

Solicitor General
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24/05/13

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 14 of 2011

BETWEEN: SIOELI MOA MAFI

- Plaintiff

AND : SEPETI VAKAMEILALO

a.k.a. SIONE FILI VAKAMEILALO

- Defendant

Mrs F. Vaihu for the Plaintiff

S. Tu'utafaiva for the Defendant

Before the President and Mr Assessor S. Toumo'ua

J U D G M E N T

- [1] This is a claim for vacant possession of a town allotment by the registered owner of the land against his uncle who had been given permission to reside on the land by his mother.
- [2] Where land has been registered, the Court will presume the registration to be valid unless it has come about as a result of an error of law, as a result of fraud, mistake or breach of promise by the Minister or Estate Holder or if the grant was made in breach of the rules of natural justice (see e.g. *Maamakalafi v Finau* [2004] To. L.R. 218). A registration may also be set aside if the land granted was

not, in fact, available (see Land Act, Section 50(a) and *Tafa v Viau* [2006] To. L.R. 287 and *Ma'ake v Lataimu'a* [2007] To. L.R.15).

- [3] The land, which is part of the estate of Lord Vaea was customarily given to the Plaintiff's father in the 1970's by Baron Vaea in return for services rendered. The Plaintiff's father (originally from Vava'u) moved onto the land together with his wife Kato Kakala Mafi. Their older child, the Plaintiff, was born on the land in 1974.
- [4] The Plaintiff told the Court that his father cleared the land and planted it. He also built a Tongan house on the land which later burned down.
- [5] In about 1980 the Plaintiff's father who is a Minister of religion was posted to Samoa and the family went with him. It appears that the land was looked after by the extended family. In about 1999 the Plaintiff married. He moved back to the land and built a wood and iron house for himself and his wife. In about 2001 the Plaintiff again went overseas, leaving the house he had built on the land.
- [6] Some time after the Plaintiff left the land in 2001 the Defendant moved on to it. He built a house, wood and iron on a concrete base, worth about \$8000, for himself, his wife and his five children.
- [7] The Plaintiff told the Court that the house had been built by the Defendant without obtaining permission. The house built by the

Plaintiff had been incorporated into the new structure and was being used as a kitchen.

- [8] The Plaintiff explained that following the gift of the land to him in about 1970, his father had never got around to having it registered in his name. There seemed no reason to do so. He knew it belonged to him. The intention however was to have the land formally registered in the Plaintiff's name in due course.
- [9] The Plaintiff told the Court that when he returned in 2002 he was surprised to find the new house that the Defendant had built. He also heard that the Defendant had taken steps to have the land registered in his own son's name.
- [10] It appears that for the next few years the Plaintiff remained overseas but in about 2009 he returned and filed an application for the land to be granted to him. A copy of the application is Document 1 & 1A admitted by consent. This document, dated 1 December 2009, appears to have been signed by the Plaintiff, consented to by the Estate Holder, Lord Vaea and to have been witnessed by the Defendant's brother. It is endorsed with the following statement (apparently added by an officer from the Ministry of Lands):

"This land was occupied by 'Etuete Fokikovi Mafi in the 1970's and they moved to Samoa but is occupied by Sione Fili Vakameilalo at the present time".

According to the Plaintiff, this endorsement, (dated 22-1-2009) already appeared on the form when he presented it to Lord Vaea for his signed consent the following December.

[11] The deed of grant is dated 7 April 2010. The Plaintiff told the Court that after he received it he went to the land. He had bought building materials with the intention of building another house for himself, his wife and his five children. The Defendant refused to allow him onto the land and he also refused to leave.

[12] According to the Plaintiff, the Defendant was several times asked to leave the land after the grant, however he refused. After he refused the Plaintiff went to see Lord Vaea. Lord Vaea sent his spokesman Maka Mapu to see the Defendant. According to the Plaintiff, Maka Mapu was instructed to offer the Defendant the choice of one of 12 pieces of land that were available from the estate to be granted to him, but the Defendant again refused to move. These proceedings were commenced in July 2011.

[13] The only other witness for the Plaintiff was his mother Kato, the Defendant's sister. Giving evidence was obviously difficult for her, torn as she was between the claim of her son and her considerable affection for her brother.

[14] Kato told the Court that in about 2001 she spoke to the Defendant who was, at that time, living with his wife and family at their parent's house:

"I told my brother and his wife to stay on the land while my husband and I went on missionary work. When we came back they could look for their own land or, if not, we could all stay together"

"I did agree for [the Defendant] to build on the land". They asked if they could build. They said they would leave the house for me and the children when they left".

"The land was never given to [the Defendant] it was to be registered in [the Plaintiff's] name. I never agreed to give the land away to him completely".

