

[2] On 31 October 2006 Chief Justice Heta Hingston determined Lasitu¹ to be the common ancestor for this land and appointed Sani Elia Lagigietama Lakatani as the Leveki Magafaoa (Leveki).

[3] On 9 November 2006, Reverend Pahetogia Faitala filed an application for rehearing because he disagreed with the determination of the common ancestor for Part Fatuaua (Block A) and the appointment of Mr Lakatani as Leveki. If the rehearing is granted, Reverend Faitala seeks the following amended orders, that:

- (a) Reverend Faitala and his family (the applicants) be declared the mangafaoa of Part Fatuaua (Block A), also known as Falepipi he Mafola Fatuaua, and
- (b) Tagiheulu Palalagi, daughter of Palalagitoa and Sialenifo, be declared the common ancestor of the applicants and the respondents², and
- (c) Reverend Faitala be appointed the Leveki.

[4] On 29 April 2009 I heard submissions relating to the rehearing application, and to save the parties further time and expense, I also heard evidence on the substantive issues; being

- (i) the identity of the common ancestor for the magafaoa of Part Fatuaua (Block A), and
- (ii) the appointment of the Leveki.


[5] I informed both parties that these issues would only be dealt with if a rehearing was granted.

[6] I will now consider the rehearing application.

Submissions in support of a rehearing

[7] Ms Woodroffe, counsel for Reverend Faitala, has made the following submissions in favour of a rehearing:

¹ Lasitu is the father of Manogi Toehetau Maiole Lasitu. Manogi is Mr Lakatani's mother.
² Palalagitoa and Sialenifo are listed as Palalagi Tau Ikinofotoa and Tialenifo Tafenuku in the Court's records.

- (a) Chief Justice Hingston did not properly consider the following evidence presented at the hearing:
- (i) written records from the Land and Justice Department ie genealogical records and registry record documents
 - (ii) physical evidence of the tombstone of the applicants' forebears on the land, and
 - (iii) 100 years of Lagigie and Faitala family occupation and care of Fatuaua;
- (b) Chief Justice Hingston's decision was based on inadmissible evidence, in particular hearsay;
- (c) The land boundaries provided to Chief Justice Hingston were inaccurate. The boundaries shown in the Provisional Plan (survey) for Fatuaua are the Lagigie and Faitala family boundaries, not Mr Lakatani's. Mr Lakatani's boundaries for the Provisional Plan made in 2003 are completely different and small, because he had "no idea at all about the boundaries";
- (d) The Chief Justice did not allow enough time for responses and cross-examination before making his orders;
- (e) It is not clear whether the original decision relates only to Block A or to all of the land at Fatuaua. The decision refers to application numbers 9126/16/6, 9127/16/6, 9439/17/6, 9440/17/6, 9468, 9469, 9481/18/6, 9509, 9510, 9516/19/6 and 9515/19/6 being the land at Fatuaua. However, the evidence provided at the original hearing only refers to Block A. There appears to be no evidence recorded from persons who are interested parties in the other blocks of land (B to F);
- (f) The decision should not have been made until all the blocks of land included in the applicants' claims have been considered;
- (g) As the Chief Justice has based his decision on flimsy and baseless evidence, there must either be bias or a conflict of interest on his behalf.
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Submissions in favour of a rehearing *de novo*

[8] Ms Woodroffe states that the Court's rules are silent on the procedure for a rehearing. However she submits that Reverend Faitala's application should be dealt with as a hearing *de novo* for the following reasons:

- (a) At the original hearing, the grounds on which Mr Lakatani based his claim to Fatuaua (Block A) were not disclosed. Reverend Faitala and the other applicants had prepared their submissions on the understanding that Mr Lakatani was claiming his land interest through his relation Lagigie Huluti Fanafoiiki (the applicants' adoptive grandfather). However, the applicants were taken by surprise when, at the hearing, Mr Lakatani denied Lagigie Fanafoiiki's ownership of the land. It is in the interests of justice that Reverend Faitala and his family be given an opportunity to fully argue their case, in full knowledge of Mr Lakatani's claim to the land;
- (b) At the original hearing, the applicants were not represented by legal counsel and were given little notice to prepare. The applicants' evidence lacked some coherence and order and it is Counsel's respectful view that both the applicants and the Court would benefit if this evidence was presented in an orderly manner. In *Fidow v Registered Securities Limited (in liquidation)* (1991) 3 PRNZ 235, the Court of Appeal found that it was in the interests of justice to refer to new evidence on appeal, as the evidence presented to the lower court lacked order and coherence;
- (c) The Court transcript of the original hearing is incomplete (at just over one page) and does not accurately record the evidence presented. In *Belling v Belling* (1995) 8 PRNZ 523, the New Zealand High Court considered an application to have evidence reheard on appeal, on the ground that the transcript was defective. Although the High Court found that the transcript was adequate, it is submitted that a defective transcript is a ground that could support a finding that further evidence should be presented to the Court.

