I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O TE TAITOKERAU
In the Māori Appellate Court of New Zealand
Taitokerau District

A20190003324
APPEAL 2019/6

WĀHANGA *Under*	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	an appeal against a decision of the Māori Land Court made on 31 January 2019 at 185 Taitokerau MB 148-160 in respect of the Māori land interests of Carol Ngawhira Tanui Fleet
I WAENGA I A *Between*	JOHN JAMES FLEET Te kaitono *Appellant*
ME *And*	NATHAN KENNEDY Te kaiurupare *Respondent*

Nohoanga: *Hearing*	12 November 2019, 2020 Māori Appellate Court MB 4-26 (Heard at North Shore, Auckland)
Kooti: *Court*	Judge D H Stone (Presiding) Chief Judge W W Isaac Judge P J Savage
Kanohi kitea: *Appearances*	C Hockly, for the Appellant P Majurey, for the Respondent
Whakataunga: *Judgment date*	28 February 2020

TE WHAKATAUNGA Ā TE KOOTI
Reserved Judgment of the Court

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Hei tīmatanga kōrero - Introduction

[1] Carol Ngawhira Tanui Fleet left her various Māori land interests by will to Nathan Kennedy. The Māori Land Court determined that Mr Kennedy is entitled succeed to the Kuaotunu 7B1E, Kuaotonu 7B2, Pungapunga Island and Orotu No. 1 land blocks, because he is related by blood to Ms Fleet and is a member of the hapū associated with those blocks.[1] That Court also determined that Mr Kennedy is not entitled to succeed to Ms Fleet's remaining Māori land interests, as he did not demonstrate that he falls within one of the preferred classes referred to under s 108 of Te Ture Whenua Māori Act 1993 concerning those interests. Accordingly, the Court held that those interests must instead go to Ms Fleet's siblings on intestacy.

[2] John James Fleet has appealed the Māori Land Court decision.[2] Essentially, the appellant submitted that insufficient evidence was before the lower Court to justify the Court's findings. The respondent, Nathan Kennedy, submitted that the lower Court properly assessed all of the evidence and reached a reasonable decision in light of this.

[3] The appeal was set down to be heard on 6 August 2019, but was adjourned by consent of the parties. It was heard on 12 November 2019 at the North Shore District Court.

Submissions for the appellant

[4] Mr Hockly, counsel for the appellant, referred to the conjunctive approach set down by the Court of Appeal in *Kameta v Nicholas* in applying s 108(2)(c) of the Act.[3] That approach requires that a person must have an "associational relationship" in order to succeed by will to Māori land interests. In addition to having a whakapapa or blood relationship to the deceased, a person must also be a member of the hapū associated with the land to which the Māori land interests relate. Mr Hockly argued that this test requires Mr Kennedy to prove: [4]

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[1] *Vincent v Kennedy – Estate of Carol Fleet* (2019) 185 Taitokerau MB 148–160 (185 TTK 48).

[2] John James Fleet, is the named appellant in the Notice of Appeal dated 25 March 2019, however his submissions were filed on behalf of himself, Maureen Vincent and Matt Tanui, the family of Ms Fleet.

[3] *Kameta v Nicholas* [2012] NZCA 350, [2012] 3 NZLR 573.

[4] For the purposes of the appeal, these are the Kuaotunu 7B1E & Kuaotunu 7B2, Pungapunga Island and Orotu No. 1 land blocks.

(a) the hapū associated with the land to which Ms Fleet's Māori land interests relate;

(b) that Mr Kennedy is a member of those hapū; and

(c) that Mr Kennedy and Ms Fleet have shared bloodlines which are relevant to those hapū.

[5] Mr Hockly submitted that Mr Kennedy had not satisfied the test set down in *Kameta v Nicholas*. In summary, he argued:

(a) The evidence showed that Ms Fleet and Mr Kennedy shared a common ancestor, Mere Kaimanu Patene. However, Ms Fleet's interests in the relevant land blocks came from Peneamene Tanui and Rahera Hinganoa, who were of Ngāti Hei descent. Mr Kennedy did not demonstrate a whakapapa connection to them.

