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28/03/19

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IN THE SUPREME COURT OF TONGA  
APPEAL JURISDICTION  
NEIAFU REGISTRY

AM 21 of 2016

**BETWEEN:** SAM TAMALE

**Appellant**

**AND:** KAATI HALATOA

**Respondent**

**Counsel:** Mr S Taufateau for the Appellant  
Mr S Ika for the Respondent

**Date of Hearing:** 22 March 2019  
**Date of Ruling:** 26 March 2019

**RULING**

- [1] This is an appeal from a decision of the Principal Magistrate at Neiafu of 22 September 2016 in a dispute between the appellant and the respondent as to ownership of a bull.
- [2] The respondent brought the claim in the Magistrates' Court seeking an order that the appellant return to him a brown bull which had been removed by the appellant from land upon which the respondent kept his animals.
- [3] The Principal Magistrate held that the respondent was the owner of the bull and ordered that it be returned to him within one week.

ruled 27/03/19

### **The parties' positions**

- [4] The respondent's case was that he owned a brown bull that was born in August 2014. It was kept, together with other animals, at the tax allotment of Sione Fisi'ihoi. The bull had gone missing towards the end of 2015. In June 2016, the respondent's son reported to him that he had seen the bull roaming at the tax allotment of one Tu'i'afitu. This bull was retrieved and tied up at the tax allotment of Sione Fisi'ihoi. About two weeks later the bull was taken by the appellant. The respondent asked for the bull to be returned but the appellant said it was his bull and would not return it.
- [5] The appellant's case was that he had a brown bull that was four years old when it went missing in around May 2016. The bull was called Hercules and it was friendly and would come when called. The bull fled a couple of times and on the last occasion it went to the tax allotment of Sione Fisi'ihoi where there are other animals. He retrieved it and kept it on the tax allotment of Siope Lonitenisi. He did not return the bull to the respondent because he was certain it was his bull.

### **The evidence and the decision**

- [6] The respondent gave evidence of his ownership of the bull and called two witnesses in support of his position. Likewise, the appellant gave evidence that the bull was his and called two witnesses to support him. Importantly, the appellant produced three photographs of the bull (exhibits D1, D2 and D3).
- [7] In his decision, the Principal Magistrate refers to each witness who gave evidence but does not summarise or analyse the content of their evidence (except in one matter) or give reasons why he accepted or rejected the evidence of any witness and in what particular respects.
- [8] The exception was that the Principal Magistrate noted that the appellant's witnesses had said that the bull was called Hercules and would come when it was called and was the bull shown in the three photographs produced by the appellant.
- [9] The Principal Magistrate accepted that the bull in dispute was the same bull shown in exhibits D1, D2 and D3. He refers in paragraph 7 of his decision to the photographs and then, in the following paragraph, says that the Court visited the bull and that the respondent and his witnesses identified 'the bull to be their bull,

however the [*appellant*] and his witnesses also identified this bull and said it was theirs'. Later on he refers to the fact that he had sighted the bull 'as shown on exhibit D1' and that it fled.

[10] The Principal Magistrate gave reasons for finding that he was satisfied on the balance of probabilities that the bull was owned by the respondent. Those reasons can be summarised as follows:

- (a) The bull was tied up where the respondent kept his animals and the appellant had taken it. From the respondent's prior possession of the bull it could be inferred that he was the owner of it;
- (b) The appellant had taken ('kidnapped') the bull rather than bringing a legal claim for its recovery; and
- (c) The appellant and his witnesses said the bull was tame but at the site visit when the appellant called the bull it fled into the bushes 'confirming that it was not his bull'.

#### **The grounds of appeal**

[11] The appellant advances what are in effect three grounds of appeal, which I summarise as follows:

- (a) The Principal Magistrate was wrong to infer from the respondent's possession of the bull that he was the owner of it when the bull had been lost for many months and the respondent had believed it to have been destroyed;
- (b) The Principal Magistrate was wrong to put any weight on the fact that during the site visit the bull did not come when called; and
- (c) The bull could not be the respondent's bull because it was too mature to have been born in August 2014 and the Principal Magistrate did not have regard to the evidence of Lisiate Tokolahi, who had seen the bull in November 2014 and it was two years old at that time.

