

I TE KOOTI PĪRA MĀORI O AOTEAROA
I TE ROHE O TE WAIARIKI

*In the Māori Appellate Court of New Zealand
Waiariki District*

AP-20230000035782

APPEAL 2023/13

WĀHANGA
Under

Section 58, Te Ture Whenua Māori Act 1993

MŌ TE TAKE
In the matter of

Waikite 3A

I WAENGA I A
Between

JIMMY ROSS
Kaitono pira
Appellant

ME
And

MARGARET AMY EDWARDS, PAULINE
ETHEL ROSS, EVA MOLLY WARETINI,
LORRAINE AMY GALVIN AND FRANCES
RAUKURA KAHUKIWA
Ngā kaiurupare pira
Respondents

Nohoanga:
Hearing

16 May 2024
(Heard at Rotorua)

Kooti:
Court

Judge M P Armstrong (Presiding)
Judge T K T A R Williams
Judge A H C Warren

Whakataunga:
Judgment date

22 May 2024

TE WHAKATAUNGA Ā TE KOOTI
Reserved Judgment of the Court

Hei tīmatanga kōrero

Introduction

[1] On 5 April 2023, Judge Wara granted an injunction requiring Mr Ross to vacate Waikite 3A and to remove the buildings and his possessions from the land.¹

[2] Mr Ross sought a rehearing of that decision per s 43 of Te Ture Whenua Māori Act 1993 (the Act). On 7 December 2023, Judge Wara dismissed the application seeking a rehearing.² Mr Ross appeals against the 7 December decision. In this judgment we decide whether the appeal should be upheld.

Kōrero whānui

Background

[3] There is a long background to these proceedings. Judge Wara set out that background in detail in her 5 April 2023 judgment. We adopt that background and do not repeat it here.

He aha te tikanga whānui mō te pira?

What is the approach on appeal?

[4] Firstly, we note that Mr Ross did not appeal Judge Wara's decision where she granted the injunction. Instead, he applied for a rehearing of that decision.

[5] It is not clear to us why he chose to seek a rehearing rather than to appeal the injunction order. Mr Ross does not have counsel. That may have contributed to it. Ultimately, that is the choice he made.

[6] We also note that Judge Wara pointed this out to Mr Ross. When he filed the rehearing application, Judge Wara issued a minute dated 13 October 2023, where she set out the nature of a rehearing, what it is, and what Mr Ross has to demonstrate in order to obtain a rehearing.³ Judge Wara also pointed out that the concerns raised by Mr Ross may be better suited for an appeal. Despite that, no appeal was filed against the injunction order.

¹ *Edwards v Ross – Waikite 3A* (2023) 293 Waiariki MB 110 (291 WAR 110).

² 307 Waiariki MB 88-98 at 96.

³ 305 Waiariki MB 235-236.

[7] It follows that we are not considering whether Judge Wara made an error granting the injunction. Mr Ross appeals against Judge Wara's refusal to grant a rehearing. The only issue we can consider is whether Judge Wara erred when she refused to grant a rehearing.

[8] When doing so, there is a specific approach that has to be followed. The Māori Land Court has jurisdiction to grant a rehearing per s 43 of the Act. Whether to do so is discretionary. On appeal, it is not relevant that we may have exercised that discretion differently. Mr Ross must show that Judge Wara:⁴

- (a) Erred in law or principle;
- (b) Took into account an irrelevant matter;
- (c) Failed to take into account a relevant matter; or
- (d) Was plainly wrong.

[9] This can be contrasted with a general right of appeal which is heard de novo.⁵

Me tautīnei e mātou te pīra?
Should we uphold the appeal?

[10] The only ground of appeal raised in the notice of appeal is that Mr Ross is very sick and has nowhere else to live. He says he has lived in the property for eight years, he has maintained the whenua and paid the rates. Now that he is unwell, he doesn't want to be a burden on his whanau.

[11] Judge Wara took this into account. In her decision, she said she is aware of the hardship that Mr Ross faced following the hearing of the injunction application. She referred to Mr Ross losing his wife and son, his bad health and the struggle he is facing as a result of the injunction. She considered that this did not amount to a miscarriage of justice requiring a rehearing.

⁴ *Flight v Fletcher – Waipapa 1D 2B 3B* [2017] Maori Appellate Court MB 96 (2017 APPEAL 96) at [20]-[21]; *Harris v McIntosh* [2001] 3 NZLR 721 (CA) at [13]; *Kacem v Bashir* [2010] NZSC 112 at [32].

