

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

Scam, Ah & Upland

AC 15 of 2017
[LA 12 of 2016]

[Signature]
26/03/18

BETWEEN : LUSE LOPETI

- **Appellant**

**AND : 1. TAVITE KAVAFOLAU LOPETI
2. YOHANNY LOPETI
3. MINISTER OF LANDS**

- **Respondents**

**Coram : Handley J
Blanchard J
Hansen J**

**Counsel : Mr. S. Tu'utafaiva for the Appellant
Mr. L. M. Niu SC for the First & Second
Respondents
Mr. 'A. Kefu SC for the Third Respondent**

Date of Hearing : 20 March 2018

Date of Judgment : 26 March 2018

JUDGMENT OF THE COURT

[1] This appeal from a judgment of Lord President Paulsen in the Land Court concerns the validity of a lease for 50 years from 13 January 2016 in favour of the appellant, Luse Lopeti, now registered under No. 8778 against part of a town allotment called Felemei. The holder of the allotment and lessor was at the time of that registration shown in the registry records as Yohanny Lopeti. However, the Land Court has found that registration to have been made in error and has declared the first respondent, Tavite Lopeti, to be the lawful holder. There is no appeal against that decision. This appeal therefore relates only to the validity of the lease. The parties to the appeal are sister and brother.

[2] Tavite's father, 'Aleksio, succeeded to Felemei on the death of his own father, Tavite's grandfather, in 1984 but 'Aleksio was never registered as the holder. He died in 2007. Tavite duly lodged his heir's affidavit in 2008. But because of some muddlement in the registry office, which misunderstood the legal position, and which the Lord President's judgment describes and has set to rest, Tavite's son Yohanny was

registered as the holder and lessor. Because of the narrowed scope of the appeal we need not go into how that incorrect registration of Yohanny occurred.

[3] We do however have to go back to the genesis of the lease to Luse which was in 1996. In that year 'Aleksio, despite being himself un-registered, agreed to lease part of Felemei to Luse and made an application to lease. On 16 October 1996 Cabinet consented to a 50 year lease but no lease document was prepared during 'Aleksio's lifetime.

[4] Eventually, after his death, and after the incorrect registration of Yohanny as holder, a lease dated 13 January 2016 was signed by the Minister of Lands in favour of Luse. It was for a 50 year term running not from 1996 but from 2016. We were told by counsel that it is not the Ministry's practice to back-date grants as delay disadvantages the intended lessee, who cannot assume a lease will eventuate. The Ministry treated Yohanny as lessor despite the fact that he had never made any application to lease and in fact was actively opposing it. The naming of Yohanny as lessor was contrary to the original Cabinet approval in 1996 of a lease from 'Aleksio.

[5] It follows that the Lord President correctly ruled that the registered lease, which under s.56(1) of the Land Act required the consent of Cabinet, did not comply with that consent. As he said, Cabinet has never consented to a lease other than between 'Alekisio and Luse.

[6] Moreover there is a deeper problem, as the Lord President recognised. The question is whether *any* lease granted by 'Alekisio and never recognised by Tavite, can be effective and bind Tavite after 'Alekisio's death in circumstances where 'Alekisio never became registered as holder of the allotment. We agree with the Lord President that it could not, for the reason he gave.

[7] As he said, a registered lease binds a widow or an heir for the period of the lease unexpired at the death of the holder. It also binds the estate holder if there is no successor to the allotment. This is provided for in s.58 where the lease has been granted in terms of Part IV of the Act. But, crucially, the right to grant a lease of a town or tax allotment is restricted, under s.56, to a *registered* holder. (Although s.56 provides for

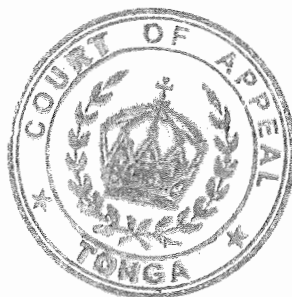
a grant by the registered holder, the lease is actually signed as lessor by the Minister of Lands pursuant to cl.110 of the Constitution of Tonga and s.19(3) of the Land Act as required by the prescribed Form of Lease No. 3 in Schedule IX of the Act, this being done with the agreement of the holder of the allotment in his form of application for lease (Form No. 1)).

[8] Therefore someone who has not become registered as a holder cannot grant a lease in terms of the Act. Furthermore, s.126 provides that no lease until registered as prescribed in the Act is effectual to pass or affect any interest in land.

[9] These provisions leave no room for the operation against a successor in title to the allotment of any equivalent of the equitable lease familiar in other jurisdictions, even where the successor has notice that an agreement for a lease purports to have been made by the previous holder. And, in the present case, nothing has been said or done by Tevita that estops him from refusing to give effect to 'Aleksio's arrangements with Luse.

[10] A comparison can be made with the position under s.82 where, under a proviso to the section, the failure of a deceased lawful male holder of any town or tax allotment to register under the Act does not bar a grant to his heir under the section. There is similar protection for a widow in the proviso to s.80. It may be thought to be an anomaly, requiring legislative attention, that no such protection is given under s.58 where an unregistered lawful holder has entered into an agreement to lease, even when Cabinet approval has been given.

[11] We dismiss the appeal with costs to be fixed by the Registrar.



K.P. Handley
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Handley J

J. Blanchard
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Blanchard J

M. Hansen
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Hansen J