

IN THE LAND COURT OF TONGA

NUKU'ALOFA REGISTRY

LA 20 of 2019

**BETWEEN** : **SAMU TONGA VALEVALE LOTO'ANIU**

- **Plaintiff**

**AND** : **'AHO KILISIMASI KOLOMALU**

- **Defendant**

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

**Counsel** : Mr C. Edwards and Mr. V. Latu for the plaintiff

: Mr. H. Tatila for the defendant.

**Trial** : 19 and 20 April 2021.

**Submissions** : by Mr. Tatila on 7 May 2021.

: by Mr. Latu on 21 May 2021.

**Ruling** : 9 June 2021.

---

# RULING

---

## Plaintiff's claim

[1] The plaintiff claims that the defendant had asked his father in 1996 for somewhere on his tax allotment where he could live temporarily while his children were attending school as they had come from Niua and had nowhere to stay, and his father gave him a piece of the tax allotment and that he lived

29 JUN 2021  
[Signature]

on it, but that when his father asked him to leave, he did not leave and that he stayed on up to the death of his father in 2010.

- [2] The tax allotment was transferred to and became registered in the plaintiff as heir of his father and he claims that he notified the defendant to leave but the defendant has refused to leave up to now.
- [3] He then filed this action on 8 August 2019 and sought the eviction of the defendant and damages for the unlawful occupation by the defendant of his tax allotment for the past five years in the sum of \$5,333.33.

### **Defendant's defence**

- [4] The defendant claims that he and the plaintiff's father had agreed in 1996 that the defendant would live on the piece of land and pay him \$6,000 and that upon payment of the \$6,000 to him, he would surrender the piece of land to the estate holder, Fakafanua, and that the defendant would then apply to Fakafanua to have the piece of land registered in his name.
- [5] He says that he did pay the agreed \$6,000 to the father but that the father died before he could surrender the piece of land for him to apply for.
- [6] He says that after the plaintiff became registered as holder of the tax allotment the plaintiff offered to other occupants of the tax allotment who had not paid up the whole of their lots of \$6,000, that if they paid \$10,000 each afresh, they would be granted the lots they occupied, but that he did not make that offer to him instead, and that he was wrongfully dealt with by the plaintiff instead.
- [7] He says that the plaintiff was and is estopped from evicting him because he has built a substantial building on his lot and that the plaintiff did not prohibit or stop him from building it after Cyclone Gita blew it down in 2018. He says that because he has built on it and is occupying it, that lot cannot be granted to anyone except him to hold as his town allotment.

### **The evidence**

- [8] The evidence in this trial were given by the plaintiff and his mother, and by the defendant and by a neighbour of his whose brief of evidence was produced by consent without that witness being called.

### **The agreement**

- [9] The main issue to be decided in this case is whether or not there was an agreement made between the father of the plaintiff and the defendant, such as the defendant has claimed there was. The burden of proving that there was such an agreement rests upon the defendant and the standard to which he must prove it is the balance of probability. I have to ask myself whether it is more likely than not there was such an agreement.

### **Defence evidence**

- [10] The defendant ('Aho) said that he had heard that the plaintiff's father (Tonga) was sub-dividing his tax allotment and he thought to go and ask him for a piece of land for him to live on with his family. He said that he went with his Church bishop (Nulua) to Tonga in about August 1996. He said that Tonga and his wife ('Elisiva), mother of the plaintiff, were the only ones in the house and that Tonga came out of the house and that they walked to the bush area of the tax allotment where they talked.
- [11] He said he asked Tonga for a piece of land for him and his family to live on and that Tonga asked him what money he had brought with him and that he told Tonga that he had \$1,000 and that Tonga told him to give it to him as a start and that he did. He said he asked Tonga how he would get to have the piece of land, and that Tonga told him that he would pay up a total of \$6,000 as he could afford and then he would give him the letter of surrender to enable him to have the piece registered in his name.
- [12] He said that Tonga then led them to a piece of land that was in bush where a little house was situated and that Tonga told him that they could move in and

live in the little house right away. He said that he thanked Tonga and that they left.

[13] He said that he and his family moved in and lived in the little house in the evening of the same day but that after about 2 weeks a man came and claimed the house as his and that about a month later the parents of that man came and took the little house away.

[14] He said that he went and saw Tonga about it and that Tonga told him to build a shelter for them to live in. He said that he went and asked his bishop and the bishop gave him some timber and corrugated iron sheets and with coconut trees he cut down to use as posts, he built their little house and they lived in it.

