Civil Law

29/04/20
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IN THE LAND COURT OF TONGA **LA 22 of 2019**
NUKU'ALOFA REGISTRY

BETWEEN : KA'ILI TU'ALAU

- **Plaintiff**

AND : KALAUSA TUALAU

- **First Defendant**

AND : MINISTER OF LANDS

- **Second Defendant**

BEFORE HON. JUSTICE NIU IN CHAMBERS

Counsel : Mr. S. Fonua for the plaintiff.

Mr. C. Edwards for first defendant.

Ms. 'E. 'Akau'ola for second defendant

Hearing : In chambers (but in open Court) of application first defendant for security for costs against the plaintiff on 24 April 2020.

Ruling : 28 April 2020.

RULING ON SECURITY FOR COSTS

[1] In an application by a defendant against the plaintiff for security for costs, the Court must consider not only whether or not the ground of the application is proved, namely that the plaintiff is not ordinarily resident within the jurisdiction or that he may be unable to pay the costs of the defendant if ordered to do so, it must consider whether or not "in the light of all the circumstances of the case justice requires

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that the plaintiff should be required to give some security for costs:" *Public Service Association Inc anor v Kingdom of Tonga a*nor [2015] Tonga LR 439, 445.

[2] In the present case, the first defendant has applied for security for costs against the plaintiff in the sum of $8,500 upon the ground that the plaintiff is ordinarily resident out of the jurisdiction of this Court namely the United States and also on the ground that the plaintiff may be unable to pay the costs of the first defendant if ordered to do, as provided in Order 17 Rule 1 of the Supreme Court Rules which also applies in this Court.

[3] The plaintiff opposes the application. He says that he resides in Tonga but that he visits the United States from time to time. And as to the second ground of the application, he says that with the assistance of his sister, he will be able to pay the costs of these proceedings (if so ordered by the Court).

Background

[4] It is common ground the tax allotment in issue was lawfully held by and registered in one Lotolua Tu'alau. Lotolua was married and he lived in and died in American Samoa on 7 June 2007, leaving his widow and their illegitimate son. He is survived by two brothers and one sister. His next younger brother is the plaintiff and his youngest brother is the first defendant.

[5] The youngest brother was the one residing in Tonga and who had possession and use of the tax allotment, up to now.

[6] Neither the widow nor the plaintiff, who is the lawful heir to the allotment, made any claim for the allotment and upon expiry of 12 months from the holders Lotolua's death in 2007, it reverted to the estate of Pea, which is held by the estate holder, Lord Lavaka, as provided in S.87 of the Land Act.

[7] On 20 February 2009, the first defendant applied for the allotment. On 10 March 2013, the estate holder signed his consent to the grant of the allotment to him.

[8] On 14 October 2013, he paid the survey fees of $46.00 to the Land Office.

[9] On 10 March 2014, the Minister of Lands, second defendant, directed the surveyors to carry out the surveying of the allotment and to prepare the deed of grant thereof to be issued and registered in the first defendant.

[10] On 5 December 2018, the second defendant issued the deed of grant of the allotment Book 454 Folio 44, to the first defendant and registered it on the same day.

The Claim

[11] On 27 September 2019, the plaintiff filed his present claim and claims that the first defendant had falsely represented to the estate holder that he was the lawful heir to the allotment and thereby secured the consent of the estate holder to the grant of the allotment to him. He also claims that the first defendant also misrepresented the situation to the second defendant in that he omitted to state in an affidavit, which he attached to his application, that the plaintiff is the lawful heir to the allotment. As against the second defendant, he claims that the second defendant was put on notice (by that affidavit) that it was possible that the plaintiff was the lawful heir to the allotment and that he ought to have inquired as to who was the rightful heir to the allotment but he failed to do so. He accordingly prays for orders that the grant of the allotment made to and registered in the first defendant be cancelled and that the allotment be granted to and registered in the plaintiff instead.

The defence

[12] The first defendant has filed his defence on 16 October 2019 that

(a) the allotment had lawfully reverted to the estate holder on expiry of 12 months from the date of death of Lotolua on 7 June 2007;

(b) the plaintiff had admitted that reversion in his own claim (paras. 7 and 8 of the claim);

(c) the claim by the plaintiff that Lotolua had an illegitimate son with his wife was denied and put the plaintiff to proof of the illegitimacy of the son;

(d) he denies the allegation of the plaintiff that he had represented to the estate holder that he was the lawful heir to the allotment.

