

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

IN THE MATTER of The Electoral Act 1963 and
its Amendments

A N D

IN THE MATTER of an Election Petition by
TOOMALATAI LAUVAI II against
the election of TAUA KITIONA to
represent the Territorial
Constituency of Aleipata Itupa-
i-luga

BETWEEN: TOOMALATAI LAUVAI II of Vailoa
in Aleipata, a candidate for
election

Petitioner

A N D: TAUA KITIONA of Lalomanu, a
candidate for election

First Respondent

A N D: THE REGISTRAR OF ELECTORS AND
VOTERS of Mulinuu

Second Respondent

A N D: THE CHIEF ELECTORAL OFFICER

Third Respondent

Counsel: T K Enari for petitioner
R S Toailoa for first respondent
H Schuster for second and third respondents

Hearing: 3, 4, 5, 9 & 15 July 1996

Judgment: 19 July 1996

JUDGMENT OF SAPOLU, CJ

The official results for the general election held on 26 April 1996 were publicly notified by the Chief Electoral Officer on 14 May 1996 after the preliminary results had been announced over Radio 2AP on election night. By a further public notification on 22 May 1996, the Chief Electoral Officer declared the final result of the poll for the territorial constituency of Aleipata Itupa-i-luga as follows :

<u>Candidates</u>	<u>Votes Received</u>
Sagapolutele Sipaia Uitime	213
Taua Kitiona Tavana	455
Taua Latu Lome	165
Toomalatai Lauvai II	<u>323</u>
Total number of valid votes	1,156
Number of votes rejected as informal	0

The candidate Taua Kitiona Tavana was therefore declared to be elected.

By an election petition dated 21 May 1996, the petitioner Toomalatai Lauvai II sought from the Court the following declarations :

- (a) That the first respondent was not duly elected and his election be declared void.
- (b) That the petitioner be declared as having being duly elected.

These declarations were sought on the basis of the allegations contained in the election petition. Some of those allegations were directed at the first

respondent and some were directed against the Registrar of Electors and Voters and the Chief Electoral Officer who is one and the same person and was cited as the second and third respondents. At the conclusion of the evidence presented for the petitioner, both counsel for the first respondent and counsel for the second and third respondents made submissions of no prima facie case. I found that there was no prima facie case in respect of some of the allegations made by the petitioner. I now give my reasons for those findings.

The petitioner alleged that the first respondent by his agents Aleki Simoo and Pakone Seuala committed acts of corrupt practice as follows :

- (a) by giving \$20 to elector Iese Talataiga and \$40 to elector Nui Farao on 24 April 1996 for the purpose of influencing those electors to vote for the first respondent at the election;
- (b) by giving \$10 to elector Iese Talataiga and \$10 to elector Nui Farao on 25 April 1996 for the purpose of influencing those electors to vote for the first respondent at the election;
- (c) by giving \$10 to elector Lealofi Isaako on 25 April 1996 to vote for the respondent at the election; and
- (d) by Aleki Simoo giving \$10 to elector Moa Fagasoiaia with the intent to influence that elector to vote for the first respondent at the election.

Apart from the general unsatisfactory nature of the evidence adduced in support of those allegations, there was no evidence to show that Aleki Simoo and Pakone Seuala were agents for the first respondent as alleged in the petition, or were

acting with the knowledge or authority of the first respondent. I therefore found there was no prima facie case in respect of those allegations.

The next series of allegations were actually complaints made against the electoral officers who conducted the poll at the Savalalo polling booth for Aleipata Itupa-i-luga special votes; the Chief Electoral Officer and members of her staff who conducted the scrutiny of the rolls and official recount of the votes for the Aleipata Itupa-i-luga territorial constituency, and the fact that some of the ballot papers used in the Savalalo special polling booth were written in ink and not printed. It was clear during the hearing that if these complaints were to have any bearing on the outcome of the election for the present territorial constituency, then they must be shown to have affected the result of the election. However it was clear that those complaints had absolutely no effect on the result of the poll held at the Savalalo special polling booth or the election for Aleipata Itupa-i-luga. Accordingly I held that there was no prima facie case in respect of those allegations and complaints and they were therefore also dismissed.

