

**Taufa v Kupu & Minister of Lands**

Land Court, Nuku'alofa

10 Lewis J  
L 255/94

9, 10, 11 August 1995, 10 January 1996

*Land - mistake - set aside grant - equity*

*Land - limitation of time*

*Limitation - land - estate holder & Minister*

20 The first defendant was registered as the holder of a tax api, and issued a Deed of Grant, with respect to land which had been occupied by the plaintiff and cultivated by him for 25 years, and for which he had first applied in or about 1968 and again in 1992. By then the first defendant had applied for the land and he was granted it in 1993. The plaintiff claimed that the grant to the first defendant, at all relevant times resident in the U.S.A., should be set aside and the land granted to him. The first defendant claimed the plaintiff was time barred pursuant to s.34(2) Land Act.

Held:

- 30 1. The plea of time bar was misconceived and irrelevant. The 3 month period in s.34 is directed at a disagreement between the Minister of Land and the holder of an hereditary estate concerning the granting of a tax allotment out of such an estate.
2. Where two contenders for title present for registration of the same allotment, the applicants are governed by s.50 Land Act. Each must be judged according to their merits in an even-handed way. Neither must fall prey nor victim to the negligence of the administration or to the wiles of one who would obtain issue of title first by stealth.
- 40 3. Here the plaintiff had toiled for more than 25 years on the land, had been assured the land was his, his application had been approved by the estateholder, although the approval became frozen.
4. There was an error by the Ministry. The application by the first defendant's brother (for a different allotment) was confused with the first defendant's application for this allotment. There was clerical error; and evidence of mistake in the Minister holding 2 complete but unregistered applications for the same allotment; the error leading him to accept the second (the first defendant's) and fail to consult the estate holder.
- 50 5. The grant should be set aside and the Minister directed to register in the

plaintiff's name; and not in the name of an absentee holder, whose residential intentions are unknown but who has not lived in Tonga since registration was first effected in his name. The equity of the case was clear.

Statute considered : Land Act

Counsel for plaintiff : Mrs Vaihu

Counsel for first defendant : Mr Niu

60 Counsel for second defendant : Ms Simiki

### Judgment

The first defendant Inoke Fotu Kupu is possessed of a deed of grant registered in his name and dated 5 February 1993 in respect of a tax allotment situated at Fua'amotu. His right and title to the 'api are challenged by the plaintiff. At the commencement of the hearing in this matter, the first defendant filed an amended defence without objection. An un-numbered paragraph contained in the prayer alleges that the claim is statute barred - failing to bring the action within three months after the grant of the allotment was made to the first defendant. It is regrettable that so important a defence was included so late and without any accompanying list of authorities. The success or failure of the plaintiff's claim turns on the point. I deal with it straight away.

The Land Act 1988 (Cap.132) Section 34(2) provides:-

"(2) Before making a grant of a tax allotment out of an hereditary estate the Minister shall consult the holder thereof and hear any objections he may make to the grant being made and where the Minister and the holder of the hereditary estate fail to agree, the Minister shall nevertheless grant the land as a tax allotment but such grant shall within three months of the making thereof be liable to review by the court, the decision of which on the matter shall be final."

The allotment in question forms part of an hereditary estate. The Land Act draws a distinction between estates (Tofias) and estates (Apis), however every Tofia and 'Api is hereditary according to the prescribed rules of succession - Section 5. In the present case the dispute centres around a tax allotment. A grant of title was sought by both the plaintiff and the first defendant. There was never any "Objection" nor were there "Objections" from the holder, one Fau Pakileata. There was no failure of agreement between the Minister of Land and the holder concerning the making of the grant. Moreover, the marginal note to section 34 is "Holder not to refuse land for allotment."

In my opinion, the plea of "Statute Barred" to the plaintiff's claim on the grounds in section 34 of the Act is entirely misconceived and irrelevant to the issues raised by the plaintiff in the claim. The three month limitation (if that is what it be) in section 34, is directed at disagreement between Minister and holder concerning the granting of a tax allotment out of an hereditary estate. None of the preconditions for the application of the three month limitation exist on any view of the claim of the plaintiff here. The plea of "Statute Barred" fails.

The following narrative sets out the facts as I find them to be from the whole of the evidence. The plaintiff has carried the onus of proof of the claim before the court on the balance of probabilities.

The plaintiff was born a legitimate Tongan male in the year 1925 at Ha'apai. In 1951 then aged twenty six years he moved to Tonga and began to reside in the village of Fua'amotu.

In 1959 he commenced to cultivate the land the subject of this claim, namely an Tax Allotment of some 8 acres (3.389 hectares) being land then part of a Tofi'a the hereditary title of which was in the name of Fau Pakileata. Fau was the foster brother of the plaintiff. In 1959 the 'Api was not yet allocated.

