

## Fifita v Fie'eiki

Land Court, Nuku'alofa  
 10 Hampton CJ  
 L 778/95

24 December 1995.

*Land - breach of orders - contempt - penalty*  
*Contempt of court - breach of orders - penalty*  
*Practice and procedure - contempt of court.*

20 The defendants had been the subject of court orders preventing them going on the land leased to the plaintiff. A variation of the orders was made at the defendants' request so that they might remove their goods from storage on the land. After those orders, as varied, the defendants brought a container of further imported goods onto the land for their own personal commercial advantage and expediency.

Held:

1. The defendant were both guilty of contempt.
2. Each of them knew of the previous court orders, the terms of those orders, and  
 30 of the variation.
3. Apologies, belated, were only made part way through the trial.
4. Commercial pragmatism overtook reasoned application of principle, expediency and advantage over a court order.
5. Each were given suspended terms of imprisonment and fined an amount which totalled their expected profit on the goods.
6. An order was also made striking out the defendant's defence to the claim of the plaintiff for an order for possession of the Land and for the defendant's to remove their goods; and a judgment given in favour of the plaintiff on that  
 40 claim.

[Note - see the report of the appeal proceedings of May 1996 printed immediately following and then the following three judgments reported in this volume, touching on the same parties and land].

Regulations considered : Supreme Court Rules 1991, O.26 r.3

Counsel for plaintiff : Mr Edwards

Counsel for defendants : Mr 'Etika

### Judgment

I have found each of you guilty of the Court earlier today. I gave short reasons then. I add to and elaborate on them now. In each case, as I have already said, each of you knew full well the terms of the order of 13 September 1995 which prevented each of you, and your servants and agents going on this land of Mrs 'Ilavalu which is leased, on a long term lease, to the Plaintiff, Mrs Fifita. In addition from the evidence of each of you it is clear that you each knew of the variation of that Order, which, indeed was made at your request on 2 September 1995 and which created an exception or exemption allowing each of you, your servants and/or agents, permission to enter the land only for the purposes of feeding your pigs and/or the removal of your goods from storage for the purpose of your business.

I am satisfied that the original order was served on you, Filimone Fie'eiki on 14 September 1995 and you have acknowledged that.

I am satisfied that, in terms of the Supreme Court Rules 1991, O 26 r.3(2)(ii), that you, Fine Fie'eiki, were aware of the orders of 13 and 20 September and the terms of those orders. Likewise I am satisfied that you, Filimone Fie'eiki, were aware of the order of the 20 September and its terms.

Some background may be helpful. Around December 1994 - January this year Mrs 'Ilavalu agreed to lease this particular area of land to Mrs Fifita for 50 years.

For some while you two had been "informally occupying" the land. I say informally occupying in view, of the contents of the affidavit of Mrs 'Ilavalu of 18 September 1995 and in view of what was said in evidence by both of you today. You claim an "understanding" with Mrs 'Ilavalu based on family rather than commercial ties, but on your own admissions it was (my words) at best an off again on again affair and, as you acknowledge, Mrs 'Ilavalu never agreed to lease this area of land to you.

She did agree to lease you another area nearby - and the formalities as to that have been completed. Significantly you have chosen not to use that area at all, but chose to "develop" and use this uncertain site. That leased and certain site you say you were reserving for a dwelling-house - yet you have not built on it at all. Indeed you have 2 houses, the last of which was built by you on a completely different site at the end of last year.

You have chosen to use the present "uncertain" site, I find on what I have heard, on the basis you might thereby consolidate yourself on an additional piece of Mrs 'Ilavalu's land, and present thereby a fait accompli.

It is significant also, as I find, that you are both mature persons, in your 60s, experienced, and business people. You know the ways of the world, of commerce, and of legal aspects of land and commerce.

In January this year when you heard of the 50 year lease to Mrs Fifita it is significant that, as you each accepted in evidence, an agreement was reached, orally, with the Fifitas, that you would vacate the land by 31 July 1995. A letter of 12 January 1995 from Mr Fifita to you confirms that agreement.

Again you each agree that that letter was received and it sets out the state of the oral agreement. You each knew you were to go by 31 July 1995. You each acknowledge that today.

