

**IN THE HIGH COURT OF NIUE  
LAND DIVISION**

**Application No. 10687  
Application No. 10688  
Application No. 10801**



**IN THE MATTER OF**

**Part Avatoga Block, Hikutavake Survey District**

**BETWEEN**

**TAPU JUDITH TALIMA PIHIGIA  
Applicant**

**AND**

**JOYCE KEESING TAGAMAKA TALAGI  
Applicant**

**Hearing:** 6 November 2013

**Appearances** Ms Drummond for Joyce Talagi  
Togiavalu Pihigia for Tapu Pihigia

**Judgment:** 21 October 2014 – (5:00pm New Zealand time)

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**DECISION OF COXHEAD J**

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**Introduction**

[1] This decision concerns two competing applications to determine the title to the Avatoga Block in the Hikutavake Survey District, and for the appointment of a Leveki Mangafaoa. The applicants have each proposed a different common ancestor as the source of title.

**Procedural History**

[2] An application to determine the title to the land and for the appointment of a Leveki Mangafaoa was originally filed by Tapu Judith Talima Pihigia on 14 November 2012. A subsequent application was then filed by Joyce Keesing Tagamaka Talagi on 26 March 2013 also seeking to determine the title to the land. Land investigation reports have been completed in relation to each application, along with surveys of the land.

 1

[3] The application of Ms Pihigia was heard by the Court in March 2013 and, given that the parties are related, it was adjourned to allow discussion of the matter within the family. Although discussions were held, no resolution was reached, and the matter was again heard by the Court on 6 November 2013. At that hearing I indicated that if I was not in a position to give an oral decision, then a written decision would be issued. I now proceed with my written decision.

### **The case for Tapu Pihigia**

#### *Evidence of Tapu Judith Talima Pihigia*

[4] Ms Pihigia made an application for a title to the Avatoga Block under the name of her great-grandmother, Mokatogia Niuloa, as the common ancestor. She seeks:

- (a) The appointment of Mokatogia Niuloa as the common ancestor for the land Part Avatoga Block II as set out on provisional plan No 10687, being an area of approximately 1.4570 hectares; and
- (b) The appointment of Tapu Judith Talima Pihigia as the Leveki Magafaoa for the land part Avatoga as set out on provisional plan No 10687, being an area of approximately 1.4570 hectares.

[5] I do note that Ms Pihigia's application form does not stipulate who is to be appointed as Leveki Magafaoa. However, Ms Pihigia's statement of 6 November 2013 makes it clear that she wishes to be appointed to this role.

[6] Ms Pihigia submitted that the land in question belonged to Niuloa and Fukesifa, who allocated the land to their daughter, Mokatogia. In support of this, she submitted, was the fact that the siblings of Mokatogia owned the lands surrounding the Avatoga Block. Her brother Hipa owned the land to the front of Avatoga, her brother Niutama owned the land to the right of Avatoga, and her sister Foulana owned the land just behind that of Niutama.

[7] Ms Pihigia's grandmother, Puakafa Valepo, was a child of Mokatogia and was born before Mokatogia married her husband, Tagamaka. Mokatogia and Tagamaka did not have children together. When Mokatogia passed away, Tagamaka married Mokatagaloa, who was the widow of Mokotogia's brother Niutama. Due to the close proximity of the

lands which Mokatagaloa and Tagamaka occupied, and given that Tagamaka was an important person in the community and much loved, the family saw no reason to make Tagamaka leave Avatoga. However, the family were always aware that neither Tagamaka nor Mokatagaloa had any blood ties to the land.

[8] Ms Pihigia says that her family had a good relationship with Tagamaka and Mokatagaloa, and after the death of Mokatagaloa the family continued to care for Tagamaka. She says it seemed that he had no other family to care for him in his old age.

[9] In relation to the claims of Ms Talagi, Ms Pihigia maintains that Tagamaka was not the source of the land. He married into the family from outside and had moved to the land to live with his bride Mokatogia. Tagamaka's father was from Lakepa and his mother from Alofi. Although Tagamaka cleared the land and built two houses, Ms Pihigia submitted that this does not alter the fact that Mokatogia was the source of the land. Ms Pihigia advised that she had no objection to Ms Talagi claiming the lands of Tagamaka. However she submitted that the land in question belonged to Mokatogia.

