IN THE HIGH COURT OF THE COOK ISLANDS (LAND DIVISION)

App No. 291/2013

IN THE MATTER	of Section 409(f) of the Cook Islands Act 1915
AND IN THE MATTER	of an application to hear and determine the right to hold the TANGIIAU RANGATIRA TITLE
BETWEEN	ARAMA JOSEPH WICHMAN **Applicant**
AND	TUATATA TOETA on behalf of the descendants of Tangiau also known as Putimere **Objector**

Hearing: 28 April 2014 (heard at Rarotonga)

Appearances: Mathilda Miria-Tairea for the applicant
Tina Pupuke Browne for the objector

Judgment: 17 April 2015

DECISION OF JUSTICE W W ISAAC

Introduction

[1] The applicant, Arama Joseph Wichman, seeks a determination from the Court pursuant to s 409(f) of the Cook Islands Act 1915 as to his right to hold the office of Tangiiau Rangatira on the basis that:

(i) The applicant was duly elected by his tribe according to Maori custom and practice;

(ii) A meeting of the Ngati Tangiiau was held on 13 December 2012 at the Kavera Meeting House to determine from amongst the family a person to be invested with the title of Tangiiau Rangatira; and

(iii) It was agreed by all those present that the title ought to be bestowed upon the applicant.

[2] Tuatata Toeta objects to the application on behalf of the descendants of Tangiau, also known as Putimere.

Applicant's submissions

[3] The applicant submits that there are six branches of Ngati Tangiau:

(i) The Putimere Te Akamei Tangiiau line:

i. Tamatoa Tamaau;

ii. Tauariki Tamaau;

iii. Pirangi Tamaau;

iv. Rere Tamaau;

(ii) The Tuterangi Te Akamei Tangiiau line:

v. Ioveta Tuterangi;

vi. Vaine Turuma Tuterangi

[4] The applicant belongs to the Ioveta Tuterangi line. He states that he was invested with the Tangiiau Rangatira title following discussions within his branch of the family that it is time for their branch to hold the title. His father approached the applicant's elder brother, and he agreed that it should go to the applicant on the basis that he already holds a church title. His father's brother also agreed that the title should go to the applicant.

[5] The applicant states that a family meeting was held in early November 2012, which was attended by most if not all of the children of Tearikivaine Ioteva Tuterangi

(the Ioteva line) that were present on Rarotonga at the time. It was at this meeting that the Ioteva line nominated the applicant to hold the title.

[6] A second family meeting was held a week later with both the Ioteva line and the descendants of Vaine Turuma (the Turuma line) in attendance. The Ioteva line sought support from the Turuma line for the nomination of the applicant. This support was given.

[7] A third meeting was held on 6 December 2012 at the Ruaau Meeting House with attendance from all branches of Ngati Tangiiau. At the meeting, the Tamatoa Tamaau and Tauariki Tamauu lines objected to the applicant's nomination.

[8] All six branches of the family reconvened for a fourth meeting on 13 December 2012 at the Kavera Meeting House. The Tamatoa and Tauariki Tamaau branches remained in opposition to the nomination on the basis that in their view the applicant's family has no right to the title as it belongs to their grandmother, Tuiarongo who married Tamaau. And in addition, they stated that they had already selected May Henry to hold the title. The applicant states that according to the Tangiiau genealogy passed down by their ancestors, the Tangiiau title originated from Tamaau's line, and not through his wife, Tuiarongo. Tuiarongo is from the Tinomana clan, but from a different branch.

[9] The applicant states that although they were aware of the objections, his nomination had majority support from four of the six branches, and he was duly invested in accordance with Maori custom on 7 January 2013 at Te Marae Verovero o te Ra o Tangiiau Rangatira. The applicant states that a number of members of the objecting lines attended in support.

