

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

**APPLICATION NO. 4/2016**

**IN THE MATTER** of section 390A of the Cook Islands Act  
1915 (the Act)

**AND**

**IN THE MATTER** of the lands known as **TURINA 371,**  
**TURINA 139A, PAARIKI 37B,**  
**PAARIKI 37G, PAARIKI 37H,**  
**PAARIKI 371, AREKOI 32, AREKOI**  
**52 & 53, MAIREKURA 31,**  
**MAIREKURA 74, OKAU 153A,**  
**AREKAA 350, ITIANGA 227,**  
**TUENUA 369, TE TUAPAPA 104B,**  
**MAINETAI 117, PUNAREI 73A,**  
**PUNAREI 73C, KAREI 72,**  
**VAOVAOKA 47, TE PAEPAENUI**  
**TUAVARU 59, PIAUI 56, MATARIKI**  
**2C, ARUTANGA; and**  
**TUAIVA 2, ANAUNGA; and**  
**TOREAONU 24, ARAKAKAI 4 & 4B,**  
**AMURI; and**  
**TE AU O TU ISLAND, TE**  
**RUAIKARAU 27D, TE RUAIKARAU**  
**27C, TAANGA 14B, TE TAMARU 43,**  
**TARARO 67, VAIPAE; and**  
**NAOA 57D, TARAVAO**

**AND**

**IN THE MATTER** of an application by **HARRIET TITO** to  
amend the Succession Orders made 18  
February 2013 to the interests of **VAKA**  
**@ VAKAROTO ONGO/ONGA** (the  
Deceased)

Appearance: Mr T Moore for Applicant

Minute (No.1): 11 August 2016

Minute (No.2): 31 October 2017

Judgment (No.1): 15 June 2018

**Judgment (No.2): 5 July 2018**

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**JUDGMENT (NO.2) OF HUGH WILLIAMS, CJ**

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## **History of application**

[1] On 28 October 2015 Harriet Tito, through her agent, Mr Moore, applied to the Court under s 390A of the Cook Islands Act 1915 for an order amending succession orders made on 18 February 2013 in relation to interests in all the above lands. The grounds of the application were that, when successions orders were made in six applications to the Land Division of this Court of Aitutaki<sup>1</sup> they were granted as moved but when Ms Tito later saw a copy of the papaanga on which the Court had relied she realised that one of her sisters, Aileen, had been omitted from the papaanga and accordingly from the succession orders and another sister, Donna, should have been shown as Donna Karena and not Donna Tito. Her application was to correct both those errors pursuant to the power of correction in s 390A.

[2] The file was later referred to Weston CJ and he, on 11 August 2016, issued a Minute recounting the procedural omissions and difficulties arising from the papers as filed and inviting Ms Tito's agent to reconsider the matter.

[3] However, when the file was reviewed in October 2017 there was no indication of any action having been taken in response to Weston CJ's minute and accordingly, by Minute dated 31 October 2017, the Court noted:

[3] The application cannot be allowed to drift and accordingly if the procedural difficulties identified in the 11 August 2016 minute are not corrected by Friday, 15 December 2017 the application will be dismissed for non-prosecution and as being procedurally incapable of being adjudicated upon.

[4] The file was again considered on 28 May 2018 and again it appeared that no documents had been filed since 11 August 2016 and no other attempt had been made to rectify the issues identified by the former Chief Justice.

[5] As a result, by Judgment delivered on 15 June 2018, the application was dismissed for non-prosecution and as being procedurally incapable of being adjudicated upon.

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<sup>1</sup> Applications 80/13, 81/13, 82/13, 83, 84 and 85/13

[6] The judgment, however, led to Mr Moore advising the Court that an amended application dated 10 March 2017<sup>2</sup> had been filed together with an amended memorandum of submissions. Quite where those documents had been since their filing in the Registry and why Mr Moore had not called the Court's attention to them following receipt of the 31 October 2017 minute is unexplained, but the Court accepts they were filed on the date bearing the Registry's date stamp.

### **Discussion and decision**

[7] The grounds for the original application were that "one issue of the deceased was not shown on the papaanga ... and had the Court been aware that it would have included the missing issue when the orders namely Aileen Tito" and "one issue of the deceased shown on the papaanga ... as Donna Tito is actually named Donna Karena and had the Court been aware of that it would have corrected her name".

