

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

APPLICATION: 68/2021

UNDER	Section 409(f) of the Cook Islands Act 1915 and Rule 29 of the Code of Civil Procedure of the High Court 1981
IN THE MATTER	of the 1980 Judgment of Justice Dillon in re Ina Vakatini's right to hold the title of Vakatini Ariki
BETWEEN	YITIRI AKAMA Applicant
AND	PHILLIP VAKATINI Respondent

Date: 1 March 2022 (NZT)

JUDGMENT OF JUSTICE C T COXHEAD

Introduction

[1] Yitiri Akama filed the present application with the Court on 23 March 2021. Since then however, he has not progressed the application and has failed to comply with the directions of the Court.

[2] The respondent now asks that the application be dismissed and seeks an award of costs.

Background

[3] At the time of filing, the applicant advised that he was trying to obtain legal counsel. Further, the applicant noted he would need to amend the application and asked for extra time for the translation in the preparation of additional evidence.

[4] When the matter came before Justice Isaac on 14 July 2021, timetabling orders were made by consent.

[5] The applicant did not comply with those timetabling orders and requested an adjournment on the basis that he was still seeking legal counsel and a key witness was stranded in New Zealand because of the Covid-19 lockdown. Due to these matters, the applicant was not ready to proceed with his application.

[6] When the matter came before me in November 2021, I made new timetabling orders with regard to Mr Akama's application (68/2021) and a related application of the respondent, Mr Vakatini (360/2021).

[7] In respect of application 68/2021, I ordered that:

- (a) The applicant file an amended application, evidence, and legal submissions by 17 December 2021;
- (b) The respondent file any response by 24 January 2022; and
- (c) The applicant to file any reply by 21 February 2022.

[8] In respect of application 360/2021, I ordered that:

- (a) The applicant file any evidence in support of the submissions dated 23 August 2021 and any further submissions, by 24 January 2022;
- (b) The respondent file any response, including any evidence, by 21 February 2022; and
- (c) The applicant file any reply by 14 March 2022.

[9] I also directed that the file was to be referred to me on 20 December 2021.

[10] On 13 December 2021, the applicant filed a memorandum, seeking a further adjournment.

[11] On 17 December 2021, Mr Moore, agent for the respondents, filed a memorandum submitting that the applicant appeared to have made no progress with the timetabling orders and is still unable to obtain counsel. The memorandum noted that Mr Akama was seeking a third adjournment, which effectively would be an adjournment of the matter from a fixture during the first Land Division session in 2022 until the July 2022 session. The respondent opposed any such adjournment. However, if a short extension of time was granted to the applicant, the respondent asked that the Court consider:

- (a) An interim costs order in the amount of \$5,000, or in the alternative;
- (b) A bond in the amount of \$10,000 as security for costs.

[12] On 22 December 2021, I directed that Mr Akama be advised he had 14 days to file a response to Mr Moore's memo and, in particular, Mr Akama should tell the Court why the Court should not dismiss the application and order costs against him.

[13] On 13 January 2022, Mr Moore filed a memorandum advising that he had not been served with any documents from the applicant and he understood that the Registry had not received any documents from the applicant.

[14] However, at 2.30pm on 13 January 2022, the applicant filed a notice seeking an extension of time to respond to my direction of 22 December 2021 and for the Court to consider his attached memorandum. The applicant's reasons for seeking an extension were that he was unable to file a response due to the festive season and was under the impression that 14 days did not include weekends.

[15] The memorandum filed opposed an order for costs and noted that the applicant was still experiencing issues obtaining a lawyer to assist him. The memorandum filed states the Court should not order costs against him for the following reasons:

- (a) The person, namely William Framehein, left him at the start while he was handling his case;
- (b) He has had issues instructing legal counsel after William Framehein left;

- (c) He has spoken to a few lawyers on the Island and also in New Zealand, but they were unable to take his case due to the complexity and nature of the case; and
- (d) As a result, an order of costs against him is unjustified due to the above reasons, and he has not received full instructions or the legal representation that is needed for his case.

[16] Mr Moore filed a further memorandum on 16 February 2022 noting a number of matters, including that his client Mr Vakatini had held off filing evidence and further submissions in respect of the related application 306/2021 until receiving Mr Akama's amended application. However, given it appeared that Mr Akama's application has been abandoned, he would proceed to file the relevant documents. Mr Moore asked the Court to consider bringing finality to the present matter.

[17] Mr Akama's most recent memorandum of 22 February 2022 confirms that his position remains the same. He is still having issues trying to instruct Counsel to assist him and is now seeking Counsel in New Zealand. Because such Counsel have requested clarity around Mr Akama's position, he is in the process of preparing a summary report to send. He asked that the Court consider his position in light of the respondent's request to bring the matter to finality.

Decision

Should the application be dismissed?

[18] I note that the applicant, despite being asked to specifically advise the Court why I should not dismiss his application, has failed to address that issue, other than his recent request in memorandum of 22 February 2022 asking that his position of not being able to instruct Counsel be taken into account.

[19] As noted above, the respondent submits that the application be dismissed as the applicant has failed to comply with timetabling orders on two occasions.

[20] I have no doubt that the applicant is genuine in his view that he has a claim which he believes is valid. However, when a person has a claim to put before the Court, they need to

be ready to progress their application. Sometimes people will have their application finalised and all their evidence in support of their application ready when they file their application. Other times people may only have some of their evidence ready or parts of their application ready. It is not uncommon for applicants to amend their applications and to file further evidence following the filing of the application.

[21] In my view, the application should be dismissed on a without prejudice basis to the applicant to file a new application when they are ready to actually progress an application. I rely on the following matters:

- (a) Little to no progress has been made with the application, even though it has been before the Court twice and timetabling orders have been made on both occasions by two different Judges.
- (b) As it currently stands, the application, by the applicant's own admission, is nowhere near ready to proceed.
- (c) The applicant himself acknowledges that the current application before the Court needs amending. Despite being given time to amend his application, the applicant has not done so.
- (d) There are two affidavits filed in support of the application. The applicant concedes that further evidence needs to be filed. The applicant has been given time to file further evidence and has not done so.
- (e) As the applicant has noted on a number of occasions a clear impediment to progressing the application is the fact that he has not been able to find a lawyer to assist him. He has been given significant time to engage a lawyer and has not been able to.
- (f) The respondent is left in the position where he is not able to respond to the application as it is unclear what he should respond to.
- (g) The Court does not have an application to progress.

- (h) The applicant has not complied with timetabling orders of 14 July and then November 2021.

[22] For all of these reasons, the application is dismissed.

Costs

[23] In terms of costs, I make a minimal order of \$500.00 costs against the applicant.

[24] In my view, the application has not progressed very far at all and, while the respondent has been eager to file a number of memorandum and has potentially been more active than the applicant in this matter, their role should have been minimal.

[25] It is difficult to see how the respondent could have costs in excess of \$5,000.00 given the application has not progressed beyond the filing of the application and the setting of timetabling orders.

Summary

[26] The Court makes the following orders:

- (a) Application 68/2021 is dismissed.
- (b) The applicant is to pay the respondent \$500.00 costs.

Dated at Rotorua, Aotearoa/New Zealand this 1st day of March 2022.

C T Coxhead
JUSTICE