

IN THE SUPREME COURT OF TONGA  
CIVIL JURISDICTION  
NUKU'ALOFA REGISTRY

*Solicitor General*

CV 51 of 2012

*10/05/16*

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**BETWEEN : BENJAMIN TAPEALAVA**  
- **First Plaintiff**  
**AND : EMMA JANE TAPEALAVA VEA**  
- **Second Plaintiff**  
**AND : LAKI NIU**  
- **First Defendant**  
**AND : MAKINETI JONES**  
- **Second Defendant**  
**AND : SAUNI TAI**  
- **Third Defendant**  
**AND : 'ALIPATE PASINA**  
- **Fourth Defendant**

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Counsel: Mrs. P. Tupou for plaintiffs**  
**Mr. L. Niu SC in person**  
**Mr. S. Tu'utafaiva for the second, third and fourth**  
**defendants**

**Date of Hearing: 11 April 2016.**

**Date of Ruling: 28 April 2016.**

*rec'd 09/05/16  
HIC*

**RULING**

**A family dispute**

- [1] Benjamin Tapealava (Benjamin) is the eldest son of Moi Tapealava (Moi) and his wife Siutoni (Siutoni) who have passed away. Emma Tapealava (Emma) is the natural child of Moi's younger brother, Malakai Tapealava. She was customarily adopted and raised by Moi and Siutoni.
- [2] Makineti Jones (Makineti) is the eldest sister of Moi and the aunt of Benjamin and Emma. Sauni Tai is a niece of Makineti and a cousin of Benjamin and Emma. Laki Niu SC is a prominent Tongan litigation lawyer who until recently has represented Makineti. 'Alipate Pasina is said to be the Manager of a security business called Homeland Security.
- [3] There is a dispute as to who is entitled to the land and buildings on a town allotment at Haveluloto. Emma has lived on the property with her family since around the time of the death of Siutoni in 2011. There is also a dental practice operating there which is owned by her brother, William Tapealava. On 24 July 2012 Makineti, Laki Niu, Sauni Tai and security guards came onto the property and entered the house. It is alleged this was an attempt by Makineti to take the property by force. As a result of the events of that day this action was commenced seeking damages against all defendants for

trespass, intimidation and, against Laki Niu, for battery. Makineti has filed a counterclaim seeking a declaration that the land and the house, as well as other structures on the land, belong to her and for an order for possession of the property.

**Paring the claims**

- [4] Mrs. Tupou advised that the claims in trespass, intimidation and battery were being pursued on behalf of Emma alone and that Benjamin remains a party only for the purpose of answering Makineti's counterclaim. The claims by Benjamin against all defendants are accordingly dismissed.
- [5] As far as Makineti's counterclaim is concerned, she no longer seeks an order for possession of the land but continues to pursue a declaration as to her ownership of the house and other structures on the land and possession of the house.
- [6] As regards the claims for trespass and intimidation made against 'Alipate Pasina, there was no evidence connecting Mr. Pasina to the events of 24 July 2012 or to the security guards who entered the property that day. No witness identified Mr. Pasina as having been present, nor was there evidence that he was the employer, manager or supervisor of the security guards who were present from which some liability might arise. Accordingly the claims against him are dismissed.

[7] What is left for the Court to resolve are the following:

[7.1] Emma's claim in trespass against Makineti, Sauni Tai and Laki Niu.

[7.2] Emma's claim in battery against Laki Niu.

[7.3] Emma's claim in intimidation against Makineti, Sauni Tai and Laki Niu.

[7.4] Makineti's counterclaim.

**The facts**

[8] This case concerns a town allotment consisting of 38.2 perches at Haveluloto. It is in the hereditage estate of Noble Fielakepa. To understand the events of 24 July 2012 it is necessary for me to set out some Tapealava family history.

[9] Makineti was born on 1 June 1931 and is now 85 years old. Her father was Siosaia Tapealava and her mother was Naule'o Tapealava. Siosaia and Naule'o had seven children. Tafokitau, a boy, was the eldest child. Makineti was the second child. The fourth child was Moi.

[10] Siosaia had his town allotment at Mo'unga'one and tax allotment at Ofolanga (both at Ha'apai) but in the 1940s Siosaia and Naule'o

moved to Tongatapu with their children and lived at Fua'amotu. In 1945 Siosaia died and Naule'o married Kasina Tava and moved from Fua'amotu to Kasina Tava's town allotment at Kolomotu'a.

