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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 19 of 2019

BETWEEN : JIN MING HE

- Plaintiff

AND : LOKA KANONGATA'A

- Defendant

BEFORE HON. JUSTICE NIU AND ASSESSOR TOUMO'UA

Counsel : Mrs. P. Tupou KC for the plaintiff
Mr S. Tu'utafaiva for the defendant

Trial : 22 October 2020

Submissions : by Mr. Tu'utafaiva on 11 November 2020
by Mrs. Tupou KC on 30 November 2020

Ruling : 11 December 2020.

RULING

The facts

- [1] The facts are not in dispute. A man named Viliami Kanongata'a (Senior) held a town allotment at Ma'ufanga in the estate of Noble Fakafanua. It had an area of 2 roods 14.8 perches. His name was entered in a book called the "Register of Town Allotments, Tongatapu" as holder of the town allotment on 16 September 1937.
- [2] He died on 10 September 1976 and the allotment was transferred to his widow, Soana Kanongata'a, on 17 November 1976.

- [3] On the following day, 18 November 1976, the Minister of Lands directed that 30.8 perches be cut off from the town allotment as shown in a plan he attached and that a deed of grant containing the remainder of the allotment, being 1 rood 24 perches, be drawn up in the widow's name.
- [4] The required survey fee of \$17.50 for the surveying to be carried out had been paid on 17 November 1976, on receipt no.833560.
- [5] The surveying was duly carried out and 30.8 perches were surveyed off from the southern end of the allotment leaving the allotment with the exact area of 1 rood 24 perches which was duly demarcated with numbered survey pegs planted in the ground.
- [6] A deed of grant was drawn up in the name of the widow, Soana Kanongata'a, showing the remainder of 1 rood 24 perches as the area of the allotment in a diagram drawn on the deed and showing the positions of the survey pegs and the number of each peg. It had the number of the book of register of town allotments, book no.108, and the page (or folio) number in that book which this deed of grant would constitute, page 37, written on it. All that remained to be done was for the Minister to date and sign it.
- [7] Despite not having been dated and signed, that deed of grant of Soana Kanongata'a was bound up as page 37 in the book no.108 and kept in the office of the Minister as having been duly registered according to law.
- [8] On 7 October 2001, the widow, with the written consent of the eldest son and heir of Viliami Kanongata'a, who was also named Viliami Kanongata'a (Junior), wrote to the Minister to surrender 30 perches of the allotment so that the next eldest son, Le'ula Kanongata'a, could apply to hold it as his town allotment.
- [9] However, the letter omitted to specify, and no plan was attached to show, which part of the allotment was to be surrendered. All that it stated was that 30 perches of the allotment were to be surrendered.

- [10] The request for surrender was submitted to Cabinet and Cabinet, by its decision no.71 of 23 January 2002, approved it. The Ministry notified the widow by letter dated 28 January 2002 and required her to pay the costs of \$36.00 for the publication of the surrender in the newspaper 3 times. The \$36.00 was paid directly to and was receipted by the newspaper on receipt no.48135 on 29 April 2002. The Minister signed the notice of the surrender for publication on the same day, 29 April 2002.
- [11] No claim was made by anyone as heir for the surrendered 30 perches in accordance with the notice published, that is, by the deadline of 28 April 2003.
- [12] The widow, Soana Kanongata'a, died on 21 October 2003. The allotment was then transferred to Viliami Kanongata'a (Junior) on 8 March 2004.
- [13] On 12 June 2006, Viliami Kanongata'a (Junior) signed his consent to the grant of a lease of 32 perches of the allotment to their sister, Melesete Pouanga, and her husband, Nafetalai Pouanga, for 50 years at \$50 rent per annum. A plan of the 32 perches to be leased was drawn on the reverse side of the application form – as being the half of the allotment to the east.
- [14] That application was approved by Cabinet, by its decision no.704, on 30 June 2006. Surveying was carried out and the land was duly pegged with numbered pegs and the deed of lease no.7604 was signed and registered by the Minister on 10 June 2008.
- [15] Prior to that, namely on 5 August 2007, an application form was filled in for the grant of a town allotment of 30 perches for Le'ula Kanongata'a in pursuance of the surrender which was approved by Cabinet on 23 January 2002. However, that application had not, and has not, been approved by the estate holder, Noble Fakafanua, and it had not been lodged with the Minister or his office up to now.

