

The facts

- [2] The action concerns a property known as Fononga Hihifo at Ma'ufanga, Tongatapu.
- [3] The land was first registered to Sefo Puamau on 9 December 1927 and devolved to his heir Pataleone Fau on 19 May 1943. Pataleone Fau died on 5 October 1982. He had two surviving sons namely Peauafi Fau and Sosefo Fau. The plaintiff is the eldest son of Peauafi Fau. The first defendant is the eldest son of Sosefo Fau.
- [4] After Pataleone Fau's death Fononga Hihifo remained unregistered for 6 years. On 5 January 1988 it was registered to Sosefo Fau.
- [5] Peauafi Fau died on 6 April 2001. Sosefo Fau died on 5 July 2012 and the land devolved to the first defendant.
- [6] The plaintiff is seeking a declaration that the registration of the land to the first defendant was unlawful and for cancellation of the same. He also seeks an order for the land to be granted to him and costs.
- [7] The kernel of the plaintiff's claim is contained in paragraphs 5 and 6 of the statement of claim as follows:

'5 The land was registered by Pataleone Fau's younger son Sosefo Fau in 1988 in a process which was fraudulent based on a false submission made by him to the Second Defendant.

6 Sosefo Fau succeeded in registering the tax allotment after somehow convincing the Second Defendant that Peauafi (Mafi) Fau was not the eldest legitimate son and heir of Pataleone Fau.'

[8] Although for present purposes I proceed on the basis that these allegations are correct and will be proven at trial I should note for completeness that the position of the defendants is that there was no fraud committed.

[9] Also I record that Mr. Pouono has confirmed that it is not alleged that the first defendant was in any way involved in the alleged fraudulent behavior.

The argument in favor of the application.

[10] The guiding principle on an application to strike out was stated by the Court of Appeal in *Jagroop v Soakai and the Kingdom of Tonga* [2001] Tonga LR 234, 236 as:

'The principle upon which an application to strike out a claim may be entertained by the Court is clear. No party should have his claim denied without a hearing in the ordinary way, except where the claim is so hopeless that it cannot possibly succeed.'

[11] Clearly to strike out or dismiss a claim at this early stage is a matter of last resort.

[12] The following further principles apply to strike out applications:

- a. Facts pleaded in the statement of claim, whether or not admitted, are assumed to be true.
- b. Before striking out a claim the cause of action must be clearly untenable: the Court must be certain that it cannot succeed.
- c. The jurisdiction is to be exercised sparingly, and only in clear cases.
- d. The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.
- e. The Court should be particularly slow to strike out a claim in a developing area of the law.

[13] I accept that the Court may strike out a claim that is clearly time barred on the basis that such a claim is frivolous, vexatious or an abuse of process. It must be clear that a defendant intends to rely upon that defence. I am advised by Counsel that both defendants will rely on the limitation defense. Mr. Edwards referred me to a number of cases that contain these principles and to the commentary in the

White Book. (See also *Trustees Executors Ltd v Murray* [2007] NZSC 27.)

[14] In concise submissions Mr. Edwards argues that the claim is founded upon the alleged fraudulent registration of the land to Sosefa Fau in 1988 and that the right to challenge the registration arose at that time. In reliance upon section 170 of the Land Act he says any claim, by the person so aggrieved (in this case Peauafi Fau) and any person claiming through him (in this case the plaintiff) had to be filed within 10 years of 5 January 1988 (by 5 January 1998) and as it was not the claim is time barred. Section 170 of the Land Act provides:

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.

[15] Mr. Edwards referred me to *Cocker v Cocker* [2002] Tonga L.R 252 at 253-254 and to the view expressed by the Court in that case that there is no scope for an exception to section 170 based on the nature of the cause of action in fraud.

[16] Mr. Kefu helpfully referred me to the Court of Appeal decision in *Mokofisi v Minister of Lands and anor* [LA 7 of 2014] which is on point and supports the defendants' position.

- [17] Anticipating the plaintiff's arguments Mr Edwards also submitted that it could not be said that the cause of action only arose in 2012, upon the registration to the first defendant, as the land had devolved to him by operation of law under section 82 (c) of the Land Act. The first defendant did not obtain the land unlawfully in 2012.
- [18] Mr. Pouono for the plaintiff submitted the claim was not time barred. He argued that as Peauafi Fau had taken no steps to challenge the grant to Sosefo Fau in 1988 the plaintiff was unable to do so himself. He also argued that the plaintiff had to wait until both Pataleone Fau and Sosefo Fau had died and the land had been transferred to the first defendant before suing. On this basis time only began to run in 2012 and the plaintiff was therefore well within the 10 years to bring his claim. He referred me to *Motuliki v Namoa, Motuliki and Minister of Lands* [1990] Tonga L.R. 61 (PC). Resourceful as it is, I do not accept Mr Pouono's argument.
- [19] The alleged wrong upon which this claim is based is said to be the fraudulent registration of the land to Sosefo Fau in 1988. Any right Peauafi Fau had to challenge Sosefo Fau's registration accrued in 1988. The plaintiff does not have any claim independent of that which first accrued to Peauafi Fau. He makes the same claim as was available to his father but through his father as heir. Time begins to run under section 170 from when the right to bring the action first accrues. It does not matter, in the case of a plaintiff who claims

through the person to whom the right to bring the action first accrued, that the plaintiff was not able to bring the action at that time or that time may have expired before he acquires a right to do so.

[20] Applying section 170 to the facts of this case the right to bring an action based on the alleged fraudulent registration of the land to Sosefo Fau accrued in 1988 and expired in 1998.

[21] *Motuliki* does not assist the plaintiff. In that case the plaintiff's father had unlawfully surrendered land which the plaintiff sought to recover. The surrender had occurred more than 10 years before the claim was filed but within 10 years of the plaintiff attaining the age of majority. It was held that the plaintiff's claim was not time barred because in the "special circumstances" the plaintiff's father, having agreed to voluntarily surrender his rights to the allotment could not challenge what he had himself done. The plaintiff was therefore not claiming through his father but bringing the claim against his father and in his own name. Time only began to run from when the plaintiff attained his majority. The present case is quite different. It is not alleged that the plaintiff's father had unlawfully surrendered his rights; rather it is alleged he was a victim of his brother's fraud. The plaintiff therefore claims through his father not against him.¹

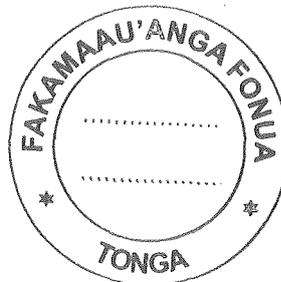
¹ It was not suggested either that the plaintiff was prevented from bringing this action earlier because he had not obtained his majority.

The result

[22] I am satisfied that the plaintiff has no answer to this application and that the claim is statute barred. It has not been necessary therefore for me to consider the further submissions of Mr. Edwards relying on *Koloamatangi v Koloamatangi* [2003] Tonga L.R. 131.

[23] The plaintiff's claim is dismissed with costs to the defendants to be taxed if not agreed.

NUKU'ALOFA: 16 April 2015.



PRESIDENT

OGP

16/4/2015.