IN THE LAND COURT OF TONGA

NUKU'ALOFA REGISTRY LA 11 of 2018

BETWEEN : SAMIUELA LOTENI KAVA

- First Plaintiff

PAULA KAVA

- Second Plaintiff

AND : LORD LUANI

- First Defendant

MINISTER OF LANDS

- Second Defendant

BEFORE HON. JUSTICE NIU

Counsel : Mr Clive Edwards for both plaintiffs.
Mr Sione Fonua for first defendant
Mr Sione Sisifa for second defendant

Trial : 15, 16 July 2019.

Submissions Hearing: 13 August 2019.

Ruling : 27 August 2019.

rec'd 29/08/19

RULING

The plaintiff's claim

[1] Although Paula Kava is intituled and pleaded in the statement of claim as second plaintiff, he has no claim at all in this action. It is only the first plaintiff who makes the claim, and his claim is that he is the lawful heir of Paula Kava in respect of the tax allotment which Paula Kava lawfully held, and which he lawfully surrendered. He says that the tax allotment has not, as yet, reverted to the estateholder, Lord Luani, the first defendant, in accordance with the requirements of S. 54 of the Land Act, under which the surrender and Cabinet approval were made, because the Minister of Lands, the second defendant, has failed to comply with those requirements, and that he the plaintiff is still lawfully entitled to claim it as his lawful tax allotment as the lawful heir to it, in accordance with the provisions of the Act.

The defendants' defence

[2] The first defendant, Lord Luani, says that the tax allotment had lawfully reverted to him and that the matter had been litigated and the Court, as well as the Court of Appeal, had held that the tax allotment had lawfully reverted to him, and that he was awarded damages as lawful holder of the allotment.

[3] He also says that the (first) plaintiff had consented to the surrender as the heir to the tax allotment in order that it would revert to the estateholder (Lord Luani) in order that Lord Nuku's son would apply to hold it as his tax allotment, and because S. 54's requirements are to ensure that the heir is aware of the surrender, the purpose of S. 54 was satisfied because the first plaintiff who is the heir was already aware of the surrender and had consented to it. He therefore says that the failure of the second Defendant to comply with the requirements of S. 54 did not stop the tax allotment from reverting to him as estateholder.

[4] The second defendant, Minister of Lands, says that although there was only one publication of the notice of the approval by Cabinet of the surrender in

the Taimi 'o Tonga newspaper, and that there was no gazette publication of it at all, the first plaintiff had had no intention of claiming the tax allotment at all because he wanted the allotment to revert to Luani so that Nuku's son would apply to hold it as his tax allotment, and accordingly says, it did not matter that not all the requirements of S. 54 were complied with. The tax allotment had lawfully reverted to Lord Luani as estate holder.

The facts

[5] The relevant facts are not really in dispute and may briefly be given.

[6] On 24 January 2011, Lord Nuku and Paula Kava made an agreement that Paula Kava would surrender his tax allotment at Malapo and that Lord Nuku's son, Faka'osifono Valevale, would apply to hold it as his tax allotment, and that in return, Lord Nuku would pay him $130,000 in cash and would have another tax allotment granted to him in the estate of Ha'ateiho which was much closer to Nuku'alofa, and that Lord Nuku would arrange and have Paula Kava's brother's town allotment at Tofoa, which was low-lying, filled with coral to an agreed level.

[7] Paula Kava explained that agreement to the first plaintiff and that as he was the heir to his tax allotment, he would not lose out under the agreement because another tax allotment at Ha'ateiho would be granted to him and that the first plaintiff would still be heir to it, as he was to the Malapo allotment. The first plaintiff agreed to it and he signed a letter of Paula Kava to the Minister of Lands that he, Paula Kava, wished to surrender his said tax allotment at Malapo.

[8] The reason for that agreement was so that Lord Nuku's son would lease it to a Chinese company (which would quarry coral rocks from the allotment for the road construction projects of the Tongan Government which was funded by the Chinese Government) at a rent of $500,000 for 20 years.

[9] The signed letter of surrender was lodged with office of the Minister of Lands on 23 February 2011.

[10] Lord Nuku paid the agreed $130,000 to Paula Kava, and he authorised the Chinese company to commence quarrying on the allotment and it did.

[11] He however failed to have the town allotment of Paula Kava's brother filled with gravel or secure the grant of the tax allotment at Ha'ateiho to Paula Kava and Paula Kava wrote to the Lord Nuku and copied to the Minister of Lands, on 1 April 2011 that quarrying be stopped forthwith until the exchange for his tax allotment was completed.

