IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA **CA 1/2020**

BETWEEN **ANNA DOROTHY VON HOFF**
Appellant

AND **SAMUEL NAPA**
Respondent

Coram: White P, Williams JA, Asher JA

Hearing: 18 & 19 October 2021 (CIT) / 19 & 20 October 2021 (NZT)

Appearances: T Browne and H Ellingham for the Appellant
B Mason for the Respondent

Judgment: 29 October 2021

JUDGMENT OF THE COURT OF APPEAL

A. The appeal is allowed.

B. The decision of Savage J in the High Court dated 3 September 2019 is quashed.

C. The person named as "Teariki Paitai" by the Land Titles Court in the 1906 order of title for Vaitamanga 88M is declared to be Paitai Araiti, the son of Tiamarama and Te Ora Araiti, and the great-grandfather of the Appellant.

D. The descendants of Teariki Paitai (Paitai Aratai) are entitled to succeed to his interests in Vaitamanga 88M.

E. The High Court (Land Division) is to determine who those descendants are and to record those persons as having succeeded to Tearki Paitai's interests.

F. The Respondent is to pay the Appellant costs in the sum of $2,500 with disbursements to be fixed by the Registrar.

Introduction

[1] This appeal involves a dispute over the succession to a block of native freehold land of approximately 10 hectares known as Vaitamanga Section 88M located in Aorangi on the western side of Rarotonga in the Cook Islands. The dispute relates to the identity of "Teariki Paitai" who was named as one of 13 persons awarded title to the land in 1906 by the then Land Titles Court.

[2] The Appellant, Anna Dorothy von Hoff, and her family claim Teariki Paitai was their ancestor (the Appellant's great-grandfather) and they are therefore entitled to succeed to his interests in the land.

[3] The Respondent, Samuel Napa, is a descendant of Tauei, one of the other persons awarded title to the land in 1906. He opposes the Appellant's claim on the ground that she has not established, on the balance of probabilities, that Teariki Paitai was her ancestor. The Respondent claims Teariki Paitai was another person altogether.

[4] The dispute requires the Court to examine and unravel the history of the title to Vaitamanga 88M since 1906, previous applications and Court decisions relating to the identification of Teariki Paitai and all the relevant evidence relied on by the parties.

[5] The parties have agreed the appeal is in the nature of a *de novo* rehearing on the evidence before the High Court[1] and is not limited to a consideration of new evidence only.[2] During the hearing of the appeal we also granted leave by consent for evidence in earlier cases not before Savage J in the High Court to be taken into account. In agreeing to this, Mr Mason made it clear that caution would be required in respect of evidence which had not been subject to cross-examination in such cases involving different counsel.

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1 Section 61 of the Judicature Act 1981-82 as inserted by s 2 of the Judicature Amendment Act 2011.

2 cf Savage J in the High Court at [13] and [42]-[44].

[6] The parties have both approached the appeal on the basis the Appellant must prove on the balance of probabilities that Teariki Paitai was her ancestor. We accept this is the appropriate test.[3]

[7] Prior to the hearing of the appeal, we granted Ms Tere Carr, a Cook Islands registered land agent with particular experience in the history of land dealings and fluent in Cook Islands Maori, special leave[4] to sit next to Mr Mason during the hearing of the appeal and to address the Court on a case by case basis during the hearing if the Court were satisfied it was appropriate special leave should be given.[5] Ms Carr attended and assisted Mr Mason, but in the end did not address the Court.

[8] As the appeal was heard during the Covid-19 pandemic, the Judges were unable to travel to Rarotonga and the appeal was heard by Zoom with White P in Wellington, Williams and Asher JJA in Auckland, Mrs Browne who had recently returned from New Zealand in isolation in the Edgewater Hotel in Rarotonga, and other Counsel and the Registrar and members of the public in the Courtroom in Rarotonga.[6] We express our gratitude to Counsel and the Court staff for their co-operation.

[9] This judgment proceeds under the following headings:

(a) The Appellant's genealogy.
(b) The history of the title to Vaitamanga 88M.
(c) Previous cases.
(d) The identification of Teariki Paitai.
(e) The Respondent's Te Ariki Paitai.
(f) The balance of probabilities.
(g) Result.

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3 Below para [78].
4 Under s 57 of the Judicature Act 1980-81 as inserted by the Judicature Amendment Act 2011.
5 Minute of the Court dated 13 October 2021 (CIT) / 14 October 2021 (NZT).
6 By s 53(3) of the Judicature Act 1980-81 as inserted by s 2 of the Judicature Amendment Act 2011 and rule 40 of the Court of Appeal Rules 2012.

The Appellant's genealogy.

[10] Attached to this judgment as Appendix A is the genealogy which Mrs Browne, Counsel for the Appellant, provided to the Court at our request to assist us to understand the dispute. The genealogy shows the descendants of Enua Rurutini, the Ariki of Aorangi, and his second wife Oakirangi with the 13 persons awarded title to Vaitamanga 88M in 1906 highlighted in yellow.

[11] There is no dispute about 12 of those persons, namely those shown as descendants of Enua Rurutini and Oakirangi's son Tauei. The Respondent is descended from that line. The Appellant does not challenge the entitlement of the Respondent and the other descendants of Tauei to succeed to their appropriate interests in the land.

[12] The Respondent, however, does not accept the accuracy of the Appellant's genealogy insofar as it relates to Tiamarama, who is shown as a daughter of Enua Rurutini and Oakirangi, and Te Ariki Paitai, who is shown as Tiamarama's son and great-grandfather of the Appellant. The Respondent argues that these entries in the genealogy are not established by the evidence.

[13] The Respondent has provided alternative genealogies one showing that the Appellant's great-grandfather, Paitai, as the son of Araiti, but not Tiamarama, and the other relating to the alternative Teariki Paitai suggesting he was another descendant of Tauei and died without issue.

The history of the title to Vaitamanga 88M.

