IN THE LAND COURT OF TONGA LA 36 of 2017
NUKU'ALOFA REGISTRY

BETWEEN: PAULIASI VA'ENUKU MAPA a.k.a
PAULIASI MAPA VA'ENUKU
- Plaintiff

AND: TEVITA MAPA VA'ENUKU II
- First Defendant

MINISTER OF LANDS
- Second Defendant

BEFORE HON. JUSTICE NIU AND ASSESSOR TU'IFUA

Counsel for plaintiff: Mr. H. Tatila

Date of Hearing: 15 January 2019
Date of Ruling: 15 and 22 January 2019

RULING

[1] Because neither defendant filed any defence, the plaintiff and witnesses called by him have given evidence in a formal proof hearing of the plaintiff's claim held on 15 January 2019. At the end of the hearing, I ruled that the claim of the plaintiff was upheld but stated that I would write up my reasons for it. The following are my reasons.

The facts

[2] The plaintiff's grandfather was Pauliasi Va'enuku. He lived with his family on a town allotment in the village of Matahau in the estate of Tu'ivakano, Tongatapu.

The town allotment had an area of 1 rood 23.28 perches and he had it registered in his name on 4 October 1928.

[3] He had 4 sons (as well as daughters), the eldest being Tevita. When Tevita got married he continued to live with his parents on the allotment and had 11 children, of whom the eldest 2 sons are 'Ilavalu (who gave evidence for the plaintiff) and Pauliasi, the plaintiff.

[4] In 1966, Tevita and his whole family left for the United States and the care of the allotment was left to one Folau who was a son of Tevita's second brother, Sione, who came and lived in Tevita's house, which was only a Tongan house. Later on Sione and his family, including Folau, also left for the United States.

[5] In 1977, Pauliasi, the grandfather, died and no body claimed the allotment and it reverted to Tu'ivakano..

[6] In 1993, whilst he was in Tonga as a teacher at Liahona High School, the defendant, who is also named Tevita but herein referred to as the defendant, and is the second son of Sione, who was the first brother of Tevita, went and asked Tu'ivakano for the allotment to be granted to him. He told Tu'ivakano that Tevita, who was Pauliasi's eldest son and heir, and his family were not coming back to Tonga again and that they no longer wanted the allotment. That was not true at all but Tu'ivakano believed him and he signed his consent to the defendant's application. Tu'ivakano gave evidence in this hearing and stated that had he known that, he would not have signed the defendant's application.

[7] The defendant lodged his application with the Minister's office and paid the survey fees on 12 August 1993. By savingram dated 23 August 1993, the Minister (Ma'afu Tupou) directed that a deed of grant be prepared for the defendant. However nothing was done about it.

[8] On 17 February 1997, the defendant wrote to the Minister to cancel those instructions (which were given to prepare a deed of grant for him) and to change the area of his allotment so that he could have half and his younger brother, Nauha'amea, could have half. By written instructions given on 1 April 1997, the

Minister (Fakafanua) directed that the first instruction be cancelled and that the allotment be halved between the defendant and his brother, Nauha'amea.

[9] In pursuance of that direction, the allotment was surveyed into 2 halves of 35.2 perches each with the northern half being made lot 1 for the defendant and the southern lot being lot 2 for Nauha'amea.

[10] In 1999, Tevita (plaintiff's father) returned and lived on his own town allotment at Matahau and looked after the allotment, that is both lots 1 and 2 although he did know that the allotment had been halved.

[11] In 2000, the plaintiff came and visited his father here in Tonga and his father told him that he had been told that the defendant had gone and had his name written on the allotment, and that he had asked the defendant why he had gone and done that, and that the defendant had told him that he had gone and put his (the plaintiff's father name Tevita) on the allotment, not his (the defendant's name Tevita).

[12] In 2001, Tevita had to return to the United States because he was ill and he died there in June 2001.

[13] In 2002, the plaintiff came back to Tonga and went and checked up the allotment at the land office. He found out that the allotment was being halved between the defendant and Nauha'amea. He went and confronted the defendant and told him that he had lied to his father (Tevita) that the allotment had been put in his name whereas he had put it in his own name instead. The defendant admitted it and apologised and agreed that the half (lot 1) in his name be given to the plaintiff instead. He wrote a letter in his handwriting to the Minister to cancel his application for lot 1 and signed it. That letter was dated the 9 August 2002.

