



writing within 12 months after the death of his uncle in 2005, but that the Minister of Lands, first defendant, had granted it unlawfully to one Mapili To'a in 2010 (and which grant was cancelled by order of the Land Court in 2015) and again unlawfully granted it to the second defendant in 2016.

- [2] He also claimed that the second defendant had already held a town allotment of his own when he was granted the allotment in question in 2016 such that the grant of the allotment in question to him was also invalid for that reason.
- [3] Subsequently, in reply to the first defendant's amended statement of defence, in which it was stated that there was a meeting between the Minister and the plaintiff and Mapili To'a and the second defendant and the second defendant's counsel, Mrs. Tupou, on 27 October 2015, the plaintiff then claimed that the Minister had already made up his mind at that meeting to grant the allotment to the second defendant, and that the Minister did not give to him any opportunity to make representations as to his claim for the allotment. He said that the actions of the Minister were unlawful and were in breach of the principle of natural justice.
- [4] He prays for orders that the grant to, and registration of the allotment in, the second defendant be cancelled.

**Defences**

- [5] Both defendants deny and they dispute the claim of the plaintiff.

**The facts**

- [6] The relevant facts are not in dispute.
- [7] Matei Taumoepeau (Matei) lawfully held the town allotment in question. He was granted a deed of grant (book 9 Folio 42) of it on 25 September 1952. It had an area of 1 rood 24.2 perches. He was never married and never had any children. He adopted Makameone (Maka) as his son.

- [8] Matei had an older brother, Siosifa, who had an illegitimate son. That son is Maka, the second defendant, whom Matei adopted. Siosifa had no legitimate children.
- [9] Matei had 3 younger brothers, Fakava'inga, 'Onehunga and 'Aleksanita. Fakava'inga had 3 sons, Paula, Siosifa (Jnr) (the plaintiff) and 'Aleksanita, none of whom held or holds any town allotment. Paula, the eldest son, never married and he has no children. Siosifa, the plaintiff (Sifa) is married and has 3 sons and 3 daughters.
- [10] Four of the brothers, Siosifa, Matei, Vakava'inga and 'Onehunga each held his own town allotment.
- [11] Siosifa died in 1960. Fakava'inga died in 2003, and his town allotment was transferred to his widow and she still holds it up to now. 'Onehunga died in 2018 or so.
- [12] Matei built 3 houses on his town allotment, all of which were still standing when he died on 6 November 2005. He was using them for the purpose of a mortuary business.
- [13] He died intestate.
- [14] Maka lodged his claim as heir to the allotment (of Matei) with the Land Office on 20 December 2005.
- [15] On 1 August 2006 Maka lodged his application to be granted the allotment with the Land Office. He carried on the mortuary business and a medical clinic in the houses of Matei on the allotment.
- [16] Paula, eldest son of Fakava'inga, wrote to the Land Registrar of the Ministry of Lands on 15 September 2006 and applied that Matei's allotment be registered in his next brother, Sifa (the plaintiff).
- [17] On 1 February 2007, Sifa wrote to "Maka" of the Ministry of Lands, whose full name was Makakaufaki Matekitonga and was the Land Registrar at the time

and referred to a recent meeting that he and Makakaufaki had had with the Minister about his application for the allotment.

- [18] On 10 April 2007, he wrote to the Minister that no agreement had been reached and it appeared that no agreement would be reached with Maka (the second defendant) about the allotment.
- [19] On 23 June 2010, Siosifa wrote to Rosamond of the Land Office about the allotment and asked for a decision.
- [20] On 27 September 2010, he wrote to the Minister attaching an affidavit by one Pele Puloka to assist his application.
- [21] On 13 April 2011, one Mapili To'a (Mapili) applied for the allotment. He was the grandson of the older brother of the holder of the allotment of which the allotment had formed part. The Minister (Ma'afu) signed his consent to the grant, as estate holder, on 29 April 2011 and he registered Mapili's grant on 7 June 2011.
- [22] Mapili filed his claim in the Land Court to evict Maka from the allotment. By order of the Court, the Minister was joined as third party.
- [23] On 13 March 2015, the Land Court found that the way in which this matter was handled by the Ministry was in the clearest breach of the principles of natural justice (because of the presence of Maka on the land and without having afforded to him an opportunity to be heard before Mapili was granted the allotment) and accordingly set aside the registration of Mapili and referred the matter back to the Minister for further consideration.
- [24] Meetings were held with the Minister (first defendant) and the following are the (translation of) minutes of those meetings:

MAPILI TO'A – "KAPE" – KOLOFO'OU

17/08/2015

Introduction

Mapili - Since the conclusion of our trial with Maka over the allotment we were ordered by the Judge to come here – and that is why I’ve come here.

