IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY **LA 28 OF 2015**

BETWEEN: **PEAUAFI FILIMOEHALA**

- **Plaintiff**

AND: **PENI TOLOA FILIMOEHALA**

- **First Defendant**

MINISTER OF LANDS

- **Second Defendant**

BEFORE PRESIDENT PAULSEN AND LAND ASSESSOR

Hearing : **7 and 8 June 2016**
Date of Ruling : **14 June 2016**

Counsel : **Mr. S. Fonua for the plaintiff**
Mr. S. Tu'utafaiva for the first defendant
Mr. 'A. Kefu SC for the second defendant

RULING

The issues

[1] Penisimani Filimoehala (Penisimani) had a town allotment at Ma'ufanga known as Kape. He married twice. His eldest son with his first wife was Uatesoni Toloamoelama Filimoehala (Toloa). Toloa's eldest legitimate son is the first defendant. When Penisimani died Kape was claimed by his second wife, Vasitai Filimoehala (Vasitai), as her widow's estate. Toloa predeceased Vasitai. When Vasitai died Kape was claimed by the first defendant as Penisimani's heir. Kape was registered in the first defendant's name in April 2011.

[2] The plaintiff is Penisimani's first son of his second marriage to Vasitai. He seeks cancellation of the first defendant's registration. He says that as Kape was acquired during Penisimani's second marriage he is Penisimani's eldest son and rightful heir. In the alternative he claims that the first defendant's registration was obtained through him misrepresenting to the Minister that he was the son of Vasitai when he was not. Finally, should it be found that he is not entitled to Kape the plaintiff seeks compensation for improvements he says he carried out to it.

[3] The issues that arise in this case can be broadly stated as follows:

[3.1] Was the plaintiff entitled to succeed to Kape following Vasitai's death?

[3.2] Did the first defendant acquire Kape as a result of a misrepresentation made to the Minister that he was the son of Vasitai and, if so, what is the effect of that?

[3.3] Is the plaintiff entitled to compensation for improvements to Kape?

The witnesses

[4] The plaintiff gave evidence and called one other witness. I did not find the plaintiff to be a convincing witness. His evidence was largely founded on an understanding of events that occurred when he was very young and of which he could not in my view have any accurate recollection. In important respects what he said occurred, including in relation to the circumstances under which his family moved to Kape, was implausible and inconsistent with the conduct of the parties and contemporaneous documents. He took positions which he must have known were plainly wrong, such as his evidence that he has had possession of Kape for 63 years when in fact he has lived in the United States since 1982. On occasions he was evasive, such as when answering questions about his residence in the United States. However, in my view the relevant law is beyond any serious argument and the facts are not in dispute in any manner which could possibly affect the result of this action.

[5] The plaintiff called as a witness Mr. Heneli Tuiono. I understand he was to provide an example of a first son of a second marriage succeeding to the land of his father ahead of the eldest son of the

father's first marriage. At its highest Mr. Tuiono's evidence proved only that he is the first son of a second marriage and expects to inherit his father's land in due course. His evidence did not assist me.

[6] The first defendant chose not to call any evidence. That was not at all surprising given the insurmountable problems which face the plaintiff's case.

[7] The Minister called evidence from Mr. Fataua Halatanu. He is an experienced Land Registry Officer at the Ministry of Lands and Survey who has given evidence before this Court on a number of occasions. I found him to be an honest and credible witness. His evidence was not challenged in any significant respect and was important, particularly in relation to the content of contemporaneous documents relevant to the circumstances under which Penisimani acquired Kape.

The facts

[8] Penisimani Filimoehala was born in 1911. In 1931 he married Salote and together they had six children. The eldest child was Toloa who was born in 1932. In around 1942 Salote died. Penisimani re-married in 1943 to Vasitai. Penisimani and Vasitai had nine children. The first child of the second marriage was the plaintiff, who was born in 1944.

