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08/02/13

IN THE LAND COURT OF TONGA **LA 14/2009**

NUKU'ALOFA REGISTRY

BETWEEN: **TEVITA TATAFU VAKAMEILALO**
a.k.a. 'ATONIO VAKAMEILALO
- Plaintiff

AND : **1. RODERICK TAHAVALU**
2. 'OFA TAHAVALU
3. MELI MAHE
- Defendants

AND : **MINISTER OF LANDS**
- Third Party

W. Edwards for the Plaintiff

S. Tu'utafaiva for the Defendant

A. Kefu (Solicitor General) for the Third Party

JUDGMENT

1. On 25 June 2009 the Plaintiff commenced seven sets of proceedings, numbered LA 14 to LA 20 of 2009, against one group of three defendants (LA14/09) and six other individual defendants, all of whom were said to be trespassing on portions of a tax allotment known as "Fonua'eiki" which was registered in the Plaintiff's name on 18 July 2002.

2. All the Defendants (with the apparent exception of Paula Kupu Tu'ivai – LA 16/09) have filed defences. These defences are not identical and will have to be considered separately, however, a number of common submissions were advanced. These include the claim that the

Defendants had entered onto the land with permission, that they had lived there for many years and that the land occupied by them had been promised to them. In these circumstances, the Minister of Lands erred in registering the land in the Plaintiff's name since it was not available for allocation to him; alternatively, the Plaintiff was estopped from obtaining vacant possession against the Defendants (see *Tafa v Viau & Ors* [2006] To.L.R. 287).

3. The Defendants in LA 14/09 filed an amended Defence on 6 October 2009 after leave to join the Minister had been given on 11 September 2009. The Defendants state that the first went on to the land in 1991 at the invitation of one Mohulea Latu who was already living there. "Sometimes in 2000/2001" Tau promised Tupou Mahe, the deceased husband of the Second Defendant, that the portion of the land being occupied by them would be registered in Tupou Mahe's name. Unfortunately, both Tau and Tupou Mahe died before that promise was kept. As evidence of the promise they state that the name Tupou Mahe can be found on survey maps prepared for the Ministry in July 2000 and August 2000. By way of alternative, the Defendants claim to have been in adverse possession of the land for more than 10 years, since 1991 and accordingly the Plaintiff's action is statue barred by virtue of Section 170 of the Act. In further alternative the Defendants counter-claimed T$180,000 "for developing and looking after the allotment for about almost 18 years" and to cover the cost of finding an alternative place to live.

4. A third party notice was filed on 19 April 2010. The Defendants claim that the Minister erred in granting the land to the Plaintiff since it was not available for grant, first, because the Defendants were in lawful occupation and secondly because it had reverted to the estate holder in 1993. Similar third party notices were filed in LA 15, 17, 18 & 19/09. No notice was issued in LA 20/09 (or LA 16/09).

5. On 19 March 2010 the Plaintiff applied for Summary Judgment. In his supporting affidavit he averred that he was the registered holder of the land. A copy of the deed of grant was Exhibit B to the affidavit. This deed records that the previous holder of the land was Filimone Afu'alo Katoa Vakameilalo (Katoa) who first registered the land on 5 May 1939 and who died on 15 September 1999. On Katoa's death the land (or so much of it as remained after several portions had been surrendered – see Further and Better Particulars filed by the Third Party on 6-12-2011) devolved to his son Siaosi Tau Vaka (Tau) by operation of Section 82(c) of the Act. Tau died on 28 September 2000 and the Plaintiff then presented his own claim relying on Section 82(e) of the Act.

6. According to paragraph 8 of the affidavit, on 22 January 2002 the Ministry of Lands wrote to the Defendants (addressed as Tupou Mahe – Exhibit D):

> "Before the Hon. Minister of Lands makes a decision to transfer the tax allotment to [the Plaintiff] I am required to advise you all in order that you will know that the allotment

presently occupied by you is to be transferred to [the Plaintiff] as the heir in accordance with the law".

7. The Defendants admit receiving this letter and also admit that they did not make any representations to the Minister. On 28 August 2002 the Defendants (again addressed as Tupou Mahe) were given notice to quit. They did not comply. On 1 May 2009 a second notice to quit was served, this time on the First Defendant. The notice was not complied with.

8. In paragraphs 17 to 19 of his affidavit the Plaintiff pointed out that Mohulea Latu was never the holder of the tax allotment but that from 1991 until his death in 1999 the holder was Katoa. It was also pointed out that Tau died in September 2000 and therefore could not possibly have given the Defendants any assurances in 2001.

9. The Second Defendant filed an affidavit in opposition to the application in April 2010 on behalf of herself and her co-defendants. She stated that the Defendants "thought that the land in which we have now occupied was given to us in a lawful manner" by Tau and accordingly was not available to be granted to the Plaintiff.