[12] On 27 June 2011, because nothing had been done by Lord Nuku, even by then, Paula Kava wrote to the Minister and cancelled his letter of surrender of his tax allotment because the tax allotment at Ha'ateiho had part of it leased to someone else and he wanted a tax allotment that was unencumbered by any lease, and because his brother's town allotment had still not been filled. The first plaintiff was aware of this cancellation and agreed to it.

[13] On 16 November 2011, after a meeting held with the Minister and his officer Warrick and Lord Nuku, and the officer Warrick confirming to Paula Kava that the tax allotment at Ha'ateiho was clear of any encumbrance and was available to be granted, Paula Kava wrote to the Minister to proceed with his surrender of his tax allotment and lodged his application and asked the Minister to process his application for the tax allotment at Ha'ateiho. The first plaintiff was not aware of this letter or the continuation of the surrender until about January 2012, when his father told it to him.

[14] On 11 January 2012, Officer Warrick prepared and gave the Minister a submission to Cabinet for him to sign to seek approval of the surrender by Paula Kava of his tax allotment under S. 54 of the Land Act. The Minister signed it on 3 February 2012.

[15] That submission was submitted to Cabinet and it was approved on 24 February 2012.

[16] On 7 May 2012, the Minister signed a notice, dated the same day, that Cabinet had on 24 February 2012 approved the surrender by Paula Kava of his tax

allotment at Malapo which is registered Book 148 Folio 63, and notified any person who claimed he was heir to the allotment to lodge his claim in writing with the Minister by no later than 10 May 2013 failing which it would revert to the estateholder.

[17] A receipt for $41.40 was issued by Taimi 'o Tonga newspaper on the same day, 7 May 2012, in the name of Paula Kava for "Land Notice Book 148 Folio 63", which the Land Registrar, Semisi Moala stated was for publication of the said notice in the newspaper 3 times. He was however unable to give or produce any evidence that the notice was published in the newspaper at all. He said no copy of the newspaper was required to be produced to or kept by the Minister as evidence of the newspaper publication. He said that the Minister did not require any such evidence. He also said that the notice of this surrender was not published in the Government Gazette at all.

[18] The only evidence of any publication of the notice was given by Paula Kava in his brief of evidence. In paragraph 26, he stated: "My inquiry show that the advertisement was inserted once only in the Taimi Newspaper..." I accept it as fact that there was only one publication of the notice, namely in the Taimi newspaper and that there was no publication in the Gazette at all.

[19] Paula Kava said he went and checked on his application for the Ha'ateiho tax allotment and Officer Warrick told him that he had to wait one year for the surrender to be complete before processing his application, and so he waited.

[20] He said that after one year he went to check and Officer Warrick told him that the tax allotment at Ha'ateiho that he was applying for, had already been registered in someone else. He then wrote to the Minister of Lands on 24 May 2013, in Tongan, as follows (as translated):

> "Hon Minister,
>
> With my respect and according to our culture I humbly request you to allow me to appeal to you.

I apologise to you and your good heart because your workers betrayed you and me.

Warrick advised me, at our meeting with noble Nuku at your office, that the land at Ha'ateiho (Lot 46 & 46A, BLK 77/99) was unencumbered and that I could apply to have it which led me to write the letter of 16 November 2011 to continue the surrender my tax allotment "Lofia" on the estate of noble Luani at Malapo. And the one year has finished and I came to complete my application only to be told by Warrick that the allotment I'm applying for at Ha'ateiho had already been registered (in someone else).

I am very disappointed and unhappy about the lie and incorrect advice that was given to me and you at our meeting. Furthermore, I have already surrendered my allotment and lost it and I have not got another allotment in place of it as we had agreed.

I apologise and appeal to God to give you the good spirit to help me in this predicament. I need your advice as to what to do urgently.

Respectfully yours".

[21] The first plaintiff, as heir, did not claim the tax allotment of Paula Kava at any time.

[22] Because of the letter of surrender signed by Paula Kava and the first plaintiff on 24 January 2011, Lord Nuku wrote and authorised the Chinese Technical Team company, Yan Jian Group Co. Ltd, to commence and that company commenced quarrying coral rocks from the tax allotment of Paula Kava. It did not cease to stop quarrying until Lord Luani stopped it in or about May 2013 when the one year from 10 May 2012 expired on 10 May 2013, when he claimed that the tax allotment of Paula Kava had lawfully reverted to him.

