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

A20190005108

WĀHANGA *Under*	Section 58, Te Ture Whenua Māori Act 1993
MŌ TE TAKE *In the matter of*	An appeal against an order of the Māori Land Court on 4 August 2004 at 2004 Chief Judges MB 374-381 in respect of THE ESTATE OF MERE HARE KEREPETI
I WAENGA I A *Between*	KEREMIA JANE TAIRUA Kaitono *Appellant*
ME *And*	DEMETRIUS AATI Kaiurupare *Respondent*

Nohoanga: *Hearing*	13 November 2019, 2019 Māori Appellate Court MB 725-770 (Heard at Auckland)
Kooti: *Court*	T M Wara, Presiding Judge P J Savage, Judge D H Stone, Judge
Kanohi kitea: *Appearances*	L Watson, for the appellant T K Williams, for the respondent
Whakataunga: *Judgment date*	8 June 2020

TE WHAKATAUNGA Ā TE KOOTI
Reserved Judgment of the Court

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Hei tīmatanga kōrero - Introduction

[1] This appeal concerns a decision of the Chief Judge dated 4 August 2004 ('the 2004 decision') which amended an order made on 27 November 1961 ('the 1961 order') determining the persons legally entitled to succeed to the land interests of Mere Hare Kerepeti. This amendment resulted in Rewi Hare Kerepeti or Richard David Gilbert being recognised as a child of Mere Hare Kerepeti and receiving one-quarter of Mere Kerepeti's Māori land interests.

[2] The appellant, Keremia Jane Tairua, appeals the 2004 decision on three principal grounds. First, the Court failed to give proper notice of the hearing that led to the 2004 decision. Second, the 2004 decision failed to take into account material considerations, including the evidence relied on in earlier Court decisions. Third, the interests of justice require that the appeal be allowed.

Kōrero whānui - Background

The 1961 order - Succession to Mere Hare Kerepeti

[3] Mere Hare Kerepeti ('Mere Kerepeti') died at Pipiwai on 4 August 1961, leaving no will. She was married to Wiremu Tairua who predeceased her on 10 May 1940. Together they had three children: Annie Moore; Anne Adams and Taaki Tairua. Anne Adams died in 1938 and had three children: Caroline Daniels, Lucy Henry and Clem Adams. The Estate of Mere Kerepeti was initially dealt with by the Māori Land Court on 27 November 1961. It was determined that Annie Moore, Anne Adams and Taaki Tairua were entitled to succeed, with substitution for Anne Adams.

1980 section 45 application

[4] On 17 December 1980, an application was filed by Kenneth David Gilbert ('Mr Gilbert') seeking an amendment to the 1961 order, on the basis that there had been a mistake, error or omission of the facts presented to the Court in failing to identify that his father Rewi Hare Kerepeti ('Rewi') was the son of Mere Kerepeti. Mr Gilbert claimed that Rewi was the eldest son of Mere, born to Pene Kerepeti, Mere's paternal uncle. The application was opposed by Taaki Tairua, on the basis that there was no evidence that Rewi was Mere Kerepeti's son.

[5] A series of hearings took place, and the Court heard evidence from Rewi Kerepeti's wife Christine Gilbert, and David King who was Christine's son from a previous marriage, in support of the application. On 13 August 1982, Taki Tairua sent a letter to the Court opposing the application and claiming that there was no evidence to support the assertion that Rewi Kerepeti was his brother.

[6] In a memorandum dated 1 February 1984, Judge McHugh observed that a marriage certificate produced as evidence by the applicant, introduced the possibility that Rewi Kerepeti's mother was "Mary Williams." In addition, the only evidence given in support was that of Christine Gilbert and David King, and that there was no other documentary or corroborative evidence. Judge McHugh was not satisfied on the evidence produced that the applicant had established that Mere Kerepeti was the mother of Rewi.

