

IN THE HIGH COURT OF NIUE

APPLICATION NO. CR41/2020

IN THE MATTER OF Section 1 of the High Court Rules Amendment
No 2

AND

IN THE MATTER OF Part Pua, Section 1, Block III, Alofi District

BETWEEN PETER FETAUI AND TELEANA FETAUI
Applicants

AND NIUE POLICE
Respondents

Date: 2 October 2020 (NZ)

DECISION OF COXHEAD J

Introduction

[1] On 14 July 2020 a Trespass Notice was issued to Teleana Fetaui and Peter Fetaui requiring them to stay off the area known as Part Pua, Alofi South, a block of 8.7742ha. The applicants' mother's house is on the land block with a shared driveway.

[2] On 30 July 2020 Teleana Fetaui and Peter Fetaui filed an application requesting that the Court nullify the Trespass Notice.

[3] On 26 August 2020 the matter was referred to me.

[4] On 28 August 2020 I issued directions requiring that the application and supporting documentation be served on Taumafai Fuhiniu (Leveki Mangafaoa for the land in question) and the Niue Police.

[5] I directed that Taumafai Fuhiniu and the Niue Police had until 1 September 2020 (Niue time) to file responses.

[6] On 1 September 2020 the Niue Police filed a response. Taumafai Fuhiniu did not file a response.

Submissions of the Applicant

[7] Teleana Fetaui and Peter Fetaui opposed the Trespass Notice issued by the Police and asked that the Trespass Notice be nullified. This is on the basis that:

- (a) The occupier and authorised resident of this property is Teleana Fetaui's 90-year-old mother, her younger sister Hana Fuhiniu and her daughter Miliana;
- (b) Teleana Fetaui is a joint landowner of the same section;
- (c) Teleana Fetaui's father willed all his lands to his named children which is evidenced in a handwritten letter in Niuean;
- (d) The Trespass Notice was instigated by Teleana Fetaui's brother, Taumafai Fuhiniu on his own without notice or discussion prior with any of the named landowners who reside in Niue, New Zealand and Australia;
- (e) Teleana Fetaui holds Enduring Power of Attorney for her mother;
- (f) Teleana Fetaui and Mr Peter Fetaui regularly maintain the grounds on her mother's home;

- (g) Teleana Fetaui and Mr Peter Fetaui have been alienated from accessing the property which is putting her mother's health and wellbeing at risk and causing her mother undue stress;
- (h) The issuing of a Trespass Notice is undeserved and Teleana Fetaui is one of the landowners of the said land;
- (i) Teleana Fetaui's brother Taumafai Fuhiniu was appointed Leveki Mangafaoa by their father (deceased) as Taumafai Fuhiniu was the only sibling residing in Niue at the time;
- (j) Teleana Fetaui has not been given any reason why the Trespass Notice was issued;
- (k) Teleana Fetaui wishes to continue to care and support her dearly loved mother and sister.

Respondent's submission

[8] The Police have replied. In summary they submit:

- (a) It is their understanding that the Leveki Mangafaoa of the land has legal authority to act on behalf of the family regarding the land;
- (b) The Leveki Mangafaoa has been involved in a long family battle over the land with his sisters Teleana Fetaui and Hana Fuhiniu;
- (c) Taumafai Fuhiniu contacted the police alleging that Teleana Fetaui had driven recklessly in the area of the residence placing Taumafai Fuhiniu's grandchildren at risk;
- (d) The Niue Police investigated the reckless driving complaint and it was determined that there was insufficient evidence that the incident had occurred as reported by Taumafai Fuhiniu. No charges were filed against Teleana Fetaui;

- (e) Mediation was offered to Taumafai Fuhiniu in an attempt to resolve the issue, but he declined;
- (f) The trespass warning notice was issued by Police due to Taumafai Fuhiniu's position as the Leveki Magafaoa. The Police issued the Trespass Notice in question at the request of the Leveki Mangafaoa who, in their view, has the legal authority over the lands;
- (g) The Police are not legally required to determine if the Leveki Mangafaoa is indeed acting on behalf of the family and it is the responsibility of the family to remove a Leveki Mangafaoa if she/he is not acting according to their desires;
- (h) Hana Fuhiniu, a resident on the section of land, granted permission to Teleana and Peter Fetau to enter onto the land;
- (i) The Niue Police believe the Trespass Notice was issued according to law, even if the reasonableness of the warning is questionable.

The Law

[9] Section 15 of the Land Act 1969 states:

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.

[10] The Leveki Mangafaoa has the responsibility of making significant decisions regarding the land on behalf of the Mangafaoa. In *Laifone v Tauekipaoa*, Judge Reeves considered an application for an interim injunction, the removal of the Leveki Mangafaoa

and the replacement with a new Leveki Mangafaoa.¹ In her decision, Judge Reeves referred to previous cases discussing the role and obligations of a Leveki Mangafaoa:²

[39] 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;

[40] 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. 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.

[41] 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 relate to the land and there was insufficient evidence to show that the leveki mangafaoa did not care for the land.

[42] In *Palalagi v Talafasi* the Court emphasised the obligations of the leveki mangafaoa, noting the following:

[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.

