

**I TE KOOTI WHENUA MĀORI O AOTEAROA
I TE ROHE O AOTEA**

*In the Māori Land Court of New Zealand
Aotea District*

**AP-20240000006057
CJ 2024/45**

WĀHANGA <i>Under</i>	Section 45, Te Ture Whenua Māori Act 1993
MŌ TE TAKE <i>In the matter of</i>	Succession to Taa Tapsell also known as Tapihana or Retireti Tapihana or Ngahu Tohiteururangi or Tereanuku or Winiata Tohiteururangi or Te Arepa Tereanuku
I WAENGA I A <i>Between</i>	KATHLEEN MCFETRIDGE Te Kaitono <i>Applicant</i>
ME <i>And</i>	THOMAS WIRIHANA TAPSELL Te Kaiurupare Tuatahi <i>First Respondent</i>
ME <i>And</i>	LARISSA WHAREPŌURI Te Kaiurupare Tuarua <i>Second Respondent</i>

Nohoanga: <i>Hearing</i>	26 September 2024, 2024 Chief Judge’s MB 1713-1717 (Heard at Wellington via zoom)
Kanohi kitea: <i>Appearances</i>	G Titter for the Applicant C Bidois for the First Respondent K Katipo for the Second Respondent
Whakataunga: <i>Judgment date</i>	11 February 2025

TE WHAKATAUNGA Ā KAIWHAKAWĀ MATUA C L FOX
Judgment of Chief Judge C L Fox

Copies to:
G Titter, Holland Beckett, Private Bag 12011, Tauranga 3143, grace.titter@hobec.co.nz
C Bidois, JB Morrison, PO Box 1742, Rotorua 3040, curtis.bidois@jbmorrison.com
K Katipo, McCaw Lewis, PO Box 9348, Hamilton 3240, kylee.katipo@mccawlewis.co.nz

Hei timatanga kōrero*Introduction*

[1] This application, filed by Kathleen McFetridge (the applicant) on 13 June 2024, seeks an order pursuant to s 44 of Te Ture Whenua Māori Act 1993 (the Act) to cancel a previous s 44 order made by the Chief Judge at 2009 Chief Judge's MB 388-397 on 25 November 2009 (the 2009 decision).

[2] The 2009 decision of the Chief Judge amended succession orders made on 5 December 1966 recorded at 136 Rotorua MB 155-156 concerning the Māori land interests of Taa Tapsell also known as Tapihana or Retireti Tapihana or Ngahu Tohiteururangi or Tereanuku or Winiata Tohiteururangi or Te Arepa Tereanuku (the deceased). The order made in 1966 vested the deceased's land interests in his children, Parewaikato Kameta, Kathleen Corbett, Mary Tapsell, Jack Tapsell, Anzac Butcher and Merle Jennings. The 2009 decision included Whenuariri Richard Tapsell (Whenuariri) as a child of the deceased.

[3] The applicant is 67 years of age, with two children and five grandchildren. She was legally adopted by Kathleen and Kiwi Corbett. Her biological mother was Marie Corbett, one of the two daughters of Kathleen and Kiwi Corbett. The deceased was the applicant's grandfather and the father of Kathleen Corbett.

[4] A son of Whenuariri was Thomas Wirihana Tapsell. Thomas advised the Chief Judge that Hineranga Te Reiti Tapsell (nee Whakaawe) was married to the deceased. She is listed on the death certificate for Whenuariri as his mother along with John Tan Tapsell as his father. Thomas told the Chief Judge that there was a mistake in the death certificate, and it should read "John Taa Tapsell". The applicant claims that the deceased was never known as John Tan Tapsell or John Taa Tapsell.

[5] The applicant claimed that her own DNA, analysed by Ancestry.com, confirms that Whenuariri is not a biological son of the deceased. She claimed that the whakapapa she relies upon shows Hans and Hineaturama Tapsell had a number of children including Retireti and Ieni Tapsell. Retireti had the deceased. Ieni had a daughter, Te Mamaeroa Te Atuatawhana Tapsell, making the deceased and Te Mamaeroa first cousins. Te Mamaeroa had a daughter called Monica Te Rohu Ngatipeehi Ngahana. Whenuariri married Monica. The children of the deceased are related to the children of Whenuariri through Monica.

[6] A genealogist commissioned by the applicant, found that the applicant and Donna Clarke, a granddaughter of Whenuariri, are likely distant cousins who share great-great-great-grandparents.

[7] The applicant has also claimed that her whānau were never given notice of the hearing held by the Chief Judge in 2009.

