

Online

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC. 14079

IN THE MATTER

of the Declaratory Judgment Act 1988

IN THE ESTATE

of TU'I, late of Vailoa, Faleata, a Samoan female, deceased

IN THE MATTER

of an application by FAUMUI SA'E duly appointed Administrator and Trustee of the afore-mentioned estate

Counsel: T Malifa for applicant
P A Fepuleai for respondent

Hearing: 2, 3 & 4 September 1996

Judgment: 4 September 1996

JUDGMENT OF BISSON, J

This is an application under the Declaratory Judgments Act 1988 by Faumui Sa'e as the administrator in the deceased estate of Tu'i, late of Vailoa, Faleata. An order was made on 10 May 1982 granting Letters of Administration to him in terms of his affidavit as the adopted son according to Samoan customs and nephew of the deceased. He has moved for declaratory orders as follows :

1. That the purported will of the deceased published in the Savali of 1 September 1916 is not valid or legally enforceable.

2. That the beneficiaries of the estate are Faumui Sa'e and the issue of Vaeula deceased.
3. That the estate be divided equally between Faumui Sa'e and the issue of Vaeula deceased.

Tu'i died intestate her only asset being a piece of land at Tulaele and this case concerns a family dispute which has been going on for many years as to its ownership.

The applicant gave evidence. He said his age was 120 but on other evidence it would seem he is about 100 years old. He is blind and cannot stand, so gave his evidence seated in a wheel chair. He was confused at times but on the whole he showed a keen mind and gave his evidence as best he could remember. His son Muliaumalu Sa'e also gave evidence which repeated much of what he had been told by his father. He also had some personal dealings with the land with the Vaeula family. Mr Fepuleai called two witnesses Tovia Fonoti and Selesele Amani Vaeula to dispute the applicant's claim to be an adopted son of Tu'i and to give evidence of the occupation of the land by the Vaeula family. The decision of the Court does not depend on evidence of occupation.

The Court's jurisdiction under the Declaratory Judgments Act arises when any person, here the administrator of the estate of Tu'i, desires to administer her estate but that depends on the construction or validity of a particular document. The document in question is "Savali Extract 1916". The Savali is a Government publication similar to a Government Gazette and the extract is an advertisement to the public calling for objections, if any to the giving by Tu'i

of pule over her land as recorded in the Commission of Lands and Titles. I set it out in full :

" Translation

" Savali Extract 1.9.1916

"The lady Tu'i, of Vailoa (Faleata) desires to be conveyed through the Savali and noted in the records of the Commission of Lands and Titles her pule (authority) over her land at Tulaele, Vailoa (Faleata). The land is approximately 21 acres in size, and she leased to Makuati four(4) acres.

"It is bound on the west with Taala, bound inland with Pita Olopaka and Moa, bound on the east with Enele Olopaka by the road, and bound on the seaward side by the Government road.

"It is now decided by her (T) that she is giving the pule (authority) of this land to Pilia'e, Vae'ula and Faumui. When these three are dead, the pule will pass on to the aiga (family), but this land shall not be sold.

"Now, any one who wishes to claim and object against that pule, should indicate such objection to the Samoan Court in Apia, no later than the 30th day November 1916. If there are no objections by that date, that pule will be noted and confirmed".

Any declaration made by the Court is binding on the person making the application and all persons on whom the notice of motion has been served. In this case service was made of the Motion and supporting affidavit on Mrs Tu'i Betham, a daughter of the Vaeula named in the document and she has confirmed in her affidavit of 2 March 1992 that she is authorised to make her affidavit on behalf of the heirs of Vaeula, her deceased father. There is no challenge to service on her as effective for all heirs of Vaeula of whom there were five. Two are now deceased including Mrs Tu'i Betham. Service was also effected on Tauvela Piliae on behalf of the Piliae named in the document and the Piliae family. No steps have been taken by them but the administrator in his affidavit said that Piliae's heirs are claiminig an interest pursuant to the purported will published

