IN THE LAND COURT OF TONGA

NUKU'ALOFA REGISTRY **LA 5 of 2009**

BETWEEN : **SAMIUELA SAMI MAFILE'O**
- ***Plaintiff***

AND : **'IKANI AND MELENAITE MUHUPEATAU**
- ***First Defendants***

AND : **LOSA SAUESI**
- ***Second Defendants***

AND : **TEVITA TONGA FAKATELI**
- ***Third Defendants***

Mrs F.L. Vaihu for the Plaintiff

Mr M. Kaufusi for the Defendants

J U D G M E N T

A. Introduction

[1] The writ was issued in April 2009. The Plaintiff sought vacant possession of a town allotment known as Hala-Ki-Langi which was registered in his name on 20 September 2006 – Deed of Grant No.374 Folio 57 – R.P. 1491 Lot 4. (the land)

[2] The Plaintiff's case was that prior to September 2006 the land had been registered in the name of Siaosi Vuki Mafile'o (Siaosi) his uncle, who had held the land since 16 January 1987. According to the Plaintiff, Siaosi had allowed a relative of his Sione Sauesi (Sione) temporarily to occupy the land. Since Sione's death in 2004 the land has been occupied not only by Sione's widow, the Second Defendant, but also by his brother Hateni (who has also since died) a nephew Tevita, the Third Defendant, and by Hateni's daughter and son in law, the First Defendants. The Plaintiff says that the Defendants have no right to continue their occupation of the land.

[3] The Defendants' case is that it was not Siaosi who allowed Sione onto the land but Siaosi's uncle Samiu Tonga (Samiu) who was the registered owner of the land at all material times prior to 15 January 1987. As pleaded in the Statement of Defence, paragraphs 15 & 16.

> "… Hateni … and Sione… asked their uncle Samiu Tonga in 1967 for a piece of land on his tax allotment for them to develop, live and and own as they are from the island of Kotu in Ha'apai and had nowhere to live in Tonga."
>
> "… Samiu … pointed out and marked the area which is now the town allotment in question and gave it to Sione … and … Hateni to develop, live on and own and in consideration they gave Tongan mats, tapa cloths and artifacts valued at $300 at the time and money from time to time to help him out".

[4] Put briefly, the Plaintiff's submission is that he is the registered owner of the land and is therefore entitled to all the benefits that thereby accrue, including vacant possession. Unless the Defendants are able to show that in registering the Plaintiff the Minister acted on wrong principles, the registration must stand (see *Havea v Tu'i'afitu, Kava and Minister of Lands* [1974-1980] Tonga L.R. 55).

B. <u>The evidence for the Plaintiff</u>

[5] Mrs Vaihu called four witnesses. The first was the Plaintiff who told the Court that the land was registered in his name in 2006. A copy of the deed of grant was produced as Exhibit P1. The Plaintiff explained that the land had previously been registered in the name of his uncle Siaosi in January 1987 (Exhibit P3). In 1986 Siaosi wrote to the Minister of Lands from Hawaii, when he was living, vesting control of the land in his elder brother Pakola (Exhibit P2). In October 2004 Siaosi again wrote to the Minister (Exhibit P4) applying to surrender the land (in accordance with the provisions of Section 54 of the Land Act), with a view to its regrant to the Plaintiff (Pakola's son) in accordance with the provisions of Sections 87 and 88 of the Act. On 15 February 2005 a Section 54 (2) surrender notice was published in the Tonga Chronicle (Exhibit P6) requiring any person claiming to be

the legal successor to lodge his claim to the surrendered land. It is not in dispute that no claim to the land was made other than by the Plaintiff and, after its reversion to the Crown, by operation of Section 53(3), it was allocated to the Plaintiff the following September.

[6] The Plaintiff told the court that he and Siaosi went to the land in October 2004, shortly before the letter of surrender was delivered to the Ministry of Lands. They spoke to Sione and his wife Losa (the Second Defendant). According to the Plaintiff, Siaosi advised Sione that he was intending to give the land to the Plaintiff. The Plaintiff told me that Sione had agreed with pleasure to this proposal. He explained that he had been married twice but still had no children : "the children for whom we were given the land have all grown up".

[7] The Plaintiff told the court that after he received the Deed of Grant in 2006 he again visited the land. By then Sione had died and the property was being occupied by Sione's brother Hateni and his family. Shortly after, one of Hateni's sons, Sikulu, approached him and asked for the land. After it became clear that Hateni and his family were not prepared to move off the land the Plaintiff went to see his lawyer.

