

IN THE COURT OF APPEAL OF TONGA

LAND JURISDICTION

AC 15 of 2015

NUKU'ALOFA REGISTRY

[LA 9 of 2014]

BETWEEN : KISIONE FAKAFANUA - Appellant

**AND : 1. FAUA DEVELOPMENT LTD
2. WESTPAC BANK OF TONGA
3. MINISTER OF LANDS - Respondents**

**Coram : Moore J
Blanchard J
Hansen J
Tupou J**

**Counsel : Mr. 'O. Pouono for the Appellant
Mrs. D. Stephenson for the First & Second Respondents
Mr. S. Sisifa SG for the Third Respondent**

Date of Hearing : 7 September 2015

Date of Judgment : 7 September 2015

Reason for Judgment : 11 September 2015

REASONS FOR JUDGMENT OF THE COURT

- [1] On 7 September 2015 we declined the appellant's application for the adjournment of this appeal until the first sitting of the Court in 2016 and heard and dismissed the appeal for want of prosecution, also ordering that the appellant should pay the respondents' costs, to be taxed by the Registrar if not agreed upon by the parties. We now give our reasons for those decisions.
- [2] The proceeding brought by the appellant, Mr. Fakafanua, is an attempt to relitigate matters that were, in relation to the respondent Faua Developments Ltd (in receivership), the subject of judgments given in the Land Court by Lord President Scott in 2011.
- [3] Mr. Fakafanua had granted a 50 year lease to Faua of an area of his land at Ma'ufanga on which there is a commercial building. At the time Faua was controlled by Mr. Fakafanua. Faua borrowed TOP\$650,000 from the second respondent, Westpac Bank of Tonga, in order to acquire certain business assets. A mortgage of the lease was executed in favour of the bank. Faua also gave the bank an equitable mortgage (charge) over all its assets and undertaking.

- [4] Faua made default and, acting pursuant to the equitable mortgage, Westpac appointed a receiver of its assets. The receiver caused Faua to bring a proceeding against Mr. Fakafanua seeking orders requiring him to vacate the land comprised in the lease and restraining him and his agents from interfering with Faua's possession of that land during the term of the lease.
- [5] In Faua's statement of claim it pleaded that Mr. Fakafanua "has no lawful right to occupy the Land and Premises during the term of registered lease number 7888". Mr. Fakafanua's statement of defence, and what President Scott described as a proposed amended statement of defence, admitted that allegation. At no stage of that proceeding does Mr. Fakafanua appear to have resiled from that position. The President referred to this admission in both the judgments he gave on an application by Faua for summary judgment.
- [6] The first of those judgments, on 29 July, 2011, dealt only with the validity of the equitable mortgage. The President found that it was a valid security despite not being registered under the Land Act (Cap 132).
- [7] In his second judgment, delivered on 3 September 2011, the President determined that the receiver was not acting as agent of Westpac in

bringing the proceeding. He then dealt with a defence pleading that Mr. Fakafanua had acted on “wrong legal advice” when agreeing to provide security to the bank. The President found that this was not arguable against Faua:

“If indeed the legal advice was somehow tainted then the remedy is against the adviser.”

[8] It had also been pleaded by Mr. Fakafanua that the lease granted was not in accordance with the plan of the land to be leased. But no particulars of the suggested inconsistency were provided to the Court and there was:

“... nothing to suggest that any inconsistency was such as to prevent [Faua] from being able to operate without breaching [Mr. Fakafanua’s] rights.

Faua was “only seeking quiet possession of that which it says it is entitled to occupy.”

[9] The President entered summary judgment for Faua. An appeal against the first judgment was “dismissed as withdrawn” on 27 April 2012. There was no appeal against the second judgment.

[10] But then, having changed counsel, Mr. Fakafanua brought the present proceeding in April 2014 against Faua, Westpac and the Minister of Lands pleading that the lease and the equitable mortgage were invalid

and unenforceable. All defendants applied for the proceeding to be struck out.

[11] Lord President Paulsen granted the application in a judgment delivered on 1 June 2015. He found that the issues Mr. Fakafanua sought to raise against Fava had been pleaded in the earlier proceeding and were either the subject of admission by Mr. Fakafanua or had been decided against him. Therefore as between Mr. Fakafanua and Fava the validity of the lease and of the equitable mortgage were beyond challenge.

