IN THE HIGH COURT OF NIUE
(LAND DIVISION)

App No. 11304

IN THE MATTER OF	An appeal from the 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 Makafotu**
BY	FENOGATAO SUAMILI, VIHI SENITULI, MOKAMUA VALAMAKA, HEGEHEMOTU LOSELI and ANGELA SALT, for and on behalf of the heirs of Meleke and Faatai **Applicant**
AND	PELALOI ROY EKUAKI MALIETOA, **Respondent**

Hearing: 15 November 2017
(Heard on the papers)

Judgment: 17th December 2020

DECISION OF JUSTICE S F REEVES

Introduction

[1] This decision concerns an appeal from a decision of the Commissioners determining title and appointing leveki magafaoa for the land known as Block 1, Part Makafotu, Tamakautoga.[1]

[2] On 28 April 2015, Pelaloi Roy Ekuaki Malietoa and others filed an application to title Part Makafotu and appoint leveki.

[3] Following a hearing on 28 September 2015, the Commissioners granted Mr Malietoa's application and titled Part Makafotu in the name of Malietoa Kuto, and appointed Ettie Asemaga and Tony Edwards as leveki magafaoa.

[4] On 21 October 2015, the Court received an application to appeal the Commissioners' decision from Fenogatao Suamili, Vihi Senituli, Mokamua Valamaka, Hegehemotu Loseli and Angela Salt on behalf of the Valamaka magafaoa.

[5] The appellants say they were not given proper notice of the hearings, and further that the Commissioners made other errors of law and fact in reaching their decision. They seek to have the decision set aside and reheard.

[6] The issue is whether the Court should grant an appeal of the orders by the Commissioners determining title and appointing leveki for Block 1, Part Makafotu.

[7] I regret the delaying in finalising this decision which sets out my final view on this matter.

Background

[8] On 28 April 2015, Mr Malietoa and others filed an application to determine title and appoint leveki for Part Makafotu. They sought to have Malietoa Kuto determined as a common ancestor, and Ms Asemaga and Mr Edwards appointed as leveki magafaoa. Mr Malietoa wishes to build a family home on the land.

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[1] Land Minute Book 20, Folio 66.

[9] On 9 June 2015, the land was surveyed and Provisional Plan (11354) was issued for Block 1, Part Makafotu, Tamakautonga, comprising an area of 3078m^2.

[10] On 12 June 2015, Fenogatao Suamili one of the appellants emailed from New Zealand to the Deputy Registrar objecting to the survey of Part Makafotu and claiming the land on behalf of the Valamaka magafaoa.

[11] On 13 June 2015, the Deputy Registrar replied to Ms Suamili advising her that the application to title Part Makafotu was to be heard by the Commissioners in Niue on 15 June 2015.

[12] On 14 June 2015, Ms Suamili replied to the Deputy Registrar advising that she and her family were not previously aware that the application was proceeding to a court hearing. She requested the hearing be adjourned as the magafaoa resided in New Zealand and would need to travel to Niue to attend.

[13] On 15 June 2015, the application came before the Commissioners. Umuti Makani, leveki for the Valamaka magafaoa appeared and requested an adjournment until they could attend the court hearing. After hearing from those parties present the Commissioners determined Kuto Malietoa as common ancestor and Ettie Asemaga and Tony Edwards as leveki magafaoa. This decision was conditional upon Mr Malietoa meeting with the Valamaka magafaoa and providing the minutes to the Court, and to provide his birth certificate at the next court hearing.[2]

[14] Ms Suamili and Ms Salt flew to Niue and attended a meeting on 18 June 2015 chaired by the Deputy Registrar. Mr Malietoa did not attend. At this meeting, Ms Suamili continued to oppose the application to title Part Makafotu by Mr Malietoa.

[15] Subsequently, on 24 June 2015 a meeting of the extended magafaoa took place in Niue. Minutes were taken by the Deputy Registrar. At this meeting Ms Suamili confirmed the Valamaka magafaoa were opposed to Mr Malietoa's application and offered alternative land to build his house. She requested further time to discuss the matter with her siblings in New Zealand.

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[2] Land Minute Book 20, Folio 60.

[16] On 31 August 2015, the appellants filed an opposition and cross application to title Part Makafotu in the name of Meleke and Fa'atai and to appoint Umuti Makani and Ricky Makani as leveki. The applications were filed with affidavits in support.[3]

[17] The appellants were not given notice of the hearing on 28 September, and neither did the Commissioners receive the appellants' cross application prior to the hearing. The Deputy Registrar sent a notice to Mr Makani on 24 September, but he advised the same day that he was no longer involved and the appellants had instructed a lawyer.

[18] A further hearing of Mr Malietoa's application was held on 28 September 2015, with no one present representing the Valamaka magafaoa. The Commissioners issued an oral decision on the same day confirming the orders granting Mr Malietoa's application for title and leveki.

