

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

NO: 01/2003

IN THE MATTER OF Section 390A Cook Islands Act 1915

AND

**IN THE MATTER OF HOUSESITE SECTION 172 A
AVARUA**

AND

**IN THE MATTER OF an application to rehear the Order
granting Right of Occupation to TEKURA
KAMANA ON 16TH May 1991.**

BETWEEN IONA WILLIAMS
APPLICANT

AND TEKURA KAMANA
RESPONDENT

Judgment of Greig CJ
Dated the 16th day of April 2003

1. The application is made to cancel the Order, made on 16 May 1991, on the grounds that there was already an Occupation Right on the land granted on 10 March 1908 and, alternatively, that the majority of the landowners did not support the grant of the Occupation Right and thus the Court erred in granting the later Order.
2. The application was referred to Norman Smith J for a report. He heard the application on 14 March 2003 and has now furnished his report. He recommends that the order in question be cancelled. I have considered his report and the written material before the Court. I accept his report and the recommendation. I state my reasons for this. In doing so it is necessary to deal in some detail with the background facts and history of this matter.

3. The order made on 10 March 1908 following investigation of the title was recorded in the register book in this form:

“(a) Te Ruaroa Taraare m.a.)
 (b) Angene m.a.) for an Occupation Right
 (c) Anani f.a.)
 (d) Angene Ita m.12)

together with their direct descendants

Makea – atu Enuu, Housesite Section 172 Avarua

Subject to the owners paying Makea Ariki and her successors one shilling on the first of January in each year.”

The first two named were brothers. Anani was the wife of Angene. Angene Iti was the adopted child of Angene and Anani.

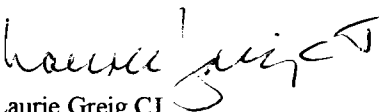
The actual order dated 25 May 1908 records the order made in this form:

“It is hereby ordered that the Natives whose names are set out on the first column of the Schedule indorsed hereon are and are hereby declared to be together with their direct descendants the owners of an occupation or residential right in the parcel of land to be called or known as House Site Allotment 172 Ngatipa Avarua containing 20Ars and delineated on the plan numbered 436 subject to payment to Makea the owner of the said land and her successors the sum of one shilling on the first day of January in each year.”

4. Angene died on 9 May 1919 and Te Ruaroa followed on 11 May 1919. Anani died in 1921. On 9 November 1926 the Court dealt with the succession of all three to the Housesite. Angene Iti succeeded to the rights of Angene and Anani. In respect of Te Ruaroa his adopted son Teariki Kaivananga appeared and gave evidence of his adoption and that there were no other children. By agreement in which Angene Iti concurred Te Ruaroa's sister Ngapoko succeeded to his right in the Occupation Right.
5. On 14 March 1962 there was an application for succession to the rights of Angene Iti who died in 1956. The application was dismissed The Judge stating as recorded in the Minute Book at MB 25/118:
- “ Award was to certain persons and their direct issue (see original order). Children of Angene Iti already have right to occupy. Succession order not necessary. No objections to issue of Angene succeeding to Angene Iti”
6. In 1985 a succession order was made in respect of Ngapoko's interest in favour of Te Kura Vaikirangi Karika. That succession order has been challenged on the grounds that the successor is not a descendant of Ngapoko who succeeded to Te Ruaroa. Te Kura who is the respondent in this application was granted the occupation right in 1991 for an area of 750 square metres for a housesite subject to a right of way. Support for that application was given by Makea Nui Ariki, Tuapikepika Heather, and George Angene. None of these were

landowners in respect of the occupation right existing and granted in 1908. Makea Nui Ariki is the Atu Enuā as described in the original order but it is said that the decisions about this occupation right lie with the direct descendants of the original owners rather than the underlying owner.

7. It is to be observed that the respondent has challenged the succession orders granted in respect of Angane and Anani. These challenges were successful and now there are new applications for succession orders proceeding in Court.
8. There are a number of questions in this case which arise but which have not been answered. One of these is the effect if any of S.428 of the Cook Islands Act 1915. The second is that though Ngapoko is not a direct descendant of the original named owners she was by agreement included as an owner. The question is whether her ownership like the others before her goes to her direct descendants or to the direct descendants of the original owners or in some other way. The form of occupation right now granted and granted to the respondent in 1991 is made under the Cook Islands Amendment Act 1946 section 50. That is not the same occupation or residential right granted in 1908. The current provision declares, ss. (2), that the person occupying land under such an order is deemed to be the owner of the land under Native custom. That may provide, it seems for the occupier or occupiers an interest in native freehold land as defined in the Act. It is likely that the right granted in 1908 provides a similar interest. It is clear that these questions were not dealt with in terms in the grant of the occupation order in 1991.
9. What is plain is that the original occupation order extends over the whole of the land including the part which is the subject of the 1991 order. That order was made without the consent or consideration of the registered owners of the original occupation right. At the least, a further or second occupation right over part of the land must require the consent of the majority of the owners of the existing occupation right. The consent of the owners of the land (the fee simple title of it) cannot suffice. The respondent is not a direct descendant of the original owners of the occupation right or the included owner Ngapoko. It seems that in the light of the original grant the preferred view of the right of Ngapoko must require a direct descendant to succeed: whether of the original owners or of Ngapoko is not necessary to decide at this stage.
10. In the result I am satisfied that there was error in the grant of the occupation right to the respondent on 16 May 1991 which falls within section 390A of the Act. The remedy is to cancel that grant. The order is accordingly cancelled. I direct the Registrar to make the consequential amendments to the records and register in respect of the land.


Laurie Greig CJ