

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

**App Nos. 2023-00053,
2022-00108**

UNDER

Section 16 of the Lands Act
1969

IN THE MATTER OF

Removal and Appointment of
Leveki Mangafaoa in the land
known as PART
FUGALUGA/FUTAPEKA,
SECTION 2, BLK III,
HIKUTAVAKE DISTRICT

BETWEEN

Ms Melealope Gumaka
Applicant

AND

Mr Niutaha Tahega
Respondent

Hearing: 20 March 2024

Judgment: 18 December 2024

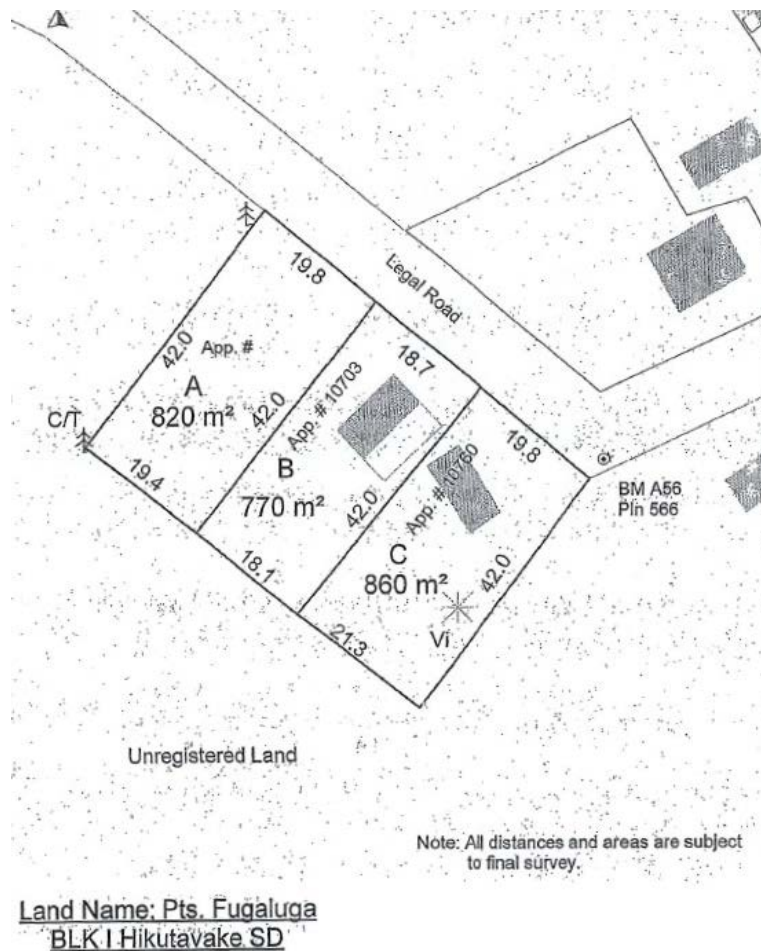
DECISION OF JUSTICE S F REEVES

Introduction

[1] Melealope Gumaka (Ms Gumaka) seeks an order for removal of Niutaha Tahega (Mr Tahega) as joint leveki over Section 2, Block III, Part Fugaluga/Futapeka, Hikutavake Survey District (Section 2), and appointing her as joint leveki in his place. She also seeks an injunction order to remove Mr Tahega from the house on Section 2 that he currently occupies. This judgment determines whether those orders should be granted.

Background

[2] On 6 April 2017, Isaac J issued a judgment determining title and appointment of leveki mangafaoa for Part Fugaluga/Futapeka (the land).¹ The provisional plan that was before the Court set out the several sections on the land and is reproduced below:



[3] At issue in this application is occupation of the house on the section previously referred to as Section B, now known as Section 2, Block III, Hikutavake District (Part Fugaluga/Futapeka).

