

L. MOEAKI v. FAKAFANUA.

(Land Court. Scott J. Nuku'alofa, 27th July, 17th and 18th August, 1927).

Claim for Tofi'a and Title — Illegitimacy — What must be proved — Tongan Custom — Tongan marriages — Burial of Chiefs.

This was a claim of the Plaintiff to the Title and Tofi'a of Fakafanua. It was alleged that the holder had descended from an illegitimate person, a Fijian named Toto and therefore was not the proper person to succeed. At the end of the Plaintiff's case M. Finau, Counsel for the Defendant, submitted that there was no case to answer. The judge agreed with this submission and dismissed the claim. The case is reported because the judgment contains some interesting observations about Tongan Custom regarding marriage, burial etc.

S. Vaikona appeared for the Plaintiff.

M. Finau appeared for the Defendant.

C.A.V.

SCOTT J.: On the 18th of this month, after hearing the evidence of the Plaintiff and his witnesses, the Defendant urged that the evidence before the Court did not make out a case for answer, and I adjourned the Court until to day for the purpose of considering the evidence and I stated that if I came to the conclusion that a case had been made out that required an answer the Defendant was to go on with his defence, if I came to the conclusion that there was no case to answer I would proceed and give my judgment in the matter. The reason of the adjournment was to enable me to go through the great amount of evidence produced to the Court on the 27th July and on the 17th and 18th of this month.

I have done this and I have in the first place come to the conclusion that there is no case for the Defendant to answer as the evidence does not call for any reply, and therefore I will give shortly my reasons for doing so and then my judgment.

This Action is a claim by one Lutoviko Moeaki against Fakafanua the Noble of Ma'ufanga for the Tofi'a and the name of the Nobleship. The claim made by the Plaintiff is on the ground that the grandfather of the Defendant was not the son of Fakafanua Lelea, but of a Fijian named Toto, and he is therefore not the proper person to succeed under the 117th Section of the Constitution and that the Plaintiff being the true grandson of Lelea that is the grandson of 'Epelechame the legitimate son of Lelea he is the rightful person to hold the Tofi'a and title.

In a case of this nature, where a claim is made against a Noble on the grounds that he is descended from an illegitimate ancestor two things must be proved absolutely to the satisfaction of the Court. First that the person whom it is claimed is descended from an illegitimate is so descended from an illegitimate, and Secondly that the Claimant himself is legitimate and is descended from a

legitimate member of the family entitled to inherit in case the other member is proved to be from illegitimate stock. In this case it was imperative for the plaintiff to prove that the ancestor of the Defendant namely JIAKI was not legitimate, and that 'Epalahame from whom he traces his descent was legitimate and that he was entitled to succeed to Sioele.

The Fakafanuas for the purpose of this case were :—

1. Lelea, then his brother.
2. Paku, then Lelea's son.
3. Siaki, then Siaki's brother.
4. Sioele, then Siaki's Son.
5. Sailosi, then Siaki's grandson
6. The Defendant.

Lelea is said to have had the following children Siaki, Sioele and 'Epelehamé, and all by different mothers.

Lelea, Siaki and Paku held the title before the Constitution. Siaki, was the endest son of Lelea, and was a Fakafanua and was deprived of the title by King George Tupou I before the Constitution because he disobeyed the King and went to Samoa. One or two of the witnesses said they heard that Siaki was turned out of the title because he was an out-sider that is because he was a descendant of Toto and not of Lelea but the evidence of all those who were alive and knew Siaki and also of all the intimate relations of the family say that they never heard of this reason and know that it is not correct. Therefore I have come to the conclusion that there is no doubt whatever that the reason why His Majesty deprived Siaki of his title was on account of disobedience and not on account of the alleged Fijian parentage. Siaki had children amongst whom were Fangapo and Sailosi. Fangapo died before Sioele died and Sailosi then succeeded, evidently as heir because the children of Fangapo were not of an age to receive the titles. When Sailosi died the title then went to the child of Fangapo, the Defendant and this was in accordance with the Constitution. When Siaki was deprived of his title it was given to Sioele, his next brother and he was the Noble when the Constitution was passed. He however had no children, and therefore it was in accordance with the 117 Section of the Constitution that his eldest brother should succeed and the heirs of his body. As the eldest son of Siaki was then dead the title went to Sailosi, and when Sailosi died it was restored to the son of the elder brother of Sailosi, that is the Defendant. So far, then the title has descended in accordance with the Constitution, but the Plaintiff now comes along and says Siaki, being a son of a Fijian and not of Lelea could not succeed and his heirs could not do so either, but the person to succeed was his grandfather 'Epelehamé the proper son of Lelea. What is the evidence before the Court that Siaki was not the son of Lelea? So far as I can ascertain there is no evidence to this effect. There is not a single witness to substan-

