

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

App No. 95/2013 and 230/13

IN THE MATTER of Section 409(f) of the Cook Islands
Act 1915

AND

IN THE MATTER TE WHAKAHEO ARIKI TITLE of
MANIHIKI and RAKAHANGA

BETWEEN

POPO BEN (95/2013)
Applicant

AND

TRAINEE SAMSON (230/2013)
Applicant

AND

UMUTAI GREIG and TAEPAE
MEHAU
Objectors

Hearing: 28 and 29 April 2014

Appearances: Mrs T Brown for Popo Ben
Mr R Tepapa Mairi for Trainee Samson
Mr U Greig and Mr T Mehau as objectors to the applications

Judgment: 10 September 2015

DECISION OF JUSTICE W W ISAAC

Introduction

[1] Mr Popo Ben and Mr Trainee Samson have each applied to this Court for confirmation of their right to hold the Te Whakaheo Ariki title. Mr Umutai Greig (a Mataiapo of Te Whakaheo) and Mr Taepae Mehau (the Chairman/Secretary of the Tarani clan) object to both applications. The applications were heard together on 28 and 29 April 2014 at Rarotonga.

Background

[2] Since the time of Iete Te Whakaheo's passing in around 1906,¹ there has been uncertainty about whether the Te Whakaheo Ariki title has been held according to custom, by whom, and the customary and formal processes needed to transfer the title and for confirmation of election of the title-holder.

[3] Although it is generally accepted that there have been title-holders since Iete's time,² none of the previous applications made to this Court for confirmation have been successful. Confirmation is now sought by two separate applicants, Mr Popo Ben and Mr Trainee Samson.

Submissions of Mr Popo Ben (first applicant)

[4] Two sets of submissions were filed on behalf of Mr Ben. At the hearing, counsel stated that the later set of submissions was to replace those filed earlier. However, information from all submissions is included here for completeness.

[5] The first applicant seeks an order from the Court pursuant to s 409(f) of the Cook Islands Act 1915 determining that he is entitled to hold the Te Whakaheo title.

[6] In reaching a decision under s 409(f), the first applicant submits that the following questions are relevant:

- (i) whether the applicant is entitled to be selected;
- (ii) whether the applicant has been elected by those that are entitled to elect;
- (iii) whether the applicant has been properly invested with the title in accordance with the custom of the title; and
- (iv) whether the applicant is fit and suitable to hold the title.

[7] On behalf of Mr Ben it is submitted that:

- (i) He is entitled to be elected because he is from the line of Tuteru Havake.

¹ Both "Iete" and "Iese" have been used in the parties' submissions. "Iete" is adopted throughout this decision for consistency.

² Several submissions state that since Iete, the title has been held in a "custodian" capacity.

- (ii) The first applicant has been elected by those who are entitled to elect. The two meetings that were held in January and June of 2011 were meetings of descendants of Iete, son of Tuteru Havake. A meeting for the Ui Mataiapo and Ui Rangatira was held on 26 November 2012.
- (iii) Popo Ben was properly invested with the title in Rakahanga on 29 November 2012. The investiture was carried out according to custom and there were no objections.
- (iv) The first applicant is fit and suitable to hold the title.

[8] Mr Ben objects to the application by Mr Samson because:

- (i) The Court in its 1970 decision ruled that Te Whakaheo Ariki title is a Rakahanga title;
- (ii) Mr Samson is not a member of the kopu ariki and is therefore not entitled to be elected;
- (iii) Mr Samson was not elected by the correct kopu ariki;
- (iv) The kopu ariki of Te Whakaheo does not support Mr Samson's election; and
- (v) The people of Rakahanga do not support Mr Samson's election.

