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31/08/18.

IN THE LAND COURT OF TONGA **LA 23 of 2017**

NUKU'ALOFA REGISTRY

BETWEEN : SIOSAIA PEKIPAKI

- Plaintiff

AND : MELE'ANA MOIMOI

- First Defendant

AND : MINISTER OF LANDS

- Second Defendant

BEFORE JUSTICE NIU AND ASSESSOR TOUMO'UA

Hearing date: 17th and 18th July, 2018
First Defendant's submission: 8th August 2018
Second Defendant's submission: 13th August 2018
Plaintiff's submission: 24th August, 2018
Plaintiff counsel: Mr. Clive Edwards
First defendant counsel: Mr. Viliami Moale
Second defendant counsel: Mr. Sione Sisifa
Judgment date: 31st August 2018

JUDGEMENT

Claim of the plaintiff

1. In the plaintiff's statement of claim, he prays for 3 main orders:

recd 31/08/18

(a). that lease no.7899 and the improvements thereon be declared the sole property of his mother, Ofa Toutai Pekipaki;

(b). that lease no.7899 be declared to be under the letters of administration which have been granted to the plaintiff in respect of the estate of his mother, Ofa Toutai Pekipaki;

(c). that the second defendant Minister of Lands be directed to register the lease no.7899 in the name of the plaintiff as administrator.

2. However, in Mr.Edward's (plaintiff counsel) submissions he states that the plaintiff's claim is to seek a declaration that lease no.7899 in the name of 'Ofa Moimoi Pekipaki and Tevita Moimoi is a joint tenancy and that on the death of Tevita Moimoi on 15 March 2015, 'Ofa, as survivor of her co-lessee, became the sole owner of the said lease. That means that the plaintiff does not pursue his claim that the improvements upon the land be also declared the sole property of his mother or claims (b) and (c) as stated above.

3. The plaintiff's claim is based on the fact that lease no.7899 was registered (on 5 October 2010) in the joint names of his mother, Ofa Moimoi Pekipaki, and of his mother's brother, Tevita Moimoi and that said Tevita Moimoi pre-deceased his mother.

4. He says that the Land Act has no provision to provide for the devolution of such jointly owned lease, and that the common law of England providing for devolution of such joint lease be applied, namely, that the survivor takes all the interest of the deceased joint owner of the lease. So that when Tevita Moimoi died on 15 March 2015, his interest became vested in the co-owner, Ofa Moimoi Pekipaki, before she herself died on 15 April 2016.

5. He says that he has been properly appointed by the Supreme Court as administrator of Ofa Moimoi Pekipaki's estate when letters of administration in respect of her estate were granted to him on 21 November 2016, and that as the widow of said Tevita Moimoi and children have continued to occupy the land of lease 1899 and have also claimed that said Tevita Moimoi had a half share of said lease and that they were lawfully entitled to that

share, it is desirable that the Court makes the declaration sought by him in this action.

First defendant's defence

6. The first defendant is the widow of Tevita Moimoi and she says that when her husband died, he had a half-share of the lease and that she and their children were and are entitled to that half share as provided for in the Probate Act.

7. Mr. Moale, counsel for the first defendant, says in his submissions that the interest of Tevita Moimoi in lease no.7899 did not cease to exist and did not become 'Ofa Moimoi Pekipaki's on his death because of the provision in the deed of lease: "And the Lessee, his heirs, and representatives, shall hold the piece of land described in this Deed from fourth day of the month of October in the year of our Lord two thousand and ten until third day of the month of October in the year of our Lord two thousand and seventy."

8. He also argues that as the first defendant and her husband and children had occupied the residential house and were collecting

the rent from tenants of other houses on the leased land (the other owner, Ofa Moimoi Pekipaki and her family all living overseas since registration of the lease) there was a severance of the four unities necessary in a joint tenancy in English common law so that the tenancy became a tenancy in common in which case the share of a joint holder devolves upon his death to his heirs rather than upon the co-owner of the lease.

Second defendant defence

9. The second defendant, Minister of Lands, supports the defence of the first defendant that there was no unity in possession of the lease because of the occupation thereof by the first defendnat and her husband and family, and that the lease was a tenancy in common rather than a joint tenancy.

