

BETWEEN:

- 1. HONE TAUMOEPEAU**
- 2. KALOLAINE LATU**
- 3. MINI NIUALIKU**
- 4. SIOSI'ANA WOLFGRAMM**
- 5. MELI NIUALIKU**

- Plaintiffs

AND :

- 1. ROBERT BLAKE**
- 2. THE CHURCH OF JESUS CHRIST OF LATTER
DAY SAINTS**
- 3. MINISTER OF LANDS**

- Defendants

No appearance by the First and Fifth Plaintiffs.

Siosifa Taumoepeau, by leave of the Court, for the 2nd, 3rd and 4th Plaintiffs.

R. Stephenson for the First Defendant.

L.M. Niu SC for the Second Defendant/Applicant.

A. Kefu SC (Solicitor General) for the Third Defendant.

J U D G M E N T

- [1] This judgment may conveniently be read together with my Decision of 19 August 2013.
- [2] On 23 August Mr Corbett appeared for the Plaintiffs. He told the Court that he was having difficulty contacting his clients but indicated that he was preparing a cross application. On 13 September, Mr Corbett withdrew. Mr Siosifa Taumoepeau then appeared, describing himself as “instructing agent” for the Second, Third and Fourth Plaintiffs and asked for extra time to instruct counsel. In view of the uncertainties referred to in my Decision of 19 August I adjourned the matter for hearing on 31 October.
- [3] On 28 October a document “Statement of Claim to refute strike out claim by Second Defendant” was filed by Mr Taumoepeau. This document, apparently drafted by Mr Taumoepeau, raised several issues of law and fact and exhibited sworn statements appearing to have been made by the First, Second, Third and Fourth Plaintiffs. In summary, it was alleged, first, that the surrender of the bulk of the town allotment to the Crown by the Plaintiffs’ brother Siasia Peleki Nialiku (aka George Blake, the father of the First Defendant – “Siasia”) in 2007 (not by the First Defendant, as suggested in paragraph 8 of my Decision prompted by paragraph 27 of the Statement of Claim) was in breach of an agreement reached between ‘Isileli Tupou Nialiku – “Isileli” the holder of the allotment until his death in 1965 and his children, including the Plaintiffs and Siasia, the

effect of which was that the allotment would be divided between them, rather than devolve undivided upon his heir Siasosi following 'Isileli's death. Secondly, it was alleged that Siasosi had become a New Zealand citizen by the time that the surrender took place and therefore, by virtue of the provisions of the Citizenship Act as they then stood, he had lost his right to hold the allotment and ipso facto had nothing to surrender with the result that the surrender, which was a necessary precondition to the grant by the Crown of a lease to the Second Defendant, was invalid with the final result being that the lease held by the Second Defendant was also invalid.

- [4] On 30 October 2013 two further documents were filed by Mr Niu. The first purported to be an Amended Statement of Claim (complete with deletions and additions in red) reflecting what Mr Niu understood to be the Plaintiffs' case. The second document was headed "Reply of Second Defendant to 'Statement of Claim to refute Strike Claim by Second Defendant'". In this document Mr Niu took issue with a number of paragraphs of the "Amended Statement of Claim" (which of course he himself had drafted and filed). He referred to several reported authorities. He conceded that "the allegation that Siasosi Peleki Nialiku became a New Zealand citizen is most serious and it must be properly pleaded with particulars of such naturalisation. It cannot be guessed or assumed". He argued that "the present allegation is an assumption only and ought to be struck off". It will be noted that the "Amended Statement of Claim" (leave to file which had not been obtained by the Plaintiffs) indicated that the First and Fifth Plaintiffs had discontinued their action. Paragraph 11 of the "Reply"

also states that “Mr Meli Niu aliku has withdrawn and is no longer a Plaintiff”. No record of any withdrawal by any of the Plaintiffs is to be found on the file.

- [5] On 6 November Mr Taumoepeau again appeared. After further submissions, the positions of the parties were still unclear to me. I called for final submissions and requested further affidavit evidence from the Second Defendant.
- [6] On 8 November Mr Niu filed a substantial affidavit containing 39 paragraphs and 31 pages of exhibits. Among these exhibits was a notice of discontinuance filed in LA 6/2009 on 22 June 2011. This action, of which I was previously unaware, is referred to in paragraphs 11 to 25 of Mr Niu’s affidavit. It seems that the action was brought by the present First and Second Defendants after some of the Plaintiffs had attempted to prevent the issuance of the lease to the Second Defendant.
- [7] On 14 November 2013 a further document headed “Final Submissions” was filed by Mr Taumoepeau. It is a mix of submissions and further claims including claims for compensation for property lost and cancellation of the lease. Among several new matters raised was the suggestion, backed up by exhibited documents, that some or all of the Plaintiffs had lodged claims upon part of the land with the Third Defendant and that the supporting documents had been altered within the Ministry. It was also argued that what was done, either by the First Defendant or his father,

amounted to an illegal sale of the land contrary to Sections 12 and 13 of the Act.

[8] As already explained, the original Statement of Claim filed on behalf of the Plaintiffs (no doubt inadvertently) seriously mis-stated the nature of the Plaintiffs' claim against the Defendants. This did not become apparent until the strike out application was filed. Such an application can in principle properly be heard and decided by a judge alone given that RSC O.8 r 8(2) excludes evidence from such hearings in chambers (see also Land Court Rules O.6 r 1 (2)). With further filings it became ever more plain that numerous issues of law and fact separate the parties and that some disquieting questions have been raised.

[9] It is settled procedural law that an application under RSC O.8 r 8(1)(a) to strike out a Statement of Claim should only be allowed in plain and obvious cases (*Hubbuck v Wilkinson* [1899] 1 QB 86) and where the claim is "obviously unsustainable" (*Att-Gen of Duchy of Lancaster v L & N.W. Ry Co* [1892] 3 Ch 274). After re-examining all the facts and matters placed before me I have concluded that it would not be just to the Plaintiffs, or in accordance with the requirements of Section 146 of the Act that I shut out the Plaintiffs' claim at this stage. At the same time, the Plaintiffs must clearly understand that at the trial of the issues raised, they must be properly represented by counsel (if not appearing themselves in person) and that the rules for the conduct of trials must be followed. In view of the time that has elapsed since the writ was issued (time not entirely wasted since it

has led to the production of documents) I am of the opinion that an early trial is required.

[10] I give the following directions:

- (a) Plaintiffs wishing to proceed with their action must file an Amended Statement of Claim conforming with the requirements of the rules within 28 days.
- (b) Plaintiffs not wishing to proceed must file a notice of discontinuance or will be presumed to have discontinued if not named in the Amended Statement of Claim.
- (c) Notices of appearance must be filed at the same time as the Amended Statement of Claim is filed.
- (d) Plaintiffs must file and serve their lists of documents to be relied on within 28 days.
- (e) The "Amended Statement of Claim" filed on 14 November 2013 is struck out.
- (f) A Defence is to be filed within 14 days of the filing of the Amended Statement of Claim referred to in (b).
- (g) The Defendants are to file and serve lists of documents concurrently with their Statements of Defence.

(h) For further directions on 7 February 2014 at 10am in chambers.

[11] The application filed on 11 July 2013 is dismissed. There will be no order as to costs.

10 January 2014.




PRESIDENT