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IN THE LAND COURT OF TONGA

NUKU'ALOFA REGISTRY **LA 4 of 2019**

BETWEEN : KALO MATAELE SOUKOP

- **Plaintiff**

AND : 'AIONA FA'ASUA MATAELE

- **First Defendant**

AND : MINISTER OF LANDS

- **Second Defendant**

BEFORE HON. JUSTICE NIU AND ASSESSOR TU'IFUA

Counsel : Mrs Dana Stephenson for the plaintiff.

Mr Clive Edwards for the first defendant

Ms Leotrina Macomber for the second defendant

Trial : 15, 16 and 17 March 2021

Submissions : 5 May 2021

Ruling : 18 May 2021

RULING

The claim

[1] The plaintiff claims that 2 leases, namely, leases no.6147 and 6148, which were granted and registered by second defendant Minister of Lands jointly in the names of herself and the first defendant's late husband, Joe Mataele, are her sole properties because they were joint tenants of those leases and that she is the survivor of the two joint tenants as provided by the common law. She seeks orders that the said 2 leases be transferred and registered in her name.

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[2] She also claims that the first defendant should account and to pay to her all income of those 2 leases (less outgoings thereon) since Joe Mataele died on 20 August 2008, or damages in lieu thereof.

[3] The 2 leases were registered on 12 February 1998 for a term of 50 years with areas of 768.9m^2 for no.6147 at $300 rent per annum and of 2052m^2 for no.6148 at $700 rent per annum, and they are 2 of 5 leases of lands which comprise the business Kahana Beach Resort situated on the beach of Fangauta Lagoon.

[4] Alternatively, that is, if she is not entitled to the whole of both said leases, the plaintiff claims that she is entitled to half of each of them and seeks orders that her registration as joint holder thereof be maintained by the second defendant Minister of Lands.

The defence and counterclaim of first defendant

[5] The first defendant disputes the claims of the plaintiff and says that the 2 leases were obtained by Joe Mataele himself from the estateholder, noble Fakafanua, as additional lands for his resort, Kahana Beach Resort, and that the plaintiff was a joint holder of the leases because she was a guarantor of the loan of funds from Tonga Development Bank for development of the resort. But that subsequently judgment was entered against Joe Mataele and the plaintiff for the loan balance of $523,735.93 in the year 2000 and the plaintiff thereupon refused to continue with the business and abandoned her interest in both leases. She says that the plaintiff has not participated or paid any rent of the 2 leases from the date of their registration up to now. She also says that the plaintiff's claim is barred by S.170 of the Land Act.

[6] She counterclaims against the plaintiff and seeks orders that, as the lawful widow of Joe Mataele and the sole beneficiary of Joe Mataele's will, which will expressly provide that all the leases of Kahana Beach Resort, including the 2 said leases, be her absolute property, the second defendant Minister of Lands be ordered to effect the registration of the 2 leases in her name alone.

The second defendant

[7] The second defendant Minister of Lands remains neutral and awaits whatever order this Court makes.

The facts

[8] Although the plaintiff is the only one surviving and giving evidence about what she and her cousin, Joe Mataele, were doing in the 1980s and 1990s, about the Kahana Beach Resort, and despite the strong and extensive cross-

examination of counsel Mr Edwards for the first defendant, I am satisfied, after hearing her, and after hearing the evidence of the first defendant, that the detailed account which the plaintiff has given in her brief of evidence is what had happened. And I would only relate matters which are relevant to the claims and defences and counterclaim.

[9] Joe Mataele (Joe) and the plaintiff (Kalo) were first cousins.

[10] Joe owned and operated a hotel called Joe Tropicana Hotel at Fasi in the 1970s. In the 1980s he built and operated another restaurant and bar business on the beach of Fangauta Lagoon called the Kahana Lagoon Resort. He had 3 leases of land there in his name for that business.

[11] In the mid 1980s, Joe wanted to expand the Lagoon Resort to include motel accommodation on the adjoining lands which were held by the Noble Fakafanua, and he invited Kalo to join him in the business of the resort by providing $100,000 for acquirance of the leases of the land and by borrowing the necessary funds for the construction of the motel units from the Tonga Development Bank. The loan would be repaid within 7 years, and the rent payments of the leases would be paid, by the business itself.

