

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

IN THE MATTER of Part Matalelega / Pokoluo
BETWEEN John Vilisoni
Applicant
AND Harry Ikitule
Respondent

DECISION

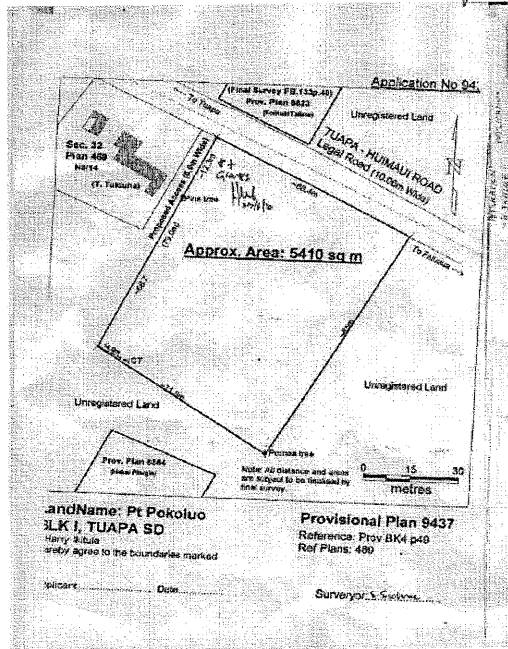
Introduction

[1] The applications before the Court are as follows:

- (i) An application to determine title for Part Matalelega at Tuapa by John Vilisoni and Olenesisi Makakona, and to declare the common ancestor to be Mesitalani Apelila.
- (ii) An application to appoint as Leveki Magafaoa for this land John Vilisoni.
- (iii) An application to determine title for Part Pokoluo at Tuapa by Harry Ikitule and declare the common ancestor to be Aotagaloa.
- (iv) An application to appoint as Leveki Magafaoa for this land Harry Ikitule.

[2] Although the applications refer to the blocks to be titled by different names the parties in Court both identified the land to be titled as contained in Provisional Plan 9437 containing 5410 square metres as set out below.





[3] The issue as to the name of the land will be considered later in this decision.

Case for Harry Ikitule

[4] Submissions and evidence were presented by Herman Tagaloailuga and Harry Ikitule supported by Fisa Pihigia and Litothenana Talagi.

[5] Harry Ikitule stated that ever since childhood he had worked this land and in doing so he had continued the work of his parents and his forefathers. He was raised in the Tuapa village by his grandparents Kasalinaketai and Ikitule. The common ancestor to this land is Aotagaloa and the land is Pokoluo and not Matalelega.

[6] Harry Ikitule worked the land until he got married and had children. Mr Ikitule's children know the area and are still working this land. The Ikitule family also cleared the roadsides. Mr Ikitule stated that not once had Olenesisi or Vilisoni been seen working on this land. Also they have not opposed his parents or his forefathers who worked this land and cleared the roadsides. This is the Ikitule family land and the application of John Vilisoni and Olenesisi is strongly opposed.

[7] Pokoluo was surveyed by Ikitule because his ancestors worked the land and it has remained in the care of their Magafaoa for generations.

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[8] As a child Harry Ikitule always cleared the roadside with his grandmother Kesi and her husband Ikitule as did Harry's father and other members of the family. It was custom that each family cleared the roadside of the land they own. The clearing of roadsides was finished in 1974 when Niue became self-governing.

[9] Ikitule's grandmother Kesi, daughter of Lagitutakai Holatupe, was brought up on this land Pokoluo. Before she passed away on 21 March 1990 she wrote a Deed for the family that also included this part Pokoluo. Kesi was the last living tupuna in the family and her children still occupy this land.

