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**IN THE LAND COURT OF TONGA  
NUKU'ALOFA REGISTRY**

**LA 22 of 2019**

**BETWEEN : KA'ILI TU'ALAU**

- **Plaintiff**

**AND : 1. KALAUSA TU'ALAU**

**2. MINISTER OF LANDS**

- **Defendants**

**BEFORE HON. JUSTICE NIU AND ASSESSOR SINILAU TOUMO'UA**

**Counsel :** Mr Sione Fonua for plaintiff  
Mr Clive Edwards for first defendant  
Ms 'Akanesi Katoa for second defendant

**Trial :** 11 May 2020

**Submissions :** by Mr Fonua on 25 May 2020  
by Mr Sisifa on 10 June 2020  
by Mr Edwards on 12 June 2020  
by Mr Fonua on 16 June 2020

**Ruling :** 1 July 2020

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## **RULING**

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### **The plaintiff's claim**

[1] The plaintiff claims that he is the lawful heir to the town and tax allotments in issue in this case, and that the second defendant Minister of Lands has unlawfully granted them to the first defendant, who is the younger brother of the plaintiff, to be his allotments.

### **Agreed facts**

[2] An agreed statement of facts was put into evidence by consent, it reads as follows:

1. Lotolua Tu'alau, a.k.a Vilitoni Moala, the holder of the town and tax allotments in question and situated in the estate of Lavaka at Pea, died on the 7<sup>th</sup> day of June 2007.
2. The plaintiff or heirs to the town and tax allotments, did not apply for registration of the town and tax allotments at Pea within 12 months from the date of death of Lotolua Tu'alau a.k.a Vilitoni Moala.
3. The town and tax allotments reverted to the estateholder on the 6<sup>th</sup> June 2008.
4. At all material times, Kalausa Tu'alau was in possession of the said town and tax allotments.
5. That on or about 10<sup>th</sup> day of April 2013, Kalausa Tu'alau applied for the grant and registration of the town and tax allotments and which applications were consented to by the estateholder.
6. The deed of grant in respect of the town allotment was issued to the first defendant on 4<sup>th</sup> day of May 2017.
7. The deed of grant in respect of the tax allotment was issued to the first defendant on the 5<sup>th</sup> day of December 2018.
8. The present proceedings were issued by the plaintiff on the 27<sup>th</sup> day of September 2019 claiming that he is the heir to the said town and tax allotments.

### **Prayers**

[3] The plaintiff prays for orders that the registrations of the said allotments in the name of the first defendant be cancelled and that the said allotments be registered in the name of the plaintiff instead.

### **Defences**

- [4] Both defendants dispute the claim of the plaintiff. They say that neither the plaintiff nor any other person claimed the said allotments as heir within 12 months from the death of the last holder, Lotolua Tu'alau, on 7 June 2007, and in accordance with S.87 of the Land Act, the allotments reverted to the estateholder Lavaka. They say that the first defendant properly applied, with the consent of the estateholder, for grant of the allotments to him, and the Minister of Lands duly granted them to him according to law.

### **Documents**

- [5] By consent, a production of documents by the Minister of Lnds was admitted as evidence.

### **Oral evidence**

- [6] By consent, oral evidence was given by the Registrar of Lands, Mr Semisi Moala in Court. He said that he has worked in the Land Office for 30 years. He said that when an application for an allotment is received, they check the map of the area to locate the allotment in question on the map to see if any name of any person has been written on it. If it has no person's name on it, they then check the register of allotments to see if the allotment has been granted or registered in any person. If both of those are clear then the applicant is told to pay the required survey fee. Upon payment of that, a savingram is drafted and the matter is submitted to the Minister. If the Minister approves it, he then signs the drafted savingram which directs the surveyor to carry out the survey of the allotment and to prepare the deed of grant for registration of the allotment in the applicant. When the deed of grant is done, the Minister signs and dates it and the applicant then comes and pays the registration fee and the name of the applicant is then entered in the register.
- [7] He said in this case, the deed of grant of the town allotment (P.30 of Production) was signed and dated by the Minister on 4 May2017, but that it

was not entered in the register of town allotment until 23 June 2017. He said that that was because of the delay in having the registration fee paid, which was a sum of \$4.08 on receipt no.440006 of same date. He was asked by Mr Fonua and he said that that date was “the date of commencement of legal right of the applicant to the town allotment”.

- [8] He was referred to P.21 of the Production which was the brief to the Minister to approve the first defendant’s applications for both the town and tax allotments and to sign the drafted savingram. Mr Fonua asked him if there was any procedure to check if there was an heir to an allotment which was being applied for by any person. Mr Moala said that if no claim is lodged by an heir to an allotment whose holder has died within 12 months of the death of the holder, they do not concern themselves with whether there is an heir to the allotment anymore. Assessor Toumo’ua asked and the witness answered that even if an heir makes a claim after the 12 months have expired they do not accept it at all.