- [11] In 1949 Makineti finished her secondary education at Queen Salote College and then held positions working for the Free Wesleyan Church and in the civil service. In around 1953 Makineti learned that Siosaia's town and tax allotments would be lost unless a claim was made for them. Tafokitau had taken the land of his grandfather, Nehasi Moi. Moi was 19 years old and Makineti says that she arranged for him to travel to Ha'apai to apply for their father's tax and town allotments which he did. She said that upon his return from Ha'apai he confirmed that he had been registered as the owner of both the tax and town allotments.
- [12] In 1955 Moi took up a job at the hospital in Tongatapu and in 1956 he went to Fiji to study dentistry. In the same year Makineti left Tonga to go to Canberra to study nursing. The evidence established that Makineti has lived constantly overseas (mainly in Australia) since 1956 apart from periods when she has visited Tonga.
- [13] Naule'o's second husband died in 1961 and in 1963 she was forced from the land at Kolomotu'a by his heir and told to remove her Tongan house from the land. Makineti was living in Australia at the time but was friendly with Kaifonua, the daughter of the Noble Fielakepa, and she said that she asked Kaifonua if there was any land her mother could live on. Kaifonua told her that there was land at

Haveluloto that had been given to her by her father where Makineti's mother could live. Naule'o moved onto that land with her Tongan house. Makineti did not speak to the Noble Fielakepa about this arrangement and the moving of the house was arranged and undertaken by Tafokitau.

- [14] Benjamin was born in July 1971 in Australia which was where Moi was studying dentistry at that time. I was not told when Emma was born or exactly when, as a young child, she went to live with Moi and Siutoni.
- [15] Makineti visited Tonga in 1972 and stayed with Tafokitau. She said that when she visited she found that Moi had removed the ends from Naule'o's Tongan house and had moved her elsewhere. She says that she then had a brick house built on the land and her mother moved into it before she returned to Papua New Guinea, which is where she was staying at the time because of her husband's work. I understand that the house Makineti built was a modest structure and is still on the land but is dilapidated. It also does not appear to have been constructed of brick although nothing turns on that. At some stage the Tongan house was removed from the land but it was not clear when.
- [16] Makineti returned to visit Tonga in 1976. Moi had qualified as a dentist. He had built a house on the land which had dental rooms and a bedroom where Naule'o was then living. Makineti said that on this visit she stayed for some of the time at the property and she

planted three Heilala trees there. Makineti also says that she told Moi off for building on the land without telling her and that he apologized for this. She also said that she told Moi that they would make the house he had built bigger so that it would accommodate the family when they were visiting Tonga.

- [17] In around 1978 a younger sister named Sauni added a living room to the house. Makineti says that she then added two bedrooms on the northern side of the living room, with a hallway between, and a dining room/kitchen. In fact what was added was a second smaller living room and a dining room/kitchen. The second living room was subsequently converted into two bedrooms and a hallway but not by Makineti. At the same time a front porch was added to the house by Moi. Makineti also said that at the time she had the land fenced with wooden posts and square wire mesh and she planted Tanetane trees, to keep out pigs and dogs, as well as flowers and other trees. It is not disputed that Makineti planted three Heilala trees on the property, of which just one remains. She removed two of them later. Of the other work she said she did there was no evidence that any of it still remains due to the extensive development of the property in later years. There was no evidence either that Sauni has ever claimed any interest in the land or the house as a result of her contribution. For her part Makineti accepted that the house and land as it is today is largely the result of the investment of Moi and his family, that she had never stopped them from investing in the property and that her personal contribution to the house was small.

- [18] It appears Moi and his family lived in Government Quarters for most of the period between 1977 and 1997 although there was some time around 1979 that Moi was in Australia.
- [19] Significantly, in 1978 Moi applied for the Haveluloto property to be registered as his town allotment. The application was successful and the land was registered in Moi's name in 1982. A deed of grant was issued to him on 22 December 1982 (Tohi 108 Folio 57). Makineti was unaware of this at the time.
- [20] In 1986 Makineti, who was still living overseas, was considering starting a coffee shop business and says that she wrote to Moi to tell him that she was coming to Tonga to set up a business on the property. She received a letter back from Siutoni telling her to go and set up her business at the Talamahu market. Makineti said that this upset her and that she telephoned Siutoni and told her that she would set up her business on the property if she wanted to and Moi should move his dental business. She says Siutoni apologized and she forgave her. However, Makineti did no more about setting up any business on the property. It appears that when she next came to Tonga she stayed with Tafokitau and ran a business on his land selling take away food. Benjamin said that he would go to help her with the business and that this was the longest period that Makineti spent in Tonga. It is not clear how long she was here on this visit but she said that it was for less than twelve months.



- [21] It is not clear when Naule'o died. Makineti gave various dates and appeared confused about when this occurred. Based on the evidence it appears to me that Naule'o died in August 1998. Makineti came to Tonga to care for Naule'o and was here when her mother died. She said that she remained in Tonga for a month and stayed at Haveluloto.
- [22] It is a convenient point to describe the development of the property and extensions to the house that took place after 1978. I am very grateful for the plans that are documents 28, 29 and 30 in the plaintiffs' bundle of documents. They show in a striking fashion the development undertaken by Moi and his family. It is not clear exactly when this work was done but I note from Moi's deed of grant that advances were made on mortgage after December 1982 and the mortgage was discharged in April 1999 shortly after Moi's death. That would suggest to me that the work was principally done during Moi's lifetime and that is consistent with Benjamin's evidence that his parents did the extensions to the house and the landscaping of the land. It may be that some work was done after Moi died also as Emma said in her evidence. Benjamin also confirmed, and I do not understand it to be disputed, that Makineti made no contribution to any work on the property after 1978.
- [23] Page 28 of the bundle shows the house as it is today following the extensions by Moi and Siutoni. The dental rooms, the larger of the two living rooms and the kitchen/dining room remain as they were in

1978 but in other respects the house is much changed. Naule'o's bedroom has had both a bathroom and shower room built in it. The smaller living room, contributed by Makineti, has been converted into two small bedrooms and a hallway that leads from the front door through to the kitchen. On the back of the house has been added a laundry, a store room, a bathroom, a shower room, a very large veranda and a large water tank. On the front of the house, facing the road, has been built a car port and the veranda has been enlarged considerably and extends along the full width of the house. An outdoor bathroom has also been built separate from the house. In addition to all that, the property has been substantially landscaped with ornamental fencing, a cement paving driveway and three garden areas.

