

Helu v Taufa & Others

Land Court, Nuku'alofa

¹⁰ Lewis J
L335/93

17 March, 24 April, 12 May, 2 & 7 June 1995

Land Act-grant-set aside-fraud
Evidence-parole evidence rule-fraud
Estoppel-clean hands-equity

- ²⁰ The plaintiff claimed that his elder brother, the first defendant, had agreed to surrender holding an 'api kolo in favour of the plaintiff's son, for services rendered. The plaintiff filled the land and built a substantial house on the land. The sister of the plaintiff and the first defendant, by fraudulent means, obtained the surrender and the registration of the land into her son's (the second defendant's) name.

Held, setting aside and cancelling that registration:

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- (1) The actions of the sister were made with intent to defraud the Minister - to lead him to erroneously register the second defendant.
 - (2) The Minister was misled and fell into error
 - (3) Fraud or mistake will vitiate a grant by the Minister
 - (4) The plaintiff could not be estopped - and the second defendant could not raise such a claim, in any event, as not coming with clean hands
 - (5) In addition the Minister failed to see the two competing claimants as he had sought to do, originally. That failure was another sound reason to set aside the grant.
 - (6) The parole evidence rule, particularly as embodied in the Evidence Act, does not preclude evidence of fraudulent act or omission

⁴⁰ Cases considered : Lolohea V Tafolo & Lavake
Privy Council No 1 | 1963

Statutes considered : Evidence Act s.79

Counsel for plaintiff : Mr Hola
Counsel for first defendant : Mr 'Etika
Counsel for second defendant : Mr Veikoso
⁵⁰ Counsel for third defendant : Ms. Simiki

Judgment

The Plaintiff, Lemeki Taufa Helu, is the younger brother of the first Defendant Losipeli Taufa. The land, the subject of this claim is an 'Api Kolo of 822.1m² at Kolomotu'a being S/plan 3410 Lot2. in respect of which there is a Land Grant registered in the name of 'Efoti Mafile'o, the second Defendant and dated the 22nd day of March 1992.

The second Defendant 'Efoti Mafile'o is the nephew of the Plaintiff. He is the son of the Plaintiff's sister, Seini Mafile'o.

60 Lemeki Helu the Plaintiff, lays claim in these proceedings to the land in respect of which 'Efoti, the 2nd Defendant holds the grant of title issued in March 1992. The Plaintiff says that the land is his because the Holder Losipeli Taufa gave it to the Plaintiff on two occasions, once in New Zealand and in the years 1977 and 1979 in Tonga. The Plaintiff says that Losipeli gave it to him for his, the Plaintiff's, son Sonatane Pasivulangi Helu out of gratitude for assistance he (Losipeli) had been given by the Plaintiff.

Losipeli had lost a leg. The Plaintiff paid air fares for Losipeli and accompanied Losipeli to New Zealand where a false leg was measured made and fitted. The Plaintiff paid for Losipeli's expenses. The Plaintiff remained with Losipeli in New Zealand. In 70 New Zealand Losipeli again confirmed that the Plaintiff would have the 'Api of which Losipeli was the Holder in Kolomotu'a.

In 1986 the Plaintiff and his family returned to Tonga from New Zealand. The land upon which the 'Api at Kolomotu'a was situated was swampy land. The Plaintiff acting in the belief that Losipeli would give him the land, personally spent \$3,800.00 on fill, which he placed on the allotment, it having a tendency to flood. There is argument about the amount spent by Lemeki but I am satisfied the amount was \$3800.00. Lemeki and his family planted mango and breadfruit trees and some other varieties.

After the land was filled the Plaintiff, acting on the belief that Losipeli would surrender the land in favour of the Plaintiff's son built a substantial dwelling house on it. 80 The building was L-shaped. It was 60 feet in length and 50 feet along the "L side". It had four bedrooms and a kitchen, sitting room, toilet and bathroom. The Plaintiff says that he spent about \$25,000.00 on the construction of the building. During the course of the construction he was neither stopped nor warned about the course of building in which he was engaging.

There is no doubt that Lemeki believed the land would be conveyed to his son. Losipeli agreed during his evidence that he had told Lemeki in New Zealand that he would surrender the allotment to Lemeki's son - he added he wanted to buy an allotment for 'Efoti. It is intriguing to view Losipeli's evidence against the formal Defence filed (paras 90 4,5,6 & 7). The pleadings appear to be contrary to Losipeli's evidence.

