IN THE COURT OF APPEAL OF TONGA
NUKU'ALOFA REGISTRY **Appeal Case No: AC 9/2019**

BETWEEN **LORD LUANI**
First Appellant

AND **MINISTER OF LANDS**
Second Appellant

AND **SAMIUELA LOTENI KAVA and PAULA KAVA**
Respondents

Coram: Whitten P
Blanchard J
Hansen J

Counsel: ST Fonua for First Appellant
S Sisifa, Solicitor General for the Second Appellant
WC Edwards SC for the Respondents

Date of hearing: 23 March 2020

Date of Judgment: 31 March 2020

JUDGMENT OF THE COURT

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Introduction

[1] This appeal concerns the surrender by Paula Kava of his tax allotment at Malapo which is part of the hereditary estate of Lord Luani. The issue is whether Paula's eldest son, Samiuela Kava, as his heir, still has a claim to the allotment under s54 of the Land Act. Paula and Samiuela Kava, who are the respondents to this appeal, sought in the Land Court a declaration that the tax allotment has not reverted to Lord Luani and that Samiuela is the heir and successor to it and can claim it as his tax allotment.

Facts

[2] The events that have given rise to Samiuela's claim against Lord Luani and the Ministry of Lands were before this Court in 2017: *Nuku v Luani* [2017] TOCA 5; AC 6 & 7/2017 (6 September 2017). Lord Nuku wanted his son, Faka'osifono Valevale, to become the holder of the allotment so that it could then be leased to a Chinese owned company which would operate on the land a quarry for coral rocks to be used for road construction. Lord Luani's evidence in the present case was that he was never a party to this.

[3] In January 2011 Lord Nuku and Paula Kava made what this Court in the earlier case called an informal agreement for Paula Kava to apply under s54 of the Land Act to consent to surrender of the allotment. This Court explained (at [4]) what was intended:

> "This would normally enliven an entitlement in his heir under s54 to claim the Lot for himself but Mr Kava promised that his heir would not make such a claim. If after 12 months from publication from notice of the surrender no such claim had been received the Lot would revert to the Estate holder, in this case Lord Luani, under s54. Lord Nuku's son, Mr Valevale, would then apply for the lot for himself. In return Mr Kava would receive a tax allotment at Ha'ateiho and Lord Nuku would pay him TOP$130,000."

Samiuela would then be the heir to the Ha'ateiho allotment. That allotment was not in the hereditary estate of either Lord Luani or Lord Nuku.

[4] Paula applied for consent to surrender by a letter lodged with the Ministry of Lands on 23 February 2011. Samiuela counter-signed that letter as heir. At the same time Paula applied for a grant of the Ha'ateiho allotment.

[5] Lord Nuku paid TOP$130,000 to Paula Kava but failed to fulfil the other parts of the bargain he had made with Paula, namely that he would arrange for Ha'ateiho to be granted to Paula and would have another low lying allotment at Tofoa, held by Paula's brother, filled with coral to an agreed level.

[6] As a result of these defaults on the part of Lord Nuku, in June 2011, Paula Kava wrote to the Minister requesting him to cancel the surrender of the allotment. Samiuela was aware of this "cancellation" and acquiesced in it.

[7] However, on 16 November 2011, after representations to the Minister by Lord Nuku, and an assurance by a Ministry Officer, Mr Vea, that Ha'ateiho was clear of any encumbrance and was available to be granted, Paula withdrew his cancellation, asking for the surrender to proceed and for his application for Ha'ateiho to be continued with. Samiuela was not aware of this at the time but was told about it by Paula in December 2011 or January 2012. He took no steps in the matter and raised no objection.

[8] Cabinet approved the surrender on 24 February 2012. The approval did not mention any grant to Mr Valevale. Then, on 7 May 2012, the Minister signed a notice of that approval requiring any person claiming as heir to the allotment to lodge his claim in writing with the Minister no later than 10 May 2013 failing which it would revert to the estate holder, Lord Luani.

