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

AC 10 of 2021
(LA 4 of 2020)

BETWEEN:

TALI-KI-HA'AMOA FATAFEHI Appellant

-and-

[1] SIONE AFEMEIMO'UNGA
[2] MELE'ANA AFEMEIMO'UNGA
[3] LORD LAVAKA
[4] MINISTER OF LANDS Respondents

JUDGMENT OF THE COURT

Court: Whitten P
Hansen J
Randerson J
White J

Counsel: Mr S. Fonua for the Appellant
Mr V. Latu for the First and Second Respondents
No appearance for the Third Respondent
Mr S. Sisifa S.G. for the Fourth Respondent

Hearing: 22 September 2021
Judgment: 28 September 2021

Introduction

1. On 13 September 2019, the Appellant became the registered holder of a town allotment at Pea in the estate of the Third Respondent ("*the allotment*"). The First and Second Respondents ("*Mele'ana and Sione*") have lived on the allotment for more than 30 years and have raised their children there. In March 2020, the Appellant brought proceedings in the Land Court for their eviction from the allotment. Mele'ana and Sione counterclaimed for a declaration that the Appellant's registration was unlawful and for an order directing the Minister of Lands ("the Minister") to cancel the registration. On 19 February 2021, Niu J dismissed the Appellant's claim and found that his registration was unlawful.[1] The Appellant appeals that decision.

Background

2. In the 1950's, a man by the name of Sioeli Leone was living on the allotment. He moved and allowed Tuitu'u and Heilala Folau to occupy the allotment. They built a wooden

[1] *Fatafehi v Afemeimo'unga* [2021] TOLC 3.

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house and lived there with their six children. Their eldest son, Tali Snr, moved to the United States for work.

3. In 1992, Tali Snr financed works to the house. The was some issue at trial as to whether those works involved an extension to the existing house or its demolition and reconstruction of a substantial concrete block dwelling in its place. The trial judge found the latter and that the work was undertaken with the assistance of Tuitu'u and Heilala's other children at the time. Once completed, Tu'itu'u and Heilala and their eldest daughter, Fane and her children, the Appellant ("*Tali Jnr*"), Puikala and Kaufusi, and their two sons, Lisiate and Leone occupied the house. That same year, Fane and her husband and children moved to another allotment.

4. Mele'ana is the youngest daughter of Tuitu'u and Heilala. She was born on the allotment. When she married Sione in 1992, they moved from Havelu to the allotment and the new house to look after Tuitu'u and Heilala.

5. That same year, Tu'itu'u passed away. In the years that followed, Lisiate and Leone moved away, leaving only Mele'ana and Sione and their children living with Heilala on the allotment.

6. In 2007, the Appellant married and continued to live with his wife on a nearby allotment with his parents and their children.

7. In the same year, during his return from the U.S., Heilala told Tali Snr that she wanted the Appellant to have the allotment. Tali Snr agreed and returned to the U.S.

8. In 2008, Heilala approached the representative of the estate holder and asked for the allotment to be registered to the Appellant. The representative later attended the allotment with an application form which the Appellant signed. The judge accepted, as a fact, that on that occasion, Mele'ana stated that she was not happy with the Appellant having the land because the allotment was her home. Heilala told her to be quiet because the matter had nothing to do with her. The representative advised the estate holder that Heilala and her family were living on the allotment, although not legally; that the Appellant was one of Heilala's grandchildren; and, that they all agreed with the Appellant's application. There was no evidence that Mele'ana's disagreement was ever communicated to the estate holder.

9. On 10 February 2010, the estate holder signed the application thereby giving his consent to the grant in favour of the Appellant and declaring that there was no impediment to the grant.

10. In 2012, Heilala passed away.

11. It was not until 4 June 2015 that the Appellant's application was submitted to the Ministry of Lands with a copy of the representative's advice to the estate holder.

12. On 20 June 2016, the Appellant wrote to the Minister and stated, among other things, that there had been agreement about his application between Heilala and the rest of the children, but that after she died, disagreements had arisen, particularly with his 'mother's

younger sister' (being Mele'ana) .

13. On 29 November 2016, the Appellant's lawyer wrote to Mele'ana and Sione demanding that they vacate the allotment.

14. On 30 November 2016, Tali Snr wrote to the Minister confirming his wish that Mele'ana and Sione continue living in and maintaining 'his' allotment until he returned.

15. On 19 December 2016, a Ministry officer inspected the allotment. She then prepared a report in which she recorded, relevantly, that:

    (a) the house had been built by Tali Folau (being Tali Snr), who lives in America, for his parents, Tuitu'u and Heilala, to live in; and

    (b) they had since passed away and the Appellant's younger sister was living there and maintaining the allotment with the permission of Tali Folau.

