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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY **LA 18 of 2016**

BETWEEN: **VILIAMI TALITAUFA HELU**
First Plaintiff

VILIAMI HELU
Second Plaintiff

AND: **SIONE SIKINI HELU**
First Defendant

MINISTER OF LANDS
Second Defendant

Hearing : **8, 9 and 14 December 2016**
Date of Ruling: **17 January 2017**

Counsel : **Mr. V. F. Mo'ale for plaintiffs**
Mr. S. Fili for first defendant
Mr. 'A. Kefu SC for second defendant

RULING

The nature of the action

[1] The first plaintiff (Viliami Snr) and second plaintiff (Viliami Jnr) are father and son. Viliami Snr has a registered town allotment at Kolofo'ou where Viliami Jnr runs a business offering holiday accommodation. The first defendant (Sione) is Viliami Snr's younger brother. He has a registered

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lease of land that is contiguous with Viliami Snr's town allotment. Viliami Jnr built accommodation on the land that is now leased by Sione. The plaintiffs ask the Court to direct the Minister to cancel Sione's lease. They argue that the Minister should have undertaken an inspection before granting the lease and given them the opportunity to take a lease "for the sake of their investment". They also contend that the land was not available to be leased.

[2] The defendants argue that the land was available for lease, the lease was validly granted and the Minister was not obliged to undertake an inspection or hear from the plaintiffs prior to granting the lease.

[3] In closing submissions the plaintiffs advanced two other claims. Neither claim was pleaded. First, they argue that the Minister should be required to comply with the orders of the Land Court in LA 20 of 2007 (ruling on 30 March 2009) requiring the Minister to reinstate Viliami Snr's town allotment to its original area prior to its subdivision in 1978. Secondly, they argue that should the lease not be cancelled then they are entitled to compensation of TOP$80,000 for their improvements.

[4] The defendants oppose the plaintiffs' attempt to advance these new claims.

The witnesses

[5] Viliami Snr, Viliami Jnr and Sione are Tongan but have been resident in the United States for many years. Neither Viliami Snr nor Sione gave evidence and I am told that they are both unwell.

[6] Viliami Jnr gave evidence. He has lived overseas since childhood returning to Tonga from time to time. His evidence was surprisingly brief. It did not cover much of the relevant background, was lacking in detail and supporting documentation and, on some matters, it was implausible. I will highlight those matters later in this ruling.

[7] Tevita Helu is a younger brother of Viliami Snr and Sione. He gave evidence for Sione about the Helu family history and the circumstances under which Sione had been granted the lease and also of the use to which the family wishes to put the land.

[8] Semisi Moala, a Lands Registration Officer, gave evidence for the Minister of the dealings with the land and produced relevant documents from the Ministry's file. Unfortunately some documents have been lost and could not be produced.

The facts

[9] The parents of Viliami Snr and Sione were Viliami Helu (Old Viliami) and Nanisi Helu. They had ten children of which four were sons. Viliami Snr was the eldest son. Sione was the second son followed by Tevita and Heneli. Heneli has died.

[10] In 1953 Old Viliami was registered as the holder of a town allotment fronting Vaha'akolo Road at Kolofo'ou called 'Elipeni'. Elipeni had an area of 1 rood 24.4 perches.

[11] Directly to the rear and sharing a common boundary with Elipeni was unallocated Crown land with an area of 28.87 perches. This unallocated land had no direct access to Vaha'akolo Road.

[12] Old Viliami died in 1967 and Elipeni was claimed by Nanisi as his widow but not registered in her name until 28 August 1977. Tevita gave evidence, which I accept, that as he grew up the older children in the family moved away but he remained and looked after his parents and maintained Elipeni and the unallocated land. When Old Viliami died Nanisi told Tevita to apply for the unallocated land but the land was not large enough to be granted as a town allotment.

[13] In around 1977, Viliami Snr (who was Old Viliami's heir) agreed that part of Elipeni would be subdivided and amalgamated with the unallocated land so that Tevita could apply for it as his town allotment.

