IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA

Application Nos 315/96 and 316/96

IN THE MATTER of applications by Tetupuariki Araiti Tetupuariki to succeed to the respective interests of Tapaeru Araiti and Kautai in House Site Section 153 Avarua

Hearing: 7 May 1997

Hearing Venue: Courthouse, Rarotonga

Parties: Elizabeth Ponga on behalf of her brother, - the applicant

Mr B.J Gibson - Counsel for an objector Tiaono Gilmore

Judgment of McHugh J

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1. INTRODUCTION

There are two applications before the Court both of which are directed to interests in the same piece of land but in respect of two separate deceased persons. It was convenient to hear the applications together and this judgment will decide both those applications.

A rather unusual procedural process has been followed by the applicant. This has, to some degree, been forced on the applicant by the form of the original order of investigation made in 1908 and by three Court decisions in 1959, 1967 and 1970 respectively. These decisions will all be reviewed by this Court shortly. The applications are made pursuant to Section 448 of the Cook Islands Act 1915 (hereinafter referred to as "the said Act") and Rule 350 of the Code of Civil Procedure 1981. The applicant seeks a succession order in his favour solely to the interests of firstly, Tapaeru Araiti Iotia f.d who died on 17 July 1932 aged 102 and secondly, Kautai Iotia m.a who died on 22 December 1940. Both deceased held interests in a small section named House Site Section 153, Avarua. Although the applications are for succession to the two deceased, the applicant is really seeking an exclusive right to occupy the land solely.

The applications are contested by Tiaono (also known as "Tiano") Gilmore who claims right of occupation by virtue of a succession order made in her favour on 25 March 1970.

I shall return to the respective claims of the parties shortly but at this point wish to review the history and title records of the land subject to this dispute namely House Site Section 153 Avarua.

2. HISTORY AND TITLE RECORDS

Section 153 is a small section of 11 ars (approximately a 1/4 acre) between the main central road and the sea in the Tupapa township area and near the Maraerenga meeting house.

On 9 March 1908 following an investigation of title by the Land Titles Court, an order was made vesting title in the following 10 persons:

1.	Araiti	fa	)	
2.	Kautai	ma	)	
3.	Iotia	ma	)	
4.	Ngareta	fa	)	
5.	Tereapi (later changed to Tereapii)	fa	)	For an occupation
6.	Nia (later changed to "Ma)	ma	)	right.
7.	Anguna	ma	)	
8.	Vaataua	ma	)	
9.	Ngapoko	fa	)	
10.	Te Araroa	fa	)	

(together with their direct descendants Makea - Atu Anua)

The order was made subject to the payment by the owners of the occupation right to Makea Ariki and her successors of one shilling on the first day of January in each year. It is interesting and important to read the judgment of Gudgeon J. which preceded his awards. He first of all made the point that the purpose in granting a site was to allow the grantee *"to build a house thereon and by so doing acquire a residential right for themselves and descendants"*. (MB 4/21A). Gudgeon J. went on to say that the respective house sites would only return into the hands of the Atu Enua where a person died without blood descendants.

The second point made by the learned Judge was that the lands were not under the mana of any Ariki or Chief but under the mana of the Akonoanga Oire. The Judge clearly directed that the aim of the Court was *"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"*. (ibid)

At Minute Book 4/32 the Court head-noted its minute with the caption *"Claim of Kainana"*.

When the Court made its order in 1908 the land was occupied by Kainana, one of the six issue of Maraea and Vaero Araiti. Upon Kainana's death one of his children Ma Kainana continued to live in the house and lived there all his life until he died about 1958. At Minute Book 24/291 on 1 December 1959 when the Court had before it a

succession to Anguna deceased, one of the original 10 owners, a witness, Vaemarangi Anguna referred to the house on Section 153. He said:

> *"Only one house on this land - a store house with iron roof. I don't know who built it but when I first knew anything our uncle Ma Kainana was occupying it. Ma's daughter Makiroa also occupied and when she went to New Zealand Ma continued to occupy it until he died in 1958. After Ma died my father occupied and when he died my brother Vaevae occupied. He is there now".*

The Anguna family sought sole succession rights for Vaevae but the application was dismissed by Judge Morgan. The Court had this to say:

> *"The area of this site is only 1/4 acre (approx). Ten persons were named in the original order as having a right to occupy. Their direct issue have the same right. The position is already impossible and it would not be wise to make it worse by adding a lot more names to the list of those entitled to occupy. Perhaps at some future date the descendants of the original owners of the occupation right will get together and arrange a workable agreement. In the meantime it would be best to leave Anguna's name in the title."* (Emphasis added)

Eight years later on 7 November 1967 Ngametua Nooroa Iotia completed succession to three blocks of land in the name of his grandfather Iotia (number 3 on the original list of 1908). The minute reference at MB 27/374 is very short. There were no objections and the Court vested the blocks in the applicant.