[19] On 12 October 2015, the Registrar wrote to Mr Toailoa, now acting for the appellants, acknowledging that the Court staff had not brought his clients' opposition and cross-application to the attention of the Commissioners, and had not given his clients notice of the court hearing.

[20] The appellants filed an application to appeal the Commissioners decision on 21 October 2015.

Procedural History

[21] In 2015 Mr Malietoa and others also filed applications for relative interests[4] and injunction[5] in relation to the site of the Matavai Resort, comprising several land blocks known as Part Lauoka. These other applications involved the same extended magafaoa but were separate to the applications to title and appoint leveki for Part Makafotu.

[22] All applications first came before me on 24 November 2015 and were adjourned due to counsel being unwell.[6]

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[3] Application nos 11298 and 11299.
[4] Application no. 11345.
[5] Application no 11344.
[6] Land Minute Book 20, Folio 70.

[23] On 8 March 2016, the applications were called before Judge Isaac. The injunction applications were withdrawn by consent.[7] Directions were given in relation to the relative interests application, and the appeal and relative interests applications were adjourned to November 2016.

[24] On 9 November 2016, the applications came before Judge Coxhead. There was insufficient evidence for the relative interests matter to proceed, and at the appellants' request, the applications were further adjourned to November 2017.

[25] On 15 November 2017, the applications came back before me. The parties agreed that I would initially hear the application for relative interests in Part Makafotu. The appeal concerning Part Lauoka was adjourned to be dealt with subsequently. I issued a decision in relation to the relative interests application on 17 April 2020.[8]

[26] On 21 May 2020, I directed parties to file any further submissions in respect to the appeal.

[27] In the respondent's submissions received on 17 August 2020, it was submitted that there was a subsequent appeal to the High Court which quashed the decision of the Commissioners' made on 28 September 2015 and sent the matter back to the Court for a rehearing on the basis that the appellant had not been offered procedural fairness. Counsel further submitted that the appellants, in exercising their right to natural justice to be heard, did not bring any fresh material that suggested that the land in question was unsuitable for the purpose proposed by the respondent, nor did they bring evidence of any alternative suggestions that could be identified.

[28] To my knowledge there has been no High Court appeal quashing the decision of the Commissioners made on 28 September 2015. The appellants are yet to be given the opportunity to present evidence and make their arguments on the substantive matter and whether they will have that opportunity is dependent on whether this appeal application is successful and whether this matter will be reheard.

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[7] Land Minute Book 20, Folio 89.
[8] *Asemaga v Suamili* [2020] NUHC 1; Land Division 11345; (17 April 2020).

[29] I have proceeded to determine the appeal on the papers.

Case for the Appellants

[30] The appellants are directly descended from the tupuna Futifia Foufili Kapagahemata through her son Malietoa Kuto, and his daughter Fa'atai, the elder sister of Ekuaki Malietoa.[9]

[31] Counsel argued that the Commissioners erred in law, for the following reasons:

(a) Commencing hearing on 15 June 2015 without proper notice to the appellants.

(b) Determining title and appointing leveki on 28 September 2015 without all the evidence placed before them as the appellants were not present.

(c) Failing to enquire into whether notice of the hearing was provided to the appellants.

(d) By denying natural justice to the appellants.

[32] Counsel argued that the Commissioners had also erred in fact, for the following reasons:

(e) Failing to ascertain the minutes of the family meeting and checking whether their directions issued on 15 June 2015 were followed with a meeting taking place between the relevant members of the magafaoa.

(f) Determining the common ancestor as Malietoa Kuto.

(g) Appointing Ettie Salamasina Siono Asemaga and Tony Edwards Kose as joint leveki magafaoa without the consent of the appellants.

[9] Above n 8 at [29].

Case for the Respondent

[33] Mr Malietoa is a direct descendant of the tupuna Futifa Foufili Kapagahemata through her son Malietoa Kuto, and his son Ekuaki Malietoa.[10] The original application to determine title and appoint leveki was brought on behalf of Ms Asemaga, Mr Malietoa, Mr Edwards and Mr Palamoa. For clarity, it is noted that the respondent to the application of appeal is solely Mr Malietoa.

[34] Counsel for the respondent submitted that the Commissioners' decision is fair and just based on the directions to the parties at the hearing on 15 June 2015. The minutes from the meeting held on 24 June 2015 between the magafaoa were made available to the Commissioners at the hearing on 28 September 2015 as was Mr Malietoa's birth certificate.

[35] Counsel stated that as Block 1, Part Makafotu, Tamakautoga is unregistered land, that the common ancestor proposed and accepted by the Commissioners is Malietoa Kuto.

