

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

**App Nos. 10542/45/6
10543/45/6
10560/46/6
10561/46/6**

IN THE MATTER of sections 12 and 14 of the
Land Act 1969

AND

IN THE MATTER of the land known as Part
Laloai, Avatele

BETWEEN NIUMANI MITINI
TULEHEMOANA
First Applicant

KETILIGI SANITELI
FERETI
Second Applicant

Hearing: 21 March 2013, Land Minute 17 Folio 283-296.

Judgment: 15 January 2014

DECISION OF JUDGE W W ISAAC

Introduction

[1] This decision deals with two applications for determination of title to Part Laloai, Avatele (the land).

[2] The first applicant is Niumani Tulehemoana. His application, dated 13 February 2012, seeks orders determining the common ancestor of the land, appointing a leveki mangafaoa, and an injunction preventing any further work on the land. His application relates to the land as set out on provisional plan 10542, comprising 7.3500 ha.

[3] The second applicant is Ketiligi Fereti. Her application, dated 19 March 2012, relates to the land as set out on provisional plan 10560, comprising 4968 m², which forms part of the land subject to the first applicant's application. The second applicant, on behalf of Vili Nosa, seeks orders determining the common ancestor and appointing a leveki mangafaoa for that portion of the land.

[4] A hearing took place on 22 March 2012. The first applicant was not present and the proceedings were adjourned until the next sitting in March 2013. The Court made an order that prior to the next hearing, when it was clear that both parties were to be present and ready to proceed with all their evidence, the parties should hold a meeting chaired by an officer of the Court to consider the applications and ensure the boundaries of the land being considered were certain.¹

[5] A meeting was held on 14 March 2013, chaired by Hubert M Kalauni, a senior surveyor. The purpose of the meeting, as stated by Mr Kalauni, was to identify the parties' views in relation to the land, and discuss the common ancestor nominated by the second applicant. The meeting ended without agreement being reached, and both parties electing to proceed to a Court hearing. A land investigation was set for Monday 18 March 2013.

[6] A hearing was held on 21 March 2013, and the decision reserved.²

¹ Land Minute 17 Folio 116-117.

² Land Minute 17 Folio 283-296.

First applicant's submissions

[7] The first applicant filed an application, dated 13 February 2012, seeking:

- 1) An order determining the title of the land Laloai according to the customs and usages of the Niuean people and determination that the common ancestor Hegotule has not yet been so determined;
- 2) An order appointing Poimamao Vakanofiti as leveki magafaoa of Laloai, an untitled block containing 10,000 ha at Avatele, as approved by the family to be the leveki upon the grounds that he is family and is over 21 years of age; and
- 3) An injunction "preventing any further work/title the land at Laloai, Avatele" upon the grounds that: it is the first applicant's family land; he and his parents worked there continuously up until he left the island; the other claimants did not work the land until he left the island; that he intends to take title to the land in due course; and that the other claimants do not have a right to the land.

[8] In an affidavit dated March 2013, the first applicant states that he resides permanently in Auckland, but returns regularly to Niue and intends to move back there permanently in the near future.

[9] The first applicant submits that his claim to the land is derived from Hegotule, his mother Pativai's great-grandfather. He filed a copy of his mother's genealogy showing the generations Hegotule to Tukimata to Haelemata to Pativai, by whom he and his biological mother were adopted. He also filed copies of the adoption orders, and a copy of a genealogy showing that he was adopted "within the blood".

[10] The first applicant states that he was raised by his adoptive parents from when he was a baby and this was formalised when he was nine years old. He states that the lands belonging to Pativai's grandfather, Tukimata Hegotule, were handed over in their entirety to Pativai. These lands were: Manua, Anafonua, Liolau and other lands, Laloai, Uluvehi, Malata, Tumuuli, Fakape, Panivaka and Talamaitoga.

[11] The first applicant states that his mother explained to him that Anafonua, Manua, Talamaitoga and Malata were given or gifted to the family of Sionepaea and Hakeagaiki, but Laloai was not part of the land gifted.