- [24] Around 1998 Moi took ill and he moved with his family from the Government Quarters to the property. In January 1999 Moi died. He did not leave a will and no application was made for the grant of letters of administration. Makineti attended his funeral when, she said, she learned that Moi had registered the land in his name. She said that she immediately went to the Land Office to confirm that this was true. Her evidence was that Moi had registered the land in his own name when he knew that Fielakepa had given her the land and when he already had a town allotment in Ha'apai. She also said that Fielakepa had been succeeded by his son and was not aware of either the gift of the land to her or of the "presence on the allotment of my houses, trees, hedges and fences".

- [25] Makineti said that at this time she removed two of the three Heilala trees and had them planted elsewhere but that the one remaining tree was left there because Siutoni had said she should leave it to show that "the home is still your home". She says that at that time she told Siutoni that the family could continue to live on the land until they had built their homes on their other lands. The purpose of this evidence was, I understand, to demonstrate that Siutoni acknowledged Makineti's ownership of the property. If this was what occurred it seems strange that Makineti would remove her Heilala trees. For reasons I shall expand on later in this ruling I do not accept that Moi or Siutoni ever acknowledged Makineti's ownership of the property. I am also satisfied that Benjamin and Emma were never told that Makineti had any claim over the land or any inkling that she might do so until 2011 by which time Siutoni had died and Benjamin had made a claim for the land as Moi's heir.
- [26] After Moi's death Siutoni claimed the land as part of her widow's estate and on 28 April 2000 it was registered in her name. She continued to live on the property until her death in July 2011.
- [27] In 1999 Emma married Paelata Vea. After they were married Emma and her husband moved from the property and for most of the period thereafter until 2010 or 2011 they lived at Longolongo and had a family. I understand Benjamin lived at the property until he left for Australia in 2004. Benjamin has two younger brothers, William and Michael, but the evidence did not establish for what periods they

lived at the property after Moi's death. William now lives in Australia and Michael lives in New Zealand but when they moved to those countries is not clear. However William, who is a dentist, took over Moi's dentist practice and I understand it still operates to the present day even though William resides in Australia. Emma gave evidence that she has assisted with the running of the business in an administrative capacity.

- [28] In 2002 Makineti returned to Tonga and stayed at the property for two months where she was welcomed by Siutoni. Makineti said that she may have returned to Tonga in 2010 but it is not clear to me whether that was so or not.
- [29] In July 2011 Siutoni died. She did not leave a will and no application was made for letters of administration. Makineti did not attend Siutoni's funeral. Emma had returned to live on the property prior to her mother's death and she has continued to occupy the property with her husband and children since at least the middle of 2011.
- [30] In November 2011 Makineti came to Tonga again. She initially stayed with a friend for about four weeks and did not tell Emma that she was coming to Tonga or, at least initially, ask to stay with her. However after four weeks she did go to see Emma and asked Emma to stay on the property and was welcomed by Emma. It was on this visit that the relationship between the parties began to breakdown. Makineti told Emma that the property had been given to her by the Fielakepa and was still hers and that the dental practice should be

removed from the land. This came as a complete surprise. Benjamin considered the property was his as Moi's heir and Emma believed she was living on the property with Benjamin's permission. In addition, the dental practice was run from the property and appears to have been a family enterprise. Emma rang both Benjamin and William and they travelled to Tonga to speak with Makineti. According to Makineti, William said he would remove the dental business at some future time when he had built premises on his own town allotment but he has never done so. For his part, Benjamin did not accept Makineti's claim at all.

- [31] During this visit there was an incident where as a result of a heated argument between Makineti and Emma the Police were called to the property by Paelata Ve'a. Makineti said that she was elbowed by Emma and that when the Police were called she had out of fear locked herself in her room where due to the heat she could hardly breathe and that she only came out when her lawyer told her that the Police were no longer there. Emma was not cross-examined about the allegation that she had elbowed Makineti and I do not accept that this occurred. It appears to me that Makineti exaggerated the events of this visit. An example was in relation to Paelata Ve'a's gun. Makineti said that she had seen him cleaning his gun in the house. In her evidence in chief she said she was afraid and because of this she went to stay at a friend's house. In cross-examination she said that she was not afraid and simply went to her friend to visit.

