

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

Solicitor General
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LA 18 of 2012
12/08/15

BETWEEN: SIONE HENOA TU'IONE AKA FALEAFA

- Plaintiff

AND: VILIAMI MALUPO FALEAFA

- Defendant

Hearing : 27 May 2015

Decision: 4 August 2015

**Appearances: Mrs. P. Taufaeteau for plaintiff
 Mr. P. Pifeleti for defendant**

RULING

The issues

[1] The plaintiff (Sione) is the registered owner of a town allotment at Kolomotu'a. The defendant (Viliami) has lived on the land with his wife and family for many years. The relationship between Sione and Viliami has now soured. Sione seeks to evict Viliami from the land and also damages

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for trespass. Viliami says that Sione gave him the land or is estopped from evicting him. Viliami has filed a counterclaim for an order that Sione register the town allotment to reflect his interest in the land.

[2] The issues that arise are:

[2.1] Is Sione estopped from evicting Viliami from the land?

[2.2] Does Viliami have any interest in the land?

The facts

[3] Since 1969, Sione has been the registered owner of a town allotment situated at Siulikutapu Road, Kolomotu'a contained in Book 130 Folio 72. The allotment is divided by substantial wire fencing and by plantings of trees and shrubs. It presents as two sections of roughly the same size. I understand that before the fences were built the land was divided by a row of Tanetane trees planted by Sione sometime before 1981.

[4] There are two houses on the allotment. On one side of the fence is Sione's house. An earlier house was removed and this house was built in around 2007. Sione lives in New Zealand but stays in his house when he visits Tonga. On the other side of the fence is Viliami's house, some outbuildings, an established garden and a plant nursery. This house was built in 1994. Viliami lives there with his wife, Poli, and it is where their children grew up. It is clear that the house cannot be moved except at very considerable cost, if at all.

[5] Sione and Viliami are uncle and nephew respectively. Viliami's father was one of Sione's older brothers, Lesinali Tovo. Sione's allotment was previously owned by another older brother, Folauha'amoā, who died in around 1966. Folauha'amoā did not marry and had no children.

[6] There was some disputed evidence that Viliami was customarily adopted by Folauha'amoā and lived on the land as a young child in a Tongan house with Folauha'amoā and an aunt called Katoalu. It was suggested also that after Folauha'amoā's death Sione applied for his land secretly and that this caused conflict in the family as the land had been promised to Viliami. The evidence was scant and

unsatisfactory and I can make no findings on these matters. I am satisfied that it is not necessary to do so to decide this case.

[7] In January 1981, Viliami married 'Ana Moaeteau (Poli) and they began to live together on Sione's land from around March 1981. Sione gave permission for Viliami and Poli to live on the land. Viliami and Poli built their first house that year. They lived in that house from 1981 until 1994.

[8] In 1994, Viliami commenced building another house on the land. Sione objected and told Viliami that he could not build the house. Viliami and Poli sought advice from Viliami's father and they went to discuss the matter with Sione Vave Faleafa, a family elder who was referred to in the evidence as the 'Ulumotu'a. This meeting took place at the 'Ulumotu'a's home sometime in 1994. The evidence of Viliami and Poli, which I accept, was that upon learning that Sione would not allow them to build their house the 'Ulumotu'a offered to give them some of his own land for that purpose. He said that Viliami should come with a machete and they would go and select the land. While this was being discussed, Sione and his wife, Mele, arrived and

Sione apologised and told Viliami to build his house on the land. The 'Ulumotu'a asked Sione if he was sure about his decision as a house was not like "a wheelbarrow which is easy to move" or words to that effect. Sione replied that he was sure because the land was Viliami's land. The evidence of Viliami and Poli, as to what occurred at this meeting, was substantially confirmed by Meleane Moeata who was also present. She was the wife of the 'Ulumotu'a's eldest son.

[9] Sione agrees that a meeting occurred at the 'Ulumotu'a's house but says he only went there because Viliami's father had cursed him and so that he could tell the 'Ulumotu'a what had happened. He acknowledged that he did consent to Viliami building his house on the land but, he said, only because Viliami and Poli had been living in a shelter under the trees and he felt love for them. He said that he did not expect them to live there forever more and that when he wanted them to leave they had to leave. He also said that he would not have surrendered his land to Viliami as he had children of his own to consider.