[10] Ms Pihigia submitted that her grandmother Puakafa is the sole heir to all Mokatogia's land, as she was her only child. In accordance with the wishes of her mother that she look after the family land holdings on behalf of the wider family, Ms Pihigia also seeks appointment as the Leveki Mangafaoa of Avatoga.

#### *Evidence of Dick Hipa Tuhipa*

[11] Dick Hipa Tuhipa, a descendant of Niutama (the brother of Mokatogia), gave evidence in support of the application of Ms Pihigia. He confirmed his understanding that the land in question was ancestral land and belonged to Mokatogia. He stated that she lived on the land before her marriage to Tagamaka, and that Tagamaka came to the land as an outsider to be married. Tagamaka built a house on the land following a hurricane in 1959 and was allowed to remain on the land by the family of Mokatogia, even though he was supposed to leave. Mr Tuhipa maintains that the land did not belong to Tagamaka and he did not agree with the statement that Ms Talagi believed the land to be Tagamaka's.

[12] Mr Tuhipa also advised that family of Tagamaka reside on the upper terrace in Hikutavake but none of the family reside on the lower terrace where this land, Avatoga, is located.



*Evidence of Lilly Asekona*

[13] Lilly Asekona, a sister of Tapu Pihigia, also gave evidence in support of Ms Pihigia's application. She recalled visiting the land as a child and the traditional Niuean fale that was on the land however she did not recall Joyce Talagi living there.

[14] She advised that the land was specifically given to her great-great-grandmother, and Tagamaka was an outsider who married her. Later Tagamaka married the second wife of her great-great-grandmother's brother, Niutama, and that is how Joyce Talagi came to the land.

**The case for Joyce Talagi**

*Evidence of Joyce Keesing Tagamaka Talagi*

[15] Ms Talagi has made an application for a title to part of the Avatoga Block, in particular the part where her father, Tagamaka, lived. This area of 2000m<sup>2</sup> is located within the larger Avatoga block (1.4570 hectares) that Ms Pihigia seeks title determination to. Ms Talagi seeks:

- (a) The appointment of Tagamaka as the common ancestor for the land Part Avatoga Block III as set out on provisional plan No 10801, being an area of approximately 2000m<sup>2</sup>; and
- (b) The appointment of Lalomanogi Togiakona as the Leveki Magafaoa for the land part Avatoga as set out on provisional plan No 10801, being an area of approximately 2000m<sup>2</sup>.

[16] Ms Talagi advised that she is the legally adopted daughter of Tagamaka Pulegamotu, who she submitted was the owner of the house and land at Avatoga. She was born in Niue in 1962 and adopted in 1970 by Tagamaka and his second wife Mokatagaloa (who died when Ms Talagi was a child). She was Tagamaka's only adopted child and carries his name. She advised that she lived with Tagamaka until 1972 when she moved with her natural parents to New Zealand for five years. When she returned to Niue she lived with both Tagamaka and her natural parents, who resided a short distance from Tagamaka's house at Avatoga. She later resided in Tagamaka's house with her husband and children, and following Tagamaka's death, named her son after him.



[17] Ms Talagi states she never heard from Tapu Pihigia during this time regarding Tagamaka's house or land.

[18] Ms Talagi disputes the claim of Ms Pihigia to the land at Avatoga. She submitted that the land belonged to Tagamaka and the only connection Ms Pihigia has to Tagamaka is through her great-grandmother, Mokatogia, who was Tagamaka's first wife. Ms Pihigia's grandmother, Puakafa, was a child of Mokatogia but was not a child of Tagamaka. Ms Talagi therefore submitted that Ms Pihigia has no claim to the land through Puakafa.

[19] Ms Talagi submitted that she is the legal owner and occupier of the land at Avatoga, including the house built by Tagamaka with his second wife Mokatagaloa. While Ms Talagi claimed the land through adoption, she also submitted that she is related by blood to both Mokatogia and Tagamaka. The extent of this connection was not made clear by Ms Talagi.

