

**IN THE COURT OF APPEAL OF TONGA
NUKU'ALOFA REGISTRY**

**AC 15 of 2012
[CV 51/2012]**

**BETWEEN: 1. LAKI NIU
2. MAKINETI JONES
3. SAUNI TAI
4. 'ALIPATE PASINA**

- Appellants

**AND : 1. BENJAMIN TAPEALAVA
2. EMMA JANE TAPEALAVA VEA**

- Respondents

**Coram : Salmon J
Handley J
Blanchard J**

**Counsel : Mr. L. Niu SC for the Appellants
Mrs. 'A. Taumoepeau SC for the Respondents**

Date of hearing : 8 April 2013

Date of judgment : 17 April 2013

JUDGMENT OF THE COURT

- [1] This is an appeal, by leave granted by the Lord Chief Justice on 17 October 2012, from his decision on the jurisdiction of the Supreme Court given on 6 September 2012.
- [2] The question of jurisdiction arose in proceedings in the Supreme Court commenced on 25 July 2012 to prohibit the appellants from entering or remaining on what was described as the plaintiffs' property, being a town allotment at Taufa'ahau Road, Haveluloto, Tongatapu (the property) and their house on that property occupied by the plaintiffs.
- [3] On 27 July after hearing counsel for the plaintiffs and the first defendant in person the Lord Chief Justice granted the injunction sought with effect from 2pm that day. The injunction remains in force.
- [4] The first plaintiff, who claims to be the rightful heir of the last registered holder of the property, in 2011 commenced proceedings against the Minister of Lands (the Minister) in the Land Court challenging the Minister's decision that the original registration of the property in the name of the first plaintiff's father was null and void, and the property had reverted to the estate holder.
- [5] These proceedings remain pending in the Land Court. The present appellants, the defendants below, are not parties to the proceedings in the Land Court, and do not claim under the Minister or the estate holder.
- [6] The second appellant's claim to possession of one or two rooms in the house appears to have been based partly on her blood relationship with the second plaintiff, and what could be no more than a licence to occupy that room or rooms, while visiting from Australia, under long standing arrangements of an informal nature.
- [7] On 23 August 2012, without having filed a defence or an affidavit on the merits the defendants applied for an order striking out the Supreme Court proceedings for lack of

jurisdiction. On 6 September the Lord Chief Justice dismissed the application.

[8] The appellants' challenge to the jurisdiction of the Supreme Court was based on certain sections in the *Land Act* which must be read with the *Act of the Constitution*, and the *Supreme Court Act*.

[9] Section 149 of the *Land Act* relevantly provides

"(1) The Court shall have jurisdiction-

- (a) ...
- (b) To hear and determine all disputes, claims and questions of title affecting any land or any interest in land...and in particular all disputes claims and questions of title affecting any...town allotment or any interest therein...
- (c) ...
- (d) ...
- (e) To hear and determine any question or amount of damages, loss, compensation...or claim in respect of any allotment...or interests of any kind in any land."

[10] Section 151 (2) (b) provides:

"(2) The Court may whenever necessary-

- (a) ...
- (b) grant or issue injunctions affecting lands"

[11] Section 4 (1) of the *Supreme Court Act* provides, so far as relevant:

"(1) The Supreme Court shall have jurisdiction to hear any proceedings other than proceedings which-

- (a) Are excluded from the jurisdiction of the Supreme Court by the *Act of the Constitution*; or
- (b) by law, are within the exclusive jurisdiction of another court or tribunal;

..."

[12] Section 149 of the *Land Act* does not make the jurisdiction of the Land Court exclusive, and is strictly irrelevant.

[13] However, s90 of the *Act of Constitution of Tonga* (the Constitution) provides:

"The Supreme Court shall have jurisdiction in all cases in Law and Equity arising under the Constitution and Laws of the Kingdom (except cases concerning titles to Land which shall be determined by a Land Court)..."

