



**The agreed statement of facts**

- [2] The parties called no witnesses and presented an agreed statement of facts as follows.
- [3] Tevita 'Otani Kula was lawfully registered as holder of a town allotment on Salote Road at Ma'ufanga on 21 September 1937. He was also lawfully registered as holder of a tax allotment which comprised two separate lots, one at Umusi and the other at Ha'amoko, both in Ma'ufanga, on 21 September 1939.
- [4] All that time, Tevita 'Otani Kula was living together with Fakaanga Hopoi as husband and wife but they were not married to each other. Neither of them had been married to anyone else. They had the following children:
- (a) Kalolaine Tangakina Hopoi, born 7 September 1939, female;
  - (b) Samisoni 'Otani, born 18 August 1942, male (the plaintiff); and
  - (c) Fine Hopoi, born 26 December 1947, male.
- [5] On 15 August 1949, Tevita 'Otani Kula and Fakaanga Hopoi were lawfully married to each other, and thereby rendered the said three children legitimate children by virtue of section 3 of the Legitimacy Act (Cap. 32). Thereafter, the following children were born to them:
- (d) Toeumu Kula, female;
  - (e) Pita Kula Tanaki, male, born 14 June 1951, (first

defendant);

- (f) Kongika Kula, male, and
- (g) 'Ilemaile Kula, female.

- [6] The wife, Fakaanga Kula, died on 2 January 1958 and Tevita 'Otani Kula then married Lute 'Otani Kula, but they had no children.
- [7] On 26 June 1987, Tevita 'Otani Kula died, and [*counsel*] are not aware if the town and tax allotments were transferred to his widow, Lute 'Otani Kula, but after the widow died on 10 May 2010, the first defendant, Pita Kula Tanaki, filed his affidavit of claim as heir stating therein that Lute 'Otani Kula had held the said town and tax allotments, and claiming that they be transferred to him, on 3 May 2011. The first defendant has been registered as the holder of the town and the allotments.<sup>1</sup>
- [8] Samisoni 'Otani, the plaintiff, who is the eldest legitimate son of Tevita 'Otani Kula, did not make any claim for the said town and tax allotments of Tevita 'Otani Kula, either, after Tevita 'Otani died, or after his widow, Lute 'Otani Kula, died, either by himself or by this children or by anyone else for him.

**The agreed orders and the agreed issue**

- [9] Based on these agreed facts the plaintiff and the first defendant stated that the following orders could be made by consent:

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<sup>1</sup> The plaintiff and the first defendant are proceeding on the basis that the first defendant was registered as the holder of the town and tax allotments of Tevita 'Otani Kula but the Minister has denied this in his statement of defence. This has meant that the orders that the plaintiff and the first defendant agree should be made have been modified from what is shown in Counsels' joint memorandum of 7 June 2017.

- (a) The Court declares that the registrations of the first defendant as holder of the said town and tax allotments to be invalid.
- (b) The second defendant Minister of Lands is directed to cancel the said registrations of the first defendant forthwith or in the event that the first defendant has not yet been registered as the holder of the town and tax allotments the Minister should proceed no further with the registrations.
- (c) There will be no order as to costs.

[10] The only issue for determination is whether the plaintiff is also entitled to an order that he is the lawful heir to the said town and tax allotments of Tevita 'Otani Kula.

[11] I understand from Mr. Lutui that the Minister will abide by the decision of the Court.

**The submissions**

[12] For the plaintiff Mrs. Vaihu argues that the plaintiff's birthright as heir cannot be removed and is protected by the Land Act. She relied on the proviso to section 82 of the Land Act and submitted that the plaintiff was entitled to effect posthumous registration of the land.

[13] Although the plaintiff had failed to claim his father's tax and town allotments as required by section 87 of the Land Act Mrs. Vaihu submitted that the land had not reverted to the estate holder because the first defendant had claimed the land.

- [14] In what appears to me to be something of a contradiction to her previous submission Mrs. Vaihu also argues that there is no prejudice to anyone in the Court making the declaration sought as upon cancellation of the first defendant's registrations the land would revert to the estate holder and be available for grant by the Minister to anyone else who applied for it.
- [15] I am unable to accept Mrs. Vaihu's submissions. The proviso to section 82 has no application to this case. It applies upon the 'failure of the deceased lawful holder of any tax or town allotment to register the same'. In this case the deceased lawful holder was Tevita 'Otani Kula and he did register his tax and town allotments.
- [16] It is not correct either that the land did not revert to the estate holder under section 87 because the first defendant applied for it. Under section 87 land reverts if no claim has been lodged 'by or on behalf of the heir' within 12 months from the death of the last holder. The first defendant was not the heir of the last lawful holder. The plaintiff was the heir and he failed to apply for the land as required by section 87. It follows that Mrs. Vaihu is also not correct when she submits that the plaintiff cannot be deprived of his birthright as heir as that is both the intent and effect of section 87.
- [17] Finally, I do not accept Mrs. Vaihu's argument that there is no prejudice in me making the order sought. Certainly there will be no prejudice to the plaintiff but the same cannot be said for the first defendant who although he has had his registrations cancelled is entitled to apply for the land. There is force in Mr. Niu's submission that the plaintiff is seeking to gain support for an application for the land that will be made by him or his sons which would be unfair and prejudicial to any

application that the first defendant may make for the land. It is up to the Minister to weigh competing applications for the land and it would be wrong for the Court to make orders that could be perceived to express a view or preference.

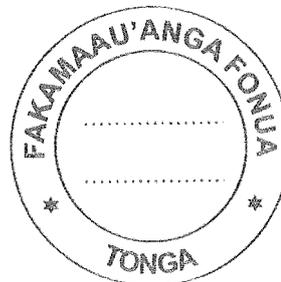
**Result**

[18] By consent:

- (a) The Court declares that the registrations of the first defendant as holder of the said town and tax allotments formerly registered to his father Tevita Otani Kula to be invalid.
- (b) The Minister of Lands is directed to cancel the said registrations of the first defendant forthwith or in the event that the first defendant has not yet been registered as the holder of the town and tax allotments the Minister should proceed no further with the registrations.
- (c) There will be no order as to costs.

[19] I do not make the further order sought by the plaintiff.

**NUKU'ALOFA: 8 June 2017**



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

**O.G. Paulsen  
PRESIDENT**