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24/11/16

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY LA 01 of 2016

BETWEEN: PENETI PELESIKOTI

Plaintiff

AND: TU'ITALIKITAHI 'ANAU

First Defendant

AND: MINISTER OF LANDS

Second Defendant

BEFORE THE PRESIDENT PAULSEN

Counsel: Mr. L. Niu SC for plaintiff
Mr. W. C. Edwards SC for first defendant
Mr. S. Lutui for second defendant

Date of Hearing: 14-16 November 2016.

Date of Ruling: 24 November 2016.

rec'd 24/11/16

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY **LA 01 of 2016**

RULING

The nature of the case

[1] On 5 January 2009 by deed of grant 377/71 the first defendant was granted 810m² of land at Kolomotu'a (RP 6318 Lot 20A) as his town allotment. The plaintiff asks the Court to order the Minister to cancel the deed of grant. What is at issue is whether the Minister fulfilled his duty to make reasonable enquires to determine whether there were any impediments to the making of the grant. The plaintiff says that had the Minister made such enquires he would have found that the plaintiff had developed and was living upon the land and that it was not available to be granted to the first defendant.

The facts

[2] The disputed land had previously formed part of the tax allotment granted in September 1978 to one Manase Kaho Tonga. Manase Tonga has now died.

[3] The first defendant (Mr. 'Anau) and his family were from Ha'apai. His father, 'Apolosi Finau 'Anau, was related to Manase Tonga. Manase Tonga had plans to subdivide his tax allotment. Drawings were prepared dividing the property into a number of lots. In around 1999 Manase Tonga allocated an area from his tax

allotment for 'Apolosi 'Anau and family to occupy intending that it would be given to 'Apolosi 'Anau as his own town allotment. 'Apolosi 'Anau was shown the land that he was to be given. The family then cleared the bush and built a little dwelling on the land, which the family occupied for approximately 2 years. 'Apolosi 'Anau and his wife both died in 2001. From around January 2002 the family dispersed from where they were living. Mr. 'Anau went with his wife to Tofoa.

[4] In a letter of 26 March 2002, Manase Tonga and his heir, Sateki Tonga, requested the Minister to surrender part of the tax allotment so that Mr. 'Anau could make an application for it. The letter referred to Lots 26 and 27 and 28. It appears that this meant Lots 26 and 27 on the scheme plan which was Lot 28 of the survey plan. This was not the land allocated for 'Apolosi 'Anau. That land was part of Lot 15 on the scheme plan and Lot 20 on the survey plan.

[5] On 14 April 2003, the Minister applied for Cabinet approval to the surrender of Lot 28 (on the survey plan), which was an area of 1135m² for re-allocation to Mr. 'Anau. On 30 April 2003, by decision No. 705, Cabinet approved the surrender of Lot 28 and on 8 May 2003 Manase Tonga was advised of this by the Ministry of Lands.

[6] On 12 May 2003, the Minister of Lands directed that the surrender application be re-submitted to Cabinet because he had given instructions that allotments from Manase Tonga's land be reduced from 1 rood 24 perches to 30 perches each. In a handwritten note of 12 May 2003 he wrote:

> VILIULA
>
> (1) I think this is ALL WRONG. I gave instructions that the allotments be reduced from 1R 24 p to 30p each and then surrendered accordingly (there was another map to this effect).
> (2) Have these resubmitted to Cabinet i.e. for Tu'italikitahi 'Anau..."

[7] On 14 May 2003, an application was submitted by the Minister to Cabinet to amend Cabinet decision No. 705 so that the area surrendered was Lot 20A consisting of 810m² instead of Lot 28 consisting of 1135m². Lot 20A was the southern half of what was Lot 20 on the survey plan. Lot 20 had a total area of 1620 m^2 and this was equally divided to create a reduced Lot 20 and Lot 20A. On 28 May 2003 Cabinet approved the Minister's application and issued a decision in these terms:

> Area to be surrendered under CD No.705 of 30/04/2003 is 810m² (Lot 20A) instead of 1135m² (Lot 28).