[7] In dismissing the application on 26 April 1984, Chief Judge Durie stated the following:[1]

> … as a result of finally getting the evidence of Taaki Tairua and conducting further hearings I am now firmly of the view that there is insufficient evidence to support the applicant's claim. In particular there has been produced:
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> (1) No birth certificate of Rewi Gilbert.
>
> (2) No school records showing the parents of Rewi.
>
> (3) No real evidence of acknowledgment be Mere Gilbert that Rewi was her son. In fact the evidence of Mrs Gilbert (fol 25/2) discloses that "Mere never seemed to take any interest in my husband." Mrs Climo (fol 89) another witness called by the applicant says "I never heard her acknowledge that David was her son."
>
> (4) No evidence of acknowledgment by Pene or Ben Gilbert that Mere was the mother of Rewi.
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> (5) There is no evidence of any cohabitation or of customary marriages between Pene and Mere.

1997 section 45 application

[8] On 8 September 1997 a further application to the Chief Judge was filed by Isabelle Aati, Rewi's daughter, seeking an amendment to the 1961 order for the inclusion of Rewi in the estate of Mere Kerepeti. A report was prepared by the Registrar dated 15 September

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1 1984 Chief Judge's MB 31-32 (1984 CJ 31-32).

1998 and sent to Isabelle Aati, Annie Moore, Taki Tairua and Caroline Daniels by way of a letter dated 14 September 1998. The report recommended that Rewi receive a one-quarter share of the interest held by Mere Kerepeti. In that letter the Registrar advises that written objections to the report were required to be lodged by 2 October 1998.

[9] No objection to the report was lodged. By 1998 both Ani Moore and Taki Tairua were deceased. The Registrar was aware that Mr Tairua had passed, as the report notes that his estate was held under the Public Trustee as the administrator. In addition, the Registrar was aware that Caroline Daniels only retained one out of the four interest she received – the report notes that her interests in Waiteuku 1B were sold in 1979, and her interest in the Horahora Blocks were gifted to her son Michael Daniels in 1991.

[10] On 4 August 2004 the Chief Judge issued his determination, recommending that Rewi should be given a one-quarter interest in all land interests of Mere Kerepeti. The Chief Judge observed that:[2]

> The applicant, Isabelle Aati, had made an extensive application previously to the estate of Pene Kerepeti. It contains sworn affidavits by Hohi Pene Kerepeti and Kamo Pene Kerepeti, sons of the late Pene Kerepeti, that Rewi Hare Kerepeti was a half-brother by their father and Mere Kerepeti. Two hearings in the Lower Court occurred and at no time was the applicant's claim that her father was a child of Pene and Mere Kerepeti disputed.

Ko te hātepe ture o te tono nei - Procedural History

[11] On 28 May 2019 a notice of appeal was filed by the appellant and leave was sought to appeal out of time. On 25 June 2019 Chief Judge Isaac set down the appeal to be heard on 7 August 2019 and appointed the coram.[3]

[12] On 10 July 2019 we issued directions for parties to file any material in support or opposition on or before 4pm on 26 July 2019. We also intimated that a decision on the issue of leave to appeal would be indicated after 26 July 2019.[4]

[13] On 16 July 2019 a notice of representation was filed by Mr Williams on behalf of Demetrius Aati ('Mr Aati'), the son of Isabelle Aati ('Mrs Aati'), who filed the section 45

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2 2004 Chief Judge's MB 374-381 (2004 CJ 374-371).
3 2019 Chief Judge's MB 594 (2019 CJ 594).
4 2019 Maori Appellate Court MB 325-326 (2019 MAC 325-326).

application in 1997. Mr Williams also sought an extension to file a notice of opposition and submissions in support. A notice of intention to appear in opposition to the appeal and submissions were subsequently filed on 31 July 2019.

[14] On 1 August 2019 counsel for the appellant, Mr Watson, filed a memorandum responding to the respondent's submissions. He signalled the appropriateness of the parties meeting to try and reach a resolution. We granted an adjournment on 1 August 2019 to allow these discussions to take place.[5] The 7 August 2019 hearing was therefore vacated.

[15] On 10 September 2019 a joint memorandum of counsel was filed on behalf of the parties, advising that the parties convened a hui in Auckland on 5 September 2019, which was well attended. Unfortunately, the parties were not able to reach a resolution and a further hearing date was sought.

