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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 16 of 2018

BETWEEN : SIONE PANUVE VEATUPU

- First Plaintiff

LUPE VEATUPU

- Second Plaintiff

AND : NAITINGIKEILI KAUFUSI

- First Defendant

MINISTER OF LANDS

- Second Defendant

HUANG HUA

- Third Defendant

BEFORE HON. JUSTICE NIU AND ASSESSOR SINILAU TOUMO'UA

- Counsel : Mrs Petunia Tupou for plaintiffs
Mr Clive Edwards for first and third defendants
Mr Sione Sisifa for second defendant
- Trial : 13-15 January 2020
- Submissions : By Mr Edwards for first defendant on 18 February 2020
By Mr Edwards for third defendant on 2 March 2020
By Mrs Tupou for the plaintiffs on 3 March 2020
By Mr Sisifa for second defendant on 5 March 2020
- Ruling : 24 March 2020

25
23 MAR 2020
HHC

RULING

Background

- [1] I have found that the following facts have been proved by the evidence produced and given at this trial.
- [2] Tevita Uluilakepa was married twice. From his first marriage, he had Viliami (m) and Siosuia (m) and from his second marriage he had Tupou (f), Mele (f), Mo'ale (m), Lupe (f) and Tautuiaki (m).
- [3] Lupe (second plaintiff) says, and I accept, that Tevita and his second wife and only their children were living on the town allotment of Tevita in respect of which this case is concerned. There was no evidence where Viliami and Siosuia were living, but Viliami got married and he had his son, Naitingikeili, (the first defendant) born in about 1968 because he said in his evidence that he would be 52 this year, and he said that when he was 3 years old, he went and lived in Samoa until 2017 when he came back to Tonga. In the marriage certificate of Viliami dated 30 August 1967, it stated that he was residing in Kolomotu'a.
- [4] Mele was 20 years old when she was married in 1980 to Sione Me'afo'ou. She would have been born in 1960. In her marriage certificate, it stated that she was residing in Kolofo'ou, and this town allotment is in Kolofo'ou. Her occupation was teaching.
- [5] Lupe also says and I accept, that Mele built the dwellinghouse, in which they then lived, on the town allotment and which still stands on the allotment up to now, and that she did that whilst she was teaching in Tonga before she left with her husband with their son, Mataiasi (born 1982) to the United States in 1986.
- [6] The house was made of concrete foundation and floor with weatherboard walls with hardboard lining and ceiling and with corrugated iron roof. It was 100 square meters and had 3 bedrooms, lounge, dining room, kitchen, bathroom and toilet. It also had a part verandah to the front and a part veranda to the back and a 1,500 gallon cement water tank beside it.
- [7] In 1993, Tevita's second wife died.

- [8] In the same year 1993, Tevita leased half of his town allotment, that is, the half of the town allotment on which the house was situated, to Mele herself, for 90 years at \$5.00 rent per year for residential purpose. Tevita paid the rent of that lease for Mele himself for the whole of the term of 90 years of the lease, that is, up to the year 2083. That lease was registered as lease no. 5452 on 18 November 1993.
- [9] In the following year 1994, Tevita leased the other half of the allotment to Lupe, who had already married Sione Veatupu (first plaintiff) in 1987 and who were living together with him in the house at the time. That lease was for 99 years at \$5.00 rent per year for residential purpose and it was registered as lease no. 5488 on 28 February 1994.
- [10] In 1998, Viliami, eldest son of Tevita, died.
- [11] On 13 March 1999, Tevita died and Lupe and her husband Sione and their children continued to live in the house on Mele's leased land.
- [12] On 22 October 1999, Naitingikeili, Viliami's son and heir, and heir of Tevita, claimed the town allotment of Tevita, and his name was entered in the register as holder of the allotment on 19 April 2000.
- [13] On 12 October 2001, Mele died in the United States and her husband Sione and their son, Mataiasi, continued to remain there.
- [14] No claim was made by any of Tevita's children that the house built by Mele, and is situated on the half of the allotment which she had leased, was Tevita's house and no letters of administration were granted in respect of it. It continued to remain as Mele's house, situated on her leased land. No letters of administration have been granted in respect of Mele's estate either, especially in respect of her lease and of the house on it.
- [15] Lupe and her husband and family continued to occupy and to use it as they had been doing since they had lived there in 1987. It was stated by Mo'ale, their brother, in an affidavit in 2018 that before Mele died, she had given him, in a telephone conversation they had, the authority to care for and look after her house and to tell Lupe and her family to move out of it. He said that he told Lupe to move out and that Lupe told him to wait until her husband, Sione, returned from New Zealand and they would move out, but after Sione returned, he

