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RACC

LAND 850002
Haveluloto

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 10 of 2007

BETWEEN: LOSETI MAHE - Plaintiff

AND: MANONO MAFI - Defendant

Before the President and Mr Assessor Blake.

L. M. Niu for the Plaintiff

O. Pouono for the Defendant.

JUDGMENT

1. The Plaintiff and the Defendant are distantly related by marriage. The Plaintiff is the adopted son of Moli Tongatu'a who was the aunt of the Defendant's father.
2. The land in question is a town allotment at Haveluloto survey plan L 5683 Lot 3 which was registered in the Plaintiff's name on 9 April 1992.
3. The Plaintiff has lived in New Zealand since 1977 and prior to its registration in his name the land was apparently "looked after" by Moli Tongatu'a or her daughter. I was not told in whose name it was registered.
4. According to witness Sione Atu Puha Latu who has for many years lived on an allotment across the road from the land, a couple named Silipa lived on the land which they then left and, it appears, left in a very bad state.

5. In 1995, after the Silipa couple had gone the Plaintiff and the Defendant's father (Samuela Mafi) had a conversation. The Plaintiff went to Samuela Mafi's house. He was visiting Tonga and was looking for someone to look after the land. The Defendant told me that he was present at a conversation between the Plaintiff and Samuela Mafi at which it was proposed that he and his recently-married wife would move onto the land. The Defendant's wife Lavinia told me that she and her husband discussed the proposal and went to visit the land.
6. On the land at that time there was a two bedroom house, a square concrete water tank and an outside toilet. The Plaintiff told me that he gave the Defendant \$100 to pay for the removal of a wrecked motor vehicle. The Plaintiff described the house as being in good order when the Defendant and his wife took possession but the Defendant told me that the house was in a state of disrepair. His evidence, which was broadly supported by Lavinia, was that the house was uninhabitable. He told me that there were holes in the walls and floors, that much of the house was rotten, that doors were missing, that part of the roof had to be replaced and that the electricity wiring was not usable. Lavinia told me that she was not at all happy with the condition of the house and the land but that she accepted the Defendant's assurances that they would be able to make improvements. Before moving into the house some months after the agreement, they did a "massive cleanup" of the house and compound removing rotten trees, broken vehicles and other rubbish.
7. According to the Plaintiff, he travelled to and from Tonga several times over the next several years after 1995 but he did not actually visit the land again until 2003. He had come over for a church conference with his family but their plan to stay at an hotel had fallen through and so he asked the Defendant if he and his family could stay with them in the house. This was Christmas 2003 and the Defendant agreed.
8. The Plaintiff told me that when he and his family arrived at the land he noticed that there had been a number of changes since his last visit in 1995. Now there was a shop fronting onto the road. The square water tank had gone and the house had been extended. The Plaintiff's evidence was that he was very

surprised and disappointed by what he found but, as the families were getting on so well together and were enjoying Christmas so much he was "too embarrassed" to raise the matter. After staying with the Defendant in the house on the land for a few days, the Plaintiff and his family returned to New Zealand.

9. According to the Plaintiff he telephoned the Defendant in 2004 from New Zealand and told him that he was displeased with the changes that had been made without his permission and that he wanted the Defendant to leave the land. According to the Statement of Claim the Plaintiff did not tell the Defendant to leave until 2005 and this is also what Lavinia told me. This is consistent with the Plaintiff's later evidence that he told the Defendant to move in 2005 when he stayed with his brother and noticed that the original concrete tank had gone. A letter from the Plaintiff to the Defendant (P3) which is one of the very few documents available in this case states:

"We had talked by telephone and I even came to Tonga in December 2005 in my effort that you vacate the allotment."

10. The Defendant and his family are still occupying the land. This is an action for possession. The Plaintiff's case is that his permission to the Defendant to occupy the land has been revoked. The Defendant seeks dismissal of the claim on the following grounds:

- (i) doctrine of estoppel applies thus defeating the Plaintiff's claim for an eviction order; and/or
- (ii) compensation for the sum of \$40, 000 or in the alternative to this remedy;
- (iii) specific performance of the agreement [by the Plaintiff to provide the Defendant with a container load of timber and corrugated iron to enable him to construct a replacement house on a new piece of land];
- (iv) adverse possession of the allotment for more than 10 years;
- (v) the action is statutorily barred from being heard by this court."