in the Savali. I note that Ms Sapolu in making written legal submissions on behalf of the applicant as directed by a Judge prior to trial said that the Court can proceed with this matter without the heirs of Piliae being heard as they are aware of the proceedings and have failed to file any papers declaring their interest. However in the course of the applicant's son giving evidence he said that "there is a daughter of Piliae behind our actions in this matter now before the Court". When I asked him what he meant by that he said "they are coming to support our side in this matter". The daughter he was referring to was present in Court and he said the Piliae family had themselves tried to make a claim in the same way as the applicant. He was asked if his father intended to share with them any interest he gained in the land. He answered, "that is his whole intention and why we are asking for a big piece of land so that we can share it with the heirs of Piliae and because they helped in the cultivation of the land". I also note that in August 1990 an Auckland solicitor was acting for both the applicant and Mrs Tauvela Vaa of the Piliae family in this matter. In the face of this evidence clearly the Piliae family have not abandoned any interest in the land but in any event they are named in the document before the Court and in deciding the construction and validity of the document the Court must keep within its parameters.

Prior to the hearing, counsel agreed that they would not object to the admissibility of hearsay evidence which was inevitable when evidence of family history going back 100 years was tendered to the Court. Counsel were free to comment and the question of its weight was a matter for the Court. Much of it was of interest only as background and also directed at proving both Vaeula and the applicant were sons adopted by Tu'i in accordance with Samoan custom. It was

agreed by counsel that adoptions according to Samoan custom of this vintage, at least over 80 years ago, were recognised in Samoan law as valid. So far as Vaeula is concerned he would qualify as an heir of Tu'i either as issue as advice from parish records supplied by the Congregational Church in Samoa showed or as an adopted son as the family believed him to be.

According to the affidavit of Selesele Amani Vaeula, Tu'i and her husband John Kubary in 1878 went to live on Joluit Island in the Marshall Islands. Her husband died there and she then became the common law wife of Tafiloa Vailele, a Samoan matai, who had a son named Vaeula by a local woman. Tafiloa returned to Samoa and left the child with Tu'i who thereafter raised him as her son. As Tu'i referred to Vaeula as her adopted son that can be accepted.

As to the applicant he was born to Tu'i's sister Talolini also referred to as Karolaine in Tonga and brought to Samoa by Tu'i when aged 10 years. He had no further contact with his mother and lived with Tu'i from the time she brought him to Samoa in 1908 until her death in 1918. However my view of the evidence is that he was brought up by Tu'i as her nephew and not as an adopted son. His was not the usual case of an infant needing a mother as he was a boy of 10 years. Then when Tu'i went to the Land and Titles Court in 1917 when the applicant was 16 years of age she referred to him as "the son of my sister Talolini" and to "Piliae as the son of my sister Salome" whereas in contrast she referred to Vaeula as "my adopted child". Furthermore I think it is significant that when the heirs of Vaeula in 1973 brought a claim to the Land Titles Investigation Commission for confirmation of their title to Tu'i's land, the applicant in his objection to their claim described himself as son of "Karolaine, a sister of

Tu'i" and not the adopted son of Tu'i as he claimed when applying for Letters of Administration in her estate in 1982 and as he claimed in this Court. He said in his objection, "In 1908, Tu'i visited Nukualofa in Tonga to see her sister Karolaine and she brought me with her to Samoa and the three of us, Tu'i, myself and Vaeula lived on the land. In 1914 Tu'i requested her nephew Piliae Maifea to come and lived with us on the land". This he did along with the applicant and Vaeula. The applicant further stated "Tui died in 1918 together with Piliae Maifea in the great epidemic. She had, however, already expressed to us, i.e., myself, Piliae Maifea and Vaeula her desires regarding the pule or ownership of the land. Her entire family comprised the three of us and we cultivated the land and rendered traditional services to her and she regarded Vaeula and myself as her own children". No doubt she did treat the applicant as one of her own children, he was her nephew, but she did not as already pointed out refer to him as adopted as she did with Vaeula whom she had raised from infancy. How a mother viewed the relationship at the time is more decisive than what the applicant put before the Court 64 years after Tu'i's death when applying for Letters of Administration and again in this Court.

