Solicitor General

IN THE SUPREME COURT OF TONGA AM 15 of 2019
APPELLATE JURISDICTION
NUKU'ALOFA REGISTRY

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BETWEEN: TUPOU LE'OKAVA PAKOFE
- Appellant

AND : 'ANA TOLIA PAKOFE
- Respondent

BEFORE HON. JUSTICE NIU

Counsel : Mrs. L. Kuli for appellant.
Mr. S. Tu'utafaiva for respondent.

Hearing : 6 August 2019

Ruling : 21 August 2019

## RULING

### Background

[1] The appellant (husband) and the respondent (wife) were married in 1993, when they were both 26 years old. They have 5 children, the 3 older ones having married and left home. They have lived at Tokomololo in a house and town allotment of the respondent's brother for 18 years now. They have made



rec'd 26/08/19

additions and repairs to the house. The brother has died and his widow still holds the allotment.

[2] The appellant is the heir to the tax allotment of his father, who has died, but which is presently held by his widow (the appellant's mother). He also has his own town allotment. With the consent of the widow, the appellant has been able to "sell" 30 perches lots from the tax allotment for $25,000 per lot. He has sold some 10 or so lots so far.

[3] The couple have been farming for sale for their livehood and their children's. They have grown crops such as early season yams, main season yams, manioke, talo and pele. They also planted hiapo (mulberry). In 2018 they had borrowed some $13,000 to finance their farming. The income from the lu leaves and pele leaves alone were about $300 to 400 per week.

[4] In 2015, the respondent suffered a stroke and she was partially crippled and the older of the 2 youngest children, a daughter, had to give up school and stay home to look after her. She's still doing that up to now.

[5] On 4 December 2018, the appellant left the respondent and lived with another woman, and still lives with her up to now.

[6] On 2 May 2019, the respondent filed her claim against the appellant in the Magistrate's Court for:

(a) past maintenance in the sum of $8,000 for herself and the 2 children;

(b) future maintenance in the sum of $500 per week for herself and the 2 children; and

(c) a home for her and the 2 children to live in.

[7] On 17 May 2019, the Magistrate Court made an interim maintenance order that the appellant pay $50 and to give a basket of food crop to the respondent in each week.

[8] On 7 June 2019, the Magistrate Court, after hearing the evidence of the respondent and one witness and of the appellant, and the written submissions of both counsel, gave judgement and made orders to the following effect:

(a) The claim of the respondent for past maintenance is declined.

(b) The claim of the respondent for future maintenance is accepted in the sum of $200 per week and with effect from 17 May 2019.

(c) The appellant shall sell a lot from the tax allotment and use the money therefrom to build a house for the respondent to live in.

**The appeal**

[9] The appellant has now appealed to this Court against only the above order (b), namely, that the appellant pays maintenance of $200 per week commencing 17 May 2019.

[10] Mrs. Kuli submits for the appellant that the maintenance order made is unlawful and be set aside because:

(a) the maintenance ordered should be in accordance with the means of the appellant, and the evidence is that there is no income of the appellant because he does not farm and he does not work and he has no means to pay the maintenance ordered;

(b) no maintenance should be payable in respect of the older of the 2 children, 'Eseta, the daughter, because she is 18 years of age already and is not still studying and is quite able to work and earn for herself, and she is not of physical or mental incapacity (as is provided in the definition of "children of the family" in S.2 of the Divorce Act);

(c) the back-dating of the maintenance order by some 4 weeks is unlawful because the Magistrate had already made an temporary maintenance order on 6 May 2019 for $50 and a basket of food

crop per week. She says that the appellant only found out on 5 July 2019 that the maintenance was $200 per week instead and that it was back dated to 17 May 2019. She says that if the $200 per week maintenance is back dated to 17 May 2019, then the total maintenance for the period 17 May 2019 to 28 June 2019 would then be $250 per week which would make it $50 per week more than the $200 per week which was ordered on 7 June 2019.

**The response**

[11] Mr. Tu'utafaiva for the respondent submits that the maintenance order made by the Magistrate be upheld and that the appeal be dismissed because:

(a) the appellant has the physical ability, experience and knowledge to plant and grow crops commercially for sale. He has been doing that for the family for many years. Those are his attributes and are his means of income. If the daughter, 'Eseta, a female and weaker person than the appellant can go and plant and grow and sell crops, how much more can the appellant with his strength and experience and knowledge achieve;

(b) the daughter, 'Eseta, although already 18 years of age, and is not at school and is not incapacitated physically or mentally, she is a dependent nevertheless because she has to look after the respondent because of her physical disability. 'Eseta had to give up school and stay home and look after her. While she so stays at home she cannot work and earn for herself. She is therefore a dependent, due to and by reason of the physical disability of her mother. She is as entitled to her maintenance as a child who is pursuing studies or is herself handicapped.