[20] During the Court hearing, Ms Talagi agreed that Tagamaka's family living in Niue reside at Fugaluga, and that Tagamaka was the only one who came down to this block. She submitted however, that Tagamaka has a link to the land surrounding Avatoga as he is related to the tupuna Tuhega. Ms Talagi did not explicitly state how Tuhega relates to the land.

[21] Counsel for Ms Talagi submitted that Tagamaka settled the land at Avatoga as no one lived on the land before him. He cleared the land, planted crops, and lived in a house which he built on the land. He continued to occupy the land through his second marriage to Mokatagaloa, with whom he adopted Ms Talagi. Counsel further submitted that the will of Tagamaka showed that he considered that he owned the land and was entitled to dispose of it as such. As Ms Talagi is the legally adopted child of Tagamaka, she is entitled to the land.

*Evidence of Lalomanogi Togiakona*

[22] Lalomanogi Togiakona stated that the correct common ancestor of this land is Tagamaka. She recalls the history of the land as told to her as a child, that Tagamaka lived at Tamahotokula and moved to Hikutavake with others of the village to be closer to the sea and enable them to fish for the families. He settled the land at Avatoga, building a house and planting crops. Tagamaka lived in the house with his first wife, Mokatogia, but they had no children. Although Mokatogia had a child of her own, Tagamaka did not adopt





the child. Following the death of Mokatogia, Tagamaka married his second wife, Mokatagaloa, who also already had a child. Tagamaka did not adopt that child either and they did not have any natural children together, however, he and Mokatagaloa legally adopted Joyce Talagi. Tagamaka and Mokatagaloa lived in the house that Tagamaka built until it was destroyed by a cyclone. Tagamaka then built a second house which remains on the land today.

[23] Ms Togiakona recalled Joyce living in the house with Tagamaka at Avatoga and later Joyce lived there with her husband and some of her children, before moving to New Zealand. Ms Togiakona submits that it was always known that Joyce was to have Tagamaka's land. When Tagamaka was alive, Ms Togiakona attended a meeting with him where he produced his will and discussed his wish that his land go to Joyce.

[24] At the Court hearing, Ms Togiakona confirmed that the family of Tagamaka all lived on the upper terrace and he was the only one who came down to Avatoga. She also confirmed that the siblings of Mokatogia occupied the lands surrounding Avatoga. However, Ms Togiakona gave evidence that Tagamaka was family to the land, that the tupuna Tuhega and Niuloa were brothers, making Tagamaka and Mokatogia first cousins.

#### **Determination of Title**

[25] Part 2 of the Land Act 1969 (the Act) sets out the provisions for determining title to land. Section 10 provides as follows:

##### **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.

[26] In determining the title, the Court must therefore consider the customs and usages of the Niuean people, as far as these can be ascertained. In doing so the Court is required to consider the genealogical tables showing descent from a common ancestor,

cultivations, burial places, marks of historical interest and occupation and connection to the land.

[27] In relation to ownership of land, s 12 of the Act provides that the Court shall determine ownership of the 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. Mangafaoa is defined in s 2 of the Act as:

**"Mangafaoa"** in relation to any Niuean land means 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. Where Niuean land is owned by a single person exclusively, that person is the Mangafaoa of the land.

#### **Appointment of Leveki Mangafaoa**

[28] Once the land has been titled and ownership of the land has been determined, s 14 of the Act sets out the requirements for the appointment of a Leveki Mangafaoa. Section 14 provides:

##### **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.



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

### Discussion

[29] The two competing applicants both provide different arguments justifying title to the whole of Part Avatoga block in terms of Ms Pihigia's application and to a smaller area of Part Avatoga in terms of Ms Talagi's application.

[30] Ms Pihigia's claim is based on ancestral connection and Ms Talagi's claim is based on ancestral connection and occupation.

[31] The essence of Ms Pihigia's claim is that her family have ancestral connection to the Avatoga Block and its surrounding blocks of land. In particular, her great-grandmother Mokatogia is the "source of the land." Siblings of Mokatogia own the lands surrounding the Avatoga Block. Mokatogia's brother, Hipa, owned the land in front of Avatoga. Her brother Niutama owned the land to the right of Avatoga and her sister Foulana owned the land just behind that of Niutama.

