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

APPLICATION NO: 123/2019

UNDER	Section 50, Cook Islands Amendment Act 1946 Section 3, Declaratory Judgments Act 1994
IN THE MATTER OF	the land known as KAREKARE 127W2B2B, AVARUA and an application for Declaratory and Occupation Right
BETWEEN	RENNIE NICHOLLS Applicant
AND	EDDIE KARIKA First Respondent
AND	LYNNSAY FRANCIS Second Respondent

Hearings:	6 and 13 July 2020
Appearances:	M Short for Applicant H Ellingham for Respondent T Nicholas for Respondent
Judgment:	22 December 2020 (NZ)

DECISION OF JUSTICE COXHEAD

Introduction

[1] This is an application by Rennie Nicholls for an occupation right order pursuant to s 50 of the Cook Islands Amendment Act 1946, over the land known as Karekare 127W2B2B, Avarua ("the land"). The land is currently subject to two separate occupation right orders and the applicant also seeks a declaratory order cancelling those occupation rights pursuant to s 3 of the Declaratory Judgments Act 1994.

[2] The existing occupation rights over the land were granted to:

(a) Eddie Karika, who was granted an occupation right on 30 April 1997; and

(b) Maria Tapuanoa Heather née Ngaputa and Geoffrey Heather who were granted an occupation right on 30 June 1994.

[3] Eddie Karika and Lynnsay Francis, the latter of whom represents the family that hold the occupation right granted to Maria Tapuanoa Heather née Ngaputa and Geoffrey Heather, oppose this application.

The Land

[4] Karekare 127W2B2B, Avarua is a block of land located in the parent block known as Karekare Section 127W, Avarua. Section 127W consists of a total of 12 hectares. On 20 November 1967, the Court granted an order determining the relative interests in Section 127W. The application to determine relative interests was filed by Mii Teremoana, who submitted that there should be three total shares in the land for the Pikitavake line, the Te Upoko line and the Anguna line respectively. The order granted confirmed a total of three shares in Section 127W. The order also noted that the Tangiao portion, containing 21,676 square metres, would be separately surveyed and excluded from the total area of Section 127W.

[5] The land was subsequently partitioned. On 19 May 1979, a partition order created Karekare Section 127W2A and on 18 November 1980, a partition order created Karekare Section 127W2B2B.

[6] The applicant's family is the Pikitavake line, with seven kopu. The applicant's grandmother, Mii Teremoana, is one of the seven kopu of the Pikitavake line. Mr Karika's family descends from the Anguna line. Ms Francis represents the Te Upoko line, who hold the occupation right granted to Maria Tapuanoa Heather née Ngaputa and Geoffrey Heather.

Procedural History

[7] On 18 March 2019, the applicant filed the application for a declaratory judgment and an occupation right order. Attached to the application was the minute from a meeting of assembled owners showing consent by the majority of the landowners to give the applicant an occupation right of an area of 2285 square metres.

[8] On 26 April 2019, Ms Francis filed a letter of objection to the application on behalf of the descendants of the Te Upoko line. She claimed the minutes from the meeting of assembled owners did not reflect her objection.

[9] On 6 May 2019, the applicant responded to Ms Francis' objection letter.

[10] On 6 July 2020, this matter proceeded to hearing where Mr Short, (counsel for the applicant), Ms Ellingham (counsel for Mr Karika) and Ms Francis were present. The matter was adjourned to allow the parties time to work collaboratively and provide necessary documents.

[11] On 13 July 2020, the hearing on this matter continued after the requested adjournment. The parties submitted that they could not come to an agreement themselves. In particular, there were discrepancies in the evidence provided pertaining to the land and how many shares each party believed they were entitled to. I reserved this matter and directed all parties to file written submissions.

[12] On 3 August 2020, counsel for Ms Francis filed final written submissions. However, counsel for the applicant and counsel for Mr Karika filed memoranda requesting extensions for filing their final written submissions. By 7 August 2020, all final written submissions were received.

Applicant's submissions

[13] The applicant submitted that the two objectors have not been to visit the land, nor have they built or made any developments on the land, in the past 25 years. The applicant further claimed this has led to him and his family cleaning and maintaining the land.

[14] The applicant claimed that his kopu is entitled to $1/7^{th}$ of the 97,359 square metres of land, which is equivalent to 13,908 square metres for his family. Further, the applicant claimed that Mr Karika was only entitled to $1/15^{th}$ of the total 97,359 square metres.

[15] The applicant acknowledged the submission of counsel for Mr Karika at the hearing that the applicant did not include in his calculations land that had previously been lost to a mortgage. The applicant submitted that this was due to the fact that land came from Mr Karika's family's share of the land, and that they had failed to service the mortgage.

