

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

**App No. 10911 and 10912**

<b>UNDER</b>	Section 14, Niue Land Act 1969
<b>IN THE MATTER OF</b>	Part Fonuakula, Sections 2 and 3, Section 103, Block III, Alofi
<b>BETWEEN</b>	<b>PULEIKI FILIMONA TASMANIA Applicant</b>
<b>AND</b>	<b>ALAITA POSINI VAKAHEKETAHA First Respondent</b>
<b>AND</b>	<b>PILENA MOTUFOOU or PILENA BESTGEN Second Respondent</b>

Hearing: 20 March 2018

Appearances: H Lawry for the applicant

Judgment: 8 July 2020

---

**DECISION OF JUSTICE W W ISAAC**

---

**Introduction**

[1] The case before the Court concerns an application dated 30 September 2013 by Puleiki Filimona Tasmania to change the leveki magafaoa of the land known as sections 2 and 3, section 103, Part Fonuakula, Alofi.

[2] Although the application only concerns the appointment of leveki, during the proceedings the applicant also made submissions relating to other orders, including for rehearing and partition. These matters can only be dealt with by proper application to the Court, and this judgment will only consider the application to change leveki.

## Background

[3] Part Fonuakula is located in Alofi. It has two main frontages, one adjoining the Alofi and Tamakautoga Road, and the other adjoining Kaimiti Road.

[4] There were three persons who appear to have originally worked on the land, Paheuhila, Petelu and Toke.<sup>1</sup>

[5] In 1980, a descendant of Paheuhila applied to the Court to have their families area of land determined. A meeting was convened and agreement was reached between the families.<sup>2</sup> For section 100, the title of the land was to be issued to the heirs of Paheuhila, and for section 103, the title of the land was to be issued to the heirs of Toke and Petelu.

[6] Section 103 is the land at issue in this judgment and the subsequent background will focus on the history of this block alone.

[7] On 23 November 1981, Donne J determined the title of the land for section 103. It was ordered that Toke and Petelu were the common ancestors of the land, and Filimona Tasmania, the applicant, and Patricia Tagaloa Rex were appointed joint leveki. The latter's interest was confined to the triangle outside of Filimona's passionfruit area, as shown on the Provisional Plan.<sup>3</sup>

[8] On 29 March 1994, Alaita Vakaheketaha, the first respondent, filed an application to partition section 103 of Part Fonuakula as a descendant of Petelu.<sup>4</sup> A site visit was held on 7 July 1994 and no objections were noted. The partition was completed, creating section 2, and Ms Vakaheketaha was appointed leveki magafaoa on 27 May 1996. The Land Registrar for section 2 shows Ms Vakaheketaha as leveki and Toke and Petelu as the common ancestors.<sup>5</sup>

[9] In January 2004, Patricia Rex passed away.

---

<sup>1</sup> Land Minute Book 4, Folio 317-318.

<sup>2</sup> Land Minute Book 4, Folio 297-298.

<sup>3</sup> Land Minute Book 7, Folio 35. Order no. 1281.

<sup>4</sup> Application no. 5984.

<sup>5</sup> Volume 13, Folio 95.

[10] On 3 May 2004, there was a further application to partition by Selevaina Malcolm which was approved, creating section 3.<sup>6</sup> On 29 October 2004, Smith CJ appointed the second respondent, Pilena Bestgen as leveki of section 3, and no objections were noted as having been received.<sup>7</sup> A subsequent record in the Land Register dated 7 July 2006 shows Ms Bestgen as leveki for the land with Toke and Petelu as the common ancestors.<sup>8</sup>

[11] On 8 April 2006, Hingston CJ appointed Ethel Waiwera Maile Rex as leveki for section 103.<sup>9</sup> This appears to have been to replace the late Patricia Rex, as the subsequent Land Register dated 16 July 2008 names Filimona Tasmania and Ethel Rex as leveki for section 1, block III.<sup>10</sup>

### **Procedural history**

[12] This application has been before the Court since 2013, and resultingly has a long procedural history.

[13] Initially, it appears there was an application by Robert Rex Junior to build on section 103. A meeting of magafaoa was held in 2010, where it was discovered that the land had been previously partitioned in 1996 by the first respondent and 2004 by the second respondent without the applicant's knowledge. This prompted the applicant to investigate what had happened and file to correct the ownership.

[14] There also appears to have been related matters before the Court of Appeal in 2010 and 2012.

[15] The application for change of leveki currently before this Court was filed on 30 September 2013.