⁵ *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103 at [4] and [13].

[12] It does not matter that we might have taken a different view. It was for Judge Wara to take that into account. She did so.

[13] In written submissions the appellant’s daughter, Janice Wetere, argues that her father has been disadvantaged as he doesn’t understand the law, he doesn’t understand the term “injunction” and, had he known, he could have sought better support. Ms Wetere says because of these limitations, she disputes Judge Wara’s finding that her father had every opportunity for a fair hearing.

[14] This is a new issue. It was not raised in the Notice of Appeal, nor was it raised when Mr Ross sought a rehearing in front of Judge Wara. It is difficult to see how Judge Wara could have failed to take this into account when it wasn’t raised before her.

[15] In any event, even if Mr Ross does struggle to understand legal terms and processes, we consider he clearly knew what the effect of the orders were that were sought against him. The injunction application was heard on 18 October 2022. The minutes from that hearing are telling. It records the following exchange between Judge Wara and Mr Ross:⁶

Court: I want to discuss with you the aspects that are going to be relevant for me when determining this application. The application is for the removal of buildings and yourself from the land. So I suppose the first question that I have for you is what legal authority do you have to reside on the land?

J Ross: There was an agreement in the Māori Land Court a few years back that I was to reside on the property. I am 72 years of age. I put all my money in there. I am not worried about that, because I want our mokopuna coming up to be able to live in there. You know, what’s the point in taking all the buildings down on that land and having it bare? There is no point in that. These three here have got their own homes. They want to put me out on the road. Where can I go at 72?

[16] This exchange is clear that even if Mr Ross didn’t know what the term ‘injunction’ meant, he knew that some of the owners were seeking an order requiring him to vacate the land and to remove the buildings.

[17] Mr Ross has also had support throughout these proceedings. At various times, members of his family have appeared and filed material supporting Mr Ross. If he required

⁶ 283 Waiariki MB 145-169 at 155-156.

further assistance, he could have instructed a lawyer. He could have applied for legal aid, or a grant from the Māori Land Court special aid fund, if he could not afford to instruct a lawyer.

[18] Ms Wetere also says that Judge Wara made the injunction decision on 5 April 2023, but her father didn't receive a copy of the decision until 18 April 2023. Even then he only received a copy of the decision from his sister. The delay in Mr Ross receiving a copy of the decision is unfortunate. However, that does not justify a rehearing. He did receive the decision, albeit slightly late.

[19] Mr Ross also argues that Judge Wara did not allow him to present all of his material when the rehearing application was heard. We have reviewed the minutes from the 7 December hearing. We consider that Judge Wara was attempting to assist Mr Ross and his supporters by directing them to focus on whether she should grant a rehearing. Instead, they often argued why they disagreed with the injunction order. At times, Judge Wara intervened to try and bring them back on track.

[20] We asked Mr Ross what he wanted to say during that hearing that he was unable to. He read out a letter that in essence proposed a settlement offer to the other owners. Mr Ross confirmed that he wanted to present a similar letter at the earlier hearing. While it is always open for Mr Ross to try and settle this issue with his family, the proposed settlement offer is not relevant to whether a rehearing should be granted.

[21] Ms Wetere argues that her father was not given a fair opportunity to try and resolve these issues with the other owners. This is not a ground of appeal. In any event, we do not agree. There have been proceedings before the lower Court concerning this land since 2017. There have been plenty of opportunities for Mr Ross to engage with the other owners. Judge Wara also found that the other owners reached out to discuss this issue with Mr Ross but he refused to engage and was hostile towards those who raised it. There was no challenge to that finding. When the injunction application was heard, Judge Wara encouraged the parties to enter into mediation. The respondents refused. Mediation is a voluntary process, the Court cannot compel parties to engage. Judge Wara did what she could.

[22] The other arguments from Mr Ross and his supporters all focus on Judge Wara's decision granting the injunction. As noted, we are not hearing an appeal against the injunction. We are hearing an appeal against the refusal to grant a rehearing.

[23] When making that decision, Judge Wara set out the legal principles that apply to a rehearing. She adopted the approach taken by this Court in *Henare v Maori Trustee*.⁷ She correctly referred to, and applied, those principles.

