

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 15 of 2015

BETWEEN : TUPOU TONGALIUAKI FILO'AULO ALEAMOTU'A

- Plaintiff

AND : FIELAKEPA
[TUPOU TONGAPO'ULI ALEAMOTU'A]

- Defendant

Before Mr Justice M. D. Scott and Mrs Assessor F. Kavaliku

L. M. Niu SC for the Plaintiff

S. T. Tu'utafaiva with S. Taione for the Defendant

J U D G M E N T

INTRODUCTION

[1] It will not be disputed that the title "Fielakepa" is of ancient origin and is held in high esteem. The substantial hereditary estate is located at Havelu.

[2] In 1964 the title was inherited by Paula Longolongo'atumai Aleamotu'a ("Longolongo") who had married Tunakaimanu in 1959. They had three sons:

- (a) Siosaia Tupou Aleamotu'a, born 1961 ("Aleamotu'a")
- (b) Mosese Tangaki Taulupe Ki Folaha Aleamotu'a, born 1965 ("Taulupe"); and

(c) Tupou Tongapo'uli Aleamotu'a, born 1966 ("the Defendant")

- [3] Longolongo died in 1997. The title was inherited by his oldest son, Aleamotu'a (Baron Fielakepa).
- [4] In June 1991 Taulupe married Mele Simiki Aleamotu'a ("Miki"). The Plaintiff was born in October 1991. Following the marriage Taulupe and Miki had seven other children, including six sons.
- [5] Taulupe died in 2007 and Aleamotu'a died in 2013, without issue.
- [6] On 18 April 2013 His Majesty the King appointed the Defendant as trustee of the Fielakepa estate (Document P-6-14 & 15). On 10 April 2015 he was recognised by His Majesty as the lawful successor to the title Fielakepa. It appears that notice of the succession was published in the Gazette shortly thereafter.
- [7] The Plaintiff claims that he, not Taulupe, is the lawful successor to the title and estate and seeks declarations to that effect. He also seeks repayment to him of all moneys received by the Defendant in his capacity as trustee and holder of the title since 2013.

THE APPLICABLE LAW

- [8] The law of succession to hereditary estates and titles is set out in Clauses 111 and 112 of the Constitution supplemented by section 30 and Division II of Part III of the Land Act (Cap 132).
- [9] The effect of this law is not disputed. It is known as the law of primogeniture. The oldest legitimate son has the right to inherit the

whole estate. He has this right in preference to any elder but illegitimate sons, to younger sons or other collateral relatives. An oldest legitimate son of a deceased elder brother inherits before a living younger brother by right of substitution. A female is only eligible to inherit if there is no male heir.

- [10] By virtue of Section 41 of the Land Act the term "legitimate" must be confined to sons actually born in wedlock. It does not extend to sons subsequently legitimated pursuant to the Legitimacy Act (Cap 32). Section 41 however explains that:

"Provided marriage precedes the birth of a child such child is legitimate and capable of succeeding no matter how short the interval between the parents marriage and the birth".

- [11] Section 44 of the Evidence Act must also be noted. It provides, as relevant, that:

"where a person is proved to have been born during the continuance of a valid marriage between his mother and any man the Court shall presume conclusively that he is the legitimate son of that man unless it is shown by evidence, other than that of the parties to the marriage, that such parties had no access to each other at any time when he could have been begotten".

- [12] The Plaintiff says that during Aleamotu'a's lifetime his father Taulupe was the heir presumptive. He says that following his father's death he himself became the heir presumptive and that

following Aleamotu'as death he succeeded to the title by operation of law.

[13] The Plaintiff contends that His Majesty (a) failed to comply with the provisions of section 40 (1) of the Land Act when he appointed the Defendant as trustee of the Fielakepa estate since the Plaintiff had already attained the age of 21 when the appointment was made and (b) that His Majesty erred when causing the section 38 (1) notice to issue because, by virtue of Clause 111 of the Constitution it was the Plaintiff, not the Defendant whose name should have been published.