Ko te hātepe ture o te tono nei
Procedural history

[8] On 10 July 2024, I directed as follows:

- (a) Set the matter down for the Chief Judge hearings in September 2024.
- (b) The principle of ‘*Res Judicata*’ applies, draft a minute for dismissal.
- (c) Advise the applicant to get legal advice.

[9] The applicant was duly advised of those directions by correspondence dated 15 July 2024.

[10] By email dated 9 August 2024, Ms Grace Titter advised the Court that she was now acting as counsel for the applicant.

[11] A further email dated 14 August 2024, advised that Mr Curtis Bidois would be acting for Thomas Wirihana Tapsell (the first respondent).

[12] The matter was set down for hearing on 26 September 2024.

[13] On 17 September 2024, Ms Kylie Katipo filed a “Notice of Representation and Intention to Appear” on behalf of Larissa Wharepōuri (the second respondent).

[14] Legal submissions and an affidavit of the applicant dated 23 September 2024, were subsequently filed by her counsel. In that affidavit the applicant reiterated the points made above, including the fact that she and her whānau only discovered the order had been made in 2023. She added that although there were rumours that Whenuariri was the deceased’s

son, there is no evidence of this. She elaborated further on the DNA evidence. In late 2023, she visited the Ancestry.com website and discovered that Donna Clarke, the granddaughter of Whenuariri referred to above, had completed a DNA test.

[15] On 24 September 2024, the first respondent's counsel filed submissions and an unsigned affidavit of Thomas Wirihana Tapsell. A signed version of the affidavit dated 25 September 2024 was subsequently filed on the same day. In that affidavit, Mr Tapsell noted the applicant's reliance on information obtained from Ancestry.com. He attached the Ancestry.com terms and conditions of use and noted that these prohibit using that information in judicial proceedings at clauses 1.3 and 1.4.2.

[16] On 25 September 2024, legal submissions and an unsworn affidavit of Larissa Wharepōuri were filed by counsel for the second respondent. A signed version of the affidavit was subsequently filed on 26 September 2024. In that affidavit, Ms Wharepōuri deposed that she was a granddaughter of Whenuariri. Her mother was Margaret Meteria Clarke (nee Tapsell). She claimed that the deceased was her great grandfather, that this fact was well known and accepted by the extended whānau. She also advised that the use by the applicant of the DNA results of Donna Clarke was done without her consent and knowledge. She opposed the application.

Te Nohonga a Te Kooti

The Hearing

[17] The hearing was held on 26 September 2024.¹ I reserved my decision, and the file was referred to me for judgment on 11 November 2024.

Ngā kōrero mō te kaitono

Submissions for the applicant

[18] In her written submissions, Ms Titter submitted that the outcome of the 2009 order was incorrect, namely its finding that Whenuariri Richard Tapsell was a child of the deceased and that he be included as a successor. She submits that her position is supported by the Ancestry.com evidence, the fact that no records show any evidence of a union between Taa

¹ 2024 Chief Judge's MB 1713-1717 (2024 CJ 1713-1717).

Tapsell and Te Reiti Whakaawe, nor does the birth certificate of Whenuariri list the deceased as his father.

[19] Counsel submitted that the Registrar's Report, relied upon by the Chief Judge, was wrong when it was stated that a copy of the report was sent to all parties and that no objections were received.² The applicant's whānau did not receive a copy of the report or notice of the hearing.

[20] Counsel argued that if the 2009 order was allowed to stand, the preferred class of alienees are adversely affected by having a smaller interest in the land than they are beneficially entitled to, thereby impacting on future generations.

[21] In terms of my s 44 jurisdiction, counsel acknowledged that as a matter of public interest, it is necessary for the Chief Judge to uphold the principles of certainty and finality, but she submitted that the Chief Judge has the jurisdiction to address any case when exceptional circumstances apply and where an incorrect decision has been made due to a flaw in the evidence presented, and where it is necessary in the interests of justice to correct the record. In this case the applicant would have pursued the matter earlier, to meet the 10-year time limit as set out under s 77 of the Act, if they had been made aware of the 2009 order. However, they were not notified.

[22] If I consider that the principle of *res judicata* applies, counsel submitted that I should weigh that against principles of tikanga and the purpose of the Act, specifically to ensure that the general objectives of the Act are met. The Act recognises that land is a taonga tuku iho of special significance to Māori. The Preamble sets out the dual principles of retention and utilisation for owners, their whānau, and their hapū. Counsel submitted that the tikanga principles of whakapapa, rangatiratanga, and kaitiakitanga are all adversely affected by the mistake made by the 2009 order and she gave reasons why.

