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

Application No. 607/04

IN THE MATTER

of sections 429 and 430 of
the Cook Islands Act 1915
and Rule 348 of the Code
of Civil Procedure 1981

AND

IN THE MATTER

of the land known as
KAIKAVEKA SECTION
103E3 AVARUA

AND

IN THE MATTER

of an application by
GEORGE NGAEI to
Partition an Occupation
Right dated 10th August
1962

Mr Mitchell for applicant
Mr Little for objector
Date of hearing: 23 March 2005
Date of decision: 23 March 2005

DECISION OF SMITH J

This is an application for a re-hearing of the decision of the Court on the 25th of August 2003 when the Court dismissed an application for the partition of the Occupation Order on Kaikaveka Section 103E3, Avarua, dated the 10th August 1962.

In so far as the decision was made without opportunity for Mr Mitchell, counsel for the applicants for partition to be heard, natural justice dictates that the re-hearing should be granted.

Rehearing granted accordingly.

The land the subject of the application for partition is part Kaikaveka Section 103E3 comprising 2649 square metres being an Occupation Right granted to Ngaeikura Tou for residential purposes.

Following the death of the holder of the Occupation Right the rights continued on for his descendants namely:

George Ngaei	residing in Invercargill in New Zealand
Charles Ngaei	residing in Wellington in New Zealand
Terai McFadzien	residing on the land
Lester	residing in ahihi
Douglas Ngaei	residing in Rarotonga
Ana Henry	residing in Dunedin in New Zealand

Evidence was given that following the death of the Occupation Right holder Charlie Ngaei proceeded to build a commercial property on the land in accordance with his late father's intentions to provide funds for the maintenance of the family home on the land and the welfare of the family.

The building currently occupied and known as the Tyre Centre has been continuously occupied since its erection and from the payments received through the lawyers receiving the rents, the widow purchased furniture and traveled extensively.

Following the death of the widow in 1991 the rental from the commercial property continued to be collected by Short and Tylor until around 1992 it was

agreed that Ben Toma should take over. It was agreed at that time that as more of the siblings were in the Cook islands, Ben Toma could live in the family home.

Throughout the following years, the house was occupied by Terai, Charles and Douglas. The latter has since built his own house, Charles has moved to Wellington and Terai and her husband currently occupy the house.

Since approximately 1994 George Ngaei has been responsible for the rent from the commercial property and since then has made a payment of \$1000 to each of Anna, Terai and Douglas.

The accounting for this money appears to be of some concern amongst the family.

George Ngaei and Anna Henry have now applied to partition an area of 883 square metres, their 1/6th share each from the Occupation Right. The area they seek to excise includes the Tyre Centre building.

The proposal is opposed by their four siblings. Terai McFadzien in evidence stated that she did not want them to take the building. It was built by Charles and if anyone should receive it then it should be him.

She suggested an alternate site alongside the commercial building fronting the main road. This however is somewhat restricted as a building site because of the presence of two graves there.

Terai would prefer to see Anna build there or behind the commercial building without partitioning.

It is agreed that George Ngaei has a house on a leasehold property on Rarotonga.

It is suggested that all of the family have strong feelings for the house site as it represents the only land interest they have on Rarotonga.

Mr Mitchell, counsel for the applicants argues that the ongoing dispute amongst the family can only be resolved through a partition.

Terai McFadzien denies that the family are in dispute, apart from George Ngaei. She stated that Anna who is also party to the partition visited Rarotonga recently and spent some time visiting the family home and had meals there. Terai states that only George Ngaei is at loggerheads with the rest of the family.

Partition has long been a means of resolving disputes and on occasions when the Courts have been unable to partition they have directed the sale of the property and apportionment of the proceeds. Such drastic action is not called for in this instance.

The question of concern to the Court is would, in terms of section 429 of the Cook Islands Act 1915, partition "be in the interests of the owners or the persons interested in the land."

Mr Mitchell has clearly anticipated this and has had Tinomana give evidence that the landowners support the partition.

The Court must however look at the position of the remaining successors to the Occupation Right.

What was the purpose in building the commercial building?

Evidence was to the effect that it was intended to provide funds for the maintenance of the family home. Evidence was also given however that Terai McFadzien carried out extensive repairs and maintenance at her own expense.

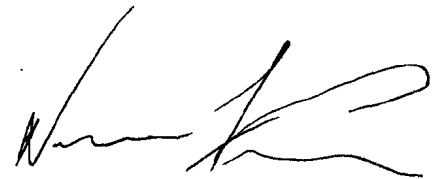
The house is said to be a large five bedroom residence and the occupier in evidence said she would have no objection to her siblings making use of it.

Obviously only those living in New Zealand would have a need for that or perhaps Lester in Tahiti, and then only for short periods. She states it is a family home for the benefit of all.

The Court cannot accept that a partition granting George Ngaei and Anna Henry sole ownership of the commercial building would be in the interests of the whole of the family.

Accordingly the Court declines to exercise its jurisdiction in this matter.

The application is dismissed.



N F Smith

JUDGE

Mr Mitchell, (21087)

Mr Little, (21615)

Copy referred!

2/6/05