IN THE SUPREME COURT OF SAMOA
HELD AT MULINUU

BETWEEN: **SALA FILI LAUANO, TUALA TELE'A LILII, TUALA TASIPALE MOLI, TUALA SEGI REUPENA TUALA. SALA TAGOAI LUPE CHAN MOW, VAIFALE VEI, TEVAGA VAILUA, TAU NAIME, TAGOAI ALISI POLU, LEMALU IOANE VAIMOLI, TUALA ENELE, TUI SEU, FAATOAFE FAIGA, LEMALU PAULO, TUALA MALEKO, MUAGUTUTIA KOLOKO, MALIA PULOU, KOSE SEVE, KIA VILIAMU, LAVE SIPOLOA, SIAOSI SAGOTE MALO** Matais of Leauva'a for and on behalf of **ALII & FAIPULE OF LEAUVA'A**

Applicants

AND: **MAULOLO TAVITA AMOSA, UTUTA'ALOGA CHARLIE ULIA, FATA ROKETI, FATA VAAFAI TOLUTASI** Matais of Afega for and on behalf of **ALII & FAIPULE OF AFEGA**

Respondents

Court Honourable Chief Justice Perese

Counsel Sala J. Stowers for the Applicants
T. Toailoa for the Respondents
Letoafaiga D.J. Fong and V Leilua (Counsel for First Respondent in M. 56/24)
Fuimaono S. Ainuu for Samoa Law Society (Amicus Curiae)

Hearing 4 April 2024
Judgment 9 April 2024

JUDGMENT OF THE COURT

INTRODUCTION

[1] The Applicants and Respondents represent the Alii and Faipule of their villages; Leauva'a and Afega respectively. They have standing to exercise power and authority in their villages in accordance with the customs and usages of their villages.

[2] This dispute concerns occupation of customary land which appears to be owned by the Alii and Faipule of Afega. The people of Leauva'a have lived on this land for many years, indeed decades, but they are now on the cusp of being evicted from there by the Police pursuant to an eviction order that was to take place on 5 April 2024.

[3] The Alii and Faipule of Leauva'a bring their dispute to this court for the first time, although there have been many Land and Titles Court of Samoa ("LTC") decisions on their dispute going back to the 1950s. LTC records show that its decisions in 1952, 1962, 1963, and 2013, all decided that Afega owns the land. And, in each of those decisions the court made orders for the Applicants to vacate the land.

[4] It is an eleventh hour attempt to seek an interim injunction to stay the planned eviction. The Applicants' cling on to a 2017 LTC Appeal Court decision, which whilst determining ownership in Afega's favour, set aside the 2013 eviction order. They say that this meant the Respondents owned the land but were not able to evict the Applicants.

[5] The Applicants have not always been required to vacate the land. Rather, the Respondents say that from 1963 the Applicants lived on the land with their permission; upon the basis that the Applicants recognised the Respondents as the owners of the land. That arrangement faltered in about 2013 when the Applicants are alleged to have asserted ownership of the land.

[6] The nub of the dispute concerns the validity of a 2018 LTC decision which purports to override the 2017 decision of the LTC Appeal Court, by making a new eviction order against the Applicants from the land.

[7] The Applicants seeks in this Court the judicial review of three LTC decisions – the 2018 decision, and two made in 2023. Given the new legal landscape in Samoa, since 2020, the Court must in relation to all the challenges address whether it has jurisdiction in this matter, and if it does, then determine the substantive proceeding.

[8] Despite the complexity and importance of these substantive issues, the only issue for the court to determine in this decision is limited to an interlocutory application for the making of an order granting an interim injunction to preserve the position in so far as the eviction is concerned.

[9] Leading to the discussion and analysis of the application for interim injunction as against the principles of law relating to interim injunction, it will be necessary to look at the pleadings, the progress of the proceeding, the position taken by the Respondents on the interim injunction issue, and a review of the relevant LTC decisions and the affidavit evidence of the parties.

THE PLEADINGS

[10] The Applicants filed with the Supreme Court a Notice of their Motion seeking an interim injunction against the Respondents, dated 7 March 2024; it has been served on the Respondents.

[11] There then followed on 13 March 2024 the filing of related proceeding M. 56/24, which is a Motion for Judicial Review accompanied by a Statement of Claim, against the President of the Land and Titles Court, the Land and Titles First Court and the Lands and Titles High Court.

[12] The Motion for Judicial Review challenges 3 decisions of the Land Titles Court made on 18 December 2018, 24 March 2023 and 22 December 2023. They are alleged to be decisions that involve jurisdictional error and they should be quashed. The Applicants plead that these decisions deprive them of fundamental rights which are protected under Part II of the Constitution: namely, Articles 6, 9, 13(d) and 15. This strand of the judicial review motion might be conveniently referred to as the Part II challenge.

[13] As is want to happen when proceedings are sought to be advanced under great urgency, and this is one of those cases, the Applicants added a further aspect to their Constitutional challenge. This happened when Ms Stowers in submissions she filed on the eve of the jurisdiction hearing, challenged legislative changes made in 2020 to the Land and Titles Court and to the jurisdiction of the Supreme Court, claiming them to be unconstitutional under Article 2 of the Constitution; this challenge might for convenience be referred to as the Part 1 challenge. Neither of the respondents opposed the granting of leave to the Applicants to amend their claim to adequately set out the Part 1 claim.

[14] It was initially intended that the court would hear submissions on jurisdiction to determine the Applicants' Part II claims. However, in light of the Part I claim, the better view is to deal with jurisdiction issues with respect to the Part I and Part II claims together, when the Part I claim has been properly pleaded and particularised. Even with all parties working with urgency, the time needed for preparation and scheduling of a jurisdiction hearing may take some weeks.

[15] In the circumstances I consider the court has no option but to consider the application for the interim injunction ahead of the jurisdiction issues.

[16] The Supreme Court is a court of general jurisdiction, and it has an inherent jurisdiction and inherent powers, which are based in the common law, to the extent that the jurisdiction or powers are not excluded by an Act of Parliament.

