

Po'uhila v Veikune

Supreme Court, Nuku'alofa

Lewis J

10 C276/94

5 December 1995, 10 January 1996

*Contract - breach - custom or contract**Land - promise - contract or custom*

The plaintiff sued the defendant estate holder alleging a breach of an agreement, for consideration, to grant the plaintiff a tax allotment.

20 Held:

1. It is ill becoming an estate holder, and unwise of him, to make a request for moneys, from an applicant (of him) for land. Equity sets its face against such an approach.
2. There was never any settled agreement merely a direction by the defendant to the plaintiff to come back after a year (s.87 Land Act) and if the api had not been made the subject of a claim by an heir with an equal or better claim than the plaintiff, the defendant would approve the plaintiff's application.
3. In the year a better claimant was approved.
4. There never was consideration for any agreement. The essential test was whether the relationship between the parties had crossed the border from custom to contract.
5. In addition there was no proof that the plaintiff was a legitimate Tongan male over the age of 16 years (s.14 Land Act).
6. Claim was dismissed.

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Case considered : *Veleika v Dep. Min. of Lands (Martin CJ, 1991)*

40 Statute considered : Land Act

Counsel for plaintiff : Mr Appleby

Counsel for defendant : Mr Paasi

Judgment

This action alleges breach of contract. The plaintiff claims that the defendant, estateholder for the 'Api Tukahau in question, situated at Longoteme, Tongatapu, promised the plaintiff a grant of the tax allotment.

The holder of the 'Api, one Fatai 'Atu, was the uncle of the plaintiff. Fatai 'Atu died on 12 April 1990. The plaintiff, then a resident of New Zealand came to Tonga for the funeral. He arrived in Tonga on 13 April 1990.

When the plaintiff arrived the funeral was over. The plaintiff then sought to consult the defendant Hon. Veikune to claim the 'Api. There was a meeting at the defendant's house. The plaintiff asked the estateholder for the 'Api. The defendant told the plaintiff and his brother Muhu to return to him the next day. They did so. The plaintiff brought a pig and kumara taro yams and popua and gave it to the estateholder Hon. Veikune. It was custom to do so. Neither side disputes the custom.

Having taken the offerings of the plaintiff the defendant then questioned the plaintiff (who was again accompanied by his brother), how he related to the 'Api. The plaintiff described his relationship. He told the estateholder that Fatai, the holder died leaving no heirs. The plaintiff told Veikune that he believed that the 'api would revert to the estateholder. The plaintiff referred to a hand drawn family tree and identified himself as the second son of Malia daughter of 'Atu and sister of Fatai. The family tree is document 2 of exhibit P1.

The plaintiff says that at the conclusion of the discussion about the relationship the estateholder, using the English language said words to the effect that he promised to make a grant of the land to the plaintiff. He says that he was happy that the estateholder had promised him the land and gave the estateholder \$500.00. Veikune said according to the recollection of the plaintiff, - "go back to New Zealand and before the first anniversary (of the death of the holder) come back and I'll give you the land". The plaintiff says that the defendant called him by telephone in New Zealand from Tonga and told him that Soane, (cousin of the plaintiff) has offered him (Hon. Veikune) \$6000.00 to grant him the land but the defendant refused telling Soane that he had already promised it.

The evidence of Muhu Po'uhila, brother of the plaintiff supports the account of the conversation given by the plaintiff. He added that Hon. Veikune said words to the effect that they had a "Right to the allotment."

Muhu says that the estateholder told them that once one year had passed from the death of the former holder Fatai, the plaintiff was to come to see him and he would grant him the allotment.

The defendant estateholder differs in his account of the conversation. Hon. Veikune says that he asked the plaintiff how he related to the land in question. The plaintiff replied that his mother was the sister of Fatai 'Atu. Veikune said to the plaintiff the Land Act enables heirs to claim in 12 months and if no-one claims the land within the twelve months, then if Po'uhila came to him after the twelve months was up he would grant him the land in question.

There were other things which occurred between the claimant and the estateholder. During the telephone call concerning Soane's approach (admitted by the defendant), Veikune asked for money from the plaintiff. Hon. Veikune told the plaintiff that Veikune's brother Mapa urgently needed \$500 to repay a loan. Veikune asked the plaintiff for the money. Although no one says so expressly, it is clear that the defendant was asking

for a gift of \$500 from the plaintiff. It is common ground that the plaintiff complied with the request and advanced the defendant the money. Whether such an approach is custom is unclear - the plaintiff has not proved that it is not custom. There is every reason to believe that it is ill becoming an estate holder and unwise of him to make such a request of one of his applicants. Equity, which is to be done in this court, (Veleika v Deputy Minister of Lands, 1991 per Martin CJ) sets its face against such an approach. The Hon. Veikune has, however, in his evidence made an offer to return the sum.

