

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

APPLICATION NO. 376/12

IN THE MATTER of the land known as **TAAPAKE 9,
TAKITUMU, RAROTONGA** and an
application for partition

BETWEEN **POONA TAUA**
Applicant

AND **TUNOA KAINA and INANGARO
KAMANA**
Objectors

Hearing dates: 13 and 16 July 2018
21 August 2017
(Heard at Rarotonga)

Appearances: Mr T Moore for the applicant
Mrs T Browne for the objectors

Decision: 20 December 2018

DECISION OF JUSTICE C T COXHEAD

Introduction

[1] This application was originally filed in 2013 by Mr Poona Taua (the applicant) seeking a vesting order in relation to Taapake Section 9 (the land) in the Takitumu region of Rarotonga. On 1 April 2015, agent for the applicant filed a memorandum amending the application to one for partition pursuant to ss 429 and 430 of the Cook Islands Act 1915 and r 348 of the Code of Civil Procedure 1981.

[2] The application is opposed by Tunoa Kaina and Inangaro Kamana (the objectors) who are also owners in the land. The grounds of opposition are that the applicant does not have majority support and that the applicant is acting outside of accepted family custom.



[3] Located on the South side of the island, the land is 5.28 ha in size and stretches from the mean high tide mark to the mountainous interior. The land is bisected at two points by the Main Road and by the Ara Metua. There are currently two leases over the majority of the beach front land. One is tourist accommodation and the other is a house which has been sublet outside of the family.

[4] Relative interests in the land were determined as between the three kopu: one third to the Taua family, one third to Pare and one third to Tepuretu.

Procedural history

[5] Application 376/2012 was filed in 2013 as an application for a vesting order in favour of the applicant. The matter was called before the Court at various times but did not proceed to substantive hearing.

[6] On 1 April 2015, agent for the applicant filed an amended application seeking partition of the land instead of vesting and that the matter be heard at the May sitting of the Court.

[7] On 27 April 2015, the application came before Isaac J who directed a meeting of owners be held at the Courthouse.

[8] The matter then came before Savage J who also directed that a meeting of owners be held and that this be independently chaired.

[9] On 21 August 2017, the parties appeared before me and some of the evidence was heard. Due to timing constraints and the absence of key witnesses, I directed that the remaining evidence could be heard before Savage J at the next sitting of the Land Court, and he would report it to me for decision.

[10] As Savage J believed the matter was best heard by me in its entirety, he adjourned the remaining evidence to my sitting on 13 and 16 July 2018.

Submissions of the applicant

[11] The applicant is seeking to partition his 1/6 share in the land as he has been unable to obtain an allotment in the land for his own use. He particularly seeks part of the beach front as he states that the Tepuretu kopu has obtained rights over 1/3 of the beachfront as well as the entirety of the land that fronts onto the Main Road. The applicant believes that, given the

majority opposition to the application, his children will be unable to succeed to his share in the land without partition.

[12] According to maps submitted with the application, there is currently an area on the beach front that is neither occupied nor subject to a lease which the applicant believes ought to be granted to him. In consideration of the area's prime location, the applicant has offered to set aside part of the land as a pedestrian access and 100m² at the mean high-water mark to be used as a reserve for family events. In the alternative, the applicant would accept a section on the beachfront that is currently leased outside of the family. This approach has been used by the Court previously in *Popoara* where the applicants waited for leases to expire before taking control of land partitioned in their favour.¹

[13] The applicant submits that unlike New Zealand's Māori Land Court jurisdiction, there is no requirement for majority owner support when bringing a case for partition in the Cook Islands. In fact, the High Court's jurisdiction is much wider than the Māori Land Court's and a number of partitions have been granted in spite of majority opposition.

[14] Over the course of four meetings of owners, the applicant has sought and failed to obtain support from the other owners of the land. He submits that the Tepuretu Mataiapo, Dan Kamana (who passed away earlier this year) opposed all partitions sought by members of the other kopu and was supported in this opposition by the members of Tepuretu. The applicant submits that this is particularly unfair as the Tepuretu family has control over land far in excess of their one third share. The inequity arises not only from the total size of land taken by Tepuretu, submitted to be 16,900m², but the value of the sites they have chosen at the road front and on the beach.

Submissions of the objectors

[15] The objectors oppose the application for partition on the basis that it is contrary to family custom and that it is inexpedient in the interests of the owners. The objectors submit that the majority of landowners opposed the partition and their will should not be constrained by the minority opinion.