    Details of the features and improvements to the allotment were also recorded on a sketch map together with a photograph of the substantial house.

16. On 17 July 2019, a different officer provided a brief to the Minister on the application. In it, she stated, relevantly, that:

    (a) the allotment had been allocated to Tuitu'u but that he had passed away without applying for registration;

    (b) Tuitu'u and Heilala wished to give the land to the Appellant since he is their grandson;

    (c) that the allotment was occupied by Mele'ana (the Appellant's aunt) "*upon the permission of Tali since he travels very often to USA*;" and

    (d) Mele'ana had "*been acknowledged about this application since the premises was built by Tuitu'u and his wife in intention to Tali*" [sic].

    The officer recommended that the application be approved.

17. On 29 July 2019, the Minister approved the application.

18. On 2 August 2019, the Secretary of Lands informed Mele'ana and Sione that the Minister had approved the grant of the allotment on which they were living to the Appellant and required them to vacate the allotment.

19. On 13 September 2019, a deed of grant in favour of the Appellant was registered.

The judgment below

20. The learned trial judge found, in summary, that:

    (a) the house on the allotment belonged to Tali Snr;

    (b) therefore, the statement in the brief to the Minister that the house had been built by Tuitu'u and Heilala with the intention that it would pass to the Appellant was wrong;

(c) as the estate holder had never required them (or Tuitu'u and Heilala before them) to vacate the allotment, Mele'ana and Sione had been lawfully residing on the allotment since 1992;

(d) the estate holder was never informed that Mele'ana was 'not happy' with the proposed grant. Therefore, the advice to the estate holder by his representative that all the children and grandchildren had agreed that the allotment be granted to the Appellant was untrue and that only Heilala, Fane and the Appellant had so agreed;

(e) as a consequence, the declaration by the estate holder that there was no impediment to prejudice the grant was in error because Mele'ana and Sione lawfully occupied the allotment and they were not agreeable to it being granted to the Appellant;

(f) the Minister was aware that Mele'ana and Sione were in lawful occupation of the allotment and that they were not agreeable to it being granted to the Appellant, and that if he was not aware that they had been living there for then 29 years, that was due to his officers failing to inform him;

(g) as such, Mele'ana and Sione were persons who could be adversely affected by a decision of the Minister to grant the allotment on which they were living to another person, and therefore they ought to have been afforded an opportunity of being heard by the Minister before he decided the application;

(h) the inspection by the first officer in 2016 did not constitute an opportunity to be heard by the Minister;

(i) the brief by the second officer in 2019 to the Minister misrepresented that:

  (i) the house had been built by Tuitu'u and Heilala, whereas it was built by Tali Snr;

  (ii) the house was built and intended for the Appellant, whereas it was built by Tali Snr for the parents, Tuitu'u and Heilala, to live in; and

  (iii) 'Tali', the applicant, travelled often to the U.S. and had left the care of the house to Mele'ana, who was agreeable to the grant, because there was no evidence that the Appellant (Tali Jnr) travelled often, if at all, to the U.S. or that he left the house in the care of Mele'ana or that Mele'ana ever agreed to the grant;

(j) the brief therefore was not a fair representation of Mele'ana and Sione's side of the story; and

(k) accordingly, the grant was made in breach of natural justice and was therefore unlawful.

Appellant's submissions

21. On this appeal, Mr Fonua, submitted that the trial judge erred for the following reasons, in summary:

(a) Tuitu'u and Heilala built the original house on the allotment with the intention that it would eventually belong to the Appellant. When asked for a reference to the evidence of that intention, Mr Fonua referred to the brief to the Minister.[2] When asked for a reference to the evidence at trial as to the source of the statements recorded by the second Ministry officer in the relevant section of the brief, Mr Fonua explained that there was no such evidence.

(b) The written submission[3] that the evidence suggested that, in 2008, everybody in the family agreed with Heilala's wish that the allotment be granted to the Appellant, was modified by Mr Fonua in oral submissions to effect that there was no evidence that any other family member disagreed with Heilala's wish. That, of course, conflicts with the judge's finding that Mele'ana expressed her discontent at the time the estate holder's representative brought the application for the Appellant to sign. We note in that regard, that during her evidence at trial, Mele'ana herself denied having said anything at that time to her mother to the effect that she was unhappy with the grant in favour of the Appellant or that "women should own land".[4]

(c) The written submission[5] that Mele'ana was interviewed twice by the Ministry officers, once in 2016, and again in 2019, and that she never expressed any discontent with the application, was corrected by Mr Fonua in his oral submissions to effect that Mele'ana was only interviewed once in 2016. In that regard, we note that in the relevant section of the site inspection report,[6] there was no record of Mele'ana being asked how she felt about the application. During her evidence at trial, she said that the officer told her she was there in relation to the Appellant's application but that Mele'ana did not understand that to mean for the purpose of registration.[7]

(d) The judge had 'distorted' certain of the facts including that the reference in the brief to the Minister accurately stated that it was Tali Snr who often travelled to the United States, not the Appellant. We observe that the brief did not state that. The only reference was to 'Tali' travelling, and all other references to Tali were clearly to the Appellant.

