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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY **LA 31 of 2015**

BETWEEN: **SOLOMONE GRAHAME FINAU**

First Plaintiff

AND **HUAFETALIAKI 'ELONE FINAU**

Second Plaintiff

AND : **KEIO FINAU**

Defendant

AND : **HON. MINISTER OF LANDS**

Third Party

BEFORE PRESIDENT PAULSEN AND ASSESSOR

To: **Mr. S. Tu'utafaiva for the plaintiffs**
Mr. L. Niu SC for the defendant
Mr. 'A Kefu SC and Mrs. E Langi for the third party

Hearing: **22-23 May and 9 June 2017**
Date of Ruling: **21 June 2017**

RULING

The claim and counterclaim

[1] The plaintiffs are brothers. They were born in New Zealand and educated in Tonga. They have town allotments at Fatai and Matafonua respectively. The defendant is the plaintiffs' uncle and is occupying their

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allotments. The plaintiffs wish to evict him. The defendant says that the plaintiffs' grants of their town allotments are unlawful. He counterclaims for orders that the Minister be directed to cancel the grants.

[2] Broadly the defendant argues that the grants are unlawful because the Minister failed to inspect the allotments before making the grants, that there were impediments to the grants as the allotments were occupied and built upon and in the case of the second plaintiff that he was not entitled to be granted land at Matafonua when he was not a resident there.

[3] There is a preliminary hurdle that the defendant must overcome which is whether he has any standing to challenge the plaintiffs' grants.

The witnesses and credibility

[4] There are disputed questions of fact. I have no reservations about the credibility of the plaintiffs or the Minister's witness Seli Taufa. However, the main protagonists are the defendant and the plaintiffs' father, Kaitu'u Finau (Kaitu'u). This action has its genesis in a disagreement between them and they gave most of the evidence. I found neither to be reliable witnesses. They hold intransigent views, gave some quite implausible evidence and both developed their evidence on their feet in certain respects.

The facts

The Fatai allotment

[5] The plaintiffs' grandfather was Laulotu Finau (Laulotu). He had 11 legitimate children with his first wife. The eldest child and son was Solomone. The second child was a son called 'Elone. The third child was

a daughter called Lu'isa. The fourth child and third son was Kaitu'u. The defendant was the fifth child and fourth son. The sixth child and fifth son was Malua. The eighth child and seventh son was Sione.

[6] Laulotu had a town allotment and tax allotment at Fatai. In 1997 he surrendered 2 acres of his tax allotment in favour of Kaitu'u and the remainder was subdivided into town allotments for other sons including Sione. A deed of grant was never issued to Sione but his grant was validly made. The first plaintiff's allotment was formerly Sione's allotment.

[7] Sione lived in New Zealand. In February 1988 he married a Rarotongan woman and they had a son in November 1988 called 'Atonio. It is not clear to me if Sione ever lived on his allotment. In around 2003 a house and a small shop was built on Sione's allotment for Lu'isa's daughter who is Viola. The defendant says Lu'isa paid for the materials but he did the construction work. He does not claim ownership of the house. Viola and her uncle Malua moved into the house and Viola operated the shop.

[8] In 2006 Sione died and his funeral was held at New Zealand. Neither Sione's widow nor 'Antonio made any claim for Sione's land following his death. As a result the land reverted to the estate holder (in this case the Crown).

[9] The defendant says that after the funeral Laulotu told Lu'isa that Viola should continue to live in Sione's house as if she was renting it from 'Antonio and 'we all agreed'. I find this evidence implausible as Laulotu had no rights over Sione's allotment but nothing turns on this. Viola continued to live on the allotment with Malua until around 2009 but then moved away. In around 2009 also Malua married and his wife lived with

him. In 2011 Malua died and his wife returned to her family. No one lived on the allotment for a time.

