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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY **LA 20 of 2007**

BETWEEN: **VILIAMI TALITAUFA HELU**

First Plaintiff

VILIAMI HELU

Second Plaintiff

AND: **SIONE HELU**

First Defendant

MINISTER OF LANDS

Second Defendant

Hearing : **19 June 2017**
Date of Ruling: **20 June 2017**

Counsel : **Mr. V. F. Mo'ale for the plaintiffs**
No appearance for the first defendant
Mr. 'A. Kefu SC for the second defendant

RULING

The nature of the action

[1] This is an application under O.29 Rule 1 Supreme Court Rules for leave to issue enforcement proceedings in respect of a ruling made in this action by Ford CJ on 30 March 2009 (the Ruling).

The facts

[2] A fuller narrative of the background to this application can be found in the ruling of this Court in LA 18 of 2016. For present purposes the relevant facts can be stated briefly.

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[3] The first plaintiff and the second plaintiff are father and son. The first plaintiff and first defendant are brothers.

[4] The first plaintiff succeeded to his father's town allotment which was known as Elipeni. In 1978 Elipeni was subdivided with the first plaintiff's consent and 8.1 perches were amalgamated with contiguous land which the first defendant was granted as his town allotment in 1991.

[5] In 2007 the plaintiffs commenced this action challenging the first defendant's grant. The first defendant lives overseas and did not file a defence. That is unfortunate as the action faced significant hurdles and had it been defended the parties might well have been saved years of litigation.

[6] On 30 March 2009 the action was dealt with by way of formal proof. The Court orders were as follows:

> **HAVING HEARD** Counsel Vaihu, the first plaintiff and evidence from the Registrar of Lands Sione Uele on formal proof
>
> **IT IS ORDERED:**
>
> The second defendant is hereby directed to cancel the registration of a town allotment in the name of the first defendant Sione Helu a.k.a. Sione Siniki Helu granted on or about the 22/1/1991 and recorded in Volume 1K P57 Folio 1409.
>
> The second defendant is further directed to rectify the deed of grant 250 Folio 66 by amending the area of the first plaintiff's town allotment to show 0a 1r 24.4 p instead of 0a 1r 16.2p thereby reinstating the same to the original area of the town allotment before the subdivision subsequent to 1978.

The plaintiff's costs be paid by the first defendant to be taxed if not agreed.

[7] The Minister acted on the ruling and cancelled the first defendant's deed of grant. He also reissued a new deed of grant to the first plaintiff (deed of grant Volume 375 Folio 95) in November 2010. In this way Elipeni was restored to its original area before the subdivision but not to all of its original boundaries. This was so that an accessway was maintained servicing the balance of what had been the first defendant's town allotment without which that land is landlocked. As something of an aside, Mr. Mo'ale submitted that the Minister failed to conduct a survey before issuing the first plaintiff with his new deed of grant in breach of section 26 of the Land Act but I am satisfied that he is incorrect about that (see paragraph [26] of ruling in LA 18 of 2016).

[8] In 2012 the first defendant was granted a lease of what remained of his former town allotment. However to complicate matters the second plaintiff, with no right to do so, had constructed buildings on the first defendant's land.

[9] This led to further Court proceedings. In an effort to maintain the second plaintiff's building on the first defendant's land the plaintiffs' filed LA 18 of 2016 challenging the first defendant's lease. In a ruling of 17 January 2017 I dismissed that action.

The objective of the application

[10] Order 29 Rule 1(a) provides that no enforcement proceedings shall be issued without leave of the Court if six years or more have elapsed since the date of the judgment or order. There is no dispute that the rule applies in this case.

[11] Although the Rules allow an application for leave to be made on an *ex parte* basis I required the application to be served and Mr. Mo'ale did not object to that. The first defendant has taken no steps but the Minister opposes the application. The Minister argues that the plaintiffs should not be granted leave because:

[11.1] The application is a collateral challenge to the first defendant's lease which the Court has already held was validly granted.

[11.2] The Minister did in fact comply with the Ruling.

[11.3] There is no evidence supporting the application that the Ruling was not complied with.

[11.4] The Court should not exercise its discretion to grant leave as the application is unreasonable and will simply continue a family dispute that will see no end. Mr. Kefu referred to paragraph 71 of my ruling in LA 18 of 2016 where I made comments of a similar nature.

Discussion

[12] I do not grant leave to enforce the Ruling for the reasons that follow.

[13] The first issue concerns the standing of the 'applicant'. The affidavit in support of the application is made by one 'Isapela Tafea, who is employed by the second plaintiff and manages the second plaintiff's accommodation business from Elipeni. She describes herself as the applicant and says "I want to enforce the Court Order" and "I should have possession of all areas" and "...I am asking for leave so that I may seek to enforce the decision...". Ms Tafea has no standing to enforce the Ruling.

[14] In paragraph 2 of her affidavit Ms Tafea does say that she has been authorised by 'the plaintiff' to bring this application. Mr. Mo'ale candidly confirmed that he does not have any instructions from the first plaintiff. Mr. Mo'ale also confirmed that the first plaintiff suffers from dementia and does not have capacity to give instructions. The first plaintiff is the registered holder of Elipeni. This application concerns his land and should never have been filed without his instructions (if he has capacity) or by his next friend (if he does not).

[15] It is implicit from the fact that leave of the Court is required that an applicant must satisfy the Court that it should exercise its discretion in his favour. In *Tonga Air Services Ltd v Fowler* [1989] Tonga LR 4 the Court noted, in relation to applications for leave to enforce judgments, the following principles:

> (a) the decision is a matter of judicial discretion, to be properly exercised according to the known rules of law...
>
> (b) there must be adequate reasons for the long delay in enforcing the judgment, meaning "proper and just ground"...
>
> (c) the exercise of the discretion depends on whether the balance of justice or injustice is in favour of granting the remedy or withholding it...

[16] An applicant seeking leave to enforce a stale ruling must support the application with evidence. In this case the evidence should have dealt with the following matters (1) the method by which the applicant proposes to enforce the ruling (2) that the ruling is not satisfied (3) the reasons for the delay in enforcing the ruling and (4) any relevant change of circumstances that would cause prejudice to the respondent by reason of the delay. There is no such evidence or such evidence as is before the Court is plainly wrong.

An example of that is Ms Tafea's evidence that there is no prejudice to the first defendant when the object of the application is to remove the only access there is to his land. The evidential basis upon which the Court must exercise its discretion is absent in this case.

[17] Finally, and regrettably given the view I expressed in my ruling in LA 18 of 2016 at [68], enforcement proceedings in whatever form they might take will not serve any useful purpose in this case. We are not concerned here with a money judgment (with which most methods of enforcement are concerned) and the Minister did not ignore the Ruling. He gave effect to it in accordance with his understanding of its requirements and the plaintiffs did not object at the time. Believing that the plaintiffs' claim was satisfied the Minister granted the first defendant his lease. The Minister maintains that his interpretation of the Ruling is correct and that is clearly arguable. It would be inappropriate for the Court to grant leave to enforce the Ruling in those circumstances.

[18] That is not to say that the plaintiffs do not have other avenues open to them but that is a matter upon which they will need to take advice. The Court can do no more than express the view that further litigation would be regrettable and the result uncertain.

Result

[19] The application for leave to enforce the Ruling is dismissed. There is no order for costs.

FAKAMAAU'ANGA FONUA

O.G. Paulsen

NUKU'ALOFA: 20 June 2017. **PRESIDENT**