

BETWEEN : KATALINA KOFE : Plaintiff

AND : 1. KOLOPEAUA KOFE
(a.k.a MAKONI KOFE)
2. SALOTE KOFE
3. PASIKALA KOFE : Defendants

BEFORE HON JUSTICE FINNIGAN

Counsel : Mr Fakahua for the plaintiff, Mr Tu'utafaiva for the defendants,
Mrs Vaihu given leave to appear for intervener, abiding outcome

Dates of Hearing : 23 & 24 September, 5 November 1999

Date of Judgment : 30 November 1999

INTERIM JUDGMENT OF FINNIGAN, J

This is a claim for possession of, or else payment for, personal property that was acquired during marriage. The property is a house, a car and some household furniture. The first defendant is the plaintiff's husband, though the evidence is that he has left the plaintiff and now lives in New Zealand with another woman. He is not paying maintenance, although ordered to pay \$40 per week by the Magistrates' Court. Apart from being represented along with the other defendants he has not taken part in the proceedings.

The second and third defendants are the husband's mother and older brother. They claim that the husband's family provided the house for the mother. They say that the car is solely the husband's, and that he gave it to his elder brother, who had contributed over \$3000 towards its purchase. Together they had used it as security for a loan for another car being bought by the brother. They say that the plaintiff has taken her furniture, and that what remains was supplied by the husband for his mother and for some nieces/nephews.

The property has been preserved by interim injunction, except for a television set and video player, pending determination of the dispute. The third defendant has removed those items because he said in evidence he thought they were not the property of the couple. Meanwhile the mother, the second defendant, has moved to New Zealand and she has taken no active part in the proceedings either. The Tonga Development Bank, as co-owner of the car, has taken possession of it pursuant to an interim order, and has given it to the third defendant to operate as a taxi so that payments on the second car may continue. There was to have been some maintenance paid by the second defendant to the plaintiff from this operation also, but none is presently being paid.

THE EVIDENCE AND THE PRINCIPLES

This case is to be decided almost entirely by its evidence. It is not a divorce case and this is not a contest for final division of matrimonial property. It is a dispute between the husband and the wife over their shares in their joint property. The claim by the plaintiff is that her husband has abandoned her and left the country, so she should have all of what they formerly owned together. The claim against her is a claim that his family in Tonga owns all the property that the parties formerly used during their marriage. The case turns on the view I take of the veracity of the witnesses, the contributions made towards purchase of the various items, and the purpose of those contributions. There are conflicts in the evidence that I have to determine. I have to decide ownership first between the husband and wife on the one hand and the husband's family on the other. Then for whatever property does not belong to the husband's family, I must decide what are the respective shares of the husband and the wife.

For deciding the shares of the husband and the wife, Mr Tu'utafaiva, counsel for the defendants, referred me to *Ualesi v Tukutoa and Ngalu* [1974 - 1980 Tonga L.R. 83. There the Court applied s 14 (now s 15) of the Divorce Act (now cap 30), which provides that whenever a decree for divorce is pronounced, each of the parties to the dissolved marriage is to retain his/her own property. That provision cannot govern the present application because there is no divorce, but the parties to the marriage wish to have this issue settled and the provision is a logical guiding principle to apply in any event. The Court's main task is, as it was in that earlier case, to decide what property belongs to which party. Mr Fakahua, counsel for the plaintiff points also to part of that decision in which the Court held (at p 85) that "if a man cares to run off with another woman" he cannot "come along and say I want a large piece of your property as well". Each case, as the Court noted, must be decided by its own facts to some extent. In that case the Court left each party in possession of the property held by each, and divided a joint savings account equally. It was the wife who had left in that case, and the Court's decision left the husband with more than the wife but in the circumstances of that marriage and that case the Court thought that was "reasonably fair between the parties in the circumstances".

No other principles have been put forward by counsel.

With all that in mind I turn to consider first, the house. It is clear from the evidence that none of the parties can claim title to the land under the house. I accept that it belongs to Sese Vaea and his son 'Amanaki. Although the husband's family has lived on it for a long time, it belongs to none of them. The house is a chattel that has been put there. I have no doubt it was put there with the agreement of all the parties, at a time when the plaintiff and first defendant needed a bigger house. Contributions of materials and cash came from both families. The plaintiff and first defendant were caring for the husband's mother. The house was built, so far as the builders were concerned, for the plaintiff and first defendant. I have no doubt after giving all the evidence careful thought that the plaintiff and defendant would have

occupied the house, and taken care of the husband's mother, indefinitely had they continued living as man and wife.

But who owns it? The first and third defendants went to the Tonga Development Bank, which had financed a car for the plaintiff and first defendant (T1646), to borrow money for a car for the third defendant. When pledging property for the loan to buy the second car, they pledged not only that first car T1646, and the third defendant's house, but also another house, which is the house in dispute. They told the bank it was the first defendant's house. The third defendant said in evidence that despite this it had still been his mother's house, because that is what it was, but I have trouble with that. His mother would have had trouble with it too I imagine, had it been her house and the bank had come demanding her house. So would the bank, if it had demanded the house and been met by a claim that the security had not been what the two defendants said it was. The first and third defendants pledged the house as security for a loan to them. I cannot accept that they did not tell the bank the truth. I am satisfied from the evidence that the parties did not claim while the husband and wife were living in the house, that it belonged to the husband's mother. At that time all the parties saw the house as the house of the husband and wife, and none claimed it was for the mother until the dispute arose and the wife vacated it. I am satisfied she vacated it and went back to her parents because her husband came back from New Zealand and was joined by his new partner. It seems he moved into that house with her, before moving to live with his elder brother the third defendant. I accept what the plaintiff said in evidence, she could not stand seeing the woman whom her husband had preferred to herself. I am satisfied that she locked the house and left it, as she said in evidence. I accept her rejection of the suggestion that by vacating the house she was giving it back to the first defendant's mother. I am satisfied that at the time it was built it was intended to be the property of herself and her husband. It was paid for by cash, materials, effort and care for the husband's mother contributed by them both, and by contributions of timber by the wife's family. It was paid for also by contributions from the husband's family, being the site, some materials from an earlier house destroyed in a cyclone and cash.