[14] On 15 June 1977, Viliami Snr wrote to the Minister of Lands consenting to the subdivision of Elipeni so "that it may be divided between me and my younger brother Tevita Solopani Helu". There is a handwritten note of a Ministry Officer on the letter. That note is dated 14 February 1978 and states that a letter was being written to Viliami Snr together with a map of the subdivision of Elipeni.

[15] The letter of 15 June 1977 was produced by the Minister for the first time at the hearing. Mr. Mo'ale was asked if he objected to the production of the letter and he did not. In his closing submissions Mr. Mo'ale said he was taken by surprise and asked the Court to ignore the letter. I do not accept that he was taken by surprise and Mr. Mo'ale cannot, at such a late

stage, raise an objection to a letter that was produced with his agreement. I note also at this point that the evidence established that Viliami Snr was fully aware of and consented to the subdivision of Elipeni.

[16] In September 1977, Nanisi surrendered Elipeni in favour of Viliami Snr. Elipeni was registered in Viliami Snr's name although no deed of grant was issued to him at that time.

[17] The subdivision of Elipeni was undertaken during 1978. In a savingram of 12 June 1978, the Minister directed the subdivision of 8.1 perches of Elipeni to be added to the unallocated land. Notably, the savingram records that it was Viliami Snr who had applied for the subdivision on 7 June 1978. There was attached a plan of the subdivision. It shows that Elipeni was reduced in area to 1 rood 16.3 perches (from 1 rood 24.4 perches) with 8.1 perches being taken to provide access from the unallocated land to Vaha'akolo Road.

[18] Together the unallocated land and accessway had a total area of 37 perches. Tevita applied for this land as his town allotment. On 1 November 1978, the Minister granted the land to Tevita but it was never registered.

[19] It is not clear how it came about but Sione applied for the land that had been granted to Tevita as his town allotment. On 22 January 1991, Sione was issued with a deed of grant (deed of grant 309/61) for the 37 perches (935.8 sq metres). Highlighting the family connection to the land, Sione called his allotment Elipeni II. Tevita gave evidence that he took no objection to this.

[20] It was not until 28 October 2005 that Viliami Snr was issued with his deed of grant for Elipeni (deed of grant 250/66). There is an acknowledgment on the deed of grant of the changes made to the map, which would appear to be a reference to the subdivision.

[21] Shortly before that, in September 2005, Viliami Jnr obtained a permit to build rental accommodation on Elipeni. Neither the application for the permit nor the supporting documents and related correspondence were produced. Viliami Jnr's evidence was that he built about eight buildings between 2005 and 2009. Four of the buildings were built in whole or part on Sione's land. Viliami Jnr estimated that the cost of these four buildings was around TOP$100,000.

[22] I found Viliami Jnr's evidence as to when the buildings were built unsatisfactorily vague. No documents were produced to substantiate his estimate of the costs, which I find were unproven. However I accept Viliami Jnr's evidence that the buildings on Sione's land were the last to be built as this accords with Tevita's evidence that those buildings were built in around 2009.

[23] In 2007, the plaintiffs filed a claim against Sione and the Minister in the Land Court under LA 20 of 2007. No evidence was given about the events that gave rise to the litigation. The plaintiffs applied to restore Elipeni to its original area, which would necessarily involve the cancellation of Sione's grant. Viliami Jnr said that the intention was to get rid of the accessway.

[24] On the face of it the claim faced formidable hurdles. Viliami Snr had consented to the subdivision of Elipeni and the claim was, potentially at least, time barred. However, Sione was living in the United States and no defense was filed.

[25] On 30 March 2009, the Land Court made orders following a formal proof hearing directing the Minister to cancel Sione's registration and to rectify Viliami Snr's deed of grant "by amending the area [of Elipeni]....to show 0a 1r 24.4p instead of 0a 1r 16.2 p thereby reinstating the same to the original area of the town allotment before the subdivision subsequent to 1978".