[9] Section 54 of the Land Act is as follows:

> **54 Surrender of Allotments**
>
> (1) Whenever a holder of a tax or town allotment desires to surrender such allotment or any part of it, it shall be lawful for such holder with the consent of the Cabinet to surrender the said allotment or any part thereof as aforesaid, and any allotment or any part thereof so surrendered shall, subject to the provisions of this Act, immediately devolve upon the person who would be the heir of the holder if such holder had died; and if there be no person on whom the allotment or any part thereof can so devolve the allotment or any part thereof if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder thereof.
>
> (2) Notice of the Cabinet's consent to the surrender shall be published by the Minister in one issue of the Tonga Government Gazette and in 3 issues of a Tongan weekly newspaper within two months of the date of the notice.
>
> (3) The notice shall be in the form specified in Schedule IV A and will require any person claiming to be the legal successor to the surrendered land to lodge his claim in writing to the allotment or part thereof by the date specified in the notice which date shall not be less than 12 months from the date that the notice is first published in accordance with subsection (2), failing which the said allotment or part thereof will revert to the estate holder.

[10] The form of the notice complied with the Schedule but Niu J, in the Land Court, has found that there was no publication in the Gazette (the Minister's pleading admitted as much) and that only one publication in a weekly newspaper, Taimi 'o Tonga, was in evidence (though the newspaper appears to have received payment for three publications). It was in fact pleaded by the Kavas that there was one publication on 7 May 2012 "or thereabout".

[11] Niu J further found that Paula Kava was told by the Ministry Officer, Mr Vea, that he had to wait one year for the surrender of the Malapo allotment to be completed before his application in respect of Ha'ateiho could be processed. But after a year elapsed, he was told that the Ha'ateiho allotment had been granted and registered to someone else. He wrote a letter of protest to the Minister on 24 May 2013 in which he stated that he had already surrendered his allotment and lost it and had not got another allotment in place of it as agreed.

[12] Samiuela made no claim to the Malapo allotment within twelve months of the publication in Taimi 'o Tonga.

[13] Meanwhile, the Chinese owned company carried out extensive quarrying on the allotment by arrangement with Lord Nuku. However, there was never a grant of the allotment to Lord Nuku's son, Mr Valevale. As this Court pointed out in the earlier case, a person surrendering cannot bind the Minister to grant a surrendered lot to a person he nominates. In any event, Mr Valevale had never applied for a grant. Lord Luani, who had not been a party to the informal agreement between Paula Kava and Lord Nuku, sued Lord Nuku and two Chinese companies in respect of the quarrying and was awarded very substantial damages for trespass (TOP$5,556,000 reduced by this Court on appeal to TOP$3,380,335 and interest and costs).

[14] In this Court in that earlier proceeding Lord Nuku attempted to challenge the finding by Scott J in the Land Court that the allotment had reverted to the hereditary estate of Lord Luani, giving him a right to sue for trespass to the land, since there was no evidence in the case that all the advertisements required by s54 had been published. That submission was rejected by this Court because the fact of the reversion to Lord Luani had been admitted in the Statement of Defence of Lord Nuku and evidence of that fact was not required. This Court commented (at [7]):

> "In any event s 54(1) and (3) clearly provide for the allotment to revert to the holder of the hereditary estate if the heir of the previous owner fails to claim the land within 12 months after the appearance of the first advertisement. A disappointed heir may be able to bring a late claim but a stranger whose rights were not affected cannot complain."

[15] Paula and Samiuela Kava were not parties to the litigation between Lord Luani and Lord Nuku.

The Judgment in the Land Court

[16] Niu J summarised Lord Luani's defence: that the tax allotment lawfully reverted to him having been surrendered by Paula Kava with the consent of Samiuela; and that the purpose of the notice provisions in s54 was to ensure that an heir was aware of the

surrender, with that purpose being satisfied because Samiuela was aware and had consented. Therefore, it was said by way of defence, the procedural failings of compliance did not stop the tax allotment reverting to Lord Luani.

