

IN THE LAND COURT OF TONGA

NUKU'ALOFA REGISTRY

LA 4 of 2020

BETWEEN : TALI-KI-HA'AMOA FATAFEHI
- **Plaintiff**

AND : 1. SIONE AFEMEIMO'UNGA
- **First Defendant**

2. MELE'ANA AFEMEIMO'UNGA
- **Second Defendant**

3. LORD LAVAKA
- **Third Party**

4. MINISTER OF LANDS
- **Fourth Party**

BEFORE HON. JUSTICE NIU AND ASSESSOR TOUMO'UA

Counsel : Mr S. Fonua for plaintiff.
Mr. V. Latu for first and second defendants.
Mr. S. Taione for third party.
Mr. S. Sisifa for fourth party.

Trial : 14 – 16 December 2020.

Submissions: by Mr. Fonua filed 25 January 2021.
by Mr. Sisifa filed 26 January 2021.
by Mr. Taione filed 4 February 2021.
By Mr. Latu filed 8 February 2021.

Ruling : 19 February 2021

RULING

The claim

- [1] The plaintiff claims that the defendants are unlawfully residing upon a town allotment at Pea, in the estate of Noble Lavaka, the third party, which the fourth party Minister of Lands has lawfully granted to him and which has been registered in his name by issue of a deed of grant to him, with the consent of the estate holder, Noble Lavaka.

The defence

- [2] The defendants, who are husband and wife, say that they have been lawfully residing upon the allotment since 1992 and that the Minister has made the grant of the allotment to the plaintiff, in 2019, without having afforded to them any opportunity of being heard.
- [3] They also say that there was and there is already situated on the allotment a dwelling house in which they were and are residing and that the allotment was therefore not available to be granted to the plaintiff.
- [4] They also say that the representative of the estate holder, who had presented the plaintiff's application for the allotment to the estate holder, had misrepresented to the estate holder that all the persons connected with the allotment had agreed that the allotment be granted to the plaintiff because the defendants, who were connected with and who were the ones residing upon the allotment, were not consulted and they had not so agreed.

The facts

- [5] The relevant facts are not really in dispute. The following are what I have found have been proved by the evidence.
- [6] Tuitu'u Folau (Tuitu'u), a man from Ha'apai, married Heilala, a woman of Pea, Tongatapu, and they lived on the piece of land in question in about the 1950's and had 4 sons and 2 daughters.
- [7] Evidence was given that a man named Sioeli Leone was living on this land and that he shifted to another piece of land and allowed Tuitu'u and Heilala to have this land.
- [8] Tuitu'u and Heilala built a wooden house on the land and they lived there with their 6 children.

- [9] Their eldest son, Tali, went to the US and worked and in 1992 he sent the money with which the wooden house was pulled down and a substantial concrete foundation and concrete block wall dwelling house and verandah was built in its place, with the help of the children in Tonga at the time.
- [10] The house was then occupied by Tuitu'u and Heilala, their elder daughter, Fane, and her children, Tali (Jnr), Piukala and Kaufusi, and their 2 sons, Lisiate and Leone.
- [11] In the same year, Fane's husband, returned from the U.S. and Fane and her husband and their 3 children left and lived on another piece of land which was one town allotment away from this piece of land. They have lived there up to now.
- [12] The younger daughter, Mele'ana, and her husband, Sione Afemeimo'unga, then came from Haveluloto where they were staying and lived with and looked after Tuitu'u and Heilala in the new house on this piece of land.
- [13] In the same year 1992, Tuitu'u died. In the following years Lisiate left, and in 1998, Leone got married and went and lived elsewhere in Pea. There were then only Heilala, Mele'ana and Sione and their children living in the house on this land. Sione and Mele'ana are the defendants.
- [14] In 2007, Fane's eldest son, Tali (Jnr) was married and he continued to live with his wife with Fane and Sione Fatafehi and their children on the land which was one allotment away. In the same year, Tali (Snr) came from the US for the opening of the new St. Paul Church building of the Wesleyan Church at Pea. Heilala told him that the allotment (on which he had had the dwelling house built) be Tali (Jnr)'s, and Tali (Snr) agreed to it. Tali (Snr) returned to the U.S.
- [15] In the following year 2008, Fane drove Heilala over to see the representative of the estate holder in Pea, Finau Hufanga ("Na'ahokonga") and told him that she wanted the piece of land in question registered in Fane's oldest boy's name, Tali (Jnr). Na'ahokonga came to the house with the application form for the allotment to be signed by Tali (Jnr).
- [16] Mele'ana spoke words to the effect that she was not happy with Tali (Jnr) having the land she was living on because the allotment was her home. Heilala told her to be quiet because the matter had nothing to do with her. Mele'ana said no more and left the room. Na'ahokonga was there at the time with the application form.
- [17] The application form was signed by Tali (Jnr) but not dated and it was forwarded by Na'ahokonga to the estate holder together with a letter from him

