IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
TAKITIMU DISTRICT

A20170005766
2017/16

UNDER	Section 58, Te Ture Whenua Māori Act 1993
IN THE MATTER OF	TE KOAU A AHU WHENUA TRUST
BETWEEN	Wero Karena Applicant
AND	Te Koau A Ahu Whenua Trust Respondent

Hearing:	19 February 2018 (Heard at Hastings)
Court:	Judge P J Savage (Presiding) Judge S F Reeves Judge C M Wainwright
Present:	Dr Bryan Gilling, for the Applicant Ms Annette Sykes, for the Respondents
Judgment:	28 March 2018

JUDGMENT OF THE COURT

Introduction

[1] On 9 December 2016, Judge Harvey dismissed this Appellant's application for removal of trustees and a review of the trust. The Appellant says he received a copy of that judgment on 21 or 22 December 2016.

[2] On 27 June 2017, he filed an application for a rehearing under section 43 of Te Ture Whenua Māori Act 1993. The relevant parts of Section 43 read:

> ***Rehearings***
>
> *(1) Subject to subsection (2), on an application made in accordance with the rules of court by any person interested in any matter in respect of which the court has made an order, the Judge by whom the order was made or any other Judge may order a rehearing upon such terms as the Judge thinks reasonable, and in the meantime may stay the proceedings.*
>
> *(2) A rehearing under this section shall not be granted on an application made more than 28 days after the order, unless the Judge is satisfied that the application could not reasonably have been made sooner.*
>
> …

[3] Judge Harvey dismissed the application for rehearing on the papers and without calling on the respondent for submissions.

The nature of the question to be decided

[4] The legislation allows 28 days for the filing of an application for rehearing. According to our calculations, the period between 22 December 2016, the date of Judge Harvey's judgment, and 27 June 2017, the date of filing of the application for rehearing, was 186 days. In other words, the applicant filed his application for rehearing 158 days outside the statutory deadline.

[5] Appellate Counsel submitted that there is a judicial discretion involved in the decision that is to be made under subsection 2 above. We disagree. This is a statutory

prohibition which can be avoided only if the Judge decides that the application could not reasonably have been made sooner. The Judge must be satisfied on this point, and no discretion is involved. The question is simply whether the Judge was satisfied.

[6] The onus of proof is on the applicant.[1] The applicant must prove to the judge's satisfaction that the application could not reasonably have been made sooner.

[7] Appellant Counsel submitted that the Court has an obligation to act inquisitorially when determining whether the application could have been made sooner. Again, we see the matter otherwise. Although the Māori Land Court has the power and sometimes the duty to act in an inquisitorial manner, we do not consider that this is such a case.

[8] Section 43(2) is expressed as a prohibition against granting a late application for rehearing unless there are cogent reasons for delay. Impliedly, the longer the delay, the more cogent the reasons would need to be. The policy behind the subsection is clear: parties are entitled to rely on the court's decisions. If a matter is to be reheard, and the court's decision set aside, parties must know about that as soon as possible, lest they act in reliance on the judgment of the court only to learn that the matter is to be reheard and the court's judgment may therefore not stand. Consequently, there is a quality of urgency about applications for rehearing. The statute does not permit parties to dillydally or prevaricate, and the court too must act promptly. In order that parties know where they stand as soon as possible, the court must quickly determine whether a rehearing will ensue.

[9] The court is determining a matter of jurisdiction: it *may not* grant a rehearing unless it is satisfied of the reasonableness of the delay.

The court's obligations as to process

[10] In such circumstances, we do not consider that the court is obliged to embark upon an inquisitorial exercise to elicit further information. Reasons for delay are not difficult to assemble and document. It is up to the applicant to put before the court the information it

[1] Henare v Maori Trustee; Parengarenga 3G [2014] Chief Judge's Minute Book 365
Croft v Hing; Motatau 5E14B3B (2017) 162 Taitokerau MB 155

requires so as to be satisfied of any basis for granting the application for rehearing notwithstanding that it is out of time.

[11] Where it is deciding whether it had jurisdiction to grant a late application for rehearing, the Court would regard itself as being under a duty to go beyond the material filed to seek out reasons for delay only in situations that are outside the norm – for instance, where a party seeking rehearing was for some reason unusually disadvantaged. We see no such circumstance here. This case is a standard case where it is for the applicant to provide to the court the information it needs to determine whether there should be a rehearing, and to supply that information within the time allowed. In the event that the application is out of time, it is for the applicant to furnish the court with the information it requires to be satisfied that the application could not reasonably have been made sooner.

