

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

APPLICATION NOS. 11204, 11205, 11347

IN THE MATTER of the land known as **PART
LAMEA, ALOFI
DISTRICT**

AND
IN THE MATTER of Partition of Land under s
34 of the Land Act 1969

AND Appointment of Leveki
Magafaoa under s 14 of the
Land Act 1969

BETWEEN SONIA TAFATU and
IKIVALE KIFOTO
Applicants

AND CHARLIE TONGAHAI
Respondent

Hearing: 22 March 2018
15 November 2017
6 April 2017

Decision: 19 March 2019

Appearances: Ms P Togiakona for the applicant
Mr R Toailoa for the respondent

DECISION OF JUSTICE C T COXHEAD

Introduction

[1] This decision arises from longstanding ill-will between the parties involved. The applicants and their uncle, the respondent, have appeared in this court before on matters related to their land. Although once a close and supportive family, they now are unable to jointly manage their land and interests in a peaceful manner reflective of their family ties.

[2] The applicants, Sonia Tafatu and her brother Ikivale Kifoto, seek to partition out an area of the larger land and have themselves appointed as leveki magafaoa for that area. They have brought other applications of the same nature for land blocks on which they are part of the magafaoa.

[3] The respondent, Charlie Tongahai, is the leveki magafaoa of the larger land block and opposes the partition. Mr Tongahai has previously opposed the applicants on land matters as he believes they are acting contrary to the wishes of the magafaoa and without recourse to Niuean custom.

Background

[4] According to the Niuean Land Register, Section 1, Block II, Alofi District, being the land known as Part Lamea comprises some 16.8392 hectares. The longest boundary of the land runs along Tuila-Kaimiti Legal Road. The Register records Tauhogofulu Logolea as the magafaoa or common ancestor and Charlie Fuku Tongahai as leveki magafaoa. Those records were added to the register in May 2014.¹

Procedural History

[5] On 23 April 1987, the register for Section 79, Block III, Alofi District (Part Tapeu) was updated by the Registrar to reflect orders registered on 23 April 1987. The common ancestor was determined to be Tuitoga and Mafina Cooper appointed leveki magafaoa.²

[6] On 16 June 1994, the register for Section 1, Block III, Alofi District (Part Aliluki) was updated by the Registrar to reflect orders registered on 10 June 1994.³ These orders determined Tuitoga to be the common ancestor and appointed Romero Toailoa and Fia Toailoa as leveki magafaoa.

¹ Volume n 21 Folio 82.

² Volume N 9 Folio 18.

³ Volume N 12 Folio 6.

[7] On 24 October 2013, the register for Section 3, Block III, Alofi District (Part Tapeu) was updated by the Registrar to reflect orders of the same date naming Tuitoga as common ancestor and appointing Tagaloa Cooper as leveki magafaoa.⁴

[8] On 1 October 2007, the Court granted a partition order of the land Section 3, Block III, Alofi District (Part Tapeu), Plan 1308.⁵ With the support of Mr Tongahai, Mrs Tafatu partitioned the land and was appointed joint-leveki with Mr Stanley Tafatu. Mrs Tafatu now runs a restaurant on that land.

[9] On 26 May 2014, a group of applications were heard before Isaac J for partition and appointment of leveki magafaoa on Part Lamea. These applications were brought by Mr Tongahai to partition the land into four sections of roughly equal size, three of these blocks would be apportioned to Mr Tongahai's daughters and the fourth would be for Wayne Kifoto, Mrs Tafatu's brother. Mrs Tafatu and her brother objected to the applications in court and the matter was adjourned for further discussion between the magafaoa. Their reason for objecting was that the block they were to receive was not the land on which their parents had worked. The matter was withdrawn in court the following day.⁶

[10] On 28 May 2014, Isaac J heard an application from Mr Tongahai to cancel the 2007 partition of Part Tapeu, evict Mrs Tafatu and her husband from the land and have himself reinstated as leveki magafaoa. In a decision of 16 December 2014, Isaac J found he did not have the power to rescind a partition order and dismissed the applications.

