

BETWEEN : SOSEFO 'AHOKAVA TAVAKE

- Plaintiff

AND : SEMISI TAUFA

- Defendant

To: Mr. S. Taione for plaintiff

Mr. S. Fili for defendant

BEFORE HON. JUSTICE NIU AND ASSESSOR TU'IFUA

Counsel : Mr. S. Taione for plaintiff

: Mr. S. Fili for defendant

Hearing : 22 & 23 November 2018

Submissions : By Mr. Fili on 10 December 2018

By Mr. Taione on 4 January 2019

Ruling : 1 February 2019

R U L I N G

Background

- [1] The plaintiff is the registered holder of the town allotment (the allotment) involved in this case. It is situated in the village of Folaha in the estate of the Crown, and it has an area of 3 roods 34.2 perches. It was first registered on 11

December 1920 in the name of the plaintiff's father, Sosefo Tavake, and it was transferred to the plaintiff as heir upon the father's death on 21 June 1990. A deed of grant was only issued posthumously on 19 January 2001 and transferred to the plaintiff on same day.

- [2] The father and the plaintiff did not reside upon or occupy the allotment. They resided upon an allotment on the opposite side of the road together with the wife and children of the plaintiff. The only occupant of the allotment in or about 1960s or 1970s was a younger brother of the plaintiff, named Laine Tavake. He no longer lived there by the 1980s but his house was still there. It is now at the disposal of the plaintiff.
- [3] The village water tank was and is still situated on the allotment, by the road. The road runs from west to east and the tank is some 16 metre or so from the northwest corner of the allotment. Laine Tavake's house is located between the water tank and the west boundary of the allotment. The allotment was otherwise largely bare.
- [4] The plaintiff had 7 children with his wife (who has since died) 5 of whom are sons. The eldest daughter, Malieta, married the defendant in 1977. At first they lived with an uncle of the defendant but they came and lived with the plaintiff and the rest of the family on the allotment across the road from the allotment, (where the plaintiff and his family were always living). They had their first child, Tama'a (a witness for the defendant) born there in 1978. They then built a Tongan house on a vacant allotment at the outskirt of the village by the swamp and they went and lived there, as approved by the town officer.
- [5] Despite the swamp and bush, the defendant and Malieta made that allotment their home. They built a copra drier on it and operated it by purchasing coconuts for processing and drying into copra and selling it to Government and buying more coconuts. The defendant also did net fishing. They had settled there when Hurricane Issac came in 1982 and destroyed their houses. They came back and lived with the plaintiff and his family again. They decided that they needed to build a strong and permanent house on their allotment and the defendant went to the United States to work and get the money to build that house. They also

decided that before building the house they would level the high area to fill the swamp part of the allotment.

- [6] The defendant went to the US in 1982 and found work after about 6 months. A big and substantial permanent dwelling house made of concrete foundation, and concrete block footing and concrete floor and weatherboard walls and corrugated iron roof was built. It was 36 feet long and 24 feet wide. A concrete water tank of 3,000 litres was permanently built. However, it was not built on the allotment of the defendant and Malieta at the outskirts of the village. It was built instead upon the allotment of Sosefo Tavake from about 1983 to about 1985 and it was occupied and used by Malieta and the defendant and their children when it was completed. It was so strong and permanent that it withstood Hurricane Gita in February 2018.
- [7] The defendant returned in 1985, and continued living with Malieta and their children in the house and in 1988 went to New Zealand to work to get furnishing and appliances for their house.
- [8] In 1990, Sosefo Tavake died and the whole allotment was transferred to the plaintiff.
- [9] Whilst the defendant was in New Zealand papers were said to be brought from the Court to be signed and were signed by Malieta which the defendant was said to have filed to divorce his wife, Malieta. The plaintiff became aware of it and he was not happy with the defendant for doing that. Unknown to him, the divorce was arranged secretly between the defendant and Malieta so that the defendant could gain residence in New Zealand and then get Malieta and the children over to live in New Zealand.
- [10] In 1994, the defendant was deported from New Zealand and he continued living with Malieta and their family in the house.
- [11] In 1995, the plaintiff, being unhappy with the defendant, demanded that the defendant and Malieta vacate the allotment. The defendant saw a lawyer who wrote to the plaintiff informing him that he could not evict the defendant and his family from the allotment unless there was a court order for them to vacate.

