Solicitor General
20/03/15
Scan, email

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY **LA 10/2012**

BETWEEN : TEVITA MAPILI NISA TO'A

- *Plaintiff*

AND : MAKAMEONE TAUMOEPEAU

- *Defendant*

AND : MINISTER OF LANDS

- *Third Party*

Before Mr Justice M. D. Scott and Mr Assessor G. Blake

L. M. Niu SC for the Plaintiff
Mrs P. Tupou for the Defendant
S. Sisifa with Ms J. Lutui for the third Party
(note: the third Party was erroneously referred to on occasions as the 2nd Defendant)

JUDGMENT

THE PARTIES

[1] The Plaintiff is aged 71 and retired. He is a matapule (hereditary spokesman) of H. M. The King. He told the Court that he resides

Rec'd 23/03/15

at Campbell Down, New South Wales, Australia but is a Tongan citizen.

[2] On 7 June 2011 the Plaintiff was registered as the holder of a town allotment known as "Konga o Kape" at Kolofo'ou having an area of 1626 square metres reference Vol 109 Folio 42, Survey plan 5342, Lot 1. (the land).

[3] This is the same piece of land which was previously held by Matei Taumoepeau who died on 6 November 2005.

[4] Matei Taumoepeau (Matei) was the (customarily) adopted son of Fetutuki Talakai who was the daughter of Metuisela Talakai whose brother Vita Mapili To'a was the Plaintiff's grandfather. Disregarding the fact that Matei was adopted it may be said that he and the Plaintiff were, in effect, second cousins.

[5] Matei did not marry and had no children. He did however legally adopt the Defendant (Dr Maka) who was the illegitimate son of Matei's elder brother Siosifa.

[6] These rather complicated relationships are illustrated, to a degree, by document D-2-20 of the Third Party's production (wrongly entitled "Second Defendants" production). All the documents were produced by consent with the First Defendant's being referred to as D-1-1 etc. and the Third Party's as D-2-1 etc.

[7] Although there is no blood relationship between the Plaintiff and Dr. Maka, the Plaintiff's father's grandfather Semisi To'a was also the grandfather of Matei's adoptive mother Fetutuki. It is in that rather narrow sense that the Plaintiff and Dr Maka may be said to be "related".

THE ORIGINAL LAND

[8] The land is roughly one quarter of a piece of land (the original land) comprising 1 acre 2 roods and 23.5 perches which was granted to Metuisela Talakai (Metuisela) on 22 November 1926. This is Crown land and it appears that prior to the grant in 1926 it was unoccupied.

[9] Between 1947 and 1953 the original land was divided into four pieces of roughly the same size. The subdivisions are shown in documents D-2-5 and 6 and a helpful and simplified diagram is included at paragraph 1 (3) of the Third Party's Statement of Defence. It is to this diagram that reference will henceforth be made.

[10] The four allotments are numbered 1 to 4. Allotment 3, the land in dispute, was surrendered by Metuisela in 1947 and was then granted to Matei. This surrender and grant by consent presumably was effected under the provisions of section 54 (as it then stood) and the practice referred to by Ford CJ at paragraphs [42] and [43] of his judgment in *Tafa v Viau & Ors* [2006] To. L.R 136.

[11] In 1949 allotment 4 was surrendered and then leased to Katalina Hansen who had also been adopted by Fetutuki Talakai and her husband Saimone Taumoepeau.

[12] The remaining two allotments 1 and 2 were surrendered in 1953. Allotment 1 was granted to Sione Nisa To'a who was Metuisela's nephew and the Plaintiff's father. As will later be explained, this allotment is now held by the Plaintiff's son Semisi To'a as his town allotment.

ALLOTMENT 2

[13] Allotment 2 was surrendered and leased to Metuisela's daughter Palu Talakai who was the sister of Fetutuki. No copy of the lease was produced but according to D-2-8 & 9 lease 3009A ran from 30 September 1973 to 29 September 1994. I suspect that the commencement date may be incorrect however nothing turns on it; it is what happened in August and September 1994 which is of importance.

