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IN THE LAND COURT OF TONGA

NUKU'ALOFA REGISTRY

LA 18 of 2020

BETWEEN : **TANAKI LATU**

- **Plaintiff**

AND : **LOLANGI KAHO**

- **Defendant**

BEFORE HON. JUSTICE NIU AND ASSESSOR TOUMO'UA

Counsel : Mrs P. Tupou KC for the plaintiff

: Mr. S. Fili for the defendant.

Trial : 10, 12 and 13 May 2021.

Submissions : of Mr. Fili filed 3 June 2021.

: of Mrs. Tupou filed 24 June 2021.

Ruling : 8 July 2021.

RULING

The claim

[1] The plaintiff claims that he was lawfully granted the right to possess and to use, and that he did possess and he used a tax allotment situated at Fua'amotu, by the estate holder, Noble Tunji, and that the defendant unlawfully cut, or caused to be cut the fence which kept the cattle of the plaintiff on the tax allotment, and caused the cattle to escape and to cause

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damage to neighbouring properties, and that the defendant also caused to be cut 260 posts of the fence and the plaintiff has had to keep his cattle in someone else's tax allotment pending the outcome of his present claim. He claims in trespass and claims damages in a total sum of \$29,735 against the defendant.

The defence

- [2] The defendant has raised several defences in his statement of defence as follows:
- (a) that he and his younger brother had each applied to the Minister of Lands for grant of this tax allotment to either of them but that the Minister failed in his statutory duty to grant the allotment to either of them, and he asks for an order that the Minister grant the allotment to either one of them, and for an order that the estate holder (Noble Tungi) perform his statutory duty to consult with the Minister to grant the allotment to either the plaintiff or his brother;
 - (b) that he had planted lose yams on the allotment prior to the grant of the right to use the allotment by the estate holder to the plaintiff and that before he could harvest that crop, the plaintiff caused his cattle to enter the allotment and destroyed part of his crop of lose yams, and he accordingly counterclaims for damages in respect of the damaged yams in the sum of \$909.30;
 - (c) that the plaintiff had brought an action against him for trespass in respect of the same allotment in a land case no. LA13/2017 (in the Land Court) and in a private prosecution for trespass in PR1/2020 (in the Magistrate's Court) and that he, the plaintiff, lost them both;
 - (d) that he, the defendant, is the grandson of the holder of the allotment and that his parents had farmed the allotment ever since he grew up and that the plaintiff has no blood connection to the allotment. He says

that as he and his brother had applied for the allotment, he had the right to possession of it.

The facts

- [3] The following are the relevant facts which I have found from the evidence which have been given in this trial.
- [4] This tax allotment is situated in Fua'amotu in the estate of Noble Tungi. It has an area of 8 acres 1 rood and 20 perches. It was first granted to and was registered in one Tevita Tui'one Nai on 3 November 1933. He died on 8 June 1980 and the allotment was transferred to his widow, 'Ema Nai, on 17 November 1980. 'Ema Nai died on 19 October 1982. No claim was lodged by any person as heir to the allotment by the 19 October 1983 and it reverted to Noble Tungi as estate holder in accordance with S.87 of the Land Act.
- [5] At that time, the title of Tungi was still held by His Majesty, King Taufa'ahau Tupou IV (since he was still Crown Prince). Tupou IV was succeeded by Tupou V in 2006 and in or about July 2008, the title Tungi was bestowed upon the present holder (eldest son of Tupou V's next eldest brother).
- [6] Tevita Tui'one Nai and 'Ema Nai had 2 children, Vaikalafi Nai and Mosiana Nai. Vaikalafi went to the U.S. and married and lived there. It is said that he became an U.S. Citizen. He became acquainted with Tanaki Latu (the plaintiff) who also lived in the U.S. He is also from Fua'amotu. Both Vaikalafi and Tanaki each had his own tax allotment at Fua'amotu. In about 2004, they both decided to come back and live in Tonga.
- [7] When Vaikalafi returned, he found that his sister, Mosiana, and her husband, Sione Kaho, had built their dwelling house on their parent's town allotment and were living there with their children, of whom the eldest son is Lolangi Kaho (the defendant). He was not happy with that and he went and lived on the tax allotment. He asked Tanaki to help him build a house there for him to live there in exchange for Tanaki using the tax allotment for 20 years at an annual rent of \$350 which he was to pay in advance (\$7,000). They signed an

agreement to that effect and the \$7,000 was paid and the house was built and Vaikalafi lived there.

