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

Applications 418/92, 373/93, 316/93

IN THE MATTER of Section 421 and 423 of the Cook Islands Act 1915 and Rules 341-347 of the Code of Avil Procedure of the High Court 1981

AND

IN THE MATTER of the uninvestigated Land known as **VAIRAUARA-KI-UTA** in the Tapere of Tokorau, Arorangi District, Rarotonga

AND

IN THE MATTER of an application for Investigation of Title by **TEINA RIRI NGAPOKO TUTU-ARIKI JONASSEN (NEE TAUEI)** of Rarotonga, Retired

AND

IN THE MATTER of an application by **VAIMUTU MATAIAPO TUTARA** (also known as **EMILY PAUKA**) of Arorangi, Rarotonga

AND

IN THE MATTER of an application by **MANOA HEATHER** of Rarotonga

Mr Holmes for Teina Jonassen
Mr Manarangi for Emily Pauka
Mr Browne for Manoa Heather

Date of Hearing : 13 December 1993
Date of Interim Judgment : 10 March 1994
Date of Judgment : 20th February 1995

JUDGMENT OF DILLON J.

In its Interim Judgment dated 10 March 1994 the Court deferred "... making any decision to allow Counsel the opportunity to file further submissions, firstly limited to the evidence already tended

and the conclusions I have drawn from that evidence; and secondly as to the identification of the actual areas occupied and now claimed so that a proper appreciation of the respective areas claimed by each applicant can be assessed." These further submissions have now been filed. They have been of limited assistance to the Court. That observation is not made as a criticism of Counsel's efforts to present the historical data and information necessary so that the Court can make an informed judgment. Rather it is an explanation of the difficulties Counsel face in establishing the source of ownership and entitlement to the land now claimed by the three applicants to the same piece of land. The very same difficulties confront the Court.

I shall deal firstly with the application by Teina Riri Ngapoko Tutu-Ariki Jonassen. Mr Holmes has presented detailed and comprehensive submissions on behalf of this Applicant, together with a critical analysis of the evidence supporting that application and which he claims is to be preferred to the evidence presented on behalf of the other two applications.

In the Interim Judgment the Court made certain findings on this application and the evidence that was presented in support as follows :

> "Mr Holmes called Rena Jonassen who was a witness for his father, one of the applicants. His claim was based, so he said, on Oakirangi's father Tepai, and that he was descended from Oakirangi. He conceded however that Oakirangi never held the Tinomana title; nor was there any evidence that Tinomana Tepai held the Tinomana title as he had originally claimed. Significantly however Mr Jonassen still persisted in claiming that the land was Tinomana land; that there was no record of Tepai being Tinomana; and that he nevertheless claimed as a direct descendant of Tepai while at the same time conceding that Tepai was not Tinomana. He certainly acknowledged that he had no evidence that Tinomana Tepai held the title.
>
> Finally, in cross examination Mr Jonassen agreed that he could not "specifically point out" the land that he was applying for - a strange acknowledgement."

The submissions by Mr Holmes now attempts to address what the Court perceived as insufficient evidence to support the claim by Mrs Jonassen. He confirmed that his client "... seeks title to the entire area known as Vairauara-Ki-Uta in Aroarangi." His application relied on the genealogy detailed in Minute Book 2/234, that is Tinomana Te Pai and that the Applicant's "...claim was as direct descendants of Te Pai." At this point it is necessary to confirm that Mr Jonassen, who gave evidence at the original hearing, was not able to produce evidence that Tinomana Te Pai had ever held the title; and further that while Mr Jonassen was able to refer to his family occupying the adjoining Blocks 88H and 88M, he was not able to identify any specific area actually occupied

in the 106 Block. These concessions and admissions have not assisted the Court in making a decision on the claim presented by Mrs Jonassen.

Of more concern however is the serious conflict of the genealogical evidence presented to this Court. By way of example, Mr Holmes in paragraphs 31- 38 of his submissions refers to a number of minute books and their references. These are 2/234 to 239; 6/258 to 262; and the journal of the Polynesian Society Volume 26 (1917) 59 to 65. However, he claims that the genealogy in Minute Book 6 at page 260 is not accurate. Similarly he says that the genealogy of Oakirangi in Minute Book 6 at page 260 is incorrect. To add further confusion to the conflict of the numerous minute books referred to, it appears that the evidence in Minute Book 2/234 is also contrary to the evidence in Minute Book 11/185 and to the genealogy referred to as having been compiled by Mr Savage.

