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21/11/18.

IN THE LAND COURT OF TONGA LA 3 of 2013

NUKU'ALOFA REGISTRY

BETWEEN: SITILI MATANGI

- Plaintiff

AND: VILI SEFO PALU KINIKINI

- First Defendant

MINISTER OF LANDS

- Second Defendant

BEFORE HON. JUSTICE NIU

Counsel: Mr. 'O. Pouono for the plaintiff

Mrs. F. Vaihu for the first defendant

Ms. H. Aleamotu'a for the second defendant

Hearing dates: 24, 25 and 26 September 2018

Plaintiff's submissions in writing: 3 October 2018

Defendants' submissions in writing: 10 October 2018

Date of Ruling: 20 November 2018

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RULING

The delay

[1] The claim of the plaintiff was filed on 12 March 2013, and was served on the defendants in the same month. No defence was filed by the defendants and no action was taken by the plaintiff.

[2] On 5 August 2013, the first defendant filed his statement of defence together with an application for security for costs to be paid by the plaintiff because he ordinarily resided in New Zealand.

[3] That application was heard by Scott LCJ on 21 August 2013 and he ordered that the plaintiff pay $5,000 as security for costs, and that unless paid, no further step be taken in the plaintiff's claim.

[4] That security was not paid by the plaintiff and on 16 December 2013, the first defendant sought an order that if the security was not paid by a set date, the claim be struck out.

[5] On 17 January 2014, the plaintiff filed in Court a Kiwibank Kiwi Saver Scheme Investment Summary that the plaintiff had NZ$15,400 in it and asked that it be accepted as the security for costs.

[6] On 22 March 2014, the Court ordered, after hearing counsel for all parties, that the security already ordered be paid to the Court.

[7] Leave was applied for and was granted and the second defendant filed his defence on 26 May 2014.

[8] On 19 September 2014, at a call over of cases for the Vava'u Circuit, it was agreed that a sum of $3,331.80 had been paid up by the plaintiff and was held in a joint bank account of plaintiff and first defendant counsel, but the first defendant still wanted the full $5,000 paid up. The matter was accordingly not included in the Vava'u circuit.

[9] On 21 October 2014, the matter was further directed to be placed before the next Chief Justice on 19 January 2015.

[10] On 19 January 2015, the matter was directed to be called again on 23 January 2015 before the Chief Justice but no further record is found in the file except notes written on the file cover that minutes were placed in the racks of counsel at the Court office on 28 January 2015 and 10 February2015.

[11] The next note was dated 9 April 2018: "Security for costs paid under R.482253 $5,000.00".

The facts

[12] These are the facts as I have found them.

[13] The land in dispute is an area of 1174m² (1r6.4p) situated in the village of Ta'anea, Vava'u, in the estate of Noble Vaha'i. It is a town allotment (the allotment).

[14] There is no record as to who, if any, had been given the allotment, either by the estate holder or by the Minister of Lands or Governor. But it was looked after (weeded and cleaned) by Vili Sefo Samani by the early 1960s. No one was occupying it and no house was on it. The allotment was called "Niukula".

[15] In or about 1966, one Lupeni Matangi, and his wife, Vahoi, came and lived on the allotment. The reason they did so was because Vahoi and Ma'ata, were good friends. Ma'ata was the wife of Vili Sefo Samani. Vahoi and Lupeni asked Vili Sefo Samani if they could drag their house over to the allotment for them to live in, and Vili Sefo Samani agreed. The house was then dragged over and mounted on concrete posts on the allotment and Lupeni and Vahoi then lived in it.

[16] It was stated by witnesses for the first defendant that Lupeni and Vahoi had asked Vili and Ma'ata to live on the allotment temporarily whilst they looked for their own allotment. One of those witnesses was Melenaite 'Olie, daughter of Vili and Ma'ata. She said that she was in class 4 or 5 at primary school at that

time, and that she directly heard Vahoi ask her mother for her and Lupeni to live on the allotment temporarily. However she, the witness, stated that she was now 58 years old. That means she was born in 1960 and would have been 6 years old in 1966 when the request was made. She would not have been in class 4 or 5 at all by then. It is more likely, and I believe that she was only subsequently told that that was the request made.

