

VILISONI NAMOA v. VAHA'I.

(Land Court. Scott J. 'Alome'e Assessor, Nuku'alofa, 25th, 29th and 31st March, 1926).

Tongan marriages before 1875 — Tongan Custom — Legitimacy of children — King bound by Constitution — Government Gazettes September, 1880. — The Constitution 1880 Clause 117.

This was a claim by the Plaintiff for the Tofia and Inheritances of Vaha'i.

The facts are sufficiently set forth in the judgment.

HELD: The Plaintiff is the proper person to hold the Tofia and Title of Vaha'i.

M. Finau for the Plaintiff.

Tuivakano and Siaki Lolohea for the Defendant.

C.A.V.

SCOTT J.: The claim was for the Tofia and inheritance of "Vaha'i" namely Fo'ui in Tongatapu and Ta'anea in Vava'u.

Evidence was taken in this Court on the 25th March, 1926 and the Court was adjourned until to day for consideration by the Court of such evidence and for judgment.

The Plaintiff bases his claim on the ground that he is the proper person to succeed to the Title and Estates of Vaha'i because he is the eldest legitimate grandson of Siosaia Vaha'i, the Noble who held the title and lands at the granting of the Constitution and remained in possession until his death sometime in 1900, and also because the present holder of the title, the Defendant, is a younger brother of the Plaintiffs father, and should not have received the Title and lands.

The Defendant relies on the fact that he was appointed by King George Tupou II and also asserts that the father of the Plaintiff was not a legitimate son of the said Sosaia Vaha'i.

The case therefore seems to me to rely chiefly on the fact as to whether the father of the Plaintiff was legitimate or not.

From the evidence before me it is quite clear that shortly after the granting of the Constitution and for some 25 years afterwards Sosaia Vaha'i was the Noble holding the title of Vaha'i and the lands connected with such title. His appointment appears in the Gazette of September 1, 1880 and the King appointed him a Hereditary Noble of his Majesty's Kingdom in accordance with the revised Constitution of 31st July, 1880, and in the list of Tofias published in the Gazette of 25th October, 1882 Vava'i was granted Fo'ui and Ta'anea as his hereditary lands. Sosaia Vaha'i lived with one Vika Mafle'o and by her he had the following children:

- (1) & (2) Twin daughters who died young.
- (3) Uilisoni Fatafehi (Male)
- (4) Elaisane (Female)
- (5) Maava (Male)

and witnesses ('Ana Sioeli and Defendant) state that between the birth of Elaisane and Maava Sosaia Vaha'i left Vika and went and lived at Houma with another woman by whom he had a son called Lamatau, and then he again returned to Vika. There is evidence also to show that after Vika died Sosaia Vaha'i married one called Mele, and they had one child the defendant.

Uilisoni Fatafehi, the eldest son of Sosaia Vaha'i and Vika married one called "Lupe". There are witnesses who saw the marriage, and Fatafehi and Lupe had a son called Uilisoni Namoa the Plaintiff in this action. Uilisoni Fatafehi is said, shortly after the birth of his son, to have sailed for Samoa and was with others shipwrecked and never heard of again. Somewhere in 1900 (14th August, 1900 by the Tongan Government Almanac). Sosaia Vaha'i died, and it is stated that Lamatau the son to the woman whom Sosaia Vaha'i took to Houma and cohabited with was appointed to act in the position until the Defendant came of age, and on his coming of age he received the estates and appointment as a Noble from Tupou II. He was born on the 14th day of August, 1882 and received the name and estates on the 1st day of May, 1909, that is when he was in his 27th year. That is how the Title and Estates have been dealt with.

Now as to the legitimacy or illegitimacy of the Plaintiff in this case there is evidence as follows :— Ana Sioeli says that she saw Sosaia Vaha'i and Vika living together. Vika was her aunt. She says she heard they were married. They had children and the eldest son was Uilisoni Fatafehi, she further states that she knows that the children of Vaha'i and Vika were always looked upon and considered as legitimate. She saw the marriage of Fatafehi and Lupe. She also says that after Vika died Vaha'i married again to one Mele and the Defendant is their child. Manu Tu'ufanga swears the same. She was also a niece of Vika and she heard the children of Vaha'i and Vika were legitimate and knows that they were always considered as legitimate and treated as such. Siu 'Ahom'e, who does not appear to be any relation, says that she lived with Elaisane and Fatafehi, two of the said children of Vika and Vaha'i, and she says they were always treated and looked upon as being legitimate children, and the Plaintiff himself states on oath that Sosaia Vaha'i told him he was married to Vika, who was Plaintiff's grandmother. In the whole of the evidence before the Court there is only one statement to the effect that Sosaia Vaha'i and Vika were not married, and that is the statement of the Defendant, who says that Sosaia Vaha'i told him so but cannot recollect what was said on this occasion, except that his father said that the only woman he was married to was Mele as the other children were born before christianity was adopted and this, coupled with the fact that Tupou II appointed him as Vaha'i is put forward to the Court to declare the children of Vika and Vaha'i illegitimate. I am of the opinion that this or any other Court should always consider any one legitimate until some clear and precise evidence is produced to show that the person is not so.