In 1963 the Plaintiff married Fine Taufu. There have been no children of the union. Fine Taufu was born and lived the village of Fua'amotu. Fua'amotu was at all material times on the estate of the Estate Holder Tungi.

The plaintiff registered as a voter in the electorate at Fua'amotu. He became the

village carpenter, he grew crops for the village. He carried out obligations to the Estate Holder Tungi. He was obliged from time to time to prepare polas and to collect and to pay monies for Tungi.

In 1968 the Minister of Land distributed lands at Kauvai. The 'Api in issue in the present claim was part of the Land distributed. The undisputed evidence is that no minor was entitled to inherit and receive registration in respect of any land. In 1967 one Folau was appointed the estate holder's representative of Tungi for the land in question.

Fau gave 8 acres to his younger brother and gave the plaintiff the 8 acres in issue since there were no others to take up that 'Api. Fau, together with the town officer, Tauke Laume (now deceased) and the plaintiff when to Folau, the estateholder's representative, and told him of the gift to the plaintiff and made application for registration of the 'Api in the name of 'Inoke Fili moe 'Eiki Taufa, the plaintiff.

On that same day, the day of 'Inoke Taufa's application, Saia Lepa Kupu made application to Folau for five lots. The evidence of Folau is that the King directed that Saia Kupu be given one allotment only and that he make application to the Estate Holder Kalaniuvalu for any other allotments he may need.

In 1970 the plaintiff enquired of Folau of the progress of the registration of the 'Api in his name. After a conversation with Folau the plaintiff left believing that his application for the 'Api was "with the King."

Folau was succeeded by one Fielakepa as Estate Holder for Tungi. Time passed and in 1992 the plaintiff enquired of Fielakepa of the progress of his application twice.

Having received no satisfactory answers to his enquiries the plaintiff then had the town officer, Takai Laume, present another application, this time directly to Tungi personally. The plaintiff accompanied Takai to Tungi. Tungi asked the plaintiff if he had made applications for the 'Api on previous occasions and the plaintiff said that he had. Tungi signed the application (Exhibit P1) on 8 April 1992.

Exhibit P1 bears an endorsement in the form of a note which is referred to by the Registrar of a Land, Siosifa Tupouto'a, in his evidence. The note (handwritten) says:-

"With respect I say the estateholder fully consents to give this land to the applicants and I seek instructions for payment of the survey fee. Simaima Muimuiheata (Sgd) 23.7.'92."

The note does not make it clear just who Simaima Muimuiheata is, but no point is taken by counsel as to the admissibility of the document. Presumably she was a clerical officer of the second defendant at the material time. The document bears a further handwritten note that the plaintiff paid the survey fee on 27.7.'92. Again, there is no dispute over the authenticity and admissibility of that fact.

The Minister wrote to the Secretary of Land on 6 August 1992 and directed the Secretary as follows (Exhibit P5):-

"Re Deed of grant 'Inoke Moe 'Eiki in his estate please prepare and draw up a deed of grant for a tax 'api for the application 6 Block 74/9 8 acres 1 rood of perches and the estate holder has granted it to the applicant. Survey fee paid 27.8.'92 there is also an application for the allotment Minister S. Ma'afu Tupou (Sgd)"

The Secretary gave evidence that he did not carry out the instruction because he saw a letter from the Palace Office signed by Sateki H. 'Aho dated 8 December 1992 and addressed to Hon. Minister of Land (Exhibit P2) as follows:-

"Dear Sir,

I hereby respectfully advise regarding an order from the estate of the Hon. Tungī concerning a tax allotment in his estate at Fua'amotu.

This allotment has involved two respective applications by 'Olioni Kupu and 'Inoke F. Taufā.

Therefore, you are hereby directed not to permit anyone to register this allotment until work is properly carried out and permission is given from the estate representative.

Signed Sateki H. 'Ahio  
for the Estate Representative of Tungī.\*

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The letter P3 was sent in error. 'Olioni Kupu's application had nothing to do with the land subject of these proceedings. The intent of the writer appears to have been directed toward the application of the first defendant, 'Inoke Fotu Kupu, (Exhibit P7) which had not only been lodged on his behalf by Saia Lepa Kupu on 1 August 1990 but which was to be granted on 5 February 1993.

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By undated letter from one M.S. Tu'ipulotu the plaintiff became aware of the competing application for grant of the allotment made by the first defendant. The letter (Exhibit D3) purports to be on the instructions of 'Olioni Kupu, brother of the first defendant. D3 asserts that the 'Api is that of 'Inoke Fotu Kupu. It asserts that the 'Api in issue had been subdivided by the Estateholder to the children of Saia Kupu and requires the plaintiff to vacate the land.

Judging by the response given D3 by one Luki Veikoso in his letter to 'Olioni and 'Inoke dated 9 November 1993 (Exhibit D4), the exhibit D3 was written or sent or both on 3 April 1993 i.e. just over three weeks following issue of the grant of title to 'Inoke Fotu Kupu.

