

Appeal 1991/11

13 AOTEA APPELLATE MINUTE BOOK 333-340

In the Maori Land Appellate Court  
of New Zealand  
Aotea District

IN THE MATTER

of an appeal against  
an order of the Maori  
Land Court made at  
Wanganui in terms of  
sections 30(1)(e) and  
443 of the Maori  
Affairs Act 1953  
appointing Matthew  
John McMillan a  
Trustee in respect of  
Lake Horowhenua Trust

Parties: Josephine Hanita-Paki Appellant  
Represented by G H Takarangi  
Matthew John McMillan Respondent  
Represented by E A MacDonald

Hearing Wanganui  
Date 16 February 1993  
Coram Deputy Chief Judge A G McHugh Presiding  
Judge N F Smith  
Judge A D Spencer

Decision delivered at Wellington on the 19<sup>th</sup> of April 1993

On the 20th March 1991 the Maori Land Court at Wanganui accepted an application by R Metekingi for the appointment of Matthew John McMillan as an additional or substitutionary trustee for the Lake Horowhenua Trust.

The application first came before the Court for hearing on the 9th May 1991 at which time the matter was adjourned until 29th May 1991 at the request of Josephine Hanita-Paki who sought to instruct Counsel.

Mr G Takarangi telephoned the Court on the 21st May 1991 confirming his instructions but advising that he would not be able to proceed to a hearing on the 29th May 1991 because Mrs Hanita-Paki's legal aid application had not been processed.

Accordingly the hearing was adjourned to the July session at Levin.

On the 24th June 1991 the Court held a conference with Mr Takarangi, Counsel for Mrs Paki, and Mrs M Haeata, acting for the Trustees and the July fixture was vacated and the application adjourned sine die.

K H Paki, Chairman of the Lake Horowhenua Trustees wrote to the Court on the 5th July 1991 advising that:- "There are a number of very important activities concerning the Lake underway at present including preparation of management and economic plans and the future of the Domain Board.

In all these things we need input from Matt (M J McMillan) as a Lake Trustee.

I respectfully urge you to make the appointment as soon as possible."

Upon consideration of this letter, the Learned Judge on the 15th July 1991 without notice to the parties or those acting for them made an order:

"Appointing Mr Matthew John McMillan as an additional trustee subject to review by the Court upon the determination of the objections lodged by Josephine Hanita-Paki - this order to issue forthwith under section 34(10)/53."

The order was drawn signed and sealed in that form.

Josephine Hanita-Paki through her Counsel Mr Takarangi filed a Notice of Appeal on the 31st July 1991 upon the following grounds:

- (1) That I had no opportunity to be heard on the application despite having:
  - (a) Filed a Notice of Intention to appear.
  - (b) Engaged legal Counsel who had attended at Court on 24.6.91 when the matter was adjourned sine die.
  - (c) The Court issued a statement advising of the adjournment of this matter by letter on 25.6.91.
- (2) That the decision of 15.7.91 pre-determined the outcome of my application which has not yet been heard.

On the 14th November 1991 the Appellate Court with the consent of Counsel adjourned the hearing of the appeal pending determination of the substantive application.

Mr J Broughton, one of the trustees filed an application with the Court for the appointment of 11 named Trustees and Matthew John McMillan.

That application was heard on the 15th October 1992 when Mr Takarangi appeared as Counsel for Mrs Ada Tatana, and Josephine Hanita-Paki was also present.

Mr Takarangi made submissions on questions of jurisdiction on behalf of Mrs Tatana and then withdrew.

Following presentation of evidence including minutes of meeting of owners the Court in terms of section 443 of the Maori affairs Act 1953 made orders appointing the 11 named additional trustees and then went on to say:

"In order to put Mr McMillan's position beyond all doubt and to give effect to the wishes clearly expressed at the meeting on 22 August 1992, the Court exercising jurisdiction under section 27(2) makes a further Order under section 443 and section 30(1)(e) appointing Matthew John McMillan a trustee - this order to issue forthwith under section 34(10). This order renders redundant the order made on 15th July 1991 (19 Aotea 367-369) appointing Mr M J McMillan a trustee."

Josephine Hanita-Paki did not file a notice of appeal in respect of the order made on the 15th October 1992.

Mr Takarangi, as Counsel for Mrs Josephine Hanita-Paki in response to a query from the Court made on the 10th December 1992 requested that his client's appeal be set down for hearing.

Deputy Chief Judge A G McHugh issued a minute - 1993 Chief Judge's Minute Book Folio 14-17 - on the 20th January 1993 a copy of which was given to Mr Takarangi.