[32] The fact that this family have ancestral connection to a number of land blocks surrounding the Avatoga block is significant evidence of title of the area.

[33] Ms Pihigia acknowledges that Tagamaka came to the land, cleared part of the land and built two houses at different times on the land. However, she maintains that Tagamaka was not the source of the land.

[34] In contrast, Ms Talagi's claim is based on ancestral connection and occupation of the land. Ms Talagi's evidence of ancestral connection to this land is unclear or as Ms Drummond rightly recognised, the genealogy provided with Ms Talagi's application was fairly sparse, with her claim of occupation and the working of the land being her stronger point. Ms Talagi's main point was that her father was the first person to settle on the land and had long occupied the land, worked the land and built on it. It is on that basis that she claims title.

[35] Tagamaka's clearing of part of the Avatoga block, working the land, residing on the land and building houses on the land, is undisputed.



[36] I am required to determine title by reference to Niuean custom. In this situation I have evidence of ancestral connection to the land being provided by Ms Pihigia. I also have from Ms Talagi, some evidence of ancestral connection and a stronger case put forward based on occupation of the land.

[37] Occupation is part of the picture of custom at work, but only part of that picture. The other important part as I understand it is ancestral connection to the land.

[38] In my view the evidence provided by Ms Pihigia as to ancestral connection is telling. In particular the undisputed evidence that her great grandmother's brothers and sisters are the common ancestors to the blocks of land around Avatoga, is compelling.

[39] Ms Pihigia, rightly, does not dispute that Tagamaka lived on part of Avatoga for some time, worked the land and built two houses on the land. However, as Ms Pihigia infers, he was always resident on the land with their family's permission, having first married Mokatogia and when she passed away, marrying Mokatagaloa, who was the widow of Mokotogia's brother Niutama.

[40] As Ms Pihigia has noted in Court, Tagamaka was an important person in the community and much loved, and the family saw no reason to make Tagamaka leave Avatoga. However, the family were always aware that Tagamaka had no blood ties to the land.

[41] I agree that Takamaga's long occupation and working of the land does not override the clear ancestral connection of Mokatogia to the land.

[42] Considering all evidence I am of the view that Mokatogia Niuloa, the great-grandmother of Ms Pihigia, should be the common ancestor for the Avatoga block. The fact that the surrounding lands blocks of Avatoga are in the title of her brothers and sister is persuasive. This demonstrates to me that the lands in this area have been recognised as being sourced from this family's common ancestors and I see no reason why the other Avatoga block would be titled to an ancestor not of Mokatogia's family.

[43] It would have been a better arrangement if the two applicants and families could have in some way accommodated both applications in recognising Mokatogia as the common ancestor of Avatoga block while still providing for Ms Talagi's application and agreeing to her having title to that portion of the land that Takamaga had built the house

on and had lived. However, no such arrangement was made and I was asked to determine the two applications as they were presented. I have done that.

### Summary

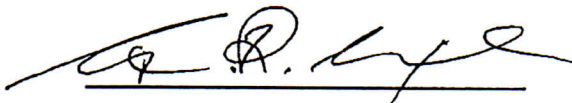
[44] For the reasons above I dismiss the application of Ms Talagi.

[45] In relation to the application of Ms Pihigia I make the following orders:

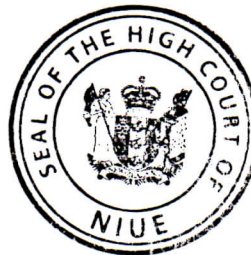
- (a) Declaring Mokatogia Niuloa to be the common ancestor for the land part Avatoga as set out on provisional plan No 10687, being as area of approximately 1.4570 hectares; and
- (b) Appointing Tapu Judith Talima Pihigia as the Leveki Magafaoa for the land Part Avatoga as set out on provisional plan No 10687, being as area of approximately 1.4570 hectares.

[46] A copy of this decision is to go to all parties.

Dated at Rotorua, New Zealand this 21<sup>st</sup> day of October 2014.



C T Coxhead J



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