

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

App No: 10703/ 10760/
10925/ 10988/ 11329

IN THE MATTER: Part Fugaluga, Hikutavake –
Determine Title and Appoint Leveki
Magafaoa

BETWEEN Melealope Taniela Gumaka
Hilimatapule Palalagi
Mokavesi Jack Willie Lipitoa
Dick Hipa Tuhipa

Applicants

Judgment: 6th April 2017

DECISION OF JUDGE W W ISAAC

Introduction

[1] The applications before the Court are to determine the title and appoint a Leveki Magafaoa for Part Fugaluga, Hikutavake.

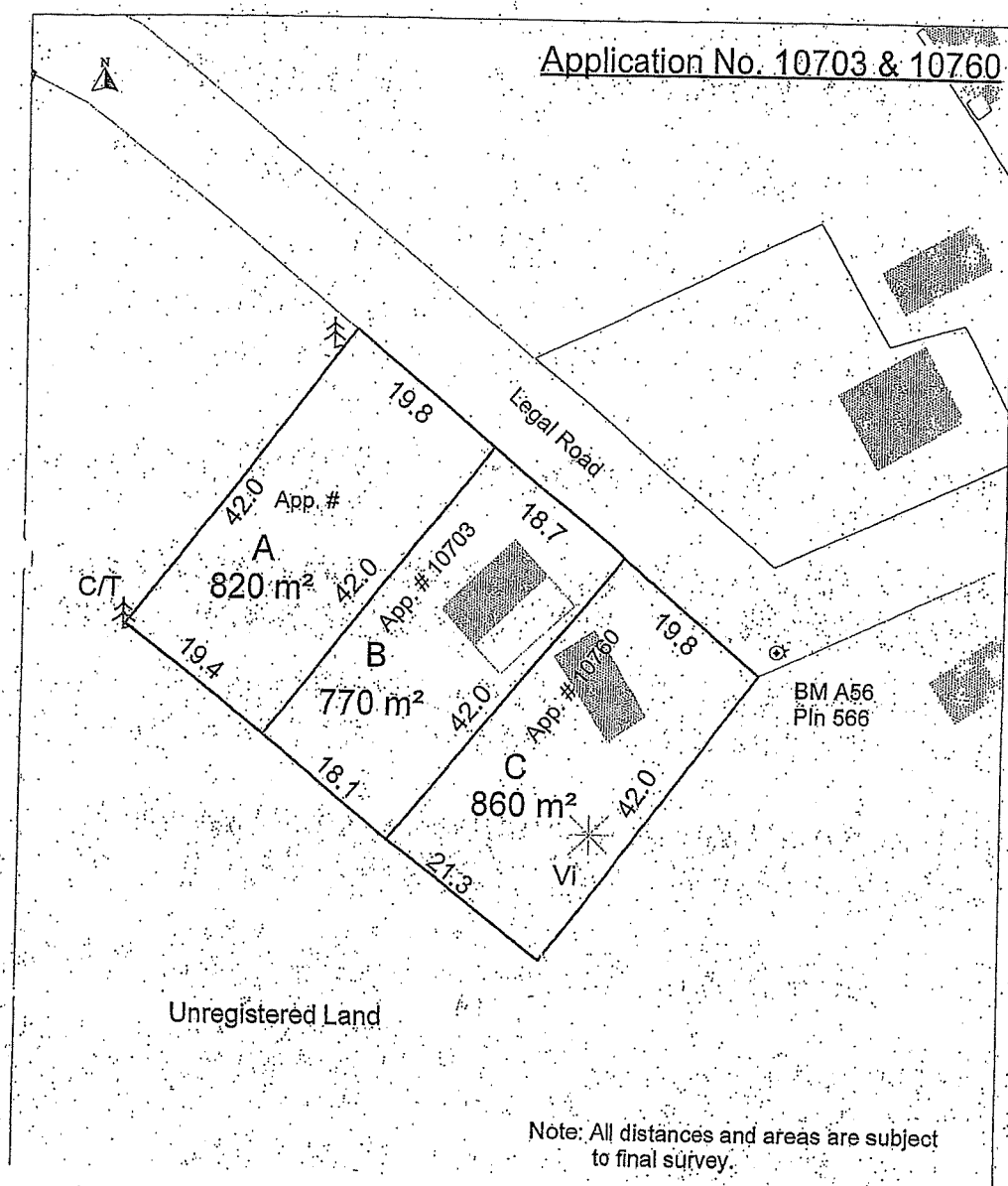
[2] The applications are as follows:

- (a) By Melealope Taniela Gumaka, dated 25 January 2013, determining the common ancestor as Kalopulu Taniela Gumaka and Melealope Gumaka as the Leveki Magafaoa.
- (b) By Mokavesi Jack Willie Lipitoa, dated 4 March 2013, determining the common ancestor as Puasifa and Opili Talafasi as the Leveki Magafaoa.
- (c) By Dick Hipa Tuhipa, dated 8 October 2013, determining the common ancestor as Fulutatao and Richard Puivao Rangi Tuhipa as the Leveki Magafaoa.

