IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA
(LAND DIVISION)

MATTER NO.7/93

IN THE MATTER of an Application to the High Court for an Order Granting Leave to Appeal pursuant to Section 60 of the Cook Islands Constitution Act 1964 as amended by Constitution Amendment (No.9) Act 1980-81 and Section 54 of the Judicature Act 1980-81

AND of a Judgment of the High Court given by Dillon J on the 23rd June 1993 upon an Application for Revocation and Substitution of Succession Orders to the High Court by Mii Matapo (the judgment)

BETWEEN MARU NGANU AND OTHERS

Appellant

AND MIIMETUA MATAPO

Respondent

Coram: Sir Ian Barker (Presiding)
Hillyer J A
Henry J A

Hearing: 1 July 1994

Counsel: Mr R. Holmes for Appellant
Mrs T. Browne for Respondent

Date of Judgment: 1 July 1994

(ORAL) JUDGMENT OF THE COURT DELIVERED BY BARKER J.A.

This is an appeal against a decision of Dillon J given in the High Court of the Cook Islands (Land Division) on 23 June 1993.

The Respondent, Miimetua Matapo, made an application dated 24 November 1992 under section 450 of the Cook Islands Act 1915 ('The Act') seeking revocation of eight succession orders made between 1939 and 1979 as listed in that application. In summary, what was sought was to include amongst the descendants of Teariki Kaivananga the descendants of Vaine Noopoto of whom the Respondent's mother, Uaputa was one. The effect of the order sought would be roughly to double the number of persons with an interest in the lands mentioned in the application.

The application was supported by an affidavit from the Respondent which annexed a geneology, the minutes of a family meeting dated 11 September 1992 and the Death Certificate of Uaputa. The applicant stated, (with some justification) her belief that there would be no objection to the application but, if there were to be any, this could only be due to a misunderstanding or a lack of knowledge of the situation on her part as to procedure. The application provoked a notice disputing the claim filed by the appellant, purporting to lodge an objection on behalf of himself and other unspecified persons.

The appellant stated in his objection that he was very suspicious of the applicant's geneology and wondered why things had been left very late after four previous meetings at which there had been objections and after the metuas had died. He referred to a geneology accepted by the Court in 1949 as correctly setting out the situation that only the descendants of Teariki Kaivananga's marriage were entitled to succeed to this land.

The appellant had received a notice of objection from Turimotu, one of the issue from the marriage of Teariki Kaivananga: she was born on 25 January 1935. Her father died when she was only three years old and her mother when she was 18. She was living in Australia at the time of the hearing in the Court below: she had not attended the hearing but she knew of it. At the hearing before Dillon J, on 26 June 1993, the appellant was not represented. He had previously had legal representation. He neither sought an adjournment nor the opportunity to bring further evidence before the Court: he did mention to the Judge that he disputed the claim of the applicant but that he had given his agreement to the family meeting to which I shall refer.

The evidence given by the respondent was along the lines of her affidavit. She spoke of the family meeting, she acknowledged there was no written record that Teariki Kaivananga had lived with Vaine Noopoto: she acknowledged, as did her counsel, that her mother Uaputa's birth certificate showed no person registered as her father: it was undisputed that Teariki Kaivananga and Vaine Noopoto were not married. There were references to a number of hearsay statements by various persons over the years and to the fact that a son of Tupi, a member of the legitimate family of Teariki Kaivananga used to live with the Respondent's mother in Wellington. None of these statements taken on their own was particularly convincing.

There was evidence from a Minute Book taken at a Land Court hearing concerning land at Mauke on 4 June 1952: there, the Respondent's grandmother was named as one of her family in

respect of land on that island. The record shows at page 1/425 "Poto (i.e. Noopoto) = Teariki Kaivananga issue in Rarotonga and Raiatea". It is correct, as Counsel for the Appellant pointed out, that it is not clear what evidence was available to the geneologist giving evidence in the Mauke case some 41 years ago; but it does seem clear that there was a clear notion at the time that Vaine Noopoto and Teariki Kaivananga did have a relationship which produced children. Mention of issue in Raiatea and Rarotonga is somewhat ambiguous: it could mean that at 1952 the issue were thought to have been living in both places. It does not necessarily mean to say that Teariki Kaivananga even went to Raiatea.