In the final paragraph of folio 16 of that minute the Deputy Chief Judge reported:

"The appeal by Ada Tatana in respect of the Orders made on 15 October 1992 has now been dismissed. There is no other appeal against the Order made on 15th October 1992. It would seem that insofar as Appeal 1991/11 is against what was intended to be an interim Order of the Court dated 15 July 1991, pending hearing of the substantive application and the opportunity been given to the appellant to voice objections, that the substantive application was disposed of by the Court at its hearing of 15 October 1992 and that therefore the substance of the appeal by Josephine Hanita-Paki has disappeared."

On folio 17 the Deputy Chief Judge went on to say:

"It is important that this question be addressed by the Appellate Court before it proceeds to Wanganui at the sittings in February next to hear Appeal 1991/11 as requested by Counsel for the Appellant. It would seem that the order against which the Appeal has been made has been replaced by the later Order of 15 October 1992 and even if the Appellate Court was to uphold the appeal and cancel the appointment made by the Court on 15 July 1991 there is no present appeal against the Order made on 15 October 1992. This matter is raised because if the Appellate Court is to convene and rule on the question of whether there now exists an Order to be revoked by the Appellate Court in the light of the circumstances attending the actions of owners herein I have

no doubt that the Appellate Court would be looking at the question of costs bearing in mind the outcome."

Mr Takarangi elected to prosecute the appeal and on the 16th February 1993 the hearing proceeded at Wanganui.

In his submissions produced to the Appellate Court Mr Takarangi sought to challenge the jurisdiction of the Maori Land Court to make the order complained of in terms of section 443(3) of the Maori Affairs Act 1953.

As this was not a ground specified in the Notice of Appeal filed, the Appellate Court, in reliance upon Rule 140(6) of the Maori Land Court Rules 1958 declined to hear argument on the question of jurisdiction.

Similarly the Appellate Court declined to accept Mr Takarangi's submission:- "that the appeal should be of the nature of a "fresh hearing. No hearing of the parties has taken place."

The appeal hearing was originally adjourned sine die pending the determination of the substantive application, and was afforded a fixture following the order of the Lower Court dated the 15th October 1992 which, in the words of the learned Judge, "renders redundant the order made on the 15th July 1991."

In essence this application included the subject matter of the substantive application which stood adjourned in the Court and afforded the opportunity for Mrs Hanita-Paki to voice her objections.

With respect to Mr Takarangi's submission, he and his client Josephine Hanita-Paki were both present at that hearing and declined to make any submissions on the appointment of Mr McMillan, a matter clearly seen from the application, to be "before the Court."

The arguments of, want of jurisdiction, and breach of natural justice, through lack of opportunity of being heard are both found to be lacking merit.

Further, the Appellate Court finds that the appeal is flawed through the subject of the appeal, the order dated the 15th July 1991, having been extinguished by the order of the 15th October 1992, as acknowledged by Mr Takarangi, pursuant to section 34(7) of the Maori Affairs Act 1953, which provides:

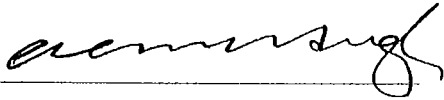
"The order drawn up, sealed and signed as hereinbefore provided shall be dated as of the date of the minute thereof and shall relate back to that date. The validity and operation of all intermediate orders, instruments, proceedings, and transactions shall be determined accordingly."

Mr Takarangi further acknowledged that as the order of the 15th July 1991 was superceded there was no "final order" of the Court within the provisions of section 42(7) of the Maori Affairs Act 1953 against which an appeal could be brought and the Appellate Court could not therefore exercise jurisdiction for the purposes of granting relief in terms of section 45 of the Maori Affaris Act 1953.

This Court accepts the submissions made by Mr MacDonald, Counsel for the respondent, that the substance of the appeal had disappeared and the appeal was therefore at an end.

This Court finds accordingly and the appeal is dismissed pursuant to section 45(1)(g)/53.

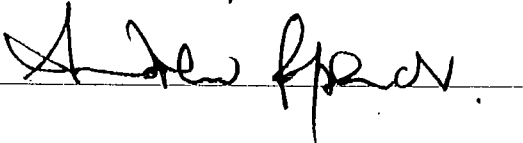
The Court further orders that the sum of \$300 paid as security for costs should now be paid by the Registrar to the respondent Mr M J McMillan and the sum of \$200 paid for the preparation of the record is to be applied by the Registrar for that purpose.



Judge A G McHugh



Judge N F Smith



Judge A D Spencer