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**IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY**

BETWEEN : TOAKASE PANUVE

Plaintiff

AND : TAPU PANUVE

First Defendant

HON. MINISTER OF LANDS

Second Defendant

BEFORE PRESIDENT PAULSEN

To: Mr. L Niu for the plaintiff

Mr. W C Edwards Snr SC for the first defendant

Mr. 'A Kefu SC for the second defendant

Hearing: 11 and 31 July 2017

Date of Ruling: 7 August 2017.

RULING

The nature of the case

[1] The plaintiff's (Toakase) husband (Sionatapi) died and she claimed and was granted his town and tax allotments as widow under section 80 of the Land Act. Prior to Sionatapi's death he had granted a lease of his town allotment to the first defendant (Tapu) who was his eldest son. The lease

was not registered until after Toakase was registered as the holder of the town allotment. Toakase is seeking cancellation of the lease. Tapu seeks cancellation of Toakase's registrations of the tax and town allotments on the ground that she was not on the date of Sionatapi's death a Tongan subject. In addition Tapu seeks a declaration that he is the owner of the house on the town allotment.

[2] The issues that arise are:

- a) Did Toakase have to be a Tongan subject to claim and to hold a life interest over the town and tax allotments of Sionatapi under section 80 of the Land Act?
- b) If so, did Toakase have to be a Tongan subject on the date of Sionatapi's death or on the date she lodged her claim as widow?
- c) Does Tapu own the house?
- d) Is registration of the lease invalid because it was made after the registration of the town allotment in the name of Toakase?

The facts

[3] Toakase was born in Tonga in 1948 and married a Tongan man in the United States in 1974. She became naturalized as a citizen of the United States in February 1982. She was divorced from her first husband in 1986.

[4] Sionatapi's first wife was named Ana and they had two legitimate sons named Tapu (the eldest and heir) and Semisi. They also had a customarily adopted daughter named Juliet.

- [5] Sionatapi had a town allotment at Haveluloto (Deed of Grant 273/79) registered on 2 June 1989 and a tax allotment at Pelehake (Deed of Grant 324/72) registered on 24 January 1996.
- [6] In around 1989 Sionatapi agreed with Tapu and Semisi to build a house on his town allotment. They jointly borrowed the money to build the house from the Bank of Tonga and agreed to share the burden of the loan payments. In December 1989, before the house was completed, Ana died and she never lived in the house. When the house was completed Sionatapi, Tapu, James and Juliet lived in the house.
- [7] On 15 June 1991 Sionatapi married Toakase in the United States of America and brought her to Tonga to live in the house with his children. In August 1991 Tapu married and left the house and lived elsewhere with his wife. He continued to make his payments towards the house loan. Semisi married in 1992 and continued living in the house with his wife, Sionatapi, Toakase and Juliet. In around 1996 Juliet moved to the United States. Also around 1996 Semisi asked to be released from the bank loan as he and his wife wanted to build their own house. Sionatapi and Tapu agreed to release him. A new arrangement was made with the bank whereby Sionatapi and Tapu shared the payments. At that stage the monthly payments were \$1,050 of which Sionatapi was to pay \$730 and Tapu \$320.
- [8] Toakase gave evidence about the work she did as Sionatapi's wife which in some years included growing squash pumpkin. In 1997 Sionatapi retired and in 1998 Sionatapi and Toakase planted crops for their own use. From around 2000 Toakase went back to the United States for work and remained there until 2009. She says, and I accept, that during this period she visited Sionatapi in Tonga, he visited her in the United States

and they met up in New Zealand also. She also gave evidence that through her employment she was able to send Sionatapi money.

