

IN THE SUPREME COURT OF SAMOA

HELD AT MULINU'U

BETWEEN: **LEANAPAPA LAKI** also known as
LUCKY JOHAN ANDERSEN and
IRENE ANNIE ANDERSEN both of
Fusi, Safotulafai, Savaii,
administrators of the estate of
LETASI PETER ANDERSEN
deceased.

Plaintiffs

A N D: **LESINA PEKINA** of Matautu-uta,
Married Woman

Defendant

A N D: **AGATHA (AKAKA) FAUMUINA**
of Tanumapua, Retired

First Third Party

A N D: **PUBLIC TRUSTEE**

Second Third Party

Counsel: B Heather-Latu for plaintiffs
Defendant – No appearance
RT Faaiuso for first third party
H Hoglund for second third party

Hearing: 9, 10 August 2011

Conclusions: 10 August 2011

Judgment: 24 August 2011

JUDGMENT OF SAPOLU CJ

Proceedings

1. These are proceedings by way of an action brought by the plaintiffs Leanapapa Laki aka Lucky Johan Andersen and his sister Irene Annie Andersen as administrators of the estate of their late father Letasi Peter Andersen who passed away on 18 January 2008. The action was brought in 2007 by the said Letasi Peter Andersen for an order to evict the defendant and her family from a certain land at Matautu-uta near Apia. When Letasi Peter Andersen passed away intestate, the hearing of the action was still pending. On 10 July 2008, letters of administration of the estate of Letasi Peter Andersen were granted to the present plaintiffs. They were then substituted as plaintiffs in place of their late father for the purpose of these proceedings.

2. This matter has been the subject of several adjournments for reasons known to the parties and their respective counsel. The last time this matter was to proceed to a hearing the defendant did not appear and the matter was stood down for the defendant to be contacted and to appear. When the defendant appeared she was not ready to proceed. This matter was then further adjourned to a new hearing date. The Court warned the defendant not to fail again to appear on the new hearing date.

3. On 2 and 3 August 2011, a process server was sent by the solicitors for the plaintiffs with a letter dated 2 August 2011 to the defendant to remind her of the hearing of this matter on 9 and 10 August 2011. The process server could not locate the defendant on 2 August. When the process server located the defendant on 3 August, the defendant refused to sign the receipt for delivery of documents. So the process server simply left the letter from the plaintiffs solicitors with the defendant. When the hearing of this matter was to start on 9 August, the defendant again did not appear. The process server was called by counsel for the plaintiffs to give evidence.

4. In the circumstances, and given that this has been a long-standing matter of which the defendant must be aware, I decided to proceed with the hearing in the absence of the defendant.

Background

5. The land which is the subject of these proceedings was originally part of the estate of one Taiafiifi Gosche nee Toomalatai (hereinafter referred to as “Taiafiifi”). Taiafiifi married a foreigner named Anton Ludwid Gosche from Germany and their children were Margaret Elsa aka Meki (hereinafter referred to as “Meki”) who was born on 27 June 1897 and died on 13 November 1980 and Ferdinand aka Pekina (hereinafter referred to as “Pekina” or Toomalatai Pekina”) who was born on 22 November 1898 and died on 20 November 1974.

6. Taiafiafi had two pieces of land under her name. A piece of land called ‘Solapo’ at Matautu-tai and the land which is the subject of these proceedings situated at Matautu-uta (hereinafter referred to as “the disputed land”). Taiafiafi died intestate on 3 December 1925. Her husband must have pre-deceased her because the evidence suggests that her two children Meki and Pekina succeeded equally to her land ‘Solapo’ as tenants in common. The second third party, the Public Trustee, is the administrator of Taiafiafi’s estate and became the registered proprietor of the disputed land by virtue of transmission no. 1203Z registered in the land register on 12 September 2002.

7. By deed of conveyance dated 19th July 1932, Meki and Pekina being owners as tenants in common in equal shares of their mother’s land ‘Solapo’ sold that land to one Nellie Lydia Davidson for the sum of four hundred and ten pounds (£410). That left only the disputed land which was declared as freehold land by the Land and Titles Investigation Commission on 30 October 1973.

