

IN THE MAORI APPELLATE COURT
OF NEW ZEALAND
TAIRAWHITI REGISTRY

APPEAL 1993/6

IN THE MATTER of the land known as
AWAPUNI MOANA

AND

IN THE MATTER of an appeal by JOSEPH
TE KANI PERE against a
final order of the Maori
Land Court under Section
30(1)(a) of the Maori
Affairs Act 1953
determining ownership of
that land in favour of
RONGO WHAKAATA

Hearing: At Gisborne Maori Land Court on Wednesday 19 May 1993

Parties: Joseph Te Kani Pere, represented by Counsel Mr J Egan
Appellant

The Proprietors of Mangatu represented by Mr R Barber
Respondent

Mr Darcy Ria represented by Mr Webb
Supporting
the
Respondent

Decision: Delivered at Rotorua on 4th day of JUNE 1993

Coram: Judge N F Smith (Presiding Officer)
Judges H K Hingston and H B Marumaru, Members

DECISION

At the hearing on 19 May 1993 the Court indicated to those present that by consent it intended to direct a rehearing by the Maori Land Court and it would give its reasons for so directing in writing.

Awapuni Moana block (the land) has an interesting but legally complex history. When the Maori Land Court of the last century investigated and determined freehold titles to the lands on the Gisborne flats there was frequent reference to Awapuni Lake/Lagoon which then comprised the land much of it covered by water.

In 14 May 1928 an application to investigate the title of the land was heard at Gisborne and on 15 May a decision was delivered by the Court whereat it was determined that in 1928 there was no doubt that Awapuni lagoon "was an arm or creek of the sea, where the sea flows and reflows".

The consequence of this finding was a determination that as a matter of law the lagoon (the land) was *prima facie*, the absolute property of the Crown and there was insufficient evidence before the Court as to whether the lagoon became an arm of the sea because of some sudden erosion or convulsion as against slow and gradual accretion. If the former had been established the Crown's absolute ownership could be challenged but not necessarily in the Maori Land Court.

It is interesting to note the application was dismissed "without prejudice" thus allowing for a further investigation.

There was no further Maori Land Court investigation and in 1953 the Crown by Section 20 of the Reserves and other lands Disposal Act of that year declared the bed of the Awapuni lagoon (the land) to be Crown's land.

For our purposes the relevant parts of that provision are:

"20 Whereas the bed of the Awapuni Lagoon situated in Blocks V and VI, Turanganui Survey District, is vested in the Crown subject to the rights, if any, of the owners of the adjoining lands: And whereas it is desirable that provision be made securing the title of

the Crown to the bed of the lagoon against possible claims by adjoining owners in the event of the dewatering of the bed by natural causes or artificial works: Be it therefore enacted as follows:

- (1) The bed of the Awapuni Lagoon, as described in subsection two of this section, together with any part or parts thereof that may be dewatered and become dry land due to natural causes or as a direct or indirect result of drainage, reclamation, or protection works or of any other artificial works of whatsoever nature, are hereby declared to be vested in Her Majesty as Crown land subject to the Land Act 1948."

Following the declaration the Crown drained the land and developed it as a dry stock farm known as Awapuni Farm Settlement Block.

Consequent upon a petition to Parliament, the Minister of Lands in 1990 made application pursuant to Section 267 of the Maori Affairs Act 1953 to vest the land in the Proprietors of Mangatu Block upon trust "to hold and administer the said land upon certain terms and conditions".

For reasons which will become evident later in this decision we recite the relevant parts of that provision.

"267 Special Provisions for sale to and vesting in Maoris of interests in Maori land acquired by Crown

- (1) This section applies with respect to any Maori land or to any undivided share in Maori land that has at any time been acquired by the Crown, whether pursuant to this Part of this Act or otherwise howsoever, and whether or not the land has been proclaimed to be Crown land."

- (3) The Court, on the application of the Minister of Lands, shall make an order vesting any land or undivided share in land to which this section applies, in the person or persons specified in the application as being entitled thereto."

"(3A) The Court, with the agreement of the Minister of Lands, may, instead of vesting the land in the persons beneficially entitled, vest it in some person or persons or in a body corporate as trustees for the persons beneficially entitled or for some class of persons."

"(4) Every vesting order made under this section shall have the same effect as if the land or undivided share had been duly transferred by the Crown to the person or persons in whose favour the vesting order is made."