said they did not move out of the house at all. Lupe denies that Mo'ale had told her any such thing. Mo'ale did not give evidence and could not be cross-examined on his affidavit (because he has died in 2019) but Lupe did and was cross-examined at length but she maintained her evidence and it was supported by the evidence of her husband who said that he was in Tonga in 2001. I prefer and believe their evidence rather than Mo'ale's affidavit. I find that Mele had impliedly authorised Lupe and Sione to occupy and look after her house and land up to when she died.

[16] In about 2005, Lupe and her husband began building their own dwellinghouse on the land of her lease (which is adjoining Mele's lease). Her deed of lease (no. 5488) shows that she had a mortgage on it for \$55,000 on 31 May 2005. She said that the house was not completed until 2009 and they then moved out of Mele's house into their house, but that they continued to keep and look after Mele's house which were then used from time to time by visitors from overseas, including Lupe's brothers and their families.

[17] Lupe and Sione's daughter, Milika, was married in 2015 to 'Inoke Vaka and they lived in Mele's house and are still living there up to now. Lupe and Sione carried out renovations to Mele's house no doubt for Milika and 'Inoke to live there. They tiled the floor and re-did the bedrooms, the lounge and the bathroom and re-did the roof to the rear. A photograph of the lounge which is attached to a valuation report of the house shows evidence of the work carried out to the lounge. They say that they spent \$50,000 doing that. They also built a large carport at the front of the house which they said cost them \$30,000. They say that Mele's widower husband, Sione, had left his trust and care of the house to them and that they have diligently kept that trust up to now. Lupe says and I accept that when Mele died, she spoke by telephone with Sione and Sione told her to continue to use and look after the house. I accept that it also suited them that their daughter and her husband could live in it since 2015.

[18] In 2014, Lupe and Sione allowed the Free Wesleyan Church, to store their rental chairs and tables and tents in the verandahs of the house and also in the carport on Mele's land only temporarily until the Church could build its own building elsewhere for such storage of its rental equipment. They say that no rent was or is paid by the Church for its use of the place for such storage. When people rent those equipment they would go and pay the costs of the

hire at the Church office and they then come and collect the equipment from this place. Neither Sione or Lupe was or is involved in any of it or in the return of the equipment. That temporary use of the place is still carried on up to now. Lupe was and is employed as finance officer at the Church office.

- [19] In 2016, Naitingkeili returned to Tonga and he lived with Mo'ale at Havelu on the town allotment of Mo'ale which had been part of Naitingikeili's tax allotment. On 11 September 2017, he wrote to the Minister of Lands (second defendant) and requested that Mele's lease no. 5452 be cancelled because "for the past 28 years there have been failure to comply with the lease agreement: (a) abandon, neglect or fail to use it for a period of altogether 3 years (b) use or permit any person to use it for any purpose other than that upon which application and approval have hitherto been made". He also stated in it that Mele had died in 2001 and that there was only one structure (house) on the land which belonged to Mele's father but which was being used by Mele's sister for business.
- [20] He attached to that letter an affidavit by him dated 1 September 2017 in which he stated, inter alia, that the portion of land leased to Mele was never occupied by Mele or her descendants, and that he wanted the land to revert back to him as he was the registered owner of the land.
- [21] On 17 October 2017, a briefing paper was given by the officers in the Land Office to the second defendant Minister of Lands with 2 recommendations: (1) to terminate Mele's lease on the basis of non-payment of rental and abandonment/neglect, and (2) to submit the matter to Cabinet. It stated that the term of lease was from 18/11/1993 - 17/11/2083 but that the rent payment was only for the year ending 17/11/1983, meaning that there was default in rent payment since 17/11/1983, which was wrong because the term of the lease had not started until 17/11/1993.
- [22] It also stated that there was no competing or prior claim in respect of the leased land, which was also wrong because there was a substantial house, water tank and carport on the land which were being occupied and used as I have stated above.
- [23] It also stated that there had been a site inspection and it indicated that reference be made to attached photographs. There was only one attached photograph and it showed the carport in

the foreground with chairs stacked in the carport and also on the back of a truck parked in the carport and a motor car also parked partly in the carport and the roof of the dwellinghouse shown behind the carport. No overgrowth, weeds, bush or rubbish was shown in the photograph to indicate any neglect or abandonment.

