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LA 9 of 2021

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

BETWEEN:

VAISIMA KAUHALANIUA SALAKIELU

Plaintiff

-and-

[1] MISINIVA TATAKAMOTONGA

[2] POTEAU TATAKAMOTONGA

Defendants

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Land Assessor: Mr S. Taumou
Appearances: Mrs P. Tupou KC followed by Mr D. Garrett SC for the Plaintiff
Mr W.C. Edwards SC for the Defendants
Trial: 2 June 2022, 25 August 2021
Judgment: 30 August 2022

Claim

1. This is a claim by the Plaintiff for eviction of the Defendants from a town allotment with dwelling in Pahu¹ known as 'Little America' ("*the property*"), and payment of rent.

Background

2. On 1 December 2005, the Plaintiff married Kimo Tahi Salakielu. In 2006, they moved to the United States.
3. Kimo inherited the property from his father who passed away in February 2006. On 25 October 2006, Kimo became the registered holder of the allotment.
4. The Defendants are married with five children. Misiniva is currently serving a prison term. His wife, Poteau, is currently pregnant with their sixth child. She gave evidence that in 2012, Kimo entered into an arrangement with Tevita Ngaue (who is her uncle) which resulted in she and her husband being allowed to stay on the property and 'look after it'. Later, she said, Tevita and her husband carried out

¹ Deed of Grant book 375, folio 37. Area of 789.1 m².

repairs and improvements to the property. Tevita has since passed away.

5. The Defendants pleaded that Kimo also agreed to surrender the allotment to Tevita for \$67,000, in respect of which, they paid Tevita \$10,300. No evidence was adduced of that agreement or payment.
6. The Plaintiff denied any knowledge of the alleged surrender agreement or any payment in respect thereof. She testified that Kimo agreed for Tevita to live in the house on condition that he carry out upgrade works including to the roof, water tank, bathroom and drywall in lieu of one year's rent. After the first year, Tevita had not supplied any evidence of work done. In July 2013, Kimo asked Tevita to start paying rent of \$1,000 per month. Tevita claimed that the repairs he carried out were extensive and that he should therefore be permitted to remain in the house rent free. Kimo requested receipts evidencing what work had been done. Tevita did not supply any. Kimo and the Plaintiff tried to contact Tevita but without success. They later found out that he had moved to Australia. When they did contact him, Tevita claimed that Kimo and the Plaintiff owed him money. They agreed that Tevita would pay them \$400 per month and that \$600 would be credited to the repairs he said he had carried out. During this time, Tevita travelled to and from Tonga. When he was away, he had other people stay at the property. Tevita did not make any payments in 2013 and so Kimo and the Plaintiff tried to evict him. Tevita then made some sporadic payments, mostly US\$200 at a time, up to February 2016. A Western Union statement showed a total of US\$4,100 having been transferred during that period.
7. On 23 April 2016, Kimo died.
8. On 23 June 2016, the Plaintiff's life interest as widow was registered.
9. In June 2017, the Plaintiff attended the property and found the Defendants living there. When she explained who she was, 'the lady' swore at her. The Plaintiff then engaged counsel who issued a demand for the Defendants to vacate the property. Counsel for the Defendant and Tevita responded that they would not vacate, that \$63,800 had been spent on repairs, assistance and other expenses, and that they therefore had an equitable right to continue occupying the property. Poteau did not substantiate those matters in her evidence. In May 2018, the Plaintiff's counsel requested details of expenses said to have been incurred by

the Defendants. None were forthcoming. During her evidence, Poteau said that she had some receipts. None were discovered in the proceeding.

10. In 2018, the Plaintiff became a United States citizen. She retained her Tongan citizenship.
11. In January 2020, the Plaintiff's then counsel again demanded that the Defendants vacate the property. In January 2020, the Plaintiff's new counsel repeated the demand. Again, the Defendants did not respond.
12. In January 2022, the Tongan immigration authorities renewed the Plaintiff's Tongan passport.

Defences

13. In closing submissions, Mr Edwards articulated two issues by way of defence.
14. Firstly, Mr Edwards submitted that the Plaintiff's US citizenship disqualified her from continuing to hold her widow's interest in the property because:

"... a person who has taken up American citizenship would, as a normal requirement in the naturalisation process, forsake his/her citizenship and adopt the citizenship of the United States of America. A naturalised person has a first loyalty to the USA whereas in this case, the plaintiff lives and resides in America and enjoys all the privileges that a naturalised citizen has in the USA."

15. Mr Garrett identified that by the 2007 amendments to the *Nationality Act*, dual citizenship is recognised in Tonga, so that the fact of the plaintiff's US citizenship without her having renounced to Tongan citizenship, does not affect her entitlement to hold the property as a widow for life. Otherwise, Mr Garrett characterise this issue as a 'red herring'.
16. I agree.
17. In *Panuve v Panuve*,² the Court of Appeal confirmed that to claim the allotment of her husband, a widow must be a Tongan subject at the date of death of her husband. As at the date of Kimo's death, the Plaintiff was and remains a Tongan citizen.
18. Mr Edwards was unable to cite any legal authority for his submission that taking US citizenship requires the person to renounce his or her native citizenship. in

² [2018] TOCA 4; [2018] Tonga LR 102.

light of the uncontroverted fact that's the point of his had her tongue and passport recently renewed (which would have been impossible had she renounced her Tongan citizenship), the submission cannot be accepted.