[9] Mr Greig and Mr Mehau object to Mr Ben's application alleging that he is not eligible to be elected because his ancestor, Munokoa Koteka, was not the natural child of Tahiri and is therefore not a biological child of the Te Whakaheo Ariki line. Regarding this objection, Mr Ben submits that this issue was previously determined by the Court in 1970 and cannot be revisited unless the objector has new evidence to support that claim. Because such evidence has not been submitted, the objection should be disallowed.

[10] Counsel made a number of submissions in relation to genealogy and the Te Whakaheo title. It is submitted that Whakaheo-Tama, a son of Takai Te Whakaheo, died without issue and that on his death, the title passed from Whakaheo-Tama to his nephew Iete and that from there, it continued down Iete's line through Tarani and Tahiri. It is submitted that because Mr Samson is not from these lines, he is not entitled to be elected.



However, counsel agreed that if the kopu ariki is defined to include the issue of Takai Te Whakaheo as the Court did in 1970, the genealogy allows for more than the Iete line to form the kopu ariki.

[11] Evidence in support of Mr Ben's application was also given by Mr Sadaraka Puroku and Mrs Hauavaine Takai-Numanga. Regarding the constitution of the kopu ariki, it was submitted that it comprises all the descendants of Tuteru Havake through Iete and that from Iete, there are two family lines, Tahiri and Tarani.

[12] Mr Puroku gave evidence about the process that was adopted in the meetings of the kopu ariki held in Auckland, New Zealand. It was explained that the meeting held on 16 January was for the Tahiri and Tarani families and at that meeting, the Tarani family returned the title to the Tahiri line because James Haurua from the Tarani line had previously sat in the House of Ariki. It is also stated that as far as they are aware, no application was made to the court to determine James Haurua's right to hold the title and it could not be explained how James Haurua had been admitted to the House of Ariki.

Submissions of Mr Trainee Samson (second applicant)

[13] Mr Samson asks that the Court determine that he is the rightful person to hold the Te Whakaheo Ariki title and for Mr Ben's application to be dismissed. Regarding the title itself, it is submitted that the Te Whakaheo Ariki title is based in Manihiki and that there are not separate Ariki titles for Manihiki and Rakahanga.

[14] Mr Samson submits that his genealogy confirms his right to the Ariki title as he is linked to the original Te Whakaheo Ariki title holder. He states that he was approved to hold the Te Whakaheo Ariki title by the majority of the Te Whakaheo Ariki family at a meeting held on 7 August 2006. This was followed by a full traditional Te Whakaheo Ariki investiture service which was held on the Te Hono marae on 16 August 2006. Those who attended the meeting were from the kopu ariki of Takai Te Whakaheo Ariki from the Munokoa Tarau line. It is submitted that Mr Samson has represented his people unchallenged since this time.

[15] Under cross-examination, Mr Samson confirmed that that the Mataiapo who carried out his investiture was the Mataiapo Tutara, Tuteru Tetahua, and that the person holding that title was his mother. The other Mataiapo present at the investiture were

Tihauma Nitika (a title previously held by Mr Samson but given to his uncle, Tamatona Piniata) and Mokomokorua (this title had been given by Tamatona Piniata to his younger brother, Fonu Piniata). It was acknowledged that there had been an objection at his investiture. However, Mr Samson states that he is supported by the people of Manihiki and some of his family from Rakahanga.

[16] The second applicant believes that all Ariki should live with their tribe in the Cook Islands and that they are required to represent the people at the House of Ariki meetings. According to Mr Samson, Mr Ben has returned to live in New Zealand and has no intention of living in Rakahanga and Manihiki and serving his people there. It is alleged that instead, Mr Ben is using the title to elevate his social status.

[17] On behalf of the second applicant, it is submitted that Mr Ben is not entitled to the Whakaheo title because there was no vacancy in the role at the time he claims he was appointed. According to Mr Samson, the correct process to unseat the incumbent title holder would have been through family meetings and by establishing legal grounds as to why the second applicant should not hold the title.