[8] Cross-examined by Mr Kaufusi, the Plaintiff agreed that there were substantial buildings on the land, that the land appeared to have been filled in above the water table and that a number of fruit bearing trees had apparently been planted (see Defendants' photographs 1 – 5). He did not dispute that Samiu had originally held the land as part of his allotment.

[9] The next witness, Latu Koloamatangi (Latu), told me that she remembered that the land was part of her grandfather's tax allotment. Her uncle Samiu inherited it from his father. At some point the land was subdivided and Siaosi was given the land in question. It was then registered in his name. According to this witness she was present in about 1972 when Sione came to see Siosi's mother 'Aioema to ask permission to bring his adopted children and wife to live on the land. 'Aioema told them that they could come and live there for a while to allow the children to go to school on Tongatapu. Sometime later Sione came to see her mother Sita and again asked about the land. He asked to be

given it, as he had heard that Siaosi had gone away and would not be returning. According to this witness, Sione was sent away after he had been told that the land of 'Aioema's children would never be given up.

[10] In cross-examination this witness maintained that the land had not been improved in the 1960's and nobody was living there at that time. Although the land was eventually used for relatives to stay on it was "clearly Siaosi's land before he registered it in 1987".

[11] The next witness was Sione Fifalati Latu (Latu) who told the court that he was a grass cutter who has lived next to the land since the 1970's. He remembered that Sione's family lived on the land which was part of Samiu's tax allotment. Sione and Hateni had both lived there but had now died. The third defendant, Tevita Tonga, also lived there with some other unknown persons, including school children. He agreed that the land had been swampy and had been improved by Sione and his family who had also built the house which is now standing there.

[12] The last witness for the Plaintiff was Penitani Ulakai (Penitani) who told the court that he accompanied Siaosi and the Plaintiff when they visited the land in 2004. He overheard part of a conversation between Siaosi and Sione in which Siaosi told Sione that he intended to give the land to the Plaintiff. According to this witness Sione agreed to leave but asked for time to remove his belongings. In cross-examination he agreed that he did not hear Sione say that he was happy about it as although he had been twice married, he had no son.

C. <u>The evidence for the Defendants</u>

[13] Mr Kaufusi explained that the original Defendant had been Hateni but that he died after the proceedings were commenced in 2009. The First and Second Defendants, husband and wife, are Hateni's son-in-law and daughter. The Second Defendant is Sione's widow (and second wife). The Third Defendant, as already noted, is Hateni's son.

[14] Put briefly, the Defendant's case is that Sione and his family were given permission to move onto the land by the then

registered owner Samiu. With his consent they had improved the land and erected buildings, including a substantial house, upon it. It was submitted jointly and alternatively that the Plaintiff was estopped from asserting his claim to the land and that the Minister erred in registering the land in the Plaintiff's name because it was not "available" for grant within the meaning of Sections 43 and 88 of the Act (and see e.g. *Vai v 'Uliafu & Anor.* [1989] Tonga L.R. 56).

[15] The first defence witness was Tevita Tonga Fakateli (Tevita) the third defendant. Tevita told me that he was born in 1964 and first came to the land in about 1975, at the beginning of his studies. In common with his other close relatives he came from Ha'apai. "A few of my brothers came before, I am one of three groups that came". "The previous groups who came were my brothers and my aunty's children". This witness told the court that when he came to the land the house on posts had gone. There was a concrete slab which was still wet. He also said, however, that the present house on the land was not built until 1983 to 1984.

[16] Tevita told the court that Samiu was in the habit of visiting the land. He came to share food and for financial reasons: "if we did not have money he would ask for tongan artifacts like tapa cloth. He wanted to sell them for money, for alcohol." Asked in cross-examination about the arrangement under which the family came to live on the land, Tevita said that Sione and Hateni went to Samiu and asked his permission to "come and stay on the land." He conceded that he was not present when the arrangement was made in about 1967. He was only three years old then and had been told about it later. Although clearly hearsay, this evidence was admitted under the Land Court's recognized exception to the hearsay rule (see *Tafa v Viau* [2006] Tonga L.R. 125).

