

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

Application No. 9579, 9580 and 9324

IN THE MATTER of Part Matapa, Provisional Plan
Number 9388 Hikutavake
District

BETWEEN Niutama Tuhipa and Dick Hipa
Tuhipa
Applicants

AND Dick Hipa and Morris Tafatu
Respondents

DECISION

Introduction

[1] There are 3 competing applications before the Court in respect to Part Matapa (Pool Chasm), Hikutavake District the land contained in provisional plan 9388 containing 2.1130 hectares as follows:

- (i). By Tuhipa Niutama to determine the common ancestor as Matilatau and the leveki magafaoa to be Tuhipa Niutama dated 31 July 2007.
- (ii). By Morris Tafatu and Richard Hipa to determine the common ancestor to be Taoafe and leveki magafaoa to be Morris Tafatu and Richard Hipa dated 27 May 2014.
- (iii). By Frank Fakaotimanava Lui to determine the common ancestor as Emile Poakihesifa and the leveki magafaoa to be Frank Fakaotimanava Lui dated 20 September 2013.

[2] It should be noted that prior applications to determine title and appoint leveki magafaoa have been filed by Tuhipa Niutama on 27 March 1995 and Dr Richard Hipa on 14 May 1999

in respect to this land. The applications have not been completed and the present applications now overtake these past applications.

[3] It should be also noted that the land subject of these applications include the Matapa trails, leading to Matapa Chasm and part of Talava trails leading to Talava Arches. Both these areas are of immense cultural and historical importance to the Hikutavake community and are important areas for Niue tourism.

[4] On 8 November 2014 I heard evidence and submissions of the parties in support of their respective applications.

Case of the Taofo Magafaoa

[5] The applicants Morris Tafatu and Richard Hipa maintain that Taofo is the common ancestor for this land. A genealogy obtained from the Ministry of Justice records was filed in support of the application. This genealogy records Taofo as being of Matapa, Hikutavake. From Taofo there is a direct line of descent to Sifahemotu, Rousalina Hipa and Hipatama Dick Hipa.

[6] The Taofo case is based around the occupation of this land by the direct descendants of Taofo to the present time.

[7] This occupation has included living close by the land in question. Sifahemotu, a direct descendant of Taofo lived at Matapa beside the Ekalesia Niue church. Ian Hipa continues to reside there today.

[8] This Matapa land was always cleared by Taofo's descendants who also cleared the boundaries and roadsides to this land.

[9] The Hipa families' link to this land is from the maternal side, Sifahemotu, and not the paternal or Hipa or Tuhipa side.

[10] The will of Sifahemotu records her lands as including Matapa and Talava. When Sifahemotu and her daughter Rousalina were alive no one challenged her ownership.

[11] The Tuhipa family are from Vaha or the upper terrace above Hikutavake. It was only after Hipa Tuhipa Niuloa married Sifahemotu, that they moved to Matapa. The Tuhipa link to this land comes from the marriage to Sifahemotu.

[12] Sifahemotu is buried in the heart of Matapa and at the time of her burial there was no dispute from the Tuhipa family. Sifahemotu is buried beside her parents.

[13] The Taoafe descendants have never seen the Lui magafaoa on this land and say the Lui family have no claim to it by genealogy or occupation.

Tuhipa Case

[14] The Tuhipa case was presented by Dick Hipa Tuhipa.

[15] He claims that the common ancestor for the land is Masilatau.

[16] He maintains that the Matapa land is from the Tuhipa Niuloa or Hipa side. That is from Sifahemotu's husband.

[17] He states that Masilatau is buried on this land along with his wife Lekeitoa, their son Tuhega and children Hale Patumatagi, Patukau, Matalahetia and Tamalia. The graves are marked with rocks, frangipanis and hibiscus plants are grown at the burial grounds.

[18] Mr Tuhipa states he grew up on this land with his father Niutama Tuhipa and he now lives 65m from the land in dispute. He believes his family are the true occupiers of this land.