[12] Kalo was in the professional entertainment and tourism field for many years in Honolulu, Hawaii and served in the Polynesian Cultural Center Board of Directors of Hawaii for 21 years. She also had her own travel business named Kalo South Sea Travel and Tour. She had $100,000 in a term deposit account in the Bank of Tonga and she saw benefit to her in her travel and tour business if the Kahana Lagoon Resort was to provide accommodation for her tour groups from Hawaii.

[13] She agreed to Joe's request. She paid $50,000 to Joe to pay to Fakafanua, and she also paid the other $50,000 upon approval of the 2 leases by Cabinet in about 1988. She also signed the loan application for $240,000 for the construction. The loan was approved and the leases were to be mortgaged to the bank as security, in addition to all other properties of Joe including Joe Tropicana Hotel.

[14] She says that there was to be a company to be formed between her and Joe in which they would each have 50% shareholding, but that was never followed up and was never registered or even operated.

[15] For some unknown reason the 2 leases were not registered by the Minister of Lands until 12 February 1998, and when the bank applied to register the mortgages of the 2 leases as security for the loan of 1988, only the lessee Joe

signed the application. Kalo did not sign it at all. The Minister however proceeded to and registered the mortgages of the two leases.

[16] In 2001 the loan was in default and the bank issued a notice of foreclosure in respect of lease no.4275, which was one of the 3 leases held by Joe at the Kahana Beach Resort. That foreclosure was resolved by Joe agreeing to sell his Joe's Tropicana Hotel to pay off that debt.

[17] In about July 2008, the Ministry of Lands wrote to Kalo in Hawaii and asked her if she still wanted to be lessee of the 2 leases and whether she would want to surrender her interests to Joe. Kalo immediately wrote back and said that she had no wish or intention to surrender her interest in either lease at all.

[18] Joe died in the following month on 20 August 2008.

[19] On 26 August 2010, probate of Joe's will was granted by the Supreme Court to Joe's widow, the first defendant. She has not as yet registered it as required under S.131 (c) of the Land Act.

[20] On 25 August 2017, Kalo sought copies of tenancy agreements made by the first defendant with tenants who occupy and operate the motel business conducted on the lands of the 2 leases but the first defendant refused.

[21] She has filed her present claims in this Court on 21 February 2019.

[22] No request or demand had been made by Joe while he was alive, or by the first defendant after Joe died, to Kalo to pay the annual rents of the 2 leases. All the annual rents for the 2 leases have been paid by Joe, and by the first defendant up to now.

[23] On 12 July 2012, the first defendant signed a tenancy agreement for 10 years as landlord with one Ming Tsay as tenant to occupy and operate the Kahana Beach Resort and that agreement includes the 2 leases. The area of the 2 leases comprise 77% of the total area of the resort. The rent of $156,000 for the whole term of the tenancy has been paid to the first defendant.

[24] The tenancy has been extended to July 2029 and a further sum of $90,000 has been paid for that extension, thereby making the total sum paid to the first defendant of $246,000.

[25] Photographs showing the buildings, accommodation units, facilities and carparks which have been let have been produced in evidence.

Joint Tenancy or Tenancy in common

[26] The first and main issue in this case is the claim of the plaintiff that the 2 leases were joint tenancies and that under the common law of England, which applies in Tonga because the Land Act is silent on the matter, the survivor or survivors of a joint tenancy takes or take over the share of the deceased tenant upon his or her death.

[27] Mr Edwards argues that the plaintiff never had any lawful interest in the 2 leases because she never paid any money for the acquisition of the 2 leases, such as she claims that she paid $100,000 for, because she never produced any receipt or bank document to prove such payment. He also says that the plaintiff has admitted that she has never paid any rent of either lease up to now. He says that the plaintiff has never shown any interest or concern about the leases until now. He says that the plaintiff has abandoned any right or interest that she might have had.

[28] I have found as a fact that the plaintiff did pay the $100,000 which she has said that she had paid to Joe in 1988 for the acquisition of the 2 leases. I do not think that Joe, being a businessman himself, would have agreed to having the plaintiff, who was only his first cousin, as a joint holder of the 2 biggest leases of the business he operated as the Kahana Lagoon Resort, if the plaintiff had not paid him anything. I am satisfied that Joe was able to obtain the land from Fakafanua because he had the $100,000 which the plaintiff said she paid to him.

