

BETWEEN: WESTPACBANK OF TONGA

Plaintiff

AND: LISIA AKATA VAKALAHU

Defendant

BEFORE PRESIDENT PAULSEN

Hearing: 26 February 2016.

Decision: 29 February 2016.

Appearances: Mrs. D. Stephenson for the plaintiff
Mrs. F. Vaihu for the defendant

RULING

The application before the Court

[1] This is an application by the defendant to set aside a judgment obtained by the plaintiff on 25 January 2016. The judgment requires the defendant to deliver up possession to the plaintiff Bank (the Bank) a town allotment that she presently occupies at Ha'ateiho comprised in Deed of Grant 323 Folio 69. The application is opposed by the Bank.

The facts

- [2] The defendant is the widow of the late Tomupua 'Iloahelotu Vakalahi who died on 17 October 2006. Mr. Vakalahi left no will and no application was made following his death for the grant of letters of administration.
- [3] Mr. Vakalahi was the registered holder of the town allotment at Ha'ateiho which he lived on with his family and mortgaged to the Bank to secure payment of loan advances made on and following December 2003. The Bank's mortgage was registered on 26 January 2004 and was subject to a number of registered variations.
- [4] The information provided by Mrs. Vakalahi in support of her application is scant but following her husband's death it appears that she has remained on the land and applied for the land to the Minister of Lands under section 80 of the Land Act as widow.
- [5] Mrs. Vakalahi has continued to make payments to the Bank under the loan secured by the mortgage but the loan fell into arrears. On 27 May 2014 a demand was made for payment of arrears amounting to \$5,236.15. When the arrears were not cleared, on 9 June 2014 the Bank demanded payment of the total balance outstanding being \$47,7~0.22. On 30 October 2014 the Bank served upon Mrs. Vakalahi and the Minister of Lands a notice under section 109 of the Land Act giving notice of its intention to take possession of the land.
- [6] When Mrs. Vakalahi did not deliver up possession of the land to the Bank this proceeding was commenced on 20 May 2015. There followed hearings before the Court at which the Bank's Counsel kindly agreed to assist Mrs. Vakalahi with information that she might require in respect of the claim. Mrs Vakalahi was also advised to obtain the services of a lawyer.

[7] When no statement of defence was filed the action was set down for formal proof. Mrs. Vakalahi did not make any appearance at the formal proof hearing on 25 January 2016. Consequently, after hearing from the Bank's witnesses, and being satisfied that its claim was proved, judgment was entered in favour of the Bank requiring Mrs. Vakalahi to deliver up possession of the land to the Bank within 28 days.

[8] On 19 February 2016, Mrs. Vakalahi filed this application asking the Court to set aside the Bank's judgment. The ground relied upon is that Mrs. Vakalahi is now seeking to have the Bank's mortgage declared null and void "in view of fresh evidence attained from the Ministry of Lands". Mrs. Vakalahi has filed an affidavit in support of the application. In it she says that she instructed a lawyer to represent her and paid him money for his fees but he did nothing to assist her. As far as the fresh evidence is concerned, this consists of a letter from the Ministry of Lands & Natural Resources addressed to Mr Laki Niu of 15 February 2016 in which it is asserted that the Ministry had discovered "this day" (which I must presume means on the date of the letter) that Mrs. Vakalahi had registered two town allotments and that her registration of the land at Ha'ateiho, being second in time, was null and void. The letter states:

As of today the status of the town allotment at Ha'ateiho is cancelled [sic] on our registration but the mortgage on this land still exists as it hasn't been declared void yet.

[9] The letter also records that Mrs. Vakalahi had been advised that she was able to claim her husband's town allotment at Feletoa, and that she had tried to have the town allotment at Ha'ateiho registered in the name of her son but that this request had been refused.

Setting aside a judgment

[10] Under O. 14 Rule 4 Supreme Court Rules (see also O.2 Rule 2 Land Court Rules) the Court may set aside a judgment obtained in the absence of a defence being filed if there was good reason for the failure to file a defence in time; there is an arguable defence; and the plaintiff will not suffer irreparable injury if the judgment is set aside. Ultimately the question is what does the interests of justice require?