[24] Mr Ross has not demonstrated that Judge Wara:

- (a) Erred in law or principle;
- (b) Took into account an irrelevant matter; or
- (c) Failed to take into account a relevant matter.

[25] Nor has Mr Ross demonstrated that the decision was plainly wrong. We accept that the injunction will cause hardship to Mr Ross. However, that is the nature of injunctive relief. Hardship is relevant when deciding whether to grant an injunction. Even where an injunction will cause hardship, the Court can still grant the injunction where it considers the hardship is not disproportionate or oppressive.⁸

[26] As noted, this appeal is not against the grant of the injunction. It is against the refusal to grant a rehearing. There is no basis to overturn that decision.

Me whakarerekē matou i te ōta whakahōtaetae?

Should we vary the injunction order?

[27] Ms Wetere asks, if we do not uphold the appeal, can we extend the timeframe by a further six months, for her father to vacate the land and remove the buildings.

[28] Judge Wara ordered Mr Ross to vacate the land, and to remove the buildings and his possessions, within 120 days of her decision. There was no stay granted against that order.

⁷ *Henare v Maori Trustee – Parengarenga 3G* [2012] 2012 Maori Appellate Court MB 1 (2012 APPEAL 1).

⁸ *Peihopa v Peihopa – Kaikou H* [2021] 2021 Maori Appellate Court MB 180 (2021 APPEAL 180).

Thirteen months has passed since Judge Wara granted the injunction. Mr Ross has already had an additional nine months to vacate. There is little justification to now extend that again by a further six months. There is also a question over whether we have jurisdiction to do so.

[29] Section 56 of the Act states:

56 Powers of court on appeal

- (1) On any appeal, the Maori Appellate Court may, by order, do such 1 or more of the following things as it thinks fit:
 - (a) It may affirm the order appealed from:
 - (b) It may annul or revoke that order, with or without the substitution of any other order:
 - (c) It may vary that order:
 - (d) It may direct the Maori Land Court to make such other or additional order as the Maori Appellate Court thinks fit:
 - (e) It may direct a rehearing by the Maori Land Court of the whole or any specified part of the matter to which the order relates:
 - (f) It may make any order that the Maori Land Court could have made in the proceedings:
 - (g) It may dismiss the appeal.
- (2) The Maori Appellate Court, in the exercise of the jurisdiction conferred on it by this section, may exercise, as though it were the Maori Land Court, any of the discretionary powers conferred upon that Court.

[30] It is clear that we have power, per s 56(1)(c), to vary an order. We consider we could still exercise that power even though we are dismissing, rather than upholding, this appeal. Section 56(1) provides that we may, by order, do one or more of the things listed in (a) to (g) above. That means we could still dismiss the appeal, and then vary the order, if we decided to exercise our discretion to do so. Generally, it would be unusual to exercise this power where the appeal has been dismissed. However, there may be practical reasons for doing so, such as varying an action date as is the case here.

[31] Despite that, s 56(1)(a) provides that we can only affirm the order appealed from. Pursuant to ss 56(1)(b) and (c) we can annul, revoke or vary *that* order. It follows that we only have the power to vary the order under appeal.

[32] This is not an appeal against the injunction order. This is an appeal against the refusal to grant a rehearing. We cannot vary the injunction order per s 56(1)(c) of the Act. Section 56(2) does not take this any further. While that allows this Court to exercise any discretionary powers of the lower Court, we can only do so when exercising our jurisdiction conferred by s 56 of the Act. That must still relate back to the order under appeal.

[33] For these reasons, we do not grant an extension to the timeframe Mr Ross must vacate the land and remove the buildings and his possessions.

[34] We are aware that the timeframe under Judge Wara's order has already expired. This means that Mr Ross will now need to vacate and remove his possessions and the buildings as soon as possible. We accept that removing the buildings will take some time. The respondents acknowledged this when we heard the appeal. Mr Ross should liaise with the respondents and other owners on how and when he will comply with the injunction, particularly concerning removing the buildings. If there is an unreasonable delay, the respondents can seek to enforce the injunction.

Kupu whakataua
Decision

[35] The appeal is dismissed.

[36] Neither side were represented by counsel. Costs will lie where they fall.

I whakapuaki i te wā 4:00pm, ki Whangārei, i te rā 22nd o ngā ra o Haratua i te tau 2024.

M P Armstrong
JUDGE (Presiding)

T K T A R Williams
JUDGE

A H C Warren
JUDGE