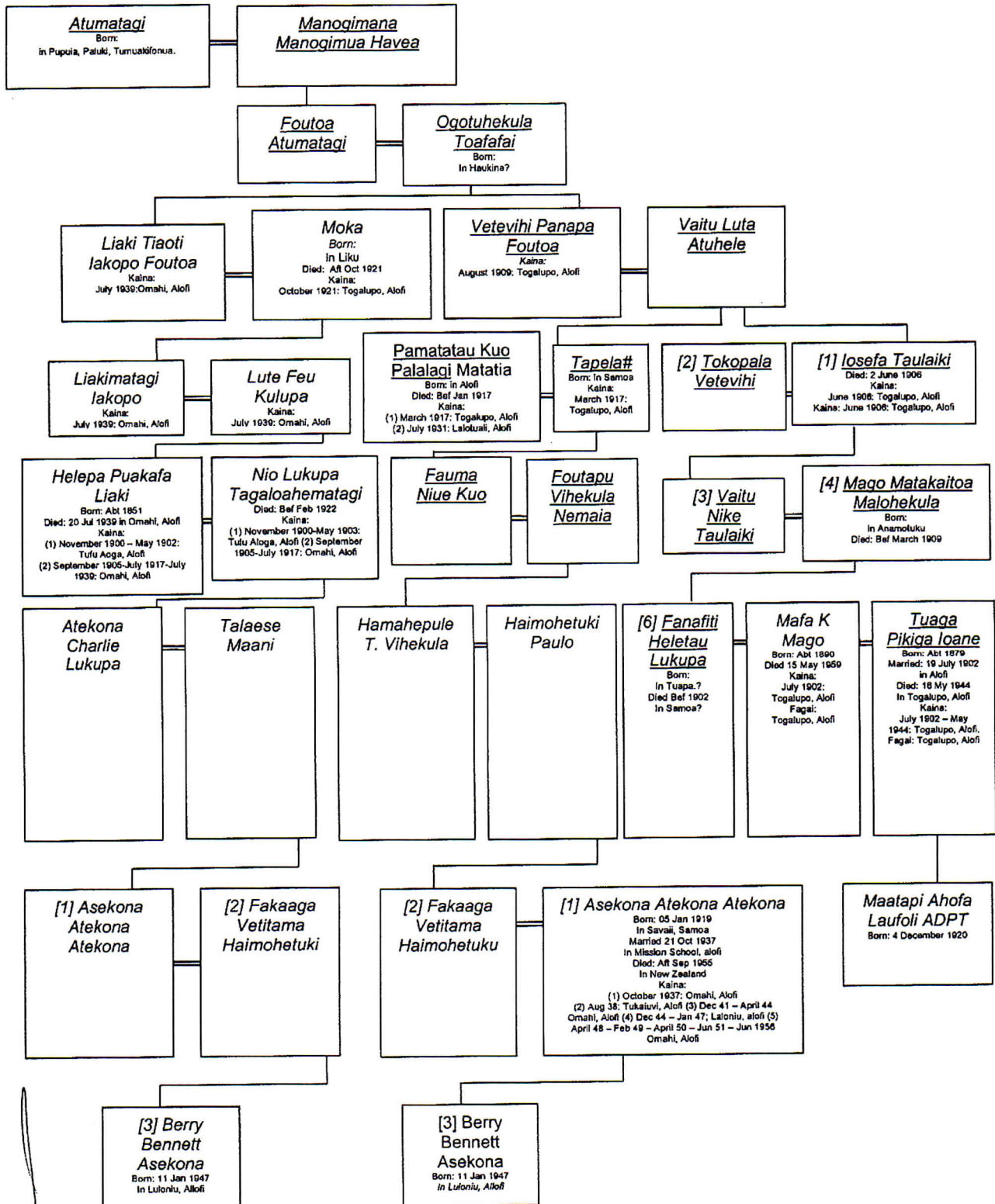
Genealogy

[45] As both cases rely heavily on genealogy, I want to set these out in detail in three stages. Each stage will go down the family tree of three of the children of Atumatagi and Manogimana Manogimua Havea, namely, Foutoa, Fakapuna and Tagelagi.