- [32] On her 2011 visit Makineti was given a bedroom to stay in and was also given keys to the room and the house. When she left to return to her home in Australia Makineti locked her bedroom and left some belongings in the room and also took the keys with her. Emma said (and I accept) that she made it clear to Makineti that she would be opening the room so that it could be used by others but that she would look after Makineti's belongings until she returned for them. Makineti and Emma parted on bad terms. I am satisfied that Makineti understood when she left the property that Benjamin and Emma did not accept her claim to the land or the house and that Emma's intention was to remain living there.
- [33] As I noted above Benjamin applied for the land as his own town allotment. He already had a town allotment at Popua (and his brothers also have town allotments) but he intended to elect to take his father's land and surrender his town allotment in Popua. However, on 18 November 2011 the Minister of Lands cancelled Moi's registration on the grounds that the grant to Moi in 1982 was void because he had already been registered in 1953 as the holder of a town allotment at Ha'apai. Benjamin issued proceedings challenging the Minister's decision in the Land Court under LA 24 of 2011.
- [34] In July 2012 the family was planning to commemorate the anniversary of Siutoni's death. Benjamin was travelling to Tonga for that gathering. On 24 July 2012, before Benjamin had arrived in Tonga, Makineti arrived in Tonga and went straight to the property

unannounced. With her were Mr. Niu, Sauni Tai and a number of security guards. It was not clear how many security guards were present but it was at least three and as many as five. They all entered the property without permission. The only person home at the time was Paelata Ve'a who heard voices in the house and he immediately phoned Emma. When Emma arrived she says that she found (and I accept) that there were people in the bedroom used by her daughter. She said that Makineti made it clear that she had come to claim the property for herself. An argument followed. I do not propose to set out all of Emma's evidence of what was said except for the following. Makineti said to Emma "this is my home. This is not your home and this is not your parents' home" and consistent with this Sauni Tai said "this is our home. We stayed here. Where have you come from and your parents did not help at all with this home". During the course of the argument Emma says that she was approached threateningly by Makineti and Sauni and at one stage Mr. Niu had touched her arm telling her to "stop swearing at the old lady".

- [35] Emma also said that Mr. Niu was demanding that Emma make two bedrooms in the house available for Makineti and Sauni and she took legal advice about that. The counsel she received was to allow Makineti and Sauni to stay in one bedroom for the time being which is what she agreed to do. Benjamin arrived shortly after these events. Surprisingly, the security guards remained at the property and patrolled around and inside the house (even during the night

hours). Makineti said in her evidence that one security guard was asked to stay behind overnight in case Emma's husband did something to her and Sauni. I do not accept that Makineti ever had cause to fear Paelata Vea or that she did so. I also accept the evidence of Benjamin that there was more than one security guard at the property because he saw two and sometimes three flashlights when they were on patrol at night through the hallway and living room (where he was sleeping).

[36] The following day Benjamin and Emma filed these proceedings and sought and obtained an injunction on 27 July 2012 to remove the defendants from the property. I understand that Mr. Niu appeared before Scott LCJ at the hearing. On 23 August 2012 the defendants filed an application to dismiss the action alleging that the Supreme Court lacked jurisdiction to hear it. That was dismissed in a written decision of Scott LCJ of 6 September 2012. An appeal from that decision to the Court of Appeal was also dismissed in a judgment of 17 April 2013 in which the Court made important observations about the law of trespass to which I shall shortly refer.

[37] Benjamin's action against the Minister's decision cancelling Moi's registration was heard before me in the Land Court and in a decision dated 4 August 2015 I upheld the Minister's decision on the ground that Moi's registration was void under 48 of the Land Act. Since then Benjamin has applied for a lease of the land to preserve his family's investment in it but such application is still pending.



**Credibility**

[38] I need to say something of my assessment of the credibility of the witnesses. In support of the plaintiffs' case I heard evidence from Benjamin, Emma and Paelata Ve'a. I found them to be honest and credible witnesses. That is not to say that I accept unreservedly all that they had to say but their evidence was generally clear, logical and convincing. Benjamin particularly impressed me as gentle, thoughtful and entirely candid. He was clearly deeply troubled by this dispute and hurt at the allegations that Makineti has made against Moi in relation to the circumstances under which he applied for and was granted the land. Notwithstanding that, he repeatedly acknowledged Makineti's contribution to the property and what he regarded as her entitlement, along with all other members of the family, to come and stay. This was in accordance with what he understood were his parents' wishes. Emma's evidence in its important respects, particularly as to what occurred on 24 July 2012, was not subject to serious challenge in cross-examination and apart from Makineti no defendant gave any evidence to challenge what she said had occurred on that day. Paelata Ve'a gave only brief evidence but importantly he presented as a timorous man intent on avoiding conflict which clearly troubled and upset him. I saw nothing to support Makineti's portrayal of him as a man whom she had cause to fear.

[39] Makineti was the only defendant who gave evidence and no other witnesses were called to give evidence on their behalf. I did not find Makineti to be a reliable witness. She was confused as to when events happened. Her recall of dates, such as when her mother died, was poor. In some respects Makineti's evidence was clearly embellished. I have already given the example in her evidence in chief about seeing Paelata Ve'a cleaning his gun in 2011. Furthermore, in giving her evidence Makineti was often dogmatic and imperious. She asserted as facts what are in truth no more than statements of position for which, in many instances, there was little or no supporting evidence. As an example I refer to Makineti's insistence that the land was gifted to her by Kaifonua and also by Fielakepa despite the fact that her own evidence was that Kaifonua provided the land for her mother to live on and Makineti never spoke at all to Fielakepa about the matter. In any matters of significance where there was a conflict in the evidence of Emma and Benjamin and Makineti I preferred the evidence of Emma and Benjamin.

