

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

App No: 2022-00054

UNDER Section 47D of the Niue Amendment Act (No. 2)
1968 and Rule 39 of the High Court (Land
Division) Rules 1969

IN THE MATTER OF Pt Vinivini, Makefu

CONCERNING An appeal against a decision of the
Commissioners of the High Court (Land
Division)

BETWEEN MALAMAPETA LAVINI
Applicant

AND CHARLIE TOHOVAKA
Respondent

Judgment: 17 April 2025 (NZ Time)

JUDGMENT OF ARMSTRONG J

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Introduction

[1] Malamapeta Lavini filed an application to title an area of approximately 8,574m² in Part Vinivini, Makefu. Charlie Tohovaka filed an application to title an area of approximately 6,198m² also in Part Vinivini, Makefu. These claimed areas partially overlapped. The disputed area is approximately 4,083m² in size.

[2] On 11 April 2022, the Commissioners of the Land Division of the High Court upheld both applications but awarded the disputed area in favour of the Tohovaka claim.¹ Mrs Lavini appeals against the Commissioners' decision. In this judgment, I determine whether the appeal should be upheld.

What legal principles apply?

What is the approach on appeal?

[3] Per s 47D of the Niue Amendment Act (No. 2) 1968, any party can appeal the Commissioners' decision.² The appeal is conducted as a rehearing before a High Court judge. The appellant in this case was confused by what this means. Mrs Lavini thought her application was being heard afresh. She sought to call a new witness and to introduce new evidence not presented to the Commissioners.

[4] In *Asekona v Peauvale-Misikea*, the Court of Appeal of Niue held:³

Appeals by way of rehearing are conducted on the record of the evidence given in the Court below (that is, not as a new trial with the evidence recalled) subject only to power to admit further evidence and apply the law at the time the appeal is heard.

[5] That approach applies here. I explained to Mrs Lavini at the hearing that she could not present new evidence but had to rely on the evidence presented to the Commissioners.⁴

[6] It is also necessary to consider how I approach this appeal. When hearing a general appeal, I have to consider the issues under appeal and come to my own decision.⁵ However,

¹ The Commissioners also appointed leveki over the respective areas, but those orders are not in dispute.

² Per r 39 of the Land Court Rules 1969, the appeal has to be filed within 28 days of the Commissioners' decision. This appeal was filed in time.

³ *Asekona v Peauvale-Misikea* [2017] NUCA; App No. 10130/5 at [30].

⁴ An application was not filed seeking to adduce further evidence on appeal.

on an appeal against an exercise of discretion, it is not relevant that I may have exercised the discretion differently. Rather, the appellant must demonstrate that the Commissioners:⁶

- (a) Erred in law or principle;
- (b) Took into account an irrelevant matter;
- (c) Failed to take into account a relevant matter; or
- (d) Were plainly wrong.

[7] Section 10 of the Land Act 1969 provides that the Court shall determine every title to and every interest in Niuean land according to the customs and usages of the Niuean people, as far as the same can be ascertained. Section 12 of that Act provides that the Court shall determine the ownership of any land by ascertaining and declaring the magafaoa of that land by reference to the common ancestor of it. These provisions are clear that the Court must determine title and ownership of land pursuant to those provisions. This does not involve an exercise of discretion. As such, an appeal against a decision determining title is a general appeal.

[8] This does not mean that I must disregard the decision, and reasons, adopted by the Commissioners. In *Austin, Nichols & Co Inc v Stichting Lodestar*,⁷ the Supreme Court of New Zealand held:

...The short answer is that the general appeal... requires the High Court to come to its own view on the merits. The weight it gives to the decision of the Commissioner is a matter of judgment. If the High Court is of a different view from the Commissioner and is, therefore, of opinion that the Commissioner's decision is wrong, it must act on its own view.

...the appellant bears an onus of satisfying the appeal court that it should differ from the decision under appeal. It is only if the appellate court considers that the appealed decision is wrong that it is justified in interfering with it.

