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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 8 of 2021

BETWEEN : LA'IE 'OAHU TOUTAI

- Plaintiff

AND : 1. 'ONIKI SAVE
2. 'ESETA SAVE

- Defendants

BEFORE HON. JUSTICE NIU AND ASSESSOR TU'IFUA

Counsel : Mr C. Edwards for the plaintiff
Mr S. Tu'utafaiva for the defendants

Trial : 11 and 12 October 2021

Submissions : by Mr Edwards on 26 October 2021

Ruling : 7 December 2021

RULING

Apology

[1] I apologise to the parties and counsel for my oversight and the undue delay in making this ruling.

The allotment

[2] The plaintiff duly became the lawful holder of an unoccupied town allotment named "Talifolau" (the allotment) in the village of Ha'akame on Crown Land in Tongatapu when the Minister of Lands directed on 23 October 1987 that it be

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surveyed and be registered in his name. The registration of the allotment was only effected on 4 June 2015 when the deed of grant Book 354 Folio 21 was issued and registered.

- [3] He however went to the U.S in 1988 and did not return to Tonga until February 2020. When he left in 1988, the allotment was left in the care of his mother, Mele'ofa.
- [4] Mele'ofa left Tonga and lived in Australia soon afterwards but she returned to the family home at Ha'akame from time to time and still maintained control of the allotment, although another son of hers, Kalamea, brother of the plaintiff, was still in Tonga. Her husband, Pillote, died in 1993. His eldest son, the eldest brother of the defendant, Etuini, was living in the family home.

The defendants

- [5] There were a brother and sister, Samuela Mataele and Sela Fuaipai. Mele'ofa descended from Samuela, the brother, and Eseta, the second defendant, descended from Sela, the sister. Sela had a daughter, Toa Kaufusi, and Toa had a daughter, 'Ana Kioa, and 'Ana Kioa had 'Eseta. In the Tongan custom, Sela and her descendants were the fahu over the descendants of Samuela.
- [6] And it happened that Mele'ofa, being the descendant of Samuela, also became a close friend of Toa Kaufusi, 'Eseta's grandmother, and 'Eseta became close to Mele'ofa as well, although they were living in Tokomololo themselves.
- [7] In 1992, 'Eseta married 'Oniki Save, the first defendant, who was from Ha'akame himself and they lived together with 'Oniki's parents and their family at their home at Ha'akame.
- [8] In 1995, Mele'ofa came from Australia to her home for a visit and 'Eseta visited her together with her first child who was just born that year. In 1997, Mele'ofa came from Australia again and 'Eseta again visited her together with her 2 children which they then had. Mele'ofa told 'Eseta that she and 'Oniki and their children could go and live on the allotment in view of their growing family. 'Eseta told her she would think about it.
- [9] In 1998, Mele'ofa again came to visit and 'Eseta and 'Oniki and their 3 children, the last one having just been born in May that year, visited her. Mele'ofa again offered the allotment to them and 'Eseta accepted. Mele'ofa then told them that they could have the allotment as theirs because La'ie, the plaintiff, would not return to Tonga. She then called her son, Kalamea, and she told him that she had given the allotment to 'Eseta and 'Oniki and their children as theirs.

- [10] 'Eseta and 'Oniki straight away cleared the bush and weeds on the allotment and put up a small wooden house on it with just the bare ground as floor and moved in and lived in it in about October 1998. They had the floor cemented in 1999.
- [11] In about 2005 some physical altercation took place between 'Oniki and one, Viliami Kingi, who was related to the plaintiff's father, Piliote, and Kalamea went and told 'Eseta and 'Oniki to move out of the allotment. 'Eseta went and told her grandmother, Toa Kaufusi, and asked her if there was any land in Tokomololo to move to. Not long after that, Kalamea went and told 'Eseta that Mele'ofa had rung him and told him to come and tell them not to move out of the allotment. They then continued to live on the allotment as before.
- [12] Mele'ofa died in Australia in 2007.
- [13] Over the years, 'Eseta and 'Oniki extended their house to the front and to the back and erected a concrete block wall and bathroom and toilet at the back and verandah at the front. They have 6 children altogether and they all lived in the house.
- [14] They have been able to build and live on the allotment with money earned by 'Oniki working in a work group at between \$200 and \$300 per week. 'Eseta also made tapa cloth for sale to supplement their income. None of their children was gainfully employed. They have no land or crops. They buy all their food. They were only able to buy a motor vehicle for \$3,500 in May of this year after selling a tapa cloth of 'Eseta.

The plaintiff

- [15] La'ie, the plaintiff, got married in the US. He worked as a builder for 18 years and was earning US \$2,500 per week. He had his own house at Logan, Utah, which he bought in 2009 and the mortgage of which he is still paying, in which he lived with his wife and their 8 children.
- [16] In February 2020, La'ie was deported from the US for "abusing his children" as he put it when I asked him. His wife and children remained in the US. Over the ensuing 12 months, he kept asking the defendants, 'Oniki and 'Eseta to vacate the allotment so that he could build and live on it, but the defendants refused because they had nowhere else to move to.
- [17] On 2 March 2021, plaintiff counsel served notice on the defendants to vacate the allotment by 10 March 2021. The defendants did not vacate and they did not respond to the letter.

[18] On 27 April 2021, the plaintiff filed his claim and he seeks orders for eviction of the defendants and for possession of the allotment.

The defence

[19] The defence of the defendants is that the defendants have an equitable right to possess and occupy the allotment, and or alternatively, the plaintiff is estopped from evicting them from the allotment.

The facts

[20] The relevant facts in this case are those which I have outlined in the foregoing paragraphs. I am satisfied that they have been proved by the evidence given.

