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

APPLICATION NOS. 588/12 & 228/16

IN THE MATTER of Section 50 of the Cook Islands Amendment Act 1946

AND
IN THE MATTER of Application for an Occupation Right by **REO TE ARIKI PUIA (TE ARIKI TAPURANGI ALEXANDER HOLLOWAY PUIA, TE ARIKI HOLLOWAY PUIA)**
Applicant

APPLICATION NO. 311/16

IN THE MATTER of an Application for Orders Determining Ownership and Possession by **MOTU TE ARIKI PUIA**
Applicant

Date: 25 August 2017

Appearances: Mrs T Browne for the Applicant (588/12 & 228/16)
Mr T Moore for the Applicant (311/16)
Mrs T Carr for Mr Hugh Baker

DECISION OF THE HONOURABLE JUSTICE WILSON ISAAC

Introduction

[1] There are two applications before the Court as follows:

1) An application pursuant to s 50 of the Cook Islands Amendment Act 1946 for an occupation right order by Reo Teariki Puia (Reo) over the land known as house site 163A, Avarua containing 570m^2 (five hundred and seventy square metres) as set out on the plan dated 24 March 2016.

2) An application pursuant to s 409A of the Cook Islands Act 1915 by Motu Teariki Puia (Motu) for an order determining the ownership and possession of a house on house site 163A, Avarua.

[2] Motu objects to Reo's application and Reo objects to Motu's application.

[3] Mr Hugh Baker also objects to Reo's application. Mr Baker's standing to object is disputed by counsel for Reo.

[4] The applications were heard by the Court in Rarotonga on 11, 13, 16 and 20 May 2016. At the conclusion of the hearing, I invited counsel to file submissions in relation to a decision I had issued on 12 April 2016 which dealt with similar issues to the present case on Section 166, Avarua.

[5] I note the transcript of the May 2016 hearing was distributed to counsel on 2 November 2016 and further submissions were filed with the Court from Mrs Carr on behalf of Mr Baker on 17 November 2016; Mr Moore for Motu on 22 November 2016; and Mrs T Browne for Reo on 28 November 2016. The submissions of Mr Moore and Mrs Browne were received by me during the May 2017 Rarotonga Court sitting.

Background to the Applications

[6] Section 163A was created by Chief Justice Gudgeon with an Order on Investigation of Title dated 10 March 1908 where Puia and Iotia together with their direct descendants were declared "the owners of the occupation or residential right in the parcel of land to be called or known as House site Allotment 163A, Ngatipa, Avarua, containing 19 Ars …. subject to payment to Makea, owner of the said land and her successors, of the sum of one shilling on the first day of January in each year".

[7] This title was one of a number of house site titles which Chief Justice Gudgeon explained were set out in the early days of the mission to give legal effect to an arrangement whereby the Ariki gave house sites to Orometua to live near the church.

[8] Chief Justice Gudgeon in the Order on Investigation of Title for the house sites makes a number of pronouncements to clarify the effect of these titles and the rights of the owners of the house sites and the Ariki. I now set out the relevant pronouncements to this issue:

1) MB 1/67-69, dated 13 July 1903. This minute dealt with the Order on Investigation of Title for occupation sites to Tinomana and TeUri. The Chief Justice said this:

> "… all the other sections there are Occupation Rights which in many instances give a title superior to that of the real owner of the land. It will therefore be our duty to define those rights, and in doing so we will follow the arrangement made with the mission where the people were brought together and induced to build in the vicinity of the church in order to be near religious instruction.
>
> The arrangement as we read it is this. That all those who built houses should have an inalienable right to live on the piece of land chosen by them so long as the family lived or continued to occupy the land. Therefore in awarding this land to Tinomana and Te Uri the award will be subject to the following rights:
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> 1) That each householder shall pay to Tinomana one shilling in the month of January of each year as atinga for the land.
> 2) That so long as the descendants or near relatives of the present owner are alive they shall be deemed to be the absolute owner of house and land. But in the event of the family dying out Tinomana or any future representative of the Arikiship may apply to this Court to replace him or her in possession.
> 3) The occupier may sell or lease his or her right acquired in the section that is his for her own life interest but nothing further and any rent received shall be the property of the occupier.
> 4) Any owner of a house may purchase from Tinomana or other Atu Enua the soil on which his or her house is built and become the absolute owner provided such arrangement be made before the Court and with its consent.
> 5) The one shilling per annum shall represent the total of Tinomana's interest in such section during the occupation of such house and land."

