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BETWEEN : 1. TAMIANO TAUFA'AO FALEKAONO  
2. JENAIHOKULANI CHRISTOPHER FALEKAONO

*Plaintiffs*

AND : 1. VILIAMI FALEKAONO  
2. LOVELY MAKA  
3. DAVIC FE'AOMOENGALU FANIFO MAKA  
4. SAMISONI. P. VAKA  
5. JOHN MICHAEL P. BAKER  
6. PAULA PAHULU MOTU  
7. POHIVA MOTULALO  
8. MINISTER OF LANDS

*Defendants*

To: Mr S. Tu'utafaiva for the Plaintiffs  
Mr C. Edwards SC for the First Defendant  
Ms L. Tonga for the Second, Third, Fifth Defendants  
Ms 'E. 'Akauola for the Eighth Defendant  
No appearance by or for the 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants

**RULING ON NO CASE TO ANSWER SUBMISSION**

1. At the conclusion of the Plaintiff's case, the Defendants jointly submitted that there was no case to answer on the following grounds;
  - a) that there was no evidence that the surrender of part of the land in dispute now occupied by the Second to the Seventh Defendants was unlawful;
  - b) there was no evidence that exchange of the balance of the land in dispute now registered in the First Defendant was unlawful;
  - c) that the Plaintiff had no standing to bring this claim because he does not hold a similar allotment; and
  - d) the Plaintiff's claim is time barred.

13 SEP 2022  
*[Signature]*

## The Background

2. The Plaintiffs are father and son. By the time this matter went to trial the First Plaintiff, Tamiano Taufua'ao Falekaono ("Tamiano") had died. The Second Plaintiff will be referenced as the Plaintiff in this Ruling.
3. The land in dispute is a tax allotment called Ha'atu'ukau ("the Land") situated at Ma'ufanga, Tongatapu originally registered on 15 November, 1920 to Petelo Motulalo as described below;

Name:	Ha'atu'ukau
Area:	5a 2r 22p
Location:	Lot 92 Blk79/93
Date of Registration:	15 November, 1920
Survey fee:	Rec 150045 - \$28 (26.10/1979)

4. When Mr. Motulalo died in June, 1943 the Land was transferred to Mateo Falekaono ("Mateo") on 15 October, 1943<sup>1</sup>.
5. Mateo had two sons. His heir was Tu'ipulotu Falekaono ("Tu'ipulotu") and his second son was Kuli Falekaono ("Kuli").
6. On 30 May, 1991, Mateo surrendered an area of 1a 3r 1.16p of the Land in favour of Sepuloni Mateo Motulalo, Falanisi Vaka, Frank Baker, Seno Penitani, Sali Sele, Paula Pahulu and Masima Motu<sup>2</sup>. The 2<sup>nd</sup> to 7<sup>th</sup> Defendants are descendants of these named individuals and occupy that part of the Land.
7. On 26 August, 1991, Mateo applied to the Minister of Lands to exchange the Land with Kuli's tax allotment at Ta'anea, Vava'u. The application was approved by Cabinet on 21 September, 1993.
8. On 15 September, 1993 Tu'ipulotu wrote to the Minister of Lands seeking that the area from the Land previously surrendered by Mateo be returned to him as heir.<sup>3</sup> At the bottom of this letter he stated that he attached his affidavit claiming Mateo's land as heir.
9. The said affidavit is dated 9 January, 1995 and said that Mateo died on 23 November, 1994<sup>4</sup> and that he was claiming the deceased's town allotment at Ma'ufanga and tax allotment at Ta'anea, Vava'u.<sup>5</sup>
10. On 24 January, 1995, Tu'ipulotu wrote to the Minister of Lands again. The first paragraph sought that Mateo's town and tax allotment be registered in his name. The second paragraph

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<sup>1</sup> paras 5-6 Plaintiff's brief of evidence

<sup>2</sup> Pg.50 court book (cb)

<sup>3</sup> Pg.54 ibid

<sup>4</sup> Note the affidavit and death of Mateo occurring after the date of the letter.