[14] The Defendant makes two principal submissions. The first, apparently grounded in Clause 44 of the Constitution is that the King alone has the prerogative to confer titles. The second is the assertion that the Plaintiff's father was not Taulupe but one 'Atunaisa Fetokai. In these circumstances, it is argued, His Majesty was not bound to recognise the Plaintiff as the lawful successor to the title and had the power, instead, to confer it on the last holder's younger brother, the Defendant.

[15] At the conclusion of the trial a third argument, alluded to in paragraph 12 of the Statement of Defence, was advanced. Mr Tu'utafaiva submitted that the Defendant had merely accepted the appointment as trustee and the subsequent recognition of his entitlement to inherit the title. It was not the Defendant's requests or decisions that led to these developments. Mr Tu'utafaiva suggested that these were decisions which lay within the exclusive prerogative of the King. But the King had not been joined as a party and it would therefore be wrong to make orders or declarations in

respect of those decisions without having given His Majesty an opportunity to explain and defend his actions.

CONSIDERATION OF THE ISSUES

A – HIS MAJESTY THE KING AS A PARTY

[16] The file reveals that when the writ was filed on 3 June 2015 the King was named as Second Defendant. The President referred counsel to *Tu'ipulotu v Kingdom of Tonga* [1997] To. L.R 258. On 15 June after counsel had also referred to *Tukuafu v Latu & Anr* (Appeal 5/2005) the President invited Mr Niu to submit amended documents. On 19 June an amended Writ and Statement of Claim were filed omitting a Second Defendant altogether.

[17] On 3 July the matter again came before the President when it was agreed that the action should proceed to trial. Paragraph [3] of the Ruling delivered that day is as follows:

"I am advised by Counsel that no orders for discovery are required and neither party intends to make any interlocutory applications. The case can be set down for hearing in those circumstances".

[18] Among the "interlocutory applications" which counsel, including Mr Tu'utafaiva, might have made is an application for leave to issue a Third Party Notice.

[19] RSC O.10 Rule 1 (c) provides that:

"When a defendant who has filed a defence ... (c) requires that any issue arising in the action be determined also as it affects such person; that defendant may apply for leave to issue a third party notice".

[20] In my opinion the correct stage at which a third party application or assertion should be made is prior to the close of pleadings, not in the closing stages of a trial. But even had leave been sought at the appropriate time, I am of the view that it would have failed.

[21] A distinction must, in my view, be drawn between the exercise by His Majesty of unfettered royal prerogatives retained by him under the Constitution, such as the power to confer titles (Clause 44) and the exercise by him either upon the advice of a body or person, of the powers specified in the relevant statute (e.g Clause 50 A (1) or Clause 50 B).

[22] In *Tu'ipulotu v Kingdom of Tonga* (above) Hampton CJ held that in Tonga, as in England, the King in person (subject only to Clause 49) is immune from all actions at law whether civil or criminal:

"No proceedings are maintainable against the King in person. The Courts are the King's court and the Courts have no jurisdiction over him".

While the decision relates to Judicial review proceedings in the Supreme Court in my view the principle is equally applicable to the Land Court.

[23] A second distinction must also be drawn between the powers exercised by His Majesty in relation to estates themselves (e.g. Land Act, Section 36 (2) proviso) and in relation to the titles appurtenant to those estates. The former powers are concerned with land whereas the latter only relate to titles. In my view while the Minister of Lands has an obvious interest in the former, the latter may not involve land at all. As is well known, His Late Majesty King George Tupou V created several life peerages which did not also involve grants of landed estates. In the present case the central question is the right of the Plaintiff to inherit the title previously held by his uncle Aleamotu'a. Although the estate follows the title the issues before the Court are not, in my view, those to which the Minister of Lands would want to become a party.

