

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

APPLICATION NO. 8/2019

IN THE MATTER of the land known as **MOEIREA
101 MAUKE**

AND
IN THE MATTER of an application for Occupation
Right by **MARIA IOANE
VAERUARANGI** also known as
TUNGANE POKERE
APPLICANT

Hearing Dates: 2 and 8 October 2019
Appearances: Mr B Mason for Applicant
Mr Whitta for Respondents

APPLICATION NO: AIT 148/2017

IN THE MATTER of the land known as
PUIPUIRANGI 110 TAUTU

AND
IN THE MATTER of an application for Occupation
Right by **NOOAPII PITA
IEREMIA**
APPLICANT

Hearing Date: 30 September
Appearances: No appearance for the applicant
Mrs Browne to oppose

APPLICATION NO: AIT 248/2012

IN THE MATTER of the land known as
PUIPUIRANGI 110 TAUTU

AND
IN THE MATTER of an application for Occupation
Right by **ZEKARIA WILLIAMS**
APPLICANT

Hearing Date: 30 September
Appearances: Mrs Browne for Applicant
Mr Nicholas has filed submissions for Mr Ieremia subsequent to the hearings in
both the above matters

Date: 31 August 2020 (NZ)

JUDGMENT OF JUSTICE P J SAVAGE

[1] There is an issue as to the jurisdiction of this Court in both of these cases. It arises because the Court must be satisfied as to the wishes of a majority of owners before it can exercise the power given to it by s 50 of the Cook Islands Amendment Act 1946.

[2] In particular the question arises as to the way the Court deals with owners who have died but remain on the title, not having been succeeded to.

[3] There were views put forward to me that they should be counted or on the other hand not counted for the purpose of calculating the number of owners so that the issue of a majority could be established. I took a somewhat different view and suggested that s 447 of the Cook Islands Act 1915 meant that the shares passed by operation of law immediately upon death to those entitled to succeed and without the need for a succession Order for the purposes of establishing the number of owners.

[4] Because I could see that this was a somewhat different view to that previously held and might have serious consequences for the exercise of this jurisdiction, I invited submissions not only from the parties but also from the Cook Islands Law Society. Mr Mason did not wish to make submissions. Mr Whitta and the Law Society did.

[5] I think it is appropriate that my direction and the submissions of Mr Whitta and the Law Society be available and therefore they are annexed as items A, B and C to this judgment.

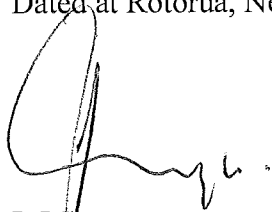
[6] There is no contrary view to my reading of s 447 but the parties rightly point out difficulties that then arise.

[7] The temptation is to respond to those ancillary matters but I think the short point is, if I have no jurisdiction, then anything that I might say further would simply be obiter.

[8] For example, it may be that the mere expression of a wish by an owner is not the making of an alienation but as in so far that an occupation order is an alienation it is made by the Court.

[9] I am not satisfied as to the requisite wish of the majority of owners in either of these cases and they are dismissed for want of jurisdiction.

Dated at Rotorua, New Zealand this 31st day of August 2020



P J Savage
JUSTICE

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

App No. 8/19

IN THE MATTER of the land known as **MOEIREA 101
MAUKE**

AND
IN THE MATTER of an application for Occupation Right by
Maria IOANE VAERUARANGI also
known as **TUNGANE POKERE**

Applicants

Hearing Dates: 2 and 8 October 2019
Appearances: Mr B Mason for Applicant
Mr Whitta for Respondents

App No. Ait 148/17

IN THE MATTER of the land known **Puipuirangi 110 Tautu**

AND
IN THE MATTER of an application for Occupation Right by
Nooapii Pita Ieremia

Applicants

Hearing Date: 30 September
Appearances: no appearance for the applicant
Mrs Browne to oppose

App No. Ait 248/12

IN THE MATTER of the land known **Puipuirangi 110 Tautu**

AND
IN THE MATTER of an application for Occupation Right by
Zekaria Williams

Applicants

Hearing Date: 30 September
Appearances: Mrs Browne for Applicant

Mr Nicholas has filed submissions for Mr Ieremia subsequent to the hearings in both the
above matters

DIRECTION OF JUSTICE P SAVAGE

[1] These two sets of proceedings stand adjourned. They concern issues relating to whether or not the majority of owners have expressed the required wish in terms of s 50 of the Cook Islands Amendment Act 1946.