(e) he denies the allegation that he misrepresented anything to the second defendant.

[13] The second defendant has filed his statement of defence on 3 March 2020 that

(a) the first defendant did inform him on 1 August 2012 that he had an older brother, namely the plaintiff, who was at the time in prison in Pagopago,

(b) the allotment had lawfully reverted and was lawfully granted to the first defendant.

The hearing

[14] At the hearing of this matter, both counsel had filed written submissions which assisted me greatly in considering the circumstances of this case and the grounds of the application. I will deal with each of them.

Residence

[15] The question of residence of the plaintiff is only relevant for the purpose of this application. The first defendant applicant has the burden of proving that the plaintiff "is ordinarily resident out of the jurisdiction". He says, in his counsel's submissions, that the plaintiff

had left Tonga and lived in Pagopago in 1986, and then went and lived in the United States in the 1990s until he was deported to Tonga in 2000. In 2001 he says the plaintiff left Tonga again and only returned in 2019 to commence these proceedings.

[16] That appears to be different from what he said in an affidavit he made on 4 March 2020 in support of his application. He said there that after the plaintiff left and lived in Pagopago in 2001, he returned to Tonga in 2011, and that he came and lived with the first defendant and his family and that they quarreled as a result of which he then left and lived with their first cousin at Pea. He made no mention of the plaintiff returning to the U.S. and having only returned in 2019 to commence these proceedings. It would therefore appear that according to his affidavit in March 2020, the plaintiff has been residing in Tonga since 2011.

[17] The plaintiff has said in his affidavit in opposition dated 20 February 2020 that he was not an U.S. citizen but that he was, and is, a permanent resident and that he had received his "green card" when he went to the U.S. in 2017. He said that Tonga was, and is, his place of residence.

[18] That appears to be the only evidence upon which I have to decide whether or not the plaintiff is ordinarily resident outside the jurisdiction, and the Court Rules offer no definition, explanation, criteria or criterion by which the matter can be decided, and no case law was referred to by either counsel. I must therefore apply the ordinary meaning of the word "resident", which is stated in Webster's dictionary as "living in a place for a length of time". And in the present case I have to accept that, according to the first defendant's affidavit of 4 March 2020, the plaintiff has lived in Tonga since 2011. From 2011 to 2019, that is a length of time, in fact a long length of time, which I must accept as to make him ordinarily resident within the jurisdiction.

[19] Accordingly, I find that the applicant first defendant has failed to prove that the plaintiff is ordinarily resident outside of the jurisdiction and fails in that ground of his application.

Unable to pay the costs

[20] Order 17 Rule 1 (b) of the Rules provide that if it appears to the Court that the plaintiff may be unable to pay the costs of the defendant if ordered to do so, it may order that the action be stayed until the plaintiff gives security as the Court may determine.

[21] The first defendant says that, in addition to being ordinarily resident out of the jurisdiction, the plaintiff may be unable to pay his costs if ordered to do, and accordingly applies that the plaintiff gives security for costs in the said sum of $8,500.

[22] In response to that ground of application, the plaintiff says in his notice of opposition that with the assistance of his sister, he will be able to pay the costs of the first defendant if ordered to do so. And in his affidavit dated 24 February 2020, he says that he had a stroke and that his movements are restricted and that he cannot work and that his sister in the US, is supporting him financially now. He says the amount of $8,500 sought is excessive and that the sum of $2,000 was fair and reasonable as the trial should take no more than a day.

[23] Mr. Edwards for the first defendant does not agree and maintain that the costs that would be incurred would be much higher than the figure of $8,500 which is applied for.

Arguable case

[24] Both counsel agreed that the authority to be applied is the ruling of the Court of Appeal in *Public Service Association & Anor v Kingdom of Tonga & Anor* [2015] Tonga LR 439, which recognised and upheld the basic principle that a natural person who appears to have an arguable case should not be ordered to give security for costs, no matter how poor he or she is, and that the power to require security for costs

ought not to be used so as to bar even the poorest litigant from the court," as stated by Megarry v-c in *Pearson v Naydler* [1977] 1 WLR 899 at 904.

[25] In that case, the Court of Appeal said that "if the court concludes that the plaintiff has shown a reasonable prospect of success, it will not make a security for costs order if and to the extent that it will have the practical effect of shutting the plaintiff out of the court.