[23] At the hearing, Ms Titter reiterated that the applicant considered that the Chief Judge had made a factual mistake resulting in an error in the 2009 order. The factual mistake led to the fragmentation of the deceased's land interests, and the interests succeeded to by her client's whānau. It was counsel's further submission that given the unique power under s

² 2009 Chief Judge's MB 388-397 (2009 CJ 388-397) at [5].

44 of the Act, I have the discretion to take the DNA evidence into account, along with the evidence of the genealogist. She contended that the 2009 order was “at odds with justice” and will have significant long-term impacts on the applicant and her whānau. Finally, she noted that the applicant was not legally represented at the time the application was filed with the Ancestry.com evidence. If there was time, the applicant would be able to provide further evidence to support her position.

Ngā kōrero mō ngā kaiurupare

Submissions for the respondents

[24] At the hearing, Mr Bidois and Ms Katipo did not significantly add to their written submissions.

[25] In his written submissions, Mr Bidois, for the first respondent, opposed the application. He submitted that this application is effectively a request for a rehearing. As such it is well out of time in terms of s 43(2) of the Act. He also submitted that the principle of *res judicata* applies. This effectively prevents the applicant relitigating issues previously determined by the Chief Judge, and he cited authorities in support of that submission. In this case, he argued, the applicant is seeking to relitigate the same cause of action and the same issue as previously determined in 2009. Therefore, the principle of *res judicata* applies to estop the applicant doing so. Finally, he contended that the DNA evidence from Ancestry.com and the opinion of the genealogist should be excluded. He cited a High Court authority to support this proposition, noting in this case there is no evidence as to the processes used whereby tests of the DNA of the applicant and Donna Clarke were carried out. He also referred to the terms and conditions for using Ancestry.com, noting the contractual prohibition on using information sourced from that site.

[26] Ms Katipo submitted that the principle of *res judicata* applies and that the evidence that the applicant relies upon is unreliable. The respondents are entitled to finality of this issue. In terms of the DNA evidence, she noted that Ancestry.com do not guarantee the quality, accuracy, reliability or availability of its content or services. Furthermore, Ms Donna Clarke was not consulted about the use of her DNA information. There is no direct evidence of DNA information for the deceased or Whenuariri. That being the case, the hearsay rule applies.

Ngā Ture
The Law

[27] The Chief Judge's jurisdiction to amend or cancel an order of the Māori Land Court is set out in s 44(1) of the Act:

44 Chief Judge may correct mistakes and omissions

- (1) On any application made under section 45 of this Act, the Chief Judge may, if satisfied that an order made by the Court or a Registrar (including an order made by a Registrar before the commencement of this Act), or a certificate of confirmation issued by a Registrar under section 160 of this Act, was erroneous in fact or in law because of any mistake or omission on the part of the Court or the Registrar or in the presentation of the facts of the case to the Court or the Registrar, cancel or amend the order or certificate of confirmation or make such other order or issue such certificate of confirmation as, in the opinion of the Chief Judge, is necessary in the interests of justice to remedy the mistake or omission.

[28] The law relating to s 44 orders has been well rehearsed and is derived from *Ashwell – Rawinia or Lavinia Ashwell (nee Russell)*; ³ *Tau v Nga Whānau o Morven and Glenavy – Waihao 903 Section IX Block*; ⁴ and *Inia v Julian*.⁵ I do not intend to repeat those principles of law as all parties were represented by counsel.

Kōrerorero
Discussion

[29] The issues for determination are:

- (a) Was an error made in fact or in law or in the presentation of the evidence to the former Chief Judge, which led to an error in the order complained of?
- (b) If so, is it necessary in the interests of justice to remedy the error by amending or cancelling the order?

³ *Ashwell – Rawinia or Lavinia Ashwell (nee Russell)* [2009] Chief Judge's MB 209 (2009 CJ 209) at [15].

⁴ *Tau v Nga Whanau O Morven & Glenavy – Waihao 903 Section IX Block* [2010] Māori Appellate Court MB 167 (2010 APPEAL 167).

⁵ *Inia v Julian* [2020] NZCA 423 at [10].

Was an error made?

[30] Mr Bidois submitted that this was effectively an application for a rehearing pursuant to s 43 of the Act but no leave to apply out of time was filed and that s 77 of the Act should apply. I note that no application for a rehearing was filed, therefore, there is no need for me to address his submissions on this matter. What is clear is that a decision of the Chief Judge can be the subject of a further s 45 hearing.⁶

[31] Section 77(3) of the Act also provides that the Chief Judge's jurisdiction is exempt from the effect of s 77(1) and (2) of the Act. So I can continue to hear this matter as a s 45 application.

