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IN THE COURT OF APPEAL
LAND JURISDICTION
NUKU'ALOFA REGISTRY

AC 5 of 2021
(LA 6/2019)

BETWEEN:

NEIL TAUFAHEMA Appellant

-and-

[1] PAULA TAUFAHEMA
[2] MINISTER OF LANDS Respondents

JUDGMENT OF THE COURT

Court: White J
Harrison J
Morrison J

Counsel: Mr D Corbett for the Appellant
Mr S Fili for the First Respondent
Mr S Sisifa for the Second Respondent

Hearing: 30 March 2023
Judgment: 6 April 2023

Introduction

[1] This is an application for leave to apply to recall the orders of the Court of Appeal made on 31 October 2021 and leave to set aside a ruling of the Court of Appeal, or alternatively order a new trial.

[2] The Applicant (Neil) and the First Respondent (Paula) are brothers. They have long disputed the entitlement to a portion of an allotment in the estate of Prince Tungi of Navutoka, once known as "Onevai". The allotment is registered in Neil's name. On the front portion is a house which is owned and occupied by Paula.

[3] The general background between the parties is set out in the decision of the Lord Chief Justice sitting in the Land Court.[1] For present purpose that can be adopted without repeating it, except where necessary to elucidate the issues before this Court.

[4] The general history of the litigation can be summarised thus:

(a) 27 September 2006: the registered holder of the allotment surrendered it by letter to the Minister for Lands;

(b) 7 March 2007: Cabinet approved the surrender;

(c) 5 November 2008: the Ministry of Lands prepared a notice in form of Schedule IVA of the *Land Act*, confirming Cabinet's consent to the surrender and giving notice for any claimants to lodge their claim by 4 November 2009, failing which the allotment would revert to the estate holder; no claim was lodged in that period;

(d) August 2015: Neil applied for registration of the allotment with the estate holder's consent;

(e) 26 October 2017: the Minister approved the registration;

(f) 12 December 2017: the allotment was registered in Neil's name;

(g) 8 March 2019: Paula issued proceedings in the Land Court;

(h) April 2020: discovery was completed; no documents relating to publication pursuant to s 54(2) of the *Land Act* were disclosed;

(i) 20 October 2020: Nui J published the decision in *Kaufusi v Lord Ma'afu Tuhu'aulahi and Minister of Lands*,[2] in which reference was made to a publication in a local newspaper of 342 names of persons who had apparently not paid the relevant publication fees for notices under s 54(2) of the *Land Act*;

(j) 30 November 2020 to 1 December 2020: the trial of Paula's claim in the Land Court took place;

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[1] *Paula Taufahema v Neil Taufahema and Minister for Lands* (LA 6 of 2019), 31 December 2020: paragraphs 10-38.

[2] *Kaufusi v Lord Ma'afu Tuhu'aulahi and Minister of Lands*, [2020] TOLC 10; LA 21 of 2018.

(k) 31 December 2020: the Lord Chief Justice issued judgment in favour of Paula;[3] the point upon which he succeeded was that the Minister had failed to comply with the requirements of s 54(2) of the *Land Act* following the surrender; that meant that the Minister had no power to grant registration of the allotment to Neil; the grant and registration was set cancelled and the Minister was required to complete the requirements of s 54(2) in full;

(l) 8 March 2021: Neil appealed that decision;

(m) 8 March 2021: Neil applied for leave to adduce fresh evidence on the appeal: that issue was referred to Randerson J; the fresh evidence consisted of a receipt dated 5 November 2008, on Ministry letterhead and issued by the Ministry in the sum of $41.40, showing that sum was received by Paula's sister, Sela Pomana; the receipt was said to be in respect of "Land Notice";

(n) 11 May 2021: Randerson J dismissed the application;[4]

(o) Neil then sought leave to renew the application under Order 7 r 3 of the Court of Appeal rules; and

(p) 1 October 2021: this Court, constituted by Hansen and White JJ, heard that application together with the substantive appeal; the application and appeal were dismissed.[5]

[5] Neil now applies to this Court to recall the orders made by Hansen and White JJ on 1 October 2021, adduce fresh evidence, and either have the appeal determined in his favour, or the matter remitted for a new trial.

Principles

[6] The principles governing an application for leave to adduce further evidence were laid down by this Court in *Takataka & Ors v Hurrell & Ors*.[6] Leave will only be granted if the following are fulfilled: (i) the evidence could not have been obtained with reasonable diligence; (ii) the evidence is such that, if given, it would probably have an important influence in the result of the case, though it need not be decisive; and (iii) the evidence must be such as it can be presumed to be believed.