On 25 March 1970 a further succession order was sought by Tiaono Gilmore - the present objector. Makeanui Ariki gave evidence in support and referred to the long occupation by the Kainana family. An order was made in favour of Tiaono Gilbert solely. (MB 29/197-188).

Since 1970 there have been no further title or occupation applications before the Court until the present applications were lodged on 1 August 1996.

3. GROUNDS OF PRESENT APPLICATION

As stated earlier, these applications before the Court are for succession to two of the original 10 owners in the 1908 order. The applications themselves are quite straight forward and capable of completion upon production of evidence showing entitlement by way of genealogical evidence. The applicant has produced a genealogy which

establishes the chain of descent from the two deceased. It is not so much the nature of the applications but the purpose and objectives behind the applications that is in issue before this Court. The applicant seeks to be awarded sole rights of succession to the two deceased and in support of that request has produced in a sworn statement given to the Court minutes of a meeting of the Araiti family. (Appendix "A" attached to the written statement) and two consent forms (Schedules "B" and "C"). It is submitted by Mrs Ponga on behalf of the applicant that these minutes and consents constitute an agreement from all other persons entitled to succeed to Tapaeru (Araiti) and Kautai that her brother Tetupuariki become the sole successor. Mrs Ponga has submitted that these consents fulfil the direction given by the Court dated 19 January 1997. If these consents are given by every person otherwise entitled to be granted succession to Tapaeru and Kautai then the Court may well be persuaded to make the order solely in the applicant's favour. But once again that issue is not the real contest in these proceedings. What the applicant is really seeking is set out in the remedies sought on page 4 of Elizabeth Ponga's affidavit given in Court at Rarotonga on 7 May 1997 namely:

> *"(3) That an occupation right be granted to Tetuapuariki Araiti alias Tetupuariki Tetupuariki of Rarotonga of this land being an area of One thousand one hundred square metres (1100m2) for a house site.*
>
> *(4) That the order granting succession to Tiano Gilmore for occupation right be revoked."*

It should be stated at this point that neither of the above requested orders are contained in separate applications to this Court pursuant to the relevant provisions of the Cook Islands Act 1915 and its amendments. They are also not mentioned in the succession applications but have simply been added on to Elizabeth Pongas affidavit. Nevertheless the two orders requested spell out the applicant's real intention.

The grounds put forward on behalf of the applicant to have the present succession order made in 1970 revoked and a sole occupation right in favour of Tetupuariki issue are these:

1. The applicant is the eldest line of the senior branch and House Site 153 is a "Taura oire" land of Makea and originally given to his family as a tribute to the Araiti Mataiapo title.

2. The applicant's families and members of the Kainana issues support the application.

3. Makea Nui Mere Maraea supports the applicant.

4. Tiaono Gilmore has had 27 years to develop the land and has not done so. She has also continued to live away from the Cook Islands since 1955. She does not contribute to the economic development of the Cooks and does not contribute to the work of the Makea Ariki.

4. GROUNDS OF OBJECTION

Counsel for the objector Tiano Gilmore presents these grounds:

1. That Section 153 from 1908 was occupied by Kainana, then by his son Ma Kainana and grand-daughter Makiroa Strickland until 1957 when Makiroa's family went to New Zealand for a better life. The objector Tiano, daughter of Makiroa, came back to Rarotonga in 1970 when the landowners agreed to her having the house site. Makeanui Ariki agreed as well. Although she returned to New Zealand to save money for a home on Section 153 she made arrangements for the property to be looked after. The old limestone house has been levelled preparatory to construction of a pre-cut house which has been ordered and booked for sea carriage to Rarotonga.

