

**IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY**

LA 01/15

Solicitor General

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20/02/15

BETWEEN : FREE WESLEYAN CHURCH OF TONGA
- **Plaintiff**

AND : FILISIONE SAMATE
- **Defendant**

BEFORE LORD CHIEF JUSTICE PAULSEN

R U L I N G

1. This is an application by the plaintiff for an interim order evicting the defendant, Mr Samate, from a Gas Station known as Siumafuaola at a property on Li Teng Hui Road, Fua'amotu. I understand the Gas Station consists of a house, a building from which the Gas Station operates and equipment such as pumps.
2. The plaintiff is the lessee of the property under Registered Lease No 5756 for a term of twenty five years beginning on 14 November 1992 and expiring on 13 November 2017.
3. Mr Samate has operated the Gas Station since August 2012. There is no dispute that Mr Samate was allowed to operate the Gas

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Station by the plaintiff. The dispute is whether his right to operate the Gas Station is extant or has expired.

4. The plaintiff's case is that Mr Samate was allowed to operate the Gas Station pursuant to an agreement entered into around 2 June 2012 for a period of only one year. The plaintiff contends that when the agreement expired Mr Samate remained in occupation of the Gas Station at the will of the plaintiff. In April 2014 the plaintiff gave notice to Mr Samate that he was required to vacate by 31 December 2014. Mr Samate did not accept the notice to vacate the Gas Station for the reasons set out below. The steps taken by the plaintiff to recover possession of the Gas Station following 31 December 2014 have been successfully resisted by Mr Samate.
5. The plaintiff regards Mr Samate as a trespasser and seeks an interim order in these terms:

The defendant, his family, friends, employees and workers are hereby ordered to vacate the Gas Station known as Siumafuaola at Li Teng Hui Rd, Fua'amotu and Lease No. 5756 immediately.

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6. For his part Mr Samate says that prior to June 2012 the Gas Station was not operating and that at a meeting of the Trustees of the Fua'amotu Congregation of the plaintiff, held on 3 June 2012, it was agreed to let him operate the Gas Station for six years.

 7. According to Mr Samate, the plaintiff's Church Minister, Reverend Pahulu, later gave him a written agreement to sign but he would not sign it because it did not accurately record what was agreed. One of his reasons for not signing was that the written agreement gave him only one year to operate the Gas Station and not the six years that, he says, was agreed. Mr Samate attempted to contact Reverend Pahulu several times to arrange a meeting but no meeting was ever held.

 8. Mr Samate began operating the Gas Station and negotiated with Total Ltd (Tonga) for the supply of petroleum products to the Gas Station. As part of the negotiation he had to provide written confirmation of the terms upon which he was operating the Gas Station. It appears that the Head Steward of the plaintiff, Siosaia Kaufonoga, prepared a document for Mr Samate to give to Total Ltd (Tonga) which, although unsigned, relevantly provides as follows:

Six continuous years is given to Filisione Samate to operate the petrol station.

and

If it [sic] there is a decision by estate order [sic] regarding the land, this agreement must be relaxed.

9. It seems clear that the last sentence is meant to read 'If there is a decision by the Estate Holder regarding the land, this agreement must be relaxed'. This enigmatic sentence is relevant because it may answer one of the main arguments advanced for the plaintiff by Mr Pouono. He submitted that the plaintiff could not have agreed to allow Mr Samate six years to operate the Gas Station because that would extend beyond the term of the plaintiff's lease. The sentence I have referred to in the document given to Mr Samate by the Head Steward of the plaintiff may suggest that the parties had contemplated this possibility when making their agreement.
10. Mr Samate also says that in September 2013 there was a further agreement between him and the plaintiff to extend the term of the agreement from six to twenty five years. Mr Pouono acknowledged

that there had been a discussion of a twenty five year term but, having initially agreed to it, the Trustees changed their minds a month later. I understand from Mr Tu'utafaiva that notwithstanding this further agreement Mr Samate argues for a six year term and not for a twenty five year term.

The Law

11. The principles that the Court must consider when dealing with interim injunction applications are well known. The applicant must show that he has arguable case and that the balance of convenience favours making the orders sought. In considering the balance of convenience regard is had to whether an award of damages after a trial is a sufficient remedy, the ability of the other party to pay such damages, and whether greater harm will be done by granting or refusing the injunction.

12. There is a further consideration also. Having decided whether there is an arguable case and where the balance of convenience lies the Court must stand back and ask where the overall justice of the case lies. *Klissers Farmhouse Bakeries Ltd v Harvest Bakery Ltd* [1985] 2 NZLR 129, 142 (CA). The relative strengths or weaknesses of the parties' cases may be an important factor at this stage.

13. It must be remembered also that an interlocutory decision of this kind is essentially discretionary. It will often be better to order a prompt hearing, to determine once and for all the rights of the parties, than granting interim relief with a trial to follow at a much later date.

