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

APPLICATION NO. 55/19, 204/17, 205/17, 349/15, 354/15

IN THE MATTER OF	the land known as TUAPU SECTION 12D2E, NGATANGIIA
AND	an application for recall of judgment
BETWEEN	RUTA SHORT Applicant
AND	IRITI MAOATE Respondent

Hearing: 2 May 2019

Appearances: Mrs T Browne for the Applicant
Mr T Moore for Respondent

Judgment: 1 November 2019

DECISION OF JUSTICE W W ISAAC

Copies to:
T Browne, offices of Browne Harvey & Associates P.C, Avarua, Rarotonga
T Moore, office of the Land Court Services, Ngatipa, Rarotonga

Introduction

[1] On 2 May 2019, Ruta Short applied for a recall of my judgment dated 7 February 2018 (the February judgment) where I discussed irregularities between a Court order for partition and the reality of the land.

[2] I heard submissions from counsel on this matter on 2 May 2019, alongside an application by Iriti Maoate for an order under s 44 of Judicature Act 1980-81. At the end of the hearing, I reserved my decision, awaiting further submissions from parties.

[3] The Court received submissions from Iriti Maoate objecting to the recall application on 5 June 2019.

Background

[4] In 2000, landowners agreed how land at Ngatangiia would be distributed between the various family branches. An application for a partition order reflecting this agreement was made to the Court.

[5] Judge Hingston made the partition order on 16 March 2004 on the following terms:

> I have no problem in each of the applications before the Court in making the required Partition Order and Exchange order as requested, and the allocation to the respective parties as per schedule and I have signed the memorandum so that it is clear that it is being used in this episode. The Court makes orders as requested to accomplish what has been set out in this memorandum.

[6] The memorandum of agreement referred to by Judge Hingston in his decision is dated 16 March 2004. This refers to an agreement of the families involved from 9 March 2000. In terms of that agreement, the 1630m^2 of Lot 42 Tuapu 12D2 is proposed to go to the Pekamu family. The partition order was made on the basis of that agreement from 2000.

[7] The partition order was sealed by the Registrar on 6 November 2008 based on the final survey plan. The block in question, Tuapu 12D2E, was allocated to the Pekamu and Tairi families, with an intention to further partition at a later date. The survey plan showed Tuapu 12D2E to have a total land area of 2817m^2 as a creek was filed in and the surveyor included this in the block.

[8] As became clear in my 2018 decision, there are discrepancies between the 2004 and 2008 orders regarding the land area of Tuapu 12D2E. The partition order of the Court, which aligned with the map presented by landowners to the Court in 2004, showed Tuapu 12D2E to have a total area of 1630m^2. The order sealed by the Registrar, which followed the final survey plan completed in 2008, showed a total land area of 2817m^2, a difference of 1187m^2. The final survey plan which showed the increased area and resulted in the partition order being sealed by the Registrar was not referred back to Judge Hingston.

[9] In 2017, Ruta Short asked a meeting of owners to approve two lease applications, including Tuapu 12D2E, and for permission to commercially develop the land.

Procedural history

[10] There are a number of extant matters before the Court concerning this land:

(a) Application for confirmation of resolution of owners by Max Makimou Maoate, Max Garrick Maoate and Alana Clare Maoate (55/19);

(b) Application for partition by Iriti Maoate (205/17);

(c) Application for declaratory order and occupation right by Iriti Maoate (204/17); and

(d) Application for confirmation of resolution of owners by Ruta Short (349/15 and 354/15).

[11] I initially heard this matter on 25-26 May 2017 and asked the Chief Surveyor to prepare a report explaining the discrepancies between the 2004 partition order and the sealed survey plan. The Chief Surveyor completed the report, dated 22 June 2017. This report confirmed that the sealed order was inconsistent with the order made by the Court due to the increase in the area of Tuapu 12D2E. The Chief Surveyor reported that a creek on the border of the property had been filled in 1999, which accounted for some of the increase in the land area.

[12] In a reserved decision of 7 February 2018, I noted that I did not consider the final survey plan was sufficient to give effect to the true intentions of the original partition order, as it did

not reflect the 2000 agreement or the 2004 Court order. That order was completed conditional only on the survey for finalisation. There was no provision in the 2004 order to alter the area of partition.

[13] As the final survey in essence altered the fundamentals of the Court order of 2004, I referred the matter back to the Court to consider the views of all parties. The applications for partition and confirmation of resolution of owners were adjourned until this occurred.

Submissions for the Applicant

[14] On 2 May 2019, Mrs Browne for the applicant filed an application for the recall of my February judgment. The grounds of this application were that the justice of the case requires it to be recalled, because:

(a) There was no application before me to amend or cancel the partition order;

(b) There was no jurisdiction for me to rehear the partition order;

(c) Landowners affected by the said order were not notified or aware of the Court's intention to cancel it and thus did not participate in the hearing; and

(d) The said order was relied on by the objectors to obtain leases and occupation rights and therefore were estopped from challenging the said order.

