

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

**App Nos. 2022-00086, 2022-
00087, 2022-00118**

UNDER	Sections 14, 15 and 16 of the Lands Act 1969
IN THE MATTER	Removal and Appointment of Leveki in the land known as PART LOTOULI
BETWEEN	Michle Makata Applicant
AND	Malamapeta Lavini Respondent

Hearing: 5 October 2022

Judgment: 10 February 2023

DECISION OF JUSTICE S F REEVES

Introduction

[1] On 18 July 2022 the applicant Michle Makata filed an application to remove Malamapeta Lavini as the Leveki Mangafaoa for the land known as Part Lotouli, Makefu (Lotouli). The applicant also seeks to be appointed as the new Leveki Mangafaoa. The application arises from tensions between the parties regarding the leasing of the land and the maintenance of the land and its buildings.

[2] The respondent, Malamapeta Lavini as the current Leveki Magafaoa, opposes the application on the basis that she has appropriately considered the interests of the wider Mangafaoa in the management of the Lotouli land.

[3] The issue for determination is whether the Leveki Mangafaoa should be removed.

Procedure

[4] I heard the applications at Fonuakula on 5 October 2022. At the hearing, the parties agreed that I would hear the applications by Mr Makata for removal of the Leveki Mangafaoa, and that another set of applications filed by Mrs Lavini for partition and appointment of Leveki would be adjourned pending the outcome of Mr Makata's applications.¹

[5] At the hearing Mr Makata was assisted by Mr Guest, and Mrs Lavini by Mr Lavini. At the conclusion of the hearing the applications were adjourned for a reserved decision.

[6] On 12 October 2022, Mr Makata filed an application to remove the then-current occupiers of the house at Lotouli. I have since dismissed this application for injunction.²

[7] On 16 January 2023, Mrs Lavini filed an application for an injunction to halt work to the house and land on Lotouli being carried out by Mr Makata until the substantive decision is issued.³ That application awaits the outcome of this decision.

Background

[8] Sections 1-3, Block 1, Makefu (Part Lotouli) are located in Makefu District. All parties agree that Hegasea is the common ancestor for the land.

[9] A dwelling situated on Section 2 of the land was built in approximately 1963 by Hekokoe Makata, the great-grandson of Hegasea. Hekokoe Makata migrated to New Zealand in the late 1970s and bequeathed the house and the land to his younger sister Vileo Makata, the applicant's late mother. The majority of Vileo Makata's children, including the applicant, were born, and raised in the house on Lotouli before eventually all migrating to New Zealand.

[10] On 8 February 2000 Vileo Makata and her younger sister, the respondent Mrs Lavini, had their application heard in this Court to appoint Mrs Lavini as the Leveki

¹ App Nos 2022-00073, 2022-00074, 2022-00075, 2022-00076

² *Makata v Lavini* [2022] NUHC; Land Division 00126 (2 December 2022).

³ App No. 2023-00005

Mangafaoa. Following this, Vileo Makata continued to travel from New Zealand to Lotouli annually to assist in maintaining the house and land until she passed away in February 2010.

[11] Under Mrs Lavini's oversight, the house and land on Lotouli has been leased several times. The most recent tenants also operated a rental car business on the land, to the dismay of the applicant, which led to the present application.

Submissions for the Applicant

[12] Mr Makata seeks the removal of Mrs Lavini as Leveki Mangafaoa for the following reasons:

- (i) Mrs Lavini as Leveki Mangafaoa has not adequately communicated with the wider Mangafaoa regarding the leasing of the house and land at Lotouli.
- (ii) Mrs Lavini as Leveki Mangafaoa has leased the house and land at Lotouli to people who are not Mangafaoa, to the exclusion of Mangafaoa. The applicant submits that Romio Palemia, the tenant at the time of the hearing, is not part of the wider Mangafaoa.
- (iii) Mrs Lavini as Leveki Mangafaoa has not ensured that the land is being well maintained, respected, and kept clean of rubbish consistent with her duties.

[13] Mr Makata submits that the respondent has failed in her duties as Leveki Mangafaoa since her appointment in February 2000. He has also filed a petition of support for his application signed by 13 members of the Mangafaoa, including himself. He submits that this support of the Mangafaoa is adequate to achieve the removal and replacement of Mrs Lavini.

