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IN THE LAND COURT OF TONGA **LA 24 of 2008**

NUKU'ALOFA REGISTRY

BETWEEN : **1. SATUA TU'AKOI**

2. SIOSIUA TU'AKOI

- Plaintiffs

AND : **1. MAFI TU'AKOI**

2. 'ALILIA HUNI

3. MINISTER OF LANDS

- Defendants

Before Mr Justice M. D. Scott KC and Madam Assessor Salote Fukofuka

L. M. Niu SC for the Plaintiffs

S. Tu'utafaiva for the First and Second Defendants

'A. Kefu SC (Acting Attorney General) for the Third Defendant

JUDGMENT

INTRODUCTION

[1] An agreed statement of facts and written submissions by all three Counsel have been filed. There are no factual issues and no evidence was heard. The Court proceeds to judgment following consideration of the papers before it.

BACKGROUND

[2] The land in question is a town allotment whose registered holder, until his death in 2007, was 'Elone Fetaiakimoeata Tu'akoi (Fetaiaki). The First Defendant is his widow. The Second Defendant who was legally adopted, was the only child of the marriage.

[3] Following the death of her husband the First Defendant registered her life interest in the allotment as provided by sections 80 and 87 of the Act. She built a house on the allotment which is where she and the Second Defendant are living with their family.

[4] In 2008 the First Defendant applied to the Third Defendant (the Minister) for permission to surrender her interest in the allotment. As is apparent from the application (Documents 7 & 8) the intention of the First and Second Defendants was that following its surrender and reversion to the Crown the Second Defendant would then seek to lease the land in her own name.

[5] On 30 September 2008 Cabinet approved the First Defendant's request and on 22 October a section 54(2) notice was issued (Documents 27 & 28). Apparently it was published on 6 November 2008.

[6] At the time of the publication several brothers and sisters of Fetaiaki were still alive. These include his sister Satua, the First Plaintiff, and his younger brothers Siosiua, the Second Plaintiff, and Siale. According to a report by the Lands Registration Division (Documents 13 & 14) both Siosiua and Siale were already registered as holders of their own town allotments.

[7] On 17 October 2008 Siale and Satua wrote to the Minister (Documents 21 & 22). They described the First Defendant's request to surrender the land as "unlawful, unconstitutional and ungodly". They asserted that the Second Defendant was not their brother's daughter and demanded that the land "revert back to the family that the property belongs to" following the First Defendant's departure.

[8] On 16 March 2009 Siosiua applied to the Minister to surrender his own town allotment at Ngele'ia. In his letter (Documents 29 & 30) he stated that upon Cabinet approval to his request "I will be available, with no town allotment or tax allotment, and I will be able to become heir for my older brother Fetaiaki Tu'akoi's town and tax allotment at the time his widow [the First Defendant] remarries or dies because they have no legitimate male children (or legitimate female children)".

[9] Between about 19 and 28 November 2009 the Minister received no fewer than eight applications from close relatives of Fetaiaki (including a sister, an illegitimate daughter and four nephews) for the land either to be granted or to be leased to them. On 9 September 2010 the Second Defendant herself applied for a 50 year lease of the land (Document 63).

PROCEEDINGS COMMENCED: THE CLAIM

[10] The writ was issued on 30 October 2008. It was amended on 16 July 2009. The Plaintiff stated in paragraphs 2 and 12 that the Second Defendant "was the illegitimate daughter [of the First Defendant] to another man" and that by agreeing to the First Defendant's request to surrender the land with the intention that it then be leased by the Second Defendant:

> ".. the Defendants have thereby practically alienated the allotment from the blood family of the deceased (Fetaiaki) to the First Defendant's own family contrary to normal practice of the Ministry of Lands which ensures that such allotments are granted only to blood relatives of deceased holders".

[11] In paragraph 12 it was pleaded that the surrender by the First Defendant was unlawful since she was not a "holder" of the allotment within the meaning of section 54(1) of the Land Act.

[12] In paragraph 9 the Plaintiffs claimed that the Cabinet's decision to approve the First Defendant's application was in breach of the rules of natural justice by reason of the Minister's failure to consult the Plaintiffs "their brothers and sisters or nephews and nieces" before the decision was taken.

[13] The only relief sought (apart from costs) was an order declaring:

> "That the purported surrender by the First Defendant of her widows estate on 15 October 2008 [was] null and void".

DEFENCES: FIRST AND SECOND DEFEDANTS

[14] The Plaintiff's claims were denied. It was asserted that the First Defendant was the "holder" of an estate to which the Land Act applies. Consultation, as demanded by the Plaintiffs would have been "impractical", the more so as most of the claimants reside overseas. The land was not being "alienated", it was Fetaiaki's wish that it be given to the Second Defendant.