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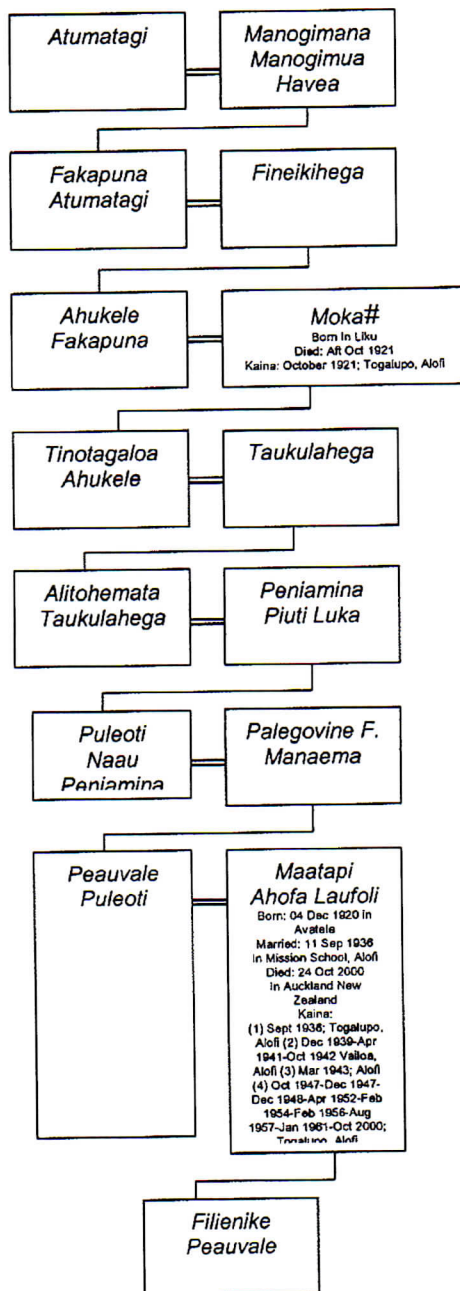
Foutoa Line

Direct Descendants of Foutoa Atumatagi



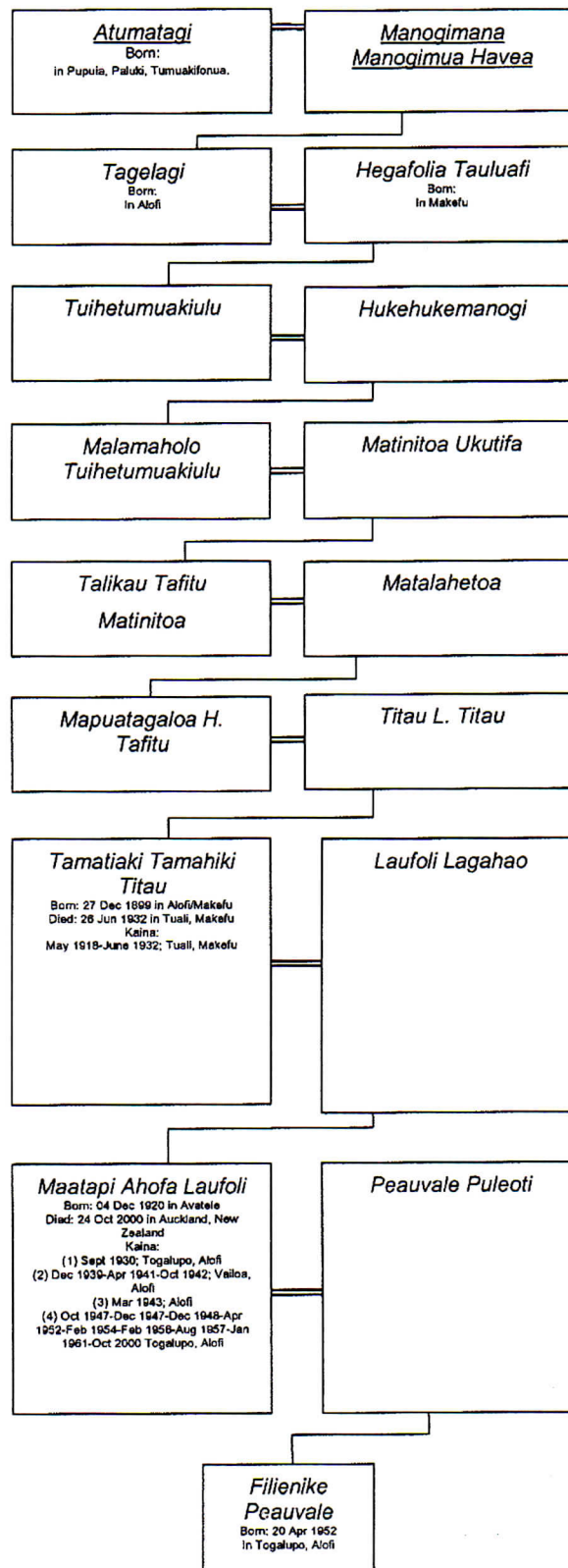
Fakapuna Line

Direct Descendants of Fakapuna Atumatagi



Tugelagi Line

Direct Descendants of Tagelagi Atumatagi



The Law

[46] The relevant provisions of the Niue Land Act 1969 relating to the determination of title and appointment of Leveki Magafaoa are as follows:

Section 10 – Determination of Title

- (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 - Court may require written statement

- (1) *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 - Ownership determined by ascertaining and declaring Mangafaoa

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.