- [16] On 2 April 2009, Viliami Kanongata'a (Junior) died and the allotment was transferred to his widow, Laukau Kanongata'a, on 21 April 2009. She has held the allotment up to now.
- [17] On 20 December 2012, a new deed of grant was granted by the Minister posthumously to Viliami Kanongata'a (Junior), and he had it registered by binding it as page (or folio) 100 in book no.405 showing exactly the same survey pegs and area shown in deed of grant book 108 folio 37. On the reverse side of folio 100, it recorded that this was the allotment held and registered in Viliami Kanongata'a (Senior) on 16 September 1937 and transferred to his widow on 17 November 1976 and to his son, Viliami Kanongata'a (Junior), on 8 March 2004 and transferred to his widow, Laukau Kanongata'a, on 21 April 2009.
- [18] On 3 August 2018, Cabinet approved the transfer of the lease no.7604 by its decision no.567, from Nafetalai Pouanga and Melesete Pouanga to Sosefo Vaifo'ou and that transfer was registered by the Minister on 12 October 2018 as lease no.7604 A.
- [19] On 2 November 2018, by its decision no.978, Cabinet approved the further transfer of lease no.7604A from Sosefo Vaifo'ou to Jinming He (the plaintiff) and that transfer was registered by the Minister on 9 November 2018 as lease no.7604B. In consideration of the transfer of the lease to him, the plaintiff paid \$60,000 to Sosefo Vaifo'ou.
- [20] At this time, there was no one occupying or using the land of the lease. On or about 5 June 2019, two truck loads of soil were caused to be dumped on the land of the lease by the defendant and when the plaintiff went to ask him why he was doing that, the defendant told him that he was not to come to the land again.
- [21] The plaintiff had counsel Mr. Clive Edwards, write to the defendant and asked for his reason for stopping the plaintiff, and the defendant had counsel, Mr. Tu'utafaiva, respond to say that the area leased by the plaintiff had already

been surrendered in favour of Le'ula Kanongata'a and Le'ula Kanongata'a had instructed him to look after the land for him.

[22] The plaintiff filed his claim in this action on 16 September 2019 claiming that the defendant has trespassed on the land of the lease and claimed damages for the same.

[23] The defendant filed his defence on 25 October 2019 (after having been served with the claim on 29 September 2019) that the lease of the plaintiff was unlawful because the lessor, Viliami Kanongata'a (Junior), was not a registered holder of the allotment (at the time of the grant of the lease no. 7604 on 10 June 2008).

[24] The defence also claimed that the defendant was always in possession of the land of the lease since about 2012 and that he had filled the swampy area in it since about 2012. However, that was not admitted by the plaintiff and no evidence was given about it because the defendant gave no evidence and called no witness.

The issues

[25] There are two main issues to be decided in this case:

- (a) Was the area of 30 perches of the allotment validly surrendered by the widow, Soana Kanongata'a, when Cabinet approved it on 23 January 2002?
- (b) Was the lease no.7604 validly granted by the Minister to Nafetalai and Melesete Pouanga on 10 June 2008?

Was the surrender valid?

[26] Mr. Tu'utafaiva did not argue whether or not the surrender was valid. He simply assumed that the surrender by the widow was valid because it was approved by Cabinet and no claim for the surrendered land was made by the heir, Viliami Kanongata'a (Junior), by the deadline published in the notice, the 28 April 2003. He argues that the surrendered 30 perches reverted to

the estate holder, Noble Fakafanua, on that date, and that it no longer formed part of the allotment.

- [27] He argues that when the allotment was transferred to Viliami Kanongata'a (Junior) on 8 March 2004, the allotment only comprised the 34 perches which was to the west of the allotment. He says that, accordingly, the purported grant by Viliami Kanongata'a (Junior) of a lease of the 30 perches to the east of the allotment was invalid because those 30 perches had already reverted to Noble Fakafanua.
- [28] Mrs. Tupou similarly did not argue whether or not the surrender was valid either. She simply argued that the surrender was valid as well but that because no specific part of the allotment was the area surrendered, the surrendered area would and should be treated as being part of 34 perches remaining in the widow and which is to the west of the allotment, so that the 32 perches to the east still remained as the allotment and was subsequently and validly leased by Viliami Kanongata'a (Junior) to his sister and her husband.
- [29] She points out that Noble Fakafanua had not taken any steps to claim the 30 perches to the east as having reverted to him since 2003 or since the lease was granted in 2008.
- [30] What both counsel fail to appreciate and to have considered is that the widow had not specified the particular part of the allotment which she wanted to surrender for her second son, Le'ula. By failing to do so, no part of the allotment was surrendered.
- [31] And the reason for that is because the surrender could not have been enforced against her, the widow. Noble Fakafanua could not have been able to specify which part of the allotment had reverted to him. And even while the widow was still alive, she could not have been forced to specify which part she had intended to surrender because she could decide not to specify any part.

[32] Furthermore, the procedure under which she was to surrender the 30 perches of the allotment was the same procedure that is provided under S.54 of the Land Act. That is because the right of a widow to surrender her allotment or a part thereof is not provided for under S.54 or elsewhere in the Act. But the Minister has adopted the procedure under S.54 as the procedure to be followed in respect of a surrender to be made by a widow. This Court has upheld that procedure in the case of *Tu'akoi v Tu'akoi and Minister of Lands* [2016] Tonga LR 243.