[16] Counsel for the applicant submitted that this demonstrated Mr Karika's family line has previously lost land to the bank. He also highlighted Te Upoko's previous history of

not managing their lands in a responsible way, which had resulted in the loss of a section of land.

[17] Counsel noted that Ms Francis' calculations of the applicant's family's leases and occupation right equate to 12,466 square metres. However, he submitted that if a calculation is done according to the figures included in her objection letter, this would add up to 11,576 square metres, making Ms Francis' calculation incorrect according to her own submissions. Counsel submitted that, if calculated accurately, it would be evident that the applicant's family had 11,576 square metres, as opposed to Ms Francis' estimated 20,000 square metres, and demonstrated that the applicant was well under his entitlement.

[18] Counsel also noted that, while Mr Karika's counsel mentioned that there were discrepancies in the applicant's calculations, they did not provide any evidence to substantiate their submission that the applicant had exceeded his shares.

[19] It was submitted that both existing occupation rights have lapsed, as the two occupants have not complied with the terms and conditions specified in the orders to build within five years, nor have they applied to the Court for an extension for a further two years.

[20] Counsel argued that there had been clear directions from the Land Court that a person can only hold one occupation right, and therefore Mr Karika, who holds an occupation right over another section, should not be entitled to retain his occupation over the land in dispute.

[21] The applicant submitted that, due to him obtaining consent of the majority of landowners, after qualifying as a pilot in New Zealand and returning to live in Rarotonga while working for Air Rarotonga, being ready to build a home for his wife and child, and given the calculations which confirm he has not exceeded his shares in the land, he asks the Court to grant the occupation right order sought over the land.

Respondents' submissions

Eddie Karika's submissions

[22] Counsel for Mr Karika submitted that the question of who should be entitled to occupy the land that was subject to the occupation right granted on 30 April 1997 should be decided by Mr Karika's kopu, as the land subject to that occupation order is within that kopu's allocated entitlement of the land.

[23] Further, counsel submitted that the applicant's kopu have exceeded their allocated land entitlement on the land in dispute.

[24] Counsel drew attention to the two partition orders made in 1980. The application to partition the block known as Karekare section 127W2, Avarua, was filed by Ngapoko Eteke. The application granted made the following orders:

(a) An area of 5,140 square metres to be partitioned in the name of Enua, Ngapoko, Ina, Iro and Ngatupuna equally to be known as Karekare section 127W2B2A, Avarua; and

(b) The balance of the land to be known as Karekare section 127W2B2B, Avarua, for the remining of all the owners excluding the Eteke family.

[25] Counsel argued that as the Ekete family is entitled to 1/7th share from the Pikitavake line (the applicant's kopu's one share), the 5,140 square metres Eteke received from the partition order made on 18 November 1980 needed to be deducted from the Pikitavake's one share of 32,774.67 square metres. This resulted in the Pikitavake shares equating to 27,634.67 square metres, to be divided amongst the six remaining kopu within the Pikitavake line after Ekete's share had been partitioned as one of the seven kopu. Counsel submitted that this would result in the six remaining kopu of the Pikitavake line receiving 4,605.77 square metres each.

[26] Counsel argued that the applicant's calculations of the shares in the land are mistakenly based on there being seven shares in the block, rather than the three shares that were agreed to in 1967 and reflected in the order determining relative interests. Counsel contended that the applicant's calculations focus on Mii Teremoana having an entitlement to 1/7th of the shares in the block, suggesting there are seven total shares in the land rather than three. Counsel submitted that there are actually three total shares for each of the three identified kopu with a relative interest: Pikitavake, Te Upoko, and Anguna, which is reflected in the order determining relative interests. Mii Teremoana, from whom the applicant descends, has an entitlement equal to 1/7th of one share, rather than 1/7th of the entire land block.

[27] Additionally, counsel submitted that the land interests that have been granted to the successors of Mii Teremoana total 8,314 square metres, almost double of Mii Teremoana's initial entitlement of 4,605.77 square metres. Counsel therefore contended that the two

sections sought by the applicant fall within the entitlement of the Te Upoko and Anguna lines.

