

BETWEEN : NAITINGIKEILI KAUFUSI
Plaintiff

AND : SULIASI FUNAKI
First Defendant

'ALANI TUFI
Second Defendant

BEFORE PRESIDENT PAULSEN

To: Mrs. F. Vaihu for the plaintiff
Mr. S. Tu'utafaiva for the defendants

Hearing: 14 September 2017

Date of Ruling: 20 September 2017

RULING

The nature of the action

- [1] The plaintiff is the holder of a tax allotment at Haveluloto called Tufitokelau. The first defendant and second defendant have both been residing on the land for many years with their families in houses they have built on the land. The plaintiff seeks to evict them from the land.
- [2] The defendants oppose the plaintiff's claim. After the evidence was heard each defendant advanced only one ground of defence. The first defendant says that he relied upon a promise from the plaintiff's grandfather to give him the land and that the plaintiff is estopped

from relying on his title to evict him. The second defendant says that the plaintiff's claim is time barred under s.170 Land Act.

The facts and evidence

The land

- [3] There was some uncertainty about the chain of ownership of the tax allotment but that is not material to the result of this case. The tax allotment was first registered in 1952. It was later registered in the name of the plaintiff's grandfather Tevita Kaufusi (Tevita). In around 1990 Tevita had a plan of subdivision prepared dividing the land up into lots, some of which he surrendered in favour of people who I understand were related to him. The tax allotment was then much larger than its present 2A 3R 6P because of those surrenders and also because the plaintiff has also surrendered lots since it has been registered to him. This is shown on a helpful plan produced into evidence by the Senior Land Registry Officer Mr. Fataua Halatanu (P15). The lots in dispute are shown on that plan as lot 16, which is occupied by the first defendant Suliasi Funaki (Suliasi), and lot 14, which is occupied by the second defendant 'Alani Tufi (Alani).
- [4] In around 1994 Tevita purported to surrender the tax allotment in favour of his son Mo'ale Uluilakepa (Moale). Mo'ale was not the heir. The heir was the plaintiff's father Viliami Kaufusi (Viliami). Viliami successfully challenged Mo'ale's grant in the Land Court but he died in January 1998 shortly before an appeal by Tevita and Mo'ale from the Land Court decision was dismissed in the Court of Appeal (No 297/96). The plaintiff (Naitingi) then claimed the land as Viliami's heir and it was granted to him on 17 May 1998.

The plaintiff

- [5] Naitingi is 49 years old and described himself as a planter. He was born in Tonga but was educated in American Samoa. He stayed in American Samoa until 1996 when he says he came back to Tonga. However he has returned and lived in American Samoa for periods since then.
- [6] Naitingi has no direct knowledge of the circumstances under which Suliasi and 'Alani came to occupy the land and his evidence was curt. He was aware that Tevita granted Suliasi a lease and says that the lease has expired and Suliasi has no right to be on the land. Naitingi says that 'Alani is a squatter.
- [7] Naitingi claimed that he became aware that Suliasi had been occupying the land in 1998 but was not aware of 'Alani's occupation until 2015. He said that that he was in Tonga in 1998 following the Court case and there was no house on lot 14. He also said that after the Court case he had gone to the Ministry of Lands to find out the status of his land but had been told to wait and it was not until 2015 that Mr. Halatanu had prepared the plan for him.
- [8] Naitingi said that both Suliasi and 'Alani had asked him for their land in 2015 but he did not give them the land. He denied asking for money for the land. He said he did not give Suliasi his land because on one occasion he had failed to go kava drinking with him as he had promised and was therefore a liar. He said that he did not give 'Alani his land because he had failed to supply him with a girl to serve him his kava. I found those reasons to be trivial and peculiar and they indicated a degree of ill-will towards Suliasi and 'Alani.

