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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 24 of 2019

BETWEEN:

KILIFI LATU (in substitution for TANAKI LATU)

Plaintiff

-and-

1. TOHIMINITI LATU
2. KAKALA PALU & MANOA PALU
3. LIVIMAI LATU

Defendants

Formal proof hearing

JUDGMENT

BEFORE: PRESIDENT WHITTEN LCJ
Appearances: Mr 'A. Pouvalu for the Plaintiff
No appearance for the Defendants
Date of hearings: 15 January 2020, 30 September 2020

1. This proceeding concerns a dispute over land known as 'Hala Siaosi Melo' at Fua'amotu ("the land").

The claim

2. By his statement of claim filed on 18 October 2019, the plaintiff alleges, in summary, that:
 - (a) The land was last registered on 10 November 1977 to Sione Penisini Latu who died on 12 February 1997.
 - (b) Sione Latu was the father of Tanaki Latu (the original plaintiff herein).
 - (c) Tanaki, his wife and their three children occupied the land since 1985 and on which they reconstructed a house and fenced the allotment.
 - (d) In 1991, Sione Latu and his eldest son, Sefo Latu, surrendered "their right" over the land and "gave it" to Tanaki.

- (e) In 1995, Tanaki, with his wife and children, migrated to the United States.
 - (f) Peni Latu is a brother of the first defendant. Tanaki and his wife treated Peni as if he was their adopted son. Peni looked after the house while the family was away. After Peni passed away, Sione Latu, described as the holder of the land, moved in and looked after the land and the house until he passed away in 1997.
 - (g) Tanaki failed to claim the land within one year of the death of his father.
 - (h) Sefo Latu and his wife asked Tanaki for permission to occupy the property. Tanaki agreed.
 - (i) Sometime later, Sefo and his wife passed away. They were survived by their sons and daughter which include the three defendants: Tohiminiti Latu, Kakala Palu (one of the second named defendants) and Livimai Latu.
 - (j) Tohiminiti continued to live on the property after his parents died.
 - (k) About 10 years ago, Tanaki asked Tohiminiti to leave the property but he refused.
 - (l) In about 2005, Kakala Palu and her family built a house next to Tanaki's house on the land.
 - (m) In 2019, Livimai, who is the eldest son of Sefo Latu, applied to the Ministry of Lands to subdivide the land between himself and his son, Sisiloni Latu.
 - (n) On 21 July 2019, Tanaki's son, Kilifi (the substituted plaintiff herein) also applied for the land because Tanaki already had a town allotment. His application bore the signature of the estate holder, Prince Tungji, and was accompanied by a copy of a letter by Sione and Sefo surrendering their right to the land to Tanaki.
 - (o) Both applications are still being considered by the Minister.
3. Notwithstanding, the plaintiff seeks the following orders:
- (a) eviction of the first and second defendants;

- (b) possession of the house;
 - (c) cancellation of Livimai's application; and
 - (d) a grant of the land in favour of Kilifi.
4. The Defendants did not file a Statement of Defence within the time required by the Rules, or at all.
 5. The majority of the allegations in the statement of claim were affirmed by Tanaki in his affidavit sworn 22 November 2019 in support of his then application for a formal proof hearing of his claim.

The evidence

6. At the first formal proof hearing on 15 January 2020, Mr Pouvalu called evidence from Tanaki who confirmed the contents of his affidavit sworn 22 November 2019.
7. At paragraph 10 of his affidavit, Tanaki deposed that on 3 January 1991, his father and eldest brother (Sefo Letu, the heir) surrendered their rights to the subject land and gave it to him. A document to that effect was tendered into evidence and marked exhibit A.
8. There was no evidence of compliance with any of the requirements of s.54 of the *Land Act* for the surrender of allotments.
9. Evidence was also called from Mr Simisi Moala, a Registrar of Lands. He produced documents from the Ministry of Lands in relation to the subject land, registered in book 246, folio 80, which confirmed the above history of registration. Mr Moala also confirmed that;
 - (a) from the Ministry's perspective, consistent with s.87 of the Act, once Tanaki failed to claim the land within 12 months of Sione's death, the land reverted to the estate holder;
 - (b) the Ministry had received two applications in relation to the subject land, one from the third defendant ("Livimai"), dated 18 August 2016 and the other by his son ("Sisiloni"), dated 12 June 2017. Each application sought

registration of half of the land with each subdivided lot having one of the two houses on the overall allotment. Both applications had been signed by the estate holder as having apparently "gifted" the land to Livimai and Sisiloni;

- (c) both those applications were in progress; and
 - (d) there was no record on the Ministry file of having received an application by Kilifi. He examined a copy of that application which formed part of exhibit B and noted that it did not bear a 'received' stamp which he said was standard procedure for documents received within the Ministry.
10. During submissions on that occasion, it became clear that the hearing would have to be adjourned part heard because Mr Pouvalu:
- (a) agreed that it was necessary to adduce evidence from the estate holder to explain why he had apparently consented to the land being granted to Livimai and Sisiloni on the one hand and to Kilifi on the other;
 - (b) said that he had instructions that Livimai already holds a town allotment but that he did not have any objective evidence to support that proposition;
 - (c) indicated that Mr Moala might need to be recalled; and
 - (d) most importantly, agreed that upon the reversion of the land to the estate holder, Tanaki, who already holds a town allotment, was ineligible to claim the land.¹ As Kilifi was eligible to apply, and had applied, for the land, he was the proper plaintiff.
11. In his affidavit in support of the application to substitute Kilifi as plaintiff in the proceeding, Tanaki deposed, relevantly, to having received a copy of a letter from the agent of the estate holder stating that the estate holder had approved the applications by Livimai and Sisiloni by mistake. Tanaki asked the court to order that the application by Livimai and Sisiloni be cancelled and for the land to be registered in the name of Kilifi.