In this case, taking the father of the Plaintiff, Fatafahi, to have married young, say at an age from 18 to 24, this would make his birth somewhere between 1856 or 1850, or let us say 1853. Now I have not had in evidence before me any evidence of any custom or practice which would make Fatafahi illegitimate or which would make him to be considered illegitimate according to the Tongan Custom or practice of that time, and no evidence is before the Court to show that the cohabiting of Sosaia Vaha'i and Vika was not in accordance with the custom and practices which considered such cohabiting as a proper marriage in accordance with such practices and customs. In these days there was no law governing marriages in force or adopted, but there were customs and practices of the Country. The first law dealing with the marriages of Tongans was passed in 1875 and approved by His Majesty on the 4th November, 1875. Before this the practices and customs governed all marriages, and these customs and practices although they may not be in accordance with the Christian method must be considered in reference to all marriages before 1875 as they governed the legitimacy or illegitimacy of the offspring in accordance with the rules and customs then prevailing. Now Vika, so my Assessor informs me was a very high Chief Woman as she was a direct descendant of the Tu'ikanokupolu, in fact a granddaughter of Mumui, and it is most improbable that a woman of this rank would have lived as man and wife with Vaha'i, a Noble or rather at that time a High Chief also, if she were not married to him in accordance with the customs and practices of Tonga. There is evidence before this Court that the children of this marriage were always considered as legitimate and were treated as such. Both Ana Siocli and Manutu'ufanga were first cousins of the children of Vika, as their respective fathers Tongataulakepa and Niumeitolu were brothers of Vika who were all the children of Namoa who was the son of Mumui, and their evidence is to the effect that the children of Vika and Sosaia Vaha'i were always considered and treated as legitimate. Then too we have the fact that five children were born to Sosaia Vaha'i and Vika, and it is hardly likely that this would have happened had he been living in what in those days would be considered as adultery. They must have been together as man and wife for many years, as even after he left her for a short while to go and live with another woman, he returned to her and they had another child, and it was not until after the death of Vika that he married again to Mele the mother of Defendant.

From the evidence before the Court I am unable to find that the statement made by the Defendant is proved. On the contrary I am convinced that Sosaia Vaha'i and Vika were in accordance with the customs and practices then prevailing in Tonga considered as man and wife and that their children were legitimate. In this also the Assessor agrees with me.

This being the case, it appears to me then that when Sosaia Vaha'i died, the proper person to succeed would have been his

eldest son, namely Fatafehi but as he died before Sosaia Vaha'i, the son of Fatafehi was the proper person to succeed to the title and estates. Why he did not do so is not clear. It is not the first case before this Court where the wrong person has been appointed as a successor to the title and estates of a Noble. There seemed to be some idea that on the death of a Noble the Monarch could appoint anyone of the family to succeed. So far as this Court is concerned the 117th Section of the Constitution must be followed, and if it has not been followed it is the function of this Court to rectify the error. It is certainly a long time for the Plaintiff to wait to bring his action, but there appears there was no re-dress from the so called appointments made by the King before this Court was established, and also there was the natural timidity of any one claiming from the Monarch an estate which that monarch had already "given" to someone else. Under these circumstances I think the action of the Plaintiff is not altogether unreasonable. There is no statute of limitations governing the time of actions in this Court. It would perhaps be better if there were one, and that being the case I cannot dismiss the action on that ground.

From the evidence before this Court it is very plain that the Plaintiff is a grandson of Sosaia Vaha'i, and the eldest son of the person, who had he lived, would have been the proper person to succeed to the Title on the death of Sosaia Vaha'i, and therefore I hold that the estates of Vaha'i are by Law and Constitution of Tonga, the Plaintiff's.

Judgment will be for the Plaintiff who is the proper person to inherit the lands granted to Vaha'i in 1882 and any that may have since been added.

EDITOR'S NOTE: The Defendant appealed to the Privy Council (Horne C. J.). On the 15th December, 1926 the Privy Council dismissed the appeal, but gave no reasons.

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