[17] I find that the request made was that Lupeni and Vahoi were to live permanently on the allotment because in about 1980, according to the same witness, Melenaite 'Olie, she noticed that the plaintiff's parents were erecting a concrete block foundation to replace the concrete posts of the house on the allotment. That was confirmed by the plaintiff in his evidence, and he stated that the wooden floor of the house was completely replaced by a concrete floor on the concrete foundation erected. To me that indicated permanency in the occupation of the allotment by Lupeni and Vahoi.

[18] Furthermore, there seemed to have been no secret about it because the witness saw it herself and no doubt would have informed Vili Sefo and Ma'ata, but no complaint or objection was raised by them as to the seeming permanency of the occupation by Lupeni and Vahoi of the allotment.

[19] In 1993, the plaintiff, who had been born in 1968 and been living on the allotment and was living there with wife and family, applied to be granted the allotment as his town allotment. His application form was signed by himself and by the estate holder, Noble Vaha'i, on 17 June 1993 and was lodged with the office of the Governor of Vava'u, at Neiafu. The application was specifically for this allotment "Niukula".

[20] Unfortunately, it appeared that the Governor's Office did nothing about that application, because the copy of that application which is produced as P.3 in the second defendant's List of Documents in this trial, shows no note of any action done about it at all.

[21] In 1995, the plaintiff's wife, Tesitimoni Matangi became very ill. She was said to be possessed with demons. The plaintiff heard and he went to one Semisi Ta'ufo'ou (who was a first cousin of Melenaite 'Olie) and asked him, and Semisi Ta'ufo'ou told him that it was true, that he had gone to the grave where his grandmother, Vika Samani, (who was also Melenaite 'Olie's grandmother) was buried and asked her to make him (Sitili) and his wife (Tesitimoni) leave the allotment so that the allotment would come back to them (the Ta'ufo'ou family). He said that that was why Tesitimoni was possessed with demons.

[22] The plaintiff then went and dug up the grave of the grandparents and took and boiled the grandfather's skull in a pot together with leaves. His wife's illness was immediately healed. The wife, Tesitimoni, stated in her evidence that she was the only one that was affected and she was immediately well and has not had any such illness since.

[23] The Samani family found out what the plaintiff had done and they complained to the police and the police prosecuted the plaintiff for desecration of a grave. In an effort to appease the family, especially and in particular, Semisi Ta'ufo'ou (who had called upon Vika to chase the plaintiff off the land), Lupeni offered to give the land back and in particular, for Semisi's son, Kelepi Ta'ufo'ou, to apply for it as his allotment. He wrote a letter to that effect in 1995.

[24] In that letter (P.5 of the second defendant's list of documents) he stated that this allotment had been granted to him on 8 June 1972, and that he had applied to be granted it as his allotment. But he was agreeable that that application be cancelled so that the land reverted to the estate holder, Noble Vaha'i, in order that Kelepi Ta'ufo'ou of Ta'anea could apply for it.

[25] That letter was received by the Governor and he wrote a note to the clerk, Maka, to proceed with the request but to check if any instruction had been given for the survey fee to be paid. That note was dated "29/05/95".

[26] The plaintiff stated that Lupeni showed him the letter for him to sign as well but he refused to sign it.

[27] Nothing further was done about the letter. No application was made by Kelepi Ta'ufo'ou, and nothing more was done about the plaintiff's application dated 17/6/1993.

[28] On 28 December 2004 there was a gathering at the Ta'anea hall where the noble Vaha'i and land office workers were present and applications for allotments were made. Tevita Matangi, older brother of the plaintiff's father Lupeni, applied and signed the application form for the plaintiff to be granted the allotment Niukula. The form was filled in by the clerk and after it was signed by Tevita for the plaintiff, it was given back to the clerk, Makafilia Mafi.

[29] In February 2005, Lupeni informed the plaintiff that the survey fee for this allotment was required to be paid. The plaintiff went and paid it on 18 February 2005. He was issued receipt no. 228688 – and that payment was noted on the plaintiff's application form.

