

IN THE NIUE COURT OF APPEAL

Application No: 8277/4/33

IN THE MATTER of the land Part Avaiki, Makefu

BETWEEN MARYANNE PALEMIA TALAGI
Appellant

AND SIENI MAKATA
Respondent

Hearing: 18 March 2024

Coram: Coxhead, CJ
Reeves, J
Armstrong, J

Judgment date: 9 October 2024

JUDGMENT OF THE COURT OF APPEAL

Introduction

[1] Maryanne Palemia Talagi appeals a 7 December 1999 judgment of Justice Norman Smith.

[2] Justice Smith dismissed Ms Talagi's appeal of the Land Commissioners' 1998 decision. In that 1998 judgment the Land Commissioners determined the title of Part Avaiki (the land) and appointed three leveki mangafaoa, including the respondent, Sieni Makata.

Background and Procedural History

[3] On 14 December 1998, Mr Makata applied for the determination of title over an area of land and to have a leveki mangafaoa appointed for that area of land. His application was opposed by Ms Talagi, Malamapeta Lavini and Salilo Togia.

[4] The five Land Commissioners who heard Mr Makata's application – M Tahafa, A H Touna, P Molai, V Siakisoni, and L Litaio – granted the application, determined the common ancestor would be Palana, titled the land as Avaiki, and appointed Mr Makata, Lovely Lagi Puletama and Stafford Guest as leveki mangafaoa.

[5] Ms Talagi appealed the decision. On 7 December 1999, Justice Norman Smith heard and dismissed the appeal, stating:¹

The appellant has failed to produce any or any adequate reason as to why this Court should interfere with the decision appealed from other claim the appointment of Leveki Magafaoa. The appellant has produced a letter from Lovely Lagi Puletama resignation from the position of Leveki Magafaoa. There are doubts as to whether she was ever consulted prior to her appointment.

The appeal is allowed and in accordance with the powers ended in the Court, the appointment of Lovely Lagi Puletama as Leveki Magafaoa is revoked.

In all other respects, the decision of the Court is confirmed.

[6] Ms Talagi now appeals the decision of Justice Smith.

¹ 11 Niue High Court (Land Division) MB 33 – 34.

[7] We do not intend to detail the directions, filing of notice of appeal and then directions for the filing of a more explicit notice of appeal and responses. It is sufficient to say that, on 18 July 2002, Ms Talagi, Malapeta Lavini and Salilo Togia filed a detailed statement in response to the directions of Justice Smith, and this is considered the detailed notice of appeal that was required.

[8] The appellant raises the following grounds of appeal:

- (a) It was the appellant's understanding that the Makatas were only to investigate part of the land, from the main road to the remains of Lavini's toilet. This is a piece of land where Palana and his mother, Maima, lived. At the hearing before the Land Commissioners, Ms Talagi opposed the application and wanted the tupuna to be Tukilagi and Maima.
- (b) The appellant believes that the Land Commissioners made an incorrect decision.
- (c) Mr Makata's claim to access this land was through his mother, Emutupe. Emutupe is a child of Palana who was adopted according to Niuean custom. The appellant's claim to this land is through Tukilagi II. Mr Makata did not present a family tree for his mother to show a clear ancestral link between Emutupe and Paku to prove that the customary adoption was from within the extended family of Palana. Mr Makata is not a blood relation of Palana and, therefore, has no right to claim this land since Emutupe's link to the genealogy of Tapukeheiki was not presented to the Land Commissioners when they made their determination. The Commissioners did not investigate whether Mr Makata's mother was really a blood descendant of Palana.
- (d) Emutupe's children are not blood relations to Palana and should not have any rights to all of the land of Palana's extended family.
- (e) Emutupe is an adopted child of Palana but Emutupe's children are not adopted by Palana. The link to Palana ends on the death of Emutupe.
- (f) The Land Commissioners were wrong in naming Palana as tupuna, as Palana is a child of Maima and the nephew of Tukilagi II.

- (g) The appellant was disadvantaged further as Ms Talagi did not seek a lawyer to represent her case.

[9] On 17 December 2002, the respondent, Mr Makata, responded to the notice of appeal stating:

- (a) The original hearing in front of the Land Commissioners was fair to both parties and the Commissioners made no decisions that were manifestly wrong but, rather, made decisions based on the evidence presented before them.
- (b) Both the appellant and respondent made written submissions to Norman Smith J on appeal by the appellant, and both parties were treated fairly by the Chief Justice.
- (c) That non-resident Niueans have the same land rights as those residents on the island.
- (d) The respondent contends that there are insufficient grounds to reconsider, amend or quash the decisions of the Land Court and the Chief Justice or challenge the proceedings of the hearing.
- (e) The Honourable Court of Appeal should therefore dismiss the appeal.