[36] Counsel submitted that the grandparents of the appellants and the respondent are biological brother and sister and therefore their parents have equal birth rights to the land of their tupuna. The respondent recognised that it is an inalienable right of inheritance recognised by Niue custom.

[37] Counsel highlighted that Palamoa Neki, the brother of Mr Valamaka by adoption, supported Mr Malietoa's wish to build a family home on Part Makafotu. His evidence is that the late Mr Valamaka, father of the appellants, agreed with Mr Neki and it is only now being disputed by his daughters after his death. The respondent highlighted that Takave Tinoluka confirmed the discussion between Mr Valamaka and Mr Neki regarding the land being set aside for Mr Mailetoa to build a family home on.

[38] Counsel argued that the appellants were aware of the Commissioners hearing in June 2015 and that it was to reconvene at the next court sitting and as such, counsel submitted that the appellants should have planned their arrival in Niue in advance.

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[10] *Asemaga v Suamili* [2020] NUHC 1; Land Division 11345 (17 April 2020) at [13]-[14].

[39] Counsel submitted that the role and responsibilities of the leveki is clearly set out under ss 14, 15, and 16 of the Niue Land Act 1969. Mr Makani was informed of the Commissioners hearing, and it was submitted that it was his duty and responsibility to inform the appellants, however he declined to have any further involvement with this matter.

Law

[40] Section 47D of the Niue Amendment Act (No. 2) 1968 (NAA) is the relevant provision which considers appeals from the decisions of Commissioners:

> **47D Appeals from decisions of Commissioners**
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> (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.
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> (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.

[41] Section 47D (2) provides that appeals are to be conducted by way of rehearing and further, that s 45 NAA in relation to rehearings and r 39 of the Niue Land Court Rules 1969 (LCR), are to apply to such appeals:

> **45 Rehearings**
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> (1) On the application of any person interested, the Land Court may, if it thinks fit, grant a rehearing of any matter either wholly or as to any part thereof.
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> (2) On any such rehearing the Court may either affirm, vary, or annul its former determination, and may exercise any jurisdiction which it might have exercised on the original hearing.
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> (3) When a rehearing has been so granted, the period allowed for an appeal to the Land Appellate Court shall not commence to run until the rehearing has been disposed of by a final order of the Court.
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> (4) Any such rehearing may be granted on such terms as to costs and otherwise as the Court thinks fit, and the granting or refusal thereof shall be in the absolute discretion of the Court.
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> (5) No order shall be so varied or annulled at any time after the signing and sealing thereof.

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.

(5) Before hearing an appeal, a Judge may impose such conditions on the appellant as the Judge thinks fit as to security for costs or otherwise.

(6) If the appellant fails to prosecute the appeal with due diligence, or fails to observe or perform any of the conditions imposed on him under paragraph (5), the Judge may dismiss the appeal.

(7) (a) The appellant may, at any time before the hearing of the appeal, discontinue his appeal, either wholly or in part, by filing in the Court a notice of discontinuance.
(b) If an appeal is wholly discontinued, the order or decision may be immediately carried into effect and the appeal shall be deemed to have been dismissed under paragraph (6) and the Court shall give directions as to the disposal of any sum deposited as security for costs.

(8) A Commissioner may at any stage of any proceedings before him adjourn the proceedings for hearing and determination by a Judge.

(9) No appeal from an order or decision of a Commissioner shall, save with the leave of the Court or the Court of Appeal, be brought in the Court of Appeal.

[42] The inclusion in s 47D (2) NAA of the powers in relation to rehearings strongly points to an intention that the Court has a wide discretion in dealing with appeals from decisions of the Commissioners. This is in contract to the powers on appeal of the Court of Appeal as set out in Part 6 NAA. This includes, in my view, discretion to direct that a successful appeal be reheard by the Commissioners as opposed to being referred to a Judge. Relevant factors will be whether the error of fact or law has resulted in a miscarriage of justice and whether it is in the interests of justice that the application be reheard by the Commissioners.

[43] The Court of Appeal in *Koligi v Iakopo* set out the circumstances in which the Court has discretion to grant a rehearing:[11]

> (a) Where further material of a credible nature has been discovered which was not available at the original hearing;
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> (b) Where there has been a breach of process or procedure which may have disadvantaged one of the parties to the extent that there has been a miscarriage of justice; and
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> (c) Where judicial error is involved, a party is entitled to a retrial if the result of the error is a fundamental miscarriage of justice.

