

SKELTON (EMELINE) v TAGIILIMA (MALIA) & OTHERS

Supreme Court Apia
Ryan CJ
22 August 1991

PRACTICE AND PROCEDURE - Injunction - land dispute - no probate of will

LAND DISPUTE - no probate of will - injunction, not to issue

HELD: Land devolving through will, not yet probated.
Injunction not to issue but dispute adjourned for 6 months to allow will to be proved.

Fepulea'i for Plaintiff
Drake for Defendants

This is an application for an injunction by the Plaintiff against one of the Defendants, Malia Tagiilima, she being the only Defendant who has been served with the application. Another of the Defendants appeared here today as a witness and I refer to the first named Defendant Aleki Skelton.

The matter is complex in the extreme because it relates to a piece of land the registered proprietor of which land is one John Skelton. John Skelton died in 1912 intestate and no steps have been taken to administer his estate in such a way that the land could be dealt with.

It appears from the evidence that John Skelton left at least nine and possibly up to 12 children one of whom was Alexander Skelton. Alexander Skelton had at least two children one of whom was the mother of the Plaintiff and the other child is the mother of the previously mentioned Aleki Skelton. Just when Aleki Skelton's biological mother died if she has died was not revealed to me here today but it is clear also from the evidence that the deceased Alexander Skelton brought up Aleki Skelton and the Plaintiff's mother as brother and sister although it is clear now, notwithstanding a birth certificate to the contrary, that Aleki Skelton is not the son of Alexander Skelton but was in fact his grandson.

Alexander Skelton died in 1964 and he in a will dated 11 December 1957 which has yet to be proved appointed one Ola Sunu (also now deceased) as his executor and devised his land at Malie which is presumably the land in dispute to his daughter Emeline the

Plaintiff in this action. The first named Defendant Aleki Skelton had apparently been promised the right to build a dwelling house on the land and took steps to build such a house in the early 1970s. It seems that he applied for a building permit on 3 December 1973 but ran into some difficulties presumably when he answered question 11 of a number of questions attached to his application for the permit when he stated that the owner of the land was John Skelton estate. At that point it seems that a Mr Jackson a solicitor was consulted, he being the solicitor who had drawn up the will of Alexander Skelton of which will Aleki Skelton had become aware in 1967. Mr Jackson made a notation on the side of the application form for the building permit which may refer to the equitable right of entitlement of the Plaintiff in the land pursuant to the will of Alexander Skelton and indeed just under the dating of the application form there was a consent which was obtained from the Plaintiff with the words "I agree to this" and signed "Emeline Skelton 4/3/74". Under that were the words "Sole devisee under will of Alexander Skelton".

It seems that once that endorsement had been obtained then the authorities were quite happy to approve a building permit and appeared to have done so on either 4 March 1974 the date of the agreement or 3 April 1974 which two dates appear in the area of the approval on the form.

It can be seen from that summary of the factual situation that the two sets of liabilities or obligations seem to have been recognised by both the Plaintiff and by Aleki Skelton. Emeline Skelton appeared to have recognised some rights over the land which required her to consent to the building permit which she duly did. Aleki Skelton appears to have recognised that before he could obtain a building permit it was necessary to obtain the consent of Emeline Skelton which consent he then obtained through the good offices of the solicitor, Mr. Jackson. That then seems to have resolved any problems until April of this year when the present occupier of Aleki Skelton's home on the land, Malia Tagiilima, endeavoured to erect a Samoan fale between the European house occupied by her and the sea. I had a view of this site today and it is clear that towards the main west coast road end of the small 2r.22p. block there are side by side European-style homes occupied by the Plaintiff and her mother on the one hand and by Malia Tagiilima on the other hand and that beyond both of those homes there are the two Samoan fales which both appear to be used for the same purpose namely to obtain relief from the heat by way of the breezes which clearly blow from the sea towards the land. The European house as I have said occupied by Emeline has a fale in front of it which achieves that purpose and in April of this year the Defendant Malia sought to build a fale to achieve a similar purpose.

The present proceedings were then filed and the first prayer for relief was to stop the building of the fale. However the fale proceeded and is now in place. It is not a building of great substance and it seems to have been put up in a very short time and could no doubt be demolished in a similarly short period of time.

The Court in a situation such as this has a discretion as to whether or not the remedy of injunction should be granted to demolish the Samoan fale. The Defendant's basic stance is that the Plaintiff has no status to come to Court to seek an order to demolish the fale. It is clear however that she has an equitable right to occupy part of the land and that no other person apart from the persons named as Defendants, appear to have taken any steps to obtain similar rights so that the factual situation is that only the Plaintiff and her mother on the one hand and the three Defendants on the other hand seem at all interested in any occupation rights of the property.

I have reached the conclusion that an injunction should not be issued at this point in time but by no stretch of the imagination should that be taken to mean that the Defendants are at liberty to sit on whatever limited rights they might have forever and a day because it seems clear to me that they occupy the land insofar as the European house is concerned and it follows, the Samoan fale, purely because of the agreement and good grace of the Plaintiff and her mother in 1974. They have certainly been unable to point out to me today any other legal rights which they might have to occupy the land.

I have reached the conclusion that both of the parties to this Action should take steps to resolve --

- (a) the animosity which has resulted in this injunction application;
- (b) request the Public Trustee to administer the estate of John Skelton; and
- (c) as a result the action of the Plaintiff.

There are also matters which require resolution to resolve the estate of Alexander Skelton and it seems to me that both parties should take immediate steps or at least the Plaintiff should prove the will of Alexander Skelton in some shape or form and to obtain probate and administer the will through the executor, or his descendants, named in the will and secondly the Defendants should take steps to obtain the consent of the descendants of John Skelton to their continued occupation of the land whether by way of long term lease or perhaps by way of purchase of the

rights of the persons entitled to succeed to the estate of John Skelton. What I intend to do is to adjourn the application for a period of six months and during that time I expect --

- (a) the Plaintiff to take steps to prove the will of her father; and
- (b) the Defendants to take steps to resolve their position to the extent of having some legal right to remain on the land.

I would anticipate that the Defendants will need to obtain the consent of as many of the descendants of John Skelton as can be located. At the end of 6 months either party will be entitled to return to court on 7 days notice to the other.