[19] The Tuhipa family also gathered in a small cave by the trail leading to Matapa pool to weave baskets. They also used the Matapa pool for cleaning the Pia (starch) bulbs and for swimming.

[20] He says his family also collect rocks from this land to sell to government between 1968 and 1969.

[21] He maintains that his father Niutama Tuhipa gave permission for Sifahemotu to be buried at Matapa although; they believed she should be buried at Sipae Hipa's home and not Matapa.

[22] Mr Tuhipa considers that Sifahemotu came to the land from Makefu.

[23] He also opposes the Lui's claim, saying the Lui family are from Toi and also that they have never worked or occupied this land.

[24] He accepts that the Tuhipa family have land at Vaha but says Matapa is their land as well.

[25] He opposes the Hipa occupation of the land.

The Lui Case

[26] The applicant Frank Fakaotimanava Lui is claiming that Emile Poakihesifa is the common ancestor to this land and that he should be appointed as the leveki magafaoa.

[27] Mr Lui maintains that the land came to Emile Poakihesifa from the ancestor Moka who received the land from the demigod Huanaki.

[28] Emile is buried in Tapaiki, in Hikutavake and from her line comes the applicant Frank Lui.

[29] The applicant's case in this regard is based on oral tradition passed down to him from his ancestors.

[30] Mr Solomon as Counsel for Mr Lui submitted that the customary claim of Mr Lui is very strong and too much emphasis is placed on occupation by the other parties.

The Law

[1] The relevant sections of the Niue Land Act 1969 are as follow:

(i). Section 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 Magafaoa or relative interests in that land, until it has before it a plan of the survey of the land affected.

- (3) The court may at any stage of the proceedings require that all claims relating to such land, whether by the applicant or by any other person, shall be made in writing to the Court within a time to be fixed by the Court, after which time to further claims for inclusion will be admitted, except by the leave of the Court and upon such terms as the Court determines.

(ii). Section 11 – Court May Require Written Statement

The court may require any persons 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 land which he claims;
- (b) The grounds of the claim;
- (c) The genealogical table 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.

(iii). Section 12 – Ownership Determined by Ascertaining and Declaring Magafaoa

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

(iv). Section 14 – Appointment of Leveki Magafaoa

- (1) When the ownership of any land has been determined any member of that Magafaoa who has 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, through having attained the age of 21 years, constitute less than a majority of the Magafaoa who have attained such age the court may in its discretion, 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 in its discretion expressly limit his powers in such manner as it sees fit.

Discussion

[31] As set out in section 10 Niue Land act 1969, the court is required to determine title having regard to the customs and usages of the Niuean people.

[32] Section 11 then refers the Court to the matters which may assist in its determination. These include the genealogical connection to the land, the names and locations of cultivations, villages, burial places and other places of historical significance and other proof of occupation to the land.

[33] In this case the 3 parties before the Court claim entitlement from three different common ancestors.

[34] Hipa from Taoafe, Tuhipa from Masilatau and Lui from Emile Poakihesifa's.

[35] Also Hipa and Tuhipa claim occupation and utilization of the land. The Lui claim does not.

[36] Dealing firstly with the Lui claim it was not opposed that the common ancestor Emile Poakihesifa was from Tapaiki and that this common ancestor was buried at Tapaiki. Tapaiki is approximately 4 to 5 kilometres from Matapa.

[37] Furthermore it was submitted that Emile Poakihesifa received interests in this land from Moka who received them from the demigod, Huanaki.

[38] When questioned that this could not be true because according to legend Huanaki arrived in Niue before it was settled. Therefore Moka could not have received this land from Huanaki. Mr Lui's response was that this was the story passed to him from his ancestors.

[39] As far as occupation is concerned the Lui claim accepts there was no occupation by his family and their involvement was based around a discussion of the survey boundaries in 1973 for section 2, Block 1. However at that time no claim to the land was made.

[40] While I will not comment on the legend of Huanaki, I will note that the Lui claim does not link to any ancestors who lived, worked or were buried on this land.

[41] Counsel for Mr Lui submits that occupation of the land is overstated but with respect the Court has to consider such matters as contained in section 11.

