

BETWEEN : 'ISILELI TUPOU FATAFEHI
- 1st Plaintiff

AND : TEVITA MUIMUI HE LOTU FATAFEHI
-2nd Plaintiff

AND : SIOSIFA KUEA
-1st Defendant

AND : MINISTER OF LANDS
-2nd Defendant

BEFORE THE HON. CHIEF JUSTICE AND MR. ASSESSOR BLAKE

Counsel: Mrs. Vaihu for the Plaintiffs
Mr. Fa'otusia for the First Defendant
Mr. Sisifa for the Second Defendant

Dates of Hearing: 25 October, 15 November, 2010

Dates of Judgment: 10 January, 2011

JUDGMENT

[1] The subject matter of this dispute is a town allotment at Kolomotu'a known as Vailongaki. The land is Crown land.

[2] In 1995 the allotment was registered in the name of Siaso Kuea Fatafehi. Its total area is 1 r 14.1 p. or 1345 m².

[3] Siaso had five sons. His eldest son was the First Plaintiff. His second son was Palu Valevale Fatafehi. His fifth son was Sefesi Kuea. The First Defendant is Sefesi Kuea's eldest son.

[4] On a date unknown but prior to 2 February, 2001 the Minister of Lands and Survey received a letter dated 10 June, 1999 from Siasosi (Document P.2) in which Siasosi informed the Minister of his intention to surrender the land with the intention that it be reallocated to the First Defendant.

[5] In this letter Siasosi explained that on 17 June, 1995 he, his heir (the First Plaintiff) and the First Defendant's father (Sefesi) had reached an agreement whereby the heir had renounced his right to inherit the land and had agreed that instead it was to be allocated to his son Sefesi. According to the letter of 16 June 1999 a copy of the June, 1995 agreement was attached.

[6] In his letter of 16 June, 1999 Siasosi also explained that Sefesi had died (in June 1999) before the surrender agreed in 1995 had taken place. It was for this reason that it was now intended that the land be re-allocated, following surrender, to his son, the First Defendant.

[7] On 30 November, 1999 (Document D5) Siasosi's second son Palu wrote to the Minister giving his "full consent" to the surrender of the land by his father with the intention of its being re-allocated to the First Defendant.

[8] On 13 December, 1999 the First Defendant wrote to the Minister formally applying to have the land registered in his name. (Document D4).

[9] On the same date, 13 December, 1999, Siasosi again wrote to the Minister (Document D3). This is not a very easy document to understand however a number of points clearly emerge. According to Siasosi at some point (presumably after June 1995) it had been agreed that the land in dispute (of which the Plaintiff was, in default of any surrender having occurred, the heir presumptive) would instead be inherited by his second son Palu. Palu was already the holder of an allotment at Tukungapahu and it had been agreed that Palu would exchange that allotment with the First Plaintiff.

[10] Document D6, a letter from the Ministry of Lands confirms that on 2 November, 1998 the First Plaintiff was registered as the holder of the town allotment Tukungapahu. The letter from Palu dated 30 November, 1999 has already been noted.

[11] On 14 February, 2001 (Document P4) the Secretary of Lands was advised that the Cabinet had approved Siasosi's application to

surrender the land. On 15 February, 2001 the Minister advised Siaosi that his application had been granted.

[12] On 16 March, 2001 the Secretary for Lands again wrote to Siaosi advising him that his surrender application had been accepted. He also expressed certain opinions about the effect of Section 54 of the Land Act (Cap. 132 as amended by Act 18/91)

[13] On 5 April 2001 a section 54 notice appeared in the Tonga Chronicle. It is not in dispute that this notice is the only section 54 notice that was published in this case.

[14] On 29 January, 2009 Siaosi died. On 18 June 2009 the land was allocated to the First Defendant (Document D2).

THE PARTIES' CASES

[15] The Plaintiff's case is that he never agreed to renounce his claim to the land and that his signature on the 1995 document was forged. He seeks to have the allocation of the land to the First Defendant revoked. Taking advantage of section 84 of the Act he intends to surrender Tukungapahu and to move into occupation of Vailongaki.

[16] The First Defendant's case is that the 1995 agreement is valid and should be upheld, together with the allocation of the land to him.