[18] Mr Rahui Tepapa David Mairi made submissions on behalf of Mr Samson during the hearing and challenged several points raised by the first applicant. Mr Mairi challenged the genealogy contained in Terangihiroa's book *Ethnology of Manihiki and Rakahanga* because it was based on information given by the people of Rakahanga only. According to Mr Mairi, Terangihiroa did not spend much time on Manihiki.

[19] Mr Mairi believes that the title originated in Manihiki and agrees with Mr Mehau's view that the Te Whakaheo Ariki title belongs to Rakahanga including Manihiki.

[20] Regarding the transfer of the Te Whakaheo Ariki title, Mr Mairi questions the conferral of the title on Iete and the right of those Ariki who held the title as custodians to transfer the title by will. He submits that the last title holder was Takai Whakaheo-Tama, rather than Iete, and that all persons who have subsequently claimed to hold the title did so as custodians.



Objections of Mr Umutai Greig and Mr Taepae Mehau

[21] Mr Umutai Greig, jointly with Mr Taepae Mehau, objects to the applications of both Mr Ben and Mr Samson. Mr Greig explains that he is the holder of the Te Tipa Mataiapo Tutara title and that this is the Mataiapo that is responsible for performing the investiture of any holder of the Ariki title of Te Whakaheo. The basis of Mr Greig's objection is that:

- (i) Neither applicant has the support of the whole kopu ariki of Te Whakaheo Ariki;
- (ii) Neither investiture was carried out according to Maori customs;
- (iii) The ancestor through whom Mr Ben claims the title is not a biological child of the Te Whakaheo Ariki line; and
- (iv) The Te Whakaheo Ariki title is a Rakahanga title rather than a Manihiki one.

[22] Mr Greig says that both applications should be referred back to the Te Whakaheo kopu ariki so that they can meet, discuss and resolve the matter in a peaceful way. Once the Te Whakaheo Ariki has been elected and invested according to Maori custom, the matter can come back to Court for confirmation.

[23] Regarding the history of the title, Mr Greig submits that the last person to hold the title after Iete Te Whakaheo Ariki was Te Whakaheo James Ariki of the Tarani line. According to Mr Greig, Te Whakaheo James Ariki had been accepted in the House of Ariki representing Rakahanga and Manihiki (Tukao). The investiture of Te Whakaheo James Ariki was performed by Mr Greig's father who was Te Tipa Mataiapo Tutara at that time. In terms of the constitution of the kopu ariki, Mr Greig agrees that the two kopu involved are Tarani and Tahiri. According to Mr Greig, there is one Te Whakaheo family from Manihiki but the title is from Rakahanga.

[24] During the hearing, Mr Greig stated that he does not accept the decision of the 1970 Court regarding the issue of Munokoa Koteka's lineage.

[25] Mr Mehau also explained that the House of Ariki's policy is that the Court confirms that the person is entitled to hold the title and that until this is done, they cannot enter the House.

[26] He identified three points he wished to convey to the Court: that the Whakaheo Ariki title belongs to Rakahanga including Manihiki, that the kopu ariki families are the descendants from Iete (although Mr Mehau accepts that some say this includes descendants of Iete's mother), that Popo Ben's elevation was invalid because of his lineage, and that all the Ariki families would like the disputed title to be resolved. Mr Mehau believes that the Ariki families are those of Tahiri and Tarani.

The Law

[27] Section 409(f) of the Cook Islands Act 1915 gives the Court jurisdiction "[t]o 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."

[28] This provision 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 the title.

[29] The 1948 Native Appellate Court decision *re Makea Nui Takau* stated:³

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.

[30] This was confirmed by the Native Appellate Court in *Re Tinimana*:⁴

The most that the Court can do is to declare for the guidance and assistance of the people what it believes to be the customs 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.

[31] This principle remains the same today.

³ *Re Makea Nui Takau* (1948) Native Appellate Court of the Cook Islands, App 147, 16 October 1948, Morison, Morgan and Harvey JJ.

