

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

APPLICATION NO. 681/2024

IN THE MATTER of Section 409(d) of the Cook Islands Act
1915 and Rule 132(a) of the Code of Civil
Procedure of the High Court 1981

AND

IN THE MATTER of the land known as AREMOUKU 188B
AVARUA

AND

IN THE MATTER of an Application for an Ex-Parte
Injunction Relief and Damages

BETWEEN TANGAROA IKU REO NELIO
Applicant

AGAINST UPOKO NELIO
Respondent

Date: 22 May 2024 (NZT)

ORAL JUDGMENT OF JUSTICE C T COXHEAD

This is the written version of my oral judgment delivered on 21 May 2024, Cook Islands Time, being 22 May Aotearoa/New Zealand Time. I advised at hearing that I reserved the right to correct the written version of the judgment in terms of grammar, but the substance of the judgment would not change.

Introduction

[1] The Court has an application seeking permanent orders. An amended application was filed for injunctive relief and for damages. The application states:

Application is hereby made for permanent orders prohibiting the Respondents, their agents, guests and assignees, from remaining on the Land and in the dwelling upon

the Land contained within the area of the Right of Occupation granted to the Applicant on 09 November 2018 by an order of the Court AND for damages including mense profits UPON THE GROUNDS:

- A. The applicant is an owner.
- B. The applicant has held since November 2019 a valid order vesting in him the exclusive right of occupation over an area of the Land of some 1322 m² (the Order);
- C. There is a dwelling on the Land the area of the right of occupation;
- D. The respondents have occupied the land and the dwelling without the consent of the applicant;
- E. The respondents have no legal justification for occupying the Land or the dwelling and are trespassing;
- F. The applicant was entitled from the date of the Order to exclusive use of the Land and the dwelling;
- G. The respondents have made wrongful use of the Land and the dwelling and the [applicant] is entitled to recover by way of damages, generally called mense profits.

[2] As I had indicated yesterday, I would be dealing with the first issue in regard to the injunction and the other, the issues of damages will be for another time.

Has the Occupation Right lapsed?

[3] A key element, if not the central element, in regard to the application is the applicant, Mr Nelio's, relates to his rights of occupation as per the occupation right granted to him.

[4] Clearly, a right of occupation was granted to Mr Nelio. The order had conditions.

[5] The respondent submits that the condition to build a house has not been met and therefore the order has at law automatically lapsed.

[6] The respondent also submits that they will apply for a Declaration from the Court to have the Court confirm that the 2018 order has lapsed and is at an end. Not surprisingly, the applicant has indicated that they will oppose that application.

[7] In my assessment, the applicant must accept the order granted has lapsed because they have applied to the Chief Justice for an order to, in essence, amend the 2018 order and have the condition to build removed. This will have the effect that the 2018 order has not lapsed for the reason of non-satisfaction of a condition of the order. The applicant, like I say, must accept that the order has otherwise, why have they filed a section 390A application?

[8] As I see it in order to grant an injunction to the applicant based on his 2018 occupation right, I must be satisfied that his rights as per the occupation right exist.

[9] The 2018 occupation right is clear that the applicant was required to build a house within certain timeframes.

[10] It is accepted that there was a house already on the land pre-2018.

[11] The applicant has not built a house on the land within the timeframe or the extension period.

[12] Based on the evidence the occupation right has, in my view lapsed due to the condition not being satisfied.

[13] I find that the applicant no longer has the legal rights as per the 2018 order.

[14] I read the 2018 order, as it is, not as it might potentially be following the 390A application because I have to deal with the order as it is and not pending the 390A application.

[15] Further, considering the evidence and being aware that the applicant seeks to amend the order upon which he relies upon, it is my finding that the occupation right has lapsed. It is difficult to see how any other finding can be reached.

What has been pleaded as per the application?

[16] I read the amended application in full at the start because it is the application that guides the Court in terms of what I am being asked to consider.

[17] During hearing, Mr Moore raised further argument on the basis that if the occupation right has lapsed, then the applicant seeks an injunction on the basis of being an owner and that the respondent and other occupiers of the land are not owners.

[18] I agree with Mr Moore that the respondent is not an owner. If she was an owner why then has the Court received evidence that she has obtained consent from her father and uncles for her to have permission to be on the land?

[19] However, the amended application is filed on the basis that the applicants processional rights derive from the occupation right. That is what is being pleaded in the application.

[20] The application is premised on the basis that the applicant holds an occupation right, not premise on the basis that those rights are only due to him as an owner.

[21] The respondent's responses are framed in terms of the occupation right, not in terms of an owner seeking to injunct someone on the land through permissions of other owners.

[22] Mr Moore's client may have a valid claim for an injunction as an owner and not based on his rights as a holder of a lapsed occupation right. But that was not pleaded as part of the application. It will need to properly be pleaded for the Court to consider such a claim. Currently, no such claim is before the Court.

[23] Based on the amended application before the Court, the application is dismissed.

[24] If I had an operative occupation right where it was clear that the applicant had rights as per his occupation right, then most probably, I would have granted the injunction. Based on those processional rights, that the applicant would be entitled to as per the occupation right. But I don't have that situation, and the application, and as I say the applicant has filed an application seeking to regain those rights as per the occupation right.

Is the respondent trespassing?

[25] What of the respondent's position? As I have said, the respondent in my view, is not an owner. She may have equitable interest in the land as submitted by Mr Smith, but like

all descendants of registered owners, those equitable interests are yet to be determined. Being a descendant of a registered owner and her father still being alive, does not, in my view make her an owner like her father.

[26] The matter of whether the respondent as a non-owner relying on permissions from co-owners is trespassing is something that if pleaded appropriately, may result in an injunction being granted against the respondent.

[27] But that is not what I am being asked to consider today, and that certainly is not something that has been pleaded. As I say, for such a claim to be determined, it will have to be pleaded in the appropriate manner.

Decision

[28] The injunction part of the application is dismissed.

[29] Given my findings as to the occupation right the applicant may wish to either consider withdrawing the damages part of the application or may seek an adjournment of that pending the outcome of the section 390A application. That is a matter for the applicant to consider.

Dated at Rotorua, Aotearoa/New Zealand on this 22nd day of May 2024 (Aotearoa/New Zealand Time).



C T Coxhead
JUSTICE