[4] Isaac J found that the land was given by Puasifa to Gumaka, and that the Gumaka family had occupied the land without interference since 1940.² He determined that Puasifa was the common ancestor for the land, and he appointed joint leveki; Opili Talafasi as

¹ *Gumaka – Part Fugaluga, Hikutavake* [2017] NUHC 2; Application 10703 (6 April 2017).

² At [29]

leveki for the Puasifa family and Mr Tahega as leveki for the Gumaka family.³ This was to recognise the ownership of the land by Puasifa and the occupation by the Gumaka family. Isaac J noted that both men were considered as the appropriate leveki mangafaoa by the respective families.⁴

[5] Dick Tuhipa subsequently appealed the High Court decision and in 2019, the Court of Appeal dismissed Mr Tuhipa's appeal and confirmed the decision of Isaac J.⁵

[6] In August 2022, Ms Gumaka requested that the Department of Justice convene a family meeting to discuss her wish that Mr Tahega be removed as leveki mangafaoa for Section 2 and that she be appointed in his place. The meeting held on 22 August 2022 was mediated by a Deputy Registrar of the Court. The meeting concluded that Mr Tahega should remain as leveki. Family members attending were:

- (a) Melealope Gumaka
- (b) Nuitaha Tahega
- (c) Opili Talafasi
- (d) Nogi Jackwillie Feleti
- (e) Hilimatahepule Palalagi
- (f) Tom Cooper Tahega
- (g) Narita Tahega

[7] A meeting of the Puasifa mangafaoa was then held on 28 August 2022. The meeting resolved to evict Mr Tahega from the Gumaka family house on Section 2 and to appoint Ms Gumaka as leveki. Family members who attended and/or who signed the consent form were:

³ At [31] and [33]-[36].

⁴ At [34].

⁵ *Tuhipa v Lipitoa – Part Fugaluga, Hikutavake* [2019] NUCA 2; Application 11551 (14 March 2019).

- (a) Opili Talafasi
- (b) Ms Gumaka Gumaka
- (c) Feu Mokalei
- (d) A Talafasi
- (e) Alisha Talafasi
- (f) A Tohovaka
- (g) Nina Pipitolu
- (h) Nio Pipitolu

[8] On 26 November 2022, a meeting of the Kalopulu Taniela Gumaka Family was held in Niue, where the siblings of Ms Gumaka affirmed support for their sister in these proceedings.

[9] I heard the applications on 20 March 2024.

Submissions for the Applicant

[10] Ms Gumaka's grandfather is Kaupoe Gumaka, who originally received the land from Puasifa. Ms Gumaka is a daughter of Gumaka's son, Kalopulu Taniela Gumaka. She submits that it was her father who built the two houses which are on neighbouring sections, and that the house on Section 2 now occupied by Mr Tahega is owned by her family.

[11] The house on the neighbouring section is occupied by the family of Ms Gumaka's aunt, Malama Siuofa, who was the elder sister of Taniela.

[12] Ms Gumaka wants Mr Tahega removed as the Gumaka family's leveki mangafaoa on Section 2 and to be appointed to replace him. She also wants to regain possession of the house where Mr Tahega is currently living and has applied for an injunction to remove him.

[13] Ms Gumaka's siblings have written to the Court and filed minutes of a meeting on 26 November 2022, stating that they seek the removal of Mr Tahega and his family from the house on Section 2 and take issue with his conduct as leveki mangafaoa. They are also concerned about the welfare of Ms Gumaka due to her mistreatment by Mr Tahega.

[14] The siblings state that Mr Tahega was originally brought by Opili Talafasi to live in their aunt's house on the neighbouring section. But when the aunt's family returned to Niue, they moved Mr Tahega to the house on Section 2. Ms Gumaka's family were never consulted about this, and Mr Tahega never sought permission from them to live in the house.

[15] The Gumaka siblings state that it was never their family's intention that Mr Tahega occupy the house on Section 2, and they now wish their elder brother, Tagavaimotu Sale Gumaka, to live permanently in the house and make upgrades to it. They also want to allow for the possibility of other members of the family moving back to Niue to stay in the house.