[11] In *Palalagi v Talafasi*, I was faced with an application for an injunction to halt development on a block which, at its heart, was a dispute as to the true Mangafaoa of the land.³ In addressing the lack of consultation with the Mangafaoa, I discussed the powers of the Leveki and the resulting responsibility of consultation with the Magafaoa:⁴

[15] The powers and functions of the Leveki Magafaoa are noted in s 15 of the Niue Land Act 1969 ("the Act"). They provide that the Leveki Magafaoa of any land shall have power to control the occupation and use of the land under Niue

¹ *Laihone v Tauekipaoa* [2019] NUHC 8; Application 11507, 11515, 11543, 11647 (10 September 2019).

² *Laihone v Tauekipaoa* [2019] NUHC 8 at [39]-[42].

³ *Palalagi v Talafasi – Part Toloagamotu, Section 7, Block I, Hikutavake District* [2014] NUHC 2 (30 January 2014).

⁴ *Palalagi v Talafasi* [2014] NUHC 2 at [15]-[17].

custom and shall have power to alienate the land in accordance with Part 3 of the Act.

[16] Further, in the exercise of their powers under this section, the Leveki Magafaoa shall, under Niue custom consult with the members of the Magafaoa, whether resident in Niue or elsewhere in particular they shall meet the requirements as to consultation laid down in s 17(3) of the Act in relation to the sale and lease of land, and the giving of security charges over land.

[17] This current situation is not one of alienation, however, there is still a requirement that the Leveki Magafaoa consult with the members of the Magafaoa pursuant to Niue custom.

Decision

[12] This is a situation where clearly the Police have issued a trespass notice at the request of the Leveki Mangafaoa. The Leveki has sought the Police assistance after an incident he complained of, that resulted in no charges being laid by the Police but in a trespass notice being issued.

[13] Section 15 of the Niue Act 1969 gives the Leveki Mangafaoa broad powers 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.”

[14] However, the Leveki Mangafaoa’s power is curbed by s 15(2) which states that in the exercise of their powers the Leveki shall “under Niuean custom consult with the members of the Mangafaoa whether resident in Niue or elsewhere...”

[15] In considering both the Police and Applicant’s submissions it is clear that there was no wider consultation with the mangafaoa.

[16] This is an interesting situation where a Leveki Mangafaoa is seeking to prohibit a member of the mangafaoa from entering on to the land, where they both descend from the common ancestor.

[17] In light of the Police and Applicant submissions, there are issues as to whether the trespass notice is valid given the clear lack of consultation with the mangafaoa. I have concerns in this particular situation that one person, while holding the position of Leveki

Mangafaoa, has ultimately been able to exclude a fellow member of the mangafaoa from land without consultation with the mangafaoa. It is also concerning that Teleana Fetaui, a member of the mangafaoa, is being excluded from going onto the land where her elderly mother and sister reside.

[18] The Police have made their assessment as to whether the Trespass Notice is justified and after due consideration have issued the Trespass Notice. They have relied on the Leveki Mangafaoa having authority and have not assessed whether the Leveki Mangafaoa has consulted with the mangafaoa.

[19] As part of the Leveki Mangafaoa's broad powers to control the occupation and use of the land, I would have thought that a Leveki Mangafaoa must be able to trespass a fellow member of the mangafaoa from land, in certain situations. But the ability to trespass a member of the mangafaoa must be after consultation with the mangafaoa.

[20] The Leveki Mangafaoa has not consulted with the mangafaoa.

Decision

[21] The Court would have been assisted if evidence from other family members had of been filed, in particular Hana Fuhiniu, who it is understood, is living with her 90-year-old mother and taking care of her.

[22] Based on the information before the Court, it is clear that the Leveki Mangafaoa has not consulted with the mangafaoa and therefore, in this situation where clearly the Trespass Notice has been issued at the request of the Leveki Mangafaoa, I consider the Trespass Notice should be withdrawn by the issuing authority – being the Niue Police.

[23] My decision should not be seen as being any criticism of the approach the Police have taken. The Police clearly have authority to issue trespass notices. The Police have followed a clear process and have made a proper assessment in issuing the Trespass Notice. It is for those reasons that I do not look to invalidate the Trespass Notice, but rather think it appropriate that the Trespass Notice be withdrawn by the Police.

[24] It must be remembered that in Niue, no individual owns land. Land is vested in a common ancestor for the benefit of that ancestor's descendants. In this situation and given the Niuean land tenure system and the wider consideration the Court is required to examine, including the requirement for the Leveki Mangafaoa to consult the mangafaoa – the Trespass Notice should be withdrawn by the Police.

Further comments

[25] I would strongly encourage Teleana Fetaui and Taumafai Fuhiniu to meet to resolve the issues that have led to this situation. A mediator may be able to assist them to come to a resolution. My concern is that if the matter is not resolved then this Court will soon see further applications. The mangafaoa should look to resolve the issues rather than have a court resolve it for them.

Dated at Rotorua, Aotearoa on this 2nd day of October 2020.

C T Coxhead
CHIEF JUSTICE