¹ *Karu – Popoara 64, Vaitupa* [2013] App No. 193/11.

[16] The objectors submit that the partition will displace agreements already made between the owners to apportion land to owners who are not currently in occupation. Changing the underlying ownership of the land also means that this displacement will be permanent.

[17] Although the applicant may have held four meetings of owners on the matter, they were poorly attended and do not provide a representative view of the owners. The only well-attended meeting was at the Court as directed by Isaac J and it was clear from that that the majority are in opposition.

[18] The leader of the tribe, Tepuretu Mataiapo has already voiced his opposition to the application and to act against him is contrary to custom. Furthermore, the traditional structure of the family will be diluted by the partition which will lead to fragmentation of land and family. The objectors do not believe the applicant has properly considered the current occupation of the land and future implications and this may be due to the 60 years he spent in New Zealand. Regardless, there is other land available to the applicant which is as yet unoccupied or undeveloped.

[19] The objectors further submit that the applicant is requesting land in excess of his share entitlement by some 6000m². He has also failed to account for shared areas such as the beach reserve and land currently leased outside of the family.

The issues

[20] I consider the following to be the issues central to this decision:

- (a) Is the partition inexpedient in the interest of the other owners or the public?
- (b) Have the land owners behaved unjustly, unreasonably or inequitably by refusing to support the application for partition?

The law

[21] The High Court's jurisdiction to partition land is set out in the Cook Islands Act 1915:

429. Jurisdiction to partition Native land –

- (1) [The Land Court] shall have exclusive jurisdiction to partition Native freehold land.
- (2) Such jurisdiction shall be discretionary, and the Court may refuse to exercise the same in any case in which it is of opinion that partition would be inexpedient in the public interest or

in the interests of the owners or other persons interested in the land.

430. Partition orders –

- (1) Native freehold land may be partitioned by the making of partition orders.
- (2) Each such order shall constitute without any conveyance or other instrument of assurance the title to the parcel of land therein included.

431. Apportionment of encumbrances on partition –

When a partition order is made the Court may, in that order or in any subsequent order, apportion between the several parcels into which the land has been partitioned all rights, obligations, or liabilities arising from any lease, licence, charge, or other encumbrance to which the land is subject at the date of the partition thereof; and any such order shall have effect according to its tenor in the same manner in all respects as if all necessary conveyances, assignments, releases, covenants, and other dispositions or agreements had been duly made in that behalf by all persons concerned.

432. Mode of partition –

The Court may partition land either into parcels held by single owners in severalty or into parcels held by any number of owners or tenants in common in such shares as may be expressed in the partition order, or may partition the land partly in one manner and partly in the other.

433. Land to be partitioned into suitable areas –

It shall be the duty of the Court so to exercise its jurisdiction in the matter of partition as to avoid, so far, as practicable, the subdivision of any land into areas which because of their smallness or their configuration or for any other reason are unsuitable for separate ownership or occupation.

[22] The requirements for filing an application for partition are listed in the Code of Civil Procedure of the High Court 1981:

348. Application for partition –

- (1) Every application for partition shall be accompanied by the following particulars:-
 - (i) Name of land and area;
 - (ii) Name of applicant;
 - (iii) Name of district in which the land is situated;
 - (iv) Particulars of any order or other instrument constituting title;
 - (v) Whether the order is completed by survey;
 - (vi) The legal width of any public road to which the land has a frontage;

- (vii) Particulars of the existing valuation (if any);
- (viii) Particulars of any improvements upon the land;
- (ix) Particulars of any alienations, encumbrances, rights of way, or other easements disclosed by the Court record or known to the applicant;
- (x) Particulars of any alienation pending;
- (xi) The names, addresses and relative shares of all the owners of the land at the time of the application.

(2) The applicant shall file with the application, or within such time as the Registrar shall allow, a plan showing the proposed partition with the measurements of boundaries, and areas where possible.

(3) The Registrar shall not set down for hearing by the court any application filed under this rule until the particulars required by subclause (1) of this rule and the plan required by subclause (2) of this rule, have been filed.

(4) The Court may, at any time during the proceedings in respect of any application for partition, require any party to the proceedings to furnish to the Court such additional information as the Court deems necessary for dealing with such application for partition.