[8] Though Ms Tito's supporting affidavit exhibited the transcript of the hearing of the six applications on 18 February 2013, including some amendments to the genealogy put in evidence, it contained no copy of the genealogy on which the Court relied. The accompanying memorandum said that an attached schedule was a true copy of the papaanga before the Court at the hearing but, as Weston CJ observed<sup>3</sup> the schedule was not the papaanga.

[9] The amended application went some distance to rectifying those deficiencies in that it amended the grounds as follows:

1. That Aileen Tito is entitled to succeed to her uncle the Deceased (who died without issue) by right, having on 15<sup>th</sup> January 2009 succeeded to the interest of her mother Tara Vaevaeongo @ Tara Ongo in the Lands.
2. That the Court at the Hearing was unaware that Aileen Tito was not shown on the papaanga submitted in evidence as an heir to the Deceased and had the Court been aware that it would have included Aileen Tito in the Orders.

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<sup>2</sup> Date stamped 9 March 2017 by the Registry

<sup>3</sup> At [5]

3. That the Court at the Hearing was unaware that Aileen Tito was already an owner in the Lands by virtue of the succession orders to the interest of her mother made on 15<sup>th</sup> January 2009.
4. That the Court at the Hearing was unaware that one issue of the Deceased shown on the papaanga submitted in evidence as Donna Karena Tito is actually named Donna Karena and had the Court been aware of that error on the papaanga that it would have corrected the name to read Donna Karena on the Orders.

[10] It was supported by an affidavit, not from the applicant but from the agent who appeared on her behalf on 18 February 2013, who confirmed a witness was called to further confirm the papaanga before the Court. The affidavit exhibited a genealogy – not prepared by the agent – which contains the presiding Justice’s amendments. The affidavit exhibited a sealed copy of the order made on 18 February 2013 and the same is attached to this judgment for identification purposes. The agent said in the affidavit that the omission of one issue of the deceased and the incorrect naming of the other was the agent’s error and caused the Court to make its error.

[11] Both the agent’s affidavit and the supporting memorandum state, correctly, that:

“It has always been the practice in the Land Division that once a successor is granted succession to her or his parent, on at least one land title, that when that child comes back to Court for further successions to that parent, such successions are granted by the Court by right”.

### **Recall of Judgment**

[12] A procedural hurdle confronting the Court dealing with the amended application is that this application, Land 4/2016, was dismissed in the Judgment of 15 June 2018.

[13] In light of the fact that the application has been determined, the only avenues available to Ms Tito to alter the judgment of 13 February 2013 are either for her to appeal the dismissal of her application by the Judgment of 15 June 2018 or for the Court to recall that Judgment.<sup>4</sup> The power for the Court to recall its Judgment is exercisable in the

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<sup>4</sup> The recall power is terminated if the Judgment has been sealed or perfected but there is nothing on the file to suggest that such step has been taken in this case in the brief period since the 15 June 2018 Judgment was delivered.

circumstances described in the New Zealand High Court case of *Horowhenua County v. Nash (No.2)* [1968] NZLR 632, 633<sup>5</sup> :

“Generally speaking, a judgment once delivered must stand for better or worse subject, of course, to appeal. Were it otherwise there would be great inconvenience and uncertainty. There are ... three categories of cases in which a judgment not affected may be recalled – first, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; secondly, where counsel had failed to direct the Court’s attention to a legislative provision or authoritative decision of plain relevance; and thirdly, where for some other very special reason Justice requires that the Judgment be recalled.”

[14] The circumstances of this case as summarised in the first section of this judgment, could fall into the second category in *Horowhenua County* because the applicant’s agent, when he should have been alerted by the minute of 31 October 2017 to the fact the Court was unaware of the filing of the amended application and supporting papers, failed to draw that circumstance to the Court’s attention for another seven months. But the circumstances fall more naturally into the third category in *Horowhenua County* namely that the filing of the amended application and supporting documents, changing the way in which the Land Division’s error came about, is plainly a very special reason relating to the merits of the application and justice would be denied the applicant were the judgment of 15 June 2018 not recalled.

[15] There will therefore be an order that the judgment of 15 June 2018 be recalled.

