

**IN THE HIGH COURT
OF NIUE (Land Division)**

Application No. 10662 & 10567

IN THE MATTER OF

Pt Fakape, Avatele
District, Rehearing,
Determination of Title

BETWEEN

Kenneth Dawson
Applicant

AND

Manilla Nosa
Respondent

Hearing: 21 and 22 March 2013

Judgment: 9 December 2013

DECISION OF JUDGE W W ISAAC

Introduction

[1] Two applications were filed by the applicant, Kenneth Dawson, on 23 March 2012 with regard to the land known as Fakape as follows:

- i) An application in terms of s 10 of the Land Ordinance Act 1969 and Rule 12 of the Niue Land Court Rules 1969, seeking determination of title of the land known as Fakape, and the common ancestor as Hegotule;
- ii) An application in terms of s 14 of the Land Ordinance Act 1969 seeking the appointment of Mary Talaiti as leveki magafaoa of the land.

[2] The hearing was held on 21 and 22 March 2013. At the hearing an agreement was reached between Ms Lavaligi Mokalei and Mr Dawson, the result being that Mr Dawson's boundary would be moved to the dripline of the kolivao tree as this was clearly within the boundary of his claim.

[3] Ms Amanda Heka, as representative for Mr Manilla Nosa, disagreed with this and after hearing from all parties, I reserved my decision. As this was the first the Court had heard of Mr Nosa and his claim to have interests in this land I gave him one month to file any further submissions, and Mr Dawson one month to respond.

[4] Submissions were received on 22 April 2013 from Mr Nosa and on 27 June from Mr Dawson.

Background

[5] This is not the first application filed by Mr Dawson with regard to Fakape. On 3 June 2005 Mr Dawson filed an application for a rehearing of a decision issued by Judge Hingston on 2 June 2005.¹

[6] On 2 June 2005 at Land Minute Book 13 Folio 72 – 74 Judge Hingston considered an application filed by Ms Mokalei seeking determination of title and appointment of a leveki for Fulalasea and Fakape.

[7] After hearing evidence and submissions from interested parties, including Mr Dawson, Ms Mokalei, Mr Aokuso Pavihi and Mr Pita Halo, Judge Hingston found that Ms Mokalei had not proven to his satisfaction that the land belonged to the ancestor Taole. Judge Hingston preferred the evidence of Mr Pavihi who he found to be more knowledgeable on these matters stating "he was not contradicted and he supported some area going to the Dawson family".

¹ Mr Dawson's application mistakenly dates the order as 3 May 2005 however, Court staff confirm that there has only been the application heard on 2 June 2005 and that is the only decision that he could be requesting a rehearing of.

[8] Judge Hingston agreed with the evidence provided by Mr Pavihi, who submitted that the ancestor for the back part of the land should be Hakeagaiki, and Taole is the common ancestor on the front area of land. It was suggested Ms Mokalei and Mr Pavihi be appointed leveki to the back area of land, and Ms Mokalei be appointed to the smaller front area.²

[9] Judge Hingston concluded that:

...the plan should be amended by extracting about 200 sq meters from the Avatele. Vaiea main road into block. As well as line meter from the top left corner of block directly to boundary should be divided. The balance of block I believe should go to the magafaoa Hakeagaiki ancestor.

[10] Judge Hingston also noted that there would be “no action at all on Dawson area”.

[11] As stated Mr Dawson filed an application for a rehearing dated 3 June 2005 which according to the Court record has not been determined.

[12] However, Mr Dawson has since filed the present applications, which essentially overtake the prior applications and which were the subject of the hearing on 21 and 22 March 2013.

Hearing of 21 and 21 March 2013

[13] At the hearing Mr Dawson stated that the boundaries of this land had not previously been agreed to however, there had now been discussion between all three properties surrounding the land at issue.

[14] Mr Pavihi gave evidence, stating that Ms Mokalei was aware of the tree dispute and she was asked to give a small area to Mr Dawson. If agreement could not be reached then the matter would be brought before the Court.

