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IN THE LAND COURT OF TONGA

NUKU'ALOFA REGISTRY

LA 17 of 2018

**BETWEEN** : **LORD FOHE**

- **Plaintiff**

**AND** : **1. VE'ETUTU MAHE**  
**2. SALESI FOHE**  
**3. MELE TANGI**  
**4. ZING WANG CO. LTD**

- **Defendants**

**BEFORE HON. JUSTICE NIU AND ASSESSOR TU'IFUA**

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

: Mr. V. Latu for the defendant.

**Trial** : 18 and 19 February 2021.

**Submissions** : of Mr. Latu filed 18 March 2021.

: of Mrs. Tupou filed 29 March 2021.

**Oral submissions** : 6 May 2021.

**Ruling** : 9 June 2021.

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# RULING

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## The plaintiff's claim

[1] The plaintiff initially brought his claim against 4 defendants seeking orders to evict them from the lands of his estate as estate holder, and damages. No

29 JUN 2021  
JH.

defence was filed by any defendant and after formal proof of the plaintiff's claim, I ordered that all the defendants were to vacate the lands they occupied within 3 months and to pay \$100 damages each to the plaintiff. That was on 9 July 2019.

[2] On 9 August 2019, the first defendant filed an application to set aside the default judgement of the plaintiff, and after a contested hearing, I ordered that the default judgement be set aside with costs of the application to the plaintiff, on 22 November 2019.

[3] The claim of the plaintiff in this action is now only against the first defendant and I will only refer to the first defendant as "the defendant".

[4] The plaintiff claims that he has been duly appointed to the hereditary title of Fohe, and the hereditary estate of Puke in Tongatapu to which the title pertains, on 17 November 2016 (as shown in his letters of appointment signed by His Majesty King Tupou VI, with effect from 18 November 2016, as stated therein).

[5] He then found that the defendant had built and was living on the land of his estate and did not know where he had come from or upon what or whose authority he had done so, and he served written notice upon him to vacate but he refused to vacate it, and the plaintiff seeks damages of \$2,000 for the wrongful occupation of his estate by the defendant.

### **The defendant's defence**

[6] The defendant says that he had asked the previous Fohe (Samiu) for a town allotment, and gave him \$1,000, and that Fohe showed him the piece of land in March 2007 and that he subsequently gave sums of money to Fohe totaling in all \$6,500 as well as presenting to him 20 yams and the traditional large pig in appreciation of the allotment given to him. He said that he also carried out repairs and painting of Fohe's residential house as Fohe had requested for free.

[7] He says that Fohe had assured him that he would arrange for the grant and registration of the allotment in his name to be carried out, and that after Fohe

died (in 2009) he then proceeded to clear the land and built his house on it and lived in it (in 2014).

- [8] He says that he has an equitable right to possession and the right to be granted and to be registered as lawful holder of the allotment.

### **The facts**

- [9] From the evidence given by both parties and their witnesses, I have found the following as the relevant facts.
- [10] The estate of Puke is the hereditary estate of the Noble Fohe. The title of Noble Fohe was held by one Samiu Fohe from about 1978 to 2009. Because of ill health towards the end of his life, his daughter, Lupe, acted as his representative for some 7 years, before he died in 2009.
- [11] In 2007, the defendant, who is the son of a sister of Samiu Fohe's wife (Lupe's mother) asked Samiu Fohe for a town allotment and Samiu Fohe pointed out to him a piece of land which was not far from where Samiu Fohe was living. The piece of land was still in bush and it was part of an unallocated area of some 14 acres.
- [12] The piece of land pointed out is immediately behind an area of 2024 m<sup>2</sup> which had already been leased to one, Lord Tangi, by the main Hihifo Road. Because Lord Tangi's area had been cleared and built on and was kept maintained, the piece of land allotted to the defendant was easily seen from the Hihifo Road.
- [13] In appreciation of the gift of the piece of land to him, the defendant gave \$1,000 to Noble Fohe on the same day. Two months later, he gave another \$1,000 for father's day, and \$2,000 for his birthday in October that same year. On father's day of 2008, he gave him another \$1,000. In the 4<sup>th</sup> of July celebration of 2008, he gave him 20 yams and a pig and in Christmas 2008 he gave him \$1,000 and when Fohe was in hospital in 2009, he gave him \$500. When Fohe died in April 2009, he took the traditional large pig and food crops for the food preparation.

