IN THE LAND COURT OF TONGA **LA 06/2012**

NUKU'ALOFA REGISTRY

BETWEEN : **NAFETALAI TAVAKE**

- Plaintiff

AND : **1. MOHEOFO TAVAKE**
2. MOHEKONOKONO TAUELANGI
3. MINISTER OF LANDS

- Defendants

Before the President and Mrs. Assessor Koloamatangi

O. Pouono for the Plaintiff

T. Fakahua for the First and Second Defendants

A. Kefu [Solicitor General] for the Third Defendant

JUDGMENT

[1] The subject matter of this action is a town allotment Lot 21 (D/G 109/83) at Kolofo'ou known as Ma'u Mamahi ("obtained with pain" – The land).

[2] The allotment was registered on 1-4-1971 by Viliami Kuma aka Viliami Kuma Palekona Tavake ("Kuma") who died on 16-3-2003 leaving a widow, the First Defendant.

[3] There were no children of the marriage between Kuma and the First Defendant however they did adopt (whether formally or customarily was not revealed) a nephew of the First Defendant, the Second Defendant, whom they brought up as their son.

[4] On 18 June 2003 the land was registered in the name of the First Defendant as a widow's life estate pursuant to the provision of Section 80 of the Land Act (The Act).

[5] The Plaintiff was Kuma's younger and sole surviving brother and as such was his heir apparent subject only to his sister-in-law's wife, as provided for by Section 82 (e) of the Act.

[6] In April 2003 and again in May 2003 the Plaintiff, the First Defendant and the Plaintiff's own heir apparent Tevita Siu Tavake agreed in writing (Exhibits Document 4 and 5 and D1 and D1A) that the First Defendant would surrender her life estate, that the Plaintiff and his son would renounce their claims to the land and that the land would be re-registered in the Second Defendant's name. The Plaintiff told me that he did not need to the two letters before signing them.

[7] It is not disputed that shortly after the May 2003 letter was signed, the First Defendant took it to the Ministry of Lands. The Minister did not give evidence and the First Defendant's account of what transpired in the Minister's office was confused. The Plaintiff told me that the First Defendant told him that the Minister had refused to accept the letter. The First Defendant told the Court that she left the letter with the Minister who told her that it would be better if she retained her widow's estate. In any event, nothing further of relevance occurred until 2010.

[8] In about June 2010, the First Defendant decided to revive her attempt to have the land re-registered in her adopted son's name. She

approached the Plaintiff with a freshly drafted letter apparently proposing the same arrangement which had been agreed in 2003. A copy of the letter was not produced for the Court. On this occasion, however, the Plaintiff insisted of having the letter read to him before signing it. The First Defendant and the Plaintiff went to the Ministry of Lands where the letter was read out in front of a clerk. The Plaintiff refused to sign. He told the Court that he had changed his mind in 2003 after the First Defendant returned from speaking to the Minister and related the Minister's advice to him.

[9] What happened after the 2010 visit to the Ministry is in dispute. The Plaintiff's case is that the First Defendant misled the Ministry by once again tendering the May 2003 letter containing the Plaintiff's consent to the proposed transaction while knowing full well that the Plaintiff had since changed his mind.

[10] The First Defendant denied representing the letter. Her evidence was that shortly after the 2010 visit to the Ministry, the Ministry contacted her and told her that the 2003 letter which had been mislaid has been found and was now being acted upon by the Minister. She did however concede that she knew that by the time she was given this information the Plaintiff had withdrawn his consent.

[11] The copy of the May 2003 letter (Documents 4 & 5) shows that it was received and date stamped by the Ministry on 9 June 2010 but whether that is the date that the letter was recovered after being

mislaid or the date that it was first actually received by the Ministry, it is not possible to tell.

[12] Although there is some doubt about what happened to the 2003 letter between 2003 and June 2010, what is quite clear is that the Ministry acted upon the 2003 letter in 2010 on the assumption that it still represented the wishes of the signatories when that was not in fact the case.

[13] Document 4 shows that on 10 June the Minister asked the Secretary for Lands to check the application. On 9 July the Land Registrar (documents 6 & 7) advised the Minister that the land was unencumbered and was therefore "available for the surrender to continue" on the "application by the widow ... and her heir to surrender the allotment ... to the adopted son...". It appears that documents 4 and 5 are endorsed with the Minister's instructions dated 9 July 2010 "surrender now".

[14] On 21 July 2010 (Document 8) the Minister recommended to Cabinet that it accede to the First Defendant's request to surrender the land:

> "The land owner and her heir request the surrender for reallocation to [the Second Defendant]".

On 28 July (Document 9) Cabinet approved:

> "The application from [the First Defendant] to surrender her town allotment at Kolofo'ou ..."

[15] On 3 September 2010 the legal notice of surrender required by Section 54 of the Act was sent for publication and on 8 September 2010 it was published in the Tonga Chronicle (Exhibits D2 & D2A).

[16] The Plaintiff told the Court that he did not see the Section 54 notice and did not lodge a claim to the land. No other person lodged a claim within the 12 months required by Section 54(3) and accordingly on 9 September 2011 the land reverted to the Crown by automatic operation of law.