[16] Furthermore, the siblings object to the fact that even though Ms Gumaka lives in Niue, Mr Tahega has never consulted her about making alterations to the house.

[17] Ms Gumaka submits that when she consented to Mr Tahega's appointment as leveki mangafaoa, she was not aware of how difficult it would be to remove him from that position. Her English is not good, and she states that when she signed the document consenting to his appointment as leveki she "had no understanding of what the document said." She was not residing in Niue at the time, so needed someone to look after the house, but did not realise the implications of making Mr Tahega the leveki mangafaoa.

[18] Ms Gumaka submits that whenever she tries to talk to Mr Tahega, he is abusive towards her. She states that she has made many attempts to meet with Mr Tahega and discuss their issues. However, she states that he always turns up to those meetings obviously having already been drinking alcohol and "with a can of beer in his hand". She finds this intimidating, as she fears his aggressive and threatening behaviour when he is under the influence of alcohol, and as a result of these fears, has been unable to engage with Mr Tahega.

[19] Ms Gumaka told the Court about an incident where Mr Tahega threw rocks at her and followed her in his car while she was trying to run away from him. She had to go to the hospital as a result of this incident. This was reported to the police. She states that Mr Tahega has also been abusive towards her dog.

[20] Ms Gumaka says that she now lives in fear of Mr Tahega. She states that “his animosity towards me is continuing and unlikely to change.”

[21] Ms Gumaka claims that Mr Tahega never cleans or maintains the house in which he is residing. He wants her to go there and clean while he is there, but she is too intimidated by him to do so. She gave evidence that the house was “like a forest ... [with] grass growing on top of the roof.”

[22] Ms Gumaka also states that Mr Tahega has requested \$8000 from her for renovations that he has undertaken on the house, which she never approved and disputes she should have to pay. She also argues that since he used government-provided aluminium, the repairs did not cost as much as Mr Tahega is claiming.

[23] Ms Gumaka also complains that Mr Tahega has never paid rent during his residence in the house.

[24] The leveki for the Puasifa family, Opili Talafasi, supports Ms Gumaka’s request for the removal of Mr Tahega, and also supports his removal from the land. This is confirmed in minutes of the family meeting on 28 August 2022.

[25] The Court also received a letter of support for Ms Gumaka on 5 May 2022, from Mokavesi Lipitoa who is the granddaughter by adoption of Puasifa, the common ancestor for the land.

Submissions for the Respondent

[26] Mr Sioneholo appeared for Mr Tahega. He submits that Ms Gumaka has not provided sufficient evidence to satisfy the Court that Mr Tahega is not fit to continue as leveki mangafaoa. In relation to the house on Section 2, Mr Sioneholo also submits there is insufficient evidence before the Court that it is owned by Ms Gumaka’s family.

[27] Counsel argues that Mr Tahega was properly appointed by the Court based on his ability to satisfy the requirements of the appointment as the leveki mangafaoa, and that Mr Tahega has taken care of the property. When he was first appointed as leveki mangafaoa, the house was rundown. He has kept the house clean, completed renovations and installed electricity, making the house habitable. When the roof was damaged by a cyclone, Mr Tahega repaired it. In terms of the money he has requested from the Ms Gumaka, counsel submits that he just wants compensation for the work he had done on the house.

[28] In relation to the allegations of abusive behaviour, Mr Sioneholo sought to portray the issues between Ms Gumaka and Mr Tahega as a family dispute, with the two being closely related. Mr Sioneholo's submission is that the problems have arisen through Ms Gumaka's return to Niue after a long absence and insistence that the house is hers and Mr Tahega should leave.

[29] Mr Sioneholo says Ms Gumaka has not presented any evidence to the Court that the house on Section 2 is owned by her family. While the house was built by Taniela it was occupied by his mother and brother who is still alive, and there is a question about who has paid the government loan for the house. Mr Sioneholo submits that a separate application is required to determine the issue of ownership.