[17] According to Tevita, the first time that he became aware that there was a problem about the land was in 2009 when the Plaintiff came and told them to leave. He did not know that the land had been registered in the Plaintiff's name until 2010. He was not aware of any discussions with Samiu about registering the land in Sione's or Hateni's name. Samiu was often drunk. He conceded that neither Sione nor Hateni had ever sought to have the land registered in their names. None of the Defendants had tried to register the land either : "we were still waiting for the

court case."

[18] The second defence witness was 'Aunofo Fakateli ('Aunofo) who gave evidence along the lines of an affidavit sworn by him in October 2010 and which was admitted by consent. Much time and effort can be saved by adopting this practice as a means of giving evidence in chief.

[19] 'Aunofo told the court that he is 77 years of age. Sione and Hateni were his brothers. "We came from Kotu Ha'apai then Sione made an arrangement with Samiu to give us a piece of land for the children and family from Kotu to come and live on for their study here in Tonga". "This piece of land was allocated and gave it to the family". Later he said "the allegation of the Plaintiff is not true for it is the allotment of Samiu and he came to Hateni and Sione to eat, and he was given money for giving them this allotment. This family cannot build if they live temporary".

[20] In response to further questions 'Aunofo said that the land had been given to them in 1967. The understanding was for Sione to own the land, however no "paper arrangement" was entered into. He admitted knowing that a tax allotment should be registered but explained that steps were not taken to register it because "Samiu told us that we could stay there".

[21] Questioned by the court, 'Aunofo said that Samiu used to visit the land asking for money or artifacts. Sometimes, he would not come for a month. He was coming to the land regularly right up to the time of his death in April 1984. He used to ask for money for drinks.

[22] The third defence witness (Manase Tu'itavuki – Manase) (who also swore an affidavit in October 2010) told the court that he understood that the land was given by Samiu to "Sione and his brother Hateni for they are coming from Ha'apai together with children to study here in Tonga". He also told the court that he had helped to build the house on the land.

[23] Defence witnesses 5 and 7 did not add to the defence case. Defence witness 6, Losaline Sauesi, the Second Defendant, told the court that she was Sione Sauesi's widow; she had married him in 1996. She still lived on the land.

D. Submissions

[24] After the close of the defence case both counsel asked for time to file written submissions. On 10 June 2011 Mr Kaufusi filed his submissions. He submitted that it was clear that the Defendants had occupied and built on the land since 1967 with the permission of Samiu. In these circumstances the land was not available for registration in the Plaintiff's name. Mr Kaufusi relied on *Ongolea v Finau* [2003] Tonga L.R. 147 for the proposition that "with the exception of a person in occupation as a squatter, the land [is] not available for allotment if it [is] occupied". He also relied on *Tafa v Viau & Ors* [2000] Tonga L.R. 125 and 287 for the proposition that before registering the land, the Minister is required to take steps "which must be reasonable in the particular circumstances, to ascertain claims that might be an impediment to a grant or make it unavailable". Mr Kaufusi suggested that it was clear that the Minister had either made insufficient enquiries to ascertain the true position or had made a mistake in allowing the land to be registered in the Plaintiff's name. Therefore (relying on *Havea* – supra) the Defendants were entitled to have the registration cancelled.

[25] Mrs Vaihu also filed a helpful submission. She pointed out that the Defendants had made no attempt to register the land and that they had not responded to the Section 54 notice. She suggested that there was nothing to show any intention by Samiu to do any more than allow Sione and his family to occupy the land to enable the children to attend school. There was nothing to suggest that the present occupants of the land (with the exception of the Second Defendant) had ever been given permission to occupy it and they were therefore squatters; accordingly, the land was indeed available and therefore properly registered. So far as the Second Defendant was concerned, it was conceded that she had acquired the right, as Sione's widow, to stay on the land for the rest of her life.

E. The principal facts

[26] As conceded by Mrs Vaihu in her closing submissions, there is no reason to doubt that Sione came onto the land with the permission of the then registered holder, Samiu. I accept 'Aunofo's evidence that this was in about 1967. I also accept the

evidence that at that time the land was swampy and liable to flood, that over the next several years the land was improved by being filled in, that fruit bearing trees were planted and that several houses were built on the land, including those that are still standing. It is obvious that these works all required expenditure by those occupying the land.

[27] Having heard and seen him, however, I also accept the evidence of the Plaintiff that at about the time of Sione's death he was approached by one of Hateni's sons Sikulu and was asked for the land. I also accept PW2 Latu's evidence that she was present, in about 1972, when Sione came to see Aioema, Siaosi's mother, and was told that he could occupy the land together with his adopted children. I accept Latu's evidence that in about 2000 Sione again came, this time to her mother Sita, and asked to be given the land, but was refused.