[14] The handwritten schedule attached to the order made by the Land Titles Court on 10 November 1906 listed the owners of Vaitamanga 88M with their sex and, if a minor, their age as follows:

1. Tauei	ma [male adult]
2. Enua	ma [male adult]
3. Tangiao	ma [male adult]
4. Tiamarama	f 3 [female aged 3]
5. Roimata	f 14 [female aged 14]
6. Rangi	f 10 [female aged 10]

7. Ema	f 8 [female aged 8]
8. Maio	m 4 [male aged 4]
9. Tuira	f 2 [female aged 2]
10. Tetewano	m 1 [male aged 2]
11. Remuela iti	m 9 [male aged 9]
12. Ana Remuela life interest	f [female adult]
13. Teariki Patiai	m [male adult]

[15] It is to be noted that:

(a) Tiamarama aged 3 should not be confused with her grandmother the Tiamarama shown as the daughter of Enua Rurutini and Oakirangi in the Appellant's genealogy.

(b) Ana Remuela had a life interest as she was the wife of Remuera and not a blood descendant of Enua Rurutini or his son Tauei.

(c) Teariki Paitai was an adult and not a minor. This is relevant because the Appellant's great-grandfather, Paitai Araiti, was aged 57 in 1906.

(d) In the typed version of the 1906 order "Teariki" was changed to "Te Ariki". The existence of the two forms of the name, used interchangeably from the outset, has no particular significance. The inclusion of "Ariki" in the name does not signify the person held the title "Ariki" which means Paramount Chief.[7]

[16] The title records for Vaitamanga 88M show that succession orders were subsequently made in 1939 in respect of the interest of Tauei, who had died in 1927, in 1956 in respect of the interest of Remuela Iti, who had died in 1948, and in 1959 in respect of the interest of Rangi, who had died in 1924.

[17] Then the title records an interim decision in 1970 determining the relative shares and interests of the original owners of the land. The interim decision was made by a Commissioner and confirmed by a Judge of the Land Court. It will be necessary to refer to the approach adopted by the Commissioner and the genealogy he relied on, but at this point it is sufficient to note the schedule to the Judge's order:

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7 The House of Ariki Papers of 1970 and *Browne v Munokoa* [2018] UKPC 18 at [6] and [31].

1. Tauei	3/7	0 acres	3 roods	23 perches
2. Enua	3/4	1	2	10
3. Tiamarama	3/28	0	0	36
6. Rangi	3/4	1	2	10
7. Enua	3/4	1	2	10
9. Te Uira	3/28	0	0	36
10. Tetevano	3/28	0	0	35
11. Remuera iti	3	6	1	00
12. Te Ariki Paitai	6	12	2	00
	12	25	0	00

[18] This interim decision was followed by a succession order in 1975 vesting the interest of Te Ariki Paitai in ten of his descendants as shown in the Appellant's genealogy, including his daughter Varaire, the Appellant's grandmother.

[19] Further succession orders were made in the following years in respect of the interests of other descendants of Tauei and in 1982 in respect of the interest of Varaire Paitai, the Appellant's grandmother, who died in 1981. One of the successors was the Appellant's mother.

Previous cases.

[20] In 1999 a number of applications were made to the High Court (Land Division) for the revocation of the 1970 interim decision and the 1975 succession order:

(a) Tauei Solomona applied to revoke the 1970 interim decision. The application was dismissed by Judge Smith in 1999.

(b) Descendants of a different person from Te Ariki Paitai, known as Te Ariki Paiti (not Paitai), who had died in 1979 aged 79, applied for the revocation of the 1975 succession order on the ground that he was the true Te Ariki Paitai. The application was also dismissed by Judge Smith in 1999.

(c) Tauei Konitanitai Napa applied for the revocation of the 1975 succession order on the ground that the Te Ariki Paitai in the 1906

> order was another person called Te Ariki Paitai who had died in 1947. The application was noted by Judge Smith as having been withdrawn in 1999.

[21] The descendants of Te Ariki Paiti whose application had been dismissed appealed to the Court of Appeal. Their appeal was heard on 13 November 2001. Mrs Browne appeared in the Court of Appeal for the Respondent representing those named in the 1975 succession order who sought to support the High Court decision dismissing the application.

[22] The Court of Appeal (Greig CJ, Henry J and Hingston J) in a short judgment delivered on 15 November 2001 allowed the appeal and revoked the 1975 succession order, but made no order in substitution,[8] and made no order revoking the 1970 order on which the 1975 order was based. Instead the Court left it to the appellants, the respondents and other interested parties to apply to the High Court for succession or other orders in respect of the land in question "as they think fit".

[23] In reaching its decision the Court made it clear, however, it did not consider it had been established that Te Ariki Paiti was the Te Ariki Paitai referred to in the 1906 order. The claim was not supported by the age of Te Ariki Paiti who was aged 6 in 1906.[9] Nor was the claim supported by other submissions made on behalf of the descendants of Te Ariki Paiti.

[24] The Court of Appeal then went on to say:[10]

> "In the course of the submissions on each side it became necessary to consider and analyse the evidence put forward by the respondents in support of their claim that Paitai is the Te Ariki Paitai and is a son of Tiamarama, the wife of Te Ora Araiti and the sister of Tinomana Tauei. This linkage between Tiamarama and Te Ariki Paitai seems to have been first recorded in the Minute Book in the course of the hearing in 1970 of an application to determine the relative interests in the land see MB 29 p 348. In the course of that a genealogy was produced by a Deputy Registrar of the Court and it seems unsworn. The Tinomana genealogies have been relied upon in this hearing but were made subsequent to that hearing in 1970. **There is no doubt that Paitai is the son of Tiamarama and Te Ora Araiti.**

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8 CA 10/2000 Re Vaitamanga Sec 88M, Aorangi, Rarotonga, 15 November 2001.

9 It will be recalled Te Ariki Paitai was listed in the 1906 order as an adult male not as a minor aged 6.

10 At page 3.

[emphasis added.]

> For a number of other reasons canvassed at the hearing on the evidence traversed before us there must be some doubt that Paitai and Te Ariki Paitai in the 1906 order are the same person. These include the fact that until the 1970 Application his name did not include "Te Ariki". Moreover the order made in 1906 seems to be largely in favour of Tauei's children and grandchildren. The Tiamarama referred to in the order as "f.3" clearly could not be Paitai's mother but is more likely to be a daughter of Tauei the granddaughter of Tinomana shown on the Tinomana genealogy.
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> …
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> It may be that the 1970 determination of relative interests and other succession orders subsequent to the order of 1906 may be now in question to the extent they have depended on Paitai being Te Ariki Paitai of the 1906 Order or on Tiamarama his mother being the Tiamrarama in that Order as having an interest in this land."