<sup>5</sup> Pg.55ibid

strangely seeks a different result. That Tu'ipulotu already held a town and tax allotment and elected to retain them. His heir, Tamiano already held a town allotment and Mateo's tax allotment was to be registered in Tamiano's name and for the town allotment to be held by him in trust for the Plaintiff as he was still a minor at the time.<sup>6</sup>

11. The details of the allotments were given as;

Mateo's allotments;

Town Allotment

Name: Falemamange

Area: 1r .03p

Location: Lot 6 S/Plan 4484

Registration: 19/1/1912

Ma'ufanga

Tax Allotment

Name: Ha'atu'ukau

Area: 8a 3r 01.1p

Location: Lot 69 Blk 219/159

Registration: 20/4/1966

Ta'anea, Vv

Tu'ipulotu's allotments;

Town Allotment

Name: Falemamange II

Area: 30p

Location:

Registration: 24/5/48

Ma'ufanga

Tax Allotment

Name: Lolopaongo

Area: 7a 2r 37p

Location: Lot 64 Blk 219/159

Registration: 19/5/1932

Ta'anea Vv

Tamiano's allotment was;

Town Allotment

Name: K.Toafa

Area: 1r 24.3p

Location: DG 86/44

Registration: 9/12/1954

Ma'ufanga

12. That meant that Tamiano's holdings then became;

Town Allotment

Name: Toafa

Area: 1r 24.3p

Location: DG 86/44

Registration: 8/12/1954

Ma'ufanga

Tax Allotment

Name: Ha'atu'ukau

Area: 8a 3r 01.1p

Location: Lot 69 Blk 219/159

Registration: 20/4/1966

Ta'anea, Vv

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<sup>6</sup> Pg.56 ibid

13. On 24 May, 1996, Tu'ipulotu wrote another letter to the Minister of Lands, re-stating his election to retain his own town and tax allotments and for Mateo's tax allotment transferred to Tamiano, his heir. He lists Mateo's tax allotment as in his letter of 24 January, 1995. At the bottom of this letter, he writes;

*“P.S. I also wish to advise here that his allotment had been approved by Cabinet Decision No.1342 on 21 December, 1993 for an exchange between the deceased and Kuli F. Falekaono.”*

14. Kuli died on 29 July, 2007 and the Land was transferred to Viti Viki Falekaono (“Viti”), his widow. Viti died on 27 June, 2012 and the Land was transferred on 26 November, 2012 to Viliami Falekaono, the First Defendant.<sup>7</sup>
15. During cross examination, the Plaintiff was referred to a letter of 21 October, 1998 from his father, Tamiano to the Minister of Lands after Tu'ipulotu died. Tamiano elected to retain his own town and tax allotment and wished for Tu'ipulotu's town and tax allotment to be registered in the Plaintiff's name. This letter mistakenly refers to Tu'ipulotu's tax allotment as the Land instead of Lolopaongo.
16. When cross examined by Mr. Edwards, the Plaintiff admitted that he had registered Tu'ipulotu's town and tax allotment in the following exchange;

Mr. Edwards SC: Can you refer to the letter dated 21/10/1998 that was signed by your father at pg. 110?

Plaintiff: Yes

Mr. Edwards SC: That's a letter from your father to the Minister of Lands electing to retain his town and tax allotment to be held in trust for you

Plaintiff: Yes

Mr. Edwards SC: If you see at the bottom, there's a note from the Minister to Fataua that he approves the request?

Plaintiff: Yes

Mr. Edwards SC: Because Tu'ipulotu's allotments were held for you?

Plaintiff: Yes

Mr. Edwards SC: Did you register Tu'ipulotu's allotments?

Plaintiff: Yes

Mr. Edwards SC: So you already registered a town and tax allotment?

Plaintiff: Yes

.....

Mr. Edwards SC: You held registered allotments since 1998?

Plaintiff: Yes

Mr. Edwards SC: Based on those registrations, what right have you got to bring this action?

Plaintiff: Because my father has died. ....

<sup>7</sup> Paras.10-12 Plaintiff's brief of evidence

17. His counsel re-examined him on the point as below:

Mr. Tu'utafaiva: Jenai, on the understanding that you now have a tax allotment registered in your name – how does it come you are asking for this tax allotment as well?

Plaintiff: I was just saying it's an option- I have papers, laws, and it says you can lease. You can hold different allotments as long as you lease it or give a permit.