8. Meki married Jens Christian (Baker) Anderson from Denmark. They lived at Fatausi, Safotulafai, in Savaii where they operated several businesses. Pekina lived on the disputed land here in Upolu. As it appears from the plaintiffs second affidavit, Pekina had four marriages or three marriages and one common law relationship. After Pekina was bestowed with the matai title Toomalatai of Matautu, he continued to live on the disputed land.

9. In 1955, Toomalatai Pekina either gave part of the disputed land to the then LMS congregation at Matautu-uta to build a church or allowed the said congregation to build a church on part of the disputed land. The church was not built until 1961. The church is still there up to now. The name of the congregation has been changed to the congregation of the EFKS at Matautu-uta.

10. In 1967 Toomalatai Pekina married the first third party and they lived on the disputed land. On 20 November 1974, Toomalatai Pekina died. The first third party subsequently re-married and she left the disputed land to live with her new husband. On 28 August 1990, letters of administration of the estate of Toomalatai Pekina were granted to the first third party who then became the administratrix of the estate of Toomalatai Pekina.

11. In 1978, according to the evidence given by the plaintiffs, Meki and the plaintiff Leanapapa Laki moved onto the disputed land and occupied the big Samoan fale on the land which had been occupied by Toomalatai Pekina. On 1 April 1978 when the congregation of the EFKS at Matautu-uta tried to build an extension and make renovations to the church on the disputed land, it was stopped by Meki on the basis that the estate of her mother Taiafiafi had not been settled. The said congregation then approached the first third party who gave her approval. However, the work on the extension and renovations of the church did not proceed.

12. Meki died on 13 November 1980. She left a will in which she bequeathed her share in the disputed land to her son Letasi Peter Andersen the original plaintiff and father of the present plaintiffs.

13. It is not entirely clear from the evidence what happened to the Samoan fale on the disputed land soon after Meki had died. The Samoan fale is now occupied by the defendant and her family. What had happened was that Fereti, a grandson of Toomalatai Pekina from his second marriage, married the defendant. Fereti then died in the late 1990's leaving his wife and their children. After Fereti died, the defendant, her children, and her second husband moved into the Samoan fale without the consent of Letasi Peter Andersen, the plaintiff's father.

14. In or about 1996 or 1997, Letasi Peter Andersen told the EFKS congregation at Mataututa to pull down and remove their church from the disputed land. This prompted the congregation to write to the then Public Trustee Toleafoa Solomona Toailoa for assistance.

15. The Public Trustee, the second third party, was appointed as administrator of the estate of Taiafiafi and became registered as proprietor of the disputed land by virtue of transmission no. 1203Z registered in the land register on 12 September 2002. The only asset in the estate of Taiafiafi seems to have been the disputed land. There were difficulties as the

second third party tried to effect a fair distribution of the disputed land between the estate of Meki and the estate of Pekina. These difficulties are set out in detail in the affidavit of Paniani Vaa for the second third party sworn on 9 February 2011 and the second affidavit of the plaintiffs sworn on 31 August 2010.

16. It appears from the said affidavit of Paniani Vaa that a plan of definition of the disputed land in the form of a scheme plan of subdivision was completed in 2003 by a surveyor instructed by the second third party. This plan followed negotiations between the second third party and the then solicitor for the first third party. It subdivides the disputed land into two parcels, parcel 1047 and parcel 1048. The plan was subsequently amended in 2004 due to instructions from the then solicitor for the first third party so that parcel 1047 included the whole shop, the church, and the church residence situated on the disputed land while parcel 1048 included the entire Samoan fale on the land. In October 2004, the second third party endorsed the plan as amended which then became the plan of subdivision for the disputed land.
17. Even though in terms of this subdivision the entire Samoan fale is included in parcel 1048, the plaintiffs have agreed that the first third party and the defendant may dismantle, remove, and take the Samoan fale.