It must be added here that the evidence given by the Chief Electoral Officer, and which I accept, was that the official count which she conducted followed the same procedures she had observed being adopted with regard to Magisterial recounts conducted under the provisions of the Electoral Act 1963. I also accepted the Chief Electoral Officer's explanation of the reason why some of the ballot papers in the special polling booths are written in ink. It is because of the uncertainty as to how many electors of any particular territorial constituency will turn out to vote at a special polling booth. The same

situation applied to all special polling booths throughout the country during the election. There was certainly no impropriety or fraud associated with the use of handwritten ballot papers at the Savalalo special polling booth for the Aleipata Itupa-i-luga territorial constituency and the evidence adduced for the petitioner showed none.

There were also allegations that one elector was accompanied by her 12 year old son to cast her vote in the polling booth and another elector who was the victim of a stroke was carried by her children into the polling booth to cast her vote. It was clear from the evidence of the witness Saoluafata Milo called for petitioner that each of those two electors was issued one ballot paper each and none of the persons who accompanied those two electors to cast their votes was issued a ballot paper or was in possession of any other paper. The evidence also clearly suggested that the ballot box was intact and secure and there was no evidence to suggest that the ballot box might have been interfered with by any person including those who accompanied the aforesaid two electors to cast their votes.

That brings me to the two allegations in the election petition against the first respondent in respect of which I found there was a prima facie case. I will deal first with the allegation of treating, namely, that on election day during the hours of polling the first respondent and/or his agents presented food to various electors for the purpose of corruptly procuring the first respondent to be elected.

The witnesses called for the petitioner to prove the present allegation

were Kalameli Iese and Tuitui Aloivini. According to the evidence of the elector Kalameli Iese, after she had cast her vote at about 11.00am in the morning she was given food at the house of the first respondent at Lalomanu. The evidence of the witness Tuitui Aloivini was that after she had cast her vote after 1.00pm in the afternoon, Aulele Pato took her to the house of the first respondent at Lalomanu where she ate some food and was given an extra plate of food to take home. She also testified that she did not see the first respondent in his house.

In his evidence, the first respondent testified that he slept in Apia so that he was in Apia in the morning of polling day. He said that he was in Apia at the special booth for Aleipata Itupa-i-luga at Savalalo for most of polling day and he did not arrive back at his home at Lalomanu until 4.00pm in the afternoon which was after the polling booths had closed at 3.00pm. He denied having any knowledge of any food being prepared for electors at his family's home at Lalomanu on polling day. He also denied having given any instructions to his family or anyone to prepare food for any electors on polling day.

The witness Luatua Faafetai who was called for the first respondent gave evidence that he was at the house of the first respondent's family at Lalomanu on polling day and that no food were prepared to be given out to electors on that day except food prepared for members of the first respondent's family who had gathered at the first respondent's house on polling day. This witness also testified that the food was the usual meal served to members of their family. He also testified that the first respondent only arrived back at Lalomanu after 4.00pm in the afternoon of polling day.

Now the onus of proving the allegation of treating lies on the petitioner. The standard of proof required of the petitioner is that he must prove the allegation of treating beyond reasonable doubt which is the standard of proof required in criminal cases.

In considering the evidence, I am aware that the giving of food to an elector after he has cast his vote may be treating in certain circumstances provided that the giving of food was corrupt. However I am not satisfied beyond reasonable doubt on the evidence in this case that the giving of food by members of the first respondent's family to electors Kalameli Iese and Tuitui Aloivini after they had cast their votes was corrupt. Furthermore, the first respondent as the evidence shows was not present at his family when the food was given out to those two electors and he has denied that he had knowledge of any food being given out to the aforesaid electors or any other electors. He also testified that he did not instruct his family to prepare food for any electors on polling day. There is also no sufficient evidence to show that the members of the first respondent's family, whoever they were, who gave food to Kalameli Iese and Tuitui Aloivini were acting as agents of the first respondent. In other words there is no evidential link between the first respondent and the giving of food to Kalameli Iese and Tuitui Aloivini. It is also clear that the giving of food to those two electors could not have reasonably affected the result of the poll as between the first respondent and the petitioner.

I am therefore not satisfied beyond reasonable doubt that the present allegation of treating has been proved and it is dismissed.

I come now to the second allegation in the election petition in respect of which I found there was a prima facie case. This is the allegation that the first respondent was not qualified to be a candidate for election under the provisions of the Electoral Act 1963 because he is not a duly registered holder of a matai title for the Aleipata Itupa-i-luga territorial constituency. Initially I had held that there was also no prima facie case in respect of this allegation. However, after due consideration of the Land and Titles Act 1981 which contains provisions for publication and registration of matai titles, I decided to reopen this allegation and require the first respondent to call evidence in reply if he wanted to do so. I took this course relying on the provisions of section 115(a) of the Electoral Act 1963 which say as follows :

- "On the trial of any election petition the Court shall be guided by the "substantial merits and justice of the case without regard to legal forms "and technicalities".

