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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY **LA 16 of 2017**

BETWEEN : **LATA 'I FATAI PALELEI LENATI**

Plaintiff

AND : **SIOSIFA PALELEI**

First Defendant

HON. MINISTER OF LANDS

Second Defendant

BEFORE PRESIDENT PAULSEN AND ASSESSOR

Counsel: **Mrs. P. Tupou for the plaintiff.**
Mr. S. H. Taione (on 19 and 20 July) and Mr. S. Tu'utafaiva (on 28 July) for the first defendant.
Mrs. 'E. Langi for the second defendant.

Hearing: **19, 20 and 28 July 2017**
Date of Ruling: **7 August 2017**

RULING

The claim

[1] The Minister granted the first defendant a town allotment at Ma'ufanga and it was registered on 26 July 2016. The plaintiff had been living on that land all her life but was not consulted by the Minister before the grant was made and registration completed. The plaintiff seeks an order cancelling the first defendant's registration.

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[2] At issue is whether the Minister fulfilled his duty to make reasonable enquiries to determine whether there was an impediment to the making of the grant of the town allotment to the first defendant.

The facts

[3] Siaosi Palelei (Siaosi) had two daughters by his first wife and four daughters by his second wife, 'Uheina Palelei. The plaintiff (Lata) is the second daughter of Siaosi's marriage to 'Uheina. Siaosi also had an illegitimate son named Paula Palelei (Paula). Paula has three sons. The first defendant (Siosifa) is Paula's youngest son. It follows that Lata and Paula are half siblings and Lata is Siosifa's aunt.

[4] In 1948, Siaosi was granted a town allotment known as Matakivaha'i. It was registered in 1956. Siaosi and his family lived in a substantial house which was gifted to him and relocated onto the allotment.

[5] Lata was born in 1965. She has lived on Matakivaha'i her entire life; that is 52 years. She is married and her husband has a town allotment.

[6] Paula moved to live on Matakivaha'i in around 1979 when he was chased off his uncle's land. Siaosi consulted 'Uheina and they agreed Paula could live with them. He was treated as any other member of the family.

[7] Siaosi retired in around 1985. He decided to stand for the Legislative Assembly as a candidate in 'Eua. To advance this intention he arranged to exchange Matakivaha'i for Paula's town allotment at 'Eua. The exchange of the town allotments was approved by Cabinet. Paula was registered as the holder of Matakivaha'i on 31 July 1990. However Siaosi became ill and never stood for election.

[8] When 'Uheina found out about the exchange of the allotments she was not happy. She was concerned that one day the family would be chased

from the land. She told Siaosi to reverse the exchange but he said it could not be done. 'Uheina then said that the allotment should be halved between Paula and their daughters. Siaosi assured his family that he would see to it that no one would chase them from their land. Lata understood from her father's assurance that she would be able to live on the land for as long as she wished. Siaosi and 'Uheina continued to live on the land until they died in 2000 and 2006 respectively and Lata has lived there to the present day.

[9] Paula (who did not give evidence) must have been aware of the concerns within the family about the exchange of the allotments and discussed that with Siaosi. On 19 October 1990 Cabinet approval was obtained to the grant of a lease over one half of the allotment for 20 years in favour of Siaosi's eldest daughter Talahiva. The lease was registered on 22 February 1996 for the term 22 February 1996 to 21 February 2016. This was broadly congruous with 'Uheina's suggestion that the town allotment be divided between Paula and the daughters. I have no doubt that the lease was intended to provide security of occupation for Siaosi's daughters. It is not clear why the lease was registered in only Talahiva's name but there was no suggestion that it was to benefit her alone. It is also not clear why the lease was granted for 20 years. The circumstances lead me to conclude it was thought likely that within 20 years the daughters would have moved away.

[10] On 10 April 2012 Paula wrote to the Minister of Lands to surrender that part of Matakahiva'i that was subject to the lease in favour of Siosifa. However Paula's letter made no mention of the lease or of Lata's occupation. The application was not processed immediately because the allotment was subject to a mortgage. Following the discharge of the mortgage Cabinet approval to the surrender was given on 17 October 2014. On 11 November 2014 a public notice was published notifying of

the surrender and calling for any claims to be made to the land. No claims were made.

