

**IN THE SUPREME COURT OF TONGA**

**CIVIL JURISDICTION**

**NUKU'ALOFA REGISTRY**

**C. NO.478/99**

**IN THE MATTER OF** THE PROBATE ACT CAP 16 LAWS OF TONGA.

**AND**

**IN THE MATTER OF** The Estate of **Sela Moimoi Finau** of Kolofu'ou, deceased.

**AND**

**IN THE MATTER OF** an application by **Tevita Moimoi** to be appointed **Administrator and Executor** of the will of the said Sela Moimoi Finau.

**BEFORE HON JUSTICE FINNIGAN**

**Counsel:** Mr Kengike for applicant (respondent in strike out motion); Mr Edwards for respondent (applicant to strike out)

**Date of Hearing** : 3 February 2000

**Date of Judgment** : 11 February 2000

**JUDGMENT OF FINNIGAN, J**

There is an application for committal of certain persons and a motion to strike out the application. After hearing counsel and considering their submissions I intend to dispose of both matters by issuing a final judgment.

**THE APPLICATIONS**

Mr Kengike filed the application for committal. The grounds for the application are an allegation that a certain person, 'Ofa Kelepi Toutai, forged the testator's signature in a purported will of a person now deceased, Sela Moimoi, then presented that will at the Supreme Court as genuine, thus fraudulently dealing with a forged document. The object of the application is the committal of 'Ofa Kelepi Toutai. Possibly the purported witnesses are also included. The motion to strike out the application is filed by Mr Edwards, who is acting on 'Ofa Kelepi Toutai's instructions. The facts emerge from the affidavits. These are untested, and were filed by Mr Kengike. Briefly, the facts are these.

**THE FACTS**

The late Sela Moimoi had made a will in 1990. In 1999 she was ill and sensed death approaching. She made known her wishes about succession to any rights she might have over some leased property. She sought legal

advice about that and Mr Kengike drew up a will. She executed the will on 12 March 1999 in the presence of two witnesses, who signed their names in her presence and in each other's. These witnesses were Tevita Moimoi and Meleana Moimoi. The will appointed Tevita Moimoi as administrator of the will, and its sole beneficiary. He is Sela Moimoi's second son. Meleana is his wife.

Sela Moimoi died on 10 April 1999. Subsequently, a new will appeared. This will purported to have been made on 7 April 1999. It appointed no administrator, and named a sole beneficiary, 'Ofa Kelepi Toutai who is Sela Moimoi's eldest daughter.

Mr Kengike thereupon filed his application. It is full and detailed, and is supported by many affidavits and, in his extensive written submissions, by many cited authorities.

### **COMMENTS**

From its general tenor and from his submissions at the hearing, it is clear that the main object of the application is to have the Court declare that the second will is false. What the application alleges is that the 12 March will naming Tevita Moimoi is the true last will of the deceased, and that the 7 April will is a forgery and should be declared a nullity. I shall return to that.

Mr Edwards has moved to strike out the application. He submits that the application for committal is misconceived. In his submission, it confuses and attempts to combine the power of the Court to imprison for contempt in the face of the Court in civil proceedings with certain crimes created in the Criminal Offences Act cap 18.

I have no alternative open to me, but must accept that submission. The power to commit for an apparent contempt of Court in civil proceedings has no application to a charge that certain crimes have been committed, even if they are said to be crimes that were intended to mislead the Court. The application itself seeks a nullity. It must be struck out, and I strike it out.

I turn now to the general situation. The Court is not yet required to make findings on the facts in the untested affidavits. I note that both claimant beneficiaries have given public notice by advertisement that each intends to apply for probate of the last will of the deceased. Each should now proceed with a probate application if they wish, and if both apply the Court will resolve the issue of whether the later will is genuine. To enable this to occur, 'Ofa Kelepi Toutai must file affidavits with her application that set out the facts of the later will, and then there will be a hearing. Notices for cross-examination will be exchanged, and the Court will hear cross-examination of any witnesses.

There are clear and direct allegations against 'Ofa Kelepi Toutai in some of the affidavits, and circumstantial allegations in most of the others. The allegations amount to serious charges, which the Court cannot ignore.

However, they will be left for now, until that person has the opportunity to reply to them if she wishes.

I turn now to the earlier of the two wills. Mr Kengike addressed the question of its validity. There is clearly a problem, which Mr Kengike addressed. It arises from the provisions of s 23(1) & (2) of the Probate Act cap 16. That section is as follows:

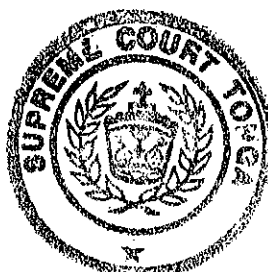
- "(1) Subject to subsection (2), if a person who attests the execution of a will is a person to whom any interest is given by the will (whether by way of gift or by way of exercise of a power of appointment, but other than and except charges and directions for the payment of debts), the gift or appointment is void, so far as it concerns such an attesting witness or any person claiming under the witness; but the attesting witness is competent as a witness to prove the execution, or to prove the validity or invalidity of the will, notwithstanding the gift or appointment mentioned in the will.*
- (2) Attestation of a will by a person to whom or to whose spouse there is given or made any such disposition as is described in subsection (1) shall be disregarded if the will is duly executed without his attestation and without that of any other such person.*
- (3) This section applies to the will of any person dying after the passing of the Probate (Amendment) Act 1987, whether executed before or after the passing of that Act".*

Pursuant to those provisions, the appointment of, and the gift to, Tevita Moimoi are void. In other words, while the will appears validly executed and attested, and while Tevita Moimoi is available as a witness to prove that it is valid, it cannot operate to confer anything on Tevita. S23 (2) provides that his attestation, and that of his spouse Meleana, are to be disregarded if the will is duly executed without their attestations. However, without their attestations the will, on its face, is not duly executed. Mr Kengike made submissions of law about proof of the will by other persons who were present at the same time as the testator and at the same time as each other. I have to put those submissions aside until any such persons have filed affidavits in the application for probate. I shall consider them then.

### **CONCLUSION**

There the matter rests. The present application is at an end. However, I reserve leave to Mr Kengike to rely upon the affidavits and submissions in this file should any of them be relevant to the application for probate.

**NUKU'ALOFA; 11 February 2000**



*[Handwritten signature]*  
**JUDGE**