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BETWEEN : KALISI KAFO'ATU LANGI FALAHOLA

- Plaintiff

AND : 1. VILI PELE TUPOU

2. SINA FIEFIA

3. HEMA AND MALIA SAILOSI

4. MAKASINI SAILOSI a.k.a MAKASINI VAIPULU 'EPENISA

- Defendants

BEFORE HON. JUSTICE NIU AND ASSESSOR SALOTE FUKOFUKA

Counsel : Mr 'Atalasa Pouvalu for plaintiff

Mr Siosifa Tu'utafaiva for defendants

Trial : 20 November 2019

Submissions : were to be filed by defendants by 29 November 2019 but none were filed, and plaintiff filed hers on 19 December 2019.

Ruling : 14 January 2020

RULING

Background

[1] The plaintiff (Kalisi) is the widow of Penisimani Falahola (Peni) who has died on 26 September 2016. She now holds what remains of a tax allotment formerly held by Peni in the estate of Lord Tu'iha'ateiho at Ha'ateiho, Tongatapu.

[2] The tax allotment was only 4 acres 0 rood 20 perches in area. In about 1993, Peni subdivided it into 18 lots, and except for lots no. 16, 17 and 18 which were slightly bigger in area, lots 1 to 15 were each 759m² in area, the minimum area for a town allotment being 752m² (Refer S.51 of the Land Act). He then offered them to people to build and live on by way of lease for 20 years at a consideration of \$2,000 per 752m² lot. This case concerns lots 10, 11, 12 and 13.

[3] Lot 12 was leased by one Filipe Tupou (lease no. 5462) from 9 December 1993 to 8 December 2013. He lived on the lot from about 1995 onwards, together with his son (and heir) Vilipele Tupou (who is the first defendant) and Vilipele's family. Before the lease expired, Peni offered the lot to Filipe as his, or his son's or grandson's town allotment, if he would pay him \$6,000.

[4] At that time, Filipe held his own allotment at Holopeka, Ha'apai and Vilipele was the heir to it. Vilipele's son and heir, Sifa Tupou, agreed to pay the \$6,000 so that the allotment would be his. At that time, he was working for a company Luna'eva Enterprises and the company agreed to lend the \$6,000 to him to pay Peni and that the company would hold the surrender letter, that is, the letter by which Peni and his wife (the plaintiff) and his heir, agreed to surrender the lot in favour of Sifa, until Sifa would repay the \$6,000 to the company.

[5] The \$6,000 was paid directly from the company to Peni in 3 instalments:

(a) 17/12/2014	\$2,000.00
(b) 19/1/2015	\$600.00
(c) 27/2/2015	<u>\$3,400.00</u>
Total	<u>\$6,000.00</u>

Copies of 3 payment vouchers issued by the company were produced by the first defendant in evidence, and they all show that Peni signed each one of them as evidence of having received a cheque for each sum on each said date.

[6] Mr Pouvalu, counsel for the plaintiff, objected to the production of the copies of the vouchers as exhibits upon the ground that they were being attached to the brief of evidence of the first defendant and that the first defendant had not signed that brief of evidence. I overruled the objection because although the brief of evidence was not signed, the first

defendant had read and confirmed its contents and the said attachments on oath in Court as true.

- [7] The first defendant said in evidence, and I accept, that he and his son Sifa went in 2017 and paid the \$6,000 to Luna'eva Enterprises so that they could get the surrender letter released to them, but unfortunately the letter could not be located. They were told that it was lost when the company moved from its former office to its new office.
- [8] The first defendant also said, and I accept, that because the \$6,000 had been paid and the surrender letter was being held by Luna'eva Enterprise, he borrowed \$18,000 and extended his dwelling house by adding a verandah to the house which was already 30 feet by 24 feet with 3 bedrooms. He said he had also built 2 extra huts of timber and corrugated iron roof for his boys, there being 5 of them in addition to his 2 daughters. He said that his father, Filipe, had planted 8 breadfruit trees on the lot and they were already bearing fruit. He had also had a cement water tank built for their use on the lot.
- [9] Lot 11 was to be leased by Mosese Fiefia but for some reason it was not registered although he paid his \$2,000 and he and his family occupied the lot up to its expiry in about 2015. Mosese died in 2011 and his daughter, the second defendant, continued to occupy it. At the commencement of this trial, both counsel confirmed that the plaintiff and the second defendant had settled the matter, and by consent, I ordered the claim against the second defendants be struck off with no order for costs.
- [10] Lot 10 was to be leased by 'Asipeli Leua but again for some reason it was not registered although he had paid his \$2,000 and he and his family occupied the lot. One of his daughters, Malia, was married to Hema Sailosi and they lived together with 'Asipeli and his family on the lot, until 'Asipeli left and lived elsewhere whilst Hema and Malia Sailosi have continued to occupy the lot up to now.
- [11] The lease was to have run from 1994 to 2014, and Hema said in evidence, which I accept, that before the 20 years expired, Peni offered the lot to them directly for \$6,000 and that Peni made that offer whilst they were making the extension to their house on the lot, and by consent, the work on the extension was not to proceed until the \$6,000 had been paid or approval given.

