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

APPLICATION NO. 560/18

UNDER	Sections 429 and 430 of the Cook Islands Act 1915 and Rule 348 of the Code of Civil Procedure 1981
IN THE MATTER OF	the land known as MARAERA Section 90E Arorangi
BETWEEN	TINOMANA ARIKI Applicant
AND	ALEXIS WOLFGRAMM AS POWER OF ATTORNEY FOR MEREANA WOLFGRAMM, BRENDA WAINOHU, TAUEI SOLOMONA AND TUTU TAIRA Respondents

Hearing: 16 July 2019

Appearances: T Moore for Applicant
A Wolfgramm for Respondents

Judgment: 3 April 2020 (Aotearoa/New Zealand time)

JUDGMENT OF COXHEAD J

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Introduction

[1] This decision concerns an application filed by Tinomana Ariki pursuant to ss 429 and 430 of the Cook Islands Act 1915. The applicant seeks to partition her interests in a block of land known as Maraera Section 90E.

[2] The application is opposed by several other owners in the block. They argue that the applicant holds the land only 'by virtue of his or her office as Ariki'. However, even if the applicant was entitled to partition her shares, the respondents argue this would be contrary to the wishes of the remaining owners and the applicant does not have majority support for the partition application.

[3] The issue I must consider is whether the applicant can partition her shares in the block.

Background

[4] Maraera Section 90E is a block of land approximately 6 hectares in size. It is located in the district of Arorangi. The land was originally examined by an Order on Investigation of Title (OIT) on 8 March 1906. The OTI listed the following seven persons as the owners of the block; Tinomana, Te Ariki Tapurangi, John Meangiti, Mereane, Te Uira, Tiamarama Katerina and Minnie.[1] The OTI recorded Tinomana as having a "life interest" only. John Meangti was also recorded as having a life interest and this ceased on his death.

[5] On 31 March 1937, the words "life interest" were deleted for Tinomana and the OTI records that the words "By virtue of his office of Ariki" were inserted.[2] On 13 September 1940, the relative shares and interest of the six owners were defined equally.

[6] Subsequently, succession to Tinomana's interest in the block has been completed over the decades. The most recent succession order was completed on 27 June 2013, vesting in favour of 'Tinomana Tokerau Ariki'. Succession to Tinomana Tokerau Ariki

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1 Minute Book 2/239.
2 Minute Book 12/35.

was made using the words "Atu Enua" in place of "by virtue of his office of Ariki". The title records do not state the reason for this change.

[7] Further, a lease was entered into by "all owners except Tinomana" with Marcus Estall on 25 July 1909. The lease was for an area of six hectares for a term of 99 years. In 2009 that lease came to an end, and new occupation rights and leases have been in place since then.

Procedural History

[8] In 2018, Mr Moore on behalf of the applicant filed an application for partition. A notice of objection was filed by Mereana Wolfgramm on 28 April 2019. The majority of the landowners also filed a notice of objection on 29 April 2019.

[9] The matter came before me on 16 July 2019, with both parties present. Mr Moore, for the applicants presented Mr Donald Munro, as a witness. He is the applicant's son and a member of the committee that advises Tinomana. I also provided Ms Wolfgramm, daughter of Mereana Wolfgramm, with the opportunity to cross-examine Mr Munro. Both parties raised arguments related to the status of the land, the lack of support for the partition application, the use and occupation of the block over the past decades and the latent concerns about family meetings that have been held. There was also indication that certain areas of the block have been allocated to family members on an informal basis. At the conclusion of the hearing, I adjourned the matter and directed both parties to file their closing submissions within four weeks. I provided the applicant with a further two weeks to file reply submissions, if they wished to do so.

Applicant's submissions

[10] Mr Moore, on behalf of the applicant, argued that the applicant is a legal owner in the land and should be entitled to partition her entitlement in the block, equating to approximately 10,000 m^2. He says the opposition by the respondents is based on unfounded arguments and is unfair, unreasonable, and inequitable.

[11] Mr Moore noted that the applicant has called several meetings of owners, which were well advertised and attended, to discuss her proposal to partition her shares.

However, at each meeting the landowners rejected her proposal without providing any reasoning.

[12] In particular, Mr Moore also contended that the applicant tried to obtain a lease or an occupation order in respect of her shares in the block at a meeting of assembled owners held on 16 April 2019. However, the landowners rejected her requests, while at the same meeting, approved a lease for another landowner. Mr Moore also submitted that over the years, there have been several meetings of owners held, however, the applicant was never notified or invited to these meetings. Mr Moore says this is illustrative of the deep-seated disharmony between the respondents and the applicant, and it is unlikely to change in the future.