The evidence relating to the present allegation was that the late Fuataga Ioane Alama published in the *Savali* on 9 July 1990 his intention to make appointments to twenty matai titles named in the publication including the title Taua presently held by the first respondent. The title Fuataga is the paramount matai title of the village of Lalomanu and of the Aleipata Itupa-i-luga territorial constituency. After the three months period required for lodging any objection to the publication by Fuataga Ioane Alama, there was no objection lodged by any person. Fuataga then proceeded at a ceremony held at Lalomanu on 29 December 1990 to make appointments to the twenty titles he had published in the *Savali*. To the title Taua he appointed the first respondent. 'Saofais' were held at the same time in respect of the appointments that were made.

The first respondent gave evidence that about June 1990, the late Fuataga Ioane Alama expressed to his family his desire to bestow matai titles on members of his family including the first respondent. So on 29 December 1990 after there was no objection lodged against Fuataga's publication of his intention to make appointments to the twenty matai titles listed in his publication, the appointments to those titles were formally made and 'saofais' were held at the same time in respect of those appointments. The first respondent also testified that the custom with regard to the making of appointments to the matai titles in question is that the holder of the title Fuataga on his sole authority makes such appointments and not the Sa Fuataga family. The village and the district also attended and participated in the 'saofais' held for the appointments made by Fuataga, including the appointment of the first respondent to the title Taua, by performing a 'usu' in accordance with Samoan custom.

After the first respondent was appointed to the title Taua he participated in village affairs of Lalomanu and performed his 'monotaga' to the village under his title Taua. There was no objection lodged by any person against his appointment to the title Taua. In these circumstances it is clear that the village of Lalomanu had recognised the title Taua of the first respondent in accordance with Samoan custom. Then Fuataga Ioane Alama who was also the Member of Parliament for the Aleipata Itupa-i-luga territorial constituency passed away towards the end of 1994 and a by-election for the constituency was set for early 1995. The village of Lalomanu wanted the first respondent to run as a candidate in that by-election. It was then that the first respondent found out that his title Taua had not been registered. So he approached the then Registrar of Land and Titles to have his title Taua registered. According to the first respon-

dent, the Registrar required him to provide confirmation that a 'saofai' had been held in respect of his title Taua and he obtained written confirmation of his 'saofai' from the pastor of Lalomanu who had conducted the religious service for his 'saofai'. It appears that the publication made by Fuataga Ioane Alama was then confirmed by the Land and Titles Court on 17 January 1995 and the next day the first respondent's title was registered and he was issued with a matai certificate.

According to the explanation given by the first respondent, Fuataga Ioane Alama had asked all those who were to be appointed to the matai titles on 29 December 1990 to bring two passport photos and \$10 each to be given to the pulenuu of Lalomanu for the purpose of registration of their matai titles. The first respondent on that day gave his two passport photos and \$10 to the pulenuu for registration of his title Taua and he also signed a registration form. He only found out in early 1995 when he wanted to run as a candidate in the by-election for his constituency that his title Taua was still unregistered even though he had assumed that the then pulenuu of his village had attended to registration of his title.

After registration of the first respondent's title in January 1995 he was then able to run in the by-election held for his territorial constituency early that year. The present petitioner was also a candidate in that by-election. The result of that by-election was that the present petitioner and the first respondent both topped the poll by polling the same highest number of votes. The result of the election was then determined by lot in accordance with the relevant provisions of the Electoral Act 1963 and the petitioner was declared to be

electd. Then in the 1996 general election, the petitioner, the first respondent together with other candidates contested the parliamentary seat for the Aleipata Itupa-i-luga territorial constituency and the first respondent topped the poll for the constituency with a clear majority.

The witness Taua Latu Lome who was called for the petitioner testified that he objected to the appointment of the first respondent to the title Taua by not attending the 'saofai' for that appointment which was held in 1990. I am not able to accept this kind of informal, silent and passive objection as a valid or effective objection. In any case, the first respondent has held the title Taua for almost 5 1/2 years without any formal objection from Taua Latu Lome and both the first respondent and Taua Latu Lome contested the 1996 general election for the same territorial constituency without any objection by Taua Latu Lome to the title Taua of the first respondent.