[30] Mr Tahega also has support from other members of the wider Gumaka family who occupy the house on the neighbouring section. Letters of support were provided to the Court by Tasinitogia Halatafua Mahanitotonu, the eldest son of Malama Siuofa and her husband Mahanitotonu. Malama Siuofa was the elder daughter of Kaupoe Gumaka and sister of Ms Gumaka's father Taniela. Her husband Mahanitotonu was a great nephew of Puasifa, the common ancestor.

[31] Mr Mahanitotonu states that the house on Section 2 was built by his uncle, Taniela Gumaka, for Taniela's mother Talomatagi Mokahekafa and younger brother Mataiki who suffers from a disability. He states that after the house was built, there was a disagreement between Taniela and his mother over payments for the house. Taniela moved away to build a house on his wife's land at Vaituku where Ms Gumaka presently lives. Taniela requested that his sister Malama Siuofa and her husband look after the house and his mother and

younger brother. Malama Siuofa and Mahanitotonu, along with Talomatagi Mokahekafa, were the sole contributors who paid to maintain the house.

[32] Mr Mahanitotonu's parents looked after Mataiki and his mother in the house on Section 2. Ms Gumaka and her siblings were born and brought up at Vaituku, and in the 1970s they all left Niue. The Mahanitotonu family continued to care for Mataiki and his mother, and Mataiki remains in their care to this day in New Zealand.

[33] It was Opili Talafasi who moved Mr Tahega and his family on to the land to look after the Gumaka houses with the agreement of Mahanitotonu and his family.

[34] Mr Mahanitotonu states that Taniela always maintained that he wanted Malama Siuofa and Mahanitotonu to remain in charge of the house and lands. Before Mahanitotonu passed away, his last request was for Mr Tahega to stay on as leveki mangafaoa and for no one to remove him from this role.

[35] Mr Mahanitotonu states that Ms Gumaka is ignoring the years that Mr Tahega has lived on the land and looked after the houses. He states that Mr Tahega has maintained and cleaned the homes on the land for many years with no payment. He has also demolished the many rocks around the houses. Ms Gumaka is currently preventing Mr Tahega from renovating the home and properly maintaining the property.

[36] Mr Mahanitotonu points out that it was Ms Gumaka, along with Hilimatahepule Palalagi and Maria Leau who agreed to the appointment of Mr Tahega as leveki mangafaoa on behalf of the wider Gumaka family. He says that Ms Gumaka is now attempting to overrule this decision without any discussion with Hilimatahepule Palalagi and Maria Leau.

[37] Furthermore, he states that this is a decision for the whole Gumaka family, not just Ms Gumaka alone, and she has been avoiding discussion with the Mahanitotonu family, despite their attempts to contact her and discuss the matter together.

The Law

[38] Section 16 of the Land Act 1969 ("the Act") provides for the removal and replacement of a leveki mangafaoa by the Court:

16 Removal and replacement of Leveki Mangafaoa

(1) The Court may remove from office any Leveki Mangafaoa if in its opinion he cannot by reason of mental or physical disability or for any reason carry out his duties satisfactorily or if he is shown to the satisfaction of the Court to have exercised his powers otherwise than in accordance with Niuean custom or in accordance with equity and good conscience or if he tenders his resignation in writing to the Registrar.

(2) Upon the death or removal from office of any Leveki Mangafaoa a new Leveki Mangafaoa may be appointed in the manner provided by section 14 and all the provisions of that section so far as they are applicable shall apply accordingly.

[39] Section 17 articulates the powers and functions of Leveki Mangafaoa:

17 Powers and functions of Leveki Mangafaoa

(1) The Leveki Mangafaoa of any land, subject to this section and to the terms of his appointment and to any order or direction of the Court, shall have power to control the occupation and use of the land under Niuean custom and shall have power to alienate the land in accordance with the subject to Part 3.

