

## SUNIA 'AKAVEKA v. NUKU.

(Land Court. Richardson J. 'Etoni Tonga, Assessor. Nuku-'alofa, 26th, 27th, 28th and 29th April, 2nd, 3rd, 5th, 6th and 11th May, 1949).

Claim to Tofi'a — Privy Council's decision binding on Land Court — Legitimate issue — Clause 107 Constitution — Cap. 9 S. 89 (x) (1928 Laws).

This was a claim to the Tofi'a and Title of Nuku. The question of the meaning of "legitimate issue" as used in Clause 107 of the Constitution was discussed, and it was held the Land Court was bound by a previous decision of the Privy Council where it was decided that "legitimate male issue" means legitimate issue of the first generation.

HELD: Defendant's right of succession to his great-great-grandfather Nehasi Nuku was broken by the intervention of two female generations and the Plaintiff as Nuku Pulu's brother (Nuku Pulu having no male heir) was entitled to succeed.

Verdict for the Plaintiff.

M. Finau and V. S. Kioa appeared for the Plaintiff.

V. Latu and S. H. Hafoka appeared for the Defendant.

C.A.V.

RICHARDSON J.: Plaintiff is claiming from Defendant the title of "Nuku" and the land and estates appertaining thereto, alleging that the appointment of the Defendant to that title in November 1947 was wrong in law.

Plaintiff bases his argument on the following points:—

- (i). Plaintiff alleges that Defendant's right of inheritance is statute barred owing to his father Kailahi's failure to establish his family's right to the title within the 10 year time limit set by Section 145 of Cap. 27 and that consequently Defendant has no rights which he can maintain at law.
- (ii). Plaintiff claims that the grant of the title to Defendant is contrary to the provisions of Section 107 of the Constitution as interpreted by the decision in the leading case of Lupeti Finau v. Tu'ivakano (Land Court Case No. 48/1926).
- (iii). Plaintiff alleges that Defendant's great grandmother, one Nanasi, through whom he claims the title was in fact an illegitimate daughter of a previous Nuku and as such incapable of passing on to subsequent generations any rights of inheritance of the title.

The first two of these arguments are based on the interpretation of the law; the third is a question of fact. I will deal first with the question of fact and later pass onto consideration of the arguments in law.

The argument on this point springs from the time when one NEHASI held the title of NUKU from about 1875 to about 1882 or 1884. This holder had a daughter NANASI, who in her turn had a daughter TUPOU VAINIAKU, TUPOU VAINIAKU subsequently had a son KAILAHI, born in 1889, who was the father of the Defendant. Section 41 (i) of Cap. 27 provides that only persons born in wedlock may inherit: consequently if Plaintiff could establish beyond all doubt that any person in the direct line of descent from NUKU NEHASI to the Defendant was not born in wedlock, then any claim on the part of Defendant to inherit the title must be defeated. Plaintiff does in fact endeavour to show that NUKU NEHASI's daughter NANASI was born out of wedlock. The evidence on this point produced by both parties has been long and involved: the greater part of it has been hearsay evidence given by members of the family and therefore admissible to prove the existence or otherwise of the alleged relationship under Section 89 (x) of Cap. 9, but at the same time it purports to be evidence of something that happened more than 100 years ago and its value must be assessed accordingly. The remainder of the evidence given on this point is largely circumstantial evidence for the interpretation of which a profound knowledge of Tongan custom is necessary. I do not propose to dwell at length on the many points put forward by both parties: I have discussed these at length with my assessor, and we are in agreement that the evidence put forward by the Plaintiff is on the whole insufficient to prove conclusively the illegitimacy of NANASI, and consequently his argument on that ground must fail.

Turning to Plaintiff's first argument in law regarding the application of the provisions of Section 145 of Cap. 27 to this case, the facts are as follows: NUKU NEHASI died in either 1882 or 1884 (the exact year is immaterial) without leaving any male heir, his daughter NANASI surviving him, and he was succeeded in accordance with the provisions of Section 107 of the Constitution by his younger brother SIOSAIA FINEFEUIAKI who held the title until his death in 1896. On the death of SIOSAIA FINEFEUIAKI in 1896 he was succeeded in the title by his eldest surviving son PULU who held the title until 1946 when he died and was succeeded by the present Defendant. It should be noted however that KAILAHI was already born at the time PULU succeeded to the title, although he was but a child aged about 7 years: Plaintiff therefore argues that, had KAILAHI's line of the family any claim to the title through direct descent from NUKU NEHASI through his daughter NANASI, then such rights accrued to KAILAHI on the death of SIOSAIA FINEFEUIAKI in 1896 and that consequently some action to dispossess PULU should have been taken either by a representative during the minority of KAILAHI on his behalf, claiming the appointment of a trustee until KAILAHI became of age, or at least by KAILAHI himself within a reasonable time after he came of age in 1910: as it happened no such action was taken against PULU by KAILAHI

