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21/05/19

BETWEEN: KENETI MATEASI PENITANI

- Plaintiff

AND: 1. PATELESIO FUIMAONO  
2. KILISITINA FUIMAONO

- Defendants

AND: MINISTER OF LANDS

- Third Party

BEFORE HON. JUSTICE NIU AND ASSESSOR TOUMO'UA

Counsel : Mr. D. Corbett for plaintiff.

Hearing : 19 and 28 March 2019, 4, 11, 18, 24 April 2019, and  
17 May 2019

Ruling : 21 May 2019

R U L I N G O N F O R M A L P R O O F

[1] This is a formal proof hearing of the claim of the plaintiff against the defendants. Both defendants were served with the plaintiff's claim on 29

November 2018 and neither of them has filed any defence to that claim up to now. Notice of this formal proof hearing was served upon the second defendant (who is the wife of the first defendant) but neither she nor her husband attended the hearing.

### **The claim**

- [2] The plaintiff claims that he has been lawfully granted a lease of the whole of the tax allotment of Richard Mafi at Ma'ufanga for 20 years, and that the defendants, who were already occupying the land prior to the grant of the lease to him, were unlawfully refusing to vacate the land and he is asking this Court to order that they do so. He also asks for damages in the sum of \$1,500 per month since the grant of the lease to him and for costs.

### **The evidence**

- [3] The evidence, which was given by the plaintiff and which the Learned Assessor and I accept as the facts, is that Sitani Mafi started the bakery business and he brought his relatives, the Fuimaonos, from Niuafono'u to work for him as employees in the bakery business in the 1970s. His son, Sepa Mafi, was the holder of a tax allotment at Ma'ufanga with an area of 3 acres and 18.9 perches. As he was manager of the business, Sepa Mafi had the extension of the bakery built upon his tax allotment and he allowed the Fuimaonos to build a house for themselves on the tax allotment so that they could be close by for work purpose at the bakery.
- [4] It was clear that the purpose of such house (no. 1) was only temporary whilst they were employees employed at the bakery because the house was built on concrete posts (which were movable) and the floor and walls of the house were wooden, to enable the house to be moved from the land when required.
- [5] Subsequent to that, that is in about 1987, Sepa Mafi himself built a house (no. 2) near the house no. 1 for his second son, Michael Mafi. That was built permanently because it had a concrete foundation and floor although the walls were wooden.

- [6] Subsequent to that and by 2006 or so, 4 other houses were built by one of the Fuimaono brothers namely, Savelio. Those 4 houses were all of concrete floor as well and which he rented out to tenants. The plaintiff stated that Sepa had told him, before Sepa Mafi died in 2012, that he did not agree to give the land on which those houses were built to Savelio, as he did with the land on which Savelio's twin brother, Falakiko, had built his house. The plaintiff said that Sepa told him that he was happy with Falakiko because he was hardworking and honest and so he gave him the piece of land on which he had allowed Falakiko to build, but that he was not happy with Savelio at all and had not agreed to give any land to him.
- [7] The reason why Sepa had told the plaintiff that was because he had asked the plaintiff to come back from Australia and try and rebuild the biscuit factory of the business because it had died. The plaintiff then came in 2012 and inspected and talked with Sepa and agreed to go to Australia and get the necessary parts and machinery to re-start the business. Sepa died later in 2012.
- [8] In 2013, the plaintiff returned and restarted the biscuit factory and he re-employed the Fuimaono employees, including the first defendant, whom he employed as truck driver, but by 2015, he had to replace him because he did not want to employ him anymore.
- [9] By 2017, with the business running again, the plaintiff wanted permanent arrangements with the son and heir of Sepa Mafi who then held the tax allotment, Richard Mafi. For an agreed sum of money, Richard Mafi agreed to grant a lease of the whole tax allotment to the plaintiff for 20 years at \$100 rent per year.
- [10] Richard Mafi was issued a deed of grant book 444 Folio 12 for the tax allotment and it was registered by the Minister of Lands on 10 April 2017. On 21 July 2017, the lease no. 9075 of the plaintiff of the whole of the area of the tax allotment was registered by the Minister of Lands for 20 years commencing on 21 July 2017 at an annual rent of \$100.

- [11] The plaintiff served notices upon the defendants and the tenants in 2017 to pay the rent to the office of the bakery instead but they did not comply. They have continued to remain on the land up to now.

