

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

**APPLICATION NOs: 827/2022 & 925/2023**

**UNDER** Section 409(e) of the Cook Islands Act 1915 and  
Rule 132 of the Code of Civil Procedure of the  
High Court 1981

**UNDER** Section 3 of the Declaratory Judgements Act

**AND**

**IN THE MATTER** of the land known as RAU UTU 17H1,  
MATAVERA and an application for declaration  
of occupation right

**BETWEEN** AVAIKI MATAIO of Rarotonga  
**Applicant**

**AND** KIRIAU TUREPU of Rarotonga  
**Respondent**

Hearing: 20 & 21 July 2023

Appearances: Mrs T Browne for Applicant  
Mr B Mason for Respondent

Judgment: 16 June 2025 (NZT)

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**JUDGMENT OF COXHEAD J**

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## **Introduction**

[1] This is an application by Avaiki Mataio to declare that an occupation right to the parent block, Rau Utu 17H, Matavera, has come to an end pursuant to s 3 of the Declaratory Judgements Act 1994.

[2] The applicant also seeks an injunction preventing the respondent from cultivating on the applicant's land, Rau Utu 17H1.

[3] Kirirau Turepu, the respondent, argues that the occupation right has not lapsed and that the declaratory order should not be given. The respondent also argues that their occupation right to the parent block, Rau Utu 17H, protects them from an injunction preventing them from entering Rau Utu 17H1.

## **Background**

[4] Rau Utu 17H1, Matavera is a block of land located in the parent block known as Rau Utu 17H, Matavera. Rau Utu 17H consists of a total of 7 acres, 3 roods and 9 perches (31,591 m<sup>2</sup>).

[5] On 13 March 1946, a landowners meeting was held where Parakoti, a landowner in Rau Utu 17H, was given consent to occupy part of Rau Utu 17H for cultivation. The Native Land Court granted the right of occupation on 6 November 1948. However, Parakoti had died before then, so the right of occupation was granted to his issue, Boy Parakoti.

[6] The specified purpose in the Order Granting the Right of Occupation is, "the purpose of the cultivation of oranges or other citrus fruits".

[7] The terms and conditions of the Order Granting the Right of Occupation is as follows:

1. The land shall be used for the purpose specified above.
2. The right of occupation shall be for so long as the occupier or his descendants shall use the land for the purpose specified in this order and shall comply with the other conditions contained herein.
3. The occupier may not lease or transfer his right of occupation to any other person or persons.
4. On the death of the occupier, his occupation right shall pass to his children and registered adopted children who shall decide, subject to the approval of the Native Land Court, who, of those children or adopted children shall occupy. If

the occupier leaves no children or registered adopted children then the successors appointed by the Native Land Court shall decide who shall occupy.

5. If an occupier leaves the Island where the land is situated and takes up permanent residence elsewhere or if he fails to use the land for the purpose for which the occupation right was granted or if he fails to use it in a proper and husbandlike manner or if for any other reason he abandons the land or is unable to continue to use it in accordance with the conditions herein contained then the owners or the next of kin of the occupier or his issue as the case may require may, with the approval of the Native Land Court, appoint a new occupier subject to any order or conditions the Court may make as to compensation.
6. The Native Land Court may, so long as any money is owing by the occupier to the Cook Islands administration for the development of the land, declare the land subject to the provisions of Part IV of the Cook Islands Amendment Act 1946.
7. Any disputes will be settled by the Native Land Court.
8. The Court reserves the right to lay a right of way over the land held under an occupation right wherever it is shown that such a right of way is necessary to give access to land which otherwise would have no suitable access.

[8] The land was initially used for its specified purpose until the orange trees on the land came to the end of their natural life.

[9] Following Boy Parakoti's death, his sole legal child, Teokotai Ben Nooroa Parakoti succeeded to the occupation right. Ben Parakoti then allowed the respondent to farm on the land for other purposes. The respondent has been farming other crops on the land for more than 40 years. The respondent is not a direct descendant of Parakoti but is the grandson of Parakoti's sister.

[10] The landowners of Rau Utu 17H held meetings in 2012 and 2015 to discuss seeking a determination of relative interests. On 13 October 2016, the landowners received a determination of relative interests from the Court. The applicant, one of the landowners, applied for a partition order of Rau Utu 17H. On 18 May 2017 the partition order was granted, and the land was split into three separate blocks. The applicant is now a landowner in Rau Utu 17H1. The respondent is now a landowner in Rau Utu 17H3. The respondent has continued to farm the land subject to the occupation right on Rau Utu 17H, which covers the land on Rau Utu 17H1.

[11] The applicant argues that the occupation right to Rau Utu 17H is at an end and seeks a declaration that the occupation right has concluded and that an injunction be granted

preventing the respondent from cultivating on the land as the respondent has no claim to Rau Utu 17H1.

### **Procedural History**

[12] On 20 July 2022, the applicant applied for an interim injunction to remove the respondent from the land. On 2 September 2022, the respondent filed a notice of objection to the application for interim injunction.