[24] It is a well established principle that a decision maker should not hear an appeal against his own decision. The principle is exemplified in Clause 94 of the Constitution. In my view Clause 50 (2) is relevant. An appeal from a Land Court determination relating to hereditary estates and titles is to the King in Privy Council. As I see it, it would therefore be anomalous for His Majesty to be a party to the action in the Land Court.

[25] In my opinion the powers and duties given to the King by Sections 40 (1) and 38 (1) are personal and not subject to direction by the

Court. It follows that there is no basis for the King to be joined as a party when breaches of these sections are alleged.

[26] To say however that decisions made by the King pursuant to sections 40 (1) 38 (1) are not subject to order is not to say that they are not justiciable at all. The Court retains the right and indeed the duty to analyse the actions taken and, when it is of the view that the parameters within which the royal prerogative must be exercised have been exceeded it may, in its discretion, declare that to be the case.

[27] Most of the previous cases dealing with the issue of contested hereditary titles may be found in Volume II, Tonga Law Reports. Some of those will be referred to later on in this judgment. In none of them, so far as can be seen from the report, was the Sovereign joined as a party. In my view the matters now before this Court for decision may be satisfactorily and comprehensively be dealt with without the need for any second defendant or third party to be joined.

B - HEREDITARY TITLES

[28] In *Tu'ipulotu v Hon. Niukapu* [1995] To. L.R 79, 83. The Privy Council quoted from the address to Parliament by H. M. King George Tupou I in 1875.

"After referring to past practice by which, he said "my rule was absolute and ... I could please myself to create Chiefs and alter titles" he proclaimed: "I have made up my mind absolutely not to alter names or nominate Chiefs so that the estate shall go with the title and the

succession shall be from father to son forever. The law of succession is stated in the Constitution.... Should there be a dispute it shall be tried by the Justices of the Court in accordance with the usage of civilised Governments. You Chiefs of Tonga all of you who have titled estates when the Constitution came into force: I now affirm to you the right of yourself and your children by marriage to hold and possess your titles and estates for ever, as stated in the Constitution".

[29] These two important principles, namely the inheritance of hereditary titles and estates according to the provisions of the Constitution and the duty of the Land Court to elucidate those provisions, remain.

[30] It must be emphasised that the creation of an entirely new title under Clause 44 is quite separate from the process which takes place under Clause 111 which governs succession to already existing titles. While both provisions are constitutional and the former appears to grant His Majesty an unfettered right to create such titles, the second part of the clause reads:

"but it shall not be lawful for [The King] to deprive anyone who has a hereditary title of his title except in cases of treason"

Where, as in this case, there is no suggestion of treason, hereditary titles are inherited in the manner provided in Clause 111 the effect of which I have already described in paragraph [9] above.

[31] In *Moliton F. Finau v. Tu'ivakano* Vol II TLR 13, 17 Scott J said:

"It has been urged for the Plaintiff's claim that the appointment of Manoa having been made by the King his heirs should succeed. Manoa was appointed since the Constitution and I have held in this Court before that so long as there are heirs to succeed in accordance with the [111th] section of the Constitution ... no appointment is necessary by the King of the Country. The heirs should inherit immediately. They inherit by descent and not by any appointment".

The difference between acquisition of a title by appointment (Clause 44) and acquisition of a title by succession (Clause 111) is further highlighted by these remarks.

[32] In the present case the title of Fielakepa was lawfully held by Aleamotu'a until his death. It was not suggested by the Defendant that he died without heir. In these circumstances it was not possible to create a second title of Fielakepa in order to deprive the heir of the same title; the only question that had to be answered was "who is the person entitled to inherit?" In answering that question His Majesty was bound by Clause 111. While there was no objection to an entirely new title being conferred on the Defendant, the title Fielakepa and the associated estates were already the entitlement of Aleamotu'a's lawful successor.

C - WHO WAS ALEAMOTU'A'S HEIR?