² This order is quite unclear and says “The small area beside the applicant [Ms Mokalei] Section Magafaoa Taole the Leveki magafaoa for that area be the applicant [Ms Mokalei] – Leveki for the large area to be the applicant and Aokuso Pavihi”.

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[15] Ms Mokalei and Mr Dawson both spoke of the importance of the kolivao tree located on the land. People had slept beneath it, used it for shade, and grown and stored taro under it. It was noted that there are no houses or burial sites on this land.

[16] Also, on 21 March 2013 it is important to note that Ms Mokalei and Mr Dawson agreed to moving the boundary on Provisional Plan 10567 so that the tree to the dripline was included in the Dawson boundary.

[17] Mr Dawson submitted that the common ancestor is his great grandfather, Hegotule. Tosene is the son of Hegotule, and he legally adopted Fasene, who is Mr Dawson's grandfather, his father's father. Mr Dawson's father worked this land while Tosene was still alive, and in turn Mr Dawson worked this land with his father.


[18] In 1948 Mr Dawson left Niue however, he returned regularly, and he states that there were no objections to his working the land. He would clear the roadsides, or give permission to Pokihega and Vaitolo Siakimotu to clear the land.

[19] Mr Nosa submitted that he does not dispute Mr Dawson's connection to this land, he is merely asserting his own connection, through his grandmother Tapuakilana who worked this land. His father Masiniua Nosa also worked this land with Tapuakilana, and they were involved with clearing the roadsides.

[20] Mr Nosa only seeks the land by the roadside. He disagrees with the outcomes of the discussions held between the families and says he has not been consulted by Mr Dawson in relation to this application.

Submissions of Mr Manilla Nosa

[21] Submissions from Mr Manilla Nosa were received by the Court on 22 April 2013. The respondent opposes the application but only to the extent that it affects the part of the land where his family used to work under the authority of his grandmother, Tapuaki Tahola. It is submitted that this is an area of land near the main road, and is identified as 'Tapuaki' on the Provisional Plan 10567.



[22] Mr Nosa submits that the applicant has claimed the land without any consultation with his family and claims this is both insulting and offensive as it makes them look insignificant and implies they have no link to the land.

[23] Mr Nosa states that he has a valid interest in the land because he is a direct descendant of Hegotule through Hakeagaiki and further states that Hakeagaiki was the brother of Mr Dawson's adopted grandfather Tosene.

[24] The respondent submits that his family has worked this land since he was a child, clearing the roadside from the kolivao tree and up to the Pago Bush Track, and planting crops such as taro, bananas and kumara, although this land was rocky and it was difficult to grow crops. He submits that their last plantation was in 1972, after which they left the land to fallow.

[25] Despite his family's absence from the land after this time, Mr Nosa submits they have not forfeited their right to the land. Affidavit evidence from members of the community who witnessed his family working on this land is appended to these submissions, and Mr Nosa contends that the same cannot be said for Mr Dawson.

[26] The respondent suggests that Mr Dawson's lengthy absence from Niue renders him incapable of clearly recalling the landmarks and boundary markers of the land.

[27] In conclusion, Mr Nosa requests that his grandmother Tapuaki Tahola be declared the common ancestor, and he be appointed Leveki Magafaoa of the land.

Response from Mr Dawson

[28] Mr Dawson disputes Mr Nosa's claim to the land and queries why he has not come to the Court sooner to state his interest in the land considering this application has been before the Court since 2005 and Mr Nosa lives in Niue and should have known about the applications concerning this land and presented at Court setting out his interest.

[29] Mr Dawson suggests that the respondent's lack of knowledge of certain landmarks does little to substantiate his claim to the land, particularly in light of his permanent residency and his claims that he has worked the land since childhood.

[30] The applicant further disagrees that the respondent and his family have worked the land during his absence. The applicant has returned to Niue a number of times since 1972 and states that at no time has permission been sought by others to work the land. Any claims of occupation are also rejected by the applicant.

[31] The applicant submits that he is the oldest surviving descendant of Hegotule Tosene, and his knowledge of the land was passed down to him from his father, who had the knowledge passed to him from his father, Hegotule.