[25] As will become apparent from our examination of the evidence relied on by the Appellant, there are a number of difficulties with aspects of the reasoning of the Court of Appeal because:

(a) The linkage between Tiamarama and Te Ariki Paitai is not recorded for the first time in the Minute Book in the course of the 1970 hearing.[11]

(b) The Tauei Napa group and at least one of the successors of Te Ariki Paitai were involved in the 1970 hearing when the genealogy was produced by the Deputy Registrar.[12]

(c) The Tinomana genealogies were made before the hearing in 1970.[13]

(d) Te Ariki Paitai's name included "Te Ariki" and "Teariki" before the 1970 application.[14]

(e) The 1970 determination and the other succession orders have not depended on the Tiamarama in the 1906 order being the mother of Te Ariki Paitai. As shown in the Appellant's genealogy, the Appellant's case is based on Teariki Paitai being the son of Tiamarama, the daughter of Enua Rurutini and Oakirangi.

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11 Below paras [51]-[54].
12 Below para [59].
13 Below paras [48]-[51].
14 Below para [67].

[26] For the purposes of our decision, however, these difficulties do not matter because the parties in this appeal accept that the Court of Appeal's 2001 judgment, which made no final order in substitution but left it to any interested parties to apply to the High Court for succession or other orders, clearly left the question of the final determination of the identity of Teariki Paitai in the 1906 order to the Court determining any subsequent application. The approach of the Court of Appeal in the 2001 judgment does not therefore constitute any issue estoppel.[15]

[27] Mr Mason made it clear that his acceptance of this approach to the 2001 judgment of the Court of Appeal was based on the view that this Court should start again now and consider all the relevant evidence without being distracted by earlier decisions. In particular, it would not be appropriate to "cherry pick" statements from the 2001 judgment. For instance, the Respondent did not accept there was "no doubt that Paitai is the son of Tiamarama and Te Ora Araiti". We take Mr Mason's point, but as it transpires, following our examination of the evidence, we reach the same conclusion, namely that Paitai was the son of Tiamarama and Te Ora Araiti.[16]

[28] Following the Court of Appeal's 2001 judgment some 19 different applications were made to the High Court in respect of Vaitamanga 88B. They included the following which proceeded to hearings:

(a) An application in 2001 by Kave Ariki Nia, the Appellant's great uncle, to succeed to the interests of Te Ariki Paitai; and

(b) A similar application by the Appellant in 2016.

[29] Kave Ariki Nia's application was heard by Hingston J in the High Court in September 2003, March 2004 and February 2006. In a judgment issued in August 2006 Hingston J said:[17]

> "… I am of the view that until this Court is satisfied as to who Te Ariki Paitai in the 1906 order was, there should be no succession to him.

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15 *Talyanich v Index Developments Ltd* [1992] 3 NZLR 28 (CA) at 37, and *van Heeren v Kidd* [2016] NZCA 401, [2017] 3 NZLR 141 at [1].

16 Below para [53].

17 Application 593/01 *Re Vaitaamanga Section 88M Arorangi*, 22 August 2006.

> I do not believe this refusal is in any way a rejection of the Tinomana geneology [sic] but the substitution of the name …. Te Ariki Paitai. For [sic] Paitai Ariki or Paitai shown in the records of this Court over many years has not been explained sufficiently for the Court to accept that this man, the applicant Kave Nia's grandfather is the Te Ariki Paitai of 1906.
>
> I believe the appropriate course is to adjourn this case sine die fix [sic] to allow for competing applicants to take the necessary steps to re-open the 1970 determinations."

[30] An application to the Land Court in 2008 to rehear the case which had been heard before Hingston J was dismissed by Smith J.[18]

[31] The 2016 application by the Appellant was heard by Savage J in the High Court in October 2017 and October 2018. In his judgment dated 3 September 2019 Savage J dismissed the application essentially because the new evidence presented to him did not take the case any further than it had been before the Court of Appeal and Hingston J.[19]

[32] The Appellant now appeals to the Court of Appeal against the 2019 judgment of Savage J. In this respect it is important to note before we turn to examine the evidence relating to the identification of Teariki Paitai in the 1906 order that the descendants of Paiti have not pursued their application further. The dispute is now solely between the parties to the present appeal.

The identification of Teariki Paitai.

[33] Mr Mason submitted there are hierarchies of evidence to be examined with official documents such as birth and death certificates being the best evidence and records earliest in time being better than those based on less direct evidence or fading memories. He also submitted genealogies require considerable caution particularly when based on hearsay minutes or discussions which one party disputes. There is a distinction to be drawn between genealogies with footnote references and those without references. In general terms we accept these submissions, while noting that in the end reliability turns on the known circumstances giving rise to the particular evidence, which must always be assessed without rigid pre-conceptions.

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18 *In re Nia* [2008] CKLC 3, 25 June 2008.

19 Application 122/2016 *von Hoff v Napa*, 3 September 2019, at [13] and [41]-[45].

[34] Mr Mason also accepted, however, that even official records are dependent on oral evidence and not too much should be drawn from the absence of the names of both parents in official records from the nineteenth century. He noted that official records were not kept in the Cook Islands until 1917 and there is no "law of names" in the Cook Islands. Several names such as "Teariki" are common generic names in widespread use. As already noted[20], the interchangeable use of "Teariki" and "Te Ariki" has no particular significance for this case and "Ariki" in the name does not indicate the "Ariki" title.

[35] Mrs Browne submitted it was the function of the Land Title Court in 1906 to determine title to native land in accordance with custom and in doing so it was relevant to take into account the approach set out in the House of Ariki Papers of 1970 which suggested the custom in 1906 was that native land was held by a family who had a common ancestor, together with their adopted children and those who had not "entered another tribe".[21]

[36] As Mrs Browne submitted, this custom is consistent with the notion that all 13 people named in the 1906 award of Vaitamanga 88M were related through descent from a common ancestor, namely Enua Rurutini and Oakirangi. Furthermore, the customary basis for including the son of Tiamarama on the title was that she was a Rangatira-ki-te-Ara: she was the daughter of an Ariki and had been married to a Mataiapo of another tribe (Te Ora Araiti). As such, her son, Paitai, was entitled to be allocated an interest in his mother's land, Vaitamanga 88M.