[12] The said defendant said that he then began making partial payments the total of which he produced in writing in the form of a letter by Peni and which Peni signed as correct on 6 August 2016. The letter, as translated, reads as follows:

“Ha’ateiho

6 August, 2016.

“I PENI KATOA of HA’ATEIHO declare that today HEMA SAILOSI of HA’ATEIHO pays me \$500.00 as partial payment (instalment payment) for my land which he has purchased for himself for \$6,000.

He has paid to me a total of \$5,100 as of today thereby leaving a balance of \$900.00 to pay me.

We (meaning 3 or more persons) all sign our names below.

(Signed) PKatoa

PENI KATOA

06/08/2016

(Signed) HSailosi

HEMA SAILOSI

06/08/2016

(Signed) S.Tu’ilape

WITNESS

06/08/2016

Siuinava Tu’ilape. ”

[13] He said that after he paid that \$500, Peni asked him for some more money and he paid him \$300 and Peni then permitted him to continue his extension work to his house and he did. That was in August. Peni died in the following month – 26 September 2016. He said that he has not paid any more because the plaintiff demanded that he pay an additional \$10,000 before he would be given the surrender letter which he required, and which sum he has refused to pay.

[14] Lot 13 was to be leased by ‘Epenisa Vaipulu, but again for some reason it was not registered although he and his family paid the \$2,000 and occupied the lot from about 1993 to 2013.

His son, Makasini Vaipulu, and his wife (Makasini's wife), Nauniua, and their family were occupying the lot. Makasini is the fourth defendant.

[15] The evidence for the fourth defendant was given by his wife, Nauniua Vaipulu. She said that in October 2010, Peni wanted money for his trip to New Zealand for the illness of his brother there, and they held a meeting with him with all the lot holders, at lot 3, Taulama Te'ekafa's house, in which Peni offered each lot to the holders for \$6,000 per lot which he would then surrender for application by each holder. She said that Peni asked for whatever money that they could afford to give him for his trip and as he would need later on, and that each payment would count towards the required of \$6,000 for each lot.

[16] She said that she gave \$50 that night and from then on she recorded in writing every amount that she paid and also the value of every item which they gave in kind, and the dates thereof. She produced in evidence the record which she kept which may be summarised by year as follows:

(a) October 2010	\$50
(b) October 2011	\$500
(c) November & December 2013	\$1,050
(d) March – August 2014	\$680
(e) July – September 2015	\$150
(f) February – June 2016	<u>\$1,350</u>
Total	<u>\$3,780</u>

[17] She said that they did not pay any more after Peni died in September 2016 because the plaintiff was demanding that they pay an additional \$10,000 on top of the \$3,780 which they had paid to Peni. She said that the plaintiff herself did receive the Tongan wares (mat and Tapa clothes) herself as part of the \$6,000.

Plaintiff's claim

[18] In respect of the first defendant (lot 12) the plaintiff says that she does not accept that he had paid the \$6,000 to her husband whilst he was still alive or that her husband had issued to him or to Luna'eva for him a surrender letter which is said Luna'eva has misplaced. She accordingly demanded, irrespective of any agreement made by her husband, that the first

defendant paid to her a total sum of \$10,000 and she would then surrender the lot (12) to be granted to him as his town allotment. Because the first defendant has refused to pay that \$10,000 or to vacate the lot, upon demand having been made by her lawyer by letter dated 16 May 2018, she prays for an order of eviction of the first defendant and his family from the lot and damages of \$2,000 and for costs. She says that whatever agreement her husband had had with the first defendant ended when her husband died.