[17] Niu J described how subsections (2) and (3) came to be added to s54 in 1991, saying it was obvious that the Legislature decided that there must be publicity given to the approval by Cabinet of the surrender. The date in the notice must give the heir at least twelve months to lodge his claim. He said there was no discretion given to the Minister to publish or not to publish the four publications. The use in the subsection of the word "shall" made such publication mandatory. The Minister had no discretion to decide whether there had been a reversion. The Judge said that s54 provides for when the reversion may lawfully be held to have occurred. Because there was only one publication of the notice, the Judge held, the tax allotment had not reverted to the estate holder, and it would not until the Minister has published the notice exactly as required by s54 and if the heir of Paula Kava does not claim it by the specified date in the notice. Niu J said that when Samiuela signed his consent to the reversion he had no legal interest in the allotment, which was wholly held by his father. It was only after Paula Kava's surrender was approved by Cabinet that Paula's interest ceased, and after that time Samiuela did not sign anything to indicate a consent to the reversion. Furthermore, the consent did not "amend" s54 such that notice was no longer required to be published, as there might be another person who might be the heir.

[18] The Judge also said that the earlier decision of this Court depended on Lord Nuku's admission in his pleadings. It had made no finding that the heir failed to make a claim. The matter was not *res judicata* because the plaintiffs, the Kavas, were not parties to the case.

[19] Niu J upheld the claim of Paula and Samiuela Kava and ordered the Minister to publish the notice in accordance with subsections (2) and (3) of s54. He also ordered Lord Luani to cease exercising any right or authorising the doing of any act on and over the tax allotment surrendered by Paula Kava.

[20] The appeal against that decision by Lord Luani relies upon a plea of *res judicata*. Both appellants also assert that a partial failure by the Minister to comply with the notice requirements of s54 has not had the consequence that Samiuela Kava still has the right to claim the tax allotment.

Res Judicata

[21] Mr Fonua submitted that Paula and Samiuela Kava were privies of Lord Nuku in the case of *Nuku v Luani* and also "privies of facts directly in issue" in that decision because it was Paula who surrendered the allotment and Samiuela who consented to that. Counsel said that this Court had already decided the issue. The present Court, and Niu J below, could not set aside or overrule its earlier decision.

[22] We have to say that this was a forlorn argument. Paula and Samiuela were not parties to the earlier case nor were their interests in any way represented by a party to it. There was simply no privity between them and Lord Luani or the Chinese companies. It would be quite wrong if their ability to bring their claim was thwarted by something done in a case in which they had no right to participate and where they could not control what admissions were made by Lord Nuku. And, as this Court made no ruling on the issue whether surrender of the allotment had occurred, merely holding Lord Nuku to his pleading that it had, a determination to the contrary in the present case between different parties would not overrule the earlier decision. Assuming for the moment that we were to find that Samiuela could claim the allotment as heir to Paula, that finding would not permit Lord Nuku to say that there had been no reversion to Lord Luani at the time of the quarrying operations because as between Lord Nuku and Lord Luani that question has been finally determined in Lord Luani's favour. Inconsistencies of this kind are sometimes created where the same issue has to be determined in separate cases between different parties but the possibility of an inconsistency cannot prevent or inhibit someone not directly or indirectly engaged in the earlier case from asserting and establishing his rights in the matter. The two (inconsistent) decisions would have to be understood in the light of what was pleaded and proved by different parties in the differently run cases.

Non-compliance with s54

(a) Submissions

[23] Mr Fonua said that what the Minister had done by way of publication was sufficient in circumstances where Samiuela had in fact wanted his father to be able to surrender the allotment so as to be able to acquire the allotment at Ha'ateiho, to which his right as heir of his father would attach. He drew attention to the Privy Council decision in *Kaufusi v Taunaholo* [1984] Tonga LR 70. But no question about public notification under s54 arose in that case which predated the present notice requirements. The Privy Council said in passing that following surrender there was no guarantee that the person intended by the previous holder, and named in his letter of surrender, would

obtain a grant. That remains the position, but it does not assist the appellants' arguments.