[28] As has been noted in paragraphs [6] and [12] the Plaintiff and Penitani told me that they spoke to Sione at the land shortly before it was surrendered by Siaosi. I accept this evidence to be true.

F. The principal legal issues

[29] In my opinion, this case raises three main legal questions:

(a) How far is the Plaintiff estopped from asserting his right to the occupation of the land by reason of assurances given by Samiu to Sione or to be inferred from Samiu's conduct towards Sione?
(b) Was the land "available" to be registered in the Plaintiff's name in 2006?
(c) Is there any ground for ordering the cancellation of the registration of the land in 2006?

[30] In *Fakatava v Koloamatangi & Anor* [1974-1980] 15 the Supreme Court, in a very short judgment, stated that "the law of estoppels" may prevent undeserved loss. In the following years two distinct forms of estoppel have been recognized. The first is a statutory estoppel which is to be found at Part VII of the Evidence Act (Cap 15). This provision has been relied on both by the Land Court (see e.g. *Vai v 'Uliafu* – supra) and by the Privy Council (see

Matavalea v Uata [1989] Tonga L.R. 100). The Courts have also recognised and relied on equitable or promissory estoppel (see e.g. *O.G. Sanft & Sons v Tonga Tourist and Development Co. Ltd* [1981-1988] Tonga L.R. 26 and *Veikune v To'a* [1981-1988] Tonga L.R. 138). As explained in these judgments, while an estoppel may prevent an allotment holder from taking possession of the land, the estoppel does not itself create any form of title; only an equity and a licence are conferred, (see also *Matavalea v Uata* [1989] Tonga L.R. 101).

[31] In view of the consequences that flow from the recognition of an estoppel it is obviously crucial that the representations which are said to have led to the creation of the estoppel should precisely be defined. A party should not be estopped on an ambiguity (*Legione v Hately* (1983) 152 CLR 406).

[32] The witnesses for the Defendants, not surprisingly, gave varying accounts of what it was precisely that was asked of Samiu by Sione and what it was that was granted. As pleaded, the Defendants claim that Samiu gave the land to Sione (and Hateni) "to develop, live on and own" whereas some of the witnesses seemed to suggest that the land was merely lent for the use of Sione and the children who were coming to Tongatapu from Ha'apai to pursue their studies.

[33] With the passage of time and the death of the principals it is my view that the exact nature of the arrangement between Samiu and Sione is impossible to determine. The facts, however, as accepted in paragraph [26] above taken together with the limitations imposed by the Land Act do, in my opinion, define the limits of the estoppel.

[34] It will be remembered that under the Land Act an allotment can only be acquired under the provisions of Part IV Division I. Land cannot be granted verbally and an attempt to sell it is illegal (Section 13). Secondly, the Land Act, in Division VII of Part IV lays down exactly how allotments are to devolve on the death of the registered holder. No agreement could be made by Samiu which would avoid these provisions. As it happened, the land devolved on Siaosi in 1987, following Samiu's death in 1984. I was not told anything about the way this came about and in the absence of any challenge to that devolution by operation of the

Act, assume the transaction to be beyond challenge. The point, however, of these considerations is this: the principles of equity can only be applied where they are not I conflict with the Act. Even supposing there was evidence (which there is not) that Samiu had undertaken to surrender the allotment with a view to its regrant to Sione under the practice referred to in *Tafa-v-Viau&Ors* (supra at page 137 paras 42 and 43) there was no way in which Samiu could prevent a challenge to a grant of the allotment to Sione by Samiu's statutory heir as defined in Section 82 of the Act.

[35] In my opinion the Defendants' claim that Sione acquired a legal, as opposed to an equitable, interest in this land is unsustainable. How far an equity has survived his death, and how best it can be satisfied are questions to which it will be necessary to return.

[36] The Defendants' alternative submission is that the land was not 'available' to be registered in the Plaintiff's name because there was a house built on the land. Support for this argument comes from *Vai* (supra p.63) in which the Court found:

> "as a fact that the land was not available … because a house had been built on the land."

Later (on page 64 – 410) the court said:

> "while it may be one thing to consider as "available" land which a person is occupying as a squatter without any form of leave, it would not be right to include in "available" land plots occupied by people with the leave of the estate owner or his agents".

