

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

APPLICATION NO. 214/17

IN THE MATTER of an application for the **KAENA
MATAIAPO TITLE**

BETWEEN **TARAMANA TIPOKOROA**
Applicant

AND **NOOROA TUORO, THOMAS WYNN
and DOREEN BOGGS**
Objectors

APPLICATION NO. 250/17

IN THE MATTER of the **KAENA MATAIAPO TITLE**

AND
IN THE MATTER of an application for Tribal Title by
NOOROA TUORO
Applicant

Hearing date: 23-25 May 2018

Appearances: Mrs T Browne for Mr Tipokoroa
Mrs Tuoro and Mrs Boggs in person

Decision: 30 October 2018

DECISION OF JUSTICE W W ISAAC

Introduction

[1] Application 214/17 was filed by Taramana Tipokoroa to confirm his right to hold the tribal title of Kaena Mataiapo.

[2] That application is opposed by Nooroa Tuoro, Thomas Wynn and Doreen Boggs. Mrs Tuoro also brings her own application, 250/17, to confirm her right to the same title.

[3] Therefore, both applicants contest the other's right to the title, while asserting their own investiture was done according to custom.

Background

[4] The Kaena Mataiapo is a chiefly title sitting beneath that of Tinomana Ariki, the paramount chief of the Arorangi district of Rarotonga.

[5] The title sits with Ngati Kaena, which contains a number of family lines. The dispute in this case is which of these family lines should hold the title.

[6] Previous title holders from the most recent are: Tipokoroa Utia, Tapaeru Utia, Utia, Tipokoroa, Konini and Tapaeru a Kaena.

[7] The most recent Mataiapo, Tipokoroa Utia is suffering from poor health that requires he remain in New Zealand for treatment. Because of his distance from the tribal land, he informed the family he would be stepping down from the title and that he wanted his son Taramana Tipokoroa to hold the title.

[8] Both Mrs Tuoro and Mr Tipokoroa have applied for the title and the Court is advised that they have been invested with the title in traditional ceremonies, Mrs Tuoro on 22 April 2017 and Mr Tipokoroa on 28 July 2016.

Case for the Mr Tipokoroa

[9] The case for Mr Tipokoroa was presented by Mrs Browne.

[10] The applicant brings his application for the Kaena Mataiapo title on the basis he had the required support from his family at a meeting held on 26 July 2016 and that he was invested with the title according to custom on 28 July 2016.

[11] According to the applicant, the custom is that members of the Tapaeru family nominate one of their own to hold the title. It is submitted that only issue of Tapaeru have that right. Members of the other families are not needed for the election but are often present and may support the nomination.

[12] The applicant submits that all previous, known title holders have been members of the elder Tapaeru line.

[13] As a member of the Tapaeru line, the applicant submits he is entitled to be elected and to hold the Mataiapo title.

[14] The applicant deposed that he is the son of the previous title holder, Tipokoroa Utia who has resigned the title due to ill health. He is familiar with the history of the title and all previous titles have come from his family line, Kaena Tapaeru.

[15] In 1906, Onemaru and Tamati 8C were vested in 52 owners, including the title holder at the time, Konini. Following her death in 1941, half of Konini's estate was succeeded to by Tapaeru and the other half was succeeded to by Utia, Pua and Tio Tipokoroa equally. Utia Tipokoroa is the applicant's grandfather.

[16] The applicant conceded that he is aware of some objections to his investiture, however he has his family's support and the ceremony was held at the Kaena Mataiapo marae.

[17] Mrs Browne submits that the title has stayed in the applicant's family since 1823, when Christianity came to the Cook Islands. The Court record shows that the title has passed into no other branches of the family.

[18] As the applicant also descends from this line, his right to be elected to the title is clear.

[19] The applicant submits that Mrs Tuoro is not from the Tapaeru family line, therefore she is not eligible to hold the Mataiapo title. It would be against custom to elect the respondent unless the family agreed to change the custom.

[20] Mrs Browne submits that a title holder can only be elected against custom by way of family agreement.

[21] At a family meeting in 1974 to elect a new Kaena Mataiapo, the election process was agreed upon. The applicant submits that this process was for the Tapaeru family to decide but that the person elected comes from within the Tapaeru family.

Case for Mrs Tuoro

[22] The case for the respondents was presented by Mrs Boggs, as spokesperson on their behalf.

[23] The respondents submit that the tradition for nominating the Kaena Mataiapo title cannot be based on the last 117 years alone as the title is far older than that.

[24] The custom, according to the respondents is that the title was handed to the seven kopu or families of Ngati Kaena to discuss and appoint an appropriate holder.

[25] Although it would appear that the Tipokoroa line has held the title for the last 117 years, the respondents submit there is no evidence as to how three of those Kaena Mataiapo were nominated and vested with the title. Furthermore, it is submitted it is not right to privilege one family over the others.

[26] The respondents reason the previous title holders were all from the Tipokoroa line not as of right but because their nominations were supported by all the families. Their previous support for nominees does not limit their ability to oppose future nominees.