[14] On 24 August 1994 Semisi To'a, the Plaintiff's son, applied for the grant to him of allotment 2 as his town allotment. In the Form 9 application (Documents D-2-8 & 9) he stated that the last registered owner of the allotment had been Metuisela. He did not disclose that the allotment was held by lessee Matei and that the lease was to expire on 29 September following. Enquiries were however made by the Lands Registry and these revealed the existence of the lease and the fact that, in circumstances which

are not at all clear (but may include the breakdown of her marriage) the lease, originally granted to Palu Talakai had been transferred to Matei.

[15] The then Minister, Dr S. Ma'afu Tupou endorsed Form 9 as follows:

> "[Registrar] keep the application to the expiration of the lease and do not renew but execute land application".

[16] On 6 October 1994 Dr Tupou gave instructions for the land comprised in the lease (which by then had expired) to be surveyed (D-2-10 & 11). On 13 January 1995 he instructed "hold the survey". He also noted:

> "Tu'ipelehake had issued directions regarding the said allotment. All applications regarding this allotment shall be placed on hold until things are rectified".

What Tu'ipelehake's directions were and what needed to be rectified was not disclosed to the Court.

[17] Notwithstanding Dr Tupou's instructions, in circumstances which are again unclear, Matei apparently applied for the renewal of his lease for a further 50 years. No copy of Matei's application was produced however D-2-14 &15 reveal that on 21 February 1996 Cabinet approved the application (on the recommendation of the

then Acting Minister of Lands Hon. Fakafanua, it must be presumed, see section 19 (3) of the Land Act – the Act).

[18] In further unclear circumstances the lease was then transferred from Matei to Dr Maka, was renumbered as Lease 5980 and is currently held by him, not expiring until 29 September 2044.

[19] The relevance of Semisi To'a's unsuccessful application for the grant to him of allotment 2 will in due course become clear.

ALLOTMENT 3

[20] The land in dispute is allotment 3, the registered holder of which, prior to the grant to the Plaintiff in 2011, was Matei.

[21] Matei customarily adopted Dr Maka "at a very young age". In paragraphs 3.1 of his brief of evidence – Exhibit 2 – Dr Maka described his upbringing by Matei, his schooling, his education in New Zealand, his scholarship to the Fiji School of Medicine, his marriage, his return to his father's land, his children and bringing them up on the land. Matei legally adopted Dr Maka in 1962 when he was 19 years old (D-1-1)

[22] Dr Maka told the Court that in addition to the family house first erected either by Matei or his father, there are two other principal buildings on the land. The first is an old style shop situated close to the boundary with the Hansen allotment and the other is a substantial building which houses a morgue.

[23] According to Dr Maka the shop was run by Matei, by himself and by his brother and sister. In about 1996 Dr Maka converted the shop into a medical clinic and at about the same time he and some others set up the morgue operation. Both the clinic and the morgue are still operating.

[24] Dr Maka does not live on the land. As a Government doctor, he is entitled to Government quarters in which he resides, although he occasionally stays in the house. Relatives of his live in the house and in the house on the adjacent leased land, allotment 2.

The death of Matei

[25] By 2005 Matei was 87 years old. According to Dr Maka, Matei decided that it was time to surrender the land and have it transferred to Dr Maka. On 17 February 2005 Dr Maka wrote to the Minister asking for the land to be transferred to him. In the letter witnessed by Matei (D-1-6 & 7) Dr Maka explained that he was Matei's adopted son, that he was living with Matei and caring for him and that he held no allotment of his own. The letter was accompanied by a Form 9 application for the grant of an allotment, again witnessed by Matei (D-1-7 & 8).

[26] On 7 March 2005 Matei changed his mind. He wrote to the Minister (D-2-25 & 26) cancelling his earlier request.

[27] On 14 March 2005 Matei again amended his request. He now wanted part of the land to be leased to one Zhu Ai Yu with the

balance and the reversion to be held by Dr Maka (D-1-10 & 11). On receipt of this letter the surrender and regrant to Dr Maka was put on hold (D-1-12 & 13). There then followed several letters by Dr Maka explaining that Matei was suffering from suspected Alzheimer's disease and cancer and only had a few months to live. He was allegedly being coerced by Zhu Ai Yu who had paid him a substantial sum of money. Dr Maka expressed the family's strong opposition to the lease plan and renewed the request for the land to be transferred to him.