[26] On 30 April 2009, the Minister directed that Sione's deed of grant be cancelled and that a survey be carried to return Elipeni to its original area of 1r 24.4p. Sione's registration was cancelled on 15 November 2010 and on the same day the Minister reissued a deed of grant in respect of Elipeni (deed of grant 375/95).

[27] Elipeni was restored to its original area but not to its original boundaries. Semisi Moala steadfastly maintained in his evidence that the Land Court ruling did not require the Minister to restore Elipeni to its original boundaries. The rear boundary was moved back from boundary pegs 2024 and 45638 to boundary pegs 100847 and 100855 (document 1 of the Minister's bundle) thereby increasing the area of Elipeni by 8.1 perches. The accessway was retained to avoid the land at the rear from becoming landlocked. Viliami Jnr collected and signed for the new deed of grant on behalf of Viliami Snr on 29 March 2011.

[28] Despite his evidence to the contrary, I find that Viliami Jnr built his accommodation units knowing they were on Sione's land. Before commencing the action in the Land Court Viliami Jnr clearly knew Sione owned his allotment. He must also have been aware of, or willfully blind to, the location of the boundaries shared by Viliami Snr's land and Sione's land.

[29] Having been successful in the Land Court, Viliami Jnr took the view that no one else would apply for Sione's allotment and therefore built on the land. He acknowledged that following the Land Court case he knew the land was available for lease "but I didn't think anyone would come and take the land". Also under cross examination the following exchange occurred:

Kefu	And you built those three houses knowing that that land did not belong to your father?
Witness	I thought nobody would ever have access to it and there wouldn't be a problem.
Kefu	Yes and you knew that land didn't belong to your father?
Witness	All I knew it was family land.

[30] Viliami Jnr was mistaken, as in early 2011 Sione applied for a lease of what remained of his town allotment. Cabinet approval was obtained and on 1 June 2012 Deed of Lease no. 8202 was issued to him. The lease was for 728.7 sq metres of land and included the accessway.

[31] In his closing submissions, Mr. Mo'ale submitted that Sione knew that Viliami Jnr was building on his land and never challenged the construction. In answer to questions from me, Mr. Mo'ale accepted that there was no evidence that Sione knew Viliami Jnr was building on his land (at least not prior to the grant of the lease). In circumstances where Sione was living in the United States I am not prepared to infer that he had such knowledge either. On the state of the evidence I find that Sione did not know prior to the grant of the lease that Viliami Jnr had built on his land.

[32] Since 2012 there has been conflict between Viliami Jnr and Tevita and other members of the Helu family. The Helu family wants Viliami Jnr to remove his buildings so they can build on the land to provide a place to stay for relatives visiting Tonga from overseas. Viliami Jnr wants his buildings to remain so he can continue to use the land for commercial purposes.

[33] The plaintiffs first complained to the Minister about Sione's lease in October 2012 but they took no other steps to challenge it at that time.

[34] In August 2015, the Minister had a survey done to confirm the boundaries of the parties land in the hope that it would resolve the conflict. It did not, and on 4 September 2015 a law practitioner, Mrs. Vaihu, wrote to the Minister on behalf of Viliami Snr disputing the boundaries and asserting that Sione's land was not available for lease.

[35] It appears matters came to a head in late 2015 when Tevita Helu and others removed a gate and some trees on Sione's land. This resulted in

the issue of proceedings by the plaintiffs for trespass (since abandoned) and this proceeding.

The legal submissions

[36] Mr. Mo'ale argued that the grant of the lease was invalid and should be set aside because the Minister did not inspect the land and because Viliami Jnr had built on it. Viliami Jnr's occupation was, he argues, an impediment to the grant of a lease which would have been apparent upon inspection of the land. He relied on *Tafa v Viau & Ors* [2006] Tonga LR 287 and *Finau v Minister of Land and Anor* (Unreported, Court of Appeal, AC 9 of 2012, 12 October 2012).

[37] Mr. Mo'ale also raised the Land Court's ruling in LA 20 of 2007 and argued that "regardless whether it is pleaded or not" the Court should give effect to it. How exactly that should be done was not explained.