Objector's submissions

[10] The objector objects to the application on the following grounds:

(i) The applicant is not a member of those entitled to hold the Tangiau Rangatira title;

(ii) The applicant is a member of the Tutaranianini line, the younger brother of Tangiau Putimere;

(iii) Those that elected the applicant are not of the kopu entitled to elect the person to hold this rangatira title;

(iv) The title has been in the line of Tangiau Putimere for many generations. Tangiau Putimere died in around 1910 (MB 24/374). After his death, the titles went to Tamatoa, and on Tamatoa's death, it went to Tepai (MB 14/120). On the death of Tepai Tamatoa, the title went to his eldest son, Tepai Tepai; and

(v) The Putimere family have yet to appoint a successor to the Tangiau Rangatira title.

The hearing

[11] The matter was initially set down to be heard on 7 October 2013 before Savage J, but was adjourned. I heard the application on 28 April 2014.

[12] At the hearing, counsel for the applicant stated that it has been acknowledged that the original ground for objecting the applicant's nomination – that the title derived from Tuiarongo – was incorrect and further grounds of objection are now advanced.

[13] The applicant stated that the genealogy submitted to the Court shows that the title has previously been held by the second child, not the eldest, on at least two occasions. Tepaii Tangiiau or Tinomana Tepaii Tangiiau held the title as the second son of Te Mutu Ariki. The title then went to Tepaii's second child, Tangiiau Te Vaa Tutae. Te Akamei also held the title as a second child. The genealogy shows that once the title went to Te Akamei, it reverted to his first child and continued down this line, the Putimere line, which holds the title to this day.

[14] Counsel for the objector raised the possibility that the reason Tuiariki Tamatoa was overlooked and the title given to Tepaii Tangiiau instead was that Tuiariki died as a child, and this may explain why the applicant's version of the genealogy shows that Te Mutu Ariki had five sons, whereas a version of the genealogy published in the Journal of the Polynesian Society refers to only four sons. The applicant conceded that this is possible.

[15] Counsel for the objector also pointed out in relation to Te Akamei holding the title as a second child, that the copy of the genealogy from the Court records has a note on it that the first child, Taka or Takaa, was non-living. The applicant stated that this was not noted on his copy of the genealogy, but he conceded that simply looking at the genealogy without knowing the reasons why those eldest children were overlooked for the title may not necessarily support his argument that these were instances where the first child was simply overlooked.

[16] Counsel for the objector submitted that one of the first grounds in the application is that the applicant was elected to hold the title by the tribe in accordance with Maori custom and practice. However, Court records show that the custom relating to this title for the past 104 years has been for the title to remain in the Putimere line. The applicant contended that the title only remained with that line because his line did not oppose it, and it is now their turn to hold the title.

[17] Counsel for the objector asked whether there had been a time since Putimere where his branch of the family had been involved in electing the title holder. The applicant stated that his family were involved with the election of the last title-holder, Boy Tepai, and that his father and aunt supported that appointment in return for the title coming to the applicant's family afterward. He also stated that his great-grandfather turned down the title before it went to Tepai. Counsel for the objector highlighted that the 1941 hearing held in relation to Tepai's appointment was not attended by any of the applicant's family. The applicant says that this was because his family had already given support for the appointment and therefore did not need to go to the hearing.

[18] Counsel for the objector also asked whether the applicant's family had followed the process for changing the custom, which involves an agreement to do so, given there were members of the family who did not agree to the title being rotated. The applicant stated that the purpose of the meeting held with all the branches of the family was to make such an agreement and he had 75 per cent support for the rotation of the title to his family.

[19] Upon questioning from counsel for the objector, the applicant also conceded that the majority of people who attended his investiture in support were from his branch of the family.

[20] Upon being questioned by the Court, the applicant stated that custom depends on the time when the title is invested and whoever is strongest to take it. He accepted the title because his father felt it was time for their family to take it up from the Putimere branch of the family following an agreement made when the last Tangiiau Rangatira was invested; that after the death of that title-holder, Tepai, the title would switch and the families would take turns.