[17] Pursuant to Rule 196 of the Supreme Court (Civil Procedure) Rules 1980, the court may at any time after the filing of a motion seeking an extraordinary remedy (and an injunction is an extraordinary remedy), the court may make such an order ex parte (without notice), if the court is satisfied the delay that would be caused by proceeding on notice would or might entail "irreparable injury". I turn to consider the application for interim injunction

THE APPLICANTS' APPLICATION FOR INTERIM INJUNCTION

The First and Second Respondents position with respect to the hearing of the application for interim injunction.

[18] Before engaging in an analysis of the application, I record that neither the First or Second Respondents were prepared to make submissions with respect to the application for interim injunction.

[19] The First Respondent in M. 56/24 is not a party to the application for interim injunction but Mr Fong was nevertheless offered the courtesy of an opportunity to make submissions. He accepted the invitation and whilst not commenting on the interim injunction application directly, did provide very helpful submissions on jurisdiction in which he said the Court did not have jurisdiction to hear the Applicants' substantive application, and it therefore followed that the Court would not have the jurisdiction to make an interim order. Mr Fong's position was constrained because his client was the decision maker, and the usual expectation is that in these types of applications the decision maker abides the Court's decision.

[20] Ms Toailoa's position on the other hand was quite different. Learned counsel's clients were not prepared to be involved in the interim injunction debate because to do so would mean that they agreed the court had jurisdiction to deal with the substantive issues, which she says they do not.

[21] Respectfully, that view is mistaken.

[22] Jurisdiction issues are often run as a preliminary issue to get to an answer without the time and substantial costs involved in a substantive hearing. Alternatively, lack of jurisdiction may be run as an affirmative defence at a substantive trial. Participating at the interlocutory hearing concerning an application for interim injunction does not mean that you have accepted that the court

has jurisdiction to hear the substantive issue – that is a plainly mistaken conclusion. Even where a jurisdiction issue is considered preliminarily, it is open to the Court to come to a view that it cannot decide the issue on a summary basis and that it needs to hear all the evidence, which should be tested, and then further submissions, at a hearing. In those circumstances, the party protesting jurisdiction would normally participate in the hearing of the substantive matter, and the court understands that such participation is only on the basis that the party has not conceded jurisdiction.

[23] I begin my analysis with a focus on the facts of the case.

The litigation history before the Land and Titles Court and the Land and Titles Appeal Court.

[24] This very public dispute between Leauva'a and Afega is over land which was subject to a determination of the LTC in 1952. The dispute was between the Alii and Faipule o Afega and Alii and Faipule o Leauva'a, which are the same bodies as in this case.

[25] The Samoan text of the 1952 decision is set out as follows:

> "O le eleele o lo'o finau ai, o le eleele e i tua o le tuaoi o le 723 eka na tu'uina atu e le Malo ina ia faaaogaina e tagata o Leauva'a ma ua lē o se eleele o Leauva'a, a'o le'a i ai pea i le pule o Fata ma Maulolo."

[26] The crux of the 1952 decision provided that the disputed land is located behind the boarder of the 723 acres the Government gave for the use of the people of Leauva'a. This land is not owned by Leauva'a but by Fata and Maulolo (of Afega) who continue to hold the *pule* or ownership of the land.[1]

[27] The Court went on to prohibit the establishment of new plantations, and that the people of Leauva'a were required to vacate the land by 31 December 1959.

[28] The 1953 court noted that the land may have been the subject of some sort of grant from the Government - for the use of the people of Leauva'a. If there is a weakness in the 1953 decision, it is that it does not explain how the Government grant was made in the first place and what were its terms. The 1953 Land and Titles Court's order for the people to vacate the land would amount to the cancellation of the Government grant.

[29] The scope of the 1952 decision was the subject of further proceedings heard on 5 April

[1] Affidavit of Sala Fili Lauano, dated 26 February 2024 ("Lauano 1"– Exh "I", LC 1195

1961,[2] the written ruling was not issued until 5 April 1962.[3] The LTC in 1961 was asked to determine this issue and whether the 1952 decision applied to land that was not being used by the people of Leauva'a at the time of the 1952 decision. The 1961 Court recognised that the 1952 decision did not particularise which areas were affected by the ruling and determined that Fata and Maulolo could determine the scope of the areas affected by the 1952 decision. The 1961 Court extended the date by which the Leauva'a people were to vacate the land, to 1 January 1962.

[30] There appears to have been one other LTC decision[4] between the 1962 and 2013.[5] The 2013 decision once again affirmed Fata and Maulolo's *pule* over the land, consistent with the findings of the LTC in 1952, 1962 and 1971. In its decision, dated 14 June 2013, the 2013 LTC directed that the people of Leauva'a were to vacate the land behind the boundary of the 723 acres *ua toina mo Leauva'a* within 6 months but no later than 31 December 2013.[6]

[31] The 2013 decision was appealed to the LTC Appeal Court, which under the LTA 1981, was an appeal against a final decision of the LTC under Part IX of that Act. The Appeal Court heard the appeal, with Vaepule Vaemoa Vaai as its President. President Vaai at the time was also a Justice of the Supreme Court, having earlier spent many years as the Senior District Court Judge of Samoa. In short, His Honour was a seasoned and highly respected senior jurist.

[32] The LTC Appeal Court considered the LTC decisions of 1952, 1961, 1963 and 2013. The Appeal Court confirmed that Fata and Maulolo held the *pule* of the land. However, unlike the lower courts before, the LTC Appeal Court held that the 1952 determination only applied to those from Leauva'a who were using the disputed land before 29 July 1952, the date of the 1952 decision. It accordingly upheld the appeal against the eviction order made by the 2013 court, and the order for eviction was set aside.

[33] I stress that whether the decision to set aside the eviction order was correct or not is not relevant to my decision concerning the interim injunction application. What is wholly relevant is that the Appeal Court made a ruling, which as I will discuss next, appears to have been disregarded by the LTC.

