

IN THE SUPREME COURT OF SAMOA

HELD AT APIA

C.P. 366/95

BETWEEN: TAIENE PAINA of Eva, Matai:

Plaintiff

A N D: PUBLIC TRUSTEE set up pursuant  
to the Public Trust Act 1975 and the  
Samoa Public Trust Order 1921:

Defendant

Counsel: R Drake for plaintiff  
TRS Toailoa for defendant

Judgment: 30 July 1998

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JUDGMENT OF SAPOLU, CJ

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The Public Trustee, who is the defendant in these proceedings, has applied to strike out the plaintiff's statement of claim as disclosing no cause of action. For the purpose of a strike out application, the Court assumes that the facts pleaded are true.

The plaintiff has filed a statement of claim and an amended statement of claim. It is to the amended statement of claim that the strike out motion is directed. It appears from the amended statement of claim that the plaintiff is bringing this action as the administrator of the estate of his late grandfather one Taiene Pouono Paina ("Taiene") who was a pastor at Fusi, Saluafata. The defendant, on the other hand, is being sued as the administrator of the estate of the late Patu Tauvela Paniani Hunter ("Tauvela") who was a surveyor.

The essential facts pleaded in the amended statement of claim show that Taiene and Tauvela became close friends when Tauvela used to stop for a rest at Taiene's house at Fusi, Saluafata, when he was out doing survey field work. Taiene was at the time a pastor at Fusi, Saluafata. In 1940 during one of these stops at Taiene's house, Tauvela agreed to find a piece of freehold land near Apia for Taiene to buy for the use of Taiene's family when they came to Apia. Tauvela then located a piece of freehold land of about 3a.0r.10p at Tanumaleko, Vailima, with a purchase price of 100 pounds (one hundred pounds) which Taiene agreed to buy. The land was part of the estate of one Trood, deceased, and was administered by the Public Trustee.

From December 1940, Taiene made part payments to Tauvela for on payment to the Public Trustee for the price of the land. By April 1945 the full purchase price of the land had been paid as well as the survey fees requested by Tauvela. About 1946 Taiene's children moved onto the land and they have been occupying the land up to now.

Taiene made numerous requests to Tauvela, starting in 1946, after payment of the full purchase price of the land in 1945, for the deed of conveyance of the land to Taiene. No such deed was ever provided by Tauvela. When Taiene died in 1964 there was still no deed of

conveyance given to him. Then Tauvela died in 1971. It was discovered that the land was registered to Tauvela on 3 September 1945 and mortgaged by him to the Public Trustee in 1969. That mortgage has not been discharged. Those are the essential facts pleaded for the plaintiff.

The amended statement of claim also alleges that Tauvela held the land in dispute as constructive trustee for Taiene. An order for specific performance is therefore sought to compel the defendant, as the administrator of Tauvela's estate, to convey the land to the plaintiff as the administrator of the estate of Taiene. A further order is also sought to extinguish the mortgage by Tauvela to the Public Trustee.

As I understand the strike out application, it is based on two grounds. The first is that the amended statement of claim discloses no wrongdoing against the defendant and therefore there is no cause of action against him. The short answer to this ground is that the defendant is being sued in a representative capacity as the administrator of Tauvela's estate. He is not being sued in a personal capacity or for any personal wrongdoing. The first ground of the strike out application therefore fails.

The second ground of the application is based on section 3(3) of the Law Reform Act 1964. That provision refers to survival of a cause of action in tort against the estate of a deceased person. It therefore does not apply to a cause of action which is not tortious. In these proceedings it was not shown to the Court's satisfaction that on the pleadings there is a cause of action in tort. That being so, section 3(3) has not been shown to apply to these proceedings and the second ground of the strike out application must also fail.

Having said all that, I must point out that the present claim contains defects which must be considered and remedied in order to facilitate the substantive hearing of this case, if this case does go that far. In the first place, the legal basis of the claim is not clear. What is it? If not torts, is it contract or something else? Secondly, it is not sufficient to say Tauvela was a constructive trustee for Taiene. A constructive trust is a remedy which is normally allowed in equity; but it is not a cause of action, at least, at this stage of our legal development. Thirdly, one of the relief sought is specific performance which presupposes the existence of contractual obligations to be enforced against a contracting party. However, it is very difficult to see whether the pleadings do disclose a cause of action in contract. What contract is there? If there is a contract, what are its terms and who are the parties to it? Has there been a breach of such contract? If so, what is the nature of the breach? Fourthly, it is not clear on what legal basis is the plaintiff asking the Court to extinguish the mortgage by Tauvela to the Public Trustee.

Notwithstanding, the lack of clarity of a cause of action from the pleadings, I am not satisfied that from the facts pleaded, there cannot possibly be a cause of action maintainable in law against the defendant. My mind has not yet reached that stage at this point in time of the present proceedings.

In these circumstances, the plaintiff is ordered to file and serve on the defendant by 10 August 1998 a fresh amended statement of claim setting out with sufficient clarity the cause of action, if any, he relies on. Leave is reserved to the defendant to apply again to strike out if necessary.

Question of costs is reserved.

Adjourned to 10 August 1998 for re-mention.

*TFM Sapolu*  
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**CHIEF JUSTICE**

**Solicitors:**

Drake & Co., of Apia, for plaintiff

Toailoa, of Apia, for defendant