[17] On 23 September 2010, the Second Defendant applied for the grant of the land to him (Documents 12 & 13) and on the same day the Minister executed a deed of grant in his favour (Documents 16 & 17). It is this grant which the Plaintiff, by bringing these proceedings, seeks to have set aside.

[18] Put briefly, both Mr Fakahua and Mr Kefu submitted that the procedures followed by the Defendants were entirely proper and in accordance with the requirements of the Act. In these circumstances no grounds had been established for the grant to the Second Defendant to be cancelled (see *Havea v Tu'i'afitu & Ors* (1974-1980) To.L.R. 55).

[19] Mr Pouono's central submission was that in 2010 the Ministry, knowing that the Plaintiff had withdrawn his consent, nevertheless processed the 2003 application. Mr Pouono suggested that the First Defendant had wrongly allowed the 2003 application to proceed and the Ministry had wrongly allowed the 2003 application to be processed.

[20] In my view, these submissions face two principal difficulties. The first is that there is nothing to show that the Plaintiff's change of mind was formally or effectively drawn to the Ministry's attention. The clerk before whom the 2010 letter was supposedly read out did not give evidence. The Plaintiff himself took no steps to advise the Ministry that his 2003 consent had been withdrawn even though he knew in 2010 that the First Defendant still wanted to proceed on the basis previously agreed.

[21] The second and more fundamental difficulty is that the submission overlooks the exact nature of the transaction that was initiated by the First Defendant.

[22] Section 54 of the Act provides a procedure by which the holder of an allotment may, with the consent of Cabinet, surrender his interest. As is clear from Sections 2 and 56(ii) of the Act, the term "holder" includes a widow holding a life estate in the land. The consequences of a surrender are precisely spelled out in Sections 54 & 82. A holder seeking permission to surrender cannot, as a condition of surrendering, prevent the operation of the statutory rules of succession and neither can those statutory rules be varied by the Ministry.

[23] The agreement reached in 2003 could, in law, amount to no more than an agreement:

(a) that the First Defendant would apply to surrender the land; and

(b) if the surrender was approved and the land reverted then the Plaintiff (and his son) as heir apparent following the surrender, would not present a Section 54 (3) claim but would instead allow the Second Defendant's claim to be presented without objection.

[24] By 2010 the Plaintiff had changed his mind but his change of mind could not bind the First Defendant or prevent her proceeding with her application to surrender. In other words, the fact that the Plaintiff withdrew his undertaking not to present a Section 54(3) claim could not prevent the First Defendant from proceeding with her application to surrender, without his consent.

[25] Although the Land Registry stated in Documents 6 & 7 that:

> "This is an application by the widow ... and the heir to surrender the town allotment ... to the adopted son ..."

That description of the application was not correct. The only person applying to surrender was the First Defendant for the simple reason that at that time, the Plaintiff had no interest (other than an expectation) to surrender. Furthermore, as already noted, a person surrendering cannot exclude the right of "any person claiming to be the legal successor" from presenting a Section 54(3) claim.

[26] Paragraph 3 of Document 8 also mi-states the correct position. A land holder surrendering cannot obtain Cabinet permission for the land to be re-allocated to any specific person after the surrender has taken place. It was not until document 9 was prepared that the strictly limited nature of Cabinet's consent was correctly and precisely recorded. All that Cabinet did and indeed could do, was to allow the First Defendant's application to surrender. After that surrender, the Section 54 statutory procedure allowing any hopeful applicant to apply, had to be followed.

[27] Following the surrender, Exhibit D2 and D2A was published. That gave the Plaintiff and indeed anyone else who wished, 12 months to present a claim. At the end of the 12 months period specified in Section 54(3) the land, in the absence of any claim, by operation of law reverted to the Crown. After the reversion, the only claimant was the Second Defendant. In the absence of any other claim it is, in my view, impossible to argue that the Minister erred in the exercise of his discretion to grant the land to the Second Defendant.

[28] In my view, the 12 month period in Section 54(3) operates in a similar way to any other statutory limitation provision and can only be avoided in a case of fraud.

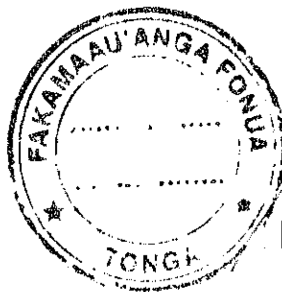
[29] In the present case I find there was no fraud. The First Defendant went ahead and surrendered the land which is what the Plaintiff knew she intended to do. Nothing that she did, or could have done, prevented the Plaintiff from lodging a claim to the land either in

response to the Section 54 notice or even after it had expired but prior to the land reverting and than being re-granted to the Second Defendant.

[30] It is probable that the First and Second Defendant's were not aware that they risked the land being inherited by the Plaintiff, had he ever presented a claim to it. Unfortunately for him, but luckily for them, the Section 54 notice was overlooked by the Plaintiff with the result that his claim was never presented. The Plaintiff's failure to present a claim to the land following publication of the Section 54 notice must be attributed to his failure to notice the advertisement placed in the Chronicle. In no way was either the First or the Second Defendant responsible for that failure on his part.

Result

The Plaintiff's claim is dismissed with costs to be taxed if not agreed.



DATED: 25 January 2013. **PRESIDENT**

H.Ngalu
17/01/13