IN THE HIGH COURT OF NIUE
(LAND DIVISION)

Application No: 10891

IN THE MATTER OF	Pt Halamahaga Section 112, Alofi
BETWEEN	TAGALOA COOPER-HALO AND CHARLIE FUKULAKI TONGAHAI **Applicants**
AND	IKIVALE KIFOTO **Respondent**

Hearing: 21 March 2024

Appearances: Romero Tailoa for Applicants
Phillip Allan for Respondent

Judgment Date: 20 January 2025

JUDGMENT OF CHIEF JUSTICE C T COXHEAD

Background

[1] This decision concerns a series of applications seeking to change a 1970 decision of this Court, which determined Pagetau as the common ancestor of Section 112, Halamahaga, Alofi (the land). Tagaloa Cooper-Halo and Charlie Fukulaki Tongahai filed further applications for a change of leveki, removal of leveki, to have a joint leveki and for an eviction.

[2] At the hearing of this matter on 21 March 2024, jurisdictional issues were raised as to whether this Court has the jurisdiction to change a previous decisions determination of a common ancestor. The issues to be considered in this decision are:

(a) Can the High Court of Niue review its own decisions; and

(b) Does the High Court have the inherent jurisdiction to change the common ancestor.

Applicant's submissions

[3] The applicants are seeking to amend the decision made in 1970 declaring Pagetau as the common ancestor of the land, due to an earlier order made in 1962 declaring that Kose Pani, Sipou, Tuiolo and Lolepati Rex were entitled to equal shares of the land.

[4] Given the discrepancies between the 1962 order and the 1970 order the applicants submit that the latter decision should be annulled by this Court.

[5] The applicants submit that the Court has jurisdiction to review and amend its own decisions as follows:

(a) There are no statutory provisions in Niue prohibiting or providing the High Court of Niue with its inherent jurisdiction, however, given its constitutional status the High Court possess its inherent jurisdiction for the administration of justice in Niue;

(b) Judicial review is a part of the High Courts inherent jurisdiction;

(c) Jurisdiction to set aside a decision is a natural extension of the High Court of Niue's inherent jurisdiction and such an extension will only better equip the Court to provide justice and to maintain its character as a Court; and

(d) The High Court of Niue should adopt the English and New Zealand High Court's jurisdiction, which would extend the scope of the High Courts inherent jurisdiction to include being able to set aside its own orders:

(i) In exceptional circumstances as required by the interests of justice and to maintain its character as a court of justice;

(ii) Where there is a substantial miscarriage of justice that would result if a fundamental error was not remedied; and

(iii) Where there is no alternative remedy reasonably available.

Respondent's submissions

[6] The respondent submits that this Court does not have the jurisdiction to amend earlier orders as contended by the applicants.

[7] The respondents agree that the High Court of Niue does have inherent jurisdiction, but say that this differs between the Civil and Land divisions of the Court. They submit that the inherent jurisdiction does not reside within the Land Division of the Court, which has exclusive jurisdiction to Niuean Land and gains this jurisdiction from the Niue Constitution Act 1974 and statute.

[8] The respondents agree with a previous determination made by Justice Isaac in this Court that the High Court's Land division can only act within its jurisdiction as set out in the Act and cannot defer from that.[1] There is no section in the Act to determine an application to change a common ancestor, therefore they submit that jurisdiction is not present here.

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1 *Fatiaki v Tafau – Part Tumau, Alofi District* [2015] NUHC 2 (20 March 2015).

[9] The respondents submit that there are instances where issues with a previous determination of a common ancestor has been addressed, as seen in *Asekona v Misika* [2017] NUCA 1 App No. 10130/5 (3 July 2017):

> [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.

[10] The respondent noted that where the Court has recognised a procedural irregularity or where it is was found, as a fact, that the earlier decision determining a common ancestor has not been perfected then the irregularity can be challenged by way of rehearing or appeal and, should the Court be satisfied, the irregularity can be corrected.

[11] In the present case the respondents submit that the applicants no longer have the ability to seek a rehearing of the 1970 decision. Rule 30 of the Land Court Rules 1969 provides that a rehearing application should be made 14 clear days after the making of the order or determination in respect of which the rehearing is sought.

[12] Further, at s 45(5) of the Niue Amendment Act No.2 1968 (the NAA) it provides that no order shall be varied or annulled at any time after the signing or sealing of the order.