- [9] In 2003, Sionatapi was in financial difficulties and asked Tapu for assistance to repay the bank loan. In return for Tapu paying off the loan Sionatapi offered him a lease of his town allotment. It was never satisfactorily explained to me what real benefit Tapu was to obtain from the lease. Tapu repaid the bank loan. The amount owing was \$21,582.34. A mortgage that had been registered over the town allotment was discharged.
- [10] On 5 April 2004 Tapu signed the application to lease the town allotment and Sionatapi signed the application agreeing to the lease. On 18 November 2004 Cabinet approved the lease. However, notwithstanding enquires about the lease by Tapu to the Ministry of Lands, it was not completed or registered.
- [11] In 2009 Toakase returned to Tonga and she lived with Sionatapi for three years until he died on 23 July 2012. At the date of Sionatapi's death Toakase was still a citizen of the United States of America.
- [12] Before making any claim for Sionatapi's town and tax allotments as widow Toakase applied for and was on 25 October 2012 readmitted to Tongan nationality.
- [13] On 31 October 2012 Toakase lodged her claim as widow for Sionatapi's town and tax allotments and they were registered in her name on 8 August 2013 and 4 June 2013 respectively.
- [14] It was not until 12 August 2015 that Tapu's lease was registered. Toakase was not consulted about that. In her statement of claim Toakase

pleaded that Tapu had required her to vacate the town allotment. I do not believe that to be the case.

Nationality

[15] Both Tapu and the Minister argue that Toakase was not entitled to Sionatapi's tax and town allotments because she was not a Tongan national on the date of Sionatapi's death. Toakase responds with two arguments. First, that there is no requirement that a widow be a Tongan national to claim her deceased husband's tax or town allotments. Secondly, that if such a requirement exists it is enough that a widow is a Tongan national at the date she makes her claim.

[16] Mr. Niu referred me to clause 113 of the Constitution which provides:

Tongan male subjects by birth of or over the age of 16 years may be granted town allotments and tax allotments out of estates granted in pursuance of this Constitution with the content of or upon consultation with the estate holder and out of the lands of the Crown, by the Minister of Lands. Such allotments shall be hereditary and shall be of such size and at an annual rent as may be determined by law. A widow shall have the right to succeed according to law, to her deceased husband's tax and town allotments.

[17] Mr. Niu submitted that whilst clause 113 requires that males be Tongan subjects by birth to be eligible to be granted tax and town allotments it does not require widows to be so. He noted that widows are entitled to succeed 'according to law' and submitted that there is no requirement anywhere in the Land Act that a widow be a Tongan subject in order to succeed to her husband's town or tax allotment either.

[18] I was referred to a decision of the Land Court in *Ve'a & anor v Ve'a and ors* (Unreported Land Court, LA 22 of 2009, 1 October 2010, Lewis J) where the Judge held in relation to a widow's rights under section 80 of the Land Act:

I agree with the submission that there is no provision in the Constitution or in any other law in Tonga that a widow will only have that right if she is a Tonga subject.

There have been several if not many cases, where a non-Tonga citizen has received a widow's life estate.

[19] Mr. Niu then submitted that in any event it was sufficient that Toakase was a Tongan national when she made her claim for Sionatapi's allotments. He argued that the view expressed by the Court of Appeal in *Taufa v Tahaafe anor* [2015] Tonga LR 104 to the effect that the time for the determination of a right of inheritance is the time of death of the last holder simply recorded an agreed position of the Counsel in that case and was not binding on this Court.

[20] In further support of his submissions Mr. Niu also referred me to the proviso to section 80 of the Land Act which provides:

...Provided always that the failure of the deceased lawful male holder of any tax or town allotment to register the same under the provision of Division II of Part VIII of this Act shall not of itself be a bar to the grant to his widow of a life estate under this section, and that provided the Minister of Lands is satisfied upon enquiry that the deceased person was the lawful holder of the said allotment it shall be lawful for him to effect posthumous registration at the request of the widow.

[21] He argued that the proviso makes clear that whilst a widow is entitled to claim her husband's tax and town allotments there is still a requirement

that the land be granted to her by the Minister. As I understand the argument, two points are being made. First, there is nothing in the Land Act that restricts such a grant to a Tongan subject as there is in the case of a male applying for an allotment under section 43. Secondly, the important time for determining eligibility to be granted an allotment should be the time when the Minister makes the grant.

[22] Despite all that Mr. Niu had to say on the matter I fully agree with Mr. Kefu that it is a fundamental tenet of Tongan land tenure that only Tongan subjects can hold a life interest in any town or tax allotment. Toakase was not entitled to claim Sionatapi's tax or town allotment because she was not a Tongan subject on the date that he died.