[26] It is in respect of this aspect that the application of the first defendant falls to be decided. If the plaintiff does have an arguable case and has reasonable prospects of success then no security for costs need be given. If he does not have such a case then it may be well be necessary that security be given, especially if it can be given by the plaintiff's sister for the plaintiff.

Reversion of the tax allotment

[27] It is agreed by both counsel that the tax allotment held by the eldest brother Lotolua reverted to the estate holder, Lord Lavaka, upon the expiry of 12 months from his death. This is because no claim was made by the heir or the widow within 12 months of Lotolua's death as is provided in S.87 of the Act.

The dispute

[28] The dispute between the plaintiff and first defendant is that the plaintiff says and argues that even though he did not claim the allotment as heir within 12 months of Lotolua's death, his right to succeed as heir did not and does not end. He says that he can still assert his claim as the rightful heir as against his younger brother, the first defendant, to whom the Minister of Lands has granted it.

[29] Mr. Fonua submits that that claim of the plaintiff is based on his succession right under S.82 (e) of the Land Act as heir to his brother, and that that right cannot be terminated and is not terminated by S.87 of the Act which provides:

"87. If no claim to a tax allotment has been lodged by or on behalf of the heir or widow with the Minister or his Deputy within 12 months from the death of the last holder, such allotment if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder."

He says that that is because the proviso to S.82 provides for the continuance of such right. That proviso is as follows:

> "Provided always that the failure of the deceased lawful male holder of any tax or town allotment to register the same under the provisions of Division II of Part VIII of this Act shall not of itself be a bar to the grant to his heir under this section, and that provided that the Minister of Lands is satisfied upon inquiry that the deceased person was the lawful holder of the said allotment it shall be lawful for him to effect posthumous registration at the request of the heir."

[30] He says that only a reversion under S.83 has the effect of final reversion of an allotment to the estate holder or Crown because the reversion occurs because there is no longer any heir, whereas a reversion under S.87 occurs because the heir makes no claim within 12 months. S.83 provides as follows:

"83. On the death of the lawful male holder of any tax or town allotment without leaving any person entitled to succeed thereto in accordance with the provisions of this Act such allotment shall if situate on Crown Land revert to the Crown and if situate on an hereditary estate shall revert to the holder thereof."

[31] In effect Mr. Fonua argues that the plaintiff has an arguable case, that it has reasonable prospect of success, such that, as the Court of Appeal has said, no order for security for costs be made against him.

[32] Mr. Edwards submits that if the proposition proposed by the plaintiff was to be upheld, it would result in a chaotic situation because rightful heirs need not claim within the stipulated 12 months and that they can come forward at any time thereafter, in particular, after a grant of a reverted allotment has made by the Minister and lawfully claim it as theirs. He says that there is just no authority for that proposition to be found in the Land Act.

[33] Mr. Fonua bases his proposition on his interpretation of the proviso to S.82. But a careful study of that proviso reveals that it does not mean, and was not intended that it be applied as Mr. Fonua has suggested. That proviso provides that if a holder fails to have his tax or town allotment registered (by issue of a deed of grant to him and by having the duplicate of the deed bound in a book which is called the register) as provided in Division II of Part VIII of the Land Act, it shall not be a bar to the succession of his heir to the said allotment, provided the Minister is satisfied upon inquiry that the deceased holder was the lawful holder of the said allotment. Upon being so satisfied, the Minister then effects posthumous registration of the said allotment in the deceased holder and then transfers that registration to his rightful heir.

[34] A post humous registration of an allotment is the registration of the allotment in the name of a person who has died; it only applies to the registration in a person who has died. Mr. Fonua says that such registration can be made under the proviso in the heir of the deceased holder who has come forward and claim the allotment after it has reverted to the Crown or to the estate holder. This is what he says in paragraph 4.3.3 and 4.3.4 of his submissions:

> "4.3.3. In the case where the heir fails to claim within 12 months, he is still entitled to claim the allotment after (wards) provided he can prove to the satisfaction of the Minister of Lands that he is the true heir.

4.3.4 The plaintiff's argument, in the preceding sub-paragraph, is supported by the proviso to S.82 of the Act which states that the failure of the heir to register the allotment is not a bar to him to register the allotment. The Minister of Lands is empowered to register the allotment in the name of the heir posthumously."

