

## Kama v Kuli, Kalaniuvalu & Minister of Lands

Land Court, Nuku'alofa

10 No.L 451/92

Lewis J

21, 22, 25 August, 1995

*Api to - reward - gift*

*Land - api to - fraud - set aside grant*

*Fraud - set aside grant of land*

20 The plaintiffs claimed land, through their parents who were alleged to have been given it as an "api to". No registration occurred. The first defendant, with knowledge of the plaintiffs' claims to the land, obtained registration.

Held:

1. The court will set aside a grant of land for fraud.
2. An applicant for land has a duty to disclose knowledge of competing claims to the Minister, especially in cases where a question arises whether the gift of an "api to" has been made by the estate holder (an "api to" being an award of land, usually by the King, to a recipient as a reward for bravery or an act of national importance or as a prize for winning an important contest).
3. Here there was credible evidence of the traditional giving of an "api to" being thwarted by the actions of a man with no better claim (indeed a lesser one, on the evidence).
4. The registration of the first defendant should be cancelled and the Minister should exercise his discretion and grant the land to the person proper in his judgment.

40 Counsel for plaintiff : Mr Tonga  
Counsel for first defendant : Mr Veikoso  
Counsel for third defendant : Ms Tapueluelu

### Judgment

The First Plaintiff in this land claim has died. The action has been carried on by his younger brother, the Second Plaintiff. The First Defendant presently resides in Australia and was represented at trial but did not attend to give evidence.

The Second Defendant, 'Eiki Nope Kalaniuvalu, by all accounts is the estate-holder in respect of the 'Api Kolo the subject of these proceedings and, as it transpired in the hearing, plays an important part in the resolution of this matter.

The Court has not been assisted by his absence. What follows, is a narrative account of findings about which the Court is satisfied on the balance of probabilities.

The First Defendant received a grant of title from the Minister of Lands in respect of the subject land which was registered in the name of Fotofili Sefo Kuli on 12 November 1991.

In 1956 or sometime thereabout, the late Hon. Kalaniuvalu, father of the present Hon. Kalaniuvalu was the estate-holder in respect of the subject land. He visited the site of the 'Api in issue at a time when it was part of a much larger area of land and made some awards of the land, as he was entitled to do.

To the parents of the First Plaintiff he gave an area of 964.3 metres square, so much is established from the evidence of the witness Moala Tapumele Kioa, whose husband is the brother of the Second Plaintiff's mother and who was present when the estate-holder made the award. It is said to have been given to the parents of the Plaintiffs as an "API TO".

The Court is informed by the Land Assessor that an "API TO" is an award of land given usually by the King to the recipient as a reward for bravery or an act of national importance or as a prize for winning an important contest.

The witness Moala recounted the occasion when in the late 1950's the estate-holder met with a number of people including the parents of the Plaintiffs at the large allotment of KAVAPELE. I pause in this narrative to say that I consider Moala Tapumele Kioa to be an honest witness who was doing her best to recall events as they occurred. Accepting that her account of events would attract the criticism of partisanship, I note that it was not put to her by the defence that her account was untrue or exaggerated.

Moala's evidence is that there were some seven people present when Kalaniuvalu measured and distributed the large parcel of land from which the subject 'Api was excised and given by Kalaniuvalu to the parents of the Plaintiffs. Those present were Kalaniuvalu, Talia Kama and Titie Kama (the parents of the Plaintiffs), Soane Pailate, Paulo Langakali and Sione Maile. A criticism of the failure of the Plaintiffs to call those witnesses or any of them was made by the first Defendant. I am not inclined to draw any inference nor to guess at the meaning of their absence. They may or may not have been of assistance. I certainly conclude nothing from the failure to call them.

Hon. Kalaniuvalu does however stand apart somewhat. He was a Defendant. The Plaintiffs discontinued against him. He could have been called one can assume and he would have shed light on the process of determining the truth. However, I am entitled to rely upon the evidence of Moala concerning the occasion of the gathering at which the parents of the Plaintiffs were given the land - and I do so rely.

Moala's evidence is to an extent corroborated by subsequent events. There is no doubt that the Plaintiffs parents and the Plaintiffs occupied the land (hereinafter "Fiefia") from 1962 until they were forced off by the activities of the witness called by the first

Defendant, Sililo Suli Mote.

Moala was asked by the parents of the Plaintiff to look after the allotment which she did from 1967 until 1992 until she became afraid having been threatened by, and then attacked by, the witness Suli Sefo Kuli or "Mote". Mote conceded that he forced the Kama family out and "tore down" a fence which they had erected on the perimeter. It was a fence of a substantial nature. For them to have built such a fence is at least consistent with a belief in ownership. To have cared for the place, equally, is consistent with holding a belief in proprietorship. Mote was charged in a Court case with assault on the husband of the witness Moala. There is no evidence of the outcome. I make no finding concerning the alleged assault on Moala. I consider her to be a material and honest witness.