[8] On the survey plan (document 6 of the Minister's bundle) there is a boundary line drawn across Lot 20 to indicate the division of Lot 20 into Lot 20, as the northern half, and Lot 20A, as the southern half, with words handwritten on the southern half "Surr, CD 927 (285.03)" to indicate the approval of the surrender of that half by Cabinet on 28 May 2003.

[9] There is no evidence that Manase Tonga consented to or was advised of the Minister's intention to seek an amendment to Cabinet decision No. 705, nor was there any explanation for the change from Lot 28 to Lot 20A. There was no evidence either that Manase Tonga was advised that Cabinet decision No. 705 had been amended after Cabinet approved the change. His subsequent behaviour would suggest that he was not aware.

[10] In about September 2003, Manase Tonga and the plaintiff (Mr. Pelesikoti) agreed that Mr. Pelesikoti would pay $16,000 to Manase Tonga in return for which Manase Tonga would surrender all of Lot 20 (by which I mean the full 1135m^2 incorporating Lot 20A) so that Mr. Pelesikoti could make an application for it.

[11] It is relevant to note at this juncture that Mr. Pelesikoti already had a town allotment at Hofoa and he retains this allotment. By law of course, he could not have two town allotments.

[12] The agreement between Manase Tonga and Mr. Pelesikoti was that Mr. Pelesikoti would pay $10,000 as a deposit with the balance to be paid upon the surrender of Lot 20. I am satisfied that these sums were paid and also that upon payment of the deposit Manase Tonga gave Mr. Pelesikoti permission to occupy and build on the land.

[13] Mr. Pelesikoti immediately began laying and filling the road to Lot 20 and then filled the whole of Lot 20 with gravel rocks and soil, and in November 2003, began constructing his dwelling house. Mr. Pelesikoti said that the expenses associated with this work totalled $179,480. Although he did not produce any receipts, the figure was not challenged and on viewing the property does not seem excessive. By April 2004, the house was completed and Mr. Pelesikoti moved into the house and has lived in it and occupied the whole of Lot 20 from then up to the present.

[14] I conducted a site visit. Only by doing so did I obtain an appreciation of the extent of the development of Lot 20. The land that surrounds Lot 20 is low lying, undeveloped and covered in overgrown and dense bush. In wet weather that land would undoubtedly be swampy. Lot 20 has been raised by perhaps 2 to 3 feet. It is filled with coral rock and has been levelled with finer rock and soils. The work involved was significant and must have been back breaking. A modern dwelling house is built on the northern half of the property. The southern half (that is what is

now Lot 20A) is attractively grassed but also has on it a sceptic tank and a piggery. It is quite obvious to anyone inspecting the property that this is one residence.

[15] On 4 February 2004, Manase Tonga wrote to the Ministry of Lands and requested to surrender the whole of Lot 20 in favour of Mr. Pelesikoti. On 22 March 2004, the Ministry of Lands submitted that request to Cabinet and on 14 April 2004, by Cabinet decision No. 484, Cabinet approved the surrender of Lot 20. It is unlikely Manase Tonga would have sought to surrender Lot 20 had he been aware that the Minister had obtained an amendment to Cabinet decision No. 705 to surrender Lot 20A in favour of Mr. 'Anau.

[16] On 27 April 2004, the Ministry of Lands Assistant Secretary wrote to Manase Tonga and informed him of Cabinet's approval of his surrender of Lot 20 and required him to pay TOP$36 for the notice of surrender to be published in the newspaper. Manase Tonga gave that letter to Mr. Pelesikoti and he took the letter to the Lands Office and paid the TOP$36. He said he was told by a Lands Officer, by the name of Tevita, that it would be one year before he could make an application for the land.

[17] Mr. Pelesikoti said that he also spoke to the Lands Registration Officer Warrick Vea (Mr. Vea) and that he told Mr. Vea that it was his intention that his two sons would apply to each have half of

the land when they turned 16 years old. Mr. Pelesikoti's sons were then just 9 and 4 years of age respectively. He said that Mr. Vea told him that there was no time limit within which an application had to be made for the land and that it was all right to wait until his sons were 16 years old and then they could apply for the land.

