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**BETWEEN:** 'OKUSITINO NGONGO TU'UHETOKA

Plaintiff

18/08/16

**AND:** TUPOU TU'UHETOKA

Defendant

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Hearing : 19 July 2016 and 2 August 2016**

**Date of Ruling : 8 August 2016**

**Counsel : Mr. H Tatila for the plaintiff  
Mr. L Niu SC for the defendant**

**RULING**

[1] This is an application by the plaintiff for an interim injunction that the defendant be evicted from the dwellinghouse upon his town allotment at Lapaha. The application is opposed by the defendant who says that she is the owner of the dwellinghouse and entitled to occupy it.

**The principles**

[2] As I have said on a number of occasions, in Tonga the principles to be applied in considering applications for interim injunctions are those set out by the New Zealand Court of Appeal in *Klissers Farmhouse Bakeries v Harvest Bakeries Limited* [1985] 2 NZLR 129 (CA). These can be summarised as:

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- [2.1] Whether there is a serious issue to be tried.
- [2.2] Whether the balance of convenience favours the granting of an injunction.
- [2.3] Whether the overall justice of the case favours the granting of an injunction.
- [3] Recently in *Mike Pero (New Zealand) Limited v Heath and Ors* [2015] NZHC 2040 Moore J conveniently summarised the matter in this way:

[25] Thus the Court must first consider whether there is a serious question to be tried and, if it determines there is, whether damages would provide an adequate remedy and against that, where the balance of convenience properly lies. In assessing the balance of convenience, regard may be had to the adequacy of damages should relief not be granted, the relative strength of each party's case and the impact of a decision on the rights of third parties.

[26] Finally the Court is required to step back and consider what overall justice requires having regard to these considerations.

[27] I note that after identifying those issues, Cooke J (as he then was) in *Klissers Farmhouse Bakeries* emphasised that:

"...an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generality."

[28] The Court is not concerned with attempting to resolve conflicts of evidence in respect of facts which may determine the case,

nor is it concerned with deciding difficult questions of law which "call for detailed argument and mature considerations".

- [4] The affidavit filed in support of this application was terse. The plaintiff relied largely upon the content of the statement of claim as stating the relevant facts. Counsel need to be aware that in deciding whether to grant or refuse an injunction the Court acts in a principled manner having regard to considerations which go beyond the respective merits of the parties' cases. The papers filed in support of (and opposition to) an application for interim injunction must be fulsome and focus upon all the relevant considerations of arguable case, adequacy of damages, balance of convenience and overall justice of the case.

**The position of the parties.**

- [5] The plaintiff's father was 'Epifanio Moahengi Tu'uhetoka. 'Epifanio owned a tax and a town allotment at Lapaha which he inherited from his father in around 1980. 'Epifanio raised his family on the town allotment, occupying the dwellinghouse on the land. He also obtained and repaid loans to build or renovate the dwellinghouse.
- [6] 'Epifanio died on 5 December 2013. The plaintiff succeeded to his lands and registration was effected on 6 January 2014. The plaintiff lives in Australia. Following 'Epifanio's death, the plaintiff allowed his sister and her husband to occupy the land and reside in the dwellinghouse and more latterly he allowed his adopted brother 'Ioane Falekaono, his wife and six children to live there. They moved into the dwellinghouse on around 8 March 2016.
- [7] The defendant is the sister of 'Epifanio and is the plaintiff's aunt. She lives in New Zealand. In May 2016 she came to Tonga and initially stayed with relatives. On 26 May 2016 the defendant and her brother went to the plaintiff's town allotment and asked Ioane to move out because she wanted to

live there. Ioane contacted the plaintiff who said he was not to leave the property. The defendant and her brother returned on 28 May 2016 and again required Ioane to leave the property. Again he did not do so. As a result of these events, on 2 June 2016 the plaintiff travelled to Tonga from Australia. He decided to allow the defendant to live in the dwellinghouse with Ioane and his family, an arrangement Ioane was prepared to accept. The plaintiff returned to Australia on 16 June 2016. On 17 June 2016 the defendant broke into the property and attempted to prevent Ioane (or his family) returning. The Police became involved. The defendant then lived with Ioane's family for a short time but on 1 July 2016 she removed their belongings and has prevented them returning to the property. On 2 July 2016 the plaintiff arranged for a lawyer to serve a letter on the defendant requiring her to move out of the property and threatening Court action but she refuses to leave.