[33] As will be seen from the pleadings, the Defendant did not attempt to suggest that Clause 111 of the Constitution operated to entitle

him to inherit the title Fielakepa following Aleamotu'a's death. Rather, he claimed that the Plaintiff could not succeed since he was not Taulupe's son. As pointed out by Mr Niu however, even if this argument succeeded, it could not have the effect of doing more than disinherit the Plaintiff. Given the fact that the Plaintiff has six younger brothers, none alleged to be illegitimate, the mere disinheritance of the Plaintiff could not avail the Defendant at all.

- [34] In the absence of any dispute as to the meaning and effect of Clause 111 it may be concluded that, if the Plaintiff is found by this Court to be the legitimate son of Taulupe then his claim to have inherited the title upon the death of his uncle Aleamotu'a is unassailable.

D - The Evidence Act – Section 44

- [35] The relevant wording of section 44 of the Evidence Act has already been set out in paragraph [11] above. Its meaning is perfectly plain: a child born in wedlock shall conclusively be presumed to be the son of the man who is his mother's husband at the time of his birth unless there is evidence, other than from his mother and her husband, that during the period of time that the child must have been conceived the wife's husband could not have had physical access to her.
- [36] In *Veikune v Ha'ateiho* [2008] To. L.R 295 the Land Court, at paragraph [18] held that a party seeking to rebut the presumption of legitimacy had the burden of so doing beyond all reasonable doubt. I respectfully agree.

[37] The Court also clarified, adopting certain observations in *Gordon v Gordon* [1903] P 141, that the question to be asked is *not* whether the mother of the child might, or even had been proved to, have had sexual intercourse with a man other than the man who was her husband at the time that the birth occurred but *whether it had been proved that she could not have conceived by her husband* because he could not have had physical access to her at the time the child must have been conceived.

[38] Mr Tu'utafaiva ingeniously suggested that this test did not operate if, at the time the child must have been conceived, the mother was not yet married to the man who became her husband prior to the birth. While it is true that the words quoted from *Gordon v Gordon* (above) presuppose that the husband and wife were already married at the time the conception took place I find nothing in the clear wording of the section to warrant the gloss which Mr Tu'utafaiva sought to put upon them. Furthermore, the authorities are against him. The learned authors of Phipson on Evidence (14th Edn. Paragraph 5-06) state:

“the presumption applies although the birth occurred so soon after marriage that the child must have been begotten before it (*R v Luffe* (1807) 8 East. 198; *Turncock v Turncock* (1867) 16 L.T. 611; *Re Parsons* (1868) 18 L.T. 704; *Gardner v Gardner* (1877) 2 App. Cas. 723, 728”.

Section 41 of the Legitimacy Act already quoted in paragraph [10] is also relevant.

[39] In the present case, Miki's evidence was that she had sexual intercourse both with Taulupe and with another man, 'Atunaisa Fetokai, in November or December 1990. As has been noted, the Plaintiff was born on 1 October 1991. As there was nothing to suggest that he was born prematurely or after term, judicial notice may be taken of the fact that he was conceived approximately 9 months earlier, in about late January or early February 1991. Miki was not asked when her relationship with Fetokai ceased but in cross-examination Fetokai said that the relationship lasted "7 or 8 months". According to Miki "I know when I slept with Taulupe and became pregnant in February 1991. I know whom I got pregnant by. I missed my period in February".

[40] The main problem about this evidence is that it does not even begin to answer the central question which is whether it has been shown that during the period January to February 1991 *Taulupe could not have had physical access to Miki at all*. In fact, the admissible evidence suggests that the opposite. Fetokai accepted that he knew that Taulupe and Miki had been lovers for a considerable time before he began his relationship with Miki, that indeed she had already borne him a child, Sela. He also admitted that he did not know how Miki spent her time when he was not actually with her on the ten or so occasions when they were together. He also knew, of course, that Miki and Taulupe were married after his relationship with her came to an end.

[41] The third witness for the Defendant was Kalolaine Fusikaunanga Lolohea who had sworn an affidavit in June 2015 which exhibited copies of emails exchanged between Miki and Fetokai in 2008 and 2009. These were said to show that they "had an intimate

relationship 3 to 6 months prior to [Miki's] wedding with Taulupe". I hope it will be clear from the foregoing that I did not find this somewhat distasteful evidence to be relevant to the issue before the Court.