⁴ *Re Tinimana* (1948) Native Appellate Court of the Cook Islands, App 2, 14 October 1948, Morison, Morgan and Harvey JJ.

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[32] It should also be noted that the High Court has exercised its jurisdiction in terms of s 409(f) of the Cook Islands Act 1915 in respect to the Whakaheo title in 1966 and 1970.

The 1966 Decision

[33] This decision follows the 1965 application by Mehau Ngapoe to determine the rightful person to hold the Ariki Title of Te Whakaheo of Rakahanga and Manihiki. Chief Judge Morgan found that:⁵

- (i) History indicates that the title originated in Rakahanga and that Rakahanga is the seat of the Ariki and that one would expect the Ariki to live in Rakahanga;
- (ii) The election of a female is not in accordance with custom;
- (iii) No pronouncement was made as to whether Munokoa Koteka was a son of Tahiri;
- (iv) The last title holder was Iete who died in 1906;
- (v) The question of whether the people of Rakahanga wish to have an Ariki and if so, whether that Ariki be chosen from the Whakaheo family appeared to the Court to be a question for the people and not only for the descendants of Takai Whakaheo; and
- (vi) If an Ariki is appointed for the sole purpose of representing Manihiki and Rakahanga in the House of Ariki, it could not be claimed to be in accordance with tradition or custom as at that time, no Ariki of Manihiki or Rakahanga has ever taken part in a meeting of the Ariki of the Cook Islands.

The 1970 Decision

[34] Following the second application by Mehau Ngapoe in 1967, the court issued a further decision on the Te Whakaheo Ariki title in 1970. The Court determined that in order to make the decision, it was necessary to address three preliminary questions:

⁵ *Ariki Title of Te Whakaheo of Rakahanga and Manihiki* (1966) MB 1 Folios 240-248 at 6.

- (i) Whether selection or election of the title holder is done by the kopu ariki or the Ui Mataiapo;
- (ii) If selection is to be by the kopu ariki, it must be certain who the persons are who can rightfully claim to be members of such kopu ariki; and
- (iii) Whether there is any merit in the claim that the Whakaheo title should be split by having one holder in Rakahanga and another for Tukao, Manihiki.

[35] The Court determined that selection of the title holder shall be by the kopu ariki because precedent and practice based on Maori custom throughout the Cook Islands appeared to be in favour of this approach.

[36] It was determined that the kopu ariki should include and comprise all of the issue of Takai Whakaheo, the original progenitor of what is generally accepted as the Ariki line, and such issue is to include the issue of Tarau, son of Takai Whakaheo, if these persons can be ascertained with sufficient certitude. The Court noted there was some debate over whether Tarau was male or female, however, the Court concluded that in either case, his or her issue would be eligible members of the kopu ariki. Similarly, the Court concluded that all issue of Tahiri are to be included in the kopu ariki.

[37] On the issue of whether Munukoa Koteka was the son of Tahiri, the Court found that this should be accepted as fact because of the length of time that had passed and that it was impossible to produce conclusive proof.

[38] The Court did not see any merit in having a subsidiary Whakaheo title for Tukao, Manihiki, because this would serve no useful purpose and was likely to lead to dissention.

[39] Regarding the Te Whakaheo title, the court said that the seat of the title appears to be in Rakahanga and under Maori custom, the election should take place on the island or at least the outcome should be announced there. The reason given for this is that the local inhabitants of Rakahanga would have close contact with the Ariki.

[40] In this case, the Court concluded that the second application of Mehau Ngapoe should be dismissed because it had not been established that he had been properly elected to hold the title because of the former doubt as to who the composition of the kopu ariki.



Discussion

[41] The legislative provision and previous decisions of this Court demonstrate that this Court's jurisdiction is to confirm whether a title-holder has been invested with the title according to custom. While it is not the role of the Court to determine the content of that custom, it is necessary to consider its existence and practice and whether the custom has been adhered to by the applicants.