[15] In the May 2019 hearing, Mrs Browne submitted that the Court has no jurisdiction to revisit the partition order, even under s 44 of the Judicature Act, as it is a final order sealed by the Court. She says there is Court of Appeal authority which states sealed orders and orders made by consent should not be disturbed.

[16] Mrs Browne called Lynnsay Francis, a Tuapu landowner, as a witness. Ms Francis said that the sealed partition order reflected the wishes of the six kopu.

[17] Mrs Browne cited *Baudinet v Tavioni and MacQuarie* and *Horowhenua County v Nash* which set out three categories of recall applications.[1] She emphasised that jurisdiction should be used sparingly and it is not an opportunity to present new evidence.

[18] The applicant requested that the judgment be recalled so that questions of law and fact can be properly argued.

Submissions for the Respondent

[19] On 5 June 2019, Mr Moore for the respondent filed an objection to the recall application.

[20] Mr Moore submitted that the February judgment was not a rehearing, rather it was a hearing to determine if the sealed order gave true effect to Judge Hingston's 2004 order. It was an interlocutory hearing that necessarily preceded the other extant matters. The Judge found that the applications for confirmation were dependent on the partition, so he adjourned those applications until the outcome of the partition application is known.

[21] Mr Moore submitted that the February judgment is or has the effect of a sealed and perfected order. However, as it was sealed incorrectly, it can be corrected by s 44 of the Judicature Act 1980-81, in accordance with *Teariki v Sanderson*.

[22] Mr Moore submitted that the February judgment should stand as there are no s 390A or appeal applications concerning it. The only thing required is a hearing under s 44 to correct the error.

[23] In response to Mrs Browne citing *Baudinet v Tavioni and MacQuarie* and *Horowhenua County v Nash*, Mr Moore submitted that the applicant's bundle of documents in the May 2019 hearing was significantly longer than in the February hearing. This, he submitted, must be a reframing of previous arguments or new arguments, which is not within the scope of recall applications according to these cases.

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[1] *Baudinet v Tavioni & Macquarie* [2010] CKCA, 18 June 2010 per Barker P, Smellie JA, and Fisher JA; citing principles from the New Zealand cases of *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC), *Unison Networks Ltd v Commerce Commission* [2007] NZCA 4 (CA) and *Faloon v Commissioner of Inland Revenue* High Court Tauranga CIV 2005-470-508, 20 March 2006.

[24] The respondent requested that the Court dismiss the application and the question of costs be reserved.

Law

[25] This Court in the recent decision of *Bates v Mateara* summarised the law on recall applications as follows:[2]

> [24] The High Court has inherent jurisdiction to recall its own decisions, as a superior court of record. However, the power to recall is only used in limited circumstances.[3]
>
> [25] The Cook Islands Court of Appeal discussed the Court's recall jurisdiction in *Baudinet v Tavioni & Macquarie*. The Court took significant guidance from New Zealand authorities which establish three categories of cases where recall may be used:[4]
>
> a) Where there has been an amendment of a relevant statute or regulation or a judicial decision of a relevant and high authority since the hearing;
>
> b) Where counsel failed to direct the Court's attention to a legislative provision or authoritative decision of plain relevance; and
>
> c) Where for some other very special reason justice requires that the judgment be recalled.
>
> [26] The general principle is that, once a judgment has been granted, it is final and may not be altered except on appeal or review. The Court of Appeal recognised this in *Baudinet* when it concluded that:[5]
>
> > The jurisdiction is to be exercised only sparingly. A recall application is not a rehearing in disguise. Nor is it an opportunity for reframing the arguments previously presented, presenting fresh arguments which ought to have been advanced but in the event were not, or traversing fresh legislative provisions, authorities or arguments which could not have affected the overall result.

[26] Section 44 of the Judicature Act 1980-81 states:

> **44. Amendments**
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> A Judge may at any time amend any minute or judgement of the Court or other record of the Court in order to give effect to the true intent of the Court in respect thereof or truly to record the course of any proceeding.

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[2] *Bates v Mateara* [2018] CKLC 8; Application 319 of 2018 (9 November 2018) at [24]-[26].
[3] *Bank of New Zealand v Mullholland* [1991] 4 PRNZ 299.
[4] Above n 1.
[5] Above n 1.

[27] In *Baudinet v Tavioni*, the Privy Council stated the general rule in s 44 of the Judicature Act 1980-81 can be applied to orders made on investigation of title and it is not to be read as subject to s 390A of the Cook Islands Act 1915.[6]

Discussion

[28] The issues for determination are:

(a) Should my February judgment be recalled? In particular, was the partition order made by Judge Hingston final or conditional upon survey?

(b) Do I have jurisdiction under s 44 of the Judicature Act 1980-81 to amend the partition order?