- (d) By Hilimatahepule Tafua-Palalagi, dated 21 January 2014, determining the common ancestor as Gumaka and Niutaha Tahega as the Leveki Magafaoa.
- (e) By Hilimatapule Palalagi and Melealope Gumaka, dated 10 November 2015, determining the common ancestor as Kalopulu Taniela Gumaka and Niutaha Tahega as the Leveki Magafaoa.

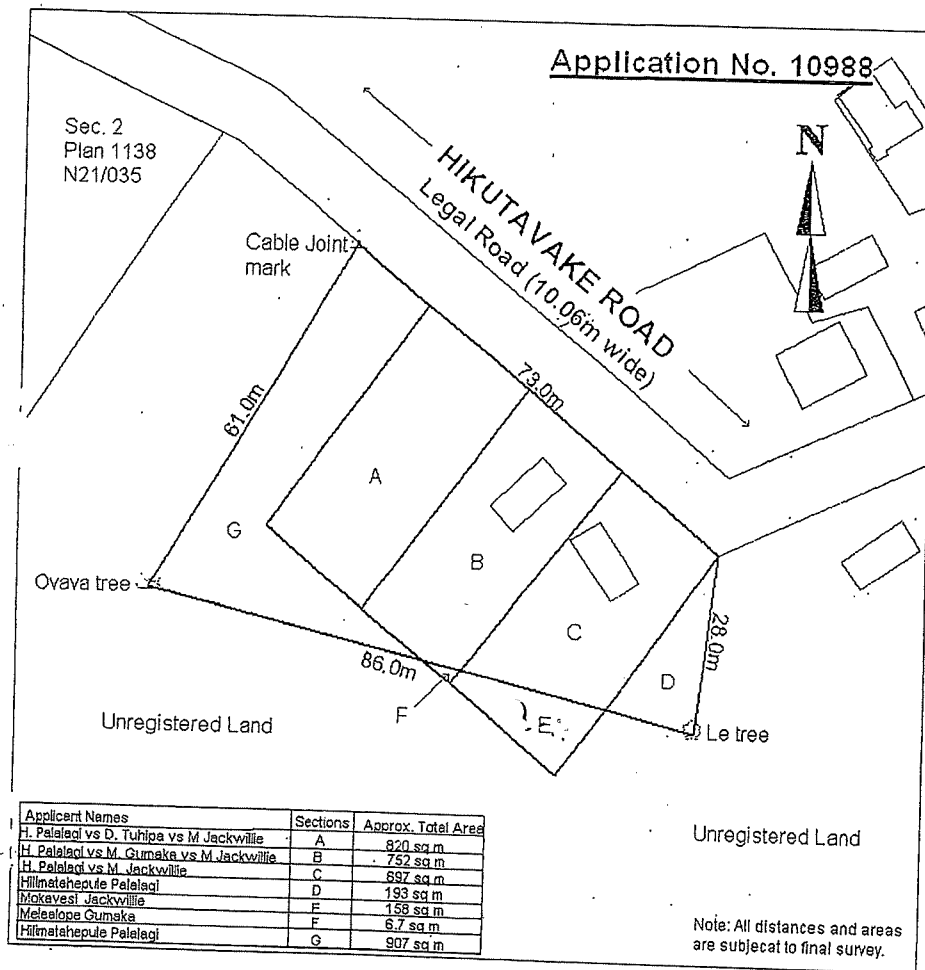
[3] The provisional plans before the Court are:

(a) PP 10703 & 10760, dated 13 March 2013:



Land Name: Pts. Fugaluga
BLK.I Hikutavake SD

(b) PP 10988, dated 14 May 2014:



Land Name: Pt. Fugaluga/Futapeka
BLK II, HIKUTAVAKE SD

Provisional Plan 10988

[4] Since the commencement of the proceedings, the Gumaka and Palalagi families have completed a Memorandum of Agreement dated 4 November 2015 in which they agree to the following:

- (a) Melealope Gumaka's applications of No. 10703 and 10704 seek to determine title and appoint Leveki Magafaoa for Blocks B and F, and the hurricane house of her father Taniela Gumaka.
- (b) Hilimatapule Tafua-Palalagi's applications of No. 10988 and 10989 seek to determine title and appoint Leveki Magafaoa for Blocks C and D, and the hurricane house of her father Mahanitotonu Tafua.

