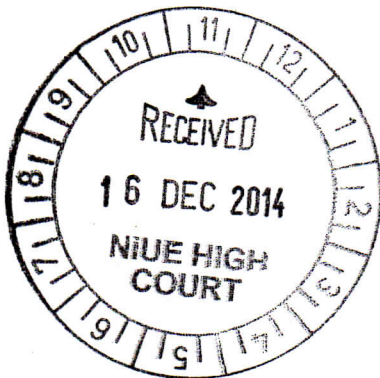


**IN THE HIGH COURT OF NIUE
HELD AT FONUAKULA**

No: 10930

IN THE MATTER OF of Section 3, Block III, Alofi
District (Part Tapeu), Plan
1308, Volume N 21 Folio 65

BETWEEN



CHARLIE FUKU
TONGAHAI, TUIOLO
TONGAHAI, LEE
OKALANA, TUINEAU,
MATA PAHIVA, TANAKE
TUKUTAMA, JOHN AX
(BILLY) TONGAHAI,
LEFATAU TONGAHAI,
DAPHNEY TUPOU
TONGAHAI, JULIANA
TONGAHAI, PATRICIA
TONGAHAI, ALL OF Alofi,
Niue

APPLICANTS

AND

SONIA TAFATU,
STANLEY TAFATU,
MORRIS TAFATU

RESPONDENTS

DECISION

Introduction

1. The application before the Courts are seeking the following orders:
 - (i) Rescinding the orders of the Court of 1 October 2007 granting an occupation order and appointing leveki magafaoa;
 - (ii) Reinstating Charlie Fuku Tongahai as leveki magafaoa;
 - (iii) Seeking the eviction of the respondents from Section 3 Block III Alofi District (Part Tapeu)

2. The applications essentially replace the application by C F Tongahai dated 11th October 2013 to change the leveki magafaoa of this land from Sonia & Stanley Tafatu to C F Tongahai.
3. The applications that were called before on 26th May 2014 at which time it was agreed by Mr R Toailoa as counsel for Mr Tongahai and the respondent Mrs Sonia Tafatu that before the Court heard any evidence in this matter, that the applicant had to satisfy the Court that it had jurisdiction to determine the application. At that time I encouraged Mrs Tafatu to obtain legal advice.
4. The applications were called again on 27th May 2014 and Ms Drummond advised the Court she was Acting for Ms Tafatu. The applications were then adjourned to 28th May 2014 for hearing submissions from Counsel as to the Courts jurisdiction to determine the application.

Submissions for the Applicants

5. Mr Toailoa for the applicant referred the Court to the provisions relating to the determination of title and in particular that titles are to be determined in accordance with Niuean custom. Further, if a question of jurisdiction arises this should be determined in the context of Niuean customs relating to land rights and interests.
6. In relation to the relevant Niuean customs, counsel referred to certain publications which highlight certain Niuean customs relevant to these applications. These include that a person's mana & identity come from the land; obligations to family come from the land; improper behaviour can lead to reduced inheritance; there is no individual ownership and occupancy rights come from the leveki magafaoa ; and dissension in a family causes hurt and pain.
7. Counsel then referred to Court applications by the respondent and members of the Tafatu family which upset the applicant's magafaoa and was disrespectful to it. These actions led to the present application to revoke the partition order replace the leveki magafaoa and evict the respondents from the land.
8. Counsel submitted that the Court had jurisdiction to rescind the partition order. He referred to the general jurisdiction of the Court in respect to land matters set out in Niue Constitution 1974. He also referred to the jurisdiction of the Court at s.47

Niue Amendment Act (No.2) 1968 which enables the Court to hear and determine any application as to ownership, possession and occupation of Niuean land and any right, title or interest in it and to determine any application for a leveki magafaoa.

9. In making the above submission Counsel acknowledges there are no specific provisions for the revocation of a partition order but maintains the jurisdiction arises from the general jurisdiction set out above.
10. Counsel further maintains that the making of a partition order does not provide additional land rights to the members of the magafaoa in whose favour the order was made. The partitioned land in counsel's submission must remain communal land and the magafaoa still has overall right of ownership.
11. Therefore counsel submitted that as the relationship between the magafaoa and the respondent has broken down, it would be unconscionable and inequitable for them to remain leveki magafaoa of magafaoa land and they should be replaced.