#### **The Plaintiff's claim**

18. Firstly, that Mateo's surrender of 30 May, 1991 was unlawful. He seeks cancellation of the surrender, transfer of the said land to him and an eviction order against the 2<sup>nd</sup> to 7<sup>th</sup> Defendants.
19. Secondly, that the exchange of tax allotments between Mateo and Kuli was unlawful. He seeks cancellation of the exchange, transfer of the said land to him and an eviction order against the First Defendant.
20. Thirdly, that an alleged Lease No.4049 in the name of Ekho T Lim that expired in 11 March, 2004 and transferred to Kuli's name, be cancelled and transferred to the Plaintiff.
21. Fourthly, that 2 duplexes on the Land belonging to Tu'ipulotu to be declared as property of the Plaintiff or for the Second Defendant to pay Jenai \$200,000 for rent collected by her from that said property.

#### **Considerations**

22. Firstly I turn to consider the claim in relation to the surrender by Mateo of part of his tax allotment.
23. Section 54 of the Land Act does not require the consent or signature of the heir for the landholder's surrender to be complete.
24. The court of appeal, in *Luani & anor v Kava*<sup>8</sup> dealt with this very issue and said this;
  - i) *"We do need to determine whether the position is different when the heir knows that his father is surrendering the allotment and has signified to the Minister in writing that he consents to it. We consider that it is, because the heir's written consent amounts to a representation to the Minister that he intends to waive his right under s54 to claim the allotment. In that circumstance, knowing of the surrender, he will not be prejudiced by the Minister's failure to publish all of the four notices.*

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<sup>8</sup> *Luani v Kava* [2020] TOCA 1; AC 9 of 2019

- ii) *However, the section makes no provision for a notification of consent to surrender by an heir and clearly does not bar him from changing his mind and, in effect, withdrawing his consent by making a claim under subsection (3) within the 12 –month period. (In some cases it may be that he will have contractually bound himself not to make a claim or is estopped from retracting his waiver of his rights.)*
- iii) *We have concluded, that, subject to a complication shortly to be discussed, Samiuela, having indicated in writing to the Minister, that he consented to Paula’s surrender, cannot after the expiry of the 12month period- indeed long after- be heard to say that the allotment did not revert to Lord Luani as provided for in s54(3).”*

25. Here, Tu’ipulotu co-signed Mateo’s surrender therefore waiving his right to claim that land back. Peculiarly, the letter refers and attaches an affidavit by Tu’ipulotu as heir, claiming Mateo’s town and tax allotment. The affidavit is dated 9 January, 1995 and it states that Mateo died on 23 November, 1994 both events occurring after the date of the letter.
26. I am satisfied that by law, Mateo did not require Tu’ipulotu’s consent or signature to render his surrender complete or lawful. Further, in the absence of any proof that Tu’ipulotu’s signature was forged, I accept that Tu’ipulotu’s signature amounts to a representation to the Minister that he intended to waive his right under s54 to claim the land.
27. Tu’ipulotu’s attempt to re-claim the land by his letter of 15 September, 1993 was outside of the mandatory 12-month period permitted by s54 and as in *Luani*<sup>9</sup>, the land had reverted to the estate holder and beyond any hereditary claim by him or his heirs. This permitted anyone including the persons named by Mateo in his surrender to lodge applications for it. It appears that they did and those allotments have since devolved to the 2<sup>nd</sup> to 7<sup>th</sup> Defendants in this case.
28. Secondly, I turn to the issue of the exchange of their tax allotments, all Mateo and Kuli required was the approval of Cabinet according to Section 55(1)(a) of the Land Act which state;

*“Cabinet may, at their own discretion and on the recommendation of the Minister, permit— (a) an allotment holder to exchange his town or tax allotment for the town or tax allotment of another allotment holder.”*

29. The Plaintiff admitted that the balance of the tax allotment was registered in Kuli, then to his widow and now to the First Defendant.<sup>10</sup> Contradicting himself he claimed that the “land in dispute was transferred on Mateo’s death to Tu’ipulotu on 23 September, 1993”<sup>11</sup> Further contradicting himself he said, “I believe that on 13 March 2002 the land in dispute

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<sup>9</sup> *ibid*

<sup>10</sup> Paras.10-12 of Plaintiffs brief of evidence

<sup>11</sup> Para.17 *ibid*

was transferred to my name.”<sup>12</sup> And at paragraph 15 above, the Plaintiff said he registered Tu’ipulotu’s town and tax allotment in 1998.