10. The Plaintiff also filed applications for Summary Judgment in the associated actions LA 15, 17, 18, 19 & 20/09. Each application was supported by an individual affidavit and, with the exception of LA 20/09 affidavits in answer were filed by each of the Defendants.

11. The applications for Summary Judgment were all dismissed on 12 April 2010 however no reasons for the dismissals appear to have been published. The trial of all seven actions was fixed for December 2010 but it did not take place as Ford CJ left Tonga at short notice.

12. In April 2011 Mr Kefu advised the Court that he had only just been served with the Third Party Notices. A Defence to the notice in LA 15/09 was filed on 1 June 2011 and defences to the other notices in the related actions were filed on the same day. In 15/09, the Minister accepted that the Defendants were in fact residing on the land which the Plaintiff was entitled to inherit following Tau's death and also admitted that Tupou Mahe's name was written on the survey plans. This, however, was not evidence of registration in their favour, merely of the fact of their occupation. When the Plaintiff had applied to be registered as the holder of the land the Defendants were written to (paragraph 6 above) but they did not take the opportunity to make any claim to the land.

13. On 19 July 2011, the Defendants requested further and better particulars of the Third Party Defence. The particulars were provided on 6 December 2011. They concerned details of the land surrendered by Katoa and do not go to the central issues now before the Court.

14. Between December 2011 and May 2012, the parties attempted settlement. On 3rd May, Mr Edwards filed a memorandum suggesting that the matter be dealt with by way of written submissions (together with the documents and affidavits already

filed). Both Mr Tu'utafaiva and Mr Kefu agreed that the main question was whether the Plaintiff was bound by any promises found to have been made to the Defendants by his predecessor in title, that further evidence was not needed and that the assistance of an assessor was not required. A bundle of agreed documents 1-15 was filed by Mr Edwards and a second bundle A to E was filed by Mr Kefu. On 3 September 2012 Mr Edwards filed helpful and comprehensive written submissions for which I am grateful. On 5 October 2012 I extended the time for filing by the Defendants to 14 October and by the Minister to 22 October. I also warned that if the submissions were not filed by those dates I would proceed to judgment without them. By 26 October no further submissions had been filed and none have been filed since. In view of the complexity of the matters before me, I record my regret that the further assistance promised by counsel was not forthcoming.

15. Before considering the individual actions it may be helpful to be reminded of a number of fundamental legal and procedural propositions which apply to land cases of this kind.

16. In *Ma'ake v Lataimu'a* [2007] To.L.R. 15, 26 the Court explained that:

> "The legal position in relation to any challenge to a registered deed of grant has often been stated. Until it is established to the contrary, the Court will *presume* that the register is correct. Registration is final unless it has come about as a result of fraud, mistake, breach of

promise made by the Minister or estate holder or breach of the principles of natural justice. If land is "unavailable" to be granted because it is the subject of some other claim, then there *might* be an impediment which would make registration contrary to the Act and, hence, liable to be set aside" (emphasis added).

In *Havea v Tu'i'afitu & Ors* [1974-80] To.L.R.55 the Privy Council held that the burden of proof rests upon the person challenging the grant to produce sufficient evidence to rebut the presumption referred to in *Ma'ake.*

17. Where, as in this case, it is claimed that the land in question was not available to be registered in the Plaintiff's name by reason of it being occupied by the Defendants, something more than mere occupation must be pleaded. In *Finau v Minster of Lands* LA25/2010 I endeavoured to explain that the fact of legal occupation does not *ipso facto* confer upon the occupant a right to continue that occupation and in *Schaumkel & Anor v 'Aholelei & Anor* LA18/07 I expressed the view that *Tafa v Viau* (above) is not authority for the proposition that land which is lawfully occupied is, by virtue of that fact alone, unavailable for grant; rather it is authority for the proposition that before granting land, the Minister is obliged to investigate the circumstances on the land in question and, in particular, when there is found to be on the land a person living in a house who claims to have been living there lawfully for some time, the Minister must fully

inquire into the basis of the resident's claim to be allowed to continue to reside on the land (but note paragraph [16] of *Tafa v Viau* p294).

18. Where a Defendant is accepted as having lawfully come onto the land (ie is not a mere trespasser) which has subsequently been registered in the Plaintiff's name, then, applying *Havea* (above) the burden rests on the Defendant to show that he has more than a mere revocable licence (see *Palu v Bloomfield* [1974-80] To.L.R.105). If it is the Defendant's case that the Plaintiff is estopped from obtaining vacant possession then it is obviously crucial that the representations which are said to have lead to the creation of the estoppel should precisely be proved. A party should not be estopped on an ambiguity (*Legione v Hately* [1983] 152 CLR 406). Where an estoppel is found to have been established, no form of title is acquired by the Defendant, only an equity and a licence are conferred (*Matavalea v Uatu* [1989] To.L.R. 101).