[32] Under normal circumstances, I would agree with Mr Bidois and Ms Katipo that the principle of *res judicata* should apply to the facts of a case this far out of time. I also consider that the evidence produced to date for the applicant is unreliable due to the issues concerning the Ancestry.com website, its terms and conditions and the fact that Ms Donna Clarke did not consent to her DNA being used by the applicant for the purposes of these proceedings.

[33] However, I note the submission made by Ms Titter that the applicant's whānau did not receive a copy of the Registrar's report or notice of the hearing in 2009. I asked the case manager to check the 2009 ordered application file and he advised that:

- (a) Notice of the application being filed was only sent to the applicant acknowledging its receipt on 4 April 2007.
- (b) A copy of the Registrar's Preliminary Report and Recommendation was sent to the following party on 27 February 2009:
 - (i) Thomas Wirihana Tapsell (the applicant)
- (c) A copy of the Chief Judge's decision and order were sent to the following parties on 12 February 2010:

⁶ *Karaitiana – Runanga 2E* (2022) Chief Judges MB 454, at [34].

- (i) Thomas Wirihana Tapsell (the applicant for the 2009 order);
 - (ii) Theresa Ngawaka Horne;
 - (iii) Margaret Meteria Clarke;
 - (iv) Frances Constance Ngawiki Tapsell;
 - (v) Monica Hineranga Jones; and
 - (vi) Richard Waata Tapsell.
- (d) The children, or their descendants, of Taa Tapsell and Takapou Te Ngahu who did not get a copy of the Registrar's report or notice of the hearing were:
- (i) Parewaikato Kameta;
 - (ii) Kathleen Corbett;
 - (iii) Mary Tapsell;
 - (iv) Jack Tapsell;
 - (v) Anzac Butcher;
 - (vi) Merle Jennings; and
 - (vii) Peter Tapsell.

[34] The people who received a copy of the Chief Judge's decision in 2009, were only Whenuariri's children. Most other communications on file were between Court staff and Thomas Wirihana Tapsell. There was no advertised Court hearing, and the Chief Judge made the decision based upon the papers filed with the application.

[35] Clearly the Registrar's report was incorrect when it stated that a copy of the report was sent to all parties and that no objections were received. This was a mistake in the

presentation of facts to the Court and that led to an error in the making of the order. It was also a breach of the principles of natural justice as it effectively denied the applicant's whānau the opportunity to test the case presented by Thomas Wirihana Tapsell.

Is it necessary in the interests of justice to remedy the error?

[36] I consider it may be necessary in the interests of justice to remedy the error made by the Chief Judge at 2009 Chief Judge's MB 388-397 on 25 November 2009. Whether I do or not depends on Thomas Wirihana Tapsell or a member of his whānau undertaking a blood test in co-operation with the applicant.

[37] I take this cautious approach because the Act recognises land is a taonga tuku iho of special significance to Māori. The Preamble sets out the dual principles of retention and utilisation for owners, their whānau, and their hapū. Currently, based upon their anecdotal evidence and belief, the deceased's Māori land interests are of significance to both these two whānau. Finding in favour of one side or the other without proper evidence would not satisfy the test of whether it was necessary in the interests of justice to correct the error. Therefore, I am going to recommend Thomas Wirihana Tapsell undertake a blood test for the purpose of confirming the degree of consanguinity between him and the applicant. I recommend this because, it is not clear to me based upon the evidence received to date, both in 2007-2009 and through this application, whether the deceased was Whenuariri's father. That is because Whenuariri's death certificate does not accurately record the deceased as his father.

Ngā Kupu Tohutohu

Directions

[38] The Registrar, pursuant to s 40 of the Act, is directed to commission blood testing services from a reputable provider and liaise with counsel for the applicant and counsel for the first respondent to complete a blood test. The provider is to also report on the degree of consanguinity between them. An order for the payment of these services will be made pursuant to s 98(9)(aa) of the Act. While I cannot compel any party to take a blood test, I am able to draw an inference from their refusal when I make my final decision.

[39] The Case Manager is directed to distribute a copy of this judgment to all parties. If there is no action on my direction within three months, the file is to be referred back to me for the making of final orders.

I whakapuaki i te 2.00 pm i Tāmaki Makaurau, tekau mā tahi o Pepuere i te tau 2025.
Pronounced at 2.00pm in Auckland on this 11th day of February 2025.

C L Fox
CHIEF JUDGE