[34] The Appeal Court's ruling on eviction, which at the time represented the law of Samoa, was disregarded by the LTC which issued a further decision on a proceeding between the same parties, arguing the same issues, filed and determined in 2018. The 2018 LTC decision is simply a no no in

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[2] Lauano 1 Exh "F" at E page 4 of 9
[3] Lauano 1 Exh "O" LC 1927
[4] Made in 1970, a copy of which has not been produced in this proceeding.
[5] Lauano 1 Exh "G" LC940P1-P14.
[6] Lauano 1 Exh "G" at page 10/10

our legal system. Our legal system is based on the rule of law, and means that a decision of a superior court such as an Appeal Court binds all lower courts such as the LTC. Unless the Appeal Court can be distinguished on the facts or law, it is binding on the lower court.

[35] The LTC 2018 heard a case involving the same issues and the same parties, which was, respectfully, completely against the views of the then Chief Justice of Samoa, the late Honourable Pātū Tiāva'asu'e F Maka Sapolu. His Honour prepared a short direction which was sent to Sala Lauano, the first named Applicant:

> O le mataupu lenei e tatau ona faaulu se talosaga a Salā Fili Lauano ma isi o Leauvaa i le Faamasinoga e teena le talosaga ua toe faaulu mai e Fata Saifoloi ma Fata Enoka, ona ua maea i ai le faaiuga a le Faamasinoga o Talosaga i le aso 15/08/2017 i le mataupu lenei.
>
> Pātū Tiāva'asu'e F Maka Sapolu (CJ)
> 05/10/2018

[36] The direction is a most unusual intervention by a Judge in a matter that is not before him. But, as the Chief Justice, and His Honour being responsible for the administration of justice in Samoa, Sapolu CJ's letter does two things: (1) it invites Sala Fili Lauano and others of Leauva'a to challenge the new proceeding being brought in the Land and Titles Court, on the grounds, that (2) the Court of Appeal had already determined the issue in its decision of 15/082017. In other words, the 2018 case should have been struck out by the LTC because in legal terms the 2018 proceedings before the LTC were res judicata. That is to say, the issues had already been decided by the Appeal Court between the same parties and the decision was binding on the lower court: namely, the LTC. The LTC was not free to re-decide the matter in accordance with the views of those judges.

[37] However, and in what appears to be a troubling indifference to the Appeal Court's decision, the 2018 court directed the eviction of the Leauva'a people. It is this 2018 decision that the Applicants challenge, and it is this order of eviction which is the subject of the mass eviction enforcement that was planned for 5 April 2024.

[38] For completeness, Ms Stower's clients filed an appeal against the 2018 decision; it was lodged within time on 19 January 2019. The Applicants' application also filed an application for leave to appeal, but this was not heard until over three years later, on 20 March 2023.[7] A decision on the application for leave was then delivered 4 days later, on 24 March 2023.[8] The application for leave to appeal was dismissed on the basis that the 1952 decision prevailed. Respectfully, the important issues raised by the late Chief Justice Sapolu were not answered in the 2023 decision –

[7] Lauano 1 Exh "L"
[8] Lauano 1 Exh "A"

that is, that the 2018 decision cannot as a matter of law stand because it was made in breach of the principles of res judicata. It is not clear whether the Deputy President knew of Chief Justice Sapolu's views (at [35] above) but those are matters that would be clarified at the substantive hearing.

[39] For completeness, the Applicants applied to the President of the Land and Titles Court, the Honourable President Lesātele Vaai, for an order for a stay of the execution of the order for eviction. In His Honour's response, dated 22 December 2023, he advised the Applicants that he did not have jurisdiction to grant a stay of eviction because the matter is now before the Land and Titles Court of Appeal and Review ("LTCAR"), and it is only that body which can issue a stay. Instead, His Honour offered some courses of action for the parties to consider, which might have averted eviction. Respectfully, I consider President Vaai's view is correct, once a decision has been made either by his high office or by his Deputy on an issue of leave to appeal, the President and his Deputy no longer have jurisdiction in the matter and cannot stay that which they have ordered to happen. It is up to the LTCAR, a court which exists in name only to consider both the stay and leave to appeal decisions.

[40] Leave to appeal may still be able to be obtained from the LTCAR under s 44(7), but the scope of that court's powers is limited and there is no clear pathway. And so, it may be the case that although there is an appeal that has been filed, it may be unable to be heard.

[41] At the commencement of this hearing, the parties were invited to voluntarily agree to a stay, to preserve the position, whilst this Court grappled with the issues before it. That invitation was accepted by the Applicants but rejected by the Second Respondents. To preserve the then position I had no alternative but to grant an interim injunction until the argument itself could be heard. At the conclusion of the interim injunction hearing, the interim injunction was further extended to the delivery of this judgment.

[42] The Court was asked by the Police, who appear to have been poised to give effect to the mass eviction, to formally advise of the extension of the grant of an interim injunction pending the delivery of this judgment. That advice was given to the Police and the parties in the following terms:

> 1. After hearing from Sala Josephine Stowers in support of the Applicant's application for "Injunctory Orders", and after affording Ms Tanya Toailoa the opportunity to be heard on the application, this court reserves its decision on the application, and, further, extends the order that no further steps be taken to enforce the Land and Titles Court decisions under challenge in the proceedings between these parties before the Court pending the issue of the Court's determination of the said Applicants application.
>
> 2. This order is intended to preserve the current position as between the parties and prevent irreparable harm possibly physical injury that may be caused by a mass eviction planned for 5 April 2024 until this Court has had the opportunity to consider the interim orders issues. The parties are respectfully

asked to show restraint in the meantime. A decision is intended to be delivered early in the new week.

