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

CV 39 of 2020

**IN THE MATTER OF** interpleader proceedings pursuant to Part IV of the *Bailiffs Act*

BETWEEN:

**LUNA'EVA & SONS CO. LTD**

Plaintiff / Judgment Creditor

-and-

**MANOA P. M. TUITA** trading as T&M Constructions

Defendant / Judgment Debtor

-and-

[1] 'ATILUA TUITA FINAU

[2] PENINA TUITA

Claimants

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## RULING

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BEFORE: LORD CHIEF JUSTICE WHITTEN QC

Appearances: Mr H. Tatila for the Plaintiff / Judgment Creditor  
Judgment Debtor in court  
Claimants in person

Hearing: 28 July 2021, 20 August 2021 (no appearances)

Date of ruling: 23 August 2021

### The proceedings

1. This is the determination of an interpleader summons pursuant to ss 12 to 14 of the *Bailiffs Act* ("the **Act**").

### Background

2. On 5 November 2020, judgment in default of defence was entered against the defendant/judgment debtor in the sum of \$78,760.75 together with interest and costs.
3. On 15 January 2021, upon the application of the judgment creditor, a Writ of Distress was issued.
4. On 22 March 2021, the Bailiff's Office filed a report on execution of the Writ of Distress. The items seized included a van (registration number J-9305) and various items of household furniture and appliances.
5. On 23 March 2021, the Bailiff received letters dated 22 March 2021 from the claimants in which:
  - (a) 'Atilua (who is the judgment debtor's daughter) claimed ownership of the van and annexed a certificate of registration to that effect; and

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(b) Penina (who is the judgment debtor's wife) claimed ownership of three wall units, one refrigerator, one king-size bed and a TV screen seized as items which were given to her by her older sister from New Zealand as well as a washing machine which she stated she purchased for her needs at home.

6. On 13 July 2021, summonses were issued for each of the claimants to appear before the court on 28 July 2021.

### Evidence

7. On 27 July 2021, Mr Tatila, for the judgment creditor, filed a memorandum which annexed a number of documents including a further letter from 'Atilua to the Bailiff dated 23 March 2021, in relation to five motor vehicles (registration numbers C 21597, J 8536, L 20868, L 21958 and L 20411) ("**the vehicles**") which are still registered in the name of the judgment debtor. According to 'Atilua, the vehicles were originally acquired by a business known as T&M Motors which was/is also owned by the judgment debtor and were sold to various customers between 25 November 2017 and 25 November 2019. She annexed copies of receipts for the various sums paid for the vehicles by the said purchasers. The receipts are in the name of "T and M Construction", also owned by the judgment debtor.

8. During the hearing on 28 July 2021, 'Atilua explained that:

(a) she has been employed by T&M Construction as a secretary since 2015;

(b) T&M Motors had a Facebook page at the relevant time on which it advertised motor vehicles for sale;

(c) she issued the receipts (although some were signed by her sister) as well as other documents evidencing the change of ownership;

(d) she did not advise the Ministry of Infrastructure and Transport of the changes of registration/ownership as she expected that the purchasers would do so;

(e) those purchasers have not done so;

(f) the proceeds of those sales were paid into a T&M Construction bank account and used to pay expenses such as wages; and

(g) her father uses her vehicle (J9305) which was originally given to her by an aunt when she was getting married.

9. Following consideration of that information, Mr Tatila did not pursue his challenge to 'Atilua's claim over the van J9305.

10. After discussion with Mr Tatila about Penina's claim to the household items and the fact that pursuant to s 15 of the *Divorce Act*, if she and the judgment debtor divorced tomorrow, they would each be entitled to retain their respective property, Mr Tatila did not oppose Penina's claim any further.

11. However, Mr Tatila did not accept the assertions from the bar table by 'Atilua in relation to the other five motor vehicles and requested that the claimed sales of those vehicles be further investigated.
12. Directions were then made, which included, relevantly:
  - (a) By 11 August 2021, the judgment debtor is to serve on Mr Tatila's office all documents in his (including the businesses known as T&M Construction and T&M Motors) possession, power or control evidencing or relating to the original acquisition of the five motor vehicles, their original registration in the judgment debtor's name, their sales, any contracts of sale with the purchasers, the original books of receipts for those sales and their changes of ownership.
  - (b) If any documents falling within the above descriptions have been, but are no longer within the judgement debtor's possession, power or control, an affidavit is to be sworn and also served in accordance with order 1 above, either by the judgment debt himself or the appropriate officer within the said businesses in charge of those documents and who has conducted all reasonable searches for them, evidencing the results of those searches and explaining the circumstances by which those documents are no longer in the judgment debtor's possession, power or control.
  - (c) By 18 August 2021, Mr Tatila is to file (and serve on the judgment debtor) a memorandum advising his client's position in relation to the documents and other information to be provided in accordance with orders 1 and 2 above, and whether the judgment creditor wishes to proceed with a further hearing in relation to any remaining dispute over the ownership of the five motor vehicles.
  - (d) In the event that the judgment creditor wishes to proceed further in relation to the five motor vehicles:
    - (i) and if the documents required pursuant to order 1 disclose the addresses of the purchasers of the motor vehicles as named in the copy receipts referred to above, Mr Tatila is to also serve, by 18 July 2021, a copy of his memorandum and these Directions on each of the purchasers;
    - (ii) any of those purchasers who wish to be heard on the issue are to attend the next hearing; and
    - (iii) the matter will be listed for further hearing on 20 August 2021 at 9 AM in court 1.
13. On 18 August 2021, Mr Tatila filed a memorandum in which he advised, relevantly, that the judgment debtor had provided him with:
  - (a) an affidavit sworn by 'Atilua which disclosed the addresses of the purchasers; and