[10] The Ikitule family were surprised when John Vilisoni and Olenesisi Makakona sought claim to this land. Vilisoni is not known to Harry Ikitule and lived at Tuapa before going to New Zealand. Vilisoni has never been seen working this land or clearing the roadsides and, Mr Ikitule states Vilisoni does not know the boundaries. Matalelega is not the name of this land, but relates to a separate land all together. Matalelega is not included in Ikitule's survey of Pokoluo. Matalelega however, can be claimed by Ikitule's mother. Part Pokoluo is claimed through Ikitule's father's side and this is supported by Ikitule's father Ikituletama and Uncle Fokimata.

[11] Mr Fisa Igilisi Pihigia, in support of Harry Ikitule, stated that he has resided in Tuapa since birth. He knows and has worked the land adjacent to the land in dispute. There are no physical identified boundaries and the practice was that the landowners agreed the boundaries. This is the same practice followed by their parents and ancestors.

[12] Mr Pihigia stated that John Vilisoni's parents are from Tamakautoga village while Olenesisi Makakona's parents, Muke and Makatoa, are from Namukulu and Makefu villages. He stated that they should look for their parents land from these areas.

[13] Olenesisi was adopted under custom by Mesitalani and Apelila and not legally adopted as she claims. Mesitalani is an aunt of Ikitule's mother Helena. Mesitalani had no children so when Olenesisi and Vilisoni migrated to New Zealand Ikitule looked after Mesitalani until she too migrated to New Zealand many years later.

[14] The Ikitule family have continued working the land for generations stemming from their tupuna Aotagaloa. The adjoining land to the West of Pokoluo is owned by Misipelo, to the south Fakatohesifa and to the East Tupuaga and Fakatule.

Case for John Hita Vilisoni and Olenesisi Makakona

[15] Submissions and evidence were presented by Mr Tongatule, John Hita Vilisoni and Olenesisi Makakona, supported by Samoauli Apelila.

[16] Lepopo Hita John Vilisoni was born at Tuapa 6 May 1938 to Vilisoni and Letoheone. He claims he was then adopted by Mesitalani and Apelila and they lived at Mataga Lalo. He also claims that that Mesitalani's mother, Puletakaihemotu, is related by blood to his father Vilisoni.

[17] John Vilisoni states that he lived and worked the land at Matalelega with his adopted parents where they grew taro, kumara, tapioca and other crops for food. John lived with his parents until 1960 when he married his wife Hakupu. During this time he did not see the Ikitule family or any other family cultivating the Matalelega lands. Harry Ikitule was only eight years old at the time so was too young to see John working the lands. In 1964 John Vilisoni and his family migrated to New Zealand.

[18] Olenesisi Apelila Makakona was born 23 December 1932. Her parents are Makatoa and Muke. At age five she was placed into the care of Mesitalani and Apelila who she claims adopted her by legal registration.

[19] At the hearing on 25 December 2009 Olenesisi's counsel, Tongatule, advised that the Registrar of Baptisms confirmed to him that Olenesisi had not been legally adopted. Olenesisi now accepts she was not legally adopted as she originally claimed.

[20] As a child Olenesisi helped Mesitalani and Apelila to cultivate Matalelega. This land is not Pokoluo. Pokoluo is on the left hand side of the Huimanu Road whilst Matalelega is on the right hand side.

[21] Apelila and his brother Fanaola, from Namukulu village, worked the land planting taro, kumara and tapioca on Matalelega. Apelila was a school teacher at Tuapa primary school and Fanaola worked on Matalelega.

[22] In 1969 Olenesisi migrated to New Zealand. She states that in her time in Niue she does not recall talking to or seeing the family of Harry Ikitule working the lands of Matalelega. These are not the lands of the Aotagaloa genealogy.

[23] When the land at Matalelega is burnt other families are allowed to help clear and cultivate food crops, then the land is left to fallow. The Pihigia and Livapulu families helped during this time.

[24] Folituki Pihigia cared for the land while Olenesisi and Vilisoni lived in New Zealand and Tapu, son of Folituki, represented the family interests in court.

[25] Olenesisi visited Niue several times from 1985 onwards and maintained regular contact with the family. While in New Zealand Olenesisi received a letter from Fanaola, Apelila's brother, asking that Pihigia be allowed to cultivate their land. Olenesisi objected to this request and nothing became of it.

