Solicitor General

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23/02/15

IN THE LAND COURT OF TONGA **LA 18 of 2007**

NUKU'ALOFA REGISTRY **[AC14/2012]**

BETWEEN : **1. MAKAFALANI SCHAUMKEL**
2. SATEKI HAIMA SCHAUMKEL
- ***Plaintiffs***

AND : **1. SOANE VAKAMEITANGAKE 'AHOLELEI**
2. MINISTER OF LANDS
- ***Defendants***

L. M. Niu SC for the Plaintiffs
Mrs A. Taumoepeau SC for the First Defendant
A. Kefu SC (Acting Attorney General) for the Second Defendant

DECISION

[1] The First Defendant is the registered holder of a town allotment Taki Ki 'Okalani situated at Vaha'akolo Road, Kolomotu'a.

[2] The First Plaintiff is living in a house which he built on the allotment after his marriage to the First Defendant's late aunt and in which they lived prior to her death.

[3] In 2007 the Plaintiffs commenced proceedings seeking cancellation of the First Defendant's registration (effected by the Second Defendant).

[4] On 17 August 2012 this Court gave judgment in favour of the First Defendant. It held that the First Defendant was entitled to an order for vacant possession of the allotment, the precise terms of the order were however not specified but were left open for further argument.

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[5] In April 2013 the Court of Appeal dismissed the Plaintiff's appeal. It held that the First Defendant was entitled to registration and to an order for vacant possession. The matter was then remitted to this Court "to determine, if necessary the terms of the order for possession and so that any issues as to compensation can be resolved".

[6] On 4 June 2014 the First Defendant filed an ex-parte application for an order for possession. On 6 June 2014 the Court ordered possession to be granted 90 days after service of the order. It is not in dispute that the order was served, that the 90 days period has expired and that the First Plaintiff has not vacated.

[7] On 22 August 2014 an application was filed by the First Plaintiff seeking determination (assessment) of "the amount of compensation to be paid by the First Defendant to the Plaintiffs for the buildings and fences on the land of the town allotment".

[8] In a supporting affidavit the First Plaintiff deposed that he had spent over $135,000 in the construction of the buildings and fences and had always maintained them in good order. He revealed that several proposals for the payment of compensation had been put to the First Defendant but had been rejected. In paragraph 9 of his affidavit he averred:

> "It is now clear that the First Defendant just does not want to pay me and my son any compensation and wants me to remove my buildings and fence from the allotment and thereby destroy them. That would be quite a waste and is unwarranted".

[9] In paragraph 7 of his affidavit the First Plaintiff stated that: "if rented out as residence it would fetch no less than $2500 per month. If rented out for commercial use, it would fetch no less than $5000 per month".

[10] The proposals referred to by the First Plaintiff and their rationale were expounded in written submissions filed by Mr Niu in support of the application. According to Mr. Niu it is "clear that the First Defendant [does] not have the funds to pay the compensation for

the premises to the Plaintiffs". Therefore, three options were offered as follows:

" (a) that the first Defendant borrowed the sum of compensation by way of loan from the bank and that the loan would be repaid by the monthly rent received from a tenant who would occupy the premises and who would ensure that the premises are well repaired and maintained and insured;

(b) that the Plaintiffs occupy the premises for a several number of years, say 5 years, during which they can rent it out and receive their compensation but that they must repair, maintain and insure; and

(c) that the first Defendant rents out the premises and pays the compensation by monthly payment, for a total amount which was half what they proposed under (a) above and deduct these from the costs of the appeal (as ordered by the Court of Appeal)".

[11] At the hearing of the application Mr. Niu filed further written submissions. After commenting on certain provisions of the Land Act and the Probate Act he submitted, echoing remarks made by this Court obiter in the last sentence of the judgment of 17 August 2012, that :

> "as is presently the practice, the heir takes the title to the allotment and keeps the dwellinghouse for himself simply because he claims he is legally the lawful owner of the allotment and that the dwellinghouse should be left there because to remove it, especially if it is a brick house or one with a concrete floor, it would be worth very little to any person. He thereby exerts unfair advantage upon the rest of his siblings and that it inequitable. The law of equity must apply to prevent it".

[12] In paragraph 29 of the submission Mr. Niu stated that the value of the buildings and fences was not agreed. In those circumstances evidence would be required including evidence of the amount of rent that the house might command.