(e) Mele'ana and Sione had no right to be heard because they were 'mere occupiers' of the allotment, who admittedly had either no ability or interest in claiming it for themselves, and who had not expended money in building any improvement on the allotment nor had they acted in reliance upon any promise or other actionable representation such as in *Tafe v Viau* [2006] Tonga LR 287.

(f) The judge's decision was based in equity by an apparent finding that by reason of their long occupation, Mele'ana and Sione had a legal right to the allotment, which

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[2] AB 110
[3] [18]
[4] AB 220 and 249-250
[5] [20], [31] and [51]
[6] AB 108
[7] AB 233, 239-240.

was inconsistent with the *Constitution* and the *Land Act*.

(g) The Appellant had done everything in accordance with the requirements of the Act.

(h) The decision below "*is a direct assault on the registration system under the Land Act*" and "*means that there is no security afforded to any Tongan subject who registers an allotment in his name*".

Respondents' submissions

22. Mr Latu submitted, in summary, that:

(a) The Minister was aware that Mele'ana and Sione and their children were occupants of the house on the allotment and that they were not happy with the proposed grant to the Appellant. When asked during oral submissions for a reference to any evidence that the Minister was aware that Mele'ana and Sione were 'not happy', Mr Latu conceded that there was none. That is consistent with the contents of both the 2016 field inspection report and the 2019 brief to the Minister, neither of which contained any reference to Mele'ana (or Sione) being asked about whether she agreed to the Appellant's application. To the extent that the Appellant's 2016 letter to the Minister[8] referred to disagreements after Heilala died, 'particularly the younger sister of my mother', there was no evidence that the officer who conducted the site inspection or the one who prepared the brief were aware of the Appellant's letter or whether they asked Mele'ana or Sione about it. Nor was there any evidence that the Minister was aware that the reference to the younger sister of the Appellant's mother was to the Mele'ana referred to in the report and brief as the person in occupation of the allotment.

(b) The trial judge was right to find that Mele'ana and Sione had a right to be heard before the Minister decided the Appellant's application.[9]

(c) The estate holder was misinformed as his representative failed to report Mele'ana's discontent at the time the application was signed by the Appellant.

(d) The judge "*correctly applied the principle of Equity*" because the Minister failed to follow proper procedures and policy leading to a breach of natural justice.

(e) The inconsistencies between the inspection report and the brief to the Minister constituted "*false representations*".

23. Mr Sisifa, for the Minister, adopted a neutral position on the appeal and therefore made no submissions on the substantive issues.

Consideration

24. It is well established that registration is presumed to be final, paramount and conclusive, until it has been established that it came about as a result of an error of law (i.e. contrary

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[8] AB 99-100

[9] Referring to *Tafa v Viau*, ibid; *To'a v Taumoepeau* (unreported, LA 10 of 2012); *Hakeai v Minister of Lands & ors* [1996] Tonga LR 142; *Cocker v Palavi & anor* [1997] Tonga LR 203; *Manu v 'Aholelei* [2015] Tonga LR 135 and *Naulu v Tupou & ors* (unreported, AC 1 of 2015, 8 April 2016).

to the *Land Act*), fraud, mistake, breach of the principles of natural justice or of a promise made by the Minister.[10]

25. Here, on the issue of natural justice, the two central planks to the Appellant's submissions – that Mele'ana and Sione were not entitled to natural justice; alternatively, that they were afforded an opportunity to be heard – cannot be accepted.

26. Since at least the decision of this Court in *Hakeai v Minister of Lands* [1996] Tonga LR 142, 143, it has been held to be:

> *"... clear law that a person whose rights, interests or legitimate expectations are imperilled by an official's consideration of some other person's application will generally be entitled to a fair opportunity to be heard before a decision adverse to him is made. ... ".*

27. There was no doubt that Mele'ana and Sione had lawfully occupied the house on the allotment for almost 30 years, by the permission of Tali Snr and the acquiescence of the estate holder. That right of occupation was imperiled by the Minister's consideration of the Appellant's application for a grant of the allotment.