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On 8 December 1992 the now Estate Holder's representative Fielakepa, reported by letter (Exhibit P2) to the Minister of Land. The plaintiff saw the letter and went to see Fielakepa.

Events from December 1992 moved quickly. On 5 February 1993 the first defendant 'Inoke Fotu Kupu received a Deed of grant (P9) for the 'Api in issue. Saia Lepa Kupu had been given an allotment of land on his application to Tungī in 1968.

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In 1989, in light of a Government decision to extend a runway at Fua'amotu airport, land was resumed from the estates of Tungī Tu'ipelehake and Kalaniuvalu. Included among the land resumed was an allotment allocated to the father of the first defendant Saia Lepa Kupu. Saia was allocated another Tax 'Api in substitution for the one resumed. Saia fathered six sons. Each had a tax allotment except 'Inoke his third son. All the applications for tax allotments were prepared by Saia and then taken to Tungī by Saia Kupu.

The first defendant claims right to the tax allotment in question by reason of his being the son of Saia Kupu who claims to derive his right to the 'Api by reason of a promise by the Estate Holder to Saia Kupu that the land of Fau was to be "kept in his Tungī's name until his children of whom the first defendant is one, became of age."

The first defendant further pleads in his defence:-

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\*Q. The Estateholder never authorised Folau to allocate or grant the land in question to the plaintiff. With regards to paragraph 19 of the statement of claim the plaintiff was aware (Sic) of the letter from the estateholder on 8th December 1992 not to register the land in question upon the plaintiff. He had

a reasonable time to move out and stop cultivation of the land as he had no legal right to the land."

'Inoke Fotu Kupu is a medical practitioner. He resides in the United States of America. According to Saia, 'Inoke has been in the United States for about six years; it is unclear from the evidence whether he is a permanent resident of the U.S.A. Saia Kupu says that 'Inoke Fotu Kupu was not in Tonga at the time of the application for a grant of the allotment, that 'Inoke has not farmed the land. 'Inoke was not called as a witness in these proceedings. 'Inoke's father, Saia made application to the Estate Holder for the grant in his son's name. Saia has farmed the land and it was Saia who pointed out to the King the allotment sought to be registered in the name of his son. Saia was an unsatisfactory witness. He was evasive and indirect. It was necessary for counsel to press him to answer questions properly.

The following exchange reflects the reluctance of the witness Saia Kupu:-

- 220 "Q. (Mrs. Vaihu) When you made application in 1990 did you know someone was farming (the land)?
- A. (Sai Kupu) A man came to see me when I was there and said he's been farming. I said go and see the land Registrar.
- 230 Q. So if any body was farming you wouldn't know?
- A. Yes.
- Q. So you went to make an application without knowing what was on it?
- A. I was instructed by the estate holder to those lands vacated.

After further cross examination Saia Kupu conceded that he, Saia, had pointed out the allotment presently the subject of this dispute to the government officer who filled out the form for him and that Saia then took it to the Estate Holder who signed the application which led to a grant to 'Inoke.

240 In a situation like the present - one where two contenders for title present for registration of the same allotment, the applicants are governed by S.50 of the Land Act. They must be judged according to their merits in an even-handed way. Neither must fall prey nor victim to the negligence of an administration or to the wiles of one who would obtain issue of title first by stealth. This is a case where one applicant has toiled for more than 25 years on the land, has been assured that the land is his and whose application has been approved by the Estate Holder although the approval became frozen.

250 Counsel for the first defendant characterises the plaintiff's claim as being based on four limbs -

- Tungi was not called upon to resolve the competing applications which he granted.
- 'Inoke Kupu was and is not a resident of Fua'amotu.
- The plaintiff has occupied the allotment since the late nineteen sixties, probably longer.
- The plaintiff has extensively farmed the allotment.

Mr Niu for the first defendant submits that a registered title evidenced by deed of grant may be set aside only upon proof of -

- 31 - Fraud.

- Ministerial error.
- Ministerial lack of jurisdiction or
- The exercise of Ministerial discretion on wrong principles.

The first defendant submits that no such proof exists on the evidence led by the plaintiff in the present case.

Mr Niu argues that since the jurisdiction of the Minister has not been questioned and since neither fraud or mistake are alleged by the plaintiff, the only ground left for the plaintiff to prove is that the Minister proceeded to decided the matter on wrong principle.

270 I am satisfied from the evidence that Fau and the plaintiff made application for the land in question to the Estate Holder after the allocations of 1968 and I so find.

There is, says the first defendant, no proof that Tungi had any knowledge before 1992 (when the plaintiff saw the King in person) that the plaintiff had been cultivating the land for so long. That proposition is true but what is the merit in it? Tungi approved and signed the application in spite of his not knowing of the industry and occupation of the plaintiff.