[37] We agree with Mrs Browne that custom and the House of Ariki papers support her submission, but of course the Respondent does not accept that Paitai was in fact the Teariki Paitai named in the 1906 order. We therefore examine the evidence in further detail starting with the official records as suggested by Mr Mason.

[38] There is no dispute that the relevant death certificates prove that the Appellant is the granddaughter of a person called Paitai and Ngaavae, through their daughter Varaire and her daughter Ana who was the Appellant's mother.

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20 Above para [15](d).

21 *Browne v Munokoa* [2018] UKPC 18 at [40] and the House of Ariki Papers of 1970.

[39] Nor is there any dispute that Paitai, who was the Appellant's great grandfather, was born in 1849 and died in 1915. The London Missionary Society (LMS) recorded the birth of Paitai in January 1849 with his father named as "Araiti" and the place for his mother's name left blank. We accept that the inclusion of the name of one parent only was common in the nineteenth century LMS records.

[40] There is also no dispute that Paitai was aged 57 in 1906 so that if he were the Teariki Paitai in the 1906 order he was correctly described as an adult male. And it is possible that by the time he had reached the age of 57 he had acquired the common generic name "Teariki".

[41] While there is no official death certificate for Paitai because, as Mr Mason pointed out, Cook Islands records commenced in 1917, it is accepted that Paitai died in 1915 (or possibly 1914) aged 62.

[42] Official Cook Islands death certificates show that Paitai was married to Ngaavae and their children relevantly included:

(a) Tapeka Paitai who died in 1932 aged 48 with no issue;

(b) Varaire who died in 1981 aged 88 with issue, including the Appellant's mother; and

(c) Te Keu who died in 1953 aged 61 with issue.

[43] The Respondent's challenge to the Appellant's claim that Paitai was the Teariki Paitai in the 1906 order has two parts to it:

(a) There is no evidence establishing that Tiamarama, the person alleged to be the daughter of Enua Rurutini and Oakirangi, existed at all or, if she did, that she was called Tiamarama and had any children.

(b) If she did have children, Paitai was not her child.

[44] While there are no official records relating to the birth or death of Tiamarama who lived in the nineteenth century, we consider there is other evidence establishing she existed, she was the daughter of Enua Rurutini and Oakirangi, she was married to Te Ora Araiti and they were the parents of Paitai.

[45] First, there is the typewritten record of evidence given by Tauei, a great grandson of Enua Rurutini and Oakirangi through their son Tauei and his son Napa, in March 1906 relating to another block of land which included a genealogy called the Tinomana genealogy. This genealogy named the children of Enua Rurutini and Oakirangi as Pipo, Tutuariki, Napa, Tauei, Te Aomarama, and Te Pini. It also included the issue of Tauei, but not for Te Aomarama.

[46] As subsequent evidence confirmed,[22] the names "Te Aomarama" and "Tiamarama" more likely than not referred to the same person.

[47] Mr Mason emphasised, however, that if Te Aomarama had had any children in 1906 Tauei would have added them to the genealogy in his evidence in the same way as he had included the children of his great grandfather Tauei. Mr Mason submitted this omission was significant. But in response to questions from the Court, Mr Mason acknowledged that the existence of children of Te Aomarama was not relevant to the issue in the case relating to the different block of land. The omission of children of Te Aomarama in this genealogy is therefore not of particular relevance.

[48] Second, there is a handwritten note of Tauei's Tinomana genealogy, which may have also have been dated 1906 or possibly 1934. It names one of the children of Enua Rurutini and Oakirangi as "Teamarama (Tiamarama)?" This provides some support for the view that the written name of "Te Aomarama" changed slightly over time.

[49] Third, there is a typewritten record from the Court Minute Book recording evidence given at a hearing in 1934 concerning the Tinomana Ariki title of a genealogy which includes "Tiamarama (f)" as the daughter of Rurutini and Oakirangi. Once again the children of Tauei are included and no children are included for Tiamarama, but this time there are express statements below the names of Napa and Tapini, the brothers of Tauei and Tiamarama, that they had "No issue". There is no statement to that effect below Tiamarama's name.

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22 Below para [48].

[50] Mr Mason submitted that if Tiamarama had had children they would have been included in this genealogy, but again acknowledged it was unnecessary for her issue to be recorded for the case about the Tinomana Ariki title. Mr Mason also acknowledged that the absence of any express statement that Tiamarama had "No issue" left open the possibility that she did in fact have issue.

[51] Fourth, there is a handwritten record of evidence given in a case before Judge McCarthy in 1943 about the Rangitira title of Kapu which includes a genealogy showing "Tiamarama (f)" as the daughter of Enua Rurutini's second wife Oakirangi and below her name the statement "issue alive Te Keu Paitai family".[23]

[52] In respect of this evidence, Mr Mason invited the Court to contemplate it was based on speculative information rather than personal knowledge. In response to questions from the Court, however, he accepted that the information recorded under the name "Tiamarama (f)" was accurate at least to the extent that Te Keu Paitai was alive in 1943. As already noted,[24] Te Keu's official death certificate recorded he died in 1953 aged 61 so he was aged 51 in 1943.

[53] But of even greater significance is the fact that Te Keu's death certificate recorded he was the son of Paitai Araiti and Ngaavae Marmariki thus providing crucial evidence of the link between Paitai Araiti and Tiamarama because Te Keu Paitai is only "Issue alive" of Tiamarama if Paitai Araiti was her son. In our view this is the best evidence available to support the Appellant's claim that Tiamarama was the wife of Araiti and the mother of Paitai Araiti.

[54] It is this evidence which provides the basis for the answer to the second part of the Respondent's challenge to the Appellant's claim relating to the identity of "Teariki Paitai" in the 1906 order. On the basis that Paitai Araiti was the son of Tiamarama, he was a member of her family and, like the other persons named in the 1906 order, a descendant of Enua Rurutini and Oakirangi. The addition of the common generic name "Teariki" or "Te Ariki" to Paitai's name in the 1906 order

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23 A later handwritten note also included a statement below "Tiamarama (f)" "Issue alive in Avarua".

