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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY **LA 1 of 2013**

BETWEEN: **SAMUELA TALIA'ULI HELU**
First Plaintiff
VILIAMI TAVAO HELU
Second Plaintiff

AND: **SIAOSI FATU PEA PAU MATEKITONGA**
First Defendant
MING SEN TSAY
Second Defendant
MINISTER OF LANDS
Third Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

To: **Mr. S. Tu'utafaiva for the plaintiffs**
Mr. V Mo'ale for the first defendant
Mr. W. Edwards for the second defendant
Mr. 'A. Kefu SC for the third defendant

Date of Hearing: **29 and 30 March and 24 May 2017**

Date of Ruling: **29 May 2017**

RULING

The claim and the issues

[1] The first defendant is the registered holder of a town allotment consisting of 860.4 m² being all the land in Registered Plan

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5389 Lot 2 contained in deed of grant Volume 405 Folio 85. The land is subject to registered lease No.8274 in favour of the second defendant.

[2] The first plaintiff and second plaintiff are father and son. In their statement of claim they seek cancellation of the first defendant's deed of grant and the second defendant's lease. The plaintiffs also claimed compensation for damage to a fence and crops on the land along with exemplary damages.

[3] This action was commenced on the misconceived notion that the first plaintiff had an election to take land of which the first defendant' land forms part as heir under section 84 of the Land Act. In opening the plaintiffs' case Mr. Tu'utafaiva (who it should be said took the case on at a late stage and said all that could be said for the plaintiffs) signaled the plaintiffs' intention to maintain this argument. In addition he advised that the plaintiffs challenged the exercise of the Minister's discretion to grant the land to the first defendant, albeit the specific matters relied upon were not all pleaded. The plaintiffs did however abandon the claim for compensation.

[4] By final submissions the plaintiffs had also abandoned any reliance upon section 84. Mr. Tu'utafaiva submitted in closing that the two issues for the Court to determine where:

[4.1] Whether the Minister exercised his discretion to grant the land to the first defendant under section 88 of the Land Act correctly; and

[4.2] If not, what are the appropriate remedies.

The plaintiffs' standing

[5] Mr. Tu'utafaiva correctly conceded that the first plaintiff has no standing to seek cancellation of the first defendant's grant or the second defendant's lease. The first plaintiff had applied for the land on the basis that he was the deceased holder's heir. It is now accepted that his application was correctly rejected by the Minister and that the first plaintiff's claim must be dismissed.

[6] As far as the second plaintiff is concerned, he made an application for the same land not as heir but under section 43 of the Land Act. Mr. Tu'utafaiva argues, amongst other things, that the Minister failed to process or consider that application before making the grant to the first defendant.

[7] The second plaintiff has taken no part in this proceeding and did not attend the hearing. He lives overseas and Mr. Tu'utafaiva has never received any instructions from him. There is no evidence from the second plaintiff that he authorised this proceeding to be brought in his name or that he is dissatisfied with the Minister's decision under challenge. There is also no evidence that at the time the second plaintiff made his application he was a Tongan subject entitled to apply for a town allotment under section 43 of the Act. This would be sufficient to dispose of the second plaintiffs' claim but for the reasons I set out below I dismiss the second plaintiffs' claim notwithstanding these matters.

The facts

[8] In 1929 Siaosi Matekitonga (Siaosi) was registered as the holder of a large town allotment at Kolofo'ou. The first and second plaintiffs and the first defendant all trace their decent from Siaosi.

[9] On the first defendant's side of the family, Siaosi's eldest son was named Kau'ulufonua. Kau'ulufonua's eldest son is 'Alipate Matekitonga ('Alipate). 'Alipate is the father of the first defendant.

[10] On the plaintiffs' side of the family, Siaosi had an illegitimate daughter named Tupou Maluhola. She married Viliami Tavao Helu and they had five sons. The second son was Tomasi Helu. The third son was Matakaiongo Helu. Matakaiongo was the father of the first plaintiff and grandfather of the second plaintiff.

[11] Siaosi wished to make provision for his daughter Tupou. His town allotment was subdivided and an area of 1R 24.3p of land was registered on 5 November 1943 in the name of Tupou's second son Tomasi. In 1945 Tomasi married Liumeitupou and they had four daughters but no sons. The daughters were Vusenga (the eldest), Katea, 'Ami and Lesaline.

[12] Matakaiongo married Laufafo Luani. The first plaintiff is their eldest son and he was born in 1956. The first plaintiff grew up on Tomasi's land in a house that he says was built by his father. It appears that despite being granted his own land in

1972 the first plaintiff remained living on Tomasi's land until around 2009 when he said he demolished the house on the land.

