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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY **CV 39 OF 2014**

BETWEEN: **YUZHEN YANG**

- **Plaintiff**

AND: **'OLIONI MANOA**

- **First Defendant**

AND: **MATELITA MANOA**

- **Second Defendant**

Hearing : 18 February 2015

Judgment : 7 August 2015

Counsel : L. M. Niu SC for the Plaintiff

S. T. Fonua for the Defendants

Recd 12/08/15

JUDGMENT

[1] It was thought wise to await the outcome of the appeal in *Mortimer & Anr v Piea Fe'aomoeata & Ors* AC 28 of 2014 and AC 2 of 2015 before delivery of this preliminary judgment. Following that decision it seems clear that the matter now before the Court might have remained in the Land Court but that the Supreme Court is equally well able to rule on the issue.

[2] My Decision of 6 June 2014 following which the action was recommenced in the Supreme Court deals with several aspects of the circumstances and law which are relevant to the matter. I will not repeat what I wrote but instead respectfully refer to it and attach a copy hereto.

[3] The preliminary issue before the Court for determination is the legality or effectiveness of an agreement dated 20 October 2007. A copy of the agreement is Document P11-13 apparently signed by the Plaintiff Yuzhen Yang (a second-named Plaintiff Zhufu Wei discontinued on 16 February 2015) and the Second Defendant. A second copy of the same agreement appears to have been signed by the Plaintiff and the First Defendant nine days later (P-14-16).

[4] The question is whether the agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee. If the latter then a further question is whether the licence should be regarded as a permit provided for by the Land Act.

[5] The particular relevance of the distinction between a lease and a licence in the context of the Land Act is that a lease of an allotment must:

(i) be in Form 3 of Schedule IX to the Act;

(ii) must be approved by Cabinet (section 56(i)); and

(iii) is ineffective to pass or affect any interest in land unless registered (section 126).

A licence, on the other hand, eg. to enter an hotel, cinema or sports stadium does not fall within the purview of the Act unless in fact it amounts to a permit.

[6] Section 125 provides for two distinct forms of permit. The first is a Form 2 permit which allows an alien to reside in Tonga. This form of permit is not relevant to this case although the Defendants relied on section 15.

[7] The second type of permit is a Form 6 permit, the purpose of which is revealed in Form 6 of the Schedule IX. It is plainly a permit to occupy a "place" referred to in the permit upon payment of rent. It allows the permit holder to remove improvements made to the place at the end of the term. Section 126 also applies.

[8] Before examining the agreement in question several observations may be made. The first, on the authority of *Cowley v Tourist Services* [2001] To.L.R 183, 188 is that:

> "buildings (in Tonga) are not, *in general*, regarded as fixtures. They are treated as chattel houses are in Barbados – that is to say as personal property detachable from the land".
>
> "It would be inconsistent with this approach (and destructive of ordinary weekly tenancies of houses and shops in Tonga) to treat s.13 as applicable to the *short term* tenancy agreements in this case" (emphasis added)

[9] On the authority of *Kolo v Bank of Tonga* [1997] To.L.R 181, 183 "The *broad proposition* stated by Ward CJ should be accepted. That means it was open to Mr Kolo to pledge his house as an item separate from the land on which it stood" (emphasis added). The "broad proposition" was that "buildings ... have been regarded as items of personal

property rather than forming part of the realty. "... the intricate law of fixtures and accretions to land which applies elsewhere is not wholly appropriate in Tonga".

[10] The source of this view is not clear. The Act does not directly refer to the matter but, as already noted, Form 6 makes provision for removal of improvements, not excluding buildings, while Form 3, the Form of Lease, provides that upon the termination of the lease:

> "It shall be lawful for the Lessee, his heirs and those who represent him to remove all houses and improvements which may have been built on the land."

[11] Although the Act does not say so, it seems clear that when advantage is taken of the right to remove what in most other jurisdictions would be considered fixtures, a duty arises on the permit holder or tenant to make good any damage to the land occasioned by the removal. While a tenant may have a right to remove improvements the landholder must have a corresponding right to have his land returned to him in a reasonably usable condition.

[12] The Land Act dates back to 1903 and since that time enormous changes have taken place in building construction

methods, both domestic and commercial. The original typical fale was made entirely of local materials chiefly timber and thatch. It stood on posts driven into the ground. It could easily be removed. The next stage was the evolution of the "lean to" made out of timber and corrugated iron. Again, such buildings can easily be dismantled, removed and re-erected. With the advent, however, of the concrete style of construction the situation was quite changed. Nowadays many domestic buildings are constructed out of concrete blocks standing on a concrete slab with windows, doors, roof, plumbing, electricity all embedded in the construction. Large commercial buildings such as the Reserve Bank, Little Italy or the Sanft Building need no description. The simple point is that nowadays the average home or commercial building cannot be removed from the land except at considerable cost and inconvenience. The option theoretically accorded by the law to remove such "chattels" is not one which, in practical reality, can usually be exercised.

[13] In the present case, it is not disputed that the building in question is a two storey construction. Some of it appears to be of concrete blocks. It has a corrugated iron roof. The original shop was built by the First Defendant. It was then extended by one Ming Sen Tsay who then sub-let the

building to the Plaintiff who herself then built the upper storey before moving into it as her residence, meanwhile subletting the ground floor shop. The building is erected at the road frontage and occupies a substantial part of the First Defendant's town allotment.

