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06/05/16

IN THE LAND COURT OF TONGA **LA 01 of 2014**

NUKU'ALOFA REGISTRY

06/05/16

BETWEEN : **ROBERT MERVYN GEORGE MAKAUI**

- **Plaintiff**

AND : **VILIAMI FONISE HAVELU**

- **First Defendant**

AND : **FINAU HUFANGA**

- **Second Defendant**

AND : **MINISTER OF LANDS**

- **Third Defendant**

Before Mr Justice M. D. Scott and Mr Assessor S. Toumo'ua

Mrs F. Vaihu for the Plaintiff
Mrs M. T. Pale-Palelei for the First & Second Defendants
Mr S. Sisifa (Solicitor General) for the Third Defendant

JUDGMENT

INTRODUCTION

[1] This is another family dispute over the grant of an allotment of estate land. The land at Pea, part of the Lavaka estate, is Lot 2 Survey Plan 851 Volume 413 Folio 98 having an area of 1603m². It was granted to the First Defendant on 13 January 2014.

[2] The Plaintiff claims that the land was in fact unavailable since it was already lawfully occupied on his behalf by his mother who, together with his deceased aunt had, with the consent of the then town officer, fenced off the allotment and built a substantial house upon it. The Plaintiff also says that the actions of the Second Defendant, the Estate Holder's Land Representative, had the result that the Minister approved a grant to the First Defendant under the impression that this was the only application, when in fact, that was not the case: the Plaintiff himself was the first person to apply for the land.

THE APPLICABLE LAW

[3] It is settled law that when the grant of an allotment is challenged the Court will only intervene if:

> "The person challenging its validity establishes that the Minister has acted on wrong principles which means that the Minister has acted contrary to statute, or in breach of the rules of natural justice or in breach of a clear promise by the Minister and the tofi'a holder".

(*Havea v Tu'i'afitu & Ors* [1974-1980] To. L.R 55)

It is not in doubt that when the Minister is significantly misled or mistaken as to the true position he will also be taken to have acted on wrong principles (see e.g. *Fosita v Tu'ineau & Ors* (1981 – 1988) To. L.R 105 and *Mateni v Pulileka & Anr* [2009] To. L.R. 410).

[4] The principal provisions governing the grant of allotments out of hereditary estates which are relevant to this case are sections 43(1) and 50(a) of the Land Act.

Section 43(1) provides that:

> "Every male Tongan by birth of 16 years of age not being in possession of a tax or town allotment shall be entitled to the grant

of a tax or town allotment or if in possession of neither to the grant of a tax and town allotment".

Section 50(1) provides that:

"Land for allotments shall be taken from the hereditary estates in accordance with the following rules:

(a) An applicant for an allotment lawfully resident in an hereditary estate shall have his allotment out of land *available* for allotments in that estate" (emphasis added).

[5] The leading authority on the essential requirement for the land to be "available" before it can be granted is *Tafa v Viau & Ors* [2006] To. L.R 236 (CA). The importance of availability being ascertained by the Ministry of Lands both in the case of a grant from Crown Land and a grant from an hereditary estate was recently emphasised by the Court of Appeal in *Fililangi Naulu v 'Amanaki Tupou & Ors* AC 21 of 2015 (8 April 2016).

[6] An application for the grant of an allotment is made by completing and submitting Form No 9. A copy of the Form is at Cap 132 Subsidiary Legislation S-3. It will be seen that the application is addressed to the Minister of Lands (in the case of an estate located on Tongatapu) and that there is provision for the Estate Holder to endorse his support for the application in the following terms:

"I hereby agree to the grant of the allotment as described above and declare that there is no impediment to prejudice this grant".

[7] The importance of the Estate Holder's endorsement was emphasised in *Ma'ake v Lataimu'a* [2007] To. L.R 15, 29 where the Court stated:

"It is an important declaration because if the land is not "available" then that clearly would be an impediment to the grant. There was therefore an obligation upon the estate holder to take reasonable steps to ensure that the Plaintiff had in fact given his consent to the grant before he (the estate holder) signed the declaration in the defendant's application form. The estate holder should not simply have relied upon the applicant in this regard but he should have taken appropriate steps himself to contact the plaintiff and check out the position and ensure that his consent was forthcoming".