## **The law**

### Validity of the lease

- [12] A registered holder of an allotment may grant a lease of the whole or part of the allotment to another person and if it is a tax allotment, the lease shall not be for more than 20 years, and the consent of Cabinet must be obtained before the grant of the lease can be made. Section 56 of the Land Act provides for those requirements.
- [13] Richard Mafi, the lessor and grantor of the lease of the plaintiff, has been issued a deed of grant of the tax allotment which the Minister of Lands has granted to him. That deed has the page number, namely, "Folio 12" (page 12) and book number, namely book no. 444. That means that the deed of grant has been bound together with other deeds of grant as a book and the number of that book is no. 444 and the deed of grant of Richard Mafi is the one that is page no. 12 in that book.
- [14] Only when a deed of grant of an allotment has been bound up together with other deeds of grants in a book can it be said that a grant of an allotment has been registered by the Minister of Lands. S.121 of the Land Act provides for that:

*"121. The Minister shall sign and deliver to the grantee one duplicate and shall register the other by binding up the same in a book to be called the register of allotments."*

- [15] Because the deed of grant of Richard Mafi has been bound in a book which is numbered 444 and the deed is the page 12 of that book, I have to accept that Richard Mafi has been lawfully registered as holder of this tax allotment, and

that he could lawfully grant a lease of the whole of that allotment to someone else, as is required by S.56 of the Act.

- [16] A lease is not effective until it has been registered in a prescribed manner (Refer S.126) The prescribed manner is stated in S.127 as follows:

*“127. Registration of a lease ... shall be effected by the Minister filing one original thereof in the register of leases in his office and by endorsing the other with the following memorial of registration:*

*Registered the .... day of ..... 19...*

*Register of Leases Book .... Folio ...*

*..... Signature of Minister*

*The lease ... endorsed with the memorial of registration shall be delivered by the Minister to the person entitled thereto.”*

- [17] It is clear that the same way in which deeds of grants of allotments are registered is to be used for registration of leases, hence the requirement for “Book ... Folio ...”. But it appears that what is being done by the Minister with registration of leases is to bind the deeds of leases which are kept but instead of having the books numbered, and the pages of the leases therein numbered numerically therein, and the number of the book and of the page of the book being written on the deed of lease “Book ... Folio ...”, he has a separate book which he calls the register of leases in which he has entered all the particulars of all the leases that have ever been granted in Tonga from the beginning up to now in numerical order. In that register of leases, the lease granted to the plaintiff has been registered as lease no. 9075, on 21 July 2017.

- [18] Mr. Semisi Moala, Land Registrar of the Ministry of Lands, gave evidence and stated that all the deeds of lease have been bound in books but the pages or folios of those books are not numbered. On the front cover and spine of each book is written the number of the deed at the front and the number of the deed at the back of the book, and all the deeds are bound in the book in

numerical order from the number of the first deed to the number of the last deed in it. He said that in all, there are some 80 books of the deeds, and that the deed of this lease of the plaintiff, together with other deeds of lease, have all been put together but not yet bound into a book yet, until, he said, the Ministry would have 50 leases before they can be bound into a book like the last book, book no. 79.

[19] Mr. Moala said that to date, there are 4 books which constitute the register of leases. All the other 3 books are all full of the list and particulars of all the leases there are in the Kingdom. The particulars of the lease of the plaintiff, ie. Lease no. 9075, have been entered as no. 9075, in book no. 4 of that register.

[20] I have therefore concluded from the evidence of Mr. Moala that the book which the Minister of Lands has used and which he has called "Register of Leases" is a book wherein he has entered only the particulars of the leases and has given them the numerical number by which he has entered them in it. That is not the register of leases which S.127 of the Land Act requires him to keep. The register of leases required by S.127 is the deeds of lease themselves, not the particulars only of the leases. S.127 requires that the deeds of leases are bound in a book as the register of those leases, with the number of that book and the page or folio of each lease being written on each deed as "Book ... Folio ...", and the deed for the lessee being handed to the lessee with the "Book ... Folio ..." numbers being already written on it. So that if one looks at the lessee's deed, he would see the number of the book and of the page in which that deed of lease has been registered, without the need for him to check any book in the Land Office to see if the deed has been registered. But with the register of leases which the Minister now keeps, all that the deed which the lessee has is a register number. If he checks that number, he only finds that it is a number in a book of particulars of leases. He does not find the deed in that book. He has to look for one of some 80 books to find the book with the numerical number by which his deed has been registered. Those 80 books are not numbered and the pages are not numbered. Although they contain the

deeds of lease, they are not the register because they are not numbered as required by S.127 and the Minister has a different book which he calls the register of leases.