[8] The defendant has filed an affidavit. In it she says that she was a sickly child and that upon the death of her parents (who died just weeks apart in around October 1980) it was agreed with her siblings that she would have the dwellinghouse as long as she lived and was unmarried because of her 'frail and sickly condition'. However, it appears that the defendant choose in 1982 to move to Australia. Although she returned to Tonga in 1985 she then left again in 1986 and has lived in New Zealand ever since. She says that she did provide financial assistance to 'Epifanio to maintain the dwellinghouse, to service the loans 'Epifanio obtained for renovations and also for family purposes generally, including the payment of school fees.

[9] Much of the defendant's affidavit details her past and present medical ailments. She has clearly suffered from ill health in recent years. In 2015 she was advised to have her breasts removed due to breast cancer. She has had other ailments also. Although she has conventional medical treatment available to her in New Zealand she has decided to rely on traditional Tongan medicine. She says that this medicine involves the light rubbing of her body

with Tongan leaves. In May 2016 she learned that there was a woman in Lapaha who could treat her and she came to Tonga on 23 May 2016. She required Ioane and his family to leave the dwellinghouse as she needs peace and quiet and rest whilst she is being treated. She says she gave Ioane a week to move out of the dwellinghouse and that he (and his family) can live with his parents. She says that she resigned from her job in New Zealand in November 2015 but does not get a sickness benefit now (apparently as she chooses to live in Tonga) and as a consequence she does not have any income to pay rent. She relies on her brothers to provide for her but they have their own families to provide for also.

- [10] The defendant's case then is that her brothers gifted her the dwellinghouse and that Ioane and his family have no right to live there. As far as the plaintiff is concerned, the defendant says that he has no use for the dwellinghouse and that he will own the dwellinghouse upon her death.

**An arguable case**

- [11] There is no dispute that the plaintiff is the owner of the land. The plaintiff regards the defendant as a trespasser and seeks her eviction from the land and also from the dwellinghouse on the land. I did not understand Mr. Niu to contend that the plaintiff does not have an arguable case for the removal of the defendant from his land. He was right not to do so.
- [12] As far as the dwellinghouse is concerned, in Tonga a dwellinghouse is a chattel. In this case the issue of ownership of the dwellinghouse is muddled by the fact that it appears that following the death of both 'Epifanio and his father before him no letters of administration were applied for to allow for the distribution of the estate according to law. However, in an action for trespass a plaintiff does not need to prove ownership of a chattel. A plaintiff must only establish a right to immediate possession of the chattel. I am satisfied that it is clearly arguable that following the death of 'Epifanio the plaintiff took lawful

*de facto* possession of the dwellinghouse, authorizing first his sister and then Ioane and his family to live in it and that this confers upon him a right to be protected from unlawful disturbance (*Niu anors v Tapealava anor* [2013] Tonga LR 55, 58 at [21]). Of course it is open to a defendant to prove a superior title, which is what the defendant contends for in this case. I will deal with this below but for present purposes it is sufficient that I find that the plaintiff's case is arguable.

**Balance of convenience**

- [13] There are a number of factors which I have considered when weighing the balance of convenience.
- [14] The first matter is whether either party will suffer unquantifiable loss in the event that they are successful at trial but not on the interim application (*Wellington International Airport Ltd v Air New Zealand Ltd* (HC Wellington CIV 2007-485-1756, 30 July 2008 at [4]-[14])). In this regard, the defendant contends that she will indeed suffer unquantifiable loss. I accept that the evidence establishes that the defendant is suffering from serious ill-health. Her perception is that the treatment she is receiving will only be effective if she can rest in peace and quiet and that this is not possible if the dwellinghouse is occupied by a family with six children. To her mind the matter is one of life and death (see paragraph 18 of her affidavit). Whether her view has any basis in fact is not at all clear but the plaintiff's counsel did not challenge the defendant's position on this aspect of the case.
- [15] The defendant says that she has nowhere else to live and cannot afford to pay rent. If that is so, it is the result of the defendant's own choices to the extent that she has made herself ineligible for payment of a benefit in New Zealand and has forgone modern conventional medical treatment. That is entirely her right, but there is obvious unfairness in the defendant visiting the consequences of her choices upon the plaintiff, Ioane and his family. It also

appears to me that the defendant is almost certainly overstating her case as she has brothers in Tonga who have, and are, providing for her, but again there was no effort made on behalf of the plaintiff to counter this evidence in a meaningful way.

