

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

**App No. 11713**

**UNDER** Part II Niue Land Ordinance 1969 and Section 54  
Niue Amendment Act (No. 2) 1968

**IN THE MATTER OF** The land known as Sections 1 and 2, Block III,  
Part Maleua, Liku

**BY** JOHN PUHIATAU PULE  
**Applicant**

**AND** NEWLAND POUMALE AND ENELETAMA  
KAIUHA  
**Respondents**

Hearing: 14 March 2019  
(Heard at the Niue Golf and Sports Club)

Appearances: Mr Toailoa for the Applicant  
Ms Kaiuha and Mr Poumale in person

Judgment: 19 May 2020

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**DECISION OF JUSTICE S F REEVES**

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## Introduction

[1] Sections 1 and 2, Block III, Part Maleua, Liku District are adjoining blocks of land located on the fringes of Liku Village, titled in 1995 and 1996 respectively.

[2] On 31 July 2018, John Puiatau Pule filed applications as follows:

- a) An application to annul an order dated 3 July 1995 which determined title to Section 1 and declared the common ancestor to be Noue and the leveki magafaoa to be Sionepata Poumale and D Lupeiki.<sup>1</sup>
- b) An application to annul an order dated 24 April 2002 for further appointment of John Poumale, Aifolia Poumale, Manogi Poumale, and Newland Poumale as leveki magafaoa of Section 1.<sup>2</sup>
- c) An application to annul an order dated 1 November 1996 which determined title to Section 2 and declared the common ancestor as Iona Vemoa and the leveki magafaoa to be Eneletama Kaiuha.<sup>3</sup>

[3] Mr Pule seeks the annulment of the orders pursuant to s 54 of the Niue Amendment Act (No.2) 1968 (NAA) on the basis they were fraudulently obtained by Ms Kaiuha and Mr Sionepata Poumale. Mr Pule's application was supported by an affidavit and numerous supporting documents.

[4] It was also submitted that the original claimants incorrectly identified the whole of the subject lands as Maleua, when in fact there are two pieces of adjoining land: Maleua and Kavaka. Mr Pule's claim relates only to the inland side of Kavaka, and not the seaward side.

[5] If successful, Mr Pule also seeks further orders; revoking the separate title for Section 2 and for that land to revert back to form part of Section 1, declaring the correct names of the

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<sup>1</sup> Land Book no. 13, Folio 81, made on 3 July 1995.

<sup>2</sup> Land Book no. 13, Folio 81, noted as Memorial 5610, made on 24 April 2002.

<sup>3</sup> Land Book no. 13, Folio 82, made on 1 November 1996.

land as Maleua and Kavaka, declaring the common ancestor as Fatipalima Puhiatau, and appointing John Puhiatau Pule as the leveki magafaoa.

[6] All applications are opposed by the respondents Ms Kaiuha and Mr Newland Poumale. The hearing was held on 14 March 2019 and the parties also provided written submissions following the hearing.

[7] I will deal with the application for annulment of the title orders in the first instance as this has consequences for the remaining applications. The key issue is whether Mr Pule could prove on the balance of probabilities that the actions of Mr Sionepata Poumale and Ms Kaiuha in titling Sections 1 and 2 amounted to actual fraud under s 54 of the NAA.

### **The applicant's case**

[8] Mr Pule's case is that the orders determining title to the lands were obtained by acts of fraud committed by Mr Sionepata Poumale (for Section 1) and Ms Kaiuha (for Section 2).

[9] It was also submitted by Mr Toailoa, counsel for Mr Pule that the evidence presented when titling the land was irrelevant, lacked the support of magafaoa, and did not meet legal requirements. Therefore, the Court failed to uphold and apply the law and the decision is a nullity.

[10] Mr Toailoa referred to the decision of this Court in *Tuhipa v Hipa – Part Matapa, Section 2, Block 1, Hikutavake District* and submitted that where fraud is alleged, it is now well established that actual fraud or dishonesty must be proven in order to extinguish any title to land.<sup>4</sup> Furthermore, such fraud must be proven on the balance of probabilities.

[11] It was submitted that Mr Sionepata Poumale acted fraudulently when he proposed Noue as the common ancestor for Section 1 knowing full well that Noue was not a blood descendant of the rightful magafaoa for that land. In support of this allegation, Mr Pule produced copies of correspondence from his paternal aunt Mokafalenogi to the Department of Lands in 1990 and to Sionepata from 1992. He says the correspondence clearly sets these

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<sup>4</sup> *Tuhipa v Hipa – Part Matapa, Section 2, Block 1, Hikutavake District* [2008] NUHC (8 October 2008).

matters out and Sionepata knew or should have known this information before he titled Section 1.