The Affidavit evidence

The applicants

[43] The Applicants rely on nine affidavits:

a. The affidavits of Sala Fili Lauano; a 76 year old Matai of Leauva'a;
   i. the first is dated 26 February 2024 which exhibited among the documents produced, copies of most of the Land and Titles Court decisions concerning the land in dispute.
   ii. the second affidavit is dated 4 April 2024, and was filed on the morning of the interim injunction hearing. The affidavit produced a copy of a decision of the Land and Titles First Court in LC 9480 P 20, delivered on 8 March 2024, which ordered the Applicants to vacate the disputed land within four weeks, and no later than 5 April 2024. Sala Fili also produced a copy of the separate judgment of Tauiliili Auelua, one of the three Judges who presided, where Tauiliili dissented from the majority decision with respect to the extent of the time frame within which the Applicants were to vacate the land. Tauiliili considered that the Applicants should vacate the land within 4 months, no later than 8 August 2024.
b. Affidavit of Tuala Tele'a Lili'i, an 81-year-old Matai of Leauvaa, dated 26 February 2024, who asserts on oath that he has a plantation and houses, families and their relatives living on Parcels 29 and 30, Plan 1173. He claims ownership of the land and expresses his frustration at the Second Respondent has been given the unfettered right to destroy and remove everything that the Applicants have relied on for their livelihoods.
c. Affidavit of Tuala Segi Reupena Tuala. A 66-year-old Matai of Leauva'a, dated 26 February 2024. Tuala Segi asserts on oath that he has a plantation on the disputed land which has been cleared by the Second Respondents. He says the Second Respondents exercise of pule over the disputed land *is impacting our village peace and harmony with the way our people have been treated and subjected to the total destruction of our family livelihoods especially most of our village rely*

on the plantation for a living.

d. Affidavit Sala Komitiano. A 63-year-old Electrical Engineer and Matai of Leualesi, Leauva'a, dated 26 February 2024. He asserts on oath that he had a "huge ava plantation" which he intended to harvest to sustain his family and his commitments to the village and the church. However, he says the Ava plantation and all the vegetable gardens and fruit trees were cleared by the Second Respondents starting Monday 19 February 2024 to the date of the affidavit. The Second Defendants are alleged to have used heavy machinery, and there were youths carrying knives and machetes, axes and other tools to remove the crops to take for themselves leaving them with nothing. Sala Komitiano exhibited three photos allegedly showing the destruction of gardens and plantation.

e. Affidavit of Lauano Akenese Auali'itia, a 52-year-old Businesswoman and Matai of Leualesi, Leauva'a. Lauano asserted on oath on 26 February 2024 that she had a "huge banana plantation" which she and her family planted over many years to sustain their livelihoods, as well as to serve their village and church. Lauano asserts that the plantation has been removed by force and cleared by the Second Respondent and that this has affected their daily survival and livelihoods. She has also found the Second Respondents actions to be morally and mentally disturbing. Lauano exhibits 3 photos of the alleged damage caused by the Second Respondent.

f. Affidavit of Sagote Siaosi Malo Vaifale, a 57-year-old Matai of Leualesi, Leauvaa. Sagote asserted on oath on 26 February 2024 that he had a "huge cocoa plantation" which was nearly 60 years. He says there were nearly 600 cocoa trees, there were as well breadfruit and coconut trees, a tobacco plantation, a passionfruit plantation, and fruit trees. He alleges that this vegetation, together with the cooking house, flower gardens and all the vegetation around the house, were cleared by the machetes and heavy digging machinery of the Second Defendant. He says the Second Defendants also damaged his personal property and threw them out on to the road, leaving him and his family with nothing. Sagote claims the Second Respondents actions have caused him much pain and hurt. With the damage to his crops and personal property, he has no other source of income with which to support his family.

g. Fulu Faraimo Nautu, a 64-year-old Matai of Leualesi, Leauva'a. Fulu asserted on oath on 26 February 2024 that his "huge banana plantation",

breadfruit trees as well as all the vegetable gardens and al the vegetation surrounding his house were cleared with the Second Respondents machetes, axes and saw mills. He also says the Second Respondents have constructed a road about a meter away from his house. The Second Respondents are alleged to have damaged his water supply including his electricity line. Fulu exhibits photographs showing the new road, and the damage to vegetation. He speaks about the hardship caused to their livelihoods, and the impact on his ability to support his village and the Church.

h. Ainiu Johnny Ah Fook, a 63-year-old Matai of Leualesi, Leauva'a who asserted on 26 February 2024, that he had he had a "huge banana plantation", a taro plantation, breadfruit and coconut trees as well as flower gardens which they planted to sell and use as their means of survival, were damaged by the Second Defendant using machetes and heavy digging machinery.

[44] It is noteworthy that most of the affidavits filed on behalf of the Applicants were from people who live in Leualesi, which is an area of described as Parcels 29 and 30, Plan 1173. These lands are customary land and the Certificate of Customary land records they are owned by the Alii and Faipule of Leauva'a. The point of their affidavits seems to be to demonstrate that the eviction of Leauva'a people has gone too far.

[45] What concerns is the potential for great danger to physical safety with allegations that knives, machetes and heavy machinery are being used to evict people from the land.

The Second Respondents

[46] The Second Respondents rely on the joint affidavit Maulolo Tavita Uelese and Ututaaloga Charlie Ulia, dated 4 April 2024, filed with the Court on the morning of the interim injunction hearing. [9]

[47] The affidavit asserts that there has been up until the last ten years or so, a common understanding between Leauva'a and Afega that the rightful owners of the land was Afega, and that the people of Leauva'a lived on the land with Afega's permission. The people of the two villages coexisted without conflict. Maulolo and Ututaaloga say change to this arrangement came about

[9] Affidavit Aulolo Tavita Uelese Amosa and Ututaaloga Charlie Ulia, dated 4 April 2024

because Leauva'a challenged Afega's ownership of the land. Their evidence is as follows:[10]

> From 1963, families from both villages – Leauva'a and Afega – were in agreement that those from Leauva'a were living on these lands with the permission of Afega as Afega were the rightful owners. Because of this common understanding, there was no conflict between the two villages as the question of ownership of the lands were not disputed and each knew where they stood with the other. The catalyst for the relatively recent decisions from 2013 onwards when Leauva'a challenged Afega's ownership of these lands and kept challenging that ownership.