[19] In respect of the third defendants, (lot 10), the plaintiff says that she does not deny that her husband had signed the letter dated 6 August 2016 which acknowledged that the third defendant had paid a total of \$5,100 leaving only a balance of \$900 to be paid, but she says that that agreement ended when her husband died, and that she was free to demand the new sum of \$10,000 for the surrender of the lot and to demand the eviction of the third defendants for their refusal to pay that sum of \$10,000. She prays for the eviction order and for \$2,000 damages and for costs against the third defendants.

[20] In respect of the fourth defendant, (lot 13), the plaintiff says she disagrees with the amount by which the Tongan wares were valued. Whereas the tapa cloth was valued at \$350 .00 she says she would only value it at \$150, and whereas the mat was valued at \$450 she would only value it at \$250. As to the sums of money listed by the defendant, she says that they were such small amounts they should be disregarded, because they should have been paid in a lump sum at one time, rather in such small sums. Besides she says that that agreement ended when her husband died and that she was entitled to demand the payment of the additional \$10,000 and to the eviction of the fourth defendant because of his failure and refusal to pay that \$10,000. She prays for an eviction order and \$2,000 damages and costs against the fourth defendants.

Defendants' defence

[21] The defendants say in their statement of defence that the equitable defence of estoppel applies and the plaintiff is estopped from evicting them from their respective lots.

Submissions

[22] Mr. Tu'utafaiva did not file any submissions for the defendants but Mr. Pouvalu filed the submissions of the plaintiff, within the times agreed with counsel for the filing of the same.

[23] Mr. Pouvalu states the case for the plaintiff in paragraphs 2, 3 and 4 of his submissions as follows:

“2. The land was sub-divided into 18 pieces of town allotments by Peni Falahola on 3rd May 1994. Permits were given to people who expressed their interests in the lands to occupy them under contractual licences. These contracts include –

(a) each tenant must lease the land from the landholder for 20 years.

(b) During the 20 years, the tenant must try and pay to the landholder a sum of \$6,000 in order for the landholder to surrender the allotment to the lessees so they could apply for a deed of grant at the expiration of the 20 years.

3. Fifteen of the occupants could manage to meet the conditions and their respective land was surrendered to them and deeds of grants were granted to them. Only three of them had failed to meet such conditions but they have built houses in the land in dispute. Therefore they are defendants in these proceedings.

4. The land was transferred to the Plaintiff, widow of Peni Falahola, in 2016 pursuant to section 80 of the Land Act. Since the 3 licensees are in default and Peni who gave them permits to occupy had passed (away), the Plaintiff ended such permits and demanded each default occupant to pay a sum of \$10,000 before the lands in question are surrendered to them but they refused.”

[24] In respect of the first defendant, he says that the claim by him that he had already paid the \$6,000 in full to Peni whilst Peni was still alive was not proved by him by substantive evidence. I do not agree. I am satisfied on the evidence given, namely, the copies of the payment vouchers of the company Luna’eva Enterprises, which bear the signatures of Peni, that Peni received the total sum of \$6,000 paid to him on behalf of Sifa Tupou, son of the first defendant, on 27 February 2015, when the last voucher for \$3,400 was signed by him, long before he died on 26 September 2016. I am also satisfied that Sifa Tupou has paid back

his loan of the sum of \$6,000 from Luna'eva Enterprises in the following year, 2017, and that Luna'eva Enterprises has failed to return the surrender letter for the lot back to him due to its misplacement when that company moved its office.

[25] I am therefore satisfied that Sifa Tupou (son of the first defendant) had already lawfully performed his obligation under the agreement long before Peni died, and that he was lawfully entitled to the surrender by Peni and by his wife (the plaintiff) and his son and heir, of the lot 11.

[26] It would appear that counsel may not have appreciated who the parties to the several agreements were. There is no doubt that at the time of the making of the agreements, the landholder was Peni. That is why the agreements were, and are, said to have been made by Peni alone with the lot occupants. But that is not so. The agreement also necessarily and impliedly included the wife and the heir of Peni, because without their agreements to the agreement, the surrender of the lot would not have been possible. That is because both the wife and the heir have the rights under the law (SS.80 and 82 of the Land Act) to claim the surrendered lot as theirs upon approval of the surrender by Cabinet under S.54 of the Act. Without their consents to the agreements made, no surrender in favour of any lot occupant was possible.

[27] Mr. Pouvalu has confirmed in his submissions as I have quoted above, that fifteen "of the occupants could manage to meet the conditions and their respective land was surrendered to them and deeds of grant were granted to them". I accept that and I am satisfied that Peni would not have represented to the occupants that he would be able to surrender the respective lots to the estateholder of Ha'ateiho for the applicants to apply for them, if he had not already had the consents of both his wife and of his heir to the surrender. I am satisfied that both his wife and his heir had consented to the surrenders which he proposed to the occupants. That made the wife, who is now the plaintiff, and the heir, parties to the agreement individually made with each paying occupant.

