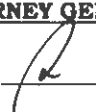


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IN THE LAND COURT OF TONGA
 NUKU'ALOFA REGISTRY

LA 7 of 2019

BETWEEN:

SILIVESITILI FUSIPUNGA LOPETI

Plaintiff

-and-

[1] TAVITE KAVAFOLAU LOPETI
[2] PRINCE KALANIUVALU
[3] MINISTER OF LANDS

Defendants

Applications by the Second and Third Defendants to strike out of the claims against them

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
 Appearances: Mr Sunia Fili for the Plaintiff
 Ms L. Tonga for the First Defendant (observing)
 Mrs A. Taumoepeau KC for the Second Defendant
 Mrs S. Sisifa for the Third Defendant
 Hearing: 6 September 2022
 Ruling: 6 September 2022

1. This is an application to strike out claims against the Second and Third Defendant here, the Estate Holder and the Minister of Lands.
2. At the conclusion of the hearing of the application, I delivered an *ex tempore* ruling. This is the transcript of those reasons, edited as to form only, not substance.
3. The claims for negligence against both those defendants arise out of the construction of a house by the Plaintiff on land, which was subsequently determined by this court and confirmed by the Court of Appeal to be owned by the First Defendant. Those decisions included that a lease in respect of part the allotment registered in the name of the Plaintiff's sister, Luse Toke, was invalid and was cancelled.
4. The trial of the proceeding commenced this year on 9 May (for three days) and 25 July. On both occasions, the trial was adjourned part-heard for various reasons, including questions about the competence of the claims then pleaded against the Second and Third Defendants having regard to the evidence that had been adduced to that point which included, importantly, that of the Plaintiff.

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5. Directions were therefore made for the Plaintiff to determine whether he wished to proceed with his claims against the Second and Third Defendants, and that if he did, he was to file an Amended Statement of Claim to which I have just referred.
6. The relevant claims are articulated in an Amended Statement of Claim filed on 12 August 2022. The principal amendments are to be found in paragraphs 8.1 and 8.2 thereof in which the Plaintiff alleges (verbatim):

8.1 The Second Defendant has a legal duty to grant allotment under section 34(1) Holder not to refuse land for allotments:

The holder of a hereditary estate shall admit into possession any person who has been granted an allotment upon his estate by the Minister.

Particulars

8.1.1 Its alleged that the Second Defendant has a duty of care under the law to ascertain that what he had confirmed to the Plaintiff after series of offerings and meetings to be obtained by the Plaintiff. In July 2015, they met whereby the Plaintiff submits his first application signed 22 July 2015 (40 of trial booklet) the Second Defendant said *“Leave it to me Punga I will have to find why there is a name Yohani Lopeti on the land of Falemai and there should not be any name in there because it would have reverted back to me (estate holder) after the last known registered name Filise Auaea who has passed already, also your oldest brother is already registered with town allotment ‘Pule’ and tax allotment ‘Foi Hefa’.”*

8.1.2 On October 2015 the Plaintiff received information that his tohi tala’api (application) is granted from Kalaniuvalu and signed on 27 October 2015. He urges the Plaintiff to come and build the house.

8.1.3 The same land “Falemai” was also granted by the Second Defendant to one Filise A Pouono as he signed on his application on 28 July 2015.

8.1.4 On the second application by the Plaintiff for the same land “Falemai” on 24 February 2016 the Second Defendant signed on 25 [February] 2016.¹

8.1.5 On the roofing stage on the new building the Second Defendant came with food stuff and offering and recognised the building of the new house to decorate the village.

8.1.6 The Second Defendant breached the duty of the care for not to inform the Plaintiff that he should stop building if any reasoning or knowledge of an issue but he was so pleased for what he could see and wished the Plaintiff all the best for the rest finishing up the house.

8.1.7 In terms of causation there were a relationship between the Plaintiff and the Second Defendant whereby his confirmation of the land caused the Plaintiff to come to Tonga and build the house and the effect of such actions resulted in a very substantial loss of time, money and depressed to the Plaintiff.

¹ Mr Fili accepted that the reference in the pleading to ‘December’ was incorrect.

8.1.8 In terms of damages the Plaintiff has suffered a loss of money claimed and emotional distress.

8.2: The Third Defendant has a legal duty under Section 19(1) and (2) of the *Land Act* General Power that (1) the Minister of Lands is the Representative of the Crown in all matters concerning the land of the Kingdom (2) he shall grant allotment to Tongan subject duly entitle there by law.

8.2.1 [The Plaintiff pleads and recites s 43 of the *Land Act*].

8.2.2 The Third Defendant has a duty of care under the law to ascertain that his office shall perform their duty in accordance to the law.

8.2.3 The Plaintiff received information that his first application was lost in the office as a result, they demand a second application for him to be signed by his sister Luse Toke because he was in Australia.