[23] Before 2007, section 4 of the Nationality Act provided that a Tongan subject upon naturalization in a foreign State was henceforth deemed to have ceased to be a Tongan subject. It stated:

- (1) A Tongan subject who when in any foreign State and not under disability by obtaining a certificate of naturalization or by any other voluntary and formal act becomes naturalized therein shall henceforth be deemed to have ceased to be a Tongan subject.
- (2) A female Tongan subject who marries an alien, and exercise her right to acquire the nationality of her husband, and does in fact acquire the nationality of her husband, shall cease to be a Tongan subject from the date on which she acquires foreign nationality.

[24] The effect of this section was far reaching and was described in *Pahulu v Mottini & anor* [1996] Tonga LR 252, 256 as follows:

It seems to me that the plain effect of section 4 of the Act is to bring to an end any rights enjoyed by a Tongan subject by reason of his being a Tongan subject prior to his acquiring another nationality. Section 4 'deems' him to be no longer a Tongan subject by operation of law without any other act taking place. It is an Act designed to have quite profound consequences including the preservation of liability with the destruction of rights.

- [25] In 2007 the Nationality Act was amended and included provision in section 17 for a Tongan who had lost his or her Tongan nationality to apply for re-admission as a Tongan subject.
- [26] Section 14 of the Land Act prohibits non-Tongans from holding, residing or occupying land without a permit. Section 7 and 43 provide that only Tongan male subjects by birth can hold land as a life interest. The Courts have confirmed that only Tongan male subject can hold land on a life interest. (*Ministry of Lands v Kulitapa* [1974-1980] Tonga LR 101; *Pahulu v Mottini and anor* [1996] Tonga LR 253; *Taufa v Tahaafe anor* [2015] Tonga LR 104).
- [27] Mr. Niu's arguments proceed from the premise that there is no express requirement in the Land Act that a widow must be a Tongan subject to claim her deceased's husband's town and tax allotments. The premise is superficially appealing but incorrect.
- [28] The terms 'landholder' and 'holder' are defined in section 2 of the Land Act which provides:

"landholder" or "holder" means -

- (a) as regards Crown Land the Minister of Lands;

- (b) any Tongan subject holding an hereditary estate (tofia), a tax allotment ('api tukuhau) or town allotment ('api kolo);
- (c) any Tongan subject claiming to be interested in land which he is legally capable to hold;
- (d) any trustee duly appointed by the King, the Minister, or the Court on behalf of any person entitled to succeed to any land on reaching the lawful age of succession in respect of such land;
- (e) any person appointed as or acting as trustee or representative for any person beneficially entitled to any land or interest in land;
- (f) any person who claims to be entitled to any land or interest in land whether in actual possession or occupation or otherwise.

[29] It will be noted that both paragraphs (b) and (c) of the definition refer to the landholder or holder being a Tongan subject.

[30] The definition was considered by the Court of Appeal in *Taufa* (supra). The facts were that the last holder of the land in dispute was Finau Taufau who had a life interest as widow. The eldest son, Kisione, had been naturalised as an American. Upon Finau's death the land was claimed by Kisione and also on behalf of the second son who was a Tongan subject. Nothing was done to determine who was the lawful heir to succeed to the allotment for a number of years. In 2011 Kisione was re-admitted as a Tongan national and in 2012 the Minister granted him the allotment. The Minister's decision was set aside by the Land Court and Kisione's appeal was dismissed by the Court of Appeal. It was held in the Court of Appeal that when Kisione became an American citizen he lost his Tongan nationality and his right to succeed to the land under section 82 of the Act.

[31] Consistent with the position that a holder of a tax or town allotment must be a Tongan subject the Court of Appeal said in relation to the definition in section 2:

When s.82 is read with this definition in mind the following appears. Section 82, as we have said, deals with inheritance through blood lines from a "lawful male holder". A person whose claim to the succession is correctly registered will in turn become the lawful male holder. Paras (b) and (c) encompass only Tongan subjects as holders. That suggests that a foreigner cannot become a holder under the operation of s.82. The only other paragraph of possible relevance is para (f) but that part of the definition, which is a general one for the purposes of the whole of the Act, is not apt to describe a holder under s.82, for such a person is not a mere claimant.