[14] The relevant exclusion from the jurisdiction of the Supreme Court flows only from s90 of the *Constitution* and it relates to "cases concerning titles to land". Accordingly the issue in the appeal depends on whether the proceedings commenced by the respondents on 25 July 2012 concerned "titles to Land."

[15] In our judgment the answer is they did not. Prior to the events of 24 July the plaintiffs (respondents) had been in long undisturbed possession of the house and the property. The plaintiffs claimed title to the house as their personal property under the Law of Tonga, and their possession would be protected against anyone who did not sue within 10 years: *Land Act* s170: *Ilavalu v Minister of Lands Tonga* LR [1974-1980] 29; or who did not have a better title. The plaintiffs' possession was accordingly lawful and entitled them to remain in possession until someone established a better right which certainly cannot be done by a forcible, and therefore unlawful, entry.

[16] The second defendant did not claim before the Lord Chief Justice and has not formally claimed since that she has any title to the house or the land. She has not commenced proceedings in the Land Court, or applied to be joined in the proceedings pending in that Court against the Minister.

- [17] During the hearing Mr. Niu outlined the second defendant's claim to the property traced through an ancestor but there is no trace of this claim in the record before us.
- [18] He said, apparently relying on Order 7 of the *Rules of the Supreme Court* dealing with objections to the jurisdiction of the Court, that he could not take any step in the action without waiving his objection to the jurisdiction of the Supreme Court.
- [19] There are several answers to this explanation. The objection to jurisdiction was based on s90 of the Constitution, which is the supreme law of Tonga, and the objection, if valid, could not be affected by Rules of Court. In any event Order 7 is concerned with the Court's international jurisdiction over defendants who are resident outside Tonga, and not with the Court's domestic jurisdiction under the Constitution.
- [20] The actions of trespass to land and trespass to goods protect lawful possession, not title as such. Even if the Land Court ultimately decides that the second defendant had a better title than the plaintiffs, that decision, after the event, would not justify or excuse the second defendant's forcible entry onto the property and into the house with her lawyer and 6 male security guards. The defendants would still be liable for those trespasses.
- [21] One of the rights enjoyed by a person in lawful possession of land or personal property is the right to be protected from unlawful disturbance of that possession, a right which can be protected by injunction and vindicated in an action for trespass to land or goods. This right and these remedies against self-help, taking the law into one's own hands, are essential for the preservation of the King's peace, and the rule of law in Tonga.
- [22] The rights under the law of Tonga of those in lawful possession of an allotment without a documentary title were recognized in *Tafa v Viau* [2006] Tonga L.R. 125 (LC) and 287 (CA). At [2] the Court of Appeal said:
"At the time of an application made by the appellant for the grant of an allotment...the...respondents...were in lawful occupation of the land."

[23] In that case the respondents' "lawful occupation" without a documentary title enabled them to successfully challenge a grant by the Minister to another, leaving it to the Minister to determine who should receive the new grant.

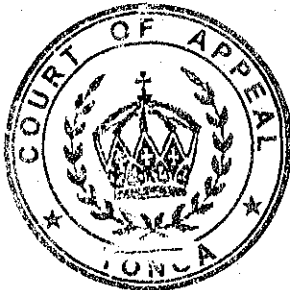
[24] The right of a lawful occupier to undisturbed possession until the Land Court makes an order requiring him to vacate is another aspect of the right conferred by lawful possession of the property and the house.

[25] Since the dispute before the Lord Chief Justice did not concern titles to land, section 151 (2) (b) of the *Land Act*, which gives the Land Court power to issue injunctions, cannot deprive the Supreme Court of jurisdiction either. This power will be exclusive if the dispute concerns "titles to land", but is not expressed to be exclusive in other land cases, such as the present, where title was not in issue.

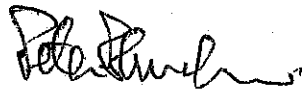
[26] The appeal is therefore dismissed with costs.



Salmon J



Handley J



Blanchard J