

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

App No. 1185

IN THE MATTER Part Avatoga, Hikutavake
Survey District

BETWEEN **JOYCE KEESING**
TAGAMAKA TALAGI

Applicant

AND **TAPUAKI JUDITH**
TALIMA PIHIGIA

Respondent

REASONS FOR DECISION

[1] This is an appeal by Joyce Keesing Tagamaka Talagi against a decision of the High Court dated 6 November 2013.

[2] In that decision the Court made the following Orders:

- (i) Declaring Mokatogia Niuloa to be the common ancestor for the land part Avatoga as set out in PP.10687 being an area of approximately 1.4570 hectares; and
- (ii) Appointing Tapu Judith Talima Pihigia as the leveki magafaoa for the land part Avatoga as set out in PP. 10687 being an area of approximately 1.4570 hectares.

[3] The appeal was brought upon the grounds:

- (i) That the Judge found that the appellant was entitled to a share or interest in the land to which her application related by virtue of the development of the land by Tagamaka;

- (ii) That the Judge improperly restricted himself to determining the cases as brought and did not make orders reflecting the interests in the land as determined by him.

[4] The appeal was heard at Niue on 27 March 2015 at which time Counsel for the appellant Mr Phillip Allan abandoned the second ground of appeal.

[5] After the submissions of Mr Allan concerning the first ground of appeal we decided that we did not need to hear from the respondent and we dismissed the appeal. We also stated that we would issue the written reasons for the dismissal.

[6] We now set out the case for the appellant and our reasons for dismissing the appeal.

Case for the Appellant

[7] The primary remedy sought by the appellant is that this Appellate Court annul the Orders made in the High Court with respect to the land related to the appellant's application only and substitutes the orders sought by the appellant in respect of that land.

[8] The appellant's case is based on the relationship between the parties which she says the lower Court judge was unclear about or misunderstood.

[9] This relationship she says is as follows:

- (i) Takamaga first married Mokotogia. Together they did not have children, but Mokotogia had a daughter from a previous relationship (Puakafa Valepo).
- (ii) Tagamaka and Mokotogia were first cousins as their tupuna Tuhenga and Niuloa were brothers.
- (iii) Puakafa's father was from the southern side of Avatele.

- (iv) The respondent is the grandchild of Puakafa Valepo and the great grandchild of Mokatogia.
- (v) Tagamaka remarried Mokatogaloa after the passing of Mokatogia his first wife. They legally adopted the appellant.

[10] The Court found Mokatogia's links to the land were determinative over Tagamaka's interest, and did not recognise that Mokatogia and Tagamaka were from the same family.

[11] Notwithstanding this submission, Counsel also confirmed to the Court that Tagamaka had come to this land and lived here with his second wife and adopted a child, the appellant.

[12] Counsel further submitted that the lower Court had recognised the interest of the appellant when he stated that "Tagamaka's clearing of part of Avatoga block, working on the land, residing on the land and building houses on the land, is undisputed."

[13] As a result the Court erred when it made orders excluding the appellant.

[14] During the course of the appeal Counsel referred to evidence which was not before the lower Court to corroborate the links of Tagamaka and the appellant's to the land.

[15] As this evidence was not before the lower Court and no application was made to adduce further evidence before this Court we will not consider it.

The Law

[16] Land Act 1969

Part 2 – Investigation of Title
10 Determination of title

- (1) 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.

- (2) The Court may refuse to proceed with any application for investigation of title for the determination of the Mangafaoa or relative interests in that land, until it has before it a plan of the survey of the land affected by it.
- (3) The Court may at any stage of the proceedings require that all claims relating to such land, whether to the Court within a time to be fixed by the court, after which time no further claims for the inclusion will be admitted, except by leave of the Court and upon such terms as the Court determines.

11 Court may require written statement

The Court may require any person having an interest in any application under this Part to lodge with the Court a statement in writing setting out any one or more particulars of the following matters-

- (a) The boundaries of the portion of the land which he claims;
- (b) The grounds of the claim;
- (c) The genealogical tables showing descent from the ancestor or ancestors through whom title is claimed down to and including all persons admitted by the claimant as entitled with him under his claim;
- (d) The names and the approximate location of cultivations, villages, burial places, with the names of relatives of the claimant and persons included in his claim who have been buried there, and any other places or marks of historical interest;
- (e) Any other proof or signs of occupation of or connection with the land by the claimant and other persons included in his claim.

Ownership

12 Ownership determined by ascertaining and declaring Mangafaoa

The Court shall determine the ownership of any land by ascertaining and declaring the Mangafaoa of that land by reference to the common ancestor of it or by any other means which clearly identifies the Mangafaoa.

Discussion

[17] The issue before this court is to determine whether the lower Court erred when it found that Mokatogia was the common ancestor and Tapu Pihigia was the leveki magafaoa.

[18] The lower Court made this determination from two competing applications both seeking determination of title and appointment of leveki.

[19] Judge Coxhead at paragraph 43 of his decision stated:

“It would have been a better arrangement if the two applicants and families could have in some way accommodated both applications in recognising Mokatogia as the common ancestor of Avatoga Block while still providing for Ms Talagi’s application and agreeing to her having title to that portion of land that Tagamaka had built the house on and had lived. However no such arrangement was made and I was asked to determine the two applications as they were presented.”

[20] This being the case the Court had no choice but to decide for one or other of the applicants, as it could not make two orders unless the parties had agreed to a compromise position.

[21] Therefore, on that basis and after weighing the evidence before him Coxhead J determined that Mokatogia was the common ancestor and not Tagamaka.

[22] Having considered the evidence and also the submissions of Counsel for the appellant we find no error in the Court’s decision.

[23] The evidence clearly shows that Tagamaka came to this land. In the lower Court the appellant confirmed that Tagamaka’s family were living at Fugaluge and it was only Tagamaka who come to the block and settled on the land at Avatoga.

[24] Counsel for the appellant in his submissions confirms “as the hearing proceeded, it became clear that Tagamaka had come to the land ...”

[25] The evidence is equally clear that this land was part of a wider block of land that was owned and occupied by Mokatogia and her siblings from her parents Niuloa and Fukusifa.

[26] There is no such connection for Tagamaka. He came to this land following his marriage to Mokatogia and although it is submitted that he had a blood link to Mokatogia this does not change the undisputed evidence that he come to this land following his marriage to Mokatogia. In short Tagamaka was not the source of this land.

[27] As a consequence we confirm our decision in open Court on 28 March 2015, that this appeal is dismissed.

[28] We also confirm our statement in open Court that we do not consider there are any barriers to the appellant Joyce Talagi making application to the High Court for an occupation order.

[29] There is no dispute that her adoptive parents lived on this land and that prior to that the land was occupied by Tagamaka and Mokatogia. There is also no dispute that Joyce Talagi is a blood descendant of Mokatogia through his brother Niutama.

[30] We consider such an application and the reconsideration of these rights would restore the family unity that clearly existed between these two families in the past.

[31] Also stated in open Court, there will be no order as to costs.


Dated at Wellington this 2nd day of March 2016.



P J Savage
Chief Justice



W W Isaac
Justice



S F Reeves
Justice