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

Application No 299/98

IN THE MATTER of **Makea Nui Ariki** application under Rule 350 Code of Court Procedure 1981 to succeed to **Makea Nui Ariki a.k.a Makea Nui Teremoana Ariki**.

Applicant

AND **Mere Maraea MacQuarrie**

Objector

AND **Erueti Te Whiti Nia**

Objector

Application No 395/98

Teariki Akamoeau Manarangi application under Section 408 of the Cook Islands Act 1915 to determine the right of **Nooroa Matua** to hold the title **Makea Nui Ariki**.

Applicant

Application No 121/99

Mere Maraea MacQuarrie application in terms of section 409 of the Cook Islands Act 1915 to determine her right to hold the title **Makea Nui Ariki**.

Applicant

DECISION

Although no formal notices of objections have been filed in respect to the last two applications referred to above, Makea Nui Ariki, Nooroa Matua in his written submissions clearly opposes both applications. Further, although no objection was lodged by Hareraara Pito Apera Sadaraka, the Court did at the conclusion of the hearing, grant her leave to file submissions and these have now been received.

All three applications are so inextricably joined that it is appropriate they be dealt with together.

If the Court were to reach a decision that Nooroa Matua is not a proper holder of the title, then his application to succeed to the Makea Nui lands must fail. Further, if the Court finds that Nooroa Matua is the rightful holder then the remaining applications must fail.

These matters came before Justice Dillon on the 29th and 30th March 1999 and were adjourned to enable the parties to file and exchange submissions, and on the 25th May 1999 referred to Justice McHugh for a decision on the papers consequent upon the untimely death of Justice Dillon. Following the sudden death of Justice McHugh in August 1999, the files have been referred to me for a decision with the consent of all the parties excepting Hareraara Pito Apera Sadaraka (Joan Pito) who the Registrar advised could not be located. It is proposed to address her failure to consent to a decision on the papers later.

Having had the opportunity of reading the decision of the Court comprising Justices Dillon and McHugh delivered on the 18th September 1995 in dealing with the claims to this instant title by Mere Maraea MacQuarrie, Inanui Love Nia and Paula Tinirau Lineen respectively, this Court is satisfied that the principle issues to be addressed in these present cases are on all fours addressed by that Court. The submissions filed by all the parties herein have failed to persuade this Court otherwise.

At page 7 of its judgment of September 1995, the Court recorded the matters to be addressed when appointments are made to an Ariki title. It is pertinent to record them here and deal with them seriatim

1. Is the candidate a member of the class eligible for appointment according to custom or an approved arrangement?
2. Which body customarily elects the candidates?
3. Is the candidate suitable for appointment?
4. Were the meetings at which the candidate was nominated and finally selected validly constituted and conducted?
5. Did the candidate have sufficient support to justify appointment.
6. Was the candidate properly invested with the title in accordance with customary procedures?
7. What is the effect and propriety of the conditions imposed in any agreement and power of attorney in existence in relation to custom law and in the election of a candidate.

Who may be appointed Ariki?

The decision referred to above and some of the submissions filed in respect of this matter traverse various earlier judgements of the Court relating to the appointments to the Ariki title. It is abundantly clear, that except in those situations where there has been some arrangement adopted by the Kopu Ariki, such as in the case of the Will of Rangi Makea in 1921 and in the case of succession to Pori by his son Tinirau and later Tinirau's siblings, or where there is no person "*suitable*" such as happened when Mokeroa being a minor was passed over in favour of Teremoana, the primogeniture rule applies. It is therefore only a question of fact whether Nooroa Matua falls within those confines. Clearly he is not the "*eldest of the eldest*" and therefore does not come within the primogeniture rule, and the question remains as to whether there was any agreement in force that permitted appointments outside that rule. There is nothing in the submissions before this Court other than the arguments submitted by Mrs MacQuarrie at the previous hearing and rejected at that time, that the eldest of the last holder is entitled to take the title. In the absence of any agreement the primogeniture rule must apply. On this basis, it would appear that the claim by Nooroa Matua must fall at the first fence. In the interest of justice however it is appropriate that the other matters raised by the previous Court should be considered.