The appeal court may or may not find the reasoning of the tribunal persuasive in its own terms. The tribunal may have had a particular advantage (such as technical expertise or the opportunity to assess the credibility of witnesses, where such assessment is important). In such a case the appeal court may rightly hesitate to conclude that findings of fact or fact and degree are wrong. It may take the view that it

⁵ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103.

⁶ *Kacem v Bashir* [2010] NZSC 112.

⁷ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103 at [3] – [5].

has no basis for rejecting the reasoning of the tribunal appealed from and that its decision should stand. But the extent of the consideration an appeal court exercising a general power of appeal gives to the decision appealed from is a matter for its judgment.

[9] I adopt that approach here.

What principles apply determining title to land?

[10] I have to determine title to Niuean land according to Niuean custom and usage, as far as that can be ascertained.⁸ I do so by ascertaining and declaring the magafaoa of the land by reference to the common ancestor of that land.⁹ The magafaoa is the family or group descended from that common ancestor.¹⁰

[11] Per s 11 of the Land Act 1969, I can require that a statement is filed setting out a number of particulars. Whether I require such a statement is discretionary. However, the particulars referred to in s 11 set out a number of factors that will usually be relevant when determining the common ancestor, and magafaoa, of the land. This includes:

- (a) Genealogical tables showing descent from the ancestor through whom title is claimed;
- (b) The names and approximate locations of cultivations, villages, burial places and any other places of historical interest;
- (c) Where there are burial places, the names of those buried there; and
- (d) Any other proof or signs of occupation of, or connection to, the land.

[12] The particulars in s 11 are not intended to be exhaustive. Overall, I have to determine the common ancestor, and magafaoa, according to Niuean custom and usage.

⁸ Land Act 1969, s 10.

⁹ Land Act 1969, s 12. If the magafaoa can't be identified by reference to the common ancestor, then they are identified by any other means which clearly identifies the magafaoa.

¹⁰ Land Act 1969, s 2. This includes people adopted into the magafaoa who are recognised by Niuean custom to share in the land. This excludes people adopted out of the magafaoa.

What happened before the Commissioners?

[13] The Commissioners heard evidence in support of Mrs Lavini's application on 21 March 2022. The applications were then adjourned. The Commissioners heard evidence in support of Mr Tohovaka's application on 4 April 2022. They then reserved their decision. The Commissioners reconvened on 11 April 2022 and delivered their decision.

[14] The Commissioners made the following findings:

- (a) There is very little evidence supporting Mrs Lavini's claims;
- (b) There is no clear indication of how long her family worked on the land;
- (c) There is evidence supporting Mr Tohovaka's claims;
- (d) There is proof to the claims he made in his statement;
- (e) Mrs Lavini told the Court that she did not work on the land. Her siblings worked on the land;
- (f) Mr Tohovaka said he only worked on the land where his father occupied or worked the land;
- (g) Both applicants agreed to the caves seen on the land, one cave has human bones and one has water in it.

[15] The Commissioners then granted the following orders:

- (a) An area of approximately 4,464m² (this did not include the disputed area):
 - (i) Tupuna – Sitapeta Tukilagi
 - (ii) Leveki – Malamapeta Lavini and Salilo Tongia.
- (b) An area of approximately 6,198m² (this included the disputed area):

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- (i) Tupuna – Tohovaka Palaone Limatao

- (ii) Leveki – Charlie Tohovaka and Darren Tohovaka.

Should I uphold the appeal?

[16] Mrs Lavini acknowledged that the Tohovaka family worked on the land. However, she argued that they had only worked the land for the last 50 years, being two generations, whereas her family have worked the land for the last two hundred years, or eight generations.

[17] Despite this, Mrs Lavini acknowledged that she had not worked on the land herself. Rather, she asserted that other family members did but they have since passed away. On the other hand, Mr Tohavaka worked directly on the land. He was able to give direct evidence of his personal experience working on the land.

[18] This was a significant factor for the Commissioners. The Commissioners accepted that both families had worked the land, as they upheld both applications to title the land. However, on the disputed area, they preferred the evidence from Mr Tohovaka given that he worked directly on the land himself. I agree with the Commissioners' assessment of this evidence. While there is evidence to support that both families worked on the land, there is a dispute over who worked in what area. Mr Tohovaka could give direct evidence on this given that he worked on the land himself. Mrs Lavini could not. Instead, she referred to work undertaken by her sisters and other family members who have passed away. I agree with the Commissioners that Mr Tohovaka's direct evidence is stronger and more reliable.