[48] The Second Respondents by Maulolo and Ututaaloga confirm that the date when the Court's order, presumably that made in LC 9480 P 20, on 8 March 2024, would be executed by the Police on 5 April 2024.

[49] The Second Respondents did not offer any other evidence, nor seek an adjournment to adduce further evidence.

The law

[50] An interim injunction is an equitable remedy, which lies in the inherent jurisdiction of the court.[11] The applicable principles that are applied are well settled by the authorities: *American Cyanamid Co v Ethicon Ltd*;[12] *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*;[13] *Tagaloa v Mataafa*.[14] They are:

(a) whether there was a serious question to be tried;
(b) the balance of convenience; and
(c) where the overall justice lied.

A serious question to be tried?

[51] In describing what is meant by this phrase, Davison CJ in *Klissers* said:[15]

> The threshold question in each case must be whether the plaintiff has established that there is a serious question to be tried. In order to determine that question the Court must consider—first, what each of the parties claims the facts to be; second, what are the issues between the parties on these facts; third, what is the law applicable to those issues,

[10] Above para 2
[11] *AB v MN* [2017] WSSC 79, at para 63
[12] *American Cyanamid Co v Ethicon Ltd* [1975] UKHL 1; (1975) AC 396.
[13] *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries* Ltd [1985] 2 NZLR 129.
[14] *Tagaloa v Mataafa* [1996] WSSC 18
[15] Above n 13 at 133.

> and, fourth, is there a tenable resolution of the issues of fact and law on which the plaintiff may be able to succeed at the trial: see Shotover Gorge Jet Boats Ltd v Marine Enterprises Ltd [1984] 2 NZLR 154 at 157; (1983) 4 IPR 516 at 519 (HC). In American Cyanamid Lord Diplock said at AC 406–7; All ER 509–10:
> "... where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing of the application for an interlocutory injunction is incomplete. ...
> "It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations."

Is there a tenable resolution of the issues of fact and law on which the Applicant may be able to succeed at the hearing?

[52] To answer this question, I need to consider the nature and scope of the legislative changes to the Constitution and the LTC in 2020 and the Applicants challenges.

The amendments made to the Constitution and to the Land and Titles Act

[53] Mr Fong submitted that since the commencement of the Constitutional Amendment Act 2020, on 5 January 2021 and the Land and Titles Act 2020 on the 15 March 2021, the Supreme Court ceased exercise of jurisdiction in respect of Part IX of the Constitution pertaining to all matters of Land and Titles. Accordingly, the applications by the Applicants before this Court are untenable at law for want of jurisdiction. Mr Fong submitted that in the First Respondent's submission, that it is *unequivocally clear that the Supreme Court no longer has jurisdiction to entertain judicial review matters arising from Part IX of the Constitution pertaining to land and titles.*

[54] Ms Toailoa endorsed and adopted Mr Fong's submissions.

[55] The principle Constitutional provisions were relied on by the First, and Second, Respondents were:

> Article 4:
>
> **4. Remedies for enforcement of rights - (1) Except for judicial review matters arising from the proceedings in Part IX Land and Titles Courts, any person may apply to the Supreme Court by appropriate proceedings to enforce the rights conferred under the provisions of this Part.**
>
> **(2)** The Supreme Court shall have power to make all such orders as may be necessary and appropriate to secure to the applicant the enjoyment of any of the rights conferred under the provisions of this Part. (emphasis added)

Article 70

70. Jurisdiction of the Supreme Court - (1) <u>Except for Part IX Land and Titles Court and the laws administered thereunder</u>, the Supreme Court shall:

(a) have such original, appellate and, revisional jurisdiction; and

(b) possess and exercise all the jurisdiction, power, and authority, which may be necessary to administer the laws of Samoa. (emphasis added)

Article 104C(6)

(6) The Land and Titles Court of Appeal and Review in particular shall have jurisdiction to hear and determine:

(a) an appeal from a decision of the Land and Titles High Court the procedures and grounds of such petition as provided by an Act; and

(b) an application for judicial review or a review of a decision of the Land and Titles Court or the Land and Titles High Court the procedures and grounds of such petition as provided by an Act.

[56] Mr Fong also referred to ss. 50, 57 of the Land and Titles Act 2020. I will discuss these sections in more detail, shortly. In his written submissions that Mr Fong submitted:

26 Having considered the above, we submit that the wording of the Constitution and the LTA 2020 are clear and unambiguous, with the intention being that the Supreme Court no longer has jurisdiction to entertain judicial review matters arising from Part IX of the Constitution.

27 We need only look at the nature of the legislative amendments introduced by the CAA 2020 and the LTA 2020 as proof. By virtue of the passage of the 3 Acts, the Land and Titles Court System was completely restructured. It changed from being a 2 tier system to one of 3 tiers with the establishment of the LTCAR. The jurisdiction has been extended to now include Judicial Reviews and final interpretation of provisions of the Constitution (matters which were previously under the jurisdiction of the Supreme Court).

28 The composition of the LTC has also changed with the removal of the Chief Justice as the Head of the Land and Titles Courts and the exclusion of the Chief Justice from the Komisi responsible for appointments of Judges.

29 The Constitutional amendments also prescribed that a Komisi, as established by an Act, will advise the Head of State regarding all matters to do with the appointment, removal and suspension of al Judges of the LTC (except the President). Previously under the LTA 1981, Judges were appointed by the Head of State on the advice of Cabinet upon the recommendation of the Judicial Service Commission.

30 For all intents and purposes, it is unequivocally clear based on the wording of the Constitution and relevant legislation that Parliaments intention was for the LTC to be a stand-alone Court capable of dealing with and issuing decisions relating to judicial review and fundamental breaches arising from judicial review proceedings

[57] Ms Toailoa adopted these submissions as well.

Is there a serious issue to be tried?

[58] There are three LTC decisions that are under challenge. Two decisions were delivered after the legislative changes were made to the Constitution and Land and Titles legal system, and are therefore, at least initially, subject to the legislative changes.