[13] On 8 October 2022, the application for interim injunction was heard by Justice Miharo Armstrong. Justice Armstrong gave the respondent until 15 March 2023 to challenge the partition order made to Rau 17H. If no application was made by that date the interim injunction would be granted.

[14] On 4 May 2023, at the hearing of the matter, the respondent had not filed a challenge to the partition order. Instead, the respondent submitted that the partition order did not affect his occupation right because the occupation right was made prior to the partition. Justice Armstrong gave the applicant 14 days to respond to the respondent's point. The respondent was given 14 days after that to reply to the applicant.

[15] No memoranda were filed. Instead, on 6 June 2023 the applicant filed an application for a declaration that the occupation right order had come to an end. On 28 June 2023, the respondent filed a notice disputing the application for a declaratory order.

[16] I heard the matter on 20 and 21 July 2023.

[17] On 6 February 2024, the hearing transcript was issued.

[18] Both parties were given 14 days from the issue of the transcript to file their submissions and a further 14 days after that to respond to each other's submission. Both parties requested an extension to file submissions on 28 March 2024 and to file any replies on 11 April 2024. On 29 April 2024, both counsels requested an extension for replies to be submitted by 3 May 2024.

[19] The applicant submitted their reply on 3 May 2024. The respondent elected not to submit a reply.

## **Relevant Law**

[20] Section 3 of the Declaratory Judgments Act 1994 allows an applicant to seek a declaratory order from the High Court:

3. Declaratory orders on originating summons

(1) Where any person

- (a) has done or desires to do any act, the validity, legality, or effect of which depends on the construction or Validity of any enactment, or any deed, will, or document of title, or any agreement made or evidenced by writing, or any memorandum or articles of association of any company or body corporate, or any instrument prescribing the powers of any company or body corporate; or
- (b) claims to have acquired any right under any such enactment, deed, will, document of title, agreement, memorandum, articles, or instrument, or to be in any other manner interested in the construction or validity thereof, -

such person may apply to the High Court by originating summons for a declaratory order determining any regulation, bylaw, deed, will, document of title, agreement, memorandum, articles of instrument, or of any part thereof.

- (2) For the purposes of this section, "enactment" shall have the same meaning as in Article 1 of the Constitution.

[21] Section 10 of the Declaratory Judgments Act 1994 grants the High Court jurisdiction to make a discretionary judgment:

10. Jurisdiction discretion

The jurisdiction hereby conferred upon the High Court to give or make a declaratory judgment or order shall be discretionary, and the said Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order.

## **Applicant's Submissions**

[22] The applicant submits that the occupation right has lapsed because the terms and conditions of the occupancy right have broken. The applicant submits that the land has not been used for its specified purpose for over 60 years, because it has been used to cultivate crops that are neither oranges nor citrus fruits.

[23] The applicant further submits that the current holder of the occupation right, Ben Parakoti, has never occupied the land. This also breaks the terms and conditions of the

occupation right. The respondent farming on the land is not the occupier nor a descendant of Parakoti. Although the terms and conditions of the occupation right allows the court to approve a new occupier decided by the owners of the land or next of kin, no such order has been made to make the respondent the new occupier.

### **Respondent's Submissions**

[24] Counsel for the respondent submits that the occupation right has not come to an end as the terms and conditions of the occupation right have not been broken.

[25] The respondent acknowledges that the occupation right specifies that the land must be used for the purpose of the cultivation of oranges or other citrus fruits. However, the respondent argues that the underlying principle of occupation right orders is to ensure that the holder gets no more than the landowners were prepared to give. The respondent submits that the landowners of Rau Utu 17H, at the landowners meeting in 1946, gave Parakoti and his descendants the right to plant generally. Therefore, the occupation right is still being used for its purpose allowed by the owners.

[26] The respondent disagrees with the applicant's submission that Ben Parakoti has not occupied the land. The respondent, citing *Apera v Apera*,<sup>1</sup> argued that occupation can be exhibited by a person when they are able to determine who can be on the land. The respondent submits that Ben Parakoti exhibited his occupation right by allowing the respondent to farm on the land. Furthermore, the respondent submits that Ben Parakoti exhibits his right of occupation by frequenting the land.

### **Decision**

[27] In the *Nicholas v Nicholas*,<sup>2</sup> the Cook Islands Court of Appeal affirmed that the High Court does have the jurisdiction to cancel an occupation right.<sup>3</sup> This jurisdiction of the Court was also expressly affirmed in the following cases: *Nicholls v Karika* [2020] CKCL 8;

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<sup>1</sup> *Apera v Apera* [2018] CKLC at [13(d)] per Coxhead J

<sup>2</sup> *Nicholas v Nicholas* [2019] CKCA 2; CA 8 of 2018 (7 July 2019)

<sup>3</sup> At [78]

Application 123 of 2019 (22 December 2020);<sup>4</sup> *Kainuku v Daniel* [2024] CKLC 1 Application 27 of 2022 High Court (Land Division).<sup>5</sup>

[28] A common reason for the Court to declare an occupation right has come to an end is when the terms and conditions of the occupation right have not been adhered to, particularly in cases where a dwelling house has not been constructed within a specified time.<sup>6</sup>

[29] In *Tuoro v Toeta*,<sup>7</sup> the High Court declared that an occupation ended due to a condition of the occupation order that required the occupation right be used for agricultural purposes had not been followed. There, the occupier had not used the occupation right for agricultural purposes for 28 years.