[9] Toloa married Mele and their eldest legitimate son was the first defendant. He was born in 1953. The first defendant is therefore the grandson of Penisimani and the half-nephew of the plaintiff.

[10] Before 1952 Penisimani and his family were living on land at Ma'ufanga called Kau. Penisimani did not then have a town allotment. He was a musician and in a band with Kelemete Tupouto'a. Kelemete had a town allotment. Vasitai provided services to Kelemete, such as giving him food and doing his washing. The plaintiff's evidence was that he also assisted Kelemete to plant manioke and kumala and carry his produce and that he was like a grandson to Kelemete. He also said that Kelemete asked Vasitai to stay with him and look after him and that Kelemete said he would give Vasitai a piece of his land for the plaintiff. According to the plaintiff it was because of this that the family moved to Kape. I do not accept the plaintiff's evidence on this matter. The evidence of Mr. Halatanu , which I accept, was that Kelemete had been granted his land in 1911 and that there was no evidence that Kelemete ever surrendered any part of his land. Furthermore, Kelemete had his own son whose interests he had to consider and at the time the plaintiff was no more than eight years old. I do not believe that at such a young age the plaintiff would have rendered any substantial assistance to Kelemete on his land or have been involved in, or would have understood, discussions concerning the circumstances under which the family was moving to Kape.

[11] I find that what did happen was that in around 1952 Penisimani applied for Kape as his town allotment. Kape is contiguous to the allotments then owned by Kelemete and one Siaosi Fine. The Minister approved the survey of the land on an urgent basis because Penisimani intended to build a house on the land. Kelemete did not surrender any of his land for Vasitai, the plaintiff or his family.

Kelemete's and Siaosi's allotments and Kape were all surveyed at the same time. This survey was completed in around 1954. For reasons that are not clear Penisimani did not receive his deed of grant for Kape until 1982.

[12] When the family moved to Kape the land was low lying. It was filled with coral rocks. I accept that the plaintiff and his younger brother assisted their father although noting that they were just young boys. There was no evidence as to the scope or cost of this work. In around 1955 Penisimani built his house which was 22' x 28' and two storeys. I accept that the plaintiff and his brother assisted to make bricks. The work the plaintiff and his brother did in assisting their father (and no doubt other family members did also) was nothing other than the performance of ordinary family obligations.

[13] The plaintiff said that in 1974 Penisimani had intended to register Kape in his name but that Toloa had stopped him and had claimed to be entitled to the land as the eldest son. The plaintiff's evidence was that he told Toloa that the land had been given to Vasitai and that as he was the eldest son of the second marriage he was entitled to the land. The plaintiff recounted that at that stage Toloa had said that he did not know that they had different mothers and an arrangement was reached whereby the half-brothers agreed that they should share the allotment between them. It is surprising that these events, had they occurred, were not mentioned in the pleadings or in the plaintiff's brief of evidence. Be that as it may, the evidence is implausible and I do not accepted it because Penisimani had already applied for the land for

himself many years before and went on to obtain his deed of grant some years later in 1982. It is also highly unlikely that Toloa would have thought that he and the plaintiff shared the same mother. Toloa's mother, Salote, died when he was around 10 years old and one would expect that he would have remembered her.

[14] In 1980 Toloa and his second wife came to live at Kape and were welcomed by the family and it appears Toloa remained living at Kape until his death in 2007.

[15] In 1982 Penisimani obtained his deed of grant to Kape. The plaintiff said that at this time Vasitai was upset that Penisimani registered Kape in his name as the land was meant for him but that Penisimani reassured her that the plaintiff and Toloa had reached an understanding in relation to the land and that no one would remove the plaintiff from the land. As I have indicated I am not satisfied that there was ever an understanding between the plaintiff and Toloa to share the land. Furthermore, the plaintiff's evidence is inconsistent with the fact that in the same year he left Tonga permanently to live in the United States. It was Toloa and his family who remained and lived on the land. Apart from periods when he has visited Tonga, the United States has remained the plaintiffs' home to the present day. The plaintiff also applied for and obtained citizenship in the United States which he has retained and which at the time would have precluded him from claiming Kape as his own. He was only readmitted to Tongan nationality in October 2015. No challenge was made to the

registration of Kape in Penisimani's name and there was no suggestion that the grant to him was not lawfully made.