Submissions against a rehearing

[9] Mr Starling, counsel for Mr Lakatani, submits that none of the grounds proposed by Reverend Faitala are sufficient to grant a rehearing, for the following reasons:

- (a) Reverend Faitala and his family filed the original application and it was their responsibility to be prepared for the 31 October 2006 hearing or to seek an adjournment. Mr Lakatani (and other respondents) were able to present their case on the same amount of notice;
- (b) Neither party had legal counsel at the original hearing, but if the applicants thought they needed a lawyer, it was their responsibility to obtain one;
- (c) The applicants made the application for Block A and that was the block that was dealt with by the Court. Regardless, the fact that the decision focussed on only one block made no legal difference to the way the case proceeded, as the applicants claimed the same common ancestor for all six blocks;
- (d) Mr Lakatani claimed the same common ancestor as that named on the title for Block A. Mr Lakatani has never named anyone else as the common ancestor. However, irrespective of what the respondents said at the hearing, the evidential onus and burden of proof was on Reverend Faitala (and his family) as the applicants to prove their case;
- (e) The applicants have not provided any new evidence that would have made a difference to the original decision. Nor have they provided evidence of an error in law or injustice;
- (f) Even if this Court was to accept the common ancestor named by the applicants, the customary adoption of Faitala Lagigie by Hulisi Lagigie (Lagigie Fana fouiki) and his wife Tanesi does not provide the applicants with a blood connection to Block A. (refer section 92 of Niue Amendment Act)
- (g) The applicants' allegation of actual bias is exceptionally difficult to establish but their allegation against Chief Justice Hingston does not even meet the evidential threshold to show apparent bias, which is a lower threshold than that of actual bias;
- (h) It is not the Court's role to give parties another chance to try their application again because they did not do a good job the first time.

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The Law relating to Rehearings

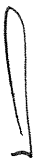
[10] Firstly, Rule 30, Niue Land Court Rules 1969 requires a rehearing application to be filed within 14 days of the Court's decision. This provision was complied with by the applicants.

[11] Also, section 45 of the Niue Amendment Act (No.2) 1968 provides:

- "(1) On the application of any person interested, the Land Court may grant a rehearing of any matter either wholly or as to any part of it.*
- (2) On any such rehearing the Court may either affirm, vary, or annul its former determination, and may exercise any jurisdiction which it might have exercised on the original hearing.*
- (3) When a rehearing has been so granted, the period allowed for an appeal shall not commence to run until the rehearing has been disposed of by a final order of the Court.*
- (4) Any such rehearing may be granted on such terms as to costs and otherwise as the Court thinks fit, and the granting or refusal of it shall be in the absolute discretion of the Court. ..."*

[12] This provision makes it clear that the Court has an absolute discretion as to whether to grant a rehearing or not.

[13] In exercising its discretion, the Court would generally consider whether there has been a miscarriage of justice that justifies a new trial. Some examples of circumstances where a rehearing may be granted are:

- (a) where a judgment has been obtained by an unfair or improper practice of the successful party to the prejudice of the opposite party;
 - (b) the judge has admitted improper evidence or rejected evidence which ought to have been admitted;
 - (c) material evidence has been discovered since the hearing which could not reasonably have been foreseen or known before the hearing;
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- (d) any witness has been guilty of such misconduct as to affect the result of a hearing; or
- (e) whenever it appears necessary to avoid possible injustice to the applicant and that cause can be followed without injury or prejudice to the opposite party at *Nairn v Central Canterbury Electric Power Board* [1964] NZLR 293, 294.