[30] Senior Land Registrar, Fataua Halatanu, stated in his evidence that survey fees were paid as and when directed by the Governor or the Minister that they be paid. In this case, it would have been the Governor who had approved and directed that the survey fee be paid.

[31] That is crucial. The payment of the survey fee is the last act required to be performed by an applicant before he is issued a deed of grant of the allotment granted to him, for which he is then required to pay a registration fee.

[32] At the time of that approval by the Governor, the allotment was occupied by the plaintiff and his wife and family and they had a substantial dwelling house situated thereon. There was no impediment or competing application or claim by anyone else for the same allotment before the Governor.

[33] I find as a fact that the Governor of Vava'u at the time, acting as the Deputy Minister of Lands, and thereby acting as the Minister of Lands (s.2 of the Land Act), in approving that the survey fee be paid by the plaintiff, thereby approved the grant of the allotment to the plaintiff. I also find that the plaintiff accepted

that grant when he paid the required survey fee on 18 February 2005. As of that date, the plaintiff thereby became the lawful holder of the allotment. The allotment had been lawfully granted to him by the Governor. It was therefore, as of that date, no longer available to be granted to anyone else.

[34] I find that there is support for that finding in the note that the Governor wrote on "29/05/95" on the letter of Lupeni Matangi (surrendering the allotment) which was as follows:

> "Maka, T/F/F,
> Proceed with this request ... Check whether there was a decision that the survey fee be paid."

The implication of that note is that if the survey fee had been decided to be paid, then there may have already been a grant made and that there would be need to seek the consent of Cabinet under section 54 of the Land Act. If there was no decision that the survey fee be paid, then no grant had been made and so the consent of Cabinet would not be needed.

[35] In about the middle of the same year, 2005, the plaintiff and his family shifted and lived in New Zealand, but they did not abandon the allotment because the plaintiff had his father's brother Tevita Matangi, and his sister, Faleula Taulani, look after the house and cut the lawn and clean the allotment all the time. The plaintiff also continued to maintain and repair the dwelling house and he gave permission for the rugby team of the village to use it for their communal sleeping quarters during the rugby seasons, in return for them cutting and cleaning the allotment. In 2010, he gave approval that the pre-school Tokamu'a 'o Lolopaongo of Ta'anea used the house for their school building and the lawns as play area, in return for them cutting and cleaning the allotment. As for the repairs and maintenance of the house, the plaintiff bore them himself.

[36] In 2005, Melenaite 'Olie, daughter of Vili and Ma'ata, was transferred from Tongatapu to work as police officer in Vava'u. She stated that when she arrived there she noticed that the land was unoccupied but was told that it was looked

after by Tevita Matangi. Clearly, when she came to Vava'u in 2005, the plaintiff and his family had already left for New Zealand, in mid 2005.

[37] Melenaite went to the Governor's office and inquired and an officer there, Lavinia Fonohema, showed her the letter of Lupeni Matangi with the Governor's note of "29/05/95", and also the plaintiff's application for the allotment of 28/12/2004. She said that the officer told her that although the plaintiff had applied for the allotment, it was not yet valid because it had not yet been registered in his name.

[38] After discussions amongst the Samani family, it was agreed that the first defendant apply to be granted the allotment. His application form was filled in stating that the allotment was last registered in "Lupeni Matangi" which was of course not true because Lupeni had never applied and was never registered on the allotment. The application was then given to the Noble Vaha'i together with a copy of Lupeni's letter and another letter by one, Sione Vuna 'Anitoni, who was the representative of the estate holder at Ta'anea, informing the Noble that the allotment had been Vili Sefo's but that Vili Sefo had given it to Lupeni Matangi and that Lupeni Matangi has now given it back to Vili Sefo's family and has written to the Governor and confirmed that return of the allotment. Noble Vaha'i then signed his consent to the grant of the allotment to the first defendant on 30 May 2007.

[39] The application was lodged at the Governor's office and the Governor directed that the survey fee be paid and it was paid on 7 June 2007. A deed of grant was drawn up and was issued by the Minister of Lands on 22 November 2007. (P.16 of the second defendant's list of documents. Deed no. 387/47) and the particulars of that grant were entered in the Register of Town Allotments on the same day (P.20 of same list).