[16] The plaintiff says that when he went to the United States he sent back money to Tonga which was used to extend the family house to 34' x 50'. When he visited Tonga in 1985 that work was largely complete. He says Toloa contributed nothing to the house but of course the plaintiff was not in Tonga so cannot possibly know that. There was no evidence as to the cost of the extensions or the amount of money contributed towards them by the plaintiff.

[17] In 1988 Penisimani died and the land was claimed by Vasitai as widow. Vasitai continued to live on the land until 2002 when she went to New Zealand before moving in 2004 to live in the United States and then Hawaii. She died in Hawaii in 2010.

[18] As Toloa had died some years before, when Vasitai passed away the first defendant applied for the land as Penisimani's heir. The plaintiff was unaware of this until July 2011 when he went to register the land in his name and found that it was already registered to the first defendant. Since 2011 the first defendant has been attempting to recover the land from the plaintiff and members of his family who are living on the land.

Was the plaintiff entitled to succeed to the land upon Vasitai's death?

[19] Section 82 of the Land Act is concerned with the rules of succession to allotments. The relevant parts of that section are as follows:

> **82 Rules of succession to allotments**
>
> Subject to the life estate of the widow, the succession to a tax or town allotment shall be as follows:
>
> (a) descent shall be traced from the last lawful male holder;
>
> (b) only persons born in wedlock may inherit;
>
> (c) the inheritance shall descend in the first place to the eldest son of the deceased holder or if such son is dead to the eldest male heir of the body of such son. If the eldest son of the deceased holder be dead without leaving any male heir of his body the succession shall devolve upon the next eldest son of the holder or if such son is dead to the eldest male heir of such son's body. If the second son of the deceased holder be dead without leaving any male heir of his body the succession shall go to the next eldest son of the deceased holder or the eldest male heir of his body and so on taking all the deceased holder's sons in succession in order of their ages;

[20] The plaintiff claims that upon Vasitai's death he was entitled to succeed to Kape. The argument presented by the plaintiff's Counsel, Mr. Fonua, goes as follows. First, he submitted that section 82 prescribes how allotments are to devolve on the 'eldest son' of a lawful holder of land. Secondly, he argued that when a holder has been married more than once and has had a son in each marriage there is

more than one eldest son. In such a case Mr. Fonua contends, the effect of section 82 is that the eldest son of the first marriage is entitled to inherit the land that the deceased holder acquired during the first marriage and the eldest son of the second marriage is entitled to inherit land acquired during the period of the second marriage. Applied to his case it was said:

> When the first marriage ended in 1941-42 the application of section 82 also ended at that time as far as the first marriage is concerned. The eldest son of the first marriage is entitled to all allotments that his deceased father held during the period of first marriage. The entitlement of eldest son under the first marriage to inherit land pursuant to section 82 cannot, in my respectful submission, apply to the second family unit.
>
> When Penisimani senior remarried in 1943 to the mother of the plaintiff section 82 applied afresh to the new family unit and any newly acquired allotment during such period of second marriage shall descent *[sic]* to the eldest son of that new family unit (i.e. second marriage).

[21] In support of this submission Mr. Fonua relied upon section 82(c) of the Act and submitted that the term 'deceased holder' would include a widow holding a life interest in the land. Accordingly he said that Kape passed upon Vasitai's death to her eldest son, who is the plaintiff.

[22] Mr. Fonua also argued that it would be absurd and repugnant to justice if the first defendant was to inherit the land "and take the land away from the plaintiff and his family who have occupied it for 64 years and also developed it".

