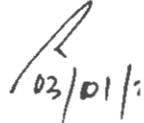


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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 12 of 2019

BETWEEN : **TIMOTE FINAU TU'ITUPOU**

- **Plaintiff**

AND : **1. SALESI KATAKAEHAU**
2. SIONE FOTU NAU
3. TEMALETI NAU
4. MINISTER OF LANDS

- **Defendants**

BEFORE HON. JUSTICE NIU AND ASSESSOR TU'IFUA

Counsel : Mrs. P. Tupou for plaintiff.
Mrs. F. Vaihu for first, second & third defendants.
Ms. 'E. 'Akau'ola for third defendant.

Trial : 17 and 18 May, 14 and 15 September, 1 October, 2021.

Submissions : 26 November 2021.

Ruling : 15 December 2021.

RULING

The facts

[1] I have considered all the evidence heard and produced in this trial and I have found that the following are the facts.

17 DEC 2021


The allotment

- [2] The allotment in issue in this case is a town allotment with an area of 1008 m² and it is identified as lot 12 in the survey plan no. 3567 of the village of Afa on Crown Land in Tongatapu (the allotment).
- [3] Adjacent to it on the north is allotment no. 11, and adjacent to it on the south is allotment no. 13, and stretching from north to south and adjacent to both lots 11 and 12 on the east is allotment no. 15, with lots 11, 12 and 13 facing a road running north-south, and lot 15 facing another road running north-south as well.

Occupation of the allotment

- [4] There are 2 versions of the history of occupation of the allotment. According to 'Ata'ata Finau, 69 years of age, of Afa who had worked as civil servant for 39 years, during which he was head of the Statistics Department from 2005 to 2015, lots 11 and 12 were just one allotment and it was occupied by one, 'Isileli Vakautakakala ('Isikeli), who was the younger brother of Paula Finau, the father of the witness. He said that 'Isileli lived on the part which is lot 11 and he also kept and maintained the part that is lot 12 up until he died in 1993.
- [5] He said that lot 12 was granted to and was registered in one Siale Finau while 'Isileli was still alive and he implies that 'Isileli agreed to it and continued to maintain it for Siale Finau although Siale Finau was not living on it. Siale Finau was the third son of Paula Finau, the older brother of 'Isileli. His registration was effected on 7 April 1987.
- [6] He said that lot 13 was occupied by one, Mōhokoi and his wife Makasini and they adopted Salesi, the first defendant, and they lived together with him and their own children on lot 13, and in about 1994, their house was damaged by a cyclone and they moved to lot 12 and lived there until they could repair their house. He said that Siale agreed to that but in around 2000, they built a more substantial house on lot 12.

- [7] He said the second and third defendants have lived there on lot 12, when they shifted there temporarily in 1993 and have continued to live there up to now, and that the first defendant has now had lot 12 registered in his name on 6 March 2019.
- [8] The other version of the history of occupation of the allotment was told by the third defendant, Temaleti, aged 49, wife of the first defendant. She said she was born in 1972 on this allotment lot 12 and that she has lived there up to now. She said her mother, Paea, was the daughter of Mohokoi and that Mohokoi and his wife (Temaleti's grandmother) adopted Salesi, the first defendant, who was Mohokoi's nephew as his son. She said that Mohokoi had his own son, Moana, and that Mohokoi gave lot 13 to be Moana's allotment and Moana lives there up to now, and that he gave lot 12 to be Salesi's.
- [9] She said that Salesi applied for lot 12 to be his allotment in 1990, the year in which she was married and that a wooden house was then built on the allotment (lot 12) and she and her husband lived in it and that they later extended it.
- [10] She said that in 2001 they received a letter from Siale Finau's lawyer demanding that they vacate the allotment in 30 days. She said that she went to the Land Office to check up Salesi's registration of lot 12 and found that Siale had had it registered in his name in 1987. She said that the Minister instructed that Siale and the town officer, Saia Naeata, and herself were to come and meet with him and that they did meet with the Minister. She said that the Minister also wanted to see Salesi, and that Salesi came from the U.S and saw the Minister.
- [11] She said that in the end, the Minister ordered that Siale's registration on lot 12 be cancelled and that his registration be transferred to lot 15 where he was living, and that lot 12 be registered in Salesi instead.

[12] She said she and her husband continued to live on lot 12 without any further problem from Siale until 2014 when his lawyer wrote to them to vacate lot 12. And he filed a court case to evict them but he died before that trial was held.

[13] The first defendant who was to give evidence in this trial died in the U.S. on 17 May 2021, at the age of 64.

The correct version

[14] I have considered these two versions and I am satisfied that the correct version is the one given by Temaleti. I have come to that conclusion because I believe Temaleti's version that they did not need the consent of Siale at any time to live on lot 12. And that is supported by the letter which 'Ata'ata himself wrote to the Minister in September 2015, after Siale had died. That letter is on pages 52 and 53 of the Minister's production of documents. This is what he said on P.52:

"The problem in Siale's town allotment (registered 1987) whilst he was saving to build his little house there, the people who lived next door moved and lived on it. He held his peace and did not speak to them in case their peaceful coexistence would be disrupted. He then had enough money in 2000 and he asked me to engage a lawyer to write to them occupying his allotment to move out, but they refused to move. He thought that if he went to court, most of the money he had saved for his house would go to the costs of the court case. So he decided to build temporarily on the lot he was on and then move it to the allotment when it was in order. But he could not move there because of the refusal of the people to move out and he was also getting much older.

...