[2] This matter goes, of course, to jurisdiction. Without the applicant being able to show how many owners there are it is often impossible to calculate whether a majority exists and therefore the Court cannot proceed. The count is by number not shares although ownership of shares maybe important in the ultimate decision.

[3] Mr Mason has filed a memorandum addressed to me relating to the practice note issued by Hingston J in 2007.

The note reads as follows:

TO: The Registrar

PRACTICE NOTE - OCCUPATION LICENCES

1. *Before acceptance into the Register applications for occupation licences must present a plan certified by the Chief Surveyor or his delegate to the effect that there are no other plans of this land effecting the area sought in the occupation licence.*
2. *Such applications must be accompanied by a clear and unambiguous statement as to how many owners consent/approve.*
3. *Before application is placed before a Judge or JP for consideration it must have a certificate signed by the Deputy Registrar stating the number of owners in the land (including deceased).*
4. *If the number of owners in (2) above are together not a majority of those shown in (3) above then the application shall not be placed before a Judge or Justice of the Peace for adjudication.*

Hingston J

12 December 2007

[4] Mr Mason points out that a dead person should not count as an owner and is not capable of expressing a wish. This means in the calculation, the presence of a deceased

person on the title counts against an applicant. He suggests that deceased persons should not be "in the count".

[5] I have noted over the years that the practice note has come to be read as if it were a statement of law. It is not. It is rather a direction to the registrar as to the preparation and presentation of the file to the Court. The intent is that a system operates that will readily disclose if the Court has jurisdiction. The Court works from the title which it is hoped is accurate and up to date. It must be remembered however that there is no Torrens system, there is no indefeasibility of title and native custom is the dominant driver of the system.

[6] This brings one to look more closely at the meaning of the word owner in s 50. The word is deceptive and open to interpretation in terms of context. The word is not defined in the Cook Islands Act in 1915 and its amendments. I am not aware of any useful indication as to interpretation in analogous legislation. I suppose it would encompass both legal and beneficial owners.

[7] It is to be remembered that this section is 75 years old. It is of a time when the population of the Cook Islanders was much smaller and almost all Cook Islanders lived in the Cook Islands. People knew each other and the list of names on titles were much smaller. It may be that we will have to recognise that changes have meant the section is not as useful as it once was.

[8] It could be that the answer lies in the s 447 of the Cook Islands Act 1915 which reads as follows:

447. Native land not to vest in administrators - The interest of a Native [or descendant of a Native] in Native land shall in no case vest in his administrator by virtue of letters of administration, but shall in every case vest, on the death of that Native [or descendant of a Native], in the person or persons entitled to succeed thereto, and if there is more than one such person, then as tenants in common in the shares in which they are so entitled.

[9] This suggests that those entitled in accordance with Native customⁱ have the interest vested in them at the moment of death.

[10] That person is not capable of instituting any Court proceedings in any Court other than the Land Court.² This suggests that but for s 451 a successor could do so. It is also to be noted that such a person could take part in Court proceedings so long as he or she did not institute them.

[11] Such an interpretation would mean that s 448 gives jurisdiction to the Land Court to determine who holds the interest and indeed has held the interest since the death of the previous owner and then to make an order accordingly. But it is to be noted that when ss 448 and 451 are read together a successor does not need to have an order for that person to be a successor.

[12] The net effect of all this may be that successors who have ownership vested in them by operation of law but no determination or order, are owners for the purposes of s 50.

[13] There is a difficulty with Mr Mason's suggestion that a deceased owner simply not go into "the count" when in fact by operation of law rather than any Court order others, be they children or siblings, hold ownership rights. It is almost as if he is asking that the Court view the land interests as, for the time being, not owned by anybody.

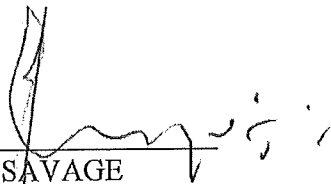
[14] This matter will have to be determined and it seems to me it will have to be determined in these proceedings. Because it is a matter of considerable consequence for the Cook Islands, I will receive submissions not only from the parties but also from the Cook Islands Law Society should it wish to participate. Submissions should be filed and served on the other parties to these proceedings by the end of July 2020.

[15] The Registrar is asked to forthwith communicate this direction to counsel appearing in these proceedings and the Cook Islands Law Society.

¹ Section 446

² Section 451

Dated Wellington, New Zealand this 24th Day of June 2020.