Suliasi

- [9] Suliasi is 62 years old and married with six children. He was originally from Ha'apai but was not the heir to any land in Ha'apai or Tongatapu. He became friendly with Tevita in 1986 and learned that Tevita had land at Haveluloto and asked him whether any part of it could be given for him and his family to live on. Suliasi said that Tevita showed him land which was covered in bush and was swampy in parts and that Tevita told him to occupy that land to become his own town allotment. This was lot 16. Suliasi cleared the bush, filled the swampy areas, built a Tongan house and moved onto the land. He said that he provided assistance to Tevita by giving him free taxi services, assisting him with his money and food contributions at New Year's Eve and Prayer Week and gifted him T\$2,000 'for giving me the allotment'.
- [10] In 1990 Suliasi wanted to build a better house. He said that he asked Tevita if the land could be used as security for a loan from the bank and Tevita saw the poor state he and his family were living in. According to Suliasi, Tevita told him that granting him a lease would be the quickest means to get security for a loan because surrendering the land would be a long process requiring both Cabinet and his heir's consent. A lease was subsequently registered against lot 16 in Suliasi's name under No. 5148 in April 1991. It was for a term of 20 years expiring on 9 April 2011 at an annual rental of T\$15. In September 1991 the lease was mortgaged to the Bank of Tonga for a loan of T\$6,994. The loan was used by Suliasi to build a new house and fruit and other trees were planted on the land. Suliasi's evidence was that Tevita told him that he could continue to occupy the land after the lease expired and that Tevita was present during construction of his house.

- [11] Suliasi acknowledged that in 2014 he prepared a letter to be taken to Naitingi in Samoa for his signature surrendering lot 16 to him. He did not know Naitingi but he said he thought Naitingi might ask him to move off the land. The letter never got to Naitingi but relevantly for present purposes it read:

This lot is clearly shown on the office map SP5446 Lot 16. Letter written is based on the said lot which was allocated to me by Tevita Uluilakepa of Havelu which was not registered but instead was leased to a Suliasi Funaki in 1990 whereby the term of the lease had expired in 2011. I wish to state herein that I am the grandson heir to the allotment, my father is Viliami Uluilakepa who is deceased. Nonetheless, I wish to state that I consent to the surrender of the said lot to Suliasi 'Apisai Funaki.

- [12] Suliasi also acknowledged that in 2015 he had gone with his wife and daughters to a meeting that Mo'ale had called at which Naitingi was present and had asked for the land. He said he was told by Mo'ale that the price of the land was \$T60,000 and upon being told this he cried as he remembered all he had spent on the land, that Tevita had promised him the land and all he had done for Tevita for free.
- [13] Suliasi was aware that a letter had been sent to him in November 2016 by Naitingi's lawyer telling him to vacate the land. He said he was in Hawai'i at the time but was told of it by his daughter. He has not moved off the land.
- [14] Suliasi's case is summed up in his evidence:

I say ... I cleared the bush on the allotment, filled the swampy area, built my house and [planted] fruit and sweet smelling

flower trees in my true knowledge that Tevita Uluilakepa had given the allotment for me, and I did not try to get a [sic] land anywhere else here in Tonga for I trusted on the grant that Tevita Uluilakepa gave me

'Alani

- [15] 'Alani is 61 years old and is married with three children. He said that in 1989 he was told by one Sione Latu to go and live on lot 14. He understood that the land had been given to Sione Latu by Tevita. The land was covered in bush and was swampy and he cleared the bush and filled the land. In 1990 he built a house and planted trees. According to 'Alani, Tevita was present when the house was being built and that Tevita visited, ate with him and the construction workers and also asked him for small amounts of money from time to time which he gave Tevita. In 1994 or 1995 'Alani extended the house by adding a kitchen, bedroom and toilet. 'Alani said that he asked Tevita three times to surrender the land to him and that Tevita's response was that he should occupy and develop the land and that the registration would be done later.
- [16] In around 1994-1995 'Alani received a letter from Viliami giving him 14 days to get off the land but he said that the letter was received after he had completed his house and he did not leave and Viliami did not take any steps to move him off the land.
- [17] 'Alani also received a letter from Naitingi's lawyer in November 2016 telling him to vacate the land. He said that as a response he had spoken to Mo'ale who had told him that each lot was T\$60,000 but that he could have his land for T\$25,000 as it had been swampy. He had later spoken to Naitingi who said that he would do as Mo'ale had

told them; that is he would sell the land. He then went to see the estate holder and was told to remain on the land.