11. As I find it, items (i), (ii), and (iii) can be dealt with together. It will be convenient first to deal with items (iv) and (v)
12. As explained in *Wallis's Ltd v Shell-Max and BP* [1974] 3 All ER 575 in order to establish adverse possession:-

"The true owner must have discontinued possession or have been dispossessed and another must have taken it adversely to him. There must be something of an ouster of the true owner by the wrongful possessor."

Mr. Pouono told me that the Plaintiff's title to the land was not in issue and paragraph 10 of the Defence is to the effect that in 2005 the Defendant agreed to leave the Plaintiff's land providing that he was properly compensated. The Defendant's evidence was that in 2002 he sought the Plaintiff's permission to build the shop. While it is the Defendant's case that the Plaintiff has broken one or more of his promises, it is not the Defendant's assertion that he was ever on the land except as the Plaintiff's licensee accordingly, there is no question of adverse possession or of section 170 of the Land Act (the Act) having any application.

13. The central question before the court, alluded to in items (i), (ii) and (iii) of the prayer of the Statement of Defence set out in paragraph [10] above, is whether the Plaintiffs right to evict the Defendant and his family from the land should, in equity, be restricted either absolutely or conditionally.
14. In Tonga the equitable doctrine of estoppel has been recognized in Part viii of the Evidence Act (Cap 15). A straight forward explanation of how the doctrine works is given by Lord Denning in *Crabb v Arun D. C* [1976] 1 Ch 179, 187:

"The basis of this proprietary estoppel – as indeed of promissory estoppel – is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law.... If I may expand on what Lord Cairns LC said in *Hughes v Metropolitan Rly. Co* (1887) 2 App. Cas. 439, 448 "it is the first principle upon which all courts of equity proceed" that it will prevent a person from insisting on his strict legal rights – whether arising under a

contract, or on his title deeds or by statute – when it would be inequitable for him to do so having regard to the dealing which have taken place between the parties.”

15. When it is found that what has taken place between the parties has raised an equity against the plaintiff then the court must look at all the circumstances of the case to decide in what way the equity can be satisfied (*Plimmer v Wellington Corporation* (1884) 9 App. Cas.699,713,714 and *Greasley v Cooke* [1980] 3 All ER 710, 713) and see also *Snell: Principles of Equity* 26th Edn. p632.
16. Among several examples of the doctrine being applied in Tonga are *Fakatava v Koloamatangai & Anor* (1974-1980) To.L.R. 15 in which the Plaintiff, having acquiesced in the building of a house on his land was estopped from asserting his right to possession of the land occupied by the house and *Motuliki v Namoa & Ors* (1990) To.L.R 61 in which the appellant was estopped from evicting the respondent by reason of allowing him to remain on the land from many years and build thereon a substantial house.
17. In *Matavalea v Uata* (1989) To.L.R 101 the Privy Council emphasized that because of the restrictions imposed by the Land Act no rights in land can be acquired in Tonga by virtue of an estoppel. In this way the situation is different from that in England.
18. Mr. Niu advanced two procedural arguments against finding an estoppel in this case. The first is that though mentioned in the prayers of the Statement of Defence, no particulars of the claimed estoppel were pleaded. Secondly, no allegations giving rise to the claim were put to the Plaintiff in cross-examination.
19. Order 8 rules 2 (b) and 3(2) of the Supreme Court Rules require the Statement of Claim and the Statement of Defence to be pleaded with sufficient particularity to enable the parties and the court to understand the nature of the case. The purpose of these rules is to prevent unfairness by issues being raised of which notice has not previously been given. Similar principles of fairness generally require a party to put to each of his opponent's witnesses so much of his own case as concerns that witness. In criminal proceedings at least, unchallenged evidence cannot be attacked in a closing speech (see *O'Connell v Adams* [1973]

Crim. Law R 113).

20. Even in Criminal cases, however, it has been held that the judge has a discretion, if necessary, to allow a witness to be recalled (*R v Wilson* [1977] Crim.L.R 553) and as explained by Buckley L.J in *Robinson's Settlement* [1912] 1Ch 717, 728 the purpose of the rule requiring the matter to be adequately pleaded is:

“...for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the Court to prove. If he does not do that the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it, or it may give him leave to amend by raising it and protect the other party if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the court the relevant subject matter for decision simply on the ground that it is not pleaded.”