[14] An application for a rehearing will not be allowed merely for the purposes of repairing omissions in the presentation of the earlier case or for reshaping that case, see *Realtycare Corporation Ltd v Cooper* (1989) 2 PRNZ 426.

Discussion

[15] The issue for this Court is whether a rehearing should or should not be granted in this case which relates to the determination of title and the appointment of Leveki.

[16] As set out in section 52 of the Niue Amendment Act 1968, when the Court makes an order affecting title, that order:

"...shall bind all persons having any interest in that land, whether or not they are parties to or have notice of the proceedings in which the order is made, and whether or not they are subject to any disability."

[17] Therefore, the Court's jurisdiction is very onerous and it is required to make careful decisions as to determination of title which stand the test of time and are equal to most challenges. For this reason, the Court must consider all the evidence relating to genealogy, occupation, boundaries, cultivations, burial places and other related matters.

[18] Reverend Faitala claims this was not done by Chief Justice Hingston and as a result, the common ancestor, the magafaoa, and appointment of the Leveki were not correctly determined.

[19] The respondent disagrees and states that the applicant failed to provide enough evidence to substantiate the claims made in their original application. Moreover the purpose of a rehearing is not to allow the applicant another opportunity to make their case when their case was poorly presented the first time.

[20] I agree with the respondent that a rehearing should not be granted merely to give the unsuccessful party another chance to present their case. Moreover, I note that neither party

was legally represented at the original hearing and both had equal opportunity to prepare and present their cases.

[21] As stated above, however, decisions concerning determination of title must be robust as they have far reaching consequences for the owners and other family members. For this reason, decisions should include a thorough analysis of evidence of occupation, cultivation and burial and genealogy.


[22] Chief Justice Hingston's decision only briefly mentioned the relevant evidence led by the respondent as recorded in the diary of Lasitu. The writer of the diary was not present in Court and therefore was not subject to cross-examination. Further, his Honour did not mention the applicants' evidence or the reasons why that evidence was not persuasive.

[23] The main issue in this case for the Court was who should be determined as the common ancestor for this land, being Part Fatuaua (Block A). This issue could only be determined by evidence of genealogy, which in this case is intertwined and complex. An examination of the Court transcript does not demonstrate an in-depth analysis of the complex genealogies of these two families.

[24] The applicant's claim to ownership was based primarily on the customary adoption of the applicant's father, Faitala Lagigie, by Lagigie Fanafouiki. The applicant's claim to ownership relied on the legal status of this adoption, which requires consideration of the law relating to adoption as set out in the Niue Amendment Act 1968. Chief Justice Hingston's decision contains no discussion of the genealogies submitted by both parties or the law relating to adoption. This appears to be an omission on the part of the Court and a compelling reason for the Court to allow this application for a rehearing.

[25] It further became clear from the additional evidence given in Court on 29 April 2009 that even the parties sought to amend their positions. Reverend Faitala sought to amend the common ancestor and Mr Lakatani to amend the Leveki. Again, this shows that the evidence presented to Chief Justice Hingston was insufficient to enable the parties to arrive at positions they were satisfied with.

[26] For this reason also, the parties should be given the opportunity to properly present all relevant evidence to the Court relating to the determination of title and appointment of Leveki to ensure that the most correct and robust title orders are made.