## Discussion

- [12] I have formed a clear view that the appeal must be allowed for the following reasons.
- [13] First, contrary to the Principal Magistrate's decision the respondent does not (according to his counsel) accept that the bull shown in the photographs was his bull.
- [14] There is a note of the Principal Magistrate that reads 'the plaintiff is arguing that it is a different [*bull*] on the exhibits submitted in the evidence'. A site visit was conducted to identify the bull. There is a record of the site visit that states that the bull was identified by the appellant and the respondent and the witnesses. In his ruling the Principal Magistrate finds that the bull in dispute is the same bull as shown in the photographs produced as exhibits by the appellant.
- [15] However in this Court, in response to Mr. Taufeateau's submission that the bull in the photographs could not be the respondent's bull, Mr. Ika argued that the bull identified during the site visit was a smaller bull. He contends that the Principal Magistrate found that the respondent was the owner of this smaller bull not the bull in the photographs.
- [16] Based on the transcript I am unable to accept Mr Ika's submission as to what the Principal Magistrate decided. In those circumstances it appears that the respondent does not accept the Principal Magistrate's decision and makes no claim to the bull that the Principal Magistrate ordered be returned to him.
- [17] Secondly, this is a single issue case where the Principal Magistrate was faced with three witnesses on each side. The Principal Magistrate was required to set out, even if only briefly, the evidence that the witnesses gave and provide his reasons for preferring the witnesses of one side over the other.
- [18] In his article '*Judgment Writing*' (1993) 67 ALJ 494, 497 Sir Harry Gibbs said:

It is of critical importance for the judge of first instance to make a clear finding on any disputed issue of fact...If a finding of fact depends on an issue of credibility the judge should resolve that issue and in fairness to the parties

should reveal why he prefers one witness to another... I believe that more injustices are created by erroneous findings of fact than by errors of law.

- [19] The reason the Principal Magistrate was required to summarise the witnesses' evidence and say who he believed and why is so that the parties and the public may have no doubt that he made an honest choice doing the best he could on the evidence. What is more, without reasons this Court's role on appeal is frustrated because I have no ability to assess the reasonableness of the result arrived at by the Principal Magistrate.
- [20] Thirdly, whilst I accept the Principal Magistrate was entitled to have regard to the fact that the bull was found in the respondent's possession and that it did not come to the appellant when called during the site visit, I do not accept that either matter should have been given much weight without some assessment of the other evidence.
- [21] There is force in Mr. Taufeateau's submission that the Principal Magistrate failed to take into account that the bull had been gone for months before the respondent retrieved it. The circumstances of the site visit, which I understand more than seven men attended, was hardly conducive to the bull answering to its name.
- [22] Furthermore, nothing should have been taken from the fact that the appellant chose to take the bull rather than issue proceedings for it. I do not condone his actions and in doing so he took a risk of being charged with theft. However, there is nothing to prevent a person in his position exercising a self-help remedy and reclaiming their property provided they do not commit an offence or otherwise breach the peace.
- [23] In addition to all of the above, the Principal Magistrate did not address the appellant's fundamental point that the bull was simply too mature to have been the respondent's bull.
- [24] This is not a case where I am able to conclude that the Principal Magistrate was clearly wrong in his conclusion that the bull belonged to the respondent. I cannot exclude the possibility that Mr. Ika's understanding of the Principal Magistrate's decision is correct and that the translation conveys an inaccurate understanding of what the Principal Magistrate actually decided. Regardless, I did not hear the

witnesses and have no way of assessing their respective credibility upon which the case falls to be determined. I find I have no alternative but to allow the appeal and refer the matter back to the Magistrates' Court for rehearing.

**Result**

- [25] The appeal is allowed. The decision of the Principal Magistrate is set aside and the case is referred back to the Magistrates' Court to be heard on the first available date before a different Magistrate.
- [26] Because the decision is largely based on the content of the Principal Magistrate's decision for which neither party is responsible I have decided that each party is to bear their own costs.

NUKU'ALOFA: 26 March 2019.



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

O.G. Paulsen

LORD CHIEF JUSTICE