- [8] Tanaki then had the whole tax allotment fenced at a cost of \$3,000 - \$4,000 and grazed cattle on it. That was about February 2005 and from then until 2016, Tanaki peacefully had his cattle grazing on the allotment without any problem, and he and his wife, `Elisiva, went back and forth to the U.S. for medical treatments of Tanaki.
- [9] In 2016, Vaikalafi died, and in January 2017, whilst Tanaki and his wife were in the U.S, the defendant, Lolangi, caused the fence to be opened and the cattle escaped and caused damage to neighbouring plantations. Tanaki returned and repaired the fence and had the cattle grazing there again but he had to return to the U.S. for his treatment. Not long after he left, the defendant again caused the cattle to escape by cutting the fence.
- [10] Tanaki returned and repaired the fence and had his cattle back in the fence, and he and his brother's son filed a claim against the defendant and his mother, Mosiana, in the Land Court in an action no. LA13/2017 and applied for an injunction to stop the defendant from interfering with the cattle until the action was disposed of. The defendant gave an undertaking that he would not interfere with the cattle. He counter-claimed that he had a prior right to possession of the allotment and prayed for damages for trespass of the plaintiff.
- [11] Tanaki had to return to the U.S. for treatment but this time he was laid up in hospital and was unable to return to Tonga for the trial. The trial having been adjourned from January 2018 to March 2018, and there being no satisfactory explanation or document from hospital verifying the state of health of the plaintiff and when he might likely to be well again, the Land Court struck out the plaintiff's claim upon the defendant withdrawing his counterclaim. It made an order that the "defendants are not for a period of 21 days to remove or otherwise interfere with the plaintiff's cattle on the land so as to give the plaintiff reasonable time to remove them."

- [12] The plaintiff, Tanaki, was informed of the Court decision and he had his cattle moved to another allotment. The defendant then entered the land and ploughed and planted it with a crop of lose yams in about September 2018.
- [13] In about early 2019, the plaintiff was advised that the allotment had lawfully reverted to the estate holder, Noble Tungi, because no claim had been made to it after `Ema Nai died in 1982. The plaintiff went and asked Noble Tungi for the use of the allotment. Noble Tungi was in the U.S. at the time and he told the plaintiff to meet him in June 2019 in Tonga to see about the matter.
- [14] In June 2019, the plaintiff went and saw Noble Tungi here in Tonga, and Noble Tungi instructed that a letter be drawn up and he signed it to the effect that the police cause the allotment to be given to the plaintiff for his use until such time that he would require it back. The letter required the occupants to vacate by noon the following day, 21 June 2019.
- [15] The letter however wrongly referred to the tax allotment. It referred to Vaikalafi's own tax allotment and the defendant refused to comply with it. When the error was discovered, Noble Tungi instructed and another letter was correctly drawn up and he signed it on 15 July 2019 to the same effect as the first letter. The plaintiff thought that the defendant had already removed his yams since he was notified in June 2019 and he let his cattle onto the land.
- [16] The defendant asked for time to remove the rest of his lose yam crops and the plaintiff allowed him to enter and remove his yams. The defendant claims that the plaintiff's cattle destroyed some of his yams, valued at \$909.30.
- [17] Thereafter the defendant and his family, including his mother continued to come onto the allotment and the plaintiff took a private prosecution against the mother, the defendant and 3 of the defendant's sons (PR15, 16 & 17/2019) in the Magistrate's Court and the Magistrate issued a restraining order against all defendants on 2 September 2019. The trial of those cases were not held until May 2020 and the decision was not given until 15 July 2020 when the Magistrate dismissed the charges against the defendants, because she found

that the defendants still had their yam crops on the land on the 16 July 2019 and that they still had the right to enter and remove them, but the charge of trespass was that they entered unlawfully on the 16 July 2019. No appeal was taken against that ruling.

