

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

CV 10 of 2018

23/05/18  
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**BETWEEN:** SIAOSI MAHE aka SIAOSI PUAMAU

- Plaintiff

**AND:** 'AKOSITA MAHE

- Defendant

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Counsel:** Mr. L. Niu SC for the plaintiff  
Mr. S.H. Tatila for the defendant

**Date of Hearing** 22 May 2018

**Date of Ruling:** 23 May 2018

### RULING

#### The applications

- [1] This ruling concerns applications by both the plaintiff and the defendant to vary the terms of an *ex parte* injunction.

#### The facts

- [2] The plaintiff and the defendant are siblings. The plaintiff is the eldest of the nine surviving children of his parents. He was customarily adopted as a child and raised by his father's sister.
- [3] The parties' father, Tipilisio Mahe, was given permission by the estate holder (Kalaniuvalu) to live with his family on land, which for convenience only I

rec'd 23/5/18  
HHC

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CV 10 of 2018

---

refer to as 'the family land'. The family land was never granted to him or registered in his name. Mr. Niu accepts that Tipilisio had only a license to live on the family land.

- [4] In around 2002 a house was built on the family land for Tipilisio, his wife (the parties' mother) and three of their daughters. The plaintiff says that the old house was rotten and unsafe. He agreed to build the new house (the house), and paid around T\$100,000 to do so, on the understanding that he would inherit the family land and the house.
- [5] Tipilisio passed away. The mother and the defendant still live on the family land. The present estate holder will allow this to continue until the mother passes away, at which time he will make a decision who should have the family land.
- [6] The plaintiff does not reside in Tonga. He does have a town allotment at Lapaha. He intends to claim the family land when his mother passes and give his allotment to his eldest son.
- [7] During Tropical Cyclone Gita the house was damaged. There is a dispute as to the extent of the damage. The plaintiff says that he offered to repair the damage but that upon coming to Tonga from his home in the United States he found that the house had been dismantled and the defendant had locked up all the materials. The defendant also obtained a protection order against the plaintiff to stop him removing the materials.
- [8] It appears that the defendant considered that the damage to the house was so great that it was better to dismantle it and build a new house using the old materials. Work on the construction of a new house has begun.
- [9] The plaintiff commenced this action on 12 April 2018. He alleges in the statement of claim that he was the owner of the house and is the owner of the materials used in its construction and that the defendant has unlawfully

IN THE SUPREME COURT OF TONGA  
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CV 10 of 2018

---

prevented him from taking his materials. He also alleges that his loss is T\$80,000.

[10] When commencing this action the plaintiff applied for an *ex parte* injunction to prevent the defendant or anyone else using his materials pending the hearing of his claim.

[11] I granted the injunction on 12 April 2018 substantially on the terms sought by the plaintiff. I reserved leave for the parties to apply to revoke or vary the injunction on 3 days' notice.

[12] Relevantly, the order provided as follows:

The defendant, and any person acting on her behalf or for whom she may be acting or any person acting on behalf of such person, are forthwith restrained from making any use or destroying or otherwise dealing with the materials which were formerly a part of the dwellinghouse in which the defendant and her mother were residing at Lapaha.

[13] On 23 April 2018, the plaintiff applied to vary the injunction. He did so after being informed that the defendant was continuing to build a new house using the existing foundation and floor (the foundation). The plaintiff accepts that the injunction did not specifically include the foundation. He sought to vary the injunction to restrain the defendant from making any use of the foundation. The effect of this would be to halt construction.

[14] On 26 April 2018, the defendant filed her own application to vary the injunction. The application did not state what variation was being sought. I understand that the defendant wanted the Court to authorise her to continue to build the new house.

IN THE SUPREME COURT OF TONGA  
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NUKU'ALOFA REGISTRY

CV 10 of 2018

---

- [15] In her affidavit the defendant disputed the plaintiff's ownership of the house and his right to the family land but said that the plaintiff could have the materials (but not the foundation). She also said that there was an urgent need to build the new house for their mother, who is now 89 years old. Mr. Tatila advises me that the mother and the defendant are living with relatives in cramped conditions. The defendant is sleeping on a verandah while they wait for the new house to be built.
- [16] I was shown photographs of the house before it was dismantled and also the new house under construction. The damage caused to the now dismantled house was substantial. The new house is made of brick and concrete. Its construction is well advanced but it will take about 2-3 months to complete.
- [17] I was told that the estate holder does not object to the construction of the new house.
- [18] Mr. Tatila advises me that when the mother passes the defendant also intends to apply for the family land but if it is ultimately granted to the plaintiff she will walk away and leave the new house to the plaintiff.