Submissions for the Respondent

[14] Mrs Lavini opposes the application and submits that she has upheld her responsibilities as the Leveki Mangafaoa for the following reasons:

- (i) The initial tenants, though not Mangafaoa, were accepted by the wider Mangafaoa and assisted in ensuring that the house was used and did not deteriorate.
- (ii) The tenants at the time of the hearing, though they have since vacated, were Mangafaoa as they have lineage back to the common ancestor, Hegasea. As such, she was acting within her powers as Leveki Mangafaoa to lease Lotouli to them, to the exclusion of other members of the Mangafaoa.
- (iii) Mrs Lavini has adequately communicated with the Mangafaoa regarding the leasing of Lotouli. While she was alive, the applicant's mother was aware and supported the leasing of the house and property. She submits that she has met and consulted with the wider Mangafaoa on this matter on a number of occasions.
- (iv) The applicant's petition to remove Mrs Lavini as Leveki Mangafaoa does not include numerous other members of the wider Mangafaoa. Therefore, the respondent submits that the application is not supported by a majority of the Mangafaoa.

Law

Removal of Leveki

[15] Section 16 of the Land Act 1969 ("The Act") provides for the removal and replacement of a Leveki Mangafaoa by the Court. It provides

16 Removal and replacement of Leveki Mangafaoa

- (1) The Court may remove from office any Leveki Mangafaoa if in its opinion he cannot by reason of mental or physical disability or for any reason carry out his duties satisfactorily or if he is shown to the satisfaction of the Court to have exercised his powers otherwise than in accordance with Niuean

custom or in accordance with equity and good conscience or if he tenders his resignation in writing to the Registrar.

- (2) Upon the death or removal from office of any Leveki Mangafaoa a new Leveki Mangafaoa may be appointed in the manner provided by section 14 and all the provisions of that section so far as they are applicable shall apply accordingly.

[16] Sections 15 articulates the powers and functions of Leveki Mangafaoa. Those sections provide:

15 Powers and functions of Leveki Mangafaoa

- (1) The Leveki Mangafaoa of any land, subject to this section and to the terms of his appointment and to any order or direction of the Court, shall have power to control the occupation and use of the land under Niuean custom and shall have power to alienate the land in accordance with the subject to Part 3.
- (2) In the exercise of his powers under this section the Leveki Mangafaoa shall under Niuean custom consult with the members of the Mangafaoa whether resident in Niue or elsewhere and shall in particular meet the requirements as to consultation laid down by section 17(3) in relation to the sale and lease of land and the giving of security charges over land.

[17] Mangafaoa is defined by s 2 of the Act as:

"Mangafaoa" 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, 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.

[18] In *Koligi v Iakopo*, the Court noted that the Leveki Mangafaoa has a general obligation to consult the Mangafaoa in exercising their powers regarding the occupation and use of the land.⁴ The Court emphasised that s 15 of the Act stipulates that the Leveki Mangafaoa must consult members whether they are resident in Niue or elsewhere, and that residency on the land does not give any person a greater entitlement over the other members of the Mangafaoa or a lesser obligation to consult with non-resident members.

[19] In *Jacobsen v Vase*, the Court dismissed an application for the removal of Leveki Mangafaoa on the basis that the main allegations against the Leveki Mangafaoa did not

⁴ *Koligi v Iakopo* [2017] NUHC 1; Land Division 11213 (12 October 2017).

relate to the land and there was insufficient evidence to show that the Leveki Mangafaoa did not care for the land.⁵

[20] In *Palalagi v Talafasi*, the Court emphasised the obligations of the Leveki Mangafaoa, noting the following:⁶

[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 land.

[21] In *Laihone v Tauekipaoa*, the Court emphasised that consultation with Mangafaoa in Niuean custom is inclusive not exclusive, for the purposes of s 15 of the Act. However, the failure of a Leveki Mangafaoa to specifically consult with individual members of the Mangafaoa is insufficiently serious to warrant removal of the Leveki Mangafaoa.⁷

Discussion

Has the Leveki Mangafaoa acted outside her powers under s 15(1) of the Act?

