



- [2] The action relates to land at Ha'ateiho that is identified in the statement of claim as Lot 13 and Lot 15. The lots were formerly held by the plaintiff's father but Lot 13 is presently registered in the name of the second defendant and Lot 15 is registered in the name of the first defendant. The plaintiff seeks the cancellation of the defendants' registrations and an order that the Minister register the lots in his name.

**The facts (as they are pleaded by the plaintiff)**

- [3] I proceed on the basis that the allegations of fact in the statement of claim are correct and in so far as they are relevant to this application they are set out below.
- [4] The plaintiff and the second defendant are brothers. Their father was 'Antonio Motuliki ('Antonio). The plaintiff was the eldest son and heir. The second defendant was the sixth and youngest son. The first defendant is the second defendant's son.
- [5] 'Antonio had a town allotment at Ha'ateiho consisting of 2a 1r 8.6p that was registered on 29 February 1928. The family lived on this land. 'Antonio died on 3 June 1978.

*Lot 15 and the claim against the first defendant*

- [6] In the 1960's 'Antonio gave part of his land to the plaintiff. This land was identified in the statement of claim as Lot 15. Lot 15 was registered in the plaintiff's name around 1970 and he built a house on the land. In around 1975 the plaintiff and his wife moved to live in New Zealand.
- [7] After 'Antonio's death the plaintiff gave the second defendant permission to live on his land.
- [8] On a date that is not specified in the statement of claim the plaintiff applied to surrender Lot 15 in favour of his adopted son believing that in

due course he would inherit 'Antonio's land upon the death of his widow. He did not hear from the Minister in regards to his application.

- [9] On around 21 January 1992 the first defendant applied for Lot 15, supporting his application with false information and Lot 15 was registered in the name of the first defendant.
- [10] The plaintiff was unaware that Lot 15 was registered in the name of the first defendant.
- [11] On 30 November 1999 the plaintiff wrote to the second defendant advising him that he was returning to Tonga and required his home back. He received a letter from the second defendant that he would build his own house and move from the land.
- [12] The plaintiff wrote to the second defendant again on 15 August 2001 asking about progress with the building of his house and advising that he did not want anyone living in his house any longer.
- [13] On 22 October 2001 the plaintiff wrote to the second defendant again demanding he vacate his home.
- [14] The first defendant has remained on the land and did not inform the plaintiff that he had registered Lot 15 in his name.
- [15] The first defendant's registration was granted based on false information (that the first defendant was the plaintiff's son, that the plaintiff already had a town allotment and that he had built on the land) and because the Minister failed to make proper enquiries or give the plaintiff an opportunity to be heard. The second defendant's assurance that he would build his own house and move from the land led the plaintiff to believe that the land was still registered in his name or in the name of his adopted son.

*Lot 13 and the claim against the second defendant*

- [16] 'Antonio's widow was Maile Motuliki (Maile). After 'Antonio's death Maile lodged a claim for his town and tax allotments as widow.
- [17] Maile was not granted Lot 13 but different land and on 19 March 1982 Lot 13 was registered in the name of the second defendant.
- [18] Maile died on 14 April 2011 and on 12 December 2011 the plaintiff claimed his father's town and tax allotments as heir. It was around this time that the plaintiff learned that Lot 13 had been registered in the name of the second defendant.
- [19] The second defendant was aware that the plaintiff was the rightful heir entitled to inherit Lot 13 as his father's town allotment and that in causing Lot 13 to be registered in his name he was acting in breach of the rules of succession.
- [20] The second defendant's registration was made based on misinformation (as to the land that 'Antonio in fact held at his death) and the Minister failed to make proper enquiries as to the correct town allotment previously held by 'Antonio effectively leaving Lot 13 vacant for an application by the second defendant.

**Strike out principles**

- [21] The application to strike out is made in reliance upon O.8 Rule 8(1) of the Supreme Court Rules. I set out the principles to be applied in such cases in *Fau v Fau anor* [2015] Tonga LR 111 at [10] - [13] as follows:

[10] The guiding principle on an application to strike out was stated by the Court of Appeal in *Jagroop v Soakai and the Kingdom of Tonga* [2001] Tonga LR 234, 236 as:

'The principle upon which an application to strike out a claim may be entertained by the Court is clear. No party should have his claim denied without a hearing in the ordinary way, except where the claim is so hopeless that it cannot possibly succeed.'

[11] Clearly to strike out or dismiss a claim at this early stage is a matter of last resort.

[12] The following further principles apply to strike out applications:

- a. Facts pleaded in the statement of claim, whether or not admitted, are assumed to be true.
- b. Before striking out a claim the cause of action must be clearly untenable: the Court must be certain that it cannot succeed.
- c. The jurisdiction is to be exercised sparingly, and only in clear cases.
- d. The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.
- e. The Court should be particularly slow to strike out a claim in a developing area of the law.

[13] I accept that the Court may strike out a claim that is clearly time barred on the basis that such a claim is frivolous, vexatious or an abuse of process. It must be clear that a defendant intends to rely upon that defence...

### **The submissions**

[22] Mr. Tatila's submissions did not advance matters beyond what was in the application. I understand his submission is that under s.170 of the Land Act an action must be brought within 10 years of it first accruing and that

time began to run against the plaintiff from the date of the defendants' registrations i.e. from 21 January 1992 in the case of the first defendant and 19 March 1982 in the case of the second defendant. As this action was not commenced until May 2017 it is, Mr. Tatila submits, time barred.