[24] It then had 4 bullet points listed under a heading “Background (New application)” as follows:

- “The lessor wrote on the 11th September 2017 requesting the termination of the subject lease on the basis of neglect and for using the land for a purpose other than that upon which application was made.
- The lessee passed away in the United States in 2001 and there has not been any application for administration from next of kin.
- According to the land holder, the subject land had been neglected for years although there is a house on it which was built by the holder’s grandfather. An inspection of the property shows that no one resides in the house and the open garage is utilised by the F.W.C. for storage.
- The non-payment of rental since 1983 is an indication of neglect by the lessee thus this request for your consideration.”

[25] On 17 October 2017 the Minister signed his approval that the matter be submitted to Cabinet for approval of termination of the lease.

[26] A submission was signed by the Minister to Cabinet on 16 October 2017 as follows:

“HONOURABLE CABINET MINISTERS,

Title:	Land – Application from Naitingikeili Kaufusi to terminate Mele Moala Uluilakepa’s (deceased) Lease No. 5452 at Kolofo’ou.
Submitted by:	Lord Minister for Lands and Natural Resources
Date of Submission:	16 th October 2017
Type of Submission:	The Land Act
Purpose of Submission:	To seek consent of Cabinet for an application to terminate a lease.

Recommendations:

That, the application from Naitingikeili Kaufusi to terminate Mele Moala Uluilakepa's (deceased) Lease No. 5452 at Kolofo'ou on the basis of non-payment of annual rental and neglect, be approved.

1. Analysis

1.1 Background

1.1.1 Details of Lease No. 5452

Lessee	-	Mele Moala Uluilakepa
Lessor	-	Naitingikeili Kaufusi
Rental	-	\$5.00 pa
Area	-	860.4 m ²
Purpose	-	Residential
Term	-	18.11.1993 – 17.11.2083
Payment	-	Current up to 17.11.1983

- 1.2 The lessor wrote on the 11th September requesting the termination of the above-two leases on the basis of neglect and for using the land for a purpose other than that upon which the application was made.
- 1.3 The lessee passed away in the United States in 2001 and there has not been any application for administration from next of kin.
- 1.4 The non-payment of rental since 1983 is an indication of neglect by the lessee thus this request for Honourable Cabinet Ministers' consideration.

2. Authority

The Lord Minister of Lands & Natural Resources with the consent of Cabinet.

3. Annexes

- 3.1 Letter dated 11th September 2017.

Respectfully submitted by : (signature) _____ LORD MA'AFU Minister of Lands & Natural Resources

[27] On 18 October 2017, by decision no. 1127, Cabinet approved the recommendation by the Minister as follows:

“Recommendation is approved, i.e:

That, the application from Naitingikeili Kaufusi to terminate Mele Moala Uluilakepa’s (deceased) lease no. 5452 at Kolofo’ou on the basis of non-payment of annual rent and neglect, be approved.”

[28] On 7 November 2017, officer, Seli Taufa, of the Ministry of Lands wrote to Naitingikeili and informed him as follows:

“Please be advised that Cabinet Ministers in their Decision no. 1127 dated 18 October 2017, approved your application to terminate Lease no. 5452 at Kolofo’ou. The subject land was leased under Lease no. 5452 by Mele Moala Uluilakepa and it was terminated on the basis of non-payment of annual rent and neglect.”

[29] Naitingikeili said that when he received that letter and saw that the termination had been based upon a second ground of non-payment of rent he went and saw officer Semisi Moala at the Ministry of Lands and told him that that was not a ground of his application to terminate the lease because that ground was not true and to correct the ground of termination. He said that Semisi Moala told him that it was too late to do that because Cabinet had already decided it. I am satisfied that Naitingikeili accepted that advice that the decision to terminate was also based on non-payment of rent which he knew to be wrong, because he then instructed law practitioner Viliami Mo’ale to enforce the Cabinet decision.