[42] The remaining matter which must be dealt with in connection with the Plaintiff's paternity is the suggestion, advanced by Mr Tu'utafaiva, that DNA testing would put the matter beyond doubt. He pointed out that while the Plaintiff had agreed to provide a sample, his mother had not. He suggested that an inference could be drawn favourable to the Defendant.

[43] This matter was also considered in *Veikune v Ha'ateiho* (above). The Court took the view, with which I agree, that in the absence of statutory authority the Court has no power to order such tests. Neither can I accept that Miki's refusal has any bearing on the matter before me: the fact that she is the Plaintiff's natural mother is not in doubt. Very great care has to be taken before DNA testing is authorised. The wholly unforeseen consequences which may flow from such a test have been highlighted in the Pringle Baronetcy case currently pending in the Supreme Court of England and Wales.

[44] I am satisfied that the Defendant has failed to offer any evidence capable of rebutting the presumption that the Plaintiff is the legitimate son of Taulupe. Accordingly this is conclusively presumed to be the case.

E - The Trustee Appointment

[45] A copy of the appointment is P6 – 14 & 15. A number of difficulties are immediately apparent. The appointment is said to be "in

accordance with the powers conferred upon [His Majesty] by the Law and Constitution of Tonga". As has been seen, the power to appoint a trustee of an estate is to be found in section 40 (1) of the Land Act. Although the instrument of appointment purports to appoint a trustee not only of the estate but *also of the title*, I can find no power to appoint a trustee of a title. As is clear from the section the purpose of the appointment is to "protect, preserve and manage the estate" appurtenant to the title during the minority of the title holder. There is no scope for appointing a trustee of the title since, as already explained, the title holder inherits the title upon the death of his predecessor, by operation of law.

[46] Secondly, the appointment states that the Plaintiff is the "lawful heir to the hereditary title Fielakepa". In the absence of any suggestion that the material circumstances changed between April 2013 and the appointment of the Defendant to the title in April 2015, it is difficult to see how the two appointments can be reconciled.

[47] Thirdly, the undisputed evidence of the Plaintiff is that he attained the age of 21 on 1 October 2012 and accordingly section 40(1) had no application.

[48] Fourthly, only a person who himself is not the heir may be appointed as trustee of the estate during the heir's minority. The appointment of the Defendant as trustee, in the absence of a material change in circumstances, is not compatible with his later recognition as the heir.

F – NOTIFICATION OF APPOINTMENT OF THE DEFENDANT AS
LAWFUL SUCCESSOR

[49] Although the gazetting of the Defendant as Fielakepa was admitted in paragraph 12 of the Statement of Defence, a copy of the notice was not produced. In view however of my interpretation of Clause 111 and Section 38 (1) I find that there is no power under Clause 111 to appoint a successor to an hereditary title. The section only imposes a duty upon His Majesty to publish the name of the lawful successor as determined by the correct application of Clause 111. I conclude that the purported appointment of the Defendant breached both Clause 111 and Section 38 (1).

G - THE PLAINTIFF'S MONEY CLAIM

[50] In paragraphs 9, 10 and 11 of the Statement of Claim the Plaintiff claimed payment to him by the Defendant of all moneys paid to the Defendant following his appointments as trustee of the estate and to the title Fielakepa. No particulars of these alleged payments were provided in the pleadings. The claims were disputed in the Statement of Defence.

[51] The evidence in support of the claims came from Makeleta Siliva, Deputy Secretary at the Treasury. She produced document P-7 which set out all the official payments made to the Defendant after receiving official notification of his appointments from the Palace Office. In total the Defendant had received TOP\$56546.92 from June 2013 to 6 November 2015.