Submissions for the Appellant

[10] Ms Talagi submits that she does not agree with the decision of the Land Commissioners. The appellant's view is that the descendants of Tukilagi II and Maima have been excluded from the land due to the declaration of Palana, son of Maima, as tupuna of the land by the Land Commissioners. The appellant contends that the correct tupuna of the land are Tukilangi and Maima, and that the descendants of these tupuna will continue to be excluded from the land if the decision of the Land Commissioners is not corrected.

[11] The appellant also submits that the appointment of the leveki mangafaoa was also incorrect as Mr Guest is not a descendant of the mangafaoa. They also submit that it is relevant that Mr Makata does not reside in Niue. Instead, Mr Makata came to Niue to apply for

determination of title and appointment of leveki mangafaoa in 1998 and then returned to Auckland, New Zealand. Mr Makata has lived in New Zealand for over 50 years.

[12] Other matters submitted were that the name of the mangafaoa land should be Lotofonu, not Avaiki.

[13] Finally, the appellant submits that the five Land Commissioners that made the determination on 14 December 1998 were very elderly, and that four of them have since passed away.

Submissions for the Respondent

[14] The respondent submits that the tupuna was correctly named as Palana and that the leveki mangafaoa nominated by Mr Makata, and appointed by the Land Commissioners, Mr Makata, Ms Puletama and Mr Guest, was done correctly.

[15] The respondent noted that the appeal opposing the appointment of Mr Guest as leveki mangafaoa by the Land Commissioners was dismissed by Norman Smith J on the basis that the appellant had not pointed to any law or regulation barring a non-Niuean permanent resident of Niue from being named as leveki mangafaoa.

[16] The respondent argued that the appellant did not take an opportunity to have her appeal heard by the Niue Court of Appeal before the COVID-19 lockdown.

[17] In the respondent's view, the length of time between the original hearing and this appeal weakens the appellant's case. The respondent referred to Norman Smith J in *Makata v Coe and Lavini – Part Masimu, Makefu* wherein the Judge stated that: "The delay in lodging a challenge lessens the weight to be given to the arguments put forward [on her behalf]."²

² [2000] NUHC; App No. 7485/4/26, at 2.

[18] The respondent also submits that the appellant has not disclosed any section plans concerning the name of the land. The name of the land, Avaiki, was declared at the original hearing on 14 December 1998 and subsequently registered in the Land Court office.

[19] Mr Makata also contends that the comments made against the Land Commissioners in the original hearing are vexatious.

[20] The respondent argued that there is no law preventing a New Zealand-Niuean from gaining legal title to family land after proving occupancy and knowing the history of the land.

[21] Finally, the respondent concluded that the appeal should, as such, be dismissed as the previous court findings were correct and no new evidence from the appellant has come to light after 24 years.

The proper approach for an appeal

[22] Unfortunately, the appellant has not fully understood how an appeal is to be approached.

[23] An appeal is where the Court will hear submissions as to why the appellant is of the view that the decision of the High Court was incorrect and for the respondents to tell the Court why the Court's decision was correct.

[24] It is important to remember that an appeal is not an opportunity to have another go at the same application that was heard before the High Court. An appeal is not an opportunity to present again all the evidence that was presented in the High Court in the hope that you will receive a different decision.

[25] In this situation, the appellant was appealing the decision of Norman Smith J. However, there was little mention of Norman Smith J's decision in the notice of appeal or in the submissions presented to Court.

[26] While it is understandable that the appellant was focussing on the decision of the Land Commissioners, the appeal was actually against the decision of Norman Smith J and why his decision was incorrect.

[27] In saying that, the Court does have some limited scope to look at the original decision of the five Land Commissioners in 1998.

[28] We attach to this decision what we hope will be a helpful note “Guidance on Appeals and Rehearings”.

What was incorrect with the judgment of Justice Smith?

[29] The main contention in the notice of appeal and submissions was regarding the adoption of Emutupe, an adopted child of Palana. The adoption of Emutupe was actually an issue that was discussed before the Land Commissioners in 1998. The appellant did not, from the Court record, appear to raise any objections regarding the adoption of Emutupe at the time. An objection not being raised at the original hearing, the Land Commissioners were, therefore, correct in considering the application based on the evidence they had before them, which did not include questions regarding the standing of the adoption of Emutupe by Palana.

[30] We do note that section 16 of the Adoption Act 1955 provides that the effect of an adoption order is that an adopted child will be deemed the natural child of the adoptive parent and as such acquires all the rights of a natural child. As such upon formal adoption Emutupe became the natural child of Palana.

[31] The Land Commissioners considered the genealogy, which clearly shows the connection between Palana, Maima and who the appellants had proposed as the tupuna, Tukilagi II.