- [12] In 2008, Malieta died, and the defendant continued to occupy the house with his children. He had planted 11 breadfruit trees, plantains, bananas, mulberry plants and other floral trees on the part of the allotment he occupied.
- [13] For some 3 years or so now, the defendant has had another woman living with him as his partner in the house, together with the youngest unmarried child of the defendant and Malieta.
- [14] In about July 2018, the plaintiff erected a barb wire fence across the front of the allotment which blocks the defendant from access to the road. He has to go through neighboring properties to get to the road.
- [15] By letter dated 11 July 2018, the plaintiff caused a notice to be given by his counsel to the defendant to vacate the allotment. The defendant refused to vacate.
- [16] The plaintiff filed this claim on 7 August 2018, seeking orders to evict the defendant and for mesne profit of \$200 per month since 11 July 2018.

Matters in dispute

- [17] From the pleadings, it was clear that there were factual matters as well as legal issues in dispute. Those matters were pointed out at the commencement of this trial as follows:
- (a) Did the plaintiff approve that the defendant and Malieta were to occupy the allotment only temporarily?
 - (b) Whose money was used to build the house?
 - (c) Who was to be the owner of the house?
 - (d) Who is the owner of the house?
 - (e) Did the defendant send any money from the U.S. and was it used for building the house?
 - (f) Was the house intended to be built on the allotment at outskirts of the village?
 - (g) Is that allotment at outskirts of the village now lost?
 - (h) Did the plaintiff surrender the part of the allotment on which the house is built to the defendant?
 - (i) Does estoppel apply against the plaintiff?

That was so that counsel would deal with them when they were calling evidence or examining the witnesses. I shall now deal with them in respect of the evidence given at the trial.

Did the plaintiff approve occupation to be only temporary?

- [18] The plaintiff claims in paragraphs 6, 7 and 8 of his statement of claim that Malieta (his daughter) had asked him to allow her to build “a shelter” on the allotment for her and her children to live in. A shelter is only a temporary accommodation. He also claims that Malieta had asked him if she could put up a temporary house until her husband returned from the U. S. and then they would move out and build elsewhere, and he accordingly gave permission to Malieta. In his evidence, he stated that Malieta had asked him for permission to build and occupy the allotment temporarily and he showed and pointed out to her where she was to build the house.
- [19] Malieta has since died in 2008, but the plaintiff gave evidence that he himself was very much involved in the construction of the house, from the beginning to the end of the construction. And the evidence, that is, of plaintiff witness, Fatai Tavake, son of the plaintiff, who was also involved in the construction of the house, is that the house is a substantial house 36 feet long and 32 feet wide with concrete foundation and floor and weatherboard walls and corrugated iron roof. It has 3 bedrooms, lounge and kitchen, and the walls and ceilings were lined with hardboards. Photographs of the house were produced in evidence. They confirm the evidence of Fatai, and they show that the concrete floor is supported by some 4 layers of concrete blocks above ground level. They show that the house, except for the roof irons which appear to be in need of paint, the weatherboard walls and rest of the house are still in good condition. That is after some 33 years since its completion in 1985.
- [20] I must accept from that evidence that the construction undertaken was for the purpose of permanent occupation of that part of the allotment with that house. It was not for any temporary occupation in order that it may be removed to be permanently built elsewhere. I therefore do not believe the evidence of the plaintiff that he had permitted Malieta to build only “a shelter”, a temporary

house, or to occupy the allotment only temporarily. I believe that the plaintiff had permitted Malieta and the defendant to build their house on the allotment for permanent residence thereon by them.

Whose money was used to build the house?

