

IN THE COURT OF APPEAL OF TONGA
LAND JURISDICTION
NUKU'ALOFA REGISTRY

AC 9 of 2016
[LA 28 of 2015]

Mr. Kefu.



BETWEEN : PEAUAFI FILIMOEHALA

- Appellant

**AND : 1. PENI TOLOA FILIMOEHALA
2. MINISTER OF LANDS**

- Respondents

**Coram : Moore J
Blanchard J
Hansen J
Tupou J**

**Counsel : Mr. S. Fonua for the Appellant
Mr. S. Tuutafaiva for the First Respondent
Mr. 'A. Kefu SC for Second Respondent**

Date of Hearing : 6 September 2016

Date of Judgment : 14 September 2016

JUDGMENT OF THE COURT

[1] This is an appeal against a judgment of the President of the Land Court Paulsen C.J. in LA28/2015 on 14 June 2016 determining that the successor to a registered town allotment known as "Kape" in Ma'ufanga previously held by Penisimani Filimoehala is the respondent, Peni Toloa Filimoehala, who is the son of the eldest son of his first marriage, and not the appellant, Peauafi Filimoehala, who is the first born son of his second marriage.

[2] Additionally an appeal is brought against a judgment of the President on the same day between the same parties involving the same town allotment in LA9/2016 that as a result of his ruling in LA28/2015, the appellant must vacate the allotment within 1 month.

Facts

[3] Penisimani Filimoehala married Salote in 1931. They had six children the eldest being Toloa who was born in 1932. Salote died in 1942. Penisimani married Vasitai in 1943 and they had 9 children, the eldest born in 1944, Peauafi Filimoehala, who is the Appellant.

- [4] Toloa, the eldest son of the first marriage of Penisimani, married Mele and their eldest legitimate son is the respondent Peni Toloa Filimoehala who was born in 1953.
- [5] In 1952 Penisimani applied for a town allotment in Ma'ufanga. This was approved by the Minister of Lands but for unknown reason was not registered until 1982 it is known as "Kape."
- [6] In 1988 Penisimani died and his second wife Vasitai was given the life estate interest in "Kape" as the widow.
- [7] Toloa died in 2007 and was survived by his son, the respondent. Toloa predeceased the widow Vasitai, who died on 6 July 2010.
- [8] On 15 April 2011 the respondent applied for and was registered as the lawful successor to "Kape".
- [9] The appellant has refused to give up possession of "Kape" and after many attempts to get the appellant and the other occupier of "Kape" to vacate the allotment, the respondent filed a claim on 11 May 2015 against the appellant and Fotofili Filimoehala, another occupier of Kape, for an eviction

order (LA9/2015). The respondent settled his claim with Fotofili so that claim against him was discontinued on 12 October 2015.

- [10] The appellant filed his claim against the respondent on 3 November 2015 claiming "Kape" as the lawful successor (LA28/2015).

Grounds of Appeal

- [11] The appeal challenges the conclusion of the Land Court that there can only be one eldest son who can succeed to a registered allotment on the death of the holder.

- [12] Section 82 of the Land Act sets out the law of succession to a registered allotment on the death of the lawful male holder. The relevant parts of section 82 are as follows:

82. Rules of succession to allotments

Subject to the life estate of the widow the succession to a tax allotment shall be as follows:

- (a) descent shall be traced from the last lawful male holder;*
- (b) only persons born in wedlock may inherit;*

(c) *the inheritance shall descent in the first place to the eldest son of the deceased holder or if such son is dead to the eldest male heir of the body of such son. If the eldest son of the deceased holder be dead without leaving any male heir of his body the succession shall devolve upon the next eldest son of the holder or if such son is dead to the eldest male heir of such son's body. If the second son of the deceased holder be dead without leaving any male heir of his body the succession shall go to the next eldest son of the deceased holder or the eldest male heir of his body and so on taking all the deceased holder's sons in succession in order of their ages;*

[13] Mr. Fonua submits that there is ambiguity in section 82 with regard to the eldest son where the holder has married more than once. He says that each marriage forms a new family unit with its own eldest son. We cannot see any ambiguity in section 82. The words "eldest son", "wedlock" and "inheritance" in the section are clear and unambiguous and must be given their ordinary and natural meaning.

[14] Mr. Fonua refers to section 82(b) which says that "*only persons born in wedlock may inherit*". He says that the word "*persons*" in the plural shows the legislature must have

intended that where the holder married twice, there would be two eldest sons within the meaning of section 82. We do not agree. The word "persons", as submitted by Mr. Tuutafaiva and Mr. Kefu, refer to all the persons named in paragraphs (c), (d), (e), (f) and (g) of section 82 beginning with the eldest son. When the holder dies, the order of succession begins with the eldest son if he is alive and goes on in succession in the order stated in these paragraphs. To succeed, each person must have been born in wedlock.

[15] In further support of his case, Mr. Fonua submits that when the holder married more than once, allotments acquired during each marriage would devolve to the eldest son of the marriage. Relevant to this case is that Penisimani had acquired "Kape" during his second marriage and therefore, it is submitted, the appellant is the eldest son of that marriage and entitled to succeed to "Kape".

[16] We do not agree with this line of reasoning. The key figure in the rule of succession in section 82 is the holder. He can have only one eldest son no matter how many times he marries. The time of determination for succession is when the

holder dies, not when he has acquired and registered the allotment. As Mr. Kefu has pointed out in his submissions –

“There is no legal provision to say that if a land holder re-marries the status of the male heir shifts to the eldest son of the second marriage”.

[17] We agree with paragraph [24] of the President’s reason for judgment stated –

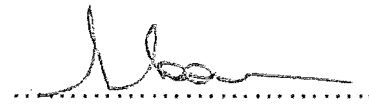
“There can be only one eldest son. Section 82 does not mention “family units” or recognise the possibility of multiple eldest sons of a deceased holder. Penisimani’s eldest son was Toloa and not the Plaintiff. The Plaintiff was the eldest son of Penisimani’s second marriage but that did not make him the eldest son. As Toloa had died before he succeeded to “Kape” the successor devolved “to the eldest male heir of the body of such son” which is the first defendant (section 82 (c))”.

Conclusion

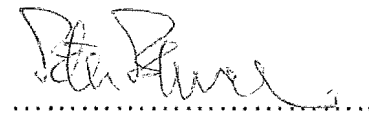
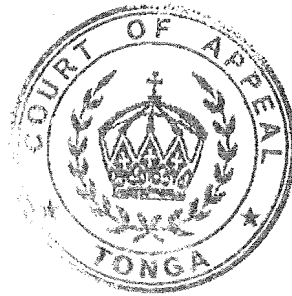
[18] The lawful successor to the allotment “Kape” is the first respondent Peni Toloa Filimoehala, the grandson of the last lawful male holder, Penisimani Filimoehala, being the eldest son of the eldest son of the first marriage of the holder. The appellant’s argument to the contrary is rejected.

Result

- [19] (1) The appeal is dismissed.
- (2) The appellant must vacate the allotment known as "Kape" in Ma'ufanga within 30 days of the date of this judgement.
- (3) Costs are awarded to the respondents to be taxed if not agreed.



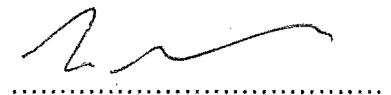
Moore J



Blanchard J



Hansen J



Tupou J