[28] In October 2005 Dr Maka again wrote to the Minister renewing his request for the land. On 6 November 2005 Matei died. Dr Maka then wrote to Hon. Tuita, the new Minister, on 10 November 2006 (D-1-36 to 41 & 43 to 46). In this lengthy document he gave a detailed chronology of the land, its history, dealings and claims. Apparently Zhu Ai Yu had pressed so far forward that a lease to him was on the verge of being granted. This led to proceedings in Court by Zhu Ai Yu against Dr Maka which were settled [D-1-35] upon payment by Dr Maka of $17,000.

[29] Dr Maka asked the Minister to consider his pending applications:

(i) Surrender and claim D-1-4 & 5 and D-1-6 & 7;

(ii) Claim as heir D-1-27 & 28; and

(iii) Application for town allotment submitted on "2 August 2005" (probably an erroneous reference to D-1-31 & 32 dated 1 August 2006).

[30] No reply by the Minister to this letter was produced. Asked about it, Land Registration Officer Semisi Moala, who was called by the Third Party, told the Court that no reply by the Minister could be found on the file. It is notable that between paragraph 24 of his brief of evidence (Exhibit 4) and paragraph 27, a gap of just under five years, no correspondence is referred to. Dr Maka's evidence was that the Minister never replied to his claim or application and I accept that fact as proved.

[31] The Plaintiff applied for the land to be granted to him on 13 April 2011. The position on the eve of that application I find to be as follows:

(a) Matei had died on 6 November 2005, therefore:

(b) The rules of succession (section 82) applied, but:

(c) Dr Maka could not inherit since he was not as a matter of fact "born in wedlock" (section 82 (b)); and

(d) His legal adoption could not operate to overcome section 82 (b); therefore, as Matei had no natural legitimate son:

(e) Section 82 (e) came into play; however

(f) It is accepted that Matei's brother Siosifa already had an allotment of his own; but

(g) By virtue of section 84 Siosifa was not permitted to choose between the land and the allotment he already held; and therefore:

(h) The land reverted to the Crown on 6 November 2005 (section 83).

(i) Dr Maka then continued to occupy, work from and occasionally reside on the land undisturbed by any claim against him either by a claimant to the land or by the Crown for a period of approximately 5 ½ years.

The Plaintiff claims the land

[32] As has already been noted, allotment 1 was surrendered by Metuisela (the Plaintiff's great-uncle) in 1953 and was regranted to the Plaintiff's father Sione Nisa To'a. Sione died in 1992 and his mother took the section 80 life estate. According to paragraph 14 of the Plaintiff's brief of evidence (Exhibit 1):

> "when [my mother] died in 2001 I requested the Minister of Lands to transfer the allotment to my only son Semisi and the Minister did".

[33] The decision not to take his father's allotment was not examined in any detail however it appears clear that this reflected the fact that the Plaintiff's grandfather Vita Mapili To'a had held a town allotment at Neiafu, on Vava'u. It may be that this is the reason that Metuisela's surrender and regrant was in favour of Sione, rather than his father. Be that as it may, the Plaintiff, upon the death of his mother had, as the section 82 (c) heir, the right to elect between that allotment and the Vava'u allotment which he had apparently inherited from his grandfather in the 1960's. He chose the latter and his son took the former. This, it must be emphasised, was in 2001.

[34] According to paragraph 16 of his brief of evidence, the Plaintiff discovered by chance, on a visit to the Ministry that consideration was being given to granting allotment 3 to one Koli Afuha'amango who was said to be the closest blood relative to Metuisela. Whether or not this was in fact the case, I do not know; his name does appear in the family tree at D-2-19 & 20 but, Mr Niu informed me, in the wrong place.

[35] When the Plaintiff discovered what was planned "I went and saw the Minister of Lands Tuita" and convinced the Minister that his claim was much to be preferred. The Minister agreed "and instructed his officer Maka Matekitonga to process the registration of the allotment in my name".