10. Mr. Sisifa, counsel for second defendant, points out in his submissions, certain evidence which indicate the severence of the unity of possession in a joint tenancy and which indicated their intention at the time:

(i). when the plaintiff was applying to the Court for the letters of administration, he informed the Court that his mother (Ofa Moimoi Pekipaki) had lived in the U.S in the last 10 years or so and had no other estates in Tonga "other than a half – share in a lease hold property" (no.7899) and he applied to administer only that half share.

(ii). The first defendant and her family had occupied and resided upon the lease land. The plaintiff's mother and family did not.

(iii). The first defendant and her family collected and utilised the rent paid by tenants on the premises. The plaintiff's mother and family did not.

(iv). The purpose approved by Cabinet for the lease was "commercial and residential", and that if they were to each have their own residence on the land, it was higly unlikely that they both agreed that when one of them died, the other (the survivor) would take all, to

the exclusion of the deceased holder's wife or husband and children.

The Facts

11. The facts, which I have found proved by the evidence given at the trial, are as follows:

(a). The area of this lease no.7899 is 891.99 square meters situated at the south-western corner of Salote Road and Railway Road, Kolofo'ou. It is in the central business area of Nuku'alofa in the estate of the Crown.

(b). It was initially leased to one, John Percival (lease no.1505) from 24/2/1929 to 23/2/1950 (21 years). It was renewed as lease no 1969 from 24/2/1950 to 23/2/1970 (20 years).

On 7/9/1954 that lease was transferred from John Percival to his daughter, Sela Moimoi. When it expired, it was renewed to Sela Moimoi as lease no.2651 from 24/2/1970 to 23/2/1990 (20 years).

(c). Sela Moimoi had 3 children (referred to in the trial): 'Ofa who was married to Kelepi Toutai Pekipaki and had 4 children, of whom the third is the plaintff. But prior to that marriage, 'Ofa had married Lewis Powell and had three children.

(d). Sela's second child was Saia, male, but he was intellectually handicapped. The third child was Tevita Moimoi who married Mele'ana, who is the first defendant, and they had 8 children.

(e). From about 1967 to 1995, Ofa and Kelepi carried on retail and wholesale business on the leased land, and buildings were erected and extended, not only for the business but also for renting to tenants. A residential part was built upstairs where Sela Moimoi and Saia lived.

(f). No sub-lease was granted to Ofa or Kelepi to carry out their business or to build any house of theirs on the leased land of Sela Moimoi. It would be fair to say that the houses built were lawfully the properties of Sela Moimoi in order that

she, as landholder could lawfully rent them for her and her intellectually handicapped son's keep. Otherwise, she would be held to have let her lease land for others to build their houses on and pay her rent for the use of her land, for profit, which may be an offence under s.13 of the Land Act. As far as I am aware no letters of administration have been granted in respect of Sela Moimoi's estate, which at the time of her death (1999), consisted of those buildings.

(g). In 1990, Sela's lease expired and Government did not renew it because Government considered that it would utilise the land itself.

(h). 'Ofa and Kelepi carried on their business on the land until about 1995 when Government decided to grant yearly permits to 4 persons, namely, Adiloa Prema, Aisea Lolesio, Sione Tualau Latu and Tiona Fifita, to carry on business on the land but to rent the buildings of Sela Moimoi and pay rent to Sela Moimoi, except Tiona Fifita who was to build his own building on the vacant lot given to him, but which he never built.

(i). 'Ofa and Kelepi left and eventually migrated to the United States.

(j). Tevita Moimoi and his wife, Mele'ana (first defendant) then came from Tofoa where they had lived and lived with and looked after Sela Moimoi and the son Saia in the upstairs residence on the land. They did the collection of the rent from the tenants for Sela's and Saia's keep.

(k). After Sela Moimoi died in 1999, Tevita and Mele'ana Moimoi continued to occupy said residential house and carried on collecting the rent for the keep of the son Saia and of themselves, except the rent from tenant Adiloa Prema which was paid directly to Ofa.

(l). On 20/2/2007, Ofa came from the U.S and asked the Minister of Lands, Tuita, to grant her a lease of the land. The Minister informed her that Government had not yet decided what to do with the land, it was still working on it, but she could write and ask for the lease in the meantime.