[33] S.54(1) provides that ... "any allotment or any part thereof so surrendered shall, subject to the provision of this Act, **immediately** devolve ...". Subsection (2) also provides "... failing which the said allotment or part thereof **will revert** to the estate holder". I underline the words "immediately" and "will revert". They both convey the clear intention that the devolvement of the surrendered part "**shall immediately occur**", and that if no claim is made then the surrendered part "**will revert**" to the estate holder.

[34] But if the purported surrender is of an unspecified part of an allotment, there is then no "immediate devolvement" until such part is specified. That was never the intention of the procedure. The witness, Semisi Moala, the Land Registrar of the Ministry of Lands, stated in his evidence that it was required by the procedure that the widow specify the part of the allotment that she wished to surrender but she failed to do so and that the Ministry overlooked to require her to do so.

[35] I therefore find, and I hold, as a matter of law, that because the widow, Soana Kanongata'a, had failed to specify which 30p of the allotment she was wishing to surrender, her purported surrender of 30 perches of her town allotment was ineffective, and no part of said town allotment was surrendered.

Was the grant of the lease no.7604 valid?

[36] Mr. Tu'utafaiva has submitted that the grant of lease no.7604 by Viliami Kanongata'a (Junior) to Nafetalai and Melesete Pouanga on 10 June 2008

was unlawful because he, Viliami Kanongata'a, was not a "registered holder" of the town allotment at the time he purported to make that grant. He says that S.56 of the Act requires that only a registered holder of an allotment can grant a lease of such allotment or part thereof.

[37] He argues that a registered holder is a holder to whom the Minister of Lands has issued a deed of grant, and because Viliami was not issued with any deed of grant on or before the date of grant and registration of said lease, he was not a registered holder and accordingly could not have lawfully granted the lease no.7604 to Nafetalai & Melesete Pouanga.

[38] S.56 of the Act does in fact provide as Mr. Tu'utafaiva has submitted. It provides:

"56. The registered holder of a town or tax allotment may grant a lease over the whole or part of his town or tax allotment, provided that –

... "

[39] Sections 120 and 121 provide for registration of allotments. They provide as follows:

"120. All deeds of grants of allotments shall be in duplicate and in the form prescribed in Schedule V and in addition to proper words of description shall contain a diagram of the land.

121. The Minister shall sign and deliver to the grantee one duplicate and shall register the other by binding up the same in a book to be called the register of allotments."

[40] Mrs. Tupou agrees that S.56 does provide as Mr. Tu'utafaiva has argued but she argues that the purpose of requiring that the title of the allotment holder is registered for the purpose of granting a lease over the allotment is to ensure the holder is the rightful owner of the allotment. She argues that such requirement of registration should not be strictly applied because the Courts

have repeatedly held that registration is only evidence and not the test of ownership of an allotment. She duly referred to those case authorities.

[41] She further argues that if there is indeed a defect in the title of lease no.7604, the plaintiff is a bona fide purchaser of that lease for value without notice of the defect in the title of that lease, and she submits that the Court is obliged in equity to protect the interest purchased by such innocent purchaser.

[42] In respect of Mrs. Tupou's point that the ownership of this allotment by Viliami Kanongata'a (Junior) was and is never in doubt and that S.56 is concerned with confirmation only of that ownership by issue of deed of grant for the allotment, I have to say S.56 is also concerned with verification of the actual physical limits and boundaries of the allotment, which can only be done by the issue of a deed of grant of the allotment. The deed would ensure that a lease granted over the whole allotment or over a part of the allotment is assured to be within the land of the allotment. Accordingly, S.56 is concerned not only with the lawful ownership of the allotment but also with the correct physical boundaries of the allotment, which only a deed of grant would ensure.

[43] So that if Viliami Kanongata'a (Junior), who had granted the lease no.7604 was not a registered holder, then Mr. Tu'utafaiva would be correct in submitting that Viliami Kanongata'a had no authority to grant the lease at all and the lease would indeed be invalid. And being so invalid, no subsequent transfer thereof thereafter, as lease 7604A or 7604B, was valid.

[44] However, both counsel failed to consider the provisions of the proviso to S.80 of the Act, and I quote the whole provision of S.80 as follows:

"80. On the death of the lawful male holder of any tax or town allotment his widow shall be entitled to a life estate in such allotment which estate shall terminate on her re-marriage or upon proof in legal proceedings of her having committed fornication or adultery:

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 widow of a life estate 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 widow."

