Mr. Kefu.

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19/12/14

IN THE LAND COURT OF TONGA **LA 12 of 2012**

NUKU'ALOFA REGISTRY

BETWEEN: **1. RICHARD MORTIMER**

2. ERIC STARK

- *Plaintiffs*

AND: **1. PIEA FE'AOMOEATA**

First defendant

2. TUPOU FE'AOMOEATA

Second Defendant

3. NESHA ROSIC

Third Defendant

4. GORDON ALLISON

Fourth Defendant

5. MAKAFILIA MAFI

Fifth Defendant

6. TU'A TAUMOEPEAU

Sixth Defendant

7. KINGDOM OF TONGA

Seventh Defendant

8. ESCAPE TONGA LIMITED

Eight Defendant

9. ISLAND REAL ESTATE LTD

Ninth Defendant

- *Defendants*

rec'd 19/12/14

IN THE LAND COURT OF TONGA **LA 12 of 2012**

NUKU'ALOFA REGISTRY

BEFORE THE HON. ACTING CHIEF JUSTICE CATO

JUDGMENT OF THE COURT

Mr L Niu SC for the Plaintiffs
Mrs Vaihu for the first, second third and ninth defendants
Ms Kaitoke for the sixth and seventh defendants

1. In this matter, the plaintiffs, who reside overseas sought relief against the defendants, arising out of agreements expressed to be Tenancy agreements entered into between each of them with the first defendant, his mother, the second defendant, and the first defendant's father who had died prior to the commencement of the litigation. Both plaintiffs entered into almost identical agreements save as to consideration expressed as rent in relation to separate blocks of land adjacent to each other on the island of Nuapapu, Vava'u. Mr Stark entered into an agreement that he was to rent premises expressed in clause 1, as;

> "The premises consist of the buildings, fences and structures, which exist or are to be built in pursuance of this Agreement and upon the Land, which is described on the map or description page hereto to be endorsed as part of this agreement. These buildings may be used for both private and commercial purposes limited to that of tourism."

2. The term was said to be 60 years from the date of the agreement, namely from the 1st December, 2006. Rental obligations consisted of a payment of US $27, 200.00 paid by one lump sum on the signing of the agreement

less any deposit already paid, and $70.00 on the signing of the agreement and monthly for the duration of the agreement. In all, Mr Stark paid the lump sum together with US $812.00 to cover 11.5 months of rent in advance.

3. Mr Mortimer entered into an identical tenancy arrangement with the same parties over a different parcel of land. In his case, on the 16th February 2006, he paid US$28, 965.00 plus US $1,512 to cover 21.6 months of rent in advance. His tenancy agreement was from the 16th February 2006.

4. In each case, the land area involved about 2 acres of coastal land on the island. In each of the tenancy agreements, it was provided that the tenant would carry out construction of the building or buildings to be built on the land and upon completion of the construction of the building fences, structures or fixtures, the ownership would vest in the landlord. Obligations relating to insurance of the buildings and maintenance and repair were imposed on the tenant. It was further provided in each of the agreements, that the tenant enjoyed quiet enjoyment;

> " provided that the tenant complies with the terms and conditions provided herein, the landlord shall not in any way whatsoever interfere with the quiet enjoyment by the tenant, his spouse, family, guests, customers , and invites of the tenancy of the premises. "

5. It was further provided in clause 10 that;

> "the Tenant shall have the use of the grounds of the premises for personal gardening, cultivation or pleasure, and the landlord shall not interfere with the quiet use and enjoyment thereof by the tenant, his customers or

guests. The tenant shall maintain and keep the grounds in good clean condition at all times."

6. Under clause 11, it was provided that;

> "The Tenant may at any time sublet this tenancy to another person provided that the tenant shall remain personally liable for his obligations under the Agreement."

7. There was further provision for renewal or extension of the tenancy for an additional term of 50 years at a monthly rental, which rental shall be at fair market value.

8. Other provisions related to assignment, termination of the relationship of landlord and tenant, and the possibility of the tenant acquiring the ownership of the buildings, and the consequences arising from that.

