

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

Application No. CV03/2020

IN THE MATTER OF Section 47 Niue Amendment Act (No 2)
1968

AND The land known as Pavihi Family Home,
Anafonua, Avatele

BETWEEN GUSTAVA ESTHER PAVIHI
Applicant

AND TINAKATI PAVIHI
Respondent

Hearing: On the papers

Judgment: 5 May 2020

DECISION OF JUSTICE S F REEVES

Introduction

[1] Gustava Esther Pavihi filed an application for an injunction on 17 February 2020. She seeks orders:

- a) To stop the respondent from making structural changes to the Pavihi residence at Anafonua, Avatele;
- b) That the respondent rebuild a partition wall between two separate units; and
- c) That the respondent stay in the eastern unit of the house, and not undertake any further renovations to the rest of the building.

[2] The application is opposed by the respondent Tinakati Pavihi, and the issue in this case is whether an injunction should be granted.

Procedural history

[3] The Court received the application on 17 February 2020. The application had been served on the respondent who is presently residing in Niue. The respondent filed submissions in response on 2 March 2020, and further submissions on 9 March 2020.

[4] In directions of 5 March 2020, I indicated that the applicant had until 19 March 2020 to file submissions and/or evidence in reply, and that I would then determine the application on the papers.

Applicant's submissions

[5] The injunction orders sought by the applicant are set out in paragraph 1 above. The grounds for seeking the orders are:

- a) The applicant is the Court appointed administrator of her late father's (Aokuso Sasalu Foufou) estate which included the house at Anafonua. The respondent is the daughter of Meafou Amanaki Pavihi, who was the aunt of Aokuso.

- b) The house belonged to the applicant's great-grandparents, Pastor Taveli (Tama) Pavihi and his wife Tapa. Aukuso Pavihi was the leveki for many years until his death and was responsible for the care and upkeep of the house during this time.
- c) Aukuso's intention was to have the two self contained units with the eastern side for the respondent's family and the western side for his children.
- d) The applicant and her siblings maintained this arrangement and did not prevent the respondent from moving into the eastern unit in 2019 after Aokuso's funeral.
- e) The respondent and her siblings subsequently made it known they wanted to claim the whole house. At a family meeting on 15 January 2020, the applicant agreed to let the respondent and her family reside in and utilise the house.
- f) After the applicant's siblings objected to this arrangement, the applicant withdrew her agreement and advised the respondent through an intermediary that their family would continue to occupy the western side of the house.
- g) The respondent has since removed the partitioning wall separating the two units.

Respondent's submissions

[6] The respondent opposes the injunction and says in reply:

- a) The house did not belong to the applicant's father Aokuso Pavihi, instead it belonged to the respondent's mother Meafou Amanaki (Aokuso's aunt) and her father Tafakaveli Pavihi Hakeagaiki (Aokuso's grandfather). This is a long-running family dispute.
- b) The respondent had ceased all activities in the house after hearing on 5 February 2020 that the applicant had changed her decision, therefore the

injunction seeks to prevent actions which have already taken place or have not happened.

- c) The applicant did not raise these issues with the respondent at the time, either in person or by correspondence, before filing the injunction application.

[7] The respondent says that all activities in the house are on hold until a resolution is found concerning ownership of the house, and says further that these are family matters involving a family home and kaina and should be discussed in a family environment rather than the public arena of the Court.

[8] The respondent seeks dismissal of the injunction application.

The Law

[9] The Court has jurisdiction to grant an injunction under s 47(1) of the Niue Amendment Act (No 2) 1968 (the NAA) which provides:

47 Jurisdiction of the Land Court

(1) In addition to 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 the ownership, possession, occupation, or utilisation of Niuean land, or to any right, title, estate or interest in Niuean land or in the proceeds of any alienation of it;
- (b) To determine the relative interests of the owners or the occupiers in any Niuean land;
- (c) To hear and determine any application for the appointment of a *Leveki Mangafaoa* in respect of any Niuean land;
- (d) To hear and determine any claim to recover damages for trespass or any other injury to Niuean land;
- (e) To grant an injunction against any person in respect of actual or threatened trespass or any other injury to Niuean land;
- (f) To grant an injunction prohibiting any person from dealing with or doing any injury to any property which is the subject-matter of any application to the Land Court;
- (g) To create easements in gross over Niuean land;
- (h) To make any order recording the determination of any matter relating to land or any interest in it, whether provided for in this Act or other enactment;
- (i) To authorise the survey of any land.