- [21] The plaintiff claims that other than some \$400 or so which Malieta gave him for the construction of the house, all the expenses for the house and for the builder were born by himself alone. In his evidence, he stated that he had asked a man named Sefo of Holonga for the gravel fill for the floor and that he had a man named Ika to build the house, both for free. He also said that he had asked a woman for the coconut trees to be cut from her land for free and which were cut and taken and milled into timber at the saw mill at Fualu also for free. As for the weatherboards for the walls, he stated that the timber was worth \$800 but he only paid \$300 because the man there, Haueti, who has now died, helped him. As for the roof, he said that he bought the corrugated irons with money he had from the packing of his banana crops. He said that he had up to 100 cartons of bananas in a packing. As for the concrete water tank, he said that he had asked Maile and Sione Lino to build it and they built it for free.
- [22] Fatai Tavake, son of the plaintiff, was asked whether he knew who had provided the money for the construction of the house, and he said that he just did not know how the material and labour for the house was paid for. But when I asked about his father's banana crops at the time, he stated that his father (the plaintiff) did not have any banana crops at all. Neither counsel asked any question to clarify that point at all. As I saw it then, it appeared to us all that what the plaintiff had stated about having up to 100 cartons of bananas in each packing was not true at all because of that evidence of his son.
- [23] Mr. Fili for the defendant submitted that because of the son's evidence, the plaintiff was shown to be lying to the Court when he had stated that he had packed up to 100 cartons of bananas in each packing. Mr. Taione, in response to that point, submitted that the plaintiff never said that he had a banana plantation; he submitted that what the plaintiff had said was he packed boxes of bananas up

to a hundred boxes. In other words, Mr. Taione was submitting that the plaintiff was saying he was packing bananas as a labourer not as owner of the bananas.

[24] I have to say that what the plaintiff said in Tongan was “na’aku fa’o siaine” (I packed bananas), and that term was the term used by banana farmers who owned banana plantations. If a person was packing bananas belonging to another person, he would only be a daily paid labourer, and he would have said “na’a ku fa’o siaine totongi” (packed bananas for pay). The plaintiff did not say that he was packing bananas for pay. He said that he was packing bananas up to a 100 boxes. I believe that he knew the difference. If he had said he was only packing bananas for pay, I would not believe he had the money to buy the roofing irons. I believe he said what he said to make me believe that he had the money to buy the roofing irons, but which money he did not have. He therefore could not have bought the roofing irons.

[25] The plaintiff denied in his evidence that the defendant had sent any money from the U.S. to help with the construction, other than the sum of \$400 or so he said Malieta had given him.

[26] Against the plaintiff’s evidence is the evidence of the defendant himself. He stated that he had remitted to his wife Malieta a sum of \$4,400 in 1983 for leveling of the land and filling of the swamp at the allotment at the outskirts of the village as he had decided with Malieta they would do before building their house on it. He said that Malieta rang and told him that the house was being built on the plaintiff’s allotment instead and that the foundation, footing and floor had already been done with the money sent and needed the money for the walls. He stated that he was concerned as to the change to build on the allotment, and Malieta told him that the plaintiff himself and his son, who was his heir, both agreed that that part of the allotment be theirs. He was then happy and he sent \$3,400 for the weatherboards and timber for the walls. The third sum he sent was \$3,000 for the roofing irons. He also sent \$500 for the sliding door. He said that he had also paid for the construction of the concrete water tank by a man named Maile, whilst he was still in the U.S. and that the size of the tank was about 3000 litres. He estimated that he has spent in excess of \$10,000 to build the house, and its value

today is about \$40,000. He said that he had sent \$600 to pay for costs of cutting and milling of the coconut trees for the house. He said he had also sent in the beginning \$500 for the purchase of a pig to kill for food for the commencement of construction, that is when the footing was to be done.

[27] In support of that evidence, the defendant's eldest daughter, Tama'a, gave evidence. She is now 40 years old but she can recall when she and her parents were still living in their Tongan house on the swampy allotment at the outskirts of the village, and that they had a well there, and then they shifted from there and lived with her grandparents at their place across from the allotment. She recalled that her father left and went to the U.S. and that she and her mother, Malieta, would walk to Sione Lopeti's house in Longoteme on Sundays for her mother to talk to her father on their telephone. She recalled that she heard her mother talk to her father on the telephone to send money for building their house. She said that they did that walk to Longoteme many times. She also recalled that she went with her mother to the bank, the Bank of Tonga, where her mother drew money she said had been sent by her father, and that they went from there to the Jones Store and purchased material including timber for the house.