[12] The first applicant also filed a copy of the provisional plan 10542, dated 19 March 2013, relating to Laloai depicting the boundaries as he recalls they were shown to him by his mother, Pativai. He accompanied his parents to their family plantations, and “distinctly remembered one of these lands that we worked on was Laloai”:

Laloai is close to Talamaitoga and on the northern side is Foua. As alluded to previously, Talamaitoga is also my great-grandfather Hegotule’s land but was gifted to Sionepaea who was a foreigner to the land. When I was about 10 or 11, Pativai, my mother took me to Laloai and showed me the boundaries of this land ... Laloai has been in my mother’s family for many generations and I intend to claim what is rightfully ours for the use of the rest of my wider magafaoa and the next generation.

[13] The first applicant states that “we worked at Laloai until I left for New Zealand in 1974”, but also that “because I was still young at the time, my parents told me to work at our other land Fākape which is much closer to the road”. He worked there until he was 15 and then went back to work on Laloai. It was about that time that one of Hakeagaiki’s sons, Makatatō and Makatatō’s niece, Agimata Nosā, had been working on Laloai without Pativai’s permission. The first applicant states that Pativai confronted them and warned them not to work there again. He states that after that they didn’t work there again until he left for New Zealand in 1974 when he was almost 18.

[14] The first applicant states that he returned to Niue in 1979 and noticed that people were still working on Laloai and had planted coconuts and pandanus there. Upon returning to New Zealand, he found out that “Agmiata Nosā continued to work at Laloai along with her mother, Hanatau, Ketiligi and other relations. Even Aukuso [sic] Pavihi worked there at that time”.

[15] The first applicant states that it is well known in Niue that as soon as people plant coconuts on a piece of land it is with the intention to lay claim to the land. He met up with Agimata Nosā in New Zealand in 1979 and asked her why she continued to work at Laloai when she had been asked not to by Pativai, and also why she had planted coconuts and pandanus on the land, given it is not her land. The first applicant states that he was

assured by Agimata Nosā that “she only planted the trees for shade when she worked there but she knew the land belonged to Pativai”.

[16] The first applicant moved back to Niue to care for his father, Mitini, following Pativai’s death in 1982. His father died in 1983, and the first applicant returned to New Zealand in early 1984. He did not return to Niue again until 1994.

[17] In 1994, the first applicant noticed that the number of people working on Laloai had increased. He states that he did not recall seeing any of these people working on the land when he and his parents worked there. He spoke with Hanatau about it, and “her response was a Bible verse. I knew then that she intended to lay claim [t]o Laloai”. The first applicant states that he told her he was happy for her and her children to work there, but during her lifetime only.

[18] In 2005 the first applicant discussed Laloai with his biological father, Tulemoana Kalauta, who is Hanatau’s son and Agimata Nosā’s brother. The first applicant states that he asked Hanatau how she came to work on the land. She stated that she thought the land belonged to her father, Hakeagaiki. The first applicant states that he recited Pativai’s genealogy as well as that of Hanatau, pointing out that her father, Hakeagaiki, and his father, Sionepaea, were “foreigners to the land and that they should go and work on their own land up in Hakupu”. He also states that “[i]t is common knowledge that when a female member of the family marries she forfeits rights to her family land but follows her husband to work on his family land”.

[19] A letter written by Tulemoana Kalauta, dated 6 March 2013, was filed in support of the first applicant’s claim. The letter states:

I am the only male child and the eldest of a family of four children of Hanatau Hakeagaiki and Poimamao Kalauta. My three siblings are Agimata Nosa, Epenesa Vakanofiti and Kuilina Kalauta.

As the eldest and only son it is also customary that I am the spokesperson on my mother Hanatau Hakeagaiki’s behalf. I also have two other siblings from my mother’s second marriage. They are Ketiola Havilitama (deceased) and Ketiligi Fereti.