[12] It was submitted that Noue was not a blood member of the Puihatau magafaoa and evidence was given that Noue was born to Mr Pule's grandmother, Atahemotu, prior to her marriage to Puihatau. It is also submitted that there is no evidence connecting Noue or his descendants to the land in terms of occupation, cultivation, burials or otherwise. Further, that Sionepata was legally adopted by persons not related to Noue and knew or should have known that he was no longer a member of that magafaoa.

[13] Regarding Section 2, titled by Ms Kaiuha, it was submitted that this was carved out by an agreement between her and Sionepata Poumale. Mr Toailoa submitted there were a number of factors which show proof of fraud or from which a clear inference of fraud could be drawn:

- a) The common ancestor, Iona Vemoa, was born in Hakupu and has no genealogical connection to the Puihatau family and no meaningful connection to the land.
- b) It was submitted that Ms Kaiuha's magafaoa own the nearby land Fakilea, which is where her ancestors are buried, not Kavaka.
- c) Her claim that she and her family cut copras from the land is disputed, as she was confused about specifics in the hearing.
- d) Evidence was provided from witness Tulisa Thompson who said she did not recall Ms Kaiuha's family working on the land.

[14] Evidence was given by Mr Pule that the Puihatau magafaoa were not advised or consulted when the lands were titled even though Mr Sionepata Poumale and Ms Kaiuha, as well as the Justice Department, knew or had been notified of their interest. They were not aware of the titling of the lands until 2014-2015.

### **Respondents' submissions**

[15] The Court received submissions by Ms Kaiuha and Mr Newland Poumale following the hearing on 10 July 2019. Despite being signed by Mr Newland Poumale, the submissions appear to have been written by Ms Kaiuha and primarily relate to Section 2, the land which she is leveki magafaoa for.

[16] Ms Kaiuha denies any fraud or misrepresentation and submitted that the land in Kavaka belonged to her ancestor, Iona Vemoa, which is why she titled it. She recalls cutting copras on the land with her grandmother and parents. Ms Kaiuha said she does not remember seeing Mr Pule's family on the land, only Noue's family. She said while she saw Pulehetau (Mr Pule's father) selling watermelons on the roadside of Kavaka, she did not see him working the land. Rather, she submitted that Mr Pule's family stayed on a different area of land known as Pia and worked on the nearby Hafata.

[17] Ms Kaiuha disputes the genealogy given by Mr Pule, submitting that Puihatau did not have any right to the land. He was only buried there as it was his wife's land. Tulisa Thompson's evidence is also disputed, as they say she never lived on Kavaka. Ms Kaiuha agreed that the applicant is family, but submitted that by naming Puihatau as the ancestor, others will be cut off. While Sionepata Poumale was adopted, he still had a relationship with the land.

[18] Ms Kaiuha also submitted that Mr Pule has waited a long time to re-open the case, given the land was titled in 1995. He also waited to build a house before bringing this application.

## **Law**

[19] Section 54 of the Niue Amendment Act (No 2) 1968 states:

### **54 Annulment of orders obtained by fraud**

The Land Court may at any time annul any order obtained by fraud.

[20] The only jurisdiction to annul orders of the Land Court determining title is pursuant to section 54, as discussed in *Asekona v Misikea*:<sup>5</sup>

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<sup>5</sup> *Asekona v Misikea* [2017] NUCA 1; App No. 10130/5 (3 July 2017) at [44]-[46].

[44] Once a common ancestor is determined there are limited opportunities to change that determination. A person may seek to have the decision changed on appeal or rehearing. If the decision is not appealed or a rehearing is not sought then there is no specific power to cancel a title set out in either the Niue Amendment Act (No.2) 1968 or the Land Act other than in cases of fraud.

[...]

[46] As noted the titling of land is a serious matter. Rather than provide for the cancellation of title the legislation provides by s 52 that every order of the Land Court determining or affecting title shall bind all persons having an interest in that land. Section 52 clearly provides for orders of the Court determining or affecting title to Niuean land being final, unless there is fraud. Section 54 of the Land Act provides that the Court can annul orders obtained by fraud.