[10] The defendant and his wife lived and operated a shop from a town allotment at Matafonua (which is the subject of the second plaintiffs' claim). In 2009 they moved to New Zealand. The defendant's evidence was that they went to New Zealand with a container of cassava and because they did not get the money they wanted for the cassava they remained to pay off the freight and related expenses. He denied that he intended to stay permanently in New Zealand. I find that when the defendant and his wife left Tonga they had an intention to remain in New Zealand. They had an existing business in Tonga to repay the debt but the defendant said he left his shop and all its contents with Laulotu 'to do with as he wished'. That does not suggest he was concerned about raising money to pay debt. It is consistent with an intention to leave Tonga permanently. Furthermore, they lived in New Zealand for six years until 2015. The defendant gave no evidence about the size of his debt which would require such a lengthy stay in New Zealand. The defendant said at one point that the debt was 'finished' in 2014 but they did not return to Tonga then and remained in New Zealand as overstayers. The reason the defendant and his wife finally returned to Tonga was because their son, Maile, was seriously ill and later sadly died

[11] On 16 March 2011 Kaitu'u wrote to the Minister of Lands asking that Sione's land be registered in his name. He noted that five years had passed since Sione's death and said that Sione had a wife and a son and that they were foreign citizens who lived overseas. He also said that the reason for his request was that this was hereditary land and that he was 'the next entitled heir to our father Laulotu Finau'.

[12] The Ministry was aware that there was a house on Sione's land. There is a Ministry note on Kaitu'u's letter of 16 March 2011 which reads:

> NOTE: The death certificate of Sione F Finau is required and there is a dwelling house of Sione according to Kaitu'u Finau

[13] On 23 June 2011 Kaitu'u wrote to the Minister again with 'a new proposition' that the land be registered to his son, the first plaintiff, who he said had turned 16, was a Tongan subject and domiciled in Tonga.

[14] The first plaintiff applied for the land and on 13 August 2012 the Minister granted him the land. In a Savingram of that date to the Secretary of Lands the Minister wrote:

> Kindly prepare the Deed of Grant of the Tax Allotment of the above mentioned person.
>
> I grant this to Solomone Grahame Finau today and he is currently living in the piece of land....
>
> Once it is ready then return it for registration.

[15] Both Laulotu Jnr and Maile (the defendant's sons) had town allotments but did not live on them. In 2012 Laulotu Jnr and his family moved onto the first plaintiff's allotment. In 2013 they were joined by Maile. It appears this was before the first plaintiff and second plaintiff returned to New Zealand in early 2013 and late 2012 respectively. The evidence did not establish whether Laulotu Jnr moved onto the allotment before or after the allotment was granted to the first plaintiff. The plaintiffs were clearly unsure when exactly Laulotu Jnr moved onto the land. The defendant did not call Laulotu Jnr to give evidence about the matter and in answer to a question from Mr. Kefu the defendant said that he did not know about the land between 2011 and 2015.

[16] The first plaintiff's deed of grant was issued to him on 2 April 2014.

[17] The defendant's wife returned to Tonga in early 2015 and she lived with Laulotu Jnr (and his family) and Maile on the first plaintiff's allotment. She had an argument with Viola and could not operate the shop from Fatai but with the permission of Kaitu'u she re-opened the shop at Matafonua. In October 2015 the defendant returned to Tonga. Since then Laulotu Jnr and his family have moved from the first plaintiff's allotment and he has made no claim to the land.

The Matafonua allotment

[18] The second plaintiff's town allotment is in the estate of Lord Tu'ivakano and was first registered in 1931 to Sitivini 'Esi. Upon his death it was registered to Finau Vala and he died in 1971. Finau Vala's son and heir was Solomone Snr who was Laulotu's father. Solomone Snr had predeceased Finau. Laulotu already had a town allotment and so Laulotu's eldest son Solomone Jnr was registered as the holder of the allotment in 1971. Laulotu and his wife then moved from Fatai to Matafonua. The defendant went with them and married in 1974 and remained at Matafonua until 2009. Solomone Jnr did not live on the allotment. He lived in the United States.

[19] What was described as a hurricane house was built on the allotment. This was replaced in around 1986 with a substantial house which was 36 x 24 feet with four bedrooms and a large lounge. A smaller building was also built which was 36 x 12 feet with a kitchen, dining room, laundry, bathroom and toilet. These are still on the allotment. There is a dispute about who built and paid for the house.

[20] The defendant says that Laulotu's children contributed to the materials whilst he paid the carpenter and his workers and for their daily food. Kaitu'u says that in 1985 he discussed with Laulotu about building a

house for him. His siblings were asked to send money but when they did not do so he built the house. Kaitu'u said the house is his and he told everyone in his family.