[28] Mr Karika's family comes from the Anguna line, who counsel submitted is entitled to one total share in accordance with the order determining relative interests. The total entitlement, after the exclusion of the Tangiao kopu's share, would be 32,774.67 square metres. This one share was then to be divided amongst five kopu: 2/5^{ths} to Ngapoko Wilson, 1/5th to Nooroa Lotia to Tou a Tou, 1/5th to Laveta A to Moeroa Laveta, and 1/5th to Aitu. Aitu and Ngapoko Wilson's entitlements were partitioned out. Counsel claimed that, excluding the two portions of Aitu's entitlement and Ngapoko Wilson's entitlement, approximately 13,404.67 square metres is left to be divided amongst the 1/5th interest of Nooria Lotia to Tou a Tou and the 1/5th interest of Laveta A to Moeroa Laveta. This would give each of these kopu an entitlement of 6,702.33 square metres.

[29] Counsel stated that Mr Karika came from the Laveta family, which has an entitlement equal to 6,702.33 square metres. Mr Karika's mother was entitled to 1/15th of one share which equates to 2,234.11 square metres, following the partitions of the entitlements of Aitu and Ngapoko Wilson. Counsel therefore submitted that the occupation right granted on 30 April 1997 to Mr Karika, with an area of 1,144 square metres, was well within the entitlement of Mr Karika's family.

[30] Counsel further stated that the combined Laveta family entitlement of 6,702.33 square metres has not been exceeded and the Laveta owners are still well within their entitlement. The interests which have been claimed through the Laveta family total 5,365 square metres.

[31] At hearing, Mr Karika accepted that he had not complied with the terms and conditions of the order which granted his occupation right, and that consequently his occupation right had lapsed. Counsel argued, however, that any question as to who should occupy that land now should be influenced by the Laveta family and wider Anguna family, given they have not reached their full entitlement to the land and Mr Karika's initial occupation was within the Laveta family's entitlement.

[32] He also noted that any question as to occupation of the land that was previously granted to Maria Tapuanoa Heather née Ngaputa and Geoffrey Heather should be influenced by the Te Upoko line, as that land would have initially been granted as part of that kopu's entitlement.

[33] Finally, counsel contended that the applicant's kopu have exceeded their allotted land entitled on this block of land and therefore should not be claiming land to which another kopu is entitled.

Lynnsay Francis' submissions

[34] Ms Francis, on behalf of the Te Upoko family, objected to the encroaching onto the Te Upoko family's entitlement to the land, but did not object to the applicant taking land from the Pikitavake family line interests.

[35] Counsel contended that the consent form circulated amongst the landowners of the land only included a house-site for an area of 2285 square metres, and did not reflect what the applicant asked for at the meeting of assembled owners. Counsel added that the consent form did not state that the applicant was seeking to cancel existing occupation rights and to appoint the applicant as the new occupier.

[36] Ms Francis' counsel requested that the Court dismiss the application upon the following grounds:

(a) There is no occupation right in the name of Jealana Heather dated 30 June 1995 and therefore the application contains the wrong information;

(b) The applicant has not obtained the consent of the majority of landowners for the declaratory order to cancel the occupation right;

(c) That the applicant has not obtained the consent of the majority of landowners for the new occupation right to be granted to himself; and

(d) That the two occupation rights the applicant seeks to cancel are not within his family's entitlement and therefore he is not entitled to acquire an occupation right over the land.

[37] Counsel submitted that after hearing took place the objectors visited landowners who they knew would not have signed the applicant's consent form had they been aware that the application was to cancel the occupation rights granted to Maria Heather and Eddie Karika. Consequently, counsel stated that 35 landowners who had originally signed the consent form in support of the application have now withdrawn their consent. The withdrawal of consent form indicates that these landowners withdraw their consent in support of this application, and that the lapsed occupation rights should remain within the

allocation of the Te Upoko and Laveta kopu (Anguna line). Counsel highlighted that with the reduction of 35 landowners supporting the application, the applicant no longer has the required majority support.

[38] Counsel highlighted that the Mii Teremoana kopu occupy an estimated 11,576 square metres of the land. However, counsel contended that they are only entitled to the equivalent to the Eteke family, who are also entitled to 1/7th of one share under the Pikitavake line. The Eteke family partitioned their interests in the land for an area of 5,140 square metres.

[39] Counsel suggested that the applicant should seek one of the sections within his own family or from the other six kopu in his kin group.

[40] Counsel also submitted that the objector's kopu, under the Te Upoko line, only occupy approximately 9,000 square metres, even though they are entitled to one of the three shares of Karekare Section 127W, Avarua.

[41] Counsel finally submitted that, since the applicant has exhausted his shares both within his kopu and Mii Teremoana's line, he has no allocation of land available to him and, for that reason, this application should be dismissed.

The Law

[42] Section 50 of the Cook Islands Amendment Act 1946 ("the Act") provides as follows:

> **50 Land Court may make orders as to occupation of Native land**
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> (1) In any case where the Native 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.

Should the two existing occupation rights be cancelled?