[36] According to paragraph 19 of his brief, officers of the Ministry "kept delaying" the implementation of the Minister's instruction until, about 8 months later, he went to see the new Minister Lord Ma'afu, who instructed Semisi Moala "to effect the registration in my name right away". This was on 13 April 2011.

[37] At this point it must be noted that apart from the fact that Dr Maka was still in de facto occupation of the land, and that his application for its grant to him was as yet undealt with section 48 of the Act provides that:

> "No person who already holds a tax allotment or town allotment shall be granted a second allotment of the same

kind as he already holds and any such grant shall be null and void".

[38] Semisi Moala told the Court that after receiving the Minister's directive he advised the Plaintiff how to proceed. He prepared a Form 9 application for the grant of the allotment (D-2-52 & 53) and attached to it a letter to the Minister which he wrote and which the Plaintiff signed (D-2-54 & 55). In it he stated that the land had reverted to the Crown, that he wanted to surrender his allotment on Vava'u under the provisions of sections 72 and 73 of the Act and that he wanted his surrendered allotment to be granted to his nephew Viliami Moengangongo Vatuvei.

[39 Sections 72 and 73 provide a mechanism whereby an allotment holder "who desires to remove permanently from the district in which his allotment is situated" may apply to the Minister for the grant of a similar allotment to him in the district to which he wishes to remove:

> "(2) The Minister shall thereupon, *if land in the estate or Crown Land specified as aforesaid is available* grant to the applicant an allotment" (emphasis added).

Upon delivery of the deed of the newly allocated land the allotment formerly held by the applicant reverts to the Crown.

[40] The Ministry handled the Plaintiff's application with commendable despatch: the Minister approved the application on 27 April (D-2-58) and the deed of grant was issued on 7 June. The Plaintiffs former allotment was granted to his nephew Viliami 12 days later.

[41] Semisi Moala was asked about form D-2-58 which he acknowledged he had prepared. In particular he was asked about the "site inspection" – which he had carried out. Semisi Moala accepted that the statement on paragraph 6 that there was only a timber house on the land was not in fact correct. "I did not notice the shop". "I did notice the shop but it was closed". "I did notice the morgue but I did not include it in my brief to the Minister because I thought it was on the adjacent allotment". "I did not try to establish the boundaries of the land, it was just a rough assessment". "I did not speak to anyone there".

[42] Semisi Moala told the Court that the Minister had decided to grant the land to the Plaintiff before he carried out the site inspection, that the Minister had not instructed him to make any enquiries at the land; he had gone on his own initiative. He was unable to explain what he meant by inserting the letters "OK" next to the "due diligence" item. He accepted that there was no reference to Dr Maka's occupation or claim for the land in the "Comments" section of the form.

[43] When Dr Maka heard that the land had been allocated to the Plaintiff he went to see his lawyer. Mr Posesi Bloomfield then

went to see the Minister. According to Semisi Moala no minutes of this meeting can be found. On 15 September 2011, however, the Ministry wrote to Mr Bloomfield. The letter is D-2-68. The letter speaks for itself: "The Hon. Minister for Lands granted the town allotment to [the Plaintiff] on the basis of a decision made by the former Minister of Lands Dr S. Ma'afu Tupou". "Lord Ma'afu ..... was compelled by the previous decision of Dr S. M. Tupou taking into consideration the family background and the competing claims to the town allotment".

[44] This explanation was not satisfactory to Dr Maka who then went to see the Minister. According to Dr Maka whose evidence on this point was not challenged, "he did not agree to cancel the Plaintiff's registration". "It was obvious that he had confused the land with the leased land with Palu's house on it". "He asked his staff to write a letter to explain what he had done". It is not clear whether this letter was D-2-68 or whether a second letter was sent but not discovered or whether no second letter was sent at all.

[45] It is at this point that the relevance of the unsuccessful attempt by Semisi To'a to have allotment 2, the allotment which had been leased by Palu, allocated to him, becomes clear [see paragraphs 13 – 19 above]. It was in respect of allotment 2, not allotment 3, the land, that Dr Tupou had issued instructions which were apparently overlooked or overruled by his successor Hon. Fakafanua. The previous decision of Dr Tupou had nothing

whatever to do with Dr Maka's claim to allotment 3. In my view Dr Maka's suggestion that the two allotments had been confused was clearly correct. Furthermore, I reject the implication that a Minister is "compelled" to follow the decision of one of his predecessors, whether that decision was right or wrong.

