IN THE HIGH COURT
OF NIUE
(LAND DIVISION)

App No. 9848 and 9849

IN THE MATTER OF	application relating to PART TUMAU, ALOFI DISTRICT, NIUE
BETWEEN	SENUOLA FATIAKI, MANASOFAI TALAGU & MICHELLE TAULAMOKA POUMALE Applicants
AND	MORRIS HEMA TAFATU Respondent

DECISION

Introduction

[1] The application before the Court dated 29 September 2014 is to change the common ancestor of the lands at Tumau from Tutakitoa to Tetaia Manatau Sotaia.

[2] The applicants are Senuola Fatiaki, Manasofai Talagu and Michelle Taulamoka Poumale as descendants of Tetaia Manatau Sotaia. The respondent is Morris Tafatu as a descendent of Tutakitoa.

Background

[3] The application concerns Tumau Section 2 Block IV Plan 248 CT N5/39 Alofi District.

[4] On 19 March 1936 Judge W. Bell heard a claim to the land known as Tumau and made, the following decision:

"i. The decision of this Court is that Fakanimo and her relations own this land.

ii. The boundaries will decided as soon as possible, when this has been done a full written decision of this Court will be given"

[5] Then on 10 November 1976 Chief Judge Donne heard an application to determine the title to the same land. He determined that Tutakitoa was the common ancestor of this land and that Morris Hema Tafatu was the leveki magafaoa.

[6] In 1978 the applicants sought to rehear the 1976 decision but their application was unsuccessful.

[7] Therefore the title for Tumau Section 2 has been in place since Chief judge Doone 1976 decision.

Procedural Background

[8] The present application was heard by me on 19 November 2014 where it was agreed by both Counsel for the applicant and the respondent that the first matter to be determined was whether the Court has jurisdiction to change the common ancestor of this land.

[9] To answer this jurisdictional issue I stated that I would consider:

i. The issue of fraud that has been alleged by the applicant; and

ii. The status of the 1936 decision.

[9] I also stated I would locate relevant case law on the question of fraud and the change of a common ancestor and distribute these cases to Counsel.

[10] Under cover of my directions of 23 December 2014 I sent Part Vaimilo and Part Matapa Section 2 decisions to Counsel and invited submissions by 31 January 2015. No submissions were received by that date. I extended the date and Counsel for the applicants filed submissions dated 22 February 2015and Counsel for the respondent

filed submissions on 23 February 2015. Counsel for the applicant responded to the respondents submissions on 3 March 2015.

[11] I now consider those submissions.

Discussion

[12] The general law relied on by Counsel for the applicant to advance the proposition that the Court has jurisdiction to change the common ancestor is contained in sections 44 and 47 Niue Amendment Act (No.2) 1968.

[13] Section 44 provides:

> "Applications to the Land Court
> (1) The jurisdiction of the Land Court in any matter may be exercised on the application of any person claiming to be interested therein, or on the application of the Cabinet of Ministers or of any person authorised by the Cabinet in that behalf.
> (2) In the course of the proceedings on any application, the Land Court may, subject to this Act, Rules of Court, and any other enactment, without further application and upon such terms as notice to parties and otherwise as the Court thinks fit, proceed to exercise any other part of its jurisdiction the exercise of which in those proceedings the Court thinks necessary or advisable."

[14] Section 47 provides:

> "General Jurisdiction of the Land Court
> (1) In addition to any jurisdiction specifically conferred upon the Land Court by any enactment other than this section , the Court shall have exclusive jurisdiction-
> (a) To hear and determine any application to the 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 thereof:
> (b) To determine the relative interests of the owners or the occupiers in any Niuean land;
> (c) To hear and determine any application for the appointment of a Leveki Magafaoa in respect of any Niuean land;
> (d) To hear and determine any claim to recover damages for trespass or any other injury to Niuean land;
> (e) To grant an injunction against any person in respect of actual or threatened trespass or other injury to Niuean land;

(f) To grant an injunction prohibiting any person from dealing with or doing any injury to any property which is subject-matter of any application to the Court;
(g) To create easements in gross over Niuean land;
(h) To make any order recording the determination of any matter relating to land or any interest therein, whether provided for in this Act or other enactment;
(i) To authorise the survey of any land.

(2) The grant of an easement pursuant to paragraph (g) of subsection (1) of this section may, if the Court thinks fit, be made subject to the payment of compensation in respect thereof, or to any other conditions that the Court may impose."

