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

APPLICATION NO. 122/2016

IN THE MATTER OF	Section 446, Cook Islands Act 1915, and Rule 350, Code of Civil Procedure of the High Court 1981
AND	
IN THE MATTER OF	the land known as Vaitamanga Section 88M, Arorangi
BETWEEN	ANNA DOROTHY VON HOFF Applicant
AND	SAMUEL NAPA Respondent

Hearings:	4 October 2017, 13 October 2017, 1 October 2018 and 4 October 2018
Appearances:	T Browne for the Applicant T Moore and T Carr for the Respondent
Judgment:	3 September 2019, (NZ)

JUDGMENT OF JUSTICE P J SAVAGE

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Introduction

[1] This decision arises from a long-standing series of litigation related to the interests of Te Ariki Paitai on Vaitamanga Section 88M block. It is a matter that has been disputed for over 40 years. While there are several other applications before the Court relating to this block, this decision concerns only the succession to Te Ariki Paitai.

[2] The applicant, Anna Dorothy Von Hoff, seeks to succeed to the interests of Te Ariki Paitai, an original owner in the block, on the basis that Te Ariki Paitai was the same person known as Paitai. The applicant contends that Paitai was her ancestor and therefore she is entitled to succeed to the interests of Te Ariki Paitai.

[3] The respondent, Samuel Napa, is a descendant of Tauei Napa (Metua) who was also an original owner in the block. He opposes the application on the basis that the applicant has failed to correctly identify Te Ariki Paitai and Paitai as being the same person.

Background

[4] Vaitamanga Section 88M is a parcel of native freehold land located in the district of Arorangi. It is approximately 10 hectares. The title to the block, dated 1906, recorded 13 owners to the block. The recorded owners were Tauei, Enua, Tiamarama, Roimata, Rangi, Ema, Maio, Tuira, Tetevano, Remuela Iti, Ana Remuela, and Te Ariki Paitai.[1]

[5] The relative interests of those owners were determined pursuant to an interim decision of the Court in 1970. Te Ariki Paitai was recorded as owning six out of 12 shares in the block, equating to an area of approximately 12 acres and two roods.

[6] On 30 April 1975, by order of the Court, succession to the estate of Te Ariki Paitai was made by vesting his land interests in Varaire Paitai, Tiamarama Te Keu, Miriama Tai, Alfred Te Keu, Paitai Te Keu, Te Ariki Te Keu, Mata Te Keu, Ngatokorua Te Keu, Te Ina Paitai and Atera Paitai (the 1975 succession order).[2]

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1 MB 2/193
2 MB 29/367-368

[7] Since that time succession to Te Ariki Paitai has been contentious. There have been numerous applications filed in the courts disputing the relative interests determined in 1970 and the subsequent succession in 1975.

[8] Consequently, on November 2001 the Court of Appeal revoked the 1975 succession order.[3] Following this judgment the applicant's family filed an application seeking, ultimately, to re-succeed to Te Ariki Paitai's interests.

[9] On 22 August 2006 Justice Hingston adjourned that application sine die, noting that until the Court had clarity as to who the Te Ariki Paitai named in the 1906 order was, there could be no succession to him.[4] This application was withdrawn before me.

Procedural History

[10] The application initially came before me on 4 and 13 October 2017 with both parties present. At this hearing, it was decided this application would proceed as a fresh application, but the Court would admit evidence given before Justice Hingston. Many of those witnesses are now deceased. The Judge's response to that evidence would be available to me.[5] At the end of the hearing, I directed that the matter be adjourned until May 2018.

[11] On 1 and 4 October 2018, I heard the matter again. At this hearing, I heard evidence from William Framhein. Ms Browne, counsel for the applicant, and Ms Carr, on behalf of the respondent, also presented their closing submissions. At the end of the hearing, I adjourned the application for a written decision to be given. The file then disappeared from the system.

Issue

[12] While this application is to succeed to one person on one block of land, hidden behind this simple exterior is a labyrinth of issues relating to the identity of Te Ariki Paitai. Justice Hingston summarised the position of the applicant's case in an earlier proceeding as:[6]

> I have followed the course of Nia's evidence carefully and it appears to me it is primarily about proving that he is a direct descendant of Tiamarama daughter of Okirangi and sister of Tinomanu Tauei. In respect of this matter the Appellate Court

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3 Application 174/99
4 Application 593/01
5 Application 593/01
6 *Nia* HC Rarotonga Application No 593/01, 22 August 2006

> accepted that Paitai was the applicant's grandfather, the son of Tiamaram and Te Ora Araiti, thus much of what has been placed before me was unnecessary. What the Appellate Court was troubled by was Paitai in 1970 becoming the Te Ariki Paitai of 1906 and notwithstanding the evidence and submissions other than what could best be described as "hearsay" i.e. evidence of concerned persons who claim Paitai Tiamarama's son was also known as Te Ariki Paitai, this court is no further ahead than the Appellate Court was.

