In the Maori Appellate Court
of New Zealand
Tairawhiti District

IN THE MATTER of an appeal by Tipiwhenua Raroa, Petuere Raroa, and Kuini Te Uruahi Raroa or Kaa against a decision of the Deputy Chief Judge under section 452 of the Maori affairs Act 1953 in respect of a succession order relating to the interests of Rangi Raroa in Hahau B2 (now Hahau B2B2)

Hearing: Rotorua Maori Land Court 12th day of July 1993

Parties: Tipiwhenua Raroa and Others Appellants represented by Counsel Mr R A Barber.

Dorothy Tamati Roil and Others Respondents represented by Counsel Mr R T Feist to Oppose.

A question of jurisdiction was dealt with by consent of Counsel on the basis of memoranda filed.

Coram: Judge N F Smith (Presiding Officer)
Judge H K Hingston
Judge G D Carter

DECISION

Tipiwhenua Raroa and others, in a single application dated 30 January 1991, applied pursuant to Section 452/53 for amendment or cancellation of two orders made by the Court insofar as they referred to interests in Hahau B2B2 Block. The orders were:

1 Order pursuant to Section 136/53 made on 15 August 1967 at 134 Waiapu MB 281 on succession to the interests of Tarati Wharepapa or Raroa deceased.

2 Order under Section 136/53 made on 4 February 1971 at 11 Ruatoria MB 223 on succession to Rangi Raroa.

On the 2nd July 1991 and the 7th August 1991 the Court at Gisborne conducted a formal enquiry on the applications and then reported to the Deputy Chief Judge with the following recommendations:

1 That the order of the Court made on the 4th February 1971 at 11 Ruatoria Minute Book 223 be cancelled.

2 That the order made on the 15th of August 1967 be cancelled, or at the very least, it be cancelled as it relates to the Hahau B2 block.

3 If any consequential amendments are required to be made in any order, record or document made, issued or kept by the Court by reason of the order now made, the Registrar of the Tairawhiti District is to refer the same to a Judge or the Court to make such amendments under section 452(10) of the Maori Affairs Act 1953.

After due consideration of all matters Deputy Chief Judge McHugh entered the following minute in the Chief Judge Minute Book (1992 CJMB 185) on the 15th June 1992:

> "I thank Judge Rota for his clear report and assessment of this matter with which I concur. I adopt the recommendations set out in 1-3 above at the conclusion of the report. There is an order Section 452 of the Maori Affairs Act 1953 cancelling the order made on the 4th February 1971 at 11 Ruatoria Minute Book 223.
>
> I am however not prepared to cancel the order made on the 15th August 1967 as it relates to the interest of Tarati Wharepapa in Hahau B2B2 Block. There is an order under Section 452(10) of the Maori Affairs Act 1953 in respect of any consequential amendments required to give effect to the cancellation of the order made on the 4th February 1971."

By notice of Appeal dated 5th August 1992 Tipiwhenua Raroa, Petuere Raroa and Kuini Te Uruahi Raroa or Kaa the applicants under sec 452/53 appealed against the decision of the Deputy Chief Judge in so far as that order relates to the order made on the 15th August 1967 in respect of Hahau B2 (now Hahau B2B2) upon the grounds:

> "The respondents adopt with respect the statements, conclusions and recommendations of Judge Rota set out at 1992 CJMB 180-185 both inclusive.
>
> We do not appeal the final order made with respect to the 4th February 1971 order."

Notice of intention to appear to oppose the appeal was filed by Mr R T Feist on behalf of Dorothy Tarati Roil and 4 others being daughters of Natana Raroa.

Mr Feist, in a letter to the Court, raised the question of jurisdiction. His argument could be summarised as follows:

a) The Deputy Chief Judge in refusing to cancel the order of 15 August 1967 effectively dismissed the application insofar as it referred to that order.

b) No appeal lies in respect of that dismissal by virtue of Section 452(7) of the Maori Affairs Act 1953 which provides:

> "No appeal shall lie to the Appellate Court from the dismissal by the Chief Judge of an application under this section."

