

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

App No. 11600

IN THE MATTER OF An appeal from the Land
Commissioners, sections 45
and 47D Niue Amendment
Act (No 2) 1968

AND Rule 39 Land Court Rules
1969

IN THE MATTER OF the land known as **Part
Lalopua – Lakepa District**

BY Togatolu Togiamua on
behalf of the Atumuahetua
Kaea family
Applicant

AND John Operator Tiakia,
Alanotama Tamahaga and
Asafotama Fatamaka as
magafaoa of Hegavale
Respondent

Hearing: 16 November 2017
(Heard at Fonuakula)

Judgment: 10 June 2019

DECISION OF JUSTICE S F REEVES

Introduction

[1] This appeal is against a decision of the Commissioners (Land Division) made on 21 September 2017 to dismiss applications for title to Part Lalopua, Lakepa District (the land).

[2] Casey Graham on behalf of the Atumuahetua Kaea family (Togiamua magafaoa) appeals that decision. The appeal is opposed by the Hegavale magafaoa.

[3] On 16 November 2017, I heard submissions from the applicants. The respondents were not present but had filed written submissions. At the end of the hearing I adjourned the matter to review the minutes and materials provided. This judgment sets out my final decision on this matter.

[4] The issue in this case is whether the appeal should be upheld.

Background

Earlier applications

[5] Lalopua is located in Lakepa. In the years 1986-1998 a series of applications were filed by various parties to have parts of the land surveyed and titled, and leveki magafaoa appointed.

[6] The Court made two orders in 1988 and 1998 titling parts of the land where houses are situated.¹ In each case, surveys of these areas had been commissioned and carried out by the applicants.

[7] The applicants' original applications were filed in 1992,² and the Hegavale magafaoa filed their applications in 1991 and 1993.³ These applications include areas other than where houses are situated on the land.

¹ Application nos 3378/3379 (heard on 26 January 1988) and 7963/7964 (heard on 28 July 1998; no 17, folio 92).

² Application nos 5205/5206.

³ Application nos 4663/4664 and 5389/5390.

[8] In 1993 the parties appeared in the High Court concerning their dispute over the appropriate common ancestor, and location of boundaries. The Court sent the parties away to meet and try to resolve their differences.⁴

[9] From 2013, the parties resumed their dispute concerning boundaries for the parts of Lalopua they wish to title. In 2016, Togiamua requested a local court hearing for the disputed land, as family meetings had not reached any agreement.

[10] The Hegavale magafaoa also applied for an injunction to remove a newly constructed grave located on the disputed part of the land.

The Land Commissioner decision

[11] The hearing before the Commissioners hearing took place on 16 August 2017 and a written decision was issued on 21 September 2017.

[12] The Commissioners' noted that the Togiamua and Hegavale parties continued to disagree over the rightful common ancestor. It was noted that parties had agreed to withdraw several applications.⁵ The Commissioners then dismissed the remaining applications to title part Lalopua.⁶ They provided the following reasons (summarised):⁷

- (a) Two areas had already been surveyed and titled, and the rest of the magafaoa should survey and apply to title the areas around their houses.
- (b) Title to the area free of houses will be dependent on further surveys.
- (c) The two magafaoa were advised to lodge fresh applications.
- (d) The Lalopua land is to be surveyed and all markings showing things of importance including houses and graves are to be included on the plan.

⁴ *Fatamaka v Togiamua – Part Lalopua, Lakepa District* [2017] NUHC Land Division (21 September 2017) at [6].

⁵ Application nos 5389/5390 of Hegavale magafaoa and 7476/7477 of Faso Taufelila Magaoa.

⁶ Application nos 4663/4664 of Hegavale magafaoa and 5205/5206 of Togiamua magafaoa.

⁷ *Fatamaka v Togiamua – Part Lalopua, Lakepa District* [2017] NUHC (21 September 2017) at 4-5.

- (e) The application for an injunction to remove a recently constructed grave on the disputed land is dismissed.

