

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

LA 12 of 2016

DPP / Aleamotua #1
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08/11/17

BETWEEN : TAVITE KAVAFOLAU LOPETI
First Plaintiff
YOHANNY LOPETI
Second Plaintiff
AND : LUSE LOPETI
First Defendant
MINISTER OF LANDS
Second Defendant

BEFORE PRESIDENT PAULSEN

To: Mr. L Niu SC for the first and second plaintiffs
Mr. S. Tu'utafaiva for the first defendant
Mr. 'A Kefu SC for the second defendant

Hearing: 7 and 8 September and 11 October 2017

Ruling: 7 November 2017

RULING

The claims

- [1] 'Aleksio Lopeti was the holder of a town allotment and a tax allotment. The first plaintiff (Tavite) is 'Aleksio's heir. The second plaintiff (Yohanny) is 'Aleksio's grandson and Tavite's heir. The first defendant (Luse) is 'Aleksio's youngest daughter.
- [2] 'Aleksio agreed to give a lease over part of his town allotment to Luse but no lease was prepared or registered during 'Aleksio's lifetime. When 'Aleksio died Tavite elected to succeed to 'Aleksio's allotments but later purported to elect to retain his own allotments and 'Aleksio's allotments

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were both granted to Yohanny. It was only some years later that Luse's lease was registered.

- [3] There are two aspects to the claim. First, Tavite and Yohanny argue that upon 'Aleksio's death Tavite elected to succeed to 'Aleksio's allotments as he was entitled under section 84 of the Land Act. He only later purported to change his election because of incorrect advice from an Officer at the Ministry of Lands, including that if he retained his own allotments Yohanny would lawfully succeed to 'Aleksio's allotments. Tavite and Yohanny seek orders declaring Tavite to be the lawful holder of 'Aleksio's allotments and Yohanny to be the lawful successor to Tavite's allotments. Secondly, Tavite and Yohanny argue that because Luse's lease was not registered before 'Aleksio died it is invalid and must be cancelled.

The facts

- [4] Before 1920 the estate holder of Lapaha granted Filise 'Auaea a tax allotment called Toafa and a town allotment called Felemei. Felemei had an area of 3 roods 26 perches. The allotments were registered on 8 January 1929.
- [5] Filise's eldest son was 'Aleksio. 'Aleksio had a town allotment called Pule where he raised his large family. Tavite is 'Aleksio's eldest son and heir and Luse is 'Aleksio's youngest daughter. Yohanny is Tavite's eldest son and heir.
- [6] In 1967 Tavite was granted a tax allotment called 'Fo'i Hefa'.
- [7] Tavite went to New Zealand in around 1973 and earned money. He returned and built a house for his parents and eight sisters on Felemei

(which was then Filise's land) thinking that he would one day inherit the allotment. Filise and his wife were also living on Felemei at this time.

- [8] Filise died in 1984. 'Alekisio succeeded to Felemei and Toafa and Tavite succeeded to Pule. 'Alekisio was never registered as the holder of Felemei and was not given a deed of grant. Pule was not registered in Tavite's name until 27 February 2009. The position then was that 'Alekisio was the holder of Felemei and Toafa (although not registered as such) and Tavite was the holder of the town allotment Pule (again not registered as such until 2009) and the tax allotment Fo'i Hefa.
- [9] In around 1996 'Alekisio agreed to lease part of Felemei to Luse. Luse's husband does not have any land and Luse had provided care to 'Alekisio and his wife. On 16 October 1996 Cabinet gave its consent to a 50 year lease of 810m² of Felemei from 'Alekisio to Luse. The lease was not prepared or registered.
- [10] 'Alekisio died on 8 November 2007. On around 8 January 2008 Tavite, who lives in New Zealand, travelled to Tonga and lodged his heir's affidavit claiming both Felemei and Toafa. Tavite's evidence in this respect was confirmed by the Ministry Officer Semisi Moala. It is quite clear that Tavite had understood that upon 'Alekisio's death 'Alekisio's allotments would devolve upon him as heir and that his allotments would in turn devolve upon Yohanny. That is what he intended to happen when he lodged his heir's affidavit and what he told Yohanny would happen after he returned to New Zealand having filed the heir's affidavit. Tavite was told by the Ministry upon filing his heir's affidavit that everything was in order and that there was nothing further for him to do.
- [11] In around 2010 Tavite became aware that Felemei was being surveyed for Luse's lease and he came to Tonga again to object to the granting of

the lease. On visiting the offices of the Ministry of Lands he was advised by a Registry Officer, Fataua Halatanu, that the Ministry did not have any record of his claim to Felemei and Toafa and that the allotments had reverted to the estate holder. Tavite returned to New Zealand and found his copy of his heir's affidavit and came back to Tonga and produced it to Mr. Halatanu. Mr. Halatanu told him that 'You were right all the time' and that he would start Tavite's claim for Felemei and Toafa afresh. I find that the Ministry understood that Tavite had claimed Felemei and Toafa.