[23] Lord Luani brought an action against Lord Nuku and Yan Jian Group Co. Ltd and another company for the damage caused by the quarrying done to the allotment. The Land Court gave judgment and awarded damages in the sum of

$5,556,000, the gross value of the coral rocks removed from the allotment, against all 3 defendants. The 3 defendants appealed to the Court of Appeal and the Court of Appeal upheld the decision of the Land Court but that the net value of $3,380,335 (after deducting the costs of extraction of the rocks) be awarded instead and that the other company was not liable for the damage suffered.

The arguments

[24] Mr Fonua for the first defendant referred to the publication of the notice of surrender on 7 May 2012 with the date of 10 May 2013 as the last day for the claim by the heir to be made, and submitted that on 10 May 2013, the first plaintiff failed to claim the allotment and it lawfully reverted to Lord Luani as estateholder by operation of law.

[25] He also submitted that this issue was res judicata because the Court of Appeal had already decided it in the land case of *Lord Luani v Lord Nuku, Yan Jian Group Co. Ltd and Yan Jian Tonga Ltd* (the other company) and that this Court is bound by that decision. He said that not only did the Court of Appeal decide that the allotment had reverted because it was admitted on the pleadings and that evidence of that fact was not required, the Court went on to hold that in "any event, S. 54 (1) and (3) clearly provide for the allotment to revert to the holder of the hereditary estate if the heir of the previous holder fails to claim the land within 12 months after the appearance of the first advertisement."

[26] Furthermore, he says that the first plaintiff not only failed to claim the allotment, he also consented that it revert to Lord Luani and that he cannot now claim that the allotment did not revert because of failure of the Minister to comply with the requirements of S. 54. He says that the first plaintiff is estopped by his own act from denying his consent that the allotment has reverted to Lord Luani.

[27] He also submitted that the Court has a discretion to hold whether or not there has been a reversion of the allotment concerned and he referred to the case of *Koloamatangi v Koloamatangi* [2003] Tonga LR 131. In that case, the town

allotment holder lied in his letter of surrender that he had no children when in fact he had 5 legitimate children of whom the plaintiff was the eldest son and heir, and upon approval of the surrender by Cabinet, no step was taken to publish the surrender in the Gazette or in any newspaper at all. But after one year expired, the Minister granted the allotment to the person intended by the surrender, who immediately expended some $60,000 in filling the land, fencing and construction of his dwelling house and occupying it, in addition to paying $7,500 to the holder for surrendering the allotment. He was entirely innocent, as so was the plaintiff, who only found out from his mother some 7 years later that the father (holder) did hold an allotment and he then proceeded to inquire at the Land Office and discovered what had happened. In the circumstances, the Land Court held that it was not prepared to order the cancellation of the grant made to the innocent grantee of the allotment.

[28] Mr Fonua submitted that the plaintiffs have lost their rights to the tax allotment because they had both consented to the surrender of the allotment and they signed two documents signifying their wish to do that and they made no claim for it after Cabinet approved their surrender at any time at all after that.

[29] Mr Sisifa for the second defendant Minister of Lands submitted, in line with Mr Fonua's submission, that this Court has a discretion as was decided in the *Koloamatangi case* referred to above because S. 54 does not say that non-compliance with its requirements would render the reversion invalid, and that that discretion be exercised in favour of upholding the surrender and reversion of the allotment to Lord Luani. He submitted that that discretion should be exercised in favour of upholding the reversion because there was no fraud involved, both plaintiffs did consent to the surrender and to the reversion of the allotment to Lord Luani and because no claim was made by the first plaintiff to the allotment within 12 months from the date 10 May 2012 to 10 May 2013 which was notified in the newspaper publication paid for on 7 May 2012 and which was admitted by the second plaintiff in his brief of evidence.

[30] He also submitted that the plaintiffs had the burden to prove and have failed to prove that the notice was not published 3 times in the newspaper and accordingly submitted that the notice was accordingly published 3 times in the newspaper.

[31] He submitted that the reversion of the allotment was lawfully complete in accordance with S. 54 because the first plaintiff failed to claim it within 12 months after the first publication was made in the newspaper and which he gave evidence he saw.

