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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 35 of 2017

06/09/18.

BETWEEN: **'ILAISAANE TUPOU TAU'AKIPULU a.k.a**

'ILAISAANE TUPOU MAFILE'O

Plaintiff

AND: **LORD NUKU**

First Defendant

AND: **MINISTER OF LANDS**

Second Defendant

BEFORE HONOURABLE JUSTICE NIU

To: **Mr W. C. Edwards Snr SC for applicant first defendant**
Mr H. Tatila for respondent plaintiff
Mr 'A. Kefu SC for second defendant ✓

Date of Hearing: **5 September 2018.**

Date of Ruling: **6 September 2018.**

RULING ON APPLICATION TO STRIKE OUT CLAIM

[1] This is an application by the first defendant to strike out the statement of claim of the plaintiff upon the ground that it is time-barred under s.170 of the Land Act. He says in his notice of application that the plaintiff's cause of action arose on 23 July 2001 when the plaintiff's husband was

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stopped from registering the tax allotment, and the plaintiff has only filed her claim, as the widow of her husband, on 14 September 2017. In support of his application the first defendant attaches an affidavit in which he states in paragraph 2 thereof that "the plaintiff's cause of action in this case arose on the 23rd July 2001 as alleged in paragraph 9 of the Plaintiff's Statement of Claim".

[2] The first defendant did not raise this defence in his statement of defence filed on 24 October 2017, but he duly raised it in his amended statement of defence filed on 18 July 2018, before he filed this present application on 27 July 2018.

[3] The plaintiff filed her opposition to the application on 3 August 2018 and stated that her right to bring this action only accrued to her when she lodged her claim for the allotment as her husband's widow on 28 March 2017 with the Minister of Lands and that she was well within the 10 years provided in s.170 to bring this claim.

[4] Mr. Edwards for the applicant filed his submissions in support of the application on 30 August 2018 in which he pointed out that s.170 provides that the 10 years run from the time the cause of action first accrued to the plaintiff's husband because the plaintiff is only claiming this allotment by reason of her being the widow of her husband as provided by the Act.

[5] At the hearing, Mr. Edwards spoke to and confirmed his submissions, and I put to him that the letter of 2001 of the first defendant is not alleged to have stated that the first defendant told the Minister to stop the grant of the allotment to the plaintiff's husband; it merely told the Minister to "hold and defer" the husband's application. Mr. Edwards replied that the letter had the same effect as if it had stated that the grant be stopped, because the grant was not made as a consequence of it up to now.

[6] Mr. Tatila spoke to the plaintiff's opposition filed, that the plaintiff only commenced to have her right to bring this action when she lodged her

claim with the Minister of Lands, and I informed him that the Courts have held that the right to bring the action accrues when the unlawful act occurrs, and not when the claimant succeeds to the right to bring the claim for the unlawful act. Refer *Fau v Fau* [2015] Tonga LR III, a decision of Lord Chief Justice Paulsen in the Land Court, and which was upheld in the Court of Appeal on appeal in 2016.

[7] In the Fau Case, Pataleone Fau, who held the tax allotment, died in 1982. He had 2 sons, Peauafi, the older, and Sosefo, the younger. Peauafi claimed the allotment as heir, but the Minister of Lands registered the allotment in Sosefo's name in 1988. Peauafi did not claim the allotment in the Court up to his death in 2001. Sosefo continued to hold the allotment until he died in 2012, and his son was registered as his heir in 2013. Peauafi's son and heir then filed his claim against Sosefo's son in 2014. The Land Court held, correctly as held by the Court of Appeal, that the right to bring the claim accrued to Peauafi upon the wrongful registration of the allotment in the second son's name, Sosefo. Peauafi had the right to do that from 1988 to 1998, in accordance with s.170 of the Land Act. After 1998, Peauafi no longer had any right to claim the allotment, and when he died in 2001, he left no right of claim for his son and heir (the plaintiff in that case) to claim it.

[8] Accordingly, the plaintiff in the present case is in the same position as the son of Peauafi in the Fau Case, if, and only if, the right to bring the present claim accrued to the plaintiff's husband in 2001.

[9] The question is, did the first defendant stop the husband's application, or withdraw his consent from the husband's application, and thereby caused the Minister of Lands to reject the husband's application in 2001? If he did, then it would be fair, and correct, to say that the right to bring this claim immediately accrued to the husband in 2001 and it expired in 2011.