9. As I have said, both agreements were in all respects ones that contained identical obligations and liabilities aside from rental which was a very similar obligation, also. Unfortunately, whilst Mortimer and Stark alleged they had met their obligations under the agreements, they discovered that the first defendant had entered into arrangements to lease both parcels of land in or about 29th June 2007 to the eight defendant (Escape Tonga Ltd) and the ninth defendant (Island Real Estate Limited). It was alleged that this had arisen whilst the first defendant's father was still alive and was still the lawful holder of the relevant tax allotment, and so the first defendant had no capacity to enter into the leases. The leases purported to be over the same land the subject of the tenancies, for a period of 20 years. The leases, which were subsequently registered, had been

arranged and proceeded to registration through the agencies of the third and fourth defendants, Mr Nesha Rosic and Mr Gordon Allison. It was alleged by the plaintiffs that Mr Rosic and Mr Allinson had proceeded on a false assumption that the tenancy agreements were invalid and or had became void through non-payment of the consideration or rental agreed to be paid by the plaintiffs.

10. It was further alleged that the leases had been improperly registered without the knowledge of the plaintiffs and in breach of any consultation with them. It was contended by them that the fifth defendant, Makafilia Mafi, since deceased, who had allegedly received the leases for registration at the office of the sixth defendant, the Governor of Vava'u, had been aware of the plaintiffs' tenancies but had not notified them, informed them or granted them any opportunity to be heard. The leases, it was alleged, had been forwarded by the sixth defendant to the Minister for Lands for Cabinet approval which was forthcoming on the 26th March 2008. The leases were registered on the 16th December, 2008, Escape Tonga and on the 14th January 2009, Island Real Estate Ltd.

11. Allegations were raised by the plaintiffs in their action commenced in the Land Court on the 21st August, 2012 of improper dealings by the first defendant. It was contended that he was not authorized to sign the leases whilst his father, who had died later on the 10th October 2007, was alive, and the sixth defendant had not made proper inquiry to establish he was authorized to enter into the leases. It

was alleged that the first defendant, even if he were authorized to enter into the leases, had improperly failed to disclose the interests of the plaintiffs under the tenancies. The plaintiffs, accordingly, sought a declaration that the tenancy agreements were valid and binding in law, orders that the plaintiffs be allowed to continue with their agreements and construct buildings, the cancellation of both registered leases, eviction orders against Escape Tonga and Island Real Estate, substantial general damages, refund of monies paid under the agreements and special damages in a substantial amount.

12. Since the proceedings commenced, Mr Makafilia and the Deputy Governor of Vava'u have died. The sixth and seventh defendants maintained that the first defendant did have the power to enter into the leases because his father had elected to retain his existing tax allotment after the death of his father allowing the land in question to devolve to first defendant on 29th June 2007. Further, they denied that the plaintiffs were entitled to be heard by the Minister or Cabinet because the Land Act did not recognize tenancy agreements or rights under such agreements. Mr Rosic, unrepresented in the later stages of the proceedings and Mr Allison (unrepresented throughout), denied any knowledge of the tenancies or any wrongdoing. The first and second defendants, in informal defences being unrepresented also, whilst acknowledging that they were co-signatories and that some moneys had been paid under the agreements, alleged that the plaintiffs had ceased to meet their financial responsibilities under those agreements, and, as a consequence, they had subsequently entered into the leases over the land that ultimately had been registered.

13. This hearing related to two central issues which, after an intended trial fixture had to be abandoned in Vava'u, as a consequence of the non – appearance of the first and second defendants, it was agreed should be tried as preliminary issues under order 24 rule 4 of the Supreme Court Rules. The first issue that of jurisdiction of the Land Court to entertain the proceedings for relief under the tenancies, arose because, shortly before the trial in Vava'u was to commence, the judgment of Scott CJ had been delivered in Yuzhen Yang and another v Manoa (LA 11 of 2013, 6th June, 2014). This placed in serious doubt the jurisdiction of the Land Court to entertain the claims. There, Scott CJ had ruled that the Land Court had no jurisdiction to entertain a claim relating to a tenancy of a building. He said this of an argument raised by Mr Niu SC that the Land Court had jurisdiction, to entertain a dispute concerning a tenancy of a building on the broad ground that a dispute, claim or question which may affect the unrestricted right of title to land can properly be said to be a case "concerning title to land" within the meaning of clause 90 of the Constitution, and subordinate legislation, section 149(1) (b)) of the Land Act ;

> "It is plain that the fact of the occupation of the shop premises amounts to a curtailment of this right to enjoy the whole of his land. The problem, however, is that the courts have usually, but not always, held that buildings erected on land are not part of the land, and therefore , by what seems to me, with respect something of a legal fiction, do not encroach upon the title to the land upon which they were located. "

