

HIGH COURT. Apia. 1955. 19, 20, 21, September; 6, October.
MARSACK C.J.

Possession of land and personal property - confused and conflicting evidence as to location and ownership of land - failure of plaintiff to establish freehold title to land claimed - similar failure of defendant.

This was a claim for possession of a piece of land claimed by the plaintiff to be freehold land belonging to him, and also of a dwelling house built thereon and certain household chattels. The evidence was confused and conflicting and the Court was unable to decide with certainty that the land upon which the house in dispute was situated was land owned by the plaintiff and accordingly concluded that the plaintiff had failed to establish freehold title to the land.

The Court however found that the defendant (or anyone else) had similarly failed to establish title to the land; and that in the circumstances it was not necessary for the plaintiff to establish such title in order to succeed.

Held: Accordingly that it was sufficient if the plaintiff proved, as he had -

- (a) That he was lawfully in possession of the land at the time of the entry thereon by the defendant;
- (b) That the presence of the defendant on the land was due to the leave or licence of the plaintiff, and not to the defendant's own personal right or to the permission of some other person having a title superior to that of the plaintiff;
- (c) That the licence of the defendant to occupy the land had been lawfully determined; and
- (d) That since the termination of his licence to occupy the defendant had, before the action was brought, been given reasonable time to vacate.

Judgment for plaintiff.

Phillips, for plaintiff.
Metcalf, for defendant.

Cur. adv. vult.

MARSACK C.J.: This is a claim for possession of a piece of land called "Moeaifana" at Fasitoouta, of the dwelling house built on the land, and of certain household chattels in the house; and also for the sum of £20 by way of damages for trespass. A great deal of evidence, much of it of a very conflicting nature, was heard by the Court as to the family relationships of the parties and their ancestors, and as to various pieces of land, mostly Samoan, at Fasitoouta which have come under the ownership or the occupation of different members of what may be referred to as the Frost family. The position is very greatly complicated by the fact that some members of the Frost family are registered as Europeans and some as Samoans. The plaintiff, for example, is a European, while his full brother Afitusi is a Samoan.

The defendant, Mua'au Etuale, has no blood connection with the Frost family; his wife, Kolone, is the daughter of Gafua who is the half-sister of the plaintiff. The father of both plaintiff and Gafua was James Frost, who was well known in the district as Simi; but they have different mothers.

Simi, who died in 1917, had erected and occupied a building which was used both as a dwelling house and as a store on a site very close to that of

the present house in dispute. Nearby Simi had caused to be built during his lifetime a tomb which still houses his remains. At the beginning of 1949, the plaintiff caused the old house and store of Simi to be demolished. In June 1949 he obtained a permit to put up the present building, engaged carpenters and had the building erected on its present site. It was ready for occupation in July 1949 and was thereupon occupied by the plaintiff, his brother Afitusi, his half-sister Gafua and her daughters. Mua'au, the defendant, and his wife Kolone were then invited to the house by the plaintiff who left his personal effects in the house but thereafter used a small Samoan fale nearby for sleeping quarters.

The defendant was a taule'ale'ale until 1953 when he acquired the title Mua'au of Fasitocouta.

Relations between the parties were good until March 1955 when Mua'au asserted his right to the pule of the house and contents in his capacity as a matai. The plaintiff asked Mua'au to give up possession of the household furnishings but Mua'au refused, stating that as the matai he had control of everything. The plaintiff thereupon informed the defendant that the latter's licence to remain in the house was terminated and that he must move out with his family. The defendant refused. On the 29th March 1955 formal notice to quit was given by Mr Phillips, Solicitor for the plaintiff and this notice was served personally on the defendant. The defendant refused to comply with the notice and is still in possession of the house and the chattels referred to in the statement of claim.