[29] And even if she did not pay any money at all, like Mr Edwards has submitted, and which I do not accept, once she was registered by the Minister of Lands as joint holder of the 2 leases in 1998, she was lawfully entitled to the possession and use of the lands of the 2 leases, subject to complying with the covenants thereof, for the 50 years for which they were granted.

[30] And as to having paid no rent or any money towards payment of the annual rents of the 2 leases, the plaintiff was not, and is not, thereby deprived of her right as registered holder of the 2 leases. That was because, and I accept that, it was agreed that the annual rents of both leases were to be paid out of the business to be conducted on the lands of the 2 leases. That is proved by the fact that the annual rents were always paid by Joe himself, no doubt with income of the business carried out on the lands of the 2 leases. No demand has ever been made by Fakafanua or the Minister of Lands that the annual rent of either lease was unpaid. Even the first defendant continued to make those payments after Joe died. No demand was ever made by Joe or by the first defendant upon the plaintiff to make such payment instead.

[31] Mrs Stephenson, for the plaintiff, has correctly pointed out that the only lawful way that the plaintiff's interests in either lease is to be terminated is if she surrenders the 2 leases in accordance with the provisions of S.130 of the Land Act and which she has not done. She in fact was asked to by letter from the Ministry in July 2008, as she has stated, but she declined to do so. That shows that that was also the understanding which the Minister of Lands had, that only by surrender could the registered holder's right to a lease be terminated.

[32] Mr Edwards however further argues that the 2 leases were tenancies in common rather than joint tenancies, such as the plaintiff has argued. He says that at the time the 2 leases were registered, Joe was already lawfully married to the first defendant and they had had 5 children born to them and he could not have possibly intended that if he was to die, his interests in the 2 leases were to become the lawful property of the plaintiff instead.

[33] Mrs Stephenson on the other hand says that the two leases were clearly intended for business purposes of motels pursuant to a business arrangement between Joe and the plaintiff and to enable a business loan to be obtained from the bank. She says that the leases were not for personal use of Joe such as his town and tax allotments, and that the defendant has failed to produce any document or evidence to rebut the legal presumption of a joint tenancy.

[34] Both counsel referred to the Court of Appeal decisions in *Wight v Wight & Minister of Lands* (AC 3/2018) and *Pekipaki v Moimoi & Minister of Lands* (AC 13/2018).

[35] In the *Wight Case* the Court of Appeal held that the Land Court had rightly decided that the lease which had been jointly held by the 4 Wight brothers and then by 3 brothers (after the sale by one brother of his share to one of the other 3 brothers) was a tenancy in common because each brother had an allocated area of the land of the lease for his own use and therefore the common law presumption of a joint tenancy was displaced with the tenancy in common which equity favoured. Furthermore, when one brother became the holder of the interest of the 4th brother who sold him his share, he thereby held one half of the interests and the other 2 brothers only held a quarter share each. So that there was an unequal sharing of the lease amongst the holders.

[36] In the *Pekipaki Case,* the same thing had happened. The brother and the sister who were jointly granted the lease, each occupied and utilized his and her own building and applied the income thereof for their own separate use. The Court held that because both the brother and the sister were much advanced in their years, one being in her 80s and the other in his 70s, it was clear that they would not have agreed that their respective separate families were to be

deprived of the right to the lease upon their respective deaths. It therefore upheld the Land Court decision that the joint lease in that case was also a tenancy in common.

[37] In the present case, there was an unequal sharing of the use of the 2 leases altogether. Both leases were used entirely by Joe alone. He used the lands of the 2 leases for his own motel business without accounting or sharing any income therefrom with the joint holder, the plaintiff. The plaintiff never disputed that. She never claimed anything from him, even the $100,000 which she had paid to acquire the 2 leases from Fakafanua.

[38] It is also clear, and I am satisfied that Joe would not have agreed, or dreamt that when he would die, the plaintiff would be the sole holder of the 2 leases, and that his wife and 5 children would be deprived of any right to them.

