

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

IN THE MATTER of Sections 390A, 391, 399,  
416, 421, 422, 423, 428, 429,  
430, 432, 442, 445, 448 and  
450 of the Cook Islands Act  
1915 and Rules 338 and 350  
of the Code of Civil  
Procedure of the High Court  
1981

A N D

IN THE MATTER of the Land known as Akaoa  
Section 66 in the Tapere of  
Akaoa, District of Arorangi,  
Rarotonga, and Waiterota  
Section 69F in the Tapere of  
Akaoa, District of Arorangi,  
Rarotonga, Tapueinui and  
Arataa sections 91H, 91H2  
and 91H2B in the Tapere of  
Rutaki, District of Arorangi,  
Rarotonga, and the land  
known as Vaiokura Section  
94F in the Tapere of Akaoa in  
the District of Arorangi,  
Rarotonga

A N D

IN THE MATTER of an application by  
EXHAM WICHMAN of  
Rarotonga, Carver

Applicant

Mr Holmes for the Applicant  
Mrs Browne for Mrs Caffery to oppose  
Date of Hearing : 30 June; 1 July; 2 July 1993  
Date of Judgment : 18 November 1993

JUDGMENT OF DILLON J.

As will be seen from the intitling of these proceedings Mr Holmes has made this application under 15 sections of the Cook Islands Act 1915 and two Rules of the Code of Civil

Procedure. If this type of procedure is to avoid filing fees then it must be pointed out that it does not avoid the confusion which flows from such a form of application. For example it could be said with justification that until clarification of exactly what is intended by an application of this type anyone objecting would be entitled to apply for an adjournment until further particulars have been filed. Again the proceedings could be adjourned because this Court cannot proceed under Section 390A without a specific authorisation from the Chief Justice and only then to make a report.

I mention these matters so that Mr Holmes is on notice about such procedure being adopted in the future.

However the problems, some of which I have just referred to, have been clarified by Mr Holmes declaring that his application relates to Section 450 only, i.e. the revocation of a Succession Order made in error.

Again as the intituling indicates six titles to land in the Arorangi District are involved. However two blocks, viz Tapueinui and Arataa 91H2 and Vaiokura 94F, have been withdrawn by Mr Holmes. The position therefore has now been crystallised to a single application pursuant to Section 450 of the Cook Islands Act 1915 in respect of the four remaining blocks.

### **The Case for the Applicant**

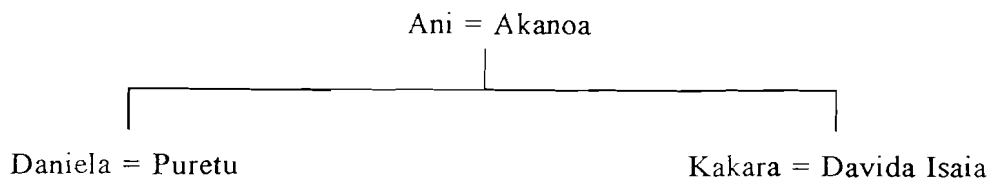
The applicant, Mr Exham Wichman, has filed a comprehensive affidavit in support of his application; he has given evidence on his own behalf; and Mr Holmes has presented brief submissions which the Court finds most helpful. Mr Holmes submitted that the case :

- "2. ... which is submitted is a simple one which will not involve a great deal of the Court's time.
3. The minute book evidence establishes that Kakara (who had no natural children) adopted two daughters Ani and Te Paeru also known as Te Paeru Daniela (reference is made to minute book 9/178, 9/182, 9/191, 9/23 and 9/187).
4. The adoption in both cases were accepted by the extended family and so matured that in accordance with Maori custom they were both entitled to succeed to the land interest of Kakara. The decision of the Court of Appeal in Panam Tanetuaio deceased (No. CA 387) is relied upon).

5. A number of the succession orders made incorrectly vested the interests of Kakara in her brother Daniela who was not entitled to succeed because of the customary adoptions.
6. All the succession orders made in respect of Kakara's interests should have been orders identical to the order made in minute book 9/191 on the 9th of June 1920 in respect of Vaiokura Section 94F, when the interests of Kakara were vested equally in Ani and Te Paeru.
7. The succession orders made subsequent to the abovementioned succession orders (all of which is detailed in the application) also need to be revoked, and new succession orders made in favour of the successors of Kakara namely Ani and Te Paeru equally."

Those submissions provide a useful and convenient starting point to consider the evidence presented by the applicant both by affidavit and by evidence and cross-examination before me.

There is no dispute as to the following geneology, viz :



It is from here on in the above geneology that there is conflict between the applicants evidence and that of the objector Mrs Caffery.

**Mr Heather Says**

"My parents are Ani Davida Isaia and Rere Wichman. Kakara adopted my mother Ani by customary adoption when my mother was one year old. Ani was the daughter of Stanley Heather."

Mr Heather goes further however. He traces the geneology of Te Paeru who he says was the step-daughter of Daniela Isaia and the natural child of Puretu the wife of Daniela Akanoa.

In summary therefore Mr Heather claims that Kakara adopted by Maori custom both Ani and Te Paeru; at that time adoption by Maori custom was legally recognised; the adoption was not formalised by any Court order as required to day but that did not detract in any way from its

recognition and validity; and both the family and the extended family have recognised those two adoptions in accordance with the standards applying and the principles recognised by Appeal Court decisions on this subject.