Minister - The Judge’s Order was to cancel your registration. I do not understand if that cancellation means I can still consider you both for the allotment like the rest of the family. Like Sifa Taumoepeau, etc. and that is why I am asking Crown Law for legal advice on this matter before we meet.

Mapili - I was wondering – if possible I could have the part that was leased.

Minister - What I did was the best I could do, grant it – but it was not good enough for you. I don’t understand why you filed a claim against the Minister of Lands? Let us wait to see what the Crown Law says before we meet.

Mapili - I will be travelling and we will return and await the response.

A. Ma’ufualu [Signature] 17/08/2015

“KAPE” KOLOFO’OU

27/10/2015

Minisiter of Land

Petunia Tupou

Dr Makameone Taumoepeau

Mapili To’a

Sifa Taumoepeau

Petunia - Introduced themselves and Makameone. The decision of the court for the allotment “Kape” in Kolofo’ou is that the grant you made to Mapili To’a is to be set aside.

But Maka and I believe that our work should be considered as it has been put on hold for a long time.

M/L - I ordered to grant this part for Mapili and it was my shortcoming as I did not inform you Maka, Sifa and family before proceeding with the grant. I acknowledge that was a shortcoming on my part.

2. I ask you – Do not let me make the decision.
3. Perhaps you could discuss as a family before we meet again.
4. I am troubled with having to decide a matter which I had already decided.

M/L - My question Petunia, am I allowed to grant land to Mapili?

Petunia - The decision of the Judge was that Sifa is barred from the claim to "Kape". As to Mapili the M/L is allowed to grant Crown Land to Mapili – and that means anywhere.

Sifa - I do not have a registered allotment. What does this mean?

M/L - The Judge stated that you are barred from making a claim to this allotment.

Sifa - Maka is the only one who has an allotment in Ngele'ia.

Maka - No. I do not have an allotment in Ngele'ia.

Sifa - Matei was registered in 1947. The allotment should have devolved through the heirs from there.

M/L - This does not mean that the matter be re-debated. We only follow the decision of the Judge.

2. - My wish is that you can discuss and then I would assist.

3. - Perhaps we may be allowed 2 weeks to complete our investigation and then we will inform you.

Maka - the issue – Lot # 3 is the object of this argument.

M/L - This can be considered.

Maka - The decision of the M/L, Ma'afu Tupou, was terminated by Tu'ipelehake and was reviewed by Fakafanua.

Mapili - At this time Tu'ipelehake had already retired from work for a long time.

M/L - We will meet on Monday of the week after next week. If when the time approaches anyone is busy then inform us – we shall postpone until we can all meet.

16/11/2015 – 10:00 am

Petunia - Thank you very much, Honourable Minister.

Mapili - There is nothing left for us to discuss. Maka has no say in what happens to the allotment.

M/L - That's fine, you should all go and discuss and we will meet again at the end of the week after next week.

A. Ma'ufualu [Signed] 27/10/15

Kolofo'ou Makameone & Sifa 2:00 pm 10/11/2015

Ma'afu - I will speak with Mapili, but I will not alter the decision of the Judge as it was our shortcoming to grant the allotment to Mapili while Maka was living there and carrying out work there and we granted it to another person and that is the reason I am a little troubled as you hold a large allotment compared to our number.

However, I hope this can be resolved today as it has been going on for too long.

- Maka - I am asking Sifa to let me hold the allotment.
- Sifa - I think that we should keep the allotment because if Matei was still alive he would not have wished to grant it to Maka.
- Ma'afu - Sifa you are explaining what has already been decided by the Judge. On Friday, a letter will be delivered to Petunia informing her of my decision to grant the allotment on Makameone's application.
- Fataua - You have ordered to grant the allotment to Maka and if Maka thinks to postpone until he offers a part for Sifa to apply for then we can postpone and if not then we will proceed with your decision.
- Maka - I do not wish for any further postponement.
- Ma'afu - That's the end of the matter I will grant the allotment to Makameone.

[Signed] F. Halatanu

(841-4335)

2:50pm Mapili To'a 10.11.2015

- Ma'afu - I am not able to carry out any other processes as the decisions of the court have been made, and I will grant this to Maka.
- Mapili - It hurts that these are other people who will be holding the allotment. But despite this, we will leave it all up to Heaven.
- Ma'afu - Allow me the opportunity to find a reserved area for you to move to as that is what I can do at this time.

Malo

[Signed] F. Halatanu

[25] A deed of grant Book 433 Folio 58 was issued by the Minister to Maka and it was registered on 8 July 2016 in respect of the allotment.

[26] The claim of the plaintiff was filed on 16 November 2020.

**The issue – Was there a breach of natural justice?**

[27] In his submissions, Mr. Corbett, for the plaintiff, touched only on the issue of breach of natural justice, and I take that to mean that the plaintiff has abandoned his claim that the second defendant had already been granted a similar allotment. The plaintiff has failed to produce any evidence that such grant had been made to the second defendant in any event.