24 Above para [42] (c).

does not alter this conclusion, especially when it was consistent with custom that he should inherit his mother's interest in Vaitamanga 88M.[25]

[55] This conclusion is also supported to a greater or lesser extent by the following further items of evidence:

(a) A detailed Tinomana genealogy marked "G" and apparently written by David Metuarau, one of the official interpreters in the Land Court, before 1965.

(b) The genealogy relied on by the Commissioner in reaching the interim decision in 1970 determining the relative interests in Vaitamanga 88M.

(c) A genealogy in a book by Taira Rere relied on in a case in 1975 relating to the Tinomana Ariki title.

(d) The evidence of Napa Tauei Napa, the father of the Respondent, given in 1975 in the case relating to the Tinomana Ariki title.

(e) Affidavit and oral evidence in the 2001 application by Kave Ariki Nia heard before Hingston J in 2004 and 2006.

[56] We now proceed to consider these five further items.

(a) The detailed Tinomana genealogy marked "G".

[57] The Tinomana genealogy marked "G" is a detailed genealogy which records "Te Ariki Paitai" as the son of Tiamarama. The evidence relating to its provenance was given by Tekii Koteka, a Cook Islands public servant from 1954 to 1984 and former clerk of the Land Court from 1970 to 1974, in one of the other cases relating to Vaitamanga 88M heard by Hingston J. Tekii Koteka's evidence was based on what he was told by David Metuarau when they worked together at the Justice Department. Tekii Koteka said he knew the genealogy was completed before 1965 because documents were kept in Wellington, New Zealand, and were released to the Cook Islands after independence [in 1965]. Under cross-examination he

[25] Above paras [35]-[36] and below para [79].

acknowledged he did not know where David Metuarau got the evidence from to put the line in the genealogy from Tiamarama to Te Ariki Paitai. Bearing in mind that the evidence about this genealogy was therefore effectively based on double hearsay, we are not inclined to give it any particular weight.

(b) The genealogy in the 1970 interim decision.

[58] The Commissioner's interim decision in 1970 determining the relative interests in Vaitamanga 88M stated:

> "Unless there is unanimous agreement among the owners as to how the undefined shares in a block are to be determined it must be presumed that the matter is contested and it is then over to the Court to make an arbitrary decision in which case some rule or yardstick must be adopted in the interests of consistency.
>
> This matter has been discussed with the Registrar and the Court agrees with his view that, after looking at the body of owners as a whole, it is necessary to work back until a common tupuna is found – then to split the interests in accordance with descent from that tupuna down to the present time. In the land before the Court it is necessary to go back to Tinomana Enua Rurutini. From him descent is as shown in the genealogical table submitted by the Registrar.
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> On the basis of this and after absorbing those owners who are 'Demisit sine prole' (died without issue) the resultant distribution of shares and area is as follows:
>
> [Then followed the distribution which we have already noted.[26]]
>
> If the remaining children of Tauei take all his share they get 18 perches each. If all eleven take it …….. [illegible]. This will no doubt be quite alarming to Napa Tauei who at present is using about half the block.
>
> A final decision on above shareholding is being withheld to allow the owners to assess the position. It has been suggested by one of the successors to Te Ariki Paitai that it may be possible to provide an area elsewhere for them to avoid upsetting the present occupation too much.
>
> Leave is given to any member of the Tauei Napa group or to Counsel for Napa Tauei to make verbal submission at a further hearing to be arranged as to why the relative interests should not be determined in the manner set out above."

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26 Above para [17].

[59] The genealogical table submitted by the Registrar recorded Tauei and Tiamarama as the only relevant children of Tinomana Enua Rurutini. It also recorded the children of Tauei and Tiamarama. For Tiamarama, it recorded Te Ariki Paitai as the only issue, but noted he himself had issue. While there is no direct evidence as to the source of the information in the Registrar's genealogical table, it is reasonable to assume it was obtained from the Tauei Napa group and at least one of the successors to Te Ariki Paitai because they are mentioned in the interim decision as having been involved in the proceeding before the Commissioner. It appears that neither the Court of Appeal in 2001 nor Hingston J in 2006 recognised that this was the position.

[60] For present purposes, it is significant there is no suggestion in the interim decision that the Tauei Napa group took issue with the reference to Te Ariki Paitai as the son of Tiamarama in the Registrar's genealogical table or to his issue being recognised as his successors and therefore entitled to his shares in accordance with custom. Nor is there any suggestion that any member of the Tauei Napa group took any steps subsequently to seek a further hearing challenging the resultant distribution of the shares in the interim decision. Instead Te Ariki Paitai's interest in the land was vested in his descendants named in the 1975 succession order which remained in effect until it was revoked some 26 years later by the Court of Appeal in 2001 in the separate proceedings involving Te Ariki Paiti (not Paitai).

[61] In our view the apparent acceptance by the Tauei Napa group of the information about Te Ariki Paitai in the Registrar's genealogical table recorded in the Commissioner's interim decision in 1970 is evidence which should be given weight in supporting the conclusion that Te Ariki Paitai was the son of Tiamarama. It was in the group's interests, if it had any doubt about the table in relation to Tiamarama, to raise that as an objection.

(c) The genealogy in the Taira Rere book.

[62] The genealogy in the book by Taira Rere showed Tiamarama and her siblings as the children of Enuarurutini and his second wife Oakirangi, Teariki as the son of Tiamarama, Ngaavae as the wife of Teariki, and their seven children. The

provenance of the information in this genealogy and its use were referred to by the Court of Appeal in *Vaineritua v Hosking*:[27]

> "Taire Rere in his book produced a genealogy based on information contained in the Court records and from members of the Tinomana family, The book and the genealogy were relied upon in the Tinomana Ariki case in 1975."

[63] In our view this genealogy, which is consistent with the other evidence confirming Te Ariki Paitai was the son of Tiamarama, should also be given weight.

(d) The 1975 evidence of the Respondent's father.

[64] The evidence of Napa Tauei Napa, the father of the Respondent, given in the 1975 Tinomana Ariki title case was:

> "From Oakirangi [Enuarurutini's second wife], she had four issues, namely, Napa, Tauei, Tiamarama and Tepini. Napa and Tepini died with no issue. Tauei begot Napa and Tiamarama begot Teariki. Napa begot Tauei and I am the eldest living son of Tauei."