There is no overt matter emerging from the evidence of the witness from the Office of the Minister of Lands, Registrar Tupouto'a which affords evidence that the registered holder Fotofili Sefo Kuli had informed the Minister or his representative that there was a competing claim in existence. That Mote knew of the existence of the relationship that the parents of the Plaintiff had had with the estateholder is clear, Mote said so. The relevant exchange is:-

Q. (Veikoso) Did they tell you that Kalaniuvalu gave them permission (to occupy the land).

A. (Mote) No but I overheard them say that Lavinia (Kalaniuvalu's daughter) had given it to them.

There is no evidence that this information was divulged to the Minister at the time of Fotofili Sefo Kuli making his application, nor of the fact of the fence or the assault case. Had the Minister known of the existence of these factors, he would no doubt have had the competing claims investigated.

The witness Mote, is "over sixty" and married with 12 children. 5 of the children are male. The first Defendant Fotofili Sefo Kuli is aged 30 or thereabout is the second son of Mote and a legitimate Tongan.

The relationship which the first Defendant claims entitled him and entitles him to the land, is as follows. The land belonged to one Fiefia. Fiefia had two brothers,

- Misipaane
- Sililo Sefo Kuli.

Sililo Kuli was the grandfather of the first Defendant. Each of the three brothers were legitimate. Fiefia was married but had no children. Misipaane was unmarried and Sefo Kuli was married and had one son namely Sililo Suli Mote, the father of the first Defendant Fotofili Sefo Kuli.

Sililo was born before the marriage of his parents who married after his birth. (Thereby legitimizing him, *Lopeti Faka'osi v Nai Maliepo* (1995) Court of Appeal) The witness Mote has no 'Api and three issues without an 'Api.

The evidence of the witness Mote is that in 1962 he and his wife and one child, moved into the subject land. He was charged with minding it and a tax 'Api as well. By whom, is unclear. At the time of their taking occupancy of the subject land, the family of the Plaintiffs was in occupation. Mote attempted he says, to force them out many times, finally succeeding (I find), in 1966.

The witness Mote deposed to his belief that his father was the heir to Fiefia's land, but that his father could not take Fiefia's land because Mote's father was already possessed of both a town and tax 'Api, and so he believed the land to have reverted to the estate-

holder. I am satisfied that on the death of the holder Fiefia it did indeed as a matter of Law revert to the estate-holder.

Ultimately in November of 1991 the land being now in the custody of the estate-holder the Applicant applied for the unregistered land which on the face of the information in the possession of the Minister was not the subject of any competing claim.

Accepting as I do however, the evidence of the witness Moala Tapumele Kioa, there was and had continued to be the competing claims of the Kama family. The claims continued because although the Kama family had made no formal application for the land themselves, they resisted the registration of the 'Api by legal action and the proposed construction of a fale by the family of the first Defendant on the 'Api and seek to have the registration in favour of the first Defendant set aside, on the basis that it was an 'Api To.

I am satisfied that there was no divulging by the Defendants to the Minister of Lands of the fact of a competing claim to this 'Api. Having forced the Plaintiffs and their parents from the land in 1966 I am satisfied that although Mote knew that the Plaintiffs had occupied the land because "Lavinia" Kalaniuvalu had said that they were to have it as an 'Api To, he proceeded to apply for his son's registration without telling the Minister that there was a competing claim.

There are limited occasions upon which a Court will be moved to set aside a grant of land. One of those ways is fraud. Fraud may arise when the party applying for registration does not reveal to the Minister competing claims of which the Applicant has knowledge. The onus of divulging knowledge of competing claims in cases such as the present must necessarily rest with the Applicant, especially in cases such as the present where a question arises whether the gift of an " 'Api To" has been made by the estate-holder.

I conclude that by reason of what has occurred, this Court is compelled to intervene. There is evidence on oath from credible witnesses that the land in question has been the subject of a traditional act, the giving of an " 'Api To" by an estate-holder. The traditional act has been thwarted by the actions of a man with no better claim than the Plaintiffs, indeed a lesser one on the face of the evidence.

IT IS ORDERED THAT

1. Leave be granted to the second-named Plaintiff to discontinue proceedings against the second Defendant 'Eiki Nopele Kalaniuvalu.
2. Upon the application of the Plaintiff Siaosi Topui Kama for registration as the holder of that town allotment at Lapaha on S/Plan 5637 Lot 1, it is directed that the Minister of Lands shall cancel the registration of Fotofili Sefo Kuli and thereafter shall award registration to the person or persons who in his judgment should be granted the said land in the absolute exercise of his discretion.
3. The Costs of these proceedings shall be those of the Plaintiff against the 1st named Defendant in any event to be taxed or agreed.