21. In the present case, no particulars of the nature of the estoppel were sought under the provisions of RSC O8 r 6 and no application was made to recall the Plaintiff to deal with matters not raised in evidence until the Defendant and his wife were called.
22. In my view, taking the pleadings, exhibits and cross-examination of the Plaintiff together and as a whole, it was perfectly plain that the essence of the Defendant's case was a claim that the Plaintiff had dealt unfairly with him and his family. In my view Mr. Niu's objections, though not without some substance do not have sufficient merit to be upheld. The remaining question is whether the court is satisfied, on the evidence, that an equity against the Plaintiff has in fact been raised.
23. As has been seen, it is not disputed that the Defendant came on the land after it was agreed that the Defendant would look after the land while the Plaintiff was overseas. It is not disputed that the Defendant came on to the land in 1995 and remains there today. It is accepted that either in 2004 or 2005 the Plaintiff told the Defendant that he wanted him to leave the land. The principal areas of dispute are:

- (i) The condition of the land and house when the Defendant went into occupation;
- (ii) Whether the alterations to the house, the erection of the shop and the removal of the water tank took place with the encouragement or acquiescence of the Plaintiff or alternatively against his wishes;
- (iii) The value of the improvements made to the property;
- (iv) Whether the Defendant moved onto the land or alternatively remained on the land as a result of representation made by the Plaintiff to the effect that he would transfer the land to them "one day";
- (v) Whether it was agreed between the parties that the Defendant would leave the land after receiving a container load of corrugated iron and timber as compensation.

24. Having seen and heard the witnesses including the independent witness Sione Atu, Puha Latu, I am satisfied, on the balance of probabilities that the Plaintiff induced the Defendant to take over the land, that he encouraged him to develop the land and the house and that he led them to believe that he would not return to Tonga but instead might visit from time to time. I accept that he gave a copy of the title deed to Latu (Exhibit P8) and that Latu gave the copy to the Defendant shortly after he moved onto the land. I accept that the house was in a very poor condition when the Defendant took it over and that substantial repairs and improvements were necessary and were made. I accept that the value of these improvements which are plainly fixtures, amounts to approximately TOP\$40,000. I reject the Plaintiff's contention that the improvements to the land were against his stated wishes. In particular I reject his evidence that he did not complain about the shop because he was embarrassed and I reject his claim to have informed the Defendant to leave as early as 2004. In my opinion, the probability is that the Plaintiff simply changed his mind about returning to Tonga either in late 2004 or in 2005 when he visited his brother and once he had changed his mind he tried to remove the Defendant from the land.

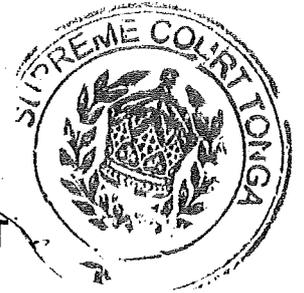
25. In my opinion it is clear that when the Defendant began to complain about being evicted from the house and land upon

which he had invested so much effort and expense, the Plaintiff tried to buy him off. I accept the evidence of the Defendant and Lavinia that compensation was discussed and that a container of corrugated iron and timber was agreed to, but was not forthcoming. That the Plaintiff accepted that he owed the Defendant something is clear from the letter already referred to in paragraph [9] above and from the \$2000 sent by the Plaintiff to the Defendant.

26. The suggested representation that the land would be transferred to the Defendant is less clear. I believe it may have been hinted at or even mentioned as a possibility when the Defendant was discussing moving onto the land. The parties had little contact between 1995 and 2003 and I doubt whether the matter was raised again in any more defined way. I accept that the Plaintiff did in fact give some form of undertaking to transfer the land to the Defendant when he visited in 2003 but by then they were already well established on the land, with no plans to move, and it has not been shown that the Defendant altered his conduct in any way as a result of the representation made.
27. Mr. Niu suggested that the Defendant and his family had benefitted by living on the land rent-free and that the improvements were for their own benefit. In my view however the Plaintiff took the benefit of having his property looked after for him free of charge and the improvements to the property (with the possible exception of the shop – value approximately TOP \$6000) are to his advantage.
28. In my view the Defendant and his family would not have moved onto the land, remained there and in effect made it their own unless they had been led to believe by the Plaintiff either that he would not return to claim it or alternatively, if he did so, that they would be compensated for the improvements they had made.
29. I am not satisfied that the Defendants have raised an equitable right unconditionally to remain on the land but I am satisfied that they have raised and established the right to be compensated by way of a substantial contribution to the cost of their new home.
30. Upon payment by the Plaintiff to the Defendant of TOP\$38, 00

[TOP\$40,000 less TOP\$2000 received) the Defendant shall vacate the land within 28 days. I will hear counsel as to costs and any other consequential matters.

9 January 2012


PRESIDENT 

E. Takataka
4/01/2012