to the estate holder wrongly dated "19.98.08" but is accepted to be "19.08.08". In that letter, Na'ahokonga informed the estate holder that Tuitu'u and Heilala occupied and kept this town allotment for many years with their 6 children. He told him that two of the sons were living overseas and that one son has his own town allotment in Pea. He said that Tuitu'u died in 1992 and that the widow Heilala was still living on this town allotment with the rest of the children and the grandchildren. He said that the applicant was one of the grandchildren and that he was living on the allotment and that everyone agreed that this allotment be registered in his name.

- [18] The application form was signed by the estate holder, Lavaka, on 10 February 2010 and Na'ahokonga signed it as witness on 12 February 2010.
- [19] It appears that the application form did not get to the Land Office until 4 June 2015, the date of payment of the survey fee of \$46.00 for the application. A copy of Na'ahokonga's letter of 19.08.08 appears to have got to the Land Office on 10 July 2015.
- [20] On 20 June 2016, Tali (Jnr), the plaintiff, wrote to the Minister, the fourth party and, among other things, told the Minister: "I wish to state here Honourable Minister, there was agreement and understanding between the widow and the rest of the children in peace and happiness to carry out this work as soon as possible to get this piece of land because we were all born on it and it has become part of our lives". And later on he said, "Unfortunately, after the mother died, hidden disagreements have now shown through to this proposal that was done ... especially the younger sister of my mother". The younger sister is the second defendant, Mele'ana.
- [21] On 29 November 2016, counsel for the plaintiff wrote to both defendants and told them to stop the work that he was told they were doing to the house on the allotment because the estate holder Lavaka and the Minister of Land had both agreed that the allotment be granted to the plaintiff. He informed them that they had to vacate the allotment within one month from the date of the letter.
- [22] On 30 November 2016, Tali (Snr.), the eldest son, wrote to the Minister and told him that as he was the eldest son of Tuitu'u and Heilala, he wanted his younger sister (Mele'ana) and her husband to remain and continue to occupy the allotment until he returned from the U.S.
- [23] On 19 December 2016, an officer of the Land Office, Sharon Fosita, attended and inspected the allotment. She made a report of that inspection. In that report she stated that the allotment was occupied by the defendants and that there was a building and improvements and a mango tree and a breadfruit tree

on the allotment, and that water, electricity and telephone were supplied to it. She drew a sketch map and she took a photograph of the dwelling house.

[24] She also wrote on it her interview of the second defendant, Mele'ana. She said that the dwelling house had been built by Tali (Snr) in 1993 for their parents to live in but that they have both died and that Mele'ana the younger sister of Tali (Snr) is now living in it and looking after the allotment. She said that Mele'ana is living in it with the consent of Tali (Snr).

[25] The photograph shows the dwelling house as a substantial and permanent construction.

[26] On 17 July 2019, an officer, Polotu Lomu, prepared and forwarded a brief to the Minister of Land on the application of Tali (Jnr) for this allotment. She stated in it:

- i. Subject land was allocated to Tuitu'u Folau but he passed away without applying for registration.
- ii. Tuitu'u and his wife wishes to give the said land to Tali (applicant) since he is their grandson.

Site inspection: Yes

Occupied by Mele'ana Afemeimo'unga (Tali's aunty) upon the permission of Tali since he travels very often to the USA. She has been acknowledged about this application since the premises was built by Tuitu'u and his wife in intention to Tali.