P J SAVAGE
JUSTICE

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

APPLICATION NO.: Mauke 9/2019

IN THE MATTER of section 50 of the Cook Islands Amendment Act 1946

AND IN THE MATTER of the land known as Moeirea section 101, Arakiropu, Mauke

AND IN THE MATTER of an application for an Occupation Right by Maria Ioane Vaeruarangi (also known as Tungane Pokere)

Applicant

AND IN THE MATTER of a Notice of Opposition by Teura Tuakanangaro Snow (nee Vaeruarangi)

Objector

SUBMISSIONS OF THE OBJECTOR

6 August 2020

LITTLE & MATYSIK
COOK ISLANDS LAWYERS

Barristers & Solicitors
Taputapuata, Avarua Rarotonga
Email: tepuretu@lawyers.co.ck / heinz@lawyers.co.ck
Solicitors on record: Tepuretu Whitta / Heinz Matysik

SUBMISSIONS OF THE OBJECTOR

May it please the court:

1. On 24 June 2020, His Honour Justice Savage issued a Minute directing the parties in this application (and other applications) to make submissions to the Court.
2. These submissions in response to that Minute on behalf of the Objector in this matter (Mauke 9/2019).
3. The Applicant and the Objector are both landowners on the subject land (**Land**) and both have support from a large proportion of the other landowners for their competing applications to obtain an occupation right over what amounts to the same area of the Land.
4. Both the Applicant and the Objector maintain that they have the support of the majority of landowners of the Land for their competing occupation rights. These positions are clouded by the fact that consents for different applications can be, and have been, withdrawn and granted to opposing parties at a moment's notice.
5. Further ambiguity is created by the fact that it is unclear what number should constitute the total number of landowners and whether this number should include deceased landowners not succeeded to by their descendants.
6. The issue raised by Mr Mason, and further outlined by His Honour in the Minute, is what happens to a landowner's interest in the time between their death and the sealing of a succession order vesting their interest in their descendants pursuant to section 448 of the Cook Islands Act 1915.
7. Counsel agrees with His Honour's statement in the Minute that there is difficulty accepting Mr Mason's suggestion that a deceased owner simply not be counted.
8. As indicated by His Honour, such a proposition would in effect result in a deceased landowner's shares being owned by nobody pending the successors of the deceased landowner obtaining sealed succession orders.
9. In addition to the legal position, there is also the practical challenges faced by landowners succeeding to land interests in the Pa Eua.
10. It is the practice of the Land Court staff to organise Land Court sittings in the Pa Eua when there are enough applications filed to warrant the travel of Land Court staff to the relevant Island. This means that there can be several years between Land Court sittings on certain outer Islands, during which time descendants of

landowners are unable to succeed to their parent's interests, leaving these interests in a form of limbo.

11. The effect of disregarding landowners that are deceased and unsucceeded to is that the interest vested in landowners pursuant to section 447 of the Cook Islands Act 1915 is not recognised.
12. Following the suggestion of Mr Mason that deceased landowners' interest not be taken into account the descendants of said landowners would be unable to make their positions heard, or at least would first be required to prove to the Court their right to do so.
13. While Counsel agrees with His Honour's posit that a landowner's interest, for the purposes of section 50 at least, vests in their descendants upon their death, the issue that then arises is one of practicalities. Some of the issues that need to be considered include:
 - a. How do they confirm whether a landowner is alive or deceased, especially for landowners residing overseas that may not have a close connection to the family?
 - b. How do they confirm if any deceased landowners have children?
 - c. How do you deal with descendants of deceased landowners who are minors?
 - d. What is the position of elders in a family to speak on behalf of the descendants of deceased landowners?
14. In addition to the practical challenges, Counsel is obligated to draw the Court's attention to sections 452 of the Cook Islands Act 1915 which states:

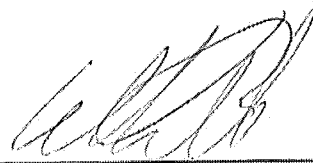
"452. No alienation without succession order – No successor shall be capable of making any alienation or disposition of the interest acquired by him as successor (other than an alienation of disposition by will in the case of a European) until and unless a succession order has been made in his favour."
15. And section 466(2) of the Cook Islands Act 1915 which states:

"Subject to the provisions of this Act, a Native [or descendant of a Native] may alienate or dispose of any land or of any interest therein in the same manner as a European, and Native land or any interest therein may be alienated or disposed of in the same manner as if it was European land."
16. It would appear that section 452 may be in conflict with section 447. It is also not clear how section 466(2) is to be interpreted or applied (if at all) with respect to

section 452 and how, if the provisions are in conflict, they might be reconciled; in particular if there is no equivalent section 452 restriction on alienation or disposition in respect of European land.