Section 14 - Appointment of Leveki Mangafaoa

(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.*

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

Section 15 - Powers and functions of Leveki Mangafaoa

(1) *The Leveki Mangafaoa of any land, subject to this section and to the terms of his appointment and to any order or direction of the Court, shall have power to control the occupation and use of the land under Niuean custom and shall have power to alienate the land in accordance with the subject to Part 3.*

(2) *In the exercise of his powers under this section the Leveki Mangafaoa shall under Niuean custom consult with the members of the Mangafaoa whether resident in Niue or elsewhere and shall in particular meet the requirements as to consultation laid down by section 17(3) in relation to the sale and lease of land and the giving of security charges over land.*

[47] There were also submissions relating to the Adoption Laws of Niue but for the reasons set out later in this decision there is no need to set the laws governing adoption out in full in this section of the decision.

Discussion

[48] As stated there are three issues to be determined in respect to Togonalupo 109C:

- (i) to determine a new common ancestor for Togonalupo 109C;
- (ii) to appoint Leveki Magafaoa for this land; and
- (iii) to consider the eviction order of Judge Hingston and who is entitled to occupy this land.

The common ancestor of Togonalupo 109C

[49] As set out earlier sections 10 and 11 Niue Land Act state that every title or interest in Niuean land shall be determined in accordance with the customs and usages of Niuean people the Court in so doing is required to consider the genealogical tables showing descent from a common ancestor, cultivations, villages, burial places, marks of historical interest and occupation and connection to the land.

[50] Both parties in this case rely heavily on genealogy and blood connection to the land and as a result I want to analyse the genealogies presented and look at the blood connection of each party.

[51] There is no doubt that the genealogy of each party before the Court started with Atumatagi and Manogimana M Havea. It is also clear that the descendants of three of the children of Atumatagi and Manogimana namely Foutoa, Fakapuna and Tagelagi are of particular significance for this case and to Togalupo 109C.

[52] The Asekona case is based exclusively on the Foutoa line and the proposition that Filienike Misikea has no blood connection to Foutoa and therefore no blood connection to this land. As a result, the Asekona submission concludes that Misikea Magafoa have no rights to this land.

[53] I wish to examine this proposition by firstly considering in detail the genealogy presented to the Court. The genealogical tables are revealing and with respect to the Asekona argument, demonstrate that all the main players in this case are connected by blood back to Atumatagi and Manogimana.

[54] The Asekona family come down the Foutoa line from Atumatagi or Manogimana and the Misikea family come down the Fakapuna line from Atumatagi and Manogimana.

[55] Moreover there was intermarriage between the two lines, namely between Tokopala of Foutoa line and Iosefa of the Fakapuna line. Mafa was the tupuna determined as the common ancestor to this land in 1986 and she was the grandchild of Tokopala and Iosefa.

[56] To add to the web of blood relationships, the evidence given stated that Mafa adopted in accordance with Niuean custom, Tamatiaki, who descended from Tagelagi who was another child of Atumatagi and Manogimana.

[57] Tamatiaki had a child Maatapi who was also adopted by Mafa in accordance with Niuean custom and in 1986 by agreement of the magafaoa, Maatapi was appointed as Leveki for this land by this Court.

[58] There were submissions received by Counsel as to the validity of the adoptions carried out by Mafa and it may well be that these adoptions have no legal force and effect in

terms of section 92 Niue Laws 2006. However, with respect, that issue is of little relevance because the children adopted by Mafa are all descendants of Atumatagi and therefore related by blood to Mafa and the tupuna of Mafa. As a consequence they are all linked by blood to this land.

[59] From at least 1920 when Mafa was said to have returned to live on this land, she and Tamatiaki, Maatapi and now Filienike Misikea have resided on this land. This occupation was not disputed from at least 1920 through to 1986 when by agreement of the magafaoa, Mafa was named as common ancestor for this land and Maatapi as Leveki.