[22] The first issue is whether the Leveki Mangafaoa had acted outside her powers by leasing the house and land at Lotouli to Romio Palemia. The applicant submits that Mr Palemia is not part of the Mangafaoa.

[23] The respondent gave evidence that Mr Palemia is a descendant of Hegasea the common ancestor. While Mr Palemia is more distantly related to Hegasea than the applicant, Niuean custom is inclusive not exclusive. Even though the applicant denies that Mr Palemia is part of the Mangafaoa, he is nonetheless a descendant of the common ancestor and part of the wider Mangafaoa.

[24] I conclude that the Leveki was acting within her powers as set out in s 15(1) of the Act, by leasing Lotouli to Romio Palemia and his family. Mr Palemia is not a stranger to

⁵ *Jacobsen v Vase* [2012] NUHC (20 March 2012).

⁶ *Palalagi v Talafasi - Part Toloagamotu, Section 7, Block I, Hikutavake District* [2014] NUHC 2 (30 January 2014).

⁷ *Laihone v Tauekipaoa* [2019] NUHC 8; Land Division 11507, 11515, 11543, 11647 (10 September 2019)

the land as he is also descended from the common ancestor, though more distantly than the parties.

Has the Leveki Mangafaoa met her obligations to consult under s 15(2) of the Act?

[25] Mrs Lavini's evidence is that there were seven meetings held between the Mangafaoa and the Leveki Mangafaoa to discuss the land and the house, and specifically whether to partition the property for the benefit of the Palemia family.

[26] I note that while members of the Mangafaoa were aware that Lotouli was being leased to Mr Palemia, there seems to have been limited consultation with the applicant and his family. On the face of it, that is surprising given the history of the house and the land. However, since Vileo Makata passed away the state of relations between the parties has deteriorated.

[27] Lack of communication or agreement with the applicant and his family is an insufficient reason by itself to remove the respondent as Leveki Mangafaoa. This is because the respondent is not failing in her duties to an extent which warrants her removal under s 16 of the Act. The respondent is meeting her obligation to carry out consultation on other issues, such as partitioning the land. In the future the respondent should make reasonable efforts to ensure there is sufficient consultation with the Mangafaoa including the applicant and his family on all material issues concerning Lotouli such as leasing, or partition.

Has the Leveki failed to comply with her duty to maintain the land?

[28] The Leveki Mangafaoa is required to control the occupation and use of the land under Niuean custom. Perhaps more should have been done to ensure the land was well maintained and free of rubbish during the lease to Mr Palemia. However, the effects to the land submitted by the applicant, namely the leaving of rubbish and the presence of many cars, are not in this case permanent or seriously damaging to the land and can be alleviated by tidying the site.

[29] There are many examples of land in Niue being leased for both residential and commercial purposes, and the use of Lotouli as such, is still within the powers conferred by s 15(1) of the Act to control the occupation and use of the land under Niuean custom.

[30] In the absence of other serious breaches of duty, the presence of rubbish or cars on Lotouli is not sufficient to justify removal of the Leveki Mangafaoa. Section 16(1) of the Act requires that the Leveki must exercise her powers other than in accordance with Niuean custom or equity or good conscience. The evidence provided does not show to my satisfaction that the Leveki Mangafaoa has so failed in the exercise of her powers.

Decision

[31] For the reasons set out above, the applicant has failed to establish that there is sufficient cause to remove the Leveki Mangafaoa pursuant to s 16(1) of the Act.

[32] The applications to remove the Leveki Mangafaoa and appoint new Leveki Mangafaoa are dismissed.

[33] The Leveki Mangafaoa's authority has been confirmed by the Court. No works can proceed on the house or land at Lotouli without her agreement. The Leveki Mangafaoa is directed to undertake further consultation with the Mangafaoa, including the applicant and his family, concerning the future of Lotouli. The Registry staff can assist with meeting facilitation if requested.

[34] Because the substantive application is now determined, there is no point in determining Mrs Lavini's application for injunction.⁸

[35] The application for injunction filed by Mrs Lavini is dismissed.

Dated at Wellington, New Zealand this 10th day of February 2023.

S F Reeves
JUDGE

⁸ See note 3