The witness Aiono Leulumoega Sofara who was also called for the petitioner testified that he did not see the publication of 9 July 1990 by Fuataga Ioane Alama of his intention to make appointments to the twenty titles listed in the publication and if he had known of that publication he would have lodged no objection to it as the titles concerned were titles under the authority of the title Fuataga. However Aiono Leulumoega Sofara further testified that if he had seen any publication of the appointment of the first respondent to the title Taua he would have objected upon the basis that Fuataga should not be making any such appointment while there were appeals against the decision of the Land and Titles Court LC 3428, 3428 P1-P29. In that decision of the Land and Titles Court, the appointment of Ioane Alama to the title Fuataga was confirmed. The Court also

determined in that case the persons who hold the 'pule' or authority to decide who should hold the title Fuataga. Aiono Leulumoega Sofara and the present petitioner were members of the same party in that case and the Land and Titles Court determined that they were not included amongst the persons who hold the 'pule' over the title Fuataga. Their appeal against that decision is still pending. I must say that I find it rather difficult to accept the evidence by Aiono Leulumoega Sofara that he would not have objected to Fuataga's publication of his intention to make appointments to the twenty titles listed in that publication if he had known of that publication, but he would definitely have objected if he had known of Fuataga proceeding to actually implement his published intention. Obviously Aiono, on his own evidence, was unaware of all that which happened in relation to the appointment of the first respondent to the title Taua.

The petitioner gave evidence that he only found out about the method of registration of the first respondent's title Taua after the by-election which was held for his constituency in early 1996. On the evidence, it is clear the only real ground of objection by the petitioner is his testimony that there was no 'saofai' held for the bestowal of the title Taua upon the first respondent. However it is clear from the evidence of Taua Latu Lome and the first respondent that such a 'saofai' was in fact held.

Now counsel for the petitioner submitted that the appointment of the first respondent to the title Taua should have been published in the *Savali* so that any person who might have wanted to lodge objection thereto could have done so. The publication of Fuataga Ioane Alama's intention to make appointments to the twenty

titles listed in his publication was not sufficient to obviate the need to publish the appointments which were actually made by Fuataga. After careful consideration, I accept that the publication made by Fuataga Ioane Alama was incomplete in that the names of those persons he intended to appoint to the titles which were published were not included in the publication. In practice the publications made in the *Savali* in relation to appointments to be made to a matai title or matai titles are given to the Office of the Registrar of Land and Titles who actually make the publication.

Now in considering this whole question whether the title Taua of the first respondent is validly held or not for election purposes, I am of the clear view that the Court must have regard to the provisions of section 115(a) of the Electoral Act 1963 which requires the Court to see that real justice is done without undue regard to technicalities. It is clear from the evidence that the appointments made by Fuataga Ioane Alama to the titles he published in the *Savali* of 9 July 1990 were done in the open and not surreptitiously or fraudulently. He told his family at Lalomanu about June 1990 of his desire to bestow matai titles on members of his family including the first respondent. Fuataga then published in the *Savali* of July 1990 his intention to make appointments to the twenty titles listed in his publication. Even though I have decided that *Savali* publication was incomplete, the publication itself was more consistent with things being done out in the open than being done in a surreptitious or fraudulent fashion. The actual appointments were then made by Fuataga on 29 December 1990 at Lalomanu in front of the family of Fuataga, the village of Lalomanu and the district of Aleipata Itupa-i-luga. 'Saofais' were held the same day and the village of Lalomanu and the district of Aleipata Itupa-i-luga

participated in those 'saofais' by performing the customary 'usu'.

After the appointments and the 'saofais' were held, the first respondent participated in the village affairs of Lalomanu and performed his 'monotaga' to the village and that state of affairs continued up to the 1996 general election without objection from any person that the first respondent did not validly hold his title Taua. In other words it appears clear that the first respondent's title Taua has been recognised by the family of Fuataga, the village of Lalomanu and the district of Aleipata Itupa-i-luga in accordance with Samoan custom. The first respondent has also run as a candidate in two elections for the Aleipata Itupa-i-luga territorial constituency without any person challenging his qualifications to run as a candidate before those two elections were held. Aiono Leulumoega Sofara and the petitioner who now claim that the first respondent does not validly hold the title Taua have only done so after the first respondent topped the poll for the Aleipata Itupa-i-luga territorial constituency in this year's general election. But the Land and Titles Court has determined at first instance that Aiono Leulumoega Sofara and the petitioner are not included in the 'pule' of the title Fuataga which made the appointment of the first respondent to the title Taua. It also appears from the evidence that the first respondent on the day of his 'saofai' did give two passport photos and \$10 to the then pulenuu of Lalomanu for registration of his title Taua but for some unknown reason the then pulenuu did not attend to such registration with the office of the Registrar of Land and Titles.

