IN THE HIGH COURT OF THE COOK ISLANDS

HELD AT RAROTONGA

(LAND DIVISION) APPLICATION NO. 368/96

IN THE MATTER of Section 450 of the Cook Islands Act 1915

AND

IN THE MATTER of the land known as NGOIOIO SEC 109B AVARUA

AND

IN THE MATTER of an application by RUTA ATA for and on behalf of the PARAU PUTUA FAMILY to revoke the Succession Order made on 28 October 1908 to the interests of TINOMANA ARIKI

Mrs Browne for Applicant Tinomana Ariki

Mr Bruce Young for Objectors (Heathers)

Mr Rassmussen for Objectors (R Jonassen & Tauei Nama).

Date of hearing: 18 October 1999

Date of decision: 20 October 1999

DECISION OF SMITH J

This is an application to revoke a succession order made on the 28th October 1908 in respect to the interest of Tinomana Ariki, in the land known as Ngoioio Section 109B.

On the investigation into the title to the land Ngoioio Section 109 Avarua on the 4th August 1905 the Court minutes at 2/150 (produced as Annex A) in the submissions dated 26th January 1997 by Mr B Young record;

"Ngoioio Te Arai for Tinomana Ariki f.a. life interest
Parau Putua m.a.
Te Ariki Tapurangi m.a. life interest only

On the 5th August 1905 (4/263) the Court partitioned 109 Avarua into a number of severances including 109B Ngoioio and vested that severance into the names;

Tinomana Ariki life
Parau Putua m
Te Ariki Tapurangi m life.

In neither of the hearings did Chief Judge Gudgeon, who presided, record any evidence nor give any reasoning for the findings of the Court. It has been argued before this Court both that the intention of the Court was to have the title Tinomana Ariki vested with an interest for life with perpetual succession to the title holder, and alternatively that the life interest was limited to the encumbent Tinomana Mereana Ariki and ceased on her death.

Neither of these suggestions can be sufficiently persuasive when measured against the actions of Chief Judge Gudgeon when, on the 28th October 1908, (MB 5/16) only a few months after the death of Tinomana Mereana Ariki, he made a succession order in respect to the lands Ngaoioio 109B and the interest therein of Tinomana Ariki recording;

"109B Ngoioio
In sucession to Tinomana, ordered that:

Napa
Tauei
Willie Isaia
Tavita Isaia

No objections."

By using the name "Tinomana" was the Chief Judge dealing with succession to the title, or the individual Mereana?
This is the succession order sought to be revoked.

If, as both the applicant and the objectors respectively argue, the life interest was limited to the encumbent, Mereana, or the title Tinomana Ariki then in either case the Chief Judge erred in making succession orders rather than terminating the life interest and vesting the lands in the remaindermen entitled.

Tinomana Mereana Ariki had no issue of her own although it appears to be accepted that she adopted Te Ariki Tapurangi. (MB 20/31). However, since no remaindermen were named to take, following the life interest recorded against the name Tinomana Ariki on the investigation of the title, nor the partition order in 1908, two possibilities arise. First, the remaindermen should be the co-owners appearing with Tinomana Ariki on both the investigation of the title, and partition, or secondly the persons beneficially entitled to succeed to Tinomana Mereana Ariki in accordance with custom.

The fact that the succession order made by the Chief Judge in 1908 was not in favour of either of these groups raises a strong presumption that at the time of the hearing of succession some form of arrangement was entered into and the lands were vested in those four recorded above.

The fact that all three of the orders relating to this land were made by the Chief Judge lends some credence to this.

This presumption is strengthened even further by the fact, that until these present proceedings, some 88 years after the event, were brought, there had been no challenge to the succession order as made. This, despite the fact that on the 23 September 1949 (MB 19/381) the Court in dealing with a succession application in respect to the interests of Stanley Heather in these lands flagged the matter by recording:

> "The extent of Stanley's interest in Ngoioio is not very clear for it comes to him from what was originally a life interest ..."

Whilst on the face of the evidence available, it appears as stated before that, the Chief Judge may have erred in making succession orders to what was clearly labelled a life interest, it must be accepted that the learned Chief Judge knew what he was about. The title both following the investigation of title and on partition clearly referred to a life interest. This raises the common law principle, that what was done at the time was done properly.

Particularly in light of the fact that all three orders made between August 1905 and October 1908 were all made by the Chief Judge.

This is however only a presumption, capable of rebuttal, and it is for the applicant seeking revocation of the order to prove that the order was made in error.

With respect, and despite the very in-depth research carried out by Counsel for the applicant, and the very erudite submission made, there is no real evidence, other than the existence of a life interest followed by succession which would rebut the possibility of an arrangement being affected. Further, the lengthy time that has elapsed since the order was made without challenge militates against the applicants case.

Section 450 of the Cook Islands Act 1915 by use of the word "may" gives the Court discretion in applications of this nature. Such discretionary jurisdiction to revoke orders should only be exercised when the Court is satisfied that "A succession order (is) made in error..."

This Court finds that the applicant has fallen short of the evidence required to establish error on the part of the Court in making the succession order complained of.

The application is therefore dismissed. The decision is promulgated at Rarotonga the 20th day of October 1999. Copy to all parties appearing and Counsel.

Judge