280 The first defendant asserts that the plaintiff was a squatter since Fau had neither power nor authority to pass legal title to the plaintiff. It seems to me that all Fau could do was to ask the King, or his representative, to register the allotment in the name of the plaintiff, which is precisely what Fau did and as a consequence of which the King granted the plaintiff's application.

The signing by Tungi of the plaintiff's application was of course thwarted by the discovery that a grant of the land had already been made to the absentee defendant Kupu in 1990 following the activities of Saia. The discovery was in a round-about way. There was an error. The Minister of Land confused the application of 'Olioni Kupu for registration of his (different) allotment with the fact of the grant of the allotment is dispute in this claim to 'Olioni's brother 'Inoke Fotu Kupu.

290 The evidence of the Registrar of Land, Siosifa Tupouto'a, reveals the confusion and error. After the note of approval was endorsed on P1, and Minister instructed his staff to draw up the deed of grant for the allotment in the name of the plaintiff (P5), then the Registrar received the letter from the Palace Office, (P2) directing that no registration be done until further investigation was done as to the availability of the allotment, and the permission of the estateholder be given.

300 It is likely that the application of 'Olioni Kupu caused confusion somewhere in the Office of the Registrar of Land. In fact, 'Olioni Kupu's application (P8) was made in respect of an entirely different allotment to the one in the present claim. P1 appears to relate to "Lot 6 Block 74/9 8A IR OOP", whereas P8 appears to relate to "Lot 4 Block/ 74/94 8A IR OOP," although it is difficult to read the handwriting in P1.

On close examination of P1 the figure "6" appears to have been written over the figure "4" in the box marked "Hingoa 'oe 'Api". Although there was some cross-examination of the registrar by counsel for the first defendant, the resulting evidence can only be at its highest mere speculation on the part of the witness. Therefore concerning that matter I make no finding and draw no conclusions about the significance of an apparent alteration or correction to part of the description of the allotment application P1.

310 At least the apparent correction or alteration provides some support for an inference of clerical error leading to the discovery by the plaintiff and the officers of the Ministry of Land that on 5 February 1993 a grant of title was made to the first defendant 'Inoke Fotu

Kupu following his application of 1 August 1990.

Fine Taufu, wife of the plaintiff, and a patently honest witness in my opinion, visited the Palace Office and consulted Fielakepa about the allotment registration in 1993. She fixes the date since Fielakepa was succeeded by the Hon. 'Ahome'e later in the year. Fielakepa showed her the allotment on a plain with Fau's name on it.

320 The Plaintiff was in the U.S.A. and Fine went to the Minister of Lands in August 1993. At the Ministry she learned that the subject allotment land had "gone to Saia Kupu's children". An Officer walked in to the Minister's Office while Fine was present and spoke with the Minister saying "Fielakepa has phoned saying the registration was 'Inoke Fotu Kupu's". The Minister said to Fine, "You had better go back to the King and whatever the King says goes." Fine Taufu did not go back to the King. Her evidence is that she thought that she would leave it to her husband. He returned to Tonga in about October of 1993.

The plaintiff has argued that there is ample evidence of a mistake by the Minister of Land by his holding two complete but unregistered applications for the same allotment.

330 The plaintiff through counsel submits that to have accepted an application from a second applicant and then to have failed to consult the holder in terms of the provisions of S34(2) of the Act (infra these reasons page 2,) is a patent error. The grant should be set aside and the Minister directed to register the allotment in the name of 'Inoke Fili moe 'Eiki Taufu and not in the name of an absentee holder whose residential intentions are unknown but who has not lived in Tonga since the registration was first effected in his name. The equity of the case is clear. I will not characterise the plaintiff as a "Squatter" as the first defendant asks me to characterise him. The association of the plaintiff with the land goes back more than 25 years. He farmed it continuously. He cared for it. He earned his living from it. His evidence to this court was the evidence of a patently honest man. He repeatedly sought registration of the land after it was promised to him by Fau. He repeatedly failed to achieve that registration through no fault of his own until the estate holder the King finally approved and signed his application on 8 April 1992.

340 The justice of this matter is that the plaintiff should have the allotment in my opinion. It is not a question of "First come First Serve". Equity and common fairness dictate that there should be a registration and a grant to the plaintiff of the allotment in question.

Accordingly it is ordered that:-

1. The grant of this allotment to 'Inoke Fotu Kupu be set aside.
2. The Minister of Land takes all necessary steps to give effect to a registration and a grant of title to the plaintiff 'Inoke Fili Moe 'Eiki Taufu the allotment more particularly described as the tax allotment situated at Fua'amotu Tongatapu being that land in plan 5864 lot 6 and containing 3.389 HA.
3. That the costs of these proceedings be those of the plaintiff to be taxed or agreed.