[13] Mr Moore expressed concern that the respondents appear to be treating the land as "Taura Oire". When land is held as "Taura Oire", the Ariki holds the land by virtue of his or her title and the owners have full ownership rights without the need to refer to the Tinomana. However, Mr Moore argued that it has been clearly acknowledged at hearing that the block is not Taura Oire land.

[14] In relation to the original title of order in 1940, where six owners and their relative shares were defined, Mr Moore drew attention to the words "their relative shares and interests therein are equal". Mr Moore argued this implied that each owner's fee simple interest in the land was equal, and unfettered. He says if the Judge had intended the applicant's fee simple interest to be "less" equal than that of the other five landowners, it would most certainly have been made clear on the title.

[15] In any case, Mr Moore argued that the words "atu enua" recorded in the most recent succession order, refers to a holder of a fee simple title. Therefore, this implies that the applicant succeeded to the land "personally" rather than by virtue of her title.

[16] Further, Mr Moore argued that the block has been allocated amongst the owners in a "first come first serve" basis. As the applicant was never notified of any of the owner meetings, Mr Moore contended such distribution mechanism is inequitable. He also says that Ms Wianohu, one of the respondents, primarily objects to the partition application as part of the land the applicant seeks to partition ("Lot 23") is supposedly

allocated to Ms Wainohu's kopu-Teuira and the partition application, if granted, would displace the existing arrangements in the block.

[17] Essentially, Mr Moore argued that with the deep-seated disharmony present between respondents and the applicant, the applicant has no recourse other than to ask the Court to intervene.

Evidence of Mr Munro

[18] Mr Munro, on behalf of the applicant, has filed an affidavit dated 16 July 2019. In the affidavit, Mr Munro stated that the applicant has never been notified of the meetings of owners called by other landowners to grant leases on the block. He also stated that at the meeting of assembled owners held on 16 April 2019, the applicant sought a lease from the owners. However, the owners objected on the basis that the lease should not be considered until the partition application had been heard and determined.

Respondents' submissions

[19] Ms Wolfgramm, on behalf of the respondents, opposed the application on the basis that the applicant holds the land 'by virtue of his or her office as Ariki'. In any case, Ms Wolfgramm contended that the applicant does not have majority support for the partition she seeks.

[20] Ms Wolfgramm relied on the following grounds:

(a) With regard to the declaration 'by virtue of his or her office of Ariki', Ms Wolfgramm says that the applicant has the right to use the land that goes with this title but does not have any right to alienate the land away from the other landowners;

(b) The landowners have never been recalcitrant in denying the applicant the right to use the land. However, they have always asked for clarification on the applicant's standing as a legal owner in the land;

(c) The meetings of owners over the years were well advertised, and if the applicant wished, she could have attended them. However, the applicant failed to attend these meetings, and she did not utilise the land; and

(d) There have been two meetings called by the applicant and at both these meetings, the landowners rejected the applicant's proposal to partition the land.

[21] Ms Wolfgramm also says that s 426(1) of the Act applies to the current circumstances and in keeping with that section, all subsequent succession orders should have included the declaration 'by virtue of his or her office of Ariki'. However, as succession by the applicant to her predecessor was made using the words "Atu Enua", meaning 'landowner', it appears the change in declaration was done without the knowledge or approval of the other owners. She says, this goes against the principle of s 426(1), which intended to maintain land that belongs to an Ariki or other native chief by virtue of his office, to vest in such Ariki and his successors in office in the same manner as if they were a corporation solely.

[22] Further, Ms Wolfgramm contended that landowners were deeply concerned that a lease or a partition, would result in succession to the applicant personally than by other future Tinomana. The respondents also submitted that if alienation of the land was allowed, this would remove their "tenants in common" ownership over that portion of the land. Essentially, Ms Wolfgramm says even if the Tinomana Ariki title is removed or dies out in the future, the land should remain consolidated for the remaining owners.

Evidence from Brenda Wainohu

[23] On 8 August 2019, Brenda Wainohu, an owner in the block, filed a letter of opposition. In this letter, she outlined her lineage to the block and argued that the owners are the caretakers of the land inherited from their ancestors. Therefore, they have an obligation to protect and safeguard the land for future generations. She essentially implied that alienation of the block would preclude this obligation. Ms Wainohu also expressed her desire to develop her section of the block for her and her family.