[21] This Court has previously considered s 54 in *Tuhipa v Hipa – Part Matapa, Section 2, Block 1, Hikutavake District*. The Court said that the applicant must establish on the balance of probabilities that actual fraud was committed.<sup>6</sup> Actual fraud requires dishonesty of some sort.<sup>7</sup> The Court found that fraud was not established as one of the persons allegedly committing the fraud had passed away, and the Court was not willing to rely on hearsay evidence from the applicants when the other party could not respond to allegations.<sup>8</sup> The Court also noted that the applicant had been able to challenge to application previously, but did not do so.<sup>9</sup> Lastly, the Court considered the importance of stability in the Niuean title system. The title in that case had been in place for 33 years and without clear documentary evidence corroborating the allegations, the Court would not interfere with the title.<sup>10</sup>

## **Discussion**

[22] The preliminary issue for determination is whether Mr Pule has proved on the balance of probabilities that the actions of Mr Sionepata Poumale and Ms Kaiuha in titling Sections 1 and 2 amounted to fraud.

[23] Mr Toailoa referred to the decision of Isaac J in *Tuhipa v Hipa*.<sup>11</sup> That decision relied in part on the provisions of the Land Transfer Act 1952 (NZ) which has since been repealed and replaced by the Land Transfer Act 2017 (LTA). The new LTA has a definition of fraud

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<sup>6</sup> *Tuhipa v Hipa*, above n 4 at [23].

<sup>7</sup> At [22].

<sup>8</sup> At [25].

<sup>9</sup> At [26].

<sup>10</sup> At [29].

<sup>11</sup> Above n 4.

which codifies the case-law in this area, including the *Assets Company Ltd v Mere Roihi* case also referred to in *Tuhipa*.<sup>12</sup>

[24] Section 6 LTA provides:

### **6 Meaning of fraud**

(1) For the purpose of this Act, other than subpart 3 of Part 2, *fraud* means forgery or other dishonest conduct by the registered owner or the registered owner's agent in acquiring a registered estate or interest in land.

(2) For the purposes of subsection (1), the fraud must be against—

(a) the registered owner of an estate or interest in land; or

(b) the owner of an unregistered interest, if the registered owner or registered owner's agent, —

(i) in acquiring the estate or interest had actual knowledge of, or was wilfully blind to, the existence of the unregistered interest; and

(ii) intended at the time of registration of the estate or interest that the registration would defeat the unregistered interest.

(3) For the purpose of subpart 3 of Part 2, *fraud* means forgery or other dishonest conduct by any person.

(4) The equitable doctrine of constructive notice does not apply for the purposes of deciding whether conduct is fraudulent.

[25] The definition in s 6 LTA differentiates between fraud against registered and unregistered interests. For the purposes of the present case where Mr Pule has alleged fraud against the known but untitled interest of his family in the lands, the key elements of s 6 LTA are:

- a) The fraud must involve dishonest conduct by the registered owner (s 6(1)),
- b) against an identifiable unregistered interest (s 6(2)(b)),
- c) where the registered owner had actual knowledge of or was wilfully blind to the unregistered interest (s 6(2)(b)(i)), and
- d) intended to defeat that interest (s 6(2)(b)(ii)).

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<sup>12</sup> At [22].

[26] The definition in s 6 LTA clarifies the requirements for a finding of fraud but sets a high threshold. For example, in the 2019 case of *Moeke v Raukawa Iwi Development Limited*, the New Zealand High Court stated that ‘where the designed object of a transfer is to cheat someone of a known existing right to land, that is fraudulent for land transfer purposes.’<sup>13</sup>

[27] Whether conduct amounts to fraud is a question of fact arising from the particular circumstances of the case. In order to prove fraud in this case, Mr Pule needs to prove that both Mr Sionepata Poumale and Ms Kaiuha knew that the Puhiaatau magafaoa were the rightful owners of the lands, and that they intentionally titled the lands knowing it would defeat the Puhiaatau interest.

[28] In relation to Section 1, Mr Pule gave evidence of an exchange with Sionepata in December 1991 where he waved a letter at Mr Pule and told him he was too late as all the kainas had already been surveyed and titled. It was submitted that this was evidence that Mr Sionepata Poumale had knowledge of Mr Pule’s family’s ownership of the land in 1991, and that when he applied to title the land in 1995 he was acting dishonestly. Mr Pule provided copies of correspondence from his aunt Mokafalenogi to the Department of Lands in 1990, and to Sionepata in 1992 to support this allegation.

