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

AC 6 & 8 of 2023
[LA 11 of 2021]

BETWEEN:

MINISTER OF LANDS
TITO BOURKE LANGI Appellants

AND

1. **TALITE HAFOKA**
2. **VAKE 'ATU'AKE** Respondents

JUDGMENT OF THE COURT

Coram: Randerson J

Harrison J

Heath J

Counsel: Mr S Sisifa Solicitor General and Mr Maka for the First Appellant
Mr. W. Edwards for the Second Appellant
Ms A. Kafoa for the Respondents

Hearing: 27 March 2023
Judgment: 5 October 2023

Introduction

[1] This appeal from a judgment of Justice Tupou[1] raises issues about the validity of the Minister of Lands' processes in registering a grant of an allotment of town land (the land).

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[1] *Hafoka v Langi* LA 11 of 2021

[2] In June 2020 the Minister, who is the first appellant, formally registered the grant of the land to the second appellant, Tito Langi, the current holder of the grant. The land falls within Lord Luani's estate at Nakolo Tongatapu. The first named respondent, Talite Hafoka, is the son of the second respondent, Vake 'Atu'ake. They claim rights to the same land.

[3] It is settled law that a grant holder is entitled to rely on the presumption that his registration is final unless another party can establish that it occurred as a result of an error of law, or fraud, mistake, breach of natural justice or of a promise made by the Minister on the tofi'a holder.[2]. These recognised grounds of challenge reflect the principle that registration is simply a method of proving ownership; it is not conclusive proof of that fact, operating only as proof of the grant itself.[3] .

[3] Talite and Vake (collectively the Hafokas) brought a challenge in the Land Court to the lawfulness of the Crown grant on the grounds that:

1) The Minister failed to make proper inquiries about the land before issuing the grant.
2) The Minister failed to give the Hafokas an opportunity to be heard on the grant.
3) The land was not available to be granted.

[4] While the Hafokas' challenge relied on establishing an arguable right to claim ownership of the land, and necessarily disputed Tito's competing right, the Judge was not required to decide that contest. Her function was limited to determining whether the Minister erred. If so, any remedy was similarly limited to setting aside the Minister's decision and directing him to reconsider his registration of Tito's grant.

Background

[2] *Finau v Finau* [2020] TOLC 13 at para 52.
[3] *Kuli v Maile* [2019] TOCA 23, *Tapealava v Minister of Lands* [2015] TOLC 7 at [18] onwards

[5] The Hafokas' claims were tried in the Land Court before Tupou J in 2022. After hearing evidence from the Hafokas' witnesses, the Judge made these finding of fact:

1) Vake was born in 1961. She married Sione in 1979. Talite is the eldest male of their seven children.

2) At a "fono" at Nakolo in the 1970s, the then, now late, Lord Luani announced that villagers who required land for residential purposes may clear an area and make it their own.

3) In response to the Lord's invitation, Vake's brother Huufifale, cleared the land and planted banyan trees and other crops there. When Vake married, Huufifale invited her and her new husband to live on the land and make it their own. Vake and her husband built a Tongan house there together with a water tank with the intention that the title to the allotment should be registered to any future child of their marriage.

4) Sometime later Vake and her husband got into a dispute with an immediate neighbour, Petueli. He had cut down some banyan trees on the land so he could create a boundary fence between his crops and theirs. The late Lord Luani intervened. At a meeting with the parties, he directed Petueli to remain behind his boundary fence. In answer to his specific inquiry, Vake advised Lord Luani that she was happy with the size of the land which she occupied. The Noble assured her that his son, the present Lord Luani, would take care of any necessary paperwork. Lesili Latu, the Noble's driver, drove him to the meeting and remembered the Noble's advice that he had given the land to Vake. He said that nobody else would claim the land because it was well known in the village that it belonged to Vake's family.