[14] The agreement in question is the third dealing with the building. The first, between the First Defendant and Ming Sen Tsay is dated 26 June 1999. (Document P-3-6) It runs from 2 June 1999 to 1 June 2008.

[15] The second agreement, said to have been concluded on 9 June 2005 i.e. just under 3 years before the first agreement was due to expire, was between the two Defendants and the Plaintiff. A copy is document P-7-10. It runs from June 2008 to June 2013. The current agreement was said to have been reached on 20 October 2007, that is, just under 6 years *prior* to the expiry of the former agreement and is stated to run from June 2013 (a little under 5 years after the date of the agreement) until June 2023. The total term of the three agreements taken together is 24 years.

[16] The agreement is entitled "Tenancy Agreement". The Defendant(s) is/are described as "Landlord". The Plaintiff is described as "Tenant". The Landlord "gives the Tenant the right to occupy the premises at his residential place at Haveluloto."

[17] Paragraph 2.1 provides that "the Tenant has the right and freedom to transfer this tenancy to a third party during the period of the tenancy."

[18] Paragraph 3 provides that the "Landlord must insure and keep insured his interest in the premises."

[19] Paragraph 5.1 (which existed in similar form in the two previous agreements) is not clear: "the Landlord agrees to attach and fixtures to renovate, alter or add the premises to 230 square meters" (sic).

[20] Paragraph 20 requires the tenant "to ensure that such grounds and garden as form part of the premises are kept tidy and free of rubbish ..."

[21] The provisions for the payment of rent may be compared. In the first, the rent is $400 per month for 5 years with the whole sum ($24,000) being paid in advance upon the signing of the agreement. In the second, the rent has been reduced to $275 per month with the whole sum of $16,500 being paid upon signature. In the third, the rent has increased slightly to $291.6 per month with the whole payment in respect of the 10 years length of the tenancy being paid in advance after the signing of the agreement.

[22] Although the agreements contain a number of covenants, some of which have been noted, there appears to be no provision for forfeiture by breach. The third agreement however, contains an unusual clause:

> "[The Landlord] will not terminate this agreement during the period of the tenancy otherwise he will pay the tenant the amount of $117,000 pa'anga for the cost of the improvement and repair of the building and other expenses and losses."

This figure appears to be a penalty.

[23] The Defendants deny that they are bound by these agreements. Substantial issues of fact and law are raised in their Statement of Defence dated 21 June 2014. With the agreement of counsel and following my Decision of 6 June it

was decided that the preliminary issues described in paragraph 3 above first be addressed.

[24] In my opinion the agreements upon which the Plaintiff relies go far beyond the short-term tenancies referred to in *Cowley*. This is not a case of estoppel such as *Matavalea v Uata* (LA 1 of 1985), a family agreement described in *Mangisi v Koloamatangi* [1999] TOCA 9 as being "a very similar case".

[25] It is not clear from *Mangisi* or *Matavalea* whether the buildings erected by the occupiers were also being lived in. In my opinion a permanent residence is a very different matter from merely operating a shop. In the present case I would hold as did Martin CJ in *Nakao –v- Fua* (unrep. 4 September 1989) that the building, partly erected by the Defendants, not the Plaintiff, is as a matter of fact affixed to the land, cannot reasonably be moved without demolition and has not been detached from the Defendants' land. It is, in other words, an exception to the *general* rule in *Kolo* (above).

[26] The particular features of the agreements which I have highlighted seem to me characteristic not of a licence but of a lease. The relationship between a licensor and a licensee is not one of "Landlord" and "Tenant" but one of "grantor" and "grantee". The Tenant's right to exclusive possession of the promises and the right to transfer the premises or sublet them to a third party from whom payment might be obtained point not to a mere licence but to an estate in the land being occupied. (see generally *Addiscombe Estates Ltd v Crabbe* [1957] 3 All ER 563).

[27] If I am wrong, and these agreements should in fact be regarded as licences then I am of the opinion that such licences should be in Form 6 permit style and should be registered as required by the Land Act. In my opinion it is entirely unsatisfactory that agreements of this type which in reality result in the owner of the allotment being deprived of its use for many years, are prepared informally, need not even be in writing, are not available for inspection in the register and are apparently varied by oral agreements at the whim of the parties. I do not believe that it was intended that far-reaching agreements of this kind could validly exist outside the Land Act which is supposed to be a "complete code" of Tongan land law (*O.G. Sanft v Tonga Tourist and Development Co. Ltd and Ors.* [1981-88] To. L.R 26)

[28] In paragraph 13 of *Mortimer & Anr.* (above) the Court of Appeal "expressed no view" on whether tenancy agreements (other than short term agreements such as those referred to in *Cowley*) breached section 13 of the Land Act by creating title or interest in the land. In my experience these agreements are to be found with increasing frequency and it would be helpful for the Court definitively to pronounce on their status.

Result: In my opinion the agreements reached between the parties herein were either illegal or ineffective or both.

M. D. Scott
JUDGE

NUKU'ALOFA: 7 August 2015.

M. Taufa
28/7/2015