[52] The Defendant admitted receiving the payments but told the Court that 80% of the sums received had been spent by him on the official and customary duties appertaining to the title; the recent

coronation involved exceptionally heavy outgoings. The balance of 20% he conceded had been treated as part of his own personal emoluments but had resulted in a liability to pay income tax at a higher rate than had previously been the case when he only had one source of remuneration.

[53] Unfortunately, these financial matters were not clarified in any detail by Counsel and at the close of the case I was not clear how much exactly the Plaintiff was seeking.

[54] In my view this aspect of the Plaintiff's claim faces three further problems. The first is that the payments made to the Defendant were made following advice received from the Palace Office. If found to have been paid in error to the Defendant rather than the Plaintiff, then it seems to me that the Plaintiff's claim should properly be made to the Treasury, rather than the Defendant. There is nothing to show that the Defendant knew that he had been wrongly appointed as the trustee or as the title holder. Secondly, there is nothing to contradict the Defendant's evidence that 80% of what was received was applied customarily or officially in his capacity as *de facto* title holder. In my view therefore, even had the Plaintiff immediately been recognised as the lawful successor to his uncle upon his death, these expenses would still have been incurred, resulting in the amount claimable being reduced to 20% of the amount paid. Thirdly, although the Plaintiffs claim is founded on an erroneous appointment in April 2013, the writ was not issued until June 2015 during which period there is no evidence that representations were made to the Treasury that the payments should be suspended.

[55] In these circumstances and in the absence of a proper account I am not minded to order the repayments sought in whole or in part at this stage. If the Plaintiff intends to pursue this part of his claim then further enquiry and discovery may have to be made and leave given to the Treasury to intervene.

SUMMARY

[56] The Court has the highest respect for His Majesty and the constitutional decisions taken by him. In the words, however, of the Privy Council in *Tukuafu v Latu & Anr* (above). "In terms of the Constitution the Court must apply the Constitution and the law and in doing so in this case the Court means no disrespect to His Majesty the King but the Court is sure that the proper application of the Constitution and the law will also be the wish of His Majesty who, it appears may have been misinformed."

Some further words of the Land Court spoken in 1924 (*Tevita Uluilakepa v Fulivai* Vol II To. L.R 10) may perhaps also be quoted:

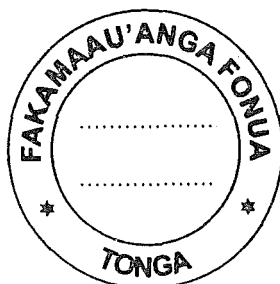
"Although a Noble's title has been conferred and the defendant was given an official letter of appointment from Her Majesty and it will be assumed that there is no need for Her Majesty to appoint another Noble while the present Noble is still alive and is a legitimate heir of the former holder of the title yet it is not right for Her Majesty to confer titles on nobles without a thorough research being made to ascertain the lawful heirs to such titles. That is why cases of this nature are brought before the Court and it is the duty of this Court to decide. With all due respect to Her Majesty I am

satisfied that no letter of appointment of the nature of the matter in question will hinder this Court from acting in accordance with the Constitution and the Law of Tonga. When a title is for the first time conferred, the same title with all estates pertaining thereto will be inherited in accordance with the Constitution and the law. Any new appointment will not waive the law of succession and this Court would rather see justice done than honour what is now known as a new appointment”.

RESULT:

1. It is declared that the Plaintiff, Tupou Tongaliuaki Filo’aulo Aleamotu’a is the lawful holder of the title Fielakepa;
2. It is declared that the appointment of the Defendant as trustee of the Fielakepa estate was null and void;
3. It is declared that the publication in the Gazette of the Defendant’s name as holder of the title Fielakepa was made in error;
4. It is declared that the Plaintiff is entitled to the publication of his name in the Gazette as the holder of the title Fielakepa;
5. There will be no orders at this stage in respect of paragraphs (e) or (f) of the prayer of the Statement of Claim. Leave will be granted to restore these matters for further hearing.

DATED : 4 DECEMBER 2015




M. D. Scott
J U D G E