IN THE MĀORI APPELLATE COURT OF NEW ZEALAND
WAIKATO-MANIAPOTO DISTRICT

A20180005605
APPEAL 2018/12

UNDER	Section 58 of Te Ture Whenua Māori Act 1993
IN THE MATTER OF	Aorangi B No.1A No. 3 Block
BETWEEN	MARK ORMSBY, NGAHINA ORMSBY AND MARYANN ORMSBY Appellants
AND	TE RAA ORMSBY Respondent

Counsel: B Gilling for the Appellants
No appearance for the Respondent

Court: Judge L R Harvey (Presiding)
Judge M J Doogan
Judge M P Armstrong

Judgment: 7 November 2018

JUDGMENT OF THE COURT

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Te Raa Ormsby, Rotorua

Introduction

[1] On 17 May 2018, Te Raa Ormsby transferred by way of gift all her shares in Aorangi B1A3 to her whanaunga Abraham Mita.[1] At the hearing in the Māori Land Court, Ms Ormsby stated that her responsibilities in maintaining the land in a financial sense were burdensome.[2] She also confirmed that her children, Jacinta and Taaniko Ormsby, supported the gift, noting that one was under age, and emphasised that in any event, they would be entitled to comparable lands through a family trust. In response to a question from the learned Judge, Ms Ormsby claimed that, despite the gifting, her children would not be denied a connection to the land.[3]

[2] Christine Ormsby is the mother of Te Raa Ormsby, and she seeks to appeal the order made on 17 May 2018. She does so out of time. In her opposition to the gifting, Christine Ormsby is supported by her children, Mark, Ngahina and Maryann Ormsby and her grand-daughter Jacinta Ormsby-Daniels, the child of Te Raa Ormsby. They oppose the gifting and the grounds relied on by Te Raa Ormsby.

[3] The appellant is not an owner in the land but is the widow of the owner from whom the shares were derived, Ronald Ormsby. As a preliminary point, we consider that Mrs Ormsby has no standing to bring the appeal. That said, Dr Gilling has sought to join as appellants Mrs Ormsby's children.[4] With their consent, as confirmed by counsel, we join with Christine Ormsby her three children as appellants, per r 6.14(1)(b) of the Māori Land Court Rules 2011.

[4] As foreshadowed, the appeal was filed out of time and before counsel was instructed. In his minute dated 5 September 2018, the Chief Judge, in setting the appeal down for hearing, has implicitly granted leave to appeal out of time.[5] Having carefully considered the evidence on the file, and the interests of justice, to avoid doubt, we grant leave to appeal out of time, under s 58(3) of Te Ture Whenua Māori Act 1993and r 8.14 of the Rules.

[5] Dr Gilling also sought to adduce further evidence. For reasons that are set out below, even though such an application should have been filed at the time the notice of

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1 163 Waikato Maniapoto MB 97-101 (163 WMN 97-101)
2 163 Waikato Maniapoto MB 97-101 (163 WMN 97-101) at 99
3 Ibid
4 Memorandum of Counsel – Request to join Co-Appellants, dated 8 October 2018
5 2018 Chief Judge's MB 558 (2018 CJ 558)

appeal was lodged, we have decided to add the evidence to the record of appeal, per s 55 of the Act and r 8.18, notwithstanding issues of timing. As is well settled, the rules are the servants of justice, not the masters.[6]

[6] We note that Te Raa Ormsby confirmed she would not be attending the hearing. In any event, we confirm that earlier today we directed the case manager to advise counsel that the hearing would not proceed, as we had decided to allow the appeal on the papers. Dr Gilling filed written submissions which we have also reviewed.

[7] Counsel then advised the case manager that, according to his instructions, the appellants and several whānau in support would be attending. However, for completeness we note that only Mr Mita and his wife were present when our decision was pronounced in open court this afternoon.

Issue

[8] The issue for our decision is whether the gifting should be affirmed or annulled.

Discussion

[9] Dr Gilling sought to file new evidence on the basis that his clients had no notice of the application to vest the shares by way of gift from Te Raa Ormsby to Abraham Mita. We accept that those represented by Dr Gilling are directly interested in the proceedings, and do not appear to have received notice of the 17 May 2018 hearing at the Māori Land Court. Even so, that is not unusual in the case of a gift of shares between whānau.