[10] I do not accept Sione's evidence on these matters. I am satisfied that Sione gave Viliami and Poli permission to build

and live on the land understanding and intending that this would be a permanent arrangement. In accepting Sione's offer, Viliami gave up the opportunity to obtain other land that the 'Ulumotu'a was prepared to make available to him. Furthermore, shortly after the meeting Sione mortgaged the land and gave his personal guarantee for a loan that Viliami obtained to build the house. Sione also told Viliami to go to the Survey Office and have his land registered. When Viliami did this he found that, at 24 perches, the land was not big enough to register. Viliami's evidence, which I accept, was that when told of this Sione said that Viliami would just have to live on the land and wait until the law changed.

[11] It was alleged in the statement of claim that Viliami defaulted on his loan repayments so that Sione had to pay off the loan himself to avoid the Bank taking possession of the land. Sione acknowledged in his evidence that this was incorrect. The loan was repaid by Viliami and the mortgage was discharged.

[12] Between 1994 and 2012 Viliami and his family lived peacefully on the land and his relations with Sione were

good. In around 2012 something happened which changed that. I do not know what was the cause of the breakdown of the relationship between Sione and Viliami. Various issues were raised but, in the end, it does not matter. Sione resolved that he wanted Viliami off the land and these proceedings are the result.

Is Sione estopped from evicting Viliami from the land?

[13] Mrs Taufaeteau argued that estoppel was not pleaded and should not be considered. I reject this argument. Whilst the pleadings are not ideal, both parties were aware that estoppel was Viliami's principal defence and the hearing proceeded on that basis. I note that in her written submissions Mrs. Taufaeteau states that "From the foregoing pleadings, the issues that this Land Court is being called to resolve are.....Can the defendant used the law of equity for defence.....on the equitable doctrine of estoppel?" There is no unfairness or prejudice to Sione in allowing estoppel to be considered.

[14] Mrs. Taufaeteau argues that Viliami was given a licence to live on the land which was revocable at any time and that this is the case even if Viliami spent money in reliance upon

the licence. She quoted from paragraph 41 of the Land Court decision in *Schaumkel v 'Aholelei*¹ as authority that being lawfully on land is not the same as having a right to continue that occupation indefinitely. However, in the same paragraph of that decision Scott CJ recognised that this principle is subject to any express agreement between the parties and:

..what is reasonable and what other conditions will apply will depend on the nature of the equity which the licensee has been found by the Court to be entitled to have satisfied...

[15] Mrs Taufaeteau also referred me to *Veikune v To'a*.² As I understand her submission, she regarded this case as authority that equitable principles have no application to a case such as this. That is incorrect³ and in *Veikune* Martin CJ held that a registered owner of land was estopped from evicting a person in possession because he had been promised that he could stay on the land, had spent a considerable sum of money building and enlarging his house and as a result made no effort to find land elsewhere. The

¹ [2012] LA 18 of 2007, 12 August 2012.

² [1981-1988] Tonga LR 138.

³ See paragraphs 37 and 38 in *Schaumkel* and also *Matavalea v 'Uata* [1989] To. L.R. 101.

similarities with the present case are obvious. Other cases where the Courts have refused claims by a registered owner for possession of land on equitable principles include *Alofi v Fine*,⁴ *Ongolea v Finau*,⁵ *Fakatava v Koloamatangi and Fakatava*⁶ and *Vai v 'Uliafu & Others*.⁷

[16] If an owner of land allows a licensee to expend money on the land under an expectation that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. As Lord Denning said in *Inwards v Baker*⁸ "He has a license coupled with an equity". In *Tafolo v Vete*⁹ the Court of Appeal recognised an equity of possession and quoted from Halsbury's Laws of England as follows:

Equity recognises and enforces rights (sometimes referred to as 'equities of possession' or 'equitable licences') so as to restrict the revocation of licences to occupy or use premises which at common law would be regarded as revocable. This restriction occurs where a person who is occupying or using land has acted in reliance upon the representation or the acquiescence of the person having a proprietary interest in respect of that land. Where a person has established an express or implied licence to

⁴ [1998] Tonga LR 24.

⁵ [2003] Tonga LR 147

⁶ [1974] Tonga LR 15

⁷ [1989] Tonga LR 56.

⁸ [1965] 1 All ER 446.

