

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

Application No. 00126

IN THE MATTER OF Section 47 of the Niue Amendment Act (No. 2)
1968

AND

IN THE MATTER OF Section 3, Block 1, Maketu District, Lotouli

BETWEEN MICHLE MAKATA
Applicant

AND MALAMAPETA LAVINI
Respondent

Hearing: On the Papers

Judgment: 2 December 2022

DECISION OF JUSTICE S F REEVES

Introduction

[1] Michle Makata (“the applicant”) has applied to remove Malamapeta Lavini (Mrs Lavini), as the leveki magafaoa for Sections 1, 2 and 3, Block 1, Makefu District, Lotouli.¹ That matter was heard by me in Niue on 6 October 2022 and adjourned for a reserve decision.

[2] The applicant now applies for an interim injunction against Mrs Lavini to remove John Togia from the house on Section 3, Block 1 at Lotouli, Makefu, and to keep the house unoccupied until the substantive application for the removal of leveki has been determined.

[3] The issue to be determined in this application is whether an interim injunction should be granted.

Applicant’s Submissions

[4] Mr Makata’s application is for an interim injunction to remove the current occupiers of the house at Lotouli based on the following submissions:

- (a) John Togia no longer needs to remain in the house as he and his family have alternative accommodations: Cabinet has approved a lease on a home purchased at Huihui, his wife’s land at Hikutavake, or a relative’s motel Turtle Lodge; and
- (b) The applicant is concerned that the present occupation by Mr Togia, appointed by leveki Malamapeta, is vexatious towards the Makata family.

[5] The applicant further seeks that the injunction apply until the Court has issued its decision on the application to remove Mrs Lavini as leveki magafaoa.

[6] The applicant also seeks the quashing of a trespass notice issued against him, Mala Makata and Rachel Makata by the respondent when they attempted to inspect the house on 2 August 2022. The police visited the Makata family, but no action has been taken. Mr Makata seeks that the notice be quashed on the grounds that:

¹ Application Nos 2022-00086 & 2022-00087

- (a) The notice was not issued by the occupier of the property; and
- (b) There was no time limit for the trespass order to be valid.

Respondent's Submissions

[7] Mrs Lavini has been served with the interim injunction application, and her submissions in reply are:

- (a) The house is currently occupied by John Togia, subject to a verbal agreement between the respondent as leveki and Mr Togia's father, Palemia Togia; and
- (b) The respondent has allowed Mr Togia to reside at the house at Lotouli, Makefu until such time that he is able to relocate to a property that he is in the process of purchasing at Huihui.

[8] The respondent will not remove the Togia family but will wait for them to relocate. She does agree, however, to keep the house at Lotouli vacant once the Togia's have relocated until the substantive application for removal as leveki magafaoa has been determined.

[9] The respondent acknowledges that the trespass notice was issued to Michle Makata, Mala Makata and Rachel Makata.

Law

[10] The Court has jurisdiction to grant an injunction under s 47(1) of the Niue Amendment Act (No 2) 1968 ("the NAA") which provides:

47 Jurisdiction of the Land Court

- (1) In addition to any jurisdiction specifically conferred upon by the Land Court by any enactment other than this section, the Land Court shall have exclusive jurisdiction –
 - (a) To hear and determine any application to the Land 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 of it;
- [...]

[11] Section 47(1) of the NAA gives the Court power to grant an interim injunction against any person in respect of actual or threatened trespass or other injury to Niuean land, or to

prohibit any person from dealing with or doing injury to a property which is the subject matter of any application to the Court.²

[12] In *Laifone v Tauekipaoa* this Court adopted the reasoning of the New Zealand Court of Appeal in *Roseneath Holdings Ltd v Grieve* in relation to interim injunction.³ The principles relating to injunctions are well-settled, and require an assessment of:

- (a) Whether there is a serious question to be tried?
- (b) Whether the balance of convenience is in the applicant's favour?
- (c) Whether the overall justice of the case supports the granting of an injunction?

Discussion

[13] The issue raised in this application concerns the leveki's decision to authorise Mr Togia to occupy the house. This is not new, and the Court heard evidence about this at its hearing of the application to remove leveki in October. A decision has not yet been issued in that matter and it would inappropriate and improper to issue an injunction when a decision on the same issue is pending and no new allegations of trespass or injury to land have been made.

[14] However, notwithstanding the above, the interim injunction application would not succeed in any event.

[15] First, there is no serious question to be tried. The issue raised is already before the Court in a separate application and no new allegations have been made.

[16] Second, in my assessment, the balance of convenience lies with Mrs Lavini as leveki. Until such time as the Court decides to remove Mrs Lavini as leveki, she has authority to determine the use and occupation of the land. Mr Togia's occupation of the house is not a new event. The applicant's rights will not be compromised or inconvenienced over and above what has already been alleged by allowing the occupants to stay in the house in the short term until either Mr Togia leaves of his own volition or the application for removal is determined, whichever is earlier.

² *Pavihi v Pavihi – Pavihi Family Home, Anafonua, Avatele* (2020).

³ *Laifone v Tauekipaoa – Section 6, Block III, Mutalau (Part Fufou)* (2020).

[17] I also note that Mrs Lavini has agreed that the house will remain unoccupied once Mr Togia moves out, until such time as the Court gives its decision on the application for removal of leveki.

[18] It is worth noting that the applicant has not presented the Court with any new evidence that the occupants of the house at Lotouli are trespassing or pose a risk of damage to the property.

[19] The question of the trespass notice is not before me. No court action has been taken against the current applicant concerning trespass. Whilst the respondent has acknowledged issuing the applicant a trespass notice, there has been no formal application before the court to enforce such a trespass notice against the current applicant.

Decision

[20] In summary the application for the injunction fails on the grounds that:

- (a) The application concerns the powers and authority of the leveki in relation to occupation of the house, which is already the subject of the substantive application, and;
- (b) A lack of sufficient evidence to satisfy the balance of convenience.

[21] The application for the injunction is dismissed under s 26(1) of the Niue Lands Act 1969.

Dated at Wellington, Aotearoa/New Zealand this 2nd day of December 2022.

S F Reeves
JUDGE