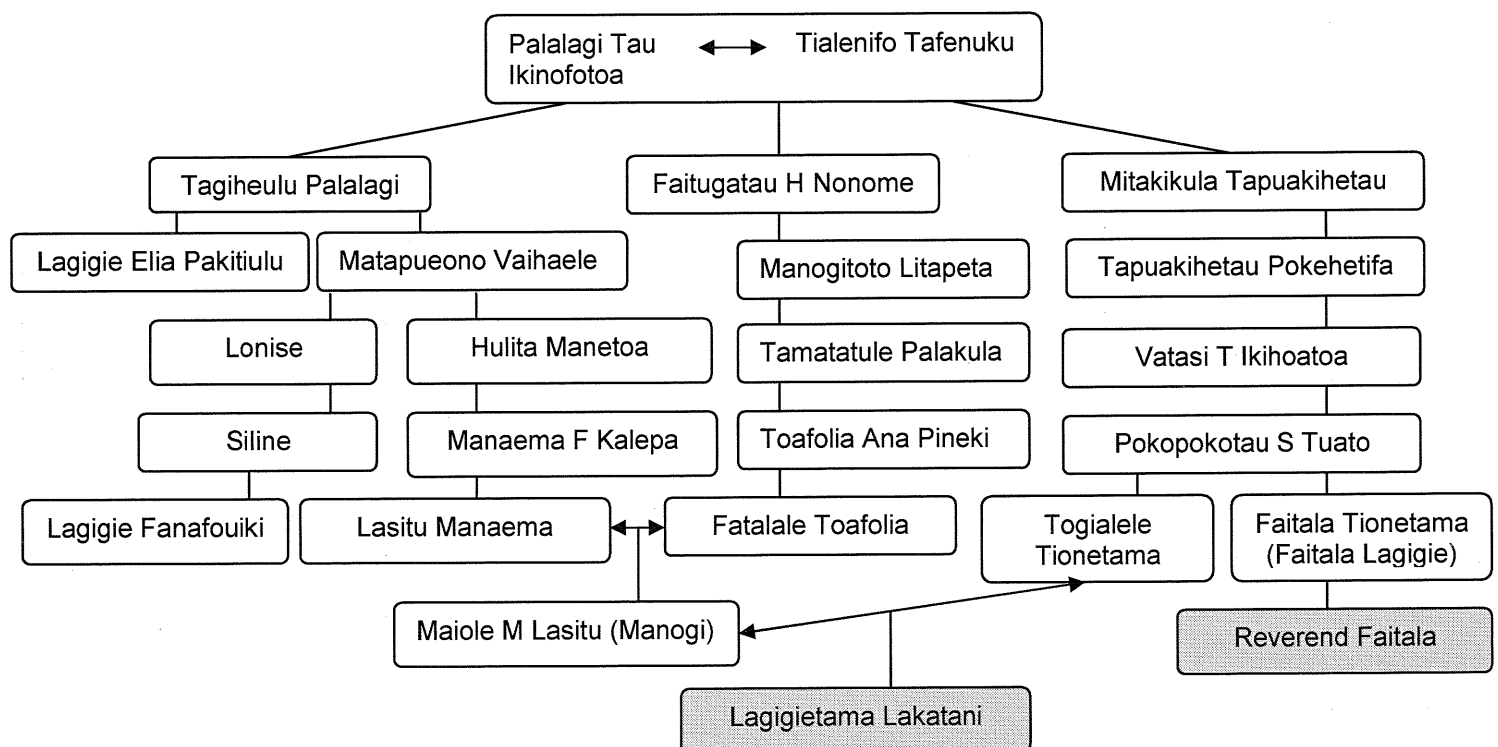


[27] Accordingly and for the reasons set out above, the application for a rehearing is granted.

[28] I now wish to deal with the substantive issues namely who should be determined as the common ancestor and who should be appointed as the Leveki.

Background – genealogy

[29] In order to determine the identity of the common ancestor, the genealogies of both Reverend Faitala and Mr Lakatani's families need to be considered. For clarity, the genealogical records from these families is set out below, as obtained from the parties and the Court records (the arrows indicate a marriage).



[30] For the purposes of this application, the relevant family genealogy begins with the marriage of two overarching common ancestors, Palalagi Tau Ikinofotoa and Tialenifo Tafenuku.

[31] According to the Court's records, Palalagi and Tialenifo had three children: Tagiheulu Palalagi, Faitugatau Nonome and Mitakikula Tapuakihetau. From these three children, the magafaoa spreads out into three descent lines, which I will call the Tagiheulu line, the Faitugatau line and the Mitakikula line. These descent lines sometimes cross-over either through inter-marriage or because of family adoptions.

[32] Reverend Faitala is a descendant of the Mitakikula line, through his natural father Faitala Lagigie³. However he and his family also claim a connection to the Tagiheulu line through the customary adoption of Faitala Lagigie by Lagigie Fanafoiiki. Lagigie Fanafoiiki descends from the Tagiheulu line. It is through this link that Reverend Faitala claims a connection to Block A.