Having established that foundation based on geneology Mr Heather then relied on various Minute Books where in the past evidence had been given to the Court and Orders had been made, not only confirming the adoption he relied on but also the succession orders in favour of Te Paeru and Ani. He refers specifically in this context to M.B. 9/191 dated 9 June 1920, when the interests of Kakara were vested equally in Ani and Te Paeru. Consequently he not unnaturally says that all the other blocks referred to in this application should have those relevant previous succession orders revoked and new succession orders made in line with the Order made on 9 June 1920 in M.B. 9/191.

### Mr Heather Cross-Examined

Mr Heather was subjected to a searching cross-examination by Mrs Browne. He acknowledged to her that Taira Rere was his brother. He would accept only part of his brothers geneology relating to the Tinomana family and title. He did not identify which part he accepted and which part he rejected. He did acknowledge however that his own geneology had been prepared by his own lawyer. It was in relation to the Tinomana case and the associated geneology that revealed a conflict which assumes some importance when related to the objection evidence that I shall deal with shortly. For example, Mrs Browne put to Mr Heather the following :

1. "The evidence in the Tinomana case is that Te Paeru was not adopted and he was therefore excluded from that Ani line."
2. "In the Tinomana case the death certificate was produced and the death certificate showed Te Paeru's parents as Daniela and Puretu ..."
3. "Do you agree that on Te Paeru's death certificate it shows her mother was Puretu and her father as Daniela."
4. "Q. What relation is Daniela, Puretu's husband to Te Paeru?  
A. Daniela married the mother of Te Paeru.  
Q. So Daniela was Te Paeru's father?  
A. I did not say that.  
Q. What did you say?  
A. I said my mother. He said that it is better that I do not know."

5. "... a geneology that was put in Court in 1934 ... page 227 of Ani married Akanoa - had Kakara female, no issue. and Daniela who had Te Paeru."
6. "Q. In 1934 when your mother was alive that is the geneology given in Court for the Tinomana family are you saying that geneology is incorrect?  
A. (No answer)."

I consider the unsatisfactory explanations given by Mr Heather to those questions put to him by Mrs Browne helps the Court to identify the difficulties confronting him, especially in respect of his assertion that Kakara adopted his mother and Te Paeru. Perhaps the answer lies in Mr Heather's own evidence when he says that his mother "... said that it is better that I do not know." He also said that "... my mother never told me her real or natural father". Those are difficulties that he has not been ask to resolve.

Mr Heather's evidence in support of his application to revoke the succession orders made in 1921 - 1930 and 1958 in respect of Akaoa Section 66; and Waiterota Section 69F; and succession orders made in 1953 - 1958 and 1979 in respect of Tapueinui and Arataa Section 91H must of necessity establish the error or errors that have caused the incorrect succession orders to be made by this Court - that of course is a fundamental requirement of invoking the provisions of S.450.

Mr Holmes puts the position very succinctly in his submissions when he states - "This case ... is a simple one ..."; "Kakara ... adopted two daughters Ani and Te Paeru ..."; "The adoptions in both cases ... so matured, that in accordance with Maori custom they were both entitled to succeed to the land interest of Kakara"; "all the succession orders made in respect of Kakara's interests should have been orders identical to the order made in Minute Book 9/191 on 9 June 1920 in respect of Vaiokura Section 94F when the interests of Kakara were vested equally in Ani and Te Paeru".

That statement, supported by evidence from Mr Heather, could very well meet the requirements of S.450; and could require this Court to amend those earlier succession orders already referred to.

#### The Case for the Objector

Mrs Helen Caffery appeared to give evidence on behalf of herself and her extended family.

Mrs Caffery confirmed that her genealogy showed that Ani married Akanoa; had Daniela and Kakara; that Kakara died without issue; that Daniela had Te Paeru; and that Te Paeru was her mother.

Mrs Caffery also confirmed that no feeding children are shown on her genealogy prepared by Taira Rere, brother of Mr Heather; that her genealogy was given to the Court in the Tinomana case in 1934 - M.B. 11/122-; was presented to the Court again in M.B. 11/226; and that the death certificate of her mother shows that Te Paeru's father was Daniela; and her mother was Puretu.

Mrs Caffery acknowledged that Kakara did have feeding children including Ani. However she denied that her mother was one of those feeding children. She explained why Ani was included in the two lands upon which Mr Heather was relying to support his application. Simply, it was the nature of Kakara to be generous.

In the course of presenting her objections to the application by Mr Heather, Mrs Caffery also referred to Minute Books 22/287 and 10/217; and the evidence therein that had been recorded. She confirmed that her mother was the only child of Daniela; and vehemently denied that her mother was the step-daughter of Daniela. Significantly Mrs Caffery hotly disputed Mr Heather's evidence that her mother was brought up by Kakara; that she was adopted by Kakara; or that her mother ever regarded Ani as her sister.

### Conclusion

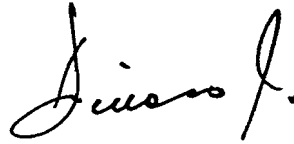
I am not persuaded by the evidence of Mr Heather presented to the Court in 1993 and relating to orders made as long ago as 1921. Orders made at a time when Mr Heather's mother was alive and raised no objections. Mr Heather acknowledges that his mother never did tell him "... her real or natural father". That information could very well provide the missing link in the relationship required to establish Mr Heather's claim.

On the other hand the evidence presented by Mrs Caffery in opposition clearly establishes her status as the child of Te Paeru - a status that has been recognised by this Court in the succession orders that have been made and which are now the subject of this challenge by Mr Heather. Of even greater significance is that Mrs Caffery's status has been recognised not

only in the Tinomana title case referred to in the evidence; but also in the geneology prepared by Taira Rere, brother of Mr Heather.

For those reasons, the application is dismissed.

Leave is reserved for an application for costs if considered necessary.



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Dillon J.