[10] The appellants argue that, contrary to the evidence provided by Te Raa Ormsby, there are no significant financial burdens on the owners that would justify the gift as claimed. They also contend that the children of Te Raa Ormsby have not consented and more importantly, if the gift stands, will be disinherited from their grandfather's lands. We accept that the evidence sought to be filed by Dr Gilling contains material inconsistencies with the assertions made by Te Raa Ormsby before the Māori Land Court. Most troubling was the claim that her children supported the gift where, if the evidence filed by her daughter is to be relied on, that is not correct.

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6 *Fenchurch Export Corp v Sitka Spruce Lumber Co* [1947] 2 D.L.R. 139

[11] The appellants submit further that Mr Mita is not a member of the preferred class of alienees and therefore is not entitled to the gift. They claim that the hapū of the land is Ngāti Marama, being the hapū named after their great grandmother, Marama Hiriako. The appellants assert, without any evidence in support of that claim, that those entitled to a gift must be the uri of Marama.[7] Abraham Mita is a descendent of Marama's brother, Te Rewatu Hiriako. In terms of whakapapa, Mr Mita's father, Te Rewatu Mita and Te Raa Ormsby are third cousins. At the recent hearing in the Māori Land Court, the minute records reference to Ngāti Tepaemate as the hapū associated with the land through descent from the ancestor Hinerangi.

[12] A review of the relevant nineteenth century Native Land Court title determinations mentions Ngāti Tepaemate as a hapū connected with the Aorangi lands.[8] Te Rewatu Hiriako, brother to Marama Hiriako, spoke as a principal claimant at the title determination hearing into the Aorangi block in 1890. Interestingly, he confirmed that Ngāti Maniapoto was his iwi and that Tukawakawa was his hapū and was, in his view, the only ancestor with legitimate claims to the Aorangi lands.

[13] In addition, it is interesting to note that in 1910, Marama Hiriako and Te Rewatu Hiriako attended the Court to deal with proceedings concerning the Aorangi lands.[9] In the absence of evidence to the contrary, our preliminary view is that Mr Mita is likely to be a member of the preferred class of alienees. The contention that a hapū, in accordance with tikanga Māori, can be named after a person who appeared before a Court in the twentieth century, would also be unusual. In any event, we do not need to express a final view on Mr Mita's eligibility, given that we have found that there was a lack of notice.

[14] Moreover, the evidence presented by Te Raa Ormsby to the Māori Land Court is inconsistent with the evidence now filed on this appeal by the persons directly affected by the gift. This is relevant to the exercise of the Court's discretion in deciding whether to grant orders confirming the gift.

[15] In summary, we consider that the proper place for the testing of this conflict of evidence is before the Court below. We therefore grant the appeal and annul the order

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7 Affidavit of Mark Ormsby, dated 25 October 2018; Affidavit of Ngahina Ormsby; dated 17 October 2018; and Affidavit of Maryann Ormsby, dated 1 November 2018

8 9 Otorohanga MB 82 (9 OT 82); 9 Otorohanga MB 101 (9 OT 101); 9 Otorohanga MB 120 (9 OT 120); 9 Otorohanga MB 126-129 (9 OT 126-129); and 9 Otorohanga MB 131-143 (9 OT 131-143)

9 51 Otorohanga MB 252 (51 OT 252)

making the gift from Te Raa Ormsby to Abraham Mita and remit the application back to the Māori Land Court for a hearing *de novo*. In doing so, we make no criticism of the Judge in the Court below who quite properly relied on the evidence that was presented at the original hearing.

[16] We note that Dr Gilling also seeks an order that the shares of Te Raa Ormsby should be gifted to her two daughters, Jacinta and Taaniko. This is a matter for the Court below.

[17] One last point. The obvious remedy in this situation was an application for rehearing, albeit out of time. If an application for rehearing out of time had been declined then the correct approach by the appellant would have been to file an appeal out of time.

Decision

[18] The appeal is granted. Pursuant to s 56(1)(b) of Te Ture Whenua Māori Act 1993, the order issued on 17 May 2018 vesting 0.25 shares in Aorangi B1A3 by way of gift from Te Raa Ormsby to Abraham Mita is annulled.

[19] Pursuant to s 56(1)(e) the Māori Land Court is directed to hold a rehearing which is to include the evidence filed in respect of this appeal.

[20] There will be no order as to costs.

Pronounced at 2.15pm in Hamilton on Wednesday this 7th day of November 2018.

L R Harvey **JUDGE**	M J Doogan **JUDGE**	M P Armstrong **JUDGE**