

IN THE LAND COURT OF TONGA

NUKU'ALOFA REGISTRY

LA 11 of 2020

**BETWEEN : HM KING TUPOU VI**

- **Plaintiff**

**AND : 1. SEMISI KOTI PASIFIKI TONGA  
2. 'ALANI TONGA**

- **Defendant**

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

**Counsel : Mrs P. Tupou, KC for the plaintiff.**

: Mr. V. Latu for the defendants.

**Trial : 4 and 5 May 2021.**

**Submissions : by Mr. Latu filed on 26 May 2021.**

: by Mrs. Tupou filed on 15 June 2021.

**Ruling : 21 June 2021.**

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# RULING

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## The claim

- [1] The plaintiff is His Majesty, King Tupou VI, and he claims that he is the estate holder of the land which comprises a town allotment situated at the north western corner of Vaha'akolo Road and Salote Road, and that the town

allotment reverted to him by operation of law when the lawful holder thereof, Viliami 'Unga Hafoka, died leaving no lawful heirs thereto.

- [2] Viliami 'Unga Hafoka had built and lived in a wooden house on the allotment and towards the end of his life he lived with his customarily adopted son, Pasifiki Tonga and his wife and some of his own children. After Viliami 'Unga Hafoka died, Pasifiki Tonga asked and the plaintiff agreed that he and his family live there until he died. Pasifiki Tonga has died and although no one lives on the allotment, the two defendants, who are a son and grandson of Pasifiki Tonga, have continued to keep the house on the allotment and maintained the allotment by having the lawn mowed, although they live elsewhere themselves.
- [3] The defendants have refused to give up possession and control of the allotment to the plaintiff despite notices having been served upon them.
- [4] The plaintiff seeks orders to evict the defendants from the allotment, and nominal damage for their trespass thereat.

### **The defence**

- [5] The first defendant says that he did not and does not occupy or live on the allotment at all.
- [6] The second defendant says that he is a son of Taniela Tonga who is the eldest son of Pasifiki Tonga and that Taniela Tonga has applied to the plaintiff for the allotment, and that he is in lawful occupation of the allotment.

### **The facts**

- [7] The relevant facts which I have found are not really in dispute.
- [8] The allotment was initially granted to and was registered in one Viliami Lolo in 1921. He was also called Viliami Lolo Mana'ia. He married 'Alisi 'Ake but they had no children. He had an older brother, Viliami 'Unga Papalangi, and a sister, Seini Fataimoemanu.

- [9] Viliami 'Unga Papalangi had only a daughter, 'Ilaisaane Lineni, who in turn had a son Pasifiki Tonga who married Lilipeti Taukolo and had several children, the eldest of whom is Taniela who is the father of 'Alani, the second defendant. The third of Pasifiki Tonga's sons is Cotty (Koti), the first defendant.
- [10] Viliami Lolo's sister, Seini Fataimoemanu, married Siale Tonga Hafoka and they had 3 children, namely, Viliami 'Unga Hafoka (m), Taufa (f) and Popua (f), none of whom was married or had any children. Viliami 'Unga Hafoka adopted Pasifiki Tonga as his son and the two sisters adopted the mother of one of the witnesses, Samuela Molitika.
- [11] Upon Viliami Lolo's death, the allotment was transferred to his widow, 'Alisi. 'Alisi subsequently remarried and there being no heir or claim to the allotment, it reverted to the estate holder and it was then granted to and was registered in Viliami 'Unga Hafoka in 1942.
- [12] In about 1997, Viliami 'Unga Hafoka became ill and Pasifiki Tonga and his wife and some of his children came and lived with him in his wooden house on the allotment. He died on 4 December 2001 and no claim was made by any person as heir to the allotment and it reverted to the estate holder on 4 December 2002.
- [13] Pasifiki Tonga and his wife and family continued to live in and occupy the allotment and the wooden house which Viliami 'Unga Hafoka had built on it.
- [14] In January 2018, the plaintiff instructed his representative, whom he had appointed to look after his estates, Mr. Ratu David Mara, to require Pasifiki Tonga and his family to vacate the allotment. Upon being so informed, Pasifiki Tonga asked that he be allowed to remain there until he died and the plaintiff agreed. He (Pasifiki Tonga) died on 22 December 2018 and his family moved out but the second defendant continued to live there and kept the allotment mowed and had the electricity supplied to the house.
- [15] On 13 February 2019, the plaintiff instructed his representative and the representative caused a letter to be served upon the first defendant to vacate

the allotment within 21 days. Upon receiving and reading that letter that same day the first defendant told 'Asipeli Kupu who had signed and delivered the letter, that: "It's fine, we can go to Court. I understand you are only delivering the letter to me as part of your duties".