[28] The wife, who is the plaintiff, has stated in paragraphs 5 and 6 of her brief of evidence that she and her husband had given the permission for the occupation of lots 10 and 13 (third and fourth defendants). I am satisfied that the reason why she has said so is because she had consented not to claim the lots as "the widow" of Peni when Cabinet would approve the

surrender thereof by her husband Peni, and I am satisfied that she has not claimed the 15 lots which have been surrendered because she had already agreed that she would not claim them. That confirms that she was a party to the agreements made with all the occupants, including the three present defendants.

[29] The heir of Peni, like the wife, did not have any right to the land whilst Peni was still alive, but he did have the right to claim the lots as his tax allotment (unless already claimed by his mother the wife) upon approval by Cabinet of the surrender thereof by Peni. It was therefore imperative that he expressed his consent to the surrender at the time that any agreement was made by Peni with any of the occupants of the lots. It is clear, and I am satisfied, that Peni and the wife would not have made the agreements with the occupants for the surrender of the lots if the heir had not consented to those surrenders. I therefore find that the heir did consent to the agreements made with the occupants as well. That is consistent with the instructions which were given to the lawyer to demand the vacating of the lots by the defaulting occupants. Those instructions were said to have been issued by the widow and by the heir. The demand notices issued on 16 May 2018 stated in the fourth paragraph thereof the following:

“That is why the widow and the son who is the heir require that you (people) vacate the land of lot no. (12) which is shown in the draft plan which was leased by (Filipe Tupou) within 14 days (2 weeks) from the date you receive this letter.”

I am therefore satisfied and I find that the heir was also a party to the agreement made by Peni and the occupants, including the defendants.

[30] In respect of the third and fourth defendants, Mr. Pouvalu submits that as they failed to pay the whole of the agreed \$6,000 consideration for the surrender of the respective lots, they have created no interest in their respective lots, and the plaintiff is therefore not estopped from evicting them. He says that because the defendants have raised the defence of estoppel in their defence.

Estoppel

- [31] Mr. Pouvalu bases his argument on a statement made by the Privy Council in 1981 in the case of *O G Sanft & Sons v. Tonga Tourist and Development Co. Ltd, Hamilton & Minister of Lands* [1981-1988] Tonga LR 26, at p.34 as follows:

“The Privy Council wishes to emphasise that equitable principles can only apply to leasehold interests after they have been validly granted. Such principles have no application to any other title, claim or interest in any other Tongan interest in land.”

He also relies on a statement by the same Court in the same case on the previous page 33 which is as follows:

“In respect of Tongan Land the Land Act is a complete code which rigidly controls by its express terms all titles and claims to any interests in Tonga land, except in respect of lease-hold interests, once they have been created ... With that exception, there is no room for the application of any rule of equity. All claims and titles must be strictly dealt with under the Act. No estate right title or interest can be created except in accordance with the provisions of the Act.”

- [32] The Land Court and even the Privy Council have however, subsequently ruled that those statements only concerned the “creation” of equitable titles and interests, and not with the application of equitable principles as defences. Estoppel is an equitable defence and it is also provided for by statute in Tonga, namely, S.103 of the Evidence Act. That defence was applied by the Land Court (Martin J) in *Veikune v. To'a* [1981-1988] Tonga LR 138 and in *Matavalea v. Uata* [1989] Tonga LR101. The Matavalea Case was appealed and the Privy Council held on p.103:

“We agree with Martin J that the circumstances were such that the respondent was entitled to call in aid the provisions of S.103 against both Tevita (the deceased husband) had he sought possession and the appellant who represented that if money was paid registration would follow.

...

“The only effect of the estoppel is to impose a personal restriction on the appellant from obtaining an eviction order during her life tenancy. What happens on her death or on termination of her life interest remains for future consideration.”

[33] But even before those cases arose, the Land Court (Roberts CJ) had decided in the case of *Fakatava v. Koloamatangi and Fakatava* [1974 - 1980] Tonga LR 15 as follows:

“... In so far as this relates to the house, the 1/3 rd of which has been built on plaintiff's land, I hold that as plaintiff did nothing to stop 1st defendant from building this house, ie. He took no legal action in the way of injunction, he allowed by implication the house to be built. A quarrel has since arisen. As the house cannot be moved without being virtually destroyed – being a stone house – any order I might make would cause undeserved loss to the 1st defendant. He is however protected by the Law of estoppel. In relation to the claim of the plaintiff with regard to the house, therefore, I give judgement for the defendants.