[30] In this situation the order was granted to allow the right of occupation for, “the purpose of the cultivation of oranges or other citrus fruits. A further condition of the right of occupation was that the occupier must use the land for the purpose for which the occupation right was granted. Evidence before the Court clearly indicates that the cultivation of oranges or other citrus fruits have not occurred on the land for over 40 years. Therefore, the land has not been used for the specified purpose for an extended period of time. The condition of the right of occupation has not been satisfied.

[31] The conditions of the right of occupation do not allow for a delegation or a transferring of the occupation to another party. In fact there is a clear condition that the occupier may not lease or transfer his right of occupation to any other person or persons. There is no evidence of any lease before the Court. But what is clear is that the Respondent has used the land for over 40 years not Mr Ben Parakoti.

[32] It was argued that Ben Parakoti has not occupied the land. With his occupation exhibited by him determining who can be on the land. The respondent submitted that Ben Parakoti exhibited his occupation right by allowing the respondent to farm on the land and, by frequenting the land.

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<sup>4</sup> At [43].

<sup>5</sup> At [56] – [60].

<sup>6</sup> *Kainuku v Daniel* [2024] CKLC 1; Application 27 of 2022; *Nicholls v Karika* [2020] CKCL 8 Application 123 of 2019.

<sup>7</sup> *Tuoro v Toeta* [2015] CKLC 2; Application 47.11, 391.11 (29 April).

[33] In *Apera v Apera*, the Court considered the question of whether a person could live away from the land while still being said to exercise an occupation right. The Court found:<sup>8</sup>

In my view a person can still occupy a property if they are away from the property for a lengthy holiday or to work overseas. But in my view lengthy would not extend to 38 years.

[34] Furthermore, the Court considered what factors indicate that a person is occupying a property:<sup>9</sup>

[13] Factors which indicate a person occupies a property may include but are not limited to:

- (a) a person residing in the property;
- (b) the residence being the person's primary address;
- (c) the person maintaining the property; or
- (d) a person having control of being able to determine who can and who cannot live on the property.

[14] Mr Moore has asked me to take a wider view of occupy and read it within the Cook Islands context. For this I take it, occupy must be seen in the Cook Islands context where many people leave the Island and return after staying away for some time.

[15] Sometimes they leave the Island for personal reasons, for work opportunities, but within that context they frequently return home for holidays, funerals, meetings or just to see family who continue to reside on the Island.

[35] In that case, the terms of the occupation right required occupation of the property. The High Court found that neither the occupier nor her descendants had occupied the property for over 20 years; the occupier had not lived or resided in the house with any permanency or semi-permanency for 38 years; and the house had not been maintained.<sup>10</sup> For these reasons, the High Court found that the occupation right had lapsed.<sup>11</sup>

[36] The conditions of the occupation order specially prohibited the leasing or transferring his right of occupation to any other person or persons. That must surely indicate that the occupation right is for the occupier to use the land and not to have someone else use the land for the intended purpose. Further, it would be difficult to see how a person could maintain occupation when someone else has clearly been using the land for 40 years.

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<sup>8</sup> *Apera v Apera* [2018] Application 131 of 18 .At [12].

<sup>9</sup> At [13] – [15].

<sup>10</sup> At [19] – [21].

<sup>11</sup> At [22]


[37] This is not a situation of different people using the land at different time for short periods of time with the permission of the occupier. This is a situation where the respondent has had uninterrupted use of the land for over 40 years. It is difficult to see how the occupier can be said to have still “occupied” the land during that period. The intentions of Ben Parakoti and Mr Turepu appear to be that Mr Turepu had the land to use as he wanted, with no lease in place it would be assumed that this was at no costs. It was Mr Turepu who was for all intents and purposes in occupation of the land not Ben Parakoti.

[38] In my view the conditions of the right of occupation have not been complied with and therefore I declared that the occupation right had ended.

[39] Having declared that the occupation right is an end there is still the injunction application to be determined. That matter will need to be set down for hearing.

[40] Further the respondent also argued that if the Court does grant the declaratory order that the occupation rights has lapsed, the respondent should be given time to file an application to challenge the partition order under s 391 of the Cook Islands Act in light of the evidence that has emerged at the hearing. The respondent has not filed such an application to date. If an application is filed that may also be something the Court will need to consider.

Dated at Rotorua, Aotearoa New Zealand this 16<sup>th</sup> day of June 2025

A handwritten signature in black ink, appearing to read 'C T Coxhead', written in a cursive style.

C T Coxhead  
**JUSTICE**