[13] In her own written submissions filed on 31 October 2014 Mrs Taumoepeau took as her starting point the Court of Appeal's finding that the second Defendant was entitled to an order for *vacant* possession. As can be seen from the prayer of his Statement of Defence the Second Plaintiff had sought not only the dismissal of the claim but also "an order for the First Defendant and his family to remove all their belongings from and to vacate" the allotment immediately. The Land Court held that the Second Defendant was entitled to an order for *vacant* possession and that finding has upheld by the Court of Appeal.

[14] As to compensation, Mrs Taumoepeau's position was that while negotiations had taken place in good faith as "serious attempts to save the family relationship" those negotiations had broken down. The Second Defendant and his family accepted that the buildings and fences belonged to the First Plaintiff; they did however not want them but rather wanted them removed in order that the possession to which they were entitled would indeed be fully vacant.

[15] Mr. Kefu told the Court that the Second Defendant's position was that the buildings and fences were not part of the allotment inherited by the First Defendant. (*Cowley –v- Tourist Services Ha'apai Ltd and Fund Management Ltd* [2001] To. L.R 183), but appeared to belong to the First Plaintiff. In Mr Kefu's submission the Second Defendant, who had been awarded vacant possession of the allotment could not be forced to pay compensation to the First Plaintiff if for no other reason than that the consequence of forcing him to compensate might be to deprive him of his ability to enjoy the fruits of the award made in his favour. In my opinion the force of this submission is clearly illustrated by the three settlement proposals offered by the First Plaintiff and which have been set out on paragraph 10 above.

[16] Although Mr. Niu, while asking the Court to assess the quantum of compensation, did not request any specific sum, it is clear from the terms of the offers and the First Plaintiff's evidence that a substantial award was being sought, not less than $135,000 and that the Second Defendant was in no position to come up with

such a sum except at the cost of forfeiting the actual possession of the allotment and the buildings upon it either to the First Plaintiff or another tenant for a period estimated at up to five years. This, I am satisfied, is quite incompatible with the orders for vacant possession made by the Courts.

[17] As has been seen, Mr Niu suggested that the "present practice" of applying the inheritance provisions of the Land Act may have unfair results. I have some sympathy with this proposition and several other examples come to mind. Some provisions of the Act, the rights of women and illegitimate children to identify but two are viewed by some as being in need of revision. It is not however for the Court to ignore the clearly expressed intent of Parliament.

[18] Where money is spent following representations as to future conduct, breach of those representations may lead to the invocation of equity and there are several well-known examples in Tonga where the Land Court has granted relief. In the present case however the First Plaintiff, as has been found by the Courts never had any realistic expectation of being able to inherit the allotment which he only entered with permission after his first marriage. It seems a pity, and a waste, that the improvements he made to the allotment are now, if the Second Defendant is taken at his word, to be demolished but this unfortunate outcome, understandable given the long and increasingly bitter litigation, cannot, as I find, affect the right of the First Defendant to inherit this land free of accretions.

[19] If indeed, the First Defendant wants to see the buildings and fences removed then he must allow a reasonable time, no longer than absolutely necessary, for the first Plaintiff to remove them. In order for this to be done he will have to allow access to the land. If such access is refused then the First Plaintiff will have no alternative but to abandon them. Whichever is of these courses is adopted there is, in my view, no right to compensation.

[20] The order for possession granted on 6 June 2014 has not been complied with. It is however still enforceable under section 151 (2)(a) of the Act.

[21] The First and Second Defendants' applications for costs included in their Statement of Defence have not yet been disposed of, and neither have the costs of the appeal been quantified. The Defendants are entitled to the costs of this application by the First Plaintiff which is dismissed. Such costs to be taxed if not agreed. There is also an outstanding order for payment by the First Defendant of $250 costs thrown away, made on 30 September 2014. I agree with Mrs Taumoepeau that the closure of this litigation is much to be desired. I therefore urge Counsel to arrange for the disposal of the remaining outstanding matters as soon as possible.

Result:

(1) First Plaintiff's application for compensation dismissed.

(2) Defendants' costs to be taxed if not agreed.

SUPREME COURT TONGA

M. D. Scott
JUDGE

DATED: 20 February 2015.

M. Taufa
18/2/2015