[40] Despite having been issued with a deed of grant and being registered as holder of the allotment, the first defendant took no action to assert his title to the allotment. It was not until he prosecuted or threatened to prosecute Tevita

Matangi, uncle of the plaintiff, for trespass in 2012 that the plaintiff became aware that the allotment had been registered in the first defendant instead. He then filed this action in 2013.

The plaintiff's claim

[41] The plaintiff claims that the grant and registration of the allotment in the first defendant's name was unlawful because –

(a) it was done by way of fraud, or alternatively;

(b) the allotment was not available to be granted.

He prays for orders that the registration of the first defendant be cancelled and that the allotment be ordered to be registered in his name instead.

The first defendant's defence

[42] Mrs. Vaihu for the first defendant raised several points in defence for first defendant in her submissions and I will deal with them under the following separate headings.

Letter by Lupeni Matangi (1995)

[43] That letter stated that Lupeni had applied for this allotment, Niukula, and that it had been granted to him on 8 June 1972, and he asked in his letter that his application be cancelled so that the allotment would revert to Noble Vaha'i in order that Kelepi Ta'ufo'ou would apply to be granted it as his town allotment.

[44] There was not any evidence that Lupeni had applied for Niukula. The evidence is that he applied for the town allotment, Petani. (Refer P.1 of Second Defendant's Document).

[45] There is no record and there is no evidence that the allotment Niukula was granted to Lupeni either by the estate holder, Noble Vaha'i, or by the Governor or by the Minister, let alone on the 8 June 1972, as is stated in the letter.

[46] At the time that Lupeni wrote that letter, 1995, his son, the plaintiff, who was lawfully residing on the allotment with his wife and family, had already applied, with the consent of the estate holder, to be granted the allotment (Niukula) on 17 June 1993. (Refer P.3 of Second Defendant's documents). Fataua Halatanu, witness for second defendant confirmed that in paragraph 5 of his brief of evidence. Lupeni had nothing to surrender except occupation of the allotment, but he never did surrender that.

[47] So that when the Governor wrote the note to his officer, Maka, on the letter on 29/05/95 "Proceed with this request", there was nothing in the Governor's office to proceed with because Lupeni had nothing to surrender.

Approved by Governor for and payment by first defendant of the survey fees

[48] Mrs. Vaihu raised the point that the Governor did approve that the survey fees be paid by the first defendant, and that indicated approval by the Governor of the grant of the allotment to the first defendant. But that was in 2007, 2 years after the Governor had similarly approved that the survey fee be paid by the plaintiff, and it was paid by the plaintiff in 2005, in acceptance of his application lodged in 2004, for the same allotment subsequently applied for by the first defendant.

Request by Governor to survey the first defendant's allotment

[49] She also referred to the savingram from the Governor to the Minister dated 8 may 2007 to request the survey of the town allotment of the first defendant, namely lot 103 (P.11 of Second Defendant's documents), as evidence of the grant made to the first defendant by the Governor. But again, that was 2 years after he had approved that the plaintiff pay the survey fee for the same allotment in 2005, and which the plaintiff had paid in 2005.

Letter from the Noble's representative, Sione Vuna 'Anitoni

[50] She also referred to the letter from the estate holder's representative (P.13 of Second Defendant's documents) as confirming the surrender of the allotment by Lupeni and his cancellation of his application. As already stated above, there was no such surrender because there was no such application by Lupeni.

Letter estopped Lupeni and the plaintiff

[51] Mrs. Vaihu submitted that that letter operated and should be held to estop Lupeni and his family, including the plaintiff, from denying the truth of its contents because the Governor and the Minister, including the first defendant, have relied upon it and have acted in reliance upon it to their detriment. However, as has been stated above, Lupeni had had nothing that he could surrender as he had written. He had not applied for this allotment and he had no application to be cancelled. Furthermore, his surrender or cancellation of his own application (if he had so applied) was only of his own application. It made no mention of the application made by the plaintiff for him to surrender, or ask to cancel the plaintiff's application. Estoppel would only apply and would only estop the person who made the representation upon which the other party acted to his detriment. In this case, if there was any one to be estopped, it would only be Lupeni. That is confirmed by the Governor approving the application of the plaintiff in 2004 and requiring him to pay the survey fee.