[43] The Court has previously cancelled occupation orders, particularly where the parties consent to the cancellation, and has granted orders declaring an occupation order to

be at an end.[1] The Court of Appeal in *Nicholas v Nicholas* agreed that the Court does have the power to cancel an occupation right made under s 50.[2]

[44] The applicant, Rennie Nicholls, applied to have the two occupation rights on the land cancelled on the basis that the orders have lapsed, as the occupants have not complied with the terms and conditions specified in the orders to build within five years.

[45] A clear condition of the occupation rights was that construction upon the land of a dwelling house must commence within five years and be completed within seven years from the date of the order. There was provision to seek an extension of this period for three years. No construction on either of the sites has commenced and no right holder has sought an extension of time.

[46] There is no contention over the question of whether the two existing occupation rights over the land have lapsed. At hearing, both Mr Karika and Ms Francis accepted that the occupation right orders had lapsed.

[47] Clearly both occupation rights have lapsed and are at an end. The Court will therefore make orders cancelling the two occupation rights orders.

Should an occupation right be granted?

[48] The outstanding issue is whether the applicant's application for a new occupation right on the land in question should be granted or dismissed.

[49] Section 50 requires a two-stage inquiry as set out below:[3]

(a) Jurisdictional threshold test: whether, as a matter of fact, the Court is satisfied that the majority of landowners consent to the grant of the occupation right; and

(b) Judicial discretion: if so, whether, as a matter of discretion, the Court should grant the occupation right.

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1 *Tuoro v Toeta – Orooroamoa Section 93L Arorangi* HC Cook Islands (Land Division) Applications 47/11 and 391/11, 29 April 2015.

2 *Nicholas v Nicholas* CA Cook Islands, Application 8/2018 7 July 2019 at [78].

3 *Ihaka v Nicholas* CA Cook Islands, CA4/85, 14 October 1985*; Ka v Pakau* CA Cook Islands, CA11/05, 1 December 2006 at [20]; *Bates – Te Raoia Section 12K2, Ngatangiia* HC Cook Islands (Land Division) Applications 483/10 and 215/11, 18 May 2012).

[50] In *Nicholas v Nicholas*, the Court of Appeal stated that the first matter to consider is that the Court must be satisfied that the majority of landowners consented to the grant of the occupation right sought.[4]

[51] The Court of Appeal in *Te Upoko Ingram Te Pa Mataiapo v Amarama – Te Kauariki Part Section 13I, Matavera* noted that s 50 of the Act simply requires that the Court be satisfied as to the wishes of the majority of land owners, and there is no requirement as to how their views need to be ascertained.[5] That approach was confirmed by the Court of Appeal in *George v Teau – Tuoro Section 87A5, Arorangi.*[6]

[52] The first matter to assess is whether the applicant has majority landowner consent.

[53] As noted above, on 21 February 2019, the applicant held a meeting of the assembled owners of the land to gain their permission to obtain an occupation right over half an acre of the land, comprising a quarter of an acre to build a house on and a quarter of an acre for planting. At this meeting the applicant received a majority of votes in support of his request to gain an occupation right over the land, which was certified by the Deputy Registrar.

[54] However, the Court now has evidence provided by Ms Francis indicating that 35 landowners who originally consented have withdrawn their names from the consent form and object to this application, after receiving further details regarding the land in question.

[55] Counsel for Ms Francis contended that the consent form circulated amongst the landowners of the land only included a house-site for an area of 2285 square metres, and did not reflect what the applicant asked for at the meeting of assembled owners. Counsel added that the consent form did not state that the applicant was seeking to cancel existing occupation rights and to appoint the applicant as the new occupier.

[56] Based on the evidence before the Court, I cannot be satisfied that the applicant does have the consent of the majority of landowners. The application fails on this basis.

Decision

[57] The Court records that the occupation right granted to Eddie Karika on 30 April 1997 and the occupation right granted to Maria Tapuanoa Heather née Ngaputa and

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4 *Nicholas v Nicholas* CA Cook Islands, Application 8/2018 7 July 2019 at [83].

5 *Upoko Ingram Te Pa Mataiapo v Amarama –Te Kauariki Part Section 13I, Matavera* CA Cook Islands, CA1/85, 14 October 1985.

6 *George v Teau –Tuoro Section 87A5, Arorangi* CA2/2012, 20 February2013at [16].

Geoffrey Heather on 30 June 1994 have both lapsed and are at an end. They are therefore cancelled.

[58] The application for an occupation order is dismissed.

Dated at Rotorua, Aotearoa/New Zealand this 22nd day of December 2020.

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C T Coxhead
JUSTICE