[21] Mr. Niu submitted that the defendant's evidence should be preferred as it was more detailed than Kaitu'u's evidence. I do not accept that. Kaitu'u gave evidence about why he built the house, how he earned his money (he was selling building materials at the time), he identified the builder and the rates he paid the builder and labourers. Mr. Niu says Kaitu'u never before claimed the house but Kaitu'u denies that and there were no witnesses other than the defendant to contradict him. That is not to say that I accept Kaitu'u's evidence that he went so far as to tell 'everyone in my family' that he owned the house. It is true that there is no reference to Kaitu'u owning the house in the statement of claim but rightly so as it is not a matter that is material to the second plaintiff's claim. There is no mention of the matter in Kaitu'u's brief of evidence either but that is a skeletal document that was clearly never intended to cover all of Kaitu'u's evidence. Mr. Niu said that the defendant had no opportunity to call evidence in rebuttal of Kaitu'u's evidence but this is misconceived as the issue was raised by the defendant. Mr. Niu also submitted that Kaitu'u would not build a house on land that was registered to someone else particularly when he had elder brothers before him but the answer to that is he built the house for his father to live in, he did not have a town allotment at the time and his older brothers had no heirs. In the absence of some corroborating evidence, which neither the defendant nor Kaitu'u produced, I am unable to make a finding as to who built and paid for the house. However it is plain and I find that the house was built for Laulotu and it was his house and not the house of the defendant or Kaitu'u.

[22] In 1998 the defendant and his wife built a shop on the allotment and operated that shop until 2009 when they moved to New Zealand.

[23] Both Laulotu and Solomone Jnr died in around 2010. Solomone had no children and no one claimed his allotment and it reverted to the estate holder. There is no evidence that anyone claimed Laulotu's house. It appears that the allotment was not occupied between late 2010 and 2015. There was the suggestion that Viola may have lived there from time to time but that she married during this period and moved to Fangaloto.

[24] The second plaintiff applied for the allotment in 2012. He was living on Kaitu'u's town allotment at Fatai. There was an issue whether the estate holder consented to the application in 2010 or 2012 but I am satisfied he signed the application in 2012. I do not understand the defendant to make anything of this.

[25] On 2 April 2012 the Minister approved the grant to the second plaintiff. On 16 April 2012 the Minister directed that a deed of grant be prepared for the second plaintiff.

[26] The Ministry did not conduct an inspection of the allotment. In his written brief Seli Taufa said that Kaitu'u informed him that there were no buildings or improvements or occupants on the allotment. In his oral evidence he said that he was mistaken about that and despite cross examination he remained firm. I find that Kaitu'u did not inform the Ministry that there were no buildings or improvements on the land.

[27] The second plaintiff's deed of grant was issued on 25 May 2012.

The defendant's submissions

The Fatai allotment

[28] The counterclaim as it relates to the first plaintiff's land is concise and alleges only that the first plaintiff's grant is invalid because the land was lawfully occupied by Lu'isa who had permitted the defendant to occupy her house and they both, that is Lu'isa and the defendant, were entitled to be heard before the grant to the first plaintiff was made. This was not pursued and the evidence does not support it.

[29] The defendant argues more broadly that the Minister must inspect land which has been applied for 'to ascertain there is no impediment to the grant like the presence of someone else or his building upon the land' and as he did not do so in this case that invalidates the first plaintiff's grant.

[30] He also argues that Kaitu'u grossly misled the Minister into thinking that there was no impediment to the grant by false representations:

[30.1] That the first plaintiff was residing on the land when he was not;

[30.2] That Kaitu'u was Laulotu's heir when the heir was 'Elone; and

[30.3] That there was no building, improvements or occupants on the land.

[31] Related to this the defendant also submits that Kaitu'u misled the Minister by creating a 'false impression' by not informing the Minister that it had been agreed at Sione's funeral that the house on Sione's land was to be occupied by Viola and by emphasizing that 'Antonio was a foreigner and resident overseas.

The Matafonua allotment

[32] Mr. Niu again argues that the Minister was obliged to make an inspection before granting the Matafonua allotment to the second plaintiff and as he had not done so the grant was invalid.