- [45] That provision authorises the Minister, if satisfied that the deceased holder was the lawful holder of the said allotment, to effect the registration of the allotment in the name of the deceased holder although he has already died. The word "posthumous" means "occurring after death", and the proviso authorises the registration of the allotment in the deceased's person as if he was still alive.
- [46] The effect of such posthumous registration is that the deceased holder is deemed by law to have been a registered holder from the moment that he had become the lawful holder of the allotment, because it was at that moment that he had failed to have had the allotment registered under the provisions of Division II of Part VIII of the Act.
- [47] As stated in paragraph 12 above, Soana Kanongata'a (the widow of Viliami Kanongata'a (Senior)) died on 21 October 2003, and within 5 months, the allotment was transferred to and was lawfully held by Viliami Kanongata'a (Junior) on 8 March 2004. It was at that moment, 8 March 2004, that he was the lawful holder of the allotment and it was at that moment that he failed to have the allotment registered in himself.
- [48] Accordingly, when the Minister posthumously registered the allotment in Viliami Kanongata'a (Junior) on 20 December 2012 by issue of the deed of grant Book 405 Folio 100 to his widow, Laukau Kanongata'a, Viliami Kanongata'a (Junior) thereupon immediately became a registered holder of the allotment as from that said date, 8 March 2004.

[49] Therefore, Viliami Kanongata'a (Junior), the lessor of lease no.7604, was a registered holder of the allotment when he granted that lease to Nafetalai and Melesete Pouongo on 10 June 2008 by a legal fiction which was expressly provided for under S.80 of the Act.

[50] Accordingly, I find and I hold that the grant of lease no.7604 was valid.

Trespass

[51] Because the lease was validly granted, its transfer from Nafetalai and Melesete Pouanga to Sosefo Vaifo'ou, and from Sosefo Vaifo'ou to the plaintiff were valid. And although the plaintiff had not gone into occupation or physical possession of the land of the lease, he was lawfully entitled to immediate and exclusive possession of the land thereof because he has proved his lawful title and his right to possess the land: **Heuston, Salmond on Torts**, as referred to by Mrs. Tupou in her submissions.

[52] That is confirmed by the deed of lease no.7604 itself: "that in consideration of the payment of the yearly rent that is recorded in this deed and the performance of the covenants in this Deed by the Lessee ... the Lessor leases to ... the Lessee all that piece of land ..." That same deed of lease is now lawfully held by the plaintiff as the Lessee, and the term Lessee means the plaintiff.

[53] Trespass to land is an unjustified direct interference with the land in the possession of another and it is actionable per se without proof of actual damage. This land of lease no.7604B was in the possession of the plaintiff (because he had the right to immediate and exclusive possession of it) and the defendant unlawfully caused 2 truckloads of soil to be dumped on it. He also obstructed and prohibited the entry of the plaintiff onto the land.

[54] The defendant has failed to prove that he was lawfully justified to carry out those actions. It was his obligation in this trial to prove that he was so lawfully justified and he has failed to prove that. His defences that the surrender was valid and that the grant of the lease was invalid have both failed.

[54] The defendant has failed to prove that he was lawfully justified to carry out those actions. It was his obligation in this trial to prove that he was so lawfully justified and he has failed to prove that. His defences that the surrender was valid and that the grant of the lease was invalid have both failed.

[55] I therefore find that the plaintiff has proved his claim of trespass against the defendant.

Damages

[56] The plaintiff has claimed \$5,000 as damages for the continuing trespass of the defendant since 5 June 2019 when he caused the 2 truckloads to be dumped on the land and for refusing to vacate it up to now. He also claims \$10,000 for the defendants interference with the land. However, he gave no evidence and provided no factual basis upon which he claims those amounts.

[57] What he is allowed to claim is the decrease in the value of the land which has been caused by the trespass committed.

[58] Evidence was given by the plaintiff and I accept that he paid \$60,000 to Sosefo Vaifo'ou to obtain the transfer of the lease from Sosefo Vaifo'ou to him. At the time that he lawfully received the lease, November 2018, there was about 40 years 6 months of the lease remaining.

[59] If I divide the \$60,000 by the remaining number of years of 40.5, I would have a sum of \$1,481.48. That is the value of each year which the plaintiff purchased. Because the defendant has caused the plaintiff to be deprived of his entitlement to use the land of this lease from 5 June 2019 up to now, a period of some 18 months (1.5 years), I can and I should reasonably assess the loss or damage which the defendant has caused to the plaintiff by multiplying the sum of \$1,481.48 by the 1.5 years. I thereby get the figure of \$2,222.22. That is the amount of damages which the defendant has caused to the plaintiff.

- (b) The defendant shall pay damages to the plaintiff in the sum of \$2,222.22.
- (c) The defendant shall forthwith, and no later than 14 days from the date of these orders, vacate the land of lease no.7604B together with all his properties.
- (d) The defendant shall pay the costs of the plaintiff, to be taxed if not agreed.



A handwritten signature in black ink, appearing to be 'Niu J', written over the seal.

Niu J
J U D G E

Nuku'alofa: 11 December 2020.