### **Trespass**

[40] Mrs. Tupou submitted that Emma was on 24 July 2012 (and remains) in lawful occupation of the house and that the actions of Makineti in bringing with her a lawyer and "an army of security guards" to take possession of the house presented a terrorist like entrance on the property and amounted to trespass for which all the defendants were liable in damages.

- [41] Mr. Niu submitted that there was no trespass as Makineti had proved that she is the owner of the house and was entitled to enter the house to retake possession of it and in furtherance of that object she could invite the other defendants onto the land also.
- [42] For the second and third defendants, Mr. Tu'utafaiva submitted that it is a good defence to an action in trespass if a defendant can prove that she entered upon the land in the exercise of a legal right (*Piliu v Satini* [2004] Tonga LR 115, 120 per Ford J). He argued that Makineti had a legal right to enter the house because she had understood the land and the house were hers, she had contributed to the development of the house so that the house would accommodate the family when they visited, when she left the house in 2011 she had told Emma that the house and land were hers and had retained keys and left her belongings there and the house had always been open to family members when they visited.
- [43] The allegation is that the defendants without authorization intentionally invaded Emma's home by entering the house and remaining there without due cause. It is now beyond doubt that in Tongan law buildings which are erected on land do not form part of the land and are chattels (*Yang v Manoa*, Unreported Court of Appeal, AC 22 of 2015, 8 April 2015). Trespass to chattels is a wrongful interference of a direct and physical kind with a plaintiff's possession of goods. The use of goods without authority will amount to a trespass (*Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204,

214). Trespass is a wrong to actual possession and not ownership. The point was made by the Court of Appeal in this case when it stated in its judgment of 17 April 2013 ([2013] Tonga LR 55 at [20] and [21]):

[20] The actions of trespass to land and trespass to goods protect lawful possession, not title as such. Even if the Land Court ultimately decides that the second defendant had a better title than the plaintiffs, that decision, after the event, would not justify or excuse the second defendant's forcible entry onto the property and into the house with her lawyer and 6 male security guards. The defendants would still be liable for those trespasses.

[21] One of the rights enjoyed by a person in lawful possession of land or personal property is the right to be protected from unlawful disturbance of that possession, a right which can be protected by injunction and vindicated in an action for trespass to land or goods. This right and these remedies against self-help, taking the law into one's own hands, are essential for the preservation of the King's peace, and the rule of law in Tonga.

[44] As a general rule, a plaintiff must be the person in possession of goods at the time of interference which is the foundation of the action. The fact that a defendant may act without moral fault is not a defence to a claim in trespass (*Wilson v New Brighton Panelbeaters Limited* [1989] 1 NZLR 74). It follows that even an honest mistake as to the law or the facts will not provide a defence to an action in trespass.

[45] It follows that to bring this action in trespass Emma does not need to establish ownership of the house. It is sufficient that she had a possessory title. There can be no doubt either that *prima facie* the acts of Makineti in entering into the house uninvited in the presence of her lawyer and security guards, asserting ownership and telling Emma to leave the property and then remaining (with security guards) until removed by order of the court amounted to trespass. That was a substantial interference with Emma's possession and use of the house. I reject Makineti's explanation that her lawyer and the security guards were required to assist her collect her possessions and to move things from her room. Emma's evidence that Makineti, Sauni and Mr. Niu all asserted that the house belonged to Makineti was effectively unchallenged. As the Court of Appeal noted at paragraph 15 of its ruling:

...Prior to the events of 24 July the plaintiffs had been in long undisturbed possession of the house and the property. The plaintiffs claimed title to the house as their personal property under the Law of Tonga, and their possession would be protected against anyone who did not sue within 10 years ....or who did not have a better title. The plaintiffs' possession was accordingly lawful and entitled them to remain in possession until someone established a better right which certainly cannot be done by a forcible, and therefore unlawful, entry.

[46] Mr. Niu argues that Makineti had the right to retake possession of the house; that is, she had a right to exercise the self help remedy of recaption. The statements of the Court of Appeal to the contrary, which I have noted in the paragraph above, were, he said, *obiter*

*dicta* and not binding. I do not accept Mr. Niu's submission. The common law allows a person who is deprived of their goods to retake possession peaceably from a person into whose *defacto* possession they have come. That is not what occurred in this case. Makineti attempted to take the house by a show of force which was resisted by Emma. The issue of if and when the law will permit the exercise of reasonable force against a person who wrongfully takes or withholds possession of chattels is subject to conflicting decisions. The approach taken in different jurisdictions is essentially a matter of policy (*Blades v Higgs* (1861) 10 CBNS 713, 721; *Lambert v Ongley* [1924] NZLR 430; *Slater v Attorney-General* [2006] NZAR 664; *Toyota Finance Australia Ltd v Dennis* (2003) 58 NSWLR 101; *Devoe v Long* [1951] 1 DLR 203). The weight of authority appears to be that force cannot be used against a person unjustifiably holding chattels of another unless the possession of that other was wrongful from its inception. That is not the case here where Emma's possession was lawful (*Niu anors v Tapealava* at [15]). I consider that as a matter of both principle and policy the approach of the Court of Appeal is correct and even if it is not binding, as Mr. Niu suggests, I will follow it. Even if Makineti could establish a superior title to the house, that did not justify her forcible entry or provide a defence to an action in trespass.