[12] Importantly, Tavite was told by Mr. Halatanu that the maximum area of a town allotment was 1 rood 24 perches and as Felemei was larger than that the surplus area would revert to the estate holder. Tavite asked whether if he kept his own allotments Yohanny would take Felemei and Toafa. He was told that he would. I accept that it was because of what Mr. Halatanu had told him (which he believed to be correct) that Tavite instructed Mr. Halatanu that he would keep his own allotments and have 'Aleksio's allotments registered in Yohanny's name. He directed Mr. Halatanu accordingly and this was written down by Mr. Halatanu and signed by Tavite (document 5 of the Minister's bundle). Tavite also said, and again I accept, that he told Mr. Halatanu that he objected to Luse's lease and was told that there was nothing that could be done about that. For reasons I shall come to the advice that Mr. Halatanu gave Tavite was incorrect in important and material respects. There is no suggestion that Mr. Halatanu gave the advice other than in good faith.

[13] Tavite's evidence cogently explains why having initially elected to claim 'Aleksio's allotments he subsequently purported to change his election and keep his own allotments. Understandably after so many years Mr. Halatanu did not have a clear recall of his conversations with Tavite but

under cross-examination he accepted that Tavite's evidence might well be correct. Furthermore, Tavite's evidence is consistent with how the parties proceeded and in important respects with the content of the Ministry's letter to Tavite of 17 August 2010 (document 4 of the plaintiffs' bundle).

- [14] Tavite returned to New Zealand and was subsequently advised that the transfer of Felemei and Toafa to Yohanny had been approved. He travelled to Tonga and paid the relevant fees and later he received a letter confirming Yohanny was the holder of Felemei and Toafa. The Minister granted Toafa to Yohanny on 19 April 2010. It is not clear exactly when Felemei was granted to Yohanny but it must have been before the date of the Ministry's letter to Tavite of 17 August 2010 and well before the registration of Luse's lease.
- [15] On 23 August 2010 Yohanny wrote to the Minister of Lands objecting to a lease over Felemei to Luse but he received no reply. In January 2016 Tavite and Yohanny were in Tonga and arranged to see the Minister to complain about Luse's lease. They were told they could see the Minister at 8.30am on 13 January 2016. They went to see the Minister as arranged but did not get to see him until 2pm and were advised that their complaint was too late as the lease was registered that morning. The Minister said he would reconsider the matter. Tavite returned a week later to see the Minister only to be told that the Minister was overseas. He returned two days later and was told to speak to a Registry Officer, Sione Uele. Tavite spoke to Sione Uele but was told that there was nothing that could be done about the lease.
- [16] Luse's lease was registered on 13 January 2016. There was conflicting evidence for the long delay between Cabinet giving its consent and the

registration of the lease. Luse said that she followed up with the Ministry about registration of her lease. The evidence of Mr. Halatanu was that the most likely cause of the delay was that Luse did not follow the matter up. Where fault lies has no bearing on the result of this particular case.

[17] Luse's lease was registered as Lease No 8778 with the following details:

Lessee:	Luse Lopeti
Lessor	Yohanny Lopeti
Area	810m ²
Term	50 years (13.01.2016-12.01.2066)
Purpose	Residential
Rental	TOP\$50 per annum

[18] This action was commenced in June 2016 and Tavite sought an interim injunction because Luse had dismantled the house he had built on Felemei and was building a new house on the land. That application was resolved on terms that should Tavite and Yohanny be successful in their application to cancel the lease Luse will leave the new house on the land for their benefit.

A preliminary issue

[19] An issue arose concerning the area of Felemei and specifically whether if Filisi had prior to the introduction of the Land Act on 23 August 1927 been granted 3 roods 26 perches as his town allotment whether the full area devolved upon 'Aleksio or only 1 rood 24 perches, being the maximum size of a town allotment under the Land Act. It is now conceded by the Minister that prior to the enactment of the Land Act Felemei was granted 3 roods 26 perches of land as his town allotment and that the full area devolved upon 'Aleksio when Filisi's died.