[13] To simplify matters, the issue as I see it is whether on the balance of probabilities the new evidence presented by the applicant is sufficient to determine the identity of Te Ariki Paitai. I must note much of the evidence presented before me was presented before Justice Hingston, and on reading that evidence and the decision of the Court of Appeal, I agree with Justice Hingston that the evidence did not offer sufficient proof.

Applicant's submissions

[14] Ms Browne submitted that Te Ariki Paitai was also known as Paitai, Teora Paitai or Paitai Teora and he was a son of Tiamarama and Te Ora Araiti from the Tinomana and Vakatini families. She contended that the identification of Te Ariki Paitai could be established by reference to genealogy and by determining the relationship between those owners listed in the 1906 order.

[15] In terms of the Tinomana papaanga, Ms Browne submitted various Court records to show that the Tinomana genealogy was first recorded by the Court in 1906 as 'Te Anomarama' which subsequent genealogies have corrected to 'Tiamarama'. She also noted that these genealogies had been accepted by the Court in previous applications.

[16] This information was considered by the Court of Appeal and subsequently by Justice Hingston.

[17] Ms Browne also submitted various passages from books written by Taira Rere. These passages essentially showed that Te Ariki Paitai was a direct descendant of Tiamarama, a sister of Tinomanu Tauei, and that Te Ariki Paitai married Ngaavae.

[18] While there have been challenges to Taira Rere's books, Ms Browne argued that these challenges did not change the genealogy supplied by the author. Again, this material was before the Court of Appeal and Justice Hingston.

[19] Counsel also relied on evidence given by the respondents in earlier proceedings to illustrate that the respondents could identify who Te Ariki Paitai was, even though they questioned his entitlement to be included in the 1906 order. Again, this material was before the Court of Appeal and Justice Hingston.

[20] Further, Ms Browne submitted that two members of the Te Ariki Paitai family were present when the relative interests were determined by the Court in 1970 and no one challenged the presence of these two members at that time.

[21] In terms of the earlier decisions given by the courts, counsel stated that these were decided incorrectly when there were clear genealogies, the writings of Taira Rere and evidence from witnesses available to the Court.

[22] Counsel also made submissions relating to irregularities in the way past applications have been heard by the Court and submitted evidence given by Napa Tauei Napa (who became Tinomana Ariki) in 1975. It was noted by Ms Browne, that the Rotation Agreement of the Tinomana Ariki Title was also signed by the Te Ariki Paitai family in 1975.

New Material

[23] Ms Browne submitted that further evidence has come to light since the previous Court proceedings in 2006, namely Ngaavae's headstone and further volumes of genealogies.

[24] She noted that Ngaavae's headstone referred to Te Ariki Paitai as her husband and her death certificate referred to her husband as Paitai. This, she contended, formed an obvious link demonstrating that Te Ariki Paitai and Paitai were the same person.

[25] Ms Browne also relied on an affidavit of William Framhein. This affidavit referred to volumes of genealogies compiled from the Court records by Mr MacCauley and ultimately were akin to the genealogy presented by Ms Browne. In Mr Framhein's affidavit, he confirms that the MacCauley genealogies assisted in confirming the relationship of those owners listed in the 1906 order.

[26] Ms Browne sought that the Court consider the evidence in its totality to find on the balance of probability that Te Ariki Paitai was the same person as Paitai.

Respondent's submissions

[27] Ms Carr opposed the application on the basis that the applicant has no blood or other connection to the land and that the applicant has not demonstrated that Paitai is the same person as Te Ariki Paitai. As for the correct identity of Te Ariki Paitai, she submitted that it can be ascertained through the death certificate of Te Ariki Paitai and minute book references, that he was a child of Tauei (the common ancestor of the respondents) and died without issue.

[28] Ms Carr submitted that the evidence of the headstone of Ngaavae should be regarded as insufficient evidence that Te Ariki Patai and Patai were the same person, as the name could have been placed on the headstone by anyone at any time.

[29] Further, she contended that the applicant relied on evidence previously submitted before Justice Hingston, which the Court determined was insufficient to show the identity of Te Ariki Paitai.

[30] In terms of the writings of Taira Rere, Ms Carr submitted that there was an error in these documents as Te Ariki was shown as the son of Tiamarama and Te Ora Araiti, when Court records illustrated Te Ora Araiti did not have a son named Te Ariki. She also argued there are other inconsistencies throughout the books especially in relation to the substitution of the name Te Ao Marama into Tiamarama.