Addition of new causes of action

[52] Mrs. Vaihu submitted that the statement of claim of the plaintiff was based solely upon an allegation that the Governor's officer, Makafilia, had committed fraud in having the first defendant's application granted and registered when he had had the plaintiff's application first and not do anything about it. She submitted that the raising by the plaintiff counsel of 2 new causes of action, namely, "mistake" and "availability" in his opening address should not be considered because he had not applied previously to amend the plaintiff's

statement of claim. She stated that the addition of the 2 new causes of action was prejudicial to the defence because the defence had not anticipated it and was thereby denied directing more evidence on the defence of estoppel.

[53] I am not quite sure what Mrs. Vaihu meant by that. If she was indeed prejudiced by the introduction of the new causes of action, she ought to have said so or asked for time to call further evidence, and of course she could have objected there and then at the outset of the trial, but she did not, and neither did Mr. Sisifa for the second defendant. As I saw it, if the grant to and registration made in favour of the first defendant was not invalid by reason of absence of evidence of fraud but that it was by reason of mistake or unavailability of the land, then it was in the interests of justice that the 2 new causes of action be added, especially if there was no prejudice to the defendants. As no prejudice or objection was raised, the trial proceeded with the additions made.

No occupant of the land (2007)

[54] Mrs. Vaihu submitted that the land and the house on the allotment was unoccupied when the first defendant applied for it. That is not correct because according to the evidence of Faleula Taulani, in the same year that the plaintiff and family went to New Zealand (2005) the village rugby team used the house for their communal living and training, and it was not disputed that the allotment was always kept mown and cleaned from 2005, after the plaintiff left for New Zealand, up to 2007, and afterwards when the preschool occupied it from 2010 up to now. It is a well known fact in Tonga that if a town allotment is not maintained by having the grass cut, the owner or occupier of the allotment is charged and fined. Everyone knows that . That was why Lupeni's brother, Tevita Matangi, and the plaintiff's sister, Faleula Taulani, were at pains to keep the allotment cut and cleaned after the plaintiff left for New Zealand. Everyone in the village (Ta'anea) knew that, including the first defendant himself. The allotment was not unoccupied when the first defendant applied for it in 2007. It was occupied by the rugby team.

First defendant not aware of plaintiff's application

[55] Mrs. Vaihu also submitted that the first defendant was not aware that the plaintiff had applied for the allotment in 2004. The evidence of Melenaite 'Olie, who had suggested in the meeting in the U.S that the first defendant be the one to be granted the allotment, was aware of the plaintiff's application which he lodged in 2004. She stated in her evidence in cross-examination that the officer in the Governor's office, Lavinia Fonohema, showed her not only Lupeni's letter but also the plaintiff's application in 2005, and she stated that she told her siblings in the U.S of the plaintiff's application.

Basis of grant to first defendant was letter of surrender by Lupeni

[56] The rest of the submissions of Mrs. Vaihu appear to continue to be based on the letter of surrender that Lupeni made. She stated that the reason for the application of the first defendant was based on that letter, and the reason for the consent of the estate holder and the approval of the Governor were based upon that letter. I have already stated why that letter cannot be held against the plaintiff, namely, that it had nothing to do with the plaintiff's own application in 2004, an application which the estate holder had endorsed with his signature, and which the Governor had approved and directed that the plaintiff pay the survey fees for the surveying and the drawing up of the deed of grant, and which the plaintiff paid in 2005.

[57] I would add that even if Lupeni had something to surrender and that he did surrender it, I find that that surrender was not a proper surrender because he would not have surrendered it but for the intimidation which Semisi Ta'ufo'ou had perpetrated upon him by making out that he had gone and asked the spirit of his grandmother, Vika Samani, to come and cause them, that is, Lupeni and his son, Sitili (the plaintiff) and his wife, Tesitimoni, and their children to leave the allotment. That intimidation was unlawful because it caused fear, unlawfully, upon Lupeni, and Lupeni was in fear that what Semisi had done to happen to his son's wife, Tesitimoni, could be done to happen again. So that instead of going

to the Court to try and get the land back, Semisi threatened Lupeni that if he did not give the land back there would be further suffering visited upon his family.