Who elects the title holder?

The decision of Dillon J and McHugh J in reliance upon a long history of decisions by the Court in this matter, make it blatantly obvious that the Kopu Ariki is the body to select the holder of the title and only in accordance with Maori custom. The Court has no jurisdiction to bestow the title although in terms of section 409(f) of the Cook Islands Act 1915 the Court may determine whether a person is entitled to hold the title.

There is however the question of who are the Kopu Ariki?

In the Appeal Court in 1991 MacCarthy J stated "*but what is the Kopu Ariki*? and proceeded to say:

> "In my view the answer is again reasonably clear. The term embraces all in a tribe who are the descendant of a particular tribal ancestor who again according to the Rarotonga practice within the Kairuku tribe at least was the Ariki living at the time when Christianity was brought to the islands by the first missionary, John Williams in 1823. In this present case, Ayson CJ, stated: "the Court will not go back to heathen times. Four generations gives a title..."

In this case both parties have agreed as to who are the members of the Kopu Ariki who have the right to attend on the selection of the new Ariki. They are the members of four families. This decision, accords the apparent acceptance that it is those descendants from Makea Apera namely Rangi Makea, Upokotohoa, Tataraka, and Mere. The Court in 1995 raised the question of the entitlement of Rupe to be included, but left that for the Kopu Ariki to decide itself. Apart from a unilateral move on the part of the Nooroa Matua to include Rupe in the Kopu Ariki nothing appears to have been done in respect to that.

It is clear to this Court that if a new holder to the title Makea Nui Ariki is to be elected by the Kopu Ariki as is recognised by custom, then the identity of the members must be determined, and this is not within the jurisdiction of this Court.

It is noted, that following the death of Rangi Makea on the 22nd July 1921, the then Resident Commissioner, when confronted by a challenge to Rangi Makea's Will, called a

meeting of all the interested parties and the Ariki of the other districts for the purposes of establishing the native custom determining the application or non-application of the Will. The custom to be applied was to be determined by all present. Whilst it is unlikely that the Kopu Ariki of Makea Nui Ariki would relish the intervention of other Kopu Ariki to determine their particular custom, in the absence of any possible settlement, that course does appear to have some merit.

It is noted in the submissions made by all including those of Nooroa Matua, that the persons purporting to make up the Kopu Ariki for his appointment was certainly fabricated.

Is the candidate suitable or unsuitable for appointment?

This is a matter for determination by the Kopu Ariki and constitutes a ground for bypassing the primogeniture rule. The Courts have from time to time considered the grounds upon which a contender can be found to be unsuitable.

In 1940 in Makea Nui Ariki title Ayson J, stated the following criteria to determine suitability of unsuitability for appointment:

(a) Sound character
(b) Adultery if proven beyond doubt
(c) Akateitei, i.e arrogant or overbearing behaviour, or
(d) Leaving the country with the full intention of not returning.

In 1980 Dillon J stated in re Vakatini Ariki Title *"that a candidate must be elected unless by reason by character or mental or physical incapacity he is unfit for office"*.

Finally, the Kotu Nui brought down the following rule in 1977, citing the grounds upon which a title could be removed:

(1) Cohabiting
(2) Murder
(3) Insanity

(4) Ill treating the family and tribe

(5) Overbearing attitude over the people in the Vaka or in his own Kopu Ariki.

Generally the presence of any of the above sins of the Ariki would be sufficient to preclude the appointment of an Ariki. Although not specifically mentioned in any of the prior judgments, it would appear from the fact that Mokoroa, a minor, although entitled under the primogeniture rule was passed over for appointment, that the minority of the nominee may also present an impediment to his or her appointment.

Were the meetings at which the candidate was nominated validly constituted and conducted?