[23] The case of *Ruaro & Vaipapa section 89D* gave two principles for the determination of partition applications:²

- (a) Owners need to determine and consent to the partition and how the land will be apportioned except where a group of owners is acting unreasonably, unfairly or inequitably.
- (b) The Court ought to have regard to and attempt to preserve land in the ownership of distinct groups of owners who have traditionally occupied or currently occupy it as distinct from other owners who do not reside in or occupy that area.

[24] While factors influencing the exercise of the discretion will alter from case to case some of the matters the Courts have considered in determining partitions have included:

- (a) The Court ought to have regard to and attempt to preserve land in the ownership of distinct groups of owners who have traditionally or currently occupy it as distinct from other owners who do not reside in or occupy that area. This should

² *Ruaro & Vaipapa Section 89D* [1988] CKHC 5, Application No. 204 /83.



be considered alongside the sharing of the total land in terms of beach front, main road frontage, cultivable areas and mountainside land.³

- (b) It is unreasonable, for the allocations of land to be determined entirely by previous occupation as this could result in disenfranchisement of shareholders or the allocation of all of the high value land to one family at the expense of other families.⁴
- (c) A partition should be a last resort for families that cannot resolve a dispute in any other way.⁵
- (d) A granting of a partition should not create inequities among landowners.⁶
- (e) Owners hold the land for their lifetime only and the next generation need to be considered in any decision made. In this assessment, a number of factors can be considered including: traditional (family) arrangements and customs; landowner consent with unanimous consent preferable except where that consent is withheld unreasonably; and the interests of future generations.⁷
- (f) The tyranny of the majority is a matter the Court must allow for when considering an application for partition. Any single family cannot be allowed to exclude another from occupying land they hold in equal shares by virtue of greater numbers and consequent greater voting power.⁸ Such behaviour can be considered inequitable enough to allow for partition.
- (g) There is no legislative foundation for prioritising the views of land owners who are resident in the Cook Islands over those who reside overseas.⁹

[25] From the above it appears that before exercising discretion to allow a partition, the Court should be satisfied of the following:

³ *Ruaro & Vaipapa* above n 1.

⁴ *Ruaro & Vaipapa* above n 1.

⁵ *Toeta v Wichman* [2015] CKHC No 420/2015 9 October 2015.

⁶ *Pirake v Pierre – Pue Section 130, Lot 7, Avarua* [2012] CKLC 3.

⁷ Above n 3 at [24].

⁸ *Karu – Popoara 64, Vaitupa* [2013] App No. 193/11.

⁹ *Nia v Love* [2010] CKCA 3; CA 5.2009 (18 June 2010).

- (a) The applicant has met the requirements of r 348 of the Code of Civil Procedure of the High Court 1981.
- (b) It is expedient in the interests of the owners, the public or anyone with an interest in the land, with regard to: allowing owners to live on their land; equity as between owners; traditional arrangements; fair apportionment of desirable land between families; and the interests of future generations.
- (c) The applicant has the consent of a majority of landowners, by number rather than shareholding.
- (d) In the alternative, a group of owners is acting unfairly, unreasonably or inequitably: by refusing to consent to the application; with regard to apportionment of desirable land; by outvoting a family that holds an equal share but has fewer members.
- (e) The issue cannot be resolved by any other means.

Discussion

[26] The Court has stated on numerous occasions that partition orders should be made by consent. This is to avoid the Court imposing its own views on how land should be apportioned or divided up between common owners. The ideal in all partition situations is that the owner's consent to the partition and have decided amongst themselves what lands will be apportioned to which group of owners. That is the ideal. But unfortunately, that is not always what happens.

[27] In those situations where a group of owners, especially a minority group, adopts a stance that can properly be regarded as irresponsible; unfair; inequitable; or unconscionable, then in that context the Court has intervened.

[28] There are three kopu connected to these lands. Tepuretu kopu, Taua kopu and Pare kopu. From the evidence, the Tepuretu line have by and large remained on the island. Meanwhile the other two kopu, including the applicant's kopu, have moved overseas.

[29] The evidence before the Court indicates that in terms of present occupation of the land in metres squared there is:

- (a) 16,943m² occupied by Tepuretu



(b) 6,008m² occupied by Pare

(c) 2,000m² occupied by Taua

[30] The Tepuretu kopu have been fortunate to obtain rights over some of the beach front sections as well as many of the blocks that front the main road. This has given rise to the Tepuretu kopu now having two-thirds of the beach front sections and the entire road frontage sections on the inland main road. The result is that the Tepuretu kopu have sections clearly in excess of the one third share of the lands they have.