[44] This Court has not directly considered the issue of natural justice being breached by the courts failure to notify an affected party of a hearing. The Māori Appellate Court has considered this issue in *White v Potroz – Mohakatino Parininihi No 1C West 3A3*, concluding that it is a fundamental tenet of natural justice that an affected party should be given notice of proceedings that might affect his or her rights or interests.[12] The Court referred to the discussion in *Tioro v McCallum – Ngapiki Waaka Hakaraia*:[13]

> [23] In *Ngati Apa ki Te Waipounamu Trust v Attorney-General* Keith J, delivering the decision of the Court of Appeal, observed in relation to the Māori Appellate Court:
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> > We begin with the proposition the parties, those appearing before the [Māori Appellate Court], and those affected by the proceeding were entitled to a fair hearing. That entitlement includes the right to have adequate notice of the proceeding and a reasonable opportunity to present their own cases through evidence and submissions and to challenge the cases put up against them.
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> [25] It has similarly been held that the Māori Land Court is obliged to give notice of an application to affected parties, and that an order made without proper notice is beyond the jurisdiction of the Court. In *Jennings v Scott* Savage J of the High Court ruled:
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> > I am satisfied that the orders were made without jurisdiction and am prepared to found this conclusion on the one ground that the Māori Land Court was under a duty to give the owners of the lands involved a reasonable opportunity to be heard on whether or not the amalgamation order should be made and that in breach of that duty, and thus contrary to the rules of natural justice, it failed to provide the plaintiffs, or at least some of them, with that opportunity.

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[11] *Koligi v Iakopo* [2017] NUHC 1; Land Division 11213 (12 October 2017) at [26].
[12] [2016] Māori Appellate Court MB 143 (2016 APPEAL 143).
[13] Above n 12 at [52].

Discussion

[45] The principles of natural justice apply to the Land Court and hearings before the Commissioners as much as to any other Court. In this context the right to a fair hearing includes adequate notice of the proceeding to affected parties and a reasonable opportunity for affected parties to present their case and to challenge the case against them.

[46] Applying these principles to the application to the present situation, I conclude firstly that the appellants did not receive adequate notice of the hearing before the Commissioners on 15 June 2015. Secondly, once the Commissioners were aware the appellants were affected parties, the hearing should have been adjourned to give the appellants a proper opportunity to present their case in opposition.[14]

[47] As it was, the Commissioners proceeded with the hearing and indicated that title orders would be made, conditional on minutes of a meeting of the parties and Mr Malietoa's birth certificate being filed. While Umuti Makani appeared at initial the hearing, he made it clear to the court that they should hear from the Valamaka magafaoa directly in relation to their opposition.

[48] Neither were the appellants given any notice of the re-convened hearing on 28 September 2015. By this time their counsel had filed a notice of opposition and cross-application to title Part Makafotu on 31 August 2015 and they were entitled to appear and be heard pursuant to r 23 LCR. To exacerbate matters this was not brought to the attention of the Commissioners prior to the hearing, and when the Commissioners asked at the hearing who was representing the Valamaka magafaoa, the Deputy Registrar did not disclose the filing or that they were now represented by a lawyer. Her response gave the false impression that they were unrepresented. This was subsequently acknowledged by the Registrar.

[49] The principles of natural justice and provisions of the Land Court Rules require that the appellants were entitled to notice and to participate in the hearings, in particular the second hearing once they had filed their opposition and cross-application. The Registry should have notified the appellants of the hearings and brought their interest to the attention

[14] Rule 21 Niue Land Court Rules 1969.

of the Commissioners. Failure to provide notice was an error of law and breach of natural justice. As the court in *Tioro v McCallum – Ngapiki Waaka Hakaraia* observed "an order made without proper notice is beyond the jurisdiction of the Court."[15] It would be a miscarriage of justice not to grant a rehearing of the application in these circumstances.

[50] The respondent made further submissions which were received on 17 August 2020. These largely focused on the substantive matter, namely why the respondent should be successful in his application to determine title and appoint leveki for Part Makafotu. However, the key issue in this appeal is the Court's error in failing to give notice and whether this should be rectified by granting the appeal and directing that the application and cross-application be reheard by the Commissioners.

[51] The appellants submit that there was a failure of procedural fairness when the Commissioners determined title and appointed leveki for Part Makafotu on 28 September 2015. They say that the matter should be referred back for a rehearing, so the substantive issue can be reconsidered by the Commissioners with all relevant evidence from both parties before them. They say the further submissions by the respondent are relevant and should be considered by the Commissioners, if this matter is set to be reheard. The appellants will then be awarded the same opportunity to make further submissions on the substantive matter, in keeping with natural justice principles.

[52] In summary, the failure by the Court to provide proper notice to the appellants is an error of law and a breach of natural justice. In my view, the circumstances concerning lack of notice and opportunity to be heard amount to a miscarriage of justice, and it is in the interests of justice that the application be sent back to the Commissioners to be reheard together with the appellants' cross-application.

Decision

[53] The appeal is granted, and there is an order that the application be sent back to the Commissioners to be reheard together with the appellants' cross-application.

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[15] Above n 12 at [25].

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

Dated at Wellington this 17th day of December 2020.

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S F Reeves
JUDGE