In these circumstances it would be completely contrary to real justice at this late stage, which is almost 5 1/2 years after the first respondent was

bestowed the title Taua, to give effect to the objections made against the title Taua of the first respondent. The allegation that the first respondent does not validly hold his title Taua is therefore dismissed.

As the two remaining allegations in respect of which I found there was a prima facie case have been dismissed, the petition is therefore also dismissed.

I turn now to the counter-allegations made by the first respondent against the petitioner. At the trial of these proceedings, counsel for the first respondent informed the Court that he was content to proceed with only some of the counter-allegations against the petitioner in order to expedite these proceedings. The first of these counter-allegations was that on 12 April 1996 the petitioner gave \$50 to elector Maataua Laumatia for the purpose of inducing that elector to vote for him and also instructing that elector to hand in her certificate of identity (ID) for the same purpose.

According to the evidence which was given by the witness Maataua Laumatia, the petitioner and one Faafetai Moleli came to her family at Fausaga, Safata, and requested her to hand her ID to the petitioner. She did not comply with the request and before the petitioner left with Faafetai Moleli the petitioner gave her \$50 and asked her to bear in mind the election. In her affidavit Maataua Laumatia stated that the petitioner and Faafetai Moleli visited her family at Fausaga, Safata, but in her oral testimony she said she thought it was before Christmas in 1995 that the petitioner and Faafetai Moleli visited her family.

The petitioner gave evidence that the reasons why he visited Maataua

Laumatia at Fausaga, Safata, were that Maataua Laumatia and her family had supported him in the by-election held in early 1995 and Maataua and her family were also relatives through the title Fuataga. So he gave Maataua Laumatia \$50 as a gift for Christmas as she and her family had supported him in the 1995 by-election and she was also a relative. The evidence by the witness Faafetai Moleli was that he and the petitioner went to see Maataua Laumatia and her sisters at Fausaga, Safata, because they had voted for the petitioner in the 1995 by-election and during that visit, the petitioner thanked Maataua for their support in the 1995 by-election and gave Maataua a gift for Christmas.

On her own evidence, Maataua Laumatia must be regarded as an accomplice for receiving an alleged bribe. However her evidence is corroborated in material particulars by the evidence of the petitioner and that of Faafetai Moleli. Even though in law it can be dangerous to act on the uncorroborated testimony of an accomplice, the evidence by the petitioner and Faafetai Moleli do confirm Maataua's evidence in material particulars regarding the giving of \$50 by the petitioner to her.

I accept that the petitioner and Faafetai Moleli did visit Maataua Laumatia and her family in December 1995 before Christmas. But I do not accept that the giving of \$50 was to thank her for her support given to the petitioner at the 1995 by-election and because she was relative through the title Fuataga. It appears from the evidence of the witness Matauta Laumatia, the sister of Maataua Laumatia, that that was the first time the petitioner had visited their family at Fausaga, Safata. It is also clear to me from the evidence that the real purpose for the petitioner giving \$50 to Maataua Laumatia was not to give a gift

for Christmas but to induce that elector to continue to support the petitioner in the general election that was coming up at any time in early 1996.

I find this counter-allegation of bribery against the petitioner to have been proved beyond reasonable doubt.

As for the counter-allegation of undue influence which allege that the petitioner either by himself or through his agents withheld the IDs of certain electors for the purpose of inducing those electors to vote for the petitioner, I am not satisfied that those allegations have been proved beyond reasonable doubt. They are therefore dismissed. Likewise the counter-allegation that the petitioner gave \$40 to Maataua Laumatia on polling day for the purpose of inducing that elector to vote for the petitioner is dismissed as that money was given after Maataua Laumatia had cast her vote and I am not satisfied that the purpose of the petitioner was corrupt.

In all then the election petition is dismissed and the election of the first respondent is confirmed. I will report my findings to the Honourable Speaker of the Legislative Assembly.

Costs against the petitioner of \$1,000 are awarded to the first respondent, and \$500 to the second and third respondents who is one and the same person.

JFM Sapolu
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CHIEF JUSTICE