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[3] *Paula Taufahema v Neil Taufahema and Minister for Lands* (LA 6 of 2019)
[4] AB 78.
[5] AB 282.
[6] (2005) TLR 359.

[7] There is no challenge by any party to the inherent jurisdiction of this Court, in an appropriate case, to recall its orders. That power was described by Whitten LCJ in *Kaufusi v Tukui'aulahi and Minister of Lands*:[7]

> "(d) A number of final courts of appeal in common law jurisdictions have held that they have inherent jurisdiction to recall their orders, even after entry, to avoid irremediable injustice or to correct any injustice caused by an earlier decision, but only in circumstances which have been described as 'special', 'truly exceptional' or 'rare and unusual', such as where a party, through no fault of its own, has been subjected to an unfair procedure, where there was no alternative effective remedy, when fresh evidence has been discovered which could not by reasonable diligence have been adduced in those proceedings, or a party failed to disclose important material, or where the decision may affect future or prospective rights. The Supreme Court of Canada has held that the exception can apply where it would be unjust to enforce the estoppel. No other court has given the exception such a wide operation. There have been very few cases where special circumstances have been established. The exception should be kept within narrow limits to avoid undermining the general rule of finality and provoking increase litigation and uncertainty."

Issues before the Land Court and on the appeal

[8] Before the Lord Chief Justice the central issue was whether the Ministry of Lands had complied with its obligations under s 54(2) of the *Land Act*. There was no evidence that it had published the surrender notice, and the Lord Chief Justice was not prepared to infer it had. In that regard the fact that there was a receipt on the Ministry file recording payment of $41.40 for "Land Notice" by the parties' sister, was an insufficient basis to draw the inference. On that finding the land had reverted to the estate holder.

[9] On appeal, and in the application to adduce new evidence, Neil contended that new evidence, that a publication on 13 August 2013 of the names of 342 people who had not paid publication fees, was sufficient to tip the balance in favour of inferring due publication by the Ministry in 2008.

[7] AC 10 of 2020; 8 July 2021, at paragraph 30(d). Footnotes omitted.

[10] The central issue concerning the advertising required under s 54(2) of the *Land Act* was summarised by Hansen and White JJ in the following way:[8]

> "[4] Neil and the first respondent (Paula) are brothers. Neil was registered as holder of a town allotment in 2017. Registration took place on the assumption that the allotment had been effectively surrendered after the then holder of the allotment, Sitalini Taufahema, the eldest brother of Neil and Paula who had no children, had surrendered the allotment in 2007 and, following the consent of cabinet to the surrender in 2009, the allotment had reverted to the estate holder pursuant to s 54 of the Land Act. The circumstances in which the surrender took place are comprehensively reviewed in the judgment of the Land Court. A critical issue for determination in the Land Court was whether the Minister had complied with the requirements of s 54(2) to advertise Cabinet's consent to the surrender. The Land Court found that he had not complied with the consequence that the allotment never reverted to the estate holder and could not be the subject of a grant by the Minister.
>
> [5] The critical issue in relation to the advertising was whether notice of Cabinet's consent to the surrender had been published in three issues of a Tongan weekly newspaper within two months of the date of the notice. In the Land Court it was found that the evidence did not establish that the notice as required by s 54(2) had been so published.
>
> [6] There was no direct evidence that advertising had taken place. In contending that it had, Neil relied on a receipt from the file of the Ministry of Lands that was produced in the course of the trial by an officer of the Ministry. It was for $41.40 received by the Ministry from Sela Pomana, the sister of Neil and Paula. The receipt was stated to be in respect of "Land Notice". Sela herself could not remember why she made the payment. The Ministry Officer, Mr Halatanu, was unable to say what the receipt was for. He said it would not have been for the surrender notice because the Ministry did not charge for that. He could do no more than acknowledge the possibility that the payment related to the advertising the Ministry itself had undertaken and that it had lost the receipt for the cost."

[11] It was held that the decision of the Lord Chief Justice disclosed no error. The effect of what his Honour held was said to be:[9]

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[8] Paragraphs [4]-[6].

"[20] After carefully reviewing the evidence of Mr Halatanu as to the Ministry's practice at the relevant time, the Lord Chief Justice concluded that the receipt could not support an inference that the payment was for advertising fees paid to a newspaper. He accepted the evidence of Mr Halatanu that Ministry practice at the time was inconsistent with its having charged for the publication of a notice under s54(2). We see no error in the Lord Chief justice's reasoning or conclusion on this issue."