- [23] I understood Mrs. Tupou to accept that *prima facie* time began to run against the plaintiff from the date of the first and second defendant's registrations. However, she argues that the action is not time barred as the registrations were obtained by fraud. Mrs. Tupou contends that if section 170 Land Act can be avoided in the case of fraud then the application to strike out should fail. She conceded in her written submissions that if section 170 cannot be avoided in cases of fraud then this action is (in its entirety) time barred. She modified her position during her oral presentation to argue that even if there is no exception to s.170 simply based on the nature of the cause of action in fraud there is still scope for an exception based on the doctrine of the fraudulent concealment of a cause of action.

### **Discussion**

- [24] Section 170 of the Land Act provides:

No person shall bring in the Court any action but within 10 years after the time at which the right to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims then within 10 years next after the time at which the right to bring such action shall have first accrued to the person bringing the same.

- [25] In support of her submissions Mrs. Tupou relied upon decisions of the Land Court in *Ve'a v Maile* [2011] (Unreported, Land Court, LA 17 of 2010, 6 May 2011, Scott P) and *Tavake v Tavake* (Unreported, Land Court, LA 6

of 2012, 25 January 2013, Scott P) but neither case is authority, in my opinion, that there is a fraud exception to the application of s.170.

[26] The Court has long held that lack of knowledge and mistake as to the existence of a cause of action are not grounds for postponing the commencement of the limitation period under the Land Act. (*Masima v Hon. Tu'ilakepa* [1995] Tonga LR 73).

[27] In *Cocker v Cocker* [2002] Tonga LR 252 the Court of Appeal held that there was no general exception to s.170 based on a cause of action in fraud. The Court said at [8]:

Then the Appellant argued that the fraud he alleged to have been involved in the registration of Tevita Cocker prevented time running under s 170. The section concludes Part X of the Land Act, which is headed "The Land Court". The first section of that Part is s 144 by which the Land Court is constituted. Thus, when s 170, the only section in Division IV of the Part, headed "Limitation of Action" refers to "the Court" it clearly refers to the Land Court. It provides that, in the Land Court, there is a time bar of 10 years, and it provides no express exception. We do not need to decide whether, nevertheless, the well established doctrine of fraudulent concealment of a cause of action applies. But certainly there is no scope for an exception simply based on the nature of the cause of action in fraud. Section 170 applies in general terms to an action in the Land Court.

[28] *Cocker* is authority that there is no general fraud exception to s 170 and that decision is binding on this Court (see also the Land Court decisions in *Fau v Fau* (Unreported, Land Court LA 20 of 2014, 16 April 2015, Paulsen P) and *Mokofisi v Minister of Lands* (Unreported, Land Court, LA 7 of 2014, 27 June 2014, Scott. P)).

[29] *Cocker* is correct in principle in my view and also consistent with what the Court of Appeal said in *Fau v Fau* [2016] Tonga LR 172 at [9] - [10] that the Land Act should be interpreted in a manner that promotes certainty not uncertainty:

The Land Act creates a comparatively complex legislative scheme for the creation and devolution of interests in land by grant and otherwise which includes important provisions concerning the succession to interests in land on the death of a person holding such an interest. Ownership and possession of land is of great importance to Tonga. The Act should be construed to the extent possible, in a way that creates certainty rather than uncertainty.

The apparent intention of s 170 is two-fold. The first is to afford a person a lengthy period to pursue a claim asserting, amongst other things, a right to or interest in land under the Land Act. However the second is to ensure certainty about, amongst other things, rights and interests under the Act after the expiration of that lengthy period.

[30] The Court of Appeal in *Cocker* did not decide whether the doctrine of fraudulent concealment of a cause of action applies in Tonga. In my view the doctrine should not apply in Tonga but in any event the plaintiff cannot avail himself of the doctrine in this case.

[31] With regards to the claim against the first defendant, there is no suggestion that he did anything to conceal his registration or the plaintiff's right of action. The plaintiff draws an impossibly long bow by arguing that by writing a letter stating the he would move from Lot 15 the second defendant concealed the plaintiff's right of action. Even if that was arguable (and I do not accept it is) there is no basis to attribute his actions to the first defendant.

[32] Furthermore, the doctrine will not apply to postpone time running when a plaintiff ought to have discovered his right of action by exercising reasonable diligence (Halsbury's Laws of England, Fourth Edition, Vol 28, 'Limitation of Actions' at 917). When the plaintiff demanded that Lot 15 be vacated in October 2001 time had already been running against him for 9 years and 9 months (since January 1992). The plaintiff ought to have discovered the first defendant's registration by October 2001 or very soon thereafter when the first defendant did not vacate the land. He did not do so as he failed to take any action to recover the land for more than a further 15 years.

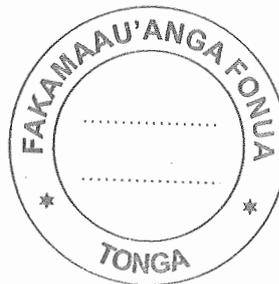
[33] In the case of the second defendant there is no suggestion that he did anything to conceal the fact of his registration or the plaintiff's right of action and Mrs. Tupou did not suggest that there was any possible basis for the case against him to be advanced on that basis.

**Result**

[34] The plaintiff's claims are plainly time barred. The plaintiff's action is struck out in its entirety.

[35] The first and second defendant are entitled to their costs to be fixed by the Registrar if not agreed.

**NUKU'ALOFA: 6 MARCH 2018.**



A handwritten signature in black ink, appearing to read "O. G. Paulsen".

O. G. Paulsen  
**P R E S I D E N T**