- (c) The balance of Blocks A and G are for the family of Kalopulu Taniela Gumaka.
- (d) The common ancestor or Magafaoa is Kalopulu Taniela Gumaka.
- (e) Niutaha Tahega is to be appointed Leveki Magafaoa to look after all the properties for the family living in Niue and overseas.
- (f) The Provisional Plan provided by Hilimatahepule Palalagi, dated 14 May 2014, is the correct plan for their claim.

[5] The matter came before the Court on 26th November 2015 and each party has had the opportunity to put their respective cases to the Court.

Case for Melealope Gumaka and Hilimatapule Palalagi

[6] Melealope Gumaka and Hilimatapule Palalagi claim that Fugaluga was given by Puasifa to their grandfather, Gumaka, around 1940 and Puasifa told her family not to go back on this gifting to Gumaka and his descendants. Hilimatapule Palalagi submits that it can be inferred from this statement that Puasifa did not intend her descendants to take back the land.

[7] Gumaka and his descendants have lived there from 1940 until the present day, as the land was later passed on to Gumaka's children, specifically his eldest child Sioufa Gumaka Tafua and her husband Mahanitotonu Tafua, great nephew of Puasifa, and cousin of Mokavesi Lipitoa (one of the other applicants). As a result, the land given to Gumaka now has a genealogical link between the families of Gumaka and Puasifa through the marriage of Sioufa and Tafua. Hilimatapule Palalagi is their eldest child, and Melealope Gumaka is their niece, daughter of Sioufa's brother Taniela.

[8] Melealope Gumaka and Hilimatapule Palalagi claim the land on the basis of undisturbed occupation for more than 70 years, since 1940. They submit that the occupation by Gumaka and his descendants on the land confirmed the gifting of the land by Puasifa in accordance with Niue custom.

[9] Hala Mahani Tafua, another child of Sioufa and Tafua, provided the following evidence by affidavit in support of Hilimatahepule's application. Sioufa and Tafua built a house on the land for themselves in 1960, and another house was built in 1962 for Sioufa's brothers, Taniela and Mataiki. They also built another smaller kitchen unit behind the main house. Sioufa and Tafua's youngest child, Ottorose, passed away in 1968 and was buried in front of the main house. Her headstone is still located there.

[10] Despite the family moving to New Zealand in the early 1970s, Sioufa and Tafua maintained connection to the land. They visited frequently and sent money to the unofficial leveki, Opili Talafasi, who had been appointed over the land to help with maintenance. It was always their intention to return to the land and although Sioufa died in 1999 after a short illness in New Zealand, Tafua returned to the land after her death. Tafua died in the house in 2003. Their last wishes, according to Hilimatapule, were for the family to maintain the houses and land. The family has now spent thousands of dollars in maintenance since the 1970s, and the grandchildren have now taken over this duty of maintenance.

[11] Hilimatapule Palalagi argues that Mokavesi Lipitua's attempts to title the land through her adopted grandmother Puasifa goes against the agreement made between Puasifa and Gumaka, and Puasifa's intentions in terms of her own descendants for them not to take the land back. Mokavesi Lipitua has never lived on the land.

[12] Hilimatapule Palalagi also submits that the survey carried out by Mokavesi and Melealope in January 2013 was wrong as they had limited knowledge about the boundaries.

[13] In summary, Melealope and Hilimatapule claim that the land was gifted by oral agreement from Puasifa to their grandfather Gumaka. Puasifa did not intend for the land to pass back to her descendants. The land therefore passed to Gumaka's children after his death, and their descendants occupy and maintain the land to this day. Their connection to the land is evidenced by the houses, plantations and burial sites which they built on the land. Any claims to the land by other extended family members are irrelevant because Gumaka passed on all his rights to his eldest daughter Sioufa and her husband Tafua.

Case for Mokavesi Jack Willie Lipitoa

[14] Mokavesi Lipitoa claims connection to the land through Puasifa, who adopted Mokavesi's adopted mother Hinavele Mokahe motu Pamo.

[15] Mokavesi Lipitoa claims that she had always known that, although the land was given to Gumaka and has been occupied by Gumaka and his descendants, it always belonged to Puasifa.

[16] Mokavesi appointed Opili Talafasi as Leveki of the land under customary process when Gumaka's children all left Niue in the early 1970s, and the houses on the land are now occupied by another family who Opili Talafasi gave permission to live there.

[17] Mokavesi submits that Melealope and Hilimatapule's claims to the land are based on the fact that they are Gumaka's grandchildren. Mokavesi submits, however, that Gumaka only lived there by permission of Puasifa, who allowed Gumaka and his children to live there so that that they could be closer to the church. Puasifa gifted the land to Gumaka in good faith and, for this reason, Mokavesi should be allowed to take ownership of the land. This is supported by the evidence of Gumaka's great grandchildren Feuakimamata Mokalei, Tuleitoa Tamauka and Apolo Talafasi, who filed affidavits in support of this fact.