- [18] From then on, the defendant caused the fence to be cut and the cattle to escape on several occasions and the plaintiff had to hire security guards to watch his cattle 24 hours for 1 week.
- [19] On 5 October 2020, the defendant caused the fence wires and the fence posts to be cut and the gate to be open and the cattle escaped. The plaintiff paid workers to round up the cattle into one paddock and to cut and transport new posts and bought new rolls of wire and rebuilt the fences cut.
- [20] On 3 November 2020, the defendant caused a tractor to plough up part of the paddock thereby depriving the cattle of grazing grass, and on 5 November 2020, he caused the fence to be destroyed by cutting 260 posts with the wires still nailed to them. Again the plaintiff paid workers to round up the cattle, plant new posts and nail up the wires again which were new rolls of wire as well.
- [21] The total costs of the damage caused by the defendant came to \$12,635.00.
- [22] The plaintiff filed his claim in this Court on 13 November 2020 and he applied for an interim injunction and I granted it *ex parte* on 17 November 2020. It ordered that the defendant "and any person acting on his behalf were restrained and prohibited from entering upon the land which is the subject of this action and from interfering in any way with any crops, animal, fence, land or any property on the said land". It invited the defendant to apply to revoke or vary that order and it also notified him that if he breached it, he might be held in contempt and be imprisoned.
- [23] On 18 November 2020, the defendant went to the allotment and he had a plough to plough up the land. On 14 December 2020, the defendant caused the fence wire to be cut and the cattle escaped and damaged the neighbour's

crops. On 30 December 2020, the defendant caused 4 traps to be laid inside the cattle pen to catch the plaintiff's cattle. On 2 January 2021, the defendant instructed boys to enter the allotment and collect coconuts.

- [24] On 14 January 2021, the plaintiff applied for leave to apply for an order of committal of the defendant. The defendant denied knowledge of any of the alleged matters stated in paragraph 33 above. By consent of both counsel, it was agreed that the matter of the application be dealt with together at this trial, to save time and costs to the parties.

The defences and submissions of the defendant

- [25] I will deal first with the defences and the submissions of the defendant in respect of them.

Breach of statutory duty of the Minister

- [26] The defendant says that the Minister of Lands had a statutory duty to consult the estate holder and to grant the allotment to his brother Hasiata Kaho when that brother applied for the allotment in 2005, and when he, the defendant, applied for the allotment in 2020. He refers to the provisions of SS.7, 8 and 34 of the Land Act (the Act) as the authority for the same.

- [27] Section 7 relevantly provides that every "male Tongan subject by birth upon making application in the prescribed form to the Minister of Lands shall be entitled to receive subject to the provisions of this Act a grant of" a tax allotment and town allotment.

- [28] Section 8 provides as follows:

"8. Subject to the provisions of this Act relating to surrender, the grant, if the applicant be lawfully residing on an hereditary estate, shall be made from the lands in such hereditary estate; and if the applicant is lawfully residing upon Crown Land shall be made from Crown Land:

Provided always that land comprised in an hereditary estate shall not be granted as a tax or town allotment without prior consultation with the holder of the hereditary estate."

[29] Section 34 (2) provides as follows:

"34. (2) Before making a grant of a tax allotment out of an hereditary estate the Minister shall consult the holder thereof and hear any objections he may make to the grant being made and where the Minister and the holder of the hereditary estate fail to agree, the Minister shall nevertheless grant the land as a tax allotment but such grant shall within 3 months of the making thereof be liable to review by the Court, the decision of which on the matter shall be final."

[30] I have underlined the words "upon making application in the prescribed form" in the provisions of S.7 because that is an express and mandatory requirement of the Act. Section 43(2)(a) provides as follows:

"43. (2) The grant shall be subject to the provisions of this Act and shall be made in accordance with the following rules –

(a) The applicant shall make an application on the prescribed form to the Minister; "

[31] It is upon the defendant to prove, upon a balance of probability, that he did apply to the Minister of Lands upon the prescribed form, or that his brother, Hasiata Kaho, did so. He has failed to so prove it. No such application or copy of such application was produced in evidence. His allegation that there was such a form is that his mother, Mosiana Kaho, had taken it to the estate holder and that he consented to it in 2005. But Mosiana Kaho was not called to substantiate it or be cross-examined about it.