[11] On 26 January 2016 Siosifa lodged an application for a grant of the land. The lease had not then expired. It had expired by 7 March 2016 when the Minister gave his consent to the grant. On 26 July 2016 Deed of Grant Vol 435 Folio 29 was issued to Siosifa.

[12] Lata was not informed of Paula's intention to surrender the land or of Siosifa's application. It was not until September 2016 that Paula's wife told her that the land had been registered by Siosifa. In December 2016 Siosifa told Lata's husband that he was going to build on the land and that they would need to move away.

[13] Lata was concerned about these events. She wrote a letter to the Minister asking him to cancel Siosifa's grant on 30 January 2016. She also wrote to Paula on 9 February 2017 asking him to return the land. Paula responded expressing the hope that Lata would vacate the land. On 28 March 2017 Siosifa's lawyers wrote to Lata giving her 14 days to vacate or they would proceed to Court and lock up the house to prevent her and her family from entering it.

The role of the Ministry

[14] Warrick Vea, an experienced Land Registration Officer, gave evidence for the Minister. He said that he personally processed the applications in relation to the allotment in dispute.

[15] Mr. Vea confirmed that no inspection of the land was carried out before the grant was made to Siosifa. This was, he said, because Paula's surrender letter made no reference to a lease or to the fact that the allotment was occupied. I note also that the lease was not recorded on Paula's Deed of Grant.

[16] There was no evidence that Mr. Vea or anyone at the Ministry asked either Paula or Siosifa if the land was occupied. Mr. Vea said that he spoke to Paula on several occasions but 'I do not recall him informing me that the allotment was occupied'. The inference I draw from the evidence is that Paula and Siosifa did not wish the Ministry to know of Lata's occupation or for Lata to be alerted to their intentions with regard to the land.

[17] Mr. Vea said that he did not learn of the lease until 2017 when Crown Law requested instructions for this case. He did not consider the possibility of a lease because Paula's allotment had been mortgaged since 1993 and was not available to be leased. This was not an assumption that Mr. Vea could safely make as notwithstanding the mortgage the lease was registered in favour of Talahiva and a further mortgage was then registered on 24 August 2001.

[18] Mr. Vea was mistaken in my view that he only became aware of the lease in 2017. It can be assumed that he was familiar with the Ministry's file. On 4 May 2016 the Minister issued a Savingram which directed that Siosifa's Deed of Grant should be prepared to complete registration. On that Savingram there is a note written by a Ministry Officer recording that the lease had expired in 2016. That Savingram refers to a map of the allotment which Mr. Vea acknowledged was the map prepared for the lease. The existence of the lease was therefore certainly known to the Ministry by 4 May 2016.

[19] If Mr. Vea was not aware of the lease he should have been aware. The lease was registered and could have been found in the register of leases. Mr. Vea also acknowledged under cross-examination that the lease would have been shown on a head map (by which I take it he meant the registered plan of allotments). Rather than search those

records he relied upon the Deed of Grant and incorrectly assumed that there could not be a lease.

The submissions

[20] Mrs. Tupou submitted that Paula had breached Tongan cultural values in taking steps to remove Lata from the land and failing to extend to her the same consideration as had been shown to him when he had been forced from his uncle's allotment.

[21] She also noted a history of non-compliance by the Ministry with the Land Act in respect to the registration of the mortgages and the lease. She also submitted that the Ministry had failed to show that the consent of Cabinet to the surrender of the land had been advertised in the Tonga Government Gazette and in three issues of a Tongan Weekly newspaper as required by section 54(2) of the Land Act. Mr. Vea's evidence was only that a public notice was published on 11 November 2014 in a newspaper. The omission to publish in accordance with section 54 meant, Mrs. Tupou submitted, that the grant to Siosifa should be declared invalid.

[22] In relation to the Minister's duty to make reasonable enquiries Mrs. Tupou referred me to *Finau v Finau* (Unreported Land Court, 21 June 2017, LA 31/2015, Paulsen LCJ) where I discussed the principles enunciated in *Naulu v Tupou and Others* (Unreported, Court of Appeal of Tonga, AC 21/15, 8 April 2016). She submitted that the history of dealings with the town allotment, involving the exchange between Paula and Siaosi and the registration of the lease in favour of Talahiva, meant that the Minister was put on notice that an inspection should be conducted before granting the town allotment to Siosifa. She also argued that the Minister must be taken to have known of the lease and the fact that it had at the time of the grant only very recently expired.