2) MB 4/21A, dated 17 February 1908. This minute dealt with Section 150, Avarua. The Chief Justice said this:

"… legal laying out of this township of Avarua took place in 1827, when the Revd. Mr Buzzacott and the land Chiefs of Avarua came to an understanding somewhat to the following effect. That within certain defined limits extending from the Avatiu creek towards Tupapa, all persons desirous of living near the Church might take up a section on either side of the Main road in order to build a house thereon and by so doing acquire a residential right for themselves and descendants. I am however of opinion that in all cases where a Resident shall die childless and without near relatives, the consent of the Atu Enua is necessary to validate the transfer of the house to a stranger. There may be circumstances which would justify the Court in departing from this rule, but speaking generally the land should return into the hands of the Atu Enua where a man dies without Heirs of his own blood."

3) In the same minute the Chief Justice explained the respective rights of the Ariki and holders of the occupation titles in this manner:

"I desire specially to make you all understand, that in this village the lands are not under the Mana of any Ariki or Chief but are under the mana of the Akonoanga Oire, and therefore I object to any arrangement by which the land of many families is included in one piece under the mana of one man who will probably in the future contest the independent rights of those joined with him in the grant. The sole purpose and intention of the Land Titles Court has been to break down this Mana nonsense which has been carried to a ridiculous point in Avarua. The aim of the Court has been to give, as far as was possible, each man his own land and make him independent of everything but the law and those appointed to carry out the law. In this work the Court has received valuable assistance from Pa, Makea, and Tinomana."

4) MB 4/47A, dated 10 March 1908. In this minute Chief Justice Gudgeon further explained the effect of the titles created for occupation. He said the Court became involved because of trouble at Arorangi when a certain man leased his house and the Atu Enua thought she had a right to a large share of the rent. He stated:

"The position now is that each house owner is under the protection of the law, and – subject to a proper recognition of the rights of the Atu Enua – is the absolute owner of the House, and can either sell or lease that right to a stranger, whether Maori or Foreigner. In such a case he merely sells the buildings he has erected and the right to live in them.

The obligations to the Atu Enua continues no matter who lives on the land. Such is the position of the occupier and I will now define that of the Ariki or Atu Enua.

> The original arrangement was that the people should pay no atinga. But the Court has given them extended powers and privileges and must therefore define with equal clearness the position of the Overlord. The Court awards the land to the various applicants as per the orders made in each block but orders that each house site shall pay to the Atu Enua the sum of one shilling in the month of January in each and every year commencing in January 1909."

[9] These pronouncements in my view clarify a number of important issues regarding the nature of the Order on Investigation of Title for occupation or residential sites.

[10] First, the titles are for occupation or residential sites. The persons determined by the Court to hold those occupation sites are the owners of the titles with all the powers to lease and to sell. They can exercise these rights without interference from the Ariki, and the titles have given "each man his own land and make him independent of everything but the law." As set out in the Gudgeon pronouncements this was to ensure it was clear that these titles were not under the mana of the Ariki but were under the mana of the title holders.

[11] The right of the Ariki was to receive one shilling every year and for the return of the land to the Ariki where the owner of the title created for occupation died without blood descendants.

The issues to be determined

[12] The main issues to be determined are:

1) The standing of Mr Hugh Baker;

2) Whether the Court has jurisdiction to grant an occupation right order on 163A Avarua, which was determined by Order on Investigation of Title as an occupation site for Puia and Iotia;

3) If the Court has jurisdiction, should it grant the occupation right order; and

4) Who has the right to the ownership or possession of the house on 163A Avarua?

Whether Mr Baker has standing to object

Submissions for the Applicant

[13] Reo submitted that Mr Baker has no standing to object and his application should therefore be dismissed. Reo claimed that the Makea only has a legal interest in the land when the line of direct descendants of the original grantees of the occupation right order dies out. For as long as there are direct descendants living on the land, the only right held by Makea is for the Ariki to receive the atinga of one shilling per year from the occupiers.

[14] Reo also submitted that the evidence at MB 1/67-69, MB 4/21A and MB 4/47A clearly shows that "the sole purpose of granting these orders was to protect the house site owners and to do away with any mana that the Ariki thought she had".