- [47] But that is not an end of the matter as Makineti did not have a superior title to the house. Mr. Nui asserts that Makineti had a superior title to the house because she was the owner of the "whole

house" (paragraph 9 of Mr. Niu's closing submissions). This is simply fanciful in my view. The argument advanced by Mr. Niu can be summarised as follows. The land upon which the house was built, he says, was gifted by the Fielakepa to Makineti as her own and that all Makineti's siblings, including Moi, knew and recognised that the land belonged to Makineti. He continues that the house that Moi built on the land was of permanent construction so that Moi must have intended that it was to remain on the land which belongs to Makineti. Mr. Niu further submitted that there was no doubt whatsoever in anyone's mind, especially Moi and Siutoni, that the land and the whole house belonged to Makineti.

[48] When I asked Mr. Niu to identify the mechanism by which ownership of the house passed from Moi, who built the house, to Makineti he said it was a gift by Moi to Makineti and asserted that there was evidence that both Moi and Siutoni by their words and conduct recognised Makineti's ownership of the house. I do not accept Mr. Niu's analysis of either the facts or the law.

[49] There is no evidence that the Fielakepa gifted the land to Makineti. Makineti had no discussions with the Fielakepa and what is plain is that the land was made available only to provide a place for Naule'o to live. It was not a gift to Makineti. Makineti's evidence was that she asked Kaifonua "if her father might have any land available at Havelu for my mother to shift to.." (paragraph 19 of Makineti's written brief of evidence). It is trite that under Tongan law Makineti

could not have owned the land. Makineti could at some stage have applied for a lease but she has never done so. Mr. Niu suggested that Makineti had an interest in the land as the Fielakepa would have been estopped from denying that he had agreed that Makineti could build and occupy this land. That is not the case because as I have said there is no evidence that the Fielakepa ever agreed that Makineti could build on and occupy the land and in any event, a right to occupy land does not create a legal interest in the land (*Schaumkel v 'Aholelei* [2013] TOCA 1 at [33]).

[50] There is also no evidence that Moi or Siutoni ever acknowledged Makineti's claim to the land apart from Makineti's assertion that they did so. The evidence that Moi and Siutoni did not recognise Makineti's claim to the land or the house is simply overwhelming and includes:

[50.1] Moi built the house on the land without Makineti's permission.

[50.2] Moi applied for the land and had it registered in his name.

[50.3] The property was substantially landscaped and extensions made to the house by Moi and Siutoni at their own expense.



[50.4] After 1978 Makineti never objected to the development of the land by Moi and Siutoni.

[50.5] Siutoni told Makineti to run her proposed business from the Talamahu market and not the land.

[50.6] When Makineti ran a business in Tonga it was from other land.

[50.7] When she came to visit Tonga Makineti would not always stay on the property and when she did it was with permission.

[50.8] Makineti removed her Heilala trees from the land when she learned that Moi had claimed it as his own.

[50.9] Siutoni applied for and had the land registered in her name following Moi's death.

[50.10] Moi and Siutoni never discussed with their children that the land or house belonged to Makineti and wanted the house to be available to the whole family when they visited Tonga.

[51] Mr. Niu argues that because the house was of permanent construction and materials it must have been intended to be a gift. In my view the fact that the house was of permanent material is

entirely consistent with the fact that Moi regarded the land as his own.

- [52] Mr. Tu'utafaiva presented a more subtle argument on behalf of Makineti and Sauni Tai which was that Makineti had a legal right to enter the land by virtue of the combination of all the factors I have referred to in paragraph 42. He relied upon comments by Ford J in *Piliu v Satini* (supra) where the learned Judge said that it was a good defence if a defendant can prove he has entered upon land in exercise of some kind of legal right. Mr. Tu'utafaiva submitted that Makineti had a reasonable expectation that she was entitled to enter the house to which she had keys and, as Emma and Benjamin freely accepted, was to be open to family whenever they visited Tonga. I note that in *Piliu v Satini* (supra) Ford J held that it was a good defence to an action in trespass that the second defendant in that case believed, erroneously as it turned out, on reasonable grounds that he had lawful authority from the plaintiff to have possession of her land and grow crops upon it. In my view *Piliu v Satini* is wrongly decided. As I have already noted, an absence of moral fault is no defence to an action in trespass. In any event, the answer to Mr. Tu'utafaiva's submission must be that whilst Makineti might well have reasonably believed that Emma would have no objection to her entering the house to stay on one of her visits to Tonga she could not have reasonably believed that this extended to entering the house to take possession of it from Emma by a show of force.

