

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P.324/95

BETWEEN: FAAITAITA MAMA of
Moata'a, Widow

Plaintiff

A N D: IOANE TAEI
FAAMASUNU of
Moata'a, Workman

Defendant

Counsel: TK Enari for plaintiff
KM Sapolu for defendant

Hearing: 15 October 1997

Judgment: 17 October 1997

JUDGMENT OF SAPOLU, CJ

This case concerns a piece of land situated at Vaivase. It is just more than one and a half acre in area. It was originally part of Crown Grant No.135 dated the 13th day of March 1940. The Crown Grant comprised a total area of nine and a quarter acres. The grant was made by the Crown to four untitled men and four untitled women of the village of Moata'a. That means those men and women were not matais.

The grant, as far as relevant, was made by the Crown to those men and women in these terms:

“Know ye that for good considerations Us thereto moving, We,
“for Us, our Heirs and Successors, do hereby in pursuance of
“section 269 of the Samoa Act, 1921, Grant unto Taei, Apa
“Faataualofa Toa, Semisi, Samoan males, and Nefunefu, Piliati,
“Faamafu, Faanape Nua, Samoan females all of Moataa their
“Executors, Administrators, and assigns all That Parcel of Land
“in the Territory of Western Samoa containing by admeasurement....”

The description of the land which was the subject of the grant then followed. The Crown Grant then goes on to provide:

“To hold unto the said Taei, Apa, Faataualofa Toa, Semisi,
“Samoan males, and Nefunefu, Piliati, Faamafu, Faanape Nua
“Samoan females all of Moata'a as tenants in common in equal
“shares their Executors, Administrators, and Assigns for ever.”

The Crown Grant was then signed by the Governor-General.

It was then registered in the land register on the 3rd day of May 1940. For some unexplained reason this Crown Grant is registered as Crown Grant No.155 CG and not as Crown Grant No.135. The land register classified the land, the subject of the Crown Grant, as European-Samoan freehold land subject to Part IV of the Native Land and titles Protection Ordinance 1934. The title of that Ordinance was later changed to Samoa Land and Titles Protection Ordinance 1934 by the Samoa Amendment Act 1951 (NZ). It also appears from the land register that since 1976 some of the registered owners have been using their shares in the land as tenants in common as mortgage security for loans.

Now it appears from the evidence and from what counsel for the plaintiff told the Court that the land has been subdivided but it is not clear when that was done.

The particular part of the land we are concerned with in this case, is that part which was subdivided and allocated to Taeli whose name appears on the Crown Grant. Taeli was subsequently bestowed with the title Mama of Tafa'ifoe at Moata'a. I will hereinafter refer to him as Mama Taeli in order to avoid confusion with Taeli who is the father of the defendant. The grandfather of Mama Taeli was Asi Mama Motu who had two daughters named Gogo and Silafo. Gogo was the mother of Mama Taeli and Silafo was the grandmother of the present defendant. The present plaintiff was the wife of Mama Taeli. The land in dispute, as counsel for the plaintiff told the Court, is now registered under her name.

According to the plaintiff's evidence she married her husband in 1952. When she first came to live on the land only Mama Taeli and his mother were living on it. Mama Taeli was an untitled man at that time and the family was without a matai. Her husband was only conferred with the title Mama some years later. The plaintiff also testified that when she first came onto the land Silafo, the defendant's grandmother, had already died. Silafo's immediate heirs also occupied the land but they left the land when they got married. Taeli, the defendant's father, had also been living on the land until he left for Hawaii about four years ago. He is still in Hawaii. His son, the defendant, returned from Hawai'i two years ago. The plaintiff said that she told the defendant she did not want him to return and live on the land. However the defendant moved onto the land and he is still living on the land. The plaintiff has therefore brought these eviction proceedings to remove the defendant from the land.