[58] It is also clear that Semisi did that so that his own son would get the allotment, rather than the children of Vili Sefo and Ma'ata who had had the allotment in the first place and who had given it to Lupeni and Vahoi. He made sure that Lupeni's letter stated that the surrender was for his (Semisi's) son, Kelepi Ta'ufo'ou.

[59] I would also add that the letter made no mention of what was to happen to the house on the allotment. In 1995 (when the letter was written) the house already had a concrete foundation and concrete floor. It was no longer on concrete posts so that it could be dragged away like it had been dragged there in 1966. It is also clear that when the plaintiff applied for the allotment in 1993, the house would have to remain on the allotment as the plaintiff's house. He was the only one of the seven children still living (with his wife and children) on the allotment. By allowing the plaintiff to apply for the allotment, it can reasonably be inferred that Lupeni thereby gifted the house to the plaintiff in 1993.

Second defendant's defence

[60] Mr. Sisifa for the second defendant submitted that there were 3 issues to be decided in this case:

(a) whether any action of the officer Makafilia Mafi amounted to fraud such as to invalidate the grant/registration made to the first defendant;

(b) whether the allotment was available to be granted to the first defendant;

(c) whether there was a breach of natural justice in failing to afford the plaintiff an opportunity of being heard before the grant was made to the first defendant.

No fraud committed

[61] Mr. Sisifa submitted that no fraud was proved by the plaintiff to have been committed by Makafilia (or anyone else) in respect of the grant made to the first defendant in 2007. The reason why he stated that was because the plaintiff pleaded in paragraph 3 of his statement of claim that: "The employee of the Ministry, namely, Makafilia Mafi, caused the registration of the town allotment under the first defendant's name by fraud". He also did that because Mr. Pouono, counsel for plaintiff, conceded in paragraph 18 of his submissions for the plaintiff that: "There is no evidence to prove fraud".

[62] Fraud is criminal deception, using false representations to obtain unjust advantage or injure another. (Oxford Dictionary). That definition may well fit what Semisi Ta'ufo'ou did to Lupeni Matangi as I have stated in paragraphs 57 and 58 above. The deception perpetrated by Semisi has resulted in the grant and registration of the allotment in the first defendant. Although Makafilia was the one who hand-wrote the letter (as stated by the plaintiff in cross-examination), there is no evidence that Makafilia knew why or what made Lupeni sign such a letter.

[63] About 9 years later, namely 2004, Makafilia was still working in the Governor's Office and he attended the gathering with the Noble Vaha'i in the village hall in Ta'anea for allocations of allotments. He filled in the application form of the plaintiff, for the allotment. I compare the handwriting of the particulars in that form (P.7 of the Second Defendant's production) and the handwriting in the application form of the plaintiff for the same allotment in 1993 (P.3 of the same) and they are identical. Maybe he did not remember that this was the same allotment that Lupeni had wanted to surrender for Kelepi Ta'ufo'ou to apply for, but he accepted the form after it was signed by the plaintiff's uncle, Tevita Matangi, for him. That was on 28 December 2004. And not 2 months later, on 18 February 2005, the plaintiff paid the survey fee of $46.00, upon approval having been given by the Governor.

[64] In the brief of evidence of Fataua Halatanu for the second defendant, he stated in paragraph 4 that Lupeni Matangi applied for the allotment, Petani, "however, no survey fees was paid, and so the application was not processed". In paragraph 5, he stated that the plaintiff applied for the allotment, Niukula, "however, no survey fees was paid, and the application was not processed".

[65] Mr. Sisifa appears to repeat that evidence in paragraphs 4 and 5 of his submissions, and in paragraph 3. ii on page 3, he repeats the same thing in respect of the plaintiff's application for Niukula in 1993, but in respect of the plaintiff's application in 2004, he stated in sub-paragraph iii: "On 28 December 2004, Tevita Matangi on behalf of the plaintiff signed an application for Niukula, and that survey fees was paid".