[32] Having considered the evidence, it appears to us that the Land Commissioners then decided, as they were entitled to do, that Palana would be the tupuna.

[33] To her credit, the appellant does acknowledge that Palana and Maima did live on this area at some time. Ms Talagi also acknowledges that Palana's descendants do have rights to part of the block but, in her view, not the whole block.

[34] As noted, the appellant did not focus on the decision of Smith J, even though that was the decision under appeal. Smith J affirmed the decision of the Land Commissioners concerning the title order. The appellant has not demonstrated that Smith J erred by doing so.

Requirements when appointing a Leveki Mangafaoa

[35] One issue where we do agree with the appellant is the appointment of the leveki mangafaoa.

[36] At the hearing, Mr Makata confirmed for the Court that he resides in New Zealand and has done so for many years.

[37] A requirement of Niue law is that leveki mangafaoa need to be resident in Niue, per s 14(5) set out below. Mr Makata is not resident in Niue and has not been resident in Niue.

[38] Section 14 of the Land Act 1969 (Land Act) provides for the appointment of leveki mangafaoa:

14 Appointment of Leveki Mangafaoa

- (1) When the ownership of any land has been determined any member of that Mangafaoa who has reached the age of 21 years may apply in writing to the Court for an order appointing a Leveki Mangafaoa of that land.
- (2) If the application is signed by members who in the Court's opinion constitute a majority of the members of the Mangafaoa whether resident in Niue or elsewhere the Court shall issue an order appointing the person named in the application as the Leveki Mangafaoa of that land.
- (3) If no such application is received within a reasonable time, or applications are each signed by members who, though having attained the age of 21 years, constitute less than a majority of the Mangafaoa who have attained such age the Court may appoint a suitable person to be Leveki Mangafaoa of that land.

- (4) The appointment of a Leveki Mangafaoa shall not be questioned on the grounds that any member of the Mangafaoa was absent from Niue, but the Court may consider any representation made in writing by any member so absent.
- (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 Mangafaoa land, may be appointed as a Leveki Mangafaoa of any land, but if he is not a member of the Mangafaoa he shall not by virtue of such appointment acquire any beneficial rights in the land.
- (6) In appointing any Leveki Mangafaoa the Court may expressly limit his powers in such manner as it sees fit.

[39] The requirements of s 14 are clear. Section 14 must be read in full and read in a way that ensures the subsections are consistent and not contradictory.

[40] Section 14(2) provides that members of the mangafaoa, whether resident in Niue or elsewhere, can support the appointment of a leveki mangafaoa. The mangafaoa do not all need to be resident in Niue.

[41] Where the majority of the members of the mangafaoa, whether they are in Niue or not, support an appointment then the Court shall issue an order appointing the person named in the application as the leveki mangafaoa of that land.

[42] However, the person named in the application must meet the requirements of s 14(5).

[43] The High Court in *Asekona v Heka – Part Togalupo (seaside)* highlighted that:³

Notably, s 14(5) notes that a leveki does not have to be part of the mangafaoa, but they must reside in Niue and be suitably familiar with the mangafaoa and the history of the land.

[citations omitted]

[44] Therefore, the person named in the application to be appointed leveki mangafaoa must meet the requirements of s 14(5) and accordingly must be resident in Niue.

³ (2020) NUHC; App No. 11237, 11238, 11318, 11319, 11320, 11321, 11322, 11323, 11324 & 11325, at [36].

Decision

[45] We have been provided with no reasons as to why the decision of Norman Smith J, the decision that is under appeal, is wrong. However, we have been provided with reasons as to why the decision of the Land Commissioners was incorrect.

[46] Looking at all matters, this is a situation where the appellant simply does not agree with the decision that the Land Commissioners were entitled to reach. The Land Commissioners had considered the information and evidence before them, and all five of them unanimously agreed that the land would be determined, the common ancestor would be Palana, and that they would appoint three leveki mangafaoa, noting that Lovely Lagi Puletama then resigned. The Land Commissioners heard that evidence first hand. They were better placed to assess that evidence than we are, 26 years later, when we didn't hear the evidence directly from the witnesses. There is no reason to depart from their decision titling the land.

[47] We do have concerns that Mr Makata, having confirmed before us that he does not reside in Niue, is a leveki mangafaoa. He should not have been appointed. Therefore, the appeal is allowed in terms of the appointment of Mr Makata as leveki mangafaoa. As such we make orders removing Mr Makata as leveki mangafaoa.

[48] However, in all other respects, the appeal is dismissed. This means that Palana will remain as the common ancestor and Mr Guest will continue as leveki mangafaoa.

Dated at Rotorua, Aotearoa/New Zealand on this 9th day of October 2024.



C T Coxhead
CHIEF JUSTICE



S F Reeves
JUSITCE



M P Armstrong
JUSTICE