[46] It should also be pointed out that the reasons for the decision in favour of the Plaintiff advanced in D-2-68 do not appear in the Defence of the Third Party (see paragraphs 23 – 27 of the Statement) nor in the brief of evidence of Semisi Moala who, at paragraph 25 stated:

> "the [Third Party] did not approve the devolution of Matei Taumoepeau's town allotment to the First Defendant because the First Defendant is not the heir of Matei Taumoepeau".

This explanation however, is no explanation for refusing (by non-action) to process Dr Maka's section 43 application.

[47] In his writ issued on 8 June 2012 the Plaintiff pleaded his registration, asserted that the Defendant Dr Maka "runs a business of a medical clinic and a morgue at the allotment, although he is not staying at the allotment. Yet he used the allotment as if he is the holder". He sought a "declaration that he is the lawful holder of the land" and an order for vacant possession".

[48] In an amended Statement of Defence filed in October 2012 the Defendant pleaded:

(1) That as the legally adopted son of Matei "he has continued to lawfully use the allotment to date because he is the lawful owner and proper registrant";

(2) That Matei clearly indicated his wish that Dr Maka hold the land following his death;

(3) That the Defendant had applied for the land to be granted to him within 12 months of Matei's death;

(4) That the Defendant had "defended the allotment" from the claim made by Zhu Ai Yu;

(5) That the Plaintiff was not the heir to the land;

(6) That the Plaintiff's application was made several years after the Defendant's claim;

(7) That the land was not available as required by section 73 (2) since it was lawfully occupied by the Defendant;

(8) That the Minister's decision to grant the land to the Plaintiff breached the rules of natural justice; and

(9) That the Minister misidentified the allotment which he granted to the Plaintiff.

[49] After a Third Party notice was issued, the Minister filed a Defence. It was pleaded:

(1) That the Minister "did not approve the devolution of Matei's allotment because the Defendant is not the heir of Matei Taumoepeau";

(2) In the absence of "a valid claim" the land reverted to the Crown;

(3) Dr Maka had "no legal right under law or in equity to the town allotment"; which

(4) The Minister decided to grant to the Plaintiff "based on the family background and the claims for the allotment".

CONSIDERATION OF THE ISSUES

[50] In my opinion the critical issues to be addressed in this matter are as follows:

(i) Was Dr Maka Matei's heir?

(ii) Did the land revert to the Crown after Matei's death?

(iii) Was Dr Maka's continued occupation of the land after Matei's death lawful?

(iv) Was Dr Maka entitled to apply for the grant of the land to him?

(v) Was it a requirement that the land be available before it could lawfully be allocated to the Plaintiff?

(vi) What were the duties of the Ministry/the Minister?

[51] As to (i) I have already explained in paragraph 31 that in my opinion Dr Maka was not Matei's heir within the meaning of section 82 of the Act.

[52] I have also answered (ii) in paragraph 31: the land reverted to the Crown.

[53] In my view the reversion of the land to the Crown by operation of law did not render Dr Maka's continual use of the land unlawful. He did not become a trespasser. While I accept that his licence to reside there came to an end with Matei's death there is nothing to suggest that the Crown which was prima facie entitled to possession took any steps to evict him. Accordingly, he was in possession *nec vi, nec clam, nec precario*. (see Nicholas, *Roman Law*, Oxford 1962). Secondly, it is notorious that applications for grant and registration typically take months to process. It would be absurd, for example, to suggest that the lawful occupant of land subject to a section 83 reversion occupied the land unlawfully while his section 43 application was being processed (and see *Tafa v Viau* – above, paragraphs 36 – 39).

[54] Although Dr Maka was not Matei's heir it does not follow that he was not entitled to make the section 43 applications which were lodged in February and October 2005. The Ministry seems to have taken the view that since Dr Maka could not claim as heir it was not open to him to claim the land or any other basis. This view, if held, was quite wrong. It cannot be denied that Dr Maka

[57] On appeal, the Judgment of the Land Court was upheld [2006] To. L.R 287. Referring to sections 43 and 50 the Court stated:

> "the scheme as a whole seems to make availability an essential requirement, before a grant can be made".