It ill behoves you now, Mr Fie'eiki, to say in effect "I had not got legal advice and I only did that awaiting advice". It is clear you took no steps to get advice until after July 1995.

Again it is significant that on 28 June 1995, knowing that the July deadline was coming up, you, Mr Fie'eiki, wrote to Mr Fifita as follows: (read from English translation): "Please excuse me in not completing the shifting and removal of my warehouse at Halaleva. There have been a lot of things happening within the family. I will now try to do some work so that the piece of land can be available to you by the last day of October 1995. I hope you will be agreeable to this."

Both of you accept in evidence that you were in effect promising to be out by the end of October 1995 claiming that you had been and would be too busy to achieve the move by the end of July.

The Plaintiff, apparently did not agree to such an extension.

You now try to claim, particularly you Mr Fie'eiki, that this letter of 28 June was a device to gain time and to take legal advice. I doubt that latter aspect from what I heard. When it was put to you why did you not then simply write a letter saying "we are not going to move meantime because we want to take advice" you replied to the Court that you forgot to write that!

So it is in the light of that background that the orders of 13 and 20 September 1995 must be viewed - and then the subsequent proved conduct, which I find as follows.

On 24 October 1995 a container holding some \$40,000 or so of your imported goods was taken by you, or rather taken at your direction, to this property and left there. The goods were destined for your retail shop and you expected to return a profit of 10-15% for yourselves from those goods.

You agree that there were other sites available to you to which this container could have been taken. Indeed the land you yourselves lease from Mrs Ilavalu could have been used.

For your personal commercial gain and advantage and expediency, as you now acknowledge, you chose however to use this site for the container notwithstanding that you knew that that use and the customs clearance, and the unloading, storage and distribution of the contents of the container from that site were against, and flew in the face of, the Court Orders.

You did this because you thought that this was the best place, the most secure place. It suited your ends.

Customs worked with you for the next 2 days. The goods were cleared from Customs (duty of \$8-10,000 was apparently paid).

The goods were then held on the land, in the warehouse (some are still there) and in the container and progressively distributed to your retail store. You both acknowledged that you knew that another container should not have been put on the land, although you regarded it as a temporary measure to secure valuable goods.

Both of you, rather belatedly in my view, tender a somewhat grudging apology. Belated in that it came only at this hearing itself and then in each case late in your evidence - in your case Mrs Fie'eiki only at the very end of your evidence in answer to the Court, and yours Mr Fie'eiki only in re-examination. I trust they are sincere. I will treat them as such, but note the timing.

Commercial pragmatism overtook the reasoned application of principle here. Expediency and advantage over a Court Order.

This Court will not allow flagrant disregard of its Orders. Whether by a Churchman, business people or otherwise. Indeed some reasonably might say such persons, advantaged

and hopefully principled, have all the more reasons to obey Court orders.

Here you chose not to do so.

I regard you Mr Fie'eiki as the more responsible given the evidence I have heard from you both. You decided profit before principle. So be it.

I intend punishing you for your contempt of Court in this way:-

- (a) by committing you to imprisonment for a term of 6 months such order for committal to be suspended for a 12 month period from this day.
- (b) by fining you a sum of \$3,000 payable forthwith.

150 As to you Mrs Fie'eiki I regard you as the lesser party in this. Yet you still knew and you were present actually involved in unloading this container. I intend punishing you for your contempt of Court in this way:-

- (a) by committing you to imprisonment for a term of 3 months such order for committal to be suspended for a 12 month period from this day.
- (b) by fining you a sum of \$1,500 payable forthwith.

You hold the Court in contempt for profit, the Court will affect that profit.

There will be an Order against each of you for the Costs of the Plaintiff, either as agreed or as taxed by the Registrar.

AND THIS COURT ORDERS:-

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1. That the Statement of Defence be struck out.
  2. That there be judgment for the Plaintiff:-
    - (a) for an order for possession of the land, at 'Alaiyahamama'o By Pass Road consisting of 4047 m. 2 and comprised and described in Lease No. 5663), the Defendants to have 14 days during which they can remove their possessions and belongings from the land.
    - (b) for orders restraining the Defendants their servants or agents from entering upon the land and/or carrying out work upon the land save and except as allowed in 2(a) above.
    - (c) for costs as agreed or as taxed by the Registrar.