2. That in 1970 the Court awarded Tiano a sole occupation right by way of succession to Ma Kainana. This occupation right is not an occupation order under Section 50 of the Cook Islands Amendment Act 1950 which can be cancelled on the grounds normally set out in the statutory occupation orders. The Court has no jurisdiction to cancel the existing 1970 occupation right on the present succession application.

3. There was no majority consent of the owners of Section 153 to the grant of an occupation right to the applicant.

4. The land is not title land according to Maori custom which should go to the senior line.

5. REVIEW OF GROUNDS

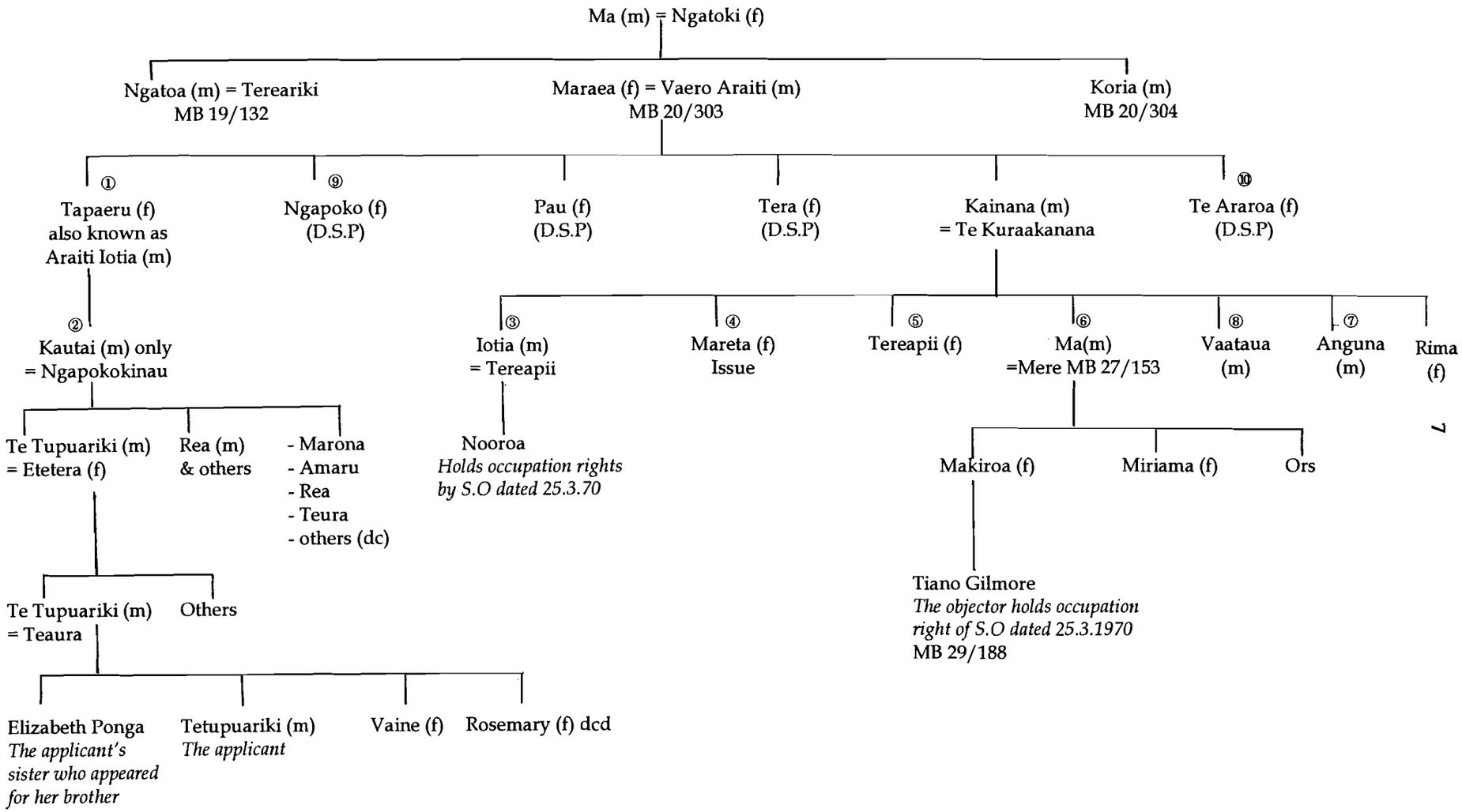
I am appending a schedule which is based on the whakapapa or genealogy as presented to this Court by both parties and which draws on various minute book references shown on the schedule.