Alisi Ao a daughter of Silafo and aunt of the defendant was the only witness called for the defendant. She testified that her grandfather Asi Mama Motu and his

daughters Gogo and Silafo all lived on the land. She herself was born on the land in 1939 and grew up on the land. Her mother rendered tautua, service, to her father. It has always been her belief that the land belonged to her grandfather. She also testified that when the land was given by government, it was given to the fathers of the village of Moata'a who in turn gave the land to their heirs named in the Crown Grant as "trustees" for the land for their respective families. In the case of her family's share of the land, her grandfather made Mama Taei who was then only about ten years old the trustee of her family's share of the land. Mama Taei when he was alive never told her side of the family that the land belonged to him alone. It was only a few years ago when she did a search of the land at the Department of Lands, Survey and Environment that she discovered that her grandfather's name was not on the land but that of Taei. This witness further testified that her brother Taei, the father of the defendant, had always been living on the land until he left for Hawaii about five years ago. He had built a house on the land. It is not a permanent dwelling house. That is the house which is now occupied by the defendant.

Having considered this evidence, I am not able to accept with the necessary degree of confidence the evidence given by the witness Alisi Ao as to how the land was given to certain members of the village of Moata'a. It is clear that the land was given by Crown Grant in 1940. Alisi was too young at that time to know what happened because she was born in 1939. There is also no sound or credible explanation as to why the fathers of the village would give the land to their children as 'trustees' to look after instead of holding themselves as trustees of the land. If Alisi is correct that Mama Taei was only about ten years old at the time of the Crown Grant, then he would hardly be a suitable choice to become 'trustee' of the land for his

family given his age. If it is also true that the land was given to the fathers of the village of Moata'a for their respective families, I would have thought that Asi Mama Motu, the matai of the family, would have made himself responsible as 'trustee' for the family's share of the land instead of giving that responsibility to a little boy who was only ten years old, if in fact Mama Taei was only ten years old at that time.

I do accept that at some time the plaintiff and her side of the family as well as the defendant's side of the family all lived on the land. As time went on, members of the defendant's side of the family got married and left the land except for the defendant's father who continued to live on the land until he left for Hawaii four or five years ago. The defendant also left for Hawaii but when he returned to live on the land again the plaintiff did not want him to live on the land.

I also accept that the whole land was given to certain named untitled men and women of Moata'a including Mama Taei before he became a matai. The documentary evidence is clear on that point. I further accept that the land in dispute was the share of Mama Taei from the subdivision of the whole land. The land is Samoan freehold land which is a class of land that ceased to exist since the Constitution came into effect on the 1st day of January 1962.

At the commencement of the hearing, counsel for the defendant raised the important question of whether this court has jurisdiction to hear this case. It was argued for the defendant that the appropriate forum to hear these proceedings is the Land and Titles Court. After hearing arguments from counsel on both sides, I ruled

that this Court has jurisdiction and that I will give my reasons for that ruling in due course. I give those reasons now.

The argument for the defendant is that the land in this case was Samoan freehold land and was therefore subject to Part IV of the Samoa Land and Titles Protection Ordinance 1934 which has been repealed and replaced by the Land and Titles Act 1981. The Samoa Land and Titles Protection Ordinance 1934 which created this category of land called Samoa freehold land provided in section 13 of Part IV:

“Samoan freehold land’ means any Crown or European land
“acquired either before or after the commencement of this
“Ordinance by a Samoan and held by him or any Samoan
“successor in title for an estate in fee simple and whether
“or not such estate in fee simple be subject to any lesser
“estate or interest or any encumbrance.”

Section 16 of that Ordinance then provided:

“The Land and Titles Court shall have jurisdiction to hear
“and determine any dispute between Samoans affecting
“Samoan freehold land and Samoan interests in freehold
“land and may declare that any such land or interests
“shall be held in accordance with the usages or customs
“of the Samoan people.”

Pausing here for the moment, it is clear from section 13 that in essence Samoan freehold land meant Crown land or European land held by a Samoan for an estate in fee simple. Crown land, European land and Samoan land were provided for and defined in the Samoa Act 1921. That classification of land in Samoa into three separate categories was adopted in the Samoa Land and Titles Protection Ordinance 1934 which then created an additional category of land called Samoan freehold land. It is clear from section 16 of the Ordinance that the Land and Titles Court was the

proper forum for determining disputes between Samoans affecting Samoan freehold land.