[15] In respect to section 44 Counsel for the applicant submits that this section contemplates occasions where matters come before the Court not covered by the framework of the Act. He further submits that s44 (2) gives the court wide powers to "proceed to exercise any other part of its jurisdiction the exercise of which in those proceedings the Court thinks necessary or advisable."

[16] Counsel for the respondent disagrees and says that the Court cannot use s.44 to effectively rehear a case and that the applicant is simply attempting to have a second attempt to have the matter reheard.

[17] Section 44(1) provides the Court with jurisdiction to hear an application of any person claiming an interest in land. This jurisdiction must be subject to the Niue Land Acts and Rules of the Court. It cannot be used to invoke a jurisdiction of the Court which does not exist.

[18] This view is supported by section 44(2) which allows the Court during the course of proceedings to exercise any other part of its jurisdiction which it thinks necessary or advisable subject to Act or Rules of the Court.

[19] Put simply if an application is filed with the Court seeking for example an occupation order but during the course of proceedings it is found that the parties want a partition order, the proceeding can be amended accordingly without a further application being filed but subject to the Act and Rues of the Court and any provisions as to notice.

[20] Therefore the Court can only act within its jurisdiction as set out in the Act. As stated above is cannot use this section to exercise jurisdiction that is not specified in the Act. As a result I do not accept Counsel for the applicant's submission that section 44 can be used to determine an application to change a common ancestor when no such jurisdiction is specifically set out in the Act.

[21] I also agree with the respondent that if section 44 was being used by the applicant to attempt to rehear the application then this is not appropriate as there are specific provisions in the legislation dealing with rehearing applications.

Section 47

[22] Counsel for the applicant also relies on section 47 of the Land Act 1968 as the basis for giving the Court jurisdiction to change the common ancestor.

[23] Counsel submits that section 47 contemplates situations where applications outside the terms of the Land Act may be made to the court relating to ownership, possession, occupation or utilisation of Niuean land or interest in Niuean land.

[24] Counsel for the applicants maintains that the 1936 order in respect to this land by Judge William Bell is still good law and that the 1936 order should have acted as a bar to any further investigation or determination of title to the same land. As a consequence Counsel submits that the 1976 application should never have been heard and it is null and void.

[25] Counsel maintains that the Court has express jurisdiction in terms of section 47 to hear and determine the application to change of common ancestor.

[26] Counsel for the respondent disagrees and maintains section 47 sets out the general jurisdiction of the Court and does not provide jurisdiction to rehear a matter for which there are specific provisions provided in the legislation. Further he maintains that section 47 does not assist the applicants at all.

[27] However Counsel for the applicant has responded by saying this is not an application for a rehearing but if it was the grounds for a rehearing are applicable to changing a common ancestor.

[28] First section 47 sets out the general jurisdiction of the Court and cannot be utilized as a rehearing application where there are specific provisions for this to take place.

[29] Next if the present application is not a rehearing application then can section 47 be used to change a common ancestor.

[30] Counsel for the applicant maintains it provides express jurisdiction to do so.

[31] If this were the case in my view section 47 would clearly set that the Court has jurisdiction to change the common ancestor. Such provision to amend an order of the Court is not uncommon. For example section 14, 15 & 16 Land Act 1968 which deals with the appointment of leveki magafaoa provides for replacement or a change of leveki magafaoa.

[32] Sections 10, 11 and 12 of the Land Act 1969 which provide in detail for the determination of a common ancestor do not provide for a replacement or change of the common ancestor.

[33] I consider that for an issue so vital as the determination of title that if parliament had intended that the common ancestor could be changed it would have been made provision for this to happen.

[34] What parliament has said however in terms of section 52 is that every order of the Land Court determining or affecting the title to Niuean land or to any estate or interest shall bind all persons in that land.

[35] Further this Court has said on more than one occasion that title orders when made must be robust and stand the test of time.

[36] CJ Hingston in his practice note in 2006 reinforced this position when he stated that the Court has no jurisdiction to change the common ancestor to land. This practice is still applicable today and in essence sets out the current position. That is that Court has no jurisdiction to change a common ancestor.

[37] The current application appears to use section 47 to circumvent this practice note and the provisions relating to rehearing. It simply cannot do so and therefore must fail.

[38] Therefore, for the reasons set out above, I do not consider the Court has jurisdiction to change the common ancestor in this case.

The 1936 Court order and the 1976 Court order

[39] Although I have found that the Court has no jurisdiction to change a common ancestor, for clarity I will set out my view on the 1936 and 1976 orders of the Court.