The Law

[24] The High Court's inherent jurisdiction to partition land is set out in the Cook Islands Act 1915. Section 429 provides:

> **429 Jurisdiction to partition Native land**
>
> (1) [The Land Court] shall have exclusive jurisdiction to partition Native freehold land.
>
> (2) Such jurisdiction shall be discretionary, and the Court may refuse to exercise the same in any case in which it is of opinion that partition would be inexpedient in the public interest or in the interests of the owners or other persons interested in the land.

[25] Section 430 is also relevant. That section provides:

> **430 Partition orders**
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> (1) Native freehold land may be partitioned by the making of partition orders.
>
> (2) Each such order shall constitute without any conveyance or other instrument of assurance the title to the parcel of land therein included.

[26] Sections 431-433 of the Act address apportionment on partition, modes of partition and land to be partitioned into suitable areas:

> **431 Apportionment of encumbrances on partition**
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> When a partition order is made the Court may, in that order or in any subsequent order, apportion between the several parcels into which the land has been partitioned all rights, obligations, or liabilities arising from any lease, licence, charge, or other encumbrance to which the land is subject at the date of the partition thereof; and any such order shall have effect according to its tenor in the same manner in all respects as if all necessary conveyances, assignments, releases, covenants, and other dispositions or agreements had been duly made in that behalf by all persons concerned.
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> **432 Mode of partition**
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> The Court may partition land either into parcels held by single owners in severalty or into parcels held by any number of owners or tenants in common in such shares as may be expressed in the partition order, or may partition the land partly in one manner and partly in the other.
>
> **433 Land to be partitioned into suitable areas**
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> It shall be the duty of the Court so to exercise its jurisdiction in the matter of partition as to avoid, so far, as practicable, the subdivision of any land into areas which because of their smallness or their configuration or for any other reason are unsuitable for separate ownership or occupation.

[27] The requirements for filing an application for partition is set out in r 348 of the Code of Civil Procedure of the High Court 1981:

> **348 Application for partition**
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> (1) Every application for partition shall be accompanied by the following particulars:-
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> (i) Name of land and area;
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> (ii) Name of applicant;
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> (iii) Name of district in which the land is situated;
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> (iv) Particulars of any order or other instrument constituting title;
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> (v) Whether the order is completed by survey;
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> (vi) The legal width of any public road to which the land has a frontage;
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> (vii) Particulars of the existing valuation (if any);
>
> (viii) Particulars of any improvements upon the land;
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> (ix) Particulars of any alienations, encumbrances, rights of way, or other easements disclosed by the Court record or known to the applicant;
>
> (x) Particulars of any alienation pending;
>
> (xi) The names, addresses and relative shares of all the owners of the land at the time of the application.
>
> (2) The applicant shall file with the application, or within such time as the Registrar shall allow, a plan showing the proposed partition with the measurements of boundaries, and areas where possible.
>
> (3) The Registrar shall not set down for hearing by the court any application filed under this rule until the particulars required by subclause (1) of this rule and the plan required by subclause (2) of this rule, have been filed.
>
> (4) The Court may, at any time during the proceedings in respect of any application for partition, require any party to the proceedings to furnish to the Court such additional information as the Court deems necessary for dealing with such application for partition.

[28] There are two main guiding principles for the determination of partition applications. Firstly, owners need to determine and consent to the partition and how the land will be apportioned, except where a group of owners are acting unreasonably, unfairly or inequitably. Secondly, the Court ought to have regard to, and attempt to preserve, land in the ownership of distinct groups of owners who have traditionally occupied or currently occupy it, as distinct from other owners who do not reside in or occupy that area. [3]

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[3] *Ruaro and Vaipapa Section 89D* HC Cook Islands (Land Division), Application No. 204/83, 12 May 1988.

[29] While it is ultimately the decision of the Court on whether to exercise its discretion, there are some matters the Court has taken into consideration when determining a partition application. In *Taua v Kaina*, the Court outlined these as: [4]

(a) The Court ought to have regard to and attempt to preserve land in the ownership of distinct groups of owners who have traditionally or currently occupy it as distinct from other owners who do not reside in or occupy that area. This should be considered alongside the sharing of the total land in terms of beach front, main road frontage, cultivable areas and mountainside land.

(b) It is unreasonable, for the allocations of land to be determined entirely by previous occupation as this could result in disenfranchisement of shareholders or the allocation of all of the high value land to one family at the expense of other families.

(c) A partition should be a last resort for families that cannot resolve a dispute in any other way.

(d) A granting of a partition should not create inequities among landowners.

