

**IN THE MĀORI APPELLATE COURT OF NEW ZEALAND  
WAIARIKI DISTRICT**

**A20180006151  
APPEAL 2018/16**

UNDER Section 58 Te Ture Whenua Māori Act 1993

IN THE MATTER OF An order made at 188 Waiariki MB 121-122 dated 28 April 2018 and an order made at 178 Waiariki MB 253-262 dated 18 December 2017

AND The land known as Ruatoki B Sections 23, 25, 26B, 27, 31, 32, 33B2C2, 38 and 79 and Ruatoki C Sections 11, 12, 15, 17, 18B2, 21, 22B, 23 (Aggregated)

BETWEEN SAMANTHA TIHI  
Applicant

AND TE PIKA NUKU and HINEHOU TIMUTIMU as  
executors of the Hare Nuku Ratana Estate  
Respondents

Hearing: 12 February 2019, 2019 Māori Appellate Court MB 144-163  
(Heard at Rotorua)

Court: Judge S F Reeves (Presiding)  
Chief Judge W W Isaac  
Judge P J Savage

Appearances: S Tihi in person  
J Pou for the Respondents

Judgment: 26 September 2019

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**JUDGMENT OF THE MĀORI APPELLATE COURT**

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## Introduction

[1] On 18 December 2017 at 178 Waiariki MB 253-262, Judge Harvey made an order pursuant to s 18(1)(a) of Te Ture Whenua Māori Act 1993 (the Act) as follows:

Pursuant to section 18(1)(a) of Te Ture Whenua Māori Act 1993, the Court makes an order determining the Rangiaukume Nuku Te Ratana Whānau Trust is the owner in both equity and law of the dwelling situated on Ruatoki B Sections 23, 25, 26B, 27, 31, 32, 33B2C2, 38 and 79 and Ruatoki C Sections 11, 12, 15, 17, 18B2, 21, 22B, 23 (Aggregated) being 150 Ngahina Road, RD1, Whakatāne in terms of the deceased's will.

[2] This order was intended to determine ownership of the house on the above listed land (the land) to allow for succession to the estate of Hare Nuku Ratana (the deceased).

[3] Upon receiving this minute, counsel for the respondents (the Executors) wrote to the Court requesting the order be amended to reflect, in counsel's view, the true intention of the Court. That is, the order should have determined the house on the land was owned by the Executors of the deceased's estate.

[4] On 28 April 2018, the Court amended its order in accordance with counsel's request to the following:<sup>1</sup>

Pursuant to section 18(1)(a) of Te Ture Whenua Māori Act 1993, the Court makes an order determining that the administrators of the Estate of Hare Nuku Ratana are the owners in both equity and law of the dwelling situated on Ruatoki B Sections 23, 25, 26B, 27, 31, 32, 33B2C2, 38 and 79 and Ruatoki C Sections 11, 12, 15, 17, 18B2, 21, 22B, 23 (Aggregated) being 150 Ngahina Road, RD1, Whakatāne in terms of the will of the deceased.

[5] Ms Tihi appeals this order on the grounds that the intention of the lower Court application was to vest the estate assets in the beneficiaries of the estate and not in the administrators.

## Background to the appeal

[6] In 1991, the deceased entered into a tripartite agreement to take out a home loan. The parties were the deceased, his wife Tei Ratana Nuku, the Housing Corporation of New

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<sup>1</sup> 188 Waiariki MB 121-122 (188 WAR 121-122).

Zealand (HCNZ), and the trustees Hare Nuku, Bill Taihoko Williams, Te Mauri Tawera, Anaru Tahi and Moai Tahi.

[7] A house was erected on the land and under the deed the exclusive use and occupation was granted to the deceased and Tei Ratana Nuku for their lifetimes or three terms of 20 years.

[8] The deceased died on 22 November 2015. He left a will dated 2 October 2009 and was predeceased by his wife.

[9] Probate was obtained on 13 June 2016. The relevant sections of the will provide:

I give the whole of my estate to my Trustees upon trust:

(a) To pay all debts and duty, executorship and administration expenses;

...

