

Land Case No. 7/68

SIONE TALANGA FA'OKULA
(on behalf of his nephew Saia Ma'ukofe

- v-
1. HON. MINISTER OF LANDS
2. KALO KALAMITONI

(Land Court. Roberts, J., Vava'u, 6th September 1968)

Posthumous registration—Application of provisos to Sections 74 and 76—adultery by widow before registration of her life interest—Interest of heir paramount.

This was a claim by plaintiff on behalf of his 7 years old nephew, the heir to the land in question, to cancel the registration of the life interest of the mother of the heir on the grounds of her adultery prior to the registration. The facts are sufficiently set forth in the judgment.

Held: The action is malicious. The infant heir is living with his mother on the land in question and it is in the best interest of the infant heir that his mother should not be dispossessed. Case of *Vaea -v- Elenoa Pale II T.L.R.* p.45 followed.

Faleola for Plaintiff.

Mafua for 2nd Defendant.

Hon. Minister of Lands represented by Magistrate 'Esau Tupou, Government Representative in Vava'u.

ROBERTS, J: This is a claim for the termination of the life estate of the second defendant Kalo Kalamitoni who is the widow of Kalamitoni. The plaintiff who is the younger brother of Kalamitoni brings this suit on behalf of Saia Ma'ukofe the infant son of Kalamitoni and plaintiff's nephew.

When Kalamitoni died in 1963 he was the lawful heir to the allotment but the allotment had never been registered in his name. This allotment known as "Pako" is on the Royal Family Estate. The widow applied for registration and a posthumous registration was made on 22.3.68 and a life interest given to the 2nd defendant pending the coming of age of the heir Saia Ma'ukofe.

The plaintiff claims that as Kalamitoni did not make a claim pursuant to Section 81 the allotment reverted to the estate holder. When the father of Kalamitoni died in 1948 his wife acquired a life interest. She, however, remarried in 1949 and it was within 12 months from her remarriage — plaintiff alleges—that Kalamitoni should have made a claim pursuant to Section 81. He failed to do so. I will firstly deal with this point. I do not consider that it is the intention that Section 81 should be interpreted so as to deprive an heir—as a matter of no consequence—of his title and the enactment of the Land (Amendment No. 2) Act 1949 (No. 13/49)

supports this view. Furthermore, Section 81 uses the expression "from the death of the last holder" and says nothing about remarriage or fornication. Therefore, I consider the posthumous registration valid and effected to overcome precisely the difficulty such as was envisaged by the amending Act (No. 13/49).

The plaintiff further alleges that as adultery was committed by the widow prior to the registration of the life estate in her name—and such adultery is admitted by her—she should be deprived by the Court of her life estate.

In dealing with this point I have to consider the position of the heir Saia Ma'ukofe. He is an infant of 7 years of age. He is living with his mother. There is no evidence that she is living as a de facto wife with anyone or that she is leading an immoral life and no evidence of any fornication committed by her since the registration of her life estate. To deprive her of this now would be to break up her association with her infant son, the heir, which would no doubt harm the heir and possibly—through family friction thus created—his inheritance.

I do not think that the Court could justify such action. Furthermore, what is the intention of the plaintiff? It would seem that it can only be a malicious action against the widow (the 2nd defendant). In this regard I will refer to the case of *Vaea -v- Elenoa Pale* reported in Vol. II of the Tongan Law Reports on page 45 in which the Court refused, to order forfeiture of a widow's life estate on the grounds that the claim against her was not brought "bona fide".

Similarly this Court cannot entertain an action which is, in its opinion, not bona fide.

For this and other reasons stated I find for the defendants and in the circumstances make no order as to costs.