[40] As set out in the background Judge William Bell heard a claim to this land and found that:

i. The decision of this Court is that Fakanimo and her relations own this land.

ii. The boundaries will be decided as soon as possible; when this has been done a full written decision of this Court will be given.

[38] There is no dispute as to what the 1936 decision said. That is that the land belonged to Fakanimo and her relations. Counsel for the applicants maintains that includes the applicants only. Counsel for the respondent maintains that the decision includes both the respondents and applicants families.

[39] The decision also stated that the boundaries had to be decided and when this happened a full written decision would issue.

[40] This statement by Judge Bell clearly makes the determination of title provisional upon the boundaries being decided and upon a full written decision being issued.

[41] The Court record between 1936 and 1976 shows that neither the boundaries nor the decision were finalised. Therefore when the matter came to the Court in 1976 in my view no final decision had been made.

[42] Furthermore section 51(7) Niue Amendment Act (No2) 1968 provides that no order relating to title shall be signed and sealed until and unless there has been drawn

or endorsed thereon a plan of the land affected which is sufficient to identify the land and the boundaries of that land. Prior to 1976, this did not happen.

[43] The applicant has argued however that, that was irrelevant in that the Court has determined the magafaoa of the land Fakanimo and her relations. The question however is whether Fakanimo and her relations are exclusively the applicants.

[44] This matter is not answered by the Court before the 1976 decision but it is relevant to note that in 1967 the applicant's family through Matalanefe and the respondent's family through Morris Tafatu agreed that the title to the land would be subject to proper investigation at some future date.

[45] Whilst this is not binding on the Court, it is instructive that the applicant's family and respondent's family were talking together about title to their land and agreed in writing to a way forward.

[46] This is also evidence for the view that both the respondents and applicant's families must have been of the view that the title to Tumau had not yet been settled and they required a proper title investigation to take place.

[47] This clearly did not happen in 1936 and it was not until 1976 that such an investigation and determination was made.

[48] Therefore in my view what is clear is that the 1936 decision was not a final title determination in respect to of Tumau Section 2.

[49] This being the case the Court in 1976 was entitled to hear an application to determine title to Tumau Section 2.

[50] What is significant is that in 1976 both representatives of the applicant's and respondents families were present at court and both agreed to the orders made by the Court.

[51] Therefore it is the 1976 decision which in my view has conclusively determined the title to Tumau Section 2 with the boundaries and area of the block being determined and the common ancestor being appointed.

Fraud

[52] At the Court hearing in Niue on 19 November 2014 Counsel for the applicant made extensive submissions that the respondent and his father committed fraud in 1976 to obtain the title to this land by misrepresenting who the common ancestor of the land was. In making this allegation he started with setting out the definition of fraud and then described in detail the alleged actions of the respondent in respect to non disclosure of the 1967 agreement and the 1936 Court order to the Court in 1976 which in his view amounted to fraud.

[53] Counsel for the respondent responded by requesting Counsel for the applicant to provide the evidence to support his allegations. He further asks how can it be fraudulent if Mr Tafatu was not present in 1936; how can it be fraudulent when the 1936 decision was a public record which was available to all; how can it be fraudulent for Mr Tafatu not bringing the detail of the 1967 agreement or the 1936 decision to the court in 1976.

[54] Although Counsel for the applicant went into detail with his allegation at the November hearing, his submissions filed on 22 February 2015 do not continue in the same vein and merely stated that the Court has jurisdiction under section 54 to annul and order obtained by fraud. Further he stated that the matter could only be determined by the Court when the respondent was cross examined and legal submission could then be made in respect to the case that I provided to Counsel to consider on the issue of fraud.

[55] Whilst I accept that no witnesses have been called in relation to the allegations of fraud, I wish to make the following comments. First, the applicant launched a stinging attack on the respondent on the 19 November 2014 and in my view the respondent was justified in his response.

[56] The allegations essentially based on evidence which is on the Court record and are public documents. These documents as they speak for themselves. They were also available to the Court and to all parties and not just the respondent. Furthermore they

have not been held from the Court in any way. I therefore consider the allegations made by the applicant to be without foundation.

[57] Next the applicant wishes to cross examination the respondent in regard to the applicant's allegations of fraud. The onus of proof is on the applicant to prove the allegation and it is not for the applicant to prove his case by cross examination of the respondent.

[58] Finally, no application in terms of section 54 has been filed and if one is filed I would caution the applicant to be very clear of the actual fraud that is alleged and the need to present his own evidence to support the allegations made.

[59] A copy of my decision is to go to all parties.

Dated at Wellington this 30 th day of March 2015.

W W Isaac

Justice of the High Court of Niue