[11] On 27 March 2015, the Court of Appeal heard an appeal by Mr Tongahai of Isaac J's decision. The decision issued on 27 October 2015 affirmed Isaac J's determination that the Court does not have jurisdiction to cancel a partition and dismissed the appeal.

[12] On 22 December 2016, the Chief Justice granted an interim injunction against Mrs Tafatu and Mr Kifoto on application by Mr Tongahai. This injunction prevented them entering or interfering with the land at Part Lamea. Due to lack of response from Mrs

⁴ Volume N 21 Folio 66.

⁵ Volume N 21 Folio 65.

⁶ 19 MB 4, 12 and 79.

Tafatu and Mr Kifoto, the matter was directed to be heard at the next sitting of the High Court in Niue.

[13] On 6 April 2017, the parties appeared before Isaac J on the current applications. Isaac J issued procedural directions and adjourned the matter to the next court sitting.⁷ On 15 November 2017, the parties appeared in court once again before Reeves J. Procedural directions were issued and the matter adjourned to the March sitting of the Court.⁸

[14] The matter was heard before me on 22 March 2018 where I directed that I would reserve my decision.⁹

Case for the applicant

[15] The applicants submit that they seek partition of the particular area of land because it is an area they are familiar with; it is land that they have worked with their parents and therefore land that they know and have a strong connection to. It is submitted that the land represents the applicants' relative interest in the wider block and the respondent has been developing the land in a way that the applicant is unhappy with. Furthermore, the respondent has prevented their access to the land by both legal and physical means.

[16] The applicants concede that they declined an offer of a different area of land from the respondent, however they reason that it was not land they were familiar with and not land to which they felt a connection. The applicants submit that the respondent had originally promised this land to Mr Kifoto before reneging on that promise and attempting to offer him alternative land.

[17] The applicants' father worked on the land they seek up until his death, running a chicken farm and hunting coconut crabs. The applicants submit that this continued despite the respondent's attempts to block him from the land by placing logs across the entryway.

⁷ 20 MB.

⁸ 20 MB 180.

⁹ 20 MB 206.

[18] It is submitted that the applicants followed due process by consulting with the leveki magafaoa and having the land surveyed. This survey was conducted before the trespass order was issued against the applicants. According to the survey plan filed with the Court, the land sought is approximately 5354 m² in size and encompasses the remains of a shed and a grove of coconut trees.

[19] According to the applicants, the respondent has previously given land to people outside of magafaoa, particularly Mrs Marthina Rex Cooper, Mrs Tagaloa Cooper Halo and Mr Romero Toailoa. The applicants submit that the respondent's gifts of land outside the magafaoa have been both unfair and without due process. The applicants do not believe that the respondent should be able to allocate land to strangers while refusing to give land within the magafaoa. Furthermore, they submit that the land allocations were not properly consulted among the magafaoa but made at the leveki magafaoa's own discretion.

[20] Mrs Tafatu deposed that she has very little land available to her from her mother's side and therefore seeks certainty that an area exists for her.

[21] Tauhogofulu's position as common ancestor for this land is not challenged by the applicants, however, they submit that their understanding is that the land had belonged to Sipou. As Sipou was a cousin of Tauhogofulu the blood line remains the same and there is no need to challenge that.

[22] The applicants have made attempts, it is submitted, to reconcile with those members of the magafaoa who are opposed to their application, but they have not been successful. Mrs Tafatu deposed that she is still on good terms with her uncles, aside from the respondent, and she hopes that good relationships will be restored. She notes however that the magafaoa did not invite her to attend her grandmother's 90th birthday celebrations and she was trespassed from the land on which they were held in any event.

Case for the respondent

[23] The respondent submits that although one of the applicants is his sister's daughter she did nothing to assist the respondent when he first attempted to secure the land. Said

securing of the land was the result of a 15-year court battle by the respondent and his mother and also led to Tauhogofulu being declared common ancestor and the respondent being named leveki magafaoa.

[24] According to the respondent's submissions, the common ancestor of the land had only one child, his adopted daughter Tuiolo Tongahai. Tuiolo is the respondent's mother and the applicant's grandmother. The respondent submits as such that the magafaoa is small and was, until recently, very close knit. Given the few generations between the common ancestor and the current parties, the applicants' opposition to Tauhogofulu position as common ancestor begs suspicion.