[14] The next day 10 August 2002, they went to Tu'ivakano with an application form for the plaintiff to be granted lot 1 and Tu'ivakano signed it to confirm his consent that lot 1 be given to the plaintiff instead. The application form was lodged in the office of the Minister of Lands (Fielakepa) together with the letter of the defendant to cancel his own application for lot 1. The Minister approved it and directed that a deed of granted be drawn up for the plaintiff. That was duly

done and on 28 January 2003, the Minister endorsed and signed it. That was Minister Fielakepa. At that time, the plaintiff had returned to the U. S. and he did not know it so that he would pay for registration of the deed of grant.

[15] In 2007, Minister Tuita replaced Minister Fielakepa, and the defendant, contrary to his letter to the Minister of 9 August 2002 to cancel his application and to his agreement with the plaintiff, went and revived his application which had been approved by the Minister (Fielakepa) in 1997. It is clear that the Minister's attention was not drawn to the deed of grant which Minister Fielakepa had already granted for the plaintiff on 28 January 2003, and so he granted another deed of grant to the defendant on 3 December 2007, the registration fee for which had been paid on 11 September 2007.

[16] That grant by the Minister Tuita was made without the knowledge of the plaintiff and without having given him an opportunity of being heard, and the plaintiff was not aware of it until 2014 and he complained to Tu'ivakano. On 24 April 2014, Tu'ivakano wrote to the Minister, who was then Ma'afu, to the effect that the defendant had lied to him and thereby obtained his consent to the grant. The plaintiff was also able to contact the defendant and the defendant agreed to give up his registration and he wrote and signed a letter to the Minister consenting to removal of his name and to having the plaintiff's name registered on the allotment.

[17] On 13 February 2017, the plaintiff's registration fee was paid and his deed of grant no. 369/53 signed by Minister Fielakepa on 28 January 2003 was duly registered.

[18] On 25 October 2017, 39 days before 10 years from 3 December 2007 (the day the defendant's deed of grant was granted) expired, the plaintiff filed his claim against the defendant and the Minister in this Court, praying that the defendant's registration be cancelled and that the defendant and his family, agents, employees or persons acting on his behalf be ordered to vacate the allotment, lot 1.

[19] No defence was filed by either the defendant or the Minister to that claim. It was confirmed during the hearing that although one, Seno Tavo, of Matahau purports

to act for the defendant as registered holder of the allotment, no one actually lives on or occupies the allotment.

The law

Must be proper consent by estate holder

[20] S.43 (2)(a) of the Land Act requires that an application for an allotment shall be made on the prescribed form and that form requires the estate holder to sign the following statement in it:

> "I hereby consent to the grant of the allotment as described above and declare that there is no impediment to prejudice this grant."

[21] That consent must be a proper consent. It must be one obtained freely and without force or coercion or by fraud or because of false or misleading information given to the estate holder.

[22] In the present case, the estate holder, Tu'ivakano, had been lawfully entitled to consent to the grant of the allotment (1r23.28p) to any one because it had lawfully reverted to him in 1978 after Pauliasi died in 1977. But he had left it to be granted to the one who was the heir to Pauliasi, Tevita, although he did not claim it within 12 months of Pauliasi's death. He alluded to that in his letter to the Minister on 24 April 2014, and stated there that the defendant had given him untrue information which persuaded him to consent to the grant of the allotment to him. In his evidence, Tu'ivakano stated that the untrue information given to him by the defendant was that Tevita, the heir of Pauliasi and his family were not returning to Tonga and that they did not want the allotment any more.

[23] That information was not true because Tevita had not said any such thing and he did return and lived in Matahau from 1999 to 2001. And furthermore, the defendant had lied to Tevita that the allotment was already transferred to Tevita's name. He admitted that lie to the plaintiff and he agreed to give back the half which he had had sub-divided for himself. He wrote and signed a letter in which he asked the Minister to cancel his "application" for the allotment, that is, the application which Tu'ivakano had signed in 1993 as a result of the lie he had told him. That may be accepted as an admission by him that that application did not

have the proper consent of Tu'ivakano because of the lie he had told him. I accept it as such.

[24] Accordingly, I find that there was no proper consent by the estate holder, Tu'ivakano, that the allotment be granted to the defendant and accordingly, the application of the defendant in 1993 was invalid. Although it was made on the prescribed form, it did not comply with the implied requirement of the form that the consent of the estate holder be proper consent.