[28] Therefore, the only issue to be decided, is whether or not, in making the grant to the second defendant, the first defendant Minister breached the principles of natural justice.

**Why did the allotment revert?**

[29] I however wish to clear up a misunderstanding which appears to be held by the parties, namely, as to why the allotment reverted to the Crown. The reason that the allotment reverted to the Crown was because the lawful heir to the allotment, Paula, the eldest son of Fakava'inga, did not claim it as heir. What he did was he claimed it for his next brother, Sifa (the plaintiff), so that he himself would wait to succeed as heir to their father's eldest brother's allotment. His claim for the allotment of Matei was therefore not **made by or for himself, Paula, as heir** such as is required by S.87.

[30] S.87 of the Land Act provides:

“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 S.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.”

[31] So that although Paula signed the letter dated 14 September 2006 on 15 September 2006 and it was taken by Siosifa to Maka Matekitonga, Land Registrar of the Ministry of Lands, it was not a claim by or for the heir, Paula, and it was therefore not a proper claim for the purpose of S.87. Accordingly, the allotment reverted on the expiry of 12 months from Matei’s death.

[32] As to whether or not Paula was or is the heir to the allotment, upon the death of Matei, the answer is that he was. That is because S.82 (e) provides for it as follows:

“(e) in default of any unmarried daughter of the deceased holder an allotment shall descend to the deceased holder’s brother or if such brother be dead to the eldest male heir of the body of such brother ....”

That means that the eldest brother of Matei, Siosifa, would have been the heir had he not died in 1960, and as he had no legitimate son, the next provision in (e) then applied:

“If the deceased holder’s eldest brother be dead without leaving any heir male of his body then the holder’s next eldest brother shall succeed or if he be dead **the eldest male heir of his body ...**”

[33] Because the next eldest brother of Matei was Fakava’inga, and Fakava’inga had already died in 2003, his eldest son, Paula, was therefore the heir.

[34] As to the provision of S.84 that only a son or grandson of the deceased holder who is an heir may elect to retain his own allotment or take the devolving allotment, that provision only applies if the heir who is not a son or grandson “already holds” a similar allotment. S.84, as relevant, provides as follows:

“84. Save and except a son or grandson of the deceased holder, no person **who already holds** a tax or town allotment shall be

permitted to succeed as heir to another allotment of the same kind as the allotment **he already holds ...**”

[35] When Fakava'inga died in 2003, his widow then held his town allotment as provided in S.80. She still holds it up to now. So Paula, the heir, would have been able to succeed as heir to Matei's town allotment as provided in S.82 (e) had he claimed the allotment as heir because he did not hold any allotment.

[36] I have no doubt that had the Land Court been informed that Siosifa had already died in 1960 leaving no son, and that Fakava'inga had also died in 2003 leaving a son, Paula, and that Fakava'inga's allotment was being held by Fakava'inga's widow instead, it would not have made its findings in paragraph 31 (f) and (g) and (h) of its judgement in the case of Mapili and Maka and M/Lands dated 13 March 2015, which were as follows:

“(f) It is accepted that Matei's brother Siosifa already held an allotment of his own; but

(g) By virtue of section 84 Siosifa was not permitted to choose between the land and the allotment he already held;

(h) The land reverted to the Crown on 6 November 2005 (Section 83)”

#### **Was the plaintiff barred by the Court?**

[37] There was also a misunderstanding to the effect that the Land Court had, in giving its judgement in the case between Mapili and Maka and the Minister, decided that the plaintiff in the present case, Sifa, was barred from making any claim to the allotment of Matei. The Land Court did not make any such order or statement. It was counsel for the second defendant, Mrs. Petunia Tupou, who had made that statement, during the meeting which was held with the Minister on 27 October 2015. Her name is stated as Petunia in the minutes of the meeting.