Submission for the Respondents

12. Ms Drummond for the respondents submitted the Court has jurisdiction to make partition orders and amend them as necessary. Further she accepts that Niuean custom is an aide to statutory interpretation and the Court should give due consideration to it in the exercise of its jurisdiction.
13. However does not accept that custom can be used to strain interpretation or provide jurisdiction where it does not exist.
14. Ms Drummond maintained that the Act does not provide for the removal of a person from the magafaoa with the exception of a legal adoption.
15. Further counsel submitted that the tenor of s36 Land Act 1969 relating to partitions allows the court to separate the totality of interests of magafaoa through partition for subsets of magafaoa to enjoy.

16. In particular s 36(a) enables partition to occur because of irreconcilable family disputes. The Act does not provide for revocation of partition orders because of dispute or removal from membership of magafaoa.
17. In regard to the removal of the leveki, Ms Drummond submitted that this should only be granted after the wider interests of all the magafaoa is considered, including the leveki who are being challenged.
18. In response to the applicants submission that the lack of an occupation order provides the magafaoa the opportunity to intervene in partitioned land, Ms Drummond submitted that a partition in favour of a magafaoa members meant an occupation order was unnecessary. Further she submitted that occupation orders follow a partition order and not vice versa.

Discussion

19. Although the application itself refers to the rescinding of an occupation order, the order that this application asks the Court to rescind is a partition order made 1st October 2007. Also all the submissions in this case are directed at that partition order.
20. In fact, the partition application in question was made by the present respondent Sonia Tafatu and presented to the court by C.F Tongahai, as the leveki magafaoa for the land in support.
21. Sonia Tafatu is a blood member of the magafaoa associated with the land, a niece of the applicant and a granddaughter of Tuiolo Tongohai, the matriarch of the magafaoa.
22. At the partition application it was confirmed that the magafaoa had approved the partition and the appointment of leveki magafaoa. It should also be noted that the granting of the partition in 2007 is not being questioned by the applicants. It is events that followed the partition which have lead to the present applications.
23. Therefore the main issue to be determined in this case is whether the Court has jurisdiction to rescind the 1st October 2007 partition order.
24. As set out earlier counsel for the applicant maintained that when determining this issue it should be done within the context of Niuean custom. In making this

submission Counsel accepted there is no specific section which gives the Court jurisdiction to rescind a partition order but relies on s.47 Niue Amendment Act 1968 which gives the Court general jurisdiction to hear and determine applications as to ownership and possession.

25. Counsel also maintained that following a partition order the land remains communal land and the magafaoa still has overall rights to it.
26. In response Counsel for the respondent acknowledged Niuean custom is a guide to title determination but custom cannot create jurisdiction where that does not exist.
27. Further she responded that the Act does not provide for removal of a person from the magafaoa and that the tenor of the legislation relating to partitions enables the magafaoa to separate land amongst the magafaoa in the event of dispute.
28. First and foremost I want to deal with the jurisdiction relating to partition orders and the nature and effect of such orders when they are made by the court.
29. Section 47 Niue amendment act (No. 2) 1968 refers to the general jurisdiction of the land Court as follows:
 - (i) In addition 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 ownership, permission, occupation on utilisation of Niuean land on to any right, title, estate or interest in Niuean land.
30. The Land Act 1969 at section 34 sets out that the Court has the exclusive jurisdiction to partition Niuean land if it considers the partition is not inexpedient in the public interest, interests of the magafaoa or other persons interested.
31. Also at s.36 the Act provides that the court may exercise its discretion to partition where the leveki magafaoa wishes to allocate a portion of land to a member of the magafaoa or the magafaoa has become unduly large, or where irreconcilable family disputes occur and the partition is considered just and equitable.