[59] The third decision was delivered in 2018, well before the legislative changes.

[60] Mr Fong submits that given the legislative amendments; the Supreme Court does not have jurisdiction to consider these challenges. In other words, there is no tenable resolution of the issues of fact and law on which the Applicant may be able to succeed at the hearing.

[61] The argument appears to me to be overly bold. In the first place, the key decision being challenged was made in 2018, and at that time the legislators had not brought in the privative clauses the First and Second Respondents rely.

[62] Any claim, title, right or interest created or vested under the LTA 1981 were not affected by the repeal of that Act by the LTA 2020 – see s.67. Further, s.25(1) (b)(c) Acts Interpretation Act 2015 provides:

> **25. Effect of repeal** - (1) The repeal or expiry of an Act does not affect:
> (a) …; or
> (b) an existing status or capacity; or
> (c) a right, interest, or title already acquired, accrued, or established, or any remedy or proceeding in respect of the right, interest, or title.

[63] There is no limitation of time within which to bring a judicial review claim, other than for reasons of unacceptable delays in bringing a claim, and so it may be possible for the Applicants to proceed with their challenge to the 2018 decision – as being in breach of Part II of the Constitution. There is in relation to the 2018 a tenable resolution of the issues of fact and law on which the Applicant may be able to succeed at the hearing.

[64] With respect to the two decisions that were made following the legislative changes, the question would be whether the ousting of the Supreme Court's jurisdiction with respect to judicial review matters that may arise from decisions made by the Land and Titles Court, at whichever tier, is consistent with the terms of the Constitution which established the Supreme Court as Samoa's court of general jurisdiction, possessing and exercising all the jurisdiction, power, and authority,

which may be necessary to administer the laws of Samoa.

[65] There can be no doubt that these are important constitutional issues – they are serious issues.

[66] There is no substance to Mr Fong's concern that given there are now two legal systems that it would be inappropriate for this Court to grant something that the LTC did not grant – namely a stay. If an interim injunction were granted by this court in relation to a decision that the Court had jurisdiction to make – such as the 2018 decision the Supreme Court must continue to administer the law in accordance with its mandate that existed at the time, no matter how it might impact today's legal arrangements.

[67] Although I consider that there is a tenable pathway for the Applicants to succeed at a hearing in relation to the 2018 decision, it may be important in the circumstances of this public profile and volatility of this case to look more widely to ask whether there any other tenable pathways that arise from the facts but which support a viable cause of action?

[68] I am conscious of the First and Second Respondents applications to strike out the Applicants claim for want of jurisdiction. And, in *McNeely v Leamosina Corporation Limited*[16], the Court of Appeal held that a pleading should be struck out if the Court is satisfied that even on the most favourable interpretation of the facts pleaded or available, the plaintiff could not succeed in law. In that case, the Plaintiff was given the chance to extensively amend its claim to take into account viable causes of action that arose from the facts of the case.

[69] The same kind of approach may be taken in this case. Whilst the three LTC decisions are challenged upon the basis of alleged breaches of the fundamental rights contained in Part II of the Constitution, the 2018 decision may also be capable of being the subject to an application for judicial review at common law.

[70] The Court of Appeal decision in *Penaia II v Land and Titles Court*[17] has had a profound influence on the application of the law of judicial review in Samoa. With reference to the Land and Titles Act 1981, the Court held:

> 16. Both the language and provenance of ss34(2), 70 and 71 point to stringent exclusion of judicial review save to the extent permitted by the Constitution. So too does the importance of the role of the Land and Titles Court that is recognised in the significance accorded to by the Constitution to the subject-matter of its exclusive jurisdiction, namely Matai title and customary land, each held in accordance with Samoan custom and usage and with the law

[16] *McNeely v Leamosina Corporation Limited* [2019] WSCA 12.
[17] *Penaia II v Land and Titles Court* [2012] WSCA 6.

relating to custom and Articles 100 and 101(2). Moreover "law" is defined as custom and usage which has acquired the force of law in Samoa (Article 111).

17. Even without ss 34(2), 70 and 71 there would be powerful reasons for the courts of general jurisdiction to be reluctant to intervene in disputes arising from decisions of the Land and Titles Court. The first principle of justice is that a court be competent to decide the case. The *raison d'être* of the Land and Titles Court is to provide that competence, bringing to disputes concerning Samoan custom and usage the expertise of Judges versed in such matters so they can evaluate what answer is most in keeping with the justice of the case according to Samoan values. Such expertise can be gained only from a life-time's exposure to Samoan culture, which in the courts of general jurisdiction may be, and in this Court, as constituted for this appeal, is wholly absent. The recent decision of the UK Supreme Court in *R(Cart) v The Upper Tribunal* [2011] UKSC 28, where the courts of general jurisdiction declined save within very narrow limits to exercise judicial of a powerfully competent tribunal chaired by a member of the Court of Appeal, has obvious analogy with the Land and Titles Court whose President has the qualifications we have recounted at [13] above. But the courts of general jurisdiction in that case did not lack, as do we, the basic linguistic and cultural skills which are possessed by the Court here sought to be reviewed.
18. When one adds to the analysis ss34(2), 70 and 71 the case for judicial reticence becomes overwhelming. We are confirmed in that conclusion by decisions of the Chief Justice to that effect.
19. It is unnecessary for us to consider whether there might be some exceptional case for which recourse might be sought in the common law. The present case could not be characterised as entailing such breach of fundamental decencies as to raise such an issue. So the decision turns on whether Mulitalo Penaia can point to some breach of a Fundamental Right stated in Part II of the Constitution.

[71] Applications for judicial review before the legislative amendments were therefore confined breaches of the Fundamental Rights stated in Part II of the Constitution. But, the Court of Appeal also left open the possibility for a reconsideration were there an exceptional case for recourse in the common law.

[72] Arguably, this may be that exceptional case.