[58] In *Finau v Minister of Lands & Heimuli* AC 9/12, 12 October 2012 the Court of Appeal pointed out that the Court of Appeal in *Tafa v Viau* "did not endorse the ultimate finding at trial that because [the land was occupied by the Respondents who had built a house on it] the land was not available for grant". Commenting on the statement of the Court of Appeal quoted in paragraph 60 above, the Court said:

> "that sentence cannot be taken as a declaration that any provisions in the Act, other than possibly section 50 which authorises the making of a grant is subject to a condition precedent that the land is available in whatever sense that word is used in section 50".

[59] The Court concluded by stating:

> "We have not sought to determine what "available" means for the purposes of section 50. ... there is a real question which may have to be determined in another case or another time. It is whether the Act entrusts to the Minister the determination of the question of whether land is "available" as a matter of fact for the purposes of section 50

having regard to the circumstances of any particular case, or whether "available" has a legal meaning to be determined by a Court in any challenge to a Minister's decision which would be of general application or to be determined and applied by a Court on a case by case basis".

[60] In the light of these observations it is clear that for this Court itself to attempt to arrive at a conclusion whether the section 73(2) requirement that the land be available had been satisfied is not the most satisfactory approach.

[61] While the responsibility for determining availability may not be clear what is beyond any doubt is the responsibility of the Ministry to make proper enquiries, to comply with the rules of natural justice and to avoid obvious mistake *before* a decision is reached. (see *Hausia v Vaka'uta* & Anr [1974 -1980] To. L.R 58; *Hakeai v Minister of Lands & Ors* [1996] To. L.R 142; *Cocker v Palavi & Minister of Lands* [1997] To. L.R 203 and *Tafa v Viau* [2006] To. L.R 287, 293 in which the Court said:

> "two aspects of the Minister's functions and duties in a case such as this combine to require him to take steps, which must be reasonable in particular circumstances to ascertain whether the land is in fact not subject to some other claim that might be an impediment to a grant or make it unavailable. In the first place he cannot properly sign a

declaration on behalf of the Crown that there is no impediment if the truth is that he simply does not know because he has made no sufficient enquiry. In the second place the administrative decision to make the particular grant cannot properly be made in the absence of the same enquiry in any case where the Minister does not actually know whether the land is available or whether any competing claim has been appropriately resolved. Of course, in both respects the Minister does not have to make enquiries personally. He may rely on his officers, but if he does so, and they fail to perform the task properly a person affected may have a remedy for that failure as if it was a failure by the Minister",

[62] In my view the Ministry did not handle the regrant of this land properly. First, it did not process Dr Maka's section 43 application with reasonable despatch, or at all. Secondly, it accepted the Plaintiff's application and decided in his favour *before* making proper enquiries (which would *inter alia*, have revealed the allotment 2/3 confusion). Thirdly, the enquiries that were made, principally the visit to the land by Semisi Moala were carried out in a slapdash manner resulting in a brief to the Minister (D-2-58) which was seriously misleading.

[63] In my view the way in which this matter was handled by the Ministry was in the clearest breach of the principles of natural justice and accordingly the registration in favour of the Plaintiff

must be set aside and the competing applications referred back to the Minister for due consideration, according to law. There is, of course, nothing to prevent the allocation of another piece of Crown Land to the Plaintiff which is available.

[64] In conclusion I acknowledge with thanks the assistance of Counsel who filed very helpful submissions. I also wish to thank Assessor George Blake for his guidance through the rather complicated family connections. The judgment is, however, my own.

Result:

(1) Plaintiff's claim dismissed.

(2) Plaintiff's registration of allotment 3 dated 7 June 2011 is set aside.

(3) The matter is referred back to the Hon Minister of Lands for further consideration.

(4) I will hear Counsel as to costs.

SUPREME COURT TONGA

M. D. Scott
JUDGE

DATED: 13 March 2015.

M. Taufa
11/3/2015