[32] Mr Edwards for the plaintiffs submitted that the defendants have failed to prove that the notice of the surrender was published 3 times in the newspaper and that it is not disputed that it was not published in the Government Gazette at all. He says that there was therefore a failure by the second defendant Minister of Lands to comply with the requirements of S. 54 of the Act. He says that there must be strict compliance with S. 54 and refers to *Fatafehi v Kuea* [2011] and to *'Amanaki Kioa v Solomone Kioa & Ors* [2016] which supported *Fatafehi's Case*. He also refers to the statement made by the Court of Appeal in *Luani Case* referred to by Mr Fonua that a disappointed heir may still bring a late claim for the allotment surrendered, but that a stranger whose rights were not affected cannot complain.

[33] He submitted that res judicata does not apply in the present case because

a) the Court of Appeal in the *Luani Case* did not decide whether or not the allotment had reverted because that fact was already admitted by Lord Nuku in his pleading. The Court accordingly stated, in answer to submissions by Mr Edwards for Lord Nuku that there was no reversion because there was non-compliance with the requirements of S. 54, that this "submission must fail because reversion was admitted on the pleading and evidence on the facts were not required;"
b) the plaintiffs were not parties to the *Luani Case* and are therefore not bound by the decision in that case that the allotment had reverted to Lord Luani. In fact, he pointed out, that the Court of Appeal did

expressly refer to the plaintiffs and stated that they were not parties to the proceedings and that their rights could not be interfered with (Refer paragraph 10 of the Court of Appeal decision).

[34] He also pointed out that it is not correct that the first plaintiff had consented to the surrender and to the reversion of the allotment when he signed his name to the letter of surrender on the 2 documents of 24 January 2011. He says that those 2 letters were cancelled by the second plaintiff on 27 June 2011 and the first plaintiff was aware of that and agreed with it, and he was not consulted and he did not consent or sign his consent to the letter of the second plaintiff on 16 November 2011 that the surrender of the allotment be proceeded with.

[35] He submitted that until the reversionary process required by S. 54 was complete the heir's right of succession was not affected, and that a defective compliance with those strict requirements does not impose a time limit of 12 months within which the heir can lodge his claim or deprive him of his right of succession to the surrendered allotment.

Consideration

Need for notice of surrender

[36] Before 1991 (in fact 4 February 1992 when His Majesty signed the amending Act), the Land Act made no provision that the heir, of a holder who surrenders his allotment or part of it, is notified or made aware of the surrender made by the holder, upon approval thereof by Cabinet under S. 54 of the Act. In 1989 in the case of *Vakameilalo v Vakameilalo & Minister of Lands* [1989] Tonga LR 98, the Privy Council (the Court of Appeal of Tonga at that time) recommended that S. 54 be amended by adding a subsection to provide that "Notice of Cabinet's consent to the surrender shall forthwith be given by the Minister to the heir of the holder", and that what is now S. 87 be amended by adding the words "or within twelve months of receiving notice pursuant to S. 54 of Cabinet's consent to the surrender" immediately after the words "from the death of the last holder" in that section.

[37] That recommendation was not enacted as law. Instead, Act 18 of 1991, namely the Land Amendment Act 1991, enacted that the existing S. 54 be made subsection (1) and that the following two subsections be added as subsections (2) and (3) thereof:

> "(2) Notice of the Cabinet's consent to the surrender shall be published by the Minister in one issue of the Tonga Government Gazette and in three issues of a Tongan weekly newspaper within 2 months of the date of notice.
>
> (3) The notice shall be in the form specified in Schedule IVA and will require any person claiming to be the legal successor to the surrendered laud to lodge his claim in writing to the allotment or part thereof by the date specified in the notice which date shall not be less than 12 months from the date that the notice is first published in accordance with sub-section (2), failing which the said allotment or part thereof will revert to the estateholder."

and that S. 87 be amended by adding the words "or by the date specified in the notice made pursuant to Section 54 of this Act" after the words "from the death of the last holder."

[38] I have underlined the word "shall" in each subsection because it conveys the intention and reason as to why the amendment does not require that the Minister or anyone must inform the heir of the holder such as the Privy Council had recommended. The reason is that the heir may not be located or difficult to be contacted, but more importantly the heir may very much be disputed. And even if the heir can be found and informed, one can never be sure if someone out there is in fact the heir instead.