[39] As to Mrs Stephenson's point that the purpose of the 2 leases was commercial and was therefore intended to be a joint tenancy with the right to the lease to pass to the survivor, I repeat the words of the Privy Council (UK) in the case of *Malayan Credit Ltd v Jack Chia_MPH Ltd* [1986] AC 549 at 560 to which the Court of Appeal referred in the *Wight case*:

> "Their Lordships do not accept that the cases in which joint tenants at law will be presumed to hold as tenants in common in equity are as rigidly circumscribed as the plaintiff asserts. Such cases are not necessarily limited to purchasers who contribute unequally, to co-mortgagees and to partners. There are other circumstances in which equity may infer that the beneficial interest is intended to be held by grantees as tenants in common. In the opinion of their Lordships, one such case is where the grantees hold the premises for their several individual business purposes."

I consider that the using of the 2 leases for business, or commercial purposes, by Joe or by Joe with the consent of the plaintiff, did not thereby make the 2 leases joint tenancies.

[40] I am therefore satisfied that the 2 leases were and are tenancies in common and that upon the death of Joe, his interests in them did not pass to the plaintiff as survivor. They have passed instead to the first defendant as beneficiary of his will in accordance with probate granted to her by the Supreme Court.

The income of the 2 leases

[41] The other issue to be decided is the claim of the plaintiff for damages or for accounting to be provided by the first defendant in respect of the income of the 2 leases.

[42] The first question to be asked is: What is the income of the 2 leases? The plaintiff says that the income of the 2 leases are the rents which are payable by Mr Tsay in respect of the tenancy agreement which he and the first defendant signed in 2012. That is what she claims and Mrs Stephenson has outlined in her submissions the amounts which the first defendant has stated in her evidence on cross-examination that have been paid by Mr Tsay to her.

[43] But those rent payments have been paid, and the tenancy agreement has only been made, in respect of and by reason only of the tenancy of the buildings situated on the land of the 2 leases. They are income of the buildings situated on the land, and not income of the land on which the buildings are situated.

[44] Empty land may bring in income if it is utilized for farming or for carpark, etc, but written approval thereof must be made by the Minister of Lands before such letting, short of sub-leasing, of the empty land is made. That is because S.13 of the Land Act provides:

> "13. Any landholder who enters or attempts to enter into any agreement for profit or benefit relating to the use or occupation of his holding or part thereof other than in the manner prescribed by this Act or as approved in writing by the Minister shall be liable on conviction to a fine not exceeding $200 or to imprisonment for any period not exceeding 12 months or both."

[45] I am therefore not satisfied that the rent payments under the tenancy agreement of the buildings situated on the lands of the 2 leases which Mr Tsay has signed with the first defendant are income of the land of the leases. Otherwise, such income would be income of the land instead and would be illegal income under S.13. Tenancy agreements have been upheld in the Courts as valid despite S.13 because they are tenancies only of the buildings on the land and not of the empty land itself.

Conclusion

[46] Accordingly, I have come to the conclusion, for the foregoing reasons, that the plaintiff has succeeded on her alternative claim that she is still a joint holder of both leases, No.6147 and No.6148, but that she is not entitled to the rent

payments of the tenancy agreement of the buildings situated on the lands of the said 2 leases which she has claimed.

[47] As to the defence of time bar which the first defendant has raised, the claim of the first defendant which she lodged with the Minister of Lands to transfer the 2 leases to her sole name was only taken **after** she was granted probate on 26 August 2010. The cause of action thereupon accrued to the plaintiff and the plaintiff filed her claim in this Court on 21 February 2019, well before end of the 10 year limitation on 26 August 2020. That defence fails.

Costs

[48] I consider that in the circumstances of this case there be no order as to costs.

Orders

[49] I make the following orders:

a) The second defendant Minister of Lands shall forthwith effect the registration of the transfer of both leases no.6147 and no.6148 from Joe Tu'ilatai Mataele and Kalolaine Mataele Soukop to 'Aiona Mataele and Kalolaine Mataele Soukop in accordance with the provisions of S.128 of the Land Act, after the grant of probate of Joe Tuilatai Mataele's estate has been registered under S.130 of the Land Act. The costs of such registrations shall be paid by the relevant party or parties.
b) The plaintiff and the first defendant shall produce the original deeds of lease of the 2 said leases and sign such forms and do such acts as the Minister shall require to effect the said registrations.
c) The Minister shall provide to each party, that is, to the plaintiff and to the first defendant, an original of the deeds of lease of the 2 leases and of the transfers thereof upon completion of registration of the transfers.
d) There be no order for costs of these proceedings.

FAKAMAAU'ANGA FONUA
TONGA

Niu J

Nuku'alofa: 18 May 2021 **J U D G E**