Scott CJ, accordingly, held that relief in the Land Court could not be pursued. This was consistent with an

earlier view he had expressed in Unuaki 'O Tonga Royal University of Technology and another v Kingdom Of Tonga (LA 16 of 2013, 8th November, 2013) where he also had ruled that the plaintiff could not pursue a claim for relief in the Land Court where there was merely an agreement (a tenancy) to use buildings and an associated and implied agreement described by Scott CJ as a collateral licence to use the land surrounding the buildings. Scott C J said, doubting any vague interest in land unrecognised in the Land Court jurisdiction would be sufficient to invoke the Jurisdiction;

> "No interest in the land known to the Act was created by the tenancy which even viewed as a permit, was not registered and was therefore not "effectual to pass any interest in land".

On this point, Scott CJ doubted Tongan Industries Traders Ltd v Shell Company Pacific Island Ltd [2005] TOLC3; [2005] TOSC5; LA 002 2005 in so far as any suggestion was involved that the Land Court could hear and determine a question or amount of rent or a claim in respect of an interest of some kind in land.

14. Mr Kefu, Acting Attorney- General, who did not appear at the hearing of these matters, but who had filed a memorandum on behalf of the sixth and seventh defendants, prior to this hearing, submitted that it had been the law in Tonga since Mangisi v Koloamatangi (Unreported Appeal No 11/98, 23rd July 1999), that a contract under which the appellant would, at her own expense, construct on a town allotment belonging to another, a building to be owned by the owner of the allotment and then rented to the appellant for the purpose of operating a business, did not involve a lease

or interest in land sufficient to give the Land Court jurisdiction. The agreement merely conferred a permission or licence to operate a business in the building constructed by the appellant at her expense. The Court of Appeal said;

> "it is essential to keep in mind that the contract conferred no interest of any kind in land. It conferred on the appellant a licence to use the building. In Tonga, a building may be severed from the land on which it stands, so as not to constitute a fixture; Kolo v Bank of Tonga (Court of Appeal, 7th August 1998)."

15. Mr Kefu submitted, as a first head of argument, that the plaintiffs could not proceed under the jurisdiction of the Land Court because the tenancy agreements conferred no more than licences to use the buildings and did not create interests in land, a submission which Ms Kautoke, who appeared as counsel in his place, also emphasised. For his part, Mr Niu SC in what he accepted was a novel argument contended that the Tongan version of clause 90 of the Constitution and subordinate legislation was not so narrow as to be limited to interests in land or matters of title. He submitted that the tenancies concerned a dispute relating to land and, under the Tongan version of clause 90 and subordinate legislation, the jurisdiction of the Land Court was not expressed as being limited to questions of title or interests in land but had a wider application involving land more generally. He submitted that, in so far as the English version was restricted to issues involving title or interest in land in that sense, it was unconstitutional. A not dissimilar approach by Mr Niu alleging a wider application of the jurisdiction of the Land Court, whilst attracting some sympathy from Scott CJ, in Yuzhen Yang and another v Manoa, had been

insufficient to convince the Judge to entertain the dispute, that involved a tenancy of a building, in the Land Court.

16. Mr Niu urged upon me that I should accept his argument, novel though he conceded it was, but I decline to do this. To do so would mean that I would be departing from settled authority. In his judgment in Yuzhen Yang, Scott CJ when ruling that the Land Court did not have jurisdiction relating to a tenancy over a building, suggested reform or further judicial guidance would be welcome in this area. One of those issues, he mentioned, was whether buildings should continue to be characterized as moveables rather than fixtures, which he described as something of a fiction. It may well be, however, that more comprehensive legislative review is now more appropriate than judicial revision and departure from precedent. Lord Scarman in Pirelli General Cable v Oscar Faber [1983] 1 All ER 65, at 72. said of reform of a limitation period in relation to building contracts that had been judicially created and was proving troublesome;

> " But the reform needed is not the substitution of a new principle or rule of law for an existing one but a detailed set of provisions to replace existing statute law. The true way forward is not by departure from precedent but by amending legislation. Fortunately, reform may be expected, since the Lord Chancellor has already referred the problem of latent damage and date of accrual of cause of action to his Law Reform Committee."