[8] When Crown Land is involved it is the Minister himself who is the Estate Holder (section 2) and the requirement that the Minister cause reasonably adequate enquiries to be made by the Ministry before his endorsement is affixed to the application has been repeatedly stressed notably in *Tafa v Viau* [2006] To. L.R 114 (LC) and 236 (CA).

[9] It is not in dispute that hitherto where applications have been received for grants from hereditary estates the Ministry's practice has been to take an endorsement of support by the Estate Holder as sufficient (in the absence of anything known to the contrary) to establish that the land applied for was in fact "available" and that there was no other impediment to the grant. Unfortunately this practice has, as pointed out by the Court of Appeal in *Fililangi Naulu's* case (supra), been found wanting. The Court recommended that in future, whether the application was for a grant of land from a hereditary estate or from Crown Land, the Minister should satisfy himself by all reasonable means that the endorsement on the application form accurately reflects the situation on the ground. It also pointed out that:

"Any application must be directed to the Minister, even if it is not accompanied by a statement of support from the Estate Holder".

I take this observation to imply that an Estate Holder is free to endorse his *opposition* to any particular application before the same is forwarded to the Ministry.

DOCUMENTS

[10] A bundle of Documents numbered and referred to as P1 to P18 A was produced by the Plaintiff by consent.

The First and Second Defendants did not produce any documents but relied on those produced by the other parties.

The Third Defendant produced a bundle of documents numbered and referred to as D1 to D13, by consent.

Two documents, copies of Form 9 applications by the Plaintiff and his brother dated 28 June 2013 were produced as exhibits A and B.

Briefs of evidence of nine of the ten witnesses were filed by consent as follows:

1. Robert Mervyn George Makaui, the Plaintiff;
2. Alakivailahi Fifita, the Plaintiff's mother;
3. Tivise Tauvaka, defacto widow of Plaintiff's uncle Likutau;
4. Lipeti Tupou, a resident of Pea;
5. Viliami Fonise Havelu, the First Defendant;
6. Melaia Finau Havelu, widow of the Plaintiffs uncle Sione;
7. Siope Lola Tu'i'onetoa, a friend of the First Defendant;
8. Finau Hufanga, the Second Defendant; and
9. Warrick Vea, Lands Registration Officer, Ministry of Lands,.

THE PLAINTIFF'S CASE

[11] The Plaintiff was born in Auckland New Zealand in 1981. He is a vehicle refurbisher. He remembered coming to Tonga when he was

about 8 years old. He lived on the land in question with his aunt Lupe, his mother's sister, who had a house there. He attended the local school at Pea and returned to New Zealand when he was about 11. He moved to Australia in 2007 and has lived there ever since. He is still a New Zealand Citizen and also has a Tongan passport which he obtained after his birth was registered in Tonga in 2012 (see Document P-13).

[12] The Plaintiff told the Court that his mother told him that he had some land in Tonga and that his aunt Lupe who had died in 2011 had left her house in Tonga to him (Document P-1). She also told him that she had applied for the land to be granted to him. Since he began working he had sometimes sent money to Tonga, it was for maintaining the house.

[13] Salesi Fotu is a land consultant to H. M. the King who holds the Lavaka title and is accordingly the Estate Holder. Fotu had looked at the files at the Palace Office and found two applications (Exhibits A and B) on the file. There was nothing to show the date on which they were received, either on the applications or on the file. There was nothing to show that they had ever reached the Estate Holder.

[14] Salesi Fotu also found a copy of a letter on the file dated 20 January 2014 (Document 14A). The letter was signed by Lord Luani a representative of the King and was addressed to the town officer at Pea. It will be noted that the First Defendant's deed of grant is dated 13 January 2014 (Document P 17A)

[15] The next witness was Lipeti Tupou, a long time resident of Pea. She told the Court that her uncle Fakavale Tapua was the town officer "in the 1970's". His daughter 'Elisi who was a friend of hers told her that her father had authorised the Plaintiff's aunt Lupe to move onto the land and develop it. This she did, fencing it and building a house

upon it. In this endeavour Lupe was helped by her sister, the Plaintiff's mother. In her opinion it was common knowledge in Pea that the land "belonged to Lupe and [her sister] Alakivailahi".

[16] The Plaintiff's most important witness was his mother, Alakivailahi Fifita. Mrs Vaihu took her through her brief of evidence in detail and she confirmed the truth of its contents. According to this witness she and her sister emigrated to New Zealand in the 1970's. Their plan however was eventually to have a home in Tonga. In about 1983 Lupe returned to Tonga and went to live with her father.