The plaintiff's submissions

- [18] Mrs. Vaihu began her submissions by stating that there is no dispute that Naitingi was granted his tax allotment following the Court case. This is not disputed by the defendants. She also submitted that Naitingi made no promises to Suliasi or 'Alani that they could live on the land. This is also not disputed. More controversially, at least as far as Suliasi is concerned, Mrs. Vaihu argued that as Naitingi was not a party to or aware of any promises that Tevita may have made he cannot be bound by them.
- [19] As far as Suliasi is concerned, Mrs. Vaihu argued that the evidence established that the only right he had to live on the land was pursuant to the lease and as the lease had expired he must now move from the land as Naitingi had demanded him to do.
- [20] As far as 'Alani is concerned Mrs. Vaihu argued that Naitingi's claim against him is not time barred as 'Alani never had any right to be on the land and, in any event, time could not begin to run against Naitingi until 2015 when Mr. Halatanu had prepared the plan and he learned 'Alani was living on the land. In support of this submission she referred me to the exhibit P11 which is a letter Naitingi wrote to the Minister of Lands in May 2015 recording his understanding that the Minister was to have cancelled grants made as a result of the surrenders effected by Tevita and Mo'ale before the Court case and expressing his wish 'that you ascertain to me all the pieces of land I still hold so that I can do work on them'.

The defendants' submissions

- [21] In response to the claim against Suliasi Mr. Tu'utafaiva relied upon *Ongolea v Finau* [2003] Tonga LR 147 as authority that equity will recognise and enforce a promise made by a landholder to another person to go on and occupy land in circumstances where that person in occupation has acted in reliance upon the promise. He argued that *Ongolea* is also authority for the proposition that the promise will bind the landholder's successors in title.
- [22] As to whether such a promise was made Mr. Tu'utafaiva submitted that this is a question of fact but that Naitingi had not rebutted Suliasi's evidence that Tevita promised him the land and that he acted upon that promise. Mr. Tu'utafaiva argued that the lease was not evidence that Suliasi was not promised the land but simply a means by which he could raise a loan quickly to build his house as shown by the fact that Suliasi did not look for other land upon the expiry of the lease.
- [23] In response to the claim against 'Alani Mr. Tu'utafaiva submitted that it was time barred having been brought more than 10 years from when Naitingi's right to bring his action first accrued. He argued that at the very latest time began to run against Naitingi when he received his grant in 1998 yet he did not bring this claim until 2017. Mr. Tu'utafaiva rejected Mrs. Vaihu submission that time did not run against Naitingi until 2015 as Naitingi was familiar with the land and there was nothing stopping him making enquiries as to who was living on the land and bringing his action in 1998.

Discussion

- [24] Naitingi has proved his title to the land occupied by the defendants and *prima facie* his entitlement to an order for possession of it from

them. The onus rests upon the defendants to establish a defence at law or equity which is an answer to Naitingi's claim for ejectment.

The claim against Suliasi

- [25] It is well established that if a person is encouraged by the owner of land to occupy the land in the expectation that he has an interest in it and that person does with the owner's knowledge and without objection enter onto the land and expend money on the land equity will protect that person and may refuse to the owner an order for possession of the land. (*To'a v Veikune* [1974-80] Tonga LR 107; *Alofi v Fine* [1998] Tonga LR 24; *Pulu v Bloomfield* [1974] Tonga LR 105; *Motuliki v Namoa ors* [1981-88] Tonga LR 141; *Tafolo v Vete* [1998] Tonga LR 164 and *Ongolea* (supra)) Such rights, are sometimes referred to as equities of possession or equitable licences.
- [26] In *Tafolo v Vete* (supra) the Court of Appeal recognised that such an equity may be varied or discharged by any subsequent arrangements made between the parties themselves (at page 172).
- [27] I am unable to accept Suliasi's defence to Naitingi's claim for three reasons. First, Mr. Tu'utafaiva is correct that whether Tevita promised Suliasi the land is a question of fact. Despite Suliasi's evidence I am not satisfied that the land was promised to him. The evidence appears to me overwhelming that Tevita did not promise him the land.
- [28] I accept that Suliasi went on to the land in around 1986. When in 1990 he wanted to obtain a loan Tevita only agreed to give him a lease and did not surrender the land so that Suliasi could apply for it. Whilst Suliasi says this was because Tevita believed this was the

quickest way to raise a loan I cannot see why it would take any longer for Tevita to surrender the land in favour of Suliasi than it would for him to grant a lease.

