

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

**Application No 10955/56/6.**

**IN THE MATTER OF: PART TOLOAGAMOTU –  
Section 7, Block I,  
Hikutavake District (Part  
Toloagamotu)**

**BETWEEN: HILIMATAHEPULE  
PALALAGI**

**(Applicant)**

**AND OPILI AND APOLO  
TALAFASI**

**(Respondents)**

**Judgment:** 30 January 2014

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**DECISION OF COXHEAD J**

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**Introduction**

[1] An injunction application has been made by Hilimatahepule Palalagi to prevent any further development on Section 7 Block I Hikutavake District (Part Toloagamotu).

[2] This matter was initially brought before me at the High Court of Niue on 8 November 2013. At that time I heard very brief submissions and then made directions for the applicant to file further evidence, with the respondents also given time to provide their response.

**Applicant's submissions**

[3] At the heart of the applicant's submissions is their dispute as to the true Magafaoa for the land block upon which a house is being built. The applicant believes that the true Magafaoa for the land should be Tafua and not Faleapa.



[4] Other grounds submitted in support of the application for injunction can be summarised as follows:

- (a) The family is concerned that the applicant's family land is being used inappropriately;
- (b) There is no Leveki for the land as the Leveki "Matakapea" is deceased;
- (c) The land is in the middle of residential dwellings and the construction of a bar ("the Bar") in the Hikutavake area would be detrimental for that community;
- (d) The respondents have not been open and transparent with the Magafaoa in relation to their intentions for the land, and the Magafaoa have not been consulted regarding the building of the Bar;
- (e) The respondents are planning to use the land for their own personal gain without consideration of the rest of the Magafaoa; and
- (f) The respondents are potentially misusing the money provided for the building of a home for Martin Matakapea.

[5] As an alternative, the applicant submits that if the Court is not minded to grant an injunction, given the progress of the building, they seek an order that the land not be used commercially pending further order of the Court.

### **Respondents' submissions**

[6] At the hearing on 8 November 2013 the respondents submitted that the construction of the building on the land was near completion. They also advised that the building when completed would be used for village council meetings as well as being used for a bar.

[7] The respondents' further submissions in response to the applicant's written submissions are as follows:

- (a) The land is legally titled;



- (b) The Leveki for the land in question is Apolo Matakapea Talafasi and therefore there is a Leveki legally appointed for this property. The respondents submitted that the applicant made an error at the initial hearing that the Leveki was Matakapea, who is deceased. The respondents have provided documentation showing that the Leveki on the title should have been noted as Apolo Matakapea Talafasi;
- (c) The Bar will continue to provide a service to tourists under the Matapa Mini Bar business and liquor license; and
- (d) The issue raised by the applicant in relation to having the Bar in a residential area is a non issue, as there are no zoning regulations in place in Niue.

[8] The respondents submit that the injunction should be dismissed upon the grounds that it is malicious, misleading and is wasting the Court's time.

### **An injunction**

[9] The essential purpose of an interim injunction can be summarised as follows:<sup>1</sup>

"The object of an interim injunction is to protect the applicant from harm occasioned by any breach of rights that is the subject of current litigation, for which the plaintiff might not be adequately compensated by an award of damages by the Court, if successful at the trial. Against that object it is necessary to weigh the consequences to the defendants of preventing them from acting in ways which the trial may determine are in accordance with their rights. The well-established two-stage approach to addressing applications for interim injunctions involves first, ascertaining whether there is a serious question to be tried and secondly, considering the balance of convenience if the relief sought is granted."

### **Dispute as to the correct Magafaoa**

[10] The applicant makes clear in a number of documents provided to the Court the assertion that the land in question has been titled by someone other than the direct descendants of the Tafua family, who it is claimed are the customary owners of this land.

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<sup>1</sup> *Roseneath Holdings Ltd v Grieve* [2004] 2 NZLR 168 (CA).



The applicant therefore disputes whether the titled land was acquired with permission from the majority of the Tafua family.

[11] The land was titled in 1997. The current legal title lists the ancestor of the land as being Faleapa, and the Leveki as being Matakapea, which based on the evidence that has been provide by the respondent should correctly be noted as Apolo Matakaea Talafasi. Tafua and Faleapa are brothers, with Tafua being the oldest male child in the family.