5) Talite was born in 1980. In 1988, Vake and her family moved off the land to live with and care for her unwell mother-in-law. After her parents in law died, Vake and her family moved to her own parents' house to care for a relative with a disability. Despite this relocation, Vake and her family maintained the

upkeep of the land. Their intention was always to have the land registered in Talite's name and to build a larger home there. In recent years Talite has gone to work overseas on a fruit picking scheme to earn sufficient money to build a house on the land.

6) Following another dispute in 1992, the late Lord Luani reaffirmed to Vake that she would have the land ahead of others. However, on a date unknown, Tito's father, Tongia, cut down some trees on the land. Sometime later Tito and Tongia moved some building materials onto it.

7) In 2020, Vake gave a young couple permission to live on the land and maintain it for her in her absence. The couple built a house there but moved away when Tito brought materials to the land. Vake approached Tito who admitted that he knew the land belonged to her and her family. But he acquired it in exchange for money given to the current Lord Luani who needed funds.

8) Vake then approached the current Lord Luani, and explained again her connection to the land, and her intention to register ownership of it for Talite who was working overseas to earn the necessary money. Lord Luani stated his surprise at this advice, and his intention to arrange for alternative land for Tito and his family. That has never happened.

[6] At the conclusion of the Hafokas' evidence the Minister joined by Tito applied for an order striking out the claim. They argued that neither Talite nor Vake had standing to bring it. The Judge dismissed this application. The Minister and Tito elected to call no evidence. In the result the only evidence before the Court was that given by the Hafokas'witnesses.

[7] Tupou J found for the Hafokas on the three grounds pleaded, that: the Minister failed to make proper inquiry before registration; the Minister failed to give the Hafokas an opportunity to be heard on the application; and the land was not available for registration. . We shall refer to her reasoning where relevant when addressing discrete arguments on appeal. She found that the Minister's registration of the grant was unlawful and ordered that it be set aside. She recited that the primary parties were free

to submit fresh applications to the estate holder for consent and submit them to the Minister for reconsideration. She dismissed the Hafokas' claim for damages. She awarded costs against both the Minister and Tito..

Appeal

(a) Standing

[8] On appeal Mr Sisifa for the Minister maintains his submission that the Minister and Tito had no case to answer. He challenged the Judge's findings that both the Hafokas had standing to bring the application because they were in actual possession of the land by virtue of their control over it at the time of the grant in June 2020 or, if not, Vake was a holder of the land[4]as a person who claimed an interest in it. The Judge referred to her legal capacity to hold a lease[5] .

[9] Mr Sisifa differentiates between Talite and Vaka. He relies on Talite's failure to give evidence at trial, his absence from the land and its actual occupation since 1988, his failure to contact Lord Luani, his failure to apply for registration for some 25 years after becoming of age, and the general absence of what he called a colour of right or equitable interest in the land.

[10] We do not accept this submission. The fact that Talita did not give evidence himself is not fatal. The question is whether there was sufficient evidence of his interest in the land to justify a right of claim. Vake's evidence of an interest in the land recognisable by a registered grant was effectively given by her for and on behalf of her family including Talite. The Judge accepted her account of the late Lord Luani's repeated acknowledgements that the land belonged to her and her family. Unless she was widowed, Vake herself would be unable to take a registered grant. But that formality would not prohibit a male member of the family, most likely Talite as her eldest son, assuming legal ownership. Ms Kafoa for the Hafokas' emphasises that any male over the age of 16 years has a constitutional right to take a grant[6].The late Lord Luani must have known of the legal limitations on Vake's right to take title when assuring her that

[4] Section 2 (f) of the *Land Act*
[5] Judgment at paras 64 and 65
[6] Section 113 of the *Constitution Act of Tonga*; section 43 of the *Land Act*

the land belonged to her and her family, allowing an inference to drawn of his acceptance that Talite or another male relative would take title.