30. The Plaintiff further alleged that Tu’ipulotu did not tell him or his father about the exchange and therefore the exchange was unlawful. However, in Tu’ipulotu’s letter of 21 May, 1996<sup>13</sup> he made a note at bottom of the said letter which show that he was indeed aware of the exchange. This is what he wrote;

*“P.S. I also wish to advise here that this allotment was approved by Cabinet Decision No.1342 on 21 December, 1993 for an exchange between the deceased and Kuli F. Falekaono.”*

31. I am satisfied that by law Mateo and Kuli did not require Tu’ipulotu’s consent to effect their exchange of tax allotments. I have found on the balance of probabilities that Tu’ipulotu was aware of Mateo’s surrender by his signature and the exchange at least by the time he wrote his letter of 21 May, 1996. As a result, the allegations that Kuli and the Defendants hid their actions and provided wrong information, misrepresentations to the Minister of Land cannot stand.
32. I found the Plaintiff’s evidence<sup>14</sup> inconsistent, contradictory therefore unhelpful to his own case.
33. Thirdly, I turn to consider the time limitation. Section 170 of the Act states;

*“No person shall bring in the Court any action but within 10 years after the time at which the right to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims then within 10 years next after the time at which the right to bring such action shall have first accrued to the person bringing the same.” (my emphasis)*

34. The Plaintiff said that he and his father only knew about the exchange on 13 June, 2011 and that time should run from then. I do not accept that proposition. Section 170 states with clarity that time starts to run when the right to bring an action first accrued. In this instant, that was, 14 September, 1992 when the surrender was approved by Cabinet<sup>15</sup> and 21 September, 1993 when Cabinet approved the exchange between Mateo and Kuli.<sup>16</sup>
35. Tu’ipulotu through whom the Plaintiffs claim was aware of both the surrender and exchange and elected not take any action within the ten years. Accordingly, the time to bring an action expired in 2002 and 2003. Time does not restart for the Plaintiffs and this action is out of time and barred.

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<sup>12</sup> Para.20 ibid

<sup>13</sup> Pg.57 cb

<sup>14</sup> See para.29 supra

<sup>15</sup> 1st para. of Tu’ipulotu’s letter of 15 September, 1993 pg.54 cb

<sup>16</sup> Para.10 of Plaintiff’s brief of evidence

36. I find no evidence before me to support the claim relating to Lease No.4049 and why that land should be transferred to the Plaintiff.
37. Equally, no evidence was produced in relation to the ownership of the 2 duplexes claimed to belong to Tu'ipulotu or that the Second Defendant was collecting rent from it and why she owed the Plaintiff \$200,000 as a result.
38. Given the above findings I do not see it necessary to address the submission that the Plaintiff had no standing because he does not hold a similar allotment.
39. I note here that the Plaintiff's evidence was principally based on hearsay evidence including the documents produced. No objection was raised by the Defendants and the documents were referred to during the course of the Plaintiff's evidence and submissions.
40. Finally, I turn to consider the applicable tests when a no case to answer submission is made to the court. I am guided by the principles set out below in *R v Galbraith*<sup>17</sup> recently referred to in *Tu'ivakano v Police Commissioner*<sup>18</sup>;

*"How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty then the judge should allow the matter to be tried by the jury."*

41. As well as Practice Direction (submission of no case) [\[1962\] 1 WLR 227](#) referred to in *Pohiva v Tu'ivakano*<sup>19</sup> where the Lord Chief Justice Parker explained that:

*"A submission that there is no case to answer may properly be made and upheld (a) when there has been no evidence to prove an essential element of the alleged offence; (b) when the evidence ..... is so manifestly unreliable that no reasonable tribunal could safely convict upon it"*

<sup>17</sup> [1981] 2 All ER 1060 [2021]0 TOSC 170, LCJ Whitten QC

<sup>18</sup> [2021]TOSC 170

<sup>19</sup> [2014] TOSC 1



42. Relying on the above principles and for the reasons given, I uphold the submission made on behalf of the First, Second, Third, Fifth and Eighth Defendants that there is no case to answer and dismiss the Plaintiff's claim with costs to be taxed if not agreed.

Nuku'alofa: 12 September, 2022



  
P. Tupou KC  
JUDGE