[31] In this situation one family, who to their credit have maintained occupation on the island, have cared for the land they have inherited and to their advantage have had the benefit of that land. But this has also resulted in other owners who have legal rights to the land being excluded.

[32] The evidence given by the applicants clearly shows that the majority of the land is occupied by the Tepuretu family. That shows an immediate inequality in land occupation between the family groups. The applicant now seeks a partition to part or parts of these lands being their fair share of occupancy or usage of their own inheritance.

[33] The objectors have made it clear that overseas owners should have limited rights. In essence, their rights should be limited given that they have chosen to move away from the Cook Islands.

[34] In questioning, Mrs Inangaro Kamana acknowledged that the Tepuretu line has more shares than the other two kopu. When asked whether it would be correct to say that the custom is that land owners who are off-shore and are not on the Island receive less than land owners who are on the Island, Mrs Kamana replied "I would have to agree with you. If they wanted land they have to come here and live here and ask for land and live here."

[35] I agree that it is important to remain connected to land. This is something the objectors have obviously continued and maintained. However, when a person moves overseas, away from their lands, that does not remove their underlying ownership rights. The public interest is served by the retention and recognition of those rights whether those persons be living in the Cook Islands or New Zealand or Australia or some other country.

[36] Given the current dynamics and circumstances, it is clear the applicant will never obtain consent for occupation or usage from the Tepuretu kopu, no matter how they propose it. The Tepuretu kopu by virtue of greater numbers and consequent greater voting power will continue to be able, on a voting basis, exclude other kopu from occupying land - land that the Tepuretu, Taua and Pare kopu hold in equal shares.

[37] This situation is unreasonable, unfair, inequitable and unconscionable and will continue as such unless there was intervention by the Court. The application for partition is one way to gain some equality and fairness for the applicant owners given that they have for some time been excluded as owners from this land block.

[38] It is difficult to see how it can be considered reasonable for one kopu who has a one-third share in the land, the same as the other two kopu, to occupy 100% of the inland side of the main road frontage and nearly 75% of the beach front land. This is not fair or reasonable.

[39] Not only is there a reluctance to share or allow other families besides Tepuretu to occupy any of these lands but the Tepuretu kopu also claim that the currently unoccupied land has been allocated to their family. That only increases the inequities.

[40] I conclude that the opposition that has been taken to this application by the objectors is inexpedient in the interests of the other owners. Some land owners have behaved unjustly, unreasonably or inequitably by refusing to support the application for partition.