After the Respondent gave evidence-in-chief, she was cross examined by the Appellant who then made submissions to the Court and gave evidence himself. In his cross-examination, he agreed that it was normal that if there are illegitimate issue, they should meet with the legal issue and that this had happened. He signed the minutes of the meeting; after searching the register, he found that Teariki Kaivananga was never registered as Uaputa's father.

Mr John Tangi gave evidence for the respondent. He is a landowner who claimed that he is head of the extended family: he was aware of the matter and made his own investigations. Really his evidence does not take the matter one way or the other.

Dillon J gave his judgment at the conclusion of the evidence: he considered this a simple application. One must bear in mind that he is a Judge with very great experience in Cook Islands land

matters: he saw this was a straightforward case: he did not have to decide (as he had in a number of cases) whether children have to or are allowed or permitted to go into a family group or whether they are feeding children. He said that the simple issue was that Teariki Kaivananga had 19 children: there was no question in the Judge's mind as this had been agreed to by the family: accordingly, he made the succession order.

The appellant relied on a minute book, not the Mauke one, which showed that Teariki Kaivananga married Tamari but does not make any reference to a first family by Uaputa. He recorded that Counsel for the respondent accepted that the birth certificate did not show paternity. I think there is sense in what Mrs Browne submitted that, where there is a birth certificate showing paternity, it is not necessary to hold a family meeting. The death certificate of Uaputa is not a matter of great weight because the Registrar of Births and Deaths in Porirua, New Zealand would only have information that he had been told by a child of Uaputa and, as such, obviously be interested in having Uaputa recorded, as a child of Teariki Kaivananga on the certificate.

There was evidence of an occupation right granted by the children of Teariki Kaivananga's legal wife in favour of a child of the first wife and that the appellant approved of that right.

The Judge held that the most significant matter in support of the respondent was the meeting held on 11 September. An agreement was there reached that the children of the first family be included with the children of the second family. The meeting was held on

11 September 1992 at the residence of Mrs Tu Nekeare. The recorded minutes seem to have been carefully kept: the meeting seems to have been a good-natured one. There is no record of any dispute at the meeting. The agenda was stated as to seek a general consent from the family for the children of Uaputa and Teariki Kaivananga tosucceed to their biological father.

A geneology was presented to the meeting showing the two families. After greetings from the chairperson and prayers, the chairperson asked those present at the meeting to be humble in their views. One of those speaking on behalf of the second family was Maara Karotaua: She said that she was trustee for Teruarau Jnr and had a Power of Attorney for Turi (Australia) and Taua Tere Kaivananga. This lady had three corrections to the geneology: one was to point out that Teariki Kaivananga never married Vaine Noopoto, that his only legal wife is Tamari. All family members agreed with the changes. That the parents of the first family were not married made no impact on the decision.

The sister of the appellant, Ina Matapo greeted members of her first family: she said that she could not turn away from what has been stated referring to the geneology and said "therefore, I am agreeing to your request".

The appellant himself said, "I give you all my full support to the request and also that of Ngatokorua's in this case. I am giving you my support to succeed to your mother Uaputa and for her to succeed to Teariki Kaivananga". He said why he did not want to say anything before because "I was thinking why didn't our forefathers do this in the first place".

Various other persons spoke: at the conclusion of the meeting and after final prayers, the chairman thanked everybody present i.e. owners and representatives of owners: all signed the record of the meeting as being correct. Dillon J considered that this meeting was most significant and that the minutes recorded the then views of the appellant and his sister.

After Dillon J's judgment was delivered, an application was made to Roper C J by the appellant for leave to appeal. In an affidavit in support of the application for leave to appeal, the appellant deposed that, just before the hearing, his former solicitors refused to take his case and he had had to represent himself: that he was in possession of significant evidence "which was not understood by the Court because of his delivery to the Court": that he had evidence that the respondent's mother had not been registered by the person through whom she was claiming to succeed. He gave no elaboration as to the members of the family he said to join him in objecting - neither at the time when this affidavit was prepared by a solicitor nor at the hearing before us.

It is eleven months since that affidavit was filed: yet the promised further evidence was provided to counsel for the respondent only yesterday.