The Presiding Judge then directed on 13 October 1992 that Counsel be notified of that issue and requested to file Memoranda addressing the Appellate Court jurisdiction having regard to the provisions of Section 452(7)/53.

Following a suggestion by Counsel that the Court deal with the question of jurisdiction prior to the appeal proceedings Notice was given by minute dated 19th February 1993 that the appeal was adjourned sine die and that the Appellate Court would consider and bring down a decision on the question of jurisdiction upon consideration of the memoranda filed unless Counsel or either of them by the 30th March 1993 requested a formal hearing.

No such request has been received.

The Deputy Chief Judge exercises jurisdiction to make orders pursuant to sec 452/53 in accordance with section 17(4)/53 as inserted by sec 2(1) of the Maori Purposes Act 1991.

Counsel for the appellants in his submissions claims that the words of the Deputy Chief Judge:

> "I thank Judge Rota for his clear report and assessment of this matter with which I concur. I adopt recommendations 1-3 above at the conclusion of the report."

constitutes an order of the Court. Further, that insofar as recommendation 2 supported the cancellation of the order made on the 15th August 1967 to the extent such order related to Hahau B2 Block, that order, in terms of Sec 452/53 is cancelled.

Counsel states that the comments of the Chief Judge recorded at 1992 CJMB 185:

"I am however not prepared to cancel the order made on the 15th August 1967 as it relates to the interest of Tarati Wharepapa in Hahau B2B2 Block" was said possibly per incuriam.

The final ground relied upon by Counsel is that as the application to the Chief Judge to cancel the orders of 4th February 1971 and the 15th August 1967 was one application, and the Deputy Chief Judge exercised jurisdiction in

respect of the order made on the 4th February 1971, the provisions of Section 452(7)/53 prohibiting appeals from a dismissal by the Chief Judge do not apply and an appeal may lie from the application.

Dealing with the first ground submitted, it is a matter of interpretation whether the Chief Judge in referring to recommendations 1-3 was intending to adopt recommendations 1, 2 and 3 or merely 1 and 3.

The decision of the Deputy Chief Judge is clearly stated by his pronouncement of the following orders:

> "There is an order Section 452 of the Maori Affairs Act 1953 cancelling the order made on the 4th February 1971 at 11 Ruatoria Minute Book 223.
>
> I am however not prepared to cancel the order made on the 15th August 1967 as it relates to the interest of Tarati Wharepapa in Hahau B2B2 Block. There is an order under Section 452(10) of the Maori Affairs Act 1953 in respect of any consequential amendments required to give effect to the cancellation of the order made on the 4th February 1971."

In construing his decision, one must look at the statements of the Deputy Chief Judge, not in isolation, but in their overall context. In our view where statements are capable of more than one construction they should be construed in a manner which is consistent with the above orders. On that basis there is only one interpretation that can be given to the reference by the Deputy Chief Judge to recommendations 1 - 3, namely, that this means recommendations 1 and 3 and we find accordingly.

The claim by Counsel, that the Deputy Chief Judge by adopting recommendations 1, 2 and 3 cancelled the 1967 order, cannot be sustained, as the orders are as set out above. It must be remembered that under Section 2(1) of the Maori Affairs Act 1953 an order "includes a refusal to make an order".

The second ground, that the statement of the Deputy Chief Judge declining an order is per incuriam, is also not sustainable following our interpretation that the reference by the Deputy Chief Judge to recommendations 1 - 3 means recommendations 1 and 3.

Finally, section 452/53 provides that the jurisdiction conferred shall be exercised only on application made by a person "who alleges that he has been adversely affected by an order (the underlining is by the Court) and that the said order was erroneous in fact or in law....."