[32] Mr Dawson submits that the boundaries of the land in dispute included the dripline of the kolivao tree, extending beyond the landmark rock to the bush track. He states that he has compromised on all of his boundaries in an attempt to maintain peace with his neighbours.

[33] The applicant states that he is not disputing the respondent's heritage, only his claim to this land. He asks that the respondent respect his claim to the land and in conclusion requests that the Court award title in his favour.

Law

[34] The present application has been filed pursuant to s 10 of the Niue Land Act 1969 which provides:

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 thereby.



(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 to further claims for inclusion will be admitted, except by the leave of the Court and upon such terms as the Court determines.

[35] A common ancestor must also be determined as per s 12 of the Niue Land Act 1969 which states:

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.

[36] Section 14 of the Niue Land Act 1969 was also cited, seeking appointment of a Leveki. This provision provides:

14. Appointment of Leveki Mangafaoa – (1) When the ownership of any land has been determined any member of that Mangafaoa who has 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 gained 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, through having attained the age of 21 years, constitute less than a majority of the Mangafaoa who have attained such age the court may, in its discretion, 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 in its discretion expressly limit his powers in such manner as it sees fit.

Discussion

[37] As set out above, the applications before the Court have had a long history which has led to the latest applications now to be determined by the Court.

[38] During this protracted litigation from 2005 to 2013 three main players have been involved, namely Ms Mokalei, Mr Dawson and Mr Pavihi.

[39] Finally, at the Court sitting on 21 March 2013 the main parties to the application agreed on the title boundaries, the common ancestor and the leveki to the land.

[40] However, after these agreements were made Mr Nosa has decided to express his interest in the land by his direct descent to Hegotule and his family's work on the land.

[41] While I do not dispute Mr Nosa's genealogy I do find it strange that he has taken no active steps in this application for the eight years it has been before the Court.

[42] Mr Nosa lives in Niue and should have known about this application but chose not to be involved.

[43] When he did become involved and was subject to examination his knowledge of the land was sketchy and certainly not the knowledge of a person with the type of involvement in the block that he maintained he had.

[44] In contrast the evidence of Ms Mokalei, Mr Dawson and Mr Pavihi has remained essentially the same. Although I note that Ms Mokalei has some sympathy for the Nosa position.



[45] Notwithstanding, as I have said, the three main players who have been consistent throughout and have provided the majority of evidence to this Court have agreed to a situation which would work with their families on the ground.

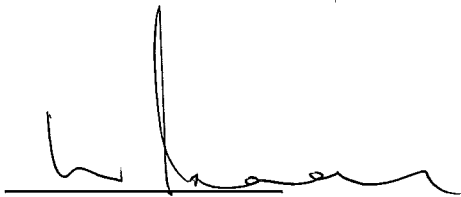
[46] I consider this important and that this Court should look to practical solutions to assist with the occupation and utilisation of land.

[47] Accordingly I make the following orders:

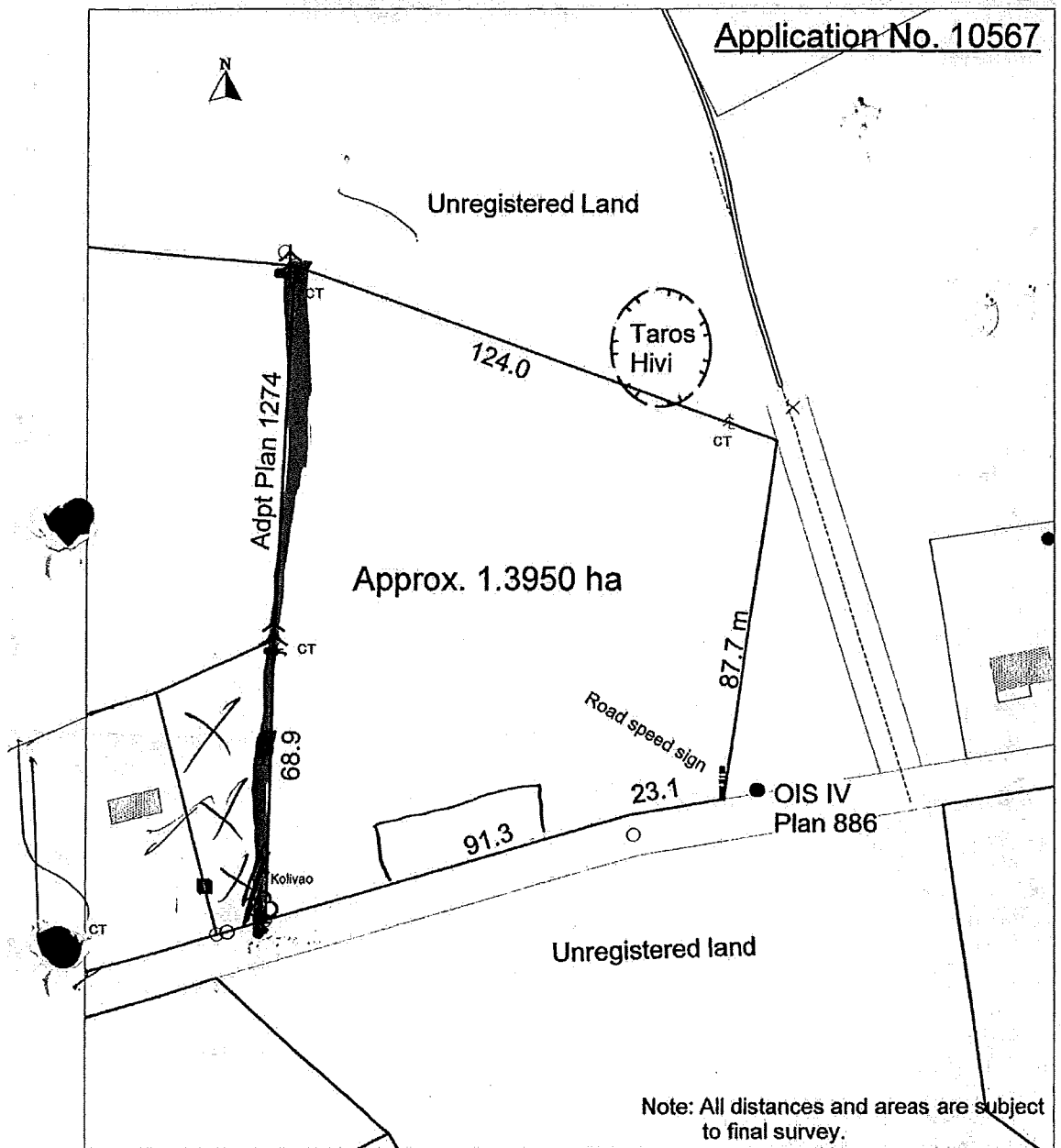
- i) An order determining title for Part Fakape, containing approximately 1.3950ha and including the kolivao tree and its dripline, as illustrated on the appended Provisional Plan 10567 (as per s 10 Niue Land Act 1969);
- ii) An order declaring the common ancestor to be Hegotule (s 12 Niue Land Act 1969);
- iii) An order appointing Mary Talaiti as Leveki Magafaoa for Part Fakape (s 14 Niue Land Act 1969).

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

Dated at Wellington this 9 day of December 2013.

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

W W Isaac
JUDGE



Land Name: Pt. Fakape
BLK II Avatele SD

Ref; Prov Bk 4 p. 157
 Plan 142, 886, 1274

I hereby agreed to the boundaries shown on this plan.

Snr Surveyor *[Signature]* 15/11/12

K. Dawson;

Provisional Plan 10567

*21/3 - Boundaries agreed between
 Tikalei & Dawson - Move boundary at the bottom
 to ensure the Kotivao tree is clearly within Dawson claim
 suggested boundary be the declivity of the tree. After agreement
 Amanda Heke disagreed.*

[Handwritten signature]