[32] As to his own application for the allotment, which he said in his statement of defence (paragraph 1): "The appellant submitted his application in the year

2020,” he gave no evidence of it at all, either in his brief of evidence or in his oral evidence. His statement of defence is not evidence unless admitted by the plaintiff and the plaintiff did not admit it.

[33] Besides, even if an application in the prescribed form was made by Hasiata Kaho, as alleged by the defendant, Hasiata Kaho is not a party to these proceedings, just as the Minister and the estate holder, Noble Tungī, are not parties to these proceedings, and I cannot see how this Court can make any order for or against them when they had not be joined and be heard in these proceedings.

[34] In any event, what is most lacking in the argument advanced by the defendant is that the estate holder and the Minister of Lands have failed to agree that the allotment be granted to him or to his brother.

S.34 (2) provides:

“... and where the Minister and the holder of the hereditary estate fail to agree ...”

No evidence has been given that the Minister and Noble Tungī have disagreed that the allotment be granted to the defendant or to his brother. The required evidence is that the Minister has agreed to grant the allotment to either applicant but that Noble Tungī does not agree to it. If that was the case, then the Minister must make the grant to either applicant and leave it to Noble Tungī to bring the matter to this Court within 3 months. But no evidence has been given that the Minister had or has agreed to make a grant to either applicant.

[35] I therefore find that this ground of defence fails.

Previous court proceedings

[36] The second defence of the defendant is that the plaintiff had brought actions against him in respect of the same land on the same ground in two cases, LA13/2017 (in the Land Court) and PR1/2020 (in the Magistrate’s Court) and that he, the plaintiff, lost them both.

[37] In respect of the Magistrate's Court case, the Magistrate decided, and I say correctly, that jurisdiction to decide who had lawful possession was in the Land Court and that the plaintiff failed to prove that the defendant had no lawful justification for entering the allotment on the 16 July 2019 because she found as a fact that on that day, the day stated in the charge, the defendant still had his yams on the allotment and that he could lawfully enter and take them.

[38] In respect of the Land Case (LA13/2017), the claim of the plaintiff was not decided by the Land Court. It was struck off because of the failure of the plaintiff to attend and prosecute his claim. There was no judgement as to the merit or absence of merit of the plaintiff's claim. It is only if judgement thereon is given by the Court that the plaintiff is barred from bringing the same claim against the defendant. S.99 of the Evidence provides for that as follows:

"99. Every judgement is conclusive proof in all subsequent proceedings between the same parties or their privies of facts directly in issue in the case actually decided by the Court, but not of facts which were only collaterally or incidentally in issue even though the decision of such facts was necessary in order to enable the Court to decide the case."

[39] I consider that that ground also fails.

Right of possession

[40] The third ground of defence of the defendant is that he had always had possession of the allotment ever since his grandfather and grandmother were alive and afterwards after they died and that that possession was confirmed when he applied to be granted it as his tax allotment.

[41] I would agree that the defendant, and the family of Tevita Tui'one Nai and Meleane Nai, continued to have possession and use of the allotment although it had reverted to Noble Tungī after 'Ema Nai died in 1982. But I find that that ended when Noble Tungī gave that possession to only the plaintiff on 15 July 2019. From then on, the plaintiff had the lawful possession of the allotment,

subject only to allowing the defendant to remove the rest of his yams from the land, and which he did.

[42] I therefore consider that that defence also fails.

Counter-claim

[43] As to his counter claim against the plaintiff, the defendant says that part of his yam crop on the allotment was destroyed by the cattle of the plaintiff when the plaintiff let them back on to the allotment upon being given the letter of Noble Tungi of 15 July 2019. He claims \$909.30 for the damaged yams.

[44] In considering the defendant's counter-claim, I take into account the letters of counsel, Mr. Fili, which he wrote to the plaintiff at the time. His first letter was on 20 July 2019 in which he told the plaintiff that he, the plaintiff had brought his cattle onto the land while the defendant's yams had not been completely removed. He told him that he the plaintiff, had brought his cattle onto the land immediately after he served the second letter from the estate holder. He told the plaintiff that the Ministry of Agriculture would evaluate the damaged yams for him to pay. No reply was made by the plaintiff to that letter.