**The defendant's application**

- [19] The defendant's application does not state what variation to the terms of the injunction are sought. It appears that from the defendant's perspective no variation is required.
- [20] The defendant takes the view, correctly it must be said, that the injunction does not prevent the construction of a new house on the family land. She accepts also (consistent with the terms of the injunction) that she cannot use the materials from the dismantled house and agrees to an order allowing the plaintiff to remove them.

**The plaintiff's application**

- [21] I have considered the application to vary the injunction having regard to the well-known principles *Klissers Farmhouse Bakeries v Harvest Bakeries Limited* [1985] 2 NZLR 129 (CA) to which this Court has often referred.
- [22] Mr. Niu accepts that the injunction did not prevent the defendant from building a new house. The plaintiff's concern, he argues, is the use of his foundation.
- [23] The plaintiff says that he made no mention of the foundation when applying for the injunction because he did not expect that the defendant would utilise it. He argues that it is just that the injunction now be varied to remedy the oversight.
- [24] I asked Mr. Niu to identify what loss the plaintiff will suffer should the injunction not be varied. It appears to me that it will be very difficult for the plaintiff to show any loss. The foundation is permanently attached to the family land and is of no use to anyone apart from a person in occupation of the family land (which the plaintiff is not) and can hardly be taken to other land or sold.
- [25] Mr. Niu argues that the plaintiff's loss is not represented by the value of the foundation. He says that the plaintiff's concern is that if the new house is built the estate holder will take that into account when deciding to whom he grants the land. In the plaintiff's view, if he is not able to halt construction of the house he will lose the land itself.
- [26] I consider that the plaintiff's application is misconceived. First, I accept that the plaintiff has an arguable cause of action against the defendant but that is in respect of the unlawful interference with his goods (the materials) for which his remedy is damages. Typically, his damages will be confined to the

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

CV 10 of 2018

---

value of the materials themselves. The plaintiff has been substantially protected for that loss by the injunction.

[27] Secondly, whilst the plaintiff says that he is at risk of losing the family land, there is no claim before the Court for the family land. What is more, the plaintiff has no entitlement to it. He may apply for the family land at any time (just as the defendant may apply to lease it) but he has no right to it. Furthermore, the Court should not interfere in the estate holder's decision to allow the defendant to build or to influence his decision as to what he will do with the family land. In short, the plaintiff is asking the Court to protect rights that he does not have.

[28] The balance of convenience favours the defendant. There is no suggestion that the plaintiff has any need for the family land. He lives overseas and already has land in Tonga. By comparison, his elderly mother and the defendant are without a home. The plaintiff says the cyclone damage could have been repaired. I do not know if that is the case but my present concern is that the plaintiff's elderly mother and the defendant are living in unsatisfactory conditions. Mr. Tatila submits that the mother is entitled, at her age, to be living comfortably. I agree.

[29] In terms of the overall justice of the case, the plaintiff had his chance to apply for the injunction and it was granted substantially upon the terms he asked for. He could have included the foundation in his application but did not do so. The construction of the new house progressed as a result. It would be unjust to halt construction and potentially inflict significant financial loss, and certainly great inconvenience, upon the defendant and the mother when the plaintiff could have been clearer at the outset.

**Result**

[30] The plaintiff's application to vary the injunction is dismissed.

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---

- [31] The defendant's application to vary the injunction is dismissed.
- [32] The plaintiff is entitled to enter onto the family land and remove the materials that were subject to the injunction made by this Court on 12 April 2018. For the avoidance of doubt, that does not include the foundation nor does it include any materials presently incorporated in the house under construction.
- [33] Both parties have been equally unsuccessful. Costs will lie where they fall.



**NUKU'ALOFA: 23 MAY 2018.**

A handwritten signature in black ink, appearing to read "O.G. Paulsen", is written over a large, faint oval shape that serves as a guide for the signature's placement.

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