32. Once a partition order is granted by the Court the effect of that order is to essentially determine a new title from the parent block. So by the granting of the partition order separate allotments of the land are created and in most cases that I have dealt with new or additional leveki magafaoa from those of the parent block are appointed to administer the land. In some cases as well the parties have asked that the common ancestor also be altered to align more closely with the magafaoa members who will use the land and who have traditionally used the land.
33. Therefore, although the title created by a partition order remains magafaoa land, the common ancestor can change and so to can the leveki magafaoa. In essence the order creates a new title and new rights and obligations can arise from it. For example, in relation to the title order created by the partition order, the leveki magafaoa can grant occupation rights or leases in respect to this new title.
34. In this case, the applicant maintains that the respondent has now offended the magafaoa and breached Niuean custom. Therefore the title created and the leveki magafaoa appointed in favour of respondent should be cancelled in terms of s.47 Niue Amendment (No.2) Act 1968.
35. I do not accept this submission or interpretation of the law.
36. S.47 Niue Amendment (No.2) Act 1968 is a general provision which is utilised when there are no specific provisions set out in the Land Act 1969.
37. The Land Act 1969 has a separate section dealing specifically with partition orders. The tenor of these sections is to create a new title order for members of the magafaoa connected to the land and therefore to alter the former parent title and determine a common ancestor and appoint leveki magafaoa for this new title.
38. Accordingly, in my view similar principles apply as to the determination of title in that a common ancestor is determined for the newly partitioned area and leveki magafaoa are appointed.
39. Further, there is no provision to cancel or revoke the newly partitioned title. In fact s.52 Niue Amendment (No.2) Act 1968 reinforces that all orders of the court affecting title shall bind all persons having any interest in that land. The only mechanism available to annul orders of the Court as suggested in this application

is contained in s.54 Niue amendment Act (No.2) 1968 where orders can be annulled if obtained by fraud. This is not the case here.

40. Therefore in summary, a new title was created on 1st October 2007 appointing leveki magafaoa to administer the land. This was done whilst the relationship between the applicant and the respondent was harmonious and as a result the respondent has built and developed a restaurant business upon the land which is functioning today.
41. The respondent has since that time filed applications with the Court challenging the applicant and his immediate family. This type of action is not uncommon in Niuean custom. Often close family members challenge each other for rights to land relating to the determination of title, occupation of land or leveki magafaoa. There challenges may involve parents against children, siblings against each other or cousin against cousin. So the present dispute in terms of family relationships is not uncommon.
42. However in this case the applicant is essentially saying the dispute between the applicant's family and the respondent's family necessitate the removal of the respondent's family from magafaoa land and the cancellation of the title created by the partition order.
43. The Act does not provide for such actions and s.52 Niue amendment (No.2) Act 1968 reinforces that all orders of the Court affecting title shall bind all persons with any interests in that land.
44. Also s.36 provides that if the magafaoa are in dispute then the allocation of land by partition may be the manner to resolve that dispute. In other words the manner to resolve a dispute is to separate the magafaoa by partition not to strip a magafaoa member of his or her entitlement to land.
45. In my view to give credibility to the applicants argument would undermine the underlying basis of Niuean title and custom. That is to create some form of stability of title to enable Niuean's to improve and utilise land to which they are entitled by blood. Furthermore, it would also be inequitable and unconscionable to the respondents because based on the granting of the partition they have expended time and capital in developing their present business.

46. Also even where relationships between members of the magafaoa have broken down those members are still linked by blood to the land and that link cannot be broken. To do so would be contrary to Niuean custom.

47. Therefore having regard to the above discussion. I dismiss the application to rescind the partition order of the 1st October 2007.

48. As the other two applications before the Court are essentially linked to the application to rescind the partition order and are designed to remove members of a magafaoa from land to which they are entitled by blood, they also cannot succeed and are accordingly dismissed.

A copy of this decision is to go to all parties.

Dated at Wellington the 16th day of December 2014



A handwritten signature in black ink, appearing to read "W W Isaac", written over a horizontal line.

W W Isaac

Justice of the High Court of Niue

Land Minute Book 20 No: 2