(b) The lower Court appears to have relied almost exclusively on the evidence of Joe Davis. Mr Davis' evidence was limited and was not corroborated with any independent documentation, such as research or historical reports concerning the hapū associated with the relevant land blocks. There was, therefore, a large and problematic gap in the evidence.

(c) Mr Kennedy is of Ngāti Karaua descent. However, the relevant Māori land interests come through Ngāti Hei tupuna. Unless Ngāti Karaua is a hapū of Ngāti Hei, Mr Kennedy cannot show a connection to the hapū associated with the relevant land blocks. In this regard, Ngāti Karaua is not a hapū of Ngāti Hei. Various documents, including deeds of mandate relevant to the representation of various Hauraki iwi, do not list Ngāti Karaua as a hapū of Ngāti Hei. It is therefore insufficient for Mr Kennedy to show that he is a member of Ngāti Karaua. He must prove he is a member of Ngāti Hei in order to be associated with the relevant land blocks, which he failed to do.

(d) The evidence, if properly analysed, did not show that Mr Kennedy was a member of the hapū associated with the relevant land blocks. For example, the evidence of Mrs Patricia MacDonald, who has extensive experience with Ngāti Hei whakapapa, should have been given due weight. It was not.

(e) A number of hapū in addition to Ngāti Karaua associate with the land blocks in question. Mr Kennedy was required to prove a connection to each of these hapū. He did not.

Submissions for the respondent

[6] Mr Majurey, for the respondent, submitted that the appeal is essentially a challenge to findings of fact based on an alleged insufficiency of, or lack of proper weight given to, evidence. He submitted:

(a) The lower Court properly assessed all of the evidence and reached a reasonable decision in light of that evidence. Importantly, not all of the lower Court's findings were in the respondent's favour. This indicates that the lower Court assessed all of the evidence and made findings in favour of both the respondent and the appellant.

(b) The lower Court carefully worked its way through the different layers of evidence and did not slavishly adhere to one side of the arguments. An example can be seen in how the Court dealt with the Motuhoa land interests. The Court initially indicated that, on the face of the evidence, Mr Kennedy associates with Motuhoa. However, the Court then finds that the association is through another tupuna (Hori Kerei Tūokioki). As the association was through a different whakapapa line, the lower Court held that Mr Kennedy did not satisfy the *Kameta* test for this block.

(c) The lower Court clearly took into account the evidence for the appellant, including the evidence of Mrs MacDonald. The Court simply found that the evidence of Mr Davis was more reliable. That was an entirely appropriate conclusion for the lower Court to reach.

(d) It is not unusual within Pare Hauraki for hapū to affiliate to more than one iwi. The evidence before the lower Court, particularly the extracts from the Waitangi Tribunal's Hauraki Settlement Overlapping Claims Inquiry Report, supported this statement.[5] The appellant could have filed rebuttal evidence in the lower Court to address this point, and could also have sought leave to adduce new evidence on appeal. Neither of those opportunities were taken by the appellant.

[7] Overall, counsel submitted the lower Court decision is clear on its facts and results from a judicial assessment and determination of evidence that was before the appropriate decision-maker.

Te Ture - The law

[8] Section 55(1) of Te Ture Whenua Māori Act 1993 provides:

> **55 Appeals to be by way of rehearing**
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> (1) Every appeal to the Māori Appellate Court shall be by way of rehearing.

[9] Appeals in this Court are not hearings *de novo*.[6] We are required to consider the evidence that was before the lower Court. We are not required to defer to the lower Court's view of the evidence. Instead, we must come to our own view.[7] The Supreme Court has put it this way:[8]

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[10] Although appeals are by way of rehearing, we are not limited to the evidence that was before the lower Court. Section 55(2) expressly allows new evidence to be adduced if

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[5] Waitangi Tribunal, *The Hauraki Settlement Overlapping Claims Inquiry Report* (Wai 2840, 2019).
[6] Te Ture Whenua Māori Act 1993, s 55.
[7] *Tau v Ngā Whānau o Morven and Lenavy – Waihao 903 Section IX Block* (2010) Māori Appellate Court MB 167 (2010 APPEAL 167) at [26].
[8] *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

we consider it necessary to enable us to reach a just decision. Rule 8.18 of the Māori Land Court Rules 2011 sets out the process to be followed if further evidence is to be adduced on appeal. Leave must be sought. We note at this juncture that no such leave was sought in this case.