[38] In the alternative, Mr. Mo'ale argued that should the Court decide it would not order the cancellation of the lease then it should award the plaintiffs compensation in a sum of TOP$80,000 for the improvements. Mr. Mo'ale did not articulate the legal basis for this claim or provide any relevant authority to support it.

[39] In his submissions, Mr. Fili emphasised that Viliami Snr had in 1978 agreed to surrender part of his allotment, that Sione had been registered as the holder of the land in dispute since 1991, that the plaintiffs had not made any competing application for the land and had built on it unlawfully. In those circumstances, he submitted, there was no obligation

upon the Minister to inspect the land or consult with the plaintiffs before granting the lease.

[40] Similarly, in comprehensive submissions for the Minister Mr. Kefu argued that the grant of the lease to Sione was valid as the land was unallocated and available for lease.

[41] Mr. Kefu submitted that the Minister was not obliged to inspect the land before granting the lease because the Ministry did not know and had no reason to suspect that the land was occupied by the plaintiffs nor that the plaintiffs would use and build on the land without lawful authority.

[42] Mr. Kefu also strongly opposed the plaintiffs' attempt to advance their case on grounds that were not pleaded. He argued that there has been no attempt to amend the pleadings and that the defendants would be prejudiced as they prepared their defenses on the basis of the pleadings. Mr. Kefu also submitted that in any event the Minister had complied with the Land Court's ruling. He argued that in giving effect to the Land Court's ruling the Minister maintained the accessway as a matter of necessity (to avoid the rear land becoming landlocked) and also to honour the desire of Viliami Snr that the land be kept in the family and be given to his younger brother.

The law

[43] The general principle is that when a challenge is made to a registered grant of an allotment the registration will be regarded as valid and final unless it is shown that the grant was made as a result of an error of law,

or as a result of fraud, mistake or breach of the principles of natural justice. In my view the same principles will apply in the case of the grant of a registered lease of land by the Minister with the consent of Cabinet (*Manu v 'Aholelei* [2015] Tonga LR 135). No submissions were presented to me to the contrary.

[44] The Minister must make such enquires as are reasonably necessary in view of the information before him to determine if the land is or may be subject to some other claim that might be an impediment to a grant or make it unavailable (*Tafa v Viau* (supra) at [12] and [13], *Naulu v Tupou and Others* (Court of Appeal of Tonga, AC 21/15, 8 April 2016 at [13])).

[45] In some cases the circumstances will require the Minister, inevitably through his officers, to undertake an inspection of land. In other cases it may not (*Pelesikoti v 'Anau* anor (Unreported, Land Court, LA 1 of 2016, 24 November 2016, President Paulsen).

[46] In *Naulu* 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.

[47] In *Pelesikoti* I set aside a grant where the Minister had not inspected the land and the Ministry had actual knowledge that the land had been surrendered by the former holder intending that it be applied for by the plaintiff and that the plaintiff had developed the land intending that his sons would apply for it upon reaching the age of 16 years.

[48] There are two important points made by the Court of Appeal in *Naulu* that should be highlighted in this case. First, there is no requirement that when making a grant the Minister must undertake an inspection of the land in every case. Whether an inspection is required will depend upon there being anything in the circumstances to put the Ministry on alert. Secondly, occupation of the land by someone other than the person applying for it does not necessarily render the land unavailable for grant.

Discussion

[49] The plaintiffs' submissions proceed on two misconceptions of law. First, that the Minister must inspect land before making a grant in every case, and, secondly, that the fact that land is occupied makes it unavailable for grant as a matter of law. The law is more nuanced than the plaintiffs' case would acknowledge.

Did the Minister make reasonable enquires?

[50] As the Court of Appeal held in *Naulu*, the Minister is obliged to undertake such reasonable inquires as the circumstances require to determine if there might be some impediment to a grant. There is no blanket rule that the Minister must always undertake an inspection of land before making a grant.