(2) In the exercise of his powers under this section the Leveki Mangafaoa shall under Niuean custom consult with the members of the Mangafaoa whether resident in Niue or elsewhere and shall in particular meet the requirements as to consultation laid down by section 17(3) in relation to the sale and lease of land and the giving of security charges over land.

[40] Mangafaoa is defined by s 2 of the Act as:

“Mangafaoa” in relation to any Niuean land means the family or group of persons descended from a common ancestor, including any person who has been legally adopted into the family, who at any given time are recognised as entitled by Niuean custom to any share or interest in the land, and excludes a former member of the family legally adopted into some other family. Where Niuean land is owned by a single person exclusively, that person is the Mangafaoa of the land.

[41] In *Laihone v Tauekipaoa*, the application for removal of the leveki mangafaoa arose from long-standing tensions between the parties.⁶ The applicant argued that the leveki mangafaoa had been hostile to her and had not consulted her about the works on the land. In that case I concluded that the grounds for removal were not met because the works carried out on the land were within the powers of the leveki mangafaoa as set out in s 15(1) of the Land Act. The works were legal and consented, and the lack of consultation should be seen in the context of the acrimonious relationship between the parties. I observed that while consultation was an obligation, the failure of a leveki mangafaoa to specifically consult with an individual member of the mangafaoa was not sufficient to warrant removal of the leveki mangafaoa.

⁶ *Laihone v Tauekipaoa* [2019] NUHC 8; Application 11507, 11515, 11543, 11647 (10 September 2019).

[42] In *Makata v Lavini*, the applicants sought the removal on the grounds that the leveki mangafaoa had not adequately communicated with the wider mangafaoa regarding the leasing of the house and land and had not ensured that the land was being well maintained, respected, and kept clean of rubbish.⁷ I concluded that the effects to the land, namely the leaving of rubbish and the presence of many cars, were not permanent or seriously damaging and could be mitigated by tidying the site. There was no breach of duty sufficiently serious to justify the removal of leveki mangafaoa. In terms of the consultation, I found that lack of communication or agreement with the applicant and his family was an insufficient reason by itself to remove the leveki. She had met some of her obligations in terms of consultation on other issues. However, I reminded the leveki mangafaoa that she should make more effort in the future to ensure sufficient consultation takes place.

[43] In *Jacobsen v Vase*, the Court dismissed an application for the removal of leveki mangafaoa on the basis that the main allegations against the leveki mangafaoa did not relate to the land and there was insufficient evidence to show that the leveki mangafaoa did not care for the land.⁸

[44] In summary, the case law shows that the leveki mangafaoa has wide powers to control the occupation and use of the land under Niuean custom, that the threshold for removal of a leveki mangafaoa is high, and that allegations raised must substantially relate to the land and the leveki mangafaoa's care of the land.

Discussion

[45] The sole issue I have to determine is whether Mr Tahega should be removed as joint leveki of Section 2.

[46] Ms Gumaka has raised a number of issues that she says justifies Mr Tahega's removal as leveki mangafaoa.

[47] In relation to the allegation that her family were never consulted about Mr Tahega's occupation of their house, the evidence shows that over a number of years there has been

⁷ *Makata v Lavini* [2023] NUHC 1; App 2022-00086, App 2022-00087, 2022-00118 (10 February 2023).

⁸ *Jacobsen v Vase* [2012] NUHC (20 March 2012).

engagement and agreement by the wider Gumaka family and the Puasifa family about Mr Tahega's occupation of the Gumaka family land, firstly in Malama Siuofa's house on the neighbouring section and then in the house on Section 2.

[48] This is consistent with the evidence accepted by Isaac J in 2017, that the Mahanitotonu family had the larger part of the decision-making on the land given their longer occupation and care for the land.⁹ There is also evidence that Ms Gumaka's family were living at Vaituku prior to leaving Niue in the 1970s.

[49] Ms Gumaka also claims that she did not properly understand the implications of agreeing to appoint Mr Tahega as leveki. The proper way to deal with those concerns was to apply for a rehearing or appeal the 2017 decision, and she cannot re-litigate that issue in this application.