[11] The appellant bears the onus of persuading us that the lower Court's decision is wrong. Although no deference in favour of the lower Court's decision on the evidence is required, we must exercise appropriate caution when an appeal raises issues of witness credibility. That is because seeing and hearing directly from a witness provides an advantage to the trial judge that appellant judges do not usually enjoy.[9]

[12] The caution principle in relation to the weight to be given to evidence has been applied by this Court. In *Faulkner v Hoete – Motiti North C No.1* this Court observed: [10]

> It appears the appellant argues Judge Clark did not place sufficient weight on the views of those owners at the meeting. Ultimately, that assessment was for Judge Clark to make. He took this factor into account in deciding whether to exercise his discretion and it is not for us to determine whether we would have exercised that discretion differently.

Kōrerorero - Discussion

[13] We agree that this case is essentially a challenge to findings of fact based on the evidence before the lower Court.

[14] We have carefully considered the evidence filed in the lower Court, the transcript of the hearing, and the submissions of counsel. Though persuasively argued, we can see no reason to come to a different view on the evidence than that formed by Judge Armstrong. It is clear from his decision that he took into account all of the evidence before him. He specifically referred to the evidence of Mrs MacDonald. He also assessed that evidence in the context of all the evidence before him. He expressly concluded, based on his own observations at trial, that he found the evidence of Mr Davis more persuasive. He gave reasons for his view. He was entitled to form that view. We find nothing wrong with it.

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[9] See, for example, the discussion of these advantages in *Powell v Streatham Manor Nursing Home* [1935] AC 243 at p 255 per Lord Atkin and p 256 per Lord Macmillan.

[10] *Faulkner v Hoete – Motiti North C No.1* [2018] Māori Appellate Court MB 17 (2018 APPEAL 17) at [37].

[15] Judge Armstrong also carefully considered the evidence in determining whether to grant succession to particular Māori land interests. After applying the appropriate legal tests to the facts as he found them, he determined that Mr Kennedy was entitled to succeed to some interests, but not others. Of course, this outcome does not, of itself, confirm that Judge Armstrong was necessarily correct in his assessment. However, it does show that Judge Armstrong was careful both in his assessment of the evidence (including as to credibility) and the application of the law to his findings on the evidence.

[16] We are also mindful that the witnesses did not appear before us on appeal. We therefore did not enjoy the advantage of hearing directly from the witnesses. In that context, we must exercise caution, particularly when making assessments of witness credibility.

[17] We further note that whether Ngāti Karaua is a hapū of Ngāti Hei was central to the issues before the lower Court. It was open for the appellants to file detailed and specific evidence on this issue in the lower Court. They could have also sought leave to adduce further evidence in this Court under s 55(2). Although there is no guarantee that such further evidence would have been accepted as necessary by this Court, we note that such evidence may have been particularly relevant because the burden of proof on appeal lies with the appellants. As it is, the appellants did not seek leave to adduce further evidence in this Court. We are therefore left to assess the evidence that was before Judge Armstrong. As noted, we see no reason to depart from his assessment of that evidence.

[18] We make one further point. Counsel for the appellant argued that the test in s 108(2)(c) requires a person to establish an associational relationship to each of the hapū associated with the relevant land. We did not find this argument convincing, as counsel was not able to support this argument with relevant authorities nor did he provide detailed submissions on the issue.

Kupu whakatau - Decision

[19] For the reasons stated above, the appeal is dismissed.

[20] Costs are reserved. If counsel are unable to reach agreement as to costs, counsel for the respondent is to file a memorandum on costs by **4pm on Friday 13 March 2020**. Counsel for the appellants is to file any response by **4pm on Friday 27 March 2020**.

I whakapuaki i te 1:00pm i te 28 o nga rā o Huitanguru te tau 2020

Judge D H Stone (Presiding)	Chief Judge W W Isaac	Judge P J Savage
JUDGE	**CHIEF JUDGE**	**JUDGE**