[20] Mr. Niu presented interesting and comprehensive submissions on this issue and referred me to the relevant authorities which I list here for the benefit of later cases where the issue may arise again (*Tu'uhetoka v Malungahu* (1945) Vol II Tonga LR 53, *Moala v Tu'i'afitu and Halalilo* (1956) Vol II Tonga LR 104, *Manakotau v Vaha'i* (1959) Vol II Tonga LR 121, *Minister of Lands v Kamoto* (1962) Vol II Tonga LR 132, *Minister of Lands and Kalanivalu v Tekiteki* [1974-1980] Tonga LR 8).

Who was entitled to Felemei and Toafa upon 'Alekisio's death?

[21] Upon 'Alekisio's death without a widow his heir Tavite, who already held his own town and tax allotments, was entitled under section 84 of the Land Act to elect to take 'Alekisio's town and tax allotments or to retain his own. It is common ground that if Tavite elected to take 'Alekisio's allotments his own allotments would devolve to Yohanny (section 86 of the Land Act). However, if Tavite elected to retain his own allotments Yohanny was not entitled to 'Alekisio's allotments because Yohanny had no town or tax allotments of his own. This is the effect of section 85 of the Land Act (*Kilifi & Kilifi v Heimuli and ors* [1996] Tonga LR 31).

[22] Tavite claimed Alekisio's allotments within 12 months of 'Alekisio's death and the allotments therefore did not at any stage revert to the estate holder. Mr. Niu argues that when Tavite filed his heir's affidavit he elected 'Alekisio's allotments and relinquished his own allotments in favour of Yohanny. I agree with that analysis. In filing his heir's affidavit Tavite could only have been understood to have been making an election under section 84 of the Land Act. I have no doubt that when Tavite filed his heir's affidavit he did so intending to claim Felemei and Toafa for himself understanding also that his allotments would go to Yohanny. That is after all what happened when 'Alekisio had claimed Filisi's allotments and Tavite had inherited Pule from 'Alekisio. The Ministry

must have understood Tavite was making his election as having filed his heir's affidavit for Felemei and Toafa he was told there was nothing more for him to do.

- [23] Whilst the heir's affidavit does not state that Tavite was electing 'Aleksio's allotments in preference to his own the Land Act does not prescribe how an election is to be evidenced (*Tonga and Ors v Minister of Lands & Ors* [1924] Vol II Tonga LR 96). What is important is that the person legally entitled to make the election has communicated that election to the Minister in which case the Minister is bound to give effect to it. That occurred in this case and it appears that the Minister did not give effect to Tavite's election only because Tavite's heir's affidavit was mislaid.
- [24] The issue then arises as to whether having made his election (to claim 'Aleksio's allotments) Tavite was able to change his mind and make a fresh election (to retain his own allotments). The Land Act is silent on the point. It is generally recognised at both common law and equity that an informed election once made is final, binding and irrevocable (*Scarf v Jardine* (1882) LR 7 App Cas 345; Meagher Gummow & Lehane's 'Equity Doctrines and Remedies', Fourth Ed at [39-075] and Halsbury's Laws of England 'Equity' Vol 16, Fourth Edition at 852). It has been said that this conclusiveness of choice is 'the only thread of identity that runs through' all categories of election (Amos S Deinard and Benedict S Deinard 'Election of Remedies' (1922) 6 Minnesota Law Review 341, 342 referred to in Quia Liu 'The Use and Misuse of Equitable Election' (2013) UNSW Law Journal 1053). This principle should apply to elections under section 84 of the Land Act. Clearly from a policy perspective the desirability of certainty and finality in dealings with land would suggest that such elections once made should generally be irrevocable. It follows that

having made an informed election to claim 'Aleksio's allotments Tavite was bound by it and could not make a fresh election.

[25] In any event, I note that Mr. Halatanu's advice to Tavite which led him to purport to change his election was incorrect in material respects. Mr. Halatanu was incorrect that the balance of Felemei in excess of the maximum statutory area of 1 rood 24 perches would revert to the estate holder. He was also incorrect that if Tavite chose to retain his own allotments Yohanny would succeed to 'Aleksio's allotments. Tavite relied upon that advice believing it to be correct. Tavite's fresh election was not in those circumstances informed but was mistaken as to matters upon which his right of election depended. There being no person who would be prejudiced by the revocation of the election it would not in my view have been binding upon him.