[13] Tomasi and his family lived for some years overseas. He died and his widow Liumeitupou claimed the land and it was registered to her in November 1991. Documents in the bundle suggest that Liumeitupou and Vusenga were not happy about Matakaiongo and the first plaintiff's occupation of the land but nothing turns on this.

[14] In 2007 Liumeitupou surrendered the land intending that it would be returned to the male line of the family; specifically to Kau'ulufonua the son of Siaosi. This was approved by Cabinet in a decision of 20 December 2007 that states:

> The application from the widow Liumeitupou Helu to Surrender her Town Allotment at Kolofo'ou to Kau'ulufonua Matekitonga's family be approved.

[15] The evidence satisfies me that Vusenga was unmarried and was the heir to the land (section 82(d) of the Land Act). She filed an affidavit in support of her mother's application to surrender the land noting her understanding that Siaosi had wanted Tupou and her children to live on the land but for it to be in 'Kau'ulufonua's hands'. She expressed the desire to comply with her mother's wishes to surrender the land in favour of Kau'ulufonua.

[16] In March 2008 the Minister of Lands issued a legal notice of the surrender of the land and called upon any person claiming

to be the heir to lodge a claim by 12 March 2009. The first plaintiff had been aware of Liumeitupou's intention to surrender the land and had already written to Cabinet and the Minister of Lands claiming that 'the Helu family, myself and my children are the lawful heirs to the town allotment of Tomasi Helu...'.

[17] On 10 April 2008 the first plaintiff made an application for the land as heir. On 23 April 2008 the Acting Secretary of Lands wrote to the first plaintiff advising him that the Minister did not accept his application. The reason was that first plaintiff already owned his own town allotment and as he was neither a son nor grandson of the deceased holder he had no right of election under section 84 of the Act. As I have noted earlier this is now not disputed by the first plaintiff.

[18] The first plaintiff's response was to have his four sons apply for the land on various dates between August 2008 and December 2008. He said his intention was that the Minister might approve any one of the applications. At around the same time the first plaintiff removed the house on the land anticipating that he would build a butchery on it. The Ministry was not at liberty to process any of the applications immediately as they were made within the 12 month period during which any person claiming to be the heir could apply for the land. On 12 March 2009 the land reverted to the Government and was available for regrant.

[19] On 6 April 2009 the first plaintiff met with the Minister to enquire about his sons' applications. The Minister, who was

clearly aware of the family background, said that he would need to speak to 'Alipate. Kau'ulufonua had passed away in November 2007.

[20] On 28 April 2009 the Minister met with 'Alipate. 'Alipate told the Minister that it was his intention that the land be subdivided and shared by his son and brother in law. The Minister suggested that 'Alipate should talk to the first plaintiff and they arranged to meet again.

[21] On 5 May 2009 there was a further meeting attended by the Minister, the first plaintiff, 'Alipate, Maka Matekitonga (a family member but also an employee of the Ministry) and Warrick Vea, a Lands Registration Officer who took the minutes of the meeting.

[22] The minutes indicate that at the commencement of the meeting the Minister noted that there were two separate requests for the land. This was recognition of the claims by the Helu family represented by the first plaintiff and the Matekitonga family represented by 'Alipate. A discussion followed which initially did not reach an agreement and the Minister proposed that he postpone any decision so that the first plaintiff could pursue the matter in Court. The minutes record that the first plaintiff advised the Minister that he did not want him to postpone his decision. He asked the Minister for a decision.

[23] The Minister indicated that his 'thoughts' were to divide the allotment in two. He was prepared to give the first plaintiff

and 'Alipate more time for discussion. The first plaintiff is recorded as thanking the Minister and saying that he accepted that outcome and there was nothing else to talk about. The first plaintiff said that his son Sisilili would apply for the half of the land. 'Alipate agreed and said that his son Siaosi would apply for the other half of the land. Importantly, the Minister finished the meeting by saying that applications for the allotments would need to be completed.

[24] In his evidence the first plaintiff said that he did not accept the Minister's suggestion to halve the land and that he thanked the Minister because a decision allowed him to pursue a legal claim for all of the land. 'Alipate said that he understood that the first defendant was not happy with the Minister's decision. I do not accept their evidence on this point. I think there is force in Mr. Kefu's contention that the first plaintiff's dissatisfaction arose when he learned that the first defendant had leased his land to the second defendant. As far as 'Alipate is concerned whilst I accept he was an honest witness his recollection of events did not impress me and in important respects his recollection of the meeting differed from both the first plaintiff and Mr. Vea.

