

IN THE COURT OF APPEAL OF TONGA

LAND JURISDICTION

NUKU'ALOFA REGISTRY

AC 18 of 2018

[LA 16 of 2018]

BETWEEN : **NAITINGIKEILI KAUFUSI**

- **Appellant**

AND : **1. SIONE PANUVE VEATUPU**

2. LUPE VEATUPU

3. MINISTER OF LANDS

- **Respondents**

Coram : **Handley J**

Blanchard J

Randerson J

Counsel : **Mr. W. C. Edwards SC for Appellant**

Mrs. P. Tupou for First and Second Respondents

Mr. S. Sisifa SC for Third Respondent

Hearing : **15 April 2019**

Date of Judgment : **17 April 2019**

JUDGMENT OF THE COURT

- [1] This is an interlocutory appeal by the first defendant in the proceedings in the Land Court, by leave granted by the Lord President, from the dismissal by Niu J of his application to strike out the proceedings because the plaintiffs lacked legal standing to bring them. The facts have not yet been found and our summary below is provisional.
- [2] The proceedings relate to part of a town allotment Kong 'o Ha'atavake, Kolofo'ou granted to Tevita Uluilakepa part of which he leased to his daughter Mele Moana by lease 5452 registered on 18 November 1993 for a term expiring on 17 March 2083. The rent for the whole term was paid to the Lands Department on 19 April 1994.
- [3] The plaintiff, Lupe Veatupu is the sister of Mele and she and her husband Sione may have lived on the before Mele and her husband moved to the United States in 1986 but they certainly claim to have lived there with Mele's permission since 1999.
- [4] Tevita died in 1999 and the allotment, subject to the lease, passed to the first defendant his grandson and heir, his father having died in 1998. The first defendant became the holder when the allotment was registered in his name on 19 April 2000.
- [5] Mele died in the United States in 2001 being survived by her husband. There has been no grant of administration for her estate, and the lease is now vested in the Crown pursuant to s.12 of the Probate Act. The plaintiffs continued living on the property.

[6] On 19 September 2017 the appellant wrote to the Minister seeking cancellation of the lease. His letter claimed this “due to the fact that the Lessee or her heirs for the last 28 years have failed to comply with the lease agreement.

(a) Abandon, neglect, or fail to use it for a period altogether 3 years

(b) Case of (sic) permit to use it any purpose other than that upon which application and approval have hitherto been made

The lessee has passed away in August of 2001. The only structure (house) on the land belongs to the lessee’s father where the lessee’s sister has converted to a business”.

[7] On 18 October 2017 the Cabinet, “on the basis of non-payment of annual rental and neglect” approved the appellant’s application to terminate the lease. He was notified on 7 November 2017.

[8] The appeal book does not reveal whether the cancellation of the lease has actually been registered.

[9] The Minister and his Department made no attempt to inspect the land to discover whether anyone was in occupation and on what basis, despite being informed by the appellant’s letter that the deceased lessee’s sister was conducting a business there. Enquiries at the Department should also have revealed that the rent was not in arrears but had been paid up to 2083.

[10] It is likely that enquiries at the property and of the plaintiffs would have led to the Minister advising Cabinet to refuse the appellant’s application and leave him to bring proceedings in the Land Court to forfeit the lease and recover possession. It should also have alerted the Department to the fact that this valuable lease was vested in the Crown and that the lessee’s family had failed to claim the property or show any interest in it for 16 years.

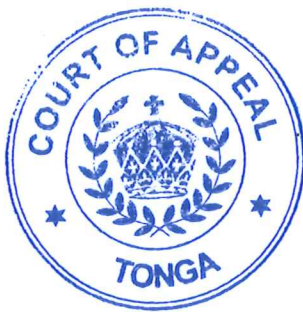
- [11] The plaintiffs have an interest which the law can protect in that they have been in possession of the leased property for at least 16 years. While the lease remained in force the appellant could not bring proceedings in the Land Court to recover possession because he had no right of immediate possession. The plaintiffs must therefore have the necessary legal standing to bring proceedings to challenge the cancellation of the lease.
- [12] The plaintiffs claim that they were in possession of the leasehold land with permission of the lessee at the time of her death in 2001. The licence may have been personal and gratuitous and may have lapsed on the death of the lessee. If however it continued until expressly revoked that would provide an additional ground for holding that they had standing but in our judgment their possession alone was sufficient.
- [13] The lease is expressed to be between King Tupou IV as lessor and Mele as lessee. It contained covenants by the lessee that “[she] will not (a) abandon, neglect or fail to use it for any periods of altogether 3 years (b) use or permit any persons to use it for any purpose other than that upon which application are approval have hitherto been made”. (sic)
- [14] The Land Act does not in terms confer power on the Cabinet to terminate a lease for breach of covenant but the lease provides:
- “ if any of the above covenants are not complied with by the lessee, his heir or representative, the Cabinet may at its direction terminate this lease “
- [15] Any doubt about the ability of the parties to a lease to confer such a power on a third party is not relevant in this case because s.124(1) of the Land Act requires leases to be in the form prescribed in Schedule 1X and Form 3 provides for leases to include this power.

- [16] The Act which requires this power to be included in a lease must be understood as intending that the power should be exercisable: *R.A.Brierley Investments Ltd v Landmark Corporation Ltd* (1966) 120 CLR 224, 231-2.
- [17] Under the general law a landlord is not obliged to observe the requirements of natural justice before taking steps to forfeit a lease for breach of covenant but this power is conferred on the Cabinet by law and not by contract. In our judgment this attracts the duty of a decision maker to observe the requirements of natural justice before exercising the power.
- [18] The appeal must therefore be dismissed, and with costs to be taxed if not agreed.
- [19] However we cannot part with the case without commenting on the continuing failure of the Lands Department to inspect land to find out what is going on there before exercising its powers. This practice provokes legal actions in the Land Court which could have been avoided if representatives of the Department had inspected the land. The litigation causes friction in families and burdens the parties particularly the unsuccessful party with unnecessary legal costs.
- [20] The practice was condemned by this Court in *Tafa v Viau* [2006] TLR 287 more than 12 years ago, a decision which the Land Court and this Court have had to apply repeatedly since. It is high time the practice was stopped.
- [21] If the Lands Department continues to make decisions based on what is reported by one party without inspecting the subject land, it can expect this Court and the Land Court will order the Minister to pay the costs of the other parties of the proceedings resulting from that practice. We trust that it will never be necessary for the Courts to make such an order.

[22] The appeal is dismissed. The appellant is to pay the costs of the first and second respondents to be taxed if not agreed. No order as to costs of the third respondents.

K.R. Handley

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Handley J



J. Blanchard

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Blanchard J

A. Randerson J

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Randerson J