[65] Mrs Browne referred to this evidence for the first time in the course of her submissions in reply. We therefore gave Mr Mason leave to respond by way of memorandum after the hearing. In his memorandum Mr Mason explained he had mistaken Mrs Browne saying the evidence was given in the 1975 application for succession. Mr Mason noted that while the judgment in the 1975 Tinomana Ariki title case was before the Court,[28] the transcript of the hearing had not been located. Mr Mason also noted that while there might be transcript evidence to the contrary to the statement made by Mr Napa he understood the thrust of Mrs Browne's point was not so much the veracity of the statement but the fact that it was the Respondent's father who made it. As no other evidence would be able to contradict that fact, Mr Mason advised the Court that the Respondent had no further submission to make.

[66] The evidence the Respondent's father gave in the 1975 Tinomana Ariki title case to the effect that Tiamarama "begot Teariki" is consistent with the genealogical information in the 1970 interim decision which was apparently accepted by the Tauei

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27 CA 5/93, 8 August 1994, at 3.

28 Judgment of Judge MacCauley declaring Napa Tauei Napa to be the Tinomana Ariki.

Napa group. In our view the 1975 evidence of the Respondent's father should therefore be given some weight as a statement of a relative of the Respondent against interest in providing support for the conclusion that Tiamarama was the mother of Teariki Paitai (also known as Paitai Araiti).

(e) The affidavit and oral evidence in the 2001 application by Kave Ariki Nia.

[67] The affidavit and oral evidence relied on by Mrs Browne was given by members of the Appellant's family in the 2001 application by Kave Ariki Nia, the Appellant's great uncle, which was heard before Hingston J in 2004 and 2006. The evidence, which was given by Kave Ariki Nia himself, Ana Hoff, the Appellant's mother, Mary Paitai, the wife of Toua Paitai, the grandson of Paitai, and Richard Browne, a great grandson of Paitai, was to the effect that Paitai was also known as Te Ariki Paitai and, as his descendants, they were part of the Tinomana family through him and his mother Tiamarama. There was also evidence to similar effect from William Framheim who had previously appeared as a witness in court on land matters and who was familiar with native custom and the Tinomana Ariki genealogy. Mrs Browne also noted that none of this evidence had been challenged.

[68] As already noted,[29] Hingston J in his judgment of 22 August 2006 adjourned Kave Ariki Nia's application sine die. In doing so, he took the view that much of the evidence was unnecessary because the Court of Appeal in 2001 had already accepted that Paitai was the son of Tiamarama and Te Ora Araiti. In addition the Judge considered the evidence that Paitai was also known as Te Ariki Paitai was best described as "hearsay" so the High Court was no further ahead than the Court of Appeal had been in 2001.[30] In the Judge's view the link between the 1906 Te Ariki Paitai and the successor had not been established.

[69] The difficulty with the approach of Hingston J is that it is based on the 2001 Court of Appeal decision which, as we have already noted,[31] did not take into account the pre 1970 evidence which we have examined. Nor does the Judge seem to have considered whether the evidence establishing the link between Paitai and

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29 Above para [29].
30 Judgment of Hingston J, at 2.
31 Above para [25].

Tiamarama was sufficient to mean he was the Tearki Paitai referred to in the 1906 order as the Commissioner had effectively found in the 1970 interim decision.

[70] For these reasons we consider the evidence given before Hingston J should be given weight in providing support for the conclusion that Tiamarama was the mother of Teariki Paitai. In doing so, we have taken into account Mr Mason's admonition about treating this evidence with caution.

The Respondent's Te Ariki Paitai.

[71] The Respondent submits that Paitai Araiti, the son of Tamarama, was not the Teariki Paitai in the 1906 order. The Respondent submits that another Teariki Paitai was "most likely" to be the Teariki Paitai in that order. Reliance was placed on the death certificate for the alternative Te Ariki Paitai which showed he died in 1947 aged 68 so he would have been 27 in 1906. His father was Tauei and his mother Rangi. He was married twice and he had children by both wives.[32]

[72] Mr Mason submitted that this Te Ariki Paitai had a genealogical connection to the Respondent as he was from the Tangiiau clan, which is the same clan as the Respondent's antecedent Oakirangi. She named her second son Tauei, the same name as the alternative Te Ariki Paitai's father. This is significant because Tauei is not a generic name. Mr Mason also submitted that this other Te Ariki Patai may have been put on the land by reason of occupation in 1906, occupation also being an important factor considered by the Court in making an original determination of title.

[73] There are several difficulties for the Respondent with these submissions. First, this other Te Ariki Paitai was the subject of the 1999 application for revocation of the 1975 succession order made by Tauei Konitanitai Napa which Smith J noted was withdrawn in 1999.[33]

[74] Second, notwithstanding the invitation by the Court of Appeal in 2001 for any other interested party to apply for a succession or other order in respect of

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32 cf The second alternative genealogy produced for the Court by the Respondent which suggested this Te Ariki Paitai had no issue.

33 Above para [20] (c).

Vaitamanga 88M, no application was made by the living descendants, if any, of this other Te Ariki Paitai, or by anyone on their behalf.

[75] Third, as Mrs Browne pointed out, this other Te Ariki Patai was not a descendant of Enua Rurutini and Oakirangi and was not located anywhere in the Tinomana genealogy. There was no link between this man and the family of Enua Rurutini and Oakirangi. Tauei Tangiiau was neither the "Tauei" nor the "Tangiao" listed in the 1906 order. As shown in the unchallenged part of the Appellant's genealogy attached as Appendix A to this judgment, Tauei of the 1906 order was the son of Napa, the son of Tauei, the son of Enua Rurutini. Tangio was Tauei's younger brother. The claim by this other Te Ariki Paitai was therefore not supported by custom.

[76] Fourth, as Mrs Browne also pointed out, there was no evidence this Te Ariki Paitai was living with the family in 1906 or, if he had been, there was any basis in custom for him to be listed as an owner of Vaitamanga 88M land.

[77] In summary the only evidence supporting the Respondent's submission is the name of this other person. The evidence before us has shown that it is not an uncommon name. Furthermore, this other person was not a member of the Tinomana family and therefore not entitled by custom to inherit the land.[34]

The balance of probabilities.