[16] On 12 September 2019 we issued directions advising that the matter was set down for hearing on 13 November 2019. We also signalled the intention to grant leave to appeal out of time, advising that formal steps to grant that leave would be taken at the commencement of the hearing. Finally, we issued directions as to the filing of submissions.[6]

[17] On 30 October 2019 Mr Williams filed a brief of evidence of Mrs Aati without seeking leave. Mr Watson filed a memorandum in opposition to the filing of evidence on 31 October 2019, and Mr Williams filed a memorandum in response, seeking leave to file the evidence on 4 November 2019.

[18] The hearing was then held on 13 November 2019, following which we reserved our decision.[7] During the hearing we determined that we would not grant leave for the filing of Mrs Aati's evidence, and we would set out our reasons in our decision.

[19] Following the hearing, parties were directed to file a joint memorandum to clarify the extent of the affected land blocks pertaining to Mere Kerepeti by 27 November 2019. The parties were unable to reach an agreement and filed separate memoranda on 20 December 2019.

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5 2019 Maori Appellate Court MB 404-405 (2019 MAC 404-405).
6 2019 Maori Appellate Court MB 489-490 (2019 MAC 489-490).
7 2019 Maori Appellate Court MB 725-770 (2019 MAC 725-770).

Ngā kaupapa - Issues

[20] The issues for determination are:

(a) Should leave to appeal out of time be granted?

(b) Should leave be granted for the filing of the evidence of Mrs Aati?

(c) Was notice of the section 45 application sent to the affected parties?

(d) Should the Chief Judge have considered the 1984 determination and the supporting evidence?

Leave to appeal out of time

Ngā kōrero a te kaitono - Appellant's submissions

[21] The appeal was filed on 28 May 2019, almost 15 years after the 2004 decision. Mr Watson submitted that the relevant period is from March 2014, when the appellant first became aware of the 2004 decision. As to notice, Mr Watson submitted that affected parties were not notified of the Registrar's recommendations, because:

(e) by September 1998, Taaki Tairua and Ani Moore had died, and Michael Daniel was not contacted at all; and

(f) in the case of Taaki Tairua, Ani Moore and Caroline Daniels, their addresses on the notice from the Court were incorrect.

[22] As to the delays for the period of March 2014 to May 2019, Mr Watson set out four broad factors. Firstly, the appellant honestly believed that a challenge was being pursued by her whanaunga by way of the Ani and Charles Moore Whānau Trust. Secondly, the appellant was not an owner of any relevant shares and therefore not materially affected until she was gifted shares by her mother in August 2016. Thirdly, the appellant had various communications with Court staff and advisors, and made several unsuccessful attempts to locate missing court files to support her appeal. Finally, the appellant has serious ongoing health and personal difficulties that have impacted on her ability to progress the appeal.

[23] With regard to the parties conduct, Mr Watson's position was that the delays were not deliberate, and that the appellant did not stand to gain from the delays. Mr Watson also submitted that there was little, if any prejudice caused by the delay, given that the Gilbert whānau did not challenge the 1961 orders until 1980 in the first instance and 1997 in the second. In addition, there has been no succession to the interests of Rewi in the blocks where he was awarded shares from Mere Kerepeti.

[24] As to the prospects of success, Mr Watson submitted that there is a strong case to present on appeal. This was in terms of both procedural defects and substantive evidence that was not considered by the Chief Judge in the 2004 decision, referring to the lack of notice, and lack of reference to either the earlier Chief Judge's ruling in 1984, or the evidence that was considered at that time.

[25] Finally, with regard to the interests of justice, Mr Watson submitted that the interests lie with the appellant because her conduct was not disentitling, the appeal has strong prospects of success, there are no subsequent share transactions concerning Rewi's interests, and that the Tairua whānau would suffer prejudice if the appeal was not heard.