In 1962 Samoa adopted a Constitution which made a change of major significance to the classification of land in Samoa. Article 101 of the Constitution declared that all land in Samoa is customary land, freehold land, and public land and defined those categories of land. Article 123 of the Constitution then provides that the categories of land provided under the Samoa Act 1921 as Samoan land, European land and Crown land were to be held under the Constitution as customary land, freehold land and public land respectively. It appears to me that the effect of these constitutional provisions was to abolish the separate category of Samoan freehold land created under Part IV of the Samoa Land and Titles Protection Ordinance 1934. That being so it follows in my view that the Constitution by clear implication repealed or voided Part IV and in particular section 16 of the Samoa Land and Titles Protection Ordinance 1934 as there is under the Constitution no longer in existence a category of land called Samoan freehold land. Article 2 of the Constitution makes it clear that any law which is inconsistent with the Constitution shall be void to the extent of the inconsistency. So if the purpose of Part IV of the Samoa Land and Titles Protection Ordinance 1934 was to create and make provision for a separate category of land in Samoa called Samoan freehold land and the Constitution says that all land in Samoa is customary land, freehold land or public land, then I cannot see how Part IV and in particular section 16 of the Samoa Land and Titles Protection Ordinance 1934 can survive the Constitution.

In any event the Land and Titles Act 1981 which repealed and replaced the Samoa Land and Titles Protection Ordinance 1934 does not re-enact section 16 of that Ordinance. So that provision is gone. The question then, as counsel for the defendant has raised in this case, is which forum has jurisdiction to hear and determine this case. In my view, to determine which is the proper forum to hear and determine this case requires that the status of the land must first be determined. It is the status of the land that will determine whether this Court or the Land and Titles Court is the proper forum.

However that question raises the further question of whether this Court has jurisdiction to determine the status of the land or not. I will deal with that question now. The Land Titles Investigation Act 1966 sets up a commission to hear a claim to individual ownership of land where there is doubt as to whether the land is held for an estate in fee simple. Section 15 of that Act provides:

“Any person desiring to make a claim to the Commission
“to individual ownership of or property in any land in
“Samoa other than land undoubtedly held by him as
“individual property for an estate in fee simple created
“or confirmed by a Court Grant or a Crown Grant, may give
“notice in writing of his claim to the Secretary.”

Section 18 of the Act then provides that the Commission in considering a claim may determine whether the land is customary, freehold or public land. So the Commission under the Land Titles Investigation Act 1966 has jurisdiction to make a determination as to the status of a land which is the subject of a claim made under section 15. However it appears to me that section 15 would only apply where there is doubt as to the status of a land and someone is claiming individual ownership of that land.

Section 15 does not apply where the land is undoubtedly held as individual property for an estate in fee simple created or confirmed by a Court Grant or Crown Grant.

Section 9(1) of the Land and Titles Act 1981 seems to serve a similar purpose but it applies to a petition to declare as customary land a land whose customary or freehold status is in doubt. Section 9(1) provides:

“Any person or the Ali'i and Faipule of any village
“claiming an interest in any freehold land or any land
“in respect of which the customary or freehold status
“is claimed to be in doubt, may petition the Court for
“an order to be made with the consent of all parties,
“declaring such land to be customary land.”

Apart from the requirement that there should be a doubt, it is clear that the power of the Land and Titles Court to make an order declaring a land to be customary land also depends on the consent of the parties. Counsel for the defendant told the Court that the defendant intends to file a petition under section 9 of the Land and titles Act 1981 and she therefore asked this Court to defer proceedings until that petition has been determined by the Land and Titles Court. Counsel for the plaintiff told the Court that the plaintiff and the heirs of Mama Taei would oppose such a petition and would not consent to an order declaring the land in dispute to be customary land.

I can see that what is likely to happen if this matter goes to a petition to the Land and Titles court is that the plaintiff and the heirs of Mama Taei would oppose the petition claiming that the land is freehold land. The Land and Titles Court would then adjourn the hearing of the petition under section 9(6) of 1981 Act to enable the plaintiff to make a claim to the Commission under the Land Titles Investigation Act

1966 even though the plaintiff does not wish to make such a claim for she believes the land is undoubtedly freehold land. How many years that will take no one knows. But the defendant will continue to live on the disputed land.