[15] Reo claimed that this argument is supported by the Court of Appeal's discussion of the occupation right order in *Vaiteru v Emi:*[1]

> While the land is the subject of an Occupation Right the owners are the holders of that right and they are the three parties concerned. The rights of the underlying owner will only arise when the Occupation Right has been cancelled or expired through the absence of any proper direct descendants.

[16] Reo also submitted that Makea's interest in the Akanoanga oire house sites is through the Ariki. There currently is no Makea Nui Ariki as the successor to the title has not yet been determined. Reo submitted that Mr Baker is not Makea Nui Ariki and therefore he has no interest in the land.

Submissions by the Objector

[17] Mr Hugh Baker submitted that the Court of Appeal determined in the case *Tavioni v Baudinet* that where there is no Makea Nui Ariki, the Kopu Ariki can act to protect the Ariki's lands.[2]

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[1] *Vaeteru v Emi* [2006] CKCA 3; CA 08/06 (1 December 2006).
[2] *Tavioni v Baudinet* [2009] CKCA 1; CA 1/09 (10 July 2009).

[18] Mr Baker claimed that his standing was never questioned when this issue was brought before the Privy Council. Furthermore, Mr Baker submitted that the Privy Council assumed that the Makea Ariki had held land on trust for the Kopu Ariki where the Makea Ariki had been named as owner. Mr Baker therefore argues that he has standing as part of the Kopu Ariki.

Law

[19] The Cook Islands courts and legislation are silent on the issue of standing. To assist, I refer to precedent from the Māori Land Court in New Zealand as useful authority in this case, as its jurisdiction is very similar to the jurisdiction of this Court.

[20] The Māori Appellate Court in *Tioro v McCallum – Estate of Ngapiki Waaka Hakaraia* discussed the requirements of natural justice in terms of affected or interested parties. The Court stated 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".[3] The New Zealand Court of Appeal considered in *Waitemata Health v Attorney-General* that the right to notice of proceedings is intrinsically related to the right to be heard; stating that notice is "essential to an effective right to be heard and in its absence there is a denial of the right".

[21] The Court also quoted from a leading New Zealand text on the subject: Philip A Joseph's *Constitutional and Administrative Law in New Zealand*:[4]

> Where a hearing is proposed, it is elementary that persons who may be affected by the decision must be given notice of the date, time and place of the hearing. The range of interested parties must be determined according to common law requirements as to standing. The courts presume that Parliament does not intend its statutory procedures to prescribe exhaustively those who might have standing to be heard. *Reasonable steps must be taken to serve all interested parties, unless the rights or interests affected are speculative or insignificant.* (Emphasis added).

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[3] *Tioro v McCallum – Estate of Ngapiki Waaka Hakaraia* [2015] Māori Appellate Court MB 483 (2015 APPEAL 483) at [20].

[4] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 1046, as cited in *Tioro v McCallum – Ngapiki Waaka Hakaraia* [2015] Māori Appellate Court MB 483 (2015 APPEAL 483) at [20].

[22] The Māori Land Court Rules 2011 also consider the rights of affected or interested parties in terms of the right to be notified of proceedings which may affect them. The Māori Appellate Court discussed this in *White v Potroz – Mohakatino Parininihi No 1C West 3A2.*[5] The Rules refer to a "person materially affected", which is defined in rule 2.5(1) as "any person whose rights or interests in any property may be materially affected by a proceeding".[6]

Discussion

[23] The concept of standing is well-settled in the law; that a party must have a sufficient interest in or be sufficiently affected by the proceedings in order to have a right to be heard in court.

[24] The applications in this case are for an occupation right order, and orders determining the ownership of a house situated on the land. Mr Baker must have a sufficient interest in these orders to have standing in relation to these proceedings.

[25] As the situation currently stands, the occupiers of the land are descendants of the original grantees of the occupation right order. Later in this decision I find that the rights of these descendants are that of landowners. Mr Baker's rights are remote. He is not the Ariki whose rights arise when the descendants die out. Mr Baker's rights are more distant to those of the Ariki. Mr Baker therefore has no interest or rights in the occupation of the land at present, and there is no indication of any such interest or rights arising in the future.

[26] The only right the Ariki has is to collect payment from the occupiers. Mr Baker is not the Ariki and so this right as a member of the Kopu Ariki does not arise and is not affected by these proceedings.

