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23/11/18

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 35 of 2017

BETWEEN: 'ILAISAANE TUPOU TAU'AKIPULU a.k.a
'ILAISAANE TUPOU MAFILE'O

- Plaintiff

AND: LORD NUKU

- First Defendant

MINISTER OF LANDS

- Second Defendant

BEFORE HON. JUSTICE NIU

Counsel: Mr. H. Tatila for the plaintiff
Mr. C. Edwards for first defendant
Mr. 'A. Kefu for second defendant

Date of Hearing: 19 November 2018

Date of Ruling: 20 November 2018

RULING

[1] When this matter was called in chambers this morning, Mr. Kefu informed me that the deed of grant of the tax allotment in issue in this case has now been issued in the name of the plaintiff's husband (posthumously) and transferred to the plaintiff as her widow's estate.

rec'd 21/11/18
llc

- [2] Mr. Tatila advised me that as the plaintiff has now been properly registered as holder of her deceased husband's tax allotment, she wishes to discontinue her claim and that no costs be ordered against any party.
- [3] Mr. Kefu, for the second defendant agreed with that.
- [4] Mr. Edwards however did not. He asked for costs for the first defendant against the plaintiff. He submitted that the plaintiff has the liberty to discontinue her claim but she does not have the liberty to say whether or not the defendants can have their costs. He says that if the plaintiff had properly investigated her husband's title in the Land Office, she would have found that the Minister, Tu'i'afitu, had already approved and signed the husband's application in 2000, and should have only made her claim against the Minister to effect the registration of that grant. She should not have included the first defendant as a defendant in her claim. But because she had included the first defendant as defendant, the first defendant has incurred his lawyer's costs and the plaintiff should pay them.
- [5] I reserved making my decision.
- [6] It is clear, as confirmed by Mr. Kefu for the second defendant, that in 2000, the Minister Tu'i'afitu had approved the grant of the tax allotment to the plaintiff's husband by signing his application and that said Minister had directed that the surveying be done and deed of grant prepared. But on 23 July 2001 the first defendant wrote to the Minister to hold and defer the husband's application. As a result of that letter the Minister did no further action up to death of the husband and even after the plaintiff lodged her claim as widow of her husband with the Minister. The delay has all been caused by the letter of the first defendant.
- [7] It was therefore proper, and indeed obligatory for the plaintiff to include the first defendant as defendant because the delay in the grant being registered was due to his letter of 2001. Further, it was incumbent upon her to include him as defendant because it appeared to her that he, the first defendant, as estate holder might still be the lawful holder of this tax allotment, and that natural justice required that he

notified of the plaintiff's claim and to be afforded the opportunity of being heard and of defending or disputing the claim of the plaintiff.

[8] Upon being served with the claim, the first defendant filed his defence, and in that defence he stated, inter alia,

- (a) that the plaintiff's husband had falsely represented to him that his brother had agreed that he be granted the allotment;
- (b) that the older brother, Pita Keake Tau'akipulu, had complained that the husband was not the heir to the allotment and that the allotment be sub-divided amongst them;
- (c) that he then wrote the letter to the Minister to withhold the grant being made to the husband;
- (d) that the plaintiff was not entitled to the registration of the allotment, and
- (e) that the plaintiff's claim be dismissed.

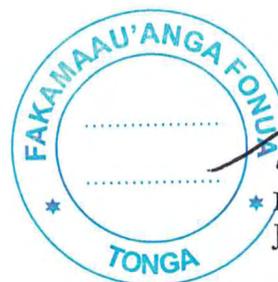
[9] In addition to that defence, the first defendant filed his amended statement of defence and added:

- (a) the defence that the claim of the plaintiff was time barred because her husband had taken no action against him from 2001 when he wrote his letter to withhold the grant up to 2011 (10 years) and
- (b) the husband had obtained his consent to his application by false misrepresentation.

[10] Not only that, the first defendant filed an application to strike out the claim of the plaintiff upon the ground that the plaintiff's claim could not be maintained because it was already out of time, that is, it was not brought within 10 years from 2001. That application went to a hearing and I gave a ruling that I was not sure if a cause of action had accrued to anyone in 2001 or any time thereafter, and dismissed the application but with costs being costs in the cause.

- [11] It is therefore the position, as I see it, that the first defendant has always taken more than a passive role as an innocent defendant being wrongfully dragged into Court. He asserted positive defences that there was false misrepresentations made by the husband, and that the plaintiff's claim was time barred. He prayed in his defence that the plaintiff's claim be dismissed. In other words, he was actively defending in order that the claim be dismissed, in order that it would grant him "authority" to do as he pleased with allotment.
- [12] Now, the facts have now emerged; the allotment had already lawfully been granted by the Minister to that husband in 2000, before the first defendant's letter was received by the Minister in 2001. If this matter had proceeded to trial, the plaintiff would have been successful in her claim and she would be entitled to costs. But she is willing to forego her costs, including the costs of the application to strike out, if the matter did not go to trial and that she is simply issued with her husband's posthumous deed of grant. The plaintiff can, if she insists, proceed with the trial and obtain the orders she seeks, including an order for costs. Instead, in the interests of saving costs for all parties, and also this Court, she wishes simply to discontinue her claim with no order for costs.
- [13] I laud her and her counsel for doing that, and in exercise of my discretion as to costs, I do not see any reason why she should be penalised with an order for costs against her, and I do not see any reason why the first defendant should be awarded any costs when, as I have stated, his defences have not been of any substance.
- [14] Accordingly, I order that for the foregoing reasons, the claim of the plaintiff is discontinued with no order for costs.

NUKU'ALOFA: 20 November 2018.


L. M. Niu
J U D G E