[25] Mr. Vea attended the meeting to take minutes. He is an experienced Registration Officer and familiar with land disputes of this sort. Given the clear potential for litigation one could expect that he would have taken care in the preparation of the minutes. The minutes indicate that the first plaintiff and 'Alipate were satisfied with the Minister's

suggestion to halve the land. In answer to questions from his Counsel the first plaintiff accepted that the minutes were indeed accurate.

[26] Mr. Vea said that it was understood from the meeting that the dispute was resolved. That must also have been the Minister's view as he had said he would postpone any decision if the parties could not agree.

[27] I note also that the parties' conduct following the meeting suggests that they willingly agreed to share the land. In 2010 the first plaintiff took steps to fill the land (although the extent of the work is disputed) and he did not file any claim challenging the Minister's decision until 2013. For his part 'Alipate took steps to lease the land to the second plaintiff so that it could construct and operate a large retail/wholesale outlet. None of this is consistent with the parties leaving the meeting understanding that their rights were yet to be determined in Court.

[28] For those reasons I accept the evidence of Mr. Vea that the first plaintiff and 'Alipate both advised the Minister that they would accept a decision to halve the land between them and they each nominated a son to take one half of the land.

[29] On 12 July 2011 the Minister approved the application of Sisilili Helu and directed that he be granted a town allotment in accordance with what had been agreed at the 5 May 2009 meeting.

[30] On 16 September 2011 the Ministry received an application for a town allotment from the first defendant and on 3 August 2012 deed of grant 405/85 was issued to him.

[31] On 8 August 2012 the second defendant applied to lease the first defendant's land. This was approved by Cabinet on 31 August 2012. On 12 September 2012 deed of lease No. 8724 was issued and registered to the second defendant.

[32] The second defendant began to develop the land he had leased. On 28 December 2012 Sione Fifita, a law practitioner, wrote to the second defendant on behalf of the first plaintiff and Sisilili Helu (but not I note the second plaintiff) demanding that the second defendant cease damaging and vacate the land or be evicted. The letter asserted, notwithstanding the Minister's rejection of the first plaintiff's earlier application for the land, that the first plaintiff and Sisilili were 'the true heirs to the land'.

The second plaintiff's submissions

[33] 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.

[34] Mr. Tu'utafaiva referred me to the decision of Scott J in *To'a v Taumoepeau and the Minister of Lands* [2015] Tonga LR 62, 72-73 where the learned Judge said that it is beyond any doubt that the responsibility of the Ministry when deciding to

make a grant of land is to make proper enquiries, to comply with the rule of natural justice and to avoid obvious mistakes before a decision is reached. Mr. Tu'utafaiva quoted the following extract from that case at [62] as follows:

> In my view the Ministry did not handle the regrant of this land properly. First, it did not process Dr. Maka's section 43 application with reasonable dispatch or at all. Secondly, it accepted the Plaintiff's application and decided in his favour before making proper enquiries (which would, inter alia, have revealed the allotment 2/3 confusion). Thirdly, the enquiries that were made, principally the visit to the land by Semisi Moala were carried out in a slapdash manner resulting in a brief to the Minister (D-2-58) which was seriously misleading.

[35] Developing his argument Mr. Tu'utafaiva identified that the Minister had three relevant responsibilities in this case. First, he submitted that the Minister could not make a grant to the first defendant without processing and considering the extant application of the second plaintiff. Secondly, he argued that the Minister could not make any decision to grant land to the first defendant when he had not applied for the land. Thirdly, he argued that the Minister had to make proper enquiries before making a grant of land.

[36] On the facts Mr. Tu'utafaiva submitted that in exercising the discretion to make the grant to the first defendant the Minister failed to act properly in no less than six respects. First, that the application of the second plaintiff was never processed by

the Minister. Secondly, that the Minister should not have agreed at the 5 May 2009 meeting to grant land to the first defendant when he had not applied for the land as required by section 43 of the Act. Thirdly, that the Minister was wrong to consider the wishes of Liumeitupou as no members of the Matekitonga family had applied for the land. Fourthly, the Minister had failed to make proper enquiries which would have revealed that the first defendant was intending to lease the land to the second defendant and that the first plaintiff had extensively filled the land. Fifthly, that the Minister should have taken account of the fact that 'Alipate has land and only one son while the first plaintiff has six sons and four of them had applied for the land. Sixthly that the second plaintiff (and his brothers) were not given an opportunity to be heard before the land was granted to the first defendant. I will deal with each of these matters seriatim.