I am writing this letter as a foundation letter in regard to the land Laloai as to its ownership and history in which Niumani Misini Tulehemoana is in dispute with Aokuso Pavihi, Ketiligi Fereti and Vili Nosa.

[20] The letter states that Tulemoana Kalauta knows the land well, and:

Neither my parents Hanatau and Poimamao, nor I ever once worked on this land, nor was I ever told that my mother Hanatau had anything to do with Laloai; neither the Pavihi nor the Nosa families. My grandparents ... Kalauta and Mokaline maintained that the land Laloai belonged to Pasivai. Laloai was Pasivai's heritage from her ancestor Tukimata Hegotule.

As a young man growing up I did not see my mother Hanatau and her siblings or once heard of them working in [L]aloai. Hanatau and her siblings should not be working on this land as it is not theirs. That land belonged to Pasivai and still is today.

[21] Tulemoana Kalauta states that their ancestor Hakeagaiki is not the owner of Laloai. Their family's land, Talamaitoga, is adjacent to Laloai. Talamaitoga, along with other land blocks, were given to their ancestors by Hegotule for living on and for planting crops. Although Tulemoana Kalauta did not work on Laloai before he left for New Zealand at age 20, he worked there with his mother, Hanatau, and the second applicant on his return to Niue about 9-10 years ago. However, he states that he always maintained that the land did not and had never belonged to his family:

Around 2004 Niumani, my mother Hanatau and I had some discussion in regard to Laloai. My mother and I both acknowledged Niumani's claim to the land and [told] him not to worry as we knew whom Laloai belonged to. (The land was Pasivai's and so would pass on to Niumani).

Niumani's words to us that day were for us to "work on the land as long as we acknowledged the land is his from Pasivai" he did not have a problem with us working in Laloai. Of my two siblings Agimata Nosa and Ketiligi Fereti I strongly suggest to move away from Laloai. Let Niumani have what is his land for him and his children.

I cannot speak for Aokuso Pavihi but being from one family he too should step aside. Pavihi, Aokuso's grandfather is my mother's brother... I cannot see the difference in his claim as to my sisters as we all share one common ancestor, Hakeagaiki. ... My sisters are married and as such should be taken care of from their own husbands family, as is customary and laws of the land and country.

I strongly suggest that Niumani be left his land and full title to Laloai ... Niumani allowed us to use his land as such we should show due respect to Niumani ... I do not hold back in saying that Niumani should have his land back.

[22] In summary, the first applicant submits that he is seeking orders determining title to Laloai; declaring that Hegotule is the common ancestor for the land; and appointing himself and Poimamao Vakanofiti, who resides permanently in Niue, as joint leveki mangafaoa of the land. He states that although he currently lives in New Zealand, he is planning to migrate back to Niue in the future. Both he and Poimamao are aware of the duties of leveki magafaoa and are suitable appointments for the role.

[23] Along with his affidavit, the first applicant filed a chart showing his descent from Tapaki, stating that "Tukimata Hegotule [son of Hegotule] is my ancestor. It is clearly shown from genealogy and from him I lay claim to Laloai". He also filed a list of names and signatures of people consenting to Hegotule as the common ancestor for Laloai and consenting to the appointment of himself and Poimamao Vakanofiti as joint leveki magafaoa and trustees of the land.

Second applicant's submissions

[24] The second applicant filed an application dated 19 March 2012 for determination of title to Part Laloai, a determination of the leveki magafaoa of the land, to secure the land being used by other family members without consultation, and to secure coconut plants currently on the land so that they remain in Hanatautama (also referred to as Agimata) Nosa's family.

[25] The second applicant states that the land is unregistered and was surveyed by the survey team on 6 February 2012. Along with her application is provisional plan No 10560 outlining the part of Laloai to which her application for title applies; an area of approximately 2968 m². The plan shows that on the area in question, there is a "vanilla farm (Kalauta)", "coconut plot (Hanatau Saligi)" and "manunu (Keti)". This land falls within the land subject to the application by the first applicant.