[51] The plaintiffs did not advance their case on the basis that the Ministry had knowledge that the plaintiffs had built on Sione's land. They have also failed to satisfy me that there was anything in the circumstances of this case to have alerted the Ministry to the fact that the plaintiffs had built on or were occupying the land.

[52] When I asked Mr. Mo'ale to identify any circumstances which required the Minister to carry out an inspection he could not do so.

[53] The facts of this case were unusual. Sione had been the registered holder of the land for 19 years until his registration was cancelled following the Land Court ruling. The Ministry might well, in those circumstances, have thought it possible that the land was occupied by Sione or his invitees, but would have no reason to think it was occupied by anyone else.

[54] As far as the plaintiffs were concerned, they had challenged Sione's grant, but only to the extent that they sought to restore Elipeni to its original area prior to the 1978 subdivision. They had made no claim to the balance of Sione's land or any claim which suggested that they were occupying the balance of the land.

[55] Mr. Mo'ale submitted that Sione was obliged to bring to the Minister's attention the fact that Viliami Jnr had built on the land when applying for the lease. This submission appears to be based on an erroneous understanding that the form of application for lease prescribed by the Land Act requires the grantee (rather than the grantor) to provide a declaration that the there was no known impediment to the lease. In any

event, as I have found there was no evidence that Sione knew the Viliami Jnr had built on the land before the lease was granted.

[56] Following the Land Court's ruling, and the steps taken by the Minister to give effect to it, the Minister was entitled to assume that the plaintiffs' claims were finally resolved in the Land Court.

[57] The plaintiffs made no challenge to the steps taken by the Minister to give effect to the Land Court's ruling until after the lease was granted to Sione. Furthermore, Sione was the only person to apply for the land. The plaintiffs did not apply for the land despite Viliami Jnr knowing that it was available for lease.

[58] Viliami Jnr had built on the land without permission and unlawfully. The Minister certainly cannot have been expected to assume that the plaintiffs would act in that way.

[59] There were no competing applications for a lease of the land for the Minister to consider or any other claims to the land of which he should reasonably have been aware. In those circumstances there was no obligation upon him to conduct an inspection of the land before granting Sione his lease.

Was the land available?

[60] Following the Land Court's ruling and the cancellation of Sione's grant, his land (other than the 8.1 perches that was amalgamated with Elipeni)

reverted to the Crown. It was unallocated land and was 'available' in the sense that it had not been registered to any person.

[61] Mr. Mo'ale referred me to section 124(1) of the Land Act requiring all applications for lease to be in the prescribed form and to Form 1 in Schedule IX of the Act which contains a requirement that an application for lease contains a declaration that there is "no impediment to prejudice this lease". He moved from there to make the bold submission that in this case "[Sione's land] was in fact occupied; thus it was [an] impediment to a grant". I do not accept that submission.

[62] In *Finau v Minister of Lands* [2012] Tonga LR 127 the Court of Appeal noted that *Tafa*, which was relied upon by the plaintiffs:

> ...is not authority for the cumulative propositions that the statutory requirement in s 50 that land be available is, as a matter of law, a precondition to grant and that lawful occupation by someone other than the potential grantee, renders the land unavailable. The case only establishes an element of the first proposition, namely that the Minister must consider whether the land is available before making the grant. A failure to do so vitiates the grant.

[63] In the Land Court in *Naulu v Tupou and ors* (Unreported, Land Court, LA 14 of 2008, 7 August 2015, Scott J) it was held that lawful occupation by someone other than the potential grantee does not render land unavailable. Whilst that decision was reversed on appeal that was on a different basis and the Court of Appeal confirmed at [21]:

> Occupation of land does not necessarily mean [land] is unavailable. That will depend upon the nature and history of the occupation.

[64] There is Land Court authority that occupation of land as a squatter will not be an impediment to a grant (*Vai v 'Uliafu* [1989] Tonga LR 56 and *Ongolea v Finau* [2003] Tonga LR 151). In *Vai*, at page 65, Webster J said:

> Whilst it may be one thing to consider as 'available' land which a person is occupying as a squatter without any form of leave, it would not be right to include in 'available' land plots occupied by people with leave of the estate holder or his agent. To do so would ... lead to manifest injustice.