- [29] It is important that Tevita said that it might take longer to surrender the land because that would require the consent of his heir. That suggests that Tevita was aware that his heir's consent might not be forthcoming and that he could not give Suliasi the land.
- [30] Furthermore, if the lease was simply a device to raise a loan it is incongruous that nothing was subsequently done by Tevita to surrender the land in favour of Suliasi particularly when the evidence of Mr. Halatanu was that between 1991 and 1994 Tevita surrendered four lots in favour of others.
- [31] In addition Suliasi's own conduct leads me to the view that he was never promised the land as his own. I am not satisfied that once the lease was granted he made requests that Tevita surrender the land and the letter that he prepared to be taken to Naitingi in 2014 states that the land was leased to him not that it was given to him by Tevita.
- [32] I do not see any significance in the fact that Suliasi did not look for other land after the lease expired. He was clearly was hopeful that Naitingi would give him that land. He had no incentive to look for land.
- [33] Suliasi's defence must fail because he failed to establish to the civil standard that Tevita promised him the land.
- [34] Secondly, even if Tevita had originally promised to give Suliasi the land it was open to Tevita and Suliasi to alter that arrangement

between themselves (*Tafolo* (supra)). The entering into of a lease is just such an alteration. There can be no suggestion that the lease was a sham when it was used to raise a loan from a third party and Suliasi said that he always paid the rent under the lease. Suliasi acknowledged also that he understood that Tevita was granting him only a lease and that he agreed to that.

[35] Thirdly, regardless of what promises Tevita made to Suliasi the effect of any estoppel could only be to impose upon Tevita a restriction from obtaining an eviction order against Suliasi. It did not bind his successors in title who had no notice of Suliasi's equity. This is the case as a matter of principle and by weight of the authorities. An estoppel necessarily binding successors in title would be akin to an equitable interest in land which is a concept that is contrary to the scheme of the Land Act and the principles in *OG Sanft & Sons v Tonga Tourist and Development Co Ltd* [1981-88] Tonga LR 26 (PC) and *Schaumkel v 'Aholelei* (Unreported Court of Appeal, AC 14 of 2012, 17 April 2013).

[36] It follows that Naitingi is entitled to the order that he seeks for Suliasi's eviction from the land.

The claim against 'Alani

[37] I accept 'Alani's evidence that he went onto the land in around 1989, cleared and filled on the land, built and extended his house on the land and has remained on the land for around 27 years. Whilst Naitingi says that he did not see any house on lot 14 in 1998 his witness and uncle Mo'ale, who has lived on the land since 1988 or 1989, said that 'Alani might well be correct as to when he went on the land. I found that Naitingi was not a reliable witness due to his

evasive and argumentative manner when asking questions from Mr. Tu'utafaiva and his apparent ill-will towards the defendants and I prefer 'Alani's evidence.

[38] Section 170 of the Land Act provides:

No person shall bring in the Court any action but within 10 years after the time at which the right to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims then within 10 years next after the time at which the right to bring such action shall have first accrued to the person bringing the same.

[39] I recently had cause to consider section 170 in a relevant context in *Payne v Fakahau & ors* (Land Court, LA23 of 2014, 10 March 2017, Paulsen P) and held that in a case such as this a landowner's right of action to recover land first accrues when a defendant physically interferes with his right to occupy the land, typically by building or living on the land.

[40] In the present case time begun to run against Naitingi from the date he was granted the land in 1998. From that date there can be no question that 'Alani was occupying the land without Naitingi's consent and that Naitingi could have taken an action to eject him. As he did not file this action until 2017 his claim is time barred. (*Tu'ifua v Tui* (supra) and *To'a v Veikune* (supra))

[41] I do not accept Mrs. Vaihu's submission that time ran from 2015 when Naitingi was given Mr. Halatanu's plan and learned that 'Alani was on the land. Knowledge that one's right of action has accrued is not a requirement of s170.

[42] In any event, I agree with Mr. Tu'utafaiva that there was nothing to stop Naitingi from inspecting the land and identifying who was occupying it from at least the time that it was granted to him. Naitingi was clearly familiar with the land. He was involved in the Court case (as a party following Tevita's death) and the evidence of Mr. Halatanu was that between 2000 and 2003 he surrendered four lots all of them in close proximity to 'Alani's lot 14. If Naitingi was unaware of 'Alani's occupation (and I am not satisfied he was unaware) it was because he failed to make any proper enquires and absented himself from Tonga.

[43] It follows that Naitingi's claim against 'Alani is time barred and he is not entitled to the order he seeks.


Result

[44] There shall be judgment for Naitingi on his claim against Suliasi and an order that Naitingi shall recover possession of lot 16 from Suliasi.

[45] Naitingi's claim against 'Alani is dismissed and there shall be judgment for 'Alani.

[46] If any party seeks costs then Counsel shall file memoranda within 21 days.

NUKU'ALOFA: 20 September 2017


O.G. Paulsen
PRESIDENT