The plaintiff is the registered proprietor, under Court Grant 474, Volume 3 Folio 213, of the land known as Moeaifana. The plaintiff claims that it is on this land that the house in dispute is erected and that, therefore, his right to the ownership of the house is unchallengeable. The defendant asserts that the true name of the land on which the house is situated, is Lepapa; but he is unable to state who is the true pule of Lepapa. The land in dispute is certainly shown as Moeaifana on survey plan No. 35 dated 20th March 1948. This, however, is a locality plan only, and was prepared in connection with the Land and Titles Court cases affecting the pieces of Samoan land known as Tapulaaia, Malaetia, Favali, Pau'amea and Vitulua, which are all in the same general vicinity.

Mr Hunter, Surveyor, was unable to give the Court the reasons which had caused the former Chief Surveyor, Mr Radford, or his Field Officer to show the land Moeaifana in the place in which it appears on Plan No. 35. It will be noted that the description of the land in Court Grant 474 does not give any recognisable starting point. It commences from a "dead breadfruit tree" without any particulars establishing the point where that dead breadfruit tree was situated. Moreover, according to Mr Hunter's evidence, he found when he plotted the land described in Court Grant 474 that the shape of the piece so plotted does not correspond accurately with the piece outlined yellow and labelled "Court Grant 474" in Plan No. 35. Mr Hunter appears to be of the opinion from a study of the early plans and descriptions in the documents that the land Moeaifana lies in the general vicinity of where it appears on Plan 35, but is unable to state that Plan 35 is thoroughly accurate and reliable with regard to Moeaifana.

In the course of his cross-examination he states -

"I cannot say with certainty where Moeaifana is. I have heard stories from the people of the village that Moeaifana is at the back of Nelson's property. This would mean that it might be the land shown on Plan No. 35 as Tapula'aia. To find a spot like "the dead breadfruit tree" the Surveyor would have to rely on statements from the people of the village."

Afitusi who is a brother of the plaintiff and who has spent most of his life in Fasitocouta gives evidence that Moeaifana is the correct name of the land upon which the house is situated.

For the defence Leiataua Poa'i says that the names Tapula'aia and

Moeaifana were interchanged, and that the piece now owned by Nelson's (Court Grant 473) is Tapula'aia. Seuga, the widow of Leaupepe Tome (Thomas Frost) states that the land on which Nelson's store is standing (Court Grant 473) is Tapula'aia; that the land upon which the house in dispute is standing is also Tapula'aia; and that though she has never known where the land Moeaifana was situated she understood it was further inland. Seuga says that the land Lepapa is very close to the land in dispute and that she is actually living herself on Lepapa.

Fatu Frost who is 66 years of age gave evidence that his father Aiono Aiolupo sold Moeaifana to James Frost, but that he would be unable to point out the land Moeaifana on the ground. He also states that there was only one piece of land properly called Tapula'aia and that was the piece now occupied by Nelson's store (Court Grant 473).

None of the witnesses called for the defence supports the defendant's own statement that the land on which the house is situated is Lepapa.

I have very carefully inspected all the old records which were produced in evidence before me, and have done my best to reconcile the descriptions of the different pieces of land, particularly Tapula'aia and Moeaifana. I have been much struck by the discrepancies shown in the documents, and in the evidence, with regard to the land Tapula'aia which I am informed by witnesses is the maota of the title Leaupepe. It is difficult to understand how so many different pieces of land should be called Tapula'aia in view of the fact that that is the maota of Leaupepe, and that substantially the whole, if not the whole, of Tapula'aia, should have been sold and otherwise alienated by the Leaupepe family, and possibly even by Aiono.

After my examination of the documents and the evidence I find myself unable to say with certainty that the land upon which the house in dispute is situated is the land known as Moeaifana the property of the plaintiff by virtue of Court Grant No. 474. There is so much confusion in the evidence, documentary and otherwise, produced as to the location of Moeaifana that the reluctance of Mr Hunter to vouch for the accuracy of the locality plan No. 35 is easily understood.

It may well be that even if plan No. 35 is in this respect inaccurate, the house in dispute is still situated on the land Moeaifana to which the plaintiff has a freehold title. But on the evidence, I am unable to hold that this has been established by the plaintiff.