[12] Counsel could not point us to authority for the proposition that the Māori Land Court must act inquisitorially in a situation such as the one we are considering.

[13] Nor do we consider that the legislation places on the court an obligation to provide a hearing for an applicant to mount his case. Here, as we have noted, the Judge determined the application on the basis of such papers as were filed on 27 June 2017, and engaged no further with the parties by way of hearing or otherwise.

[14] Counsel for the appellant referred us to rule 8.1.3 of the Māori Land Court Rules 2011, arguing that it placed on the Judge an obligation to hear the applicant. The relevant provision reads:

> ***8.1 Rehearing***
>
> **…**
>
> *(3) The application may be considered and determined without notice in the Pānui (except to the extent that it must be notified under rule 6.6), without notice to any party, and without any appearance by the applicant if the Court is satisfied that, on the face of the application, there has been a breach of procedure or natural justice so serious that an order of rehearing is clearly warranted.*
>
> *…*

[15] We do not consider that this paragraph in the rules applies to the present situation. It applies to the situation where there has been 'a breach of procedure or natural justice so serious' that it is inevitable that a rehearing will be granted. In that event, the judge may proceed to grant the rehearing without engaging the parties in any other process. This provision is irrelevant to the present application, where by contrast the Judge considered the delay in applying so lengthy that the application had no prospect of success. We see nothing in the rules that requires a Judge to conduct a hearing in these circumstances.

[16] Rather, other rules indicate that the Judge has considerable discretion as to process. The reference in rule 8.1.3 to rule 6.6 is helpful, because rule 6.6.3 provides:

> *6.6 **Notification in Pānui of application made without notice***
>
> *(3) A Judge may, in considering a particular application, direct that it be heard on such notice as the Judge thinks fit.*
>
> ...

[17] Even if the appellant is correct that rule 8.1(3) required a hearing, rule 2.4.2 provides for variance from the rules if the Judge is satisfied that compliance would be oppressive or otherwise inappropriate with regard to certain matters. Requiring the trustees to engage Counsel, and to appear on an application against them that was clearly doomed to fail, would fit that situation.

[18] As to whether the appellant was a party so disadvantaged as to oblige the court to take extraordinary steps to help him make out his case for the grant of a rehearing out of time, we observe:

a) Appellant counsel told us that the applicant had no lawyer from 3 February 2017. We take note of that fact, but consider it more important that he did have legal counsel in the substantive proceeding, retained counsel until 3 February 2017, and received advice on a potential appeal. Thus, in the 28-day period that the legislation provides for the filing of an application for rehearing, the appellant had a lawyer and took advice on appealing the substantive decision;

b) Not only did the Judge know that the appellant had legal counsel in the period when he should have applied for a rehearing, but he was also familiar with the appellant

as a litigant in the Māori Land Court. He knew of his considerable experience in that jurisdiction, and also knew that he was formerly a policeman and had a law degree;

c) Appellant counsel initially contended that the appellant's involvement in considering whether to appeal explained and justified his late application for a rehearing. She accepted in discussion with the bench that a party's consideration of whether to appeal is irrelevant to delay in applying for a rehearing; and

d) We do not accept that the learned Judge failed to take sufficient account of the appellant's having been unwell. There was material before the judge indicating that the appellant was able to consult his lawyer through to 3 February 2017, to file appeal documents, and to engage in correspondence with the Hastings Registry and the National Office of the Māori Land Court. It would have been available to him to provide the judge with information about the nature and extent of his illness – because of course, illness can be a good reason for an otherwise unacceptable delay – but he chose to make only a general reference to it. That general reference was not sufficient to satisfy the judge of the reasonableness of the long delay.

Other legal arguments

[19] Appellant counsel also pointed us to the policies and objectives of Te Ture Whenua Māori Act set out in its Preamble and in sections 2-17. We do not consider that reference to those parts of the Act would assist the judge in determining whether or not he was satisfied that the very late application for rehearing could reasonably have been made sooner. The statute prohibited him from granting the application unless he decided that question in the applicant's favour. This is purposefully a tight and simple question of law which, in the circumstances of this case, the Judge was entitled to decide on the papers.

Decision

[20] Accordingly, and for the reasons given, we dismiss the Appeal.

This judgment will be pronounced in open Court at the next sitting of the Māori Appellate Court.

_____	_____	_____
P J Savage	S F Reeves	C M Wainwright
JUDGE	**JUDGE**	**JUDGE**
(Presiding)		