

**IN THE COURT OF APPEAL OF THE COOK ISLANDS**  
**HELD IN AUCKLAND, NEW ZEALAND**

CA7/2003

**IN THE MATTER** of Article 60(3) of the Constitution and  
Rule 17 of the Court of Appeal Rules

**BETWEEN:** FANAU TEPAPAURA NICHOLAS

**Appellant**

**A N D:** GEORGE TAAVIRI NICHOLAS

**Respondent**

**Hearing:** 24 September 2003

**Coram:** Casey JA (Presiding)  
Smellie JA  
Williams JA

**Appearances:** N George for Appellant  
Mrs T P Browne for Respondent

**Judgment:** 2 October 2003

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**JUDGMENT OF THE COURT**

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**Solicitors:**

Norman George, Avarua, Raratonga for the Appellant  
Brown Gibson Harvey P.C., P O Box 144, Raratonga for Respondent

[1] The question at issue in this appeal is whether George T Nicholas (the Respondent) is the rightful holder of the Manavaroa Mataiapo Title, to which he claimed to have been elected by his tribe according to Maori custom. This was confirmed by the decision of Smith J sitting in the High Court Land Division on 18 March 2003, where his claim was contested by Fanau Nicholas, the Appellant, a sister of the previous title-holder now deceased. His Honour rejected the submission made on her behalf that by family custom, only a member of the senior family line (to which she belonged, but not Mr Nicholas) was eligible to select and elect the title-holder, and to hold the title. He ruled that Mr Nicholas came from a line entitled to take it; and that he had received majority support at a meeting held on 22 August 2002 to consider his appointment, which was properly representative of the Kopu Mataiopo and entitled to make that decision. His Honour added that the question of his suitability had been demonstrated during the time he acted as custodian of the Title, which had not been disputed; and that his investiture had been duly carried out.

[2] The appeal was late but we extended time and gave leave for it to be brought on Mr George's undertaking to pay the agreed security of \$2,500 promptly into the Court at Raratonga. The first ground is that only a member of the senior family line descended from Robert (c1890) is eligible to hold the title. The Appellant says the Respondent's ancestry goes back to Kaitara, a younger brother of that Robert. If she is right, the Respondent could not properly be the Mataiopo. Contrary to what was apparently her position in the Land Court, in this Court she did not challenge the ability of all family members to select and elect the title-holder. There were a number of other grounds, in summary alleging unsatisfactory conduct of the meeting of 22 August 2002, and bullying and intimidation by the Respondent, leading to the conclusion that the outcome cannot be regarded as a genuine expression of the members' opinion. It is also alleged that he is not a suitable person to hold the title.

## Ancestry

[3] The genealogy table put before the Court indicates that the Mataiapo title has been held continuously by members of Robert's family line, but Mrs Browne pointed to a different pattern of succession with Akinuku (two generations before Robert), taken as the starting point of the Mataiapo titleholders of Manavaroa, when Christian missionaries arrived. She also demonstrated that the record confirming Upokotiao's election in MB 24/182 of 22 July 1959 refers to a meeting and approval by Kaitara's family, and submitted that there may well have been similar approval or no opposition with others. We were not referred to anything in the Land Court records spelling out a family custom of the kind alleged by the Appellant, and note that the 1977 report by the Koutu Nui on Lands and Traditional Titles recorded at p 10 that the election and investiture of a Mataiapo is not uniform throughout the Cook Islands, and that differences must be observed and respected. A number of practices were described, but there was nothing in them suggesting that a successor must come from members of an elder family line. Here the wider family is clearly divided over this issue and in the absence of any material from which such a custom can be unambiguously spelt out or inferred, we are not prepared to hold that one exists.

## THE MEETING OF 22 August 2002

[4] Two earlier meetings to elect the titleholder did not result in agreement, and eventually the Respondent, as Tupakau Rangatira, called one at 6 pm on 22 August 2002 (although it did not get started until 6.30 pm), at which the chairman was Tepoave Raitia. Full minutes were kept and were produced to the Court. Mr Nicholas spoke first and explained that for the past year he had looked after the Title with the help of his immediate family, but there was continuing trouble over a successor and his patience was at an end. He now sought the Title for himself, and had the agreement of another Rangatira. He saw all the family lines present and asked them to give him the Title and bring the clan together so they could be in peace. He said

“I don't want to hear genealogies and who is the elder line. I just want to know whether you agree 'Yes' or 'No', then we can have supper together.”

The chairman then spoke, saying:

“I estimate we can finish this meeting by 7 pm. We just want to know whether you say ‘yes’ or ‘No’ to the request by Tupakau Rangatira. I asked Tupakau Rangatira what the procedure is to elect Manavaroa Mataiupu. He said the procedure is to ask the Rangatira of Manavaroa Mataiapo to decide.”