[30] On 14 November 2017, Viliami Mo’ale, wrote to Lupe, and informed her that Mele’s lease had been terminated by Cabinet decision no. 1127 of 18 October 2017 and that Naitingikeili required her to remove all her personal effects and the Free Wesleyan Church’s properties from there within 7 days because Naitingikeili wanted to commence operating his own business there. The letter implied that Lupe was to leave the house, carport and water tank as they were.

[31] In November 2017, according to the evidence of the third defendant, Huang Hua, which I accept, he was offered the piece of land to lease by the first defendant, Naitingikeili, and that Naitingikeili told him that the house was his and that he would have the table and chairs removed and that he, Huang Hua, could demolish the house and build his own new house on the land. He agreed and they made an agreement. He himself made no inquiries.

- [32] On or about 5 December 2017, the lease application of Huang Hua was lodged with the office of the Minister of Lands and the required survey fee of \$46.00 was paid the same day. A briefing paper to the Minister was prepared which stated that the land to be leased was the same land which had been leased to Mele and which lease had been terminated by Cabinet decision no. 1127 of 18 October 2017, and that the new lease was to be for 45 years at \$200.00 rent per year for commercial and residential purpose, such as were stated in the lease application form lodged by Huang Hua. The paper recommended that the Minister approve that the lease be granted and that Cabinet consent be sought.
- [33] On 6 December 2017, the Minister approved and signed that recommendation and he also signed a submission to Cabinet which had already been prepared on 5 December 2017 which recommended to Cabinet that the lease to Huang Hua be approved, with Naitingikeili as lessor.
- [34] On 11 December 2017, by its decision no. 1294, Cabinet approved that recommendation, and the Minister issued and registered the lease no. 9214 of the third defendant, Huang Hua, on 9 February 2018.
- [35] Upon issue of that deed of lease to Huang Hua, he paid \$120,000 in a lump sum to Naitingikeili as they had already agreed.
- [36] But before then, on 11 December 2017, law practitioner Sione Taione replied to Viliami Mo'ale's letter for Lupe and her husband that he had received the letter of Viliami Mo'ale on 6 December 2017 from the Church Minister Falematapule Lomu concerning the requirement to remove the rental equipment from the leased land. He stated to Mo'ale, *inter alia*, that the rent of Mele's lease had been paid on 19 April 1994 up to 17 November 2083, that the cancellation was unlawful and that Lupe and her husband would not vacate the leased land.
- [37] On 5 February 2018, present counsel of Lupe and her husband, Mrs Tupou, wrote to the Minister and pointed out that the two grounds upon which Cabinet had terminated Mele's lease were wrong because the rent of the lease had been paid up to the year 2083 and attached a copy of the receipt for that payment. As for the ground of neglect of the land of the lease, she pointed out that Mele had built her house on it and that people were living in it

up to date and that the house and land have been in the possession of Lupe and her husband to date. She also pointed out that they had carried out renovations to the house and property in excess of \$80,000, that the house had 3 bedrooms, bathroom and toilet, kitchen, lounge and a front and back porch. She also pointed out that no officer had consulted them and that they were not aware of the application to cancel Mele's lease but that surveyors had come to re-survey the land for grant of a new lease to someone else. She pointed out that those survey officers were sure to be aware of the presence of the house on the land and that the house and land were not neglected. She asked the Minister to re-consider the cancellation of Mele's lease in order to minimise loss and trouble.

[38] The land officer, Seli Taufafa, who had signed and sent the letter of 7 November 2017 to Naitingikeili (para. 28 above) had visited the land of Mele's lease together with the surveyors of the Ministry when they went to survey it to prepare the deed of lease of Huang Hua. Sione, Lupe's husband, said in his evidence that he had asked them what they were doing there and that Seli Taufafa had told him that they were free to check up the positions of survey pegs at the request of any person. He said that after Seli Taufafa left, one of the surveyors, Netane, told him that they did not know why he, Seli Taufafa, had come with them because it was only them who had been told to come and check up the pegs.