### **Dropping of a claim**

- [9] It was also agreed that a claim which the plaintiff made, namely, that the first defendant had falsely represented to the Minister of Lands that he was the heir to the town and tax allotments of Lotolua Tu’alau, was abandoned and was not pursued.

### **Submissions**

- [10] It was agreed that the plaintiff would file his submissions in his claim first and then the defendants would file their submissions and then the plaintiff may file any reply he wished to make to the defendants’ submissions.

### **Plaintiff’s case**

- [11] Mr Fonua has filed his submissions on 25 May 2020 (but wrongly written by the Court clerk as 25 June 2020). He says that –

"2.1 The heart of the Plaintiff's claim is that although the allotments reverted (S.87) to the estate holder, such reversion did not override or extinguish his "Right" to the allotments devolved to him under S.82 of the Land Act"

2.2 Must section 87 be read subject to S.82?

2.3 This property right is the issue that the Court is to consider and deliver judgment.

2.4 If section 87 is to be read subject to section 82, then the Plaintiff succeeds in his claim.

2.5 If section 87 is not to be read subject to section 82, then the Plaintiff will fail in his claim."

[12] He then makes his argument like this:

(a) Clause 113 of the Constitution provides that a town and tax allotment granted by the Minister of Lands to a Tongan male subject by birth "**shall be hereditary**".

(b) S. 82 of the Land Act sets out the law of succession to a town and tax allotment.

(c) Once a town or tax allotment is granted by the Minister that allotment shall be hereditary in accordance with S.82.

(d) Only when there is no longer any heir as is provided by S.82 will an allotment properly revert to the Crown or to the estate holder from whose estate the allotment had been granted originally. S.83 clearly provides for that reversion.

(e) He then says this:

"4.2 It is essential to note the proviso to section 82 prescribes that if the heir fails to register the allotment, it will not be a bar to his right as the successor to the allotments. The Minister of Land is under obligation to investigate and if satisfied that the claimant is the rightful heir the allotments will be registered posthumously in his

name. The proviso emphasises the importance of chain and ladder of succession.”

- (f) The law of succession to allotments are remarkably similar to the law of succession to the hereditary titles of nobles which is contained in clause 111 of the Constitution, and like S.83 of the Land Act, clause 112 provides for the reversion of the title and estates of a noble to the King when no heir under clause 111 exists.
- (g) Therefore an allotment should only revert to the estateholder from which it was granted when no heir to succeed to it exists.
- (h) That means that such right of an existing heir to succeed to an allotment cannot be taken away when the heir fails to make a claim of the allotment within 12 months of the death of the holder, such as is provided by S.87 of the Act.
- (i) Therefore S.87 must be subject to S.82.
- (j) That is supported by the fact that whereas S.88 provides that an allotment which reverts to the Crown can be regranted as an allotment, no similar provision exists in the Act in respect of an allotment which reverts to a noble or hereditary estate holder.
- (k) Therefore, a reversion under S.83 is unconditional whereas a reversion under S.87 is conditional upon an heir claiming his right as successor.

[13] Mr Fonua submits that in the absence of express provision in the Act authorising the re-grant of an allotment reverted under S.87, such as is provided in S.88 in respect of the reversion of an allotment to Crown Land, the Minister and the estateholder in the present case had no authority to regrant the allotments held by Lotolua Tu’alau to the first defendant.

[14] He accordingly prayed for the orders sought by the plaintiff.

## **Minister of Lands Case**

[15] In opposition to Mr Fonua's submissions, Mr Sisifa, for the Minister, submitted that there were 2 main issues to be decided:

(a) Whether S.87 must be read subject to S.82? and

(b) Whether the Minister was under any obligation to investigate the lawful heir to the allotments before he issued the deed of grant to the first defendant?

[16] He submitted that it was not the intention of the legislature that S.87 was to be read subject to S.82. He submitted that the intention of the legislature is that if a person who is an heir under S.82 does not claim his right as heir within 12 months of the death of the holder of whom he is the heir, section 87 expressly provides that the allotment or allotments held by the deceased holder shall revert to the Crown or to the hereditary holder of the estate of which the allotments form part. He says that the succession right of an heir ceases if he does not claim his right within the 12 months (because S.87 expressly says so).

[17] He says that S.87 does allow the heir to make his claim as heir and that if he does not do so for a year, the land then reverts. He refers to the case of *Taufa v Vilingia , Tupouto'a and Minister of Lands* [1981-1988] Tonga LR in which the Court cancelled the succession of the heir to the allotment because he had made his claim after the 12 months had expired.