[18] Mr. Vea gave evidence. He frankly confirmed that he did have a conversation with Mr. Pelesikoti, although I understood him to say this conversation occurred later in time and after Lot 20 had reverted to the Crown. He was aware that Mr. Pelesikoti had already developed and built a house on Lot 20 and that he could not apply for it as his own town allotment as he already owned a town allotment at Hofoa. He acknowledged that Mr. Pelesikoti told him that he wanted Lot 20 for his two sons. Mr. Vea said he informed Mr. Pelesikoti that as Lot 20 had been surrendered, intending that he apply for it, the usual practice was that the land would not be given to anyone else. He told Mr. Pelesikoti that nothing was to be done until his sons turned 16 at which time they could apply for the land. However, in giving that advice Mr. Vea was not aware that Lot 20 had been subdivided into Lot 20 and Lot 20A. Mr. Vea also said that he did not inform Mr. Pelesikoti to go and occupy and build on Lot 20 and he did all of that at his own risk.

[19] There is no suggestion that Mr. Vea intended to mislead Mr. Pelesikoti. His evidence is significant as it confirms that he was aware that Mr. Pelesikoti had built on and was occupying Lot 20 and also that Mr. Pelesikoti intended to sub-divide Lot 20 and have his sons apply for it as their own town allotments.

[20] On 22 September 2004, the Minister published the public notice of Cabinet's approval for the surrender of Lot 20. By 22 September 2005 no person had made any claim to the land so that it reverted to the Crown and was available for grant.

[21] An issue arose as to whether the Minister of Lands, who in 2004 was Noble Fielakepa, was also aware that Mr. Pelesikoti had built on Lot 20 and was occupying the land. Mr. Pelesikoti said that Fielakepa was aware of this. His evidence was that Fielakepa had attended celebrations (including a wedding) on a nearby property and that Manase Tonga told him that Fielakepa had said that the work that Mr. Pelesikoti had done filling the land was beautiful. In other circumstances that might not be thought particularly significant except that Fielakepa was related to Manase Tonga and the evidence suggests that he was also closely involved in the subdivision of Manase Tonga's land. Specifically, there is the evidence of his direction in May 2003 to amend Cabinet decision No. 705 with no record of any notice having been given of this to Manase Tonga. As I have noted, Manase Tonga's subsequent conduct in agreeing to surrender all of Lot 20 in favour of Mr.

Pelesikoti suggests that he may never have been consulted. In cross examination, when asked about this change, Mr. Vea said that it was made because of the personal relationship between the Minister and Manase Tonga. I am satisfied that Fielakepa was aware that Mr. Pelesikoti had developed and was occupying Lot 20.

[22] On 28 April 2006, the Minister published a public notice of Cabinet's approval to the surrender of Lot 20A. By this stage, however, Lot 20, which incorporated Lot 20A, had already been surrendered and had reverted to the Crown. There was no explanation for the delay in advertising the surrender of Lot 20A following the issue of the amended Cabinet decision No. 705 on 28 May 2003.

[23] On a date which was likely in 2007 (the application cannot be found) Mr. 'Anau applied for the grant of Lot 20A. In a Savingram dated 25 September 2007, the Minister, who by this stage was Noble Tuita, wrote to the Secretary for Lands, Survey and Natural Resources advising that he had granted Mr. 'Anau's application on 12 September 2007 and that the survey fee was paid on 17 September 2007. He directed that the section be surveyed and a draft deed of grant be prepared and referred back to him to complete registration. Mr. 'Anau's deed of grant for Lot 20A was issued on 5 February 2009.

[24] There is no evidence that before granting Lot 20A to Mr. 'Anau there was any inspection of the land by the Ministry to determine whether it was occupied nor is there any evidence that anyone at the Ministry searched the Ministry's own records as to the history of dealings with Lot 20A.