[73] The circumstances of this case involve two large villages, with hundreds of people, families and parts of communities who are to be evicted from land where they have lived and thrived on for their sustenance and incomes for some 50 years, upon the basis of a decision that appears to be contrary to law. It is the legal authority of the eviction which is being challenged. The LTC legal system headed by the LTCAR cannot now or in the foreseeable future hear their application for leave to appeal the eviction decision or the appeal itself. It is difficult to conceive of a more desperate situation.

[74] For the purposes of the serious issue question, there appears to be a tenable resolution of the issues of fact and law on which the Applicants may be able to succeed at the hearing, on the basis of

the 2018 decision being unlawful.

Where does the balance of convenience lie?

[75] In this part of the inquiry, I consider whether the balance of convenience favours the granting of an interim injunction.

[76] I have not seen any evidence from the Second Respondents to say that the evictions must happen **now** – just over a week on from Easter, after over 50 years of the peaceful and consensual coexistence of people from both Afega and Leauva'a. As noted earlier, the joint affidavit of Maulolo and Ututaaloga suggest that the reason behind the eviction is due to the Alii and Faipule of Leauva'a asserting ownership of the land. Whilst I have no reason to doubt the evidence, it does not explain why the eviction must be carried out now, before a superior court has had the chance to look at the legality of the 2018 decision.

[77] The majority decision of the LTC in LC 9480 P20, dated 13 March 2024, to give effect to the 2018 order for eviction, identified the final eviction date to be 5 April 2024. However, it was and is possible for the Second Respondents to seek a later date – perhaps the date of 8 August 2024, which was preferred by the dissenting Judge Tauiliili S. Solomona Auelua, or a date even later than that.

[78] I am satisfied on the only evidence before the court that, even before the Police led eviction planned for 5 April 2024 takes place, a significant destruction of property and crops owned by people who identify as being from Leauva'a, although they say they are not the people identified in the 2018 decision as being subject to the order for eviction, has already occurred. The deponents from Leualesi, point to the personal costs to them – their loss of income, the effects of the evictions on their livelihoods, and the threat to their personal safety. The way in which the people at Leualesi were treated signals the likely outcome of further evictions.

[79] The Applicants have filed an undertaking for damages, should they not succeed with their proceedings. This means that if there is damage or loss that arises out of the granting of the interim injunction, that the Applicants will pay such damages and or costs as may be awarded by the court. The Second Defendants have not challenged to the undertaking.

[80] If however the Applicants succeeded, and there was no legal basis on which the evictions could be carried out, then it is unclear whether any of the costs of eviction would be recoverable and from whom. These costs may perhaps run into the millions. Whilst the plantations and other

vegetation should eventually regrow, the fact that they have been damaged means an immediate financial loss of income for the growers. Those losses will continue until the plantations are producing again and depending on the type of plantation, some of those crops may take years to return to their current production level.

[81] I am satisfied that the balance of convenience favours the making of the interim injunction. There is no evidence that the evictions must take place now or before a hearing of the substantive issues, and weighed against that is the damage the evictions have already caused, some of which may never be compensable in money, and here I am thinking of the effects of evictions being enforced by Police, on children and young people caught up in this dispute.

Overall interests of justice

[82] If the Applicants succeeded in their claim, (1) in relation to their Part I and II challenges before and after the legislative changes, or (2) at common law, then the 2018 decision would be declared unlawful and invalid. The 2017 decision of the Court of Appeal would therefore prevail, and this would mean the people of Afega, despite owning the land, are unable to lawfully evict the people of Leauva'a from their land. There would be a return to the pre-eviction arrangement, and this may give the opportunity for the Matai of these villages to meet to discuss and agree a way forward.

[83] Mr Fong sought to rely on the decision of His Honour Justice Vaai in *Ioane-Cleverley & Ors v Land and Titles Court & Ors*.[18] The case involved an application by Luatupu Ioane-Cleverley and others. They sought a declaration from the Supreme Court that certain documents they said the Land and Titles relied on were allegedly fraudulently generated. The learned Judge noted that during the hearing counsel for the plaintiffs, Ms Ponifasio, informed the Court that the plaintiffs agreed and consented to withdraw their motion for judicial review but that they wished to still pursue their application for a declaration. His Honour noted Ms Ponifasio's submission that in her view the terms of s.57(1) LTC 2020, rendered the continuation of the judicial review proceeding in the Supreme Court as an academic exercise.

[84] The passage Mr Fong cited in his submissions from the *Ioane-Cleverley* decision at paragraph 38 sums up the mood of the decision, which for convenience I refer to below:

> In pursuing the declaration sought, the plaintiffs are asking this Court to determine and pronounce favourably for them on a question of fact which will enable the Court of a different jurisdiction to rule in favour of the plaintiffs.

[18] *Ioane-Cleverley & Ors v Land and Titles Court & Ors* [2022] WSSC 10

> Such intervention on the part of this Court in the business of another Court would be contrary to the spirit of the Act. The order sought is one of the issues which the Land and Titles Court of Appeal and Review will determine when it considers the judicial review proceedings. The Act does not permit this Court to embark on a fact finding exercise to determine whether the questioned documents are genuine or not.

[85] The question of fact referred to in the first sentence is to the issue of whether the documents were genuine. The Court's decision in *Ioane-Cleverly* was not a judicial review decision. Mr Fong's point is that s.57(1) LTC 2020 applies to the present proceeding in that just as the Supreme Court in *Ioane-Cleverley*, in the spirit of comity, referred the proceeding to the LTCAR, so should this court with the present proceeding.

[86] There are two reasons as to why I do not accept Mr Fong's submission;

(a) The parties in Cleverley withdrew their judicial review proceeding in the Supreme Court and filed it with the LTCAR. The present Applicants' applications for judicial review continue in this court, subject to a determination as to jurisdiction. The present Applicants previously filed an appeal with the LTCAR and are in terms of the process, having been declined leave to appeal by the LTC (by the Deputy President) they are awaiting the opportunity to seek leave from the LTCAR. Respectfully, an argument that this court should simply sit on its hands with the present proceeding, because of comity to a court that is not operating and has no discernible prospect of operation, is not appealing, and therefore rejected.