Equity

[21] The issue to be decided is whether or not equity provides any defence such as the defendants say in their defence against the claim of the plaintiff.

[22] I accept as a fact that in 1998, the plaintiff was aware that his mother, Mele'ofa, had given the allotment to the defendants as theirs. I see no reason why the mother would not have told him what she had done with his allotment. She told the son in Tonga, Kalamea, of it, and the sisters in Tonga, gave evidence that they knew it at the time that the defendants began to occupy it. And even the plaintiff would have become aware of it, because he said in evidence that the allotment was not in bush when the defendants were given the allotment in 1998 because he always had Sepi or 'Ofa to look after it for him while he was in the US. He would therefore have necessarily been informed by Sepi or 'Ofa that they were not cutting or cleaning the allotment anymore because the defendants were living on it.

[23] And in paragraph 12 of his brief of evidence, the plaintiff says this:

"12. I had learnt from my family, namely two sisters that the defendants had nowhere to live and because my mother is related to 'Eseta Save the defendants were told they can live on the allotment until I return to Tonga.

[24] That proved that the defendant was aware that the defendants had been allowed by the mother to live on the allotment, and that he agreed that they live there. He also knew that no time limit was given to the defendants. If, as he says, he was told that they were only living on the allotment temporarily until he came back, he did not convey to the defendants any indication of a time he would return at all. He did not write to the defendants, to state that they were only staying on the allotment temporarily until he returned. I accept

that he knew that the mother had given the allotment to the defendants as theirs.

- [25] I accept that he allowed his mother to do as she did with the allotment, and I accept as a fact that the mother did purport to give the allotment to the defendants as theirs. The mother told Kalamea that. Kalamea was not called to give evidence to deny that the mother did that. The plaintiff called the 2 sisters instead, but I do not believe their evidence that the mother told the defendant that they only have the allotment until the plaintiff returned to Tonga.
- [26] That is supported by the evidence of the defendant 'Oniki that the plaintiff spoke to him by telephone in about 2015 to find out how he could transfer the allotment to them. At that time the defendant was in contact with 'Oniki's brother, Stanley, in the US, with whom the plaintiff had grown up in Ha'akame. When 'Oniki rang back with the legal advice that the plaintiff would have to surrender the allotment, he was told that the plaintiff was not there anymore.
- [27] I believe that the plaintiff did make that contact to 'Oniki because 'Oniki told his wife, 'Eseta, about it, and that other people in Ha'akame also knew about it, namely, Penisila Save, Siua Mafoa, Toni Hifo and Limihai Hifo. I believe that the plaintiff's niece, Mele'ofa 'Uhila, came to hear about it too and that she contacted the plaintiff to give her the allotment instead.
- [28] The plaintiff agreed and gave her the letter of 28 April 2015 which stated that she and her husband could take care of the allotment and to use it as they pleased (Plaintiff's P.8). With that letter, they were able to have the allotment finally registered on 4 June 2015.
- [29] The plaintiff provided no plausible explanation as to why in all the years since 1987 the allotment was not registered until 2015. I believe the evidence of 'Oniki because it provides the explanation. It was not just coincidence.
- [30] That is supported by the evidence of 'Eseta that in 2015, one, Kafa Ha'angana, brought that letter of the plaintiff to Mele'ofa to her. Mele'ofa confirmed in her evidence that that letter was given to 'Eseta to vacate the allotment but that 'Eseta refused to and so she backed off and pursued the matter no further.
- [31] I therefore find as a fact that the plaintiff did allow the defendants to live on the allotment and to keep it as theirs.
- [32] I also find as a fact that the defendants believed that the allotment was theirs, and that they built on it and lived on it in a substantial way as far as their

means and circumstances could afford because they believed it was theirs. They built on it permanently and extended it substantially.

[33] On those facts, I consider that the equity defence of estoppel applies. That defence is stated in S.103(3) of the Evidence Act and it was laid down by Privy Council in *Matavalea v Uata* [1989] TLR 101 at 103 as follows:

“103(3) If a person, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation, and that the letter was intended to act upon it in a particular way, and he with such believe does act in that way to his damage, the first is estopped from denying the facts were as represented.

We agree with Martin J that the circumstances were such that the Respondent was entitled to call in aid the provisions of S.103 against both Tevita had he sought possession and the Appellant who represented that if money was paid registration would follow.

The crucial issue in this case concerns the effect of the estoppel. As was made clear in the Privy Council case of *O.G Sanft & Sons v Tonga Tourist and Development Co. Ltd* (Appeal No.2/1981) the Land Act is a complete code which, subject to the Constitution, rigidly controls by its express terms all titles and claims to any interest in Tongan land. There can be no question of equitable titles.

It follows, as Mr Hola conceded, that the Respondent acquires no rights under the Land Act by virtue of the estoppel. We would go further and say that she acquires no rights in land of any description and neither do her heirs.

The only effect of the estoppel is to impose as personal restriction on the Appellant from obtaining an eviction order during her life tenancy. What happens on her death or on termination of her life interest remains for future consideration.”

[34] Applying that ruling to the present case, I am satisfied that the plaintiff is estopped from denying that he had agreed that the defendants could keep the allotment as theirs and the defendants believed that representation and had expended all their energies and resources for 20 years to build and maintain their dwelling house on it permanently and substantially. As the Privy Council

stated that, estoppel binds the plaintiff until he dies or until his interest as holder ends, either by abandonment or by surrender.

[35] I therefore come to the conclusion that the defence of estoppel of the defendants succeeds.

[36] Accordingly, I give judgment for the defendants and dismiss the claim of the plaintiff with costs, to be taxed if not agreed.

Nuku'alofa: 7 December 2021



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