[25] Mr. Pelesikoti's evidence was not clear as to when exactly he learned that Lot 20A had been registered to Mr. 'Anau but it appears most likely that he was advised of this in around 2013 by Manase Tonga's heir, Sateki Tonga, who told him to check out the status of his land at the Lands Office as something had happened to it. Mr. 'Anau recounted that in April or May 2013 he visited the allotment and Mr. Penesikoti was angry that he had registered the land in his name and told him to correct "the forged registration".

[26] On 21 May 2013 Mr. Penesikoti wrote to the Minister expressing concern that a part of the land surrendered for him (that is Lot 20) had been registered in Mr. 'Anau's name. He noted that he intended to subdivide the land for his two sons to hold as their town allotments and asked that "this wrongful registration be corrected." He never received a response to his letter.

The legal submissions.

[27] For Mr. Pelesikoti, Mr. Niu argues that the grant to Mr. 'Anau was invalid and should be set aside. This is because, he said, Mr.

Pelesikoti had lawfully occupied and developed Lot 20 with the consent of the previous holder, Manase Tonga, and the land (including Lot 20A) was not available for grant.

[28] Alternatively, Mr. Niu argues that the Minister failed to make reasonable enquires before granting the land to Mr. 'Anau and was unaware of the substantial presence that Mr. Pelesikoti had on the land. Mr. Niu submitted that the Minister proceeded on a wrong assumption that the land was unoccupied. Mr. Niu relied upon *Tafa v Viau and others* [2006] Tonga LR 287 (CA), *Finau v Minister of Lands & Heimuli* [2012] Tonga LR 127 (CA) and *Manu v Aholelei* [2015] Tonga LR 135 (LC).

[29] For Mr. 'Anau, Mr. Edwards argued that Mr. 'Anau had a prior claim to Lot 20A and that Mr. Pelesikoti had no standing to bring this action. He submitted that Mr. 'Anau's prior right arose by virtue of the fact that Cabinet had approved the surrender of Lot 20A to enable him to apply for it on 28 May 2003 and it was not until 14 April 2004 that Cabinet approved the surrender of Lot 20.

[30] As to the issue of Mr. Pelesikoti's standing, Mr. Edwards argued that Mr. Pelesikoti had no interest in Lot 20A which could support this claim. He placed particular reliance upon the following matters; that Mr. Pelesikoti was not applying for Lot 20A for himself, that he was (so it was submitted) party to an illegal arrangement to acquire the land from Manase Tonga in breach of

sections 12 and 13 of the Land Act, that Mr. Pelesikoti already had a town allotment and was prohibited by section 48 of the Land Act from applying for another and that Mr. Pelesikoti did not advise Manase Tonga or the Minister that he already had a town allotment when the surrender of Lot 20 was approved by Cabinet so that the approval must be regarded as null and void. Mr. Edwards emphasised that Mr. 'Anau took no issue with Mr. Pelesikoti's right to occupy the land upon which he has built his house, but says that he should be happy with that land.

[31] For the Minister, Mr. Lutui's starting point was that the Minister is only required to consider those facts that are before him when deciding whether to make a grant. Mr. Lutui relied upon the evidence of Mr. Vea that it was not the Ministry's practise to carry out an inspection when dealing with the subdivision of tax allotments as there is a presumption of vacancy in respect of such land. He argued that Mr. Pelesikoti was not physically occupying Lot 20A and noted that Mr. Pelesikoti could not have applied for Lot 20A for himself and there was no competing application for Lot 20A on behalf of his sons or anyone else that would have suggested to the Minister that an inspection should be carried out. It is the Minister's view that Mr. Pelesikoti was wrong to have developed the land without a legal title and that he took the risk of that.

The law

[32] It is well established that the Minister is required, when making a grant, to make such enquires as the information before him makes reasonably necessary (*Naulu v Tupou and Others* (Court of Appeal of Tonga, AC 21/15, 8 April 2016 at [13]).