[32] In the same way as a successor to land under section 82 is not a 'mere claimant' nor is a widow claiming land under section 80. It follows from the definition of 'landholder' and 'holder' in section 2 that to claim a tax or town allotment a widow must be a Tongan subject.

[33] In this regard it is important to note that under section 82(d) there is the possibility of an unmarried daughter of the last lawful holder inheriting a town and tax allotment. Section 82 does not state that such a daughter must be a Tongan subject but that is the effect of the definition in section 2 as confirmed in *Taufa*.

[34] Consistent with the view I have expressed The Royal Land Commission Final Report of 30 March 2012 stated that a widow who succeeds to her husband's town and tax allotment is a 'holder' of land for the purposes of the Land Act and that only a Tongan subject can be the holder of a tax or

town allotment. The relevant extracts appear at pages 67 and 72 of the Report.

- [35] There are other considerations which also inevitably lead me to the conclusion I have reached. First, it would be peculiar that a Tongan born male is, as a result of taking foreign citizenship prior to the 2007 amendments to the Nationality Act, deprived of his right to hold a tax or town allotment yet a widow who has similarly lost her Tongan nationality retains that right.
- [36] Secondly, the Land Act created a unique system of land tenure in Tonga where all land is given by grant and not sold for money and life interests in land are reserved for Tongan people to ensure their welfare. The prevention of alienation of land to foreigners was regarded as a vitally important policy for Tonga's future (Royal Land Commission Report at page 2 quoting Rev D. A Harold Wood in his *Overseas Missions of Australian Methodist Church* Vol 1 [1975]). I do not think that anything has changed today. Mr. Kefu made the point, which I accept, that life interests in land carry cultural and customary obligations which non-Tongans cannot be expected and would not perform and thus were reserved for Tongan subjects only.
- [37] What I have said is contrary to the ruling of Lewis J in *Vea*. I consider that case was wrongly decided. Lewis J does not refer at all to the definition of 'landholder' and 'holder' in section 2 of the Act nor does he appear to have turned his mind to the principles upon which land tenure in Tonga is based.
- [38] The next issue is whether Toakase had to be a Tongan subject at the time of the death of Sionatapi or at the time of lodging her claim as widow. In

my view Toakase had to be a Tongan subject at the time of Sionatapi's death. Contrary to Mr. Niu's submission the point has been decided by the Court of Appeal in *Taufa*. The view the Court expressed was a necessary step in the line of reasoning of the Court and is binding on this Court.

[39] This view is self-evidently correct when one considers the opening words of section 80 which make clear that the widow's entitlement arises on the death of the lawful male holder not when she makes a claim or when the grant is made.

[40] There are also very practical reasons why inheritance must be capable of being determined with certainty on the date of the death of the last lawful holder. The Minister has a duty to grant land to a lawful successor upon the death of the last holder. Such grants when validly made should not later be subject to challenge because some person who would otherwise have been the successor but for the fact that they ceased to be a Tongan subject has been re-admitted to Tongan nationality.

[41] Toakase was not entitled to claim Sionatapi's tax and town allotments as widow and her registrations must be cancelled.

Ownership of the house

[42] Tapu claims he is the owner of the house. Toakase disputes this and submits that as Sionatapi's widow she is entitled to the house under section 16 of the Probate Act.

[43] Mr. Edward's argues that Tapu is the owner of the house because the arrangement between Sionatapi and his sons was that the house would be jointly owned, that Tapu made payments on the loan as agreed and that

the house became the property of Tapu alone when he fully paid off the loan at Sionatapi's request in 2003. Mr. Edwards argues that there was nothing to suggest that Tapu was paying off the loan as a gift. I am unable to accept Mr. Edward's submissions which are contrary to the evidence of Tapu himself.