Mr Holmes submitted, first, that there was insufficient evidence before the Judge to justify his revocation of the succession order: he asked that we consider this submission before considering his application under Rule 22 of the Court of Appeal

Rules to introduce further evidence. We went along with this suggestion because should we find that the decision was not justified on the evidence before the Judge, then there would be no need to consider the application to introduce new evidence.

We have considered carefully the evidence given in the Court below and the judgment of Dillon J. We consider that the Judge was quite entitled to hold, in the circumstances of this case, that its most significant aspect was the meeting of the family held on 11 September 1992. We would not expect the second family to have made at that meeting a decision which was clearly contrary to their interests, unless they were satisfied that the first family existed and bore the necessary relationship to Teariki Kaivananga. The meeting was conducted with considerable formality. Everybody seems to have been given the opportunity to express a view. We note particularly what was acknowledged by the appellant in cross-examination, namely, that this meeting was a not unusual way for resolving a dispute where members of one family have a different mother from other members of the other family: where a deceased person had fathered some children out of wedlock and other children by his legal wife.

We also acknowledge the difficulty of proving an application of this sort: we take note also of the fact, that, some 40 years ago in Mauke, this relationship was mentioned: it is not something which has been dreamed up by the family: 40 years ago, the matter was talked about. The Judge found resolution of the application one of comparative ease: we are not prepared to interfere with his judgment: disregarding for the moment the

Rule 22 of the Court of Appeal Rules reads:

"Right to adduce new evidence - (1) It shall not be open, as of right, to any party to an appeal toadduce new evidence in support of his original case, but a party may allege any facts essential to the issue which have come to his knowledge after the date of the decision from which the appeal is brought, and may adduce evidence in support of his allegations.

(2) The Court of Appeal may in any case, if it thinks fit, allow or require new evidence to be adduced, either by oral examination in Court, by affidavit, or by depositions taken before an examiner or commissioner".

It seems clear to us that the right to introduce fresh evidence is in the discretion of the Court. We do not read theRule as giving an unlimited right to a party who alleges that essential facts have come to his knowledge after the hearing. To so hold would be to allow litigation to be reheard.

Rule 22 is not as strict as Rule 36 of the New Zealand Court of Appeal Rules which gives the Court of Appeal wide discretionary powers: the Court there is given the power to hear fresh evidence on matters which have occurred after the date of the decision. This power is particularly appropriate in matrimonial cases. In Sulco Ltd v E S Redit & Co (1959) NZLR 45, 72, Hutchison J observed that as a general rule leave to admit fresh evidence under this Rule should not be given if the party making the application could with due diligence have discovered the evidence before the trial: and the weight or cogency of the evidence must be such that if admitted it would necessarily have been conclusive of the matter or at least have an important

influence on the result. Turner J, at 75, in dismissing the application for leave to adduce further evidence observed that it would be impossible in the case fairly to evaluate the additional evidence as against the evidence already taken: Henry J observed at 88, that the evidence sought to be placed before the Court of Appeal was in its nature an attempt to overcome a failure to prove at the trial that certain tests were not made with due care and skill; to admit it would be tantamount to allowing appellant to bolster his case with additional evidence which was available at the trial but which was not considered because of the particular view which was taken when the case was presented.

We reject the evidence of Turi because although she knew of the hearing, she did not file an objection or do anything prior to the hearing: she should not be allowed to be heard at this stage.

The geneologist's evidence adds little to the store of knowledge. It does disclose some additional opinion evidence: e.g. if Teariki Kaivananga had had five illegitimate children, he would have been dismissed from the church particularly in the early part of the century when a fairly strict view was taken of sexual mores. There is also a suggestion that all Noopoto's children were adopted out, including Uaputa; but these adoptions were not registered and could not affect any claim as descendants of Teariki Kaivananga. Generally, the proposed evidence is of a negative kind. We do not think that it would necessarily satisfy the test of being decisive nor have a material bearing on the case. We consider that the evidence could have been obtained

before the trial by the exercise of proper diligence: we decline to admit fresh evidence. The respondent is entitled to costs which after hearing counsel we fix at $2,500.00.

R.J. Barlow J.A.