[26] Samoauli Apelila was born 22 September 1935 to Masioloina and Sifaulu. She was then adopted by custom and raised by her aunt Mesitalani who is half sister to Masioloina. Samoauli grew up with John Vilisoni and Olenesisi who were also adopted by Mesitalani.

[27] Before Samoauli attended school she worked the lands at Matalelega with her adopted parents. The bush garden area is on the lower terrace and not the top terrace. The lands at Pokoluo/Matalelega are of the Kilipalua genealogy.

[28] At the age of 22 Samoauli Apelila migrated to New Zealand in 1957.

[29] Apelila died in 1973. Shortly after his wife Mesitalani also migrated to New Zealand where she lived with the family until she died.

[30] Samoauli does not recall the Ikitule family working on the land when she grew up in Tuapa. She supports John Vilisoni as Leveki Magafaoa and Mesitalani as common ancestor for Matalelega.

[31] David Makalele, in support of John Vilisoni, stated that to his recollection in 1942-1943 the last person to work on Matalelega, at the top of the hill, was Fanaola, brother to Apelila. He asserts that Matalelega is at the top of the hill and Pokoluo is on the left hand side of the hill.

The Law

[32] The Niuean High Court (Land Division) has exclusive jurisdiction to hear and determine applications relating to the ownership and occupation of Niuean land, and to the appointment of a Leveki.¹

[33] The relevant provisions of the Land Act 1969 concerning title to Niuean land state:

"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....*

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 –

The boundaries of the portion of the land which he claims;

The grounds of the claim;

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;

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;

Any other proof or signs of occupation of or connection with the land by the claimant and other persons included in his claim.

12 Ownership determined by ascertaining and declaring Magafaoa

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 or by any other means which clearly identifies the Magafaoa.

14 Appointment of Leveki Magafaoa

- (1) *When the ownership of any land has been determined any member of that Magafaoa who was reached the age of 21 years may apply in writing to the Court for an order appointing a Leveki Magafaoa 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 Magafaoa whether resident in Niue or elsewhere the Court shall issue an order appointing the person named in the application as the Leveki Magafaoa 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 Magafaoa who have attained such age the Court may appoint a suitable person to be Leveki Magafaoa of that land.*
- (4) *The appointment of a Leveki Magafaoa shall not be questioned on the grounds that any member of the Magafaoa 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 Magafaoa land, may be appointed as a Leveki Magafaoa of any land, but if he is not a member of the Magafaoa he shall not by virtue of such appointment acquire any beneficial rights in the land.*
- (6) *In appointing any Leveki Magafaoa the Court may expressly limit his powers in such manner as it sees fit."*

[34] Also important in this decision is the law relating to adoption and I set out the relevant sections.

92 Adoption by Niuean custom invalid

No adoption by Niuean custom, whether made before or after 1 November 1969 shall be of any force or effect, whether in respect of intestate succession or otherwise.

93 Adoption by Niuean custom before 1 April 1916 by parent dying before 5 December 1921

Notwithstanding anything in section 92, in any case where before 1 April 1916 any child was adopted by Niuean custom and since that date and before 5 December 1921 the adopting parent has died, the adoption shall for all purposes have the same operation and effect as that which is attributed by Niuean custom to adoption by Niuean custom.

99 Effect of adoption order

Every adoption order shall have both in Niue and New Zealand the same operations and effect as an adoption order made under the Adoption Act 1955 has virtue of section 16(1) and (2) of that Act.

[35] Finally, as set out in s 52 of the Niue Amendment Act 1968, when the Court makes an order affecting title, that order:

“...shall bind all persons having any interest in that land, whether or not they are parties to or have notice of the proceedings in which the order is made, and whether or not they are subject to any disability.”

[36] Therefore, the Court’s jurisdiction is very onerous and it is required to make careful decisions as to determination of title which stand the test of time and are equal to most challenges.