Application properly cancelled

[25] As stated above, the defendant did cancel his application. In his letter of 9 August 2002 to the Minister, he stated, "Please cancel my application for lot 1-plan 80/87-P9 lot 1." That letter was presented together to the Minister with the plaintiff's application for the same lot 1 which Tu'ivakano had signed on 10 August 2002. The Minister thereby had before him the consent of the defendant to the cancellation of his application. The Minister accordingly, and properly, granted lot 1 to the plaintiff on 28 January 2003 by deed of grant no.369/53 of that date.

Proper grant made to plaintiff

[26] Because the application of the defendant for lot 1 was cancelled by the defendant himself, the Minister properly granted it to the plaintiff on 28 January 2003, although it was not registered until 13 February 2017. This was because the Minister had already issued a deed of grant no 369/53 for the plaintiff in respect of the allotment lot 1. The fact that it was not registered did not affect the validity of the grant: *Lisiate v Eli* [2012] Tonga LR 30, *Folau v Taione, Ma'afu & M/Lands* [2016] Tonga LR 189.

Improper grant made to defendant in 2007

[27] Whilst the allotment lot 1 had already been lawfully granted to the plaintiff on 28 January 2003, the Minister improperly purported to grant it to the defendant on 3 December 2007 by issuing to him a deed of grant. It was improper because:

a) there was no application (form 9) form lodged for it; the one that had been lodged previously for it had already been properly cancelled by the

defendant himself, and the application form of the plaintiff of 10 August 2002 for the same lot 1 was lodged in its place instead;

b) the consent of Tu'ivakano had already been properly given on 10 August 2002 that lot 1 be granted to the plaintiff instead of the defendant. Tu'ivakano ought to have been consulted as to whether he consented that the defendant be granted lot 1 instead, but he was not. Consequently, there was no consent of Tu'ivakano to the grant of the allotment in 2007, to the defendant, and the requirement of such consent required by the application form was not complied with by the Minister. Such failure was fatal to the grant made;

c) the plaintiff ought to have been afforded by the Minister an opportunity of being heard before he made the grant to the defendant but he did not. This is because there was already before the Minister a deed of grant in the name of the plaintiff which he had signed and granted on 28 January 2003. Natural justice requires that the plaintiff be given that opportunity in order that he could object to the proposed grant to the defendant. That failure of the Minister was also fatal to the grant he made to the defendant on 3 December 2007;

No claim by defendant within 10 years

[28] The defendant was aware that the allotment lot 1 was being taken off him and was being given to the plaintiff in 2002 and by deed of grant 369/53 dated 28 January 2003. He ought to have brought a claim in this Court within 10 years of 28 January 2003 if he felt that he had been improperly deprived of any right to the allotment, but he did not. Any right he had to claim the allotment from the plaintiff expired on 28 January 2013.

Written consent to remove name of defendant

[29] By letter dated 30 June 2014, the defendant wrote to the Minister consenting to have his name removed from the allotment and that the plaintiff be registered on the allotment instead. In accordance with that letter, the plaintiff was registered on 13 February 2017 as lawful holder of lot 1. That constituted estoppel against the defendant.

Costs

[30] It is clear that the problem in this matter has arisen because the Minister had failed to decline the defendant's application in 2007 or to grant the plaintiff natural justice or to confirm Tu'ivakano's consent to the allotment being given to the defendant instead, or to bring the matter to this Court for appropriate orders to be made. I believe that the defendants should jointly pay the plaintiff's costs.

Orders

[31] It is for the foregoing reasons that I upheld the claim of the plaintiff on 15 January 2019. Accordingly, I make the following orders:

(a) There be judgment for the plaintiff.

(b) The Minister of Lands is directed to cancel forthwith the deed of grant and registration of any deed of grant in the name of the defendant in respect of lot no. 1 S/Plan 80/87 P9 Lot 1, a town allotment in Matahau, Tongatapu.

(c) The defendant and his family and any agent, employee or person acting of his behalf shall forthwith vacate the said allotment.

(d) The defendants shall pay the costs of the plaintiff, to be taxed if not agreed.

(e) The plaintiff shall cause a sealed copy of this ruling to be served upon Seno Tavo for the defendant and another sealed copy to be served upon the Minister of Lands forthwith.

FAKAMAAU'ANGA FONUA
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L. M. Niu
J U D G E

NUKU'ALOFA: 22 January 2019.