In order to take the necessary steps to establish and to have title to the 'Api recorded and formalised for his son, the Plaintiff decided to consult with the Minister of Lands. Having seen the Minister, the Plaintiff attempted to persuade his sister, ('Efoti's Mother Seini) to accompany him to speak with the Minister. He failed to persuade her. Later, however, Seini Mafile'o, did consult with the Minister for her own purposes, not those of Lemeki, and produced to the Minister a letter with which it is alleged, she persuaded the Minister to register a grant of the land to 'Efoti Mafile'o, her son and the second Defendant to this action.

100 The Plaintiff alleges that the 1st Defendant, Losipeli Taufa has changed his mind

and declined to surrender title to the Plaintiff for his son. Losipeli surrendered his town allotment in order that it be secretly claimed by 'Efoti Mafile'o. To achieve this registration, it is alleged by the Plaintiff that 'Efoti and Seini Mafile'o produced to the Minister of Lands a letter written by the Town Officer of Kolomotu'a (one Kuli Kaitu'u), the effect of which is that a building had been erected on the subject land at Kolomotu'a and that it was occupied. It said "a building has been done and there are people living there"

110 Called by the Plaintiff, the witness Town Officer Kaitu'u said that he was told by Seini Mafile'o that her son had got the allotment, that her brother (the holder) had moved to Ha'apai and that in writing to the Minister the Town Officer did not convey who had built the house and he assumed that the person who built the house would become the registered holder.

Kaitu'u said to the court that he later learned from Lemeki Taufa Helu that he Lemeki Taufa had built the house. Kaitu'u said in cross examination, "his mother told me 'Efoti (the 2nd Defendant) built the house." The implication in the letter to the Minister from the Town Officer (the Plaintiff claims), is that it conveys the impression that 'Efoti (or someone at his bidding) built the house.

120 The Town Officer Kaitu'u told the Court that he wrote the letter because Seini Mafile'o had asked him to do so in those terms. He said he had no idea of the existence of completing claims or of the fact that Lemeki Helu the Plaintiff was in fact the builder-occupier. Lemeki Helu, the Plaintiff, says Kaitu'u told him of the reality later, after the Plaintiff had gone to the Minister.

Against that background of fact, the Defendants allege that the Plaintiff, at all material times, was the holder of two other town allotments at Hala'ovave and it was therefore at law, not open to him to take up the allotment at Kolomotu'a. The Plaintiff gave evidence that he had passed the allotments on and no longer held them at the material times. In my opinion they play no part in a resolution of this matter.

130 The thrust of the complaint by the Plaintiff concerning the Ministerial grant to 'Efoti Mafile'o (leaving aside the fact of the conversations Lemeki Helu had had with Losipeli in New Zealand and Tonga,) is that the Minister was misled by the letter from the Town Officer Kaitu'u, that behind the activities of the second Defendant 'Efoti Mafile'o was Seini Mafile'o who for her own ends had:-

- put pressure on the former holder the 1st Defendant Losipeli Taufa to convey the land to 'Efoti Mafile'o.
- Gone against the specific direction of Taufa by using his signed but conditional letter proceeding to register the allotment in her son's name without waiting
- 140 - for Taufa to arrive from Ha'apai.
- been responsible for the misleading letter to the Minister from the Town Officer.

The Plaintiff called Seini Mafile'o to give evidence. He did so because Mr. Hala of Counsel for the Plaintiff said the Defendants failed to call her. I gained the impression that she is a very determined and manipulative woman who set out to have the Kolomotu'a allotment registered in the name of her son 'Efoti.

The relative accounts of Seini Mafile'o dealings with Losipeli Taufa the living Holder, make clear her involvement. The effect of the evidence of the Defendant Losipeli Taufa is:-

My sister is involved in this case. I met her in Ha'apai. She came to me with a letter. I tried to read it but I could not. She said I should sign it and I did but I was troubled. I said go back to Tonga and wait for me to come. I was to come to Tonga to see the piece of land my nephew wanted. It was a piece of land I got a long time ago. I asked Seini to wait before doing anything about the lot. I agree that I promised it to Lemeki Helu. I gave him permission to build a house on it. He had taken me to New Zealand and I had agreed there, to surrender the allotment to him for his son but when my sister came to me I felt sorry for her.

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I was intending to buy an allotment for my nephew 'Efoti Mafile'o, but before I came to Tonga I heard that they Seini and 'Efoti, had registered the allotment. I trusted them to wait. I had planned to buy an allotment for my nephew. I signed the letter which Seini gave me because she had said she would not go back to Tonga and would wait unless I signed it.

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Losipeli Taufa said that he gave the Plaintiff permission to build a house on the allotment - "so that it could be registered". It was built before Losipeli moved to Ha'apai where he was when Seini Mafile'o came to them with the letter. Mr 'Etika of Counsel for the first Defendant asked the first Defendant if he gave Lemeki permission to build a small house on the land. Losipeli replied "I consented to the building of a house so the land would be registered".