[44] The issue of ownership of the house was not discussed between Sionatapi and his sons. Tapu, who I have no hesitation in saying I found to be a completely honest witness, said there was no such discussion. In his brief of evidence he said that 'I agreed to build the house with the expectation that I would one day be the owner'. I emphasise that his expectation was that he would own it 'one day'. As his father's heir this was a realistic expectation. Consistent with this Tapu also said the house was built as a family house and in accordance with custom it belonged to Sionatapi. It is therefore clear that whilst he undoubtedly made significant contributions towards repaying the loan that was obtained to build the house it was Tapu's understanding that consistent with custom the house belonged to Sionatapi.

[45] I do not see that anything changed when Tapu paid off the balance of the loan in 2003. There was no evidence that it was agreed at that time that he owned the house. Tapu did not say that he paid off the loan in return for ownership of the house but "As I wanted to help alleviate [*Sionatapi's*] financial hardship and to allow him to enjoy his retirement more I agreed to take over and pay off his mortgage."

[46] The fact that Tapu was to be given a lease of the property, which to his mind included the land and the house, is contrary to the assertion that he was given ownership of the house.

[47] Furthermore, Tapu gave evidence that in 2012 he agreed to pay the cost of maintenance work to the house and to a shop on Sionatapi's town allotment and intended to recoup his costs by renting out the shop. Tapu accepted that the reason he wanted to recoup his money was because it was his father's house.

[48] Tapu did not satisfy me that he is the owner of the house. This is not a finding that Toakase owns the house. She did not seek an order to that effect. It appears to me there are at least two objections to the argument that she inherited the house under section 16 of the Probate Act. First, Toakase has not applied for letters of administration. Secondly, there may be a question about the application of section 16 when Toakase is not able to claim the town allotment. I do not express any view on the matter.

The lease

[49] Toakase's challenge to the lease was based on her prior registration as holder of the town allotment. I have found that her registration must be cancelled. She therefore has no standing to challenge the lease and I am not required to make any further finding in relation to it.

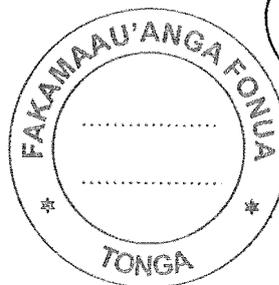
Result

[50] Toakase's claim is dismissed.

[51] Tapu's counterclaim is allowed to the extent that the Minister of Lands is directed to cancel Toakase's registrations as holder of the tax and town allotments formerly owned by Sionatapi being the town allotment in Deed of Grant 273/79 and the tax allotment in Deed of Grant 324/72.

- [52] I decline to make a finding that Tapu is the owner of the house or as to the validity or otherwise of the lease.
- [53] The defendants are entitled to the costs of this action which are to be fixed by the Registrar if not agreed.
- [54] As a final note I should add that this was a case where the Court had to have regard for Tongan usage and custom and I have obtained particular assistance from the Assessor. Whilst responsibility for any errors that may appear in this ruling are entirely my own the Assessor concurs with the decision of the Court.

NUKU'ALOFA: 7 AUGUST 2017




**O.G. Paulsen
PRESIDENT**

**IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY**

LA 26 of 2015

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BETWEEN : TOAKASE PANUVE

Plaintiff

AND : TAPU PANUVE

First Defendant

HON. MINISTER OF LANDS

Second Defendant

BEFORE PRESIDENT PAULSEN

To: Mr. L Niu for the plaintiff

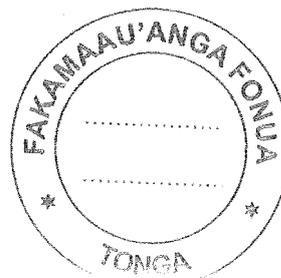
Mr. W C Edwards Snr SC for the first defendant

Mr. 'A Kefu SC for the second defendant

CORRECTION TO RULING (O.28 Rule 5)

[1] My ruling of 7 August 2017 contains a clerical error in that the Judge in *Vea & anor v Vea & ors* referred to in paragraphs 18 and 37 was Andrews J not Lewis J. Pursuant to O.28 Rule 5 the references to 'Lewis J' in those paragraphs of the ruling are corrected to read 'Andrews J'.

NUKU'ALOFA: 8 AUGUST 2017




O.G. Paulsen
PRESIDENT