⁹ [1998] Tonga LR 164

occupy premises, the role of equity is supportive and supplementary, but, if the legal relationship between the parties is such that the true arrangement between them will be frustrated if they are left to their legal rights and duties at law, an equity will arise notwithstanding that there has been no agreement (so that there is no contractual licence), and notwithstanding that the representation made or the belief which has been acted upon is so imprecise as not to define the duration of the right to occupy or use the premises; in such circumstances it is for the court to determine what period of occupation or use is sufficient to satisfy the equity. Such rights arise by operation of the principles of equitable estoppel.

[17] In *Ongolea v Finau Ford J* also recognised these principles and referred to *Tafolo*. He said:

In that case the Court of Appeal held that equity will recognise and enforce a right to occupy where the person in occupation has acted in reliance upon the representation or the acquiescence of the person having a proprietary interest in the land. The representation in the present case was one made all those years ago by the title holder Mikaele when he invited the first defendant and his wife to go and live on his land "until death or the end of the world".

[18] Applying these principles to the present case, an equity has clearly arisen preventing Sione from evicting Viliami and Poli from the land. Sione invited Viliami and Poli to live on his land from at least 1981. In 1994, Sione represented that the land was Viliami's land and told him to build his house. Viliami relied upon that representation and raised a loan, built his house and gave up other land offered by the 'Ulumotu'a. Viliami and Poli have now lived undisturbed on the land for 34 years and raised their family there. It would be unconscionable for them to be now evicted from the land.

[19] In my view the equity that has arisen can only be satisfied by the making of an order that Sione is estopped from disturbing Viliami's and Poli's occupation of the land for so long as they wish that it remain their home and I so order. It should be noted that the equity in a case such as this imposes a personal restriction on Sione while he has legal title to the land. What happens from the point in time when Sione dies or is no longer the owner of the land is a matter for consideration at that time.

[20] For completeness, I note that Mrs. Taufaeteau also submitted that section 170 of the Land Act prevents Viliami

from raising estoppel. Section 170 does not apply. It provides that 'No person shall bring in the Court any action...'. In the present context Viliami is not bringing an action. He is raising estoppel as a defence.

[21] It follows from what I have said above that Viliami is not and has never been a trespasser and Sione's claim for damages is dismissed also.

Does Viliami have any interest in the land?

[22] Viliami claims an interest in the land that he wants to have recognised by registration. This claim is misconceived and must fail.

[23] No estate, right, title or interest in land can be created except in accordance with the Land Act. Section 5 of the Land Act provides that every estate and allotment is hereditary according to the prescribed rules of succession. Section 6 provides that every verbal or documentary disposition by a holder of any estate or allotment to effect a voluntary conveyance is null and void.

[24] It follows that Sione's representation that the land was Viliami's land does not create an interest in the land. Nor does the fact that Sione is estopped from evicting Viliami from the land. It is well established that the only effect of an estoppel, in a case such as this, is to impose a personal restriction on the registered owner on obtaining an eviction order and as the Privy Council noted in *Matavalea v Uata*:¹⁰

...the Respondent acquires no rights under the Land Act by virtue of estoppel. We would go further and say that she acquires no rights in land of any description and neither do her heirs

THE RESULT

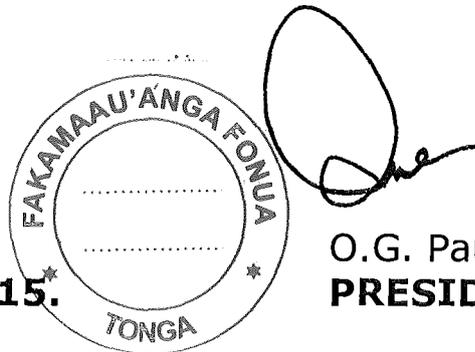
[25] Sione's claim for possession of the land and damages for trespass is dismissed. Sione is estopped from disturbing Viliami's and Poli's occupation of the land. Whilst Sione remains the owner of the land their right to remain on the land shall continue until such time as they no longer wish to occupy the land as their home.

¹⁰ [1989] Tonga LR 101, 102.

[26] Viliami's counterclaim is dismissed. Viliami has no interest in the land recognised by the Land Act.

[27] Both parties have been unsuccessful with their respective claims. This appears to me to be a case where each party should bear their own costs but I have not heard from Counsel about that. If any party does not agree with that course then memoranda should be filed as to the orders sought in respect of costs within 14 days.

NUKU'ALOFA: 4th AUGUST 2015.



**O.G. Paulsen
PRESIDENT**