[33] Mr. Niu also, rather more boldly, contends that the allotment was occupied by the children of Laulotu who owned the house and by the defendant because his shop was on the land. He submitted that the Courts have held that it is an impediment to a grant if there is a building belonging to a person situated on the allotment when the allotment is granted to another person. He relied upon *Tafa v Viau anors* [2006] Tonga LR 125 (LC), *To'a v Taumoepeau & Minister of Lands* [2015] Tonga LR 62 and *Manu v 'Aholelei and Minister of Lands* [2015] Tonga LR 135.

[34] The defendant's final argument is that the second plaintiff's grant was invalid as under section 50 of the Land Act he could not be granted land from the hereditary estate of Tu'ivakano at Matafonua but only from Crown land.

The law

[35] Before considering the defendant's arguments I wish to say something about the law relative to the issue of the defendant's standing and the other matters upon which he relies.

Standing

[36] A person cannot bring a legal action (including as a counterclaimant) unless they have a sufficient and vested interest in the subject matter of

the action (Halsburys *Laws of England* Vol. 37 Practice and Procedure at para 216).

[37] Whether a person has standing is a mixed question of law and fact. The issue of standing cannot be considered in isolation of the nature of the complaint itself.

[38] A person challenging a grant of land must establish that they have proper standing before the grounds of challenge become a relevant consideration. In *Skeen v Sovaleni* [2005] Tonga LR 298 the plaintiff sought to cancel the first defendant's registration on similar grounds as are advanced by the defendant in this case. Ford J said at page 300:

> The principles applicable to setting aside registration of a deed of grant are also well established. Until it is established to the contrary, the Court will presume that the register is correct. Registration is final unless it has come about as a result of an error of law (i.e. contrary to the Act) or as a result of fraud, mistake, breach of the principles of natural justice or of a promise made by the Minister.
>
> It is axiomatic, however, that before a plaintiff can challenge the registration of any deed of grant he must have *locus standi*. The Land Court was not established as a forum for just any busybody...
>
> .....
>
> .....Before any challenge can be made to registration of a deed of grant a plaintiff must be able to establish proper standing before the Court. Where, as in the present case, a plaintiff claims an entitlement to the land in question then the basis for his alleged entitlement must be apparent from the pleadings. Once that threshold is established then and only then do the pleaded grounds for setting aside the deed of grant become a relevant consideration.

[39] Another helpful case is *Tu'akoi v Tu'akoi* [2016] (Unreported Land Court, LA 24 of 2008, 6 May 2016, Scott J) where the plaintiffs sought an order that the surrender of a widow's estate was null and void. The Land Court held that the plaintiffs had no right to advance any claim to be legal successors to the land in question and they therefore had no right

to be notified or to be heard in relation to the surrender. Scott J said at [27]:

> In my view the only rights which the surrender procedure is designed to protect are those which might be lost if the land actually reverted at the end of the notice period. Rights to apply for land whether by way of grant or lease, do not arise until the reversion has actually taken place. They are not imperiled by the reversion itself.

[40] Relevantly in the present context it has been held that a person who at the time of a grant is in actual occupation of land is entitled to challenge a grant in defence of an action to eject him (*Schaumkel v 'Aholelei* (Unreported, Court of Appeal, AC 14/2012, 17 April 2013) and see also *Pelesikoti v 'Anau* (Unreported, Land Court, LA1/2016, 24 November 2016, Paulsen LCJ)).

The Minister's duties

[41] I do not accept the submission Mr. Niu makes for the defendant that the Minister must always carry out an inspection before granting land. It is now well established that the Minister must make such enquires as are reasonably necessary in view of the information before him to determine if land is or may be subject to some other claim that might be an impediment to a grant or make it unavailable. In some cases that will require an inspection and in other cases it may not.

[42] The purpose of this obligation to make enquires is to avoid unjust and unreasonable consequences which might result from the making of a grant.

[43] In *Naulu v Tupou and Others* (Unreported, Court of Appeal of Tonga, AC 21/15, 8 April 2016) the Court of Appeal set out important principles which can be summarised as follows:

[43.1] There is no requirement in law that before making a grant the Minister must always undertake an inspection and the extent of the inquires he must make will depend on the circumstances of the particular case.