- [53] Although no defendant argued it before me I have considered whether Makineti might be able to claim to have an interest in the house by reason of her contribution to the addition in 1978 of the smaller living room and kitchen/dining room. I have formed the view that she did not.
- [54] As a general rule property in a chattel that is annexed to a dominant chattel of another will not pass by reason merely of its annexation. It will continue to belong to its original owner unless it is shown that the degree of annexation is such that it must be taken to have become part of the dominant chattel and the property of the owner of the dominant chattel. This is the doctrine of accession.
- [55] There have been various tests suggested as to what degree of annexation is necessary to cause an accession (Guest A G '*Accession and Confusion in the Law of Hire Purchase*' (1964) 27 Mod LR 505). In *Rendell v Associated Finance Pty Ltd* [1957] VR 604, the Supreme Court of Victoria applied an injurious removal test where one chattel is added to another so that it cannot be separated without serious injury or destruction of the whole (see also *Lewis v Andrews and Rowley Pty Ltd* (1956) 56 SR (NSW) 439 and *McKeown v Cavalier Yachts Pty Ltd* (1988) 13 NSWLR 303, 311). An alternative test is as to 'separate existence' and asks whether the chattel has been incorporated into another so as to have ceased to exist as a separate chattel. Examples would include the incorporation of bricks into a house or planks of wood in a ship (*Thomas v Robinson* [1977] 1

NZLR 385, 389). A third test is concerned with the destruction of utility and whether the incorporated chattel can be removed without damage to the principal chattel. In the New Zealand Supreme Court in *Thomas v Robinson* at page 391, in a case concerning additions to a vehicle, Speight J referred with apparent approval to *Rendell* as authority that:

The accessories continue to belong to their original owner unless it shows that as a matter of practicability they cannot be identified, or, if identified, they have been incorporated to such an extent that they cannot be detached from the vehicle.

- [56] In my view it does not matter in the circumstances of this case which approach is adopted. The chattels that Makineti contributed to the house were building materials (timber, concrete and the like) and were incorporated into the house in such a manner that they lost their separate identity and could and cannot be removed without causing substantial damage to the whole. Makineti cannot in those circumstances claim the return of the chattels or any interest in the house. The chattels, of necessity, became a part of the house and ownership of them passed to Moi.
- [57] For the reasons I have given, Emma succeeds on her claim in trespass against Mr. Niu, Makineti and Sauni Tai.
- [58] I must therefore consider the issue of damages. The sum claimed in the amended statement of claim for each cause of action is not

defined and there is simply a pleading for damages of \$100,000 from each defendant. That is an unhelpful and inappropriate approach and quite clearly the sums claimed exceed by a very large margin what could ever be awarded on the facts of this case. I received few submissions from Counsel as to what damages might be recoverable and I was not referred to any decided cases as to the range of awards in Tonga. I have looked at a number of decisions of the Supreme Court and Court of Appeal but none are on facts similar to this case and I gained little assistance from them.

[59] A plaintiff who proves trespass is entitled to nominal damages even if no actual loss has been suffered. Compensatory damages can include awards for pain, suffering and distress and may include aggravated damages, the purpose of which is to compensate a plaintiff for injury suffered because of the way, or the circumstances, in which the tort was committed (*Attorney-General v Niania* [1994] 3 NZLR 106 and Halsbury Vol 45 para 1403). I must, however, temper my approach to reflect the levels of income and value of money in Tonga and general conditions in the Kingdom (*Manu & Kingdom of Tonga v Muller* [1997] Tonga LR 192, 194).

[60] There is no evidence that the house suffered any damage as a result of the trespass or that Emma suffered consequential losses of a financial kind. However Mrs. Tupou submitted that this is not a case where it would be right to award only nominal damages. She referred me to the evidence of Emma which states that as a result of

the defendants' actions she felt variously threatened, shocked, shamed, horrified, intimidated and mentally anguished, all of which I accept. She argued also that the trespass was of a particularly serious and offensive sort, not least because the defendants entered the bedroom of Emma's daughter, which in Tongan culture is a private space into which no male should enter. Makineti accepted in cross-examination that in Tongan culture a girl's bedroom is taboo to any male members of the family and to male outsiders also.

[61] In my view the actions of the defendants in this case were a pre-planned and egregious breach of the rights of Emma and her family to the possession and security of their home. I consider there is also force in Emma's case that the manner in which the defendants entered the house and her daughter's bedroom was culturally offensive. The first, second and third defendants all participated equally in the events of 24 July 2012 such that they are jointly liable for the damages to be awarded. Their behavior cannot be condoned. I believe that an award of damages must reflect the very real hurt that Emma did suffer by both the fact of the trespass and the manner in which the defendants sought to enter the home with a show of force intending, in my view, to intimidate Emma into an acceptance of Makineti's position.

[62] In all the circumstances of this case I consider that an award of damages in trespass of \$4,000 is appropriate and I so award in favour of Emma against Mr. Niu, Makineti and Sauni Tai.