8.2.4 That the Savingram dated 6 August 2010 survey of town allotment to Yohani Lopeti stated in the second paragraph "*This parcel was last registered to 'Aleksio T Lopeti...'*" which was a misleading statement which caused these problems. The land was never registered to 'Aleksio T Lopeti and not to be given to Tavite Kavafolau Lopeti the First Defendant because it reverted back to the estate holder.

8.2.5 The letter from the Ministry of Land dated 25 February 2016 stated the approval of both the Second and Third Defendants. The Second Defendant signed and granted and the Minister will process for registration.

8.2.6 The Third Defendant's duty to advise the Plaintiff to complete his application of 22 July 2015 if there was an issue of the application because they are still processing the application.

8.2.7 The Third Defendant breached the duty of care for not to advise the Plaintiff that he should stop building if any reasoning or knowledge of an issue to be raised.

8.2.8 In terms of causation there was a relationship between the Plaintiff and the Third Defendant whereby the Ministry mistaken of land registration by his grandfather 'Aleksio T Lopeti of the land caused problem which led the Plaintiff to come to Tonga to build the house and the effect of such action resulted in a very substantial loss of time, money and cause depress to the Plaintiff.

8.2.9 In terms of damages, the Plaintiff suffered a loss of money, claim and emotional distress.

7. Mrs Taumoepeau appears for the Estate Holder. Her submissions aligned with her Notice of Opposition and the affidavit of the Estate Holder.
8. Mr Sisifa, the Solicitor General, who appears for the Minister, has done likewise relying on submissions developed from his Notice of Opposition and an affidavit of Semisi Moala from the Ministry.
9. None of the factual matters are in dispute save for Mr Fili and the Plaintiff's

interpretation of the consent by the Estate Holder to the second application in February 2016 and the Ministry's letter entitled "To whom it may concern" issued on 25 February 2016, to which I will return shortly.

10. The principles pertaining to strike out applications have been distilled and summarised in *Amanaki v Government of Tonga & ors* [2019] TOSC 47 and *Edwards v Public Services Association* [2020] TSC 45 and to which I have referred in considering these applications.
11. Those principles include that a strike out application proceeds on the assumption that the facts pleaded in the Statement of Claim are true. This is so, even though they are not or may not be admitted. However, the assumption does not extend to pleaded allegations which are entirely speculative and without foundation or contrary to otherwise uncontroversial facts which are already before the court.
12. The uncontroversial facts in this case include the issue of ownership of the land and the invalidity of Luse Toke's lease as decided by the Court of Appeal. That appeal arose from the decision in proceedings LA12 of 2016 ("LA 12") which commenced in June 2016.
13. The Plaintiff here has given evidence that he started shipping materials out to Tonga from Australia in late 2016 and commenced construction through into early 2017, that is, during the course of LA 12, in which Luse was a defendant. Notwithstanding, the Plaintiff has given evidence that he had no knowledge of those proceedings. No decision is yet been made about that.
14. However, the core facts relied upon by the Plaintiff for his amended allegations of negligence against the Second and Third Defendant depend upon a reading and interpretation of, firstly, the estate holder's consent to the 2016 application for grant and, secondly, the Ministry's letter of 25 February 2016.
15. Contrary to Mr Fili's submissions, the consent of the Estate Holder did not amount to a grant by which the Plaintiff could or had any basis for belief, let alone any legal fact, that he was then the holder of the land and entitled to proceed to build on it.
16. Similarly, the letter from the Ministry dated 25 February 2016 actually states:

"This is to certify that the above named has lodged an application to register and own a town allotment property Lapaha, Tongatapu, Kingdom of Tonga.

...

The estate holder of Lapaha HSH Prince Kalaniuvalu signed and granted the above said land registration application today, 25 February 2016.

The Ministry is executing all relevant survey and land registration requirements before register the said town allotment.

Enclosed here is a copy of the land registration application form and scheme map of the subject land.

Should you need further actions on this matter please do not hesitate to contact the Ministry.”

17. That letter was requested by Luse on behalf of the Plaintiff who was then in Australia.
18. It is pleaded variously in respect of that letter that it amounted to approval by the Minister of the Plaintiff's application for the land. On a plain reading of it, that allegation cannot succeed. The submission and allegation is therefore speculative, without foundation and contrary to otherwise uncontroversial facts.
19. The uncontroversial fact is that the land was never registered in the Plaintiff's name prior to him commencing construction of the house or anytime during that exercise. He proceeded on the basis of a desired belief or assumption that the document to which I have referred amounted to effectively approval of his application by the Ministry. There is no evidence that the Minister approved his application. There is uncontroverted evidence that once it became aware of LA 12 and the issues surrounding ownership of or entitlement to the land in question, the Ministry put all work in relation to the Plaintiff's application 'on hold' and did not process it further.
20. The amended allegations against the Second and Third Defendant suffer from the following further defects.
21. The alleged duties of care in respect of each are novel. That is, they are not said to be, and Mr Fili was not able to point me to any authority to support the proposition that they are, recognised duties at law. Therefore, as discussed recently, in *Ezinet Limited v DS Venture* [2021] TOSC 162, a salient features analysis is required to establish the existence of the posited duty of care where it is novel. No attempt has been made by the Plaintiff in the Amended Statement of Claim to do that.
22. There are simply conclusory statements to the effect, firstly, that the Estate Holder had a duty under the law (not specified) to ascertain that what he had