17. In this regard Counsel has no submissions other than to note the law construction provisions in Article 65(2) of the Constitution, section 5 of the Acts Interpretation Act 1924, and the purposive approach to interpreting statutes.¹

Dated: 6 August 2020



Counsel for the Objector

¹ *Lineen v Macquarie* [2008] CKHC 47, at paras 27 to 37

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

Application No: 08/19

IN THE MATTER of section 50 of the Cook
Islands Amendment Act
1946

AND
IN THE MATTER of the land known as
Moeirea section 10I (the
"Land") in the district of
Arakiropu on the island of
Mauke

AND
IN THE MATTER of an application by Maria
Ioane Vaeruarangi (a.k.a.
Tungane Pokere)

Applicant

**MEMORANDUM OF THE COOK ISLANDS LAW SOCIETY IN RESPONSE TO DIRECTIONS OF
THE HON. JUSTICE PATRICK SAVAGE
20 August, 2020**

May it please your Honour:

1. Paragraph [15] of your Directions issued 24 June, 2002 refers.
2. The Council of the Cook Islands Law Society (“CILS”) agrees with your interpretation of the relevant provisions of the Cook Islands Act 1915 (the “Act”), with the qualification of the application of s 452 of the Cook Islands Act 1915 discussed below.
3. All rights in Native freehold land accrue to the issue of a deceased landowner immediately upon that landowner’s demise¹ but the Act provides some of those rights are not exercisable until a succession order has been made by the Court.
4. The rights that may not be exercised are the right to institute a proceeding in relation to the successor’s interest² and the ability to alienate or dispose of that interest³.
5. Section 469 of the Act provides no Native is capable of alienating freehold land for a term exceeding 60 years.
6. A person who has succeeded under Native custom has an immediate interest in Native freehold land but is not capable of alienating it at all leading to the question whether section 469 must necessarily be limited to those who are, as a starting point, capable of alienating freehold land.
7. However, even if that interpretation is correct it does not permit one Native to alienate the Native freehold land of another. It does not resolve the problem.
8. Section 1 of the Cook Islands Amendment Act 1946 (“1946 Act”) provides the 1946 Act is to be read together with and deemed part of the Principal Act.
9. Section 50 of the 1946 Act provides:
 - (1) In any case where the Land Court is satisfied that it is the wish of the majority of the owners of any Native land that that land or any part thereof should be occupied by any person or persons (being Natives or descendants of Natives), the Court may make an order accordingly granting the right of occupation of the land or part thereof to that person or those persons for such period and upon such terms and conditions as the Court thinks fit.
 - (2) Any person occupying any land under any such order of the Court shall, subject to the terms of the order, be deemed to be the owner of the land under Native custom.
 - (3) No order shall be made by the Court under this section without the consent of the person or persons to whom the right of occupation is granted.”

¹ Section 446

² Section 451

³ Section 452

10. While “owners” is defined neither the Act nor in the 1946 Act, to be “an owner in “Native land” must necessarily be a “Native” which is defined in the Act.
11. Section 2 of the Act defines “Native land” as customary land and Native freehold land. So an occupation right can be granted out of customary land or Native freehold land.
12. Section 2 of the Act has the following definition:
- “Alienation” means with respect to Native land the making or grant of any transfer, sale, gift, lease, licence, easement, profit, mortgage, charge, encumbrance, trust, or other disposition, whether legal or equitable, of or affecting customary land, or the legal or equitable fee simple of freehold land or of any share therein; and includes a contract to make any such alienation
13. Notably “alienation” applies to “Native land” which includes customary land. So whether the alienation by way of right of occupation is granted out of customary land or native freehold land it will constitute at least a transfer of legal or equitable title, notwithstanding native custom does not recognise such concepts, because were that not the case the definition could have no application to native custom at all.
14. Section 469(1) the Act only deals with alienations of Native freehold land. It refers to “alienating” “howsoever” which is, if possible, even broader than the definition “alienation”.
15. While upon an order being granted under section 50 of the 1946 Act the occupier is deemed to hold under native custom, the grant of the order itself is made under the provisions of the Act and not in accordance with Native custom.
16. The wording of section 50 of the 1946 Act shows a misunderstanding of the Act. In respect of Native freehold land a majority of the owners thereof is a majority of a particular tenant in common interest in the land and not of the land itself unless it has a sole owner.
17. Section 40 of the Land (Facilitation of Dealings) Act 1970 shows a better understanding of the Act’s regime than the 1946 Amendment. It provides:
- (1) In this Part of this Act the term “owners” in relation to any area of land means the persons who are beneficially entitled to that land in fee simple as tenants in common whether legal or equitable and includes, but not to the exclusion of the persons entitled in remainder, the owner of a beneficial interest for life or any other beneficial freehold interest.
 - (2) In this Part of this Act the term “assembled owners” means with respect to any land the owners thereof as hereinbefore defined assembled together in a meeting called and held in accordance with this Part of this Act and with any regulations relating thereto.⁴