19. Accordingly, the first defence fails.

20. The second defence submitted by Mr Edwards was that:

“29. The [Defendants] rely on the fact that the defendants carried out substantial repairs on the property with a view to acquiring it. That understanding was made with Kimo who subsequently died and the widow does not recognise that arrangement.

30. The defendants rely on the equitable principle that they were invited through Kimo to occupy, expend, repair and care for it. They had believed that their right of occupation was to subsist during their lifetime and during that lifetime the land would be surrendered for them to claim.”

21. Mr Garrett submitted that:

- (a) there was no evidence before the court that Kimo ever indicated that the defendants could somehow gain an equitable interest in the land by virtue of making repairs or improvements to the dwelling on the land;
- (b) there is nothing in writing between the parties, or any of them, which would support the existence of an equitable interest, or any form of estoppel;
- (c) Tevita Ngaue was only ever at best a tenant or a licensee of the allotment, and as such, he could never have granted the defendants any interest in it other than being his sub-tenants or sub-licensees.

22. In *Tapealava v Minister of Lands* [2015] TOLC 7 at [28],³ Paulsen P stated the well-established principles of equitable estoppel as requiring a claimant to establish against the other party:

- (a) a belief or expectation has been created or encouraged by words or conduct of the other party;
- (b) to the extent an express representation is relied upon, it is clearly and unequivocally expressed;
- (c) the claimant reasonably relied to its detriment on the representation; and
- (d) it would be unconscionable for the other party to depart from the belief or

³ Citing *Schaumkel v 'Aholelei* [2013] TOCA 1.

expectation.

23. Here, Mr Edwards conceded (correctly, with respect) that there was no evidence before the court of:
- (a) any representation, either express or implied, by Kimo to the Defendants that if they did work on the property they could continue to occupy it, rent free, or even that they could acquire the allotment;
 - (b) any agreement by Kimo to surrender the allotment to Tevita;
 - (c) '\$67,000' having been paid by either Tevita or the Defendants in reliance on any representation to them by Kimo;
 - (d) Tevita or Misiniva ever applying for the allotment on the basis of any expected surrender;
 - (e) the details of any or any substantial work having been performed on the house by Tevita or Misiniva;
 - (f) Kimo knowing about any such work; or
 - (g) Kimo knowing that Tevita had permitted the Defendants to occupy the allotment or on what basis.
24. Even if such evidence had been adduced, including critically, that Kimo had represented to the Defendants that if they looked after the property and effected repairs to it, they could continue to live there, and they then did so in reliance upon that representation, the effect of any resulting estoppel could only be to impose upon Kimo a restriction from obtaining an eviction order against the Defendants. It cannot bind his widow, the Plaintiff, as successor in title, who had no notice of any notional equity. An estoppel necessarily binding successors in title would be akin to an equitable interest in land which is a concept that is contrary to the scheme of the *Land Act* and the authorities: *Nginingini v Nginingini and Ors* [2018] Tonga LR 32.⁴
25. Accordingly, the second defence fails.
26. The Defendants did not assert any other interest by which they could continue to

⁴ See *OG Sanft & Sons v Tonga Tourist and Development Co Ltd* [1981-88] Tonga LR 26 (PC); *Schaumkel v 'Aholelei* (Unreported Court of Appeal, AC 14 of 2012, 17 April 2013); *Kaufusi v Funaki* [2017] TOLC 10.

occupy the property. Nor could they. As Mr Garrett submitted, Tevita was either a tenant or licensee pursuant to Kimo's permission for him to occupy the property. Tevita's right to do so ended upon Kimo's passing. So too did any right the Defendants had to occupy the property pursuant to Tevita's permission.

27. The Plaintiff is therefore entitled to an order for eviction of the Defendants.
28. Mr Garrett requested that the defendants be ordered to vacate the premises within one month. Mr Edwards pointed to the difficult plight of the defendant, in particular, Poteau's condition and her children and asked for as much time as the court would permit.

Rent claim

29. In relation to the Plaintiff's claim for rent, Mr Garrett submitted, relevantly, that:
 - (a) if the payments of US\$200 were intended to be rent, 'they were extremely modest';
 - (b) there is no evidence that any such payments were paid by the defendants, and Poteau denied that they had ever been paid any rent;
 - (c) by only claiming rent from January 2021, the Plaintiff is making an 'extremely generous concession';
 - (d) 'the court may take judicial notice of the fact that rent for a dwelling of TOP\$750 per month is extremely generous, and is perhaps at most half of the prevailing monthly rate for the rental of a dwelling in what are effectively the suburbs of Nuku'alofa';
 - (e) 'it would be just for the court to order that rent of TOP\$1,000 per month be paid by the defendants from 1 January 2021 to the date of judgment'.
30. Mr Edwards did not make any submissions on this issue.
31. The Plaintiff's claim for rent is a species of damages for trespass. The Defendants became trespassers on the property from the time of their failure to comply with the Plaintiff's lawful demands for them to vacate. As Mr Garrett submitted, the Plaintiff's concession in only seeking rent from 1 January 2021 may be regarded as generous.
32. At common law, if the plaintiff proves trespass, he is entitled to recover nominal

damages, even if he has not suffered any actual loss. If the trespass has caused the plaintiff actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the defendant has made use of the plaintiff's land, the plaintiff is entitled to receive by way of damages such a sum as should reasonably be paid for that use: *Piliu v Satini* [2004] Tonga LR 115.⁵