[45] On 6 August 2019, counsel again wrote to the plaintiff and attached a copy of the evaluation of the Ministry of Agriculture which was dated 24 July 2019. It stated that the damage to the yams was true and that it was caused by cattle, horses and sheep. It evaluated some damage to be 100% (56 yams) and 60% (127 yams), a 100% damage equating to \$6.50 per yam. It evaluated a total damage of \$909.30, which sum included the charge of \$50 of the Ministry for attending to the matter. Counsel required payment of the said sum within 7 days. No reply or payment was made by the plaintiff.

[46] The defendant confirmed that evidence in Court and the plaintiff denied that there was any yams left or damaged by his cattle. The plaintiff called his witness, Kali Fakapau Tupou, who said that no yam was damaged by the cattle because the cattle were put into a pen separate from where the yams were

and that the plaintiff allowed the defendant to enter and he did remove all his yams, undamaged.

[47] I doubt that evidence very much. In giving that evidence, this is what he said in his brief of evidence:

“9. I recall 2019 there was a time the plaintiff brought security guards to watch and I went and slept over to join in the watch with the plaintiff.

10. I slept in my own vehicle and the plaintiff slept in his own vehicle and I was surprised when the plaintiff rang me and asked where I was because these people were coming to go onto the land.

11. I went there and Sione Kaho (father of the defendant) went to attack the plaintiff with a machete. But the plaintiff took out his gun and I intervened and stopped them.

12. I told the plaintiff to let them come in and take the remainder of their yams because they had taken the major part of it.

13. The plaintiff then agreed and they came in and took their yams. No yam was damaged because the cattle were penned in a separate area of the allotment, not where the yams were.”

[48] From that account of the witness, it is clear that the plaintiff was not aware that any yams were still on the allotment. The witness had to tell him that. If the plaintiff was not so aware, then there was no need to keep the cattle apart from where the yams had been, and that conflicts with what the witness claims, that the cattle were penned separately.

[49] Secondly, why did not the plaintiff respond to Mr. Fili’s letter of 20 July 2019 which alleged that there was such damaged yams, and explain what the witness has now explained? If he overlooked to reply, why did he not respond after he received Mr. Fili’s letter of 6 August 2019?

[50] These letters were only produced by the defendant when he came to give his evidence at the trial and I allowed them to be produced but subject to any objection which Mrs. Tupou may raise in her final submissions. Mrs. Tupou has not made or raised any objection or given any reason why these letters should not be accepted in evidence. I consider that in the interests of justice they should be produced in evidence.

[51] Accordingly, I find that I am satisfied upon a balance of probability that the plaintiff has proved his counterclaim against the plaintiff in the sum of \$909.30.

The plaintiff's claim

The law as to trespass

[52] Mrs. Tupou has correctly stated the law with regard to trespass as stated in ***Salmond on Torts*** and as applied in *Taulanga v Kama*. [2005] TOSC 32 and in *Jing Ming He v Kanongata'a* [2020] TOLC 12. It is an unjustified direct interference with the land in the possession of another and it is actionable per se without proof of actual damage.

[53] In the present case, I am satisfied that the plaintiff had the lawful possession of the allotment as from 16 July 2019, the date of Noble Tungi's letter which confirm the grant of use of the allotment to him until such time as he shall require it again. Noble Tungi had the lawful title to the allotment upon its reversion to him as estate holder when no claim was lodged by any person as heir to Tui'one Nai after his widow died in 1982. Section 87 of the Land Act expressly provides for that as follows:

"S.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."

[54] I accept that the defendant was not in unlawful occupation or possession of the allotment prior to the 16 July 2019 because the estate holder, Noble Tungi had not required him to vacate it until then. I also consider that the defendant did accept that his occupation and possession had come to an end. He showed that by removing his yams after he was served with the first (wrong) letter. He only had a small portion of the crop left on the land when he was served with the second (correct) letter on 15 July 2019. He had to ask the plaintiff to allow him to go onto the land and remove the rest of his crop. The plaintiff allowed him and he did. He did not dispute Noble Tungi's letter by taking it to Court or by writing to him in protest. He instead chose to trespass and to cause the damages to the plaintiff as the plaintiff has claimed.