[19] Mrs Lavini also argued that the Tohovaka family worked the land through marriage, rather than by customary right. She claimed that Mr Tohovaka's aunty, Matafeloni, was married to Savesa, part of the Misipeka family, who had land at Vinivini. Mr Tohovaka rejected this. He argued that the Tohovaka, Misipeka, Konakava and Asimotu families all worked the land at Vinivini. He says after those other families moved to New Zealand, they asked the Tohovaka family to look after their portion of the Vinivini land. Mr Tohovaka produced evidence to the Commissioners that those families supported the Tohovaka application.

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[20] Not to be deterred, Mrs Lavini argued that when Mr Tohovaka cleared the land, he cleared a larger area than that claimed in his application. She asserted that this was either because he didn't know the land or he was being dishonest. Mr Tohovaka rejected this. He claimed that the larger cleared area included the Tohovaka, Misipeka, Konakava and Asimotu land. However, he did not claim those wider areas in his application as he acknowledges those areas belong to the other families.

[21] Once again, there was a clear dispute on the facts on this issue. The Commissioners preferred Mr Tohovaka's evidence. So do I. His evidence is consistent with his actions of clearing a larger area, but only claiming the area that belongs to the Tohovaka family. The support from the other families who have land is Vinivini is significant.

[22] Mrs Lavini also referred to an affidavit from her husband, Mr Lavini, that was presented to the Commissioners. In that affidavit, Mr Lavini refers to a conversation he had with Mr Tohovaka's brother, Papa Tohovaka. Mrs Lavini claims that those comments from Papa undermine the Tohovaka claim. She also argues that Papa did not give evidence to the Commissioners to dispute what her husband said. It is not clear why Papa did not give evidence to the Commissioners. In any event, the evidence from Mr Lavini, about what Papa said, is hearsay and is inadmissible.

[23] Mrs Lavini also said that, when Mr Tohovaka cleared the land, she hung a coconut leaf at the cleared area to show her objection which is consistent with Niuean custom. She says she later applied for an injunction to prevent Mr Tohovaka from undertaking any further work. However, this only occurred in 2018. Mr Tohovaka says Mrs Lavini never objected to them working the land prior to 2018 despite Mrs Lavini repeatedly travelling past the worked area. While there is evidence that Mr Lavini objected to Mr Tohovaka working the land in 2018, there is no evidence to demonstrate any objection prior to that. If Mrs Lavini considered that Mr Tohovaka was planting on her family land, I expect that she would have objected well before 2018.

[24] Finally, Mrs Lavini argues that she knows more about the caves on the land. Mr Tohovaka rejects this. The evidence demonstrates that both sides accept there are caves on the land, but the details of those caves differ. The Commissioners made findings on the caves and took this into account in their assessment. I have no reason to depart from those findings.

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[25] In summary, the Commissioners upheld the applications from both sides, awarding both of them title to Vinivini land. However, the Commissioners preferred Mr Tohovaka's evidence, and so awarded his family the disputed area. I agree with the Commissioners' assessment. I prefer Mr Tohovaka's evidence as:

- (a) He worked directly on the land, Mrs Lavini did not;
- (b) Mrs Lavini acknowledged that the Tohovaka family worked the land for the last 50 years;
- (c) Prior to 2018, Mrs Lavini, and her family, did not take any steps to challenge the Tohovaka family using the land; and
- (d) Mr Tohovaka and Mrs Lavini both acknowledged other families who had land at Vinivini such as the Misipeka and Asimotu families. Those families support the Tohovaka application.

[26] It is clear that Mrs Lavini does not agree with the Commissioners' decision. However, there is no proper basis to overturn their decision.

Decision

[27] This appeal is dismissed.

[28] Neither side was represented by counsel and so there is no issue as to costs.

Pronounced at 4:00pm in Whangārei on the 17th day of April 2025.



M P Armstrong
JUSTICE