[42] There are several sources of information available to the Court when considering custom in this context. First, there is the evidence presented by the parties themselves and their supporters; second, there is the record of previous statements about custom of this title made to the Court in earlier hearings; and third, there is evidence about custom recorded in historical sources such as Terangihiroa's writings.

[43] I consider that all these sources are helpful in relation to this issue. It is evident that these sources do not all agree on the details of the custom or even on historical matters of fact. However, I consider there is enough information from these sources to enable the Court to draw some broad conclusions in relation to the custom relating to Te Whakaheo Ariki title.

[44] The key issues are these:

- (i) Whether the title is for both Rakahanga and Manihiki;
- (ii) The constitution of the Kopu Ariki for this title;
- (iii) That the candidate is a member of the Kopu Ariki;
- (iv) That the candidate is supported by the Kopu Ariki
- (v) That the Ui Mataiapo consent to the candidate's selection; and

Is the title for Rakahanga and Manihiki?

[45] The Court in its 1966 decision was called upon to determine the rightful person to hold the Ariki title of Te Whakaheo of Rakahanga and Manihiki. The Court concluded that history indicates that the title originated in Rakahanga and that Rakahanga is the seat of the Ariki. In its 1970 decision the Court also stated that the seat of the title appears to

be Rakahanga and that it did not consider there should be separate Ariki titles for Rakahanga and Manihiki. In the current proceedings it was submitted that the Te Whakaheo Ariki title belongs to Rakahanga including Manihiki. However, some parties disagree and state that it is a Rakahanga title rather than a Manihiki one.

[46] The evidence before the Court shows that there is a strong connection between both Rakahanga and Manihiki and the Te Whakaheo Ariki title. In 1970 this Court considered and decided against the idea of having a separate title for Manihiki and also considered that members of the kopu ariki lived on both islands. This suggests that the position of the Court at that time was that it was both a Rakahanga and Manihiki title.

[47] Having regard to the 1966 and 1970 decisions and submissions presented to me, I consider that the Te Whakaheo Ariki title is for both Rakahanga and Manihiki, that Rakahanga is the seat of the Ariki, and that the person who holds the title is expected to reside in Rakahanga.

How is the kopu ariki constituted?

[48] The parties in the current proceedings have submitted variously that the kopu ariki is comprised of those who are descendants of Tarani and Tahiri, those who are descendants of Tuteru Havake through Iete, and those who are descendants of Iete, and those who are descended from Takai Te Whakaheo.

[49] I agree with the approach taken in the 1970 decision that the kopu ariki should be broadly construed to include descendants of Takai Te Whakaheo. While I acknowledge that this creates some difficulty in that it results in a very large kopu ariki, I prefer this interpretation for two reasons:

- (i) As stated in the 1970 decision, Takai Te Whakaheo is accepted as having held the title properly and according to custom. No arguments as to the validity of his appointment as Ariki have been raised in this Court.
- (ii) No evidence has been presented to this Court to explain why this definition of the kopu ariki should be altered from the position in 1970.

Are the applicants members of the kopu ariki?

[50] The parties have provided genealogical information which has assisted the Court. This information shows that the first applicant, Mr Ben, is descended from Takai Te Whakaheo through the Tahiri line. Therefore he is a member of the kopu ariki and is eligible to be elected as a title-holder.

[51] Mr Greig has objected to Mr Ben's investiture on the basis that Mr Ben's ancestor, Munokoa Koteka, was not a biological child of the Te Whakaheo Ariki line. On this point I agree with the 1970 decision that it is not possible to determine this issue conclusively as too much time has passed. I therefore accept the submission that this matter has been decided by the Court and that in the absence of further evidence, it is not possible to enquire into this matter further.