[43.2] Whether an inspection is required will depend upon there being anything in the circumstances to put the Ministry on alert.

[43.3] Where there are competing applications or where the position is not clear a detailed investigation is to be carried out.

[43.4] The occupation of the land by someone other than the person applying for it does not necessarily render the land unavailable for grant. That will depend upon the nature and history of the occupation.

[44] I do not accept either Mr. Niu's submission that the mere presence of a building on land is an impediment to a grant. That is not correct. Tonga has many empty houses and shops on what appears to be unoccupied land. It cannot be the case that such land can never be granted. Mr. Niu could not refer me to any case that is authority for this proposition and I have not found any. I note that in each of the three cases Mr. Niu relied upon (*Tafa*, *To'a* and *Manu*) the party challenging the grant was in long term occupation of the land. I am not however attempting to lay down hard and fast rules. Whether the presence of a building on an allotment is an impediment to a grant must depend on the individual circumstances of each case.

Section 50 of the Land Act

[45] The defendant submits that the effect of section 50(e) of the Land Act is that residents on the estates of the Crown must only be granted their allotments out of Crown land. The section provides:

> Land for allotments shall be taken from the hereditary estates in accordance with the following rules-
>
> ....
>
> (e) an applicant for an allotment to be granted out of Crown Land shall have his tax and town allotments from such particular portion of Crown Land as the Minister may decide:
>
> Provided that an applicant already resident on Crown Land shall where possible be granted the allotment from the particular area of Crown Land in which the applicant is resident.

[46] In *Folau v Taione* (Unreported, Land Court, LA 06 of 2015, Paulsen LCJ) I held that a grant of a town allotment in breach of section 50 of the Land Act was not for that reason alone invalid. My reasons can be found in that ruling and having reviewed it I have found no reason to change my view. Mr. Niu was Counsel for the successful plaintiff in *Folau* which I mention only because he did not advance any arguments that the decision was incorrect.

Discussion

[47] I now turn to my consideration of the defendants arguments on the facts of this case.

The Fatai allotment

[48] Following Sione's death no one claimed his allotment as widow or heir and it reverted to the Crown. Once it had reverted the defendant did not apply for the allotment. At the time of the grant to the first plaintiff the

defendant was living in New Zealand. He had never lived on the allotment and he did not have any right to do so. He did not own the house or any improvements on the allotment either. In those circumstances the defendant had no legitimate interest in the allotment (or the house) that was imperiled or lost by the grant to the first plaintiff. Consequently he has no standing to challenge the first plaintiff's grant.

[49] In his evidence (at [29]) the defendant says that Laulotu Jnr and his family and Maile had rights to live in Sione's house and that their rights to reside there had not ended at the time of the grant. Even if that were true (and I do not accept it) no one removed them from the land and they have not challenged the first plaintiff's grant. The defendant's evidence only confirms that the interests he purports to advance are not his own. The defendant is truly a busybody in the sense that the term was used by Ford J in *Skeen.* I dismiss his counterclaim on this basis.

Was the Minister required to inspect

[50] It is unnecessary for me to make any finding as to whether the Minister should have inspected the allotment before making the grant to the first plaintiff. I am satisfied that had he conducted an inspection it would have made no difference. The Minister knew that Sione's widow and son lived overseas and had made no claim to the allotment. The defendant did not satisfy me that at the time of the grant to the first plaintiff Laulotu Jnr was living on the allotment. However, even if he was he had no right to be there and could not have applied for the allotment himself as he had his own town allotment. His brother Maile was clearly not living on the allotment until after the allotment was granted. The

inspection would have revealed nothing to suggest that there was an impediment to the grant.

Was the Minister misled?