[42] When this consideration is made, the Lui claim does not comply with any of the requirements of section 11 and as a result must fail.

[43] Turning now to consider the Tuhipa and Hipa claims, I start by noting the close genealogical link of these two families and their long term occupation at Matapa and Hikutavake.

[44] The core disagreement between these two families is that the Tuhipa claim is based on the paternal line of their genealogy and the Hipa claim is based on the maternal line.

[44] In terms of the genealogy provided by the Hipa claimants, Taoafe was born, lived and was buried at Matapa. From Taoafe the land passed to Sifahemotu who was also born and buried at Matapa and from there the land went to Rousa Lousalina Hipa and then to Dick Hipa.

[45] It is important to note that Rousa Lousalina Hipa applied for and was granted title to Section 2 Matapa, being the land immediately adjacent to the subject land in 1975.

[46] The Tuhipa family did not oppose this application in 1975 and it was granted with Taoafe being determined the common ancestor and Rousalina Tafatu the leveki magafaoa.



[47] However in 2008 that title was unsuccessfully contested by Dick Tuhipa and it was noted in that case that the Taoafe and Tuhipa families are from different genealogies and areas. The Taoafe line is from the coastal area and the Tuhipa line from the top plateau called Vaha.

[48] This evidence was again repeated in the present case and although Dick Hipa Tuhipa disputed this fact, the Court record demonstrates that the Tuhipa family have land and close genealogical connections to Vaha.

[49] What is also evident is that while Sifahemotu and Rousalina were alive the Tuhipa family did not contest the Matapa and Talava lands.

[50] It should also be noted that Sifahemotu is buried on the land Section 2 referred to above which is immediately adjacent to the subject land.

[51] Tuhipa says that Sifahemotu family sought permission from his father Niutama to allow her to be buried at Matapa. This is disputed by the Hipa family who maintain they did not seek permission as Sifahemotu had the right to be buried on this land.

[52] It should also be noted that Mr Dick Tuhipa in his evidence of 13 November 2014 refers to the Hikutavake family members being upset that Sifahemotu was to be buried at Matapa and believed she should be buried at her husband Sipae Hipa's house 120 metres away from Matapa. Sipae Hipa is the brother of Niutama and although not stated it can be assumed this referred to the land at Vaha.

[53] Therefore while both claims have substance, when all the evidence is considered, it is the Hipa claim which I consider has more merit and as set out in their evidence there is a direct descent line from Taoafe to the current applicants. This genealogical link is also supported by constant occupation of this land from Taoafe to the present applicants. I therefore find that the common ancestor to this land is Taoafe.

[54] I now turn to the appointment of leveki magafaoa. It is acknowledged that the land at Matapa and Talava has historical and cultural significance for the people of Matapa. It also has immense tourism importance.

[55] All Hikutavake families recognise this fact and it is a tribute to these parties that the land has remained available for public, family and village use. I am assured this will continue and it is of some comfort to me that when I made any decision that the common ancestor was



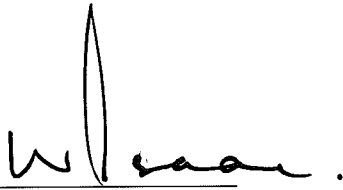
Taoafe that the Taoafe family held a meeting with all the Hikutavake community to determine the appropriate leveki magafaoa for this land.

[56] The outcome of this meeting was that not only did the Hipa family unanimously support Morris Tafatu and Richard Hipa as leveki magafaoa but so too did the majority of the Hikutavake and Matapa communities.

[57] Similar evidence was not put before me from Dick Tuhipa or Frank Lui who largely stood on their own in respect to their respective cases for appointment of leveki magafaoa.

[57] Therefore I am satisfied that Morris Tafatu and Richard Hipa comply with the provisions of section 14 Niue Land Act 1969 and I now appoint them as leveki magafaoa of the subject land.

Dated at Wellington this 20th day of March 2015.

A handwritten signature in black ink, appearing to read 'W W Isaac', written over a horizontal line.

W W Isaac

JUDGE