Case for the Applicant

[13] The Notice of Appeal dated 4 October 2017, raises a number of matters, but at the hearing the substantive issues argued by Ms Graham in support of the appeal were:

- (a) There was important evidence presented that was not acknowledged by the Commissioners;
- (b) No clear decision or reasoning was given by the Commissioners despite the intended purpose of the hearing; and
- (c) That the Commissioners were wrong to dismiss their applications for title.

[14] Ms Graham sought to file genealogical evidence referred to at the Commissioners hearing, though not previously produced and filed. She also sought to file new genealogical evidence.

[15] At the hearing on 16 November 2017, Ms Graham also claimed that the genealogy records held by the Department of Justice had been altered and updated without the knowledge of the family and that there were serious discrepancies in the record. Allegations regarding conflict of interest on the part of a Justice Department staff member were also raised.

Case for the Respondent

[16] On 9 November 2017, John Operator Tiakia, Mose Miki Alano, Asafotama Fatamaka and Mokati Tiakia Morris for the magafaoa of Hegavale filed a written response in opposition to the application for appeal.

[17] Mr Tiakia submitted that their magafaoa have occupied the land for 150 years. He said they produced evidence of occupational rights, the genealogy produced by the

Department of Justice, and the death certificates of ancestors who occupied, lived and died on the land.

[18] The respondents submit that the common ancestor is Lapolapo Hegavale Litaio. If the land is titled to Atumuahetoa, the descendants of Hegavale would be excluded whereas if Hegavale is appointed as common ancestor, everyone will be covered including Togatolu Togiamua.

[19] Mr Tiakia said that Ms Graham was making false statements about the Court records, and he asks that the Court confirm the Commissioners decision as it was a fair decision that allowed everyone a chance.

[20] Mose Miki Alano emailed the Department of Justice on 4 September 2017 stating that he believes Lapolapo Hegavale Litaio is the true common ancestor for the land of Lalopua. Young Allison Talamitaki Taifinofu also submitted an affidavit on 8 November 2017 in support of the application. He denies the assertion that Togiamua's ancestor is buried on the land as there is no evidence supporting this claim.

Law

[21] Section 47D of the Niue Amendment Act 1968 (the NAA) considers appeals from the decisions of Commissioners:

47D Appeals from decisions of Commissioners

- (1) Any party to any proceedings before Commissioners of the Land Court may appeal from the judgment of the Commissioners to a Judge of the Land Court.
- (2) Every such appeal shall be by way of rehearing and section 45 of this Act and rule 39 of the Land Court Rules 1969 shall apply accordingly.

[22] Section 45 of the NAA relates to re-hearings generally, and pursuant to s 45(2) the Court may in its discretion either affirm, vary, or annul its former determination, and may exercise any jurisdiction which it may have exercised on the original hearing.

[23] The regulations relating to appeals from a Commissioner's decision are set out in r 39 of the Land Court Rules 1969 (the LCR) and the relevant parts state:

39 Appeal from Commissioner

- (1) Any party to any proceedings before a Commissioner may appeal from any order or decision of the Commissioner to a Judge of the High Court.
- (2) Every such appeal shall be by way of an application in form 1 to the High Court and shall be filed in the Court office within 28 clear days after the date of the order or decision appealed from.
- (3) On the filing of such an appeal, the Commissioner shall, unless a Judge otherwise orders, stay further proceedings on the order or decision appealed from.
- (4) Every such appeal shall be by way of rehearing.

[...]

[24] The powers conferred on the Court to determine title are set out in s 10 of the Land Act 2006:

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 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 no further claims for inclusion will be admitted, except by the leave of the Court and upon such terms as the Court determines.

[25] Rule 26 of the LCR sets out the powers of the Court to dismiss or grant any application on such terms as it thinks fit.