[26] The second applicant states that the common ancestor for this part of the land is Hanatau Hakeagaiki Saniteli (deceased), her mother. This particular part of the land was

worked on by Hanatau and her brother Makatato, but other parts of the land were worked on by her other brothers, Tagotago and Pavihi. Hanatautama (also referred to as Agimata Nosa) and her husband, Hapaki Nosa, worked on the land until they left for New Zealand in 1972. The second applicant states that although they were living in New Zealand, Hanatautama and Hapaki's children knew that their parents planted the coconut trees on the land for their future use. The second applicant also states that other family members know and are aware that this piece of land and the coconut trees belong to Hanatautama and her family, and the family always visit the land when they are in Niue.

[27] The second applicant continues that unfortunately Kalauta Vakanofiti, son of the second applicant's sister, Epenesa Vakanofiti, planted vanilla plants on the land without consultation with Hanatautama and her family. Hanatautama expressed her disappointment about this to the second applicant and Epenesa Vakanofiti. Family members have agreed to have the land surveyed and have agreed to this application for determination of title. The members of the family of residing in Niue, as well as Hanatautama and her children, have also agreed to the second applicant being appointed as leveki for this part of the land.

Affidavit of Aokuso Sasalu Foufou Pavihi, dated 20 March 2013

[28] An affidavit by Aokuso Pavihi, leveki magafaoa of the Pavihi family, was filed in support of the second applicant's claim. Aokuso Pavihi states that Dr Vili Nosa, grandson of Hanatau, Hakeagaiki's daughter, and the second applicant, Hanatau's daughter, approached him as leveki magafaoa for the descendants of Hakeagaiki to discuss Vili Nosa's wish to title a small portion of Laloai for a house. Vili Nosa had already spoken with his mother, Agimata Nosa (also referred to as Hanatautama Nosa), and requested title only to the piece of land his mother and father worked on and planted coconut trees. At that time the land was being used by Kalauta Vakanofiti, another of Hanatau's grandsons, for a vanilla plantation, although he does not have the title and he did not consult with Aokuso Pavihi as leveki magafaoa about this plantation.

[29] Aokuso Pavihi states that although Vili Nosa and his mother and family live permanently in New Zealand, every time Vili Nosa is in Niue, he calls on Aokuso Pavihi to discuss family matters.

[30] Aokuso Pavihi states that he agreed to Vili Nosa's request to build a house, and had seen Dr Nosa's mother and father working on that particular piece of land before the family left for New Zealand. It was agreed that the second applicant would file an application on his behalf.

[31] Aokuso Pavihi continues:

On the day of the investigation, I was present, plus Mrs. FERETI and others in the family. I was shocked and surprised when Mr. TULEMOANA (who has just arrived from NZ) in his abusive manner told Surveyors to stop the investigation. He was told by staff of Justice that he had no right to stop the investigation, however, if he wanted to object he can file his own application, and to appear in Court to voice his objections.

[32] Aokuso Pavihi states that the first applicant was legally adopted by Pativai, a descendant of Hegotule. He states that he explained to the first applicant that "the Court is the place for him to raise his objection" and told him that he would have to return in March for the Court hearing. He did not come to the Court hearing, and the Court made an order to adjourn the case until the next sitting in 2013, and an order that the families meet before then to discuss the issue. Before the first applicant left for New Zealand, he submitted an application for an injunction and an application for determination of title to 10,000 hectares at Laloai.

[33] Aokuso Pavihi states that he observed some friction between Hanatau's children, Agimata Nosa and Epenesa Vakanofiti, over a small piece of Laloai that Agimata Nosa and her husband had worked on. The tension arose because Epenesa Vakanofiti's son, Kalauta Vakanofiti, had gone ahead and planted vanilla on the land. Aokuso Pavihi states that as a result of this Epenesa Vakanofiti contacted the first applicant in New Zealand.