[60] Maatapi's natural child, Filienike has continued to live on this land.

[61] Therefore the Asekona argument which maintains that Filienike has no blood connection and as a result no rights of occupation, ignores the genealogy of their tupuna and also the decision of the their tupuna and magafaoa which clearly permitted Mafa and her customarily adopted children who were from the same blood line to live on this land.

[62] Therefore, the Misikea family have lived on this land for at least 90 years and some of the evidence suggests over 100 years. When this evidence is linked to the Misikea blood connection to this land, it cannot be ignored.

[63] Furthermore, the over-riding tenor of the Niue Land Act 1969 is that Niuean custom in relation to Magafaoa is inclusive and not exclusive.

[64] The Asekona case is exclusive in that it attempts to exclude people with blood connection to this land. This was clearly not envisaged by the Act and was not envisaged by the tupuna to this land who appeared to adopt an inclusive philosophy.

[65] Having regard to the provisions of the Niuean Land Act 1969 and the evidence presented, the Magafaoa of this land are without doubt the descendants of Atumatagi.

[66] I now make an order in terms of section 12 to declare the common ancestor as Atumatagi and the Magafaoa of this land to be the Magafaoa of Atumatagi which would include both parties before the Court.

1

Appointment of the Leveki

[67] Section 14 Niuean Land Act 1969 sets out the matters the Court should take into account when appointing Leveki.

[68] Section 14(2) provides that where the application is supported by the majority of the magafaoa the Court shall appoint the person(s) as Leveki.

[69] Section 14(3) provides that where the support is less than the majority the Court shall appoint a person suitable to be the Leveki.

Section 14(5) requires the Leveki to be domiciled in Niue and be reasonably familiar with the genealogy of the family and history of the land in question.

[70] In their submission to the court dated 24 April 2009 the Asekona's submit that Ofania Tafatu, James Tafatu, Cherie Tafatu, Georgina Tafatu and O'Love Jacobsen should be appointed as Leveki. It should be noted that a family meeting held on 3 January 2007 which was attended by 51 family members that only Ofania Tafatu, Georgina Tukiuha and James Tafatu were nominated to be appointed as Leveki.

[71] At an Asekona family meeting in Niue on 23 April 2009 which was attended by 13 family members, it was recorded that Ofania Tafatu, Cherie Tafatu, James Tafatu and Georgina Tukiuha be appointed as Leveki.

[72] At neither meeting was there any resolution to appoint O'Love Jacobsen and it should be noted that Cheire Tafatu was only nominated at the meeting in Niue on 23 April 2009.

[73] The Misikea family held a meeting in Niue on 23 April 2009 at which 63 family members attended. At this meeting they supported Filienike Misikea as Leveki. There was no mention apart from the submission before the Court for the appointment of Tutuhi Heka Maaauako and Vasu Paleosina.

[74] What these meetings appear to demonstrate is that the Misikea family have a far greater presence on Niue. This may also be shown by the Misikea occupation of this land.

[75] The Niuean Land Act 1969 (s15) provides that Leveki should have the power to control the occupation and use of the land and that the Leveki shall consult with the magafaoa.

[76] As stated this land belongs to the magafaoa of Atumatagi and the duty of the magafaoa is to be fair and reasonable to those family members with a link to this land.

[77] The Asekona and Misikea families in my view both have a link to this land and the fair and appropriate manner to consider its future use and occupation is for a Leveki to come from each family and in this way the wishes of each family will be recognised.

[78] For the Misikea family I have no hesitation in appointing Filienike Misikea as a leveki.

[79] In respect to the Leveki for the Asekona family, the applicant is to advise the Court by 31 October 2009 who the Asekona family nominate for their Leveki from those persons whose names were submitted to the Court. Should no advice be forthcoming by 31 October 2009 Filienike Misikea will be the sole Leveki.

Persons Entitled to Occupy

[80] As indicated above both the Asekona family and the Misikea family are entitled to occupy this land.

[81] It appears clear that the Misikea family's occupation which has been relatively undisturbed for approximately 100 years should remain that way.

[82] However, to ensure certainty Filienike Misikea is invited to file an occupation application with the Court for the area she is occupying.

[83] The Asekona family may consider it appropriate to file an occupation application for the balance area.


Costs

[84] It should also be recorded that the Asekona family has made an application for costs.

[85] Having regard to the orders made above and more importantly to the family nature of this case, there will be no order for costs.

[86] A copy of this decision is to be sent to all parties.

Dated at *Gisborne* this *4th* day of *September* 2009.


JUDGE WILSON ISAAC

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