It is clear therefore that the jurisdiction is to be exercised in respect of a particular order and even if, for the sake of convenience an applicant cites 2 or more orders in a single application, for the purposes of sec 452/53 they must be treated as separate and individual applications.

On this basis the provisions of sec 452(7)/53

> "No appeal shall lie to the Appellate Court from the dismissal by the Chief Judge of an application under this section,"

shall apply to each individual order sought to be reviewed under section 452/53.

For the reasons stated this Appellate Court is satisfied that the Deputy Chief Judge in declining to make an order in respect of the order made on the 15th August 1967 effectively dismissed that application and in terms of sec 452(7)/53 there is no appeal from that decision.

The dispute that has arisen over the interpretation of the Deputy Chief Judge's decision highlights the lack of reasons specified therein. Had the Deputy Chief Judge given reasons, the need to speculate over the meaning of that decision should have been avoided. In New Zealand the Courts have adopted as a general principle, that stated in R v Awatere [1982] 1 NZLR 645 CA, that Judges and Justices should provide with their decisions reasons which are adequate to the occasion.

The provisions of Section 452/53 confer on the Chief Judge a special discretionary jurisdiction. No right of appeal exists in respect of a refusal to make an order. There is room therefore for argument, that as no appeal lies, there is no need to give reasons for the decision.

In the present case the Deputy Chief Judge called for an enquiry and report from the resident Judge. That Judge recommended the disputed order be set aside. In our view those circumstances were such that the Deputy Chief Judge should have given reasons for declining to follow that recommendation.

Having said that we can understand the Deputy Chief Judge failing to follow the recommendation of the resident Judge. The decision of 15 August 1967 related to an order under Section 136/53 based upon a family arrangement. The resident Judge based his recommendation, among other things, upon doubts concerning the execution of the document in which the arrangement was recorded. However, according to the minutes taken in 1967, four of the five parties to the arrangement were present in Court when the arrangement was put forward and the order made, so that the Judge in 1967 would have been able to rely, not only on the written document, but also on the presence of four of the signatories to it.

Since the recommendation was made there has been a decision of the Maori Appellate Court in In Re Ngamoe A1B1B Block 33 Tairawhiti Appeal Minute Book 35-45. In that decision the Appellate Court held that the standard of proof required to enable the Chief Judge acting under Section 452 to overturn a previous order should be the same as that required in criminal proceedings, i.e. "beyond reasonable doubt", and not "the balance of probablities" as is adequate in civil cases. Had this decision been available to the Judge concerned there is every possibility that his recommendation may have been different.

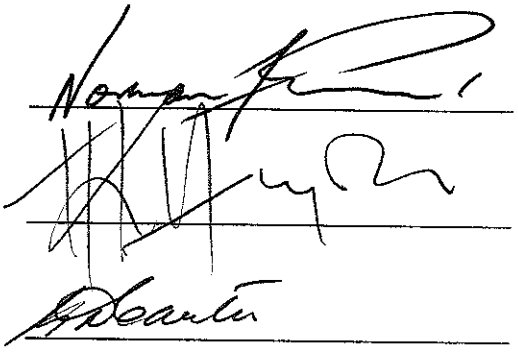
It is our view that the Appellant did not meet the onus of proof required to establish the order was in error and that the Deputy Chief Judge was justified in refusing to grant the relief sought.

We must emphasise that this Court's decision is that there is no right of appeal from the Deputy Chief Judge's decision to refuse to make an order and that the additional observations are by way of comment only. They are made solely from a perusal of the record and without benefit of argument. We hope that they assist the Appellants in clarifying what we see as the reason for the refusal to grant relief.

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

The question of jurisdiction has been raised by correspondence and has required no appearance by the parties. Taking all circumstances surrounding the decision and the appeal into account this Court does not feel that there should be any award of costs.

The Registrar is directed to refund all moneys paid for the purposes of the record and as security for costs to Mr R A Barber on behalf of the Appellants.



N F Smith Presiding Judge

H K Hingston, Judge

G D Carter, Judge