

IN THE PRIVY COUNCIL OF TONGA

PC Appeal 01 of 2016

ON APPEAL FROM THE LAND COURT OF TONGA

[LA 15 of 2015]

BETWEEN: RT. HON LORD FIELAKEPA

Appellant

AND: TUPOU TONGALIUAKI FILO'AULO ALEAMOTU'A

Respondent

Judicial Members: HM the King Tupou VI, Lord Chief Justice O. Paulsen, Rt. Hon. Lord Dalgety of Sikotilani Tonga, Rt. Hon. Lord Tupou of Kolofo'ou, Rt. Hon. Lord Madraiwiwi Tangatatonga and Justice Cato.

**Counsel: Mrs. D. Stevenson and Mr. R. Stevenson for the Appellant
Counsel: Mr. L. Niu SC for the Respondent**

**Date of Hearing: 22 July 2016
Date of Judgment: 12 August 2016**

Judgment of HM in Privy Council of Tonga

1. By Writ issued in the Land Court of Tonga on 19th June 2015 the Respondent in this Appeal (Tupou Tongaliuaki Filo'aulo Aleamotu'a) challenged the appointment by His Majesty King Tupou VI of the Appellant in this Appeal (Rt. Hon. Lord Fielakepa) to the hereditary

noble title of Fielakepa and the hereditary estates (Tofi'a) which went with that title. That Land Court action was defended by the Appellant. On 4th December 2015 Mr. Justice Scott K.C. found in favour of the Respondent and issued a number of declaratory orders, the principal one of which was – "It is declared that the Plaintiff, Tupou Tongaliuaki Filo'aulo Aleamotu'a, is the lawful holder of the title Fielakepa." That Judgment was appealed on 15th January 2016 by the Appellant to the King in Privy Council. Clause 50(2) of the Constitution requires that:-

"If any case shall be heard in the Land Court relating to the determination of hereditary estates and titles, it shall be lawful for either party thereto to appeal to the King in Privy Council which shall determine how the appeal shall proceed and the judgment of the King in Privy Council shall be final."

2. The factual background, to which there is no challenge, is set out at paragraphs [1] – [6] of the Judgment under appeal, which we set out as follows:

[1] It will not be disputed that the title "Fielakepa" is of ancient origin and is held in high esteem. The substantial hereditary estate is located at Havelu.

[2] In 1964 the title was inherited by Paula Longolongo'atumai Aleamotu'a ("Longolongo") who had married Tunakaimanu in 1959. They had three sons:

(a) Siosaia Tupou Aleamotu'a, born 1961 ("Aleamotu'a")

(b) Mosese Tangaki Taulupe Ki Folaha Aleamotu'a, born 1965 ("Taulupe"); and

(c) Tupou Tongapo'uli Aleamotu'a, born 1966 ("the Defendant")

[3] Longolongo died in 1997. The title was inherited by his oldest son, Aleamotu'a (Baron Fielakepa).

[4] In June 1991 Taulupe married Mele Simiki Aleamotu'a ("Miki"). The Plaintiff was born in October 1991. Following the marriage Taulupe and Miki had seven other children, including six sons.

[5] Taulupe died in 2007 and Aleamotu'a died in 2013, without issue.

[6] On 18 April 2013 His Majesty the King appointed the Defendant as trustee of the Fielakepa estate ...On 10 April 2015 he was recognised by His Majesty as the lawful successor to the title Fielakepa. It appears that notice of the succession was published in the Gazette shortly thereafter."

- 3 The Respondent in his Writ claimed that it was himself and not the Appellant who was the lawful successor to the estates and title of Fielakepa as he was the eldest legitimate son of his late father Taulupe.
- 4 The succession to hereditary estates and titles is dealt with comprehensively in Clause 111 of the Constitution. Succession, as a matter of law is by operation of the very detailed table of succession set forth in that Clause, provided always that the person in right to succeed complies with the legitimacy requirement of the opening eight words of that Clause, namely that "Children lawfully born in wedlock only may inherit"
- 5 The Appellant raised three principal grounds of appeal which can be summarized as follows:
 - 5.1 The Respondent had no cause of action against the Appellant as his complaint was with respect to the exercise of powers of His Majesty which powers are not subject to challenge in the Courts.
 - 5.2 That His Majesty is granted the exclusive power to appoint titles of Honour and Distinction under Clause 44 of the Constitution and that his power is not subject to challenge or review.

