

**IN THE HIGH COURT OF
THE COOK ISLANDS
(LAND DIVISION)**

App No. 141/2014

IN THE MATTER of Section 409(f) of the Cook Islands
Act 1915

AND

IN THE MATTER of an application to determine the
right to hold the
TINOMANA ARIKI TITLE

BETWEEN TOKERAU MUNRO
Applicant

AND THE ISAIA FAMILY
Respondents

Hearing: 8 May 2014 at Rarotonga

Judgment: 14 October 2014

DECISION OF JUSTICE W W ISAAC

Introduction

[1] This application was filed by Tokerau Munro (the applicant) and seeks an order pursuant to s 409(f) of the Cook Islands Act 1915 (the CIA) determining the applicant's right to hold the tribal title of Tinomana Ariki.

[2] The application is opposed by the Isaia family (the respondents) on the basis that the election process adopted to elect the successor to the title was flawed and unfair.

Background

[3] There has been a history of dispute to the title of Tinomana Ariki. Presumably in response to these sometimes bitter disputes, the Kopu Ariki of Tinomana met in 1975 and

came to an agreement on how to decide in future who should hold the title. That agreement is referred to as “the 1975 agreement”.

[4] The 1975 agreement sets out a three step process for the election of a new Tinomana Ariki following the passing of a sitting Tinomana Ariki, based on rotation between the three primary family lines, being the three wives of Enuarurutini, the Ariki of Aorangi at the time that Christianity was introduced to Rarotonga. The lines, or Kopu, are Tepori-a-Pa, Oakirangi a Tangiau and Akaiti-a-Rua.

[5] The 1975 agreement has been endorsed by the Court of Appeal in the case of *Vaineritua v Hosking*.¹

[6] In 2013, Tinomana Ruta Hosking passed away, and the process to elect a new Tinomana Ariki began.

[7] On 29 July 2013 the first meeting of the Kopu Ariki was held. It was accepted that it was the turn of Tepori-a-Pa to hold the title. The minutes of the meeting record the following resolutions:

1. That time be given to Isaia and Tepori (two of the sub-Kopu of Tepori-a-Pa) to meet and return a single candidate for the position of Tinomana Ariki.
2. That a one-month timeframe be given to the two sub-Kopu where they have to meet and report back to the Kopu Ariki.

[8] The minutes then record that the meeting was to reconvene on 29 August 2013. The first resolution passed at this meeting was to add an item to the agenda, that “The Taromi Line wants to contest the title”. Taromi is another sub-Kopu of Tepori-a-Pa. The meeting then passed a motion adopting the amended agenda.

[9] The meeting then resolved that the minutes of the previous meeting should be adopted.

¹ *Vaineritua v Hosking* [1994] CKCA; CA 5 of 1993 (8 August 1994).

[10] Next, the report from the meeting of Tepori-a-Pa was presented. A copy of those minutes has not been presented to the Court, however the minutes of the 29 August 2013 meeting record that it was reported that the Isaia line agreed that Matarii Vaineritua should hold the title and was supported by a number of the other sub-Kopu.

[11] The Chair then opened the meeting for discussions and at that point George Taikakara advised the meeting that the Taromi line had met and elected Tokerau Munro to contest for the title and moved that the relevant documents be tabled.

[12] After much discussion George Taikakara's motion was withdrawn, and it was then resolved that "The election for a Candidate be returned to Te Pori-a-Pa and for the clan to meet again". It was finally resolved to reconvene the meeting on 26 September 2013.

[13] The next meeting was actually convened on 29 September 2013. Tepori-a-Pa presented a report of a meeting held between Taromi and Isaia held on 19 September 2013, at which it was resolved that Tokerau Munro would be their candidate for Tinomana Ariki.

[14] The report was adopted. After discussion, the three clans voted to accept Tokerau Munro as Tinomana Ariki. Each of the three Kopu had one vote. Oakirangi and Ani both voted in favour, however the vote of Tepori-a-Pa was split into seven, representing each of the sub-Kopu. Five voted in favour and two (Tepori and Isaia) against. Tokerau Munro was therefore declared the candidate, and after a meeting of the Ui Mataiapo, she was announced as Tinomana Ariki.

Procedural background

[15] This application was filed on 14 February 2014. On 23 April 2014 the applicant filed an amended notice of application.

[16] On 30 April 2014 Tina Browne, at that time counsel for the Isaia Family, filed notice of opposition to the application.

[17] The application was heard at Rarotonga on 8 May 2014.

[18] The minutes of the hearing were transcribed and sent to me on 23 July 2014.

[19] The balance file was sent to me on 30 September 2014.

[20] Mr Moore as agent for the applicant sent a memorandum of Counsel dated 1 October 2014 which sets out what has been filed and also the need for a decision..

Case for the applicant

[21] The applicant submitted that in regard to s 409(f) of the CIA the Court has made it clear that its role is not to appoint the title holder, but merely to determine whether the person was elected in accordance with any “custom” or “procedure” which may exist for an election in the particular case. The applicant submitted that it is the election that is determinative in any finding that a person has the right to hold a particular title.