(e) Owners hold the land for their lifetime only and the next generation need to be considered in any decision made. In this assessment, a number of factors can be considered including: traditional (family) arrangements and customs; landowners consent with unanimous consent preferable except where that consent is withheld unreasonably; and the interests of future generations.

(f) The tyranny of the majority is a matter the Court must allow for when considering an application for partition. Any single family cannot be allowed to exclude another from occupying land they hold in equal shares by virtue of greater numbers and consequent greater voting power. Such behaviour can be considered inequitable enough to allow for partition.

(g) There is no legislative foundation for prioritising the views of land owners who are resident in the Cook Islands over those who reside overseas.

[30] Taking these into consideration, the Court then went on to specify the general requirements it should be satisfied of before exercising its discretion to allow a partition. These are: [5]

(a) The applicant has met the requirements of r 348 of the Code of Civil Procedure of the High Court 1981.

(b) It is expedient in the interests of the owners, the public or anyone with an interest in the land, with regard to: allowing owners to live on their land; equity as between owners; traditional arrangements; fair apportionment of desirable land between families; and the interests of future generations.

(c) The applicant has the consent of a majority of landowners by number rather than shareholding.

(d) In the alternative, a group of owners is acting unfairly, unreasonably or inequitably: by refusing to consent to the application; with regard to the

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4 *Taua v Kaina* HC Cook Islands (Land Division), Application No. 376/2012, 20 December 2018 at [24].

5 At [25].

apportionment of desirable land; by outvoting a family that holds an equal share but has fewer members.

(e) The issue cannot be resolved by any other means.

[31] In *Vaetrau v Emi*, the Court defined the "Atu Enua" as:[6]

> The current Pakau Mataiapo hold the Pakau title as **Atu Enua, that is to say as the owner of the underlying freehold.** Strictly speaking the owner ought to have been joined as a party to this appeal given that the value of the Atu Enua's interest is inversely proportional to the value of any continuing occupation right…

[32] As to the role of the Ariki or Atu Enua, in *Puia*, the High Court cited approvingly the comments of Chief Justice Gudgeon in 1908 as follows:[7]

> [8] Chief Justice Gudgeon in the Order on Investigation of Title for the house sites makes a number of pronouncements to clarify the effect of these titles and the rights of the owners of the house sites and the Ariki. I now set out the relevant pronouncements to this issue:
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> …
>
> 4) MB 4/47A, dated 10 March 1908. In this minute Chief Justice Gudgeon further explained the effect of the titles created for occupation. He said the Court became involved because of trouble at Arorangi when a certain man leased his house and the Atu Enua thought she had a right to a large share of the rent. He stated:
>
> > "The position now is that each house owner is under the protection of the law, and – subject to a proper recognition of the rights of the Atu Enua – is the absolute owner of the House, and can either sell or lease that right to a stranger, whether Maori or Foreigner. In such a case he merely sells the buildings he has erected and the right to live in them.
> >
> > **The obligations to the Atu Enua continues no matter who lives on the land. Such is the position of the occupier and I will now define that of the Ariki or Atu Enua.**
> >
> > **The original arrangement was that the people should pay no atinga. But the Court has given them extended powers and privileges and must therefore define with equal clearness the position of the Overlord. The Court awards the land to the various applicants as per the orders made in each block but orders that each house site shall pay to the Atu Enua the sum of one shilling in the month of January in each and every year commencing in January 1909."**
>
> [9] These pronouncements in my view clarify a number of important issues regarding the nature of the Order on Investigation of Title for occupation or residential sites.

[33] The Court went on to note that owners can exercise their rights without interference from the Ariki. In this regard the Court stated the following:[8]

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6 *Vaeteru v Emi* CA Cook Islands, Application No. 8/06, 1 December 2006 at [49].
7 *Puia* HC Cook Islands (Land Division), Application No, 588/2012, 25 August 2017.
8 *Puia* HC Cook Islands (Land Division), Application No, 588/2012, 25 August 2017.

