

## Fie'eiki v Fifita

10 Court of Appeal  
Burchett, Tompkins & Neaves JJ  
App. 13/95

28 & 31 May 1996

*Iana - assessor in land cases - role*

*Land - contempt of court - penalty*

*Contempt of Court - penalty*

20 The facts are set out in the first instance judgment immediately above. On appeal it was argued that the statement of defence of the appellants should not have been struck out and judgment given against them as the orders were ultra vires as not made by a judge sitting with an assessor. In addition it was claimed that the penalties imposed for contempt were harsh and oppressive.

Held (dismissing the appeal):

1. s.144 of the Land Act, on its proper construction, does not have the operation which the appellants claim.
- 30 2. The only role of the assessor is to provide a judge with explanation and advice in regard to Tongan usages and customs and other matters of a similar nature. In many cases the assessor will have an important role to play in the resolution of the matters in issue, but, in the light of the assessor's limited role, at every public sitting of the Land Court in which the Court is asked to make orders it is not required that the judge must be assisted by an assessor.
3. In the present case there was no role for the assessor to play. The question for the judge was whether the statement of defence disclosed any defence and no question arose concerning usages or customs.
- 40 4. The conduct of the appellants was a flagrant disregard of Court orders and the penalties were appropriate and not harsh or oppressive.

Statute considered : Land Act s.144

Counsel for appellants : Mr Veikoso

Counsel for respondent : Mr Edwards

### Judgment

On 13 September 1995, 'Ilaisaane Matelita Fifita, the respondent to the present appeal, commenced proceedings in the Land Court of Tonga against Fine Fie'eiki and Filimone Fie'eiki, the present appellants, seeking an order for immediate possession of certain land and for injunctive relief restraining the appellants from entering the land or carrying out work on the land. The land in question was situated at 'Alaivahamama'o Bypass Road and is more particularly described in Lease No.5663 registered under the Land Act (Cap.132).

On the same day, 13 September 1995, on an ex parte application by the present respondent, the Land Court (Hampton CJ) ordered that the appellants, their servants or agents be restrained until further order of the Court from entering on or carrying out any work on the subject land. By consent of the parties, the terms of the orders made on 13 September 1995 were varied by the Court on 20 September 1995 to permit the appellants, their servants and agents to enter the land "for the purposes of feeding their pigs and for the removal of their goods from storage for the purposes of their business".

On 24 November 1995 the Land Court (Hampton CJ) found each of the appellants guilty of contempt of court for disobeying the orders made on 13 September 1995 as varied on 20 September 1995. The Court ordered that the appellant Filimone Fie'eiki be committed to prison for a term of 6 months, such order to be suspended for 12 months from 24 November 1995, and that he be fined T\$3000 payable forthwith. The appellant Fine Fie'eiki was committed to prison for a term of 3 months, that order to be suspended for 12 months from 24 November 1995, and that she be fined T\$1,500 payable forthwith.

Also on 24 November 1995, the Land Court (Hampton CJ) ordered that the Statement of Defence of the appellants be struck out and that there be judgment for the respondent for possession of the land, the appellants to have 14 days during which they could remove their possessions and belongings from the land. The Court further ordered that the appellants, their servants or agents be restrained from entering upon the land or carrying out work upon the land except for the removal of their possessions and belongings.

From the orders made on 24 November 1995 the appellants have appealed to this Court.

For the appellants it was submitted that the orders made on 24 November 1995 striking out the Statement of Defence and directing judgment in the proceedings for the respondent were ultra vires as having been made in contravention of s. 146 of the Land Act. It was contended that "the orders were made in open court and by virtue of the above section a lawful sitting of the Land Court shall consist of a Judge and his Assessor".

Section 144 of the Land Act establishes for the Kingdom a Court to be called the Land Court. Section 146 provides -

- (1) The Land Court shall consist of and be presided over by the Judge assisted by an assessor to be selected by the Judge from a panel of assessors.
- (2) The orders and judgments of the Court shall be formulated and pronounced by the Judge alone and the assessor shall have no voice or part therein.
- (3) The duties of the assessor shall be to assist the Judge with explanation and advice in regard to Tongan usages and customs and other matter of a similar nature".

In our opinion, section 146 of the Land Act, on its proper construction, does not have

the operation for which the appellants contend. It is clear that the only role of an assessor is to provide the Judge with explanation and advice in regard to Tongan usages and customs and other matters of a similar nature. In many cases the assessor will have an important part to play in the resolution of the matters in issue but, in the light of the assessor's limited role, we are unable to read the section as requiring that at every public sitting of the Court in which the Court is asked to make orders the Judge must be assisted by an assessor. In the present case there was no role for an assessor to play. The question for the Judge was whether the Statement of Defence filed on behalf of the appellants disclosed any defence to the respondent's claim: no question arose concerning Tongan usages or customs or other matters of a similar nature.

A ground in the notice of appeal filed by the appellants asserts that it was premature for the Judge to order that the respondent have possession of the land while there was a competing claim by the appellants against the respondent and against the registered holder of the allotment, 'Ofa 'Ilavatu, which claim was the subject of the proceedings in the Court numbered L.780/95. That proceeding was decided on 12 April 1996 adversely to the Appellants and provides no support to the appellants in the present appeal.

We are also unable to accept the further submission on behalf of the appellants that the penalties imposed on the appellants for contempt of court were harsh and oppressive. The primary judge regarded the conduct of the appellants as amounting to a flagrant disregard of the orders of the Court and we cannot but agree. We can find no basis in the matters which have been put to us by counsel for the appellants to warrant this Court interfering with the exercise by the primary judge of his discretion in fixing an appropriate penalty.

The appeal is dismissed. The appellants must pay the respondent's costs of the appeal to be agreed or taxed.