[34] The first applicant's biological father is Tulemoana Kalauta, but as the first applicant was legally adopted by Pativai, he cannot claim any right to land belonging to his biological father's family. Aokuso Pavihi states that the first applicant's biological mother, Vaimalili, does not have any knowledge of Tulemoana's views, but says that "they did not work on Laloai".

[35] Aokuso Pavihi describes how the first applicant arrived in Niue on 9 March 2013 and was advised about the family meeting to be held on 14 March. He initially refused to

attend, but agreed to attend after discussion with Aokuso Pavihi. Aokuso Pavihi states that at the meeting the first applicant did not give any reason for his applications; he said that the land belongs to his family, and that Aokuso and the others “have no say over the land”. The first applicant also stated that it was his family who gave some of the land to the families of Aokuso, Vili and the second applicant to live and work on, but there is no written evidence from Pativai to support this claim.

[36] Aokuso Pavihi states that all the parties involved descend from the common ancestor Hegotule, but there is no evidence on record to show that Pativai or her family worked on the land in question. The tupuna allocated shares to each child. Pativai had shares in Manua and some shares in Liolau. This is shown by the certified court document in which Pativai appointed Mathina Gary Cooper as leveki magafaoa of Manua. A copy of this has been filed with the Court.

[37] The statement given by Pativai in Justice, Lands and Survey on Tuesday 3 February 1981, regarding “Section 25, block I, Avatele District (Part Manua) Plan 397, N7/4” states the “grounds of the claim” are:

1. To determine the title.
2. To appoint Mathinna Fisimonomono Rex Cooper to be Leveki Magafaoa.
3. It is my wishing long time ago to adopt Mathinna as my daughter so she can take over my share which is part Manua. Because Mr Robert Rex did not accept her to be my adoption daughter I do not change my mind to offer Mathinna the said land. Now I am very old and I like this matter to be cleared in the Land Court of Niue so I officially appoint her as Leveki Magafaoa of the said land.

I claim part Manua from our great great grandfather named Hegotule. It is a big family but part concern is my grandfather's share named Tukimata. He married Hakara (Maukean woman). Born one only child named Haelemata who is my mother. Haelemata married Tamu and I am the only child. I have no natural child. Therefore I appoint Mathinna Fisimonomono Rex Cooper as Leveki Magafaoa of the said land. I do not like anyone of the family to disturb Mathinna's right forever and ever.

[38] The statement has a family tree showing Hegotule's children Tukumata and Manapule (Sakala). Manapule married Sionepaea, from whom Mathinna descends. The

statement sets out the location of Part Manua and the “proof” stated is that the graves of Pativai’s grandfather and parents are on this part of Manua, and there is also a frangipani tree known as Tiale Mauke which was brought by her grandparents from Mauke Island.

[39] Aokuso Pavihi states that Pativai also had a share in Liolau, as seen on the plan of the Liolau school grounds, filed in support. Aokuso Pavihi states that there is also other family land, including Panivaka and Pu, on which Pativai and her family worked.

[40] Aokuso Pavihi states that Laloai is about 450 metres from where he lives, and there are now plantations on the land which belong to him. He states that other descendants of Hakeagaiki have worked continually on the land for many years. Laloai is Hakeagaiki’s land, and this is proved by his will which shows that Laloai was Hakeagaiki’s share in the land and was for any member of his family to work on. He also states that Hakeagaiki’s ownership is proved by “other written evidence”, including the minutes of an investigation “carried out by the former Secretary to Justice Mr. Solomona M Kalauni with the family”. The date on these minutes is unclear. It could read November 1954 or 1964. The minutes state:

Laloai Makatea Pits (2)

(Avatele)

Present: Solomona M. Kalauni – Registrar

Haropa – constable

Taue – councillor

Pavihi – Mahola and many others

Registrar: will now deal with Laloai Makatea Pits (2)

Are there any claimant?