(c) the back-dating of the order is quite in order because the first order was only an interim and temporary order. The appellant knew it was only temporary, and he ought to have asked his

counsel to explain what it meant. It meant that it could be increased or it could be reduced and the difference in what was actually paid and what should have been paid would then be made up by crediting or debiting it.

**The Law**

**re: the means of the appellant**

[12] The law which applies in respect of this issue is the Maintenance of Deserted Wives Act. It was enacted by the King and the Legislative Assembly of the Kingdom to apply in a case, such as the present case, where the husband has deserted the wife and the children of the marriage. Section 2 of that Act provides as follows:

> *"2 Jurisdiction*
>
> *It shall be lawful for any married woman who shall have been deserted by her husband, to summon her husband before a Magistrate's Court and thereupon the Court if satisfied that the husband has wilfully refused or neglected to maintain his wife or his wife and children and has deserted his wife may –*
>
> *(a) order the husband to pay a weekly sum to his wife or to supply his wife or his wife and children with food, clothing and other necessaries in accordance with his means: and may in addition or as an alternative to such order;*
>
> *(b) order the husband to provide accommodation for his wife or his wife and children in accordance with his means and may in addition or as a further alternative to such order;*
>
> *(c) order that either the wife or the husband shall have custody of the children; or*
>
> *(d) make any other order as in the circumstances of the case may seem just and proper:*
>
> *Provided that where the Court has made an order under this section, the Court may on the application of the married woman or of her husband and*

*upon cause being shown upon fresh evidence to the satisfaction of the Court, at any time discharge or vary the order or suspend any provision thereof temporarily and revive the operation of any provision so suspended. In exercising such powers, the Court shall have regard to all the circumstances of the case, including any increase or decrease in the means of either of the parties to the marriage.*

[13] The appellant husband gave evidence and argued in the Magistrate's Court that he had not deserted the respondent wife and that it was the wife who had chased him away and he had to leave. The Learned Magistrate did not believe that evidence. He accepted the respondent's evidence that the appellant did desert the respondent and accordingly applied the above quoted S.2 of the Act and ordered him to pay the weekly maintenance of $200 and to build a house for the wife and 2 children to live in. The appellant did not appeal against that finding that he had deserted the respondent, or against the order that he build her a house to live in with the children. He has only appealed that the sum of $200 per week that was ordered that he pay as maintenance to the respondent be reduced to only $50 plus a basket of food crops.

[14] The appellant bases that appeal on his submission that he cannot afford to pay the $200 per week because he has no work, he does not work and he has only planted a few crops for his subsistence and which have not matured as yet. He says that the Learned Magistrate was wrong to have held that he must have had money and could get money because he was able to travel overseas and comes with money, and he buys a $7,000 motor vehicle. He said that he was able to travel because he had to go because it was a funeral and that his sister had paid for his fare and he said that the money was given by his family overseas.

[15] He is however wrong about that. The error of the appellant's argument is that he bases it on his assertion that he does not work and has no work and therefore cannot afford to pay the $200 per week which the Learned Magistrate has ordered. Mr. Tu'utafaiva pointed out that error in his submissions. It is not whether or not the appellant has a job or an income from which he can pay the

$200 per week, but whether or not he has the ability to earn it and pay it. Mr. Tu'utafaiva pointed out that the 18 year old daughter, a female, is already able to plant and grow crops to sell, and how much more can the appellant plant and grow to sell with his bigger build, strength, experience and knowledge?

[16] And that is what S.2 of the Act requires as the test and standard by which the amount of maintenance can be measured: his means, his ability to earn the income to pay the maintenance which the Magistrate may consider reasonable to maintain his deserted wife. The Tongan version of the relevant words of S.2 expressly uses the word ability, "te ne lava". It provides as follows:

> *"(a) ke totongi fakauike 'a e husepaniti ki hono uaifi 'o hange ko ia te ne lava."*

If the Act had meant that the maintenance to be ordered has to be in accordance with the money he earns or his income, it would have said so but it does not. And the reason is because, if it had stated that it was to be in accordance with his income or the money he earns, a husband may simply stop working or resign from his job and he thereby does not have any income and he earns no money, and thereby lawfully avoid being ordered to pay any maintenance. In consequence, the wife and children would suffer. That is why the Legislature had deliberately used the terms "in accordance with his means", that is "in accordance with his capability" instead.