[11] Mr Sisifa relies on the same delay ground against Vake, developing it into a proposition that her inactivity since 1998, both in failing to contact the current estate holder after his succession in 2010 and the Minister until after Tito'sregistration, meant that neither was aware of the late Lord Luani's promise. This argument, supported more fully before us by Mr Edwards for Tito, incorporated elements of estoppel and absence of a legitimate expectation.

[12] We do not accept this argument, either. Its apparent genesis was in the Judge's finding that the Minister breached the Hafokas' legitimate expectations and breached the principles of natural justice in denying them an opportunity to be heard[7]. We doubt that that ground can be sustained. There is no evidence that the decision maker, the Minister and not the estate holder, had actual notice of the Hafokas' claim.

[13] But the natural justice ground is immaterial given the Judge's finding on the primary ground that the Minister failed to make proper inquiries about the land before registering the grant [8]. Private law concepts of estoppel do not arise for consideration where the question is whether a minister has discharged his or her statutory duty. In any event, the Judge rightly held that Talite's failure to file a competing application was not fatal. [9] It follows that the grounds advanced to challenge Vake's standing to bring the application in the Land Court must also fail.

(b) Failure to make proper inquiries

[14] The substantive argument on appeal is a challenge to the Judge's finding that the Minister failed to make proper inquiries. In summary, she held that (a) it was a unique feature of this case that the estate holder publicly and expressly permitted the Nakolo villagers including the Hafokas to clear and live on the land which they chose; (b) that factor should have put the Minister on alert and to make wider inquiries of independent people, who would have confirmed the Hafokas' right to the

[7] See judgment: paras 39, 51, 75 & 76 (c)
[8] At para 76 (b)
[9] At para 40, applying *Naulu v Tupou* [2016] Tonga LR 163, at para 13

land , rather than rely on Tito and his family; (c) there was no evidence that inquiry was made of the town officer of 15 years or neighbours; (d) a proper inspection of the land was not made, nor were consequential inquiries ; and (e) an inquiry would not have been an onerous undertaking[10]. She rejected a submission that the fact that as the land had not been previously registered the Minister held no records relating to any relevant history and thus had nothing to prompt an inquiry[11].

[15] In addressing the challenge made to this finding, we repeat that both the Minister and Tito elected not to call evidence. As a result, all they can rely on to counter the Hafokas' evidence, other than any concessions made in cross examination of the Hafokas' witnesses, is a summary, standard form, one-page briefing paper given by Ministry officials to the Minister, with spaces for one word or one-line answers. The document materially recited the location of the land; the applicant's name; a reference to the title search; the existence of " due diligence", noting that the land is held currently by the estate holder; the occurrence of a site inspection (without any details); the applicant's wish to register the land and payment of a survey fee; the estate holder's consent; a recommendation to grant the application; and, finally, the Minister's approval. But there were no additional papers to support the application or explain the basis for its approval.

[16] It is an unusual feature of the Land Act that it does not prescribe any processes to be followed by the Minister when considering an application for registration of a grant[12]. It appeared to be common ground before us, however, that the Minister must make sufficient inquiries to be satisfied of the applicant's right to the land. The estate holder's consent will necessarily be an important but not decisive factor.

[17] Both Messrs Sisifa and Edwards accepted that there was no evidence of any inquiries made by the Minister. However, Mr Edwards sought to redirect the challenge to a proposition that it was unreasonable to impose a duty on the estate holder to make inquiries especially where in his 10 years of ownership Vake had taken no steps to draw to his attention her claim and his late father's assurances. But that is not the

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[10] At paras 42 – 50
[11] At para 52
[12] Finau at fn 3 above at para 67 onwards

point. Responsibility for making the decision rests solely with the Minister[13]. The obligation to make inquiries is on the Minister, not the estate holder.

[18] Mr Sisifa submitted that the scope of the late Lord Luani's assurance to Vaka was confined to a right of occupation only which did not extend to a right of ownership. That submission is contrary to the evidence given by Vake and accepted by the Judge. In any event, this factor could not bear upon the Minister's separate and affirmative duty to make inquiries.