[17] At this time the First Defendant, her brother, was still living in Tonga. There was already family interest in the land which was earmarked for the First Defendant. According to this witness their father sometimes worked on the land, making it ready for his son, the First Defendant. The witness however did not see her brother himself ever work on the land. She told the Court that he was unemployed and suggested that he was not making a success of his life and needed "a fresh start".

[18] In 1985 the sisters and the First Defendant had a meeting: the First Defendant agreed to emigrate to New Zealand where his sisters would help him start a new life. He would relinquish his interest in the land and leave it clear for the sisters to develop: "[the First Defendant] surrendered the land to Lupe so that it could be transferred to my son after the house was built".

[19] It is not disputed that Lupe and her sister built the house, a "brick" house during 1986 and 1987. It has two rooms and a kitchen. Some of the building materials were sent over from New Zealand in a container and the other brothers Sione and Tuita helped with the construction. It was put to Alakivailahi that Lupe had been required to obtain the First Defendant's consent before the TDB would lend

her money to develop the land. She agreed but stated that this was not because he had any legal claim to the land but because Lupe was not at that time resident in Tonga and the Bank needed a resident guarantor.

[20] A year after Lupe's death there was a family reunion in Tonga, as is the custom. The First Defendant visited Tonga from New Zealand for the occasion. According to the First Defendant he went to the land but was refused admission. According to Alakivailahi she was unable to admit him as she did not have the key to the gate. Furthermore, the First Defendant was drunk. She told him to go away and come back another time.

[21] On 24 July, a few days after the anniversary of Lupe's death Alakivailahi and her husband, Captain Fifita went to see the Second Defendant at his residence. They took with them a completed Form 9 application for the land by the Plaintiff. Alakivailahi told the Court that the Second Defendant told them that this was the first application for this land which had never before been registered and that he would see that the Estate Holder, Lavaka, received the application as soon as possible.

[22] According to Alakivailahi the next thing she heard, several weeks later, was from Tivise, the mother of her deceased elder brother Likutau's children who at the time was living in the house. Tivise told her that the Second Defendant had returned the application form to her for forwarding to Alakivailahi. The application was being returned because the First Defendant "had already applied" for the land. When she received the form Alakivailahi consulted a Solicitor in New Zealand.

[23] According to the Statement of Claim trouble began in 2013. Two of her defacto husband's brothers Tuita and Sione tried to evict Tivise

from the house. The matter was reported to the Police who were unable to act as the ownership of the property was unclear.

[24] On about 20 January 2014 Alakivailahi and her husband went to the Royal Palace. They wanted to see the Estate Holder, the King, to find out why the application on behalf of the Plaintiff had been returned. They were unable to see the King however his representative, Lord Luani, agreed to write the letter Document P14 – 14A. The witness stated, that neither she, nor Lord Luani, was aware that in fact the land had already been granted to the First Defendant on 13 January that is, about a week before the letter was sent.

[25] Tivise Tauvaka's evidence was consistent with that of Alakivailahi. In 2011 she moved into the house at her request. She was aware that the house had been built by Lupe and Alakivailahi. She was present when the application was presented to the Second Defendant and at the visit to the Palace. The trouble began when Sione and Tuita came to the house and violently demanded that she leave.

THE FIRST DEFENDANT'S CASE

[26] In his Statement of Defence the First Defendant admits that the house was built by Lupe and in paragraph 2(ii) "that all the expenses was done by Lupe alone". In paragraph 10 he admits that he has never lived on the land although it was "earmarked for him to develop one day". He relied on the fact that when Lupe had sought a loan to develop the land his own signature was required on the application. This, he suggested, was evidence that he was regarded as having a legal claim to the land.

[27] The First Defendant told the Court that he is now aged 71 unmarried and without children. Apart from the visit to Tonga on

the anniversary of his sister's death he has always lived in New Zealand. According to the First Defendant the land was allocated to him by the then town officer Moeaki in about 1965 after he went with his father to see Lord Lavaka. After that "I went and took care of the allotment". He built a seven feet by seven feet dwelling with a flat tin roof and "took occupation". He denied entering into any arrangement with Lupe to the effect that he would surrender the land to her upon emigrating to New Zealand. He did, however agree that Lupe would build a house on the land. He stated that when he went to the house in 2012 his sister Alakivailahi told him to go away and not to return as he had lost the land.

