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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 8 of 2019

BETWEEN : FALAKIKO SAVELIO MA'AFU KULI
- Plaintiff

AND : 'ETIMONI MAILE
MINISTER OF LAND
- Defendants

BEFORE HON. JUSTICE NIU

Counsel : Mr. S. Vaipulu for plaintiff.

Hearing : 28 May, 6 June 2019, formal proof hearing

Ruling : 7 June 2019.

RULING

[1] This is a formal proof hearing of the claim of the Plaintiff against the defendants because neither defendant filed any defence to the claim within the stipulated 28 days required by the Writ of Summons attached to the claim. Both defendants were notified of this hearing.

rec'd 12/06/19
Jato

The Claim

- [2] The Plaintiff claims that in 2007, he and his siblings built a dwelling house for their parents on land which was once held by their grandfather's younger brother at Lapaha in the 1970's. In 2010, the parents migrated to Australia and gave the ownership of the house to the Plaintiff. From 2010 to date, the Plaintiff and his wife have been occupying the house and maintained the land as theirs without any claim or objection by anyone until 2018.
- [3] On 26 November 2018, the second defendant Minister of Lands registered the adjoining land as the town allotment of the first defendant, which land had been occupied by the first defendant prior to the dwelling house of the plaintiff being built in 2007. But the boundary of the area which was registered by the Minister as the allotment of the first defendant ran through part of the house of the plaintiff and also deprived the plaintiff of the area beside his house which he has been using as his driveway into the land he had been occupying and maintaining.
- [4] The plaintiff says that the Minister had failed to make proper inquiry to ascertain the availability of the land to be registered in the first defendant before he proceeded to register it in the first defendant.
- [5] He therefore seeks an order to cancel the deed of grant (Book 453 Folio 64) registered in the first defendant and to order a re-survey to exclude the dwelling house and driveway of the plaintiff from the area of the allotment of the first defendant.

The evidence

- [6] The evidence of the plaintiff and his wife confirmed as facts the claim which I have outlined in paragraphs 3 and 4 above. The evidence of the officer from the Land Office, Semisi Moala, who was subpoenaed by the plaintiff as his witness, and who produced the documents to support his evidence, however, is as follows:

- a) The first defendant applied on the prescribed form for this town allotment on or about 9 March 2002, which was the date on which the estate holder, Kalaniuvalu, signed his consent to his application.
- b) The application form had been properly filled in with the lot number (lot 206) for which he was applying. On the back of the form was drawn a plan of that lot in relation to 2 adjoining lots (lot 203 and 205). That plan also had the 5 survey peg numbers for the 5 corners of the allotment, namely, pegs nos. 79761, 79762, 79763, 79765 and 71000. Those pegs' numbers confirmed that the allotment had already been surveyed and pegged with those peg numbers in the ground.
- c) On the application form is a handwritten note of and signed by the Minister of Lands at the time, Noble Fielakepa. The note was: "Soana, Proceed", and he dated it 22/03/2002. That was in answer to a note from Soana Latu asking for his instructions about the application.
- d) Written on the form as well were:
- (i) Birth Cert. No. 1490/1968 Vol. 3
 - (ii) Tongan note that 'Etimoni Maile is a legitimate son of Sione Maile of Hamula, and Langakali Maile of Lapaha and that he was born on 4.12.1968, and that survey fee of \$40.00 was paid on receipt 70791.
 - (iii) Registration fee receipt 512574/26/11/18 \$4.03.
- e) A savingram was signed by the Minister, Fielakepa, on 3 June 2002, directing the Secretary for Lands to draw up and prepare a deed of grant of lot 206 for 'Etimoni Maile in order that the allotment be registered in his name. It confirmed that the survey fee had been paid on that same day 3 June 2002.

f) The deed of grant book 453 folio 64 of the first defendant, 'Etimoni Maile, was signed and issued by the Minister of Lands, Ma'afu, on 26 November 2018.

g) The surveying and planting of the survey pegs of the boundaries of lot 206 had already been done in the early 1990s.

[7] I therefore find as a fact that when the surveying was carried out in the early 1990s, the dwelling house of the plaintiff had not been built as yet, and that the area enclosed by the said survey pegs as lot 206, was not adversely possessed or occupied by the plaintiff or his parents or his siblings, at the time that the first defendant applied to have it granted to him as his town allotment.

The Law

[8] The law is that an allotment is lawfully granted and the holder becomes the lawful holder of it from the moment the Minister of Lands makes his decision to grant it to the holder: *Lisiate & anor v Eli & ors* [2012] Tonga LR 31.

The subsequent registration of the grant by issue of the deed of grant of the allotment by the Minister to the holder is only evidence of the grant which he has already made: *Moala v Tu'i'afitu & anor* [1956] Vol. II Tonga LR 104.

[9] It is clear that the plaintiff and his siblings did not bother to check if the area on which they erected the dwelling house of their parents was available. Had they checked at the Land Office they would have found that the Minister had agreed to grant and had granted the adjoining land to the first defendant and that the survey pegs were already there in the ground to indicate the area that was still available for them to build on. But they did not.

[10] When the Minister proceeded to sign and issue the deed of grant to the first defendant, he was not obliged to check whether the land was unoccupied by anyone because he had already validly granted it in 2002 to the first defendant when no house was encroaching on any boundary. He was only registering a grant which he had already validly made in 2002.

Conclusion

- [11] I therefore find that the claim of the plaintiff cannot be sustained and it is dismissed with no order for costs.

NUKU'ALOFA: 7 June 2019.



A handwritten signature in black ink, appearing to be 'L. M. Niu'.

L. M. Niu

JUDGE