[28] Considering the evidence of the plaintiff and of his son and of the defendant and his daughter, I prefer and I believe and accept the evidence of the defendant and of his daughter. I find them credible and more reasonable. I cannot believe, and I do not believe that the house as shown in the photographs was built for free with the roof being paid from the banana packing wages of the plaintiff or with timber worth \$800 being purchased for only with \$300.

[29] Accordingly, I find on the evidence, that the house was built with money provided by the defendant.

Who was to be owner of the house?

[30] In the plaintiff's claim, he does not claim ownership of the house and in his evidence he never said that the house was his, although he stated that he built all of it at his own expense except for \$400 given to him by his daughter, Malieta. He even stated in his evidence that when Malieta asked him for a piece of land from the allotment to build on, he told her, "OK, but when Semisi will return, you two

take your house and go”. I asked him whether he told them, after the defendant returned from the U.S., to take their house and move out, and he said that when the defendant came from the U.S., he did not move their house like he had told Malieta because the defendant ran off to New Zealand. From Semisi’s (defendant’s) evidence, which I prefer, he stayed in Tonga in the house with his wife and family for some 3 years before he left to New Zealand to get furnitures and appliances for the house. He did not run off soon after he returned from the U.S. like the plaintiff said he did.

[31] I prefer the evidence of the plaintiff’s son, Fatai, when he was asked in cross-examination by Mr. Fili as to whose house it was that they had built. He replied that the house they built was the house of the defendant and his wife, Malieta.

[32] Accordingly, I find that the house was for and it was and still is the house of the defendant and his wife (now deceased) Malieta. That answers the next question or issue as well: who is the owner of the house?

Did the defendant send any money for building the house?

[33] The answer to that question has already been given in paragraph 29 above. The answer is yes. The defendant provided all the money for the house.

Was the house intended to be built at the outskirts of the village?

[34] In his defence, the defendant says that he and his wife had intended to build their strong and permanent house on the allotment at the outskirts of the village because that allotment was vacant and had been given by the town officer to them to make their own. He gave evidence of that in his evidence. He said that he and his wife had decided that he would go to Hawaii to work and send the money for the wife to use to fill and level the allotment as it was swampy before they would build on it. He said that that was what was to be done with the first remittance he made, \$4,400. He was therefore surprised and concerned, when his wife telephoned and told him that they were building on the allotment of the plaintiff instead. The defendant said that he only accepted the change and agreed to build upon the plaintiff’s allotment because of the assurance that the plaintiff and his eldest son and heir gave them that they could have the part of the allotment where their house would be built as theirs.

[35] He stated that when he arrived back from the U.S., he was met at the airport by the plaintiff and when they drove into the allotment at Folaha where their newly completed house was, the plaintiff said to him. "Semisi, the construction was to be carried out on your piece of land by the bush, but because it is not safe there for the girls, we built it here instead so that you will have this piece as yours". In reply, he said to him, "Thank you for your kindness".

[36] I accept that evidence of the defendant, which was denied by the plaintiff and I do not accept his denial. I believe that had the plaintiff not said to Malieta that she and the defendant could have the piece of the allotment as theirs, Malieta and the defendant would not have spent their money building their house on it, on a permanent basis as they did.

Is the allotment at the outskirt now lost?

[37] The evidence on this point is conflicting. On the one hand, Fatai, son of the plaintiff, said that he had recently seen the piece of land where the defendant and Malieta had occupied at the outskirt of the village and found that it is still swampy and not occupied by anyone. On the other hand, Tama'a, daughter of the defendant, said that the piece was now occupied by one Toni Semisi who is from Niua and who is not related to them. She stated that the piece is now lost because her father and mother gave it up because of the offer of the piece of the allotment in question which the plaintiff had given to them. I prefer and I believe the evidence of Tama'a because she was specific about the person who she says has it now. I accept that that allotment is now lost.

Did the plaintiff surrender this part of the allotment to the defendant?

[38] No evidence was given of any Cabinet decision under S.54 of Land Act approving any surrender by the plaintiff of any part of this allotment to or in favour of the defendant or of anyone else. I therefore find that the plaintiff did not surrender this part of the allotment to the defendant.

Does estoppel apply against the plaintiff?