[39] However, despite Seli Taufafa's personal visit to the land and despite Counsel, Mrs Tupou's, letter to the Minister of 5 February 2018, the Minister proceeded to grant the lease of Huang Hua and issued to him his deed of lease and registered it on 9 February 2018, in consequence of which Huang Hua paid the \$120,000 to Naitingikeili.

[40] Subsequent to issue of that lease, workmen went to erect a fence between Mele's leased land (but which has now been leased by Huang Hua) and Lupe's leased land. Inoke Vaka, Lupe and Sione's son in law, however stopped them and they left. A truck load of gravel had also been dumped on the road side in front of Mele's house but it was subsequently re-loaded by a bob-cat on to a truck which took it away.

[41] A valuation of the house, carport and water tank was done in March 2018 and it came to \$95,700.

[42] The statement of claim of the plaintiffs, Sione and Lupe, in this action was filed in this Court on 31 July 2018.

[43] At the end of the evidence of Land Registrar, Semisi Moala, I asked him to describe the process they had for cancellation of a lease. He said in effect that they have to get back the copy of the deed of lease of the lessee and they draw a diagonal line across it and write the word "Cancelled" along that line on both the lessee's copy and the copy of the deed that they keep, and they also write on the page of the register of leases beside the Lessee's name the number of the Cabinet decision and the date thereof and the word "Cancelled" as well. He said that that process has not been taken in respect of Mele's lease no. 5452. He said that no letter has been written or sent to direct that Mele's copy of the lease be returned to be cancelled, as yet. Accordingly, I find as a fact that the cancellation of Mele's lease has not been registered.

Plaintiffs' claim

[44] The plaintiffs claim that the cancellation of Mele's lease no. 5452 was unlawful and that it be re-registered because the cancellation had been based upon non-payment of annual rent and neglect but that the annual rent had been paid up to the end of the lease in 2083 and that the land had not been neglected because Mele had built a house on it which has been occupied and used up to now.

First defendant's defence and counter-claim

[45] The first defendant says that the lessee, Mele, had abandoned, neglected and failed to use the land of the lease for a period of 3 years because she never occupied and used the land of her lease herself up to her death in 2001. He also says that the covenant in the lease that the land of the lease be used only for residential purpose was also breached because the plaintiffs have been using the leasehold property for business purposes by storing tents and chairs there for hire.

[46] He also says because the plaintiffs have refused to vacate the leasehold property since they were notified to do so on 14 November 2017, the plaintiffs are liable to him for damages by way of mesne profit in the sum of \$500 for every month thereafter in which they have continued to have occupied it up to 14 January 2020, the second day of this trial when counsel, Mr. Edwards, for the first defendant, corrected the monthly amount sought to be

\$500 per month up to that date and that the total amount sought be \$4,500. He accordingly prayed for damages in that sum and for an order for eviction of the plaintiffs from the land.

Second defendant's defence

[47] The second defendant denies the claim of the plaintiffs and says that proper enquiries were made which proved that the land was not only abandoned and neglected, but that it was also used for a purpose other than that for which the lease was granted, and that the annual rent of the lease was only paid up for the period from 18 November 1993 to 17 November 1994.

[48] He also says that the grant of the lease no. 9214 to the third defendant, Huang Hua, was lawful.

Third defendant's defence

[49] The third defendant says that the plaintiffs have no right under lease no. 5452 (Mele's lease) to bring their action against him and that they have no standing to do so. He otherwise denies the claim of the plaintiffs.

Submissions and considerations

[50] All counsel have made very detailed submissions on the many issues which have been raised in the facts as I have stated in the background in the foregoing pages, and I am grateful to them and I commend them on their hard work in this case.

[51] I have considered all those submissions and the many issues that have been raised and I consider that I need not and should not decide some of them because they should properly be considered by another forum. I consider that I need only decide the issues which follow.