[33] In *Tafa v Viau* the Court of Appeal noted two aspects of the Minister's functions and duties which combined to require him to take steps which must be reasonable in the particular circumstances, to ascertain whether the land is in fact subject to some other claim that might be an impediment to a grant or make it unavailable. At paragraph [12] the Court said:

> Two aspects of the Minister's functions and duties, in a case such as this, combine to require him to take steps, which must be reasonable in the particular circumstances, to ascertain whether the land is in fact not subject to some other claim that might be an impediment to a grant or make it unavailable. In the first place, he cannot properly sign a declaration on behalf of the Crown that there is no impediment if the truth is that he simply does not know because he has made no sufficient inquiry. In the second place, the administrative decision to make the particular grant cannot properly be made in the absence of the same inquiry in any case where the Minister does not actually know whether the land is available, or whether any competing claim has been appropriately resolved. Of course, in both respects, the Minister

> does not have to make inquiries personally. He may rely on his officers, but if he does so, and they fail to perform the tasks properly, a person affected may have a remedy for that failure as if it were a failure of the Minister.

[34] At paragraph [13] the Court found that a decision maker can be held to account if he fails to have regard to circumstances that he would have known had he acted reasonably and fairly. The Court said:

> Where that knowledge would have imposed a duty to accord natural justice to some person ... "the Court must place itself in the shoes of the repository of the power to determine whether the procedure adopted was reasonable and fair".

[35] In *Finau v Minister of Lands & Heimuli* the Court of Appeal considered (at paragraph [14]) that *Tafa* is authority that before making a grant a Minister must consider whether land is available and a failure to do so "vitiates the grant" (see also *Hausia v Vaka'uta and anor* [1974 – 1980] Tonga LR 58; *Hakeai v Minister of Lands and ors* [1996] Tonga LR 142 and *Cocker v Palavi and anor* [1997] Tonga LR 203).

[36] Where to the Minister's knowledge the making of a grant has the potential to adversely affect some identifiable person by dispossessing him from a home of longstanding; the Minister can reasonably be expected to seek his views and give him an

opportunity to adduce probative material before making a decision. As was noted in the Land Court in *Tafa v Viau and others* [2006] Tonga LR 125 (LC), at [66]:

> To have a situation, therefore, where the Minister of Lands is able to make a grant of an allotment in total disregard for the rights of a long-term occupant of the same piece of land, is quite untenable and is a recipe for lawlessness. I cannot accept that such a consequence could ever have been intended by the legislature.

[37] In *Naulu* (supra) the Court of Appeal set aside a grant of a tax allotment on the grounds that there was significant information available to the Ministry that the appellant, who had not himself applied for the land, had been farming the land. The Court noted at [21]:

> That surely should have alerted the Ministry to the fact that there was some form of occupancy, which might well involve the growing of crops. That might not be a short-term project ... In our view the Ministry should have investigated what was happening on the land by way of farming and only then, in light of what it found, should the Minister have decided whether the land was available.

[38] Two other points should be noted from *Naulu*. First, the Court did not say that there is a requirement that the Minister must

undertake an inspection of the land in every case, although that might be desirable. Whether an inspection is required will depend upon there being anything in the circumstances to put the Ministry on alert. At paragraph [20] the Court said:

> In the present case, as we have noted, a declaration of no impediment was made by the estate holder. There was no competing application from Tevita. If there was nothing else to put the Minister or the officer handling the application on alert it might be reasonable for the Minister to rely upon the estate holder's certification, though better practice would be for an inspection of the allotment to be made in every case and anything of concern it revealed followed up. We say this in the hope that such a change of practice may reduce the incidence of litigation challenging the making of a grant.

[39] The second point was that occupation of the land does not necessarily render land unavailable for grant. The Court noted at [21] that that will depend upon the nature and history of the occupation.

Discussion

[40] I am of the clear view that the Minister failed in his duty to make reasonable enquiries about the availability of Lot 20A and that consequently the grant of that land to Mr. 'Anau was invalidly made.