[39] Mr. Taione for the plaintiff has submitted that estoppel does not apply to protect the defendant from being evicted by the plaintiff because the defendant only had a licence to be on the land whilst he was the husband of Malieta and whilst

Malieta was still alive. He submits that this is because the arrangement for the occupation of the land was made only between the plaintiff and his daughter whilst the defendant was in the U.S. He says that the defendant was never part of the agreement. He submits that because the defendant went and divorced Malieta, and because Malieta has died, the licence he had therefore ceased and he must vacate the allotment. He submitted that the principle of estoppel cannot apply in this present situation.

[40] Mr. Fili for the defendant on the other hand has submitted that estoppel applies in the present case against the plaintiff to stop him from evicting the defendant. He refers to the case of *Faleafa v Faleafa* [2015] Tonga LR 306, a case which is not dissimilar to the present case.

[41] In that case, the town allotment belonged to and was registered in Sione but part of it was occupied by Viliami and his wife Poli in a little shelter they had under a tree. Viliami wanted to build a good house for themselves but Sione objected. The head of the extended family ('Ulumotu'a) told Viliami to come with him and he would give him land to build on as his. Before that was done, Sione told Viliami he could go ahead and build on the part of his allotment and that he could have that part as his. Viliami and Poli accepted and Sione signed his consent to mortgage his town allotment to secure Viliami and Poli's loan to build their house. The loan was granted and the house was strongly and permanently built and the loan was repaid and the mortgage discharged. Eighteen years later, relationship between Sione and Viliami soured and Sione sought eviction orders to evict Viliami and Poli from the allotment. Viliami counterclaimed that the part of the allotment they occupied be ordered to be registered in his name.

[42] Paulsen LCJ, in deciding the case, referred to *Veikune v To'a* [1981-1988] Tonga LR 138 where Martin CJ held that a registered owner of land was estopped from evicting a person in possession because he had been promised that he could stay on the land, had spent considerable sum of money building and enlarging his house and as a result made no effort to find land elsewhere. He stated that there were obvious similarities between that case and the case before him. I have to say that there are obvious similarities between those two cases and the present case as

well. He stated other cases where the Courts have refused claims by a registered owner for possession of land on equitable principles include *Alofi v Fine* [1998] Tonga LR 24, *Ongolea v Finau* [2003] Tonga LR 147, *Fakatava v Koloamatangi & Fakatava* [1974] Tonga LR 15, *Vai v Uliafu* [1989] Tonga LR 56. He also referred to the Court of Appeal decision in *Tafolo v Vete* [1998] Tonga LR 164, and then stated:

“[18] Applying these principles to the present case, an equity has clearly arisen preventing Sione from evicting Viliami and Poli from the land. Sione invited Viliami and Poli to live on his land from at least 1981. In 1994, Sione represented that the land was Viliami’s land and told him to build his house. Viliami relied upon that representation and raised a loan, built his house gave up other land offered by the ‘Ulumotu’a. Viliami and Poli have now lived undisturbed on the land for 34 years and raised their family there. It would be unconscionable for them to be now evicted from the land.

[19] In my view the equity that has arisen can only be satisfied by the making of an order that Sione is estopped from disturbing Viliami and Poli’s occupation of the land for so long as they wish that it remain their home and I so order.”

[43] The present case falls squarely within the decision of the Lord Chief Justice in that case. The defendant and Malieta had wanted to build their house on the vacant allotment at the outskirt, but the plaintiff persuaded them to build their house on his town allotment instead by promising them that the part on which they would build would be theirs. They then went ahead and built a substantial and permanent dwelling house upon it and then occupied it for some 33 years. And because of that representation by the plaintiff, they gave up the vacant allotment at the outskirt, which I have accepted is now lost to one, Toni Semisi.

[44] I hold that the plaintiff is estopped from evicting the defendant from the allotment.

Claim for mesne profit

- [45] The claim of the plaintiff for mesne profit from the time the defendant was notified to vacate the allotment up to now cannot be sustained. This is because the occupation by the defendant of the allotment of the plaintiff was not and is not unlawful because the plaintiff is estopped from denying that he had promised that that part of the allotment they built and lived on would be theirs. That is what estoppel does. S.103 (1), (2), (3) and (4) are all instances of estoppel. I quote (3) which provides as follows:

“(3) If a person, whatever, his real meaning maybe, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.”