19. As already noted, the only evidence for the Defendants in LA 14 of 2009 was the affidavit of the Second Defendant 'Ofa Tahavalu filed on 9 April 2010. In her affidavit the Second Defendant avers that:

> "The land in which we have now occupied was given to us in a lawful manner by Siaosi Tau Vakameilalo in 2000".

and that the Ministry knew that it was still being occupied by the Second Defendant in 2000. In these circumstances it was said that it was unavailable for grant to the Plaintiff.

20. It is unfortunate that this affidavit is even less detailed than the Statement of Defence filed on 6 October 2009 but even regarding the Statement of Defence as having somehow being incorporated into the Second Defendant's evidence, a number of difficulties are immediately apparent. In the first place, there is nothing to explain the status or right of occupation of the First and Third named Defendants. Secondly, even assuming that Mohulea Latu invited the Defendants onto the land in 1991, the right of Mohulea Latu to extend such invitation is nowhere explained and neither is it claimed that the invitation was agreed to by the registered land owner at the time, Katoa. The "promise" pleaded in paragraph 1 (b) and (d), 6 and 17 (a) of the Statement of Defence is not the same as the gift averred in paragraph 3 of the affidavit. The holder of an allotment is only allowed to part with possession of any part of the land as permitted by the Act. Unlawful agreements are prohibited by Section 13. No lease is alleged. No Section 54 surrender was applied for or took place. A person promising to surrender part of his allotment cannot guarantee that the surrendered land will not immediately devolve upon the heir under the provisions of the Act but instead will be granted by the Minister to the promisee, against the wishes of the heir. The promise said to have been made by Tau in about 2000 or 2001 was a promise which, in law, he was simply unable to honour (see *Kaufusi v Kaufusi* [1998] To.L.R. 173).

21. It seems fairly clear from the survey plans exhibited to the Third Party notice and from the surrenders detailed in the Third Party

Particulars filed on 6 December 2011 that subdivision of the original tax allotment held by Katoa had been both ongoing and in contemplation by Katoa and by Tau for some time. Although Mahulea Latu's status is unknown, there is no reason to doubt the Second Defendant's claim to have lived on the land since 1991. But lawful occupation in the past does not mean that a right to occupy it in the future has been established.

22. In *Veikune v To'a* [1981-88] To.L.R. 138, a case having some similarities to the present, Martin CJ found acquiescence and promissory estoppel proved. Having observed that "the effect of this in Tongan law is difficult to determine" he ruled that the son and heir of the promisor "held the land in exactly the same right as (his father) and he too therefore estopped".

23. In *Ongolea v Finau* [2003]To.L.R. 147,152 the Court, relying on *Tafolo v Vete* [1998] To.L.R. 164 and *Inwards v Baker* [1965] 2QB29; [1965] 1 All ER 446 accepted that an equity in possession is binding on subsequent title holders. With respect, I am not sure that *Tafolo* is authority for that proposition or that *Inwards* can be applied to Tongan land law which is quite different from that in England.

24. Division II of the Land Act makes provision for the lease of allotments and Section 58 provides that the widow and heir are bound by the terms of an unexpired lease following the death of the lessor. There is no similar provision relating to licences. While I do not exclude the possibility that an heir maybe bound by a promise

made by the previous holder, it seems to me that, apart from lease, an heir is entitled to acquire the land free of incumbrance, that the effect of an estoppel, at any rate so far as vacant possession is concerned (compensation is a different matter) is to impose merely a personal restriction on the person estopped, not his heir (see *Alofi v Fine* [1998] To.L.R. 24).

25. In my view the Defendants in the present case have not shown that they have any right to remain on the land either on the ground of "unavailability" or by virtue of estoppel. The Plaintiff's cause of action arose against the Defendants, not on the day they moved into occupation of the land as licencee, but on the day his cousin Tau died. These proceedings were commenced within the limitation period. Although the Defendants claim, alternatively, that they have developed the land, there was no evidence presented that this was in fact the case. The construction of a house is, of course, not a development of the land in Tonga (see *Kolo v Bank of Tonga* [1997] To.L.R. 181). Although it seems that sums of money may have been given to Tau before his death, the Defendants have been living rent free on the land since it was inherited by the Plaintiff. I can find no basis for an award of compensation to them. It is accepted that no representations were made by the Defendants to the Minister and no claim to the land was made by them under the provisions of Section 54. In these circumstances it has not been shown that the Minister erred in acting on the information supplied to him by the Plaintiff and granting the land in his name. The Defendants claim against the Third Party must fail.

Result:

There will be Judgment for the Plaintiff and for the Third Party. There will also be an order for possession against the Defendants in 42 days from delivery of this Judgment. The Plaintiff's and the Third Party's costs are to be taxed if not agreed ~~on January 2014.~~

DATED: 29 JANUARY 2013.

FAKAMAAU 'ANGA FONUA TONGA

PRESIDENT

H.Ngalu
7/01/2013.