confirmed or consented to. That allegation was pleaded in the context of the 2015 dealings between the Plaintiff and the Estate Holder which in my view have nothing to do with the current claim which is based on the second application for the grant in February 2016.

23. It is then alleged that the Estate Holder breached his duty of care by not informing the Plaintiff that he should stop building if 'any reasoning or knowledge of an issue' arose. There is no allegation that the Estate Holder had any knowledge or ought reasonably to have known of any issue (or 'impediment' as the term used in the application form) of ownership or concerning entitlement to the allotment at the time he signed the Plaintiff application in February 2016. There is no allegation that the Estate Holder had any knowledge of LA 12 once it commenced, some four months after he had consented to the second application. There is no allegation that the Estate Holder had any knowledge or ought reasonably to have known that during the course of LA 12 he ought to have withdrawn his consent to the Plaintiff's application (which would probably have been too late then anyway).
24. For those reasons alone, the amended claim as pleaded against the Second Defendant is defective, discloses no reasonable cause of action; alternatively, has no prospects of success, and is therefore struck out.
25. In relation to the claim against the Minister, again, the posited duty of care is imprecise and unsupported by either any statutory provision or extrapolation of a duty to exercise reasonable care in respect of any statutory obligation on the part of the Minister, or by virtue of any salient features analysis as described in *Ezinet* which could give rise to the existence of the duties alleged by the Plaintiff against the Minister.
26. The first reference to a legal duty is in respect of s 19 of the *Land Act* which takes the matter nowhere.
27. The second reference to a duty of care was for the Minister to ascertain that his office 'performed their duty in accordance to the law'. There is no specification as to what law is said to be required apart obviously from the *Land Act*. There is no articulation of any other common law obligation on the part of the Minister such as has been developed by the Land Court and the Court of Appeal including obligations on the Minister to make all due and proper enquiries in circumstances

where the Minister is put on notice as to any issue or potential issue about ownership or entitlement to an allotment, including affording natural justice where required, before deciding an application for grant.

28. The allegations about the Ministry office making a mistake in 2010 has been pleaded in a vacuum and has no connecting allegation either before or after which might anchor it in the Plaintiff's current claim for compensation in respect of the erroneous construction of his house on the land. In other words, it goes nowhere.
29. Similarly, the allegation that the Ministry breached any duty by failing to advise the Plaintiff to complete his application in 2015 goes nowhere because this case is based on the Plaintiff's application in 2016 which was completed and submitted. There is no other attempt to explain how any duties of care against the Minister which I have already indicated have not been articulated with any precision or clarity, or coherence are said to arise as matters of law.
30. Importantly, what is purported to be an alleged breach by the Minister arising from the letter on 25 February 2016 is, in my view, based on a misconception by the Plaintiff that the letter amounted to an approval by the Minister of his application. As noted above, the letter simply does not say that. Firstly, it can only be construed as the Minister confirming that the application had been received that very same day. As Mr Sisifa observed, it would be extremely unlikely that any application received by the Ministry was approved by the Minister on the very same day that it had been received and before any work had been done on it whether by way of survey or any other enquiries being made as to availability. Secondly, the very words in the letter do not amount to an approval rather, an indication that work in processing the application was underway. Mr Fili did not attempt to substantiate his assertion that the letter amounted to an approval, nor whether by competing construction of the text of it or otherwise.
31. For those reasons, I consider that the amended pleading as against the Third Defendant is also defective and does not disclose a reasonable cause of action. The claim is unlikely to be salvaged by any further amendment nor did Mr Fili suggest that course. For those reasons, the claim against the Minister is also struck out.
32. The Plaintiff is to pay the Second Defendants costs of and incidental to the proceeding to be taxed in default of agreement.

33. In circumstances, as confirmed by Mr Sisifa, where the Minister did not bring this application (much) earlier in the proceeding (which given the Minister's experience in matters of this kind, he should have) and there is no costs agreement in force between the Solicitor General's office and the Ministry of Lands, there will be no order as to costs between the Plaintiff and the Third Defendant.

NUKU'ALOFA
6 September 2022



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC
LORD CHIEF JUSTICE