

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

DPP #1
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LA 25 OF 2014
04/06/15

BETWEEN: HETUENI HINGANO

- **Plaintiff**

**AND: 1. NEPOTE 'ETUATE HINGANO
2. MINISTER OF LANDS**

- **Defendants**

**Counsel : Mr. T Fakahua for the plaintiff
Mrs. F Vaihu for Salesi Hingano & Sesilia Hingano
and for the first defendant
No appearance for the second defendant**

Hearing : 28 May 2015.

RULING

[1] There is before the Court an application for an interim injunction made on behalf of Hetueni Hingano (Hetueni) seeking to evict Mr. Salesi Hingano and Mrs. Sesilia Hingano (Salesi and Sesilia respectively) from an allotment named Kavelangi.

[2] Before ruling on this application I need to set out some background information for the benefit of Counsel and the parties. I heard this application on Thursday, 28 May 2015 and reserved my decision. On

Sunday, 31 May 2015 my wife and I were invited guests at a Church service. Following the service I was approached by Salesi and Sesilia who I did not recognise until they mentioned that they had attended a hearing in front of me the previous Thursday. I did not speak to them except to exchange the briefest of pleasantries and did not discuss the case with them. I subsequently learned that they may have been in photographs taken of my wife and me and members of the Church.

[3] I disclosed what had happened to Counsel and asked for their views on Monday, 1 June 2015. Mr. Fakahua expressed a preference that the application be dealt with by Justice Cato. I referred the application to Justice Cato but he has advised me that because of heavy trial commitments, including a murder trial involving Mr. Fakahua, he would not be able to rule on the application for many weeks. There are no other resident Judges.

[4] It is a fact of life in such a small nation that Judges will from time to time come into contact with litigants. In the circumstances that present themselves I have asked myself whether any fair minded, impartial and properly informed observer could reasonably believe on the facts as I have disclosed them that I may have been unconsciously biased by the contact that I have had with Salesi and

Sesilia.¹ In the circumstances I have no doubt that they could not. I consider therefore the best course for the parties is for me to rule on the application myself.

The related proceedings

- [5] There are three related Court proceedings underway. In this proceeding Hetueni is challenging the grant of Kavelangi to Mr. Nepote Hingano (Nepote), the child of Salesi and Sesilia. Hetueni asserts that the grant was, *inter alia*, obtained by fraud and that he is the legitimate son and heir of Salesi and entitled to the land. This is denied by Nepote and also by Salesi (although he is not a party to this proceeding).
- [6] There is another land case under LA 27 of 2014 in which Nepote seeks possession of the land from 'Alisi and Ma'ake Kaufusi who occupied the land on the authority of Hetueni. Although Nepote is the registered owner of the land 'Alisi and Ma'ake Kaufusi have until recently been living there and defended this claim on the basis that Hetueni is the "proper person to hold the land".
- [7] Finally in CV 74 of 2014 Salesi seeks the cancellation of the registration of Hetueni as his son.

¹ Saxmere v New Zealand Wool Board Disestablishment Co Ltd (No 1) [2009] NZSC 72.

[8] It is accepted by Counsel that the fundamental issue in all these proceedings is whether Hetueni is the child of Salesi or the issue of an extra-marital relationship of Salesi's former wife.

The events of 25 May

[9] On 25 May 2015 'Alisi and Ma'ake Kaufusi were in New Zealand and the land was being occupied by a number of other people with the authority of Ms Silioti Vaea (Silioti). She is the sister of Hetueni (and daughter of Salesi) and she has agreed to look after the land on Hetueni's behalf. The occupants I was told were Lesieli 'Aholelei, Hauhau 'Olive and some restaurant workers. I understand that the daughter and son in law of 'Alisi Kaufusi and Ma'ake Kaufusi had been living in the house but had moved temporarily to Tofoa.

[10] It is alleged that on the morning of 25 May 2015 Salesi and Sesilia broke into the house and announced that they were going to live there and then ordered the occupants out. It was also said that the occupants left to avoid "domestic violence". That same day this application for an injunction was filed.