On the basis of the authorities I have mentioned, I consider the claims based on the tenancies here fall within the line of authority that has existed in Tonga since Mangisi v Koloamatangi and the tenancies create no more than licences to occupy and fall outside the

jurisdiction of the Land Court. See further L. Niu and ors v Tapealav (AC 15/121) Westpac Bank of Tonga v Fonua (AC 16/13) where the Court of Appeal held that applications for possession of buildings were within the jurisdiction of the Supreme Court and not the land Court because they did not involve title, and buildings were not part of the land.

17. Before I leave this aspect of the case, I raised with counsel whether the fact that the plaintiffs had the use and enjoyment of the grounds under these tenancies placed this case in a different category from Mangisi v Koloamatangi. Neither counsel suggested that it did, however. On this point, I, accordingly, adopt also the approach of Scott CJ in Unuaki 'O Tonga Royal University of Technology and another v Kingdom of Tonga that the right to enjoy the land associated with the buildings here was simply a licence collateral to the principal licence which involved a licence to occupy the buildings and did not constitute an agreement creating an interest in land.

18. A second point advanced by Mr Kefu was that if the tenancies did confer interests in land, then the tenancies were illegal under section 13 of the Land Act. This section is important and provides;

> "Any landholder who enters or attempts to enter into any agreement for profit or benefit relating to the use or occupation of his holding or a part thereof other than in the manner prescribed by this Act or as approved in writing by the Minister shall be liable on conviction to a fine not exceeding $200, or to imprisonment for any period not exceeding 12 months or both."

The essence of the sixth and seventh defendants' defence, it is noted, were that the tenancies were not instruments that required the Minister or Cabinet to take note of because the Land Act did not recognize any tenancy agreement or rights of any person under a tenancy agreement, which appeared a direct challenge to the legality of the agreements.

19. If, as I have determined, consistently with cases since Mangisi the tenancies do not confer title or interest in land, but only licences to occupy then section 13 of the Act is not impugned by these agreements. However, this view is only supportable if the current judicial approach is maintained that buildings are moveables and not fixtures to land and the use of land independently of the buildings does not alter the incidence of the tenancies either. Neither party, as I have said, suggested that the right to use the land aside from the buildings here altered the nature of the tenancies and I have chosen to characterise the right to use the land as creating a licence collateral to the principal licence being the use and occupation of the buildings. If either of these assumptions; buildings as a moveable, or the use of the adjacent land as a collateral licence were to be considered differently, then I have serious disquiet concerning the legality of these tenancies which take on the substance of leases much more expansive than those allowed for in the Land Act. It could then be argued that the tenancies allowed the landowner and the tenants to exploit the use or occupation of the holding other than in a manner prescribed by the Act or as approved in writing by the Minister. The contemplated use of the land by allowing building to take place with the right of the tenants to use and occupy those building for sixty years with the

payment of rental and the provision for renewals for a further fifty year period as well as the use of the grounds went well beyond any prescribed manner for the use or occupation of land in the Act. A registered lease under Tongan law can only be for 20 years (section 56 (iv) of the Land Act), and a renewal under section 60 Land Act is much more limited than the fifty year renewal provisions provided for in these tenancies. Nor was there any evidence that the Minister had been consulted and given his approval to these agreements. These were not short term tenancy agreements as in Cowley v Tourist Services Ha'apai Ltd and Fund Management Ltd. [2001] Tonga LR 183, at 188, for which Courts have given some relaxation from a strict application of section 13. They were plainly very much more expansive.

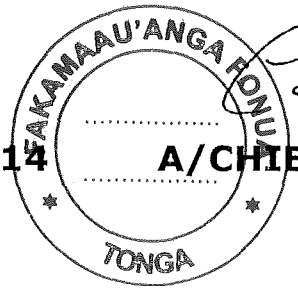
20. On the preliminary questions, the following answers are given;

1. The tenancies do not create any title or interest in land and consequently the Land Court has no jurisdiction to entertain these claims.

2. The agreements are not illegal under section 13 of the Land Act, as they create only licences to use the buildings and land, and do not create title or interests in land.

21. Since the tenancies do not give jurisdiction to the Land Court to grant relief, as Mr Kefu submitted, the plaintiffs' claims must be dismissed against all defendants.

22. Costs are awarded to all defendants aside from the fifth defendant who took no part in the action and the eighth and ninth defendants who were associated with the third and fourth defendants. Costs are to be assessed by the Registrar.



DATED: 18 DECEMBER 2014 **A/CHIEF JUSTICE**