[17] The Second Defendant's case is that there is nothing to show that the surrender by Siaosi was invalid, that the re-allocation followed compliance with the Section 54 procedure and that in any event the First Plaintiff's action is statute – barred.

THE ORAL EVIDENCE

[18] The first witness was the First Plaintiff. His son, the Second Plaintiff, did not take any part in the proceedings. The First Plaintiff told the court that in 1995 he had a discussion with his father, Siaosi. Siaosi asked him to agree that the property be divided in half, with one half to go to Sefesi. He agreed. As he was leaving for the airport his sister Fapiola, who was a civil servant, gave him a blank piece of paper to sign. It had two lines on it which is where he and his father were to sign. He signed the paper. Fapiola has since passed away.

[19] In about 1997 he returned to Tonga. He found out that the land was too small to be divided (see Section 51 (1) of the Act) “I said I did not want anymore. I left it to my father”.

[20] According to the First Plaintiff he used to visit Tonga every year. His permanent address is in Australia. He came to Tonga after his father died in January, 2009. It was not until June 2009 that he discovered for the first time that the land had been surrendered and registered in his nephew’s name. The following November he completed an Heir’s affidavit (Document P6) and a statutory declaration (P7) in which he stated his case and made his claim to the land.

[21] The First Defendant was shown Document P1 (and D1) a document dated 17 June, 1995 apparently recording the First Plaintiff’s agreement to the renunciation of his claim to the land in favour of his brother Sefesi. He told the court that he had never seen the document before it was shown to him at the Ministry of Lands. It was not the blank piece of paper that he had signed. The signature above his name was not placed there by him.

[22] In cross-examination he admitted that his father had told him that the land was too small to divide. Asked whether any of the signatures on P1 were genuine he first told the court that none of them, not even his father’s was genuine but in re-examination he said that he was not sure “as I was away for 35 or 36 years”.

[23] It will be convenient to take the third witness next. This was the First Plaintiff’s sister Tupou. This witness told the court that she had seen Fapiola give the First Plaintiff the blank piece of paper to sign. He had signed it. It was not the same piece of paper as Document P1. The blank piece of paper did not have any lines on it. She recognised her father’s signature on document P1. In cross-examination she conceded that she was not familiar with her father’s signature.

[24] The second witness was the Registrar of Lands. He told me that the section 54 notice Exhibit D2-1 was advertised as required by the Act. Since he had no direct knowledge of this fact, the court adjourned for enquiries to be made. These enquiries revealed that in fact the notice had only been published once (see paragraph 13 above) and not four times as required by section 54 (2).

[25] The First Plaintiff being the only surviving party named in document P1 and there being no other issues of fact, no other witnesses were called.

CONSIDERATION OF THE ISSUES

[26] The First question is whether the court accepts that the First Plaintiff has proved, on the balance of probabilities, that Document P1 is a forgery. This allegation, in view of the fact that it is not disputed that Siasosi presented the document to the Ministry attached to his letter dated 16 June 1999 (see paragraph 4 above) is a very serious charge of dishonesty not only against his father, a district officer, but also against his sister Fapiola and his brother Sefesi. It is the type of charge referred to by Denning L.J in *Bater v Bater* [1951] P35; [1950] 2 All E. R. 458 which requires proof to a high degree of probability. In considering this issue the court finds the following matters to be particularly relevant.

[27] It is plain, and conceded by the First Plaintiff, that Siasosi was considering dividing the land i.e partially at least disinheriting the First Plaintiff. It is also clear that this plan could not be put into effect as the land was too small. In the court's view Document D3 taken together with Documents D5 and D6 clearly establish that the subdivision plan was superceded by the decision to allow the land to be inherited by Palu with the intention that Palu surrender his right to the land in favour of Sefesi and after exchanging his allotment Tukingapahu with the First Plaintiff in 1998. This sequence of events is consistent with the 1995 agreement which would have the same result, namely inheritance by Sefesi (and his heir the First Defendant) and renunciation by the First Plaintiff. It is not consistent with the First Plaintiff's claim that he had never agreed to renounce his claim to the land.