[17] That provision is based on the English common law liability of the husband to maintain his deserted wife and children. Halsbury's Laws of England, Third Edition, Vol. 12, p.483, para. 1081 is as follows:

> *"**1081. Evidence of means.** Before an order can be made, there must be evidence of the parties means or faculties to obtain means. The question what is reasonable maintenance for a wife and children must be considered with reference to the husband's common law liability to maintain them, and the word "reasonable" must be interpreted against the background of the standard of life which the husband has previously maintained, but not so as to deprive the wife of the benefit of any subsequent increase in the husband's means, and when the wife is not at fault there is no reason*

*why she should go back to earning her living in order to reduce her husband's liability to maintain her."*

[18] Before the appellant deserted the respondent, the family was earning about $300 to $400 per week from the sale of the taro leaves (lu) and pele leaves alone. Sale of food crops would be in addition to the sale of the lu and pele. That was the evidence of the respondent and it was not rebutted by the appellant. The appellant himself stated in his evidence that the manioke crops (that he had left with the respondent when he deserted her) was sold by the respondent for only some $13,000 when the true and correct value of it was some $40,000 instead. And that was only the manioke. The evidence was that they had farmed and grew crops on two tax allotments which they had rented from the holders for $1,000 per year, not counting the tax allotment to which the appellant is heir. The farming operation of the appellant was quite substantial and it was able to borrow $13,000 to pay for the costs thereof, as the respondent gave evidence about, and which she had to repay to enable the lender to give out the shares of the members by Christmas last year.

[19] I am therefore not persuaded that the appellant does not have the means to provide the maintenance ordered by the Magistrate.

**re: Child 'Eseta**

[20] The appellant has argued that only the child, Kitione, the youngest son, should be maintained and to exclude the daughter, 'Eseta, because she is already 18 years old and not disabled and is not at school or still studying. I am afraid that the appellant is again wrong about that. The child, 'Eseta, had to leave school and stay home and look after the respondent and she still does up to now. She cannot go to work because she has to stay and look after the respondent. She is therefore as dependent as the respondent herself. She is a dependent "on account of physical incapacity" of the respondent – such as is provided in paragraph (c) of the definition of "children of the family" in S.2 of the Divorce Act. Although the words may have been meant to mean physical incapacity of the child, I do not see any reason why they should not be applied in respect of a

child who has to look after a person with a physical or mental incapacity and thereby become a dependent him or herself.

**re: Back dating of order**

[21] The $50.00 and a basket of food crop per week was abysmally and grossly inadequate to maintain the respondent and the 2 dependent children. The appellant knew that it was so and yet took no steps to increase it to something reasonable like the respondent gave evidence about. He allowed the Magistrate to make that order and he was content to let the respondent and the children suffer.

[22] He also knew that the order was only an interim and temporary measure until the Court has heard and decided "his means". He had already known his means and that his means was such that he could pay up to $500 per week (and that is only $26,000 per year) and one manioke patch could earn up to $40,000 per year. Yet he let the respondent live in hardship with only $50 in cash. He expected others to provide the maintenance for the respondent in the meantime instead. The respondent is indebted to those others for their help.

[23] I consider that the Magistrate was justified to have ordered the back dating of the orders by some 4 weeks. It would not unjustly enrich the respondent because the amount involved would only be about $520, but at least the respondent may be able to show some appreciation to those others who have helped her with some of that money.

[24] The appellant is wrong about the $250 per week. The $200 per week ordered by the Magistrate is deemed by his order to start as from 17 May 2019 and that sum was the sum that should have been ordered and which should have been paid on 17 May 2019, and not the $50 and the basket of crops, and it is not to be in addition to that $50 and basket of food.

[25] I had put this to both counsel during the hearing and it was agreed the basket of food crop be valued at $20.00 so that a total sum of $70 be deducted from the $200 leaving only $130 per week to be paid in respect of the maintenance from

17 May 2019 up to the last payment of $50 was made, and then the whole $200 per week payment begins.

**Conclusion**

[20] I therefore find that the appellant has failed to show that the Learned Magistrate has erred in the conclusion he has reached or in the order which he has made and which is the subject of this appeal that the maintenance which he has ordered is not in accordance with his means. Accordingly I dismiss the appeal with costs to the respondent, to be taxed if not agreed.

**NUKU'ALOFA:** **21 August 2019**


L. M. Niu
**JUDGE**