

**IN THE SUPREME COURT OF TONGA
APPELLATE JURISDICTION
NUKU'ALOFA REGISTRY**

Solicitor General.

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12/08/15

Forward HAH

AM 7 OF 2015

B/08/15

BETWEEN : 'ETUATE SUNGALU LAVULAVU

- Appellant

AND : VILIAMI UASIKE LATU

- Respondent

**Appearances: Mr. 'E. S. Lavulavu in person
Mr. W. C. Edwards SC for the respondent**

Hearing : 28 July 2015

Decision : 4 August 2015

RULING

The appeal

[1] The appellant, Mr. Lavulavu, and the respondent, Mr. Latu, were political rivals in the 2014 elections for the Legislative Assembly. On 19 December 2014, the Tonga Weekly newspaper published details of a complaint made by Mr.

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Lavulavu alleging that Mr. Latu had committed various acts of dishonesty, forgery and abuse of power whilst he was a Minister of the Crown (the statements). Mr. Latu filed a claim in the Magistrate's Court at Nuku'alofa against Mr. Lavulavu, the newspaper and the Editor of the newspaper, seeking damages for defamation. The matter presently before this Court is an appeal by Mr. Lavulavu from a decision of Magistrate Ma'u refusing an application by Mr. Lavulavu that the action be tried at Vava'u rather than at Nuku'alofa.

[2] In the notice of appeal Mr. Lavulavu pleads that the decision of the Learned Magistrate was wrong in fact and law because:

[2.1] He failed to consider that the statements related to matters that occurred at Vava'u.

[2.2] He failed to consider that both Mr. Lavulavu and Mr. Latu are registered voters at Vava'u.

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[3] The notice of appeal was prepared and filed by Mr. Lavulavu's lawyer, but at the hearing of this appeal Mr. Lavulavu represented himself. He presented full and eloquent submissions which ranged well beyond the grounds set out in the notice of appeal. He effectively sought to have his application heard afresh for the third time. Despite this, I will deal with all of the matters he advanced in this ruling.

[4] Mr. Lavulavu also advised me that he intends to defend the claim on the basis that he did not publish the statements but that, in any event, the statements are true.

The facts

[5] The claim was filed in the Magistrate's Court on 18 January 2015 and set down for hearing on 9 February 2015. The summons was served on Mr. Lavulavu on 6 February 2015. A certificate of service of Maile Penisoni, a Police Officer,

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has been filed with the Magistrate's Court. Mr. Lavulavu did not appear at the Magistrate's Court on 9 February 2015. The case was adjourned to 27 February 2015. On 24 February 2015 Mr. Lavulavu filed a statement of defence as well as interlocutory applications for discovery and objecting to Magistrate Kaufusi hearing the action. When those applications were called for hearing on 25 February 2015, Mr. Lavulavu's Counsel applied orally to have the trial held at Vava'u. Magistrate Kaufusi dismissed that application. There was no appeal from that decision. When the case came back before the Magistrate's Court on 26 March 2015 Mr. Lavulavu's Counsel again made an oral application for the trial to be held at Vava'u. On this occasion the application was dealt with by Magistrate Ma'u. He also dismissed the application. It is from that decision that this appeal is filed. The trial of the action has been adjourned pending the hearing of this appeal.

The grounds for obtaining a transfer of venue

- [6] A Magistrate has the power to order that a civil action be tried at any Court where sittings of the Court are authorised. (Order 25 Rule 1 Supreme Court Rules applied by Rule 3(2) Magistrates Court (Civil) Rules 2008). One circumstance where the Court might order the trial of a civil action in a place other than where the action was commenced is where that would be more convenient to the parties. Although not reflected in his notice of appeal, this is the main ground Mr. Lavulavu relied upon in his oral submissions to me.
- [7] Any party making such an application bears an onus to establish that another place is more convenient. The assessment that is required is of the physical, financial and other matters affecting convenience. To discharge this onus, the applicant will need to put before the Court some evidence of the matters that have a bearing on the issue. Such evidence will usually be put before the Court in the

form of an affidavit of the applicant setting out the matters he/she relies upon. It will not suffice for an applicant to assert that it would be more convenient that a case be heard in another place without supporting evidence.

Discussion of the appeal

[8] Despite all of Mr. Lavulavu's able submissions I am satisfied that Magistrate Ma'u was correct to dismiss his application. My reasons are as follows.

[9] Mr. Lavulavu's application had already been heard and dismissed by Magistrate Kaufusi. A party will not generally be entitled to re-argue an interlocutory application unless there has been some material change in circumstances since the original application was heard or there has been the discovery of new material which could not reasonably have been put before the Court on the hearing of the original application. *Kingdom of Tonga v Palu*, 25 February

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2009, AC 10 of 2008. No new information was put before Magistrate Ma'u which would have justified him taking a different view of the application than had been taken by Magistrate Kaufusi. It is clear that Magistrate Ma'u was satisfied that Magistrate Kaufusi's decision was correct on the merits in any event.