Ngā kōrero a ngā kaiurupare - Respondent's submissions

[26] Mr Williams submitted that the Registrar's report prepared in 1998 was circulated with the application and those who had an interest in the application were properly notified in accordance with the Act and the Māori Land Court Regulations in force at the time. There was no opposition to the application, and when it was heard seven years later in 2004, all those in attendance acknowledged the whakapapa of Rewi and supported the orders that were subsequently made. The orders have been in place for over 15 years, and to seek a reversal of those orders would be extremely prejudicial.

[27] With regard to the delay, Mr Williams rejected the appellant's explanation that it took ten years to notice the change in shareholding, and five years to take action because of poor health and difficulties in accessing information. While sympathetic to the appellant's health

issues, Mr Williams submitted that filing an appeal should have a high priority;[8] and there was no explanation as to why others could not have taken steps to file an appeal.[9]

[28] Turning to the conduct of parties, Mr Williams submitted that Mrs Aati's conduct has been entirely appropriate, and that there was no deception as the application was with the Court for seven years. In addition, he submitted that there was no obligation on Mrs Aati to refer to the 1984 decision, as the applicant was different and it is a matter of the Court record. As to prejudice, Mr Williams submitted that Mrs Aati will be prejudicially affected as they succeeded to lands they were entitled to and have been in possession of those interest for over 15 years.

[29] As to the prospects of success, Mr Williams submitted an extremely cautious approach must be taken where there is an extensive delay between the date the orders were made, as the best and most cogent evidence is that which would have been produced at the time of hearing. In addition, he submitted that the evidence heard in 2004, being that of Kamo Kerepeti and Hohi Kerepeti, was the best evidence as they were children of Pene Kerepeti, who would receive no benefit from providing false evidence. Mr Williams also argued that the appeal should be barred by the doctrine of laches given that the appellant caused the delay and that Mrs Aati and her whānau will be prejudiced by the delay.

Te ture – The law

[30] Pursuant to s 58(3) of the Act, this Court has a discretion to grant leave to appeal out of time. The legal principles regarding the grant of leave to appeal out of time are well established.[10] In both *Matchitt v Matchitt* and *Hallet,* the Court has referred to the Court of Appeal decisions *Robertson v Gilbert* and *Koroniasid v Bank of New Zealand,* which provide that the relevant considerations in determining whether to grant leave to appeal out of time include the following:

> (g) The length of the delay and the reasons for it;

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8 Citing *Tahere v Tau - Rangihamama X3A and Omapere Taraire E (Aggregated)* (2017) Māori Appellate Court MB 62 (2017 APPEAL 62).

9 Citing *Davis v Mihaere - Torere Reserves Trust* (2012) Māori Appellate Court MB 641 (2012 APPEAL 641).

10 *Hallett - Opawa Rangitoto 2G, 2D2 and 2D3B2* [2016] *Māori Appellate Court MB 343 (2016 APPEAL 343); Matchitt v Matchitt – Te Kaha 65 Block* [2015] Maori Appellate Court MB 433 (2015 APPEAL 433).

(h) The parties' conduct;

(i) The extent of the prejudice caused by the delay;

(j) The prospective merits of the appeal; and

(k) Whether the appeal raises any issue of public importance.

[31] The overarching consideration however, in determining whether to grant an extension of time, is where the interests of justice lie.[11]

Kōrerorero - Discussion

[32] We consider that, in the interests of justice, it is appropriate that leave to file the appeal out of time should be granted, for two principal reasons. Firstly, we accept the appellant's explanation as to the delays. The Ani and Charles Moore Whānau Trust had taken steps to challenge the 2004 determination, and therefore it was reasonable for the appellant to believe that the matter had been addressed. In addition, we accept that the appellant has serious ongoing health and personal difficulties that impacted on her ability to progress the appeal. Secondly, it is clear that the affected parties were not notified of the application. By the time the Registrar's report was sent in September 1998, both Taaki Tairua and Ani Moore were deceased. The Registrar was aware of Mr Tairua's passing as the report refers to his estate being administered by the Public Trustee, and yet the report was sent to him as opposed to his administrator. In addition, we accept the evidence that the addresses of Taaki Tairua, Ani Moore and Caroline Daniels on the Registrar's letter dated 14 September 1998 were incorrect. For these reasons, it would be inappropriate to deny the appellant the ability to challenge the 2004 determination, and the application for leave to appeal is granted.