[11] I required that the application be served on Salesi and Sesilia. They filed an affidavit on 27 May 2015 in opposition to the application in

which they denied breaking into the house. They say they entered peacefully. They had recently returned to Tonga and had been living with Sesilia's brother, which for cultural reasons they have found uncomfortable. They say that after they entered the property Silioti was called and she ordered them to leave which they did not do. The occupants, apart from Hauhau Olive (who lives in another building on the land) then removed the louvres from the windows and other items as well as their personal belongings and left the property. They say that they are in failing health, that they built the house whilst the land belonged to Salesi and that the property was not being maintained. In addition to this, of course, they do not accept that Hetueni has any right to the land.

Injunction principles

[12] The principles that the Court will apply in deciding whether to issue or refuse an interim injunction are well known and are set out in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*.² The applicant must show that there is a serious question to be tried (in the sense that it has made out a *prima facie* case) and that the balance of convenience favours the granting of the injunction. Having made these assessments the Court must stand back and look at where the overall justice of the case lies. If it can be shown that an applicant

² [1985] 2 NZLR 140 (CA).

will be adequately compensated in damages and will suffer no irreparable injury if the injunction is not granted that is an important factor against the making of an order.

[13] I note that in this case there are before the Court in the affidavits filed very different versions of the events that occurred on 25 May 2015. I am in no position to resolve those differences³ but in any event I do not consider I must do so for the reasons that follow.

Discussion

[14] Mr. Fakahua submitted that the balance of convenience favoured granting an injunction but it appears to me that he overlooks a fundamental hurdle. Injunctions are granted to maintain the status quo pending the hearing of an action between the parties. Salesi and Sesilia are not parties to this proceeding or indeed any proceeding in which possession of the land is claimed from them. It is open to Hetueni to commence a proceeding against Salesi and Sesilia but until he does so an injunction cannot be made against them except in the case of "extreme urgency". There is no extreme urgency here. (Order 22. Rule (6) and (7) Supreme Court Rules). I therefore

³ American Cyanamid Co v Ethicon Ltd [1975] AC 396 at 406-407

consider the Court does not have the power in this proceeding to make the injunction sought.

[15] In any event, whilst I do not condone the actions of Salesi and Sesilia in occupying the land unannounced there is nothing to suggest that damages would not be an adequate remedy should it be found that their occupation is unlawful and loss has been suffered. There is also no suggestion that the prior occupants do not have alternative accommodation. Mr. Fakahua did suggest that there are concerns about the care of the property particularly as renovations have been undertaken to it but there is nothing to suggest that Salesi and Sesilia would damage the property in anyway.

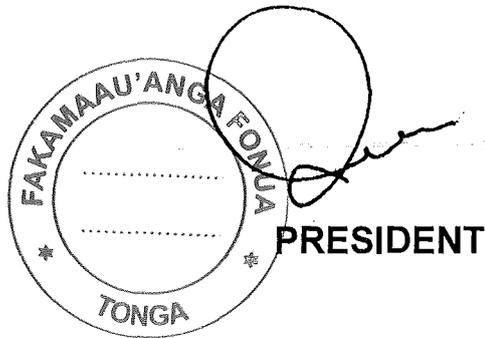
[16] Also of significance is that as a result of this application, and the events that led to it, I have set CV 74 of 2014 down for hearing on 15 and 16 July 2015. Counsel advise me that they believe a ruling in that case will resolve all differences between the parties. That is only a little over a month away and I consider as a matter of discretion that it is better deal with the substantive issue between the parties than grant an injunction.

RESULT

[17] For the reasons given the application for injunction is dismissed.

[18] Costs will lie where they fall.

NUKU'ALOFA: 3 June 2015.

The seal is circular with the text "FAKAMA'AU'ANGA FONUA" around the top inner edge and "TONGA" at the bottom. Two small stars are positioned on the left and right sides of the seal. A handwritten signature is written over the right side of the seal.

PRESIDENT