- [10] As I noted earlier, the notice of appeal raises just two matters. It is alleged that Magistrate Ma'u failed to consider that the statements relate to events that occurred at Vava'u and that Mr. Lavulavu and Mr. Latu are both registered voters in Vava'u. I was not referred to any legislative provision or rule that supported an argument that the action should not have been filed in the Nuku'alofa registry of the Court. Magistrate Ma'u considered, correctly in my view, that Mr. Latu was entitled to file his claim in Nuku'alofa. He noted that "This is where the papers were circulated....It all took place here in Tongatapu..". He might well have added that all the parties were at Tongatapu, other than Mr. Lavulavu.

[11] Furthermore, these matters have no bearing whatsoever on the question of whether the trial could be more conveniently heard in Vava'u. In this regard, there was no evidence upon which Magistrate Ma'u could have exercised his discretion in favour of Mr. Lavulavu and transferred the case to Vava'u. Mr. Lavulavu put no evidence before either Magistrate that the case could be more conveniently heard in Vava'u. The applications to both Magistrates' Kaufusi and Ma'u were made orally with no supporting evidence. The same can be said of this appeal.

Mr. Lavulavu's presentation

[12] Before me, Mr. Lavulavu raised a number of matters in his oral presentation. At the risk of repeating some of what has already been covered, I will deal with each of them in turn. Broadly speaking his submissions were directed to the following:

[12.1] That he had not been served.

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[12.2] That the case had been commenced irregularly and should have been filed in Vava'u.

[12.3] That the case could be more conveniently heard at Vava'u.

[12.4] That there were public interest considerations which required that the case be heard at Vava'u.

Service

[13] Mr. Lavulavu said he was not served with the summons and he was not aware of the hearings before Magistrates Kaufusi and Ma'u. He said he wanted to see evidence that he had personally received and signed for the proceedings. He also alleged that the proceedings were conducted in secrecy. I do not accept these submissions. As I noted earlier, a certificate of service has been filed. Any irregularity in service (and none was shown) would have been remedied by the fact that Mr. Lavulavu filed a statement of defence and he has been represented by

Counsel in the Magistrate's Court throughout. He has also made interlocutory applications to the Magistrate's Court. The proceeding has quite demonstrably been conducted openly.

Commencement of the proceeding

[14] Mr. Lavulavu then argued that the case should have been filed in Vava'u because he is resident in Vava'u, he only comes to Tongatapu to perform his duties as a Member of the Legislative Assembly and the statements relate to matters that occurred in Vava'u. I have dealt with this earlier. Mr. Latu was entitled to file his claim in Tongatapu. The newspaper was published here. The plaintiff now lives in Tongatapu and the two other defendants are also at Tongatapu.

Convenience

[15] Mr. Lavulavu submitted that the case can more conveniently be heard at Vava'u because:

[15.1] All his witnesses are at Vava'u and he will have to pay the cost of having his witnesses travel to Tongatapu.

[15.2] The Court will need to undertake site visits at Vava'u.

[15.3] The Court will want to undertake its own investigations and interview people at Vava'u.

[16] None of these matters satisfy me that the case can more conveniently be heard at Vava'u for the following reasons:

[16.1] There is no evidence of what witnesses Mr. Lavulavu will be calling, why they will be called, what they will say, where they live and what costs might be incurred should they be required to travel to give their evidence.

- [16.2] I cannot see why the Court would want, or need, to conduct any site visits when the allegations made against Mr. Latu are of theft, forgery and abuse of duty. These are allegations most likely to be proved or disproved by an analysis of financial or accounting records.
- [16.3] The Court will not undertake its own investigations. The process of the Court is adversarial not inquisitorial. It is for the parties to put their evidence before the Court and the Court to make a decision based strictly on the evidence that is put before it.
- [16.4] Mr. Lavulavu has failed to consider the obvious convenience of having the case heard in Nuku'alofa when all the other parties are here. He has also not considered the significant costs that the other parties will incur if the case was transferred to Vava'u. Whilst, understandably, Mr. Lavulavu is concerned only for his own position, the Court must take a wider view and look at the position of all the parties.

Public interest

[17] Finally, Mr. Lavulavu argued that it is not possible for justice to be done in Tongatapu and that it is an abuse of the trust of the people to have such a matter determined anywhere other than Vava'u. Mr. Lavulavu was most critical of Mr. Latu for not now living in Vava'u and said he should face the people of Vava'u. I reject immediately the suggestion that justice will not be done in Tongatapu. There is nothing to support that submission. Furthermore, there is no public interest that requires this case to be heard at Vava'u. This is a private law claim for damages and nothing more than that.

RESULT

[18] The appeal is dismissed. The action is to now proceed to a hearing in the Magistrate's Court.

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[19] The respondent has given notice of his intention to recover his costs on this appeal. Mr. Lavulavu is entitled to make submissions on that. Mr. Lavulavu is to file any objection to the respondent's application for costs and his grounds of objection in writing within 21 days.

DATED: 4 August 2015.



A handwritten signature in black ink, appearing to read "O.G. Paulsen".

**O.G. Paulsen
LORD CHIEF JUSTICE**