[33] Mr Lakatani is a descendant of all three lines:

- the Tagiheulu and Faitugatau lines (through the marriage of his grandfather Lasitu and grandmother Fatalale Toafofia) and,
- the Mitakikula line (through the marriage of his mother Manogi Toehetau Maiole Lasitu to his father Togialele Lakatani Tionetama⁴)

[34] Mr Lakatani's father Togialele Lakatani Tionetama is the natural brother of Reverend Faitala's father Faitala Lagigie. Therefore Mr Lakatani and Reverend Faitala are first cousins down the Mitakikula line.

[35] In Mr Lakatani's closing submissions at paragraph 8, Mr Lakatani states that he was adopted by Lagigie Fanafoiiki. It is not clear when this adoption took place or whether the adoption was customary or legal. This being so, it would make Mr Lakatani's adopted father, the adopted grandfather of Reverend Faitala.

[36] Both Reverend Faitala and Mr Lakatani have provided the Court with genealogies, including information from Faitala Lagigie's book dated 8 April 1979 and Lasitu's diary from 1938. These genealogies differ from each other and from the Court's records. In particular, Mr Lakatani's claim that his grandfather Lasitu descended from Lagigie Elia, not Matapuiono, conflicts with the Court's records that Lagigie Elia had only one child and no further descendants.

[37] However, these differences in genealogies will not affect the outcome of this particular application.

[38] What is significant is that the Court records clearly demonstrate that both parties agree that only the Tagiheulu line has rights to Block A.

³ Recorded in the Court's records as Faitala Tionetama.

⁴ Also known as Togialele Lakatani Pokopokotau Sionetama.

[39] Therefore, it is crucial to consider the evidence of each party to substantiate their link to the Tagiheulu line.

Case for Reverend Faitala

[40] Originally, Reverend Faitala and the Faitala family nominated Lagigie Fanafoiiki to be declared their common ancestor. However, after reviewing the genealogies produced at the April 2009 court hearing, Reverend Faitala has nominated a different common ancestor, Tagiheulu, as it is Tagiheulu who links both the Faitala family and Mr Lakatani's family to Fatuatua (Block A).

[41] Reverend Faitala and the Faitala family believe that they are the rightful owners (magafaoa) of the land at Part Fatuaua (Block A) in Tuapa.

[42] The Faitala family claim that the land has been passed down to them, through their link to Lagigie Fanafoiiki (Reverend Faitala's grandfather through customary adoption).

[43] According to Reverend Faitala's evidence, Lagigie Fanafoiiki inherited the land from his mother Lagiligitifa Siline Patiti (Siline). In turn, Siline inherited the land from her parents Lonise and Pasisi. (Lonise is the sister of Vaihaele, the applicants say Mr Lakatani descends from Vaihaele). Lonise and Vaihaele are granddaughters of Tagiheulu (ie the Tagiheulu line).

[44] Through the customs passed down and taught to them by Lagigie Fanafoiiki and then by Faitala Lagigie, the Faitala family submit they have continued the role of guardians and owners of the land that has been bestowed on at least five generations of the Faitala family.

[45] In particular, the Faitala family submits that Faitala Lagigie was recognised as the sole guardian with authority over the land by virtue of the hand-written will (maveheaga hiki) of Lagigie Fanafoiiki. The will is dated 5 September 1963.

[46] The Faitala family submits that Part Fatuaua is of "paramount historical significance" to Niue and to the Faitala family. There are a number of sacred and celebrated sites on the land that require care and protection, in particular:

- Four separate rock sites, used to make up the foundations of various houses or meeting places of historic significance;

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- Earth boat structures that were dug into the ground, which represent the boats that brought the Faitala family's ancestors to Niue;
- The burial site of Reverend Faitala's great-grandmother Siline, mother of Lagigie Fanafoiiki (behind the rock foundations); and
- Plantations and crops planted by the Faitala family.

[47] Part of the land was used historically as a public meeting place for the kings and leaders of Niue. In 1846 the Government of Niue moved the administration/executive from Block A to Alofi and the land reverted back to the family.

[48] Subsequently, generations of Lagigie Fanafoiiki's descendants have used the land to preserve the sacred sites and to grow food for the family. No one has ever lived on the land for residential purposes.

[49] It is customary that the owners of the land are those who use the land, ie the use of land for planting plantations is, by virtue of custom, indicative of ownership. The Faitala family have created various plantations on the land including taro, tapioca, kumara and coconuts, and have cleared paths to these plantations.