[24] For the Minister, Mr Sisifa submitted that there had been partial compliance in that the valid notice had been published once in the terms stipulated by s54 and so establishing the 12-month period for any claim by an heir. He argued that the Court had a discretion in those circumstances not to grant relief. Counsel cited the decision of Ford J in *Koloamatangi v Koloamatangi* [2003] Tonga LR 131 where no notice at all had been given that the heir's claim failed. But that case is readily distinguishable because there had been a new grant of the allotment which the Court was unwilling to set aside in circumstances where the new grantee was innocent of any fraud, being unaware the previous holder had any child, and had expended a considerable sum in building and other works before the heir came forward and brought his proceedings. In this case no new grant has been made and it is the estate holder, not a grantee, against whom the heir claims relief.

[25] Mr Sisifa also raised the spectre of many potential claims long after a year from the publication of a notice and indeed, although not in this case, outside the 10-year period of limitation in s170 of the Act.

[26] In response, Mr Edwards SC said that the requirements of publication were mandatory; the language of s54(2) did not import or confer any discretion on the part of the Minister. Counsel cited two decisions of the Supreme Court – discussed below – which laid down and confirmed that defective compliance was not effective against a legal successor to the surrendered land. Counsel also noted this Court's remarks in *Nuku v Luani* quoted at [14] above. He submitted that the existence of a discretion in the Court would render the requirements of s54 "redundant". He also observed that Lord Luani would lose nothing if the allotment was inherited by the lawful successor, although in oral argument he appeared to indicate that a claim against him if Samiuela obtains the allotment may be in contemplation.

(b) Discussion

[27] Section 54(1) makes it lawful for the holder of an allotment, with Cabinet consent, to surrender his allotment. If the holder has an heir, subsection (1) states that, subject to the provisions of the Act, which include of course the balance of s54, the allotment "immediately devolve[s] upon the person who would be the heir of the holder if such holder had died". If subsection (1) still stood alone in s54 the consequence of the surrender would therefore be that the allotment would immediately become the property of the heir.

[28] But subsection (1) has since amending legislation in 1991 been qualified, and indeed contradicted, by subsection (2) and, particularly, subsection (3) which provides for the giving of a notice by the Minister of Lands requiring any person claiming to be the heir ("the legal successor to the surrendered land") to lodge a written claim to the allotment by a date specified in the notice. That date cannot be less than 12 months from the date the notice is "first published" in accordance with subsection (2). (It is convenient to call this the "12 month period" although the Minister may by his notice specify a longer period).

[29] Subsection (2) requires the Minister to publish the notice of the Cabinet's consent to the surrender in one issue of the Tonga Government Gazette and in three issues of a Tongan weekly newspaper within two months of the date of the notice. Neither of the additional subsections requires that the first publication must be in the Gazette. Therefore, time begins to run for the heir to make his claim once there has been one publication in either the Gazette or a weekly newspaper. We must determine what consequences flow from the failure of the Minister to complete three further publications as required by subsection (2) within two months of the date of the notice. The section is silent about this important matter.

[30] Although subsection (1) continues to say that there is an immediate devolution, the effect of subsection (3) is to make that devolution conditional upon the making of a timely claim by the heir. Absent a timely claim, subsection (3) states that the allotment "will revert to the estate holder". (Curiously, and in contrast to subsection (1), it does not mention any reversion to the Crown, which may well be a drafting oversight.)

[31] We pause to comment that s54 deserves legislative re-consideration. There is, for instance, the further curiosity that, inconsistently with s82, it gives no rights to a younger son if the heir does not make a claim, or by virtue of s48 is not entitled to a grant (we assume, without deciding, that s48 is the overriding provision). Nor, importantly, does the section spell out what is to be the consequence of an intervening grant of the allotment to another person, as happened in *Koloamatangi v Koloamatangi.*

[32] If there is no publication at all, time never begins to run against the heir, because there is no (first) publication creating a starting point for the 12-month period. If one publication occurs, time does begin to run, and the section does not provide for it to cease if the required subsequent publications do not follow within the 2 month period from the date of the notice. However, it surely cannot have been intended by the Legislature that where the publication does not fully comply with subsection (2), the

heir is nevertheless to lose his right to claim the allotment upon expiry of the date specified in the notice, despite the obvious potential prejudice that can result for him. We are therefore drawn to the view that the Legislative intention must be taken to be that the right is not lost and that there is a rebuttable presumption of prejudice to the heir when there is an absence of publication in full compliance with subsection (2). Accordingly, we consider that in that circumstance the heir does not lose his right to claim upon expiry of the 12-month period.