[27] It is submitted that the applicant was not vested with the title according to custom and therefore, has no right to hold it.

[28] The respondents oppose the contention that the role of the seven kopu is only to support any nomination from the Tipokoroa line. They submit that their votes have weight as their support has been sought for previous elections.

[29] The respondents submit that Mrs Tuoro was elected by the seven kopu of Ngati Kaena and properly invested with the Mataiapo title according to custom. As a member of one of these seven families, Mrs Tuoro is entitled to be nominated in this way.

[30] Furthermore, the seven kopu objected to the applicant's investiture as Mataiapo and he is supported only by the Tipokoroa family.

[31] Under cross-examination, Mrs Tuoro stated that the seven kopu were founded in 1969. This process was established when a case for determination of relative interest was brought for the land known as Onemaru on which these seven kopu live.

[32] The respondents submit that the proper process for nomination requires advertisement of the meeting of families. The applicant did not do so in this case.

[33] The respondents also dispute the custom of the last 117 years. In 1898 Tapaeru was the title holder, they were succeeded by Konini but there is no evidence of how Konini was

nominated and elected to hold the title. The respondents dispute that the next title holder was Tipokoroa as their death certificate puts their death after the date of Konini's death.

[34] The respondents submit that the first confirmed member of the Tipokoroa line to hold the title was Utia in 1951. They submit there was two other applicants for the title during that election.

[35] The next title holder was Utia's aunt, Tapaeru Utia who was succeeded by Tipokoroa Utia, the applicant's father. As Tipokoroa Utia wishes to relinquish the title due to his health, the respondents submit it should come back to the seven kopu.

Law

[36] The Court's jurisdiction to hear cases of nomination to native titles is encompassed by s 409 of the Cook Islands 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.

[37] Both the applicant and the respondents drew my attention to the decision in *Wichman v Toeta*.¹ In that judgment, I summarised the law as follows:

[40] Therefore it is clear that s 409(f) 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. This is done by consideration of the applicable custom and whether it has been followed.

[41] However, it is noted that in some situations, alternative agreements may be reached in relation to succession to a title.

....

[42] Thus, the Court may also consider whether an arrangement or agreement has been made to diverge from custom.

¹ *Wichman v Toeta* [2015] CKLC 1.

[38] This summary of the law has held true since it was first set out in 1948 in *Re Makea Nui Takau* where the Court held:²

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.

[39] The facts in the *Wichman* case show the Tangiau title was passed down the Putimere line to the eldest son for 104 years. The Court found this established the custom for that title.

[40] Further, to enable a divergence from that custom, those entitled would have to agree.

Discussion

[41] When considering the law set out above and the application now before the Court, the issues for determination are as follows:

- (a) What is the custom in relation to this title?
- (b) Has there been an agreement made to change the custom?

What is the custom in relation to this title?

[42] Mr Tipokoroa maintains that it is the Tapaeru family who nominate a member of that family line to hold the title. This has been the custom since 1823 and no other branches of the family have held the title since that time. This custom was confirmed at a family meeting in 1974.

[43] Mrs Tuoro confirms that the title has been with the Tipokoroa (Tapaeru) family for 117 years but this does not make it right. She maintains that the seven kopu elected her to the title and as Tipokoroa Utia wished to relinquish the title due to ill health the title should now come back to the seven kopu.

² *Re: Makeanui Takau* (Native Appellate Court, App 147, 16 October 1948, Morison, Morgan and Harvey JJ), see also *Makea Ariki Nui* (High Court Cook Islands, Land Division, Apps 502/94 and 138/95, 18 September 1995, Dillon and McHugh JJ) and *Makea Ariki Nui* (High Court Cook Islands, Land Division, Apps 395/98, 299/98 and 121/99, 30 March 1999, Smith J).

[44] Therefore, whether the custom is right or not and whether Mrs Tuoro may have the support from the seven kopu is not the issue. The issue is what is the custom and has the custom been followed.

[45] What the evidence before me demonstrates is that the Kaena Mataiapo title has been held by the Tapaeru family for at least 117 years and may extend back to close to 200 years. From the Court's view, this is clear evidence of an established custom for this title.

[46] I therefore find that the established custom and practice in relation to electing a title holder to Kaena Mataiapo which has existed for more than 117 years is that the title is passed down the Tapaeru family line.

Has there been an agreement to diverge from this custom?

[47] From the evidence, there does not appear to be any such agreement. In fact, the custom set out above was essentially confirmed in 1974 and the Tapaeru family has not agreed to change the custom.

Decision

[48] As a consequence of the above discussion it is clear that Mr Tipokoroa was appointed to the Kaena Mataiapo title and Mrs Tuoro was not.

[49] For these reasons the application of Mr Tipokoroa is granted and the application of Mrs Tuoro is dismissed.

[50] A copy of this decision is to be distributed to all parties.

Dated at Wellington this 30th day of October 2018.

A handwritten signature in black ink, appearing to read 'W W Isaac', followed by a period.

W W Isaac
JUSTICE