[78] As we have already noted, the parties agree the Court is to determine this dispute as to identification of the Teariki Paitai in the 1906 order applying the civil standard of proof, namely the balance of probabilities. This means for the Appellant to succeed the Court must be satisfied it is more likely than not that Paitai Araiti was the Teariki Paitai named in the 1906 order.[35] If the probabilities are equal, the Court will not be able to be satisfied the standard of proof has been met. In considering whether the standard has been met the Court will be guided by many things, including the inherent probabilities, any contemporaneous documentation of records,

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34 Below para [79].

35 *Phipson on Evidence* ed HM Malek QC (Sweet & Maxwell and Thomson Reuters 2018) 18th ed, at [6-56] and *Cross on Evidence New Zealand Edition* ed Hon Justice Mathew Downs (Lexis Nexis NZ Ltd) at [3.6].

any circumstantial evidence tending to support one account rather than the other, and their overall impression of the characters and motivations of the witnesses.[36]

[79] In approaching the evidence in this case it is also necessary to recognise that custom concerning land tenure and succession to land in the Cook Islands is part of the law and is proved largely by judicial notice through experience both personal and vicarious.[37] In this context the Privy Council in *Browne v Munokoa*[38] also cited the decision of the Cook Islands Court of Appeal in *In re Vaine Noora O Taratangi Pauarii (No.2)*[39] where Sir Thaddeus McCarthy, delivering the judgment of the Court, said:

> "The retention of the use or control of land within the group is a central feature of Polynesian philosophy throughout the Pacific. Land is often scarce and it is always precious; it must be retained for those of the tribal blood and not eroded by allowing others of different descent to occupy it. **Native custom is moulded by this inherited instinct and has made blood connection the primary consideration to Native land.**"
> [emphasis added.]

[80] Following these authorities in this case, we are satisfied the standard of proof has been met by the Appellant and it is more likely than not that Paitai Araiti was the Teariki Paitai named in the 1906 order. Our reasons are:

(a) Our detailed examination of all the relevant evidence which we have referred to in our judgment and which appears to be have been much more extensive than in any previous decision supports that conclusion. In particular, the early evidence establishing the existence of Tiamarama and the fact that her son was Paitai Araitai, who more likely than not had by 1906 also acquired the common generic name "Teariki", answered the Respondent's principal challenges to the Appellant's case. The genealogical evidence in the 1943 Kapu title case was compelling, especially as it was consistent with Cook Islands custom.

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36 *B (Children)* [2008] UKHL 35, [2009] 1 AC 11, at [31] per Baroness Hale.
37 *Browne v Munokoa* [2018] UKPC 18, at [16].
38 At [26].
39 [1985] CKCA 1.

(b) The fact that the 1970 interim decision and the 1975 succession order proceeded on the basis of custom and the relationship established between Tiamarama and Paitai Araitia supported our conclusion.

(c) We find it inherently improbable that the Tauei Napa family would have accepted that relationship in the context of the 1970 interim decision and the 1975 Tinomana Ariki title case if it had not been true.

(d) Similarly, we find it inherently improbable that the 1970 interim decision and the 1975 succession order would have remained unchallenged for as long as they did if they had been based on an incorrect relationship.

(e) The fact that claims by alternative candidates such as Paiti and the Respondent's other Te Ariki Paitai, who were not blood connections of the Tinomana family, have not been pursued also supports our conclusion. If Paitai Araiti were not Teariki Paitai in the 1906 order, who was?

(f) Drawing all the various strands of evidence together and taking into account the inherent probabilities, the cumulative effect is to leave us in little or no doubt as to the outcome.

Result.

[81] Accordingly, we have decided:

(a) The appeal is allowed.

(b) The decision of Savage J in the High Court dated 3 September 2019 is quashed.

(c) The person named as "Teariki Paitai" by the Land Titles Court in the 1906 order of title for Vaitamanga 88M is declared to be Paitai Araiti,

the son of Tiamarama and Te Ora Araiti, and the great-grandfather of the Appellant.

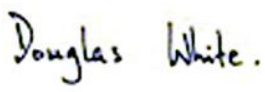
(d) The descendants of Teariki Paitai (Paitai Aratai) are entitled to succeed to his interests in Vaitamanga 88M.

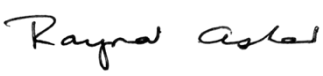
(e) The High Court (Land Division) is to determine who those descendants are and to record those persons as having succeeded to Tearki Paitai's interests.

(f) The Respondent is to pay the Appellant costs in the sum of $2,500 with disbursements to be fixed by the Registrar.

[82] On the question of costs in this Court, Counsel agreed costs should follow the event. Mrs Browne submitted quantum should be modest, while Mr Mason suggested the amount paid as security for costs ($2,500) should provide a guide. We agree with the approach of counsel. The respondent is to pay the Appellant the sum of $2,500 in costs with disbursements to be fixed by the Registrar.

[83] We received no submissions about costs in the High Court which were reserved by Savage J. In these circumstances we would hope Counsel will be able to resolve the question of costs in the High Court, but if not leave is reserved to apply to this Court.