- [14] The daughter Lupe said that after Fohe gave the piece of land to the defendant, she went and saw the land surveyor to sub-divide the whole area of land (of 14 acres) so that the piece of land allocated to the defendant could be registered and was told that they would work on it, but that her father died before that could be done. She said that when the traditional mourning for the noble Fohe was completed, she went with the traditional presentation of food and Tongan wares to the King, George Tupou V, to thank him in the customary way, and that the King told her to continue to look after the people of the estate and to come and see him if she needed any help.
- [15] The town officer of Puke, Malolo Tupou, said that after Fohe died the people were asking him for land and he went to the Palace Office and asked what he was to do and that he was told to tell the people to wait until a new Fohe was appointed and that in the meantime he was to look after the people until then.
- [16] In 2010, a man named Sepeti Haikeni and his family temporarily lived on the piece of land in question upon the direction of Lupe, with the consent of the defendant, and they left the land in 2011.
- [17] In 2012 the defendant began to build upon the piece of land and his house was completed in 2014 and he and his family occupied it and have lived there up to now.
- [18] The house is of concrete foundation and floor and wooden plywood walls and slanting corrugated iron roof. It is of strong construction because it withstood both Cyclones Gita in 2018 and Harold in 2020.
- [19] The town officer, Malolo Tupou, was aware of the construction of the house but he did not stop it or to question the right of the defendant to build it and to live in it with his family.
- [20] The plaintiff is the son of the next oldest brother of Samiu Fohe, who had predeceased Samiu Fohe. He was appointed to the Noble title of Fohe by His Majesty, King Tupou VI, on 17 November 2016 with effect from 18 November 2016.

[21] On 22 May 2017 he issued a notice to the defendant to vacate the land on which he had built and occupied with his family within 3 months.

[22] The plaintiff had been residing and working with his family first in New Zealand from 1998 to 2010, and then in Australia from 2010 up to now.

[23] The notice to vacate was served by the town officer upon the defendant. The defendant asked the town officer if they could see the plaintiff and the town officer told him that he would let him know. He never did.

[24] The plaintiff's claim was filed on 1 August 2018.

### **The law**

[25] The right of an estate holder to evict a person from his estate is provided under S.35 of the Land Act. It provides as follows:

“35. (1) Nothing contained in section 34 hereof shall be deemed or construed as prohibiting any holder of an hereditary estate from refusing permission to take up residence on his hereditary estate to any person who belongs to another locality or holds a tax allotment elsewhere even though the wife of such person belongs to a village upon such holder's estate.

(2) Any such person coming to reside on an estate may be ordered in writing by the holder to leave, and if that person refuses or fails to obey such order within 7 days he shall be liable on conviction therefor to a fine not exceeding \$4 and in default of payment to imprisonment for any period not exceeding one month.”

[26] It is not disputed that the defendant is not from the estate of Puke, and that he is from “another locality”.

[27] In 2012 or so when the defendant began to build his house on the piece of land in the present case, he may correctly be said to be “coming to reside” on

the estate of Puke as is provided in S.35 (2) as quoted above. It was then that S.35 (2) requires the estate holder to order him in writing to leave. If the holder of the estate does not require him to leave then, and the person proceeds to build upon the estate and to live on it, he will then no longer be said to be "coming to reside" because by building his house and residing therein, he has thereby no longer be said to be "coming to reside". He has thereby become lawfully resident in the estate, and S.50 (a) of the Land Act will become applicable to him. That provision is as follows:

"50. Land for allotments shall be taken from the hereditary estates in accordance with the following rules –

(a) An applicant for an allotment lawfully resident in an hereditary shall have his allotments out of land available for allotments in that estate;"

[28] In 2012, the plaintiff was already lawfully entitled to succeed as heir to the title of Noble Fohe in accordance with Clause 111 of the Constitution, the relevant part of which provides as follows:

"111. ... And failing direct heirs the property shall revert to the eldest brother of the owner of the property beginning with eldest and his heirs in succession to the youngest and their heirs in accordance with the law of succession ..."