I accept Losipeli's evidence that he stopped "the Plaintiff building a verandah once because it would have extended beyond a neighbour's boundary". I accept it was only in that way the Losipeli brought a stop to any building by Lemeki Taufa Helu the Plaintiff. I also accept there was never any suggestion by Losipeli that any house built by Lemeki was to be "temporary only" or indeed "small". Contrary to paragraph 7 of the Defence, Losipeli's sworn evidence is that he did not tell Lemeki to stop building "repeatedly". One wonders from where the draftsman of the Defence got his instructions about that topic.

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The witness Losipeli (and I am satisfied that he was a truthful witness in all respects), while he had some education, was and is illiterate. I am sure that he could and did sign the letter given to him by Seini Mafile'o, but I am equally sure he depended upon Seini to explain the contents to him.

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Seini Mafile'o does not emerge from these proceedings as a witness of truth. It is clear from the evidence that it is she who was behind a scheme to obtain the subject land for her son. She was not called as a witness for her Defendant son and she would not have been called at all had it not been for the Application of Mr. Hola, which was late in coming (after the close of the evidence for the Defendants), but successful. Mr Hola called her. The court therefore has had at least the opportunity to hear what she had to say.

Her evidence can be conveniently dealt with now. Where she is in conflict with other witnesses in this case I frankly disbelieve her evidence.

The evidence of Seini Mafile'o is that she went to the Ministry of Lands where she met with Tevita 'Amanaki Puniani (a witness called by the 1st Defendant and who was at all material times the secretary of the Ministry of Lands). Mr Puniani confirms the visit. He says she came "for advice on procedure on how to get the allotment" but she did not see Puniani for the purposes of registration.

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From the whole of the evidence, the origins of drafting of the letter signed by Losipeli Exh.P1, (Losipeli's letter of surrender) are probably as follows:-

- Seini went to the Ministry and saw Puniani who at her request roughly drafted Exh.P1, the letter. She probably saw him on 10 December 1992.
- She Seini then typed it into the form Exh P1 now is.
- She then took it to Losipeli who signed it.
- She then brought it to the Ministry of Lands where it was endorsed "Paula submit to cabinet (Signature) 14.12.'92."

Seini Mafile'o had no authority to do anything but hold the letter until Losipeli whose signature it bore, next gave her instruction. However it is clear from her own evidence that, once having got the signature, she went ahead in contradiction of the direction from Losipeli and lodged it - probably on the 12th December 1992. She received instruction from the Ministry to pay fees and to do "other requirements".

P2 is the controversial letter from Kuli Kaitu'u the Town Officer of Kolomotu'a the township on which the subject land is situated, to the Minister of Lands. I have already referred to it. It appears to have generated many Ministerial endorsements and Minutes.

On the 14th December 1992 an application form ("SIPINGA 'OE TOHI TALA 'API") Exhibit P3 was lodged. It bears a signature which purports to be the signature of Seini Mafile'o "for 'Efoti Koula Mafile'o" and bears a signature which purports to be that of the "estateholder S. Ma'afu Tupou".

On the 12th March 1993 some two and a half months after Seini/'Efoti's application P3 was lodged, Lemeki Taufa applied to be registered (Exh.P4) as the holder. The Application bears a note which reads:-

"Note: -

Paula

Check out all Applicants to the allotment Lemeki has built a brick house on the land. 12.03.'93"

and, by note dated 12.03.93 the response from Paula Moala (let in by consent)

"I respectfully state here:

1. 14-12-92 letter of surrender by Losipeli Taufa
2. 14-12-92 Application by 'Efoti Mafile'o (not yet registered)
3. This is only one Application to this allotment and also this Application by Lemeki Taufa to this allotment.
4. All enclosed together with these (two)(2) Application is the letter of surrender. Nothing has been registered.

Yours respectfully
(Sgd) Paula F. Moala.

Paula

I want 'Efoti Mafile'o and Lemeki Taufa to come this Office Tuesday 16.03.'93, 9.00 am.

(Sgd) S. Tupou
15..02.'93 (sic)"

There is (and can be at law) no argument that the Application of 'Efoti document P3 is an application in proper form for registration of the document LOT 2 PLAN 341 and for the Minister to Grant to the Applicant the land formerly in the name of the Holder Losipeli Taufa.

Subject to the condition placed upon the letter of Application P1 obtained by Seini from Losipeli, he had signed his conditional consent to the grant. The endorsement on P3 read:-

... "This allotment was divided for Losipeli Taufa, it has not yet been registered but Losipeli has moved to Ha'apai but he is asking if his nephew 'EFOTI MAFILE'O, who lives at Kolomotu'a apply for the allotment.