[25] It is the respondent's submission that the applicants have been absent from family life for many years now – they have not participated in events for the wider magafaoa, including their grandmother's birthday, and have offered neither excuse nor apology. However, the applicants have, according to the respondent, trespassed on land and acted in a threatening manner to the magafaoa.

[26] Factually, the respondent submits that the applicants have never worked on the land they are seeking, never assisted in acquiring the land, did not consult the magafaoa or the leveki magafaoa when they ordered a survey, and have refused to participate in family affairs or associate with the magafaoa. Furthermore, they have challenged the position of the common ancestor and the authority of their grandmother, the most senior member of the magafaoa. The respondent believes the section of land that the applicants wish to partition is too close to his own home and that for them to live in close proximity will only exacerbate an already tense situation.

[27] The magafaoa offered a different parcel of land to the applicants as an alternative to the land they seek to partition. The respondent submits that this was a peace-offering and an attempt to offer the applicants their 'fair share'. The applicants rejected this offer and continued with the current application. Since then, a large portion of the magafaoa have determined they do not support this application and no longer wish to be associated with the applicants. It is submitted that the applicants' grandmother wishes for Mrs Tafatu to be removed from the family.

[28] The respondent submits the appropriate legal test for determining whether partition should be granted is a two-step process. First the Court must consider whether to exercise its discretion to grant the partition by determining whether the partition is inexpedient in the public interest or the interests of the magafaoa or the interests of other people interested in the land. If the Court finds it is not inexpedient it may then go on to consider whether the magafaoa support the partition.

[29] The respondent considers that Niuean custom is the overarching principle which guides all matters before the Land Court. Furthermore, partition of any land in Niue has an impact on customary use of land and custom in relation to land. As such, it is in the public interest to preserve and respect custom in relation to land, particularly as it guides partition. Not to adhere to custom would, the respondent suggests, erode the core of Niuean society. The respondent contends that rights to land accompany participation with the magafaoa, therefore non-participation and disrespect could be considered tantamount to abandoning one's rights in land.

[30] The idea of partition does not fit well with Niuean customary land ownership according to the respondent. Land is communally owned by the magafaoa and partition is an underhand means of attempting to acquire individual ownership rights. The respondent submits that allowing partitions would enable individuals to dissociate from their magafaoa and refuse to offer the support for a properly-functioning Niuean society.

[31] The respondent submits that magafaoa should be empowered to limit the enjoyment of land by certain members who do not support the magafaoa. This would prevent undermining of magafaoa power, which is important in Niue society. He further submits that the conduct of the applicants has been of such a serious nature as to warrant their exclusion from the land.

[32] In accordance with their above submissions, the respondent believes that it would be inexpedient in the public interest and the interests of the magafaoa to grant the partition. According to the test described by the respondent, the Court does not then need to consider the support of the magafaoa, however, the respondent submits on the matter for the sake of completeness.

[33] On reading of s 36(a) of the Land Act 1969, the Court's discretion is limited by the general desire of the persons concerned. The respondent submits that the general desire must be read as meaning the support of a majority of the magafaoa for a partition to be granted. As the majority of the magafaoa in these circumstances are opposed, the Court cannot grant the partition.

Law

[34] The sections relating to partition of land are set out in Part 3 of the Lands Act 1969:

34 Jurisdiction to partition Niuean land

(1) The Court shall have exclusive jurisdiction to partition Niuean land.

(2) The jurisdiction to partition shall be discretionary and the Court may refuse to exercise it in any case in which it is of the opinion that partition would be inexpedient in the public interest or in the interests of the Mangafaoa or other persons interested in the land.

35 Court may apportion rights and obligations

(1) When a partition order is made, the Court may, in that order or in any subsequent order made on the application of any person interested, or of the Registrar, or of its own motion, apportion or adjust as between the several pieces into which the land has been partitioned all rights, obligations, or liabilities arising from any lease, occupation order, or charge to which the land is subject at the date of the partition of it and every such order of apportionment or adjustment shall have effect according to its tenor in the same manner in all respects as if all necessary transfers, releases, covenants, and other dispositions or agreements had been duly made in that behalf by all persons concerned.

