

**IN THE COURT OF APPEAL OF THE COOK ISLANDS**  
**HELD AT RAROTONGA**

**CA 11/05**

**IN THE MATTER**

of the land known as  
**AREMATI SECTION 35**  
**ANAUNGA, AITUTAKI**

**BETWEEN**

**JOSEPH JOSHUA KA**  
formerly of Reureu,  
Aitutaki, Cook Islands and  
now of Auckland, New  
Zealand

**Appellant**

**AND**

**TIRA MAKEA FRED**  
**PAKAU** formerly of Ureia  
Aitutaki, Cook Islands and  
now of the United States  
of America.

**Respondent**

**Before:**

Fisher JA (Presiding)  
Paterson JA  
Weston JA

**Counsel/Agent:**

Mr J J Ka, in person  
Mr N George for Respondent

Date of Hearing:

28 November 2006

Date of Judgment:

01 December 2006

**DECISION OF THE COURT**

**Introduction**

1. On 16 August 2004 Smith J made an order granting a right of occupation to Tiramakea Fred Pakau over part Aremati Section 35, Anaunga, Aitutaki for the purposes of a house site. Mr Ka applied for a rehearing of that decision. On 21 December 2004 Smith J issued a

judgment declining to grant a rehearing. Mr Ka has appealed against the decision of 21 December 2004.

### **History of Applications**

2. The first relevant application is that of Mr Ka made on 6 February 2003 (App 25/03) seeking on behalf of himself and his sister Tutai Ka a partition order. They claimed to be the holders of the majority [1] share and sought 5550 square metres of land.
3. After a meeting of landowners on 1 May 2003 Mr Pakau applied on 7 May 2003 for an occupation right over part of the land (App. 62/03). The application was in respect of 3563 square metres, which was part of the 5550 square metres, which was the subject of Mr Ka's application.
4. By a letter dated 17 May 2003 Mr Ka objected to Mr Pakau's application. He said in the letter:

*"My siblings and I are the holders of the majority [1] share amounting to 5550 square metres in the land, which is the area that is left on the land. The other two and who are minor shareholders from whom the applicant descends from have already exhausted and exceeded their share in the land. The meeting from which the application rose from was invalid. I also wish the Court to take notice that I have filed an Application for Partition on 6 February to be heard in August this year. The number of that application is App. 25/03."*
5. Mr Pakau's application for an occupation right was adjourned so that it could be dealt with Mr Ka's application for partition on 28-29 August 2003.

6. Mr Ka filed a Notice Disputing Claim dated 19 August 2003. This opposed Mr Pakau's application. The grounds were that Mr Ka and his siblings "are the holders of the majority [1] share amounting to 5550 square metres in the land." The notice also alleged that the meeting of 1 May 2003 (see para 3 above) was not properly constituted and the resolution passed at it was null and void, and that some of the minor shareholders "who had exhausted and exceeded their shares" were trying to deprive Mr Ka and his siblings of their share.
7. Both Mr Pakau's application for an occupation right and Mr Ka's partition application came before the Court on 29 August 2003. Both applications were adjourned to the next Court to be heard together. The Judge's handwritten note on Mr Ka's application noted it was "adjourned to enable applicant to seek order determining relative interests."
8. The partition application (see para 2 above) stated that Mr Ka and his sister Tutai were "the holders of the majority [1] share amounting to 5550 square metres in the land." This was not correct. They had obtained succession orders to their interest in that share but they had other siblings who were entitled to succeed to part of that share. The succession order stated that their interest in the share was "limited as to their interests."
9. Both the occupation right and the partition applications were then set down for a hearing at Aitutaki during the week commencing 16 August 2004. Mr Ka filed nothing further in either proceeding between 29 August 2003 and 16 August 2004. He advised this Court that this was because he was unable to persuade his other siblings to take steps in either proceedings.