(2) The grant of an easement under subsection (1)(g) may, if the Court thinks fit, be made subject to the payment of compensation in respect of it, or to any other conditions that the Court may impose.

[10] Section 47(1) of the NAA gives the Court power to grant an injunction against any person in respect of actual or threatened trespass or other injury to Niuean land, or to prohibit any person from dealing with or doing injury to a property which is the subject matter of any application to the Court.

Discussion

[11] This application was filed in the context of a family dispute over ownership and occupation of the Pavihi family home at Anafonua, Avatele. The applicant seeks orders preventing further works or remedying works already carried out, and for the respondent to keep to the eastern part of the property.

[12] There are several jurisdictional and procedural issues with this application.

[13] The application does not state what legislative provision or authority is relied upon in making the application. Neither does it set out whether an interim or permanent injunction is sought, although the orders sought appear to be permanent.

[14] There is also no affidavit evidence provided in support of the application. Both parties have provided statements, but these do not have the persuasive weight of sworn evidence particularly where there are contested issues of fact.

[15] An interim injunction is an interlocutory application to stop further actions until other Court proceedings have been resolved. In this case no other application has been filed in the Court concerning the dispute over the property. There was no suggestion of any pending applications either.

[16] In these circumstances, because there are no other proceedings filed or pending in relation to the dispute in question, an interim injunction under s 47(1)(f) of the NAA is not available.

[17] The other alternative is a permanent injunction under s 47(1)(e) of the NAA. In *Taueki v Horowhenua Sailing Club - Horowhenua 11 (Lake) Block* the Māori Appellate Court discussed the requirements for granting a permanent injunction as follows:¹

[15] In applying for a permanent injunction, applicants must also fulfil the legal elements relating to the action of trespass before the Court will exercise its jurisdiction to grant the remedy. These elements are set out below:

The action for trespass to land is primarily intended to protect possessory rights, rather than rights of ownership. Accordingly, the person prima facie entitled to sue is the person who had possession of the land at the time of the trespass. Actual possession consists of two elements: the intention to possess the land and the exercise of control over it to the exclusion of other persons. Either element alone is not sufficient...

[16] Once the elements for the trespass action are made out, the Court then considers what remedy is appropriate. The prima facie rule is that a landowner is entitled to an injunction to restrain a trespass. However, the Court still has discretion as to whether to grant the injunction or not. Matters affecting the exercise of the discretion include the parties' conduct.

[18] In order to grant a permanent injunction I would need to be satisfied that the applicant is entitled to possession of the property and that the respondent was trespassing. The applicant has not provided sufficient evidence to satisfy me on those issues.

[19] Both parties have provided statements but neither have filed affidavits in support of their claims. Without sufficient evidence concerning ownership and possession of the property I am unable to determine whether any trespass has taken place, and therefore, a permanent injunction is not available either.

[20] In any event, the respondent states that the works complained of had already taken place before the applicant had communicated her change of heart, and that all further activities are on hold until a resolution is found. In these circumstances I would not exercise my discretion to make an injunction order in any case.

[21] I encourage the family to continue their efforts to find a solution to this long-running dispute. But, if this is not possible or if the parties want the Court to determine the issues of ownership and occupation of the family property then an application for that purpose under s 47(1)(a) of the NAA will need to be filed supported by proper affidavit evidence.

¹ *Taueki v Horowhenua Sailing Club - Horowhenua 11 (Lake) Block* [2014] Māori Appellate Court MB 60 [2014 APPEAL 60] at [15]-[16].

[22] The application for an injunction is dismissed.

Pronounced at Wellington on the day of May 2020.

S F Reeves
JUDGE