- [21] Accordingly, I must find, and I find, that the lease of the plaintiff has not been registered in accordance with S.127. And because it has not been so registered, I must apply S.126 which provides as follows:

*“126. No lease, sub-lease, transfer or permit until registered in the manner hereinafter prescribed shall be effectual to pass or affect any interest in land:”*

and hold that the lease of the plaintiff is ineffectual to grant him any interest in the land on which the defendants reside.

- [22] That of course is not the fault of the plaintiff in any way whatsoever, but of the Minister alone, and I conveyed my request to the Minister through the Registrar of Lands, Mr. Moala, that he should write Book 80 and the appropriate page (folio) no. for this deed of the plaintiff in his deed as well as in the deed which the Minister keeps of it. By so doing, the Minister would thereby comply with S.127 and have this deed thereby duly and properly registered, so that I can properly enforce it. The Minister declined to do that. He instead enforced his own register of leases by writing on the two deeds of lease “Book 4” (which is the book no. 4 of the particulars of the leases) and “Folio 9075” (which is the numerical number of this lease) as it is found in that book no. 4.

- [23] When I further raised the matter with the Acting Attorney General, Mr. Kefu, who appeared on behalf of the Minister, he, upon the further instructions of the Minister, filed a memorandum in which he stated the following reasons of the Minister:

- (a) The Ministry does not use the memorial directed by S.127 because the form of the deed is prescribed in the Schedule IX to the Act and it

does not require the memorial “Book ... Folio ...” required by S.127. It instead requires:

“Registered in the Registry of Leases of the Tonga Government in the Office of the Minister of Lands, Nuku’alofa, on the ..... day of the month of ..... 20 ....

No.....  
.....  
Minister of Lands.”

- (b) The requirement to insert the memorial provided by S.127 is administrative, and not a substantial procedural matter that is mandatory.
- (c) The intention of registration is to prove that the deed of lease has been formally approved, accepted, filed and recognised as a valid document that all parties comply with, and the parties or interested persons can find a lease if they search the Ministry records.
- (d) The use of the index of the register, and using the lease number as a way to find the location of the lease meets those intentions of the register, and he submitted that there is no invalidity caused to the lease.
- (e) If non-compliance with S.127 makes this lease null and void, the legal effect will be that all other thousands of leases that are not registered accordingly would also be deemed null and void. That situation should be avoided at all costs. This will avoid potential chaos with lessors taking immediate possession of their land, or lessees demanding return of their rental paid over the years because there was never a valid lease in the first place. If registration is regularised as currently interpreted by this Honourable Court, there may be legal difficulties with leases coming into effect once the regularisation is complete.

- (f) If the current interpretation stands, it will be an administrative nightmare for the Ministry to call on all the thousands of lessees to submit their deeds of lease to be endorsed in accordance with S.127.

Mr. Kefu reserved the right to the Minister to make further and fuller submissions if the Minister was joined as a party.

[24] This Court has joined the Minister as third party, as indicated in the intituling, and the hearing of submissions were held on 17 May 2019 but no further submissions were made for the Minister other than those he had stated as above.

[25] Mr. Corbett for the plaintiff supported the submissions of Mr. Kefu.

#### **Prescribed form in the Schedule**

[26] The prescribed form in the schedule is provided for in S.124 (1) of the Act as follows:

*“124. (1) All applications, leases, sub-leases, transfers and permits shall be in the forms prescribed in Schedule IX with such variations as circumstances may require and in the cases of leases, sub-leases, transfers and permits shall be in duplicate.”*

That means that the forms in the schedule must be varied as is required, and in the case of leases, it must be varied as is required by S.127. Otherwise, the form, which is prescribed by regulation made under the Act, would result in changing the requirement of the Act instead. That is what has happened in the present case, and that can never be.

#### **Substantive provision**

[27] Prior to the enactment of S.127 in 1927, the registrations of leases (and of allotments) were effected by entering the particulars of the leases in a book called the register of leases (and register of town allotments and register of tax allotments), just like the registrations of births, deaths, marriages, vessels, motor vehicles, etc.

[28] But in 1927, with land, a separate and different system of registration was, and is, required. A deed of grant (of the allotment or of the lease) was required to be drawn up and that deed was to be bound in a book and that book was to be the register. The Minister has done that with regard to allotments of lands as tax allotment and town allotment but has not done that with regards to leases. He has chosen to continue to register leases as he had done prior to 1927 instead, and that is not a procedural error but a substantive and substantial departure from the requirement of the Act.