[50] In summary, the Faitala family submits that their knowledge of the land's history, and their continuation of the customs and usage of the land at Fatuaua (Block A) should be recognised as proof of their ownership of the land (as per s10 of the Land Act).

[51] In contrast, the Faitala family submits that the magafaoa of Mr Lakatani has broken their connection with Fatuaua when Mr Lakatani's ancestor Vaihaele married Kalepa and moved away from Tuapa to Kalepa's village, Matalau.

[52] Therefore although both families are closely related, the Faitala family submits that their magafaoa have remained connected to the land though constant use and occupation, whereas Mr Lakatani's magafaoa have not. The Faitala family submits that none of its members have seen Mr Lakatani planting on the land/using the land at any time during Mr Lakatani's lifetime.

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Leveki

[53] Reverend Faitala submits he should be appointed Leveki of Fatuaua (Block A). He submits that through the knowledge and customs passed down to him by Faitala Lagigie, he meets the statutory requirements of s14(5) of the Land Act.

[54] Lastly, Reverend Faitala submits that Mr Lakatani should be removed as Leveki because he is not domiciled in Niue as required by s14(5) of the Land Act. Reverend Faitala submits that David Makele is not a suitable candidate for Leveki as he gave no evidence of his connection to the land, or knowledge of genealogies/land/historical features of the land.

Case for Mr Lakatani

[55] Mr Lakatani was born on 4 June 1936 in Tuapa and raised by his maternal grandfather Lasitu. Mr Lakatani also provided evidence that he was adopted by Lagigie Fanafouiki.


[56] He worked the land at Fatuaua (also known as Puhala) with Lasitu until 1954, when (at age 18) Mr Lakatani left Niue to live in New Zealand and served in the armed forces.

[57] Mr Lakatani submits that the land at Puhala, which has been incorrectly labelled Fatuaua, belonged to Lasitu, his grandfather, who is the current common ancestor of the land. From Lasitu, Mr Lakatani says the land passed to his mother Manogi Toehetau Maiole Lasitu.

[58] Lasitu and Lagigie Fanafouiki were second cousins. Both men had monthly meetings with each other and worked harmoniously alongside each other on the land at Block A.

[59] At the original court hearing before Chief Justice Hingston, Mr Lakatani offered to divide the land at Block A in half, one half for the Lakatani family (under Lasitu), the other for the Faitala family (under Lagigie Fanafouiki). This would reflect the close working relationship of Lasitu and Lagigie Fanafouiki.

[60] Mr Lakatani agrees that he is part of the same magafaoa as the Faitala family but says that the land in dispute was owned by his mother's family and has nothing to do with his father's (Togialele Lakatani Pokopoko Sionetuato) side of the family – ie the Faitala family.



[61] Mr Lakatani submits that Lagigie Fanafouiki was not an owner in Block A. Lasitu gave permission for Lagigie Fanafouiki to work the land; he did not give Lagigie Fanafouiki an ownership right. Therefore, the land cannot pass down Lagigie Fanafouiki's line to the applicants.

[62] Moreover, Mr Lakatani submits Faitala Lagigie's customary adoption by Lagigie Fanafouiki does not give him a right to ownership. Like Lagigie Fanafouiki, Faitala Lagigie was fulfilling a caretaker role only. Mr Lakatani produced a letter written by Faitala Lagigie in 1979, which he says proves that Faitala Lagigie understood he was only caretaker of the land, not an owner.

[63] Given the close relationship between Lasitu and Lagigie Fanafouiki, Mr Lakatani and his family are willing to allow the Faitala family to continue using the land at Block A any time, but for planting food crops only.

[64] In giving that concession, Mr Lakatani says he is very mindful of the disharmony that has already been seen as a result of the two closely related families on the father's side making claims to the land that belongs as of right of descent to Mr Lakatani's mother Manogi. In the end, both families will lose out and the disharmony will affect future generations.