### **Order**

[16] The amended application and its supporting documents have clarified the fact that the errors mentioned in the grounds of the application in fact occurred and the reason for that occurring.

[17] Further, the supporting affidavit impleads the Land Division practice as encapsulated in the citation from the affidavit appearing above.

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<sup>5</sup> The passage which conveniently reflects British and other authority.

[18] Those factors make clear that the Land Division of the Court, in making the orders of 18 February 2013, fell into error, mistake or omission and accordingly, pursuant to s 390A of the Cook Islands Act 1915, there will be orders:

- a) Adding the name of the applicant's sister Aileen to the attached order as number 22. Mr Moore did not advert to the share which should be consequently allocated to Aileen, but, as she is a sister of the applicant who succeeded to a 1/12<sup>th</sup> interest, she, presumably, should succeed to the same interest. But if that order be incorrect, the applicant and her agent are to have 10 working days from delivery of this Judgment to file a memorandum on that topic;
- b) That the name of number 21 on the attached order be amended from "Donna Karena Tito" to "Donna Karena".

[19] For completeness, because the orders just made are plainly necessary to correct the Land Division's error omission and order, the Chief Justice, exercising the discretion conferred upon him by s 390A, sees no necessity to refer this application to the Land Division of the Court for enquiry and report and, both applications having been lodged less than five years after the making of the 18 February 2013 orders, there is no need for the consent of the Queen's Representative to be obtained to the making of the above orders.

A handwritten signature in black ink, appearing to read 'H Williams', written in a cursive style. The signature is positioned above a horizontal line.

**Hugh Williams, CJ**

IN THE HIGH COURT OF THE COOK ISLANDS APPLICATION NO. 81/2013 "D"  
 HELD AT AITUTAKI  
 (LAND DIVISION)

**SUCCESSION ORDER**

**IN THE MATTER** of Section 448 of the  
 Cook Islands Act 1915  
 and Section 44A of the  
 Judicature Act 2000

**AND  
 IN THE MATTER** of the land known as  
**TUAIVA Section 2**  
**Anaunga, Aitutaki**

**AND  
 IN THE MATTER** of the interest of  
**VAKA @ VAKAROTO**  
**ONGO**  
**(MALE DECEASED)**

**BEFORE HER WORSHIP MRS RIMA LIZZIE DAVID JUSTICE OF THE PEACE**  
**MONDAY THE 18TH DAY OF FEBRUARY 2013**

**UPON READING** the application filed herein by **NGAOA RANGINUI** as Agent on  
 behalf of Harriet Tito and others

**AND UPON** hearing **NGAOA RANGINUI** as Agent for the applicants and Enuu  
 Manavaikai in support thereof

**AND THIS COURT** being satisfied upon the circumstances of the case **HEREBY**  
**ORDERS** that the persons named and described in the Schedule are the  
 successors to the interest of the above named deceased in the above-mentioned  
 land

**BY THE COURT**



*Henry*  
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 (DEPUTY) REGISTRAR  
 C. HENRY-ANGUNA  
 REGISTRAR  
 HIGH COURT  
 COOK ISLANDS

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## SCHEDULE

1.	Tekura	Maro Manavaikai	fa	1/64
2.	Teremoana	Maro Manavaikai	ma	1/64
3.	Nio	Maro Manavaikai	ma	1/64
4.	Tata	Maro Manavaikai	fa	1/64
5.	Nootu	Manavaikai Maro	fa	1/16
6.	Koimataariki	Manavaikai Maro	fa	1/16
7.	Naomi	a Ngatokoono	fa	1/80
8.	Mata	a Ngatokoono	fa	1/80
9.	Tera	a Ngatokoono	fa	1/80
10.	Rivao	a Ngatokoono	ma	1/80
11.	Ongo	a Ngatokoono	ma	1/80
12.	Numa	Manavaikai Maro	fa	1/16
13.	Rimamotu	Manavaikai Maro	ma	1/16
14.	Rua	Manavaikai Maro	ma	1/16
15.	Enua	Manavaikai Maro	ma	1/16
16.	Harriet	Tito	fa	1/12
17.	Robert	Tito	ma	1/12
18.	Michael	Tito	ma	1/12
19.	Helena	Tito	fa	1/12
20.	Lance	Tito	ma	1/12
21.	Donna Karena	Tito	fa	1/12