[55] In fact, the plaintiff's witness, Her Royal Highness, Princess Salote Maumautaimi Tuku'aho, said so in her evidence in Court when cross-examined by Mr. Fili: "What the defendant should have done (when he was served with Noble Tungi's letter) was to have come to Tungi. They should not have gone and done what they did."

[56] I am therefore satisfied that the defendant has committed trespass on the allotment as claimed and proved on the facts which I have found.

Damages

[57] I have accepted that the defendant has caused actual or special damage to the plaintiff in the sum of \$12,635.00. In addition, I also accept that the acts of the defendant necessitated the hiring of security guards for one week at a cost of \$854, thereby making a total cost of \$13,489.00.

[58] That total sum of \$13,489 is only for the actual costs which the defendant caused. It does not include the damage to the land and the actual acts of trespassing on the land over many months or days over many months. The plaintiff claims \$5,000 in respect of that.

[59] Considering that the acts were deliberate, repeated over many occasions and in defiance of the lawful authority which the estate holder had given to the

plaintiff, thereby acting in defiance of the estate holder himself, I consider that this is a serious trespass and I consider that the sum of \$5,000 is appropriate.

[60] As to the claim for damages of \$10,000 for the emotional distress which the plaintiff has suffered over such a lengthy period, and especially, in the unfortunate state of health of the plaintiff, at the time, I consider that there should be damages in respect of it. This is not a case of negligence on the part of the defendant where such damage may not be payable. This is a case of deliberate abuse of right of quiet enjoyment of the land perpetrated by the defendant. In the circumstances of this case, I consider that \$10,000 is appropriate.

Committal application

[61] On the committal application, I am satisfied that the defendant was personally served the injunction I issued against him (on 17 November 2020) at 11:01 am 18 November 2020 whilst he was on the allotment whilst he had a plough ploughing up the land of the allotment.

[62] On 14 December 2020, the fence was cut and the cattle escaped and damaged the neighbour's crops. The defendant says he had nothing to do with it, but I am satisfied that he did. Either he told someone to do it or he deliberately did not tell such person not to do it, knowing that that person would do it.

[63] On 30 December 2020, 4 traps were found laid inside the allotment to catch the cattle. The defendant denies that he did it or knew of it but he allowed that person to do it because he did not instruct him not to do it.

[64] On 2 January 2020, boys of his family went and collected coconuts on the allotment and he claims that he did not instruct them to do so. He has however failed to instruct them not to because that was why they did it.

[65] I am therefore satisfied that the defendant has disobeyed and has breached the injunction which I have issued against him, and I had cautioned him in that injunction that if he breached it, he might be held in contempt and be liable to

imprisonment. Being aware of it, he deliberately breached it. He has committed contempt of Court and is liable for imprisonment.

[66] There is a good reason for an order of injunction, especially an interim injunction such as this order was. It ensures that neither party is to do anything before the trial is held that would affect the outcome of the trial, or which would prejudice the making of any order at the end of the trial. It serves to preserve the status quo until then.

[67] In breach of that, the defendant continued to enter and treat the allotment as his own despite the presence or control thereof by the plaintiff in order to consolidate his claim that the allotment is his family's land. That is precisely what the injunction was meant to avoid happening.

[68] I therefore find that the contempt committed by the defendant is serious.

Orders

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

(a) There be judgement for the plaintiff against the defendant for trespass in the following sums:

- | | | |
|-------|----------------------------------|--------------------------|
| (i) | special damages in the sum of | \$13,489.00 |
| (ii) | general damages in the sum of | 5,000.00 |
| (iii) | emotional distress in the sum of | <u>10,000.00</u> |
| | | <u>Total \$28,489.00</u> |

(b) There be judgement for the defendant against the plaintiff in the counterclaim in the sum of \$909.30.

(c) The defendant is fined for contempt of court in the sum of \$1,000 which shall be paid into Court within 30 days from today, in default of which the defendant shall be imprisoned without labour for 3 months.

- (d) The defendant shall pay 90% of the costs of the plaintiff in these proceedings, to be taxed if not agreed, 10% being deducted in respect of the counterclaim for which the defendant has been successful.
- (e) The interim injunction made on 17 November 2020 shall continue and is made a permanent order.



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J U D G E

Nuku'alofa: 8 July 2021