⁴ Section 40

18. The issue identified by Mr Mason and discussed by your Honour is further exacerbated by s 452 of the Cook Islands Act 1915:

a. It has been held and accepted that an occupation right is an alienation (see *In that matter of Dianna Clarke Bates, Te Raopa 12K2, Ngatangiaa at p. 6*. Refer further to the definition of “alienation” under the Cook Islands Act 1915;

b. Section 452 of the Cook Islands Act 1915 provides:

452. No alienation without succession order - No successor shall be capable of making any alienation or disposition of the interest acquired by him as successor (other than an alienation or disposition by will in the case of a European) until and unless a succession order has been made in his favour.

c. A consent to an occupation right must be viewed, in the CILS opinion, as an alienation by each consenting owner, as an occupation right holder will enjoy rights of exclusive possession. That the rights of non-consenting landowners are also alienated is only permissible by operation of statute, namely s 50.

d. It follows then from your Honour’s analysis that the successors of a landowner who have not themselves succeeded (“Unsuccessful Owners”) are vested with ownership at the moment of the death of the previous owner but due to s 452 is unable to alienate that interest.

e. It would appear then that this in fact exacerbates the issue identified by Mr Mason. Not only does the presence of a deceased person count against an applicant (as per the Practice Note by Hingston J dated 12 December 2007), if that deceased owner has successors they too will count against an applicant (or more accurately the Unsuccessful Owners would count in place of the deceased owner).

19. It is recognised that this will create numerous practical and legal difficulties for applicants, registry staff, and the Court, including:

a. Who determines which owner is alive or deceased?

i. Court registry staff are largely dependent upon succession applications, records from the Office of Births, Deaths and Marriages, and local knowledge.

ii. Such sources will only assist where the deceased owner is known, died in the Cook Islands, or where a succession application has been filed.

b. Who determines who the Unsuccessful Owners are?

- i. Succession applications are often contentious in the Cook Islands. What status is enjoyed by Unsuccessful Owners who have not proven their rights?
- ii. Who bears the onus of determining how many Unsuccessful Owners exist?
- iii. If the onus rests on an applicant, how is the court registry to verify such information, noting that the court registry is supposed to be an independent arbiter of landowner consent under the 2007 Practice Note of Hingston J).

20. Some of these issues were identified by the Objector in the submissions of 6 August 2020.

21. The conclusion of the CILS is that s 50 is no longer fit for purpose.

22. The present examination has revealed numerous flaws in the process and no obvious solution presents itself other than legislative reform. How the Court considers s 50 applications in the absence of such reform is not for the CILS to comment.

23. The CILS recognises that there remains a place for occupation rights as a valid form of title in the Cook Islands. Occupation rights have the following advantages over other forms of title (notably leases):

- a. Occupation rights are typically on much simpler terms than leases. The precise terms of an occupation have, for the most part, less import than the precise terms of a lease;
- b. Because of the simpler terms, many landowners feel confident in applying for an occupation right without the assistance of a lawyer and without incurring legal fees;
- c. Occupation rights are typically granted for zero consideration and do not impose any ongoing rental obligations;
- d. An occupation right cannot be alienated or mortgaged, which may be attractive to landowners who wish to grant their family an interest in land but with assurances that it will not be disposed of outside the family;
- e. As occupation rights cannot be alienated or mortgaged, they are considered 'creditor proof' to those who desire certainty over their family homes.

24. The CILS proposes to circulate to members a policy paper for proposed reform of section 50 of the 1946 Act to address the issues raised.

DATED at Rarotonga this 20th day of August, 2020

A handwritten signature in black ink, appearing to read 'B Marshall'.

Ben Marshall
President
Cook Islands Law Society