C. J. 1992/12

33 TAIRAWHITI APPEAL MINUTE BOOK 35-45

IN THE MAORI APPELLATE COURT
TAIRAWHITI DISTRICT

IN THE MATTER of the Maori freehold land known as Ngamoe A1B1B block

AND

IN THE MATTER of an Appeal against an order of the Deputy Chief Judge made pursuant to Section 452 of the Maori Affairs Act 1953 varying an order under Section 213 of the said Act

Appellants:	Kuini Grant and Faith Tawhai
Respondents:	Tipiwhenua Raroa referred by Mr R Barber
Date and Place:	Maori Land Court, Gisborne
Of Hearing:	19 November 1992
Decision:	Delivered at Rotorua on 27th day of January 1993
Coram:	Judge N F Smith (Presiding) Judge H K Hingston Judge G D Carter

The background to this appeal is not complex; in August 1967 when determining succession to Tarati Wharepapa or Raroa deceased the Court heard evidence from Natana Raroa (son of the deceased who himself is now deceased) and then determined those entitled pursuant to Section 135/53 to be four of the deceased's children and a granddaughter.

Upon hearing further evidence of a family arrangement the Court made vesting order pursuant to Section 136/53 and to accord with a family arrangement one of the children, Tipiwhenua Raroa ("the respondent"), received, inter alia, all the deceased's shares in Ngamoe A1B1B block. After the Section 136/53 vesting orders were made the respondent requested of the Court that his shares in Ngamoe A1B1B block be vested in his brother Natana Raroa and his cousin Whiu Taikaha (Mrs Tawhai) equally.

The Court, on the respondent's request made, of its own motion an Order under Section 213/53 vesting his shares in Ngamoe A1B1B in Natana Raroa and Whiu Taikaha equally. (134 Gisborne MB 281-283). The minutes record at folio 282 as follows:

> "Tipiwhenua Raroa (sworn):
> I desire that Ngamoe A1B1B ($180) vested in me above, now be vested in my brother Natana Raroa and in Whiu Taikaha (Mrs Tawhai), (who is my cousin) in equal shares. This block has an area of 9acs. 3rds 32.4prs. There is a family cemetery on it.
> Court:
> Order under S.213 vesting this interest in Natana Raroa and Mrs Tawhai accdly (the Ct. invoking S.27(2) for this purpose).
> Value determined under S.214 at $180."

In 1991 the respondent, Tipiwhenua Raroa made application pursuant to the provisions of Section 452/53 requesting the Chief Judge to cancel the above Section 213 Orders. He claimed that the Ngamoe land was left by his mother solely to him for a house site and that he agreed that Mrs Tawhai or Whiu Taikaha his cousin could have interests in the cemetery.

The application was referred to the Lower Court at Gisborne for inquiry. In his evidence Tipiwhenua Raroa said that Mrs Tawhai approached him for the land because it had a cemetery on it and that's where her parents were buried. That was his reason for agreeing to vest the land in her.

It is accepted that the cemetery is not on Ngamoe A1A1B. It is situated in a separate title called Ngamoe A1B3 (Cemetery) and is held by Whiu Taikaha in trust for all the descendants of Paora Wharepapa. Ngamoe A1B3 is not surveyed and is located within the perimeter of Ngamoe A1A1B Block but, of course does not form any part of that block. The Lower Court accepted that there was an error in the presentation of the facts of the case to the Court in that Tipiwhenua Raroa was under the impression that the urupa situated on Ngamoe A1B3 was in fact on Ngamoe A1B1B and the learned Judge recommended cancellation of the Secton 213/53 Vesting Order. The Chief Judge in reliance on this report cancelled the Order only insofar as it vested a one-half share of Ngamoe A1B1B in Mrs Tawhai and revested the interest in Tipiwhenua Raroa.

From that decision Kuini Grant and Faith Tawhai both daughters of the late Whiu Taikaha or Tawhai appealed.

The appellants by notice of appeal relied upon the following grounds:

(a) The Deputy Chief Judge has erred in fact and in law in making the Order deleting the vesting under Section 213 in favour of Whiu Tawhai.

(b) The said order was not erroneous in fact or in law by reason of a mistake, error, or omission on the part of the Court nor was the order erroneous in fact or in law by reason of the presentation of the facts of the case to the Court.

(c) There is no jurisdiction under Section 452 to disturb an order made in 1967 on the grounds that the donor at the time did not give his free consent to the application.

(d) Section 452 is not available to the Court to effectively rehear an application.

(e) The Court made no mistake, error or omission when it heard the application under Section 213 and in point of fact the Court made the order as sought.

(f) Nor was there a mistake, error or omission made in the presentation of the facts of the case to the Court. The presentation of the case was to seek an order under Section 213 and that order was made by the Court. In these circumstances there is no jurisdiction to make an order under Section 452 to amend the order made.

(g) The application to amend the order is in effect a rehearing application and there is no jurisdiction under Section 452 to rehear an application. Section 452 is limited to the jurisdiction set out in that section.