Possession

[52] Were and are the plaintiffs in possession of the land and houses and water tank on the land of Mele's lease (no. 5452)? I have found on the facts, as I have stated, that they have had possession of that land, house and water tank since Tevita died in 1999 and before Mele died in 2001 and after she died up to now. I do so find. They have built a substantial carport on the land. Their daughter and her husband live in the house, albeit from time to time. They have control over the house and water tank and carport. They have allowed the Free Wesleyan Church to use the carport and verandas of the house for storage of their rental equipment. I find that they are in possession of the land, house, water tank and carport on

Mele's lease no. 5452 and that they were in such possession at the time that Naitingikeili applied to have that lease cancelled and at the time that the Minister received that application and at the time that Cabinet made its decision to cancel (or terminate) Mele's lease.

Breach of purpose of the lease

- [53] I do not think that I have to decide whether or not the purpose of the lease was breached by the plaintiffs. This Court has no authority to decide that. That was for Cabinet to decide which had the authority to approve the purpose of the lease and to decide whether or not that purpose has been breached. It is relevant for consideration thereof that the lessee, or persons permitted by the lessee, have profited by way of business by such breach, because the annual rent of the lease, which must also be approved by Cabinet, had been lowly set at \$5.00 because the lease was for residential purpose only. But no rent was charged to pay by the Church and received by the plaintiffs. Cabinet is the proper forum to decide whether or not there was a breach of the purpose of the lease by the use of the carport by the Church for storage of its rental equipment. However in so doing, Cabinet must, in exercising its discretion to terminate a lease, must act fairly.

Authority in Cabinet to terminate a lease

- [54] The authority to terminate a lease, other than by order of this Court, rests with Cabinet, such as is provided in the deed of every lease, which is as follows:

“If any of the above covenants are not complied with by the Lessee, his heir or representative, then Cabinet may at its discretion terminate this lease.”

That is a statutory authority by virtue of the form of the lease which is contained in the schedule to the Land Act.

Duty to ascertain facts and accord natural justice

- [55] Any person or body who has the authority to decide anything which may affect another person or other persons has a duty to take reasonable steps to ascertain the facts relevant to the matter and to accord natural justice before that person or body proceeds to make that decision. The Court of Appeal has confirmed the existence of and the reasons for that duty in *Tafa v Viau* [2006] Tonga LR 287, at 293, as follows:

“[13] The duty to take reasonable steps to ascertain the facts to which we have referred has been held to apply by very high authorities. In *Secretary of State v Tameside MBC* at 1065, Lord Diplock said:

“The question for the court is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?”

And in the High Court of Australia, Brennan J, in *Kioa v West* (1985) 159 CLR 550 at 627, the issue being related to the obligation to accord natural justice to a party, said:

“The repository of a power has to adopt a reasonable and fair procedure before he exercises the power.”

On that basis, His Honour considered that an administrator could be held to account for a failure to have regard to “circumstances which, had he acted reasonably and fairly, he would have known”. Where that duty would have imposed a duty to accord natural justice to some person (as clearly, here, knowledge of the respondents’ occupation would have done: *Hakeai v Minister of Lands* [1996] Tonga LR 142) Brennan J held (ubi supra) “the court must place itself in the shoes of the repository of the power to determine whether the procedure adopted was reasonable and fair.”

Breach of duty and of natural justice

[56] I consider that Cabinet was the repository of the power to make the decision to cancel or terminate Mele’s lease and that it had a duty to take reasonable steps to ascertain the facts relevant to the application of Naitingikeili and to accord natural justice before it proceeded to make its decision. Had it considered the paper submitted by the Minister of Land properly, it would have seen that the ground of the application was that the annual rent had not been paid since 17 Novmeber 1983, but that the lease had not commenced until 18 November 1993. It ought to have taken steps to ascertain the exact date from which the rent had not been paid. Had it done that, it would have discovered that the rent had in fact had been paid up to 17 November 2083 instead.