- [38] The Minister asked her, "My question Petunia, am I allowed to grant land to Mapili?" Petunia replied, "The decision of the Judge was that Sifa is barred from the claim to "Kape". As to Mapili the Minister is allowed to grant Crown Land to Mapili – and that means anywhere."
- [39] The person "Sifa" to whom Petunia meant was the plaintiff who was at the meeting and who was one of the 3 applicants for the allotment "Kape" which Matei had held. Mapili was the second applicant and the second defendant, Maka, was the third applicant. All 3 applicants were at the meeting. Petunia therefore, in replying to the Minister's question, stated that the first applicant, Sifa, was barred by the Judge from making any claim to the allotment "Kape" and that Mapili could be granted an allotment from Crown Land anywhere.
- [40] The Minister accepted Petunia's advice that the plaintiff was barred from being granted the allotment Kape, because when the plaintiff said that he did not have an allotment and asked what did this meant, the Minister said to him: "The judge stated that you are barred from making a claim to this allotment." Petunia did not correct the Minister.
- [41] When the plaintiff said that the allotment should have devolved through the heirs from Matei, the Minister told him that that could not be re-debated and that they should follow the decision of the judge.
- [42] At the next meeting of 10 November 2015, when the plaintiff said that had Matei still lived he would not want Maka to have the allotment, the Minister again said to him, "Sifa you are explaining what has already been decided by the Judge."
- [43] In fact, it is clear that after saying that, the Minister made his decision that the allotment was to be granted to Maka.
- [44] I am satisfied that the advice of Petunia Tupou that the Land Court had barred Sifa (the plaintiff) from any claim to Matei's allotment, when there was no such order or statement by the Land Court, caused the Minister to eliminate Sifa from applying for the allotment, and thereby leaving only Mapili and

Maka as the applicants for it. The Minister ought to have had independent advice from the Solicitor General but he chose not to. In all, it is a breach of natural justice.

### **Ownership of the houses on the allotment**

[45] The other thing that contributed to the decision of the Minister to grant the allotment to Maka was his assumption that Maka owned the 3 houses which Matei had built on the allotment and which Maka was using for his mortuary and clinic business.

[46] The Land Court in the Mapili Case appeared to have been of that view too.

[47] However, that is not the case. The 3 houses were the properties of Matei up to his death. He had made statements to Maka that they would be Maka's after he would die, but he did not make any transfer of ownership of them to Maka before he died and he left no will giving the 3 houses to him.

[48] Accordingly, in accordance with the provisions of S.11 of the Probate Act, the 3 houses vested in the Supreme Court upon Matei's death in 2005. That provision is as follows:

"11. From the death of an intestate until administration be granted his personal property shall be vested in the Court."

"Intestate" means a person who has left no will upon his death, and "Court" means the Supreme Court, and houses are regarded, by law in Tonga, as personal property: **Cowley Case** [2001] Tonga LR 183; **Kolo Case** [1997] Tonga LR 181.

[49] Maka stated in his evidence that no application has been made for administration of Matei's estate up to now.

[50] According to the schedule to the Probate Act, the beneficiaries to Matei's estate, which are at least the 3 houses, are his brothers, namely, Siosifa, Fakava'inga and 'Onehunga or their children if they have died.

[51] It is clear that the Minister did not consider that. He ought to, and he should have directed that application for letters of administration to the Supreme Court be made to determine who owned the 3 houses which were on the allotment at the time.

[52] Maka stated in answer to my questions that there were 3 houses of Matei on the allotment and that after Matei died, he used them as his. He said that the Minister might have thought that the houses belonged to him. When further questioned by Mrs. Tupou, he said that one of those houses was blown down during Cyclone Gita in 2018.

[53] The Probate Act, which provides for vesting of the properties of a deceased in the Supreme Court also makes it an offence for any person to take or deal with the property of a deceased before the Supreme Court has adjudicated it.

[54] It also provides that where no claimant or next of kin has been found within 3 years of the vesting of the estate in the Court, the estate is to become the property of the Crown but that the Minister of Justice may approve that the Court grant letters of administration in respect thereof to any person entitled thereto or illegitimately descended from the deceased.

### **Conclusion**

[55] I have therefore come to the conclusion, for the foregoing reasons, that the grant which the first defendant Minister to the second defendant, Maka, of the town allotment of Matei was unlawful because it was made in breach of natural justice in that –

- (a) the Minister wrongfully excluded the plaintiff, Sifa, from being an applicant for the allotment, and thereby denied him the right to make representation to him and/or disregarded any representation which he had made; and

- (b) the Minister failed to consider and to ascertain a relevant factor, namely, the ownership of the 3 houses which were on the allotment at the time.

### **Orders**

[56] Accordingly, I make the following orders:

- (a) The first defendant Minister of Land, shall forthwith cancel the deed of grant book 433 folio 58 in the name of the second defendant, Filimoto Makameone Taumoepeau.
- (b) The plaintiff, Siosifa Taumoepeau, shall forthwith take appropriate steps to apply for letters of administration, subject to approval thereof by the Minister of Justice, in respect of the estate of Matei Taumoepeau.
- (c) Upon grant of letters of administration, and ascertaining ownership of the 2 remaining houses on the allotment, the Minister of Lands shall invite plaintiff, the second defendant and Mapili To'a, and any other person who may wish to apply for the allotment, to attend before him and make representations to be granted the allotment, and he shall hear and decide their applications in accordance with the principles of natural justice.
- (d) The defendants shall jointly and severally pay the costs of the plaintiff, to be taxed if not agreed.

**Nuku'alofa: 4 October 2021.**



Niu J  
**J U D G E**