IN THE HIGH COURT OF NIUE
(LAND DIVISION)

Application No: 2025-00102

UNDER	Section 45, Niue Amendment Act 1968
IN THE MATTER OF	Pt Malutu/Tumea Lakepa District
BETWEEN	TOGIATOLU TOGIAMUA AND PUNAAIKI TOGIAMUA **Applicants**
AND	ASAFOTAMA FATAMAKA & OTHERS **Respondents**

Hearing: 26 November 2025

Appearances: Mr Toailoa for Applicants
Ms Tomailuga & Mr Sioneholo for Respondents

Judgement Date: 26 February 2026

DECISION OF JUSTICE S F REEVES

Introduction

[1] On 18 March 2025 Chief Justice Coxhead granted an interim injunction to stop all works taking place on the land known as Pt Tumea/Malutu, Lakepa District. The court also granted a change of Leveki Magafaoa, conditional on the 10 proposed Leveki Mangafaoa providing consent to being appointed Leveki and confirmation that they are residents of Niue.

[2] Togiatolu Togiamua and Punaaiki Togiamua have filed an application for a rehearing of that decision on the grounds that a similar application had been previously dismissed, raising the issue of *res judicata*, and that the Chief Justice did not apply the correct legal tests and principles when issuing the injunction or appointing the Leveki. They are seeking that the court set aside the injunction and the conditional appointment of the 10 proposed Leveki, and request that the applications are adjourned *sine die*. They also seek for the title of the block of land to be relitigated.

[3] The main issue for the court to consider is whether this is really, in substance, an appeal rather than an application for rehearing?

Background

[4] This is a large block at Lakepa that was titled in 1970 on instrument 192 volume N2 folio 92 and is described as section 8 pertaining to 89 acres. The land was titled for the purpose of cattle farming projects that were being developed on the island at that time. The original title listed five Magafaoa and five Leveki Magafaoa from the common ancestors Hegavale, Kaea, Taumoemotu, Falani & Tumataiki.

[5] An initial application for a permanent injunction was filed by Asafotama Fatamaka, a descendant of the common ancestor Hegavale, to stop alleged clearing on the land. This application was dismissed at a hearing on 19 November 2024 due to the grounds for injunction not being met.

[6] Following the dismissal of the 2024 injunction application, further applications were filed regarding the land:

(a) Applications for an interim injunction and to change the Leveki Magafaoa of the land were filed by Asafotama Fatamaka and 10 others. Asafotama Fatamaka sought an interim injunction to prevent Togiatolu Togiamua and Punaaiki Togiamua, descendants of three of the common ancestors (Kaea, Tumataiki and Hegavale), from clearing the land, and to appoint Leveki for the land as they say all the current Leveki have all passed.

(b) An application seeking summary dismissal of the interim injunction and change of Leveki applications was filed by Togiatolu Togiamua and Punaaiki Togiamua.

[7] These matters were heard together on 18 March 2025 by Chief Justice Coxhead, where the interim injunction was granted and the 10 Leveki Magafaoa were appointed conditional on the confirmation that they reside in Niue and that they consent to being appointed as Leveki Magafaoa over the land. The application seeking a summary dismissal was dismissed.

[8] This is an application for rehearing of the Chief Justice's decision made at the 18th of March 2025 hearing.

Applicant's submissions

[9] In written submissions Mr Toailoa submitted that because a previous injunction application relating to the clearing of the land was dismissed by Chief Justice Coxhead on 19 November 2024, that the doctrine of *res judicata* applies. On this point, in response to a question from the court, Mr Toailoa conceded that the previous injunction decision was for a permanent injunction and therefore *res judicata* does not arise.

[10] The applicants are seeking a rehearing of the interim injunction granted pending the outcome of Asafotama Fatamaka's substantive application for the appointment of the replacement Leveki Magafaoa. They submit the onus was on the respondents to satisfy the court on the balance of probabilities that there was a serious question to be tried, the balance of convenience lay in the granting of the injunction and that the injunction was in the interests of justice. The applicants say the respondents did not fulfil these requirements, and further,

that Chief Justice Coxhead did not correctly consider the legal tests in granting the interim injunction.

[11] The applicants also submit that the applications filed with the court to appoint the Leveki Magafaoa were incomplete and should not have been accepted by the Court Registry for filing. The application included minutes of a meeting held by the Hegavale family that did not mention the appointment of the Leveki Magafaoa. The applicants claim that they have been deliberately excluded by the respondents from any of the meetings. They further say that there was no evidence supporting the appointment of any of the nominated Leveki Magafaoa, and his Honour did not have the mandate to confirm the appointments, even on a provisional basis.

[12] They also say that the nominated Leveki Magafaoa did not provide written consents to their appointments, which is a requirement normally insisted upon by the Court Registry, and that some of the nominated Leveki Magafaoa do not reside in Niue.

[13] The applicant also submits that the area that has been cleared does not interfere with the use and enjoyment of the land by any other person. When they decided to clear the land seven years ago, there was no Leveki Magafaoa alive or living in Niue to consult. In written submissions Mr Toailoa submits that of the five original Leveki Magafaoa appointed by the Court only one is still alive, Talitama Magatogia, who is currently living in New Zealand and unable to carry out his duties as a Leveki Magafaoa. He is the father of Morgan Magatogia who they paid to clear the land for the past seven years. However, during the hearings, Mr Toailoa submitted that he believes that all of the Leveki have passed away.