[18] He also referred to the case of *Holani v Tava* [2003] Tonga LR 175 where the Court of Appeal held:

"When the second respondent applied for the allotment in October 1993, he was simply applying for vacant land and the application was processed and granted in the usual way. The fact his grandfather had been the registered holder may have influenced the estate holder but it was nothing to do with his entitlement to the grant."

- [19] Mr Sisifa submitted that S.87 is the operational provision for succession under S.82, and that it has been so applied in the cases that have come before the Court.
- [20] He also says if the plaintiffs interpretation and claim is accepted, then heirs who had not claimed, and who will not claim in future, within 12 months will come forward and claim and upset grants which have already been made, and there will be never-ending lines of claimants as heirs in future.
- [21] As to whether the Minister is obliged to investigate who the heirs are to allotments, Mr Sisifa says that the Minister's only obligation is to ascertain that the claim is lodged within 12 months of the death of the holder. He says that the Minister has no obligation (or authority) to investigate, let alone decide, who the rightful heir to an allotment is.

#### **First defendant's case**

- [22] Mr Edwards for the first defendant submits that –  
“An important and fundamental feature of the Act is the requirement to register the title to land. It provides for an orderly system and certainty of rights.”  
And S.87 provides a time period within which the successor must lodge his claim as heir to the allotments of the deceased holder, and that if the claim is not lodged within that time period, the allotments revert to the estateholder.
- [23] He therefore submits that S.82 is in fact subject to S.87 and not the other way round as the plaintiff claims.
- [24] He says that the argument of the plaintiff cannot be right, that the right of an heir to succeed to an allotment is not extinguished by S.87. He says that the right is in fact extinguished because there is no longer any allotment to inherit because the allotment has already reverted.

- [25] Mr Edwards also submits that the Act provides a limitation period of 10 years during which a claim may be brought in order to preserve and maintain order and certainty. He says that the plaintiff has now brought his claim as heir to these allotments some 11 years 3 months after his right to claim them as heir had accrued to him. He says that if the plaintiff was allowed to do that, heirs who had similarly failed to claim their rights in the past can now come forward and claim. There would be disorder and uncertainty in the land system. People who have been granted the reverted allotments will be dispossessed and evicted from their houses and plantations, such as will happen in the present case.
- [26] He further says that S.87 is not ultra vires the constitutional provision that town and tax allotments shall be hereditary, because S.87 does not prohibit or take away the inheritance right of the heir. It just provides that the heir must claim his right as heir within 12 months, and that if he fails to do so, he loses it and the allotments revert to the estate.
- [27] As to there being a duty in the Minister to **inquire** as to the heir to allotments, there was no duty to do so in the present case because, there was no claim made by the heir within the stipulated 12 months. The first defendant was simply applying to be granted the allotments by way of fresh grants and not as heir and successor.

### **Plaintiff's reply**

- [28] Mr Fonua replies to Mr Edward's point about the time bar and says that the cause of action in this case arose when the town and tax allotments were registered in the first defendant on 5 December 2018.
- [29] He also says that neither Mr Sisifa nor Mr Edwards disagreed with his point in para. 6.9,6.10 and 6.11 of his submissions, which is to the effect, whereas S.88 provides that an allotment which reverts to the Crown under S.87 can be regranted as an allotment, no similar provision exists in respect of an

allotment which reverts to a noble or hereditary estateholder. He says that both counsel therefore conceded the point of that submission.

- [30] Finally he says that there would be no chaos if the Ministry kept proper records of the siblings of the deceased holder and to investigate to satisfy itself that there is no heir. He says that that can be easily done.

### **Consideration**

- [31] There are difficulties with the plaintiff's claim and I will deal with them as follows:

#### **Right as heir extinguished**

- [32] The plaintiff claims that his right as heir to the allotments in issue in this case has not ceased or been extinguished when the allotments reverted to the estateholder (Lavaka) upon the expiry of 12 months from the death of the holder, his older brother, Lotolua Tu'alau, in 2007.
- [33] If he accepts, and he does (as he has agreed in paragraph 3 of the agreed statement of facts), that the allotments have reverted under S.87 of the Act (because he made no claim for them as heir within 12 months) then what is he entitled to as heir? It cannot be the allotments because they no longer exist. They had already become "vacant" land of the estate of Lord Lavaka at Pea, Tongatapu. That is confirmed by the decision of the Court of Appeal in *Holani's Case*. As quoted by Mr Sisifa, the Court referred to the reverted land as vacant land for which the second respondent properly applied and which was properly granted as his allotment.
- [34] The plaintiff argues that the allotments still exist as such because the estateholder is prohibited from consenting to have them granted to another person by the Minister, because there is no provision in the Act to provide that when an allotment reverts to an hereditary estateholder, that allotment

may be re-granted, like the provision of S.88 which refers only for regrant of allotments which have reverted to Crown Land.