5.3 That the presumption of legitimacy in Section 44 of the Evidence Act is inconsistent with the Constitution and therefore void.

6 There are a number of provisions in the Constitution which invest the King with a personal discretionary power such as Clause 44 which provides that:-

"It is the King's prerogative to give titles of honour and to confer honourable distinctions but it shall not be lawful for him to deprive anyone who has an hereditary title of his title such as chiefs of hereditary lands and nobles of the Legislative Assembly who possess hereditary lands except in cases of treason."

7 However the King cannot under Clause 44 dispossess an existing titleholder of his title or estates except in cases of treason. Notwithstanding Clause 44 of the Constitution which grants to the King alone the power or prerogative to give titles of honour and to confer honourable distinctions; Section 38(1) of the Land Act which states it is the King who is to publish the name of the lawful successor to a noble title in the Gazette; and Section 40(1) of the same Act which vests in the King the exclusive power to appoint Trustees to a noble's estate where the lawful successor has not yet reached "the age of maturity" (which in Tonga is 21 years: Clause 27 of the Constitution), we do not consider, on a proper construction of Clause 111 of the Constitution, that Clause 44 entitles the King to depart from the prescribed table of succession set out in Clause 111. That Clause itself does not give him any such power nor do we consider that Clause 44 can be read as empowering the King to ignore the express wording of Clause 111.

8 Turning specifically to the grounds of appeal, in relation to the first ground and without canvassing the royal prerogatives at length and the circumstances in which the Courts intervene or forbear, the numerous authorities cited by both learned Counsel before us confirm that jurisdiction to pronounce on the issues of inheritance and noble

titles is well-established (*Ulullakepa v Fulivai* (1924) Vol II Tonga LR 74, *Finau v Tu'ivakano* (1924) Vol II Tonga LR 13, *Nomoa v Vaha'i* (1926) Vol II 22, *Fulivai v Kaianuanu* (1960) Tonga LR 178, *Tu'ipulotu v Niukapu* (1995) Tonga LR 79). Therefore this ground fails.

- 9 The Appellant's second ground of appeal related to the provisions of the Constitution cited previously, the effect of which was summarised by the learned Judge below as follows-

"[8] The law of succession to hereditary estates and titles is set out in Clauses 111 and 112 of the Constitution supplemented by section 30 and Division II of Part III of the Land Act (Cap 132)."

- 10 The effect of this law is not disputed. It is known as the law of primogeniture. The oldest legitimate son has the right to inherit the whole estate. He has this right in preference to any elder but illegitimate sons, to younger sons or other collateral relatives. An oldest legitimate son of a deceased elder brother inherits before a living younger brother by right of substitution. A female is only eligible to inherit if there is no male heir. Importantly also, upon the death of a hereditary noble the rules of succession apply immediately as a matter of law. Section 38 of the Land Act provides that the date of succession is the day following the death of the holder. It is only if the holder dies with no legitimate heirs that His Majesty may, under clause 112 of the Constitution, confer the noble title upon any other person.

- 11 Relevant to the interpretation to be given Clauses 104, 111 and 112 of the Constitution is HM King George Tupou I's address to Parliament in 1875 as quoted by our distinguished predecessors in *Tu'ipolotu v Hon. Niukapu* (*supra*) at 83.:

"I have made up my mind absolutely not to alter names or nominate chiefs so that the estate shall go with the title and the succession shall

be from father to son forever. The Law of Succession is stated in the Constitution, and such succession shall be by blood relationship only.....Should there be any dispute it shall be tried by Justices of the Court in accordance with the usages of civilised Governments. You Chiefs of Tonga all of you who have titled estates when the Constitution came into force: I affirm to you the right of yourself and your children by marriage to hold and possess your titles and estates forever, as stated in the Constitution."