[16] The plaintiff does not require the dwellinghouse for his own occupation. I am entitled to take into account the interests of third parties. Whilst Ioane would clearly prefer to be living in the dwellinghouse at the present time it was not disputed that he has somewhere else to live. Most importantly, in answer to a question from me the plaintiff's Counsel said that he did not foresee any serious harm would be suffered by Ioane and his family if the injunction was refused. He also noted that Ioane was living with his father and that his belongings that were still at the plaintiff's property (consisting of peanuts and pigs) were not at risk.

[17] Another factor which I can take into account is the respective strengths of the parties' cases. At this stage I can make only a broad assessment of the opposing sides. I have noted above that I consider the plaintiff has an arguable case that he is entitled to immediate possession of the dwellinghouse. The defendant claims she has a superior title. The defendant's case is founded upon an alleged agreement that she said she made with her siblings following their parents' deaths to gift her the dwellinghouse. Her case faces very formidable difficulties in my view. I do not propose to dwell on these difficulties but simply note them. First, it is not clear to me what right the defendant's siblings had to gift her the house. Secondly, the alleged agreement is incongruous with, *inter alia*, the facts that the defendant has lived away from Tonga since 1982, that 'Epifonia lived in the dwellinghouse and raised his family there and that 'Epifonia raised and repaid loans to maintain and renovate the dwellinghouse (albeit the defendant says she and others made some contributions). Furthermore, if there was such an agreement it appears to me that the defendant's ability to assert title

as against the plaintiff may well be subject to a strong limitation defence. My preliminary assessment is that the defendant's case is weak.

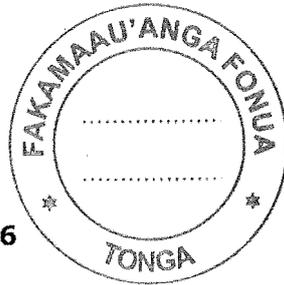
- [18] A further factor that features in my assessment of the balance of convenience is the availability of Court time to hear the substantive action. In many cases it is preferable for the Court to set a case down for an urgent hearing rather than make interim orders of the type sought here. In this case the Court is able to accommodate an early hearing of this action on 28-29 November 2016.

**The overall justice of the case**

- [19] This is an issue upon which I have had to give considerable and anxious consideration before arriving at a conclusion. Notwithstanding her understandable concern for her health the defendant has acted in a high handed manner towards the plaintiff and Ioane. A refusal to grant the injunction sought will cause serious inconvenience to Ioane and his family who have been forcibly removed from their home. Added to that, my assessment is that the defendant's case is weak and that there is a high probability that the plaintiff will prevail in this action.
- [20] Despite all of that, I am going to refuse the application for injunction for these reasons. First, I do not discount the possibility that if the defendant is evicted from the dwellinghouse immediately that may compromise the effectiveness of her treatment. Secondly and importantly, the plaintiff's Counsel conceded that the refusal of the injunction will not result in serious harm to Ioane and his family and that they do presently have alternative accommodation. Thirdly, the substantive action is able to be heard by the Court in a timely manner. Had it not been for a combination of all of these factors I would have been minded to grant the application.

**Result**

- [21] By a very close margin and not without considerable reservation the application for injunction is refused. Costs are reserved.
- [22] This action will be heard on 28-29 November 2016.
- [23] There will be a conference at 9am on Friday, 12 August 2016 at which time I will make timetabling directions.



**NUKU'ALOFA: 8 August 2016**

A handwritten signature in black ink, appearing to be "O.G. Paulsen".

O.G. Paulsen

**LORD CHIEF JUSTICE**