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IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 13 of 2021

BETWEEN:

SEMISI HAVILI

Plaintiff

-and-

[1] SIONE HAVILI KAUFUSI

[2] MINISTER OF LANDS

Defendant

JUDGMENT

BEFORE: PRESIDENT WHITTEN QC LCJ
Land Assessor: Mrs Fukofuka
Appearances: Mr Edwards SC for the Plaintiff
Mr Moale for the First Defendant
Ms 'Akau'ola for the Second Defendant
Trial: 3 August 2022
Judgment: 3 August 2022

Introduction

1. This proceeding concerns a tax allotment situated at Pangai, Ha'apai, known as 'Ahau.¹ On 12 June 2017, a grant of the allotment was registered in favour of the Plaintiff ("Semisi"). On 24 August 2018, a grant of the same allotment was registered in favour of the First Defendant ("Sione"), who is Semisi's older brother.
2. Each of the brothers claim that the other's grant is unlawful. Semisi seeks orders for the cancellation of Sione's registration and his eviction from 'Ahau.
3. After considering the pleadings and evidence filed² and called in the proceeding, and after hearing from counsel for the parties, I delivered an ex tempore decision which resulted in the dismissal of the Plaintiff's claim. I indicated to the parties that I would provide more expansive written reasons following that pronouncement of judgment. These are those reasons.

Background

4. 'Ahau was first registered in 1922. In 1972, it was registered to 'Anitelu Havili.

¹ Lot 56, Block 153/138.

² Briefs of evidence from Semisi, Sione and Warrick Vea (Lands Registration Officer) on behalf of the Minister.

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'Anitelu was married to Fakaanga. They had 12 children, including Sione (the eldest son) and Semisi. 'Anitelu died in March 2003.

5. In August 2003, in accordance with s. 80 of the *Land Act*, Fakaanga claimed her widow's entitlement to a life estate in the allotment. She did so by a letter to the Minister which was written by her daughter, Malamala 'Akauola, and signed by her for her mother. On 3 September 2003, the Minister approved Fakaanga's request. The transfer fee was paid on 24 May 2005.³
6. However, as a result of error or oversight within the Ministry, the Register of tax allotments in Ha'apai was not updated to show that Fakaanga was the holder of the allotment.
7. On 27 September 2016, after being erroneously advised by a Ministry officer that no one had made a claim for the 'Ahau within 12 months of his father's passing and that therefore it had reverted to the Government, and because Sione already had a tax allotment in Ha'ateiho, Semisi applied for a grant of the allotment.
8. On 1 December 2016, Semisi Moala, a Senior Lands Registration Officer, recorded the same advice and that the Deputy Minister (Ha'apai) had granted the allotment to Semisi. On 26 June 2017, as noted, his grant was registered.
9. On 12 February 2018, Fakaanga passed away.
10. On 26 April 2018, Sione applied for the allotment as heir. He also elected, pursuant to section 84 of the Act, to transfer his allotment in Ha'ateiho, to his son, in exchange for 'Ahau. As noted, on 24 August 2018, the allotment was registered to Sione.
11. For reasons not explained, none of the documents filed in the proceeding, in particular, those filed on behalf of the Minister, contained any reference to the allotment having already been registered to Semisi in 2017 when Sione's claim was submitted, considered and granted in 2018.

Submissions

12. At the outset of the trial, all counsel agreed that there were no material disputes on the facts. For that reason, it was unnecessary to call any of the witnesses from

³ Mr Vea's brief of evidence at [6] referred to the year as 2015 but the actual receipt shows 2005.

whom briefs of evidence had been filed.

13. The issue therefore appeared to be a legal one, namely, the consequence of the Ministry's mistake in having failed to update the Register to record Fakaanga's life interest as widow.
14. However, during his submissions, Mr Edwards endeavoured to raise an issue about the validity of Fakaanga's claim on the basis that the letter had been written and signed by Malamala albeit on her mother's behalf. The issue was not pleaded. As it turned out, Malamala was in court. She gave sworn evidence confirming that she had written the letter on instruction from her mother who was with her in their house on the day it was written. She could not recall why her mother did not sign the letter but had instead asked Malamala to do so but suggested that it might have been because her mother was unwell at the time. Beyond that, Mr Edwards was unable to point to any authority or statutory provision which took this issue any further.
15. Counsel for Sione and the Minister submitted that the consequence of the Ministry's mistake was that Semisi's registration is void.⁴ Mr Edwards did not submit otherwise.