[12] The current application before the Court does not seek to change the common ancestor. Further, no appeal of the 1997 orders has been lodged with the Court, although such an application would be out of time in any case. Neither is the Court aware of any rehearing application that has been filed in regards to the previous titling of this land.

[13] Without an appropriate application the Court has no power to amend a title or previous Court orders.

[14] Given these Court orders were made in 1997 it is difficult to see what, if any, powers the Court has to amend those orders.

#### **Lack of consultation with Magafaoa**

[15] The powers and functions of the Leveki Magafaoa are noted in s 15 of the Niue Land Act 1969 ("the Act"). They provide that the Leveki Magafaoa of any land shall have power to control the occupation and use of the land under Niue custom and shall have power to alienate the land in accordance with Part 3 of the Act.

[16] Further, in the exercise of their powers under this section, the Leveki Magafaoa shall, under Niue custom consult with the members of the Magafaoa, whether resident in Niue or elsewhere. In particular they shall meet the requirements as to consultation laid down in s 17(3) of the Act in relation to the sale and lease of land, and the giving of security charges over land.

[17] This current situation is not one of alienation, however, there is still a requirement that the Leveki Magafaoa consult with the members of the Magafaoa pursuant to Niue custom.



[18] The applicant states that her and her family have not been consulted with in regard to the development on the land.

[19] The respondents in reply submit that the Leveki Magafaoa under the Act is required to consult with those members of the family who are direct descendants of the common ancestor, in this case ,the direct descendants of Faleapa.

[20] Magafaoa is defined in s 2 of the Act as:

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 ...

[21] To require consultation with the common ancestors' siblings, and the descendants of the common ancestors' siblings, would be burdensome. In my view, the Act does not contemplate such wide spread consultation.

[22] Being a descendant of the common ancestor and being related to a common ancestor are two different things. For example, a niece or nephew of an ancestor would not be considered a descendant of that ancestor but they are still genealogically related to that ancestor.

[23] As noted earlier, based on the evidence put forward by the applicant, Faleapa was the youngest brother of Tafua. The applicant descends from Tafua. The brothers, Faleapa and Tafua, come from a family of eight children. Tafua was the oldest male and third oldest in the family. Faleapa is the sixth child of the family.

[24] Given that the land is titled with the ancestor, being Faleapa, the requirement on the Leveki is to consult with the family or group of persons descended from Faleapa, including any person who has been legally adopted into the family, who at any given time is recognised as entitled by Niue custom to any share or interest in the land.



[25] The Magafaoa of Tafua fall outside of this group. In my view there is no requirement for the Leveki of this land block to consult with the Magafaoa of Tafua.

### **Other issues raised by Applicant**

[26] The other concerns raised by the applicant are understandable given the recent history of disputes in the Hikutavake area.

[27] However, there is no suggestion that the running of the Bar on the land is in any way illegal. The respondents have submitted that the Bar will be operated under the Matapa Mini Bar business and liquor license and therefore that business has a licence to operate.

[28] If there was no such licence then the Court may have been minded to prevent the commercial use of the building on the basis that there was no legal liquor license in operation.

[29] The other grounds and concerns raised by the applicant do not provide the Court with a substantive basis upon which to impose an injunction.

### **Conclusion**

[30] As noted above the object of an interim injunction is to protect the applicant from harm occasioned by any breach of rights that is the subject of current litigation.

[31] It is difficult to see how the Court could impose an injunction preventing the building on this block of land, given that the land has a legal title with a Leveki appointed, and given that there is no application before the Court disputing the title. Further, the Bar on the land will be operated pursuant to a legal liquor licence.

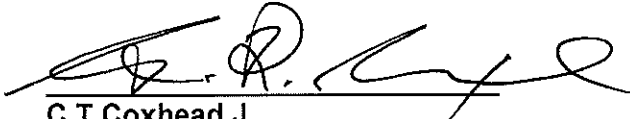
[32] If there was no Leveki the Court may then have given consideration to halting all development on the land pending the appointment of a Leveki. However, there is a Leveki in place for this land.

[33] There is therefore no serious question to be tried in this matter and the applicant has failed to satisfy the Court that the respondents should be prevented from further developing the land or prevented from commercially using the land, pending further Court orders.



[34] The application is therefore dismissed.

Dated in Rotorua, New Zealand this 30<sup>th</sup> day of January 2014



C T Coxhead J