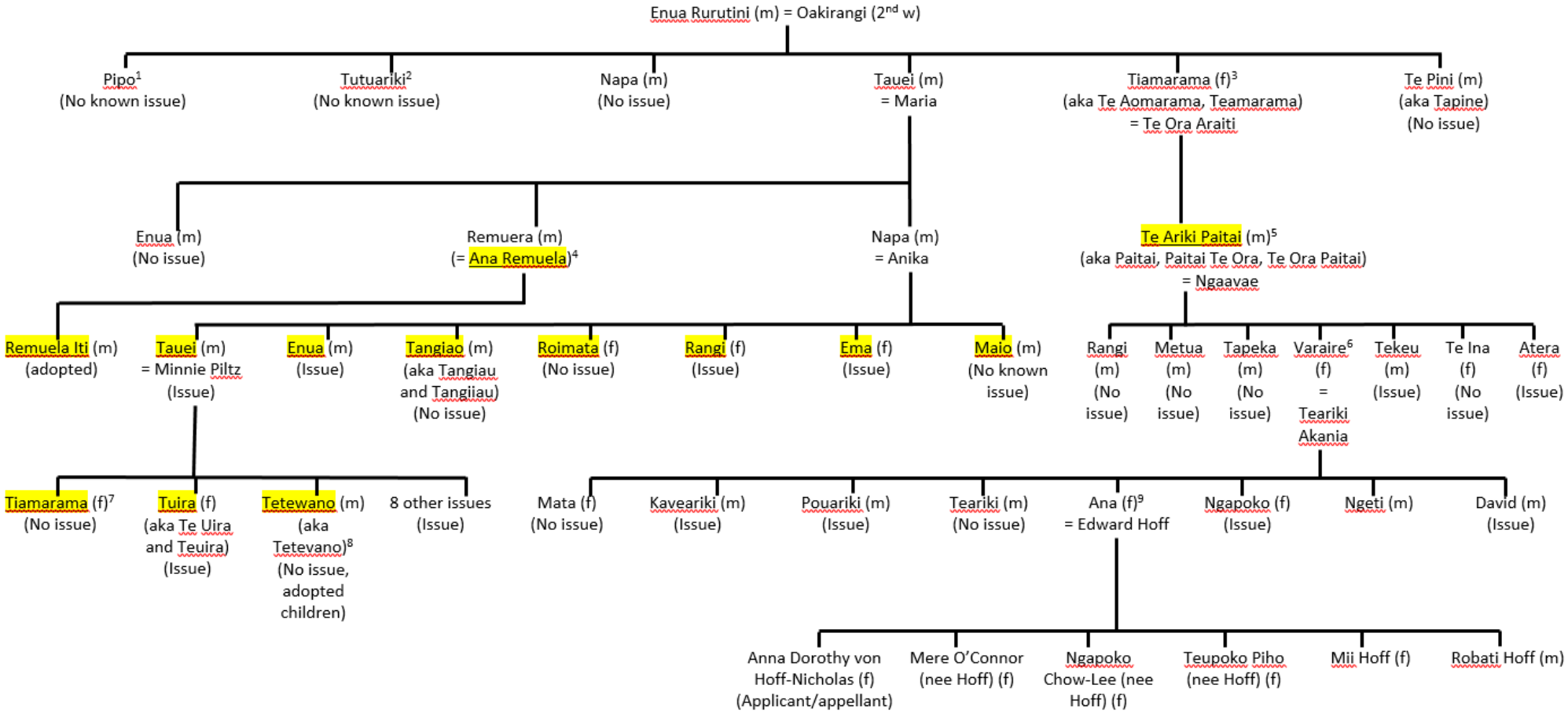




Douglas White, P **David Williams, JA** **Raynor Asher, JA**

APPENDIX A

Genealogy prepared by counsel for the appellant in Hoff v Napa (CA 1/2020) showing link from the appellant to Te Ariki Paitai to Tiamarama, including the original 13 owners of the 1906 order for Vaitamanga 88M



1 See case on appeal, vol 3, tab 30 at 140 (minutes of the Court, 8 March 1906). See also case on appeal, vol 3, tab 29 at 48.

2 See case on appeal, vol 3, tab 30 at 140 (minutes of the Court, 8 March 1906). See also case on appeal, vol 3, tab 29 at 48.

3 See the genealogies in the case on appeal at: vol 3, tab 30 at 140 (minutes of the Court, 8 March 1906, which lists "Te Aomarama"); vol 3, tab 30 at 155 (transcript of the minutes of the Court, 12 November 1934, which lists ""Tiamarama (f)"); vol 3, tab 30 at 144 (Tinirau's handwritten genealogy of 12 November 1934, which lists "Tiamarama (f)"); vol 2, tab 27 at 12 (extract from evidence given in the May 1943 Kapu Title case, which lists "Tiamarama (f) issue alive TeKeu Paitai family"); vol 2, tab 27 at 15 (extract from further evidence given in the June 1943 Kapu Title case, which lists "Teamarama (f) Issue alive in Avarua"); vol 3, tab 30 at 100 (the Tinomana genealogy prepared before 1965, which lists "Tiamarama (f) = Te Ora Araiti").

4 "Ana" is located on two of the genealogies as the wife of Remuera (case on appeal, vol 3, tab 30 at 48 and 154).

5 See the Tinomana genealogy prepared before 1965, which lists "Te Ariki Paitai (m)" as being the son of Tiamarama and Te Ora Araiti. See also the genealogy at vol 2, tab 27 at 12 (being extract from evidence given in the May 1943 Kapu Title case, which lists "Tiamarama (f) issue alive TeKeu Paitai family" – by 1943 Tekeu was the son of Te Ariki Paitai) and see the genealogy at vol 2, tab 27 at 15 (another extract from further evidence given in the June 1943 Kapu Title case, which lists "Teamarama (f) Issue alive in Avarua", that issue being the family of Tekeu Paitai, the son of Te Ariki Paitai). Te Ariki Paitai was born in 1848 (case on appeal, vol 2, tab 28 at 109) and died in 1915 (case on appeal, vol 2, tab 28 at 113-114). The Court of Appeal stated: "There is no doubt that Paitai is the son of Tiamarama and Te Ora Araiti" (case on appeal at vol 2, tab 28 at 232-235).

6 The death certificate for Varaire Teariki Nia records that she died on 22 January 1981 at the age of 88 and was the daughter of Paitai and Ngavaevae (case on appeal, vol 1, tab 8 at 29).

7 Tiamarama was also known as "Katherine" and "Kathleen": see the record of title for Vaitamanga 88M (case on appeal, vol 2, tab 27 at 3) where "Katherine" was the first person who succeeded to the interests of Tauei; and see the genealogy at case on appeal, vol 3, tab 30 at 142, which lists: "Tiamarama (f) (Kathleen)".

8 Tetewano/Tetevano was also known as "Alex" and was the third person who succeeded to the interests of Tauei: see the record of title for Vaitamanga 88M (case on appeal, vol 2, tab 27 at 3). The genealogy at case on appeal, vol 3, tab 30 at 142, lists: "Tetevano (m) Alex".

9 The death certificate of Ana Akania Hoff records her to be the daughter of Varaire Teariki Nia (case on appeal, vol 1, tab 8 at 30).