The Law

[65] The relevant provisions of the Niue Amendment Act (No.2) 1968 provide:

"47 Jurisdiction of the Land Court


(1) *In addition to any jurisdiction specifically conferred upon the Land Court by any enactment other than this section, the Land Court shall have exclusive jurisdiction –*

(a) *To hear and determine any application to the Land Court relating to the ownership, possession, occupation, or utilisation of Niuean land, or to any right, title, estate or interest in Niuean land or in the proceeds of any alienation of it;...*

(c) *To hear and determine any application for the appointment of a Leveki Mangafaoa in respect of any Niuean land; ...*

52 Orders bind all persons interested

Every order of the Land Court determining or affecting the title to Niuean land or to any estate or interest in it shall bind all persons having any interest in that land, whether or not they are parties to or have notice of the proceedings in which the order is made, and whether or not they are subject to any disability."



[66] The relevant provisions of the Land Act 1969 concerning land ownership state:

"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....*

11 Court may require written statement


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.*

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.

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*
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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."

[67] The relevant provisions of the Niue Amendment Act concerning adoption state:

"92 Adoption by Niuean custom invalid

No adoption by Niuean custom, whether made before or after 1 November 1969 shall be of any force or effect, whether in respect of intestate succession or otherwise.

93 Adoption by Niuean custom before 1 April 1916 by parent dying before 5 December 1921

Notwithstanding anything in section 92, in any case where before 1 April 1916 any child was adopted by Niuean custom and since that date and before 5 December 1921 the adopting parent has died, the adoption shall for all purposes have the same operation and effect as that which is attributed by Niuean custom to adoption by Niuean custom."

Discussion

[68] There are two issues that the Court must decide:

- (a) the common ancestor and magafaoa for Part Fatuaua (Block A); and
- (b) the appointment of a Leveki to control occupation and use of the land at Part Fatuaua (Block A).

[69] As set out in the legislation, when dealing with these issues, the Court has to take into account genealogy, occupation and use of land and support from the magafaoa.

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[70] It is evident from the genealogy that both parties stem from the same common ancestors, Palalagi Tau Ikinofotoa and Tialenifo Tafenuku and as already stated, both parties agree that ownership rights to Part Fatuaua (Block A) derive from the Tagiheulu line only. Therefore it is important to analyse how Reverend Faitala and Mr Lakatani link to Tagiheulu.

Reverend Faitala

[71] The evidence shows that Reverend Faitala's connection to Tagiheulu exists through Lagigie Fanafouiki's (and his wife Tanesi's) adoption of Faitala Lagigie, Reverend Faitala's father. Lagigie Fanafouiki is a descendant of Tagiheulu.

[72] Section 92 of the Niue Amendment Act states that customary adoptions have no legal effect. In other words, children adopted by custom, rather than by court adoption order, do not have legal rights to succession/title of their adoptive parents' land. Section 93 however, contains an exception to section 92, in that it allows customary adoptions to have legal effect if the adoption took place before 1 April 1916 and the adoptive parent died before 5 December 1921.

[73] There is no evidence before the Court that Faitala Lagigie's adoption was a legal adoption. In fact, the applicants submit that Lagigie Fanafouiki tried to get Faitala Lagigie's adoption legalised when Faitala Lagigie was 15 but were unsuccessful. Therefore the law does not recognise the adoption of Faitala Lagigie as providing either him or his son Reverend Faitala with a legal right to own land at Block A. Also, the exception contained in section 93 does not apply to Faitala Lagigie's adoption because he was not born until 14 July 1918.

Mr Lakatani

[74] Mr Lakatani links to Tagiheulu through his mother Manogi Tohetau Maiole Lasitu. Manogi's father Lasitu was a great great-grandson of Tagiheulu.

[75] The genealogical evidence provided by Mr Lakatani differs from the Court's records in that he names Lasitu as a direct descendant of Lagigie Elia (Tagiheulu's son), rather than of Matapueono (Tagiheulu's daughter).⁵ Mr Lakatani submits that Lagigie Fanafouiki was the last direct descendant of Matapueono, as Lagigie Fanafouiki had no natural children to carry on the line.

⁵ The Court's records state that Lasitu was a direct descendent of Matapueono, not Lagigie Elia.

[76] I note that Mr Lakatani himself was adopted by Lagigie Fanafoiiki, although it is unclear when or whether the adoption was legalised.

[77] As stated in paragraph 38, the differences in genealogy do not affect the outcome of this application because, regardless of whether Mr Lakatani is descended from Lagigie Elia or Matapueono, he still has a blood link to Tagiheulu through either ancestor.