"(5) All land sold or otherwise disposed of by the Crown pursuant to this section to a Maori (whether in severalty or in common with any other person or persons) or to a body corporate shall, on the taking effect of the vesting order, become and be deemed to be Maori freehold land."

The Maori Land Court heard the application on 19 October 1990 at Gisborne and made orders vesting the land in the Proprietors of Mangatu Blocks providing the land be held upon certain trusts and also recorded in terms of Section 267(5)/53 that the land was deemed to be Maori Freehold land.

On 6 November 1991 the Proprietors of Mangatu Blocks made application to the Maori Land Court pursuant to Section 30(1)(a) of the Maori Affairs Act 1953 requesting that the Court hear and determine ownership of the land and determine the relative interest of the owners in the land.

The Maori Land Court heard the application during June and July of 1992 delivering a decision on 18 December 1992 effectively determining that the land was owned by Rongowhakaata md.

Messrs J A H T Pere and P Haronga sought a rehearing pursuant to Section 28/53 of this decision but by consent withdrew their application of 5 February 1993 (134 Gisborne MB 206-214).

Mr Pere then lodged an appeal against the Court's determination of 18th December 1992. The appeal was set down for hearing on Wednesday 19 May 1993 at Gisborne and proceeded on that day.

Prior to hearing the Court had received an application to amend grounds of appeal and to adduce new evidence from the appellants.

Mr Webb applied for, and was granted leave to have Mr McEwen assist him at the hearing.

Prior to the commencement of the hearing all counsel and Mr McEwen were invited into chambers where various matters of concern to the Court were traversed and after discussion by counsel with their respective clients, agreement was concluded by the appellant and Mr Webb's client to the Court directing the rehearing as adverted to earlier herein.

The Presiding Judge, when the case was called explained briefly to the many persons in Court why there was to be the direction for a rehearing and following, in this decision, will be the reason this course was taken as well suggestions how best to address the problems that have arisen in this matter.

The order appealed from being made pursuant to Section 30(1)(a)/53 it is appropriate we recite the relevant part of that provision.

"30 General jurisdiction of Court

- (1) In addition to any jurisdiction specifically conferred on it otherwise than by this section, the Court, subject to the provisions of subsection (2) hereof, shall have jurisdiction.
 - (a) To hear and determine any claim whether at law or in equity, to the ownership of Maori freehold land
 - (b) To determine the relative interest of the owners in common, whether at law or in equity, of any Maori freehold land".

The initial enquiry of this Court was whether the land was "Maori freehold land" as this status was essential before the Lower Court had jurisdiction.

The Court further, considered whether the legislature intended Section 30(1)(a)/53 to be merely declaratory or is it a statutory provision whereby interests/ownership in land could be created.

We needed to establish whether the land was Maori freehold land because Section 267/53 requires that the land must have been Maori land (which by definition includes Maori customary land) that had at sometime been acquired by the Crown before there was jurisdiction for the Court to embark upon an enquiry or make any orders. We have above set out briefly the background and we refer in particular to the finding of the Maori Land Court in 1928 and Section 20 of the 1953 Reserves and other lands, Disposal Act wherein it is recited that "the land is vested in the Crown subject to the rights if any of the owners of adjoining land".

We have grave reservations as to the status of the land being "Maori" land which, because there had not been a "freeholding" after a Maori Land Court investigation, must necessarily be customary Maori land. It is clear that the 1928 finding on the facts that the land was an arm of the sea precluded a finding then for customary title; there was not any determination to the contrary (although the 1928 finding was made "without prejudice") up to the 1953 legislative intervention. There was nothing before the Court when addressing the Section 267/53 application that could be said to demonstrate an "acquiring" by the Crown of customary Maori land. There were statements by the applicant Minister to the effect that the land was Maori land but we cannot recognise a ministerial statement as being sufficient to reverse a decision of a competent Court.

We repeat that this Court has grave reservations that the land was "Maori land acquired by the Crown" and, if we are correct in this view, the Court had no jurisdiction to make the Section 267/53 orders and the determination of the status of the land as Maori freehold land in terms of Section 267(5)/53 must fail.

Moving now to the use of Section 30(1)(a)/53.

First

If as mentioned above the order pursuant to Section 267/53 was made without jurisdiction then (the land) retains its status of Crown land and the Court did not have jurisdiction in terms of Section 30(1)(a)/53.