[13] In terms of the applicants' potential remedy of taking the 1970 decision to appeal, s 75(3) of the NAA states the notice of appeal should be filed within 2 months after the date of the minute of the order appealed from. However, special leave may be granted from any judgment of the High Court subject to such conditions as to security for costs and otherwise as the Court of Appeal thinks fit. The respondents submit that the grant of special leave may be the most appropriate approach for the applicants but that is a matter to be determined by the Court of Appeal.

[14] The respondents therefore seek that the application for orders to annul and set aside the 1970 order should be dismissed for want of jurisdiction. They submit that this does not deprive the applicants of a remedy as they can make an application for special leave to appeal to the Court of Appeal (Land Division) against the 1970 decision.

The Law

Inherent jurisdiction

[15] The High Court of Niue has inherent jurisdiction that supplements its statutory powers but cannot directly contradict those powers.[2] A part of the inherent jurisdiction of the High Court is judicial review, which has been developed by Superior Courts to fulfil their supervisory function of administering justice as provided by law.[3]

[16] Jurisdiction for the Court to hear matters relating to 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 is provided for by s 47 of the NAA. Section 47 of the NAA provides as follows:

> (1) In addition to any jurisdiction specifically conferred upon the Land Court by any enactment other than this section, the Court shall have exclusive jurisdiction—
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> (a) To hear and determine any application to the 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 thereof:
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> (b) To determine the relative interests of the owners or the occupiers in any Niuean land:
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> (c) To hear and determine any application for the appointment of a Leveki Mangafaoa in respect of any Niuean land:
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> (d) To hear and determine any claim to recover damages for trespass or any other injury to Niuean land:
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> (e) To grant an injunction against any person in respect of actual or threatened trespass or other injury to Niuean land:
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> (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 Court:
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> (g) To create easements in gross over Niuean land:
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> (h) To make any order recording the determination of any matter relating to land or any interest therein, whether provided for in this Act or other enactment:
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> (i) To authorise the survey of any land.

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2 *Tongahai v Kitofo* [2022] NUHC 2; Application 2022-00061 (7 September 2022) at [14].

3 *Puletama v Kapaga* [2011] NUHC 3 (5 July 2011) at [21].

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

[17] Section 36(c) of the Lands Act 1969 (Lands Act) allows the Court to appoint new leveki magafaoa to land affected by any partition order. This also indicates that a new title is contemplated under the partition regime.

[18] Article 37 of the Niue Constitution 1974 provides that the High Court has jurisdiction (both criminal jurisdiction, and civil jurisdiction including jurisdiction in relation to land) as may be necessary to administer the law in force in Niue.

Discussion

[19] Both the Lands Act and the NAA do not contain specific statutory powers to cancel or change the common ancestor that determines the magafaoa. The only exception is where orders determining a common ancestor have been obtained by fraud - if this is the case, the orders may be annulled.[4]

[20] The Niue Court of Appeal in *Tafatu v Strickland* found that the High Court of Niue does not have jurisdiction to cancel the determination of a common ancestor unless those orders have been obtained through fraud.[5] The Court concluded that s 47 of the NAA does not confer general jurisdiction to determine or cancel title as ss 52 and 47 do not extend the Courts jurisdiction to hear matters involving the determination and cancellation of ownership to title.[6] In conclusion, the Court of Appeal found (agreeing with the decision under appeal) that the High Court did not have jurisdiction to cancel or change the determination of the common ancestor of the land.[7]

[21] The finding above was reiterated by the Court of Appeal in *Asekona v Misikea*, whereby once a common ancestor is determined there are limited opportunities to change that determination, with such change only being made by way of appeal or rehearing. Alongside

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4 Niue Amendment Act (No 2) 1968, s 54.
5 *Tafatu v Strickland* [2016] NUCA 3 at [54]; See also *Tongahai v Tafatu – Section 3 Block III Alofi District (Part Tapeu)* [2015] NUCA; App. No. 1189/62/6 (27 October 2015) at [68]-[70].
6 *Tafatu v Strickland* [2016] NUCA 3 at [53].
7 At [56].

this it was clear that the only other way to change a title set under the NAA is in cases of fraud.[8]

[22] In *Suamili v Paramoa* it was found that the applicants could not rely on the Court's inherent jurisdiction for the outcome they sought as there were other options available in seeking their desired outcome, which were applying for a rehearing or lodging an appeal. However, in that case the order challenged was made in 1962, therefore rehearing was out of the question. In its judgment the Court stated that the applicant's reliance on the Court's inherent jurisdiction was akin to an abuse of Court process, procedure and time.[9]

[23] It can also be noted that Chief Justice Hingston (as he was then) in 2006 issued a practice note reinforcing the position that the Court has no jurisdiction to change the common ancestor to land. This practice note was referred to and relied upon in *Fatiaki v Tafatu*.[10]

[24] Aotearoa New Zealand common law provides that the courts' inherent jurisdiction may be exercised as long as any order does not conflict with any statutory or regulatory provision. However, it may be constrained by "well established principles of common law or equity."[11] The Aotearoa New Zealand Supreme Court has also stated that the inherent jurisdiction of a Court continues as an:[12]

> …authority of the judiciary to uphold, to protect, and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.