[33] But how much later can the heir then bring his claim? We fortunately find no need to consider this question: whether time is set at large or whether any claim must be made within a reasonable time of when the heir learns of the surrender and what a reasonable time might be. These are matters better addressed by the Legislature.

[34] We do need to determine whether the position is different when the heir knows that his father is surrendering the allotment and has signified to the Minister in writing that he consents to it. We consider that it is, because the heir's written consent amounts to a representation to the Minister that he intends to waive his rights under s54 to claim the allotment. In that circumstance, knowing of the surrender, he will not be prejudiced by the Minister's failure to publish all of the four notices.

[35] However, the section makes no provision for a notification of consent to surrender by an heir and clearly does not bar him from changing his mind and, in effect, withdrawing his consent by making a claim under subsection (3) within the 12-month period. (In some cases it may be that he will have contractually bound himself not to make a claim or is estopped from retracting his waiver of his rights.)

[36] We have concluded that, subject to a complication shortly to be discussed, Samiuela, having indicated in writing to the Minister that he consented to Paula's surrender, cannot after the expiry of the 12 month period – indeed long after – be heard to say that the allotment did not revert to Lord Luani as provided for in s54(3).

[37] We acknowledge that Mr Edwards referred us to a statement by Lord President Scott in *Fatafehi v Kuea* [2011] TOLC 1; LA 30 of 2009 (10 January 2011) that the precise terms of s54 must be strictly complied with and Lord President Paulsen's approval of that statement in *Kioa v Kioa* LA 5 of 2016 (17 November 2017). But in neither case was there any real examination of the requirements of the section. In *Fatafehi* an heir who had signed a written consent to a surrender in favour of a brother was held to be estopped from denying that he had renounced his claim and the circumstances in which that occurred were the focus of the judgment. Nor do we accept that the issue is as straightforward as Scott P seems to have thought.

[38] The complication is Paula's change of mind which led him in June 2011 to request the Minister to cancel his surrender of the allotment. That is how, accurately in our view, what Paula did was described in the evidence of Mr Moala, a Senior Lands Registration Officer. Crucially, however, the Minister never granted that request. Instead, he met with Lord Nuku to discuss the position and a Registration Officer, Mr Vea, then confirmed to Paula that the tax allotment he wanted at Ha'ateiho was available to be granted to him. Paula therefore decided, as he said in his brief of evidence, "to continue with the surrender" and he wrote to the Minister asking him to "proceed with the surrender". That obviously had reference back to the original surrender letter which Samiuela had countersigned. Thus when Cabinet agreed to the surrender it was acting on Paula's original surrender application.

[39] The evidence was that Samiuela was very much guided by Paula and acquiesced in what he was doing. He was told about the change of mind at the time Paula wrote his request for cancellation, but he claims not to have known about Paula's letter in November 2011 asking the Minister to proceed. However, he admits that Paula told him in December or January that the surrender was proceeding so he knew about it, and must have accepted the Minister would proceed on the basis that the heir was consenting, before the matter went to Cabinet in February 2012. In fact he said in evidence that he knew the surrender had gone ahead because he saw an advertisement of it. We therefore find that Samiuela was an heir who consented in writing to the surrender. So he cannot now – outside the 12 months period – purport to withdraw his consent and make a claim under s54(3).

[40] It is most unfortunate that the Ha'ateiho allotment proved later to have been granted to someone else but that is not a matter for which Lord Luani has any responsibility.

Result

[41] The orders of the Court are:

(a) The appeal is allowed;

(b) The orders of the Land Court are set aside;

(c) The claim of the respondents against Lord Luani and the Minister is dismissed;

(d) The respondents are ordered to pay the costs of Lord Luani in this Court and in the Land Court, to be fixed by the Registrar if not agreed; and

(e) The Minister must bear his own costs.

Whitten P

Blanchard J

Hansen J