[23] Mr. Fonua could not refer me to any case law or other authority for what would be, if accepted, a radical re-interpretation of the Land Act.

[24] In my view the law is beyond any doubt. Section 82 sets out the rules of succession. Descent is traced through the last "male holder" of the land (section 82(a)). The last male holder of Kape was Penisimani. Inheritance descends in the first place to the eldest son of the last deceased holder (section 82(c)). There can be only one eldest son. Section 82 does not mention 'family units' or recognise the possibility of multiple eldest sons of a deceased holder. Penisimani's eldest son was Toloa and not the plaintiff. The plaintiff was the first born son of Penisimani's second marriage but that did not make him the eldest son. As Toloa had died before he succeeded to Kape the succession devolved "to the eldest male heir of the body of such son" which is the first defendant (section 82(c)).

[25] Contrary to Mr. Fonua's submission the term 'deceased holder' in section 82(c) does not include a widow with a life interest in the land. It means the last male holder referred to in section 82(a). This is put beyond any doubt by the first words of the section which read "Subject to the life estate of the widow...". If it were otherwise descent in a case like this would, contrary to section 82(a), be traced not from the last lawful male holder of the land but from the widow. That is antithetical to the scheme of succession to allotments in the Land Act.

[26] The rules of succession to allotments go to the very heart of the Tongan system of land law. The rules are to be interpreted in a way

that creates certainty not uncertainty (*Fau v Fau*, Court of Appeal, 8 April 2016, AC 28 of 2015 at [9]). It is not for this Court to concern itself with whether the application of those rules produces fair or unfair results. However on the proven facts of this case I do not see that the plaintiff has suffered any injustice.

[27] For completeness I should add that Mr. Fonua raised another argument, in reliance on *Tafa v Viau* [2006] Tonga LR 287, that Kape was never available for grant to the first defendant as it was occupied by the plaintiff and the Minister ought to have given the plaintiff an opportunity to be heard before making the grant to the first defendant. This argument fails for two reasons. First, the plaintiff was not in occupation of Kape and has not lived there on a permanent basis since 1982. His evidence was that before 2011 he last visited Tonga in 2003. Secondly, this was not a case where the Minister had any discretion to make a grant and he had no obligation to provide the plaintiff with an opportunity to be heard (*Schaumkel v 'Aholelei* (Unreported, Court of Appeal, AC 14/2012, April 2013)).

[28] It follows that the first defendant was Penisimani's lawful heir and entitled to succeed to Kape on the death of Vasitai.

Did the first defendant acquire the land as a result of a misrepresentation that he was the son of Vasitai and, if so, what is the effect of that?

[29] The plaintiff argues that when the first defendant applied for Kape he represented that he was the son of Vasitai when he was not and that the Minister relied upon that representation when registering Kape in the first defendant's name. This argument also has no merit for two reasons.

[30] First, the unchallenged evidence of Mr. Halatanu is that whilst there was an error in a document submitted by the first defendant with his claim for Kape, stating that Vasitai was Toloa's mother, the first defendant also submitted an affidavit stating that Toloa's mother was Salote, the first wife of Penisimani. The Minister was not misled by the first defendant. Mr. Halatanu's unchallenged evidence was:

> The Ministry claims that the town allotment known as Kape that was held by Penisimani Filimoehala, and then by Vasitai Filimoehala, devolved to the First Defendant, Peni Toloa Filimoehala as the legal heir of Penisimani Filimoehala, and that he was registered as the landholder on that basis, but not on the basis that he was the son of Vasitai Filimoehala.

[31] Secondly, even if the Minister had been misled this would have been immaterial because the first defendant's entitlement to Kape is beyond doubt and was traced from Penisimani not Vasitai.

[32] The claim alleging misrepresentation is dismissed.

Is the plaintiff entitled to compensation for improvements to Kape?

[33] The plaintiff argues that if he is not entitled to Kape he is entitled to compensation of $267,519 for improvements he made to the property. Mr. Fonua submitted that the plaintiff should be compensated for "the plaintiff's labour in leveling the coral rocks, making bricks to build a house on the land and money spent on the land including building a concrete building on it."