[27] It should also be noted that there was no evidence presented from the Kopu Ariki to support the actions of Mr Baker, and although his membership to the Kopu Ariki was not challenged, he stood alone in these proceedings.

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[5] *White v Potroz – Mohakatino Parininihi No 1C West 3A2* [2016] Māori Appellate Court MB 160 (2016 APPEAL 160) at [54].
[6] Māori Land Court Rules, r 2.5.

[28] In summary and following the law from the New Zealand courts, Mr Baker's rights, if existent at all, can only be considered "speculative or insignificant"[7] and are not likely to be materially affected by the proceedings at hand. Mr Baker therefore does not fall within the category of people who have a right to be heard, and in my view the principles of natural justice will not be contravened by denying him standing in this case.

Whether the Court has jurisdiction to grant an occupation right over 163A Avarua

[29] Mrs T Browne for the applicant submitted that s 50 of the Cook Islands Act 1915 requires the Court to be satisfied that it is the wish of the majority of owners of any Native land that that land be occupied by any person.

[30] She maintained that the nature of an Order of Investigation of Title is that the owners of the land are the owners of the occupation rights and, as long as they have descendants, they are the owners. The owner is not Makea, as her right only comes to life if the owners of the occupation rights have no descendants.

[31] House sites are enshrined in the Order on Investigation of Title and are sacrosanct and only end if the owner of that title has no descendants.

[32] After considering the decision of Smith J in *Vaeteru v Emi* dated 25 June 2002,[8] Mr Hugh in Applications 315/96 and 316/96 dated 7 May 1997, and my decision in regard to Application 445/14 dated 12 April 2016; Mrs Browne concluded that the persons who determine if a particular person should occupy the house site are those declared to be the owners of the occupation rights.

[33] Relying on the decision of Smith J in Application 41/05, Mr Moore submitted for Motu Puia that the Court has no jurisdiction under s 50 of the Cook Islands Amendment Act 1946 to grant an occupation right order to replace an occupation right order made under 'taura oire' one hundred years ago.

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[7] Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 1046, as cited in *Tioro v McCallum – Ngapiki Waaka Hakaraia* [2015] Māori Appellate Court MB 483 (2015 APPEAL 483) at [20].

[8] *Vaeteru v Emi* [2006] CKCA 3; CA 08/06 (1 December 2006).

[34] He also submitted that, notwithstanding the Court granting occupation right orders on the subject land, this does not make it legal.

[35] Mr Moore also submitted the Order on Investigation of Title granting occupation could not give the occupiers the right to lease and sell their interests in the title.

Discussion

[36] The nature of the titles was set out in paragraph [10] above. The persons named on the Order on Investigation of Title by the Court are the owners of the title and these titles are to be used for occupational or residential purposes.

[37] These owners have the right to lease and sell and these rights are exercised independently of the Ariki.

[38] The titles are not under the mana of the Ariki, but of the persons listed as owners of the land for occupation purposes.

[39] The mana of the Ariki only comes into force when the owners of the occupation lands have no further descendants.

[40] These titles were determined by the Court in the early 1900s to bring some certainty and legal order to the rights of those persons occupying these lands.

[41] It is hoped that this decision will continue the desire for certainty and order on the titles set aside for occupational purposes.

[42] As stated by Chief Justice Gudgeon back in 1908, the owners of this land have the right to alienate their land.

[43] I consider that, at the present time, this includes the right to apply and be granted occupation right orders with the support of the owners of the titles established for occupation purposes.

[44] I therefore conclude this Court has the jurisdiction to consider and determine occupation right applications over land described as ‘taura oire’ titles.

The occupation right order and the ownership of the house

[45] During the course of the hearing I considered evidence relevant to the question of occupation rights and also ownership and possession of the house. As such, both matters will be dealt with together.

[46] Evidence was given for the applicant that the majority of owners supported the occupation right going to Reo and his direct descendants. The certificate of the Deputy Registrar certifies that 72 out 116 owners of this occupation site support the occupation right order.

[47] The applicant’s daughter, Savanah Puia, gave evidence to say the occupation right was for an area of 570m². There is an old coral house on the land built in around 1865 which has over time been renovated, however it is in need of further repair.