DEFENCES: THIRD DEFENDANT

[15] The Statement of Defence is dated 20 January 2011. This date is important since it is over two years after the 12 month period in the section 54 (2) notice expired. The Third Defendant pleaded:

> (i) That section 54(1) permitted a widow to surrender her estate;

(ii) That there is no identifiable heir to the land apart from the widow since Fetaiaki's surviving brothers already have registered town allotments;

(iii) That in any event no claimant heir had submitted a claim before the expiry of the section 54(2) notice;

(iv) Therefore the land has reverted to the Crown. In paragraph 11(3) it was also stated that no decision had yet been taken on the Second Defendant's application for a lease made in September 2010.

[16] In paragraph 9(1) the Third Defendant pleaded that the First Plaintiff had no legal standing. The standing of the Plaintiffs to commence these proceedings was the first of the two fundamental questions addressed in the legal submissions. The second was the lawfulness of the surrender.

CONSIDERATION OF THE ISSUES

[17] At the hearing Mr Kefu amended paragraph 3(2) of his submissions to read:

"The First Defendant is a holder of the land under the Land Act and is therefore entitled to waive her rights to the land".

In *Schaumkel & Anr v 'Aholelei & Anr* [2013] TOCA 1; AC 14 of 2012, the Court of Appeal, at paragraph 17 of their judgment accepted that although section 54 does not apply to a widow with a life estate "a widow must be able to surrender her right to an allotment and, in the absence of a statutory procedure directed at such surrender we are satisfied that the procedure approved by the Minister was appropriate".

[18] The term "holder" as defined in section 2 of the Act includes:

> "any Tongan subject claiming to be interested in land which he is legally capable to hold".

This definition clearly includes a widow with a "right to an allotment".

[19] The procedure followed by the Minister in *Schaumkel* was precisely that of section 54. In my opinion a widow's right to surrender her life interest in the allotment is beyond doubt. Whether it derives directly from the Act or from the curial correction of a statutory lacuna is in my opinion, at best, only of academic interest.

[20] On the assumption that a widow has a right to surrender and that a procedure analogous to section 54 should be followed to manage the application and its consequences, the first question that then arises is whether, before agreeing to an application to surrender,

there is a duty to consult all those persons who may hope to acquire an interest in the estate *after* the reversion was taken place.

[21] As will be seen from section 54(3) the purpose of the notice is to:

> ".. require any person claiming to be the legal successor to the surrendered land to lodge his claim in writing to the allotment".

If no valid claim is received within 12 months the land reverts to the Crown or Hereditary Estate (section 87).

[22] In my opinion, examination of sections 82, 83 and 84 make it quite clear that a right to inherit is determined at the date that the death said to give rise to the right occurs. Were this not the case then section 84 could simply be circumvented (as has been attempted in this case by Siosiua – see paragraph 8 above) by someone other than a son or grandson of the deceased holder surrendering the allotment that he already held and then claiming not to hold one.

[23] If this analysis is correct then it must follow that paragraph 23 of Mr Niu's submissions cannot be correct and that the Second Plaintiff has no basis upon which to "claim to be the legal successor" to the land.

[24] The First Plaintiff is a sister of Fetaiaki. She is not his unmarried daughter. Section 82 does not permit her to inherit her brother's allotment.

[25] In my opinion neither Plaintiff is or was able to advance any claim to be the legal successors to the land, which is perhaps why no response was received to the section 54(2) notice before it expired.

[26] The Act provides a procedure for advertising the pending reversion of a surrendered allotment and gives an opportunity to claimants to the legal succession to the land to notify the Ministry of their claim which, if upheld, presents reversion occurring. There is no statutory procedure for advertising an intention to apply for permission to surrender and there is no provision for persons other than those who can advance a section 82 right to inherit to be notified that the application is pending or even to register their interest, whatever it might be, prior to the expiry of the 12 month notice period.

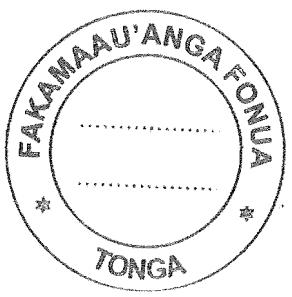
[27] In my view the only rights which the surrender procedure is designed to protect are those which might be lost if the land actually reverted at the end of the notice period. Rights to apply for the land whether by way of grant or lease, do not arise until the reversion has actually taken place. They are not imperilled by the reversion itself.

[28] In my judgment there is no reason or right for any person to be heard by the Minister or Cabinet *prior* to the consideration of the surrender application.

[29] In paragraphs 14 and 20 Mr Niu propounded the right of blood relatives to apply for the lease of reverted land. No doubt such persons have a right to apply for the reverted land to be granted to them. Anyone of full age has, including the Second Defendant, a legitimate adopted daughter of the last male holder of the land and his widow. I am satisfied however that this right is not the same right as the claimed right to be heard before the application to surrender, is considered. In my opinion no such claimed right exists.

[30] It follows from the above that the Plaintiffs have no *locus standi* to bring this action.

RESULT: The claim is dismissed with Defendants' costs to be taxed if not agreed.



DATED : 6 MAY 2016

M. D. Scott
J U D G E