Failure to consider the second plaintiff's application

[37] It is quite plain that the Minister was well aware of and did consider the applications for the land by the second plaintiff and his brothers. The first plaintiff was throughout driven by a belief that he and his sons were entitled to the land. His sons filed competing applications for the land but were unconcerned about which son was granted the land. They applied for the land on the basis that it might be granted to any one of them.

[38] Throughout the first plaintiff acted as his sons' representative before the Minister. He approached the Minister on 6 April 2009 to ask on progress with their applications and advised

the Minister at that meeting that four of his sons were of legal age, had no land of their own and had applied for the land. He represented his family at the important meeting of 5 May 2009 and agreed that one half of the land would go to Sisilili. Likewise, 'Alipate did not claim the land for himself but for his son.

[39] What the Minister was faced with was competing claims to the same land by the Helu and Matekitonga families. At the meeting of 5 May 2009 the Minister acknowledged this when he said there were two separate requests for the land. The decision to halve the land recognised all competing claims to the land.

The first defendant had not applied for a grant of the land

[40] Mr. Tu'utafaiva's submission is that the Minister should not have considered the first defendant's interests and granted the land to him when he had not made an application for it. I do not accept this submission.

[41] The submission misunderstands the obligation of the Minister to make proper enquiries. When making a grant 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 (*Naulu v Tupou and Others* (Court of Appeal of Tonga, AC 21/15, 8 April 2016 at [13]).

[42] The Minister must consider such interests whether or not they are supported by an application for the land. 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.

[43] In any event the first defendant did apply for the land. At the meeting of 5 May 2009 the Minister required that both Sisilili and the first defendant apply for their land. The first defendant filed an application for the land on 16 September 2011. The Minister did not make the grant to the first defendant until the application had been filed and the requirements of the Land Act satisfied.

The Minister was wrong to consider the wishes of Liumeitupou as no members of the Matekitonga family had applied for the land.

[44] Mr. Tu'utafaiva's submission is that having surrendered the land Liumeitupou had no right to require it to be given to the Matekitonga family particularly as no one from that family had applied for the land. The decision to grant the land was

entirely in the Minister's discretion but the history of the land, including the Matekitonga family connection to it, was clearly a relevant matter that the Minister was obliged to consider in circumstances where he was aware that 'Alipate was claiming the land. For the reasons I have given above it did not matter that at the time of the 5 May 2009 meeting no member of the Matekitonga family had formally applied for the land. Importantly, before the land was granted to the first defendant he did apply for the land.

The Minister failed to make proper enquiries as to the first defendant's intended use of the land and that the first plaintiff had filled the land.

[45] That the first defendant intended to lease the land to the second defendant did not disentitle him to a grant of the land. I agree with Mr. Kefu's submission that every person who is granted land has the right to lease the land in accordance with the Land Act.

[46] In relation to the filling of the land the extent of this work was not proven and is disputed. In any event what work was done to fill the land was undertaken after the first plaintiff had agreed that the land would be shared. He did not have permission to do work on the land that the first defendant was to apply for and it cannot possibly have disentitled the first defendant to his grant.

'Alipate has land and only one son while the first plaintiff has six sons and four of them had applied for the land in question.

[47] The Minister was well aware of these matters and there is nothing to suggest that he did not take them into account.

The second plaintiff (and his brothers) were not given an opportunity to be heard before the land was granted to the first defendant.

[48] The second plaintiff was heard by the Minister. For the reasons I have already given his interests were represented by the first plaintiff. Importantly, when the result of the 5 May 2009 meeting was known there was no complaint from the second plaintiff or any of his brothers that they had not been heard. They did not challenge either the decision to grant half of the land to their brother Sisilili. The evidence established that all relevant information was given to the Minister for his consideration in any event.

My assessment of the Minister's approach

[49] The Minister's decision to halve the land was made in a procedurally fair manner after the Minister gave all parties an opportunity to be heard and he had all relevant information before him. It was also in accordance with what he understood the parties agreed to. It was a pragmatic solution and entirely sensible recognising the connection of both families to the land. I can see no basis to cancel the first defendant's grant or the second defendant's lease.

Result

[50] The action is dismissed in its entirety.

[51] The defendants are entitled to their costs which are to be fixed by the Registrar if not agreed.

FAKAMAAU'ANGA FONUA
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TONGA

O.G. Paulsen

NUKU'ALOFA: 29 May 2017. **LORD CHIEF JUSTICE**