The Commission's decision dated the 11th day of June 1973 was as follows :

"THE LAND TITLES INVESTIGATION COMMISSION OF WESTERN SAMOA

"(constituted under the Land Titles Investigation Act 1966)

"CLAIM: No.3

"CLAIMANTS: The heirs of Vaeula Tu'i, Tu'i Betham, Su'a Vaeula,
" Selesele Amani, Faafua Peter, Taioa

"LAND: All that piece of land situated at Tulaele containing 22
" acres 2 roods more or less being Parcels part 79 and
" 152/78 Flur XI Upolu and known as Tulaele.

" ORDER OF COMMISSION

"THE Commission determines :

"1. THAT the above described land is freehold land.

"2. THAT the claimants have failed to establish their claim to the
satisfaction of the Commission.

"3. THAT any title to be issued in respect of the fee simple of the
" land shall be in the name of TU'I late of Vailoa, Faleata, a
" Samoan female, deceased.

"D A T E D at Apia this 11th day of June 1973.

" (signed) G. Donne
" CHAIRMAN
" Meleisea Folitau
" MEMBER
" A.P. Hunter
" MEMBER
" Tanuvasa Livi
" MEMBER
" Toluono Lama
" MEMBER"

Pursuant to that decision a certificate of title for the fee simple estate was issued in the name of Tu'i for the land in question, its legal description being, "All the piece or parcel of land containing an area of twenty two acres two roods (22a.2r.00p) more or less situated at Tulaele being part of Parcels 79 and 152/78 Flur XI and being also the whole of the land registered in Volume 21 Folio 33 of the Land Register of Western Samoa".

Transmission to the applicant has been registered and a caveat registered against this title to protect the interests of the Vaeula heirs but any action on that caveat, if not resolved by this judgment, will be for another Court on another day.

The issue before the Court is not one of intestate succession but the construction and validity of the Savali Extract of 1916. This document is evidence of Tu'i's wishes as recorded in the Court. I take the giving of pule (authority) over land to mean ownership and in support of this I note a minute on the Land and Titles Court file made by the Judge which reads :

"No claims or objections lodged - re Tu'i's will where she bestowed land "on the said three males". (The emphasis is mine)

I also note on the file that Tu'i told the Court on 22 August 1917 that Vaeula was to hold his pule of the land only during his life time and that on his death no one of his family was to have any right or claim to the said land. That hearing was adjourned and there is no record of any change being made and advertised in the Savali. It has not been argued that the reference to aiga (family) should apply only to family of Tu'i's nephews and not to the family of an adopted son. Such an interpretation is not expressed in the document itself so I would not adopt it.

The pre-trial legal submissions for the applicant directed argument to the document not being a will or testamentary disposition as it was not executed as required under the relevant Wills Act 1837 (U.K.). Submissions for the Vaeula

heirs did not refer to the validity of the Savali Extract as Vaeula's claim was for a legal estate in the land as the "direct legal heir of the late Tu'i who lawfully adopted him". An alternative claim based on adverse possession is not one for this Court to consider in this proceeding.

The Court was faced with a publication which has a clear expression of Tu'i's decision for "giving the pule (authority) of this land to Piliae, Vaeula and Faumui. When these three are dead, the pule will pass on to the aiga (family), but this land shall not be sold". This decision by Tu'i in 1916 was only two years before her death and no conventional last will and testament has been found. Such a decision of hers must be of significance and was cited to the Land Titles Investigation Commission in 1973 by the Vaeula applicants in support of their claim.

The Savali Extract advertised a record of the Commission of Lands and Titles and invited objections to the Court by 30 November 1916, that is, within two months of the advertisement. If there were no objections by that date the pule will be noted and confirmed. There were no objections. The decision of Tu'i as recorded in the Court therefore became final and surely must have legal force in Samoan law of that time. I called for further submissions and Mr Fepuleai produced to the Court an English translation of an Ordinance of the German Governor of Samoa dated 15 July 1913 "to regulate Land and Name disputes of the Samoans".

The relevant provisions are as follows :

SAMOAN
GOVERNMENT BLATT

"ORDINANCE OF THE GOVERNOR
"TO REGULATE LAND AND NAME DISPUTES
"OF THE SAMOANS DATED 15TH, JULY 1913

"In the virtue of para. 1 and 2 of the Kaiserlichen ordinance concerning
"the administration and native administration of justice in the African
"and South Sea trust territories of June 8th 1908.