[34] At the commencement of the hearing I advised Mr. Founa that he would need to spell out the legal basis for this claim which was unclear from the pleadings. I also drew his attention to *Schaumkel v 'Aholelei* (Unreported Land Court, LA 18/2007, 20/2/2015 Scott J) in which case a claim for compensation in not wholly dissimilar circumstances was declined.

[35] In his closing submissions Mr. Fonua argued that the plaintiff's entitlement to compensation was based on the concept of unjust enrichment. He submitted that the right to compensation was established if the plaintiff could prove three elements namely, that the first defendant was enriched by the receipt of a benefit, that the benefit was gained at the plaintiff's expense and that, thirdly, it would be unjust to allow the first defendant to retain that benefit.

[36] The evidence presented in support of this claim was entirely unsatisfactory.

[37] There was no detail of the labour the plaintiff provided to improve the land except to the extent that he said that as a child he assisted his father and brother to fill the land and make bricks for the family house. I regard it as simply absurd to put a value on the work of a child helping his father on the family land some 60 years after the event for compensation purposes. As I have noted, I regard such services as were provided were the performance of family obligations.

[38] The plaintiff also said he sent money to make the extensions to the house in around 1982 but, as I have said previously, there was no evidence of how much money he sent. There were no documents to prove that he had in fact contributed any money.

[39] There was no evidence that the plaintiff spent further money (other than for the house) to improve the land either.

[40] In his brief of evidence the plaintiff said that he contacted Pacific Engineering Consulting Group to "value the two storey house on the land, coral filing and shops". He went on to state that "They valued the improvements and developments on the land at $267,519.00" In the common bundle is a two page document. Page one is a table of the "project cost" for coral fill, a two storey house and a shop with storage. Page two is a plan showing the position and area of an existing house and existing storage area on Kape. I do not know what I am supposed to make of this document. No one from Pacific Engineering Consulting Group was called to give evidence. I do not know who prepared this report, what their qualifications are, what

their instructions were, what assumptions they have made or what the figures provided even represent.

[41] The relevance of the shop and storage area, which were not otherwise referred to in the evidence, was not explained to me nor was there any evidence that the plaintiff contributed to the cost of building them.

[42] It was not explained either why the plaintiff is entitled to claim the entire 'project cost' (whatever that means) without any regard to contributions made to the land by others.

[43] In any event I can see no legal basis for this claim. Such claims will not be made out by high level and abstract references to unjust enrichment. As is noted in Goff and Jones, The Law of Unjust Enrichment, Eighth Edition at 1-23 page [13]:

> A claimant must be able to point to a ground of recovery that is established by past authority, or at least is justifiable by a process of principled analogical reasoning from past authority. "As yet there is in English law no general rule giving the plaintiff a right of recovery from a defendant who has been unjustly enriched at the plaintiff's expense" and the courts jurisdiction to order restitution on the ground of unjust enrichment is subject "to binding authority of previous decisions": they do not have "discretionary power to order repayment whenever it seems ...just and equitable to do so". Claims in unjust enrichment must be pleaded by bringing them "within or close to some established category or factual recovery situation.

[44] There has been no attempt made by the plaintiff to identify any established ground of recovery that might be relevant here nor was

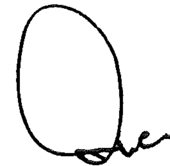
there any attempt to analyse in any meaningful way how it could be said that the first defendant had been unjustly enriched at the expense of the plaintiff justifying the payment of compensation.

[45] The claim for compensation has not been made out and is dismissed.

The result

[46] The plaintiff's claim is dismissed in its entirety.

[47] The defendants are entitled to their costs which are to be fixed by the Registrar if not agreed.



O.G. Paulsen

NUKU'ALOFA: 14 June 2016 **PRESIDENT**