IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT AUCKLAND

CA 12/2003
CA 13/2003
(Applications 74/2003)
(High Court 645A/2003)

IN THE MATTER	of Article 60 of the Constitution of the Cook Islands
A N D	
IN THE MATTER	of **TE ARAKURA SECTIONS 83A & B1,2 & 3, ARORANGI**
A N D	
IN THE MATTER	of an application by **TAU SAMUEL** to revoke the Succession Order made on the 21st May 1942 in favour of **NGAMETUA** and 27 March 1944 in favour of **TAIMAU** to the interest of **MARIA-A-RONGO** (Application 74/2003) **Appellant** in CA 12/2003 and **Respondent** in CA 13/2003
A N D	
IN THE MATTER	of an application by **TAUARIKI TAIMAU** on behalf of the descendants of **NGAMETUA** and **TAIMAU** to revoke the Succession Order made in October 1912 vesting the interest of **MARIA-A-RONGO** IN **MOEAU** **Appellant** in CA 13/2003 and **Respondent** in CA 12/2003

Hearing : 11 November 2004

Coram: Barker J A (presiding)
Henry JA
Smellie JA

Counsel : T M Browne for Appellant in CA 12/2003 and Respondent in CA 13/2003

M C Mitchell for Appellant in CA 13/2003 and Respondent in CA 12/2003

Judgment : December 2004

JUDGMENT OF THE COURT

[1] These two appeals were, by consent, heard together. Both arose out of a judgment of Smith J delivered in the High Court on 8 September 2003. The Judge declined applications made under s 450 of the Cook Islands Act 1915 ('the Act'), seeking to revoke Orders made in the Land Court in 1942 and 1944 in favour of Ngametua and in 1912 in favour of Moeau and Taimau, in relation to land known as Te Arakura S83A 0 B1, 2 and 3 ('the land').

[2] Tau Samuel (to whom we shall refer as the Appellant) had sought revocation of succession Orders in respect of Maria-a-Rongo ('Maria') made in favour of Ngametua in 1942 and of Taimau in 1944. Tauariki Taimau ('the Respondent'), on behalf of the descendents of Ngametua and Taimau, sought to revoke the 1912 succession Order which had vested the interest of Maria in Moeau and Taimau equally.

[3] In his judgment which was given in respect of both applications, Smith J noted that the 1942 and 1944 Orders were held by this Court in 1988 to be succession Orders. Accordingly s450 of the Act enabled the applications before him to be made.

[4] Section 450 of the Act provides:

> ***"Revocation of succession orders*** *– A succession Order made in error may be at any time revoked by [the Land Court], but no such revocation shall affect any interest theretofore acquired in good faith and for value by any person claiming through the successor nominated by the Order so revoked."*

[5] Counsel for the Appellant before Smith J took the Judge through various genealogies from 1904 onwards. Counsel submitted that Moeau was entitled to succeed Maria and that neither Ngametua nor Taimau should have been included in the 1942 and 1944 succession Orders because they were not from the Manava line.

[6] Counsel for the Respondent, in contrast, submitted in the High Court that, upon the death of Maria without issue, the land must revert to source and that, based on the genealogy, Ngametua and Taimau were descended from the line of Manava and were entitled to be included on the title.

[7] Smith J noted the unsuccessful applications in 1922 and 1937 by Tauariki, the mother of Ngametua and Taimau, to be included on the title. The Land Court records in 1922 show that the Judge at the time had been unclear whether Tauariki had a direct right by blood. He had suggested that Moeau apply for succession and then ask the Court to put Tauariki and Taimau either above or with him as successors. That suggestion was not taken up.

[8] The 1937 application to the Court, as the Judge noted, resulted in succession Orders to the interests of Moeau in favour of Metua Moeau and in favour of Te Anoano for life with remainder to Moeau to the interests of Taria. At the same time, there was an application to include Ngametua and Taimau, children of Tauariki on the title. The Court declined to deal with such an application, since it was not investigating title, but dealing with succession. Later comments by the Judge in 1937 indicated that he had not been entirely satisfied that Tauariki should be excluded totally. In 1942, the Court considered that the evidence showed that Tauariki was from Manava and

entitled to be on the land. Accordingly Ngametua was placed on the title in 1942 and, in 1944, Taimau was included to share in Ngametua's half share.