[65] The law protects the interests of persons who in good faith and with permission of the holder or estate holder occupy and develop land. It will guard against the manifest injustice that might result should such persons be dispossessed of the land without due inquiry. That is an explanation for the rulings in *Naulu*, *Pelesikoti* and *Manu*. This is not such a case.

[66] Viliami Jnr was not given permission to occupy the land or to build on it. He knowingly and unlawfully entered on to the land and built on it for commercial advantage assuming that no one else would apply for it. He was a trespasser and accordingly had no interest which made the land unavailable for grant by way of lease to Sione.

[67] Having chosen to take a commercial risk there is no injustice in the fact that Viliami Jnr is required to bear the cost of his decision and remove his

buildings from Sione's land. To hold otherwise would be to reward lawlessness. To the contrary, there would be manifest injustice should Sione's entitlement to the land be defeated in the circumstances of this case.

The Land Court case

[68] The plaintiffs submit that the Court can give effect to its earlier decision in LA 20 of 2007. I do not agree. The proper course is for the plaintiffs to take enforcement proceedings in respect of the Land Court's 2009 ruling. With the passage of time they now require leave of the Court to do so (O.29 Rule 1). They have not applied for leave.

[69] Even if the matter could be raised in this proceeding it has not been pleaded. Whilst the Court has a wide discretion to allow an amendment to the pleadings, and generally should do so provided that the amendment is material and will not result in prejudice or injury to the other party which cannot be compensated in costs, the plaintiffs have not applied to amend the pleadings.

[70] In addition, the Land Court's ruling is ambiguous. It is not at all clear whether the Minister was required to restore Elipeni to its original boundaries or (as he has done) to its original area. In circumstances where the issue was first raised at a very late stage and Sione is both unwell and resident in the United States, the defendants have not had adequate opportunity to present all relevant evidence that may have a bearing on the issue.

[71] At a practical level, even if Elipeni was restored to its original boundaries that will not resolve the dispute between the parties. Viliami Jnr's buildings will still be unlawfully on Sione's land and Sione may require them to be removed. An adjustment of boundaries would likely cause further litigation to re-establish access from Sione's land to Vaha'akolo Road. I cannot see that the plaintiffs will gain anything by this, but to the extent they wish to enforce the Land Court's ruling they are free to take such steps as are open to them in other proceedings.

Compensation

[72] The plaintiffs' claim for compensation was not pleaded and it was a complete surprise when the matter was raised in closing submissions.

[73] No application was made by the plaintiffs to amend the pleadings to include this claim and the defendants had no opportunity to call evidence in defense of it. For those reasons it cannot now be raised.

[74] In any event, the claim had no prospect of success. Mr. Mo'ale did not articulate the legal basis for the plaintiffs' entitlement to compensation and in the cases to which Mr. Mo'ale referred me the Court did not make awards of compensation.

[75] Mr. Mo'ale asserted that the Court had the power to award compensation in a case such as this but appeared unaware of the decision in *Schaumkel anor v 'Aholelei anor* [2015] Tonga L.R 22 where Land Court held that in the absence of some representation as to future conduct or circumstances that might lead to the invocation of equity the making of improvements to

land does not of itself give rise to a right to compensation. Furthermore, Mr. Mo'ale did not explain how the sum of TOP$80,000 was made up nor was the loss of that sum proven.

Result

[76] The plaintiffs' claim is dismissed.

[77] If the parties are unable to come to an agreement that allows Viliami Jnr's buildings to remain on Sione's land then he must be given reasonable time and opportunity to remove them.

[78] The defendants are entitled to costs to be fixed by the Registrar if not agreed within 21 days.

FAKAMAAU'ANGA FONUA
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TONGA

O.G. Paulsen
PRESIDENT

NUKU'ALOFA: 17 JANUARY 2017.
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17/01/2017