[41] There is no evidence that prior to making the grant to Mr. 'Anau the Ministry considered it own records in relation to the history of dealings with Lot 20A. Had it done so it would have found that Lot 20 (which incorporated Lot 20A) had been surrendered by Manase Tonga intending that it be re-allocated to Mr. Penesikoti. Not only that, but Mr. Vea was aware that Mr. Pelesikoti intended that Lot 20 be subdivided so that his sons could apply for it upon attaining the age of 16 years. He was also aware of the advice that he had given Mr. Pelesikoti that there was no time limit on making such an application and that the land was unlikely to be granted to anyone else. The Ministry was on notice of a competing claim to the land which required an inspection and investigation before making the grant.

[42] The Ministry also had knowledge that Mr. Pelesikoti had developed Lot 20, had built his house on the land and was occupying the land. All of this was known to Fielakepa and also Mr. Vea. I reject Mr. Lutui's argument that Mr. Pelesikoti is not occupying Lot 20A. Whilst Lot 20A is largely a grassed area it is perfectly plain that it has been developed along with the house and is part of one property. There can be no question that with this knowledge the Ministry was obliged to carry out an inspection of Lot 20A and Mr. Pelesikoti should have been given an opportunity to be heard in relation to Mr. 'Anau's application. The failure to inspect and consult with Mr. Pelesikoti vitiated the grant to Mr. 'Anau.

[43] There is nothing in the arguments advanced for Mr. 'Anau and the Minister that Mr. Pelesikoti was not entitled to be heard on Mr. 'Anau's application because Mr. 'Anau had a prior claim to the land, or that Mr. Pelesikoti was not in lawful occupation of the land, had no right to apply for the land himself or was party to an unlawful arrangement to acquire the land.

[44] There is no rule that an application for land which is first in time must prevail over any other competing claims. If that was the case the Minister would have no obligation under any circumstances to make enquiries.

[45] I am satisfied that Mr. Pelesikoti was in lawful occupation of all of Lot 20. He was authorised to occupy and build on the land by Manase Tonga. Upon Lot 20 being surrendered the Minister made no attempt to remove Mr. Pelesikoti from the land despite knowing he had built and was living on it (*Manu v 'Aholelei* (*supra*) and *To'a v Taumoepeau and Minister of Lands* (Unreported Land Court, LA 10/2012, 13 March 2015, Scott J)). Until some step was taken to remove him from the land he remained in lawful possession.

[46] Whilst it is true that Mr. Pelesikoti had no right to apply for Lot 20A as his own town allotment that would not preclude him, had he been consulted, from seeking a lease of the land or asserting a claim on behalf of his sons or making submissions to the Minister

that the land was not available for grant to Mr. 'Anau. I can certainly not be sure that had Mr. Pelesikoti been consulted the Minister would still have granted Lot 20A to Mr. 'Anau

[47] Finally, Mr. Pelesikoti's claim is not founded on the agreement with Manase Tonga which Mr. Edwards submits was unlawful, which submission I note appears contrary to authority in any event (*Finau v 'Alafoki* [1989] Tonga LR 6; *Piukala v Fonohema* [2002] Tonga LR 200).

[48] I am compelled to cancel Mr. 'Anau's registration but not without considerable sympathy for him as he has plainly done nothing wrong and was entitled to believe, and clearly did believe, that he was able to apply for and be granted Lot 20A as his own town allotment.

[49] Nothing I have said in this ruling should be taken as indicating that Lot 20A is not available for grant. I am also making no comment on whether Mr. 'Anau or Mr. Pelesikoti (or his sons) has the superior claim to the land. That is for the Minister to decide based on all the information that is available to him once he has made such further enquires as are reasonably necessary and then assessing the competing positions.

Result

[50] I declare deed of grant 377/71 in favour of Mr. 'Anau was invalid and direct that the Minister is to cancel the said deed of grant.

[51] The Minister is to make a fresh decision on Mr. 'Anau's application for Lot 20A after carrying out an inspection of the land and after giving both Mr. 'Anau and Mr. Pelesikoti an opportunity to be heard. If Mr. Pelesikoti or his sons wish to make a formal application for the land they should do so forthwith.

[52] Any party wishing to apply for costs should do so within 28 days.

NUKU'ALOFA: 24 November 2016. **PRESIDENT**

N. 'Inafo
24/11/2016.