[18] Mokavesi states that Melealope and Hilimatapule may stay on the land, but must recognise that it was given for occupation by Puasifa and they must consult the Leveki about anything done to the land. Mokavesi additionally wishes to appoint Opili Talafasi as the Leveki Magafaoa for the land under the court process.

Case for Dick Tuhipa

[19] Dick Tuhipa disputes Mokavesi's claim that the land belongs to Puasifa. He submits that Puasifa did not own any land on the upper terrace of the hill where Fugaluga is located and never lived on Fugaluga. He claims, rather, that she lived down the hill on the lower terrace of Hikutavake village.

[20] Dick Tuhipa also disputes Mokavesi's claim of rights from Puasifa. Dick submits that there is no evidence to support Mokavesi's claim of having been legally adopted, and the fact that her adopted mother Hinavele was buried in the village of Namukulu, not on Fugaluga, is not an action which would be taken by someone who has connection to the land.

[21] He also submits that there is no documented agreement between Puasifa and Gumaka and, even if there was, Puasifa had no mandate to gift family land to someone outside of the family. He states, however, that if he is successful in his application for the common ancestor to be recognised as Fulutatao, nothing will change in terms of the occupation of the land by the Gumaka family.

[22] Dick Tuhipa claims that the land comes from his ancestor Fulutatao. Dick submits, that, unlike Mokavesi, he has a strong blood connection through his great grandmother Fukesifa to Fulutatao, and therefore to the land. Dick submits that the land has always been occupied by Fulutatao's descendants

Discussion

Determination of Title

[23] The first issue to determine is to determine title by declaring a common ancestor of the magafaoa of this land.

[24] When determining title, I must take into account Section 10 of the Land Act 1969 and ensure that title to the land is determined in accordance with Niue customs and usages.¹ Section 10 further states that ownership is to be determined by ascertaining and declaring the magafaoa of that land by reference to the common ancestor.²

[25] Section 11 Land Act 1969, sets out matters which the Court may take into account when determining title. This includes the genealogical connection to the land, the names and location of any cultivation, villages, burial places and other places of historical significance, and any other proof of occupation.

¹ Land Act 1969, s 10(1)

² S 12

[26] When considering the evidence, I accept that the land was given by Puasifa to Gumaka. This took place in the 1940's and is clearly in the memory of the families of the donor of the land, Puasifa and the family of the donee Gumaka.

[27] This fact is corroborated by evidence from the Mokavesi applicants and the Gumaka applicants and I do not consider that the evidence of Dick Tuhipa refutes that evidence.

[28] This being the case it is my view that the magafaoa for this land is the Puasifa magafaoa. It would appear that Mokavesi Lipitoa and also Dick Tuhipa have close genealogical links to Puasifa.

[29] Furthermore it seems clear that since 1940 no one have interfered with the Gumaka family occupation of this land.

[30] Dick Tuhipa may say that Puasifa had no authority to gift the land, but in my view the fact remains that this land was given by Puasifa to Gumaka and the gift has endured. Mr Tuhipa himself has said he would not interfere with the Gumaka occupation.

[31] As a result of this discussion I declare the common ancestor to be Puasifa of all Blocks B and F, C and D, & A and G.

Leveki Magafaoa

[32] In considering the appointment of a Leveki Magafaoa I note the provisions of section 14 which require:

"(5) Any person who is domiciled in Niue, and whom the Court is satisfied is reasonably familiar with the genealogy of the family and the history and locations of Magafaoa land, may be appointed as a Leveki Magafaoa of any land, but if he is not a member of the Magafaoa he shall not by virtue of such appointment acquire any beneficial rights in the land."

[33] I therefore must bear in mind the ownership of the land by the Puasifa family as well as the occupation of this land by the Gumaka family. To enable both the authority


and rights of both these families to be recognized I consider I must ensure that both families are represented.

[34] The Puasifa family considered Opili Talafasi as an appropriate leveki magafaoa. The Gumaka family consider Niutaha Tahega.

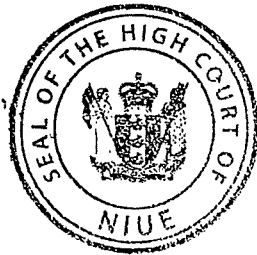
[35] Both these people are resident in Niue and both know this land.

[36] I am satisfied therefore that in terms of Section 14 Land Act 1969 both Opili Talafasi and Niutaha Tahega appointed as Leveki Magafaoa each of the titles determined at paragraph (31).

Dated at **Fonuakula, Alofi** this **06th** day of **April** **2017**.



Wilson W Isaac
JUDGE



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