[39] It is obvious that the Legislature decided that there be publicity given to the approval by Cabinet of the surrender, which was not the case before then, and accordingly required that notice of that approval be gazetted in the Government Gazette and that it be also published in 3 issues of a local Tongan weekly newspaper, and that they are to be published within 2 months of the

date of the notice. Upon such publicity, the law deems that the heir, whoever he is and wherever he is, has become aware of the notice and its requirement that he lodges his claim with the Minister to the allotment or part thereof which is surrendered by the holder by no later than a date specified in the notice. Such date must allow at least 12 months for the heir to lodge his claim. If the heir makes his claim as required, the allotment or part thereof surrendered lawfully becomes his. If he fails to make the claim within the specified 12 months, the allotment lawfully reverts to Crown or the estateholder. That is the clear intention of the amendment made.

[40] I consider that that is the proper construction of S. 54. There is no discretion given to the Minister to publish or not to publish the 4 publications specified, or to make only one or two of the publications instead. It is mandatory that he so publishes the notice. The use of the word "shall" requires that. And more importantly the Minister is not given any discretion to decide whether or not the allotment or the part of it has reverted to the Crown or to the estateholder and accordingly proceed to make a grant of it, because the provisions of S. 54 already provides for when the reversion may lawfully be held to have occurred.

[41] I therefore consider that the said provisions of S. 54 do not make any provision or allowance for the Minister or this Court to exercise a discretion to decide whether or not an allotment or part of it has reverted to the Crown or to the estateholder.

[42] Accordingly, as I have already found as a fact, that there was only one publication of the notice, I must hold, and I hold, that the tax allotment "Lofia" of Paula Kava has not reverted to the estateholder Lord Luani at all, and that it would not, until the Minister has published the notice exactly as he is required by S. 54 to do and if the heir of Paula Kava does not claim it by the specified date in the notice.

[43] Submissions were made by both Mr Fonua and Mr Sisifa that the first plaintiff had already signed his consent that the allotment revert to the estateholder Lord Luani, but it must be pointed out that at the time he signed that consent,

he had no legal interest in the allotment at all. The allotment was wholly and lawfully held by his father, Paula Kava, at that time. It was only after Paula Kava's surrender was approved by Cabinet that Paula Kava's lawful interest ended, and after Cabinet approved the surrender, I have found that the first plaintiff did not sign anything to indicate that he consented to it reverting to Lord Luani. Furthermore a consent by a person as heir does not amend S. 54 such that the notice be no longer required to be published, because there may be another person who may be heir other than the first plaintiff and whom S. 54 intended be informed.

[44] Mr Fonua had submitted that the Court of Appeal had already decided in the Lord Nuku appeal in respect of this same tax allotment that this allotment had already reverted to Lord Luani. But Mr Edwards correctly pointed out that the reason that the Court of Appeal held that that was so was because Lord Nuku had admitted in his pleading that the allotment had reverted to Lord Luani. It is true that the Court also went on to say that in any event S. 54 (1) and (3) clearly provide for the allotment to revert to the holder of the hereditary estate if the heir of the previous owner fails to claim the land within 12 months after the appearance of the first advertisement. But it is clear that the Court of Appeal did not find and did not refer to any fact that the heir failed to make the claim and it made no finding on the facts that the allotment reverted because of such failure. I consider that that statement by the Court was obiter because it had already held that the pleading had admitted the reversion of the allotment and so no evidence was required to prove that it did. Besides, I agree with Mr Edwards that the matter is not res judicata because the plaintiffs were not parties to that case.

[45] The plaintiffs pray in their statement of claim that this Court orders the second defendant Minister of Lands to receive the claim of the first plaintiff as lawful heir to the tax allotment "Lofia" at Malapo and to register that allotment in the first plaintiff. I do not agree that this Court can do that. I consider that the Minister must start afresh, that is, that he must issue a fresh notice with a fresh specified date and publish it in the Government Gazette and in 3 issues of a

Tongan newspaper within 2 months of the date of the fresh notice. Upon publication of the first notice, the first plaintiff may then lodge his claim in writing with the Minister as provided in the notice.

Conclusion

[46] Accordingly, I uphold the claim of the plaintiffs and I make the following order:

a) The second defendant, Minister of Lands, shall forthwith cause a notice of the Cabinet's consent to the surrender of the second plaintiff's tax allotment given on 12 February 2012 to be published in accordance with the provisions of subsections (2) and (3) of section 54 of the Land Act.

b) The first defendant Lord Luani shall forthwith cease to exercise any right or do any act or authorise the doing of any act on and over the said tax allotment surrendered by the said second plaintiff as estateholder thereof.

c) The costs of the plaintiffs in these proceedings shall be paid by the defendants, jointly and severally, to be taxed if not agreed.

Nuku'alofa: 27 August 2019

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JUDGE