Background

- i. The applicant wishes to register the said land.
- ii. The estate holder consents – 10.02.2010.
- iii. Survey fee: Rec.310582 – 04.06.2015 \$46.00.

Recommendation

1. Sign the Savingram."

[27] Attached to the brief was a draft savingram for the Minister to sign and date, directing the Secretary to prepare the deed of grant of Tali (Jnr). for this town allotment for registration.

- [28] On 29 July 2019, the Minister of Lands signed and dated his approval of the recommendation on the brief prepared by Polotu Lomu and he dated and signed the attached draft savingram on the same day.
- [29] On 2 August 2019, a letter was forwarded from the Secretary of Lands to the defendants and informed them that the Minister had approved the grant of the town allotment on which they were living to Tali (Jnr) and required them to vacate the allotment.
- [30] On 13 September 2019, the Minister of Lands signed and issued and registered the deed of grant book 463 folio 9 in the name of the plaintiff.
- [31] The plaintiff Tali (Jnr), filed his present claim against the two defendants, Sione and Mele'ana, on 18 March 2020.
- [32] The matter was discussed in chambers on 15 June 2020 and I ordered that the estate holder, Noble Lavaka, be joined as third party and that the Minister of Lands be joined as fourth party.

The law

- [33] All counsel have made detailed submissions in law on those facts and I find that I have to consider several questions in order to address them.

Who owns the dwelling house on the allotment?

- [34] It is not disputed that Tali (Snr) built the house. He sent the money from the U.S. for the material and the labour here in Tonga. Although the brothers and sisters here in Tonga helped with the labour, they were paid by Tali (Snr). Tali (Jnr) said in his evidence that everyone including himself, who may have been 10 years old at the time, was paid for his labour. The old house of Tuitu'u and Heilala was pulled down and the new house which did not include any material from the old house was built in its place. No doubt the old house was disposed of as Tuitu'u and Heilala decided.
- [35] In 2016, when Mele'ana (second defendant) was interviewed by Sharon Fosita on her inspection of the allotment, she told Sharon that the house was built by Tali (Snr) for their parents, Tuitu'u and Heilala, to live in, and now they have died, Tali had authorised her to live there with her family and look after it and the allotment. That was not disputed by any witness for the plaintiff or the third and fourth parties. And that was supported by Tali (Snr)'s letter to the Minister of 30 November 2016.
- [36] It was therefore wrong for the officer, Polotu Lomu, to have stated in the brief to the Minister which she prepared on 17 July 2019 that –

- (a) the house had been built by Tuitu'u and Heilala, and that
- (b) they had built it with the intention that it became Tali (Jnr's).

[37] I asked Tali (Jnr), the plaintiff, myself, what he thought was to happen to the house on the allotment if he was to be granted the allotment, such as he said Heilala and Tali (Snr) had agreed to do in 2007. He said that he understood that the house would become his as well as the land.

[38] That might well have been a gift of the house by Tali (Snr) to Tali (Jnr) and Tali (Jnr) might well now be the owner of the house. But for a verbal gift of a chattel (and the house is a chattel in Tongan law), there must be delivery of possession of the chattel to the person to whom the gift is given before the gift becomes effective and binding. However, in the present case, at the time of said gift, the possession of the house was with Mele'ana and her husband, and Tali (Jnr) was living with his own parents at the allotment next door but one. He had been living there since 1998, according to his own evidence, and he has not lived on this allotment or in the house up to now. It is therefore clear that if Tali (Snr) had meant to gift him the house, that gift was incomplete because there was no delivery of possession of the gift to him. There was of course no evidence that the keys to the house were given to him at any time.

[39] In fact, Tali (Snr) has confirmed in his letter to the Minister on 30 November 2016 that he had given possession of the house to his sister, Mele'ana, to look after for him, meaning that he still owned it and that he could grant possession of it. No one has ever disputed that.

[40] I therefore have to accept, on the facts, that the dwelling house on the allotment belonged to and continues to remain as the property of Tali (Snr).

Were the defendants in lawful occupation of the allotment?

