

11/07/19

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 17 of 2018

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BETWEEN : LORD FOHE

- Plaintiff

AND : 1. VE'ETUTU MAHE
2. SALESI FOHE
3. MELE TANGI
4. ZING WANG CO. LTD

- Defendants

BEFORE HON. JUSTICE NIU AND ASSESSOR TU'IFUA

Counsel : Mr. H. Tatila for plaintiff.

Hearing : Formal proof hearing on 16 January 2019, 12 February 2019 and
2 July 2019.

Submissions : By Mr. Tatila filed 29 January 2019.

Ruling : 9 July 2019.

RULING

[1] The 4 defendants in this action filed no defence to the plaintiff's claim and a formal proof hearing was held on 16 January 2019 to hear the evidence in support of the plaintiff's claim. At the end of the hearing, seeing that there has not been any case in Tonga like this case, where an estate holder is seeking orders of eviction against persons residing on his estate, and that the provisions of the Land Act, like SS.34 and 35, be carefully considered, Mr. Tatila was given time to make written submissions by 30 January 2019. He has done that on 29 January 2019. Upon considering the evidence given, the Learned Assessor and I wanted to hear more

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evidence from the plaintiff and the town officer and we heard that evidence from the town officer on 12 February 2019, and from the plaintiff on 2 July 2019, when he was able to return from Australia to give it.

The facts

- [2] The noble title Fohe, the estate holder of the estate of Puke in Tongatapu, was last held by one Samiu Fohe (Samiu) who died on 16 April 2009. He had held it since his appointment in about 1978. When he died, his only issue is his daughter, Lupe, who has no issue herself. His next eldest brother was Tevita Moeakiola Fohe, who had died on 25 November 2002, leaving a son, Sione Fohe, who has now been appointed to the title by His Majesty, Tupou VI, on 17 November 2016, with effect from the following day 18 November 2016. A copy of that appointment was produced in evidence (P.I of Production).
- [3] **The first defendant**, Ve'etutu Mahe (Ve'etutu) and his family live in a plywood wall house with a brick foundation and concrete floor and a slanting corrugated iron roof. A plan (P.6 of Production) shows that it is situated behind an area (2024m²) leased by Lord Tangi 'o Vaonukonuka by the main Hihifo Road. Both the lease and the area occupied by Ve'etutu are in a lot numbered 4 in the plan. That lot 4 has a total area of 14 acres 18.8 perches which the plaintiff said is still in him, meaning it has not been granted out to any person as allotment or lease and that it is available for such grants.
- [4] The town officer of Puke, Malolo Tupou (Malolo), who gave evidence, stated that when he served Ve'etutu (in May 2017) with the notice from the plaintiff to vacate, he was told that Lupe had authorised him to live there. He said that the house was only built in about 2014 and that Ve'etutu has only lived there since then. He did not know where Ve'etutu was from.
- [5] Malolo stated that after he served Ve'etutu with the notice, Ve'etutu and his wife came over to his home that evening to ask for them to stay on the land because of the expenses and construction which they have carried out, because Lupe had told them to go and build and live there. He told them that Fohe (the plaintiff) wanted them to move because that area was part of a tax allotment which Fohe was offering in exchange for a tax allotment situated adjacent to the Sia'atoutai Theological

College (to the east) where people had already built and lived on, and that Fohe wanted the allotment holder to give up that tax allotment to be subdivided amongst those people and to take up and keep this new tax allotment where Ve'etutu was in exchange for it. Malolo said that even after he explained that to them, Ve'etutu and his wife were at a loss as they did not know what to do.

[6] Malolo said that after Samiu died (in 2009), he was summoned by Tu'inavou Vaea (who is now the Noble Vaea) to the Palace Office where he was representative for the King in respect of estates for which no appointment had been made. He said that Tu'inavou told him that he was to look after the estate and the people of Puke until a new Fohe was appointed by the King. He said he went and told the District Officer and they held a fono (village meeting) at Puke where the District Officer informed the people of the care taking position of the town officer, Malolo, and that no grants were to be made until the next Fohe was appointed. Malolo said that Tu'inavou had told him that only the Palace Office had the authority about the estate of Fohe until the new appointment was made.

[7] Malolo stated that despite that fono, many people subsequently came to him to ask if what Lupe had told them was correct, namely, that they build or live on certain lands. He said that he told those people not to do as Lupe had told them and that they wait until a new Fohe had been appointed. He said that Ve'etutu and his wife had not come and seen him like those other people, and that he only knew that Lupe had told them to build and live there when he went to serve the notice on them.