1. Pay the survey measurements (sic)
2. Complete all requirements of the Application.
3. Draw the plan before
4. Registration.

(Sgd) S.M. Tupou
14.12.'92

"... Birth Certificate

'Efoti K Mafile'o was born by Sefesi Mafile'o and Seini Mafile'o on the 21.10.'67 legitimate B/Cert No.231/'67 Vol.2.

Survey fee = Rec.842686 = \$40.00 (14.12.'92)
17/03/'93

Application for the allotment of Lemeki Taufa
(attached) Sgd. P. Moala"

In fact the parties never did see the Minister - the Registration went ahead. Seini Mafile'o says "we went, Lemeki and me, but he was busy and to come back. I did not go "next week," but later to his home and told him the land had not been registered yet (in 'Efoti's name) it had been stopped."

It is open to the court to find and it does find that the letter of "Application to surrender" ostensibly by Losipeli was lodged fraudulently and with an intent to defraud the Minister - to lead him into erroneously registering 'Efoti as the registered holder of the land. While the Application in proper form may not have misled the Minister into registering the 2nd Defendant as the holder, the combination of P1 and P2 (the letter from the town officer in combination with the letter of Losipeli) certainly did.

The I and Act 1988 Cap. 39 S.43(2) provides for surrender. What the Minister obtained was a document which Seini Mafile'o was not authorised to lodge. What she did by lodging the letter and remaining silent concerning Losipeli's admonition not to do so, was to hold out on behalf of herself and her son that the letter P1 was an unconditional Application which she was to lodge on behalf of Losipeli so that the Minister would promptly accept the surrender and make the conveyance to 'Efoti. P1 of course was not such a document and Seini acted without authority to lodge it.

What of Losipeli's failure to do anything about the unauthorised lodgement of his letter? It matters not. The act which brought about the erroneous registration was that of Seini Mafile'o. A fraudulent pretence that she had authority to lodge the surrender Application when she did. Losipeli had not turned up; he had not approved the transaction at all. The Minister was profoundly misled by the presentation of the unauthorised letter of surrender.

Mr. Hola in his helpful address directed the attention of the Court to a decision of the Privy Council concerning the effect on a registration of concealment or misrepresentation. Mr. 'Etika urged that the decision is distinguishable and not to the

point. I consider the decision to bind this Court and to be highly material to a proper resolution of this matter.

The decision cited is Privy Council Appeal 1/63. LOLOHEA v SIAOSI TAFOLO AND NOBLE LAVAKA. True it is that the facts of Lolohea differ from the present, but the consequence at law brought about by those facts is as I have said, the same. The Minister in both cases was misled and fell into error.

360 Fraud or mistake will vitiate the grant in any case where it is established to the satisfaction of the Court on the balance of probabilities. The contention of Mr. 'Etika is that the Plaintiff is "Estopped" from denying the grant and registration of the land in the name of the Defendant. That cannot be. The Court is always charged in cases such as the present to do equity. The parties must come to the Court with clean hands. The document which Seini Mafile'o presented to the Minister signed by Losipeli was not what it appeared to be. There can be no mistake as to her intention. She intended that it mislead the Minister and his representatives. It did so. The Minister for a reason which is unclear failed to see the Plaintiff and Seini Mafile'o together as he had, originally, sought to do. That failure is in my opinion another sound reason why this transaction should be set aside.

370 Mr. 'Etika further submitted that the parole evidence rule precludes any reference being made to the circumstances surrounding the execution of the document exhibit P1 which is to be treated as precisely what it appears to be, namely an application by Losipeli to surrender the 'api in favour of his nephew 'Efoti.

The parole evidence rule is embodied in the Evidence Act Cap. 15 s.79, which provides:-

"79. Save, as in this section hereinafter provided, where any transaction has been reduced to the form of a document, no evidence of any oral agreement shall be admitted as between the parties to such documents or their representatives in interest for the purpose of contradicting varying adding to or subtracting from the terms:

380 Provided that

- (a) evidence may be given to any fraud, duress, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, error in date, mistake of fact or any other matter which would invalidate the document or entitle any person to any order or relief relating thereto;"

It cannot therefore be the case that Parliament ever contemplated that a party deprived of its right by the fraudulent act or omission of another should be precluded from succeeding by the operation of a statute which was designed to produce a just and fair result. There is in my opinion no merit at all submission of the defendant's counsel.

390 The registration of 'Efoti Mafile'o as the holder of the allotment which is described at page one of these reasons (infra) is cancelled. I will hear counsel on the appropriate step to take in rectifying this registration.