[19] We agree with the Judge's conclusion and grounds for it. The absence of evidence of any enquiries made by the Minister is decisive. That obligation was elementary. If he had made inquiry, the Minister would have learned of the nature of the Hafokas' competing claim to the land and of the extent of the assurances given by the late Lord Luani. His decision on Tito's application may well have been different. He was bound to satisfy himself that there was no other landholder who qualified within the statutory definition, that is a person who claimed to be entitled to the land or an interest in it whether in actual possession or occupation or otherwise[14] We agree with the Judge's that Vake has such a right or interest.[15]

[20] There is nothing to support the peremptory advice in the briefing paper of "due diligence", implying that an inquiry had in fact been undertaken. That statement appears to be based solely on the Langis' occupation of the land when the application was made. The fact that this application was for land that had not previously been registered would only have added to the circumstances demanding a proper inquiry.

[21] Mr Edwards challenges the Judge's related finding that the late Lord Luani's promise was binding on his son and that as the estate holder he should have been taken this factor into account when giving consent[16]. The law is settled, as the Judge found, that an estate holder must exercise his discretion to consent in a proper manner taking account of any restrictions placed on him by principles of estoppel or acquiescence[17].

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[13] *Folau v Taione* [2016] TOLC 2 at [29]
[14] Section 2 (f0 of the *Land Act*
[15] See judgment at paras 34, 35 and 36
[16] At para 69
[17] At para 68, applying *Vai v Uliafu* [1989] Tonga LR 56

Those principles are relevant in a context of the process where the estate holder is not being asked to perform a statutory function.

[22] An argument that the present estate holder was not bound by his late father's assurances is unsustainable. He may have advised the Minister that the land was available for registration, as the briefing paper noted. But in law he was fixed with the knowledge of representations made by his late father and would have been estopped in the different context of civil proceedings if, for example, he had attempted to eject the Hafokas[18]. The adoption of different tests for ejection and registration would be unprincipled. Mr Edwards' attempt to distinguish this case on the ground that the Hafokas had not built a house on the land does not affect the issue of the state of the estate holder's constructive knowledge. In addition, we agree with the Judge that Tito never shared with the current Lord Luani his admitted knowledge of Vake's pre-existing interest[19].

[23] While the Judge's finding on this point goes directly to the weight to be given to the estate holder's consent, it has greater significance as amounting to a stand-alone ground for allowing the Hafokas' application. It supports a finding that the registration occurred because of breaches of promises made by the tofi'a or estate holder to Vake over some years.

[24] As a consequence, the Land Court's judgment must stand.

Result

[25] The appeal against the substantive orders made by Tupou J is dismissed. The Minister and Tito are ordered to pay the costs of this appeal as agreed or, in default, as fixed by the Registrar of this Court

[26] Mr Edwards challenged the costs order made against Tito in the Supreme Court on the ground that they were innocent parties who were drawn into this litigation through no fault of their own. Ms Kafoa opposes, pointing to the Judge's finding that Tito knew

[18] *Lord Fohe v Mahe* [2022] TOCA 23 and s 39 *Land Act*
[19] Judgment at para 70

of the Hafokas' claim but did not disclose it when seeking the estate holder's consent. We agree with her. Tito's appeal against the costs order is dismissed.

[27] We have two concluding observations. First, when considering any fresh applications, the Minister must take account of Tupou J's factual findings about the nature of the Hafokas' rights to claim ownership of the land including her findings about the late Lord Luani's representations and promises to Vake. Second, we repeat that when exercising his discretion on consent, the present Lord Luani must take express account of the promises and representations made by his late father to Vake. That said, we express our confidence that he will find an amicable way to settle the underlying dispute on terms which satisfy the claims of both the Hafokas and Tito and enable each family to acquire suitable areas of land.

Randerson J

Harrison J

Heath J

COURT OF APPEAL TONGA