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[11] *Robertson v Gilbert* [2010] NZCA 429 at [24]; *Koroniadis v Bank of New Zealand* [2014] NZCA 197 at [19]. See also *My Noodle Ltd v Queenstown-Lakes District Council* [2009] NZCA 224 at [19].

Leave for the filing of the evidence of Mrs Aati

Ngā kōrero a ngā kaiurupare - Respondent's submissions

[33] Mr Williams submitted that the evidence of Mrs Aati should be received as it satisfies the threshold set out in *Dragicevich v Martinovich.*[12] First, Mr Williams argued that the evidence could not have been obtained earlier as the respondent did not have full knowledge of the appellant's case until submissions were filed on 9 October 2019. He stated that the evidence raises matters that could not have been addressed during the 1997-2004 hearings. Second, Mr Williams submitted that the additional evidence contains relevant and important information that will be influential to a decision being made. He argued that Mrs Aati has personal knowledge and is the only person alive who can provide any evidence about Mere Kerepeti. Third, Mr Williams submitted that the evidence is credible as it comprises of Mrs Aati's personal knowledge of the facts material to this case. Finally, Mr Williams argued that the prejudicial effect of not being able to have the whakapapa and interests in land recognised appropriately is a relevant matter for the Court to consider.

Ngā kōrero a te kaitono - Applicant's submissions

[34] Mr Watson submitted that the evidence was adduced so late as to cause prejudice to the appellant if it were admissible. He also submitted that the attempt to adduce further evidence does not meet the threshold test under section 55(2) of the Act, as confirmed in *Dragicevich v Martinovich*. First, Mr Watson submitted that the evidence sought to be adduced did not raise any material which Mrs Aati did not know of during 1997-2004. Second, he argued that the evidence contains assertions from a party who will be directly impacted by the result of the case, which has little probative value. Third, he submitted that there can be no presumption that the evidence should be believed as the evidence is in the nature of an assertion of personal recollection and speculation. Finally, Mr Watson submitted that there were not any exceptional circumstances to permit the filing of further evidence as per *Faulkner v Hoete*.[13]

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12 *Dragicevich v Martinovich* (1969) NZLR 306 (CA).
13 *Faulkner v Hoete - Motiti North C No 1* [2017] Māori Appellate Court MB 188 (2017 APPEAL 188).

Te ture – The law

[35] The Court may grant leave to a party to adduce further evidence pursuant to r 8.18 of the Māori Land Court Rules 2011. In determining whether to grant leave, the Court must be satisfied that the further evidence may be necessary for it to reach a just decision.[14] In addition, the Court may excuse compliance with a rule if satisfied that compliance would be oppressive or otherwise inappropriate.[15]

[36] This Court has confirmed the orthodox approach to adducing further evidence on appeal set out in *Dragicevich v Martinovich.* Three tests must be met:[16]

(l) It must be shown the evidence could not have been obtained with reasonable diligence for use at trial;

(m) The evidence must be such that if given it would probably have an important influence on the result of the case although it need not be decisive; and

(n) The evidence be such as is presumably to be believed although it need not be incontrovertible.

[37] This Court has found that there are exceptions to those principles, such as circumstances which would lead to dispossession of Māori owners for a lengthy period of time; where an Appellate Court hearing would be a final determination; and where the appellant was misled in the Court below as to the ability to produce the relevant evidence and where the subsequent appeal was unopposed.[17]

[38] In *Faulkner v Hoete* the Court referred to the Court of Appeal decision of *Erceg v Balenia Ltd* which confirmed:[18]

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14 Rule 8.18(2) of the Māori Land Court Rules 2011.
15 Rule 2.4 of the Māori Land Court Rules 2011.
16 See *Faulkner v Hoete - Motiti North C No 1* (2017) Māori Appellate Court MB 188 (2017 APPEAL 188); *Hoko – Papamoa 2A1* (2003) 20 Waikato Maniapoto Appellate Court MB 167 (20 APWM 167).
17 See *White – Maketu A2A Lot 4 DPS 63036* (1999) 1 Waiariki Appellate Court MB 116 (1 AP 116) and *Te Haki v Board of Maori Affairs – Motatau 5J2B* (1963) 1 Taitokerau Appellate Court MB 182 (1 APWH 82).
18 [2008] NZCA 535.