[9] Smith J, after summarising the history as above, noted that the 1944 Orders had stood for almost 40 years without challenge. Whilst noting the difficulty in determining the rights of the challenged owners, he placed great weight on the lack of challenge over such a long time as the major reason for not interfering with the 1942 and 1944 Orders. He found no conclusive evidence which would warrant cancellation of these Orders which had not been challenged by the owners at the time. Hence, he dismissed both applications. The Judge did not address the details of the Respondent's application which had been argued. He merely stated that it was dismissed.

[10] Before this Court, Mrs Browne, Counsel for the Appellant repeated and enlarged upon the arguments made in the Court below and took us this Court through the genealogies. She did this with great care and thoroughness. She attacked Smith J's views that there must have been harmony amongst the owners between 1944 and 1983 and that the lack of challenge in the 1942 and 1944 Orders indicated clear acceptance of those Orders. The Judge was said also to have misdirected himself as to custom regarding succession.

[11] Counsel referred to an application by Moeau brought in 1984, under Section 390A of the Act, challenging the 1942 and 1944 Orders on the grounds of lack of jurisdiction. The High Court upheld the challenge but this Court, on 26 July 1988, allowed an appeal and declared the 1942 and 1944 Orders to have been succession Orders, noting that the title may not show the true position as to succession. There is a possibility that there may still be an appeal to the Privy Council from the decision of this Court on that issue.

[12] Counsel took us through all the evidence about title to the land as disclosed in the various hearings since 1904. She claimed that the 1942 decision had been based on evidence which had no place in determining succession.

[13] Mr Mitchell for the Respondent stressed the lack of challenge to the decision from 1944 to 1984. There had been no appeal nor any applications for rehearing or revocation, nor any application for an Order under s 390A. He pointed out that, when certain blocks had been amalgamated between 1970 and 1975 with a view to incorporation, a Committee of Management had been appointed which included Metua Moeau (now deceased) a representative of the Moeau and Taimau interests and a Solicitor. There was no evidence of any dispute during this process. There are fewer than 20 owners of the land so there could not have been any confusion.

[14] Counsel then referred to the findings of fact made by Judge McCarthy in the Land Court in 1942. The relevant parts of his judgment read as follows:

"In its last judgment in this long disputed matter, the Court intimated regarding the amendment application "it is possible further evidence may be available to endorse (?) the rights of Tauariki."

This is in MB 14/352 where the application to amend was adjourned sine die with leave to mention same at a future date. Taumataia now comes forward on the application to amend and says that when he married Tauariki, Moeau and Taria came to the wedding and presented gifts, saying at the time Tauariki was of the Ngati Manava. In further support, he calls Miri, a woman from Ararangi, also present at the wedding, and she confirms his evidence, doing it insuch a manner that this Court concluded that both Tuamataia and she told the truth.

In support of this, too, the Court looks at MB 9/189 where Moeau gave evidence in 1922 and said:

Tauariki comes from another branch of the Manava family.

Having this extra evidence before it, the Court now grants the amendment asked for, and orders that the name of Ngametua (f) be added to the list of owners on the title to this land."

[15] Counsel for the Respondent submitted that the onus was on the Appellant to show that there had been an "error" in the judgment of Judge McCarthy before s450 could be invoked. Counsel submitted further that, since no new evidence had been proffered, the High Court was effectively being asked to conduct rehearings of the 1942 and 1944 cases, in neither of which Moreau had taken part.

[16] Despite Mrs Browne's very careful argument and her traverse of the genealogies, we are not persuaded that Smith J was wrong to refuse to entertain under the guise of a s450 application, what amounted to an application for the rehearing of cases decided over 60 years ago. Those cases had not been challenged for at least 40 years: no fresh evidence was produced. There is no sufficient basis to warrant the overturning of findings made 40 years ago by a Judge who saw and heard the witnesses.

[17] Accordingly, Appeal 12/03 must be dismissed.

[18] If the Court refuses to entertain an application under s450 of the Act in respect of decisions made in 1942 and 1944, then a fortiori, it is unlikely to entertain a similar challenge to a decision made in 1912. Consequently CA 13/03 should also be dismissed. The Court notes Mr Mitchell's concession on this point which is the same as he made in his written submissions in the High Court.

[19] Costs to Respondent $1,000.00 plus disbursement as fixed by the Registrar.

Barker, JA	**Henry, JA**	**Smellie, JA**

Solicitors :

Appellant – Browne, Gibson, Harvey, Avarua

Respondent – M C Mitchell & Co, Avarua