(m). In about February 2008, Tevita Moimoi and Ofa's daughter, Fale'aka, met with the Minister, Tuita, and a minute of that meeting recorded the Minister as saying:

"Thank you for coming today. The reason you are being called here again is in respect of the land that was lessed by Sela Moimoi. There was another talk about it again. I have received a letter of Ofa Pekipaki regarding this land. The letter stated that you people have talked and agreed that you two (Ofa and Tevita) will joint lease".

And that Tevita replied:

"No, we have not talked. She telephoned from the U.S and said that she had talked with you, as you are related to her husband, Kelepi, and told me to go and see Clive Edwards. And I do not want to go to him. I insisted I would come to you because you are in charge of the land. And I do not want to joint lease with her because we would have problems. Let me lease it alone as I am the one living on the land and looking after my older brother who is illectually handicapped and he and Ofa already have their shares. I love my sister and we live peacefully but Ofa will

take control over me and we will have problems. Let me lease it alone".

to which Tuita said thank you and Fale'aka then said:

"I apologise for the disrespectful statement. 'Ofa was the one worked this land. And we all survived from it including Tevita and all the family. Leave our problems in our family in the past. All we are here for is to ask the Minister of Lands to give us this land so we can again use it to accomplish our obligations to the Country. I am sorry but just because Tevita is family does not mean that he is to decide for the family. No, we are here to ask. And to ask that you clarify your help. My plea is that you forgive me and my uncle. If I had known he would be like that, I would not have come this morning. Just make your reasonable decision because I know that the decision you will make will be the most reasonable decision. There is no animosity between Tevita and 'Ofa but I am surprised today at the statement made. Please forgive us."

Tevita then said:

"Let me make a suggestion. There are too many of the children and we will not all be able to share this piece. The suggestion is that the piece on which Adiloa Prema is situated is to be leased to 'Ofa and the remainder is to be leased by me because it had always been $600.00 for 'Ofa".

Tuita then said:

"My wish is that there be a joint lease, the purpose is for business not residence."

Tevita said:

"I am ready to build because the plans are done."

Tuita said:

"My decision is that you people joint lease. But you all go back and talk again as to who are to joint lease and let me know so we can proceed. Who in the Moimoi family will be joint lease – to establish a business."

Tevita then asked:

"Can there 5 or more?"

Fale'aka then said:

" I thank you for that decision. The request is that the two of them, Tevita and Ofa Pekipaki, be joint lease, and leave the rest of the family."

Tuita then said:

"You all go and talk and you people agree and write to me and we will talk again."

(n). By letter dated 23 April 2008, the secretary for lands wrote to Tevita Moimoi and said:

"I convey my great respect to you and inform you of the decision of the Minister of Lands, Hon. Noble Tuita, on 31/3/08 as to your letter of 25/02/08 to lease the land leased in lease no.2651 by your mother Sela Finau Moimoi but which had expried.

It is decided that you joint lease by you, Tevita and 'Ofa Pekipaki and the form is forwarded with this letter. Please sign it and if you do not understand it, please bring it with you to this office. When you have signed it return it to be submitted to Cabinet."

(o). A lease application form dated 26/03/2008 was completed and signed by both Ofa Moimoi Pekipaki and by Tevita Moimoi. The purpose of the lease was written in it for "Commercial and Residential". It was for 60 years at $1,200 rent per year. It was signed also by the Minister, Noble Tuita, on 13.10.2008.

(p). A submission of the application was made to Cabinet on 20 January 2009 with a recommendation by Hon. Tuita that it be approved and Cabinet approved it on 28 January 2009 in its decision no.72. The purpose approved was for commercial and residential, for 60 years at $1,200 rent per year and that the term was to run from the date of registration of the lease.

(q). The lease was registered as lease no.7899 on 5 October 2010 and it was duly signed by both Ofa Pekipaki and Tevita Moimoi. As before, Tevita Moimoi collected the rent from the tenants for his family's keep and to also pay the rent of the lease to Government, except the rent from Adiloa Prema which went to Ofa.

(r). The annual rent of the lease was paid for the years up to 2013 but thereafter it was in default.

(s). On 5 March 2015, Tevita Moimoi died, whilst still residing in the upstairs area of the house on the land of the lease no.7899. His widow, Meleana Moimoi, continued to occupy it with his family and continued to collect the rent from the tenants as before for their keep except the rent from Adiloa Prema which went to Ofa.