> [10] First, the titles are for occupation or residential sites. The persons determined by the Court to hold those occupation sites are the owners of the titles with all the powers to lease and to sell. They can exercise these rights without interference from the Ariki, and the titles have given "each man his own land and make him independent of everything but the law." As set out in the Gudgeon pronouncements this was to ensure it was clear that these titles were not under the mana of the Ariki but were under the mana of the title holders.
>
> [11] The right of the Ariki was to receive one shilling every year and for the return of the land to the Ariki where the owner of the title created for occupation died without blood descendants.
>
> …
>
> [36] The nature of the titles was set out in paragraph [10] above. The persons named on the Order on Investigation of Title by the Court are the owners of the title and these titles are to be used for occupational or residential purposes.
>
> [37] These owners have the right to lease and sell and these rights are exercised independently of the Ariki.
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> [38] The titles are not under the mana of the Ariki, but of the persons listed as owners of the land for occupation purposes.
>
> [39] The mana of the Ariki only comes into force when the owners of the occupation lands have no further descendants.
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> [40] These titles were determined by the Court in the early 1900s to bring some certainty and legal order to the rights of those persons occupying these lands.
>
> [41] It is hoped that this decision will continue the desire for certainty and order on the titles set aside for occupational purposes.
>
> [42] As stated by Chief Justice Gudgeon back in 1908, the owners of this land have the right to alienate their land.

Discussion

[34] The Court has stated on numerous occasions that partition orders should be made by consent. This is to avoid the Court imposing its own views on how land should be apportioned or divided up between common owners. The ideal in all partition situations is that the owners consent to the partition and have decided amongst themselves what lands will be apportioned to which group of owners. That is the ideal. But unfortunately, that is not always what happens.

[35] The Court has a wide discretion in terms of s 429 of the Act. The Court, however, may refuse to exercise this discretion if it is of the opinion that the partition would be inexpedient in the public interest or in the interest of the owners to the land. On the other hand, the Court may intervene where the opposition present is unreasonable, unfair and inequitable.

[36] From the evidence given by both parties, it seems clear to me that the relationship between the parties has broken down and is dysfunctional to the point that they feel the only resolution is to seek intervention by the Court. This is unfortunate. However, as outlined above, there are certain matters the Court must be satisfied of before deciding whether or not to exercise its discretion.

[37] The Court ought to have regard to, and attempt to preserve, land in the ownership of distinct groups of owners who have traditionally occupied or currently occupy it, as distinct from other owners who do not reside in or occupy that area.

[38] At the hearing, it was clearly voiced that the applicant has not physically occupied the land. Mr Moore argued that, in large part, the remaining owners have excluded the applicant's involvement in discussions relating to the block by failing to notify her of any owner meetings. Mr Moore also provided a table in the affidavit of Mr Munro which shows the land allocation between the families. There is no land at all allocated to Tinomana. On the other hand, Ms Wolfgramm in reply stated that the meetings of owners were well-advertised and the applicant could have attended if she wished to do so. It was also brought to my attention that the respondents have always understood the applicant to have a "customary right" to the land and she has never been precluded from using the land in this regard.

[39] While I acknowledge that the land in question is not Ariki title or Taura Oire land, the situation is nevertheless akin to a Taura Oire situation, and for many years all owners, including the different persons who have held the title of Tinomana Ariki, have operated on the basis that the Tinomana Ariki have the lands, as opposed to those individuals personally. The Tinomana, while being recognised as an owner in terms of interest, has not been an owner in terms of occupying the land. This has been the custom with regard to this land and is how owners, including the different Tinomana, have operated with regards to the land.

[40] It is evident that there are misunderstandings amongst the parties as to the obligations and the role of the applicant as the title bearer "Atu Enua". The caselaw noted above indicates the obligations of an Atu Enua sits with the land, no matter who

lives on the land. The owners in the land can exercise full ownership rights without interferences from the Ariki. This very concept was examined in *Puia*.

[41] Mr Moore submitted that the applicant has called two meetings of owners, which were well advertised and attended, to seek support for her partition proposal. I am also aware that the applicant has proposed to the respondents that instead of a partition, the applicant would be willing to take a lease. However, majority support was not given for the lease and therefore Mr Moore argued that the applicant must now be allowed to withdraw her interest by way of partition. The better process would have been for the applicant to propose a lease to the owners, without holding a partition as a threat over the owners.

[42] In any case, there is a very obvious lack of support for the partition application from the owners. As foreshadowed above, the caselaw is clear that owners should determine and consent to the partition and how the land will be apportioned. The Court will generally adhere to the tyranny of majority unless consent is withheld unreasonably, unfairly or inequitably.

[43] In the present circumstances, I do not consider that the respondents are withholding consent unreasonably, unfairly or inequitably. In fact, their stance has been consistent with the long held custom that the Tinomana held interest in the land by virtue of his or her office but did not seek to exercise that interest in terms of occupying the land.

Decision

[44] The application is dismissed.

Dated at Rotorua, Aoteaora/New Zealand on the 3rd day of April 2020.

C T Coxhead
JUSTICE