

Makoni v Koloamatangi & Filipe

Privy Council
Appeal No 11/1990

21, 30 March 1990

Estoppel – can only be used as a defence to a claim not as a cause of action

¹⁰ *Land – estoppel – cannot serve as a cause of action*

Appeal – procedure – point not raised in court appealed from or in notice of appeal cannot be raised on appeal

Land – two conflicting agreements to grant land – former in time must prevail

Contract – two conflicting agreements to grant land – former in time must prevail

²⁰ In June 1986 the first respondent made an agreement with the second respondent that she would have a tenancy of the premises occupied by the appellant when the appellant's tenancy expired in 1989. In October 1988 the first respondent made an agreement with the appellant that she would continue to occupy the land until 1993.

The first and second respondents brought proceedings in the Land Court claiming that the second respondent was entitled to possession of the premises occupied by the appellant and seeking an order for her eviction. The Land Court upheld the second respondent's claim for possession on the ground that the appellant was estopped from denying it. The appellant appealed to the Privy Council.

³⁰ **HELD** dismissing the appeal :

1. The second respondent's claim to possession could not be based on estoppel because estoppel applies only as a defence to a claim, not as the basis for a claim;
2. The second respondent's claim to possession could however be based on the fact that the agreement with her was made first, and must take priority.
3. A point not raised in the lower court or in the notice of appeal could not be raised on the hearing of the appeal.

⁴⁰ Counsel for the appellant : Mr L. M. Niu
The first respondent in person
Counsel for the second respondent : Mr N. Tupou

Judgment of the Privy Council

This is an appeal against the judgment of Webster J in which he ordered that the Appellant give up possession of land owned by Koloamatangi in favour of Mrs Filipe.

Koloamatangi is the registered proprietor of a town allotment in Nuku'alofa. In 1979 he let part of his allotment to one Sipa Fine for a term expiring on the 1st June 1989 and some years before the expiry date Sipa Fine sub-let part of his tenancy to Linda Makoni and part to 'Olive Filipe. Both used them as business premises. In the normal course their sub-tenancies would have expired on the 31st May 1989. In fact Sipa Fine surrendered his tenancy on the 21st August 1988 but nothing seems to turn on that.

On the 13th June 1986 Koloamatangi entered into an agreement with 'Olive Filipe the basic terms of which can be summarised as follows:-

1. Filipe was to erect a 60' x 40' building on the allotment at her own cost which was to be \$4000.
2. Filipe was to have the right to occupy the building paying rent of \$200 per month.
3. On the expiration of Linda Makoni's sub-tenancy from Sipa Fine, Filipe was to have a tenancy of the premises then occupied by Makoni for a term of 20 years paying a further \$200 per month plus another \$100 for the part of the premises Filipe was then occupying.

It appears that this agreement was registered as No. 1066/86.

It was amended by a further agreement of the 4th March 1987 to increase the rent of the 60' x 40' building, when built, to \$3000 per annum.

Letters were sent to Linda Makoni's husband, for it appears that his name was on the sub-tenancy from Sipa Fine, on the 12th September 1987 and 8th August 1988 informing him of the agreement and demanding possession, although it seems clear that the Makoni sub-tenancy had not expired.

On the 6th October 1988 Koloamatangi entered into an agreement with Linda Makoni and these are the main terms:

1. Her rent for the portion she occupied was increased to \$3600 per annum (from \$1000) for the period 27 September 1988 to 27 September 1989.
2. She was to pay \$140 which is described as "a deposit for her to use Koloamatangi's house for the next five years" and was to pay rent of \$3000 per annum.
3. Clauses 4 and 5 read:-
 - "4. It will be allowed to either party in this agreement (landlord or tenant) to terminate the agreement at any time before although the 5 years is not yet complete (27.9.1988 - 27.9.1993) in whichever way.
 5. It will then be regarded that the agreement is terminated and void and not to be used from the time of its termination, by either party to this agreement."

As Linda Makoni had to raise finance to pay Koloamatangi he gave her a letter for the Bank which reads:-

"September 26th, 1988.
 To Whom It May Concern
 Bank of Tonga
 Nuku'alofa
TONGA

Dear Sir

I, Semisi Koloamatangi, owner of the land that Linda Makoni, propose to rent,
 100 hereby stated that the old Agreement between me and Sipa Sekona is now terminated
 through mutual agreement. I am therefore giving Linda Makoni, the first opportunity
 to pay me \$5,000.00.

1. The \$3,600.00 is for the payment of the first year 1988-1989.
2. The remainder \$1,400.00 is a deposit and an agreement between
 Linda Makoni and me, to continue renting from me, until 1993.
3. Linda Makoni is also to pay \$3,600.00 annually after 1989.

I hope that the above information is to your satisfactory, and that legal papers
 can be obtained at a later date.

110 Thank you for your help.

(Sgd) Semisi Koloamatangi
 (The Landlord)".

So we have the position of Kolomatangi renting the same part of his allotment
 to two people and extracting substantial sums of money from Linda Makoni by
 conduct which on the face of it was fraudulent.

The statement of claim is a rather curious document and appears to rely on
 120 the solicitors letters of 12th September 1987 and 8th August 1988 as giving notice
 of 'Olive Filipe's prior agreement before the agreement between Makoni and
 Koloamatangi was entered into in October 1988.

Webster J decided this case on the basis of estoppel concluding that
 Koloamatangi was estopped both from denying 'Olive Filipe's rights by the earlier
 agreement and allowing Linda Makoni to remain in possession.

* The effect has been that estoppel has been applied as a cause of action, which
 it can never be. It is a shield not a sword.

If estoppel was available to anyone it was Linda Makoni as against
 130 Koloamatangi, but in our opinion she cannot call it in aid for as the Trial Judge
 found she was aware of 'Olive Filipe's prior agreement but pressed on regardless.
 It comes down to a matter of priorities and on that basis 'Olive Filipe's prior
 agreement must prevail. If Linda Makoni has a remedy it is in damages from
 Koloamatangi whose conduct in this affair has been deplorable. Mr Niu raised an
 * argument based on s.13 of the Land Act but as this was not raised in the lower
 court or in the notice of appeal we do not deal with it.

The appeal is therefore dismissed. Both the Appellant and 'Olive Filipe are
 awarded costs against Koloamatangi to be fixed by the Registrar.