[15] He said that after they were living in that little house, Hurricane Waka blew it down and that they rebuilt it and that they also had a tent to use from the hurricane relief.

[16] He said that after they were there for about 6 months, another man named 'Auhia Siu came and told him to move out of that lot because he said it was his. He went to Tonga and Tonga showed him another piece of land that was totally in bush and was swampy. He said that he cut and cleared the bush and trees on it and filled the swamp and then built his house on it, and that that is where they have lived up to now.

[17] He said that by that time, he had paid to Tonga \$2,250. He said that he planted breadfruit trees, orange trees, kola trees, medicinal plants on that lot and that Tonga never stopped him from planting such trees on the lot.

[18] He said that it was true that there were times that Tonga had told him to leave and to vacate the lot, but he said it was only because he did not have the money to give to Tonga when he wanted it, and that after he went and sold something and got some money and gave it to him, Tonga changed his mind and let them stay on.

[19] He said that he was surprised when Tonga died and he then wrote down all the times and amounts of money which he had given to Tonga as follows:

(i) August 1996 (deposit)	\$1,000.
(ii) August 1996 (medium large pig)	800.
(iii) August 1996 (travel tax)	500.
(iv) Year 1997 (bad time)	250.
(v) Year 1998 (needed \$500)	500.
(vi) Year 1999 (my wife's fair (debt))	300.
(vii) Year 2001 (payment before 5/8/01)	1,100.
(viii) Year 2004 (a little saving)	600.
(ix) Year 2005 (work for Taipe Vaka)	500.
(x) Needs for petrol, tobacco, beer, club, etc	1,000 odd.

\_\_\_\_\_

TOTAL AS RECOLLECTED                    \$6,550. NOT INCLUDING  
OTHER NEEDS AND MONIES I DO NOT RECOLLECT.

[20] He said that there were no receipts for any of those payments because there was mutual trust between him and Tonga.

[21] He said that about a year after Tonga died, the plaintiff called the occupants of the allotment to a meeting at his house where he told them that they were to pay afresh a total sum of \$10,000 to him before he would give them their letters of surrender. He said that he stood up and disagreed with the plaintiff's decision but that the plaintiff dispersed the meeting.

[22] He said that in about 2014 to 2015, the plaintiff told him to come to a meeting with Fakafanua and he went there with his son and his son's wife. He said that he explained to Fakafanua his agreement with Tonga to pay him the \$6,000 but that the plaintiff's mother said that the payments that he had paid to them

were only rent in respect of his occupation of the lot, and that the plaintiff explained that he was the holder of the allotment and that he had already made his decision as the new holder of the allotment. He said that Fakafanua told them to go and talk and try to resolve the matter between themselves.

[23] He said he talked with his family afterwards and that on the following day, he and his son went and asked the plaintiff and his mother to let them pay the \$10,000 he wanted and to give them the letter of surrender in return, but that the plaintiff just did not agree to it. He said that what he understood that the plaintiff wanted was for him, the defendant to show him and to give him the \$10,000 first and then he would write the letter of surrender, but that he, the defendant did not want to do that. He said that what he wanted was for the plaintiff to write out and give him the letter of surrender first and then he would hand over the \$10,000 to the plaintiff. He said that his son had already had the \$10,000 with him then.

[24] He said that when the plaintiff's lawyer wrote to him (on 8 August 2016) to vacate the lot, he took it to his lawyer and that his lawyer advised him not to vacate the lot at all and so he has continued to stay up to now.

### **Plaintiff's evidence**

[25] **The plaintiff's mother 'Elisiva**, wife of Tonga, gave evidence and said that her brother, Tekilati Pule'anga, had brought and introduced the defendant to her and to Tonga because they attended the same Church of Jesus Christ of Latter Day Saints, and that they came with their Church bishop, Nulua, as well. She said that her brother stayed outside while Nulua and the defendant came inside the house. She said that the defendant asked her husband if he could come and stay temporarily on his tax allotment while his children were attending school as they had come from Niua.

[26] She said that she felt sorry for them and that she asked her husband to let them have somewhere to stay, seeing that her brother had brought him. She

said her husband agreed and he allowed them to come and stay in the little house in the bush area.

[27] She said that sometimes after the defendant had moved in and lived in the little house with his family, her husband told her that the defendant told him that he would give him \$1000 in November 1996 to help him because he was grateful for the kind help which he had given to him and his family, but she said that the defendant never paid him that \$1,000. She said that the defendant gave no money or anything at all to them in 1996, and her husband told him to leave his land. She said that it was then that the defendant began to pay something and that her husband wrote down in his diary what they were.