[8] Malolo stated that he had seen, from the main road, that workmen were digging the footing of the house of Ve'etutu in about 2014 but he did not turn in to ask who they were and why they were doing it. He also said he later on saw them doing (concreting) the footing but again he did not go and ask. Later on he saw that the house was up and standing with the slanting roof. He said he did not think to stop the construction or to go and ask the Palace Office if any change was made to what Tu'inavou had told him.

[9] He said that Sione (now Noble Fohe) the plaintiff, was aware of his appointment as care-taker of the estate but that Sione was more often in Australia because his children attend school there and that he, Sione, also work there.

- [10] He also said that despite hearing from the people of Lupe's decisions for them to live on lands of the estate, he did not speak to her not to give any such decisions.
- [11] **The second defendant**, Salesi Fohe (Salesi), is a son of a younger brother of Samiu. He was born and raised in Puke and is a Puke man. It seemed that he teamed up and worked with one Lisiate Laasi in Lisiate's mechanic's workshop. That workshop is of concrete floor and concrete block walls and corrugated iron roof and has accommodation facilities which Salesi occupies with his female partner. Malolo, the town officer, said that Samiu had built the workshop for Lisiate, but that Lisiate has now gone and lived in Kolomotu'a and Salesi and his partner are the only ones now living in and using the workshop. When Salesi was served with the notice to vacate, he had lawyer, Sione Taione, write and state that Salesi and Lisiate had occupied the workshop for 30 odd years and that they were not moving unless ordered by the Court. Counsel, Mr. Tatila, for the plaintiff replied to Mr. Taione that even if they had occupied the place for that long, they had no lawful title to the land and that they had taken no steps to acquire lawful title to it and accordingly must vacate. Salesi did not vacate. Malolo stated that the notice served was only addressed to Salesi because Lisiate was no longer there but that when Mr. Taione replied he included Lisiate as being co-occupants with Salesi.
- [12] The area on which the workshop is situated is numbered lot 2 in the plan produced as P.6 and it is beside the main Hihifo Road and to the east of Lord Tangi's lease land (numbered lot 5 in the plan). It's area is 6078m² and the plaintiff said that it is still in him as well, meaning it is still available to be granted.
- [13] **The third defendant**, Mele Tangi (Mele), has built a concrete block walled shop building with slanting corrugated iron roof to the west of the workshop occupied by Salesi but right up by the main Hihifo Road and at the south west corner of lot 2 in about 2013. She had operated the shop herself and then later on it closed down and she then rented it to the fourth defendant, Zing Wang Co. Ltd, and that company has been operating its retail business in it up to now since about 2014. It is not known who had authorised her to build the shop there.
- [14] Malolo stated that Mele was from Fatai village. She had gone to Hawaii and was married to Takai Vea and her name is in fact Mele Tangi Vea. He said that she and

her husband came and asked Samiu for a town allotment in the village of Puke and that Samiu granted it to them, but he was not sure whether it was granted as allotment of the husband or of their son. He said they have since built upon it and have occupied it up to now. Malolo said that that was where Mele was when he served her with the claim of the plaintiff.

[15] **The fourth defendant** is by its name a registered company and no evidence was given about it except that it operated the shop as a retail by a Chinese man who occupies the rear part of it with his family, paying rent of the building as tenant to the third defendant, Mele, who owns the building.

[16] Semisi Moala, land registrar of the Ministry of Lands, gave evidence that the records of the land office do not show any grant of any allotment or lease having been made to any defendant in respect of the lands they occupy, nor does the Land Office have any application of any defendant for grant of the same to them.

The plaintiff's claim

[17] The plaintiff claims that he was appointed to the title of Fohe, estate holder of Puke, in 2016 and he discovered that the defendants were residing on the land and he repeatedly asked them to vacate, including a letter from the lawyer but they refused to vacate since May 2017. He claims that the defendants are unlawfully occupying the lands and requests the eviction of the defendants and damages for their unlawful occupation.

The law

re: the first defendant

[18] The evidence is that the first defendant only began to build upon and lived on the land he presently occupies in 2014. That is the evidence of the town officer. That would be some 5 years after Samiu had died. If, as the town officer says the first defendant told him, Lupe (Samiu's daughter) had authorised him to build and live on the land, Lupe had no authority to do that, and the first defendant would have known that. Every Tongan knows that a woman does not and cannot hold the title or authority of a noble. Accordingly, the first defendant had no authority, either from the noble who held the estate, namely, the plaintiff, or from the Minister of Lands who could grant lands. Mr. Semisi Moala confirmed that no grant or

application for any grant had been made in respect of the first defendant or of the land which he occupies. The first defendant is therefore no more than a squatter on the land he occupies.