[21] The applicant's aunt, Vaikoai Simiona Wichman also referred to as Vaikoai Valoa, gave evidence that when the last title-holder was appointed in 1979, a meeting was held with the four Tamauu branches, but the only representative of the Tuterangi branches invited was the applicant's father, and that is why she went along and objected, as everyone should be invited to a meeting concerning the title. Mrs Valoa stated that it was agreed at this meeting that when that title-holder died, the title would go to the applicant's family. Mrs Valoa stated that the objector, Tuatata Toeta, was at that 1979 meeting. Counsel for the objector rejected that assertion. Mrs Valoa could not remember the date of this meeting and no minutes were able to be produced for the Court. Mrs Valoa also stated that the title had been offered to her grandfather, but he had turned it down.

[22] The applicant's brother, Edward Wichman, stated that when he approached the objector about the meeting they were calling to discuss the applicant's nomination, she told him that the title was already taken by May Henry and the applicant's family had no right to it as it belonged to Tuiarongo. The objector didn't attend the meetings in December 2012. Others attended the meeting and objected to the applicant's nomination on the same basis, but as the majority of the meeting supported the view that the line is from Tangiiau, not Tuiarongo, they went ahead with the applicant's investiture. Mr Wichman stated that in his understanding of custom, it is customary for the family to meet, make an agreement, and go through with the decision of the majority.

Events following the hearing

[23] Following the hearing, counsel for the objector filed a memorandum requesting an opportunity to call witnesses on the basis that Vaikoai Valoa had given evidence that as a condition for the election of the last title holder, the Putimere family agreed that on Tepai's death, the title would go to the Tutaranirani line. And further that it was alleged that the objector was present at that meeting and was aware of the agreement.

[24] Counsel for the applicant opposed this request on the basis that the objector had been given the right to be heard and chose not to call witnesses.

[25] I declined the request; the application was properly advertised and the parties were given equal opportunity to be heard.

Applicant's closing submissions

[26] The objector says that the applicant is ineligible because he descends from the younger brother of Tangiiau Putimere. However the applicant submits that if you look back ten generations, it can be noted that the title was not exclusively given by the eldest child. There are two instances where the title was held by the younger sibling, and in one of those cases, the title was vested in the son of the younger sibling, namely Tangiiau Putimere. There are no Court records to indicate the reasons for this, but the genealogy demonstrates that it is not mandatory for the title to be held by the eldest child.

[27] The applicant also states that May Henry, the person selected for the title by the Tamatoa and Tauariki lines, is not the eldest. This demonstrates that the title is not exclusively held by the eldest, and it is not uncommon for a younger sibling to hold the title.

[28] The objector also states that those who elected the applicant are not of the kopu entitled to elect the title-holder. The applicant states that he was fairly elected by members of the Tangiiau lines. Tangiiau Rangatira should not be elected by a few from the eldest line only. Four of the six lines supported the election of the applicant. This is clearly a majority and they have exercised their right to elect the Tangiiau Rangatira of their choice.

[29] The title may have been held by the Putimere line for over 100 years, but this would not have been the case if the applicant's great-grandfather had been well enough to accept the title when he was approached to hold it. Regrettably there are no minutes to demonstrate that this offer was made.

[30] Vaikoai Wichman Valoa also gave testimony that she was present at a meeting in 1979 at which it was agreed that after the last title-holder, Boy Tepai died, the Tangiiau Rangatira title would be given to the Tuterangi line. This was supported by the

applicant's brother, Edward Wichman, who had been told of this agreement by his father who was also present at the meeting. Again, no records of this meeting were given to them.

[31] Those present at the meeting on 13 December 2012 agreed that the title should rotate within Ngati Tangiiau. The applicant submits that title should be shared among the family and not held permanently by a particular line due to their rank in the family. The idea of rotation was raised as a good way to reunite the family, and those who supported the applicant confirmed that the practice from now onwards should be that the lines take turns holding the title. This rotation system is currently used by the Ngati Tinomana Ariki of Puaikura.

Objector's closing submissions

[32] The objector submits that there appears to be no dispute as to the five previous holders of the Tangiiau Rangatira title:

(i) Tangiiau Putimere (from the late 1800s to 1910);

(ii) Tamaau (Putimere's son);

(iii) Tamatoa (Tamaau's eldest son);

(iv) Tepai Tamatoa (Tamatoa's eldest son);

(v) Tepai Tepai (Tepai Tamatoa's eldest son).