[28] She produced that diary and the relevant page shows the following:

"Loni `Aho Kilisimasi Kolomalu

\$1,000      They asked they would bring it in November of that year because his wife was having an "exchange" (katoanga) in November and it would be brought in a lump sum.

Date

29.3.00      \$5.00 for petrol of my car to Taliai camp.

\$30              gift monies from Loni as I estimate as I receive it as he gifts it to me.

\$2.00              5.8.00

9.1.01              1½ bags of cement from Loni.

19.2.01              Loni came and asked because I wrote to him as to how he was doing and he informed me that he would give me in that year the balance of the debt when his wife has her exchange. And it did not happen because he came and asked that he would bring it all in June 2001. He came in the evening and asked.

20.2.01              There was a pig brought from Loni I estimate its value to be \$15.

30.7.01 Loni came and said that ever since his wife had gone he has been sick and there is no money. I told him how many times have you lied to me that year that year that year. Decide for yourself all I want is my money but it would end on 2/08/01. Because he told me he would go to his wife or they would move out or they would stay (but it would end on the 2<sup>nd</sup> day if he has not come that's the end.

\$1,100."

[29] She denied that the defendant had paid \$6,000 to her husband because her husband had never agreed for him to have any particular lot as his and to pay him the required \$6,000 which other occupants had had to pay for my husband, herself and their heir, the plaintiff, to all sign the letter of surrender for such occupant to have the lot registered in his name.

[30] **The plaintiff** gave evidence and said that in 2008, the defendant came and asked him to ask his father, Tonga, to agree to sell him the lot he was occupying for \$8,000 which he would pay when he would get his pension from the army in 2010. He said that Tonga did not accept that request.

[31] He said that after his father died and he had the tax allotment transferred to his name, he called a meeting with 3 occupants who had not paid the agreed \$6,000 to his father and told them that they all had to pay afresh a sum of \$10,000 each before they would be given their letters of surrender. He said that that offer was not made to the defendant at all because no agreement had been made for him to pay any \$6,000 before his father died, and because he had repeatedly been told to leave but has continually refused to leave.

[32] He said that the defendant came in about 2013-14, and again twice after that, and asked to pay the \$10,000 offered to the others but that he did not agree to it.

[33] He said that in addition to the eviction of the defendant he is claiming, he also claims \$1,000 damages per year for the unlawful occupation of his land by the defendant for the past 5 years.

**Was there or was there not an agreement?**

[34] Having now considered the evidence which have been given in this trial as I have outlined above, I have come to the firm view and conclusion that there was no agreement made at all between the landholder, Tonga, and the defendant for the defendant to pay \$6,000 in parts as he could afford (tätä) to Tonga in order that Tonga, and his wife and their son and heir (the plaintiff) would sign the letter of surrender of the lot in favour of him.

[35] I find that the defendant was only given a temporary licence or permission to occupy the lot he now lives on for the purpose of educating his children, and that purpose had been achieved and that he was notified to leave but he did not want to leave and he did not leave.

[36] There are several reasons for that finding. Firstly, \$1,000 was a lot of money in 1996 and if the defendant did have it on him as he said, he would not have needed the help of his bishop or of Tonga's brother-in-law. He would have known that Tonga would accept the \$1,000 and give him the lot. But he took along the other 2 men because he did not have any \$1,000. As I said, \$1,000 was a lot of money, money which he and his wife could ill afford and if he had in fact given Tonga such a large sum of money, he would be sure to have a receipt from Tonga for it, and more importantly, to have the number of the lot he was paying for written on the receipt. But he didn't, and I believe it was because he did not give Tonga such a large sum.

[37] Secondly, the fact that the defendant and his family moved into the little house that same evening is more consistent with the need to move out of where he and his family were at the time than with the need to acquire a piece of land to build on and live on. That is because he did not even inquire as to whose

house it was and why it was on the piece of land for which he had just paid \$1,000. It is clear he was just grateful to have a house to move into, for free.

[38] Thirdly, he was not even concerned that the little house was taken away or that he and his family had to move from that lot to the present lot, which he said was in bush and had large trees to be cut down and was swampy and was used for dumping rubbish. I believe he was happy to work and make it habitable because he did not have to pay for it. He did not even question whose lot it was or what number it was.

[39] Fourthly, the house that he built on that lot was a temporary house. I believe it was because he knew he was only to be there temporarily. That is because the house he built was of corrugated iron walls and corrugated iron roof. Such a house is most unsuitable in Tonga because it is hot in the summer and is cold in the winter, but it is cheap and easy to build and is commonly used for temporary purpose. That house is shown in the photographs which have been produced in evidence (D1). That was the only house that Tonga allowed him to build, I find, because he was only permitted to live there temporarily.