I must emphasise that this schedule is not a complete confirmed genealogy. It is brought together for two reasons. Firstly to position the ten persons named in the 1908 order. Those ten persons are shown in the diagram by an encircled number which corresponds with their respective listing on the title record. Secondly, to position the respective parties in these proceedings and also to locate the holders of the occupation rights already referred to above.

I now propose to review the four grounds of the applicant as set out in paragraph 3 above.

The first ground relies on Maori custom as it existed immediately prior to the 1908 investigation of title. The applicant contends the land is taura oire land of the Makea and given to the Araiti family as a tribute to the Araiti Mataiapo title. The applicant relies upon the primo geniture rule that the eldest born of the senior branch is the guardian and trustee of the land and the person entitled to manage the whole estate in the interests of the family. Mrs Ponga in her affidavit refers to Colonel Gudgeon's views on this question. Seemingly Mrs Ponga is asserting that her family, as the senior line and the holder of the Araiti Mataiapo title, can by virtue of that seniority and rank, claim rights to Section 153 in priority to other family members. In the present instance this would mean the ousting of the present occupier.

SCHEDULE


Ma (m) = Ngatoki (f)
Ngatoa (m) = Terearíki
MB 19/132
Maraea (f) = Vaero Araiti (m)
MB 20/303
Koria (m)
MB 20/304
①
Tapaeru (f)
also known as
Araiti Iotia (m)
⑨
Ngapoko (f)
(D.S.P)
Pau (f)
(D.S.P)
Tera (f)
(D.S.P)
Kainana (m)
= Te Kuraakanana
⑩
Te Araroa (f)
(D.S.P)
②
Kautai (m) only
= Ngapokokinau
③
Iotia (m)
= Tereapii
④
Mareta (f)
Issue
⑤
Tereapii (f)
⑥
Ma(m)
=Mere MB 27/153
⑧
Vaataua
(m)
⑦
Anguna
(m)
Rima
(f)
Te Tupuariki (m)
= Etetera (f)
Rea (m)
& others
- Marona
- Amaru
- Rea
- Teura
- others (dc)
Nooroa
Holds occupation rights
by S.O dated 25.3.70
Makiroa (f)
Miriama (f)
Ors
Te Tupuariki (m)
= Teaura
Others
Tiano Gilmore
The objector holds occupation
right of S.O dated 25.3.1970
MB 29/188
Elizabeth Ponga
The applicant's
sister who appeared
for her brother
Tetupuariki (m)
The applicant
Vaine (f)
Rosemary (f) dcd

There are two flaws in this argument. Firstly the land is not Ariki nor Mataiapo title land. Secondly even if the land was title land the occupying family member could only be put out and lose that right if some serious crime had been committed. Indeed the second passage or quote from Lord Gudgeon set out in Mrs Ponga's affidavit page 2 paragraph 3 confirms this ancient customary system. However it is more important to look at Gudgeon J's 1908 judgment and comments already set out in paragraph 2 herein which said that the aim of the Court was to give each man his own land and make him independent of everything but the law. The important issue in this case is simply: Who has the right to occupy Section 153?

Reference to the 1908 order and to the schedule appended, as well as the historical record, illustrates clearly that Section 153 was allotted as a house site for occupation by the Kainana family. In fact 6 of the 10 persons named - see numbers 3-8 on schedule - were Kainana's children, and the other 4 were his three sisters (numbers 1, 9 and 10) and nephew (number 2). Kainana occupied the land at the time, a family home was built there and from 1908 down to today the site has been occupied by direct descendants of Kainana. The applicant descends from Tapaeru and Kautai but is not a descendant of Kainana. I propose to look at the question shortly as to whether there has been any act or omission which would entitle the Court to intervene and cancel that long standing occupation by the Kainana family. At this point however I reject the submission that this land is title land and that the senior family can step in and assert that right to gain possession and occupation of Section 153.