> … [T]he requirements are that the evidence be fresh, credible and cogent. It will not be regarded as fresh if it could, with reasonable diligence, have been produced at the *trial: Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 at 192 (CA). Particular weight will be accorded in summary judgment proceedings to the need for finality: it is only in exceptional circumstances that the Court will permit further evidence to be filed on appeal*: Lawrence v Bank of New Zealand* (2001) 16 PRNZ 207 (CA).

Kōrerorero - Discussion

[39] We are not satisfied that the further evidence is necessary to reach a just decision for two reasons. First, we agree with Mr Watson that Mrs Aati had ample opportunity to put forward her case in 1997-2004. As the then applicant, Mrs Aati bore the burden to prove her case, and there was nothing of relevance in her new evidence that could not have been raised at that time. Second, the evidence is of little probative value, as it includes a vast amount of opinion, hearsay and evidence that is irrelevant. For these reasons, leave to file the evidence of Mrs Aati is declined.

The Appeal

Ngā kōrero a te kaitono - Appellants' submissions

[40] Mr Watson submitted that the 2004 section 45 determination by Chief Judge Isaac did not consider, and therefore made no reference to, the 1984 section 45 determination by Chief Judge Durie ruling that Rewi was not a child of Mere Kerepeti. Therefore, the evidence available to the 1984 Court which persuaded its determination is a relevant material consideration which was not included in the 2004 determination. This included statements of both Taaki Tairua and Ani Moore opposing the suggestion that Rewi was Mere Kerepeti's son.

[41] Mr Watson stated that the evidence relied on in the 2004 determination related to a different section 45 application concerning succession to Pene Kerepeti, and the Court was wrong in principle to simply apply that reasoning to make a determination as to the identity of Rewi's mother. In addition, the evidence that was relied on, being the statements of Kamo and Hohi Kerepeti, are not on the Court file and therefore the best record is from the Chief Judge's decision where he records "sometime after the succession to Pene Kerepeti was completed, they [Kamo and Hohi] became aware that their father Pene Kerepeti has a

previous son with Mere Kerepeti and that this person was known as Rewi David Gilbert."[19] Mr Watson argues that this evidence is not persuasive and does not establish how the deponents become aware of this knowledge.

[42] As previously noted, Mr Watson referred to the lack of notice leading to the 2004 decision. He says this was analogous to the case of *Tioro v McCallum*, and cited the Māori Appellate Court's decision:[20]

> The failure to notify the appellants and other affected owners of the s 45 proceedings means that there was a fundamental flaw in the procedure before Chief Judge Isaac. In our assessment in would be unsafe to allow the decision of 2 December 2014 to stand in the circumstances. The appeal will be allowed and the s 45 application will need to proceed to rehearing on proper notice.

[43] Finally, Mr Watson submitted that the principle of retention of land within the whānau means that the accuracy and integrity of whakapapa given to the Court is of critical importance.

Ngā kōrero a ngā kaiurupare - Respondent's submissions

[44] In response, Mr Williams argued that the 1984 ruling was always available to the Court in reaching the 2004 decision. Further, in light of the new evidence presented in support of the 1997 application, the Court may have come to a different conclusion had the evidence produced in 1997 been available in 1984. In addition, he submitted that the Court was entitled to rely on the evidence, including that of Hohi and Kamo Kerepeti, and that it was categorically supported at the whānau hui convened by the Court at the time.