Serious Issue to be Tried

14. In my view there is a serious issue to be tried. The plaintiff is the holder of a registered lease and asserts ownership of the Gas Station. Mr Samate does not dispute that. The plaintiff is entitled to possession of the Gas Station, as against Mr Samate, unless Mr Samate has been granted an existing right to occupy it by the plaintiff. He says he has been granted such a right for a six year term from June 2012.
15. Both the plaintiff and the defendant can point to documents that support their respective positions and I am unable to decide who is right on just the affidavit evidence I have before me.
16. I note that in his oral submissions Mr Pouono argued that Mr Samate only ever had a licence, or tenancy agreement, to occupy

the Gas Station at a monthly rental and that the plaintiff could terminate Mr Samate's licence at any time. In my view that submission is not correct. If the plaintiff did agree, as Mr Samate asserts, to allow him six years to operate the Gas Station then Mr Samate may well be able to successfully resist the plaintiff's claim as a matter of contract and/or estoppel. (See for instance *Ongolea v Finau* [2003] Tonga LR 147, 152.)

Balance of Convenience

17. I am of the clear view that the balance of convenience favours Mr Samate and that I should refuse to make the order sought.
18. The plaintiff does not argue that damages will not be an adequate remedy if the injunction is not granted. Mr Samate occupies the Gas Station and is paying rent at the rate of \$700 per month. He says that is the amount the plaintiff agreed to accept.
19. Notwithstanding this, Mr Pouono submits that the balance of convenience favours the plaintiff. He says Mr Samate has refused to comply with an order of the Church and the Church would prefer it if the Gas Station was under its care. In my view this does not take the plaintiff very far. The plaintiff was previously prepared to

allow Mr Samate to operate the Gas Station for payment of rent. It is still receiving rent. There is no suggestion that the Gas Station is now at risk or that the plaintiff is suffering any financial loss.

20. Mr Pouono also submits that Mr Samate has a home to go to and does not need to live at the Gas Station. He also says that Mr Samate could find other work. Mr Samate does have a home but Mr Pouono's submission does not recognise that the making of the order sought will impose significant hardship on Mr Samate. He will lose his livelihood and possibly, regardless of the outcome of this case, his business. I understand he has incurred debts in relation to the setting up of the business and has entered into commercial arrangements for the operation of the business.

Overall Justice

21. I am, on the state of the affidavit evidence, in no position to express a firm view of the relative strengths of the parties' cases.
22. It is relevant in determining the overall justice of the case that, on the evidence before me, the dispute has been contributed to in large part by the failure of the plaintiff to follow up and have an agreement with Mr Samate signed. It also gave conflicting information to him, on a number of occasions, as to how long he

could operate the Gas Station. It would be unjust in my view to evict Mr Samate, in a summary way, in those circumstances before his case is fully heard in Court.

23. Also relevant to my consideration is that I have been able to put in place a timetable which will see this case heard promptly. As the Court noted in *Klissers Farmhouse Bakeries*, an early hearing is often preferable to the granting of an interim injunction.

Jurisdiction

24. I note that Counsel presented their arguments to me on the basis that Mr Samate was granted a right to occupy the Gas Station only and had no interest in the land. Before proceeding further with this case Counsel should consider whether the Land Court has jurisdiction. *'Unuaki 'o Tonga Royal University of Technology and Anor. v Kingdom of Tonga* (LA 16/2013, 8 November 2013), *Mangisi v Koloamatangi* (Unreported Appeal No 11/98, 23 July, 1999), *Kolo v Bank of Tonga* (Court of Appeal, 7 August 1998) and also *Mortimer and Anor v Fe'aomoeata and Ors* (LA 12 of 2012, 18 December 2014). The last mentioned case is on appeal and likely to be heard in the next session of the Court of Appeal.

The Result:

25. For the reasons I have given the plaintiff's application for an interim order of eviction is dismissed.

26. Costs should usually follow the event but I have not heard argument on costs in this case. Any party seeking costs may file submissions and an itemised bill of costs for my consideration within 14 days of the date of this judgment.

The Future Conduct of the Case

27. As discussed with the Counsel at the hearing, the following timetable has been agreed:
 - a. The plaintiff has filed what is incorrectly stated to be a counterclaim but is in fact simply an additional claim for rent, damages for trespass and costs. The defendant is to file a defence to this additional claim by 2 March 2015;

 - b. Both parties are to complete discovery and inspection of documents by 27 March 2015;

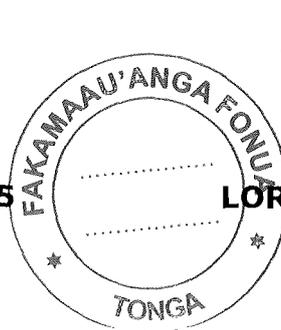
- c. The plaintiff is to exchange full written briefs of evidence of all witnesses it intends to call at the hearing by 2 June 2015. By the same date the plaintiff is to file a full paginated bundle of the documents it intends to rely upon at the hearing;

- d. The defendant is to exchange full written briefs of evidence of all witnesses it intends to call at the hearing by 16 June 2015. By the same date the defendant is to file a full paginated bundle of the documents it intends to rely upon at the hearing;

- e. The case will be called for mention again on 26 June 2015 to monitor compliance with timetable;

- f. The case will be heard on 3, 4 and 5 August 2015.

NUKU'AIOFA: 20 February 2015



**O G Paulsen
LORD CHIEF JUSTICE**