Mr Hall for the appellant submitted that there was no mistake in the presentation of the facts as envisaged by Section 452/53 - the respondent in 1967 mentioned Ngamoe A1B1B block as having an area of 9 acres 3 roods 32.4 perches and requested vestings in favour of his brother and Whiu Taikaha; he argued that the intention was clear and the Court acted upon the 1967 request. Mr Hall, aware that he must account for the reference to a cemetery being on the block in the 1967 evidence, explained that the cemetery, i.e, Ngamoe A1B3 block is undefined and included in the area of the Ngamoe A1B1B block and that the respondent in 1967 intended his shares in the block (i.e A1B1B) to pass to his brother and cousin; he did not say the block is a family cemetery but rather there is a family cemetery within the confines of the block.

Mr Barber for the respondent contended the approach adopted by the Deputy Chief Judge was correct, the respondent thinking the cemetery was part of Ngamoe A1B1B block gave half of his shares to his cousin based upon this mistaken belief.

In reaching his decision on the Section 452/53 application at folio 175 CJMB 1992, Deputy Chief Judge A G McHugh made the following comment:

> "I have some strong reservations about the parameters of the discretion vested in the Chief Judge under Section 452 and I question whether the Chief Judge is entitled to examine matters going to capacity of the donor when that matter has already been before another Judge whose duty it would have been to look at that question and the additional fact that we are now 24 years away from the final order and two of the principal persons affected have died".
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> "If I dismissed the application of Tipiwhenua Raroa there would be no right of appeal and therefore no opportunity for the Maori Appellate Court to look at the extent of the jurisdiction conferred on the Chief Judge under Section 452. Clearly section 452 is intended to allow the Chief Judge to amend an obvious error in the presentation of the facts to the Court or in an error of the Court itself. It would seem to me that there should be strong limitations on how far a Chief Judge can go to disturb an order made many years previously, particularly when there are deceased persons who cannot now give evidence and particularly when the nature of the error is of the kind found as sufficient by the Judge taking the inquiry".

In making the above observations the Deputy Chief Judge has suggested that there may be limitations on the exercise of his discretion under Section 452. It is perhaps appropriate that this Court consider this question and the principles upon which the Section 452 jurisdiction should be exercised before applying them to the present appeal.

The Chief Judge may exercise his jurisdiction under Section 452 on the application of a person alleging he is adversely affected by an Order of the Court but only where such party alleges that the said Order was erroneous in fact or in law by reason of a mistake, error or omission on the part of the Court or Registrar or in the presentation of the evidence.

It is not necessary that a mistake, error or omission is patently obvious in the Order or evidence but is sufficient that an allegation of mistake, error or omission is made.

Having assumed jurisdiction, the Chief Judge may only exercise the powers conferred upon him under the Act when he is satisfied that there had been a mistake, error or omission on the part of the Court or in the presentation of the evidence.

In most instances this can only be ascertained after due inquiry including a review of the evidence at the hearing of first instance weighed against the evidence adduced by the applicant in support of the allegations and any evidence adduced in opposition.

The enquiry is not a re-hearing of the original application but should be conducted in such a manner as to determine the justification or otherwise of the allegations made.

The principle "omnia praesumutur rite esse acta" - everything is presumed to have been done lawfully unless there is evidence to the contrary - is very much in point in applications under Section 452/53.

In the absence of a patent defect in the Order of the Court, there must be a presumption that the Order made was correct in accordance with Section 34(7) and (8) of the Maori Affairs Act 1953 which provide:

(i) That an Order drawn, sealed and signed shall be dated as of the date of the minute thereof and shall relate back to that date, and

(ii) That no such Order shall be questioned or invalidated on the ground of any variance between the Order so drawn up, sealed and signed and the minute thereof.

On the question of the presentation of evidence there must also be a presumption that the evidence given at the time by persons more closely

related to the subject matter both in time and knowledge is deemed to have been correct.

Both presumptions are capable of rebuttal, but the burden of proof rests with the applicant, as was cited in Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd (1942) AC 154 (1941) 2 All ER 165 per Viscount Maugham. "The burden of proof lies on him who affirms, not upon him who denies".

The general rule is that, where the party upon whom the onus lies of proving an allegation gives evidence as consistent with one view of the case as the other he fails in his proof.

Jayasena v Reginam (1970) AC 618, 624

At page 141 of Principles of Law and Evidence 7th Edition it is stated that:

> Judgements in Rem are conclusive against all persons parties and privies - of the matters actually decided.

Orders of the Maori Land Court are usually in the nature of judgements in Rem but are subject to review under the special provisions of Section 452/53.

The presumption seeking conclusiveness or certainty in Orders of the Court is also apparent in Section 68 of the Maori Affairs Act 1953 which provides that no Order shall, "whether on the ground of want of jurisdiction or on any other ground whatsoever, be annulled or quashed, or declared to be invalid, by a Court in any proceedings instituted more than 10 years after the date of the Order".