[45] With regard to notice, Mr Williams submitted that it was the responsibility of the affected owners to keep the Court updated with contact details and to complete succession applications accordingly. Mr Williams relied on r. 88 of the Māori Land Court Rules 1994 and stated that the notice requirements at the time were complied with. Mr Williams also argued that the facts in *Tioro v McCullum* can be distinguished from this case as it was noted in *Tioro* that no notice was sent to the appellants, whereas in the current case notice was sent to the listed names and addresses recorded in the Court file.

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19 1996 Chief Judge MB 164-168 (1996 CJ 164-168).

20 *Tioro v McCallum* [2015] Māori Land Court MB 483 (2015 APPEAL 483) at [28].

[46] Turning to whakapapa, Mr Williams concurs that the accuracy and integrity of whakapapa given to the Court is of critical importance and argues that the whole basis of Mrs Aati's 1997 application was to correct the whakapapa so that her father's parentage was properly recognised.

Te Ture – The law

[47] Section 49 of the Act provides that every order made by the Chief Judge can be appealed to the Māori Appellate Court. Previous decisions of this Court demonstrate that an appeal against a decision of the Chief Judge is dealt with in the same manner as a standard appeal in terms of ss 54 – 58 of the Act.[21]

[48] As set out in the decision of *Hallett – Opawa Rangitoto 2G, 2D2 and 2D3B2:*[22]

> The jurisdiction afforded to the Chief Judge under s 44 of the Act is discretionary and used only in exceptional circumstances, given the need for certainty and finality of decisions. In *Kacem v Bashir* the Supreme Court noted the important distinction between a general appeal and an appeal in relation to the exercise of a discretion. Where the decision involves the exercise of a discretion, it can only be overturned on appeal where there is an error of law or principle, where the Court has taken into account irrelevant considerations or failed to take into account relevant considerations, or where the decision is plainly wrong.

[49] We adopt that approach.

Kōrerorero - Discussion

[50] The 2004 determination was reached without any input from the appellant, or other affected parties. We do not agree that the notice requirements had been met. As already noted, the addresses used by the Registrar for Taaki Tairua, Ani Moore and Caroline Daniels were erroneous, Michael Daniels was an affected party who was not contacted at all, and by September 1998 Taaki Tairua and Ani Moore were deceased. We consider that the lack of notice raises the issue of natural justice.

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21 See *Hallett - Opawa Rangitoto 2G, 2D2 and 2D3B2* [2016] Māori Appellate Court MB 343 (2016 APPEAL 343); *Tioro v McCallum – Estate of Ngapiki Waaka Hakaraia* [2015] Māori Appellate Court MB 483 (2015 APPEAL 483); *Trustees of Tauwhao Te Ngare Trust v Shaw – Tauwhao Te Ngare Block* [2014] Māori Appellate Court MB 394 (2014 APPEAL 394); *Tau v Nga Whānau o Morven and Glenavy* [2010] Māori Appellate Court MB 167 (2010 APPEL 167); *Mann – Pakohu 2B2AJ Block* (2000) 4 Taitokerau Appellate MB 234 (4 APWH 234).

22 *Hallett - Opawa Rangitoto 2G, 2D2 and 2D3B2* [2016] Māori Appellate Court MB 343 (2016 APPEAL 343) at [37].

[51] The principles of natural justice were summarised by this Court in *Hallett – Opawa Rangitoto 2G, 2D2 and 2D3B2*:[23]

> The principles of natural justice were recently considered by this Court in *White v Potroz – Mohakatino Paraninihi No 1C West 3A2*. In that decision the Court traversed relevant authorities in the context of applications to the Māori Land Court, the Māori Appellate Court and to the Chief Judge. It noted that a fundamental tenet of natural justice is that an affected party should be given adequate notice of proceedings and a reasonable opportunity to present their own case through evidence and submissions, and to challenge the case put against them. Further, while the requirements of natural justice must depend on the circumstances of the case, the courts are concerned with not only the "actuality" but also the "perception"; that decisions must be reached "justly and fairly" and be seen to be so. In other words, the interests of justice are not only concerned with arriving at the correct outcome but also arriving at the correct outcome by the correct process.