In those information I have given above, I confirm that Siale first had his allotment registered, and after some years the people next door moved there without permission."

[15] I find that that conflicts with his evidence that the people next door moved on to lot 12 with the permission of Siale because their house was damaged in the cyclone at that time. His letter confirmed that the people next door did not need Siale's permission to occupy lot 12 and that they were there without any permission from Siale.

Misrepresentation by town officer

[16] Siale applied for lot 12 as his town allotment on 7 November 1979. (Refer P. 4 M/Lands documents). Attached to his application and in support of the application when presented to the Minister for approval was a letter from the town officer of Afa, Saia Naeata, which was as follows:

"Afa

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Honourable Minister of Lands,

I apologise and ask that I convey this request.

The town allotment of Siale Finau of Afa is all in order. He is presently occupying it, has built his house on it and has provided everything to it, therefore I request that you kindly approve that his town allotment be registered and that all legal requirement have been satisfied.

Yours respectfully,

(Signed) Saia Naeata (Acting Town
Officer) and obedient servant."

[17] That letter misrepresented to the Minister that Siale was living on the allotment whereas he was not, and it misrepresented that Siale had built his house on the allotment whereas he had not.

[18] That misrepresentation caused the Minister to make the grant of the allotment wrongfully to Siale, when he, the Minister signed his consent to Siale's

application on 7 April 1987, and issued to him a deed of grant, book 275 Filio 6, on the same day.

- [19] It was wrong of the Minister to have done that when he did not know whether or not there was any impediment to that grant, which the law required that he must ascertain. The application form expressly requires the estate holder, who is the Minister in respect of Crown Lands, to declare by his signature that there is no impediment to prejudice the claim: *Tafa v Viau* [2006] Tonga LR 125.
- [20] That misrepresentation was not discovered until 2001, and I accept Temaleti's evidence, that Siale and the town officer, Saia Naeata were both summoned by the Minister and that in consequence of meeting with them, and with Salesi as well, the Minister ordered that the deed of grant issued to Siale in respect of lot 12 be cancelled, and that a deed of grant in respect of lot 12 be issued to Salesi instead, and that Siale be granted lot 15 instead because that was where he had always resided and had built upon.
- [21] I accept that I am satisfied that Siale was aware that that was the decision of the Minister in 2001, and that he was aware that his registration of lot 12 was cancelled and that he was granted lot 15 instead and that a deed of grant for that lot was prepared for him to collect, but he never went and got it. I am satisfied that he was however the lawful holder of lot ` 15, and not of lot 12, from that time until he died in 2015.
- [22] I am also satisfied that Siale was never the lawful holder of lot 12 because it was granted to him in error caused by misrepresentation of the town officer, which misrepresentation caused a grave breach of natural justice in that the lawful occupants of the allotment, lot 12, were unaware of Siale's application, and were not granted any opportunity of being heard before the grant was made to Siale.
- [23] Mrs. Tupou, counsel for the plaintiff, submits that the cancellation by the Minister in 2001 of the registration of Siale which had been effected in 1987

was unlawful because the Minister had no authority to cancel the registration of an allotment.

[24] I agree with Mrs. Tupou that that is so, and that what the Minister did in 2001, namely, the cancellation of Siale's registration without any authority for him to do that, was in itself an unlawful act on the part of the Minister which gave rise to a cause of action in Siale. The cause of action thereby accrued to Siale to bring an action in the Land Court to set aside the Minister's decision and to restore his registration in lot 12. But I have real doubt that the Land Court would set aside the Minister's decision and to let Siale evict the lawful occupants of lot 12 who had had no say and were given no say in the grant of lot 12 to Siale.

[25] In any event Siale did not bring any claim in the Land Court in respect of the decision of the Minister in 2001 to cancel his registration of lot 12 for over 10 years, and any claim by him or by any one claim through him, thereafter, is statute barred by S.170 of the Land Act.

Plaintiff claim

[26] That brings me to the plaintiff's claim. In his initial statement of claim he claimed that he was the lawful heir to lot 12 upon the death of Siale in 2015. He has however abandoned that claim and has now claimed that in the letter he had written to the Minister in 2015, within the 1 year period after the death of Siale, he was in fact applying to be granted the allotment lot 12 as his town allotment.

[27] He did not lodge any application form as is required to be lodged by S.43 (2) (a) of the Land Act. It provides:

“(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;”

[28] But more importantly, the Minister had already granted lot 12 to Salesi in 2001 and it was no longer available to be granted to anyone else. And no one had challenged that grant for over 10 years. It was statute barred for anyone, including the plaintiff, to bring a claim to cancel it.

[29] I therefore agree with Ms. 'Eliesa for the Minister that not only was the plaintiff's claim as heir wrong because he is not Siale's heir, but it is also wrong because the plaintiff has no standing to bring the claim. He is not a lawful applicant for any allotment because he has lodged no application form and more importantly, he is claiming an allotment that is not available to be granted to anyone.

Conclusion

[30] I have therefore come to the conclusion that the plaintiff

- (a) has no standing to bring this claim,
- (b) that his claim is statute barred, and that
- (c) the allotment for which he claims is not available to be granted to him.

[31] I also confirm that the allotment was lawfully held by the first defendant when the Minister granted it to him in 2001. His title to it was confirmed by the Minister when he granted to him his deed of grant and had it registered on 6 March 2019.

[32] Accordingly, I order that the claim of the plaintiff be dismissed with costs to the defendants to be taxed if not agreed.

Nuku'alofa: 15 December 2021



[Handwritten Signature]
Niu J

J U D G E