[16] Justice Coxhead, as he then was, first heard the matter on 4 November 2013.<sup>11</sup> He said the application for change of leveki was, as he understood it, for section 2, but

---

<sup>6</sup> Application no. 8995/1516.

<sup>7</sup> Land Minute Book 13, Folio 35.

<sup>8</sup> Land Minute Book 13, Folio 96.

<sup>9</sup> Land Minute Book 13, Folio 135.

<sup>10</sup> Land Minute Book 20, Folio 47.

<sup>11</sup> Land Minute Book 18, Folio 169.

queried whether there was an application for section 3 and if a rehearing might be more in line with what was sought.

[17] When the matter was reconvened three days later, on 6 November 2013, the Court discussed the time constraints on rehearing applications, noting it is way out of time unless new information has come to light.<sup>12</sup>

[18] The matter was next called before me for hearing on 28 May 2014, but was adjourned at the request of Mr Lawry, counsel for the applicant, until the following year.<sup>13</sup>

[19] A further adjournment was requested by Mr Lawry on 13 March 2015, which I granted on 18 March 2015.<sup>14</sup> The second respondent had also written to the Court on 28 January 2015 advising she was unavailable.

[20] Mr Tasmania passed away on 25 May 2015, and the magafaoa have requested that Misiata Tasmania and Sonya Talagi be appointed as joint leveki in place of the applicant.

[21] The next hearing was held before Reeves J on 25 November 2015.<sup>15</sup> Mr Lawry said that while it had initially been an application for removal of leveki, it had since been raised as a rehearing application. This was questioned by the Judge, as she only had the change of leveki application on file. Mr Lawry said he was under the impression following the hearing with Coxhead J in 2013 that the issue could be resolved by removal of leveki or a rehearing, but Reeves J said as no order had been made amending the proceedings, she could only proceed with the application for change of leveki. Following discussion between counsel, the matter was again adjourned with directions as to filing further evidence and submissions.

[22] The next hearing was set down for 8 November 2016 before Coxhead J, however Sonya Talagi, representing the Tasmania family, sought and was granted an adjournment for the matter to be heard in the November sitting of the Court the following year.<sup>16</sup> The second respondent was in agreement.

---

<sup>12</sup> Land Minute Book 18, Folio 296-297.

<sup>13</sup> Land Minute Book 19, Folio 35.

<sup>14</sup> Land Minute Book 20, Folio 21.

<sup>15</sup> Land Minute Book 20, Folio 74.

<sup>16</sup> Land Minute Book 20, Folio 122.

[23] The second respondent requested an adjournment prior to the November 2017 hearing, but this was declined. She attempted to appeal this decision, but Reeves J advised in a memorandum dated 7 November 2017 that there is no such right of appeal. Mr Lawry wrote to the Court on 2 November 2017 expressing his concern at the number of adjournments, but also requested adequate notice is provided if matters are to be adjourned as he needs to travel to Niue for hearing.

[24] A further adjournment was granted by Reeves J at the 15 November 2017 hearing, due to counsel illness.<sup>17</sup>

[25] A hearing was held before me on 20 March 2018.<sup>18</sup> Mr Lawry advised that following the passing of the applicant, the descendants of Toke had agreed Sonya Talagi and Misiata Tasmania should be appointed joint leveki in place of Mr Tasmania. The nature of the application, and the issue of rehearing, were not discussed. I directed parties to file final submissions.

[26] Counsel for the applicant filed final submissions on 10 April 2018, but no final submissions have been received by the respondents.

### **Applicant's submissions**

[27] The applicant's main objection is that as leveki magafaoa of section 103 his consent should have been sought for the 1996 and 2004 partitions and leveki appointments. Failure to do so was in breach of s 15(2) of the Niue Land Act 1969. He also submitted s 36(c) of the Land Act 1969 which provides for the appointment of leveki over a new partition had been misused as under s 36(a) it is the leveki that has powers of partition.

[28] The applicant claimed he had no knowledge of these applications and they were made without proper notice. Because of a lack of due process and breach of natural justice, these applications should be held to be invalid. The applicant submitted the Court has inherent jurisdiction to prevent an abuse of process, citing *Connelly v DPP* [1949] 2

---

<sup>17</sup> Land Minute Book 20, Folio 181.

<sup>18</sup> Land Minute Book 20, Folio 201.

All ER 401 and the lack of notice, process and breach of natural justice brings the court into disrepute such that it should intervene.

[29] The applicant submitted the first respondent has not resided in Niue for years, which is in breach of s 14(5) of the Niue Land Act 1969 and further warrants her removal.