In her second ground Mrs Ponga states that both her family - the senior line - as well as members of the Kainana family, support her application. Counsel for the objectors argue that those present at the family meeting on 4 February 1997 were not a majority of owners as required to support an occupation right. There was dispute between the parties at the hearing on 7 May as to representation of the family at the February meeting. This ground is more relevant to the issue of a Section 50/46 occupation right. There is no such application currently before this Court. The succession application seeks sole occupation rights but the applicant has not in the papers filed or in submission to the Court, sought issue of a Section 50 order. It appears the Court is being asked to revoke the 1970 order in favour of Tiano and replace it with a sole succession order and occupation right in favour of the applicant. Because there have

been only two of the 10 original owners succeeded since 1908 there remains a possibly long list of descendants who would have a claim for inclusion but who are not yet shown on the list. It may be important in future decision-making processes over Section 153 to have the title updated so as to show all the beneficial owners. On the other hand and in order to bring certainty to occupation rights it may be necessary for this Court on application to it to determine ownership of this small section. I shall come back to this question shortly. Reference to the minutes of the family meeting and the later consents signed by various family members indicate a cross section of the Araiti family have taken part in discussing the future occupation of Section 153. Counsel for the objector contends that this cross section is not a consensus view of the majority supporting the grant of an occupation right to the applicant. Although the question of representation is important and relevant, the Court is unable to say from the evidence submitted whether the applicant or the objector is correct as to actual representation. It is also necessary to look at the discussion which took place at the family meeting. It is quite evident that the primary objective of the applicant was to secure a house site for himself. Mrs Ponga stated at the meeting:

> *"Tupu was back to stay and wanted land by the seaside, and hence the choice of this land".*

Obviously as Section 153 was already occupied by another family member there was a need to establish reasons for the eviction of that owner. The meeting then was provided with the grounds for revocation of Tiano Gilbert's occupation right. These grounds are the same grounds as those submitted to this Court. I move now to look at the next ground of the applicant's case namely that the application is supported by Makea Nui Mere Maraea Ariki.

In a letter to Justice Dillon dated 17 February 1997, Makea Nui Meremaraea Ariki gives her consent to the application. I do not propose to deal at length with this letter as the Court has not heard evidence from Meremaraea and needs first of all to be satisfied she holds title as Makeanui Ariki. Additionally, for the reasons set out earlier relative to the original 1908 order and Judge Gudgeon's statement, there is no authority or power vested in the Ariki to determine at will who should occupy Section 153 and thereby effectively evict the existing occupier. The land was given to the Kainana family as a house site for occupation by that family and only the Court, on application

to it, has the power to determine what will happen to that site. This is not to say the Makea Ariki's views are not to be taken into account and obviously in this case Meremaraea has been influenced by the long absence of Mrs Gilbert. Nevertheless the Court is required to be satisfied that sufficient grounds exist for the revocation of an existing right and the substitution of another. This brings the Court back to the last and main ground of appeal.

The applicant submits through Mrs Ponga that Mrs Gilbert has lived in New Zealand all her life and only fleetingly returned in 1970 to get her occupation order. Mrs Ponga states the land was used as a piggery and rubbish dump and has remained vacant except for a fishing boat and commercial containers left on the land by Tiano's cousin.

In response to this Tiano Gilmore, through her duly authorised agent Miriama Pierre who was called as a witness, claims that since 1970 and up to date the section has been kept clean and tidy. The old house has been removed and the site has been prepared for a house. Miriama Pierre stated that Tiano has ordered a pre-cut house to be sent from New Zealand and that the fabricated building materials were actually at her home ready for the house to start.

The witness produced photographs taken in February 1997 showing the section to be clean and tidy. In an earlier letter to the Registrar dated 31 January 1997 Miriama claimed the land had never been neglected and the long delay in building was due to Tiano's need to save money. The section in its vacant state was used to store the Tupapa community fish boat, as parking space for Tupapa people attending the Maraerenga meeting house and also to allow the Strickfam shop to store containers and avoid congestion by the road.

The Court is satisfied that the allegations made by the applicant have not been proven. Mrs Ponga had the opportunity to lead evidence on the state of the section but did not do so. She also cross-examined Miriama Pierre at some length but this examination was not helpful to her.

It is true that 27 years is a long period for a section to lie vacant. Under the terms and conditions of occupation orders issued by this Court pursuant to Section 50/1946 a 7

year term is imposed on commencement of house construction. This occupation right was not issued under the 1946 Act and is not governed by any conditions such as now attached to Section 50 orders. Despite that lack of governing conditions as to building, this Court must give weight to the fact that there has been a very long delay in building. Counsel for Tiano Gilbert submits that this Court has no jurisdiction to cancel the 1970 occupation right granted by a succession order and that revocation of the succession order can only be pursued by a separate application.