[22] It was submitted that the document entitled “Notice for Tinomana Ariki Title (the 1975 agreement) sets out the procedure for the election of the person to hold the title, and that its intention has been found by the Cook Islands Court of Appeal to be clear.

[23] The applicant submitted that she was elected to the office of Tinomana Ariki in full accord with the 1975 agreement.

[24] The applicant contends that the three-step process was followed. Firstly, one of the outcomes of the first electoral meeting was the election by the Isaiah sub-Kopu of Matarii Vaineritua to the office of Tinomana Ariki. However, the Kopu Ariki at the meeting of 29 August 2013, declined to confirm that election. The Tepori-a-Pa line therefore elected a new candidate on 19 September 2013, Tokerau Munro, which the Kopu Ariki accepted and confirmed on 28 September 2013.

[25] The applicant submitted that the Kopu Ariki of Tinomana came together in the traditional way and elected a new Tinomana Ariki, following the established procedures set out and confirmed by two Courts of Appeal.

Case for the respondents

[26] The respondents did not present written submissions to the Court, other than the notice of opposition filed on 30 April 2014, in which they alleged that the process adopted for the election was flawed and unfair.

[27] At the hearing the respondents submitted that the 1975 agreement was created and agreed to so that the election of Tinomana Ariki was done in a fair manner.

[28] The respondents submitted that the 1975 agreement was not followed in this case, and that the Taromi line has consistently claimed the title, but it is now time to recognise the other Tepori-a-Pa lines, including Isaia.

The law

[29] I set out the relevant principles with respect to s 409(f) of the CIA in *Makea Nui Title* (2014)² as follows:

Section 409(f) of the Cook Islands Act 1915

[49] The Court's jurisdiction to determine the right of any person to hold office as an Ariki is contained in s 409 of the Cook Island's Act 1915:

409. Miscellaneous jurisdiction of Land Court – in addition to the jurisdiction elsewhere conferred upon [the Land Court] by this Act, the Court shall have jurisdiction –

...

(f) To hear and determine any question as to the right of any person to hold office as an Ariki or other Native chief of any island.

² *Tavioni – Makea Nui Title* (2014) High Court of the Cook Islands (Land Division) at Rorotonga, Apps 132/13, 416/09, 229/13 and 390/13, 3 February 2014, Isaac J.

[50] This provision does not give the Court jurisdiction to appoint an Ariki or Native chief. The Court's role is limited to answering questions as to the right of a person to hold such office.

[51] The 1948 Native Appellate Court Decision *Re Makea Nui Takau* stated:³

It is not the function of the Native Land Court itself to appoint an Ariki or other Native chief to office. Any such appointment can only be made under the ancient custom and use of the Natives of the Cook Islands.

[52] This was confirmed by the Native Appellate Court in *Re Tinimana*:⁴

The most that the Court can do is to declare for the guidance and assistance of the people what it believes to be the custom governing such an appointment ... the most it could do if it found that Tepai had not been properly elected according to custom would be to declare that there had been no election, and then a fresh election would be necessary.

[53] This principle has not been altered over time. It was followed by the Land Court in decisions relating to the Makea Nui Ariki title in the 1995 decision of Dillon and McHugh JJ,⁵ and in the 1999 decision of Smith J.⁶

Discussion

[30] Both parties agree that the 1975 agreement outlines the correct procedure for the election of Tinomana Ariki. The agreement is set out in full as follows:

NOTICE FOR TINOMANA ARIKI TITLE

WE, the family of Tinomana Ariki hereby confirm that we have elected NAPA TAUEI NAPA, a member of the Oakirangi family to hold the Ariki title of Tinomana.

³ *Re Makea Nui Takau* (1948) Native Appellate Court of the Cook Islands, App 147, 16 October 1948, Morison, Morgan and Harvey JJ.

⁴ *Re Tinimana* (1948) Native Appellate Court of the Cook Islands, App 2, 14 October 1948, Morison, Morgan and Harvey JJ.

⁵ *MacQuarie – Makea Nui Title* (1995) High Court of the Cook Islands (Land Division) at Rarotonga, Apps 502/94 and 138/95, 18 September 1995, McHugh and Dillon JJ.

⁶ *Makea Nui Ariki* (1999) High Court of the Cook Islands (Land Division) at Rarotonga, Apps 299/98, 395/98 and 121/99, 26 November 1999, Smith J.

We also confirm that from today onward the Ariki title of Tinomana be elected in the following manner –

- (a) There are three families of Tinomana Ariki today from the three wives of Enuarurutini, Tepori-a-Pa, Oakirangi a Tangiau and Akaiti-a-Rua.
- (b) The title to rotate in these ways:
 - (i) Napa Tauai Napa will hold the title on behalf of the Oakirangi family.
 - (ii) When Napa Tauai Napa dies the family of Akaiti-a-Rua will elect a new Tinomana from their family.
 - (iii) When Tinomana from Akaiti dies Tepori-a-Pa family will elect a new Tinomana from their family.
 - (iv) When Tinomana from the Tepori-a-Pa dies it will go back to the family of Oakirangi to elect a new Tinomana.
 - (v) This is to be the system forever.
- (c) When the holder of the title is elected then they refer it to the House of Ariki of Ngati Tinomana and that Ngati Tinomana will confirm it. The Ngati Tinomana have the right to the Ariki or refuse any decision from any family. When the Ngati Tinomana confirms the Ariki then the speaker of the Ngati Tinomana will notify the elders (Mataiapo and Rangatira) and the people of the Vaka (clan).