10. On 14 August 2004 Mr Ka faxed a letter from New Zealand to the Registrar of the High Court. It advised that his family doctor required him to have an urgent medical check up on 16 August before he came back to the Cook Islands and he would not therefore be returning until 17 August. He asked for all applications in which he was appearing to be put before the Court on 18 and 19 August. The letter was not accompanied by a certificate from his doctor.
11. Mr Pakau's application was heard on 16 August 2004. Mr George, counsel for Mr Pakau on 16 August 2004 and on this appeal, advised the Court that he had to leave Aitutaki on 17 August and had arranged for Mr Pakau's case to be heard on 16 August. He was not advised of Mr Ka's request for an adjournment.
12. Smith J knew of Mr Ka's request but did not adjourn Mr Pakau's application. His handwritten note on the file noted among other matters that Mr Pakau's supporters had obtained further succession orders; a further meeting not attended by Mr Ka, who was in New Zealand, had agreed to the occupation right; Mr Ka had sought an adjournment of the application; Mr Ka was advised on 29 August 2003 that his partition application could not proceed until the relative interests of his family had been determined; no application had yet been made; Mr Pakau had traveled from the USA for the hearing; Mr Ka was the only objector; Mr Pakau was entitled to the order and he accordingly granted him the occupation right sought.

**The decision appealed from**

13. Mr Ka sought a rehearing of Smith J's decision of 16 August 2004. Smith J declined the application in a judgment dated 21 December 2004, and Mr Ka's appeal is against the latter decision.

14. In the judgment of 21 December 2004 Smith J made the following points:

- Mr Pakau's application for an occupation right had been before the Court for more than 12 months before 16 August 2004.
- After hearing the parties and checking the schedule of owners the Court, in August 2003, adjourned the occupation application on the grounds that Mr Pakau did not have the consent of the majority of owners.
- Mr Ka had previously sought succession orders in respect of the land for himself and his sister, although he had a number of siblings. Succession orders were made in favour of Mr Ka and his sister but noted as being "limited as to their interests."
- The Court, on 29 August 2003, adjourned Mr Ka's partition application and he was directed to lodge an application so that "the relative interests of the applicants for partition" would be determined.
- On 16 August 2004 Mr Pakau prosecuted various applications for succession and once these orders were made, the Court being satisfied that Mr Pakau had the consent of the majority of the owners, the occupation right order was made.
- When the order was made on the 16 August 2004 the Court was aware of Mr Ka's application on behalf of himself and his sister for a partition order. It therefore knew of Mr Ka's opposition to the application for occupation right. It was also aware that Mr Ka had asked for the application to be delayed.

- However, the Court prior to the hearing had all the applications and noted that although Mr Ka's partition order application was set down for hearing he had failed to comply with the Court's direction to file an application to determine the relative interests of Mr Ka and his sister and their other siblings. Therefore Mr Ka's partition application could not succeed.
- The Court could not consider Mr Ka's objection although it knew of it, because Mr Ka's interest in the land had not been determined and no application to determine that interest had been filed. The Court could not at 16 August 2004 accept that either Mr Ka or his sister had any interest in the land.
- Mr Pakau had prosecuted succession orders and produced the consent of the majority of the owners to the proposed occupation right.
- Mr Ka's claim that he was entitled to a rehearing as of right because of Rule 221 of the Code of Civil Procedure was rejected.
- Although the Court was aware that Mr Ka was not present for medical reasons it did not acquiesce in his request to delay the hearings, and dealt with Mr Pakau's application because Mr Ka had not raised any valid objection and could not do so because he had not filed applications to determine his relative interest in the land to rectify his partition application as directed more than 12 months before.
- In the circumstances the Court was not prepared to order a rehearing.

### **Mr Ka's Grounds for Appeal**

15. Before this Court Mr Ka's grounds of appeal were:

- (a) Smith J should not have proceeded with the application on 16 August 2004 in Mr Ka's absence; and
- (b) Mr Pakau was not entitled to the occupation right he obtained.