Should my February judgment be recalled?

[29] The first issue for determination is whether grounds exist for the recall of my February judgment.

[30] Mrs Browne's submission is that the 2008 partition order was a final order sealed by the Court, therefore there is no jurisdiction for the Court to revisit it. Mr Moore submitted that as the order did not reflect Judge Hingston's judgment, it is able to be amended by s 44.

[31] In my February judgment, I did not cancel or amend the partition order in any way. I said that it would need to be revisited in order to ensure that it reflected the true intention of the Court.

[32] There is no Cook Islands precedent on this issue. However, as mentioned in the February judgment, the New Zealand case *Chase-Seymour – Paenoa Te Akau* dealt with a similar situation.[7] The partition orders there were made "conditional upon surveyed plans being filed with the Court within six months".[8] However, the resulting survey did not accurately

[6] *Baudinet v Tavioni* [2012] CK-UKPC 2; Privy Council Appeal No.0078.2010 (22 October 2012) at [24].
[7] *Chase-Seymour - Paenoa Te Akau* (2015) 114 Waiariki MB 195 (114 WAR 195).
[8] At [1].

reflect the partition order, in that the boundaries did not align. Judge Savage only considered the partition orders finalised once the survey condition had been met.[9]

[33] The partition order made by Judge Hingston in 2004 did not state that it was subject to survey. The partition order however clearly relied on the 2000 plan agreed to by the owners which recorded the area of Tuapa 12D2E as 1630m^2. In my view, the omission of the words "subject to survey" in the 2004 order is irrelevant as the Court order always precedes the final survey. Further, no partition order can be sealed or perfected until the final survey has been completed. Therefore, there was clearly a survey condition which had to be satisfied. This condition cannot be satisfied by any survey but must be one which aligns with the order of the Court. It should also be noted that the agreement of the owners relied upon by the Court made no reference to adding additional land to Lot 42 either by way of accretion or by a combined partition. The final survey should reflect the Court order.

[34] In this case, the final survey was radically different to the owners' agreement and the Court order. The final survey extended the order of the Court from 1630m^2 to 2817m^2 and cannot be said to truly reflect the intention of the Court in 2004. This departure of the survey from the Court order led to my decision that the final survey and final partition order needed to be revisited.

[35] To this end, notice was given to the owners of the Court's intention to revisit the partition order to ensure the final survey reflected the true intention of the Court.

[36] The grounds to recall a decision as set out in *Bates v Mateara* do not refer to a situation where the decision is attempting to ensure the Court order is properly perfected.[10] Nor do they refer to a situation where the Court is aware that the final survey is clearly contrary to the Court order.

[37] For these reasons I consider the grounds relied upon to recall my decision have not been made out and the application is dismissed.

Jurisdiction under s 44?

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[9] At [31].
[10] Above n 1 at [25].

[38] The next issue for determination is whether I have jurisdiction under s 44 to amend the partition order.

[39] Under s 44 of the Judicature Act 1980-81, a Judge may at any time amend any minute or judgment of the Court or other record of the Court in order to give effect to the true intent of the Court in respect thereof or truly to record the course of any proceeding.

[40] As s 44 can apply to orders made on investigation of title, as discussed in *Baudinet v Tavioni*, it can be used in title matters, such as for the perfecting of survey plans to reflect the true intention of a Court order.

[41] For the reasons set out above, I am satisfied that there was an error as contemplated by s 44, in that the survey which was provided to the Court did not align with the plan agreed to by the owners and upon which the partition order was based. There was nothing in the agreement that discussed what to do if additional land was discovered. It did not allow the surveyor to unilaterally increase the size of the block without reference back to the Court. No applications were made to the Court for accretion or combined partition to include the extra land created by filling in the creek. Nor has there been any suggestion of a consensus of owners to vary the agreement reached in 2000. The allocation of the additional 1187m^2 should have been a matter for the owners to decide and should not have been simply added to Lot 42.

[42] As Judge Hingston and the parties anticipated that the partition order would be made in accordance with the agreed plan, the partition order should be amended in terms of s 44 in order to give effect to the true intent of the Court.

[43] I therefore direct the Chief Surveyor to undertake a further survey to truly reflect the intention of the 2004 Court order. That is that Lot 42 contains 1630m^2.

[44] I appreciate this will mean that there is an area outstanding of 1187m^2. The question as to who owns that land is for the owners to decide.

Decision

[45] The application for recall is dismissed.

[46] An order is made under s 44 of the Judicature Act 1980-81 to amend the 2008 partition order to reflect the true intention of the Court.

[47] All other related applications before the Court, being 55/19, 205/17, 204/17, 349/15 and 354/15, are dismissed as they are premised on an incorrect order.

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

Dated at Gisborne, New Zealand this 1st day of November 2019.

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W W Isaac
JUSTICE