[19] It is true that the town officer had been instructed by Tu'inavou Vaea of the Palace Office to be care-taker of the estate until the next holder of the title Fohe was announced, and that he, the town officer, was aware when the construction of the first defendant's house began in 2014, but such instruction was invalid because no one other than the plaintiff could give such instruction. Clause 111 of the Constitution expressly provides that the plaintiff was the lawful successor to the title Fohe upon the death of Samiu who had held the title, and S.38(1) of the Land Act expressly provides that upon the death of a holder of a noble's title, His Majesty shall cause the name of the lawful successor to be gazetted together with the date of his succession thereto which shall be the day following that on which the death of the holder took place. Section 39 clarifies that: from that date, the successor possesses and enjoys the rent, profit, rights and privileges of the title and of the estate.

[20] I find that the town officer had no legal authority to stop the first defendant from his construction, even if he chose to do so. But he did not choose to do so and I find that it makes no difference. The first defendant had no authority, or lawful interest of any kind whatsoever to have gone and built on the land. Accordingly, I hold that the claim of the plaintiff against the first defendant for eviction is proved.

[21] As to the claim of the plaintiff against him for damages, no evidence was given as to what damages have been suffered by the plaintiff in consequence of the unlawful occupation of the land by the first defendant, or as to any rent of the land occupied which would have been payable if leased to any person for residential purpose. Accordingly, I can only award nominal damages which I fix at a total sum of \$100.

re: the second defendant

[22] The evidence concerning the second defendant is that Samiu had authorised him, impliedly, to live in and use the workshop and accommodation which he, Samiu, had had built for Lisiate Laasi, after Lisiate had gone back and lived in Kolomotu'a. That authorisation ended when Samiu died. The continued occupation of the land by the second defendant was however not unlawful until the plaintiff served him notice to

vacate in May 2017. Refer *To'a v Taumoepeau & Minister of Lands* (LA10/2012) *Manu v 'Aholelei* [2015] Tonga LR 135.

[23] Allotment holders and estate holders may give lawful permission, in writing or verbally, for another Tongan (and his family) to live on his land. That permission may be revoked or varied but it ends upon the death of the person who gave it. The lawful successor to the allotment or to the estate must seek the vacating of the land by the person (and his family) occupying the land. If the person does not vacate the land he is then liable to be evicted by order of the Court and for damages.

[24] The plaintiff has proved that the second defendant has been served with a notice to vacate in May 2017 and the second defendant has refused to vacate up to now. As to damages, again I am unable to assess any damage because no evidence was given as to that, and so I can only award nominal damages of \$100.

re: the third defendant

[25] No evidence was given that Samiu had authorised the third defendant to build and operate her shop by the main road where it is situated. No lease or permit or allotment had been granted by the Minister in respect of this land up to now. Even if Samiu had authorised her to build and occupy the land, Samiu has died and the plaintiff has duly notified her to vacate the land since May 2017. Her presence on the land is no longer lawful. Her shop is being rented for retail business and it must be commercial and viable businesswise for her to do that, rather than to operate the retail business herself. I consider that a weekly rent of \$100 is the least that should be payable for the use of the shop because it is not only used as a shop but also for the accommodation of the tenant's employee and of his family, and that rent should be payable from 1 September 2017, when the period of notice had ended on 31 August 2017, until the date that she, and the tenant's employee and his family vacate the land together with her shop building.

re: the fourth defendant

[26] The right of the fourth defendant to be on this land is the same as and depends entirely upon the right of the third defendant because that company is the tenant of the third defendant. It ought to have verified at the commencement of the tenancy the right of the third defendant to rent the house to it and for how long. It ought to

have known that once notified to vacate, the third defendant and her shop would have to be moved from the land.

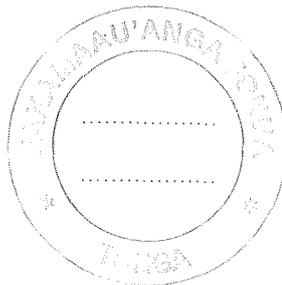
[27] I do not consider that any separate damages be payable by the fourth defendant because its occupation of the land is the same as that of the third defendant.

Orders

[28] I make the following orders:

- (a) All the defendants shall vacate the land together with the houses that they occupy thereon within 3 months from the date of these orders.
- (b) The first and second defendants shall each pay damages to the plaintiff in the sum of \$100.
- (c) The third defendant shall pay damages to the plaintiff in the sum of \$100 per week for every week since the 1st September 2017 until and including the week in which she and the fourth defendant vacate the land on which the shop is situated.
- (d) The defendants shall jointly and severally pay the costs of the plaintiffs in these proceedings, to be taxed if not agreed.
- (e) The plaintiff shall cause a sealed copy of this ruling to be served on each of the defendants forthwith and to file in this Court a certificate of each service right away.

NUKU'ALOFA: 9 July 2019



A handwritten signature in black ink, appearing to read 'L. M. Niu', is written over the seal.

L. M. Niu
JUDGE