[28] In cross examination the First Defendant denied that Lupe had paid for the house or that she had sent any container from New Zealand. He denied that Alakivailahi had made any financial contribution. He denied that Lupe had made any will. As to his application for the grant of the allotment to him this was made at the suggestion of the Second Defendant. He was not sure whether he knew that the Plaintiff had also applied for the land.

[29] In answer to questions from the Court the First Defendant, for the first time, claimed to have lent two sums of money $6000 and $7000 to assist with the construction of the house. These sums, he claimed, had not been repaid.

[30] The First Defendant called two witnesses. The first was Melaia Finau Havelu. She confirmed the truth of her brief of evidence and in particular that the First Defendant had built "a make-shift shelter (faka-palepale) with a tin roof and thatched walls made out of coconut palm leaves". She stated that "we all knew the land belonged" to the First Defendant. Contrary to the last sentence of her brief she conceded that Lupe had paid for the construction of the brick house.

[31] The second witness for the First Defendant was Siope Lolo Tu'i'onetoa, now the town officer. They had known each other for many years. When they were young men in the 1970's they went to the land and ate tava (lychee) that was growing there. "When I said to Viliami we might be arrested for coming here he answered: who will come and arrest us, the allotment belongs to me".

THE SECOND DEFENDANT'S CASE

[32] The Second Defendant's oral evidence to the Court closely followed his Statement of Defence and his brief of evidence. He accepted that he had received an application for the land presented on behalf of the Plaintiff by his mother and that he had undertaken to process it.

[33] In accordance with the Estate Holder's instructions to give preference to those born in, brought up in and living in Pea he had considered the application and had consulted the family, in particular the Plaintiff's uncle Sione. Sione was not pleased to hear of the application and suggested that the land had been allocated to the First Defendant many years ago. Having made his enquiries he decided that he could not support the Plaintiff's application, not least because his father did not come from Pea but from Houma. He also took into account that the First Plaintiff was "a local of Pea, well known for his talent in the cricket field and local affairs of the community". After receiving the application he went to the Ministry of Lands. Upon examining the relevant map he found the First Defendant's name written on the plan of the land; this confirmed what he had been told, namely that the First Defendant was generally considered in Pea to be the holder of the allotment. It was his policy not to present competing applications to the Estate Holder but to decide which one merited the Estate Holder's approval. This

he did on this occasion and the result was that the First Defendant's application was approved by the Estate Holder and then forwarded to the Minister for the grant to be made.

[34] In cross examination the Second Defendant conceded that he knew Lupe had fenced off and built on the land, however "my only concern is with the land, not constructions". "As to the requirement for the land to be available I took it into account but I thought that if I did it the other way I would be sued by the First Defendant".

[35] Although the Second Defendant had conceded in cross examination that the Plaintiff's application did not reach the Estate Holder, in answering questions to the Court he claimed that he had told the King that there was a competing application. He also claimed that the King was aware that Lupe had built on the land. Finally, he claimed that when Lord Luani wrote the letter on the 20th he had already been told by the Second Defendant that the grant of the land to the First Defendant had already been made.

THE THIRD DEFENDANT'S CASE

[36] The only witness for the Minister was Warrick Vea. His oral evidence closely followed the brief filed. In short, the Ministry received the First Defendant's application endorsed with the Estate Holder's certificate of support. No other application was received by the Ministry and the Ministry was unaware that there was another application or that the First Defendant's application was contested. As was the practice, the Ministry, apart from verifying that the land had not previously been allocated made no actual inspection of the allotment or any other enquiries. It relied on the Estate Holders declaration that there was no impediment to a grant to the applicant. It was on this basis that the grant to the First Defendant had been approved and processed.

[37] At the conclusion of his evidence Vea was asked to compare documents D6 and P12 with document P16. It will be noted that while all these maps show the allotment in question, only P16 has the First Defendant's name endorsed upon it. In Mr Vea's opinion that name could only have been inserted on the plan *after* the First Defendant's application had been received and the area had been surveyed. In his opinion the First Defendant's name would not have been found endorsed on the allotment prior to his application for it being received.

SUBMISSIONS

[38] Mrs Vaihu filed excellent written submissions. Principally, she argued that the allotment was unavailable for grant by reason of its lawful occupation by the Plaintiffs mother and/or the Plaintiff who had inherited the house from his aunt Lupe.