[14] They applicant states that whilst a Leveki Magafaoa plays an integral role in overseeing the use and occupation of magafaoa lands, there is nothing under the Land Act which inhibits any member of a magafaoa (‘owner’) from using any magafaoa land at times when there is no appointed Leveki Magafaoa. If it were otherwise, then it would be tantamount to the ‘owners’ of the land being restrained from using their own lands; a consequence that was never intended by the statutory scheme.

Respondents' submissions

[15] At the hearing, Ms Rhonda Tomailuga submitted that the respondents have no objection to the rehearing but that they support the decision made on 18 March 2025 by Chief Justice Coxhead.

[16] They say that meetings of Magafaoa were held and the newly appointed Leveki all have genealogy links to the common ancestors of the land. They also state that they have provided sufficient evidence for the Court to appoint the 10 Leveki Magafaoa who are all aware of the activities on the land.

Law

[17] Rule 30 of the Land Court Rules 1969 states that an application for rehearing must be filed within 14 clear days after the making of the order or determination.

[18] Section 45 of the NAA clearly states that the Court has absolute discretion when considering whether to grant a rehearing or not:

> **45 Rehearings**
>
> (1) On the application of any person interested, the Land Court may, if it thinks fit, grant a rehearing of any matter either wholly or as to any part thereof.
>
> (2) On any such rehearing the Court may either affirm, vary, or annul its former determination, and may exercise any jurisdiction which it might have exercised on the original hearing.
>
> (3) When a rehearing has been so granted, the period allowed for an appeal to the Land Appellate Court shall not commence to run until the rehearing has been disposed of by a final order of the Court.
>
> (4) Any such rehearing may be granted on such terms as to costs and otherwise as the Court thinks fit, and the granting or refusal thereof shall be in the absolute discretion of the Court.
>
> (5) No order shall be so varied or annulled at any time after the signing and sealing thereof.

[19] In the Niue Court of Appeal, it has been determined that a rehearing may only be granted in the following circumstances:[1]

> 1. Where further material evidence of a credible nature has been discovered which was not available at the original hearing.

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[1] *Tahega v Kapaga - Part Limu, Namukulu* [2016] NUCA 2; Application 11346 (17 August 2016) at [45].

2. Where there has been a breach of process or procedure which may have disadvantaged one of the parties to the extent that there has been a miscarriage of justice; and

3. Where judicial error is involved, a party is entitled to a retrial if the result of the error is a fundamental miscarriage of justice.

[20] Granting a rehearing is at the absolute discretion of the court, even where one of the above criteria is met, and is not an opportunity to relitigate, to fix omissions in the presentation of an earlier case or to reshape that case.[2] The fundamental principle for consideration is whether there has been a miscarriage of justice that justifies the rehearing.[3]

[21] An appeal can also be made to the Court of Appeal.[4] An appeal is distinct from a rehearing and is an opportunity for an appellant to seek a reconsideration of a decision that they say was incorrect in its reasoning. The Court of Appeal may only intervene if it is satisfied that the lower court:[5]

(a) Erred in law or principle.

(b) Took into account an irrelevant matter.

(c) Failed to take into account a relevant matter; or

(d) Was plainly wrong.

Discussion

[22] The applicants raise several issues in support of their application for rehearing.

[23] As discussed in paragraph 9 above, the *res judicata* issue raised in relation to the injunction application, does not apply as the previous application was for a permanent injunction, a substantive proceeding involving different legal tests and thresholds. This ground fails.

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2 *Seu v Paka - Part Fakafaleloto* [2021] NUHC 1; Land Division 11920 (27 October 2021) at [23].
3 *Tahega v Kapanga – Part Limu Namukulu* [2016] NUCA 2; 11346 (17 August 2016) at [50].
4 Niue Amendment Act (No 2) 1968, s 75.
5 *Kacem v Bashir* [2010] NZSC 112 at [32]. See also *Tahega v Kapaga* [2020] NUCA 2; Application 11615 (19 May 2020), *Matthews v Matthews – Estate of Graham Ngahina Matthews* [2015] Māori Appellate Court MB 512 (2015 APPEAL 512) at [56] and *Hohepa v Piripi – Waima C30A and Waima Topu Blocks* [2019] Māori Appellate Court MB 629 (2019 APPEAL 629) at [18].

[24] The procedural issues raised in relation to orders appointing provisional Leveki Magafaoa also fail. After hearing the evidence and submissions Chief Justice Coxhead was sufficiently satisfied to make the replacement Leveki appointments and exercised his discretion subject to consents and confirmations as to residency being provided. In these circumstances I do not consider that the process or procedure that was followed has disadvantaged parties to the extent that there has been a miscarriage of justice, and neither was that alleged.

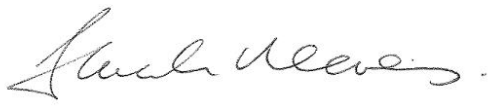
[25] In my view, the issues raised concerning the granting of the interim injunction are more amenable to an appeal than rehearing. In short, the applicants have submitted that Chief Justice Coxhead got it wrong and incorrectly applied the legal tests for granting the interim injunction. These are grounds for appeal, not rehearing, particularly as the applicants have not alleged any of the usual grounds for rehearing such as the availability of further material evidence, or a breach of process or procedure resulting in miscarriage of justice, or that judicial error has resulted in a fundamental miscarriage of justice.

[26] I conclude that in substance, the grounds raised concerning the determination of the injunction application are grounds for an appeal, rather than for rehearing, and the application for rehearing must fail.

Decision

[27] The application for rehearing is dismissed.

Pronounced at Te Whanganui–a-Tara in Aotearoa/New Zealand on this 26th day of February 2026.



S F Reeves
JUSTICE