(2) In the exercise of its powers under this section the Court shall not make any apportionment or adjustment without the consent of each and every -

(a) Lessee of the land; and

(b) Person having an interest in the land, by virtue of an order made under section 31, where the order has been made upon the terms mentioned in that section; and

(c) Person or body in whose favour a security charge created under section 32, subsists over the land or over any interest in the land.

(3) Subject to subsection (2) the Court may exercise the powers of apportionment or adjustment, conferred upon it by subsection (1).

36 Discretionary powers of Court

In partitioning any land the Court may exercise the following discretionary powers-

(a) It may where the Leveki Mangafaoa wishes to allocate a portion of the land to a member of the Mangafaoa or the Mangafaoa has become unduly large or in cases of irreconcilable family disputes, partition the land among groups of members of the Mangafaoa on what appears to the Court to be the general desire of the persons concerned to be just and equitable;

(b) It shall avoid, as far as practicable, the subdivision of any land into areas which because of their smallness or their configuration or for any other reason, are unsuitable for separate ownership or occupation;

(c) It may appoint new Leveki Mangafaoa in respect of the pieces of land affected by any partition orders.

[35] The matter of partition has been considered by the Court of Appeal before, indeed the case concerned these same parties.¹⁰

[36] In that case, Mr Tongahai alleged that Mrs Tafatu had “offended the mangafaoa and breached Niuean custom, sufficient to warrant their eviction from the mangafaoa land and the cancellation of the partition order”.¹¹ The court considered with some care the implications of a partition in Niuean jurisdiction and with regard to custom. There is a clear difference from a general law partition of land, as individual ownership does not exist in Niue. The Court determined that underlying ownership of land following partition remains with the magafaoa, although that magafaoa may change if it is determined that a new common ancestor should be appointed and a subset of the wider magafaoa is more appropriate.¹² Such circumstances might be where a smaller subset of the magafaoa has undertaken the partition and chosen a more specific common ancestor or where a group has been more closely associated with the land.

[37] A partition under the Land Act is a rationalisation of land holdings, a means of better managing people and property, as opposed to a division of title and ownership rights. Common ownership is preserved:¹³

[53] In our view Niuean law provides that a partition is a subdivision of the physical land and also the legal title but not a partition of the underlying mangafaoa ownership.

[38] The substantive outcome of partition is:¹⁴

¹⁰ *Tongahai v Tafatu - Section 3, Block III, Alofi District (Part Tapeu)* [2015] NUCA 3; App No. 1189 (27 October 2015).

¹¹ At [3].

¹² At [43].

¹³ At [53].

- (a) The land is physically divided into multiple blocks;
- (b) A leveki is appointed for the new block;
- (c) A new title is issued for the new block; and
- (d) The common ancestor is recorded on the new title.

[39] The matter was also heard before Isaac J in the High Court.¹⁵ Although the matter went on appeal, the Court of Appeal declined to comment on Isaac J's finding that under Niuean custom, a person's blood connection to land cannot be broken. His comments remain useful to this proceeding. The Court did not accept that a person can breach custom to such an extent as to warrant a cancellation of their partition order nor can a person be removed from the magafaoa, in fact the blood link to land is unbreakable. Section 36 of the Land Act provides the means for resolving disputes between family members, which is to grant a partition of land.¹⁶

[44] Also s.36 provides that if the magafaoa are in dispute then the allocation of land by partition may be the manner to resolve that dispute. In other words the manner to resolve a dispute is to separate the magafaoa by partition not to strip a magafaoa member of his or her entitlement to land.

[45] In my view to give credibility to the applicants argument would undermine the underlying basis of Niuean title and custom. That is to create some form of stability of title to enable Niuean's to improve and utilise land to which they are entitled by blood.

Discussion

Partitions in the Niue context

[40] Partitions do not sit well with most Polynesian societies. In Niue where the land is communally owned by the Magafaoa, partitioning land offends communal title. However, while partitioning in a western legal sense offends Niue customary land ownership the rationalisation of land is not new within Niuean society. As was noted by the Court of Appeal "the Niuean concept of partition will necessarily vary from that of the general law

¹⁴ At [61].