33. The Plaintiff's claim here, whilst not described as such, is in fact a claim for mesne profits. Mesne profits are to compensate for the damage suffered by the wrongful interference with the Plaintiff's right to possession of the land. The Plaintiff may recover the amount of the open market value of the premises for the period of occupation: *Fifita v Fie'eiki (No. 2)* [1995] Tonga LR 187. It is not necessary for the Plaintiff, as putative landlord, to prove that she could, or would, have leased the premises to someone else in the absence of the trespasser: *Fund Management Ltd v Fifita (No.2)* [2000] Tonga LR 342.⁶
34. The quantum of the Plaintiff's claim is advanced on Mr Garrett's submission that I should take judicial notice that rent of \$750 per month for a dwelling in Nuku'alofa is generous and that an appropriate award is \$1,000 per month.
35. I am unable to accept that submission.
36. Section 35 of the *Evidence Act* provides that any matter of which the Act provides for the Court to take judicial notice, need not be proved. Section 36 then sets out those matters. The current rental market for a specific residential property in Pahu is not one of them.
37. Those provisions do not exclusively or exhaustively define the ambit of judicial notice. At common law, the doctrine permits a court, in certain circumstances, to accept the existence of a law or fact, or the meaning of a term, without the necessity of proof.⁷
38. Courts have been prepared to take judicial notice of matters variously described as or including matters 'of such general knowledge that they need no proof',⁸ or

⁵ Citing *Dehn v Attorney-General* [1988] 2 NZLR 564, 583.

⁶ Citing 'Land Law', Peter Butt, second edition, para 1591.

⁷ The principle is expressed in the maxim *lex non requirit verificari quod apparet curiae* (the law does not require verification of what is apparent to the court): 9 Co Rep 54.

⁸ *Attorney-General v Saulala* [2001] Tonga LR 110.

as being 'notorious' in the country or area to which they relate.⁹ In *Brooks v Brooks* [1994] 4 All ER 1065, Waite LJ was prepared to take judicial notice of the current state of the UK housing market at that time.

39. Although a court may in some circumstances take judicial notice even of matters that are not notorious and which require further inquiry or research by the judge, the court must be very careful not to take judicial notice of facts requiring proof by evidence in the normal way and thus remove a party's obligation to produce it: *Attorney-General v Saulala* [2001] Tonga LR 110.
40. In my opinion, the broad range of current rental values for dwellings in Nuku'alofa may be regarded as 'notorious' to a certain extent, but that general knowledge cannot reliably descend to the rental value of the Plaintiff's particular property. It is a matter which ought to have been the subject of valuation evidence.
41. Apart from the size of the town allotment, there is no evidence before me as to the type, size, age or quality of the dwelling or the general state of the allotment. The only evidence was that at some time in the past, the property was in a state of disrepair and there has been no evidence (which was one of the Plaintiff's complaints) of any particular repairs or improvements since.
42. For those reasons, I am unable to take judicial notice of the amount of rent claimed by the Plaintiff.
43. However, I consider that the Defendants' plainly unlawful occupation of the property after Kimo's death and in defiance of repeated lawful demands for them to vacate, warrant something more than nominal damages.
44. Doing the best I can, I consider that \$500 per month is reasonable in all the circumstances. That rate from 1 January 2021 to the date hereof totals \$10,000.

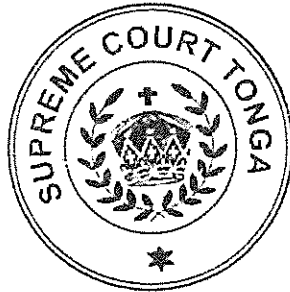
Result

45. There is judgment for the Plaintiff.
46. The Defendants are to vacate the Plaintiff's property within 42 days of service of this judgment.

⁹ For example, see *Browne v Munokoa* [2018] UKPC 18; *Gold Star Publications Ltd v DPP* [1981] 2 All ER 257 at 259; *Yeandel v Fisher* [1966] 1 QB 440 at 446; *RCA Corpn v Pollard* [1982] 2 All ER 468 at 479 (on appeal [1982] 3 All ER 771, CA).

47. The Defendants are to pay the Plaintiff damages in the form of mesne profits in the sum of \$10,000.
48. The Defendants are to pay the Plaintiff's costs of the proceeding to be taxed in default of agreement.

NUKU'ALOFA
30 August 2021



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

M. H. Whitten QC
LORD CHIEF JUSTICE