18. By deed dated 29 June 2006, the second third party conveyed parcel 1048 to the said Letasi Peter Andersen but it has yet to convey parcel 1047 to the first third party as the administratrix of the estate of Toomalatai Pekina. On 23 January 2003, the first third party lodged a caveat against the title to parcel 1048. On 1 May 2007, one Chester Toomalatai Pekina Gosche, a grandson of Toomalatai Pekina from his second wife, also lodged a caveat against parcel 1048.

19. By a statement of claim dated 24 July 2007 and filed on 25 July 2007, the original plaintiff Letasi Peter Andersen, by his then solicitor, commenced proceedings to evict the defendant and her family from the Samoan fale on parcel 1048 which they are occupying. For some unknown reason, there does not seem to be any motion to lift the caveats which had been lodged against parcel 1048.

The issue

20. The issue for decision in this case is how the disputed land which belonged to the estate of Taiafiāfi should be subdivided between the estate of her daughter Meki and the estate of her son Pekina aka Toomalatai Pekina. The plaintiffs claim that the whole of the disputed land should be divided into two equal shares and that part of the land which includes the church and the church residence should be conveyed to the first third party as administratrix of the estate of Toomalatai Pekina. The other part of the land should be conveyed to the plaintiffs as administrators of the estate of Letasi Peter Andersen the son of Meki. The Public Trustee, the second third party, takes the same position as the plaintiffs.

On the other hand, the first third party claims that the part of the land where the church and church residence are located should be excluded from the sub-division and the residue of the disputed land be subdivided in two equal shares between herself as the administratrix of the estate of Toomalatai Pekina and the plaintiffs as the administrators of the estate of Letasi Peter Andersen.

The basis of the claim by the plaintiffs

21. The basis of the claim by the plaintiffs is that it was Toomalatai Pekina alone who allowed the EFKS congregation at Matautu-uta in 1955 to build a church on part of the disputed land. So that part of the disputed land should be included in the half share to be conveyed to the estate of Toomalatai Pekina. This is also the basis of the plan and the sub-division approved by the second third party as the administrator of the estate of Taiafiafi.

22. According to the evidence of Paniani Vaa, the Assistant Public Trustee for Estates and Trusts Administration, a letter was sent from the EFKS congregation at Matautu-uta to the Public Trustee probably in 1996 or 1997. Toleafoa Solomona Toailoa was the Public Trustee at the time and the letter was addressed to him. The said letter was produced in evidence by both the plaintiffs and the second third party. It shows that part of the disputed land was given by Toomalatai Pekina alone to the EFKS congregation at Matautu-uta for the work of God. According to the affidavit sworn by the first third party on 30 November 2007 in support of her motion to be joined as first third party and the second affidavit of the plaintiffs sworn on 31 August 2010, that happened in 1955. On 2 March 1961,

construction of the church commenced on that part of the disputed land. There is no mention in the letter that Meki the sister of Toomalatai Pekina had any involvement in the giving of the said part of the disputed land to the EFKS congregation at Matautu-uta. The purpose of the said letter was to seek the assistance of the Public Trustee because Letasi Peter Andersen the son of Meki wanted the church to be dismantled and removed from the land. The letter also mentions that on 1 April 1978 the congregation wanted to build an extension and make renovations to the church but Meki stopped the congregation from proceeding with the work. That was after Toomalatai Pekina had passed away in 1974.

The basis of the claim by the first third party

23. The basis of the claim by the first third party is that both Tomoalatai Pekina and his sister Meki had agreed to give part of the disputed land to the congregation at Matautu-uta to build a church. Therefore that part of the land where the church and the church residence are located should be excluded from any sub-division of the disputed land between the estate of Toomalatai Pekina and the estate of Meki. The residue or remainder of the disputed land should then be sub-divided in two equal shares between the estate of Toomalatai Pekina and the estate of Meki.