- (b) a business name certificate for T&M Motors, BSP bank statements (although statements for the period between 1 and 20 July 2017 were said to be missing), and copies of the receipts for the alleged sales of the five vehicles which had been torn from the original receipt books.
14. In her "letter affidavit" dated 11 August 2021, but which was not sworn, 'Atilua confirmed her earlier statements to the court and added, relevantly and in summary, that:
- (a) three of the vehicles had originally been acquired from overseas with the two others acquired from local dealerships in Tonga;
  - (b) there are no receipts for the purchase by T&M Motors of those vehicles;
  - (c) the vehicles were sold many years ago and she wrote letters to change the ownership to the purchasers;
  - (d) details of the purchasers of each of the five vehicles and their respective villages were provided plus phone numbers for three of them;
  - (e) in respect of four of the sales, the prices were paid in cash, whereas for L21958, payment was described as "land in Pelehake";
  - (f) in relation to J8536, it was T&M's responsibility to complete the change of ownership but that had been overlooked;
  - (g) in relation to L21958, she completed the change of ownership but found out that all the legal work relating to the land (said to be valued at \$30,000) had not been completed, therefore payment was not settled, and so the change of ownership has not been finalised until the transfer of the land (presumably a lease) is completed;
  - (h) in relation to L20411, the change of ownership had not been completed and she was "told by the seller" (presumably meaning "the purchaser") that the vehicle suffered a mechanical failure and broke down;
  - (i) in relation to L20868, she had completed her part in the change of ownership but the purchaser had not taken the form to the Ministry to register the change of ownership; and
  - (j) payment for all the transactions (presumably excluding the land agreement) were received by the judgment debtor. He deposited part of the proceeds and used the balance for wages and other expenses.
15. Mr Tatila then submitted that:
- (a) the judgment debtor had not produced any documents evidencing the original acquisition of the five vehicles, their original registration in the name of the judgment debtor, their sales or any contracts of sale with the alleged purchasers;

- (b) the judgment debtor had not provided the original books of the receipts as directed;
  - (c) there is no evidence of any previous attempts to transfer ownership of the five vehicles;
  - (d) the judgment debtor has failed to satisfy the court with the documents and other information provided as to the alleged sales of the five vehicles;
  - (e) the judgment debtor was under a duty to bring the purchasers before the court to confirm their purchases of the vehicles, but had failed to do so;
  - (f) the five vehicles were originally registered in the name of the judgment debtor and remained registered in his name;
  - (g) on that basis, the judgment creditor "did not wish to proceed" with a further hearing in relation to any remaining dispute over the ownership of the five vehicles; and
  - (h) if the court was satisfied with "the above-stated matters, it is respectfully ask [sic] that a relevant order be made on paper", and for the hearing scheduled for 20 August 2021 to be vacated.
16. The last submission was unclear and therefore the matter was not removed from the list for hearing. When the matter was called, there was no appearance by any of the parties. I indicated then in open court that on the basis of Mr Tatila's memorandum, I would proceed to decide the matter on the papers.

### **Consideration**

17. Section 12 of the Act identifies the subject matter for an interpleader summons, namely, property seized by a Bailiff under an order of any Court and a claim by a person (other than the judgment debtor) to title over that property.
18. Here, the Bailiff seized various items including those over which the claimants, 'Atilua and Penina claimed title. Any initial challenge by the judgment creditor to those claims has not been pursued.
19. Instead, the judgment creditor, by its counsel, has challenged the claim by the judgment debtor that the five vehicles still registered in his name are no longer in fact his property.
20. I sympathise with Mr Tatila's submissions that the evidence adduced on behalf of the judgment debtor to make good that assertion is unsatisfactory. He, , has raised well-founded suspicions and, in effect, alleges that the asserted sales of the vehicles are sham transactions.
21. However, for the following reasons, it is not open in this proceeding to make any determinations on those issues:

(b) secondly, if they were seized, the putative owners (purchasers from the judgment debtor or his business, T&M Motors) would have a right to claim ownership (if they are in fact the legal owners). In that event, and assuming the judgment creditor did not admit their claims, separate summonses would have to be issued to each of those claimants for them to appear before the court to prove their claim. Here, and for the first reason above, that has not yet occurred.

22. For those reasons, I am unable to accept Mr Tatila's submission that it was for the judgment debtor on this interpleader summons to bring those purchasers before the court to demonstrate that the judgment debtor is not the legal owner of the vehicles.

### Result

23. Accordingly, until such time as the Bailiff may seek to seize one or more of the five vehicles on the grounds that they remain registered in the name of the judgment debtor, and any of the alleged purchasers of those vehicles claims ownership of them, it is not appropriate for this court to make any determinations about their ownership.

24. As such and given that the judgment creditor's challenges to the claims of ownership by 'Atilua and Penina over certain of the items that have been seized by the Bailiff were not pressed, the summonses in relation to them must be dismissed.

NUKU'ALOFA  
23 August 2021



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten QC  
LORD CHIEF JUSTICE