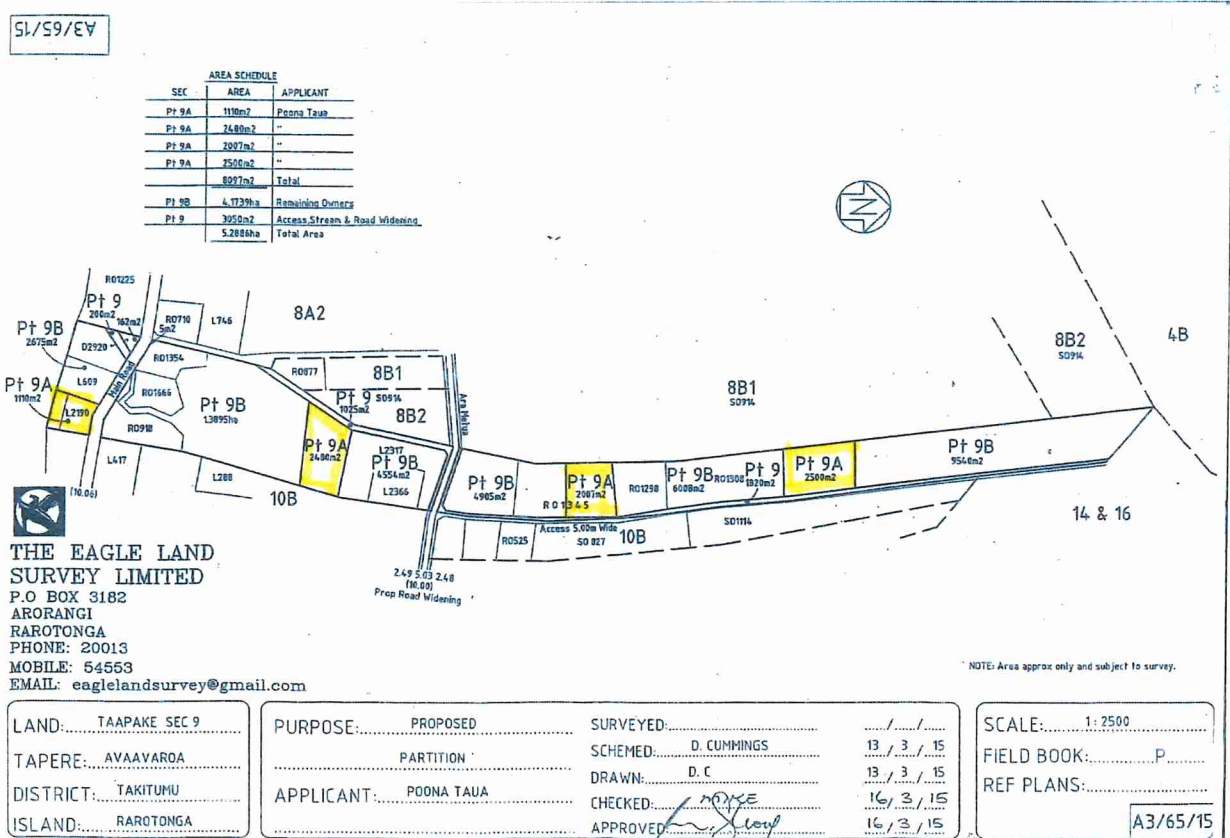
[41] Clearly part of the dispute here is with regard to the beach front sections. There are three beach front sections. Two of those sections were originally leased to land owners of the Tepuretu kopu. Mrs Kamana confirmed in evidence that both leases were no longer vested in owners of the land but in non-land owners, one lease having been sold for \$800,000.

[42] The applicant seeks the remaining beach front section for partition. This is opposed. As a compromise, the applicant has proposed that they would take one of the leased sections when that lease expired. There is opposition to that suggestion.

[43] It seems unreasonable for one family to claim not only two sections of the beach front but also to want the third section reserved for all family members. In essence, the whole beach front would, according to the Tepuretu kopu, be for them. I find this unreasonable.

[44] The applicant seeks sections that are noted in exhibit "B" of the affidavit of Ngaoa Ranginui dated 5 June 2015. The total area to be partitioned is 8097m². The total area of the land block is 52,879m².

EXHIBIT "B"



[45] There have been attempts to apportion the land as evenly as possible between the three kopu. At Exhibit "A" of the second affidavit of Ngaoa Ranginui dated 5 June 2015 there is a proposal for land rationalisation between the three kopu. However, that has not received the support of the majority of the owners. Therefore, I am focussed on the application and the sections that the applicant seeks partition.

[46] What I do note is that the applicant seeks to partition 8097m². It is not totally clear as to whether that includes the 2000m² currently occupied by the Taua kopu or whether it excludes that area. On the basis that the partition does not include the 2000m² then the 8000m² plus the 2000m² in total is still less than one-third of all the lands. The land the applicant seeks is roughly 15% of the total block.

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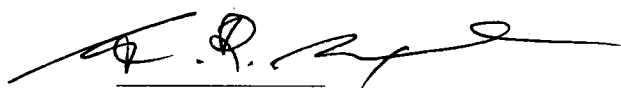
Decision

[47] What is always disappointing in these matters is the lack of recognition that all parties obtain ownership of land as a consequence of them being members of a kin group. They are in the land because they are connected. In other words, they are connected to the land because they are related through genealogy.

[48] Considering the matters noted above I am satisfied that it is appropriate to make the partition orders being sought. The Court makes orders for partition for the land marker Pt 9A per exhibit "B" to the affidavit of the affidavit of Ngaoa Ranginui dated 5 June 2015 in favour of the applicant Poona Taua.

[49] These orders are conditional on the applicant filing a survey at his own expense within three months of this order. That survey is to include into the beach section (L2190) a pedestrian access and a 10-meter square area at the mean high-water mark. The pedestrian access strip and 10 meters square area is not to be part of the partition but is to remain for all owners of the land as a beach reserve.

Dated at Rotorua, Aotearoa/New Zealand this 20th day of December 2018.



C T Coxhead
JUSTICE