Throughout the entire process of the election and investiture of an Ariki title custom prevails. It is clear that it is the duty of Potikitaua to summon the Kopu Ariki to deliberate upon an appointment. Teariki aka Moeau Manarangi was the Potikitaua or speaker of Makea Nui Ariki. It appears that Potikitaua did in fact call a meeting which was inconclusive, after which Nooroa Matua took responsibility for some of the meetings on the 14th, 15th, and 22nd April 1998 when he was finally elected.

On the 21st July 1998 Nooroa Matua as Makea Nui Ariki wrote to Manarangi Niki advising him that he was no longer required as Potikitaua. Whatever the status of Nooroa Matua following the meetings in April 1998 and even if he was confirmed as the Makea Nui Ariki, he cannot cancel the appointment of Potikitaua retrospectively and therefore all meetings held in April should in accordance with custom have been called by Potikitaua if they were to be validly constituted.

A further matter which militates against the validity of those meetings is the fact that the constitution of the Kopu Ariki appears to have been tampered with and that all entitled were not represented.

Does the candidate have sufficient support?

Insofar as the purported Kopu Ariki that had elected Nooroa Matua did not appear to meet with what appears to have been accepted as the true Kopu Ariki for the Makea Nui Ariki

title, two families having been excluded, then this question is of academic interest only. If however two families who would appear entitled to be represented in the Kopu Ariki were excluded, then clearly the question of adequate support must be suspect.

Was the candidate properly invested

The investiture of Nooroa Matua as Makea Nui Ariki was carried out on the 14th August 1998. No challenge appears to have been made against the propriety of the investiture ceremony. It follows however that if the claim of the nominee to the Ariki title is suspect, then any investiture whether properly carried out or not cannot remove the stigma attaching to the election.

Was there an agreement or power of attorney in existence that would in any way affect the determination by the Kopu Ariki?

The short answer is no, and therefore the customary primogeniture rule must apply.

This Court finds that in applying the principles enunciated in the decision of Dillon and McHugh JJ of the 18th September 1995, and after considering all submissions made by the parties, the election of Nooroa Matua was not carried out in accordance with custom, in that he does not fall within the class entitled in terms of the primogeniture rule, the appointment was not made by the true Kopu Ariki as appears to have been accepted over the years, and the meetings not properly called in accordance with custom and were not therefore valid. In accordance with the application filed by Teariki aka Moeau Manarangi, the Court finds that for the reasons set out Nooroa Matua does not have the right to hold the office as Makea Nui Ariki.

Secondly, the application by Makea Nui Ariki is dismissed upon the grounds that following the determination that Nooroa Matua does not have the right to hold the office as Makea Nui Ariki he has no status to bring such an application.

The application by Mere Maraea MacQuarrie was withdrawn by leave of the Court on the 9th of May 1999.

It is appropriate now to turn to the submissions by Hareraara Pito Apera Sadaraka (Joan Pito) who lays claim to the Makea Nui Ariki title.

The jurisdiction of the Court can only be exercised upon application and no application has ever been filed by Joan Pito to empower the Court to make an order in respect to the matters raised by her.

In the absence of any application, her submissions have been accepted as being in opposition by the application brought by Nooroa Matua as Makea Nui Ariki.

Without in any way appearing to prejudge Joan Pito's claim, the genealogy supplied by her would appear to take her outside the customary primogeniture rule.

It is noted that all parties with the exception of Joan Pito have consented to this decision being brought down by me and it is the opinion of this Court that since Joan Pito has not filed an application, and since the status quo prevailing following the decision of the Court on the 18th September 1995 has been restored, she has not been in any way prejudiced in this matter.

This Court does not propose to make any orders as to costs unless any of the parties wish to make application in that regard. Should that be the case, then counsel must file and exchange memoranda within 30 days of the date thereof.

This decision was promulgated at Tauranga, New Zealand on the 26th day of November 1999.

Smith J