Note: Pavihi claims on behalf of his family

Pavihi states: the land in question is the property of Hakeagaiki – he was the true source of the land. The said Hakeagaiki bore 8 issues, all have equal rights as far as ownership is concerned. At present, I control land for the whole & since controlling it, nothing has happened nor anyone claim interest to the title of Laloai. The descendants of Hakeagaiki were recognised as rightful owners in accordance with [two unreadable words], these present can confirm this I’m sure – nothing more to say

Note: there are no other claimant – all agreed that Pavihi and family owns land in question and having undisputed control of the same.

Registrar: since there are no objection from these present, I am satisfied that Pavihi and family own land concern and [unreadable word] the two put areas (see list of name attached).

[41] Aokuso Pavihi states that Hakeagaiki's descendants strongly oppose the orders sought by the first applicant.

[42] A number of genealogy charts were also filed in support of the second applicant's claims. The first shows the lineage from Hegotule and Hanatau Gogo Motuhelagi through Sakala Manapule Hegotule and Sionepaea Kinimotu Poitule down through the generations to Aokuso Pavihi. The next chart is titled "Direct Descendants of Hegotule Tapakitoa". This chart shows that Pativai Tamu is a direct descendant of Hegotule Tapakitoa and Hanatau Gogo Motuhelagi through Tukimata Hegotule and Haelemata Tukimata. The third chart shows that the first applicant is a direct descendant of Hegotule Hegohegotaue and Hanatau Motuhelagi. This chart notes that Hegotule was the common ancestor nominated by the first applicant at the meeting on 14 March 2013. The chart shows that Aokuso, Vili, and the second applicant also descend from Hegotule Hegohegotaue through his child Manapule (Sakala Manapule Hegotule, who married Sionepaea Kinimotu Poitule). The final chart in this submission shows the "Direct Descendants of Hanatau Motuhelagi". Hanatau Hakeagaiki is highlighted on this chart.

The hearing, 21 March 2013

[43] A hearing was held on 21 March 2013 at which the two applications in relation to Part Laloai were discussed. A plan of the land was produced and the parties marked relevant areas on it for the Court's reference.

[44] Maru Talagi appeared for the first applicant. He stated that the application for an injunction was withdrawn on the basis that the first applicant would proceed with the application for determination of title.

[45] Aokuso Pavihi appeared for the second applicant and Vili Nosa.

[46] Aokuso Pavihi referred to the meeting of 13 March 2013, stating that no resolution was reached. He re-iterated that the second applicant, on behalf of Vili Nosa, only seeks title a small piece of the land for a house site and a declaration that Hanatau is the common ancestor of that portion of the land. In cross-examination by Maru Talagi, Aokuso Pavihi stated that while the first applicant is a descendant of Hegotule, and biological grandson of Hanatau, he was legally adopted by Pativai and she is the source of any land rights he has. He also stated that Hakeagaiki's will left everything to his children, including Laloai, and although it was not signed, he has used the will before and no one has questioned it. He stated that all parties are descendants of Hegotule, but that it is custom for lands to be divided by tupuna and Pativai has shares in Manua.

[47] Makea Hakeagaiki, one of Hakeagaiki's children adopted by Taue, gave evidence that he was brought up in Avatele and neither he nor his siblings have ever seen Pativai or the first applicant working on the land. He worked on part of Laloai through Hakeagaiki, although he was adopted by Taue, who also worked there, and therefore knows their portion. He was born in 1956 and though he stated that it is hard to recall exactly when he worked on Laloai, it was before he moved to New Zealand in around 1981. And because he knows the land, he worked there again on his return to Niue in 2004.

[48] The second applicant presented her statement to the Court, and re-iterated that she has never seen the first applicant's family working on the land. In cross-examination by Maru Talagi, the second applicant stated that she lived in New Zealand for 11 years while studying, moving there in 1964 when she was 12 years old and moving back to Niue permanently in 1974. She stated that she saw people working on the land in the 1960s when she went with her parents while she was home from New Zealand to visit her family. The coconut plantation on the land was planted by her and her first husband.