[50] In relation to the allegations that Mr Tahega has not sought permission from Ms Gumaka for renovations or paid rent, it is unclear whether these allegations relate to the time before Mr Tahega's appointment or subsequently. If before, then by her consent to his appointment as leveki, Ms Gumaka has in effect affirmed his previous actions and it is not open to her to challenge those now. If subsequent to the appointment, then those actions were within his powers as leveki as set out in s 15(1) of the Land Act.

[51] These issues of use and occupation also relate to ownership of the house. While it is accepted that Ms Gumaka's father built the house, the question of ownership raised by Mr Sioneholo is more complex, and I agree there is insufficient evidence before the Court for me to determine that Ms Gumaka's family own the house on Section 2. Absent agreement of the wider Gumaka family, that will require a separate application to the Court.

[52] Ms Gumaka also alleges that Mr Tahega does not properly clean or maintain the house, but there is conflicting evidence from Mr Mahanitotonu who says that Mr Tahega and his family have occupied one or other of the houses on the Gumaka land for some years. He says that during this time, Mr Tahega has maintained and cleaned the homes and land including clearing away rocks around the houses with the consent and agreement of the Mahanitotonu family and Mr Talafasi.

⁹ *Gumaka*, above n 1, at [7] and [13].

[53] I agree with Mr Sioneholo that there is insufficient evidence to show that Mr Tahega is not performing his duties as leveki in relation to his care of the land, and he appears to have consulted with the wider Gumaka family about the work he has done.

[54] The allegations concerning Mr Tahega's conduct towards Ms Gumaka are more difficult. It is never acceptable for family members to act violently towards one another even in the context of a dispute over land. The best course of action is for a victim of violence or harassment to report the incident to the Police for investigation, and prosecution.

[55] To determine this application, I must consider Mr Tahega's actions and conduct since his appointment as leveki in 2017. In relation to the grounds set out in s 16(1) of the Land Act, Ms Gumaka does not allege that Mr Tahega is unable to carry out his duties because of mental or physical disability. I have already concluded that there is insufficient evidence that Mr Tahega is not performing his duties as leveki in relation to his care of the land.

[56] The remaining question is whether there is any other evidence to show that Mr Tahega is not carrying out his duties satisfactorily or exercising his powers other than in accordance with Niuean custom, or in accordance with equity and good conscience.

[57] The case law establishes that allegations raised in support of removal of a leveki magafaoa must substantially relate to the land and the leveki mangafaoa's care of the land. The allegations of abusive conduct by Mr Tahega are concerning but must be looked at in the context of the dispute and are not grounds for removal in the absence of any other breaches of the leveki's powers and duties in relation to the land.

[58] In relation to the injunction application, as leveki Mr Tahega has a legal right to occupy the land and house on Section 2 and there is no trespass. That application will be dismissed.

[59] It is clear from the evidence that Ms Gumaka has support for this application, and there are issues to be resolved in relation to the land and her relationship with Mr Tahega. The best way forward is for the wider Gumaka family to meet to discuss these matters, and if there is agreement, to discuss the basis upon which Mr Tahega might leave the land. This

could include whether fair compensation for works and renovations that he has undertaken with the agreement of the wider family should be paid.

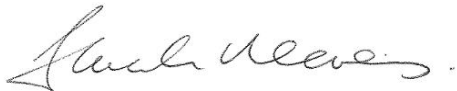
Decision

[60] The applications for removal of Nuitaha Tahega as leveki mangafaoa and appointment of Melealope Gumaka are dismissed.

[61] The application for injunction is also dismissed.

[62] In relation to costs, my view is that they should lie where they fall, but if counsel for Mr Tahega has a different view then he has leave to file submissions within 2 months of this decision.

Dated at Wellington this 18th day of December 2024.

A handwritten signature in black ink, appearing to read 'S F Reeves', with a horizontal line underneath it.

S F Reeves
JUSTICE