Consideration

16. There is nothing in the Act which requires that a widow's claim in respect of her life interest in her deceased husband's land must be in any particular form, or that it must be claimed by her personally. Section 80 confers the life estate but says nothing about how it is to be claimed.
17. Ms 'Akau'ola drew attention to s. 43 of the Act which requires, inter alia, applications by eligible male Tongans for a grant of a tax or town allotment to be made in the prescribed form to the Minister. She acknowledged, however, that the provision, by its terms, does not apply to claims by widows. There is also no prescribed form in the Act for such claims.
18. There was no evidence that the Minister at the time raised any issue or concern

⁴ In his brief of evidence, Mr Vea stated: "[16] The Ministry confirms that there was a delay in endorsing the transfer of allotment to the widow, Fakaanga Havili in the Ha'apai Register of tax allotments, which resulted in the misinformation provided to the Plaintiff that the tax allotment had reverted to the Crown and was available for a re-grant. Therefore, the grant made by the Deputy Minister for Lands who was then the Governor of Ha'apai to the Plaintiff was a result of a mistake and therefore void."

with the form of the claim submitted on behalf of Fakaanga. Self-evidently, he saw no problem with it when he approved it.

19. For those reasons, and the unchallenged evidence of Malamala, I am satisfied that in 2003, Fakaanga made a valid claim for her widow's life interest over the allotment and that her claim was validly granted by the then Minister.
20. I turn now to Semisi's registration.
21. There is a well settled presumption that registration is final until it has been established that it came about as a result of an error of law (i.e., contrary to the Act), or as a result of fraud, **mistake**, breach of the principles of natural justice or of a promise made by the Minister or the Tofi'a holder: *Finau v Finau* [2020] TOLC 13.⁵ Fraud or mistake will vitiate a grant in any case where it is established to the satisfaction of the Court on the balance of probabilities: *Helu v Taufu* [1995] Tonga LR 107. The degree of probability required to establish proof may vary according to the gravity of the allegation to be proved: *Tukuafu v Tupoumalohi* [2002] Tonga LR 268. The Court may cancel a registration which is made under a mistake of law: *Fonua v Fonua* [2018] Tonga LR 208 at [47].⁶
22. The Ministry's mistake in failing to record the widow's interest in the Register led to the erroneous advice to Semisi that the allotment was available for grant. The allotment was not available for grant, and it had not reverted, because it had already been granted to Fakaanga. Had that fact been properly recorded by the Ministry in the Register, and advised to Semisi, he would have realised that he was not then entitled to make a claim for the allotment, and this proceeding would likely never have arisen. It is perhaps unfortunate, as Mr Edwards explained, that because of certain rifts and lack of communication within the family, Semisi was not aware during all the intervening years that his mother, as widow, was the holder of the allotment.
23. It follows that Semisi's registration is void by reason of mistake by the Ministry.
24. With Semisi's registration set aside, as at the death of their mother, the allotment

⁵ Citing *Havea v Tu'ifitu & Ors* [1974-1980] To. L.R. 55; *Koloamatangi v Koloamatangi* [2003] Tonga LR 131; *Finau v Mo'unga* [2003] TOSC 38; *Skeen v Sovalei* [2005] Tonga LR 298; *Tafa v Viau* [2006] Tonga LR 125; *Ma'ake v Lataimu'a* [2007] Tonga LR 15; *Makau v Havelu* [2016] TOLC 3; *Finau v Finau* [2017] TOLC 5. Applied recently in *Taufahema v Taufahema* [2020] TOLC 14 at [76].

⁶ Citing *Lautaha v Minister of Lands* [1995] Tonga LR 195.

was available for re-grant and Sione, as the heir, was entitled to apply for it when he did. The Minister was also entitled to approve the grant and register it.

25. Ideally, had the Minister been aware of and investigated the mistake at the time of Sione's application, by simply realising that the allotment had already been registered to Semisi, he ought have notified Semisi and given him an opportunity to be heard.⁷ However, that is not something Semisi raised in the proceeding as a basis for relief. In any event, as the above legal analysis makes clear, the result could not have been any different.
26. As there are no other allegations or evidence challenging the validity of Sione's registration, it stands.

Result

27. For those reasons, the Plaintiff's claim is dismissed.
28. I declare that the Plaintiff's registration in respect of the subject allotment is void due to mistake on the part of the Ministry of Lands.
29. I order that the Minister is to cancel the Plaintiff's registration in respect of the subject allotment.
30. The First Defendant's registration in respect of the subject allotment is confirmed.
31. In circumstances where the proceeding has been occasioned solely because of error on the part of the Ministry, it is appropriate that the Minister pay the costs of the Plaintiff and the First Defendant to be taxed in default of agreement.⁸

NUKU'ALOFA
3 August 2022



M. H. Whitten QC
LORD CHIEF JUSTICE

⁷ *Sunia v Kava* [2020] TOLC 2, citing *Fifita v Minister of Lands* (1972) Tonga LR Vol III, 45; *Skeen v Sovaleni* [2005] Tonga LR 298; *Tafa v Viau* [2006] TOLC 2, referring to *Wandsworth London Borough Council v Winder* [1984] 3 All ER 976 and *Doyle and others v Northumbria Probation Committee* [1991] 4 All ER 294.

⁸ Cf *Mone v Paane* [2009] TOCA 26 citing *Cocker v Palavi* [1997] Tonga LR 203.