(t). On the Talaki newspaper of Tuesday 13 October 2015, a notice was published by a grandson of Tevita Moimoi named Tevita Moimoi, and legal counsel, Ofa Pouono, that an application was to be made for Letters of Administration in respect of the estate of Tevita Moimoi (the joint lessee of lease no.7899).

(u). On 15 April 2016, Ofa Pekipaki died in the U.S. On the Talaki newspaper of 21 June 2016, the plaintiff published a notice of his intention to apply for Letters of Administration in respect of the estate of Ofa Pekipaki.

(v). In September 2016, the plaintiff applied to the Supreme Court for Letters of administration in respect of a "half-share" of Ofa Pekipaki in the lease no.7899 and the Supreme Court granted it on 21 November 2016.

(w). On 26 January 2017, Mele'ana Moimoi, the widow of Tevita Moimoi, filed her application for letters of administration in respect of the estate of Tevita Moimoi in which she claimed his interest in the lease no.7899. That application has not as yet been finalised in the Court.

The Arguments

12. All three counsel appear to accept the decision of the Land Court (per Lord Chief Justice Paulsen) dated 18 December 2017 in *Wight* v *Wight* & *Minister of Lands* (2017) (unreported) (LA 31/2017) in which it held that a lease which was in the joint names of 3 brothers must be regarded as a joint tenancy (with the survivors or survivor taking over as owner the share of a co-owner upon his death), unless there are circumstances that dictate that they had a contrary intention.

13. Mr. Edwards, for the plaintiff, argues that the joint lease was a joint tenancy because it had the four unities which characterised a joint tenancy, namely:

(a). neither Tevita or Ofa had an exclusive right to possession to any particular part of the property – there was no demarcation of any area over which one or the other had exclusive possession;

(b). the interest of both Tevita and Ofa were the same in nature, extent and duration;

(c). both Tevita and 'Ofa's interests were derived under the same instrument, namely the deed of lease no. 7899.

(d). both Tevita and Ofa's interests vested at the same time, that the date of registration of the lease in 2010,

unless there are circumstances that dictate that they had a contrary intention.

He then submitted that the facts in the *Wight Case* were distinguishable from the present case because one brother had 2 shares whereas in the present case both Tevita's and Ofa's

shares were undivided, and also because whereas in the *Wight Case* the brothers had separate plots for their farms, both Ofa and Tevita had equal access to the income and the leasehold property. He therefore submits that there are no special circumstances that dictate a special purpose or intention that the lease was not a joint tenancy.

14. However, as I have found on the evidence, there was not an equal access by Ofa and Tevita to the income of the lease. The only income to which Ofa had access was to Adiloa Prema's rent payments. The other rent payments (from Lavinia Sunia and from Lesieli Rameil) went to Tevita and then to his widow, Mele'ana. In addition to collecting more rent, Tevita also enjoyed occupation and residence on the lease land. Ofa and her children did not. The area of the land occupied by Adiloa is only about one quarter of the leased land. So that Tevita had the rent and use of about three quarters of the land. This is shown in the surveyor's plan of the land on which Adiloa Prema's name is written and demarcated with an area of 230.6 square meters. When compared with the area of the lease, 891.9 square meters, it is just under a quarter of the total area. That plan was attached to

Mr Sisifa's letter to the Registrar of the Court dated 19 July 2018, together with other documents which I had requested the Minister of Land witness, Semisi Moala, to produce (after the hearing on 18 July 2018).

15. That of course does not mean that Tevita has thereby lawfully claimed and was entitled to three quarters of the interests of the lease. It only means that the tenancy may not be a joint tenancy because there appears to be an unequal share of the enjoyment of the lease to suggest that it was not and is not a joint tenancy. Added to that is the demarcation of Adiloa's premises. It may be regarded as a severence of the area enjoyed by Ofa from the area enjoyed by Tevita.

16. Mr. Mo'ale, for the first defendant, argues that when the Minister granted the lease to Ofa and Tevita as a joint lease, there are no clear intention that the lease be owned as a joint tenancy, and accordingly equity applies and it favours tenancy in common. He refers to *Wormald* v *Wooley* [1903] 2 ch.206 at 211 where it was stated:

> "If there is ambiguity as to the existence of a common intention... the Court very properly leans to the construction which creates a tenancy in common in preference to a joint tenancy."