¹⁵ *Tongahai v Tafatu - Section 3, Block III, Alofi District (Part Tapeu)* [2014] NUHC 7 (16 December 2014).

¹⁶ At [44]-[45].

relating to partitions where the destruction of the unity of possession is the key consequence of the partition”.¹⁷

[41] The Act contemplates that a rationalisation of land maybe necessary, however, any rationalisation that occurs is done in a way where the underlying magafaoa ownership is not disturbed. A partitioning of the land is the physical dividing of the land into two or more blocks. That partitioning does not severe the relationships between members of the magafaoa, even where those relationships have broken down. Those members are still linked by blood to the land and that link cannot be broken.

[42] Partitions in Niue are done upon a magafaoa basis. They are not an opportunity to give individuals specific land areas. Even so, as land interests become more and more fragmented lots will become smaller and smaller until it becomes impractical to partition further. Niue is not in that situation yet given partitions are not that common, but that is a long-term possibility. In any case s 36(b) of the Act instructs the Court to avoid, as far as practicable, partitioning land in to areas unsuitable for ownership or occupation.

[43] I agree with Mr Toailoa that the idea of partition does not fit well with Niuean customary land ownership. However, I do not agree with the submission that a partition is an underhanded means of attempting to acquire individual ownership rights. For a start, it is clear that an individual cannot obtain individual title. While there may be a subdivision of the physical land and also the legal title, the underlying magafaoa ownership remains. For the same reason, I cannot agree that underlying partitions would enable individuals to disassociate from their magafaoa.

The Court's discretion

[44] The Court has exclusive jurisdiction to partition but the legislation makes clear that the jurisdiction to partition is discretionary. The factors influencing the exercise of discretion will differ from case to case. There will be recurring factors common to most cases such as the degree of support or opposition of the magafaoa for the partition or whether the leveki magafaoa supports or opposes the partition. The interest of the

¹⁷ Above n 10 at [40].

magafaoa will be considered when exercising the Court's discretion as to whether to grant a partition.

[45] Further, in partitioning any land the Court may exercise discretionary powers to partition the land among groups of members of the magafaoa on what appears to the Court to be the general desire of the persons concerned to be just and equitable where:

- (a) The leveki magafaoa wishes to allocate a portion of the land to a member of the magafaoa;
- (b) The magafaoa has become unduly large; or
- (c) There are cases of irreconcilable family dispute.

[46] The ideal in this situation would be that the magafaoa are able to arrange the issues themselves in a peaceful and conciliatory way, however, the legislation contemplates that this may not always be possible. The legislation provides that where disputes arise that are irreconcilable, then a partition among groups of members of the magafaoa on a just and equitable basis may be granted. The partition in these cases can be seen to provide some form of resolution by allowing the magafaoa to continue their connection and entitlement to land while also creating some degree of separation. Section 36 must be seen as a means to create resolution and stability of title to enable Niuean's to improve and utilise land to which they are entitled by blood.

[47] The section is not invoked in situations where people are not supported by the magafaoa in their application for a partition except in exceptional cases. There must be a family dispute that is irreconcilable. Even where the Court finds that there is a family dispute that is irreconcilable the Court still has a discretion as to whether or not to grant a partition.

[48] The respondent submits s 36(a) limits the Court's discretion to the general desire of the persons concerned. It is argued that "the general desire" must be read as meaning "the support of a majority" of the magafaoa for a partition to be granted. Therefore, as the

majority the magafaoa in these circumstances are opposed to the partition, the Court cannot grant the partition.

[49] I find I cannot read s 36(a) to be consistent with the respondent's argument, this would create a near impossible situation for those seeking a partition because of a family dispute. It is not sensible to believe that the drafters assumed families in irreconcilable dispute would be supportive of each other's applications for partition of land. That contemplates a family being in dispute but then being in agreement at the same time. With a family agreeing that because of their irreconcilable dispute they agree that they should partition land. It is difficult to see how in a matter of an irreconcilable family dispute there will be general agreement other than parties agreeing that they do not agree. Such an interpretation causes that part of the section to become meaningless.