[33] The objector submits that the Tutaranirani line has never held the Tangiiau Rangatira title. The applicant claims he was elected by his tribe in accordance with Maori custom and practice; however this was not the case. The Maori custom and practice in relation to this title is that the title remains in the Tangiiau Putimere line, passing from eldest son to eldest son. This has been the custom for over 100 years.

[34] The applicant now seeks to amend that custom, claiming at the hearing that there was an agreement reached by the family to amend the custom at the meeting at which Tepai Tepai was elected. The applicant claims that members of the Putimere family agreed that as a condition of Tepai being elected the hold the title, it would pass on his

death to the Tutaranirani line. This was the first time this argument had been raised. No minutes could be produced supporting this purported agreement.

[35] Counsel submits that the Putimere line would not have made such an agreement; Tepai's selection in 1979 was in accordance with custom. The evidence of Vaikoai Valoa should be treated with caution.

[36] Counsel submits that the applicant did not state anywhere in their application or affidavit in support that it was suggested that the applicant's selection relied on an agreement made in 1979. The objector was therefore taken by surprise at the statements made by Mrs Valoa. Further, Mrs Valoa was not known to be one of the witnesses, she simply asked to be called after Mr Wichman gave evidence. The request to call witnesses was made because the objector was taken by surprise by Mrs Valoa's evidence and the objector was not given the opportunity to call witnesses.

The law

[37] The Court's jurisdiction to determine the right of any person to hold office as an Ariki is contained in s 409 of the Cook Islands Act 1915:

> **409. Miscellaneous jurisdiction of Land Court** – In addition to the jurisdiction elsewhere conferred upon [the Land Court] by this Act, the Court shall have jurisdiction –
>
> ...
>
> (f) To hear and determine any question as to the right of any person to hold office as an Ariki or other Native chief of any island.

[38] In the 1948 Native Appellate Court decision *Re Makea Nui Takau*, the Court stated:[1]

> It is not the function of the Native Land Court itself to appoint an Ariki or other Native chief to office. Any such appointment can only be made under the ancient custom and use of the Natives of the Cook Islands.

[39] This was confirmed by the Native Appellate Court in *Re Tinimana*:[2]

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1 *Re Makea Nui Takau* (1948) Native Appellate Court of the Cook Islands, App 147, 16 October 1948, Morison, Morgan and Harvey JJ.

2 *Re Tinimana* (1948) Native Appellate Court of the Cook Islands, App 2, 14 October 1948, Morison, Morgan and Harvey JJ.

> The most that the Court can do it to declare for the guidance and assistance of the people what it believes to be the custom governing such an appointment ... the most it could do if it found that Tepai had not been properly elected according to custom would be to declare that there had been no election, and then a fresh election would be necessary.

[40] Therefore it is clear that s 409(f) does not give the Court jurisdiction to appoint an Ariki or Native chief. The Court's role is limited to answering questions as to the right of a person to hold such office. This is done by consideration of the applicable custom and whether it has been followed.

[41] However, it is noted that in some situations, alternative agreements may be reached in relation to succession to a title. As observed by McHugh and Dillon JJ in a 1995 decision concerning the Makea Nui Ariki title:[3]

> Unless and until the people decide for themselves whether they wish to bind themselves to an arrangement or agreement then the established custom must be followed. In the absence of an arrangement or agreement, and this court finds no such position presently obtains, established custom must prevail.

[42] Thus, the Court may also consider whether an arrangement or agreement has been made to diverge from custom.

Discussion

[43] Broadly, the applicant claims that he has the right to hold the title on the basis that the title has not always gone to the eldest child; there was an agreement made in 1979 that the title would come to his branch of the family next; and the majority of the branches of the family who were in attendance at a meeting in 2012 supported his nomination to hold the title.

What is the custom in relation to this title? Has it been followed?