[26] It follows in my view that both as a matter of law and justice Tavite and Yohanny are entitled to the orders that they are seeking.

The lease

[27] 'Aleksio agreed to give a lease of part of Felemei to Luse and Cabinet gave its consent to the lease as required by section 56(1) of the Land Act. However, the lease was not registered until after 'Aleksio's death and Felemei had been granted to Yohanny. The plaintiffs and the Minister are in agreement that Luse's lease is invalid although they framed their arguments in a different manner.

[28] For Luse, Mr. Tu'utafaiva argues that Luse's lease is valid despite not having been registered until after 'Aleksio's death. Mr. Tu'utafaiva submits that a subsequent holder of an allotment over which a lease has been granted but not registered must be bound by the lease because

otherwise injustice will be done to the person deprived of her lease and that this cannot have been intended by the Legislature.

[29] Mr. Tu'utafaiva also referred to section 126 Land Act which provides:

No lease...until registered in the manner hereinafter prescribed shall be effectual to pass or affect any interest in land...

[30] He submits that this provision does not in its terms invalidate a lease already granted nor does it prohibit registration of a lease after the landholder's death or impose any time limit within which registration is to have occurred. It follows Mr. Tu'utafaiva argues, that Luse's lease was validly registered on 13 January 2016 and should not be cancelled.

[31] Despite all that Mr. Tu'utafaiva had to say I cannot accept that Luse's lease is valid. Section 126 is clear. An agreement to grant a lease (even if Cabinet approval to the lease has been obtained) does not pass any interest in land. It is only upon registration of the lease that any interest passes from the lessor to the lessee. The interest that then passes (but not before) is the exclusive right to possess the land during the term of the lease. A registered lease binds a widow or heir for the unexpired period of the lease (or the estate holder if there is no widow or heir) because of the effect of section 58 of the Land Act. But if a lease is not registered a holder of land who has died cannot pass any interest in the land to any person.

[32] Mr. Nui expressed the position succinctly in my view when he submitted:

Because Luse's lease was not registered before 'Aleksio ...died, Aleksio's interest...was not affected at all and no part of that interest had passed to Luse Lopeti, when Aleksio died. His whole interest devolved upon his eldest son and heir when Tavite Lopeti lodged his claim thereto on 8/1/2008.

[33] Secondly, section 56(1) of the Land Act requires that the consent of Cabinet to a lease must be obtained. In this case Cabinet's consent was obtained to a lease between 'Aleksio and Luse. There is no Cabinet consent to the lease that purports to be between Yohanny and Luse. The simple point is that Cabinet has never given its consent to a lease other than between 'Aleksio and Luse.

[34] Thirdly, section 56(1) provides that the 'registered holder' of a town or tax allotment may grant a lease. Registration of an allotment is effected in accordance with section 121 of the Act by the issue of a duplicate deed of grant to the grantee and the binding of the other in the Register of Allotments. 'Aleksio was never the registered holder of Felemei and until he was registered he could not grant a lease to Luse.

[35] There is some limited force in Mr. Tu'utafaiva's submission that injustice may arise in particular cases such as this. Such injustice might result because a prospective lessee has paid for the benefit of the lease or has spent money developing the land only to find that they do not have a valid lease at all. But the risk of injustice should not be overstated and is not a significant factor in this case. A prospective lessee can take steps to protect their own interests by not making any payment for a lease or developing the land until the lease has been registered. In this case there is no suggestion that Luse paid for the lease and whilst she has developed the land she did so in the full knowledge that her expenditure might be wasted should the lease be held to be invalid.

Result

[36] I make the following orders

[36.1] The grant of the allotments Felemei and Toafa to Yohanny are to be cancelled.

[36.2] Tavite is declared the lawful holder of the allotments Felemei (with an area of 3 rood 26 perches or 3,694m²) and Toafa and is to be registered as such.

[36.3] Yohanny is declared the lawful holder of the allotments Pule and the Fo'i Hefa presently registered to Tavite and is to be registered as such.

[36.4] Registered lease No 8778 is declared null and void and is to be cancelled.

[36.5] The Minister is to forthwith give effect to the Court's findings above.

[37] If any party seeks costs they may apply by memorandum within 28 days.

NUKU'ALOFA: 7 November 2017




O.G. Paulsen
PRESIDENT