Was there a good reason for not filing a defence

[11] In her affidavit Mrs. Vakalahi complains about her lawyer and says that:

That I relied upon Mr. Taione to represent me but recently found out he did nothing to advance our defence in the matter and the case ended up in formal proof by the plaintiff.

[12] There are a number of difficulties with this evidence. Mrs. Vakalahi does not say when she instructed Mr. Taione to act for her and what exactly she instructed him to do. As Mrs. Stephenson points out, Mrs. Vakalahi does not say what, if any, inquiries she made of Mr. Taione or of the Ministry of Lands until after she was served with the Court order on 28 January 2016.

[13] Mrs. Vakalahi also fails to disclose what she means by "our defence in the matter". She certainly cannot be referring to the contents of the letter from the Ministry of Lands because those matters were only known on 15 February 2016, which was well after the Bank's judgment was obtained.

[14] Setting aside a judgment is a significant step. A defendant wishing the Court to take that step must put before the Court cogent evidence of the reason he/she failed to take steps to defend the action in the first instance. Mrs. Vakalahi has not satisfied me that she has shown any good reason for her failure to defend the action.

Does the defendant have a defence

[15] Mrs. Vaihu submits that as Mr. Vakalahi's title to the town allotment was void it must follow that the Bank's mortgage is also void. I was referred to nothing in the Land Act or in decisions of the Court that would support the submission.

[16] I agree with Mrs. Stephenson that the letter from the Ministry of Lands is unsubstantiated. It is almost entirely inadmissible hearsay. What is more, the authority of the person who provided the letter is unclear. It has not been signed by the Minister or the Chief Executive Officer nor is it supported by any documents to substantiate its contents. In short there is an insufficient factual basis for the matters upon which Mrs. Vakalahi now seeks to rely. Furthermore, I note that the content of the letter does not support her case that the Bank's mortgage is void as it expressly states that the mortgage has not been declared void.

[17] Counsel submitted to me that the effect of steps said to have been taken by the Minister to cancel registration of the land is that the land has reverted to the estate holder. There is nothing to suggest that the estate holder or the Minister will not recognise the Bank's mortgage. Whether the estate holder is obliged to do so raises a legal issue that, for the reason that follows, I need not express a view.

[18] In my view, Mrs Vakalahi has no defence to the Bank's claim as she is unable to assert anything in derogation of the Bank's mortgage. By the terms of the mortgage Mr. Vakalahi undertook that he had good right and title to charge both the land and all the buildings upon it and covenanted that any default of the terms of any loan agreement between him and the Bank would also be a default under the mortgage. In any proceedings between Mr. Vakalahi and the Bank Mr. Vakalahi would be estopped from denying either his title to the town allotment or that it was validly provided as security for the debt owing to the Bank. Such an estoppel would also bind the defendant, whose only claim to the land was through her husband as his widow. She cannot be in stronger position vis a vis the Bank than was her husband (Halsbury's Laws of England 4th Ed, Vol 16, paragraph 1035, Elmer W. Roller, *Estoppel as Affecting Title to Real Property*, 7 Marq. L. Rev. 81 (2009), *Inwards v Baker* [1965] 2 QB 29).

Irreparable harm

[19] The Bank did not seek to convince me that it would suffer any irreparable harm should the judgment be set aside.

What does the interests of justice require?

[20] Standing back and looking at the totality of what has been put before me, Mrs Vakalahi has failed to satisfy me that there was good reason that she failed to file a defence or that she has an arguable defence to the Bank's claim that ought to be heard. Although the Bank would not suffer irreparable harm if the judgment were set aside the interests of justice clearly would not be served should I do so.

Result

[21] The application to set aside the Bank's judgment is dismissed.

[22] The parties are invited to reach agreement on costs but if they cannot do so they may file memoranda within 21 days.

NUKU'ALOFA: 29 February 2015.



[Handwritten Signature]
PRESIDENT