These matters were sufficient to alert the Minister to make further enquires.

[23] Mr. Tu'utafaiva submitted that Siosifa was entitled to apply for the land once it had reverted to the Crown following Paula's surrender. He argued that Lata's right to occupy the land did not survive the term of the lease and that at the time the grant was made she had no right to be heard. He also submitted that Lata had no right to remain on the land when her husband had his own town allotment.

[24] For the Minister Mrs. Langi submitted that with the information that was before the Minister there was no obligation to inspect the land before making the grant to Siosifa. The relevant information was, she said, Paula's letter requesting a surrender in favour of Siosifa, that there was a mortgage on the land which meant there was no reason to look for any lease, the fact that no claims had been made within the 12 months prescribed by section 54 of the Land Act and that at the time of the grant the lease had expired (although according to Mr. Vea the existence of the lease was not known).

[25] Mrs. Langi also argued that Lata's right to occupy the land could not survive the lease. She submitted that the term of the lease for 20 years was an indication that it was not the intention that Lata and her sisters would live on the land indefinitely as Lata now contends.

[26] I asked Mrs. Langi about cases where it had been held that a person in long term occupation of land was entitled to be heard by the Minister before a grant was made to another. I had in mind *Tafa v Viau anors* [2006] Tonga LR 287 (CA), *Manu v 'Aholelei* [2015] Tonga LR 135 (LC) and *Naulu*. She submitted that these cases can be distinguished because they involved a prior holder giving permission to the person challenging a grant to occupy and live permanently on land whereas in this case Lata's right to be on the land did not survive the lease. She

referred me to *Tafolo v Vete* [1998] Tonga LR 164, *Vai v 'Uliafu & anor* [1989] Tonga LR 56 and *Vainikolo v Kaihea anor* [2009] Tonga LR 201.

The law

[27] The extent of the Minister's duty to make enquiries before making a grant was considered by the Court of Appeal in *Naulu*. This Court has applied *Naulu* in *Finau* and *Pelisikoti v Anau and anor* (Unreported Land Court, LA 1 of 2016, 24 November 2016, Paulsen LCJ).

[28] In *Naulu* the Court of Appeal cancelled a grant of a tax allotment because the Minister had failed to discharge his duty to make reasonable enquiries as to the availability of the land. Specifically the Minister had not investigated the fact that the land was under cultivation. The Court of Appeal noted that the Minister had been told by the applicant for the land that it was being cultivated:

> '..which surely should have alerted the Ministry to the fact that there was some form of occupancy, which might well involve the growing of crops. This might not have been 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.

[29] Referring to *Tafa* the Court of Appeal noted:

> [15] The Court drew attention to two aspects of the Minister's functions and duties which, it said, combined to require him to take steps, which must be reasonable in the particular circumstances, to ascertain whether the land is in fact not subject to some other claim that might be an impediment to a grant or make it unavailable. The first was the need for him to sign a declaration that there was no impediment. He could not do so if he simply did not know because he had made no sufficient inquiry.

...

[17] The second aspect to which the *Tafa v Viau* Court drew attention was that, as it said:

> *"...the administrative decision to make the particular grant cannot properly be made in the absence of the same inquiry in any case where the Minister does not actually know whether the land is available, or whether any competing claim has been appropriately resolved"* (at [12])

[18] The Court stressed that the Minister does not have to make the inquiries personally and may rely on his officers "but, if he does so, and they fail to perform the task properly, a person affected may have a remedy for that failure as if it were a failure of the Minster (at [12]).

[30] The Court of Appeal in *Naulu* recognised that there is not always a requirement that the Minister undertake an inspection of land before making a grant. It stated that where there is a declaration of no impediment from the estate holder, no competing application and nothing else to put the Ministry 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'.

[31] In this regard the Court, at [10], referred with apparent approval to the comment of Scott J in the Court below where he said:

> ..where there are competing applications or when the position is not at all clear then a detailed investigation has to be carried out.