[31] In *Vaineritua v Hosking*,⁷ Hillyer JA noted that the same person who prepared both the English and Māori versions of the agreement, , also wrote an article “The Choosing of a new Ariki” which reads as follows:

After Tinomana Napa III the Kopu Ariki will choose who will hold the title of Tinomana. The selection of the new Ariki will (then) not be as troublesome as the election of Tinomana Napa, because the Kopu Ariki (now) understands that –

⁷ *Vaineritua v Hosking* [1994] CKCA; CA 5 of 1993 (8 August 1994).

1. The Kopu Ariki alone will select the new Ariki.
2. The one that will hold the title of Tinomana Napa, will have to be chosen from the descendants of Akaiti as agreed upon in the agreement drawn up and agreed by the Tinomana family.

When Tinomana Napa passes away, the Tinomana family will meet to decide who will be the new Ariki. The Ariki family will be told that the Akaiti line will have to choose one amongst them to hold the title. Then the Akaiti line will meet and choose some one capable among themselves to be the Ariki of Puiakura. Maybe that there will be some disagreement amongst them or maybe they will not have any problems with the selection of one. Nevertheless they are not the ones to elect the Ariki they are only to choose a candidate to hold the title, it will be the Tinomana family that will confirm who will be the new Ariki. That was the agreement that was agreed upon.

If the Tinomana family agrees then that person will be the new Ariki but if that person is not accepted by the Ariki family then they will reject that person, then the Akaiti line will have to meet again to choose a new candidate. It will continue like that until they bring forward a candidate that will be accepted by the Ariki family to hold the title...

[32] Both parties support the 1994 decision in *Vaineritua v Hosking*. The Court of Appeal found in that case that the intention of 1975 agreement is clear, stating:⁸

If the Ngati Tinomana objected to (or rejected) the decision of the Akaiti-a-Rua branch that branch would then have to choose another candidate. If that was not the position, the whole point of the rotation would have been lost. The parties had agreed that the title should rotate. There would be an election, selection or nomination by the Akaiti-a-Rua branch of the family. That candidate would be put forward to the Kopu Ariki. The Kopu Ariki would have the right to confirm or reject that nomination from the Akaiti-a-Rua line but not to put forward someone else to be the candidate.

⁸ *Vaineritua v Hosking*, n 7 above, At 5.

[33] The submissions of the applicant refer to a meeting taking place on 30 July 2014, referred to as the “first electoral meeting”, which I take to be the meeting of Isaia and Tepori where it was decided that Matarii Vaineritua would be put forward as candidate for the title. However, no minutes of that meeting were provided by either of the parties. As stated above a report of the meeting was presented at the meeting of 29 August.

[34] I do not accept the submission of the applicant that the Kopu Ariki rejected Matarii Vaineritua as Tinomana Ariki at the 29 August meeting. It was simply never put to the meeting. Before any resolution was made, the Taromi line presented their own candidate, in opposition to the resolution of the 29 July meeting that Isaia and Tepori present a single candidate to the meeting.

[35] Notwithstanding the evidence of Archer Hosking, and the fact that the minutes record that the Chairman advised the meeting that the resolution to accept Matarii Vaineritua was defeated, the minutes do not record such a resolution being ever being put. The election of a candidate was returned to Tepori-a-pa to elect a new candidate on the basis that the previous one had been rejected.

[36] In accordance with the 1975 agreement, the Ngati Tinomana has the right to confirm or refuse the decision of a family. The decision to present Matarii Vaineritua was neither confirmed nor refused by the Ngati Tinomana. The respondents were entitled, having been given the right to present a candidate at the first meeting, to have that candidate considered.

[37] Tokerau Munro has not been validly elected in accordance with the agreement, which both parties have accepted is the applicable custom with respect to s 409. The application must therefore fail.

Where to from here?

[38] Because of the confusion that has developed, parties need to essentially go back to square one. That is, to the last agreement of the Kopu which was in accordance with the 1975 agreement. That is the decision on 29 July 2013 that the Isaia and Tepori sub-

Kopu decide a candidate for the title. The Kopu elected Matarii Vaineritua, and the Kopu Ariki now need to meet to either confirm or reject her as Tinomana Ariki.

[38] Should the Kopu Ariki reject her, the process would need to start again. In terms of the 1975 agreement, Tepori-a-Pa must elect a new candidate to put to the Kopu Ariki to either confirm or reject.

Summary

[39] For the reasons set out above, the application is dismissed.

[40] A copy of this decision is to go to all parties.

Dated at Wellington this 15th day of October 2014.

A handwritten signature in black ink, appearing to read 'W W Isaac', with a horizontal line underneath it.

W W Isaac
JUSTICE