[50] It appears to me that the consideration of parties' general desire for what is just and equitable ought to be taken into account following the exercise of discretion to grant partition. It requires a holistic view of all those concerned would consider fair with regard to the details of the partition. The applicants will naturally be seeking enough land to live and work on but the amount granted to them should not be configured so as to undermine the operation of the parent block of land. The Court must give consideration to the size of the land to be partitioned out, the location of the boundaries, fair access to road frontage, apportionment of flat land, location of existing homes and the connection parties feel to certain areas of land. It is evidence about these and similar matters which inform the Court's views of the parties' general desire for what is just and equitable.

[51] According to the surveyor's report, the land sought for partition is 5354m² in size and contains a small grove of mature coconut trees and the remains of the shack where the applicants' father would rest while working. It was made clear to the surveyors at the time of surveying that the land sought was the area worked on by the applicants' parents and no more. This land is of a reasonable size as compared to some areas granted to others to occupy but it does appear, from the plans, to prevent access to the road. It is also assumed that this land will be shared by the descendants of the applicants and to make it prohibitively small will create its own issues. The surveyor did not indicate any other features such as homes or crops on the land.

Irreconcilable Family in dispute

[52] It is clear in this situation that the dispute between the family is irreconcilable. There has been ongoing ill-will between the applicants and their uncle resulting in continuing litigation. The respondent has previously litigated to cancel a partition order that was granted to the applicant after he had supported the application for partition when it was granted. It is disappointing to see a once tight-knit magafaoa are now divided.

[53] It is clear to me that this is not a case where there is a little disagreement from which parties will be able to move on. It is more than that. The applicants have made attempts, it is submitted, to reconcile with those members of the magafaoa who are opposed to their application, but they have not been successful. Mrs Tafatu deposed that she is not on good terms with her uncle, the respondent. While she hopes that good relationships will be restored she is doubtful as to whether this will happen. The trespass order and the failure to invite Mrs Tafatu to her grandmother's birthday celebration are particularly telling.

[54] Matters appear to be irreconcilable given the respondent and other members of the magafaoa are at a point where they wish for Mrs Tafatu to be removed from the family. Further, the respondent, through counsel, has submitted that the conduct of the applicants has been of such a serious nature that respondents want the applicants excluded from the land. I take this to mean all land that this magafaoa has connection to. These demonstrate to be that the family dispute is irreconcilable.

Connection to this piece of land

[55] The applicants were offered a different area of land from that which they seek to partition. They declined to accept that area given that they were not familiar with that land and had no connection with it.

[56] In my view, the applicants have established that they do have connection to the section they seek to partition. It is an area that their parents worked and that their magafaoa have worked. They have not chosen this section in a random way but have been quite specific as to the area and reasons why they seek partition of this area. This

indicates that the applicants do not seek this land for selfish reasons or as a rebuke to their magafaoa but because they feel a genuine connection to the land that they wish to nurture. Although some distance may help parties to remedy their current ill-feelings, the applicants appear genuine in their desire for this land and their connection, through their parents, is a strong factor in favour of granting them this particular area.

Decision

[57] As I have stated in this decision this is a sad situation. A partition of the physical land, while not resolving the issues between family is, as contemplated by the legislation, a means to allowing a land title to remain within the magafaoa while allowing magafaoa who are in dispute to live upon separate areas of land. It is a rationalisation of the land.

[58] In this situation, it is appropriate to and in the interest of the magafaoa to grant the partition.

[59] The applicants also seek to be appointed joint leveki magafaoa. It is suitable for the applicants to be able to manage the land outside of the influence of their Uncle, the respondent, given their ongoing disagreement was a driving factor for their application. Therefore, it is practical to appoint the applicants as joint leveki under s 14(3) of the Land Act 1969.

Orders

[60] The Court grants orders as follows:

- (a) Partitioning 5354m² of land under s 34 of the Land Act 1969 in favour of Sonia Tafatu and Ikivale Kifoto in accordance with the survey plan filed with the application, provisional plan 11204.
- (b) The common ancestor shall remain Tauhogofulu.
- (c) Sonia Tafatu and Ikivale Kifoto are appointed joint leveki under s 14 of the Land Act 1969.

Dated at Rotorua, Aotearoa/New Zealand this 19th day of March 2019.

C T Coxhead
JUSTICE