[25] The Māori Land Court, which is one of the Aotearoa New Zealand courts with the most similarities in jurisdiction to the Land division of the Niue High Court, as a creature of statute has limited inherent jurisdiction. This limited inherent jurisdiction is addressed in *Taueki – Horowhenua 11 (Lake) Māori Reservation Trust*, in the context of whether the Court had the ability to grant a stay of execution, as follows:[13]

> [12] The Māori Land Court does not possess any inherent jurisdiction, other than where it has been accorded the same powers and authorities of the High Court in respect of trusts under section 237 of Te Ture Whenua Māori Act 1993. While the original application to the Court was for the removal of a trustee under the Court's

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8 *Asekona v Misikea* [2017] NUCA 1; Application 10130/5 (3 July 2017).
9 *Suamili v Paramoa* [2024] NUHC 1; Application CV2023-00063 (10 May 2024) at [56]-[58].
10 *Fatiaki v Tafatu* [2015] NUHC 2; Application Nos. 9848 an 9849 (20 March 2015) at [36].
11 *Re Lee* [2017] NZHC 3263, [2018 2 NZLR 731 at [29].
12 *Mafart v Television New Zealand* [2006] NZSC 33, [2006] 3 NZLR 18 at [16].
13 *Taueki - Horowhenua 11 (Lake) Māori Reservation Trust* (2012) 279 Aotea MB 102 (279 AOT 102) ;See also *Sutherland v Sutherland* [1995] NZFLR 935.

> trust powers, the power to issue a stay of execution cannot properly be interpreted as a part of the 'powers and authorities of the High Court in respect of trusts', and the Māori Land Court accordingly does not have the authority to issue a stay in reliance on the High Court's inherent jurisdiction.
>
> [13] The only remaining ground on which the Court might issue a stay of proceedings, without there being explicit statutory authority to do so, is in accordance with the principle set out by the Court of Appeal in *McMenamin v Attorney-General* [1985] 2 NZLR 274. That Court stated that '[a]n inferior Court has the right to do what is necessary to enable it to exercise the functions, powers and duties conferred on it by statute. This is implied as a matter of statutory construction. Such Court also has the duty to see that its process is used fairly. It is bound to prevent an abuse of that process.
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> [14] I agree with this principle and consider that the Māori Land Court does have the power to issue a stay of execution in respect of a final order that has been appealed to the Māori Appellate Court, but only in very limited circumstances. In my view, Parliament would not have legislated to allow the right of an appeal from a final order of the Court without the intention that that appeal have effect where the appellant is successful. Therefore, in the situation where an appellants right of appeal under section 58 would be rendered nugatory if a stay of execution were not granted, the Māori Land Court must have the authority to issue a stay. This is comparable to the High Court's assessment of its inherent power to grant a stay where the efficacy of an appeal would be destroyed were this Court not to intervene.
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> [15] In summary, I find that the Māori Land Court has the jurisdiction to issue a stay.

[26] For the reasons set out above, I find that the High Court of Niue does not have the power to annul an order determining the common ancestor, except (as is set out in the legislation) where such an order has been obtained by fraud.

[27] If the applicants seek to challenge the order determining a common ancestor for Section 112, Halamahaga, Alofi, the options available to them, as set out in statute, are to apply for a rehearing (the statutory timeframe for which has now passed) or to seek to appeal the order (for which they must seek special leave from the Court of Appeal, in light of the time that has passed since the order was made in 1970).

[28] While the applicants have argued that the power to annul an order is a part of the inherent jurisdiction of this Court, I cannot find that such inherent jurisdiction exists when there are other options readily available to the applicants to seek a reconsideration of the order under the relevant legislation.

Conclusion

[29] The application for orders to annul and set aside the 1970 order of this Court, which determined Pagetau as the common ancestor of Section 112, Halamahaga, Alofi (the land) is dismissed for want of jurisdiction.

Pronounced at 2.00pm in Rotorua, Aotearoa New Zealand on the 20th day of January 2025

C T Coxhead
CHIEF JUSTICE