[10] The basis of the application of the first defendant is the statements by the plaintiff in paragraphs 8 and 9 of his statement of claim as follows:

"8. That on 25th September 2000, Tevita Koli Tau'akipulu prepared his application for Ha'aola and the First Defendant endorsed the same and the Second Defendant fulfilled all the Ministry of Land policy and requirements pending to issue a deed of grant to Tevita Koli Tau'akipulu."

"9. That on 23rd July 2001, the First Defendant wrote a letter to the Second Defendant and asked him to hold and defer the application of Tevita Koli Tau'akipulu for the tax allotment Ha'aola which he had already approved on 25th September 2000. Tevita Koli Tau'akipulu passed away on 16th December 2016."

The first defendant says, as submitted by Mr. Edwards, that that letter had the effect of stopping the husband's application because no deed of grant has been granted or registered up to now because of that letter, and so the letter constituted the cause of action which then accrued there and then to the husband in 2001.

[11] The letter however did not convey any instruction that the application be stopped or that the necessary consent of the estate holder was withdrawn. It simply stated that the application be on hold and be deferred. There could well have been a valid reason to defer the application, and not to cancel it, and the Minister of Lands appear to have put the application on hold and deferred it.

[12] In an additional sub paragraph (iii) added to paragraph 15, by an amended statement of claim filed by the plaintiff on 24 August 2018, the plaintiff states:

"(iii) Another letter from the Second Defendant's officer dated 04/09/2006 to the First Defendant asking for reasons of the deferment of the application of the Plaintiff's late husband to the land in dispute and if no response they would process to register the same in Tevita Koli Tau'akipulu."

[13] That was in addition to what was already stated in paragraph 15 as follows:

> "15. That on the 27.07.2011, a document at the Ministry of Lands stated as Brief to the Minister of Lands, the Registrar of Lands, Salesi Fotu Brief the Minister of Lands, at the time which stated the following:
>
> (i) This 'api was registered by Tevita Tau'akipulu and he died on 3/05/1994 and no one claim within one year.
>
> (ii) Estate holder granted Tevita Koli Tau'akipulu's application on 25.09.2000 and he requested to defer and hold this application with no reason."

[14] It would therefore appear that the Ministry of Lands did not cancel the application but simply deferred it and appeared to raise and to deal with it in 2006 and again 2011, and continued to defer it, as instructed by the first defendant. The Minister did not cancel or order the cancellation of the application and it would seem that it has not been cancelled up to now.

[15] I therefore find, on the pleading of the statement of claim, as amended, that no wrongful act was committed by the first defendant or by the second defendant in 2001 or at any time before 2011 because in 2011 there appeared to be actions still taken by the Minister to make the grant to the husband.

[16] I also consider the pleading of paragraph 8 of the statement of claim. It says that the Second Defendant fulfilled all the Ministry policy and requirements pending to issue a deed of grant to the husband. For the purpose of this application, I have to accept that pleading as if it will be duly proved to be true. If that is so, there may well have been a lawful grant already made to the husband by the Minister (although a deed of grant has not yet been registered and issued). If that is so, then the purported deferment did not affect the validity of the grant at all and that grant has not been cancelled up to now.

[17] These are matters that can only be decided upon the trial of the issues in this case. And more importantly, I must be mindful of the guiding principle stated by the Court of Appeal in *Jagroop v Soakai and Kingdom of Tonga* [2001] Tonga LR 234, 236 which Lord Chief Justice Paulsen quoted in the Fau Case:

> "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."

The Learned Lord Chief Justice further pointed out the application of these further principles which 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 must 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."

[18] Applying these principles to this present application, I cannot be sure, from the pleading in the statement of claim, and from the amended statement of claim, as to when the cause of action accrued to the plaintiff's husband, if it did accrue to him at all. I am therefore not in a position to say that the plaintiff's claim is so hopeless that it cannot possibly succeed, upon the ground that it is time-barred under s.170 of the Land Act.

[19] The application is therefore dismissed with costs to be costs in the cause.

[20] Counsel for all parties are to attend my chambers at 9am Monday 10 September 2018 for further directions.

FAKAMAAU'ANGA FONUA
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TONGA

L. M. Niu J

NUKU'ALOFA: 6 September 2018. **J U D G E**