Legislative provisions

[12] Section 54(2) and (3) of the *Land Act* provide:

> "(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 2 months of the date of the notice.
>
> (3) The notice shall be in the form specified in Schedule IVA 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 be not less than 12 months from the date the notice is first published in accordance with subsection (2), failing which the said allotment or part thereof will revert to the estate holder."

[13] There are several matters to note about those provisions.

[14] First, the obligation is mandatory. There is no room for discretionary publication methods or practices.

[15] Secondly, part of the mandatory requirements is that publication be placed in "one issue of the Tonga Government Gazette" and in "3 issues of a Tongan weekly newspaper". Both forms of publication are required. The section does not permit publication in one but not the other. Nor does it permit publication in, say, just one issue of a Tongan weekly newspaper; three issues are required.

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[9] Paragraph [20].

[16] Thirdly, it was intended that strict compliance be made with those requirements. So much may be inferred from the subject matter of the provisions, quite apart from the mandatory nature of the words, in that the rights to land, and the loss of those rights, are the subject of the provisions. A person claiming to be the legal successor to the surrendered land has to be given the chance to see the notice and respond by lodging a claim. A time limit is imposed upon lodging such a claim, namely 12 months from the date of first publication. If the claim is not made in time, or at all, the allotment reverts to the estate holder.

[17] Fourthly, this Court held in *Luani v Minister of Lands & Kava*[10] that "time begins to run for the heir to make a claim once there has been one publication in either the Gazette or a weekly newspaper". Thus, where there is at least one publication, an heir does not lose the right to claim upon expiry of the date specified in the notice, and is protected by a "rebuttable presumption of prejudice".

The new evidence on the current application

[18] The position has changed since the matter was dealt with by the Lord Chief Justice. At that time the only added pieces of evidence was the receipt from the Ministry, and the explanation of procedure by Mr Halatanu. Neil deposes that since then:

(a) in October 2022 Lands Officer Vea informed Neil that "they had located the publication of the surrender notice in the Tonga Chronicle newspaper dated 27 November 2008"; that notice was dated 13 November 2008;[11]

(b) a copy was able to be obtained through a system called MEIDECC;[12]

(c) exhibit A to Neil's affidavit is a copy of that notice.[13]

[19] On the basis of that new evidence Neil seeks orders that: (i) this court's orders made on 1 October 2021 be recalled and the judgment of the Land Court made on 31 December 2020 be set aside; (ii) Neil's registration of Lot 40 be reinstated; and (iii)

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[10] [2020] TOCA 1.

[11] Affidavit of Neil, AB 293, paragraph 9. "MEIDECC" is a reference to the Communications Department of the Ministry of Meteorology, Energy, Information, Disaster Management, Environment, Climate Change and Communication.

[12] Affidavit of Neil, AB 294, paragraph 10.

[13] AB 296.

Paula and the Minister pay the costs of all proceedings in this Court and the Land Court. Alternatively, Neil seeks a new trial in the Land Court.

Position of the Second Respondent

[20] The Second Respondent submits that the application to adduce further evidence should be allowed and the matter returned to the Land Court, to consider whether the original application should be allowed.[14] However, the second respondent opposes any order that the Minister pay costs.

Paula's position

[21] Paula opposes the application on the basis that the new evidence lack genuineness and cogency.

Consideration

[22] The fresh evidence is that a copy of the requisite surrender notice, itself dated 13 November 2008, was published in the Tonga Chronicle on 27 November 2008.

[23] That evidence is significant for several reasons.

[24] First, the Ministry's position at the trial in the Land Court was that it did not possess any records of any publication of the surrender notice in either the Tongan Government Gazette or any Tongan newspaper.

[25] Secondly, Mr Halatanu's evidence was that:

(a) the Ministry's procedures at the time meant that there was no necessary connection between the Ministry's receipt for $41.40 paid by Sela Pomana and the publication of any surrender notice;[15]

(b) it was not the Ministry's practice at that time (or before 2019) to publish notices in the Government Gazette;[16] and

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[14] Submissions of the Minister, AB 316.
[15] Reasons in the Land Court, paragraphs [47]-[61].