Discussion

[37] The issues to be considered in this case are:

- (1) The correct identity of the land set out in Provisional Plan 9437.
- (2) Who is the correct common ancestor and the magafaoa associated with this land?
- (3) The most appropriate Leveki for this land.

Identity of the land in Provisional Plan 9437

[38] The name of the land in Provisional Plan 9437 and the location of the land was the subject of considerable debate. Harry Ikitule stating the land in Provisional Plan 9437 was known as Pokoluo and John Vilisoni stating the land was known as Matalelega.

[39] The evidence given to the Court from both the Ikitule side and the Vilisoni side was consistent. Namely, that Matalelega was at the top of the hill and that Pokoluo was on the left side of the road about half way up the hill. This evidence was particularly clear from John Vilisoni’s own witness David Makalele who knows the blocks well. This evidence would also add weight to the Ikitule evidence that the Vilisoni’s did not work Pokoluo and the Vilisoni evidence that Ikitule did not work Matalelega.

[40] The evidence was so clear that I gained the view that the parties were talking about different blocks of land. One block on the left side of the road half way up the hill being Pokoluo and the other at the top of the hill being Matalelega.

[41] An added difficulty for the Vilisoni case is that Harry Ikitule took the surveyor and instructed him to survey the land he knows as Pokoluo on the left side of the road, half way

up the hill. This resulted in Provisional Plan 9437 which was simply adopted by the Vilisoni side and they called it Matalelega, notwithstanding the evidence that the land which was surveyed was not at the top of the hill.

[42] From the evidence presented I can only conclude that the parties are talking about different blocks of land. Further, the land which was surveyed was on the left side of the road half way up the hill, I find that this is Pokoluo and not Matalelega.

Common Ancestor and Use and Occupation

[43] Having regard to my finding as to the identity of this land, the submissions and evidence from the parties as to who is the correct common ancestor and magafaoa of the land in question is in my view directed at different blocks of land.

[44] Harry Ikitule at Pokoluo as set out in Provisional Plan 9437 and John Vilisoni at Matalelega which has not yet been surveyed.

[45] The evidence of John Vilisoni as to the common ancestor and use and occupation is therefore not relevant to Pokoluo.

[46] The common ancestor for Pokoluo is as set out by Harry Ikitule as being Aotagaloa. The genealogy is set out below.



[47] The evidence given links the common ancestor to this land and as such links Harry Ikitule (Haleikitule Moavao).

[48] When this genealogy is coupled with Harry Ikitule's evidence as to use and occupation there can be no doubt that the common ancestor is Aotagaloa and the magafaoa associated with this land are Aotagaloa's descendants including the applicant Harry Ikitule.

[49] Having regard to the above findings, there is no need to consider the submissions of John Vilisoni relating to entitlement through the customary adoption of Mesitalani or to consider the evidence as to use and occupation as, in my view, this relates to a different block of land.

[50] It is suggested to the applicants, John Vilisoni and Olenesisi Makakona, that they consider making a fresh application in relationship to the correct block of land, namely Matalalega. It is at that time that the submissions relating to the entitlement from the adoption and use and occupation should be considered.

Leveki

[51] Having regard to my findings above I find that the person who is most appropriate to be the Leveki Magafaoa is Harry Ikitule.

[52] This finding is based on the fact that Harry Ikitule knows the history of this land and the genealogy associated with it.

Decision

[53] For the reasons set out above I make the following orders:

- (i) An order pursuant to section 10 and 11 Land Act 1969 determining title to the land in Provisional Plan 9437 containing 5410 square metres as Pokoluo; and declaring the Common Ancestor to be Aotagaloa.
- (ii) An order pursuant to section 14 Land Act 1969 that Harry Ikitule is to be appointed Leveki Magafaoa.

[54] A copy of this decision is to go to all parties.

Dated at Wellington in New Zealand this 11th day of November 2010.


W W Isaac
JUDGE