[48] She further stated the house belonged to her great grandfather Puia who is named on the Order on Investigation of Title, and the children of Puia were raised in the house.

[49] The house is rented at the moment and her uncle Motu is collecting the rent.

[50] There are two other occupation right orders granted on this land. The first on 4 December 1990 to Tutarangi Puia and the second on 19 September 1996 to Ngatokoa Ngatipa and Okirua Ngatipa.

[51] In relation to Motu’s application for ownership and possession of the house, witnesses were called by Mrs Browne in opposition to his application. In Mrs Browne’s view, their evidence supports that Motu should not be granted ownership as the house was originally built by Puia Metua and it has over the last 100 years been occupied by many members of his family. There were repairs done to the house by Tauu Puia, a brother to both applicants, and he obtained a loan to carry out this work from the Housing Corporation. Tauu was unable to repay the loan and the Housing Corporation took possession of the house and rented the

house out from 1993 to 2003 to recover the loan. According to those witnesses, Motu Te Ariki Puia only did minor work on the property.

Motu's case

[52] In respect of the occupation right application, it is submitted that if there is support for the occupation right order it is for a life interest only, and upon the applicant's death the land should revert to all the occupiers.

[53] Reo was only one of the Puia extended family who grew up in this house. This does not entitle him to sole inheritance of the house. Furthermore, Reo had not contributed to the renovations of the dwelling.

[54] In comparison, Motu's evidence is that he took care of both the dwelling and his parents. He expanded and renovated the dwelling with money from his mother's orange plot in Ngatangiia. After his father's death, he went to New Zealand for approximately 26 years and in that time his brother Tauu took over the care of the house.

[55] Motu seeks to be made the owner of the dwelling so he can renovate it, and should his nephew return to Rarotonga, he will give him exclusive occupation of the dwelling as a life interest.

[56] It is submitted that Motu's claim is superior to that of his nephew Reo, however he does not oppose his nephew having an occupation right for his life only so he might return from overseas and have security of tenure.

Discussion

[57] Section 50 gives the Court discretion to grant an occupation right order if it is satisfied the majority of owners support the application.

[58] The certificate from the Registrar confirms that the majority of owners support that an occupation right order be granted to Reo and his direct descendants over house site 163A.

[59] The issue is whether I should now exercise my discretion and grant the occupation right in Reo's favour.

[60] The evidence received both for the occupation right order and the order for possession and ownership is instructive to the exercise of my discretion.

[61] In the early years the dwelling on this land was a family home for the Puia family. It became the family house of Te Ariki and his family and, while they lived in it, they renovated and extended it with money from the family citrus plot and work by Te Ariki and his son Motu.

[62] When Te Ariki died, Motu went to New Zealand for around 26 years and the house was cared for by his brother Tauu who obtained a loan from the Housing Corporation for further renovations. The loan fell into arrears and Housing Corporation took possession of the house and rented it to recover their debt.

[63] Motu returned to Rarotonga in 2006 and assumed control of the house and rented it out to non-landowners.

[64] The house is now in need of major repair and there are two competing applications for it in the form of an occupation right application by Reo under s 50 of the Cook Islands Amendment Act 1946 and an application for ownership and possession of the house by Motu.

[65] Each application raises meritorious factors in their favour, however neither application in my view take away from the fact that this house was built as a family home and has, in my view, remained a family home with different family members residing in it, renovating it and renting it to recover their expenses.

[66] The house needs a custodian and a member of the family to care for it and repair it as required. For this some security of tenure is required.

[67] Motu has conceded that Reo can hold the occupation right for his lifetime to enable that to happen, which appears a suitable solution to the problems facing the family.

[68] The majority of owners have agreed to the occupation right for Reo and his direct descendants.

[69] Having regard to the history of the house as a family house and the need to ensure a member of the family has security of tenure to enable occupation and repairs, I consider that the occupation right order should be granted, but that it be limited to the life of Reo and not go to his direct descendants.

Decision

[70] I therefore order as follows:

1) That Reo Te Ariki Puia be granted an occupation right over the land containing 570m^2 as per the plan attached to the application for his lifetime only.

2) That Reo Te Ariki Puia has to exercise his right of occupation within 12 months from the date of this order. If this condition is not exercised, the occupation order shall lapse.

3) That the order for ownership and possession by Motu Te Ariki Puia is dismissed.

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

Wilson Isaac, J