

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

**APPLICATION NO'S: 47/11 & 391/11**

**IN THE MATTER**

**of the land known as  
OROOROAMOA SECTION  
93L ARORANGI**

**AND**

**IN THE MATTER**

**of an application for  
Revocation of Occupation  
Right by NOOROA TUORO  
and some of the Landowners  
Applicant(s)**

**AND**

**IN THE MATTER**

**of TUATATA TOETA  
Respondent**

Date: 29 April 2015

Counsel: Mr T Moore for the Applicants  
Mrs T Browne for the Respondent

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**DECISION OF THE HONOURABLE MR JUSTICE WILSON ISAAC J**

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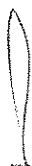
**INTRODUCTION**

[1] This is an application by Nooroa Tuoro for certain landowners in Orooroamoā 93L Arorangi to cancel and Occupation Right of Tuatata Toeta made on 25 July 1983.

[2] The Occupation Right made by Dillon J stated that it was "...for planting as from 1 January 1984 in favour of Applicant on usual terms and conditions – 4 acres approximately as per plan plus ROW – to pay survey and order fees."

[3] The usual terms and conditions attaching to this Occupation Right record as follows:

1. **THAT** the said land shall be used as a site for agricultural purposes as from the 1<sup>st</sup> day of January 1984



2. **THAT** condition (1) above shall be complied with within a reasonable time or within such time as the Court shall determine
3. **THAT** the right of occupation hereby granted may be used by the owner of the right of occupation as a security for any loans or moneys advanced to him/her by any person or lending institution approved by the Minister of Finance for the purpose(s) specified in (1) above on the land described in the schedule hereto
4. **THAT** in the event of any default by the person in whose favour the right of occupation has been granted in the repayment of any moneys lent or advanced pursuant to condition (3) above the lender may occupy and use the right of occupation for a period not exceeding 15 years or such shorter period as may be necessary for the purpose of securing the repayment of any moneys due and owing by the holder of the right of occupation
5. **THAT** the owners of the right of occupation may nominate any person to occupy such right of occupation
6. **THAT** a Right of Way is ordered as per plan

[4] By application dated 7 November 2011 Nooroa Tuoro applied to cancel this Occupation Right. The case was initially heard by me on 27 February 2012 at which time I directed submissions to be filed by Mr Moore for the applicant and Mrs Browne for the Respondent as to the jurisdiction to cancel an Occupation Right. These have been filed and I now issue my decision in this matter.

#### **CASE FOR THE APPLICANT**

[5] Mr Moore for the applicant argued that the Court in application 343/11 by Nooroa Ataera to cancel an Occupation Right on Aremango Section 7B4B2 Ngatangia, used its inherent jurisdiction to put an end to an Occupation Right by way of declaration. In that case the Court stated the “terms and conditions of the order...have not been met for 40 years approximately. The order by its very terms has lapsed, and I so declare.”

[6] The applicant submits that the same process should apply here in that the present occupation right in favour of Tuatata Toeta dated 25 July 1983 has ended by operation of law in that the conditions of the order have not been met for 29 years.

[7] It was also suggested that the Court issue a practice note relating to the determination of Occupation Rights being made by the Court pursuant to the Declaratory Judgments Act.

### CASE FOR THE RESPONDENT

[8] Mrs Browne for the respondent considers that there is no jurisdiction given to the Court in terms of s 50 of the Cook Islands Amendment Act 1946 to cancel or revoke an Occupation Right.

[9] Counsel also refers to the Aremango case referred to by the applicant and sets out the terms and conditions of that Occupation Right which she maintains were relied on when he made the Declaratory Judgment order. These terms and conditions in her view enabled the Court to make the cancellation order.

[10] In the present case no such conditions exist and for that reason Counsel submits that the Aremango case is not relevant.

[11] As a result Counsel maintains the application should be dismissed.

### DISCUSSION

[12] Section 50 provides as follows:

**50. Land Court may make orders as to occupation of Native Land – (1)** In any case where [the Land Court] is satisfied that it is the wish of the majority of the owners of any Native land that that land or any part thereof should be occupied by any person or persons (being Natives or descendants of Natives), the Court may make an order accordingly granting the right of occupation of the land or part thereof to that person or those persons for such period and upon such terms and conditions as the Court thinks fit.

[13] As correctly pointed out to Court s 50 does not give the Court jurisdiction to cancel or revoke the Occupation Right.

[14] The Order does however provide for the Court to determine as it thinks fit the time the occupation should run and the terms and conditions that should apply.

[15] This section by its very nature gives the Court a discretion depending on the nature and facts of each case to determine the terms and conditions most applicable to that case.

[16] The terms and conditions in the present Occupation Right before the Court are set out in paragraph [3] above.

[17] Mr Moore submits for the applicant that these terms and conditions have not been complied with for 29 years and as a result the Court has inherent jurisdiction to declare the Occupation Right at an end.

[18] Mrs Browne for the respondent is of the view that no conditions exist in the Occupation Right for Tuatata Toeta to cancel the Occupation Right.

[19] In my view there are terms and conditions within the Occupation Right which could depending on the facts lead the Court to make a Declaratory Order declaring that the Occupation Right was at an end.

[20] First, the Occupation Right records that the Occupation Right be used for Agricultural purposes from 1 January 1984 and that this condition be complied with within a reasonable time or such time as the Court shall determine. The Occupation Right also provides for a Right of Way to the site.

[21] Clearly, the question as to what is a reasonable time for compliance depends on circumstances in relation to this land and what has been done to it since 1 January 1984.

[22] Although no evidence was called on these issues, in the hearing before me, Mr Moore stated that we were dealing with a 28 year Occupation Right and that it was common ground that the Occupation Right was for "agriculture that nothing had ever been planted on it, on the side of the hill, the top of the property, no road had ever been put to it, no water has ever been run to it."

[23] Mrs Browne responded by saying "yes Sir that is the position."

[24] This exchange between the parties representatives makes it clear that the Occupation Right has not been utilized since it was ordered.

[25] To properly use agriculture land for planting you normally need access which was provided for in the Occupation Right and water. Neither of these services are present.

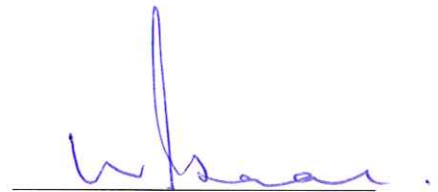
[26] Most noticeably however is that 28 or 29 years of growing seasons have not been used.

[27] By any measure that cannot be seen as compliance with the term and condition to use this land for agricultural purposes within a reasonable time.

[28] In short it is clear to me that there has been no compliance with the terms and conditions of the Occupation Right and I consider it is appropriate that this Occupation Right be cancelled.

[29] I therefore declare that the Occupation Right granted to Tuatata Toeta as at 1 January 1984 be cancelled.

[30] A copy of this decision to all parties.

A handwritten signature in blue ink, appearing to read 'Wilson Isaac, J.', is written above a horizontal line.

**Wilson Isaac, J**