[39] Mrs Pale-Palelei suggested that the occupants of the property were licencees at best and that their licence could not prevail against a claim by the First Defendant (see *Palu v Bloomfield* [1974 – 1980] To. L.R 105). She also suggested that there was no basis for any claim for financial compensation by the Plaintiff who had not shown that he had made any or any significant contribution to the cost of building the house.

[40] As to the Second Defendant Mrs Pale-Palelei submitted that the fraud and misrepresentation claimed by the Plaintiff had not been shown to have occurred. On the contrary the Second Defendant had performed his duties with diligence and competence.

[41] Mr Sisifa contrasted the present case with that of *Fililangi Naulu* (above). As pointed out that in *Naulu* there had been material available to the Minister which suggested that the Estate Holder's declaration did not reflect the true position. In the present case

however the uncontested evidence of Warrick Vea was that nothing had come to the attention of the Minister which cast any doubt on the accuracy of the declaration. Accordingly, the Minister was correct to take it as established that there was no impediment to the grant.

CONSIDERATION OF THE ISSUES

[42] In my opinion the question to be answered is whether the procedures mandated by the Act prior to a grant being made were followed.

[43] As has already been noted, an application for the grant of an allotment must be made by submitting a completed Form 9 to the Minister. It is the Minister, not the Estate Holder, who is authorised to grant an allotment (section 19(2)). The Form provides for the application, before it is submitted to the Minister, to be endorsed with the Estate Holders certificate.

[44] While, as has also been noted, the Estate Holder is responsible for enquiring to the circumstances pertaining to the application (paragraph 7 above) he of course does not have to make these enquiries personally; ordinarily, as in this case, he will have an official representative to consider applications and make enquiries on his behalf. In order to ensure a consistent and ordered approach to applications received, it seems entirely proper for the Estate Holder to give his agent representative guidelines to follow as was done in this case. I find nothing wrong with these guidelines. Having applied those guidelines and made his enquiries the applications or competing applications can then be submitted to the Estate Holder for him either to support or for his support to be withheld. What, however, I am satisfied is a material and unacceptable departure from the statutory procedure for applying for an allotment is for an Estate Holder's agent to intervene in the

procedure by preventing applications (whether or not endorsed with the Estate Holder's support) reaching the Minister at all. This however is what I find, as a fact, happened in this case.

[45] The effect of the decision of the Second Defendant to withhold the Plaintiff's application was to cause the Minister to consider the First Defendant's application as an uncontested first received application for a hitherto vacant piece of land, which of course was not at all the case.

[46] The consequences of the Ministry's reliance on the Estate Holder's certificate alone, without any further enquiries being made, taken together with the suppression by the Second Defendant of the Plaintiffs own application were, that the Minister acted on the basis of materially incorrect information given to him, and as a result he acted on wrong principles. Accordingly the grant must be set aside.

[47] Mrs Pale-Palelei's suggestion that the Plaintiff, at best a mere licencee, could not impugn the rights of a grantee overlooks the fact that the grant itself is invalid for the reasons already given.

[48] It should be understood that the conclusion that the grant must be set aside does not address the question whether the land in question is actually available. That, as the Court of Appeal has repeatedly emphasised (see *Fililangi Naulu v Amanaki Tupou & Ors* (above) paragraphs 23 & 24) is for the Minister to decide.

[49] Before leaving the matter it may be worth pointing out that the Form 9 currently in use is not identical with the Form to be found at S-3 of Cap 132. In its published form the applicant's declaration reads as follows:

> "I hereby declare that I am a male Tongan subject by birth, over 16 years of age ....."

The form currently in use reads:

> "I hereby declare that I am a Tongan subject and have attained 16 years of age".

I am advised by the Court Interpreter that the Tongan version makes it clear that the applicant is male. The important point however is that the current declaration, unlike the Form at S-3 makes no reference to the applicant being a Tongan subject by birth which is a condition of eligibity contained in Section 43(1) of the Act:

> "Every male Tongan subject by birth of 16 years ..." (and see *Ministry of Lands v Kulitapa* [1974 – 1980] To. L.R 101)

[50] Were it to be decided to amend the Form 9 currently in use provision for an Estate Holder to state his *non endorsement* of an application might also be considered.

RESULT:

1. The grant to the First Defendant must be set aside.
2. I will hear Counsel as to costs.

DATED : 6 MAY 2016

FAKAMAAU'ANGA FONUA .... TONGA

M. D. Scott
J U D G E