¹ Without electing to surrender his existing town allotment, which was never suggested.

12. The letter by the agent for the estate holder was tendered into evidence through the affidavit of the said agent, the Honourable Salote Tuku'aho, sworn 2 March 2020. She deposed to having personal knowledge about the dispute over the town allotment in question. She confirmed that, on 12 June 2017, the estate holder approved applications by Livimai and Sisiloni to subdivide the land. Further, she deposed that on 21 July 2019, the estate holder also approved an application by Kilifi for the land because the prior approval of Livimai and Sisiloni's application was "under misrepresentations and fraud" in that Livimai had failed to disclose that:
 - (a) he had no right to apply for the land because he is an illegitimate son of Sefo Latu, the heir of Sione Latu;
 - (b) the land had been surrendered by Sione and Sefu to Tanaki; and
 - (c) the dwelling house on the land was built by Tanaki and his wife.
13. Ms Tuku'aho concluded therefore that the land was not available for grant. She also noted that the estate holder became aware of these matters when Tanaki approached him in relation to Kilifi's application in 2019.
14. Also exhibited to Ms Tuku'aho's affidavit was a copy of a letter from her on behalf of the estate holder to the Minister of Lands dated 6 February 2020. In it, she confirmed that the estate holder wished to cancel the applications for registration of the land in favour of Livimai and Sisiloni by reason of the misinformation and nondisclosure referred to in her affidavit. The estate holder also confirmed his consent for the land to be registered in favour of Kilifi.
15. On 18 August 2020, Mr Pouvalu filed a copy of an internal memorandum from the Minister of Lands dated 29 July 2020 to the Chief Executive Officer, copied to all heads of division, in which the Minister issued the following directions concerning the land and the applications for it:
 - (a) The applications for the town allotment by Livimai, Sisiloni and Kilifi were all 'on hold' pending the Court's decision in this proceeding.

- (b) Requirements were to be met including, for instance, a re-inspection of the land and the two dwelling houses on it, an account of who owns the houses and when they were built, and full accounts of the backgrounds and occupation of the land.
 - (c) The word “cancelled” on Kilifi’s application was to be deleted because the Minister never made a decision to cancel his application.
 - (d) He had not made any decision in relation to the letter of the Hon. Salote Tuku’aho on behalf of the estate holder and would not do so until the Land Court made its decision in this proceeding.
16. On 21 September 2020, a brief of Kilifi’s evidence was filed. It contained much the same background and history to the occupation of the land as that stated in Tanaki’s material, save that Kilifi’s relevant recollections started from when he was about eight years of age. Clearly, anything else he stated prior to then had been told to him by others, most likely, his father, Tanaki. In fact, Kilifi’s brief largely mirrored Tanaki’s written evidence. One common hallmark was the repeated reference to the land being “our land” meaning it ‘belonged’ to Tanaki and his family, including Kilifi. He concluded by stating that he was still awaiting the outcome of his application before the Minister and repeated his father’s request for the Court to evict the first and second defendants from the land, cancel the other applications, and order that the land be registered in his name.
17. When the formal proof hearing resumed on 30 September 2020, Kilifi appeared by video link from California. He affirmed the contents of his brief of evidence.
18. Mr Pouvalu then recalled Mr Moala. He confirmed that:
- (a) all work on the applications presently before the Minister was ‘on hold’ pending the Court’s determination of the proceeding;
 - (b) Kilifi’s application was still ‘valid’;
 - (c) Sisiloni’s application could be ‘correct’ but that it was up to the Court to decide that. He further explained that any previous purported approval of Sisiloni’s application was defective because the investigative work required

by the Minister in his memorandum had not been undertaken. He emphasised that that work was required for all the applications and that none of it had yet been undertaken.

19. Mr Moale denied the suggestion that the estate holder's wishes for the land to be registered to Kilifi was determinative. He agrees rather that it was a factor, perhaps a very important factor, to be considered by the Minister when deciding to which applicant the land should be granted.