[34] The defence of estoppel was further upheld in the later cases of *Alofi v. Fine* [1998] Tonga LR 24 and *Ongolea v. Finau* [2003] Tonga LR 147. It cannot now be said, such as counsel has suggested, that the defence of estoppel does not apply in respect of land other than lease land. It does apply in respect of allotments such as in the cases mentioned above.

[35] In the present case, before the 20 year terms of the leases of the lots 10, 12 and 13 expired, that is, in October 2010, Peni, the allotment holder represented to all the occupants of all the 18 lots that if they were to pay him \$6, 000 each, within an unspecified period, he would surrender their respective lots for them to apply and have them registered as their town allotments. He also represented that the occupants could pay the \$6,000 in instalments of whatever amounts they could afford.

[36] That is proved by the evidence of payments which all 3 defendants have given. The first defendant paid his \$6,000 in 3 payments from 2014 to 2015 – that is 5 years after the representation was made in 2010. The third defendant only paid \$5,100 by 2016 – 6 years. The fourth defendant has only paid \$3,780 by 2016 – 6 years.

[37] At no time, up to the date of his death, did Peni demand that there was to be a time limit for payment of the full amount of the \$6,000.

- [38] But what was most telling, and which is the crux of estoppel, is that the occupants have, in reliance upon the “promise” that the lots would be theirs, to be registered as their town allotments, constructed their houses with commitment and permanency, at no trifling costs to them all, as I have stated in the background above.
- [39] There can be no doubt that Peni would have been estopped had he brought any action to evict the defendants whilst he was still alive. But is the wife the plaintiff, estopped as well, now that she has brought this action to evict all 3 defendants?
- [40] There can be no doubt that she too is estopped. That is because she too was involved in the representation made to the occupants. As I had stated earlier, she was a party to the promise to and agreement with the occupants, by representing that she would not claim any surrendered lot as the wife of the holder, Peni, so that the lot would revert to the estateholder and the occupant would be able to apply to have it registered as his town allotment. Without that representation, the occupant would not have agreed to pay the \$6,000 required by the holder Peni.
- [41] The plaintiff was aware of the arrangement made with the lot occupants. She said that she did the typing of the letters which Peni wanted done. Such letters would have included letters of surrender of lots for which \$6,000 had been paid, like the letter of surrender which I accept had been issued to Sifa Tupou (son of first defendant) but held by Luna’eva Enterprises. I accept she knew what the letters of surrender meant – namely – that the lots would revert to the estateholder and that she, as the lawful wife, would not hold them as widow when Peni would die. If she did not agree to that arrangement, she ought to have objected to it right away – when she would have first learnt of it. But she did not, and by being silent about it, that conduct of hers constituted a representation to the lot occupants that she was in agreement with the arrangement, that she would not claim the lots as wife when Cabinet approved the surrenders. That is representation by conduct for the purposes of S.103 (2) of the Evidence Act. The test is simple. If she had objected or had expressed her disagreement, would any occupant have still proceeded to pay the required \$6,000? The answer would clearly be no because the surrender would not be possible. Her silence was therefore deliberate and it duly constituted conduct on her part.

Extent

[42] The extent of the estoppel would be that the plaintiff would be estopped from denying that all the three defendants could continue to occupy their respective lot and that they continue to pay her until the total sum of \$6,000 was paid in full in respect of each lot, and that upon full payment thereof, to issue to them a surrender letter signed by herself and by the heir, as was arranged and agreed whilst Peni was still alive.

Conclusion

[43] Accordingly, I have come to the conclusion, for the foregoing reasons, on the facts and on the law, that the plaintiff is estopped from evicting the defendants from their respective lot such as she has prayed for in her claim against them. I order that her claims against the first defendant, third defendant and fourth defendant are dismissed, with costs to those defendants, to be taxed if not agreed.

The image shows a circular official seal of the FAKAI ʻŌNUʻA TONGA court. The seal is light blue and contains the text 'FAKAI ʻŌNUʻA' at the top, 'TONGA' at the bottom, and a small star on the left. Overlaid on the right side of the seal is a handwritten signature in black ink.

Niu J
JUDGE

Nuku'alofa: 14 January 2020