[52] However, I also note that according to the submission of Mr Greig, regardless of whether Munokoa Koteka is a biological child of the Te Whakaheo Ariki line, Mr Ben is also descended from Takai Te Whakaheo via his great-grandmother, Maggie Greig.

[53] The genealogy submitted by Mr Samson shows that he is descended from a daughter of Takai Te Whakaheo Ariki. Therefore according to his genealogy, he too is a member of the kopu ariki and is eligible to be elected to hold the title.

Do the applicants have the support of the kopu ariki?

[54] In his submissions, Mr Ben has described the process followed in his election and investiture. He was elected by members of the Tahiri and Tarani families who attended two meetings held in January and June of 2011.

[55] However, as discussed above, the kopu ariki for Te Whakaheo Ariki extends beyond the descendants of Iete and includes all those who descend from Takai Te Whakaheo. There has been limited evidence presented to this Court to show that the broader kopu ariki was involved in Mr Ben's election or investiture. Again, there is not sufficient evidence before this Court to demonstrate that this has occurred. Therefore I find that it cannot be said that Mr Ben had the support of the kopu ariki in his election.

[56] Mr Samson has submitted that he was approved to hold the Te Whakaheo Ariki title by the majority of the Te Whakaheo Ariki family at a meeting held in August 2006.

He further explains that those who attended this meeting were from the kopu ariki of Takai Te Whakaheo Ariki from the Munokoa Tarau line.

[57] Although Mr Samson has submitted that he has the support of the kopu ariki, I cannot agree. This is because as established above, the kopu ariki for this title is broad and extends to all the descendants of Takai Te Whakaheo. It is not limited to those descendants of Munokoa Tarau only. Therefore it could be expected that in order to demonstrate support of the kopu ariki, this must be drawn from the whole kopu ariki and include participants and support from both Rakahanga and Manihiki and from the other family lines.

[58] For these reasons I do not agree with Mr Samson's statement that he has the support of the majority of the kopu ariki.

Have the Ui Mataiapo consented to the election of either applicant according to custom?

[59] Following Mr Ben's election at meetings held in January and June of 2011, a meeting for the Ui Mataiapo and Ui Rangatira was held on 26 November 2012. Materials submitted with Mr Ben's submissions show that there were several Mataiapo present at his investiture. However, I am not convinced that the Ui Mataiapo were sufficiently representative given that the meeting for the Ui Rangatira and Ui Mataiapo appears to have only included those who were members of the Tarani and Tahiri families. Therefore I conclude that the Ui Mataiapo have not consented to Mr Ben's election according to custom.

[60] Mr Samson has submitted that his election has been approved by the Ui Mataiapo, that his investiture was carried out by a Mataiapo, and that other title holders were present at the ceremony. However, it is acknowledged that these title holders were closely related to Mr Samson. I also note that they were relatively few in number. For this reason, I find that the Ui Mataiapo have not consented to Mr Samson's election according to custom.

Decision


[61] In summary, I find that:

- (i) both the first and second applicants are members of the kopu ariki and as such, are eligible to be elected as holders of the Te Whakaheo Ariki title; and
- (ii) neither applicant has demonstrated a sufficient level of support from the kopu ariki and Ui Mataiapo including participants from both Rakahanga and Manihiki.

[62] As a result of these findings, the Court is unable to confirm that either Mr Ben or Mr Samson has been appointed to the Te Whakaheo Ariki title according to custom. I therefore agree with Mr Greig's submission that both applications should be referred back to the Te Whakaheo kopu ariki so that they can meet, discuss and resolve the matter. I stress that it is important that the kopu ariki is correctly constituted to include all descendants of Takai Whakaheo.

[63] The evidence before the Court shows that there has been considerable effort in conducting meetings as family groups. However, it is important to ensure that these meetings encompass the entire kopu ariki. It is important that this issue is resolved to ensure that the Te Whakaheo Ariki title investiture can be completed successfully.

Dated at Rarotonga this 10th day of September 2015.



W W Isaac, J