"Para. 1

"The proceedings have to be simplified and should be adjusted to the
"better understanding of the Samoan natives.

"Para. 2

"For the determination of the circumstances all means can be used as long
"as they are within set limit.

".....

".....

"Para. 5

"Legal relationships, mainly in regard to land, names and last wills, can
"after being published in the Savali or through a public announcement be
"considered as established if a certain period of time has passed by
"without any protest received or if protests through resumption, conclu-
"sion of agreement or decision was removed.

"The same is valid if a person with a share of interest does not make use
"of the ordinance for the maintenance of his rights".

Mr Malifa in his closing address submitted that the Court should find the Savali Extract valid and legally enforceable relying on para 5 of the ordinance of 1913 and it having been the basis for the applicant's consistent claim to an interest in the land along with Vaeula and Piliae. The heirs of Vaeula had also placed some reliance on it before the Land Titles Investigation Commission. He submitted that the distribution of the estate of Tu'i should follow her wishes as expressed in the Savali Extract.

Mr Fepuleai in his closing address submitted that the Court should not find

the Savali Extract valid and enforceable. He argued that para 5 of the ordinance related only to the provisions of "last wills" which he said meant formal wills duly executed under the Wills Act. I do not accept that argument as para 5 also applies to "legal relationships, mainly in regard to land" which is what the Commission of Lands and Titles was dealing with in Tu'i's case. Furthermore, Tu'i was not making a testamentary disposition. The words "It is now decided by her (T) that she is giving the pule (authority) of this land" are in the present tense and express an inter vivos disposition. Mr Fepuleai also submitted that the passing of the pule to aiga (family) was too vague a definition of who should take on the death of the named beneficiaries. However in the context of gifts to two named nephews and an adopted daughter the intention is clear that their respective children will become entitled to the pule in the land. For the reasons I have already given I agree with Mr Fepuleai that the applicant was not an adopted son of Tu'i but I cannot accept that Vaeula's family should inherit the whole estate because their father was the only legal heir of Tu'i. For that submission he relied on the Savali Extract being held unenforceable and the applicant not being an adopted son.

In the light of the Ordinance of 1913 the Court is satisfied that the Court record as published in the Savali Extract of 1916 has validity under the law of Samoa as a disposition by Tu'i of her land and is enforceable. A total restraint on sale however would be void. In this way Tu'i had provided for all members of her family the sons of her two sisters, her only sisters and her adopted son and their descendants. Accordingly the answer to para 1 of the Motion is that the disposition published in the Savali of 1 September 1916 is valid and enforceable and this Court hereby makes a declaratory order to that effect.

Paragraphs 2 and 3 of the Motion will be answered together in line with the above order. The further declaratory order of the Court is that the beneficiaries in the estate of Tu'i and their respective interests are :

1. A life interest in an undivided one-third share in the land to the applicant Faumui Sa'e and on his death that share shall pass to his family.
2. A one-third undivided share in the land to the family of Vaeula now deceased.
3. A one-third undivided share in the land to the family of Piliae now deceased.

I reserve leave to counsel to draft a declaratory order in testamentary terms for the approval of the Court. The said shares are to be held as tenants in common and children of deceased children are to take their parent's share. I also reserve leave for any party to apply for further directions.

The Court was informed in the course of the hearing that there was a move for the applicant to relinquish his role as administrator in favour of the Public Trustee. In view of his age and state of health this would be desirable but would not be necessary if he promptly registered transfers against the title pursuant to these declaratory orders leaving the registered proprietors to take any such further action, such as partition, as they see fit so as to end this long running dispute.

As to costs the applicant as administrator will be entitled to his costs out of the estate. The application was necessary in the overall interests of three contestants for an interest in the land. It was necessary for the Vaeula heirs to state their claim and their share has been established by the Court. In the circumstances I award costs to them against the estate of \$500 together with reasonable expenses as fixed by the Registrar.

Ch. B. Simpson

.....
JUDGE