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IN THE COURT OF APPEAL OF TONGA
LAND JURISDICTION **AC 10 of 2018**
NUKU'ALOFA REGISTRY **[LA 17 of 2017]**

BETWEEN: 1. FIFITA NIUA FONUA
2. 'ALIFELETI KI HA'ANGANA FONUA

\- Appellants

AND: 1. HAVEA HIKULE'O FONUA
2. NAFETALAI FIFITA NIUA FONUA
3. MINISTER OF LANDS

\- Respondents

Coram : Handley J
Blanchard J
Randerson J

Counsel : Self-represented by the Appellants
Mrs. F. Vaihu for the first and second Respondents
Mr. S. Sisifa SC for the third Respondent

Date of Hearing: 10 April 2019
Date of Judgment: 17 April 2019

JUDGMENT OF THE COURT

[1] This appeal from the decision of the Lord President of the Land Court concerns the devolution of a town allotment Sila'a at Kolofo'ou following the death of the holder Netane in 1996 and the death of his widow Mele on 10 September 2009.

[2] The first respondent Havea Fonua is the eldest son and heir of Netane and as such was entitled under s 82 (c) of the Land Act to succeed to Sila'a. However he already held a town allotment at Sopu known as Feingaola which had been granted to him in 1995.

[3] Section 84 of the Land Act relevantly provides:

> "... where a son ... becomes entitled to succeed to an allotment of his deceased father ... and already possesses an allotment of the same kind it shall be lawful for such son ... to elect between the allotment already hold by him and that of his deceased father ..."

[4] The Lord President recorded [11] that it was common ground that Havea the heir validly claimed Sila'a within 12 months of his mother's death as required by s.87 of the Act. Havea was registered as the holder of Sila'a on 15 February 2011. He was then still the holder of Feingaola.

[5] The appellants claimed at the trial and again on appeal that the registration of Havea as the holder of Sila'a contravened s 48 of the Land Act and thus the "grant" to Havea was avoided by the operation of that section. It relevantly provides:

> "No person who already holds a ... town allotment shall be granted a second allotment of the same kind as he already holds and any such grant shall be null and void."

[6] The Lord President held that s.48 did not apply to an allotment to which a son became entitled by succession pursuant to s.84, but the son was obliged by s.86 to surrender the allotment he already held.

[7] The appellants challenge this part, and only this part, of the decision of the Lord President and sought an order declaring the "grant" of Sila'a to Havea null and void pursuant to s 48.

[8] Section 48 appears in Part IV Division I headed "Grant of Allotments" providing for the original grant of allotments or in s 54 for their surrender and in s 55 for their exchange. Sections 82, 84, and 87 are found in Division VII of the Act headed "Devolution of Allotments". They refer to an allotment which 'descends' (s 82), to which a son becomes entitled to succeed "(s 84), or to which the heir must "claim" (s 87). None of the sections in Division VII refer to the heir becoming entitled to a *fresh* "grant" of the allotment to which he succeeds on the death of his father.

[9] Division II headed "Registration of Allotments" of Part VIII headed "Registration of Title" includes s 122 which relevantly provides:

> "Whenever any person becomes entitled under the rules governing the devolution of allotments contained in Division VII of Part IV to an allotment he shall within one month of so becoming entitled present to the Minister the deed of grant formerly in the possession of his predecessor in title and the Minister shall endorse thereon and upon the ..... deed in the register a memorial in the following form ..."

[10] It is clear therefore that the heir who succeeds to an allotment held by his father becomes entitled to the allotment by registration and not by grant where he can produce his ancestor's grant to the Minister. He only becomes entitled to a replacement grant if he cannot produce his ancestor's deed of grant and must seek a replacement under s 123.

[11] The appeal therefore fails and is dismissed with Costs.

COURT OF APPEAL TONGA

.....K R Handley.....
Handley J

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Blanchard J

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Randerson J