Discussion

Preliminary issues

[26] There are two preliminary issues. First, at the commencement of the hearing I questioned the applicant about the basis of their appeal, and whether they were in fact seeking a rehearing. I was satisfied that the question of whether the Commissioners were wrong in their decision to dismiss the applications does raise an issue of law.

[27] However, the other issues concerning failure to consider evidence and lack of reasoning, as well as alleged alteration of the Department of Justice records and conflict of interest did not raise any allegation that the Commissioners had made errors of fact or law in deciding to dismiss the applications.

[28] This Court has previously held that procedural issues are not amenable to appeal and should be dealt with by rehearing.⁸ On that basis, there is no need to further consider those matters, and the only issue dealt with in this appeal is whether the Commissioners were wrong to dismiss the applications.

[29] The second issue is that the applicant wishes to file further evidence. It is well established that appeals by way of rehearing require the appeal be conducted on the evidence given in the Court below, subject to any power to admit further evidence.⁹ The applicant did not file any application to produce the new evidence, and it will not be admitted for the purposes of this appeal. In any event, while that new material may be relevant to the substantive issues in the proceedings, it is not relevant to the issue in this appeal.

Were the Commissioners wrong to dismiss the applications?

[30] The powers of the Court when determining title are set out in s 10 of the Land Act. Section 10(1) requires that the Court “determine every title and interest in Niuean land according to the customs and usages of the Niuean people, *as far as the same can be ascertained.*” The Court has previously found that this requires the Court to:¹⁰

[...] consider genealogical links to the land, evidence of use and occupation, cultivation of the land and burials within its boundaries.

[31] Surveys are also required to determine boundaries, and per s 10(2) the Court can refuse to proceed with an application for title unless it has a survey plan of the area affected showing the boundaries claimed.

⁸ *Foulagi v Tukiuha* [2018] NUHC 5; Land Division 11339 (1 November 2018) at [17].

⁹ *McGechan on Procedure* (on-line loose-leaf ed, Thomson Reuters) at [CR47.01].

¹⁰ *Kiole v Taufitu* [2018] NUHC 6; Land Division 11401 (30 November 2018) at [41].

[32] In any application to determine title, the Court may be faced with evidence that is uncertain, conflicting, inconclusive, or of variable quality and the Court can exercise its discretion and decline to determine title where it is unable to ascertain custom and usage including boundaries to its satisfaction. In such situations, the Court is within its powers to dismiss an application under r 26 LCR.

[33] In their decision, the Commissioners referred to the conflicting genealogical information relied on by the parties. It was also stated that the applicants had not filed evidence to verify their claims concerning genealogy, and that the source of their information was unofficial and unverified records. This was particularly important given the applicants disputed the Department of Justice record. The applicants also disputed the records presented by the Hegavale magafaoa concerning the identity of Lapolapo Hegavale, claiming that this was the wrong person.

[34] As well as the disputed genealogical evidence the Commissioners also stated that the applications did not show any boundaries for their claims, and in dismissing the applications, the parties were advised to file fresh applications with surveys to support the title claims.

[35] I conclude that the Commissioners not only had the power to decline to determine title and dismiss the applications, but it was reasonable for them to do so based on their view of the evidence, as well as the failure to provide surveys. Another relevant factor is the delay from 1997 to 2013 when the applicant took no steps to progress their applications. In the circumstances it was reasonable for the Commissioners to take the view that the parties should file fresh applications.

[36] For these reasons I decline to grant the appeal.

[37] Having reached this conclusion, I observe that the issues raised by the applicant may have been more amenable to a rehearing, as was raised with the applicant at the appeal hearing. In any event, the applicants are not prevented from bringing a fresh application for title supported by the required information and evidence. Indeed, the Commissioners have invited them to do so.

Decision

[38] The appeal is dismissed.

[39] I make no order as to costs. I take into account that the title issues concerning Part Lalopua remain unresolved, and I encourage the parties to take steps to reconcile their differences.

[40] A copy of this decision is to be sent to all parties.

Dated at Wellington this 10th day of June 2019.

S F Reeves
JUDGE