[44] The genealogy presented to the Court has not been contested, nor is there any dispute as to who has held the title for the past 104 years; both parties agree that the Putimere line have held the title during this time.

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[3] *MacQuarie – Makea Nui Title* (1995) High Court of the Cook Islands (Land Division) at Rarotonga, Apps 502/94 and 138/95, 18 September 1995, McHugh and Dillon JJ [*Makea Nui Title* (1995) McHugh and Dillon JJ]. At 19, (emphasis added), and at 42.

[45] Court records submitted by the objector show that at 24 Minute Book 374 it states "Tangiiau in title is Putimere ... He died about 50 years ago". This entry also notes that "Takaa Tamatoa ... died without issue"; at 19 Minute Book 25 it states "Tangiiau in title is Putimere who was holding the Tangiau title at that time. TePai Tamatoa holds the title today". There is a also a diagram showing the line from Putimere to Tamaao to Tamatoa; and at 14 MB 120, which specifically relates to "The title Tangiiau", it notes the family's agreement for TePai to succeed to the title on Tamatoa's death.

[46] Therefore it is clear that the custom and practice in relation to this title for the past 104 years has been for it to pass down the Putimere line to the eldest son.

[47] The applicant raised examples of instances where the title had not gone to the eldest son. These instances date from well over 100 years ago. It is therefore impossible to ascertain the reason why the title may have passed that way; eldest children may have died in childhood or otherwise been unsuitable to hold the title, or there may have been agreements made to diverge from the custom at that time. It is impossible to know. Therefore the examples given by the applicant, due to their age and lack of evidence-based reasoning, do not support his contention that the title does not customarily go to the eldest child when it is clear that this has been the case since Tangiiau Putimere over 100 years ago. Nor do these instances support the contention that custom and practice now allows the title to be held by another line.

[48] It is clear that for over 104 years the title has passed down the Putimere line from the eldest son to the eldest son. This is the established custom and practice in relation to this title. The applicant is not of the Putimere line.

Has there been an agreement been made to diverge from the custom?

[49] The applicant also claims that he has the right to hold the title on the basis that there was an agreement made in 1979 that the title would come to his branch of the family upon the death of the title-holder appointed at that time. The applicant's aunt claims that the objector was present when this agreement was reached in 1979. The objector rejects this assertion and claims no knowledge of any such agreement being reached. The applicant's aunt could not remember the date of this meeting and no minutes were able to be produced for the Court.

[50] Without any evidence of this meeting and agreement, and given that members of the line customarily entitled to hold the title dispute that it was ever made and do not agree to it, I am unable to give the purported agreement any weight. The agreement from 1979 does not provide a valid basis to diverge from the custom in this instance.

[51] In addition, the applicant states that he has majority support for his nomination as four of the six branches of Ngati Tangiau agreed to the rotation of the title to his branch of the family. This support is evident in the minutes of a meeting held in December 2012, which the applicant states was attended by most of the family present in Rarotonga at the time.

[52] Although members of four of the six branches of Ngati Tangiau supported his nomination, two branches did not. The two branches objecting are the two senior branches of the Putimere line; those customarily entitled to succeed to the title. Given that two branches of Ngati Tangiau do not agree to change the custom and those two branches are the ones customarily entitled, the decision to go ahead with the applicant's investiture does not constitute a valid agreement to diverge from the custom. To enable a divergence from the custom associated with the title, those entitled would have to agree. This has not occurred.

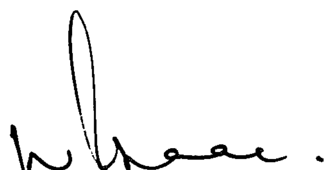
Decision

[53] The current applicant does not have the right to hold the Tangiiau Rangatira title. He was not appointed in accordance with the applicable custom and there has been no valid agreement as to an exception to the application of that custom in this instance.

[54] For these reasons, the application is dismissed.

[55] A copy of this decision is to go to all parties.

Dated at Wellington this 17th day of April 2015.



W W Isaac
JUSTICE