[31] She drew on a number of other Court minute books to submit that there was never a Tiamarama in the family, and the Paitai family were never considered descendants of the Tinomana family.

[32] She submitted to the Court birth records of Te Ora Araiti's children and Paitai's children to show that, prior to 1970, neither Araiti nor his son Paitai named any of their own children Te Ariki or Tiamarama. She also submitted that the name Te Ariki Paitai was never listed as the parent for any of Paitai's children.

[33] Furthermore, she submitted various minute book records in support of her contention that Paitai has been listed as an owner in Vakatini and Vakapora lands but was never involved in any hearings for lands in Arorangi.

[34] Ms Carr relied heavily on the minute book MB2/234, which she contended recorded what was accepted by the Court in 1934 as the correct genealogy for the Oakirangi family (mother of Tiamarama), in which the only surviving member was Tauei. Any subsequent genealogies that included Tiamarama as a daughter of Oakirangi were, she submitted, incorrect.

[35] In terms of the 1906 order, Ms Carr submitted that those named as owners were mostly descendants or siblings of Tauei.

[36] Ms Carr also raised the issue of res judicata and asked that this be taken into consideration given the several applications previously made by the applicant's family to succeed to Te Ariki Paitai.

Applicant's submissions in reply

[37] In counsel's submissions in reply she submitted that the genealogy given in the 'Kapu' title cases in 1943 and 1944 referred to Tiamarama as having Paitai and Tiamarama. Paitai therefore had a sister called Tiamarama who died without issue and subsequently Paitai married Ngaavae and had five children.[7]

[38] Ms Browne also drew on various other minute book records previously submitted to the Court and reiterated her arguments traversed in her earlier submissions.

The Law

[39] Section 446 of the Cook Island Act 1915 provides that persons entitled to succeed on the death of a Native, to his interest in native freehold land shall be determined in accordance with Native Custom. That section provides:

> **446. Succession to deceased Natives** - The persons entitled on the death of a Native to succeed to his real estate, and to his personal estate so far as not disposed of by his will, [and the persons entitled on the death of a descendant of a Native to succeed to his interest in Native freehold land,] and the shares in which they are so entitled, shall be determined in accordance with Native custom, so far as such custom extends; and shall be determined, so far as there is no Native custom applicable to the case, in the same manner as if the deceased was a European.

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7 MB 15/283, MB 16/196

[40] Section 448 may also be relevant. Under this section, the Land Court shall have exclusive jurisdiction to determine the right to any person to succeed to native freehold land. That section provides:

> **448. Succession orders -** On the death of a Native [or descendant of a Native] leaving any interest in Native freehold land [the Land Court] shall have exclusive jurisdiction to determine the right of any person to succeed to that interest, and may make in favour of every person so found to be entitled (hereinafter called a successor) an order (hereinafter called a succession order) defining the interest to which he is so entitled.

Discussion

[41] Both the Court of Appeal decision and the subsequent views expressed by Justice Hingston, who was also a member of the coram of the Court of Appeal, create substantial obstacles for the applicant.

[42] During the course of hearing, I specifically asked Ms Browne what the new material was, and she acknowledged that it comprised of the headstone and genealogies referred to in Mr Framhein's affidavit known as the MacCauley genealogies.

[43] As far as the headstone is concerned this is a recent construction at a grave. It is unknown who erected the headstone and what information was available to the person who designed the headstone and its inscription and what their motive was for doing so. This Court can receive any evidence, but it must be concerned with the issue of reliability. I cannot know what expertise in genealogy the maker of the headstone had. This is simply hearsay from an unknown source and does not carry the applicant's case any further.

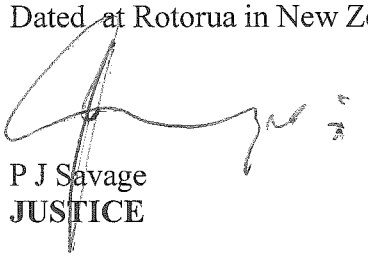
[44] The "new" genealogical material really consists of a reworking and reshuffling of material, particularly minute book material that has been around during the whole course of litigation down through the decade. It is re-packaged but does not contain any credible new evidence that would sufficiently improve the applicant's position post 2006. The same contradictions and uncertainties remain.

[45] The applicant has not managed to advance her position to the point where I could be satisfied on the balance of probabilities as to the core identity issue in this case.

Decision

[46] Accordingly, the application is dismissed, and costs are reserved. Any such application is to be made within 14 days.

Dated at Rotorua in New Zealand on the 3rd day of September 2019.



P J Savage
JUSTICE