[28] Secondly, the court finds it inconceivable that the First Plaintiff was not aware that it was intended to surrender the land so that it could be re-allocated to Sefesi if, as claimed by the First Plaintiff, he visited Tonga annually and in fact exchanged the land with Tukingapahu in 1998.

[29] There is nothing to suggest anything furtive in the actions of Siasosi. On the contrary, the 1995 agreement was the basis of his negotiations with the Ministry until 2001. As has already been pointed out, it was not suggested by the First Plaintiff that the letter of 16 June 1999 (Document P2) was anything other than genuine.

[30] The court was not impressed with the demeanor either of the First Plaintiff or his sister. Their descriptions of the paper signed by the

First Plaintiff did not agree. They appeared to be unsure whether their father's signature on Document P1 and P2 was genuine or not. The First Plaintiff's sister, in particular, did not strike the court as being a witness whose testimony could be relied upon.

[31] In the court's view the First Plaintiff did not succeed in proving, to the high probability required, that the June 1995 document P1 was forged. The First Plaintiff's evidence on this aspect of the case is rejected.

[32] The next question is what consequence flows from upholding document P1 as genuine. As explained by the Privy Council in *O.G. Sanft & Sons Ltd v Tonga Tourist and Development Co. Ltd.* [1981-1988] Tonga L R 24:

"...the Land Act is a complete code... which rigidly controls by its express terms all titles and claims to any interest in Tongan land..."

It also stated that:

"equitable principles can apply only to leasehold interests after they have been validly granted"

[33] In *Veikune v To'a* [1981-1988] Tonga L. R. 138, 140 Martin C.J held that *Sanft* was not authority for the proposition that a Defendant cannot "avail himself of an equitable defence which does not create an interest in land"

[34] In the court's view document P1 is a valid deed; it was sufficiently sealed when it was signed by the First Plaintiff and attested by the First Plaintiff's sister (*First National Securities Ltd v Jones* [1978] Ch 109). It was delivered by the First Plaintiff when, after he had signed it, he returned it to his father. Further delivery in the Court's view can be said to have taken place when the allocation of Tukungapahu was accepted in 1998. In these circumstances, the court's view is that by the application of established principles of equity which do not create here any interest in land, the First Plaintiff is estopped from denying that he had renounced his claim to the land in favour of his brother Sefesi (see *Baker v Dewey* (1823) 1 B & C 704 and see also *Motuliki & Anor v Namoa & Anor* [1990] Tonga L. R. 61,63). Having reached this conclusion, the next matter for consideration is the effect, if any on the

First Plaintiff's position as a result of the failure to comply with the provisions of section 54.

[35] In the Court's view the precise terms of Section 54 must strictly be complied with. Defective compliance will not be effective against a person having a right to assert a claim to be the legal successor to the surrendered land. In this case, however, the court has determined that the First Plaintiff by surrendering his right to the land in 1995 surrendered his right subsequently to claim the land. Accordingly, the defects in the Section 54 procedure cannot avail him.

[36] The status of the First Defendant following the failure to comply with Section 54 must be considered. In the absence of evidence to show that following the surrender there was anyone other than the First Plaintiff (who could not claim) and Palu (who did not wish to claim) who could have claimed in preference to the First Defendant, the court's view is that the First Defendants claim to title is unassailable.

[37] The final question is whether the action is statute-barred. Under section 170 of the Act, proceedings must be commenced within 10 years of the accrual of the cause of action. There is no provision, similar to that in section 26 of the English Limitation Act 1939 that this period does not run in cases of fraud. In *Vaka'uta v Vaka'uta & Anr* (1974 – 1980) Tonga L.R. 28 it was held that a claim will become statute-barred at the end of the 10 year period even if the Plaintiff had been unaware that the cause of action had accrued.

[38] In the present case, the court has rejected the First Plaintiff's claim to have been defrauded of his inheritance. It has also doubted his claim not to have known about his father's intentions with regard to the land until June 2009. In the court's view the latest date on which the First Plaintiff's cause of action could be said to have arisen is 10 June, 1999, the date of Siaosi's letter Document P2. Although the First Plaintiff's action fails for the reasons set out above, for the sake of completeness the court finds that his action is also statute-barred, the writ not having been issued until 16 December, 2009.

Result:

Judgment for the Defendants; action dismissed.

CHIEF JUSTICE