The Court has already commented that there are no separate applications presently filed in Court either to revoke the 1970 order or grant a new occupation right.

An application to revoke a succession order is provided for in Section 450 of the Cook Islands Act 1915. The section says:

> *"450. Revocation of succession orders*
>
> *A succession order made in error may be at any time be revoked by the Land Court, but no such revocation shall affect any interest therefore acquired in good faith and for value by any person claiming through the successor nominated by the order so revoked."*

The important and qualifying words are "made in error". An applicant before the Court seeking revocation must satisfy the Court an error was made. The section is remedial and designed to correct mistakes in succession such as the omission of an entitled child of the deceased. Reference to Minute Book 29/137-138 discloses that Tiano Gilbert claimed as a grand daughter and her application was supported by Makanui Ariki. Mrs Ponga claims that the Court must have relied on Makeanui Ariki's statement that Tiano Gilbert had the consent of the majority of owners. Mrs Ponga, apart from referring in her affidavit to the rejection of her mother's objection and her contention that Tiano did not have majority support, has not produced any evidence that the Court's succession order was made in error.

Section 450 gives the Court a discretion in determining whether a succession order be revoked. In exercising its discretion the Court is obliged to take into account all relevant matters. The applicant has failed to satisfy the Court that an error was made in 1970 when Tiano Gilbert was awarded the occupation right. Apart from that requirement the Court in exercising discretion is bound to exercise its discretion fairly.

These further matters given in evidence are relevant to the exercise of that discretion in this case:

(i) Illness and difficulty in raising monies to build a home resulting in the long delay by Tiano Gilbert.

(ii) The property has been maintained and cared for.

(iii) The section has been used for community purposes and not leased out to a stranger for commercial gain.

(iv) The occupier has assembled in Rarotonga the prefabricated house and is ready to commence building.

(v) There has been no objection until 1996 over the delay.

In my view it would be unjust to now revoke the succession and accordingly I reject the applicant's request for revocation.

There is also another most cogent reason for not disturbing the existing right. The application before the Court is brought by a member of the wider family and by a descendant of Tapaeru and Kautai who were named in the 1908 order (see Schedule numbers 1 and 2). The applicant is certainly entitled to seek succession and that right is evidenced by whakapapa. On the other hand this particular section was set aside to meet the claim of Kainana. Since 1908 and possibly before that date the section was occupied by Kainana and then by direct Kainana descendants for the past 88 years. It seems to me that it would be flying in the face of well established custom to evict a direct Kainana descendant and substitute another family line through Tapaeru unless satisfactory grounds both at customary law and statutory law existed. In 1959 Judge Morgan whose knowledge of Cook Island customary laws in the field of succession is widely respected saw fit not to disturb the position by allowing a succession to Anguna with the consequent further addition of successors to the title. He dismissed the application recognising that the site was only 1/4 acre in extent. The learned Judge suggested all the descendants of the 10 original owners should get together and

arrange a workable agreement. The present applicant submits that the family meeting on 4 February 1997 was in accord with Judge Morgan's recommendations. I reject that submission. There is a need for greater representation than occurred that day. Judge Morgan's views were expressed 38 years ago and the title position, if all succession proceeded, would produce a long list of successors today. This Court shares the view that the descendants of the 10 original owners should meet under an independent Chairperson to find a final resolution to the future occupation of Section 153. Suffice to say, however, at this point that the court is not prepared to make the orders sought in the present application. Those applications are hereby dismissed. This means that Tiano Gilbert still retains sole occupation right by virtue of the 1970 order.

The Court brings to the notice of the parties that Section 409(a) of the Cook Islands Act might provide a procedural jurisdiction to resolve future occupation rights particularly on the death of the present occupier. This Court cannot of course anticipate what a later Court might do nor can it prevent any person from proceeding with further applications. The Court can say however that Kainana descendants have a strong claim to continued occupation by members of that family and this should be recognised by the larger Araiti family. As a consequence of this it is not necessary for me to stress that a decision on future occupation should be made after full consultation with the direct descendants of Kainana. Any such decision must respect the present right of occupation by Tiano Gilbert.

The Court considers that this is a family matter and in the special circumstances is not prepared to make any order for costs.

Dated this 16th day of September 1997.

A G McHugh J