### **Deed complete**

[29] The deed was, and is, intended to be the complete title of the holder, that it would not only contain the holder's name, the area and location of the land, but also a diagram of the land and the pillars and numbers of the pillars of the boundaries of the land, signed, sealed and dated by the Minister of Lands with the Book no. and Folio no. of that particular deed – and that that complete title to be bound in “in the register of that deed,” that deed itself being bound in the register, as the register. If searched, those 2 numbers are directly the reference and identification numbers. They can be verified by anyone looking at the deed held by the holder himself without the need for verification in any record in the Land Office. If lost or destroyed or damaged, another deed may be drawn up from the one “in the register” itself.

### **No chaos**

[30] Every holder of a deed of lease which has been granted by the Minister is entitled to have that deed registered by the Minister by entering therein the “Book no.” in which that deed is bound, or will be bound, by the Minister and the “Folio no.” in that book in which the duplicate of that deed is located in that book. Equity grants to that holder that right, and the Minister is bound by law to enter those two requirements in his deed of lease.

[31] Equity also applies to stop such holder from claiming the return or refund of any rent that he has paid for use of the land that he has leased and used. It also applies to stop any landholder (the lessor of the lease) from evicting the holder

of the deed of lease from the land upon the purported ground that the lease is null and void or ineffectual, because that landholder has already accepted the payment of the rent for his land and has stood by and allowed the holder to expend on and utilise the land as his.

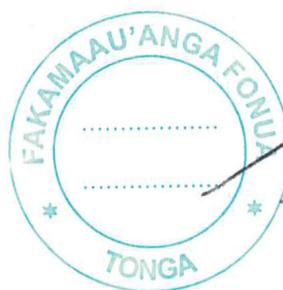
- [32] All that is now required, if the parties, or one of them wants, is for the Minister to enter in the respective duplicate of a lease the Book no. and Folio no. of the lease. There can be no chaos and there will be no chaos about that.
- [33] The leases, including the present lease, have been validly granted because they have been granted in accordance with the Constitution and the Land Act. What has not been done, and which must be done, is the registration of that grant, because S.126 of the Land Act provides that “until registered in the manner hereinafter prescribed” no lease shall be effectual to pass or affect any interest in land.
- [34] I consider that a grant of a lease is no different from a grant of an allotment. They can be validly made without registration as it is with the grant of an allotment, but with a grant of a lease, the Act expressly provides in S.126 as stated above that the “interest in land” cannot pass until the lease is registered. An unregistered deed of lease granted to a lessee as holder entitles that lessee as a matter of right to the registration of that deed. The grant of that deed is therefore valid. It grants to the lessee the right to demand its registration, because it has been validly granted.
- [35] I therefore find that the position of leases is as the Privy Council had held in the case of *O. G. Sanft and Sons v Tonga Tourist and Development Co. Ltd and Hamilton and Minister of Lands* [1981-1988] Tonga LR 26, 34:

*“The Privy Council wishes to emphasise that equitable principles only apply to leasehold interests after they have been validly granted.”*

**Order to Minister to register this lease**

- [36] I had asked Mr. Kefu to seek the consent of the Minister to his inserting into the deed of lease of the plaintiff the Book no. and Folio no, namely, book no. 80 and the applicable page no. which this particular deed would constitute in that book and to sign it – on both duplicates of this deed so that this lease can properly be held to be registered as provided by S.127 of the Act, but the Minister declined to agree and I had therefore joined him as third party so that a necessary order to that effect can be made against him.
- [37] For the foregoing reasons, I order that the third party, Minister of Lands, shall forthwith and by no later than 7 days from today cause to be written in into the 2 originals of this deed of lease of the plaintiff, Keneti Mateasi Penitani, which deed the Minister has had registered as lease no. 9075, the Book no. in which this deed would be bound and the Folio no. which this deed will constitute in that book and he shall sign and date those entries on the deeds accordingly.
- [38] I also order that the Minister shall cause the book in which the deed of lease will be bound and the deed of the plaintiff to be produced to this Court at **9am on Wednesday 29 May 2019** in order that I can properly verify the registration of this lease and in order that I can make the orders sought by the plaintiff for eviction of the defendants.
- [39] I direct that the Court service officer shall forthwith, and on this day the date of these orders, serve a sealed copy of these orders upon the third party, Minister of Lands, and file in this Court a certificate of that service right away.

NUKU'ALOFA: 21 May 2019.



*[Handwritten Signature]*  
L. M. Niu  
J U D G E