LAND: FP: [illegible]

IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 3 of 2012

BETWEEN: FETU'ULOA KAMA - *Plaintiff*

AND : LUSITA KAMA - *Defendant*

BEFORE THE PRESIDENT AND ASSESSOR MRS L. KOLOAMATANGI

S.T. Fonua for the Plaintiff

No appearance by the Defendant

INTERIM JUDGMENT

1. This matter proceeds by way of formal proof under the provisions of Order 6 Rule 1 (3) of the Land Court Rules.

2. The writ was issued on 17 February 2012. The Statement of Claim relates to a town allotment Tohi 253 Folio 100 Lot 1 on Plan 3789 at Ma'ufanga (the land).

3. According to the Plaintiff's evidence, the land was granted to his father, Titie Lolomana'ia, in May 1983 (Exhibit C). Upon his father's death on 9 February 1991 the land devolved upon his father's eldest son, his brother Visesio Kavulu and was registered in Visesio's name on 11 April 1991. Visesio died in August 1994 and, by operation of Section 80 of the Land Act (the Act) his widow, the Defendant, became entitled to a life estate in the land.

4. There was no evidence that the Defendant had ever actually claimed her estate as is required by Section 87 of the Act and

Exhibit C is not endorsed with any registration in her favour. On the other hand, it does not appear that the land has reverted. For the purpose of this action, it will be presumed that the Defendant is, as pleaded, the holder of a life estate in the land.

5. The Plaintiff brings this action under the provisions of Section 81 of the Act. The Plaintiff says that after the death of her husband, the Defendant committed fornication with one of her husband's nephews, Savelio Visesio Save, between August 1994 and August 1995.

6. The only oral evidence of the alleged fornication was given by the Plaintiff himself who told the Court that after his brother's death he came to Tonga and stayed in a house next to the Defendant's house for about two weeks. He discovered that the Defendant and Savelio were living together in one room. On one occasion he saw Savelio in the shower next to the bedroom with the door wide open while the Defendant was present in the room. It was perfectly plain to him that the Defendant and Savelio were living together as husband and wife "all the village knew it".

7. A witness called by the Plaintiff, Pasifiki Tonga, a former legal practitioner, produced a copy of a writ and statement of claim which he had filed in August 1995 on behalf of the present Plaintiff. According to Mr Tonga the action was not pursued, because he, Mr Tonga, succumbed to ill-health.

8. Somewhat strangely, the Statement of Claim filed in 1995 referred to and had attached to it a number of documents including an affidavit

apparently made by Savelio Save, aged 19 years, on 29 August 1995 in which he deposed that he had sexual intercourse with the Defendant "most of the night" between the date of the Defendant's husband's death and the date on which the affidavit was sworn.

9. Mr Fonua told me that it had been hoped to have Savelio present to give evidence in person at this hearing but "there has been difficulty locating (Savelio) in California USA and it was not until 5 days ago that he was located and he could not attend at the hearing".

10. An alternative ground, alleging that the Defendant is no longer a Tongan citizen, was not pursued.

11. The continued presence of a *dum casta* provision in Tonga's laws might be considered anachronistic but the job of the Court is to apply the law, not to reform it. The removal of a person's right to land is clearly a very serious step and one which should not be taken lightly.

12. There does not seem to be any local authority on the standard of proof required by Section 81 but in two cases the Supreme Court has held that adultery, as a ground for divorce, requires "a significant body of evidence" (*Sugar v Fatafehi & Taholo* [1993] To.L.R.4) or "like a crime [proof] beyond all reasonable doubt" (*Ualesi v Tukutoa & Ngalu* [1974-1980] To. L.R. 83). Although *Ualesi* appears to raise the standard rather too high there is no argument that :

"upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact" (see *Briginshaw v Briginshaw* (1938) 60 CLR 336, 368).

I see no reason to apply a different standard in this Court.

13. In the present case the only evidence is the eyewitness evidence of the Plaintiff himself and a copy of the affidavit evidence of Mr Savelio Save. On the other hand, the action is undefended.

14. In all the circumstances I am of the view that judgment should conditionally be entered for the plaintiff. The conditions are: (1) that a copy of this interim judgment is to be served on the Defendant by an independent process server at her address in Australia (2) the Defendant will have 60 days to send a reply to the Chief Registrar of the Supreme Court indicating whether she wishes to contest the allegations against her. In the event that no reply is received within the 60 day period or alternatively that the Defendant indicates that she does not wish to defend, final judgment will be entered. In the event that the Defendant indicates, within the 60 day period, that she does wish to defend, then the Court will give further directions for the disposal of the action.

DATED: 29 June 2012. **PRESIDENT**

NTu'uholoaki

29/6/2012.