[16] The second defendant continued to live in the house and kept the lawn mowed until about January 2020 when the representative of the plaintiff caused the supply of electricity to the house disconnected. He moved out but he had a man, Lisiate Hala'ufia, who gave evidence, to continue to keep and he kept the lawn mowed.

[17] In about February 2021, Lisiate Hala'ufia was stopped from mowing the lawn and was told not to do any more mowing there by the witness, 'Asipeli Kupu, on instruction of the representative, Ratu David Mara.

[18] The claim of the plaintiff was filed on 30 July 2020.

### **The issues**

[19] Mr. Latu for the defence says that there are 3 issues to be decided:

- (a) Was there occupation of the allotment by the defendants?
- (b) Was the allotment in the control (possession) of the defendants?
- (c) Did the defendants trespass on the allotment?

[20] Mrs. Tupou for the plaintiff says that the 3 issues to be decided are:

- (a) Is the allotment in the possession of the plaintiff?
- (b) Is the plaintiff entitled to sue for trespass?
- (c) Did the defendants interfere with the plaintiff's possession of the allotment?

[21] I will deal with each of those issues in that order.

**Was there occupation of the allotment by the defendants?**

[22] It is not disputed that the allotment lawfully reverted to the plaintiff as estate holder upon the expiry of 12 months from the death of Viliami 'Unga Hafoka on 4 December 2001. Section 87 of the Land Act expressly provides for that, as follows:

“87. If no claim to a tax or town 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 or by the date specified in the notice made pursuant to section 54, such allotment if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder.”

That happened because no claim was made by any person as heir to this town allotment within 12 months from the death of Viliami 'Unga Hafoka.

[23] By operation of that provision of the Land Act, the plaintiff thereupon, on the 4<sup>th</sup> day of December 2002, was in lawful possession and control of the allotment and in everyday thereafter, and he impliedly authorised Pasifiki Tonga and his family, who had lived with Viliami 'Unga Hafoka before he died, to continue to live on and to occupy the allotment until he required them to vacate it.

[24] In February 2018, the plaintiff required them to vacate it and Pasifiki Tonga asked that he remain until he died and the plaintiff agreed, and Pasifiki Tonga remained there until he died on 22 December of the same year, 2018. In accordance with that agreement, Pasifiki Tonga's widow and children moved out of the allotment except for the two defendants, who continued to occupy and to look after it and to keep the grass thereof mowed.

[25] In February 2019, the plaintiff notified both defendants to vacate the allotment within 21 days but the first defendant told the person who served the notice that they were not moving out and that they would take the matter to court

or that the plaintiff would have to take the matter to Court to get them evicted from the allotment.

[26] He, the first defendant, also gave evidence that the second defendant was the one who looked after the allotment. In fact, he said that the second defendant is the one who "looks after the town allotment", meaning that the second defendant was and is the one who is looking after the allotment as of the date of this trial in May this year. That statement is consistent with his statement to the person who served the letter on him in February 2019, namely, that the plaintiff would have to take this matter to Court to get them evicted from the allotment.

[27] I am satisfied that he, the first defendant, and his nephew, the second defendant, have jointly been in opposition to vacating the allotment because he claims, as he states in paragraph 9 of his brief of evidence, that

"... there is an heir to the house and the property in it and the heir is Pasifiki Tonga's widow and then Taniela and Taniela's son, 'Alani, is responsible for maintaining the town allotment."

[28] The second defendant did not give evidence to deny that evidence of the first defendant and I accept that evidence, but I do not accept the evidence of the first defendant that he did not control or manage the town allotment because he showed that he did have control when he told the person who served him that the matter had to go Court, before he even discussed it with his nephew, the second defendant.

[29] I therefore answer the question of this issue "Was there occupation of the allotment by the defendants?" in the affirmative.

**Was the allotment in the control (possession) of the defendants?**

[30] As to Mr. Latu's second issue: Was the allotment in the control (possession) of the defendants? I have to say yes because, as I have stated above, the first defendant made the decision not to move out within 21 days as the letter

required and that the matter be taken to Court instead. He, for himself and for the second defendant, thereby admitted that he and his nephew were in control of the physical possession of the allotment, and that the plaintiff could not have it until the Court would give it to him.

**Did the defendants trespass on the allotment?**

[31] As to Mr. Latu's third issue: Did the defendants trespass on the town allotment? I have to say that they became trespassers immediately when the first defendant told the person serving him the notice (to vacate within 21 days) that the matter had to go to Court, that is, on the date of service of that letter, namely, the 13<sup>th</sup> February 2019.