[35] However, I have to say that there is no provision in the Act either that any allotment which has reverted to an hereditary estate shall not be regranted as allotment to another person. In absence of such provision, the Court must interpret the words "shall revert to the holder" of the hereditary estate in S.87 to mean what their plain and ordinary meaning are, namely, that the allotment thus reverting thereby become the ordinary lands of the estate without distinction and without any encumbrance or limitation in any way. That is also its meaning in English land law.

[36] That is how the Minister of Lands and the hereditary estateholders have interpreted and applied the provision of S.87, such as Mr Moala has given in evidence in this case. When it is shown that no claim has been made by any person as heir within 12 months of the death of the holder, any person can, with the consent of the estateholder, apply to be granted the reverted allotment. Such regrants have been upheld by this Court, such as in the *Holani case* to which Mr Sisifa has referred me.

[37] Mr Fonua therefore has difficulty with the proposition he makes because the Courts have never recognised the right of an heir, who has failed to claim his right as heir within the stipulated 12 months, to continue to assert his right despite that failure.

[38] His claim that an allotment only reverts when an heir to the allotment does not exist, as is provided under S.83, does not help him because S.87 expressly provides that if the existing heir fails to claim the allotment within the stipulated 12 months, the allotment reverts anyway.

### **Proviso to S.82 inapplicable**

[39] Mr Fonua also has difficulty with applying the proviso of S.82 to the present case in support of his argument. He has completely misread the wording of the proviso. The proviso reads as follows:

“Provided always that the failure of the deceased lawful male holder of any town or tax 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 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.”

[40] What he has stated in his submission instead is

“...the proviso to section 82 prescribes that if the heir fails to register the allotment, it will not be a bar to his right as the successor to the allotments. The Minister of Land is under obligation to investigate and if satisfied the claimant is the rightful heir the allotments will be registered posthumously.”

I have underlined the words which he had misread in the proviso.

[41] He has thereby wrongly argued that the proviso supports the plaintiff’s claim in the present – that the failure of the plaintiff to register the allotment as heir was not a bar to the grant of the allotment to him. That is not what the proviso says. What it says is that if the deceased holder had failed to register the allotment, it is not a bar to the grant of the allotment to the heir provided the deceased holder was the lawful holder of the allotment. The deceased holder may then be registered posthumously as the holder of the allotment at the request of the heir, before it is then transferred and is registered in the heir making the request. But that proviso only applies if the heir claims his right within the stipulated 12 months.

[42] It has nothing to do with the failure of the heir to make his claim of the allotment within the stipulated 12 months because S.87 instead provides that the allotment shall revert to the estate holder. Neither the heir nor the Minister can do anything about it.

[43] I agree with Mr Edwards that because S.87 has provided that the allotments are to revert to the estateholder when the plaintiff did not claim them within 12 months of his brother's death, there is no longer anything in respect of which the plaintiff is heir. There is nothing he can now claim as heir. That is the intention of S.87. It thereby renders the provisions of S.82 spent, as far as the plaintiff is concerned. Accordingly, any person can apply to be granted the allotments as his. And that is what the first defendant has done. And the Minister has, with the consent of the estateholder to whom the lands of the allotments have reverted, validly granted them to the first defendant as his town and tax allotments.

### **Time bar**

[44] Mr Edwards has raised the defence of time bar against the claim of the plaintiff against the first defendant. He says that the right of the plaintiff to bring this action accrued to him upon the death of his brother, or at least upon the expiry of 1 year after the death of his brother.

[45] I am afraid I do not agree with him about that. The claim which the plaintiff has brought is brought against the first defendant because the first defendant has been granted these two allotments by the Minister. Those grants were only made in 2017 and 2018. The right to bring the action to cancel those grants only arose after the grants were made, in 2017 and 2018.

### **Conclusion**

[46] However that makes no difference because it does not assist the plaintiff's claim in any way.

[47] Now having considered the submissions of the plaintiff and the submissions of both defendants, I am not satisfied on a balance of probability that the plaintiff has made out or proved his claim in this action. He has failed to satisfy me that the provisions of S.87 are to be read as subject to S.82. On the contrary, I am satisfied that S.87 means exactly what it provides, namely, that the allotment reverts to the estateholder and that it no longer exists as an allotment. It can be re-granted to another person, as is the case in the present case.

[48] Accordingly, I find that the plaintiff has failed to prove his claim and it is dismissed, with costs to both defendants, to be taxed if not agreed. The security for costs which has been paid by the plaintiff shall forthwith be paid to Mr Edwards for the first defendant to be credited towards the costs of the first defendant.



A handwritten signature in blue ink, appearing to read "Niu J", is written over the seal.

Niu J  
**J U D G E**

**Nuku'alofa: 1 July 2020**