[32] In putting this particular case in context it is helpful to refer to two further extracts from *Tafa*. At paragraph [13] the Court of Appeal found that a decision maker can be held to account if he fails to have regard

to circumstances that he would have known had he acted reasonably and fairly. The Court went on to say:

> The duty to take reasonable steps to ascertain the facts to which we have referred has been held to apply by very high authorities. In *Secretary of State v Tameside MBC* at 1065, Lord Diplock said:
>
> > "[T]he question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"
>
> .....
>
> On that basis his Honour considered an administrator could be held to account for a failure to have regard to "circumstances which, had he acted reasonably and fairly he would then have known". Where that knowledge would have imposed a duty to accord natural justice to some person ... "the Court must place itself in the shoes of the repository of the power to determine whether the procedure adopted was reasonable and fair."

[33] The other extract comes from the ruling of the Land Court in *Tafa* ([2006] Tonga LR 125, 141-142) which was upheld on appeal. Ford Acting CJ said:

> To have a situation, therefore, where the Minister of Lands is able to make a grant of an allotment in total disregard for the rights of a long-term lawful occupant of the same piece of land, is quite untenable and is a recipe for lawlessness. I cannot accept that such a consequence could ever have been intended by the legislature.

Discussion

[34] The land in question is Government land. Whilst there were no competing applications for the land the Minister did not have and could not rely upon a declaration from the estate holder that there was no impediment to the grant. It was for the Minister to sign a declaration that there was no impediment to the grant and he could not do that in the absence of sufficient enquiry.

[35] The Minister, and the officers acting on his behalf, did not make sufficient enquiry. There was no evidence that they asked Paula or Siosifa whether the land was occupied and if so by whom. More emphatically, Mr. Vea should have searched the register of leases or the registered plan of allotments and discovered the lease. It was neither prudent nor proper for Mr. Vea to assume that there could be no lease because the land was mortgaged. The lease would have put the Ministry on alert that the land for which Siosifa had applied was almost certainly occupied by another and had been so since at least 1996.

[36] The Ministry should then have investigated what was happening on the land and undertaken an inspection and spoken to Lata. That would have revealed her occupation of the land for over 50 years and that she wishes to continue to occupy the land and claims a right to do so. Only once the Ministry had done so, and in light of what it would have found, could the Minister have reached an informed decision that the allotment was in fact available for grant.

[37] I do not accept the arguments advanced by Mrs. Langi and Mr. Tu'utafaiva that Lata had no right to be heard as the lease had expired when the grant was made. When the lease expired Lata remained in occupation of the land and there had been no demand that she vacate the land. Her occupation was not unlawful (*Manu v 'Aholelei* (supra) at

[38]-[48]). Her right to be heard arose from the fact of her long term occupation of the land not from the lease.

[38] I reject also Mrs. Langi's submission that Lata had no right to be heard because there was no promise from the former holder that she could live permanently on the land. The cases Mrs. Langi referred me to were primarily concerned with the defence of estoppel to an action for eviction. This case is not concerned with estoppel but with the Minister's duties to make reasonable enquiries before making a grant of land.

[39] I am mindful of Mr. Tu'utafaiva's submission that Lata and her husband should live on his town allotment. That may be one factor for the Minister to consider in due course but does not deprive Lata of a right to be heard.

[40] For the reasons I have given I find that the Minister did not discharge his duty to make reasonable enquiries as to the availability of the land to be granted to Siosifa. If follows that Siosifa's registration must be cancelled and the Minister is directed to do so and to make a fresh decision on Siosifa's application (and any competing application that Lata may make) once he has given both Siosifa and Lata an opportunity to be heard.

[41] Nothing in this ruling should be taken as expressing a view on how the Minister may resolve the competing claims of Siosifa and Lata. That is a matter entirely for the Minister to decide.

[42] Because of the conclusion I have reached it has not been necessary for me to consider Mrs. Tupou's argument that the grant to Siosifa was invalid in breach of section 54.

[43] For completeness I should add that this action was heard urgently as Siosifa claimed hardship because he has spent a large sum on building materials to build on the land. Storing those materials is apparently both difficult and expensive. This situation is of his own making. He concealed his intentions for the land from Lata. Had he not done so this dispute could have been resolved before he purchased any materials.

Result

[44] Lata's claim is successful and the Minister of Land is directed to cancel Siosifa's Deed of Grant in accordance with paragraph [40].

[45] Lata is entitled to costs to be fixed by the Registrar if not agreed.

NUKU'ALOFA: 7 August 2017

FAKAMAAU'ANGA FONUA
TONGA

O.G. Paulsen
PRESIDENT