[51] Kaitu'u did not mislead the Minister in any respect that was material to the first plaintiff's application. There is no evidence that Kaitu'u informed the Minister that the first plaintiff was living on the allotment and I cannot draw that inference and there was no requirement that the first plaintiff be living on the allotment for it to be granted to him. As far as Kaitu'u claiming to be Laulotu's heir is concerned the evidence was that 'Elone has been living in the United States for 43 years. The defendant called no evidence that 'Elone is still a Tongan subject and entitled to hold land in Tonga (section 4 Nationality Act Cap 58 repealed by section 5 Nationality (Amendment) Act 2007). I am not satisfied that Kaitu'u was not Laulotu's heir when he wrote to the Minister on 16 March 2011 and in any event the first plaintiff's application for the land was not dependent upon Kaitu'u being Laulotu's heir. The land had reverted to the Crown and subject to section 43 of the Land Act it was available for grant to any qualifying applicant. The third allegation is that Kaitu'u informed Seli Taufa from the Ministry that there was no building, improvement or occupant on the land. The Ministry was aware that there was a dwelling house on the land. It is noted on Kaitu'u's letter of 16 March 2011. Seli Taufa's evidence was that Kaitu'u told him that the land was vacant and not occupied or used. I consider that advice was correct at the time. Finally, there is nothing in the allegation that Kaitu'u created a false impression as to the occupation and use of the house. I do not believe there was an agreement made at Sione's funeral that Viola would live in Sione's house but in any event she chose to vacate the allotment well before it was granted to the first plaintiff. The

description of 'Atonio as a foreigner, resident overseas and a New Zealand citizen was not material in the circumstances where the allotment had reverted to the Crown but was not in the least misleading either.

The Matafonua allotment

[52] The defendant did not apply for the Matafonua land when it reverted to the estate holder following Solomone Jnr's death. He had not lived on the allotment or operated his shop from there since 2009. The defendant says he was entitled to be heard because of the 'presence of our dwelling house and our shop' on the allotment (see [29] of his brief). In my view he had no such interest in the house or the shop. As far as the house is concerned it belonged to Laulotu and after his death no one claimed it. The defendant also failed to satisfy me that he built or contributed to the building of the house. As far as the shop is concerned the defendant abandoned his interest in the shop to Laulotu when he moved to New Zealand. It is relevant that when the defendant's wife returned to Tonga she opened the shop at Matafonua only after obtaining Kaitu'u's permission. The defendant had no legitimate interest in the allotment or buildings that was imperiled or lost by the second plaintiff's grant and he has no standing to challenge the grant.

Should the Minister have inspected the land?

[53] In his submissions Mr. Niu did not identify any matters which put the Minister on notice of the possibility that there was an impediment to the grant to the second plaintiff. The information that was available to the Minister was that Solomone Jnr, the last lawful holder of the land, had died and no one had made a claim to the allotment. The allotment was unoccupied. The only person who did apply for the allotment was the

second plaintiff. He had a close family connection to the allotment. A declaration of no impediment was made by the estate holder Lord Tu'ivakano .

[54] Relevantly in the present context are the Court of Appeal's comments in *Naulu* at [20] where the Court said:

> In the present case, as we have noted, a declaration of no impediment was made by the estate holder. There was no competing application by Tevita. If there was nothing else to put the Minister or the officer handling the application on alert it might be reasonable for the Minister to rely upon the estate holder's certification, though better practice would be for an inspection of the allotment to be made in every case and anything of concern it revealed followed up. We say this in the hope that such a change of practice may reduce the incidence of litigation challenging the making of a grant.
>
> In this case, there was some further, we think significant information available to the Ministry, namely that it had been told by the applicant, 'Amanaki, that Tevita was farming the land.

[55] The factor that distinguishes this case from *Naulu* is that here there was no further information available to the Ministry to suggest that there might be an impediment to the grant or that the allotment was not available which he was required to follow up. In the circumstances it was reasonable for the Minister to have relied upon the estate holder's certification.

Section 50 of the Land Act

[56] I accept that at the time he applied for his allotment the second plaintiff was resident in Fatai and not at Matafonua but for the reasons I have given the grant is not invalidated for non-compliance with section 50.

Result

[57] The first and second plaintiffs are successful. The defendant, his invitees, servants or agents are to forthwith vacate the first and second plaintiffs' town allotments.

[58] The defendant's counterclaims are dismissed.

[59] The plaintiffs are entitled to their costs to be fixed by the Registrar if not agreed.

FAKAMAAU'ANGA FONUA
TONGA

O.G. Paulsen
PRESIDENT

NUKU'ALOFA: 21 June 2017