(e) To give to the Hare and Rangiaukume Nuku Te Ratana Whānau trust my house property situated at 150 Ngahina Road, RD1 Whakatāne, for the benefit of all beneficiaries as per the terms of the Trust Deed. However, if a separate Family Trust is created by myself and my executors herein referred to in this my Will and should my executors be appointed Trustees of the Family Trust, to give my house property situated at 150 Ngahina Road, RD1, Whakatāne to the family trust to be used as per the terms of the Trust Deed, specifically for those beneficiaries nominated in the Family Trust;

(f) To give my financial investments to the Hare and Rangiaukume Nuku Te Ratana Whānau Trust for the benefit of all beneficiaries as per the terms of the Trust Deed. However, if a separate Family Trust is created by myself and my executors referred to in this my Will, and should my executors be appointed Trustees of the Family Trust, to give my financial investments to the Family Trust to be used as per the terms of the Trust Deed, specifically for those beneficiaries nominated in the family trust.

[10] Further sections with wording identical to article (e) dealt with deceased's war medals, Auckland Airport shares and the residue of the estate.

[11] The deceased's Māori land interests were vested in the whānau trust while he was still alive, at the time succession was determined to Tei Ratana Nuku. At the hearing, the Hare and Rangiaukume Nuku Te Ratana Whānau trust was established and the deceased's

Māori land interests and the Māori land interests of his wife were vested in it.<sup>2</sup> The couple's 13 children and two whāngai were made beneficiaries of the trust.

[12] The house on the land was not dealt with and this led to an application by Ms Tihi to determine the ownership of the house following the deceased's passing. That application led to the order now under appeal.

### **Submissions for Ms Tihi**

[13] The appellant submits that the orders appealed from were made in error as the intention of the original application was to remove the estate assets from the Executors' hands and vest them in the beneficiaries of the will. This intent was made clear in the Court facilitated hui, where the vesting of the house in the whānau trust was discussed by those present.

[14] Ms Tihi submits that the actions of the Executors have been hindering the efforts of the whānau to deal with the estate. She notes the extent of the debts owing was kept from them and the Executors have not been appropriately managing how they should be repaid. It is Ms Tihi's belief that vesting the house in the whānau trust will allow for better management of accounts, proper collection of the rental monies and management of the estate's debts.

[15] According to her calculations, the appellant believes some \$32,000 from the lease of the house should have been collected from the time of the deceased's passing until now. It is her submission that the executor's refusal to collect the rent shows an intention to keep the estate in debt.

[16] By not vesting the estate assets in the whānau trust, the appellant submits that the Executors have been given the ability to do as they please. Ms Tihi believes the assets and debts would be better managed by the trust and that this would be in keeping with the deceased's intentions.

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<sup>2</sup> 105 Whakatāne MB 27-30 (105 WHK 27-30).

**Submissions of Counsel for the Executors of the estate of Hare Nuku**

[17] The Executors were represented by Terena Wara and subsequently Jason Pou of Tu Pono Legal. They oppose the appeal on the basis that no error was made in the lower Court.

[18] Counsel submits that the deceased obtained exclusive use and occupation of the house on the land via the tripartite deed. He was predeceased by Tei Ratana Nuku following which there was no apparent challenge to his ownership of the house. The house was then subject to the deceased's testamentary wishes.

[19] In performance of his duties as an executor appointed under the deceased's will, Te Pika Ratana incurred personal debts amounting to \$15,462.77. The will also states that the gifting of the house is subject to payment of the estate's debts. Until such time as those debts are cleared, it was submitted that it is correct for the house to remain vested in the Executors.

[20] The actions of Te Pika Ratana go beyond what is normally expected of a diligent executor and ultimately prevented an even larger debt being passed on to the whānau trust. Furthermore, had the house and the debt been passed to the whānau trust, the trust assets would have been liable for seizure under the Administration Act 1969.

[21] It was submitted that the decision of the lower Court is consistent with s 26 of the Administration Act, which grants to Executors the power to deal with the estate property in order to discharge properly incurred debts. Furthermore, no alternative action was available to the Judge under that same section.

[22] It was further submitted that the issues faced by the Executors in collecting rentals from the house are related in some part to the legal ownership of the house. The house was subject to an occupation order for the term of the deceased's lifetime and this has now expired.

[23] An offer has now been received from the current occupier of the house, Tania Daniels, to purchase the house for the price of the estate's outstanding debts. As some of the debts have been cleared by the sale of shares, the outstanding is \$10,090 to Te Pika Ratana.