- [46] The defendant and Malieta would not have given up the vacant allotment at the outskirts and they would not have built upon the allotment of the plaintiff had the plaintiff not represented to them that they could build permanently on and have that part of the allotment as theirs. And because they have gone and built permanently upon and have occupied that part as theirs, the plaintiff is estopped from denying that they could have it as theirs. He therefore cannot claim that they are occupying it unlawfully and that in consequence of such unlawful occupation, they are liable for mesne profit as damages for such unlawful occupation, because he is estopped from denying that they are occupying it lawfully.

- [47] Accordingly, the claim for mesne profit is misconceived as well.

Time bar

- [48] At the end of the evidence, I indicated to counsel that in the evidence, the plaintiff had sought to evict the defendant back in 1994 but took no action to evict the defendant. Was the claim of the plaintiff to evict the defendant, which he only filed in 2018, barred under S.170 of the Land Act?

- [49] Mr. Fili submitted that it was because he ought to have brought this claim within 10 years of 1994 after the defendant's lawyer wrote that the defendant would not vacate unless the Court ordered him to. The cause of action accrued to the plaintiff then and it expired in 2004.
- [50] Mr. Taione submitted that the issue of time bar was not pleaded by the defendant in his defence and it should have been pleaded because the reference by the defendant in his evidence to seeing Mr. Tu'utafaiva and serving a letter of his upon the plaintiff was prejudicial because the plaintiff had already closed his case.
- [51] I have to say that that is not quite correct. When the plaintiff was cross-examining the plaintiff, Mr. Fili put it to him that there was a letter from Mr. Tu'utafaiva given to him in the 1990s because he was trying to evict the defendant and the plaintiff replied that there was.
- [52] S.170 provides that no person shall bring in the Court any action but within 10 years after the time at which the right to bring such action shall have first accrued to the person bring the same (unless it accrued first to some other person through whom he claims, in which case the action must be brought within 10 years after the time it accrued to that person).
- [53] That provision is mandatory. It provides that no claim shall be brought after 10 years have expired. If the Court becomes aware that that is the case the Court is obliged to uphold the provision, even if it is not pleaded in defence.
- [54] However, the provision provides that there be a "right" accruing to the person bringing the action to bring the action. In the present case, I have already held that the plaintiff does not have any right to evict the defendant because he is lawfully estopped from bringing a claim for it by the principle of estoppel. He therefore did not have the right to bring the action in 1994 even if he wanted to because he would be similarly estopped from bringing it then.

The fence

- [55] The erection of the barb wire fence by the plaintiff, I find, is an unlawful and improper attempt by the plaintiff to force the defendant to vacate the allotment.

Prayer by defendant to have land granted to his son

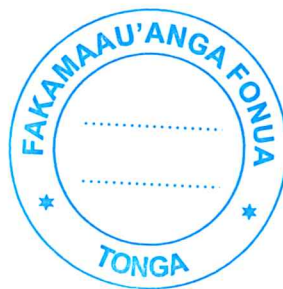
[56] The defendant has prayed in his prayers in his statement of defence that the Court orders that the part of the allotment occupied by him be granted and registered in his son's name, Filipe Taufu, no doubt because he is a grandson of the plaintiff, albeit, son of his daughter, Malieta.

[57] That cannot be so ordered by this Court because the plaintiff has not lawfully surrendered it under s.52 of the Land Act and the son has not applied for it as provided by s.43 and the Minister of Lands has not granted it to him under s.19 (2) of the Act.

Orders

[58] Accordingly, for the foregoing reasons, I make the following orders:

- a) The claim of the plaintiff for eviction order is dismissed.
- b) The claim of the plaintiff for mesne profit as damages is dismissed.
- c) The prayer of the defendant to have the land registered in Filipe Taufu's name is declined.
- d) The plaintiff is ordered to remove the barb wire fence he has erected at the front of the allotment where the defendant resides forthwith.
- e) The plaintiff shall pay the costs of the defendant in these proceedings, to be taxed if not agreed.



L. M. Niu
J U D G E

NUKU'ALOFA: 1 February 2019