[57] The paper also stated that the (applicant) lessor had written on 11 September requesting termination of the lease on the basis of neglect and also for using the land for a purpose

other than that upon which application (and approval) had been made. The purpose of the lease was stated on the paper as “residential”, but the paper did not state what the other purpose to which the lease was used for was, except to attach the applicant’s letter as an annex to the paper. In that letter, the applicant says that the “only structure (house) on the land belongs to the Lessee’s father where the Lessee’s sister has converted (it) to a business.” I consider that Cabinet ought to have taken steps to ascertain what sort of house it was, whether it is made of wood or built on posts and whether it could be removed if the lease was terminated or that it could not be removed and would have to be dismantled or destroyed if sought to be removed. It would also need to ascertain who owned it now seeing that Tevita who is stated to have built it had died and that the holder of the lease, Mele, had also died. It would also need to find out what type and extent of business there was that was operated by Mele’s sister on the land. Had it done that, it would have found that it was the Free Wesleyan Church who in fact operated the rental business by storing its rental equipment there. Cabinet was bound by the principles of natural justice to afford the plaintiffs and the Church with the opportunity of being heard before it proceeded to make its decision.

[58] But what was more serious was Cabinet’s failure to consider and appreciate that there has not been any letters of administration granted in respect of Mele’s estate, which included this lease, and the application of S.11 and S.12 of the Probate Act in respect thereof, which provide as follows:

- “11. From the death of an intestate until administration be granted his personal property shall be vested in the Court.
12. If within 3 years of the date of any estate having become vested in the Court as provided by section 11 of this Act no claimant or other person has been found to be the next of kin to the deceased or to have established a right to the property, the proceeds of such estate shall become the property of the Crown and shall be paid into general revenue.

Provided that in such cases as above his Majesty in Council may instruct that instead of the proceeds of the estate being paid into general revenue, the

Court grant letters of administration to any person entitled to such grant or to any person illegitimately descended from the deceased.”

The paper to Cabinet stated (para. 1.3) that the lessee had passed away in the United States in 2001 and that there had not been any application for administration from her next of kin. Cabinet, ought to have taken steps to ascertain whether or not there had been a will and whether it, Cabinet, could deal with the lease without any Court order having been made, by cancelling this lease, when S.37 of the Probate Act makes it an offence to do so without a Court order. That section provides as follows:

“37. Any person taking or dealing with the property of a deceased person before the Court has adjudicated thereon shall be liable for a fine not exceeding \$500 recoverable by distress and the conviction of a person under this section is no bar to the prosecution of the person for any other criminal offence.”

[59] This is because when it cancelled this lease, it destroyed a very valuable property – a lease of land which had 66 years to run at a very low rent of \$5.00 per year which rent had already been paid up for those 66 years. The land is situated at Kolofo’ou and is most suitable for residence or business. It had houses on it worth \$95,700. And more importantly it had vested in the Supreme Court by virtue of S.11 of the Probate Act, which may be paid to the Crown as general revenue under said S.12 of the Probate Act. To cancel the lease instead was a serious act with serious consequences to the several persons I have mentioned and to Government as well. They should have all been afforded an opportunity of being heard but they were not. That is a clear breach of duty to inquire and of duty to accord natural justice.

[60] I therefore find that the Minister and Cabinet, that is, with the Minister sitting as a member of Cabinet, acted unlawfully in deciding to terminate Mele’s lease in breach of those duties, and that the termination of the lease was unlawful and is invalid.

Lease of Huang Hua invalid

[61] Because the cancellation of Mele’s lease was invalid, and because her lease was still valid at the time, the land which Huang Hua applied to lease from Naitingikeili was not available to

be granted to him by way of lease, and so the purported approval by Cabinet and the purported grant thereof to him as lease no. 9214 was invalid.

Counterclaim of Naitingikeili

[62] For the same reason, the counterclaim of Naitingikeili for damages for refusal by Lupe and Sione to vacate the land of Mele's lease cannot be sustained.

Orders

[63] Accordingly, I make the following orders:

- (a) I declare that the cancellation or termination by Cabinet of lease no. 5452 of Mele Moala Uluilakepa by its decision no. 1127 on 18 October 2017 was unlawful and of no effect.
- (b) I direct that the second defendant Minister of Lands shall forthwith remove any note or record in his office that the said lease is cancelled or terminated.
- (c) I direct that the said Minister of Lands shall forthwith cancel the lease no. 9214 of the third defendant Huang Hua.
- (d) The counterclaim of the first defendant, Naitingikeili Kaufusi, is dismissed.
- (e) The costs of the plaintiffs in these proceedings shall be paid by the defendants, jointly and severally, to be taxed if not agreed.


Niu J
J U D G E



NUKU'ALOFA: 24 March 2020.