Almost all the children in the first defendant's family had married and moved away. In making these contributions the husband's family expected in return the benefit that their mother would be cared for by the plaintiff and the first defendant. Having given gifts of cash and materials for this purpose, the husband's relatives cannot now come to the Court and claim that they own the house. I hold that it is not their house. The house is the property of, to be divided between, the husband and the wife.

I turn next to the car, T1646. The husband and the wife chose to save and borrow in order to have this car before they had a house. I have considered the evidence of the plaintiff, of her father and of the third defendant about the contributions to the purchase price of this vehicle. I find from the evidence that it was purchased so that the husband could operate it as a taxi for family income. I accept the evidence of the third defendant that the

first defendant needed his own car, taxi driving was the only work that he knew. I accept that both the couple themselves and their families all contributed something to the money required for the deposit and the loan repayments. I find it very difficult to accept that the ownership of the car is to be allocated according to the contributions towards its purchase. Rather, ownership must be decided according to the evidence of who was to be the intended owner when it was bought. It was registered as the car of the first defendant. There is nothing at all to suggest that it is the property of other members of his wider family, except the evidence of the third defendant that the first defendant gave the car to him when he went to New Zealand. It was used as security for the loan for the third defendant's car, but the first defendant remained the registered owner. I hold that the car is not the property of the third defendant. I have no doubt that it is the property of either the first defendant or of the plaintiff and the first defendant jointly.

Is it the property of the first defendant alone or is it joint property? The funds first used for its purchase were the joint savings of the couple. If I accept all the evidence, then both the plaintiff's and the first defendant's family, to supplement the cash for the deposit, supplied Tongan traditional goods. The wife was working when it was purchased, and it seems she contributed from her wages. When the husband made payments toward the loan himself it was from his earnings, i.e. funds that were jointly owned, not his own funds. When he was unable to pay the loan, both his brother and the plaintiff's father contributed money and neither asked for repayment. The third defendant provided money when it was needed because he felt responsible for his younger brother, but did not know whether his brother spent that money on car repayments or on other things. That is understandable. I conclude without hesitation that this vehicle was the joint property of the husband and the wife.

I turn now to the items of furniture. These are the items listed in paragraph 9 of the statement of claim, namely: 3 lounge suites, 2 wardrobes, 1 stereo, 1 television and video machine and 1 dining table. I accept the evidence of the plaintiff and the third defendant that these items were brought by the first defendant from New Zealand. I accept that these items are still in the house except for the television and video. I am unable to accept the evidence of the third defendant that these items were brought from New Zealand for his mother's use, and that the television and video were intended to be the property of his nephews/nieces who were children fostered by his mother. I accept the evidence of the plaintiff as being the more likely, and hold that they were brought for use in the house that was occupied by the plaintiff and the first defendant. From the evidence I find that they were intended for use by the couple as their joint property.

CONCLUSIONS

The evidence has led me to the conclusion that all the items claimed by the plaintiff are the joint property of herself and her husband the first defendant. None of them are the property of the second and third defendants, or of any other persons.

The question remains, how are the shares to be divided? The plaintiff makes no helpful moves, because her claim is for a declaration that she alone owns the house, and for \$6,000 if she cannot have the car, and for \$6000 if she cannot have the furniture. She cannot have possession of the house because it is jointly owned and it is situated on the family 'api of the defendants. She can have possession of the car (subject to its release by the Tonga Development Bank) and of the items of furniture, including the television and video. However, if she takes possession of the car and furniture, it may be possible to divide the property more or less equally by value. The plaintiff has given no valuations except her own estimates. The Court will need better evidence, but valuations may not be necessary if the plaintiff and the first defendant reach an agreement. For example, they might agree that the plaintiff shall take possession of the car, debt-free, and all the furniture items, all in reasonable condition, while the first defendant takes possession of the house. If it is necessary to pay money to the Tonga Development Bank to obtain release of the car from the security arranged by the first defendant, then the first and/or third defendants must make the payment.

If the husband's relatives wish to reclaim their money contributions, it is from the husband that they should claim them. It was for him and for their mother that they say they gave the money.

I leave the matter there, so that, with the help of counsel, the plaintiff and the first defendant may reach some agreement between themselves, and the first and third defendants make an agreement with the bank about release of the car T1646. If agreement is reached, I invite counsel to file a memorandum of consent and judgment will be entered accordingly. If there is no agreement then either the plaintiff or the first defendant, or the Tonga Development Bank is at liberty to apply for further orders. For a division of the property by order, there must be competent evidence from which the Court may make findings of the values of the house, the car and each of the furniture items. In principle, any division by value should favour the plaintiff if the principle in *Ualesi* (above) is applied.

The unpaid maintenance is a matter for other proceedings. It is open to the parties to try to settle outstanding and future maintenance by reaching an agreement for the plaintiff to receive more of the jointly-owned property.

COSTS

I direct that costs shall follow the event, and are awarded to the plaintiff and to the bank against all three defendants, to be agreed or taxed.

NUKU'ALOFA: 30 November 1999