Subsection (3) of Section 68 preserves the right of the Chief Judge to act under Section 452 in the case of Orders made over ten years previously. Section 452 therefore provides the only way in which such Orders can be challenged and then only on the grounds set out in that

Section. In this Court's view Section 68 emphasises the intent of the legislature that Orders should be conclusive and is a factor to be taken into account by the Chief Judge or Deputy Chief Judge in dealing with applications under Section 452.

Having regard to all the above matters this Court finds that the standard of proof required to enable the Chief Judge to overturn a previous Order of the Court should be the same as that required in Criminal proceedings, ie, "beyond reasonable doubt", and not "the balance of probabilities" as is adequate in civil cases.

The distinction between the standards of proof required in criminal and civil cases was addressed by Denning J in Miller v Minister of Pensions (1947) All ER 372 -

> "Dealing with the degree of cogency which the evidence must reach before an accused person is found guilty, he said: "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'Of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice" (ibid 373).
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> As to the degree of cogency which evidence must reach in order to discharge the burden of proof in a civil case, he said: "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not".

We turn now to the extent to which evidence may be adduced to support the allegations of the applicant.

Evidence must be admitted to illustrate the facts in issue or the "res gestae". Those facts upon the existence of which the right or liability to be ascertained in the proceedings depend, (Principles of Law and Evidence, Garrow and McGechan 7th Edition page 45).

Evidence may also be adduced in relation to "relevant facts"; facts from the existence of which inferences as to the existence of the facts in issue may be drawn (Principles of Law and Evidence page 46).

At page 47 of 7th Edition of Principles of Law and Evidence it is recorded:

> "A cardinal rule of evidence is that the facts of which evidence is tendered must be relevant to the issue to be tried".

In the majority of enquiries under Section 452/53 the applicant is challenging evidence of witnesses now deceased and whose evidence had been recorded by the Court many years before.

Claims against the estate of a deceased person usually require to be corroborated by other evidence than that of the plaintiff himself unless the Court is convinced his testimony is true Re Hodgson (1885) 31 Ch D 177.

The weight to be afforded the evidence given by the applicant will depend upon the credibility of the evidence, the competency of the witness and the consistency of the evidence given with the matters adduced in the Court of first instance.

Summarising therefore this Court believes that the Chief Judge acting in pursuance of Section 452/53 can only exercise his powers thereunder upon being satisfied that an error or omission is proven either on the part of the Court or in the presentation of the evidence.

In reaching that conclusion the Chief Judge in determining whether the applicant has discharged the burden of proof should attach such weight to the testimony given by the applicant, as is consistent with the tenor of the evidence adduced in the Court of first instance, is credible, and corroborated to such an extent that the Chief Judge is satisfied beyond reasonable doubt that the allegation made is true.

In the grounds of appeal the Appellant alleges that there was no mistake either in the presentation of the facts to the Court or on the part of the Court in making the Order. Ngamoe A1A1B was the land identified in the application and was the land the subject of the Order.

This Court cannot agree with this submission. If A wishes to vest in B land known as Block Y which he mistakenly identifies as Block X and an Order is made as to Block X, the application and the total Court record will refer to Block X. That does not preclude A from subsequently claiming that there has been a mistake and making application under Section 452 of the Maori Affairs Act 1953.

This essentially is what has happened in the present case. Tipiwhenua Raroa claims that he was in error in that he thought the cemetery was on Ngamoa A1A1B. The question is whether the respondent has established such claim so that the Deputy Chief Judge is satisfied beyond reasonable doubt that the claim was true.

The evidence presented before the Lower Court at the inquiry is quite clear that before the 1967 hearing Mrs Tawhai requested shares in the block to give her shares in the cemetery. The evidence is not only by the respondent, but also by Petuere Raroa and Kuini Te Unuahi Raroa Kaa. The evidence at Waiapu MB Volume 134 folio 282 on 15 August 1967 in respect of Ngamoe A1A1B records in respect of Ngamoe A1A1B:

> "There is a family cemetery on it".

In most cases minutes are not recorded verbatim but are the Judge's notes of salient features that are presented. In this Court's view the recording of the details over the cemetery establishes it as a significant fact in the context of the application. It provides the reason for the vesting in favour of the respondents's cousin Mrs Tawhai and supports, and is entirely consistent with, the evidence of mistake presented to the Lower Court.

Had it not been for the inclusion on the record that the cemetery was on Ngamoe A1A1B the evidence would not have been sufficient for this Court to be satisfied that there was a mistake of fact as alleged.

For the above reasons the appeal is dismissed pursuant to Section 45(1)(g) of the Maori Affairs Act 1953.

The Appellate Court does not consider this to be a case for the award of costs. Moneys held by the Registrar towards the preparation of the record are to be applied for that purpose and the balance is to be returned to the appellant care of the Trust Account of Messrs Burnand & Bull.

N F Smith
Presiding Judge

H K Hingston
Member

G D Carter
Member