17. He also argues that upon the death of a co-owner of a lease like this one, S.11 of the Probate Act vests the interests of that owner in the Supreme Court, not on the other co-owner of a joint lease as is the case in a joint tenancy. He argues that the provision holds the interests to be distributed, as provided under S.16 of the Probate Atc, to the heirs of the deceased owner.

18. And he follows up and supports that argument with his argument that in the deed of lease itself (of lease no.7899) it expressly provides:

> "And the Lessee, his heirs and representatives, shall hold the piece of land described in this Deed from the fourth day of the month of October in the year of Our Lord two

thousand and ten until the third day of the month of October in the year of Our Lord two thousand and seventy(2070)"

He argues that the inclusion of those provisions "his heirs and representatives" in the deed of lease was an expression by the lessees, Ofa and Tevita, of their clear intention by them that their heirs and representatives were to succeed to their respective share in the lease when they die. If they had meant and intended that when one of them would die, the other would succeed to the deceased one's share, they would not have included these words in their deed of lease.

19. Against that argument is the view of the Lord Chief Justice Paulsen in paragraph 40 of his judgment in the *Wight Case* where he stated:

"[40].....I do not regard the fact that the lease refers to 'heirs and successors' as an indication that the lessees were to take separate shares. The form of lease contemplates only one lessee and those words are included to bind the lessee's heirs and successors, whoever that may be, to pay the rent and perform the covenants and conditions of the

lease. I do not see that those words give any indication as to whether co-lessees hold the lease as joint tenants or tenants in common.

He then went on to say in paragraph [41] as follows:

[41] "On the face of the lease then, the three brothers could be understood to have held the lease as joint tenants and must be regarded as such unless there are circumstances that dictate that they had a contrary intention....."

20. Mr. Sisifa, for the second defendant, argues that the circumstances in this case are such that the joint lease is a tenancy in common, and refers to –

(a). the statement of the plaintiff in his affidavit to the Supreme Court in support of his application for letters of administration that the co-lessee Ofa had a "half – share" in the lease, meaning that the co-lessees had equal shares in the lease.

(b). the application of the plaintiff was to administer only the half interest of Ofa in the lease.

(c). the letters of administration granted only refers to the estate of Ofa which is her half share in the lease.

(d). the rent from two buildings went to Tevita as well as occupation of the upstairs as residence by Tevita, which was also approved by Cabinet that the lease be used as residential as well as commercial;

(e). the rent collected was used to pay the rent of the lease;

(f). the lease was a family lease to brother and sister as passed down from their mother and their grandfather;

(g). the right of survivorship in a joint tenancy is incompatible with a family lease which can be used for business (commercial) and residential purpose. Tevita and Ofa could not possibly have intended that whoever died first would give up her or his share to the survivor, to the great detriment of the deceased's children.

21. Mr. Edwards argued against those points, but I am not pursuaded that Mr. Sisifa's points are invalid or that they do not indicate an intention of a tenancy in common.

Conclusion

22. Having considered the facts, the submissions and arguments of all counsel, and the law, including the judgment of the Lord Chief Justice in the *Wight Case*, I am of the view that this lease (no.7899) is a tenancy in common.

23. I find no evidence at all that both or even either of, Ofa and Tevita, had any intention that when she or he would die, her or his interest in the lease was to become the sole property of the survivor.

24. I find no evidence at all that the Minister of Lands had intended, when he granted the lease to Ofa and Tevita, that when one of them would die, the other would become the sole lessee of the lease.

25. On the contrary, I find that all three parties, that is, the Minister and Ofa and Tevita, were of the intention and understanding that when one would die, the heirs of that person would succeed to that person's interest in the lease. Tuita used the words "mou" in the meeting the minutes of which I quoted above. "Mou" means "you people" or you in the plural with more than two persons. He told Tevita and Fale'aka, to go and talk – in the plural of more than 2 people – and agree who in the family of Ofa and who in the family of Tevita would be the two persons who would "joint lease" the land. He meant that those two persons were to hold the lease not only for themselves but also for their respective families as well, that when they would die, their respective families would would succed to their respective share of the lease.

26. Tevita was of course after the land for himselff and was ready with plans to build on the land, so he told Tuita, but Tuita said no, it had to be joint lease with Ofa.