(c) he had made a search at the Taimi 'o Tonga newspapers published in November 2008 but there were few records from that time and nothing to show any relevant publication.[17]

[26] Thirdly, that state of evidence, and the absence of direct proof of any publication, was central to the Lord Chief Justice's rejection of a submission that he should infer that publication had occurred.[18] Further, it led to the finding that there was "no publication at all".[19]

[27] Further, it was the foundation for the Lord Chief Justice's conclusion:[20]

> "... the failure to publish the surrender notice at all meant that the claim period never began. As it never began, it could never expire. The circumstances for reversion therefore could never occur. As a result, the allotment did not revert to the estate holder on 5 November 2009, or at all. As the allotment did not revert, it was not available for the minister to regrant. The Minister therefore had no power to entertain or grant any application for the allotment. Accordingly, the grant and registration in favour of Neil was beyond, or ultra vires the Act, and was therefore unlawful."

[28] Fourthly, in *Luani v Minister of Lands & Kava*[21] this Court held that the terms of s 54 are mandatory, and that "time begins to run for the heir to make a claim once there has been one publication in either the Gazette or a weekly newspaper". The newly discovered publication in the Tonga Chronicle may therefore be found to set the start time for a claim to be made, contrary to the finding referred to in the previous paragraph above.

[29] Fifthly, the Lord Chief Justice distinguished the present case from that dealt with in *Luani*,[22] where this Court elucidated the principle that where there is at least one publication, an heir does not lose the right to claim upon expiry of the date specified in the notice, and that the heir is protected by a "rebuttable presumption of prejudice"

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[16] Reasons in the Land Court, paragraphs [48].
[17] Reasons in the Land Court, paragraphs [57].
[18] Reasons in the Land Court, paragraphs [87]-[92].
[19] Reasons in the Land Court, paragraph [92].
[20] Reasons paragraph [104].
[21] [2020] TOCA 1.
[22] Reasons in the Land Court, paragraph [98].

If there was found to be one publication, albeit not in the Government Gazette. the basis for distinguishing *Luani* may disappear.

[30] By itself, the new evidence still falls short of proof of full compliance with s 54(2) of the *Land Act*, which requires that the notice be published in both: (i) the Government Gazette, and (ii) three issues of a local newspaper. However, that evidence arguably:

(a) shows partial compliance with the publication requirements of s 54(2):

(b) may impact upon Mr Halatanu's evidence that the Ministry's receipt of $41.40 from Sela Pomana was unconnected with the publication of a surrender notice:

(c) may impact upon acceptance of Mr Halatanu's evidence (that his searches of local newspapers were fruitless) as telling against a finding of relevant publication; and

(d) could lead to a submission that the Land Court should infer that full publication occurred, even though strict proof is not available.

Paula's submissions

[31] It was submitted on behalf of Paula that:

(a) the new evidence is uncertain according to the laws of evidence, in terms of its "genuineness and place of custody", namely that it was found in one Government repository, MEIDECC, when it should have been held by the Ministry of Lands; reliance was placed upon on s 50(d) and s 57 of the *Evidence Act*; and

(b) at trial the $41.40 fee was linked to possible publication in the Taimi 'o Tonga newspaper whereas it was now a different publication, the Tonga Chronicle: and

(c) Neil's conduct was contrary to the wishes of the landowner (Sitalingi Taufahema), namely that the land be shared between Neil and Paula; Neil has acted to defeat that wish, including by firing a gun into the house[23] to threaten Paula.

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[23] Owned and occupied by Paula: Reasons of the Land Court, paragraph 28.

[32] For several reasons the submissions for Paula cannot be accepted.

[33] First, the fact that the publication notice in the Tonga Chronicle was held by MEIDECC rather than the Ministry of Lands is of little moment. Reliance on s 50(d) and s 57 of the Evidence Act is misplaced. Section 50 relevantly provides:

"The Court shall presume until the contrary is shown the genuineness:

> (d) of every document purporting to be a document directed by law to be kept by any person if the document is kept substantially in the form required by law and is produced from the proper custody as defined by s 57 of this Act."

[34] Then s 57 relevantly provides that:

> "For the purposes of ... section 50(d), documents are said to be in proper custody if they are in the place in which, and under the care of the persons with whom, they would naturally be expected to be found; or if they are in any custody which is proved to have had a legitimate origin, or which the Court considers legitimate."