As I have said before, section 15 of the Land Titles Investigation Act 1966 and section 9(6) of the Land and Titles Act 1981 apply only in cases of doubt as to the status of land. Such doubt must be real and genuine. I hold that this Court has inherent jurisdiction to decide whether there is a real case of doubt as to the status of the disputed land in order to bring the provisions of the Land and Titles Act 1981 and the Land Titles Investigation Act 1966 into operation. To put it in other words, I hold that this Court has jurisdiction to determine whether those legislations apply to the facts of this case.

I turn to the facts of this case. It is clear that all the named grantees of the land in the Crown Grant in question were not matais; the terms of the Crown Grant show that the Crown land that was granted was given to the grantees their executors, administrators and assigns for ever as tenants in common in equal shares; the land was registered in the land register as European-Samoan freehold land; the land has also been used as mortgage security for several loans. Furthermore, the concept of tenancy in common mentioned in the Crown Grant is alien to customary land tenure; customary land is normally if not always held under a matai title; under the Constitution customary land cannot be used as mortgage security; section 13 of the Samoa Land and Titles Protection Ordinance 1934 defined Samoan freehold land as Crown land held by a Samoan for an estate in fee simple; there is also no recital or declaration in the relevant Crown Grant which says that the land was to be held in accordance with the customs and usages of the Samoan people so as to bring section

17 of the 1934 Ordinance into play. All those factors to my mind conclusively show that the disputed land is not customary land but freehold land which is defined in Article 101 of the Constitution to mean land held from Samoa for an estate in fee simple.

The evidence shows that the grandmother of the defendant lived on the land and rendered "tautua" or service to her father Asi Mama Motu who was the matai of the family at the time. The evidence also shows that the defendant's side of the family lived on the land for many years. I do not consider that such evidence are decisive on the question whether the land is customary or freehold land.

It is also to be borne in mind that Vaivase where this land is situated is not a village in the customary sense. It has no matai titles; it has no Alii and Faipule; it also has no "faalupega" or customary salutation. Vaivase is widely and generally known as a settlement of people from all around the country living on freehold land. To hold that this land which is situated at Vaivase is customary land would create an anomalous situation for Vaivase has no matai titles. Customary land is normally held under a matai title of the village where the land is situated. The titles Asi and Mama of the plaintiff's and the defendant's family are not matai titles of Vaivase but of the village of Moata'a.

I am therefore of the clear view that there is no doubt as to the status of the disputed land which would trigger the operation of section 9(1) of the Land and Titles Act 1981 or section 15 of the Land Titles Investigation Act 1966. The land is

obviously not customary land but freehold land and therefore those statutory provisions do not apply. This Court therefore has jurisdiction to hear this case.

In the case of *Leulupoao Ata v Sa Vaega* [1980-1993] WSLR 86 Callander CJ also had to deal with the question of whether the land in dispute in that case was customary or freehold land. It became undoubtedly clear from the evidence and the submissions of counsel that the land was customary land. His Honour therefore held accordingly. The parties were then referred to the Land and Titles Court for determination of their case.

Counsel for the defendant also referred in her submissions to the savings provisions of section 96(3) of the Land and Titles Act 1986. In my view section 96(3) preserves only claims, titles, rights or interests which had been created or vested under the provisions of the repealed Samoan Land and Titles Protection Ordinance 1934. Any claims, titles, rights or interests which were not created or vested under that Ordinance would not be saved by section 96(3) of the Land and Titles Act 1981. In this case there is no evidence that the defendant has any claim, title, right or interest that was created or vested under the repealed 1934 Ordinance. So section 96 (3) does not apply to this case.

On the evidence I find that the defendant has not acquired any interest in the land which can be enforced at law or in equity. His occupation of the land in the past and at present would be best described as a bare licence. That licence has been withdrawn. Counsel for the defendant also told the Court that she was not relying on any interest to have been acquired by the defendant in the land. Her argument was

that this Court has no jurisdiction to hear this case at least at this stage. I have already decided that issue and hold this Court has jurisdiction.

Judgment is therefore given for the plaintiff. The defendant is ordered to vacate the land. That order is to take effect at the end of six weeks. This is to give the defendant time to dismantle and remove the house he is occupying and to find another place to move to. In the circumstances of this case and given the novelty of the principal issues raised and argued, I make no order as to costs.

TFM Sapolu
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CHIEF JUSTICE

Solicitors:

Kruse, Enari & Barlow for plaintiff
KM Sapolu for defendant