[32] I accept that the right granted by the plaintiff to Pasifiki Tonga to remain on the allotment ended on the date of Pasifiki Tonga's death, but that a reasonable period thereafter be allowed to the widow and the children to move out, and I am satisfied that that reasonable period ended after one month from the date of death, and that the notice to vacate which was issued on 13 February 2019 giving the defendants an extra 21 days to move out was a generous notice, after the death of Pasifiki Tonga had occurred on 22 December 2018.

[33] So that when the first defendant immediately opposed the notice on the date of service of it on him, he, and the second defendant, to whom the notice was addressed, immediately thereupon became trespassers on the allotment because they were opposing the plaintiff from entering and doing with the allotment as he pleased. Clause 48 of the Constitution provides for that right of the plaintiff:

"48. The land of the King and the property of the King are his to dispose of as he pleases ..."

This allotment is part of the estate of the King and he is allowed by that clause to do with it as he pleases. It became lawfully his since it reverted to him after

Viliami 'Unga Hafoka died. The defendants have denied him that right by denying him physical occupation thereof.

**Is the allotment in the possession of the plaintiff?**

- [34] Mrs. Tupou has posed 3 issues as I have stated above, the first of which is: Is the allotment in the possession of the plaintiff? The answer to that is yes. In English law, possession of the land (or premises) is a requirement that a plaintiff must have in order to found an action for trespass against a defendant who is in physical possession or occupation thereof. If there is a dispute as to which of two persons is in possession for that purpose, the presumption is that the person having title to the land is in possession: *Jones v Chapman* (1847) 2 Ex. 803, 821; *Lows v Telford* (1876) 1 App. Cas. 414, 426; *Canvey Island Comrs .v. Preedy* [1922] 1 Ch. 179. In the present case, there is no dispute as to possession, and even if there is, the evidence, which is not disputed, is that the plaintiff is the person having the lawful title to this town allotment.

**Is the plaintiff entitled to sue for trespass?**

- [35] As to Mrs. Tupou's second issue: Is the plaintiff entitled to sue for trespass?, I have to say yes because the plaintiff has the lawful title to this town allotment and because he has lawful possession of it to found an action for trespass against the defendants and anyone else.

**Did the defendants interfere with the plaintiff's entitlement to this allotment?**

- [36] Lastly, Mrs. Tupou's third issue is: Did the defendants interfere with the plaintiff's entitlement to this allotment? The answer to that is also yes. The defendants did interfere and have interfered with the plaintiff's entitlement by refusing to vacate the allotment.
- [37] Mr. Latu has submitted that the defendants have not interfered with or opposed the plaintiff from entering and taking physical possession and occupation of the allotment, like it did when it caused the electricity to be



disconnected, or from entering and breaking off the lock on the door of the house.

[38] I disagree with Mr. Latu. I have already found that the defendants have refused to vacate the allotment and that they informed the person who served them with the notice to vacate that they would not vacate it. The plaintiff thereby properly chose not to enter the allotment forceably and instead took the lawful means available to him to disconnect the electricity to persuade the defendants to vacate but they did not. He then filed his present claim against them in this Court. The defendants have continued to refuse to vacate and have defended this action and have asked that the plaintiff's claim be dismissed and that their costs in this case be paid by the plaintiff. However else can they show that they were interfering with the plaintiff's entitlement to this town allotment?

#### **Conclusion and orders**

[39] I have therefore come to the only conclusion, on the facts and on the law, that the plaintiff has proved his claim against the defendants, and I make the following orders:

- (a) There be judgement for the plaintiff.
- (b) Both the first defendant, Semisi Koti Pasifiki Tonga, and the second defendand, 'Alani Tonga, are to vacate the town allotment of Viliami 'Unga Hafoka, deceased, with deed of grant Book 111 Folio 88 situated at the northwestern corner of Vaha'akolo Road and Salote Road, together with their belongings and any person who may be there on their instructions, but not the buildings and water tank and structures and trees situated thereon unless they have letters of administration or probate in respect of them, by no later than 14 days from the date of these orders.
- (c) The said defendants shall each pay a sum of \$100.00 to counsel for the plaintiff, Mrs. Petunia Tupou, who shall issue to them receipts for the

same, on behalf of the plaintiff, as nominal damage for the trespass they have each committed, within the said period of 14 days from the date of these orders.

- (d) The said defendants shall pay the costs of the plaintiff in these proceedings as taxed unless agreed.



Niu J

**J U D G E**

**Nuku'alofa: 21 June 2021**