[35] Factual questions concerning MEIDECC's possession of the published surrender notice are yet to be explored. The current application is not the appropriate forum to do so, as it may require evidence to be adduced from MEIDCC or the Ministry as to how records came to be held by MEIDCC. Neil deposes that Mr Vea said that the Ministry "had located the publication of the surrender notice in the Tonga Chronicle" and "they were able to get a copy of the publication of the surrender notice from MEIDCC". On its face the document bears a heading: "KALONIKALI TONGA 27 'o Novema, 2008 Volume: XLII Fika: 47" which has the appearance of a label for file storage identification. For present purposes that is sufficient for this Court to conclude that the custody in the hands of MEIDCC is legitimate within the meaning of s 57.

[36] Secondly, the fact that the newly found publication now appears to have been made in the Tonga Chronicle rather than what was thought to be the case at trial, does not diminish the apparent genuineness of the evidence. Reference to the Taimi 'o Tonga newspaper at the trial was made by Mr Halatanu simply because: (i) the Ministry did not have physical evidence of the publication on the Ministry file; and (ii) it was

where he went to search for the publication notice, not because he knew it should be there.[24] There was no direct link between the $41.40 receipt and any newspaper.

[37] Thirdly, allegations about Neil's motives or discreditable conduct are irrelevant to the present issues.

Conclusion

[38] For the reasons expressed above the evidence meets the test in *Takataka & Ors v Hurrell & Ors*.[25] The history of searches and confusion in the Ministry's office and about its records enables the conclusion that it could not have been obtained with reasonable diligence. Further, the evidence is such that, if given, it would probably have an important influence in the result of the case. Finally, the evidence is cogent.

[39] Further, given that (i) the evidence will likely lead to further evidence being required from (at least) the Ministry, and (ii) absent evidence of actual full publication Neil seeks to persuade a court that full publication should be inferred, it is appropriate that the matter be referred to the Land Court for a retrial. Of course, that court will have the management of the issues and no doubt will give directions as to the evidence required for the trial.

Costs

[40] Neil seeks all his costs both before this Court on this application and of the appeal and in the Land Court proceedings. For the reasons which follow those orders are inappropriate.

[41] The central issue before the Land Court was whether the Ministry had complied with its obligations under s 54(2) of the *Land Act*. On the state of the evidence at that time Neil could not establish that it had, nor persuade the court that compliance should be inferred. That result may or may not change in light of the new evidence, and whatever else is adduced at the new trial. It is appropriate that those costs be reserved to await the outcome of the new trial.

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[24] Reasons in the Land Court paragraphs 46 and 57.
[25] (2005) TLR 359.

[42] The Second Respondent points out that it has already paid the costs ordered against it by the Lord Chief Justice, in the sums of $14,712.70 and $2,980 for costs thrown away. It contends that those costs should be repaid.[26] That proposed order complicates matters but fairness dictates that it be made given that a new trial will occur where all questions of costs will be ventilated.

[43] The costs of the application before Randerson J and then before Hansen and White JJ were correctly ordered against Neil as the then advanced new evidence did not disturb the findings in the Land Court. Whilst the evidence now adduced on the current application may alter the outcome of the trial, that cannot be said of those proceedings. Success on the present application was achieved only by evidence not then advanced. Those costs orders should not be disturbed.

[44] A different position applies to the costs of the current application and appeal. Neil has been successful in the application to adduce fresh evidence\, the previous orders recalled and to have a new trial ordered. The costs of those proceedings should be ordered against Paula, the only party opposing these applications. Costs should not be ordered against the Ministry as it supported the applications and remitter.

[45] The orders are:

1. Grant leave to adduce further evidence on the appeal.

2. The orders of this Court made on 31 October 2021 are recalled.

3. Appeal allowed and the orders made on 31 December 2020 are set aside.

4. Order the matter to be remitted for a new trial in the Land Court on the issue of the Second Respondent's compliance with s 54(2) of the Land Act.

5. Order the Applicant to pay $17,692.70 to the Second Respondent, being the total of the sums of $14,712.70 and $2,980.00 paid to him by the Second Respondent pursuant to the orders made on 31 December 2020.

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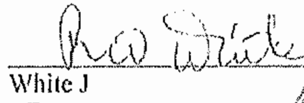
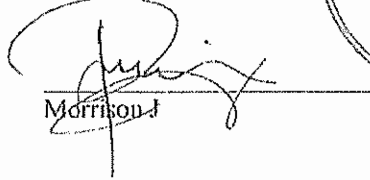
[26] Second Respondent's submissions paragraph 21-22.

6. Costs of the proceedings before the Land Court be reserved to the judge hearing the new trial.



White J

Harrison J



Morrison J