But if the plaintiff has failed to establish a freehold title to the land on which the house is situated, neither have the defendant and his family, or anyone else; and it is not necessary for the plaintiff to establish such a freehold title in order to succeed in this action. It is sufficient if the plaintiff proves -

- (a) That he was lawfully in possession of the land at the time of the entry thereon by the defendant;
- (b) That the presence of the defendant on the land was due to the leave or licence of the plaintiff, and not to the defendant's own personal right or to the permission of some other person having a title superior to that of the plaintiff;
- (c) That the licence of the defendant to occupy the land has been lawfully terminated; and
- (d) That since the termination of his licence to occupy, the defendant has, before action brought, been given reasonable time within which to vacate the premises.

I find that prior to the building of the house in dispute in 1949 the plaintiff was occupying and had for some years occupied, under a claim of right, the lands in the vicinity of the area now occupied by the house.

prior to 1917 the area in question had been occupied as of right by the plaintiff's father, James Frost, and occasionally by the plaintiff's uncle, Thomas Frost, who had Samoan status and was Leaupepe Tame, by consent of his mother.

I find, further, that the house built by the plaintiff's father was in 1948 demolished by the plaintiff, that he allowed three or four months to elapse before he commenced to build the present house, to allow of any objection being raised by any other person claiming interest; that, no objection having been raised, he obtained a building permit in his own name and instructed a carpenter, James Godinet, to erect the present house, utilizing some of the timber which came from the building recently demolished; that in building the house the extensive stone foundations were carted by the plaintiff, his brother Afitusi, and Godinet; that shortly after the new house became fit for occupation the plaintiff permitted his half-sister Gafua, her daughters including Kolone, and Kolone's husband Etuale (the defendant), to occupy portion of the new house; that although the plaintiff later always slept in a Samoan fale nearby, he at no time gave up exclusive possession of the house to the defendant and his family; that in March 1955 the defendant who then had the matai title, Mua'au, claimed the right to the exclusive possession of the building as against the plaintiff; that the plaintiff thereupon terminated the licence of the defendant to occupy the house in dispute.

It is important to note that the defendant has not even attempted to set up a title to the property superior to that of the plaintiff. He is admittedly within this family only by right of his wife, and no evidence whatever has been called to show that his wife Kolone has such an interest in the property as would entitle her, and Mua'au claiming through her, to possession as against the plaintiff.

The findings of fact set out above really determine the matter. Mua'au the defendant entered into possession of the building, or part of it, not through any claim of right but through the licence granted by the plaintiff. That licence has now been withdrawn. In my opinion the time which elapsed between the giving of the notice of termination of the licence to occupy, 22nd March 1955, and the date of commencement of proceedings, 15th July 1955, was a reasonable time to allow the defendant to vacate the premises. Consequently the plaintiff is entitled to the order for possession of the premises which he seeks.

The plaintiff also claims damages, £20, for the trespass of the defendant in remaining in possession after his licence to occupy had been terminated. In all the circumstances of the case I do not think that the plaintiff is entitled to more than nominal damages which I fix at £5.

With regard to the plaintiff's claim for the return of the chattels detailed in a list handed into the Court, it is not contested that these chattels were actually purchased by the plaintiff, with the exception that Mua'au contributed the sum of £3 towards the purchase of the safe. The defence is that these chattels were actually given to the defendant's family to assist with the Women's Committee, etc. I find that no gift to any other person has been proved and that the chattels remain the property of the plaintiff. The plaintiff is accordingly entitled to an order for possession.

For these reasons there will be judgment for the plaintiff in the following terms:-

1. An order for immediate possession of the house property at Fasitooata in dispute in these proceedings.
2. Judgment for the sum of £5 for damages in respect of the trespass of the defendant.
3. An order for the return of the chattels detailed in the list on the Court file but subject to the payment by the plaintiff to the defendant of the sum of £3 by way of refund for the amount

contributed by Mua'au, or the sum of £15 (which allows for the £3 refund to Mua'au) in case possession cannot be had.

4. Costs, disbursements and witnesses' expenses to be fixed by the Registrar.

The order for possession of house and chattels will lie in the office of the Court for one month from the date of this judgment.

Chief Judge