[49] Ezra Talamahina gave evidence that he is 61 years old and married to Meleniue Hakeagaiki of Avatele. He and his brothers-in-law worked on Laloai in 1977 and then again between 1994 and 1998. He stated that has never seen the first applicant working there. There was a dispute between Ezra Talamahina and Poi Vakanofiti regarding a vanilla plantation on the land, but it was resolved by a family meeting. In cross-examination by Maru Talagi, Ezra Talamahina stated that when he was working there in 1977 the whole family were working there, and prior to that Hakeagaiki worked there.

He is not related to the land, but his wife is, and there had been a dispute about a plantation she planted there two years ago.

[50] The first applicant read out his affidavit, stating that he “never intended to map out the boundaries”. In cross-examination Aokuso Pavihi put it to the first applicant that there is no evidence to prove that Pativai is the source of the land, that Hakeagaiki is the true source of the land and the first applicant should therefore withdraw his application. The first applicant referred him to the genealogy, stating that the whakapapa shows that Hegotule is the source of the land. Aokuso Pavihi then stated that Pativai’s share in the land was at Manua, evidenced by her offer of the land at Manua to Mrs Cooper, and also by her statement that her parents and grandparents are buried at Manua. He asked whether the first applicant was aware of that gift. The first applicant replied that he was, and Pativai offered Part Manua to Mrs Cooper as leveki. The first applicant re-iterated that he worked on Laloai between 1972 and 1973, but hasn’t worked there for 20 years.

[51] Poimamao Vakanofiti gave a statement that he is 46 years old and resides in Avatele. He started working on Laloai with his parents in 1989. He saw the second applicant working there growing taro and tapioca. He stated that there were coconut trees on this land, but he did not plant them and he does not know who did. He stated that his authority to work there came from his parents and members of his family, including brothers and sisters. He has not seen the first applicant working there, as the first applicant was in New Zealand the whole time he has worked there. He says he spoke with the first applicant about working there, and told him that he followed his parents in working there. He stated that he has never seen the first applicant’s biological father working there in the time he has worked there. He has seen Aokuso Pavihi on the block behind Laloai. In cross-examination, Aokuso asked Poimamao whether he noticed any coconut trees on the land when he started working there in 1989. Poimamao said he had, but they were not bearing fruit at that stage. Aokuso Pavihi then asked whether Poimamao worked on the land under authority from Hanatau or Pativai. Poimamao stated that he followed his parents to work there and does not know if it was through Hanatau or Pativai. Aokuso stated that when the dispute over the vanilla plantation arose, Poimamao’s mother stated at the family meeting that it was through Hanatau that they worked there. Poimamao responded that he did not remember his mother saying that and he does not accept what the minutes to that meeting say. Pativai didn’t come up in those

discussions because no one raised the issue. Aokuso Pavihi states that in addition to the statements at the family meeting, in 2005 Poimamao's mother wrote him a letter saying she worked the land through Hanatau. Poimamao conceded that he cannot speak for his mother and both his mother and grandmother descend from Hakeagaiki.

[52] Celina Tiakia read the minutes of the meeting held regarding the dispute over the vanilla plantation. Aokuso Pavihi stated that this was a statement from Epenesa Vakanofiti as to how she had come to the land. The meeting regarding the vanilla plantations ended well and apologies were made, with the family agreeing to meet regularly. Maru Talagi suggested that Poimamao does not disagree with the minutes; rather he disagrees with his mother. Aokuso pointed out that there is another letter on the Court file from Epenesa in which she confirms that she worked on Laloai through her mother, Hanatau Hakeagaiki.