[35] Division II of Part VIII (but wrongly printed Part as VII, refer P.51 of the Act where the next part of the Act is Part IX and p.42 has Part VII) contains ss.120, 121, 122 and 123. They provide for deeds of grants to be in duplicates in the form in the schedule, the Minister to sign and issue to the grantee one duplicate and to bind the other duplicate in a book to be called the register of allotments, the registration of the name of the successor to the allotment upon the death of a holder, dispossession of a widow or by order of the Court, etc, and to provide what to do if a deed of a deceased holder is lost.

[36] Therefore the proviso to S.82 is clearly intended to apply to a case where the deceased holder had failed to have his title registered in accordance with the provisions of those sections, although he had lawfully held the allotment before he died.

[37] I am therefore not persuaded that the said proviso can reasonably be argued to mean what Mr. Fonua has argued, and I agree with Mr. Edwards that there is no provision in the Land Act which would support the argument which Mr. Fonua has proposed for the plaintiff in his present claim.

Public interest

[38] Mr. Fonua argues that the argument and proposition which the plaintiff makes is the first of such proposition to be made in this Court, and that it is of a public interest because it concerns a fresh interpretation of the land law in Tonga. As such he argues that as it is of a public interest, cost ought not to be ordered against the plaintiff and that a

security for costs ought not to ordered against him as applied for by the first defendant.

[39] I would agree with Mr. Fonua, if I thought that the proposition which he has made is at least arguable or has a reasonable prospect of success, but it does not and it is not arguable. S.87 is quite clear and it has repeatedly been upheld by this Court and the Court of Appeal as the law – that once the 12 months expire, the allotment reverts to the estate holder by operation of law. That means the right of the heir to succeed under S.82 becomes ineffective. It cannot stop the regrant of the reverted allotment to other persons according to law. And the proviso to S.82 is quite clear as I stated above. They cannot reasonably be argued to mean what the plaintiff has claimed it means in his claim in this case.

Misrepresentation

[40] The plaintiff claims that the first defendant misrepresented to the Minister that he was the heir to the allotment by failing to inform the Minister that the plaintiff was the next older brother and heir to the allotment, but the Minister has stated in his statement of defence (para. (7)) that the first defendant had informed him on 1 August 2012 that he had an older brother named Ka'ili (the plaintiff) who was at the time in prison in Pagopago. That assertion by the Minister may be said to be an answer to the claim by the plaintiff that the first defendant misrepresented the position by failing to say that the plaintiff was the older brother and heir to the allotment, as well as an answer to the claim that the Minister failed to make due inquiry as to who was the older of the two surviving brothers and heir to the allotment.

[41] That further weakens the claim of the plaintiff.

Time bar

[42] This was also raised in the arguments of both counsel. Mr. Edwards argues that the right of the plaintiff to bring this action accrued to him

as heir and that he acquired that right upon the death of the eldest brother and holder, Lotolua, on 7 June 2007 and the 10 years expired on 7 June 2017. He was therefore out of time when he filed his claim in September 2019.

[43] Mr. Fonua argues that the cause of action accrued to the plaintiff when the first defendant made his misrepresentation (as already stated above) in his affidavit in support of his application for the allotment on 14 June 2011.

[44] I consider that it is arguable that the claim of the plaintiff is not time barred because no grant was made by the Minister to the first defendant until he issued his direction to the surveyors on 10 March 2014 to carry out the surveying and to prepare the deed of grant of the first defendant, as was decided in the case of *Folau v Taione, Ma'afu & Minister of Lands* [2016] Tonga L.R 189 as the time at which the grant was made to the applicant, and at which the right to grant the allotment to another subsequent applicant ended.

All the circumstances

[45] Having considered all the circumstances of this case as I have stated above, I consider that justice requires that the plaintiff should be required to give some security for the costs of these proceedings.

[46] I have come to that conclusion, despite the likelihood that the plaintiff would be unable to pay the costs if ordered to do so, because he says, and I accept, that if he is ordered to do so, his sister would pay them for him.

The amount

[47] Mr. Edwards argues that his costs, ie the costs for the first defendant at the end of this trial will exceed the sum of $8,500 which is applied for. Mr. Fonua says that the trial would only be for one day and security to be ordered should only be $2,000.

[48] In other land cases which have come before the Court, the Court has ordered a sum of $5,000 as sufficient security for costs. I do not see any reason to order a higher or a lower figure than that sum.

Order

[49] Accordingly, I order that the plaintiff pays security for costs in the sum of $5,000 within 30 days from today, in default of which the claim of the plaintiff shall be stayed.

SUPREME COURT TONGA

" Niu J

NUKU'ALOFA: 28 April 2020. **J U D G E**