100 The plaintiff also claimed to have advanced the defendant a further \$200. That claim, purports to be the sum which the plaintiff asserts amounts to "consideration" at law for the pleaded contractual relationship, namely \$700.

When he eventually returned to Tonga on 5 April 1991 the plaintiff was told by the estateholder that the land had been granted to one Lemoto Fetu'u son of the brother of Malia, the plaintiff's mother and his cousin.

The plaintiff says the estateholder told him - "I would take Lemoto to court for I want to know who gave the land to him". When he checked at the land registry the plaintiff found that the application for the grant (exhibit P1 document No.6) had been signed by the estateholder, the defendant himself, whereupon the plaintiff says he concluded Hon. Veikune was a "Liar".

110 Having seen the application the plaintiff returned to Hon. Veikune's house with his brother and spoke with the estateholder. There, says the plaintiff, the Hon. Veikune told him that he Veikune would take Lemoto to Court to retrieve the land and, as I understood the evidence of the plaintiff, so that it could be granted to the plaintiff.

120 Document 5 of Exhibit P1, is a letter of claim. It purports to be from the plaintiff to the defendant. It asserts some of the matters the plaintiff complained about in evidence. It is written by the solicitor for the plaintiff. It departs from the evidence of the plaintiff in one important and significant way. No where does the plaintiff say that the \$500 and the \$200 which he gave the defendant were sums agreed as payment (i.e. consideration passing from the promisee to the promisor) for the exchange, or promise by the Hon. Veikune to secure a grant of the 'Api for the plaintiff (if the court were to find that the exchanges were as the plaintiff has them).

On the contrary, the plaintiff in his evidence adds almost as an afterthought "On that day I am happy that he promised to give that land and I gave him some money - \$500" and then "I think I gave him \$200 before I gave him the second \$500."

Muhu says on that topic "Veikune asked when (the plaintiff) was going back and (the plaintiff) said next Wednesday and he said come back on Tuesday. We came back with some food."

130 Veikune's evidence is that he did not promise the land to the plaintiff and had there been no other claimants he would have granted the plaintiff's request. On the matter of the request he made of the plaintiff for \$500, the defendant, I must say, I found to be frank and direct. The defendant says that the plaintiff had always said that the defendant should call him if he needed assistance. The defendant puts the discussion of Mapa's debt in the month of the holder, Fatai Afu's death, adding that he had no recollection of a discussion of helping with the grant of land in that context. What the defendant did in his request for money from the applicant plaintiff was unwise, potentially compromising and unacceptable in a Noble of the Realm in charge of the estates of the Crown; but what it does not do is, 140 it does not drive me to the conclusion that the defendant is a liar who cannot be believed.

I prefer and accept the account given by the defendant of the transactions between the parties. I have concluded that the plaintiff is quite mistaken in his recall of the discussion in issue. What would possibly cause the defendant to make reference to the plaintiff waiting for a year more or less, unless it was that he had in mind the provisions of the Land Act relating to claims by heirs?

The plaintiff puts the promises which he says amounted to a binding agreement as occurring days after the death of the uncle of the plaintiff, the holder of the 'Api. The defendant stipulates, even on the plaintiff's account of things, a delay one year before the grant. What did he have in mind if it was not the provisions of the Land Act.

150 The Land Act 1988 as amended (Cap 132) provides:-

"87. If no claim to a tax or town allotment has been lodged by or on behalf of the heir or widow with the Minister or his Deputy within 12 months from the death of the last holder, such allotment if situate on Crown Land shall revert to the Crown and if situated on an hereditary estate shall revert to the holder."

I conclude that there was never any settled agreement merely a direction by the defendant to the plaintiff to come back in a year and if the 'Api had not been made the subject of a claim by an heir (or impliedly one with an equal or better claim than that of the plaintiff) then he would approve the application of the plaintiff.

160 When he did return to Tonga the plaintiff's hopes were dashed because the estateholder had approved Lemoto son of Fetu'u, a better claimant than the plaintiff on the 19 March, 1991.

I have concluded that there never was consideration for any agreement in this case. This claim is based by the plaintiff on an entirely misconceived premise. As Martin CJ said in *Veleika* (Supra) at page 7 - "The essential test is whether the relationship between the parties has crossed the border from custom to contract".

I agree with the learned Chief Justice. I would only add in this case that, such as the relationship may have been, it got nowhere near the border.

170 The plaintiff's claim is dismissed.

There is an added consideration. There is no proof that the plaintiff is a legitimate Tongan male over the age of 16 years. The plaintiff was never challenged on this score. However it is bold for a plaintiff to assume acceptance of any element of proof because the Land Act section 14 creates an offence for an alien, that is one who is not a Tongan, to hold or reside upon Land. Unless there is proof of Tongan nationality any agreement found to exist vesting title in such a non Tongan must be of necessity void for illegality.