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IN THE SUPREME COURT OF TONGA
DIVORCE JURISDICTION
NUKU'ALOFA REGISTRY **FD 872 OF 1994**

BETWEEN : MILIKA LE'OTA

- Petitioner

AND : PENISIMANI LE'OTA

- Respondent

Counsel : Mr. P. Pifeleti for the petitioner.
Miss. L. Tonga for the respondent.

Hearing : 17 July 2015.
Decision : 21 July 2015.

RULING

THE ISSUE

[1] The petitioner applies to the Court to clarify the meaning of an Order of Lewis J made in this proceeding on 13 January 1995. The respondent opposes the application and says that

rec'd 31/07/15

it serves no purpose and is an abuse of the process of the Court.

[2] The Order in question provides:

> The Respondent pay maintenance to the Petitioner in respect of the 3 children of the family at the rate of $150:00 forthwith after service of this Order upon him until further Order.

[3] The Order does not state the frequency of the maintenance payments. This is the matter that the petitioner wants clarified. In truth what the petitioner wants is for the Court to amend the Order by inserting words stipulating the frequency of the payments. To understand how this can be an issue over 20 years after the Order was made, it is necessary for me to set out the background.

THE FACTS

[4] The petitioner and the respondent were married in 1979. They had three children namely, Viliami born 31 March 1980, Maxwell born 28 April 1983 and Veisinia born 4 December 1987. In around 1991 the respondent moved to the United States and until last year he did not return to Tonga.

[5] In 1994 the petitioner planned to remarry and she applied for a divorce from the respondent. This was granted by Lewis J on 13 January 1995. At the same time he made the Order that is the subject of this application. The evidence of the petitioner is that she told the respondent about the divorce and the Order but there is no proof of service of the Order upon him and no steps were taken by the petitioner to enforce the Order until now.

[6] The petitioner remarried soon after her divorce and had children with her second husband. The family (including the

respondent's three children) lived in the house on the respondent's land. Late last year the respondent returned, for a time, to Tonga and forced the petitioner and her husband out of the house. This resulted in litigation between the parties which has now been resolved. Sadly, the parties' eldest son, Viliami, who had travelled to Tonga from New Zealand to try and reconcile the family, died at this time. The petitioner blames the respondent for Viliami's death. As a result of these events the petitioner has decided that she wishes to recover maintenance payments since 1995.

DISSUSSION OF THE APPLICATION

[7] The Court has the power to amend clerical mistakes in judgments or orders arising from accidental slip or omission (Order 25 Rule 5 Supreme Court Rules 1991 and Order 28 Rule 5 Supreme Court Rules 2007). The Court also has an inherent power to vary or clarify an order or judgment so as to make the Court's meaning or language plain. Lawrie v Lees (1881) 7 App Cas 19, 34 and Re Swire, Mellor v Swire

(1885) 30 Ch D 239, 246 (CA). The failure by Lewis J to state the frequency of the maintenance payments was clearly an accidental omission. However, despite having the power to amend the Order I do not consider the Court should do so in this case for the reasons that follow.

[8] First, I am unable to say what Lewis J intended. The petitioner put before me almost no relevant evidence that would assist me in this regard. Given this unsatisfactory state of affairs, and in the interests of attempting to do justice between the parties, I have gone back to the original Court file. Having done so, there are a number of possibilities for what Lewis J may have intended. It would appear that the petitioner has no idea what Lewis J intended as what she says in her affidavit is "There was Maintenance order of $150 but not specified whether for what period, whether one (1) week or (2) week or a month." Consistent with his client's evidence, Mr. Pifeleti argued that Lewis J could have intended that the maintenance payments be made weekly, fortnightly or monthly and that I should opt

for fortnightly payments as a middle course between the range of likely possibilities. That is an unprincipled approach that I cannot take.

[9] Secondly, the making of an order on this application would serve no useful purpose. The respondent's obligation to pay maintenance only took effect "after service of this Order upon him....". The petitioner provided no evidence in support of this application that the Order was in fact ever served upon the respondent. What she says is that she told him about the Order but that is not the same thing as service of the Order upon him. The children of the family have long since grown up and, in one case, has died and should the Order now be served no maintenance would be payable in respect of them.

[10] Thirdly, even had there been evidence that the Order was served, the Court should not exercise its discretion to amend a judgment or order when something has happened since

the date of the judgment or order that would make it inequitable or inexpedient to do so. Moore v Buchanan [1967] 3 All ER 273, 277. In this case, there are two factors that influence me that it would inequitable to make any order on this application. First, the petitioner has taken no steps to recover maintenance payments for 20 years. There has been contact between the respondent and the petitioner since 1995 and the petitioner could have taken steps to enforce the Order. Having sat on her hands for so long it would be quite wrong for her to pursue recovery now. Secondly, the Order was obtained on the basis that the respondent had been refused possession of the family home and the respondent was making no provision for his children. In fact the petitioner remained in occupation of the family home and raised all her children there, including the children of her second marriage, until December 2014. In her affidavit, the petitioner acknowledges that the respondent agreed to allow a Chinese person build a store on the land so it could be rented to "help our living". In those circumstances the respondent did make provision for

his children albeit not in the form contemplated by the Order.

THE RESULT

[11] The application is dismissed.

[12] Counsel were agreed that I should make no order for costs regardless of the result.

O.G. Paulsen

DATED: 21 July 2015. **LORD CHIEF JUSTICE**