27. Fale'aka, daughter of Ofa, met with Tuita and Tevita and agreed with Tuita, and she so agreed because she understood that Ofa's share would devolve upon her and her siblings.

28. Tuita insisted that the lease be for business (commercial). If in pursuance of that Tevita was to build a big building and carry on a business in it and dies shortly afterwards, it is inconceivable that he would have agreed or had intended that that big building and business were to be pulled and closed down so that Ofa would own the whole land of the lease. If in pursuance of the purpose of residential as approved by Cabinet, he was to build a dwellinghouse and live in it with his wife and children and dies shortly afterwards, it is inconceivable that he would have intended that his wife and children would have to pull down the dwellinghouse and move out so that Ofa would have the whole lease to herself.

29. Both Ofa and Tevita were advanced in their years in 2010. Ofa died at 88 years of age or so in 2016. Tevita was also over 80 years when he died in 2015. They were in their 70's in 2010. It is inconceivable that they each would have asked for a share in a

60 year lease only to give it away to the survivor a few years later, much to the loss of his/her own family.

30. In England where the idea of a joint tenancy was or is practised, the joint tenancy is made by agreement only between the lessor and the two lessees. The parties make it knowing what to expect when one lessee dies. The deceased lessee loses his share to the surviving lessee. In Tonga, on the other hand, a lease has to be granted by the Minister of Lands on a specified form, a deed of lease. S.22 (1) of the Land Act empowers the King with the consent of Privy Council, to make regulations, inter alia:

> "....
>
> (b). prescribing forms of registers, books, documents, instruments and writings and the conditions, stipulations, reservations and exceptions that shall be inserted or shall be implied in grants, leases, permits, and other instruments;"

31. In pursuance of that provision the deed of lease used as lease no.7899 was prescribed. In that deed are these stipulations:

"And the Lessee, his heirs, and representatives, shall hold the piece of land described in the deed from the _____of the month of _____ in the year of Our Lord two thousand _____ until the _____ day of the month of _____ in the year of Our Lord two thousand _____."

32. That stipulation expressly provides that the heirs of the Lessee are to hold the piece of land described in the deed until the end of the term of the lease. The heirs of course do not hold the lease until after the Lessee dies. So that it clearly provides that when the Lessee dies, his heirs succeed to the lease and become the Lessee.

33. Lease no.7899 contains that stipulation, and the deed of lease is an official document made by a regulation under S.22(1) of the Act.

34. Clause 106 of the Constitution also provides for it as follows:

"106.-The forms of deed transfer and permit which shall from time to time be sanctioned by His Majesty in Privy Council are hereby appointed to be the forms according to which all deeds of leases transfers and permits shall be made."

35. In the deed of lease no.7899, the above quoted stipulation has the words "And the Lessee, his heirs, and representatives". The word "Lessee" and the word "his" are not appropriate because there were two Lessees, Ofa and Tevita. Those words should have been corrected to read "Lessees" and "their" so that those words are appropriabe to having two lessees, Ofa and Tevita. But they were not so corrected and the word "Lessee" and the word "his" are still on the deed up to now.

36. This Court must construe, and I construe, and interpret, the word "Lessee" to "Lessees" and the word "his" in the deed to read "their" in order to make sense of them in their context, and to uphold the provision of the stipulation that when one of the lessees die, his or her heirs would succeed to that lessee's share of the lease as was intended by the deed.

37. This Court has the authority to do that because this Court is required by the Interpretation Act to apply its provisions when there is a situation like there is in the present case. S.2(1) provides:

> "In this Act and in every other Act and in all official, legal or public documents enacted, made or issued before or after the commencement of this Act, unless the contrary intention appears-
>
> .....
>
> (2) Words inporting the masculine gender shall include females.
>
> (3) Words importing the singular shall include the plural and vice versa."

Orders

38. Accordingly, I hold that the lessees of lease no.7899, Ofa Moimoi Pekipaki and Tevita Moimoi, were tenants in common, each with an undivided share of the lease which now each constitute their respective estate for the benefit of their "heirs and respresentatives."

39. Accordingly, I order that the claim of the plaintiff is dismissed with cost to both defendants, to be taxed if not agreed.

FAKAMAAU'ANGA FONUA
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.....
TONGA

L. M. Niu
J U D G E

NUKU'AlOFA: 31 August 2018