[29] And S.38 (1) of the Land Act provides that upon the death of a holder of an hereditary estate, "His Majesty shall cause the name of the lawful successor to the title of such holder to be published in the Gazette together with the date of his succession thereto which shall be the day following that on which the death of the holder took place."

[30] So the plaintiff was by law lawfully entitled to succeed to and to hold the rights of the estate holder immediately on the day after day of death of Samiu Fohe in 2009. The plaintiff was then lawfully the holder of the hereditary estate of Puke because although he had not been formally declared by His Majesty by

notice in the Gazette, he was lawfully, and Constitutionally entitled to it. He would be a "holder" of the hereditary estate for the purposes of S.35 of the Land Act and could issue an order in writing for the defendant to leave the estate. Section 2 of the Land Act would allow him to issue such order because it provides in paragraph (f) thereof as follows:

" 'landholder' or 'holder' means –

...

(f) any person who claims to be entitled to any land or interest in land whether in actual possession or occupation or otherwise."

[31] In the present case, the plaintiff knew that he was the lawful heir to the title of Fohe because he said that he wrote, as was customarily required, to His Majesty after Samiu Fohe died that he was the lawful heir, with which letter he would have provided the required documents in proof thereof. He ought then to have taken charge of the estate, his inheritance, in accordance with the laws relevant thereto. He said he appointed the town officer as his representative after he was "appointed" as the Fohe, but that was after he was appointed in November 2016, and the defendant and his wife and children had already become residents of the estate for 2 years.

[32] By then, the defendant, and his family, were no longer "coming to reside". They had already become "lawfully resident" in the hereditary estate of Puke.

[33] Accordingly, I have come to the conclusion that the plaintiff estate holder cannot evict or seek an order to evict the defendant and his family as he has sought in this action, or to seek damages for their occupation of his estate.

### **Licence**

[34] The plaintiff claims that Samiu Fohe had granted the defendant a licence only to occupy the piece of land and that that licence ended when Samiu Fohe died two years later, and the plaintiff, who had not agreed to such licence or to

grant the defendant a similar licence, has the right to notify him to vacate and to an order to evict him.

[35] With regard to an allotment, that is correct, and cases have been decided on that basis. But this is an estate and the Land Act makes specific provisions about the rights of an estate holder in respect of an allotment which has been abandoned for more than 2 years (S.44 (2)) and in respect of a person "coming to reside" in the estate (S.35). In respect of a person coming to reside, as in the present case, S.35 expressly provides for what is to be done by the estate holder. I do not think that an estate holder who has not exercised his right under S.35 can subsequently, after the person has become resident on his estate, claim that he had not granted him any right to reside on his estate.

[36] In my view he is properly estopped from making any such claim.

#### **Counter claim**

[37] The defendant has asked for orders that the piece of land on which he resides be granted to him as his town allotment. I am afraid that he is not entitled to such orders.

[38] S.43 of the Land Act provides before a grant of an allotment can be made, the "male Tongan subject by birth of 16 years" shall make application to the Minister of Lands on the prescribed form. The defendant has never made any such application.

[39] And S.50 (a) which I have quoted in paragraph 27 above, does not apply to him yet, because he is not, as yet, become "an applicant", such that he "shall have his allotments" granted to him out of land available in the estate.

#### **Costs**

[40] I consider that the plaintiff ought to have spoken directly with the defendant and heard what he had to say about why he had come to build and live on this piece of land. As estate holder he has the right to make such inquiry and the obligation to afford the defendant a reasonable opportunity of being heard

before he decided to notify him to vacate. He did not live in Tonga, and still does not live in Tonga, and the defendant did not know where he lived. By making the decision already to evict him, he thereby alienated the defendant. The defendant was at a loss what to do because of the substantial costs he had expended on building his house. He went and told the town officer that and asked that he be allowed to speak with the plaintiff, and the town officer told him that he would let him know but he didn't. The plaintiff issued these proceedings instead.

[41] I consider that in the circumstances, the plaintiffs should pay the costs of these proceedings, except the costs of the application of the defendant to set aside the default judgement.

### **Orders**

[42] Accordingly, for the foregoing reasons, I order that the claim of the plaintiff be dismissed with costs to the defendant to be taxed if not agreed, and that the counter claim of the defendant to be dismissed with no order for costs.



Niu J

**J U D G E**

**Nuku'alofa: 9 June 2021**