[41] It was never doubted that Tuitu'u and Heilala were in lawful occupation of this allotment, ever since it was "allowed" to them by Siieli Leone in the 1950's. Na'ahokonga said in his evidence when cross-examined by Mr. Latu that before he was appointed in about the year 2000 as representative of the estate holder, Lavaka, there was no representative appointed for the estate holder and there were a lot of problems and so he was appointed to represent him. Because there was no representative at the time Siieli Leone gave the allotment to Tuitu'u and Heilala, and because Lavaka never required them to vacate the allotment, I have to accept that he was content to let Tuitu'u and Heilala live there. They were therefore in lawful occupation. The estate holder impliedly allowed them to build and live on it.

[42] Because they were in lawful occupation all their 6 children, who were born and raised on the allotment, were in lawful occupation of the allotment as well. And although Mele'ana (second defendant) had left and lived with her husband in Haveluloto, for a short period, she had to return with her husband to look after their parents because the older daughter, Fane, had left with her husband and children to live on their own town allotment. She would have only been away from the allotment from 1988 or so to 1992. And she has been on this allotment ever since up to now, a period of some 29 years. Not once in all those 29 years did the estate holder, Lavaka, had required her to vacate the allotment.

[43] I must therefore accept that the defendants have lawfully been residing on and occupying the allotment since 1992.

Was the estate holder aware that Mele'ana was unhappy with the proposed grant of the allotment to Tali (Jnr)?

[44] I have to accept that the estate holder, Lavaka, was not aware that Mele'ana, the one in occupation of the allotment, was not happy with the proposed grant of the allotment, because Na'ahokonga never told him. Na'ahokonga not only failed to inform Lavaka of that, he told Lavaka that everyone of the children and grandchildren had agreed that the allotment be granted to Tali (Jnr) which was of course not true at all. The only ones who had agreed were Heilala, Tali (Snr) and Tali (Jnr) and his mother, Fane.

[45] That failure of Na'ahokonga was a failure of Lavaka as well because Lavaka was responsible for the failure of his representative.

[46] The consequence of that failure was that Lavaka signed the declaration in Tali (Jnr's) application form in error. He signed and declared that there was no impediment to prejudice the grant of the allotment to Tali (Jnr) when in fact the allotment was lawfully occupied by the defendants and they were not agreeable to the allotment being granted to Tali (Jnr).

[47] Na'ahokonga knew that. He was present in the house because he brought the application form for Tali (Jnr) to sign. Mele'ana (second defendant) said to Heilala that "Api pe 'a fafine" (Allotment is for women) and Heilala told her to shut her mouth because she had no say in it or words to that effect. Na'ahokonga could not have missed or have misunderstood that because Mele'ana then ran off to the kitchen crying. Tali Jnr's wife gave evidence of that. She said that Mele'ana spoke the words "Api pe 'a fafine" loudly.

Was the Minister of Lands aware that Mele'ana (and her husband) were in occupation and were not agreeable to the proposed grant to Tali (Jnr)?

[48] I am satisfied that the Minister was aware that the defendants were in occupation of the allotment and that they were not agreeable to the proposed grant to Tali (Jnr), because:

- (a) in the letter of Tali (Jnr) to the Minister dated 20 June 2016, he told the Minister "Unfortunately, after the mother died, hidden disagreements have shown through ... especially the younger sister of my mother", who was of course Mele'ana;
- (b) the letter of counsel Tomasi Fakahua for Tali (Jnr) dated 29 November 2016 was addressed to Mele'ana and her husband (the defendants) to stop the work they were carrying out to the house and to vacate the allotment and the house within 1 month because he said the Minister had approved that the allotment be granted to Tali (Jnr). That letter confirmed that the defendants were in occupation of the house and the allotment, and a copy of that letter has been produced by the Minister as page 12 of his production of documents. I accept that he was aware of the contents of that letter at that time;
- (c) the letter of Tali (Snr) of 30 November 2016 to the Minister stated as follows: "In relation to the town allotment of Heilala and Tuitu'u Folau at Pea: I wish to inform you in this letter of my wish that my younger sister Langite Mele'ana Afemeimo'unga and her spouse and their children, who presently occupy the allotment, continue to occupy and look after my allotment, until I return";
- (d) the officer Sharon Fosita who carried out the inspection of the allotment for the Minister reported on 19 December 2016 that "the dwelling house on this town allotment was built by Tali Folau for his parents, Tuitu'u and Heilala, to live in and now they have died, his younger sister, Mele'ana Afemeimo'unga, is now residing on the allotment. Mele'ana is the younger sister of the mother of Tali Fatafehi and she is presently occupying and looking after the allotment";
- (e) if the Minister was not aware that Mele'ana and her husband and family were living on the allotment for 29 years, that was a failure of his officers to inform him for which failure he himself is responsible: *Tafa v Viau* [Tonga] LR 287 (CA).