Mr Raitia’s use of the word “we” in this passage could give the impression that he was allying himself with the Respondent and it is evident from succeeding passages that he wanted to reduce discussion to a minimum, indicating that only a “yes” or “no” response was needed. This was the attitude of Mr Nicholas himself throughout the meeting, seen especially when he cut short attempts to develop a claim by the family line from Turua. Also the Chairman by seeking advice from the aspirant as to the procedure to be followed, apparently without input from others at the meeting, further suggests a bias in favour of the Respondent.

After summarising the different views expressed, the Chairman closed the meeting at 7.45 pm in these terms:

I would like to close the meeting now. I know that the majority of speakers agreed. But I will declare on the Minutes, after I have worked it all out, and check the *kopu* (lines). I will write it down and attach my decision to the Minutes. Nobody signs until after they have read it. At the moment, the decision is still in the air, even though the majority of speakers have agreed. Then *Tupakau Rangatira* will take the Minutes around for signature. If you disagree with the Minutes and my results, then don’t sign.

There was no declaration of the result as promised, nor is it apparent that the minutes themselves were taken around for signature. Although there were only 41 people at the meeting Mr Nicholas obtained the signatures of over fifty people to a document which he circulated, headed “The Manavaroa family has agreed for the Manavaroa Title to go to Tupakau Rangatira”(ie himself). In affidavits submitted to this Court

deponents said they were told that they should not sign if they disagreed, which accords with the advice given by the chairman in his closing remarks quoted above.

Those affidavits came in as part of the record on appeal, although, leave to tender them had not been obtained. In relation to the meeting they confirm (though perhaps in more colourful language) Mr Nicholas's attitude there and we accepted them with due reservation, bearing in mind that the deponents were not able to be cross-examined and that there were no affidavits in reply, due perhaps to the limited time available. However, they relate more fully to the question of Mr. Nicholas's suitability in the light of allegations made about his conduct after his election, and we deal with this point later.

#### CONCLUSIONS ABOUT ELECTION PROCESS

[5] At the outset we are concerned about the apparently radical departure from the customary way important matters are dealt with in tribal meetings such as this, convened to settle a divisive issue of great moment. One would expect to have seen full opportunity given to all speakers to express their views, subject only to their being confined to the business in hand and to the avoidance of repetition. Counsel informed us that such a meeting would have been expected to last four hours at least, and the sense of grievance felt by those who saw themselves forced into an immediate "yes" or "no" response is apparent in the affidavits.

[6] Of more concern is the fact that no final result of the voting was published in spite of the chairman's statement that this would be done, and the position was made more uncertain by the Respondent's action in personally soliciting signatures after the meeting to establish his majority, while prepared to ignore those who disagreed. Questions were also raised in the affidavits about the genuine nature of some signatures. Taking all these matters into account we think the election procedure

was so flawed that it would be quite unsatisfactory to accept that Mr Nicholas's appointment to the Title was the result of a fair and impartial process. There should be no need for us to emphasise that in a divided family situation like this, where feelings obviously ran high, it is essential that the election be properly conducted and be transparently fair. That did not happen.

[7] We suspect that His Honour in the Court below may not have had the information and assistance available to us on the appeal, and we think the proper course is to direct a rehearing of the original application in that Court after a meeting of the families to elect the holder of the Title, that meeting to be independently chaired by the Registrar or other person appointed by the Court. It may be suggested that, from the numbers apparently in Respondent's favour at the meeting, the result of a fresh election would be no different. But this would not justify the Court's refusal of such an order – see Meadowvale Stud Farm Ltd v Stratford County Council [1979] NZLR 342, 350, emphasising that no one can safely say what the result of a properly conducted meeting might have been.

#### OTHER MATTERS

[8] The Respondent's suitability was challenged in the appeal. The affidavits filed in this Court allege conduct after the meeting directed at the Appellant and her supporters, which is the subject of pending criminal proceedings. These allegations would be best left to the meeting proposed above to determine his suitability to hold the Title. We have not been asked to comment or decide upon the effect of the Appellant's own investiture of the Title, which seems to have triggered the misconduct giving rise to the charges against the Respondent.

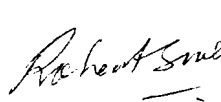
#### **DECISION**


- [a] The appeal is allowed and the decision of the High Court determining that George Nicholas is the proper person to hold the Manavaroa Mataiapo Title is set aside. That Court is directed to rehear the application after a meeting is held of the relevant families, to be

convened and chaired by the Registrar or other suitable person under its supervision.

- [b] The Appellant to have costs against the Respondent of \$2000 together with disbursements and the costs of preparation of the case and reasonable travel and accommodation expenses of counsel, to be fixed by the Registrar if the parties cannot agree.

  
Casey JA

  
Smellie JA

  
Williams JA

Signed at

am/pm on

2003