[52] In the context of applications to the Chief Judge, this Court stated that:[24]

> [26] In relation to applications to the Chief Judge under s 45, the High Court has held that natural justice requires parties be given the right to be heard. In *Bennett v Māori Land Court*, Rodney Hansen J stated that the absence of a right to appeal a dismissal of such an application supports the implication of a right to be heard, and fairness required the applicant in that case be given the opportunity to be heard. The High Court held that the decision was made in breach of natural justice. It was quashed and remitted to the Chief Judge.
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> [27] Accordingly, the principles of natural justice apply to the Chief Judge as much as they do to the Courts of this jurisdiction. All affected parties before the Chief Judge are entitled to the right to be heard and procedural fairness, a touchstone of which is proper notice in accordance with the rules of Court. That has not happened in this case, the consequence of which is that there has been a breach of natural justice. Chief Judge Isaac was unaware that a breach of natural justice had occurred.

[53] In this case it was incumbent upon the Court to correctly notify the affected parties. Taaki Tairua's contact details were confirmed with the Court in 1982 as being '19 Lanarke Cresent, Napier'. Despite this, the Registrar used a former address in the letter dated 15 September 1998. In any event, the Court had notice of Taaki Tairua's passing in 1994. With regard to Ani Moore, the Registrar's letter was erroneously sent to '53 King Street, Hikurangi' as opposed to the correct address of '35 King Street, Hikurangi'. Like Taaki Tairua, Ani Moore had passed in 1994. Finally, the notice to Caroline Daniels was also

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[23] *Hallett - Opawa Rangitoto 2G, 2D2 and 2D3B2* [2016] Māori Appellate Court MB 343 (2016 APPEAL 343) at [37].

[24] *White v Potroz – Mohakatino Parininihi No 1C West 3A2* [2016] Māori Appellate Court MB 143 (2016 APPEAL 143) at [52] referring to *Tioro v McCallum – Estate of Ngapiki Waaka Hakaraia* [2015] Māori Appellate Court MB 483 (2015 APPEAL 483).

deficient. The Court records in 1991 confirm that her address was 'PO Box 150, Moerewa' and yet the letter was erroneously sent to 'RD Pipiwai, Whangarei.'

[54] The affected parties were entitled to the right to be heard and procedural fairness, a touchstone of which is proper notice in accordance with the rules of Court. It was crucial that the affected parties be given an opportunity to consider the 1998 Registrar's report and challenge the recommendations. It was that report and its recommendations which were subsequently adopted by the Chief Judge, with particular weight being placed on the lack of opposition. We therefore find that there has been a breach of the principles of natural justice

[55] Turning to whether or not the Chief Judge should have considered the 1984 decision and the supporting evidence, we are of the view that these were relevant considerations that ought to have been taken into account. There is nothing in the Registrar's report to indicate that the 1984 decision and the supporting evidence was brought to the Chief Judge's attention, nor were they referenced in his decision. Although Mr Williams submitted that the absence of any reference to the 1984 decision does not mean it was ignored, he was unable to able to point to anything on the record to indicate that the Chief Judge was aware of the 1984 decision. The complete lack of reference to both the decision and the supporting evidence illustrates that they were not taken into consideration, when they ought to have been.

Kupu whakatau - Decision

[56] Although Mr Watson invited us to make a substantive determination on whether or not Rewi Kerepeti was Mere Kerepeti's son (particularly given the passage of time since Mere Kerepeti's original succession in 1961), he did not actively seek it. We decline the invitation. The preferable approach is to refer the matter back to the Chief Judge for a rehearing.

[57] The appeal is allowed. Pursuant to s 56(1)(b) and (e) of the Act, the orders made by the Chief Judge on 4 August 2004 at 2004 Chief Judge's MB 105-106 are revoked, and the matter is referred back to the Chief Judge for a rehearing.

I whakapuaki i te 3:15 pm i Rotorua te 8 o ngā rā Piripi o te tau 2020.

T M Wara **JUDGE** (Presiding)	P J Savage **JUDGE**	D H Stone **JUDGE**