

IN THE MATTER

of an Application by Paula Tonga for and interim injunction for an order prohibiting Foukimoana Tafolo from burying the body of Siaosi Tafolo in the Takaunove graveyard.

BEFORE THE HON. CHIEF JUSTICE WARD

Counsel: Miss P. Tupou for applicant
Respondent in person.

Date of Hearing: 9th May 2000.

Date of Ruling: 9th May 2000.

Ruling

This is an application for an interim injunction to prevent the respondent from burying his uncle's body in a grave he has already dug in the Takaunove graveyard. The funeral is tomorrow. The respondent wished to bury the deceased on that site because he would then be buried by his brother.

The applicant's objection is that the site is very close to the grave of his parents, there is limited space and the respondent's family is only distantly related. If this burial is to take place there, it will not leave sufficient space for his own family. For that reason, when the respondent asked to use that grave site, he refused and offered him an alternative site.

Despite that refusal, the respondent went ahead and dug the grave.

I ordered that the application be made inter partes and have heard from both parties and counsel for the applicant. In answer to my question as to where the applicant derives the right to control the graveyard, he informed me that, as the oldest member of the family present at the moment in Tonga, he has that right by custom of the area. The respondent agrees that is a correct statement of the customary position.

There are problems with the application.

In view of the urgency of the application, it has been filed before the filing of a writ in the case. Miss Tupou, for the applicant, suggests that that is a proper course. She is correct that urgent applications may be granted in such circumstances. However it is usual to supply a copy of the proposed writ with the application or at least to indicate the nature of the claim because the order

will generally only be made on an undertaking by counsel to file a writ within a period ordered by the court. Counsel for the applicant has provided neither and, indeed, cannot specify any cause of action for which she could enter a claim.

Equally, it is usual for the applicant to give an undertaking as to damages. That has not been done and, when the deficiency was pointed out, no step was taken to give one.

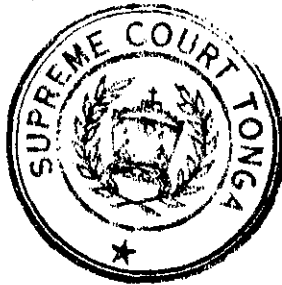
Those matters make it necessary for me to refuse the application but there is more to this case than that.

This involves matters of customary practice. There is no dispute about the applicant's right to control the place where the deceased is buried. It is plainly a case for the parties to seek the guidance and possible intervention of someone experienced in such matters.

Should the court grant the injunctive relief sought, it would freeze the situation at a very stressful and emotional point. It may not have taken account fully of the customary situation and led to future discord and bad feelings.

The applicant has offered an alternative site. It seems to me that this could or should be settled by the type of discussion that is part of normal Tongan negotiation so that this funeral can proceed without the complication of a fixed and intrusive order of the court.

The application is refused with no order for costs.



W. W. W.

NUKU'ALOFA: 9th May 2000.

CHIEF JUSTICE