24. The first third party testified that when she was living with Toomalatai Pekina, she overheard Toomalatai Pekina and his sister Meki talking about giving part of the disputed land to the congregation at Matautu-uta to build a church and Meki agreed. With respect, I regret to say that I cannot accept this evidence as true.

25. The first third party was married to Toomalatai Pekina in 1967. Part of the disputed land, as the evidence shows, had been given by Toomalatai Pekina in 1955 to the congregation at Matautu-uta to build a church. That church was subsequently built in 1961. I cannot believe that the first third party who only married Toomalatai Pekina in 1967 could have overheard any discussion between her husband and his sister Meki about giving any part of the disputed land to the congregation at Matautu-uta to build a church when that had already been done in 1955. Why should Toomalatai Pekina and Meki discuss in 1967 or thereafter the giving of part of the land to the congregation at Matautu-uta to build a church when that had already been done in 1955.
26. The first third party also testified to the effect that it was Meki who sold her mother's land 'Solapo' at Matautu-tai and that she had heard Toomalatai Pekina saying to Meki that it was not fair for her to think of gaining a share in the disputed land when she had sold their mother's land 'Solapo'. Again, I cannot accept this evidence as true. It is contradicted by the documentary evidence.
27. The deed of conveyance dated 19th July 1932 shows that it was both Meki and Pekina being owners as tenants in common in equal shares of the land 'Solapo' who sold that land to one Nellie Lydia Davidson for the sum of four hundred and ten pounds (£410). Both Meki and Pekina signed the deed of conveyance. This shows that it was both Meki and Pekina who sold the land 'Solapo' after their mother had died in 1925. I do not accept that it was Meki alone who sold the land.

28. Furthermore, the action by Meki in 1978 in stopping the extension and the renovations that the congregation at Matautu-uta wanted to make to the church on the land is inconsistent with the claim by the first third party that Meki had agreed to giving part of the disputed land to the congregation at Matautu-uta to build a church. The letter by the congregation at Matautu-uta to the Public Trustee in 1996 or 1997 when Meki's son Letasi Peter Andersen wanted the congregation to remove the church, also shows that it was Toomalatai Pekina alone who gave the land to the congregation to build a church.

Discussion

29. After careful consideration of the evidence, I am satisfied that it was Toomalatai Pekina alone who in 1955 gave part of the disputed land to the EFKS congregation at Matautu-uta to build a church. That is the part where the church and the church residence are now located. It follows that a fair distribution of the disputed land between the estate of Toomalatai Pekina and the estate of Meki should include that part of the disputed land. And that part of the disputed land should be included in the portion of the disputed land to be conveyed to the estate of Toomalatai Pekina.

30. It also follows that I agree with the sub-division of the disputed land that was approved by the Public Trustee, the second third party, that is to say, the disputed land be sub-divided in equal shares into two parcels, parcel 1047 and parcel 1048. Parcel 1048 has been properly conveyed to Letasi Peter Andersen. Parcel 1047 has yet to be conveyed to the estate of Toomalatai Pekina. I hope that will be done soon without further problems.

31. By agreement of the plaintiffs, the first third party and the defendant are also to dismantle and remove the Samoan fale which is on parcel 1047. Failing to do so, the plaintiffs may remove the fale.

Conclusions

32. The plaintiffs succeed in their action.
33. The defendant, her present husband, and her family are ordered to vacate the Samoan fale on parcel 1048 within three (3) months.
34. The first third party and the defendant are ordered to dismantle and remove the said Samoan fale within three (3) months and take it for themselves. Failing to do so, the plaintiffs may dismantle and remove the Samoan fale at the end of three (3) months as from 10 August 2011, the date of my conclusions already delivered.
35. In terms of my conclusions delivered at the end of the hearing on 10 August 2011, counsel are to file submissions as to costs within fourteen (14) days from that date if the parties cannot reach agreement as to costs.

CHIEF JUSTICE

Solicitors

Lata Ey for plaintiffs

Tapeni Faaiuaso Law Firm for first third party

Vaai Lawyers for second third party