### **The Adjournment Issue**

16. This Court accepts that, Mr Ka as an objector, was entitled to the right to be given an opportunity to be heard on Mr Pakau's application. In some circumstances that right would entitle an objector to an adjournment. However, in this case the Court is not persuaded that Smith J in exercising his discretion, not to adjourn, erred in declining an adjournment.
17. The application had been adjourned a year earlier to allow Mr Ka to take certain steps to put his house in order. He had not taken these steps. The grounds of his objection were before the Court in his Notice Disputing Claim (see para. 6 above). In essence they were:
  - (a) He and his siblings were entitled to a partition order in respect of 5550 square metres; and
  - (b) A meeting of owners approving Mr Pakau's application was not properly constituted and the approval null and void.
18. As is noted below Mr Ka misconceived the legal rights of himself and Mr Pakau. Further, if his siblings had legal rights, they had not taken steps over a period of a year to establish those rights through the Court. Mr Ka conceded before this Court that this was because he had not been able to persuade them to do so. While some Judges may have been sympathetic to Mr Ka's request for an adjournment, this Court is of the view that Smith J was not obliged to grant an

adjournment. The request was not accompanied by a medical certificate and was from a person who had not taken steps to be in a position to pursue his objection and who had misconceived his legal rights. His allegations about the constitution of the meeting were unsupported by evidence.

### **The Legal Issue**

19. Section 50 states:

*"50. Land Court may make orders as to occupation of Native land – (1) In any case where [the Land Court] is satisfied that it is the wish of the majority of the owners of any native land that that land or any part thereof should be occupied by any person or persons (being Natives or descendants of Natives), the Court may make an order accordingly granting the right of occupation of the land or part thereof to that person or those persons for such period and upon such terms and conditions as the Court thinks fit."*

20. In this Court's view the meaning of the section is clear. If the majority of the owners consent to a person (being a Native or a descendant of Natives) being granted an occupation right the Court may make the order. The grantee of the right does not have to be an owner. The section does not require the Court to balance occupation rights among owners or groupings of owners. Indeed this would be impossible in most cases because the number of owners would far exceed the number of "plots" available for occupancy.

21. Realistically the only effective opposition Mr Ka could have brought was to have had before the Court on 16 August 2004 a partition application in respect of the land in question brought by applicants with a recognized interest. Mr Ka's siblings, having established their relative interests as owners, could have joined in the partition



application. Mr Ka had a year to arrange this but did not do so. Mr George submitted that the usual way for a person to have his or her interest determined is by applying under s. 490(b) Cook Islands Act 1915. Another possibility would appear to be by obtaining a succession order under Part XIV of the same Act.

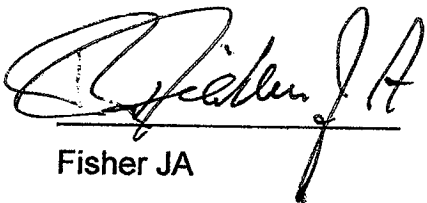
22. In this Court's view the result of Mr Pakau's application in August 2004 would have been the same if Mr Ka had been present. The best he could have hoped for was an adjournment to attempt to persuade his siblings to take some steps in the matter or to join the siblings as respondents. As he had been unable or unwilling, over a period of one year, to take such action it is unlikely that such an adjournment would have been granted.

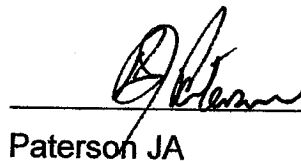
23. Smith J cannot be said to have wrongly exercised his discretion in declining Mr Ka's application for an adjournment. Mr Ka's objection to the application of Mr Pakau was misconceived. Nothing submitted by Mr Ka has persuaded us that Smith J was wrong or that there has been a miscarriage of justice.

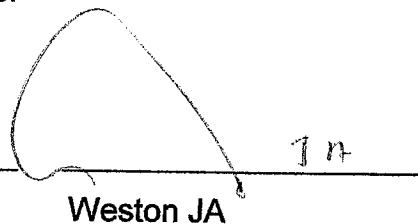
### Orders

24. This Court orders:

- (a) The appeal is dismissed;
- (b) Mr Ka will pay \$2000 costs to the Respondent, such costs to be paid by the Court paying to the Respondent the sum of \$2000 paid by Mr Ka as security for costs.

  
Fisher JA

  
Paterson JA

  
Weston JA