"I love my brother so my husband and my son did what I asked".

Kato told the Court that since their return from Samoa in 2010 she and her husband have been living with her parents.

[15] The only witness for the Defence was the Defendant's wife, 'Ana Vakameilalo. 'Ana told the Court that the Defendant had been authorised to move onto the land by Kato in about 2000.

"Kato said come and stay on the land and on the other side and build a house there. While living there we had to look for our own piece of land but if we could not find it by the time they

came back we would live on one side and they would live on the other".

"When we moved onto the land there was already a house there. We moved into the house of Kato's children. We then built our own house".

"In 2004 the Plaintiff came to us. He wanted us to move from the land. We did not vacate. We did what Kato told us. In 2005 we went to Baron Vaea and asked for a piece of land so that we could vacate the land. My husband asked for a piece of land so that the land we were on would be available for the family which owned the land. Vaea was angry because neither the Plaintiff's father nor his mother had sought his permission to allow us to occupy the land. He said you go back and stay on the land, tell the Plaintiff's father when he comes back to come and see me and I will find some land for them".

"In 2005 Kato's husband contacted us and told us to move from the land as he wanted to build his house. We did not move".

- [16] 'Ana did not accept that Vaea had, in 2009, approved the grant of the land to the Plaintiff. She did not think his signature was genuine. She admitted that Maka Mapu had offered them a choice of one of 12 pieces of land but they did not take up this offer. They relied on Lord Vaea's instruction to them to stay on the land. They did not believe

what Maka Mapu told them. She accepted that she and her husband had not looked for another piece of land:

"I want to stay where I am. I have already constructed a house there. I was authorised to stay there by Kato. Vaea has allowed us to stay on the land. I understand that Lord Vaea owns the land and no one has a right to it."

[17] Helpful written submissions were filed by both counsel. Mr Tu'utafaiva submitted that the land was not available for grant to the Plaintiff because it was occupied by the Defendant. Mrs Vaihu agreed that this was the central question to be resolved : had the Defendant shown that he had a right to continue occupy the land after he was told to leave?

[18] It will have been noted that among persons who might have been called to give evidence but were not and who might have been able to give useful information were the Plaintiff's father, to whom the land was given in the 1970's, Lord Vaea who had several conversations with the parties, Maka Mapu, Lord Vaea's spokesman and the Defendant himself. The fact that much of the evidence was hearsay did not assist to clarify the issues. Having however heard and seen such witnesses as were called I find the following facts proved on the balance of probabilities.

[19] I find that, motivated by affection for her brother, the Plaintiff's mother invited the Defendant and his family onto the land. At that time it was

not known if or when the Plaintiff's parents would return to Tonga and so the precise arrangement was somewhat vague. But however vague, it at least involved the agreement that the Defendant would look for a piece of land of his own, that, in other words, there was never any intention that the land would be given to the Defendant to have and keep. I accept Kato's evidence that this was the case and note 'Anas concession that they went to Lord Vaea to ask for a piece of land of their own "so that the land we were on would be available for the family which owned it."

[20] It is clear that the Defendant changed his position after the visit to Lord Vaea. He then came to believe that since the land had not been registered by the Plaintiff or his father, they could remain there as long as Lord Vaea agreed. This, however, was not what had been agreed with the Plaintiff's father and in 2005 he gave the Defendant valid notice to quit.

[21] Although the land was indeed being occupied by the Defendant in 2009, I find as a fact that his licence to occupy had in fact been terminated four years earlier by the only person legally able to terminate, the Plaintiff's father.

[22] It is especially unfortunate that an act of generosity by the Plaintiff's mother should have led to the present situation where the Defendants are occupying land given to the Plaintiff's father, having, as I find proved, refused all offers of alternative land to enable them to move and with the result that the Plaintiff and his family as well as his aged

parents now find themselves excluded from the land they themselves cleared and upon which the Plaintiff was born.

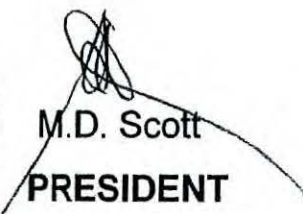
[23] As I find it, the land was no longer in lawful occupation by the Defendant and his family at the date that it was granted to the Plaintiff. In these circumstances the Plaintiff is entitled to an Order for possession. The house built by the Defendant remains, of course, his own and he should be given a reasonable time to remove it, if he so wishes. Alternatively, if he is unable to remove all or part of the house then he should be paid reasonable compensation for what is left behind.

Result:

1. Judgment for the Plaintiff. Order for possession 42 days.
2. Plaintiff's costs to be taxed if not agreed.

DATED: 26 April 2013.




M.D. Scott
PRESIDENT

N. Tu'uholoaki
26/4/2013.