[29] In my view, the evidence presented does not prove on the balance of probabilities that Mr Sionepata Poumale acted fraudulently. One problem is that we only heard Mr Pule’s account of events because Mr Sionepata Poumale is now deceased and could not respond to the allegations.

[30] The other issue was whether the correspondence produced by Mr Pule disclosed that fraud had taken place. In 2012, the *Tuhipa* case went before the Court again as an application for rehearing after a will was discovered. In that case Isaac J found that the will if produced in evidence, would not have been able to show that actual fraud existed.<sup>14</sup> I have reached the same conclusion. The correspondence produced by Mr Pule would have to demonstrate that actual fraud was committed, and in my view it does not clearly prove actual fraud by Mr Sionepata Poumale.

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<sup>13</sup> *Moeke v Raukawa Iwi Development Limited* [2019] NZHC 3166 at [47].

<sup>14</sup> *Tuhipa v Hipa – Part Matapa, Section 2, Block 1, Hikutavake District* [2012] NUHC (16 January 2012) at [23].



[31] This is not to say that I disbelieve Mr Pule, but looking at the evidence as a whole I am not satisfied that there is sufficient evidence to establish Mr Sionepata Poumale's state of mind, actual knowledge, or intentions at the relevant times, such that I can safely conclude that he acted fraudulently when he titled Section 1.

[32] In relation to Section 2, there is even less evidence of actual fraud by Ms Kaiuha. Mr Pule asks me to draw an inference of fraud from her actions when she titled Section 2, but Ms Kaiuha insisted under cross-examination that her version of the genealogy was the correct one, and that she had a stronger claim to the land than Mr Pule's family. She rejected the evidence of Tulisa Thompson that she did not recall Ms Kaiuha's family working on the land.

[33] On the information before me Ms Kaiuha's connection with Section 2 appears tenuous, but even if she is mistaken as to her facts, or has a weak claim compared to Mr Pule, there is insufficient evidence to conclude her actions were actually fraudulent. It is also important to keep in mind that the purpose of this application is not to determine the strength or otherwise of Mr Pule's claims to the lands, which have not been tested by the Court, but whether his allegations of fraud are made out.

[34] Having reached this point does not mean that I consider the conduct of Mr Sionepata Poumale or Ms Kaiuha to be blameless. There are troubling aspects to how they went about titling Sections 1 and 2 which could at best be described as opportunistic. It also appears from the Court minutes that the Court's examination of the facts was cursory. This then raises the issue of rehearing.

[35] At the beginning of the hearing I asked Mr Toailoa whether this was really an application for rehearing in disguise particularly given his submission concerning the shortcomings in the evidence, that the Court failed to apply the law, and the decision was a nullity. Mr Toailoa insisted that the application was all about fraud and was not intended as a rehearing.

[36] The original title orders were made in 1995 and 1996 and the application for annulment was filed in July 2018, more than 20 years later and well outside the rehearing and appeal periods. The only avenue left for Mr Pule to seek redress was to apply to annul the original orders pursuant to s 54 NAA by alleging fraud.

[37] Mr Pule's evidence was that in 2013 he started investigating where to build in Liku with the assistance of Aukuso Pavihi but did not become aware of the titling of Sections 1 and 2 until 2014 when he was preparing to title land at Kavaka to build his house. Mr Pule's affidavit suggests at paragraphs 66-68 that he decided not to challenge the common ancestor at that time, so he could get on the land and build. It is hard not to conclude that having secured his house and land that he was determined to have his day in Court.

[38] I have concluded that the evidence presented by Mr Pule was not sufficient to prove on the balance of probabilities that actual fraud had taken place.

[39] The Court must ensure there is stability in the Niuean title system. The titles have been in place for over 20 years and the Court will not interfere with those titles unless there is clear evidence of actual fraud.

## **Decision**

[40] The result is that the application to annul the orders of 3 July 1995 and 24 April 2002 in respect of Section 1, and the order of 1 November 1996 in respect of Section 2 is dismissed.

[41] As a consequence, there is no need to consider the further applications to revoke the separate title for Section 2, declaring the correct names of the land as Maleua and Kavaka, declaring the common ancestor as Fatipalima Puihiatau, and appointing John Puihiatau Pule as the leveki magafaoa. Those applications are also dismissed.

[42] In my view, costs should lie where they fall, but if the respondents have a different view they are to file and serve submissions as to costs within 1 month of receiving this decision.

[43] A copy of this decision is to be sent to all parties.

Dated at Wellington this 19<sup>th</sup> day of May 2020.

S F Reeves

**JUDGE**