[12] As far as the claim against Westpac was concerned, there was no pleading that Mr. Fakafanua was a party to the loan agreements or securities and he had no status to challenge them. If the agreements were, as alleged, entered into as a result of "fraud, forgery and misrepresentation" it was Fava who had title to the right to bring an action against the Bank, not Mr. Fakafanua. No independent relief was sought against the Minister.

[13] The claims against all defendants were struck out with costs.

[14] Mr. Fakafanua gave notice of appeal to this court on 13 July 2015. When the appeal was called for hearing on 7 September, Mr. Pouono

applied for it to be adjourned until the next sitting of the Court in 2016. The only reason put forward in support of this application was that the appellant wished to engage the services of a new leading counsel from Australia who had only just been retained. No supporting affidavit was filed as required by Order 7 Rule 2(1) of the Court of Appeal Rules 1990.

[15] The respondents opposed the application. Counsel for Faua and Westpac, Mrs. Stephenson, was able to point to substantial specific prejudice in that Faua was unable to complete a transfer of the lease to a purchaser and receive the proceeds of sale because of the existence of the appeal. Mr. Pouono was obliged to concede that this would be so if the transaction could be completed for some six months before the next sitting of the Court.

[16] In a jurisdiction in which the Court of Appeal sits only at six monthly intervals a party who initiates an appeal to the Court in time for a fixture to be made at the next sitting must be prepared to have the matter heard at that sitting on the appointed day and time especially in circumstances in which, as here, it is obvious that a long delay will prejudice the respondent who may be unable to obtain compensation in the form of interest because of the uncertain financial position of the appellant. It is incumbent upon the appellant to promptly give

instructions to counsel who is available to appear at the hearing. That does not appear to have been done in this case.

[17] We therefore refused to grant the adjournment that was sought and proceeded with the hearing of the appeal.

[18] The notice of appeal had failed clearly to delineate arguable grounds of appeal. No written submissions had been received from the appellant. Mr. Pouono indicated that he had no oral submissions to make to us. The appellant not having prosecuted his appeal, it was dismissed.

[19] We were, in any event, satisfied from our reading of the material put before the Court including a written submission from Mrs. Stephenson, that the proceeding was rightly struck out by Lord President Paulsen as against Faua. It sought to raise again issues of fact and law determined against Mr. Fakafanua or the subject of admission by him in the earlier proceeding. Section 99 of the Evidence Act and the doctrine of res judicata prevented them being raised again. They were matters which were in contest or were conceded in the Land Court in 2011 and thus have been finally determined as between Faua and Mr. Fakafanua. To the extent, if any, that any aspect of the validity of either the lease or the equitable mortgage may not have been brought before the Land Court in that proceeding a further proceeding

attempting to raise the matter is an abuse of process of the kind falling within the Rule in *Henderson v Henderson* (1843) 3 Hare 100 at 114 – 115. The modern approach to that rule is found in the judgment of Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1; [2001] 1 All ER 481 (HL).

[20] The claim against Westpac also appears to be meritless for the reasons given by the Lord President.

[21] For these reasons, we dismissed the appeal and ordered that the costs of the respondents, taxed if necessary by the Registrar, be paid by the appellant. The costs order made in the Land Court will stand.




Moore J


Blanchard J


Hansen J


Tupou J

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- Appellant

**AND : 1. FAUA DEVELOPMENT LTD
2. WESTPAC BANK OF TONGA
3. MINISTER OF LANDS**

- Respondents

**Coram : Salmon J
Blanchard J
Hansen J
Tupou J**

**Counsel : Mr 'O. Pouono for the Appellant
Mrs D. Stephenson for the First and Second
Respondents
Mr S. Sisifa SG for the Third Respondent**

Date of Hearing : 7 September 2015

MINUTE OF THE COURT

The court made the following orders on 7 September 2015:

[1] The appellant's application for adjournment is refused.

[2] The Court notes no submissions were made by the appellant in this appeal. The appeal is dismissed.

[3] The appellant pay the respondents costs of this appeal as agreed or taxed.

DATED: 11 SEPTEMBER 2015



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Moore J

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Blanchard J

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Hansen J

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Tupou J