[40] Fifthly, the permanent house which he later built and which is shown in the photographs D2, is the hurricane relief house which was built after Cyclone Gita in 2018, but he had already been notified in 2016 to move out, by letter from the plaintiff's lawyer but he refused to move out. He built that house permanently at his own risk.

[41] Sixthly, I believe that the defendant has fabricated his list which he says that he made in 2010 after Tonga died and the list which he has given in paragraph 38 of his brief of evidence, because according to the list which he said he wrote in 2010, he had only paid up \$4,450, whereas according to the list he has made in paragraph 38, he had already paid to Tonga \$6,550 before Tonga died. If he had already paid \$6,550 to Tonga, then why did he not demand the letter of surrender from Tonga? It is clear that he has only included in that list the \$1,100 for 2001 because Tonga wrote in his diary (and the defendant

only saw it after he received a copy of it on 1 November 2019) that that sum was to be paid to him by "5/8/01".

[42] I am satisfied that Tonga kept a separate page for all his occupants and that he kept a separate page for the defendant and that he wrote in it all the payments which the defendant had given him and also the amount promised by the defendant to give to him. That record shows that all that the defendant gave him was cash of \$37.00 and a little pig worth \$15.00 and 1½ bags of cement. I have no reason to doubt the accuracy of that record.

[43] Accordingly, I am satisfied and I find on the evidence that there was no agreement made between Tonga and the defendant such as the defendant has claimed in his defence.

#### **Licence ended**

[44] I find that Tonga had only given a licence or permission to the defendant to occupy his tax allotment, and that Tonga had terminated that licence whilst he was still alive, and if there was any doubt about that, as the defendant has maintained, that permission and licence came to an end upon the death of Tonga.

#### **No licence granted**

[45] I also find that the plaintiff has never given any licence or permission for the defendant to continue to remain on the tax allotment after he became the lawful holder of the allotment. He has also lawfully notified him to vacate the allotment by letter from his lawyer in 2016, but the defendant has refused to vacate it up to now. He, the plaintiff, is entitled to require the defendant to vacate his tax allotment.

#### **Estoppel**

[46] The defendant pleads estoppel against plaintiff. In respect of the house with the corrugated iron walls and roof, that house was built when Tonga was the

landholder. The plaintiff was not the landholder then, and he had made no representation to the defendant at any time that he could built it.

[47] As to the new hurricane relief house built after Hurricane Gita in 2018 or so, the plaintiff made no representation that he could build it either. Besides he had already notified him in 2016 to vacate the land but he refused to do so. I consider that the defendant took it upon himself to have the hurricane relief house built in 2018 in order that he had a stronger ground not to be evicted.

[48] I am not aware of any evidence that the plaintiff was aware of the construction of the hurricane relief house and that he stood by and allowed the defendant to incur the costs of the construction. In fact, it would appear that the defendant did not loose his house in the Cyclone Gita at all and so he was not entitled to any hurricane relief house at all, because the hurricane relief house has been built some 4 feet away from the existing house which had been built while Tonga was alive.

### **Damages**

[49] I am satisfied that the plaintiff is entitled to damages for the unlawful occupation of his tax allotment by the defendant. Had the defendant moved out as he was notified to do in 2016, the plaintiff would have been able to let the land to some other tenants who would have paid him \$1,000 a year to live there. I accept the plaintiff's figure of \$1,000 per year.

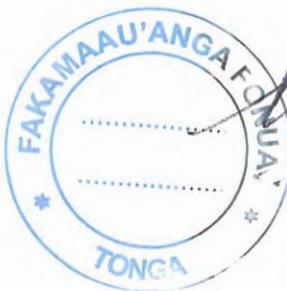
### **Orders**

[50] Accordingly, for the foregoing reasons, I make the following orders:

- (a) There be judgement for the plaintiff.
- (b) The defendant together with all his family and houses and belongings shall vacate the tax allotment of the plaintiff, which tax allotment is Fineupepe with an area of 3 acres 1 rood 30.6 perches in the estate of Ma'ufanga in Lot 7 Blk 79/94, by no later than the 30 day of September 2021.

- (c) The defendant shall pay damages to the plaintiff in the sum of \$5,000, that is, \$1,000 per year from September 2016 to September 2021.
- (d) The defendant shall also pay the costs of the plaintiff in these proceedings, to be taxed if not agreed.

**Nuku'alofa: 9 June 2021**



Niu J  
**J U D G E**