and in 1927 limitation of action to 10 years was brought in under Section 145 of Cap. 27 : in spite of this still no action was taken by KAILAHI to claim the title from PULU until 1937, by which time the period of limitation had expired. KAILAHI then appears to have petitioned Her Majesty in Council under Act 13 of 1936 for permission to bring an action against NUKU PULU out of time : the exact fate of this Petition has not been shown owing to the regrettable inability of Plaintiff's 10th witness to produce the necessary evidence from among the records of the proceedings of Her Majesty's Privy Council. However no such action was in fact ever brought by KAILAHI and from this it must be inferred that for good reason the necessary permission to do so was in fact never granted by the Privy Council and that consequently KAILAHI remained bound by the provisions of Section 145 of Cap. 27. It is argued by Defendant's counsel that in accordance with Section 107 of the Constitution no right of action accrued to KAILAHI (or his branch of the family) until after the death of PULU in 1946, by which time KAILAHI himself was dead, and that consequently Section 145 of Cap. 27 never applied. This would have been true if KAILAHI had not been born at the time of NUKU PULU's appointment in 1896 : KAILAHI however was born at that date, and I therefore hold that his right of action accrued in 1896 when NUKU PULU succeeded to his father : in 1927 the ten year period of limitation was introduced into the law, and still no action was taken by KAILAHI, and I therefore find that any right of action which might have accrued to KAILAHI, and consequently also to his son the present Defendant, lapsed in 1937 in the absence of the grant of any permission by Privy Council for him to bring an action out of time. Consequently the provisions of Section 145 of Cap. 27 must be regarded as applying and KAILAHI by his inactivity over a period of 50 years must be held to have lost all rights of action both for himself and for his son. Such loss of rights of action however would only affect the rights of KAILAHI and his family in the role of claimants and does not necessarily establish the rights to the title of the present Plaintiff : to determine this we must look into Plaintiff's third point.

The relative portion of Section 107 of the Constitution on which Plaintiff relies reads as follows :—

"..... But should a female be next in succession to the title of a noble or of an hereditary chief the next male heir shall inherit the title and estates. But should such female afterwards have a legitimate male issue the title and estates shall revert to the male issue of the female upon the death of the male in possession of the estate."

The interpretation of the latter part of this Section hinges upon the interpretation of the Tongan word "hoko" which is translated in the English Version as "legitimate issue". The point at issue is whether this term means necessarily legitimate issue of the first

generation only or whether it can be held to mean issue in a later generation. NANASI clearly did not have any "legitimate male issue" in the first generation, or in other words a son who could be her heir: she did however have legitimate male issue in the second generation, namely her daughter TUPOU VAINIAKU's son KAILAHI. If therefore the term "legitimate male issue" be construed in the narrower sense of "legitimate male issue of the first generation" then KAILAHI in any case would have had no rights to the title as he was in the second generation: if however it be construed in the wider sense then KAILAHI would have had a claim to the title inherited from his grandmother NANASI. It is therefore upon the interpretation of this phrase "legitimate male issue" that this case must turn.

In this connection Plaintiff has cited the precedent established by Privy Council sitting as a Court of Appeal from this Court in the case of *Lupeti Finau v. Tu'ivakano* (No. 48/26). The relevant portion of the judgment in that case reads as follows:—

"..... Any portion (of the law) which refers to a female heir of a Noble who has no legal male heir refers only to the first male son of a woman who is the heir to her father who has died or been appointed."

Applying that ruling to the facts of this case it is clear that the "female heir of a Noble" concerned is NANASI, and consequently the only "legitimate male issue" of hers who could inherit in accordance with the portion of Section 107 of the Constitution which I have already quoted would be NANASI's "first male son". NANASI however had no "first male son": she had a daughter and a grandson, but under the above ruling the grandson is not included as one who could inherit through NANASI: consequently following the above ruling of Privy Council KAILAHI could have had no claim to the title through NANASI as he was her grandson and not her "first male son". In other words, where there are two succeeding generations of female heirs to a previous holder of the title, it would appear that later generations of males are not included within the meaning of the term "legitimate male issue" as used in Section 107 of the Constitution.

Defendant on the other hand, whilst admitting the application of the decision in *Lupeti Finau v. Tu'ivakano* to this case, argues that such decision is in fact a wrong interpretation of the Tongan word "hoko" and therefore asks the court to disregard the decision and accept instead the interpretation of the term "legitimate male issue" in its wider sense so as to include the grandson or great-grandson of a female heir to a Noble. This however the Court cannot do: the decision in *Lupeti Finau v. Tu'ivakano* is a decision of a superior court and as such is an authoritative precedent binding upon this court, and therefore one which this court must follow and has no power to disregard. It is not for this court to comment on the wisdom of such a decision:

the court must follow the precedent thus set by the higher court.

I therefore find that in accordance with the interpretation of Section 107 of the Constitution as amplified by the decision of Privy Council in *Lupeti Finau v. Tu'ivakano* (No. 48/1926) the right of succession which might otherwise have accrued to the Defendant from his great-great-grandfather NEHASI NUKU is broken by the intervention of two female generations, and that the appointment of NUKU PULU to the title in 1896 was in accordance with this interpretation of Section 107 of the Constitution. Furthermore NUKU PULU died leaving no legitimate male issue himself and consequently "the next male heir" is entitled to inherit. I find that the next male heir to NUKU PULU is his brother SUNIA 'AKAVEKA the Plaintiff in this action, and that accordingly he is rightly entitled to succeed to the title and lands of NUKU and that, with due respect, the appointment of the Defendant thereto was not in accordance with the correct interpretation of the law.

I therefore give judgment in favour of Plaintiff for the title of "Nuku" and all lands and estates appertaining thereto.

In view of the fact that this action was not occasioned by any wrongful act on the part of Defendant personally, I direct that each party shall bear their own costs.

EDITOR'S NOTE: The defendant appealed. On 2.12.49 the Privy Council (Carew C.J.) dismissed the appeal without giving any reasons.