Second

If the land had acquired the status of Maori freehold land or Maori customary land this Court still has reservations as to the extent of the jurisdiction afforded by Section 30(1)(a)/53.

Section 161/53, (Jurisdiction of Court to investigate title to customary Maori land) Section 436/53, (revesting of surplus Public lands) Section 437/53, (determination of beneficiaries of Crown land reserved for Maori) and Section 6A of the Treaty of Waitangi Act 1975. We are of the opinion that each of these provisions are a code all providing a methodology for the Court determining owners of land owned by the Crown being passed to Maori. We ask ourselves if Section 30(1)(a)/53 is itself sufficient to "create" ownership as used in the lower Court whether all these provisions would be superfluous.

We are also conscious of this Court, decision in Williams v Williams i.e Matauri 2F2B block, 3 Tokerau App Court MB 20-26 where it was held inter alia that Section 30(1)(a)/53 could not be used to create a right to a building site.

We are also concerned, because we cannot discover any legislative authority permitting the Court below to treat land, clearly not Maori customary land, as though it had that status and embarking upon an enquiry as though it had before it a Section 161/53 or a Section 6A Treaty of Waitangi Act application. In this regard we are also mindful of the judgement of the Privy Council in Manu Kapua and others v Para Haimona and another P C App No.24 delivered 1 July 1913, where the Maori Appellate Court had suggested in a situation not unlike that now before us, that to use the customary method of owner determination when Crown land was being returned to Maoris was proper the

Privy Council remarked that the Court below would have been justified in considering the original Maori title even if it had been previously extinguished but went on to say that such a determination would have been reviewable at the suit of the Crown.

It is our considered opinion that before embarking upon an enquiry of the nature that was before the Court below, an order in Council pursuant to Section 31/53 (Section 27 Ture Whenua Maori Act 1992) should be gazetted clearly giving the Court the jurisdiction and directing the matters the Court must consider when dealing with such.

We acknowledge that these matters were not argued by Counsel however we considered them of such importance that we were able to acquiesce with the suggestion from Counsel that a rehearing be directed.

In view of the above and by consent the appeal is allowed and there is an order Section 45(e)/53 directing the Maori Land Court rehear this matter but that such rehearing be not embarked upon until:

- (a) The Chief Judge has considered whether to make an order pursuant to Section 44 of Te Turei Whenua Maori Act 1993 cancelling the 267/53 order made in the lower Court and substituting an order in the same terms but made pursuant to Section 134/93 as that provision clearly provides for the Court having jurisdiction to make an order vesting Crown land in the Proprietors of Mangatu blocks and declaring the land Maori freehold as was done in the lower Court.


If the Chief Judge made such orders the reservations we have as to the status of the land would cease. This Court respectfully suggests that the present trustee of the land file an application Section 44/93 as soon after 1 July 1993 as is possible.

- (b) An order in Council in terms of Section 27/93 conferring special jurisdiction be gazetted authorising the Court entering into the enquiry as to ownership of the land in manner and subject to such terms conditions as may be settled by the parties.

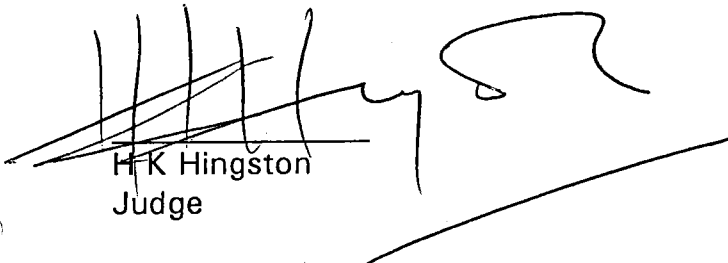
This Court is of the view that the trustee should convene a general meeting of all the persons who have claimed ownership of the land with a view to settling, for want of a better word the "terms of reference" of the enquiry and when this is settled take the necessary steps to obtain the requisite Order in Council.

This meeting may also like to consider whether pursuant to Section 28/93 additional members with necessary expertise to assist should be appointed to the Court for this case.

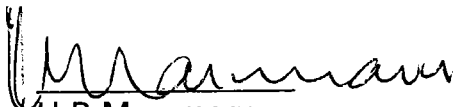
There is an order that the monies paid into Court on account of preparation of record and security for cost be refunded to the appellant.



N F Smith
(Presiding Judge)



H K Hingston
Judge



H B Marumar
Judge