28. The Appellant's submission on this issue, that Mele'ana and Sione had no right to be heard because they either could not apply (in the case of Mele'ana) or had disavowed any interest in applying (in the case of Sione), for registration of the allotment, was not to the point. The submission assumed that if the Minister had been properly and fully informed in relation to Mele'ana and Sione's occupation and opposition to the application, he would nonetheless have been required to approve the Appellant's application and grant the allotment to him. As accepted by counsel during argument, that is not necessarily the case. There was no legal requirement on the Minister to grant the application even where there is no competing claim. There may be other circumstances, such as here, which may weigh against any particular application. Other measures are also available to him. For instance, in an appropriate case, the Minister may grant a lease to persons who are unable to legally claim registration of an allotment but who otherwise have sufficient connections to the land to warrant continuing them.

29. Of course, as Mr Fonua pointed out, these are all matters for the Minister to consider and determine within his broad statutory powers to grant allotments which are available in accordance with the Act. That indubitable proposition assumes that in so exercising that power, the Minister has all relevant information before him and that he takes that information into account and does not take into account any irrelevant factors.

30. Here, the fact that Mele'ana and Sione had occupied the allotment for almost 30 years was not only a relevant, but a powerful, factor to be considered by the Minister. None of the information before him apprised him of that fact. Similarly, the Minister was not aware that Mele'ana and Sione opposed the application.

31. On the Appellant's alternative submission, there was actually no evidence that Mele'ana

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[10] For example, see *Skeen v Sovaleni* [2005] TLR 298; *Mone v Paane* [2009] TOCA 26 at [14] citing *Lautaha v Minister of Lands* [1995] Tonga LR 153 at 160-161.

and Sione were given an opportunity to be heard by the Minister, or his authorized officer in 2016, as to whether they agreed with the Appellant's application, and if not, their reasons for opposing it.

32. We do not agree with the judge's reference to the brief recording that Mele'ana agreed to the grant.[11] The brief did not contain any statement to that effect. The reference to her having "*been acknowledged about*" the application was ambiguous, but we do not consider it could be interpreted as assent. In any event, there was no suggestion in the evidence at trial, including Mele'ana's viva voce evidence, that she ever expressed to anyone from the Ministry that she agreed with the proposed grant to the Appellant. More importantly, she was never asked.

33. Further, the judge was entitled to find that the Minister was likely to have interpreted the reference in the brief to 'Tali' travelling to the United States, and permitting Mele'ana to occupy the house, as a reference to the Appellant and not Tali Snr. This too was ambiguously recorded. It served to suggest that the Appellant had a stronger tie to the allotment that was actually the case. Mr Fonua's assertion that the reference was in fact to Tali Snr was untenable. As such, and to the extent that he considered the matter as relevant, the Minister was likely to have been misled.

34. Similarly, from the information he did have, the Minister was, or ought reasonably have been aware, that:

    (a) Tali Snr wanted Mele'ana and Sione to continue to occupy and maintain the allotment until his return from the United States;

    (b) there were material inconsistencies between the relevant contents of the brief and the earlier inspection report;

    (c) neither contained any reference to how long Mele'ana and Sione had occupied the allotment; and

    (d) neither contained any reference to Mele'ana and Sione being asked whether they agreed to the proposed grant, and if not, their reasons for opposing it.

35. The Minister was required to adopt a reasonable and fair procedure to ascertain the facts before exercising his power.[12] The plain shortcomings in the inspection report and brief, and the lack of relevant information gathered by his officers, did not reflect a reasonable and fair procedure on this occasion. The Minister therefore ought to have made further enquiries before deciding the application, including giving Mele'ana and Sione a proper opportunity to be heard.

36. For those reasons, we consider that the judge was correct to find that the grant to the Appellant was in breach of Mele'ana and Sione's rights to natural justice and was therefore unlawful.

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[11] Judgment [54(c)].
[12] *Tafa v Viau* [2006] Tonga LR 287 citing *Kioa v West* (1985) 159 CLR 550 at 627.

Result

37. The appeal is dismissed.

38. It is necessary to make the following further consequential orders:

    (a) The Minister is directed to cancel the registration of the allotment in the Appellant's name.

    (b) The Appellant's application for a grant of the allotment is remitted back to the Minister for further consideration, according to law.

39. Although the Minister was ordered to the pay Mele'ana and Sione's costs of the proceeding below, we are persuaded that as he took no active part in this appeal, it is appropriate that costs follow the event. Therefore, the Appellant is to pay the First and Second Respondents' costs of the appeal to be taxed in default of agreement. There will be no order in respect of the Minister's costs.

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Whitten P

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Hansen J

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Randerson J

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White J

COURT OF APPEAL TONGA