[66] I can understand why an application is not processed when the survey fee is not paid, namely, the surveying would not be carried out and so no deed of grant could be granted. But I do not understand why an application is not processed, that is, that the surveying is not carried out, when the survey fee has been paid by the applicant.

[67] For 2 years, no surveying was done, and no request for surveying was done. The plaintiff was entitled to have his allotment surveyed. The Governor had approved his application and had directed that he pay the survey fee in order that his allotment would be surveyed so that he would get his deed of grant.

[68] The second defendant offered no explanation for that failure. But that failure caused a clerk of the Governor's office, Lavinia Fonohema, to make a false representation, perhaps unknowingly, to Melenaite 'Olie, aunt of the first defendant, that although the plaintiff had applied for the allotment, the allotment was still not been registered in anyone. On the application form of the plaintiff (P.7 of Second Defendant Documents) it is clearly written that the survey fee had been paid on "18/02/05". The clerk ought to have been instructed by the Governor that once the survey fee of an application has been paid, that allotment was no longer available to be applied for by anyone else. But he hadn't

and as a result the clerk told Melenaite what she told her and Melenaite caused the first defendant to apply for the same allotment, Niukula, and which application was granted by the Governor and registered by the Minister.

[69] That may be said to be fraud because it is a false representation which resulted in an unjust advantage to the first defendant. But it is not fraud because it is clear that Lavinia Fonohema did not knowingly convey to Melenaite 'Olie that false representation "to obtain unjust advantage" for the first defendant. Knowledge of the falsehood of the representation must be proved to have been held by the person making the representation.

Availability of the land

[70] Mr. Sisifa submitted that the evidence was that the allotment Niukula was available to be granted to the first defendant in November 2007. He pointed to the same evidence which Mrs. Vaihu had pointed to in her submission and which I have already considered as I have already stated in the foregoing paragraphs.

[71] I may add that when the Noble Vaha'i, who owned the estate in which the allotment Niukula was situated, agreed that it be granted to the plaintiff as his town allotment, and the plaintiff was lawfully residing in that estate of Noble Vaha'i, and the allotment Niukula was available to be granted (because it had not been granted to anyone before) and the occupier of the allotment, Lupeni Matangi, was agreeable to that grant being made (the plaintiff gave evidence that Lupeni knew of his application but said nothing about is), the provisions of s.50 of the Land Act was properly complied with. Sub paragraph (a) of that section provides:

> "(a) an applicant for an allotment lawfully resident in an hereditary estate shall have his allotments out of land available for allotment in that estate."

So that once the Noble signed his consent to the grant on the plaintiff's application on 28 December 2004, and the above conditions were properly

complied with, the entitlement of the plaintiff to the allotment became mandatory. The applicant shall have his town allotment out of the land that was available, namely, the town allotment, Niukula.

[72] And the Minister and the Governor must comply with that mandatory provision, but only in respect of the grant of a town allotment. In respect of the grant of a tax allotment, the Minister may disagree with the estate holder as provided in s.34(2) of the Land Act. No such authority is given to the Minister or Governor in respect of the grant of a town allotment.

[73] Furthermore, in the present case, the Governor, in accordance with the mandatory direction of s.50 (a), approved and directed that the plaintiff applicant pay the survey fees, and the plaintiff paid it on 18 February 2005. The payment of the survey fee is the last requirement or step which the Land Act requires that an applicant carries out in order that his allotment is properly demarcated and pegged with numbered concrete pillars by the surveyors of the Minister, a deed is drawn up and is then registered by the Minister. The Privy Council had held in the case of *Tu'i'afitu and Another v Mesui Moala* (Privy Council 25.1.57) that where the applicant has taken all steps required by the Land Act section 76 and that whilst registration is evidence of ownership it is not always necessary to prove registration before ownership can be established. That was followed in the case of *Fifita Manakotau v Vaha'i* Vol. 11 Tonga LR 121 and it was confirmed by the Court of Appeal in the case of *Lisiate and Another v Eli and Ors* [2012] Tonga LR 31, and was followed in the case of *Folau v Taione, Ma'afu & Minister of Lands* [2016] Tonga L.R 189.