[78] As set out above, each party agrees that this land, the subject of this application, belonged to Tagiheulu. The evidence of each attempts to link to Tagiheulu, albeit through two different relatives, Lasitu or Lagigie Fanafoiiki. Reverend Faitala's link is via a customary adoption which in terms of the legislation provides no legal basis for his claim. Mr Lakatani is related by blood and this is supported by the genealogical records.

[79] However, notwithstanding the legality or otherwise of the two claims, the background customary history of this block and the intertwining of genealogy from the eponymous ancestors of the Lakatani and Faitala families has shown that the families have worked together on this land as magafaoa.

Evidence of customary use and occupation of the land

[80] The evidence provided to the Court shows that Lasitu and his cousin Lagigie Fanafoiiki worked the land together, planting food crops and preserving the key sites of historical and family importance on the land. Faitala Lagigie, adopted by Lagigie Fanafoiiki, also worked on the land and grew up learning and putting into practice customary use and history of the land. Some time later, Lagigie Fanafoiiki also adopted Mr Lakatani and Mr Lakatani spent his childhood working on the land until the age of 18, when he left Niue for New Zealand. Reverend Faitala was 3 years old when Mr Lakatani left Niue and he also worked the land with his father Faitala Lagigie.

[81] Mr Lakatani maintains that Lagigie Fanafoiiki, Faitala Lagigie and Reverend Faitala were only caretakers of the land. They did not gain ownership rights through their work on the land.

[82] The evidence concerning Lagigie Fanafoiiki's entitlement (as a descendant of Tagiheulu) to ownership of Block A is inconclusive, with the applicant focussing more on his occupation and use of the land as proof of his entitlement.

[83] However, it is clear that both Lagigie Fanafouiki and Faitala Lagigie worked the land according to custom and that there was an ongoing connection with the land, knowledge of the land's history and protecting the land for future generations of the wider magafaoa.

[84] The Land Act defines the magafaoa as

“...the family or group of persons descended from a common ancestor, including any person who has been legally adopted into the family, who at any given time are recognised as entitled by Niuean custom to any share or interest in the land, and excludes a former member of the family legally adopted into some other family. ...”

[85] The Court's approach in determining who is a member of a magafaoa is inclusive, not exclusive. Both the applicant and respondent are closely related, albeit on their fathers' side (ie the Mitakikula line). On the Tagiheulu line side of the family, Faitala Lagigie and Mr Lakatani were both adopted by Lagigie Fanafouiki and worked with him (albeit at different times) on the land at Block A.

[86] Given the close links between parties and the occupation and protection of this land by the Faitala family, the Court is not prepared to exclude either the Faitala family or the Lakatani family from this land.

[87] I also applaud Mr Lakatani's attempt to encourage family harmony. He is right, if the disharmony continues, it will affect future generations and cannot have been envisaged when the tupuna of the two parties before the Court lived and worked together on this land.

[88] It is clear that this land has important historical and cultural significance not only for the parties before the Court but for Niue as a whole. This is the land where the leaders and kings of Niue met to determine important political matters for Niue. The foundations of this important site are still present today. They should be protected.

Decision and Directions

[89] As a result of the above discussion, I consider that the only definite and robust order that can be made is to declare the magafaoa by reference to the common ancestor in terms of section 12 of the Niue Land Act.


[90] I therefore order that the common ancestor of Part Fatuaua (Block A) containing 2.332 hectares to be Tagiheulu.

[91] In respect of the appointment of Leveki, I adjourn this matter and advise that I intend to appoint one Leveki from the Faitala family and one Leveki from the Lakatani family. I further direct each family to hold meetings to determine whom they wish to appoint as their Leveki in terms of section 14 of the Niue Land Act 1969 and to submit a copy of the minutes of their meetings and proposed Leveki to the Court by **31 March 2010**.

[92] I also direct that each family consider setting aside the rock foundations of the chiefs and kings of Niue as a place of special significance in terms of section 44 of the Niue Land Act 1969. If there is general agreement to this taking place, I would be able to deal with an application by the newly appointed Leveki on an urgent basis at the next Court sitting.

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

Dated at *Wellington* this *15th* day of October 2009.


JUSTICE WILSON W ISAAC