tiate this claim. Every witness examined on this point states that they heard a woman named Mafi Kakau say that Toto was the father of Siaki, but where Mafi Kakau got the information from is not disclosed. Mafi Kakau was a daughter of Paku, and had her own particular side of the family to fight for, and for this purpose I believe she invented this falsehood. Old members of the family never heard of it until recently, members who knew and saw Siaki both before going and returning from Samoa and when they heard it took no notice of the rumour, in fact some after hearing it never repeated it again, evidently knowing the statement had no foundation and was not true. Sioele and 'Epelehamé evidently did not believe it and never acted on the same in fact took no notice of the rumour, but instead lived with Siaki's children as one family, even bringing up the present defendant among them as one of their own children. The tale was taken to the King and to Tungi and they took no notice of it but in spite of it treated the family of Siaki as legitimate and as members of the family of the Fakafanua. No one believed the rumour started by this Mafi Kakau. Even Paula Tu'uhotoka, who heard the tale from his mother the same Mafi Kakau, stated in evidence that "Siaki was the son of Lelea". There is no foundation for the story told by Mafi Kakau, and is unproven and therefore false.

The second point mentioned by me, regarding the legitimacy of 'Epelehamé' has not to my mind been proved to this Court. It is quite true that under certain conditions the Evidence Act states that the Court will presume legitimacy, but it first has to be proved that the parties were married in accordance with the customs or laws of the Country, which in this case means a coming together of the parents in accordance with the customs of the time then usually recognised as such a living together as the children would be considered as legitimate. The witnesses were unable to tell the Court what was the nature of the living together of Lelea and Mafitea, the mother of 'Epelehamé. Some described it as "AVE". Not one witness described it by any expression used at the time as known as a marriage according to custom at that time. One witness tells us that he heard this Mafitea was a servant taken from a family who are looked upon as providing workers to the Fakafanua family, and that while working in the house of Lelea she misconducted herself and a child was born to her, but all the witnesses state that immediately after this Paku the brother of Lelea stole Mafitea away, and lived with her, yet there was no fuss made by Lelea. The general impression to be arrived at from the witnesses was that there had been no ceremony as was usual when a marriage took place, and this is borne out by the actions of the brother seizing his brother's concubine and living with her without any protest. What would have happened under these circumstances if Mafitea had been properly married to Lelea under the customs then prevailing? Would he have let his wife go without a protest, I hardly think so. I had some doubt about this and so I asked the Secretary to Her Majesty if he had any

correspondence between the late King Tupou II and 'Epelehame as to why 'Epelehame or his son was not appointed, and among the letters is one from Tupou II to 'Epelehame of the 6th June, 1900, Siocli only died on 5th June, 1900 in which Tupou informed 'Epelehame that under the will of Siocle Fakafanua, you are declared as heir. But says Tupou II "You will not be appointed as Fakafanua, because it is forbidden to appoint other than the legitimate heir to be a Noble". Another letter on the 7th June from King Tupou II to Sailosi states It is not right for 'Epelehame to succeed because he is not a son of marriage. This is very plain and shows the reason why 'Epelehame was not appointed and why the children and grandchildren of 'Epelehame were not appointed. 'Epelehame was not considered legitimate.

There is one other point which the plaintiff laid great weight upon, that is the burial of Siaki. Siaki was not placed in a vault and for this reason the Plaintiff asks me to state that Siaki was not of the family, as it was the custom to bury chiefs in vaults. Siaki was buried at Vakataumai, and this burial ground is the burial ground of the family of Fakafanua. This plainly shows that even in death, as in life he was treated as one of the family of Fakafanua. The reasons why he was not buried in a vault have not been explained, but there may have been many reasons, it may be that there being only two vaults belonging to the Fakafanua, it was impossible owing to recent burials to place him in one, it may have been that because he was disgraced by the King he was not deemed to have the rights of a Chief, but afterwards he was placed in a vault, I cannot place any weight on this portion of the evidence in face of the treatment of Siaki's children by all members of the family.

The evidence plainly shows that Lelea was the father of Siaki and no one else. The tale of Mafi Kakau is unproven and not true and has never been looked upon as true. This alone defeats the claim of the Plaintiff, and then there is the legitimacy of 'Epelehame in grave doubt and certainly not proven to this Court. How any one, with the evidence produced could hope to succeed I do not know, one thing it has had the effect of showing the Defendant that the rumours about his great grandfather are false, and that he is descended from Lelea and not from an imaginary Fijian named Toto. I dismiss the action and order :

That the claim of the plaintiff for the Tofi'a and Name of Fakafanua be dismissed as he has failed to prove the same.