[53] In his closing statement, Aokuso Pavihi stated that the purpose of these proceedings was to determine the facts. He does not dispute that Hegotule is the source of the land. He is not an outsider. Everyone is saying that Pativai has an allocation which can go to her children. Pativai stated that her parents are buried on Manua which indicates that Manua is Pativai's share. Pativai also has an allocation in the school grounds at Liolau. As for Laloai, he stated that "Hakeagaiki [was] used by my grandmother", and there was "no objection then". Aokuso Pavihi concluded by stating that he has provided written evidence supporting his submissions but the first applicant has not provided any written evidence to support his claims.

[54] Maru Talagi made a closing statement on behalf of the first applicant that the submission setting out his claim to Hegotule is firm. It is customary that each child is given a share of the land and the expectation is that within this custom, descendants will recognise and respect this for each child. Makea Hakeagaiki and Ezra Talamahina are unreliable witnesses as they could not recall the years they worked on the land. Hakeagaiki's will, which was relied on by the second applicant to show that Laloai was Hakeagaiki's share, is not recognised in law. The burial sites mentioned by Aokuso Pavihi do not concern Laloai, and the makatea pits are outside the area of the land concerned. The first applicant has rights in the land. He is now only claiming a share of Laloai and other persons who also have rights to the land can also claim their share.

The law

[55] Section 2 of the Land Act 1969 states that:

“**Mangafaoa**” in relation to 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.

[56] Other relevant sections of the Land Act 1969 are set out below:

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 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 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 location 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

[57] It is common ground that Hegotule is the ultimate source of the land and that all parties involved descend from Hegotule. The question is whether the tupuna divided Hegotule's land into shares for each child and whether Pativai retained an allocation in the land at issue, or whether this land was solely Hakeagaiki's allocation.

[58] What is clear is that Pativai is not the sole source of the land, as initially contended by the first applicant. As a result, the first applicant's claim that he is entitled to title to all 7.3500 ha of the land must fail, and his application is therefore dismissed.

[59] However, it is noted that at the hearing there was some support for the first applicant's claim that his family have some rights in the land, although not the exclusive rights he initially claimed. Aokuso Pavihi acknowledged this support, but highlighted that the facts needed to be determined and the first applicant had not provided any evidence in support of this contention. At the closing of the hearing, Maru Talagi for the first applicant stated that he was amending the claim, and was now only claiming a share in Laloai, allowing others who also have rights to also claim their share.

[60] It is therefore suggested that the first applicant file an amended application for his share in the land setting out clearly the land area he seeks. It is also suggested that this area not interfere with the established rights of other descendants of Hegotule.

[61] I turn now to the second applicant's claim for title to a 4968 m² portion of the land and appointment as leveki mangafaoa for that portion. Although the first applicant, with support from the letter written by his biological father, initially disputed that Hakeagaiki had rights in the land, by closing of the hearing, this was no longer in dispute. It therefore

appears to be acknowledged that Hakeagaiki has rights in the land, and his descendants, including the second applicant and Vili Nosa's family have worked and continue to work on the land. Further, the appointment of the second applicant as leveki mangafaoa for that portion of the land was not contested.

[62] However, I am of the view that naming Hanatau Saniteli as the common ancestor for this portion of the land is unduly restrictive on other people's ability to claim rights in the land. I therefore declare Hakeagaiki to be the common ancestor for that portion of the land, as set out on provisional plan No 10560, being an area of approximately 2968 m².

Summary

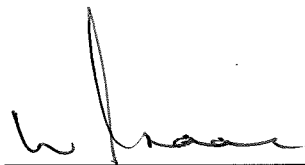
[63] For the reasons above I dismiss the application of first applicant.

[64] In relation to the second application, I make the following orders:

- (i) Declaring Hakeagaiki to be the common ancestor for the land Part Laloai as set out on provisional plan No 10560, being an area of approximately 2968 m²; and
- (ii) Appointing Ketiligi Saniteli Fereti as the leveki mangafaoa of the land Part Laloai as set out on provisional plan No 10560, being an area of approximately 2968 m².

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

Dated at Wellington this 15th day of January 2014.



W W Isaac
JUDGE