[74] The requirement that the Minister or the Governor must approve that the survey fee is to be paid is necessary because, although the application already has the consent of the estate holder, the Minister and the Governor are obliged by law to ascertain that the declaration made by the estate holder in the application form that "there is no impediment to prejudice the grant" is correct. They must satisfy themselves that there is no impediment, and they do that by physical inspection of the land to be granted to see if anyone else is occupying it, or that there is a

house on it belonging to someone else, etc. and more importantly, they must check if anyone else had already applied for the same land. That requirement was confirmed by the Court of Appeal in the case of *Tafa v Viau* [2006] Tonga LR 2.

[75] Had the Governor checked if anyone else had applied for the allotment Niukula which the first defendant applied for, he would have found his own decision that the plaintiff had paid the survey fees which he himself had directed that he paid. And had he directed an inspection to be carried out, he would have seen that a substantial and permanent house was on the land, that the land was well kept and the house was occupied and used by the rugby team of the Ta'anea Village for their common living in training for their games, which house was not the property of the first defendant. He would have then realised that the Noble Vaha'i had been wrong in declaring in the application form that there was no impediment to prejudice the claim.

[76] Accordingly, I hold that the land, the town allotment Niukula, was not available to be granted to the first defendant.

Breach of natural justice

[77] Mr. Sisifa submitted that there was no breach of natural justice when the plaintiff was not afforded an opportunity of being heard before the Governor decided to grant the allotment to the first defendant because the Governor was entitled to rely and he did rely upon the letter written by Lupeni in 1992.

[78] I have already stated what I have stated about the letter of Lupeni, but it ought to have been immediately clear to the Governor, when he received the application of the first defendant, that that application was for the same allotment which he had already approved to be surveyed for the plaintiff, for which the plaintiff had already paid his office to be done. He ought to have immediately asked, "But what does Sitili Matangi say about this applciation?"

[79] As the Court of Appeal stated in the case of *Hakeai v Minister of Lands* [1996] Tonga LR 142, 143:

"It is clear law that a person whose rights, interests or legitimate expectations are imperiled by an official's consideration of some person's application will generally be entitled to a fair opportunity to be heard before a decision adverse to him is made. This is what is known as natural justice."

[80] In the parent case, the plaintiff properly applied for this allotment, with the proper consent of the consent holder whilst there was no impediment to his application. The house on the allotment was his as he was occupying it and was applying to be granted the land on which it permanently stood with its concrete foundation and floor, and he had already paid the survey fee for the surveying of the boundaries and to have it registered in his name. In other words, the plaintiff did have legitimate expectations that the allotment was to be registered in his name. He was entitled to be afforded a fair opportunity to be heard when the first defendant subsequently applied to be granted the allotment instead. The Governor was obliged to grant that opportunity to the plaintiff but he did not. That was a breach of natural justice, and the grant, in breach of natural justice, made to the first defendant is accordingly invalid.

[81] According I hold, for the reasons I have stated above, that the town allotment Niukula was lawful granted by the Governor to the plaintiff when he approved that the survey fee be paid and the plaintiff accepted that grant by paying the prescribed and required fee. Accordingly, I also hold that the purported subsequent grant made by the Governor to the first defendant of the same allotment was invalid. I make the following orders:

(a) I declare that the grant and registration made of the town allotment at Ta'anea, Vava'u, with deed of grant Book 387 Folio 47 dated 22 November 2007 in the name of Vili Sefo Palu Kinikini is invalid.

(b) I direct that the Minister of Lands shall forthwith cancel that grant, registration and deed of grant and to issue forthwith to the plaintiff, Sitili Matangi, a deed of grant of the same town allotment and to have it registered according to law.

(c) The defendants shall pay the costs of the plaintiff in these proceedings, to be taxed if not agreed.

(d) The security for costs paid by the plaintiff into this Court shall be forthwith paid to the plaintiff together with any interests thereon if any.

L. M. Niu
JUDGE

NUKU'ALOFA: 20 November 2018.