Consideration

20. I proceed to outline the court's consideration of the issues for determination by reference to the pleaded relief sought. I do so without separate reference to Mr Pouvalu's submissions because, as a result of his exchanges with the Bench during his submissions, Mr Pouvalu conceded the inevitable outcomes set out below.
21. Firstly, the Court cannot order the eviction of the first and second defendants from the land because the plea proceeds from the premise that the land belongs to the plaintiff. That has not been, and cannot be, established on the evidence in the proceeding. Moreover, that very issue is presently before the Minister, who is yet to determine which of the applications of Kilifi or Livimai and Sisiloni is to be granted. Kilifi has submitted a claim to the land, as he is entitled to do pursuant to s.43 of the Act. His claim is supported by the estate holder. Other enquiries as to whether the land is available as required by s.50 have yet to be completed. It is also noteworthy that the rules for allotments of land prescribed by s.50 are premised on land being available in the estate in which the applicant is resident. Kilifi is resident in the United States.
22. Secondly, for the same reasons, the Court cannot presently make an order in favour of Kilifi for possession of the house built by Tanaki situated on land the subject of applications for grant yet to be determined by the Minister. No doubt, as his internal memorandum made clear, the fact of and history behind the construction of the two houses on the land is likely to be a relevant consideration for the Minister in his enquiries and determination as to whether the land is available for grant, and if so, to whom.

23. At the conclusion of the second hearing, Tanaki addressed the Court directly and asked whether, if the Minister did not grant the land to Kilifi, he – Tanaki - would be entitled to remove the house he built. As recounted recently in *Mahe v Mahe* [2020] TOSC 14 at [79], 'it remains a curious idiosyncrasy of Tongan land law that houses or other buildings in general are regarded as items of personal property rather than accreting to the land and thus forming part of the realty'.² Accordingly, in that event and provided there is no dispute as to that house belonging to Tanaki and no other legal or equitable impediment to his claim over it, it will remain his personal property and he will be entitled to remove it from the land.
24. Thirdly, Mr Pouvalu submitted that the Court ought cancel Livimai's application for two reasons, namely, that he:
- (a) is an illegitimate son of Sefu Latu; and
 - (b) already has a town allotment registered in his name.
25. While legitimacy is a requirement for succession to a tax or town allotment under s.82(b), it is not a requirement for the granting of an allotment per ss 7, 43 or 45. None of the competing claims here are based on the succession rules. The first ground therefore fails.
26. As to the second, there was no objective evidence before the court that Livimai is the registered holder of a town allotment, which might thereby disqualify him from being able to apply for the town allotment here (s.48). At paragraph 17 of his brief of evidence, Kilifi asserted that "Livimai is currently living in his own land". Despite calling Mr Moala from the Ministry to give evidence twice during the hearings, Mr Pouvalu did not seek to adduce evidence through Mr Moala from the Ministry registers on this issue. Therefore, this ground too must fail.

² *Kolo v Bank of Tonga* [1997] Tonga LR 18; *Cowley v Tourist Services Ha'apai Ltd and Fund Management Limited* [2001] Tonga LR 183 (CA); *Westpac v Fonua* [2014] Tonga LR 94 at [14]; *Veamatahau v Tulikifanga* [2015] TOSC 32 at [25].

27. Should it transpire that the Minister's enquiries identify that Livimai is the registered holder of a town allotment, that will no doubt be determinative against his application for any part of the land here.
28. In relation to Sisiloni's application with Livimai to subdivide the land and register the two lots in their names, Sisiloni is not a party to the proceeding. It is therefore not open to the court to interfere with his rights without him being joined as a party with commensurate rights to be heard before any order may be made adverse to his interests. No such application for joinder was made. Further, and in any event, Mr Pouvalu was unable to identify any factual or legal basis for Sisiloni's application to be cancelled.
29. Fourthly, there is no basis in fact or law, and it is therefore presently not open to the court, to order that the land be granted to Kilifi and registered in his name. His application is presently before the Minister. It is to be considered and weighed against the application by Livimai and Sisiloni and by reference to all other relevant information presented and derived through the investigative work which the Minister has directed to be undertaken.
30. As noted above, the fact that Kilifi has the consent of the estate holder is a relevant factor in the Minister's deliberations, but it is not determinative to the Minister's statutory role in granting allotments (ss 19, 50). That principle is reflected in s.34(2) which requires the Minister to consult the holder and hear any objections he may make to the grant being made, but that if the Minister and the estate holder estate fail to agree, the Minister shall nevertheless grant the land which may be reviewed within three months by the Court.

Result

31. For the reasons stated, the Plaintiff has not demonstrated an entitlement to any of the relief claimed in this proceeding.
32. There is no impediment to the Minister proceeding to make all reasonable enquiries in relation to the land and to consider the applications by Livimai and Sisiloni on the one hand and Kilifi on the other. It is a matter for the Minister to

take into account all relevant considerations and requirements of the Land Act in deciding to whom to grant the land.

33. If, after the Minister has decided the matter, any of the current applicants are dissatisfied with the decision by reason of the process and/or approach, legal or otherwise, taken by the Minister to the task, it may be open to that party to issue fresh proceedings in this Court seeking a review of the Minister's decision. Until then, they must await the Minister's decision.
34. Accordingly, the Plaintiff's claims herein are dismissed.
35. No order as to costs.

NUKU'ALOFA
30 September 2020



A handwritten signature in blue ink, which appears to read "M.H. Whitten".

M.H. Whitten QC LCJ
PRESIDENT