[37] Since it is plain that a squatter may well be living in a solidly constructed house on the land, the mere fact that there is a house on the land cannot, of itself, lead to the conclusion that the land is therefore "unavailable". The existence of a house may suggest an equity but in my opinion it cannot on its own affect the statutory rules for the devolution of allotments. It is also worth bearing in mind that buildings in Tonga are not generally regarded as forming part of the realty, but are regarded as items of personal property (see *Kolo v Bank of Tonga* [1997] Tonga L.R. 181.)

[38] When there is a house found to have been erected on the land, it will be necessary to enquire into the way the house came to be there. It will also be necessary to establish whether the house can reasonably conveniently be removed or whether compensation will have to be paid in lieu of removal.

[39] In my opinion the Defendants' contention that the land was not available for registration in the Plaintiff's name simply by virtue of the fact that a house has been erected thereon is unsustainable. With respect to my learned predecessor, I am of the opinion that his reading of *Vai* referred to in *Ongolea* (supra) at page 151 line 220, is incorrect.

[40] The third fundamental question is whether there is any ground for ordering the cancellation of the registration of the land in 2006.

[41] It is unfortunate that the Defendants did not join the Minister of Lands in these proceedings. The result is that nothing is known about the enquiries which may or may not have been made prior to the decision to register the land in the Plaintiff's name. The only alleged error which the Defendants are able to point to is the registration of the land, when it was "unavailable" because a house was erected upon it and was being lived on by the owners of the house. For the reasons I have given however, I do not find that these facts on their own must inevitably result in a finding that the land is unavailable. An example may illustrate the point.

[42] A kind-hearted landowner is approached by a friend whose own property has, for some temporary reason, become uninhabitable. The friend requests permission to build a house for his family on the landowner's land and promises that as soon as his land again becomes available for habitation he will take down the house and move back home. The landowner grants his friend a licence on those terms. The landowner dies and the licencee renegues on his promise. This is just one scenario in which it is obvious that a detailed enquiry would have to be held before a decision is taken to prevent the heir moving onto the land. If properly carried out, the result would be the removal of the licencee, not the exclusion of the heir.

[43] In the absence of anything suggesting that reasonable enquiries were not made by the Minister in this case, I decline to apply *Tafa v Viau* [2006] Tonga L.R. 287 and do not quash the registration.

[44] Having reached the conclusions that the Defendants have not shown that Sione acquired any rights under the Act and that the Minister has not been shown to have acted mistakenly in registering the land in the Plaintiff's name, the remaining question is the extent of the equity that must be satisfied.

[45] I think it probable that Sione and his family thought, erroneously, that they would be able to stay on the land as long as they wanted. This conviction grew as the years went by and their right to continue in occupation was not challenged. After living on the land from about 1967 to 1984 they decided to build the house which is obviously not a temporary structure. As 'Aunofo said "this family cannot build if they live temporary".

[46] In my view, the original purpose to which the land was dedicated was to allow the children to come from Ha'apai to be educated. Until his death Samiu used to come to the land and receive cash and kind; this suggests that he did not think that he had parted with possession of the land. After Samiu's death, with his heir Siaosi absent overseas, Sione and his family began to regard the land as their own. There was nothing, apart from the law, of which they were quite likely ignorant, to discourage their opinion. I accept that it was a shock when, in 2004, Siaosi suddenly arrived and laid claim to the land.

[47] In my view, Sione and Hateni acquired the right to live on the land as long as they and their wives survived and until the youngest of their children came of age. I believe that the improvement of the land was for their own benefit as well as the benefit of the reversioner. I find that the house was built in the mistaken impression that they would always be allowed to stay. While a better house was obviously for their own benefit I believe that it would be unjust for its value to be lost.

[48] The result is that the court declares that the Second Defendant and any children of Sione and Hateni who have not yet come of age are allowed to remain on the land. When the Second

Defendant passes away and the youngest child comes of age (whichever is later) the land will revert to the Plaintiff's possession. The house and other buildings can be removed by Sione and Hateni's family or alternatively they should be compensated for by the Plaintiff for their value. The precise manner in which this operation is to be carried out may need to be supervised by the court and therefore there will be liberty to apply for further directions.

[49] I acknowledge the invaluable contribution made by Mr Assessor Blake to these proceedings.

M.D. Scott

NUKU'ALOFA: 15 July 2011. **PRESIDENT**