**Battery**

[63] The action in battery is against Mr. Niu only. Battery is the intentional application of force to the body of another person, without that person's consent or other lawful justification. Battery can occur with even the most trivial contact which causes no injury but affronts personal dignity and there is no requirement that the touching be hostile. I consider the view expressed by Webster CJ in *Taulanga v Kama* [2006] Tonga LR 53 to the contrary to be wrong. A moment's reflection will show that in some cases the essence of a plaintiff's complaint will be not that a touching was hostile but that it was inappropriately friendly or intimate (S. Todd, J. Hughes, J. Burrows, J. Smillie, C. Hawes and A. Beck (eds.), *The Law of Torts in New Zealand*, 3<sup>rd</sup> ed at page 102).

[64] Emma's evidence on this aspect of the claim was extremely brief. She described how following her arrival at the house a heated argument broke out which involved Mr. Niu. She said she was threatened by Makineti and Sauni Tai and that during the course of this argument the following occurred:

Laki then touch my arm and said, "tuku ho'o kapekape'i 'a e fine'elki" (translation - "stop swearing at the old lady"). I was shaken at the confrontation with them all and shouted at him, "Don't ever touch me! Don't ever touch me in my house!

- [65] Mr. Niu did not give evidence but he did cross-examine Emma and he did not challenge her evidence on this aspect. He did ask Emma whether she spoke loudly to him and Sauni Tai and she said that she did. She also said that she was upset but not frightened during the exchange. In his submissions, Mr. Niu submitted that no injury was suffered by Emma and that having been told not to touch Emma he did not do so again.
- [66] I accept that it was proven that Mr. Niu intentionally touched Emma and that in the circumstances the touching was both unwelcome and an affront to her dignity and amounted to battery. I find the claim in battery proved.
- [67] As far as damages are concerned it is the case that there was a single brief touching and no injury was caused. I must take care that my assessment of damages relates only to the battery and not to the effects of the trespass for which an award has been made separately; that would constitute a double recovery.
- [68] I consider that the conduct of Mr. Niu, by involving himself in his client's affairs in such a personal and confronting manner and then touching Emma in her own home during a heated exchange was both extremely unwise and, due to his status, was perceived to be threatening and was upsetting to Emma. I believe in all the circumstances an award of modest but more than nominal damages is required, which I assess at \$500.



**Intimidation**

[69] I accept that the tort of intimidation is part of the law of Tonga (*Bank of Tonga v Tulikihakau* [1999] Tonga LR 183) but I do not accept it has any application in this case. The tort of intimidation is concerned with the imposition of economic loss on another by unlawful means (*Rookes v Barnard* [1964] AC 1129 (HL)). I consider the requirements of the tort are the following:

[69.1] The defendant makes a coercive and unlawful threat backed up with a demand. The threat must be of the 'or else' kind; that is unless the plaintiff does or does not do something that the defendant demands the defendant will in response do something unlawful contrary to the interests or wishes of the plaintiff.

[69.2] The plaintiff complies with the demand because of the threat.

[69.3] The defendant knows or should have known that complying with the threat will cause loss or damage to the plaintiff.

[69.4] The defendant intends that its demand shall cause loss or damage to the plaintiff.

[70] Mrs. Tupou argued that Emma felt intimidated into agreeing to give up a room in the house to Makineti and Sauni Tai. Even if that was so there was no evidence of any coercive or unlawful threat which is an essential ingredient of the tort. Makineti asserted a right to take the land and the house. She did not threaten to do anything should Emma not comply with that demand. It is true that Emma agreed to allow Makineti to stay but this was on the basis of advice and only until the rights of the parties were resolved by the Court. It follows that the claim in intimidation fails.

**Makineti's counterclaim**

[71] Makineti counterclaims for an order declaring the house and other structures on the land to be her lawful property and that the plaintiffs vacate the property.

[72] As far as the house is concerned, for the reasons I have already given Makineti does not own the house nor does she have any interest in it. As far as other structures on the land are concerned, as best as I can tell the only structure, other than the house itself, that remains on the land that Makineti could make any claim to is the small house that she says was built in 1972 for Naule'o. I do not understand that any party makes any particular claim on that house and it was clearly intended, in my view, as a gift by Makineti to Naule'o. I do not consider Makineti owns any structures on the land.

[73] As far as possession of the house is concerned Emma is in lawful possession and Makineti is not entitled to remove her. The counterclaim is dismissed.

**Result**

[74] The result is as follows:

[74.1] The plaintiffs' claims against the fourth defendant are dismissed and Benjamin's claims against the first, second and third defendants are dismissed.

[74.3] Emma's claim against the first, second and third defendants in trespass is proven and she is awarded damages against them jointly in the sum of \$4,000.

[74.4] Emma's claim against the first defendant in battery is proven and she is awarded damages in the sum of \$500.

[74.5] Emma's claim against the first, second and third defendant in intimidation is dismissed.

[74.6] Makineti's counterclaim is dismissed.

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

**CV 51 of 2012**

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[75] As far as costs are concerned the parties should attempt to reach agreement and if they cannot do so they may file memoranda within 21 days.



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

O.G. Paulsen

**NUKU'ALOFA: 28 April 2016.**

**LORD CHIEF JUSTICE**