- 12 His Majesty clearly contemplated that succession to the noble titles he had created to reinforce his reign and the unity and wellbeing of the Kingdom would henceforth devolve according to law and not by royal pleasure.
- 13 The Appellant has forcefully argued the case for reading Clause 44 together with Clause 111 and sought to conflate the two. Yet it is apparent from a simple reading of the provisions that they relate to different processes: one a creation of titles of honour, the other the acquisition of established titles and estates thereto by succession. The emphasis given Clause 44 by the Appellant would be contrary to the sentiments expressed by His Majesty Tupou I. Leaving aside for the moment the vexed issue of illegitimacy, the present situation is akin to the position described by Scott J in *Molitoni v Tu'ivakano* (supra) at 17 as follows-

"It has been urged for the Plaintiff's claim that the appointment of Manoa having been made by the King his heirs should succeed. Manoa was appointed since the Constitution and I have held in this Court before that so long as there are heirs to succeed in accordance with the 117th Section of the Constitution, as was the case with 'Ane's child no appointment is necessary by the King of the Country. The heirs should inherit immediately. They inherit by descent and not by any appointment."

- 14 Learned Counsel for the Appellant adduced evidence about the interpretation to be accorded Clause 44 in the Tongan language

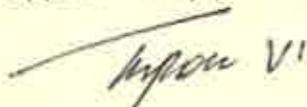
version of the Constitution. With respect, it does not appear to add anything to the English version. It cannot affect the provisions of Clauses 104 and 111 as they must be considered in the light of His Majesty Tupou I's address to Parliament in which His Majesty voluntarily relinquished his sovereign powers to the supremacy of the Constitution. Accordingly, the second ground of appeal fails.

- 15 Finally in relation to the third ground of appeal, Section 44 of the Evidence Act imports into Tongan Law a presumption of legitimacy to the effect that a child born during a marriage is presumed to be the child of the marriage partners, unless that presumption is rebutted by compelling evidence. Scott J. in the Court below heard evidence on this issue and found that there was no compelling evidence to displace the presumption. In our opinion, Section 44 applies in this case. We do not see anything in it which is inconsistent with the Constitution and indeed the arguments advanced by the Appellant proceeded on the erroneous basis that His Majesty has an unfettered power to appoint hereditary nobles. The third ground of appeal fails also.
- 16 We note that in this case there was a challenge to the legitimacy of the Respondent. Modern scientific methods, such as DNA testing, may well be a reliable way of resolving such disputes, but under the existing law no person can be compelled by Court Order to submit to DNA testing.

The Result

- 17 Accordingly we see no reason to interfere with the Judgment of Scott J that the Respondent is the eldest legitimate son of the late Taulupe and, in the words of Section 38(1) of the Land Act, is the "lawful successor" to the late Baron Fielakepa. Therefore this Appeal should be dismissed, with costs to the Respondent.

- 18 We endorse expressly Scott J's Declarations 1-4 on page 19 of his Judgment. That is the end of the matter as the Respondent has now abandoned his financial claims against the Appellant, excepting only the Costs of this Appeal.
- 19 The Respondent sought costs in the Land Court. We were not specifically addressed on that matter and accordingly costs in the Land Court should be dealt with by the Scott. J pursuant to the leave reserved.
- 20 We wish to acknowledge the quality of the submissions presented by Counsel for both parties and the manner in which they conducted this appeal. They provided great assistance to the Court.

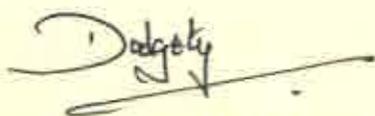


HIS MAJESTY, KING TUPOU VI



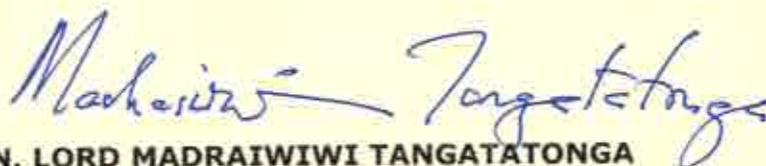
RT. HON. LORD TUPOU K. C.

(Law Lord and Privy Councillor)



RT. HON. LORD DALGETY Q. C.

(Law Lord and Privy Councillor)



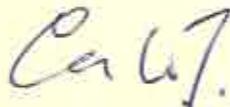
RT HON. LORD MADRAIWIWI TANGATATONGA

(Law Lord and Privy Councillor)

A handwritten signature in blue ink, consisting of a large, stylized letter 'O' with a small flourish at the bottom right.

LORD CHIEF JUSTICE OWEN PAULSEN

(Lord President of the Court of Appeal)

A handwritten signature in black ink, appearing to read 'C. Cato' in a cursive style.

HON. JUSTICE CHARLES CATO

(Supreme Court Judge)

Nuku'alofa: 12 August 2016