Were the defendants entitled to be heard by the Minister before the Minister made his decision to grant the allotment (and house) to Tali (Jnr)?

[49] I am satisfied that the defendants having lived on this allotment and house with their children for 29 years, were persons who would adversely be affected by a decision of the Minister to grant the allotment on which they were living to another person, and they ought to have been afforded an opportunity of being heard by the Minister before the Minister made his decision on the plaintiff's application: *Tafa v Viau* (Supra), *To'a v Taumoepeau* (Unreported) LA 10/2012, *Hakeai v Minister of Lands & ors* [1996] Tonga LR 142; *Cocker v Palavi & anor* [1997] Tonga LR 203, and *Manu v 'Aholelei* [2015] Tonga LR 135.

[50] The Court of Appeal had stated in the case of *Hakeai v Minister of Lands & others* (Supra) at p.143:

"It is clear law that a person whose rights, interests or legitimate expectations are imperiled by an official's consideration of some other person's application will generally be entitled to a fair opportunity to be heard before a decision adverse to him is made. This is what is known as natural justice."

[51] That was applied by this Court in *Folau v Taione, Ma'afu & Minister of Lands* (Unreported) LA 6/2015 and by the Court of Appeal in *Naulu v Tupou and ors* (Unreported) AC 1/2015, 8 April 2016).

[52] I must also apply it in the present case.

Were the defendants afforded that opportunity of being heard?

[53] Clearly the answer is no. Mr. Sisifa argues that the defendants were afforded that opportunity when Sharon Fosita spoke with Mele'ana, the second defendant, but Sharon Fosita was not the Minister. Sharon had no authority to make the decision of Tali (Jnr)'s application. The Minister had. He was the repository of the power to make the decision.

[54] Besides, Sharon Fosita left and it was a different officer who conveyed the report to the Minister in her brief. That officer grossly misrepresented the position to the Minister, as follows:

(a) that the house had been built by Tuitu'u and Heilala, whereas it was built by Tali (Snr) instead;

- (b) that the house was built and intended for Tali (Jnr), whereas the house was built by Tali (Snr) for the parents, Tuitu'u and Heilala to live in;
- (c) that Tali, the applicant, for whom the house was intended, travelled very often to the U.S. and he accordingly left the care of the house in the aunt, Mele'ana Afemeimo'unga, and that Mele'ana was agreeable to the grant of the allotment to Tali (the applicant).

That was wrong because Tali (Jnr) did not travel often, if at all, to the U.S. There was no such evidence, and certainly there was no evidence that when he so travelled he left the house in the care of Mele'ana. And worse still, Mele'ana never agreed that the allotment be granted to Tali (Jnr), the applicant.

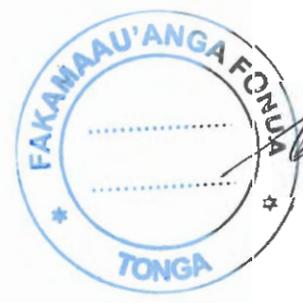
[55] I therefore cannot see how such a distortion of the facts, made to the Minister, may be said to be a fair representation of the defendant's side of the story for the consideration of the Minister.

Was the grant made to the plaintiff lawful?

[56] The answer is no. I am satisfied, on the facts which I have found and have stated, that the grant made to the plaintiff of the allotment, as evident by issue of deed of grant book 463 Folio 9 dated 13 September 2019, was made in breach of natural justice and was unlawful.

Orders

[57] Accordingly, I order that the claim of the plaintiff is dismissed with costs to the first and second defendants against the fourth party Minister of Lands, to be taxed if not agreed.



Niu J
J U D G E

Nuku'alofa: 19 February 2021.