[30] While the applicant said he was aware of the site visit prior to the first respondent's application, he submitted he was told it related to section 100, and as he is leveki only for section 103, he thought he had no interest in the application. Adding to the confusion was that the report apparently stated the name of the land was Kaimiti, further leading the applicant to believe it did not require his presence.

[31] The applicant submitted these applications have had the effect of removing him as leveki of the land in favour of the respondents and he wishes to be reinstated.

### **Respondents' submissions**

[32] The respondents have not filed formal submissions in this matter, nor appeared to have been involved in the previous hearings. While they appeared to have engaged counsel at one point, Mr Lawry noted at the 2018 hearing that this counsel was no longer acting, and he had not been able to find out if anyone else had been engaged.

[33] In a file note by the Deputy Registrar dated 26 February 2015, the first respondent was noted as having been surprised the applicant did not know the land was surveyed and partitioned in 1994 and believed she had a right to the land through her adopted father, Posini Aelani.

[34] The second respondent was noted as stating her interest in the land comes from her mother, Potuhemoka, who was legally adopted in 1922. The land in her name was claimed by her sister, Selevaina Malcolm, following Cyclone Heta.

[35] The second respondent has filed one response throughout the course of these proceedings, on 24 November 2015, in which she said she was appointed leveki to replace Patricia Rex as representative for Petelu and should not be removed as nothing in s 16 of the Land Act applies.

[36] The Court has also received a letter from the second respondent's sister, prior to the November 2016 hearing, in which she explained the land had been owned by her mother and given to them by her uncle, Posini, to work on. She asked that the Court sign the land over to them as they wish to build on it.

## **Law**

[37] Sections 14-16 of the Land Act 1969 set out the provisions relating to the appointment, powers and removal of leveki:

### **14 Appointment of leveki mangafaoa**

- (1) When the ownership of any land has been determined any member of that mangafaoa who was reached the age of 21 years may apply in writing to the Court for an order appointing a leveki mangafaoa of that land.
- (2) If the application is signed by members who in the Court's opinion constitute a majority of the members of the mangafaoa whether resident in Niue or elsewhere the Court shall issue an order appointing the person named in the application as the leveki mangafaoa of that land.
- (3) If no such application is received within a reasonable time, or applications are each signed by members who, though having attained the age of 21 years, constitute less than a majority of the mangafaoa who have attained such age the Court may appoint a suitable person to be leveki mangafaoa of that land.
- (4) The appointment of a leveki mangafaoa shall not be questioned on the grounds that any member of the mangafaoa was absent from Niue, but the Court may consider any representation made in writing by any member so absent.
- (5) Any person who is domiciled in Niue, and whom the Court is satisfied is reasonably familiar with the genealogy of the family and the history and locations of mangafaoa land, may be appointed as a leveki mangafaoa of any land, but if he is not a member of the mangafaoa he shall not by virtue of such appointment acquire any beneficial rights in the land.
- (6) In appointing any leveki mangafaoa the Court may expressly limit his powers in such manner as it sees fit.

### **15 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.

### **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.

## **Discussion**

[38] The application before me is for change of leveki. Specifically, for the first and second respondent to be removed as leveki, and Sonya Talagi and Misiata Tasmania to be appointed in their place for section 103 of the land.

[39] Under s 16 of the Land Act 1969, leveki can be removed by the Court if they are unable to carry out their duties satisfactorily, or they have exercised their powers otherwise than in accordance with Niuean custom, equity and good conscience. Resignation and death are also reasons for removal.

[40] The applicant's case has centred around the appointment of these leveki and not their ongoing role as leveki. No submissions or evidence has been provided to support an application for removal.

[41] For these reasons, I decline to remove the existing leveki as none of the grounds in s 16 have been established.

[42] I also decline to make an order appointing Sonya Talagi and Misiata Tasmania as leveki for the remainder of section 103. I need to be satisfied that these two individuals meet the requirements under s 14 of the Land Act 1969 for appointment. There is no evidence or submissions that these requirements have been met.

[43] Given the length of time this case has been before the Court and the issues raised during the proceedings, it is my view that fresh applications will need to be made, not only to clarify the issues, but also to address all the issues affecting these lands.



## **Decision**

[44] The application to change leveki by Puleiki Filimona Tasmania is dismissed.

[45] There will be no order as to costs.

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

Dated at Wellington this 8<sup>th</sup> day of July 2020.

---

**W W ISAAC**  
**JUSTICE**