

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

CV 44 of 2013

BETWEEN: **LAUTAIMI LISIATE** - **Plaintiff**

AND : **MALAKAI KAUMAVAE** - **Defendant**

L.M. Niu SC for the Plaintiff

'O. Pouono for the Defendant

JUDGMENT

1. The Plaintiff has been a commercial grower of cassava (manioke or tapioka) for upwards of 20 years. He and his wife have a stand at Ha'ateiho at which they sell the cassava at the road side by their house.
2. The Defendant described himself as a "contractor". He spends most of his time in New Zealand however he retains several business interests in Tonga which are looked after for him by his daughter.
3. The Plaintiff told the Court that the Defendant and his wife came to the cassava stand in about April 2011. They were driving a 4WD vehicle. The Plaintiff was already acquainted with the Defendant, having supplied cassava to him on two or three occasions for funerals. The Plaintiff and the Defendant discussed supplying

cassava. The Defendant suggested that the Plaintiff supply him with enough cassava to fill a container. This would then be exported to New Zealand. In exchange, it was agreed that in about the following October the Defendant would supply the Plaintiff with a 4WD vehicle similar to that in which they were driving.

4. Within a few days, the Defendant had obtained a refrigerated container and had employed about ten men to uproot the cassava from the Plaintiff's plantation, transport it to Viliami 'Anitema's house, clean it, peel it and pack it into plastic bags which the Defendant had obtained from New Zealand. The weighed bags were then packed into the container at Tofoa by Semisi Vaea who told the Court that he had stacked many containers before. The Defendant told the Court that over the six days Tuesday to Saturday which it took to fill the container he was frequently present and had oversight of the whole operation:

"I went up every morning at 5am and took my boys to pull up and clean the cassava".

5. The container was finally filled on Saturday. It is possible that some of the cassava used to fill the container came from Vaini. The filled container was locked and arrangements were made by the Defendant for it to be transported to the wharf.
6. According to defence witness Tevita Siale the container was a freezer container and it was plugged into a three phase plug at his tyre shop at Tofoa. It left for the wharf on the Monday following the Saturday when the filling had been completed.

7. The Plaintiff told the Court that by the following October he still had not received the promised for 4WD. He had heard nothing from the Defendant. He contacted the Defendant's wife who told him that the Defendant would be visiting Tonga the following week and would visit him. The Defendant did not turn up. After further inquiries the Defendant's wife eventually told him that the cassava which he had supplied was "useless". In June 2013, as he had still not received the 4WD he issued the present proceedings.
8. The Plaintiff's evidence, which I accept, was that he had supplied enough cassava to the Defendant to fill the container with sacks worth \$40 each. On the basis of 700 sacks the value of the cassava supplied was therefore \$28,000, payment of which sum he was seeking from the Defendant.
9. The Defendant's response to the claim was not altogether clear. In paragraph 5 of the Defence it was pleaded that:

"the cassava was not able to be sold for they had *become* deteriorated"

and in the next sentence:

"the cassavas were overgrown *before* they were harvested and has nothing to do with the Defendant.

The letter claim was repeated in the last sentence of paragraph 12 in which it was pleaded:

"the cassava was overgrown and doomed to be wasted".

10. In paragraphs 8 to 11 of the Defence an alternative defence, apparently a set-off, was pleaded. These expenditures were predicated on what was stated to be an agreement between the parties that they would enter into a business partnership. On this footing the amounts particularised were said to be expenses incurred by the Defendant in connection with the shipment of the container of cassava and several other ventures.

11. The fundamental problem which faced the Defendant was that it was his men who uprooted the cassava and prepared it for packing into the container and the Defendant himself was the overall supervisor of the whole operation. The evidence of the Plaintiff, of his witnesses Semisi Vea and Mote Siua was that the cassava was of a very good quality. Some of it was cooked and eaten by the men processing it. If the Defendant's claim is that the cassava was "overgrown" then, given his own evidence that "I know cassava and its quality. I can tell the quality when it is peeled" it has to be asked why the alleged fact that the cassava was overgrown and "doomed to be wasted" was not noted by the Defendant or his men over the six days that it took to fill the container. If the Defendant had suspected that the quality of the cassava was wanting then it was open to him to complain to the Plaintiff, even to reject the cassava which was being provided to him. On his own admission he did not do so and I find on the evidence before me that the cassava was, as conceded by the Defendant in cross examination "of good quality" when it was supplied.

12. In his evidence, the Defendant suggested (with some uncertainty) that the cassava was black or otherwise unsuitable when it arrived at the point of sale in Auckland. Various theories and explanations

were advanced. In my view however, the Plaintiff's obligations under the agreement were completely fulfilled when he had delivered sufficient cassava to fill the container.

13. Having heard and seen the Plaintiff and the Defendant I have no hesitation at all in rejecting the Defendant's claim that the parties had entered into some form of business partnership, sharing the profits and losses together. The Defendant was unable to produce any documentary or other independent evidence of such an agreement nor was he able to describe even in most basic terms with any precision. In cross examination he agreed that had his own 4WD not been in need of some repairs he would have been happy to exchange it there and then with the Defendant as soon as the container was filled. This concession was fatal to the Defendant's alternative defence and accordingly there is no need to imply any terms into such an agreement.
14. In addition to the Defendant, two witnesses were called by Mr Pouono. Tevita Siale stated that when he saw the cassava just before locking the container "some of it, at the front, was already turning black, the Defendant also saw this". Asked about the bags which contained the cassava he described them as red, like onion bags whereas the Defendant's evidence was that they were clear plastic purchased by him in New Zealand. The Defendant also claimed that the cassava was already beginning to turn black even before the container was finally locked but "I thought it would be alright and did not reject it".
15. At the conclusion of the trial Mr Niu handed up excellent and comprehensive submissions for which I am grateful. Several of the

points made by him have been incorporated into this judgment. Mr Pouono whose client's case seemed to wither as it progressed did the best he could with a difficult brief.

16. The only remaining area of uncertainty is the number of bags of cassava supplied. Estimates varied between 600 and 800 bags and there was also disagreement about whether the bags were 20kg or 25kg. Unfortunately, the bags were not counted as they were loaded into the container or, if they were, the records have been lost. Viliami 'Anitema, called by the Defence, told the Court that he was familiar with exporting food crops and the size of the bags required was 20kg. His evidence was not disputed and may be accepted. He estimated that the number of bags was 600-700. Both parties should have kept better records of the amount of cassava supplied. A finding that 650 were supplied would seem to do justice to both. At this rate the value of cassava supplied by the Plaintiff to the Defendant was \$26,000.

Result: Judgment for the Plaintiff with damages assessed at \$26,000.
Plaintiff's costs to be taxed if not agreed.

DATED: 18 July 2014.

N. Tu'uholoaki
16/7/2014.



CHIEF JUSTICE