The Court accepts that there is this conflict and as a result it is not possible to make a definitive determination without further evidence as to which is the correct genealogy and as to which genealogy as recorded in the original minute books is to be disregarded or confirmed as inaccurate. Mr Holmes has drawn conclusions from this conflicting evidence and then bases presumptions on which this Court has been asked to make a determination. For example he submitted in paragraph 35 :

> "It is submitted that Enua Rurutini was also identified as having occupied the land but he was not put in the land as Tinomana. It can only be surmised that Enua Rurutini, the husband of Oakirangi may have been put in the land by Tinomana Te Pai O Tangiiau because Oakirangi was the daughter of Tinomana Te Pai o Tangiiau."

This Court cannot proceed on a "surmise". Nor can it proceed where there is conflict of Minute Book evidence without an acceptable explanation as to which evidence should be relied upon.

For those obvious reasons the application by Mrs Jonassen cannot be sustained. This is not to say that with further research and investigation this applicant could resolve the uncertainties that have been highlighted and so provide the Court with the necessary evidence that could be further considered at a subsequent Court hearing.

I turn now to the application by Emily Pauka. In evidence she has conceded that Tinomana did not give her the Mataiapo title. Rather she said her family gave it to her. Her claim is similar in some respects to that of Mrs Jonassen - they are both owners in the adjoining 88H and 88M

Blocks and they both believe that this factor of itself gives them some priority and entitlement over other applicants. She makes no specific claim based on use and occupation; or on cultivation and planting. As Mr Manarangi has submitted, the issues for determination are the defining of traditional and permissive occupation. He claims that his client has the right to this land and has not been given any rights. However there is insufficient evidence to support Emily Pauka's claim to this land. Her claim is contrary to the record of the meeting on 28 July 1976 and any deficiencies in the evidence supporting her claim were not corrected or remedied by the evidence of Mr Raymond Pirangi. For those reasons the evidence as presented cannot support this application by Emily Pauka and is therefore dismissed As stated previously however, the production of relevant evidence or material in the future may well justify a further application. The applications by Mrs Jonassen and Mrs Pauka are made under the provisions of Sections 421 and 422 of the Cook Islands Act 1915. Section 422 states as follows :

> "Every title to and interest in customary land shall be determined according to the ancient custom and usage of the natives of the Cook Islands."

For the reasons already stated the "custom and usage" required to determine the title or titles to this land have not been established to enable this Court to make the orders sought.

I turn now to the third application by Manoa Heather. This application, unlike the two previously dealt with, both of which sought title to the whole of the land, is limited to part of the land only, namely an area of 16.7 hectares as shown on Survey Plan 506 dated 14 April 1994. There can be no doubt as to the continuous occupation of this area for at least 60 years; the uninterrupted and unhindered usage of an area of approximately 100 acres of which about 75 percent was rock; that the use of this land was for the whole of this time free from interference or objection by anyone; and the establishment of a quarry since December 1989 at which date interference for the first time occurred.

I have already determined that the meeting of the owners on 28 July 1976 was of real significance. The historical nature of the meeting held some 19 years ago is important. Tinomana Napa provided the historical background of what he knew of this land and it is recorded in the minutes of that meeting. It is significant that the Tinomana is not party to these proceedings.

Considering the totality of the evidence presented by Beresford Heather and William Heather; the minutes of the meeting on 28 July 1976; the continuous and uninterrupted occupation of an area

of 100 acres approximately up until December 1989 when the quarry was established, satisfies the Court that this application meets the criteria provided in Sections 421 to 423 of the Cook Islands Act 1915 in relation to not 100 acres previously occupied but to an area limited now to 16.7 hectares. There will therefore be an Order under Section 423 of the Cook Islands Act 1915 defining the area as 16.7 hectares as shown on the plan (Exhibit B) investing that land in the names of the issues of Kati Heather. Mrs Browne is to supply the Registrar with a list of successors to Kati Heather and of their relative interests.

This Order is intended to satisfy in full the interests of the Heather family in this land. As a result they will not be entitled to any further allocations within the 106 Block, the balance of which will remain uninvestigated land.

Dillon J.