## Law

[24] Section 18(1)(a) provides that:

### 18 General jurisdiction of court

(1) In addition to any jurisdiction specifically conferred on the court otherwise than by this section, the court shall have the following jurisdiction:

(a) to hear and determine any claim, whether at law or in equity, to the ownership or possession of Maori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest:

[25] The law relating to the ownership of a house on Māori land can be summarised as follows:<sup>3</sup>

- (a) The Court cannot create new ownership rights, only declare those that already exist at law or in equity.
- (b) It may be found that a building is not a part of the land and that the owners of the land are not the owners of a building; an owner in the land may separately own an improvement.
- (c) The starting point for the Court is that a house is a fixture and ownership runs with the land. On application of the test, the Court may find that the house is a chattel or that it is owned separately from the land it sits on.<sup>4</sup>

## Discussion

[26] The application to the lower Court was made by Ms Tihi to manage what she saw as an oversight by the trustees to deal with the house alongside the other estate assets. Ms Tihi saw that the house could be vested in the trust and used to create an income to pay off the estate debts.

[27] This application was opposed by the Executors as it was considered that the house was part of the estate and that it was their responsibility to ensure it was transmitted to them

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<sup>3</sup> *Nga Uri a Maata Ngapo Charitable Trust v McLeod – Harataunga West 2B2A1* (2012) 49 Waikato Maniapoto MB 223 (49 WMN 223).

<sup>4</sup> See *Skipper v Skipper - Awanui Haparapara 9* (2017) 159 Waiariki MB 3 (159 WAR 3).

and then when the debts of the estate had been paid, the house could be transferred to the beneficiaries of the estate.

[28] Counsel for the Executors in the lower Court and the proceedings before the Appellate Court based their response on s 26 of the Administration Act that the Executors were acting consistently with their duties and had a responsibility to ensure the assets of the estate were properly dealt with in accordance with that act.

[29] The Court order of 28 April 2018 determining that the Executors of Hare Nuku's estate are entitled at law and equity to the ownership of the house site was based on the assumption that the deceased was the owner of the house. However, as set out above, unless an order is made under s 18(1)(a), the ownership of a fixture on the land sits with the underlying beneficial owners. Even if there were such an order, the best that the Executors could receive was an order at law determining ownership but no rights in equity. This point was conceded by Mr Pou at the hearing.

[30] On consideration of the lower Court file it does not appear the trustees presented evidence of ownership. That the deceased owned the house was simply assumed.

[31] Therefore, if there was no order under s 18(1)(a) in favour of the deceased, what rights do the executors of his estate have in respect of the house? The answer must be that they have no rights. The rights rest with the underlying owners or those owners who can establish ownership rights by evidence.

[32] We note when the first order was made by the Court on 18 December 2017, this was made on notice and following a Court hearing. But when this order was amended in chambers following receipt of a request by Counsel, the amendment was done without notice to the trustees or beneficiaries of the whānau trust or underlying owners.

[33] It should also be noted that, if the deceased was not determined as the owner of the house in terms of s 18(1)(a), then the Court could not transmit that order to the Executors as there was no ownership order to transmit and no evidence of the Executors that they should be determined owners of the house at law and in equity.

[34] As a result, the order made by the Court is found to be made without notice to those underlying beneficial owners or the beneficiaries of the Hare and Rangiaukume Nuku Te Ratana Whānau Trust and without the foundation of a s 18(1)(a) order in the deceased's favour. As such, the appeal is allowed and the decision of the lower Court on 28 April 2018 is quashed.

### **A way forward**

[35] During the course of the appeal, there was considerable discussion on how to resolve the issue confronting the Executors and the trustees of the whānau trust.

[36] Without attempting to traverse the merits of the Executors in their administration of the deceased's estate, the question as to whether they acted prudently is questionable at best. The situation facing the Executors and beneficiaries may have been very different if steps has been taken to mitigate the debt owed by the estate, for example by leasing the house.

[37] With this is mind we direct that the application of Ms Tihi to determine ownership of the house on Ruatoki B and C sections be reheard before the lower Court and that application be considered on its own merits without the assumption that the house had been determined the property of the deceased.

[38] As we have found that the order determining the Executors of the estate to be quashed that the Executors have no rights at law to sell the house to meet the debt incurred by one of the Executors.

### **Result**

[39] The appeal is allowed.

Pronounced in Wellington on this 26<sup>th</sup> day of September 2019.

S F Reeves  
**JUDGE**

W W Isaac  
**CHIEF JUDGE**

P J Savage  
**JUDGE**