

IN THE LAND COURT OF TONGA

NUKU'ALOFA REGISTRY

LA 23 of 2014

*Solicitor General*  
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<b>BETWEEN:</b>	<b>MONTE PAYNE</b>	<b>Plaintiff</b>
<b>AND:</b>	<b>'OFA FAKAHAU</b>	<b>First Defendant</b>
	<b>TANIELA MAKAHUNUNIU</b>	<b>Second Defendant</b>
	<b>LATOA MAFUA</b>	<b>Third Defendant</b>
	<b>'OFA ASO</b>	<b>Fourth Defendant</b>
	<b>HAVEA PAVA</b>	<b>Fifth Defendant</b>
	<b>FELETI LAVULAVU</b>	<b>Sixth Defendant</b>
	<b>SIONE MATAELE MAKAHUNUNIU</b>	<b>Seventh Defendant</b>
	<b>ALAIVAHAMAMA'O MAKAHUNUNIU</b>	<b>Eighth Defendant</b>
	<b>REV. FOLAUHOLA FA'UKAFA</b>	<b>Ninth Defendant</b>
	<b>MENOLO TAFOLO</b>	<b>Tenth Defendant</b>
	<b>SIAOSI MOLITIKA</b>	<b>Eleventh Defendant</b>
	<b>LUPE FOHE</b>	<b>Twelfth Defendant</b>

*Reid 20/01/17*

**Counsel : Mrs. P. Tupou for plaintiff**

**Mr. 'O. Pouono for defendants**

**Date of Hearing: 17 January 2016**

**Date of Ruling: 19 January 2016**

**Ruling on application to join third party**

**The application**

1. This is an opposed application by the defendants to join a third party.

**Relevant background**

2. The plaintiff is the registered holder of a tax allotment at Puke. The first to twelfth defendants are living on his land. The plaintiff seeks an eviction order removing them from the land. He does not seek any monetary relief (other than costs).
3. The defendants plead that they were told they could live and build on the land by the then Estate Holder, Lord Fohe, and that the plaintiff's claim is time barred. I should add at this point that Lord Fohe died in 2009 and the title and estates remained vacant until 18 November 2016, when his successor was appointed.
4. On 9 September 2016 with the agreement of Counsel I set this case down for hearing over two weeks from 6-15 February 2017. A

timetable was made for the exchange of briefs and the filing of a bundle of documents.

5. On 12 January 2017, the defendants applied for leave to issue a third party notice on the present Lord Fohe. The application does not identify the grounds relied upon but it is accompanied by an affidavit and a draft third party notice. The draft third party notice states that Lord Fohe's presence before the Court is necessary so that the following issues can be determined, namely:

- i Did the former Lord Fohe permit each of the defendants to develop and occupy part of the plaintiff's tax allotment?
- ii Why did Lord Fohe permit each of the defendants to reside on the plaintiff's tax allotment?
- iii Is Lord Fohe the estate holder at Puke and is it true that he can hold any land reverted back to him in future?
- iv If Lord Fohe was responsible for permitting each of the defendants to live on the tax allotment and they are evicted Lord Fohe should indemnify them for their loss.

6. The plaintiff opposes the application on the basis that:

- i None of the grounds for issuing a third party notice in O.10 Rule 1 Supreme Court Rules exist in this case.
- ii The issues raised can be answered without joining the present Lord Fohe as a party

- iii The present Lord Fohe knows nothing of the facts of this case and cannot be responsible for the acts of his predecessor.
  
- iv If the application is granted it will inevitably result in the abandonment of the trial and would result in injustice to the plaintiff not only in respect of costs but also because of the further delay in him obtaining possession of his land.

**Discussion**

7. Order 10. Rule 1 Supreme Court Rules provides:

**O.10 Rule 1. Leave required to serve third party notice**

Where a defendant who has filed a defence:

- (a) claims against a person not already a party to the action any contribution or indemnity; or
  
- (b) claims against such person relief which is substantially the same as that claimed by the plaintiff; or
  
- (c) requires that any issue arising in the action be determined also as it affects such person;

that defendant may apply for leave to issue a third party notice.

8. The objects of the third party procedure are to prevent multiplicity of actions, to enable the Court to settle disputes between all parties to them in one action and to prevent the same question from being tried twice with the possibility of different results.

9. The first argument advanced by the defendants relies upon O.10 Rule 1(a). It is that the defendants are entitled to be indemnified by Lord Fohe in respect of any losses they might incur should they be evicted from the plaintiff's land. I do not accept this argument.
10. For the purposes of O.10 Rule 1(a) the term 'indemnity' is to be understood as protection from legal liability in respect of a claim made by the plaintiff against the defendant in the action. In this case the plaintiff makes no monetary claim against the defendants in this action in respect of which the defendants might seek an indemnity from Lord Fohe.
11. The second argument advanced by the defendants relies upon O.10 Rule 1(c) and is that there are issues arising between the defendants and Lord Fohe which should be decided in this action. I have set those out in paragraph 5.
12. Under O.10 Rule 1(c) it is not sufficient that there be some issue for resolution between a defendant and the proposed third party. The issue must also be one arising in the action between the plaintiff and the defendant.
13. The first two issues identified by the defendants focus on whether the former Lord Fohe told the defendants they could occupy the plaintiff's land and his reasons for doing so. These are not issues that arise between the plaintiff and the defendants. There is no suggestion that the former Lord Fohe had authority from the plaintiff or his predecessors in title to permit the defendants to occupy the land. The plaintiff's entitlement to the relief he is seeking cannot therefore be affected by anything the former Lord Fohe has done. In relation to the

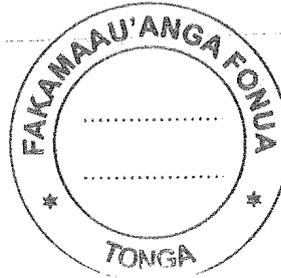
third issue it is entirely irrelevant as between the plaintiff and the defendants whether Lord Fohe is the estate holder at Puke and "holds any land that has reverted back to him in the future" (whatever that may mean). The fourth issue has been dealt with in paragraphs 9 and 10 above.

14. I note also that the present Lord Fohe has no knowledge of this case and cannot shed any light on the issues the defendants raise. To join him as a third party would be entirely futile.
15. The grounds to join a third party are not made out. I would have refused this application in the exercise of my discretion in any event. The case was set down for trial with the agreement of Counsel. There was no suggestion that it was not ready for hearing or that further applications might be made. If this application was granted two weeks of Court time would be lost. There are no other cases that can fill the void within such a short time frame.
16. Court time is a precious resource that is all too often wasted because Counsel accept trial dates without giving adequate thought to whether the case is in fact ready for hearing and only discover that it is not when doing their final preparations for trial (see *Siasi Tokaikolo 'Ia Kalaisi v Tu'i'onetoa and Ors* (Unreported Supreme Court, LA 22 of 2015, 1 December 2016, President Paulsen) for another such a case).
17. Counsel must understand that the Court will not look favorably upon late applications that imperil agreed hearing dates.

**Result**

18. The defendants' application to join a third party is dismissed.
19. The plaintiff is awarded costs to be fixed by the Registrar if not agreed.

**NUKU'ALOFA: 19 January 2017.**



O. G. Paulsen  
**P R E S I D E N T**