(b) The second reason is that the facts in this case is quite unlike those in Cleverley, and so you cannot say that the reasons for the judgment in Cleverley should be applied to the facts in this case. The imminent mass eviction of families and the removal of their homes, buildings, personal effects and crops, together with the risk of public disorder and physical harm make this a case is particularly unsuitable to be left for a court which exists in name only.

[87] Both Ms Fuimaono in *Ioane-Cleverly* and Mr Fong and Ms Tuailoa in this case argue that s. 57 of the LTC 2020 means that decisions of the Supreme Court are not binding on the three tiers of courts in the Land and Titles Court – the Land and Titles First Court; the Land and Titles High Court and the Land and Titles Court of Appeal and Review.

[88] Let me set out s. 57 for convenience:

> **Supreme Court and Court of Appeal Decisions not binding:**
> (1) The decisions of the Supreme Court and Court of Appeal are not binding

> on the Land and Titles First Court, Land and Titles High Court or Land and Titles Court of Appeal and Review.
> (2) All decisions of the Supreme Court and the Court of Appeal on matters the subject of the jurisdiction of the Land and Titles Court issued and delivered prior to the commencement of the Constitution Amendment Act 2020 and this Act, shall not bind the Land and Titles First Court, the Land and Titles High Court and the Land and Titles Court of Appeal and Review.
> (3) All rights or interests created or vested by the decisions referred to in subsection (2) shall subsist.

[89] The scope of s. 57(1) is not as wide as contended by Mr Fong – that the phrase "the decisions" means all decisions of the Supreme Court and Court of Appeal. That is because of the existence of s. 57(2), refers to the decisions of the Supreme Court and the Court of Appeal on matters the subject of the jurisdiction of the Land and Titles Court **issued and delivered prior** to the commencement of the Constitution Amendment Act 2020 and the LTC 2020 shall not bind the three tiers of Land and Titles court. Under Mr Fong's interpretation, s.57(2) would be completely unnecessary.

[90] In my respectful view, the decisions of the Supreme Court and Court of Appeal which are not binding are those which concern causes of action that arise after the commencement of the Constitutional Amendment Act 2020, or which have been delivered by these courts before the Constitutional Amendment Act and the LTC 2020.

[91] If this is the correct then way to interpret ss. 57(1) and 57(2), then it would seem that s.57(1) does not apply to situations like the present - where a cause of action arises before the legislative changes (saved by the legislative changes), but is not the subject of a Supreme Court or Court of Appeal decision, and is brought to the Supreme Court or Court of Appeal after the legislative changes. In other words, the law that applies to causes of action that arise before the legislative changes is the law that is in force at that time. The Parliament had the opportunity to provide for this type of case, but it did not.

[92] Support for the view I have taken can be found in the passage from *Cleverly* cited above. It is implicit in Justice Va'ai's reasoning that pre legislative change issues were matters within the jurisdiction of the Supreme Court, but that as a matter of judicial comity the Supreme Court may refrain from determining those matters - such as a declaration concerning the authenticity of documents to be used in proceedings that are discontinued in the Supreme Court and filed in the new LTC court system.

[93] Standing back from the minutiae of the jurisdiction issues, it is my respectful view, that there are significant constitutional issues which are relevant in this proceeding. These include the

constitutionality of s.57 itself, the constitutionality of the privative clause in Art. 4, particularly given the non-operational LTCAR. It is difficult to attribute to Parliament the intention that they intended the people in the position of the Applicants to suffer the robustness of eviction, even though their legal rights have not yet been exhausted through no fault of theirs be exercised. The Respondents' position is clear enough and protected by the many earlier decisions of the LTC and the Land and Titles Appeal Court – Afega own the land, and the issue for them will be if and when they can take full possession again.

[94] It follows that in my respectful view the interests of justice fall in favour of the Applicants and the granting of an interim injunction.

DECISION

[95] Having applied the principles to determine the question of whether an interim injunction should be granted, the three factors – a serious issue to be tried, the balance of convenience, and the overall interests of justice, lead me to the conclusion that an interim injunction should be granted pending the resolution of the issues in this proceeding.

[96] The Supreme Court accordingly orders that the enforcement of the 2018 LTC decision and consequential directions given in 2024 by the LTC in LC 9480 P20 be injuncted, pending further order of the Court.

[97] Section 59 of the LTA 2020 provides as follows:

> **Enforcement of Decisions and Orders of the Court:**
> (1) A decision or order of the Court shall be enforced in and by the Supreme Court or, as the case may be, by the District Court.
> (2) A sealed copy of the decision or order to be enforced under this section is to be filed in the Supreme Court, or the District Court.

[98] Following the hearing on 4 April 2024, I invited counsel to give me their views on the operation of this section. Ms Chang filed a memorandum submitting that:

> 4. c) Namely, it would be irrational to read into section 59 a requirement that the Supreme Court must first issue a decision of approval in relation to the LTC judgment when sections 56 and 57 clearly states that the Supreme Court cannot review in any way (such as that proposed by the Court in the email received) a LTC decision and that furthermore such an attempt by the Supreme Court to try to review or veto or approve an LTC decision is not binding on any LTC decision.
>
> d) The decisions of the LTC are final in themselves and can be enforced on their own merits without any further requirement that the Supreme Court give its approval.

[99] Mr Fong in his memorandum noted the Supreme Court decision in *Meredith Ainuu Lawyers v Muagututagata Ah Him*[19] where the Chief Justice ruled that s. 74 of the LTA 1981, the predecessor to s. 59 LTA 2020, determined that the LTC has not power to enforce its own decisions or orders. That the enforcement of such decisions or orders is with the Supreme Court or District Court as the case may be.

[100] What this inevitably means is that the requirements of s. 59 LTA 2020 need to be met before a LTC decision order can be enforced. According to Mr Fong, the parties have not filed a sealed copy of the LTC 2023 decision with the Supreme or District Courts, the duty to file a sealed copy of the LTC decision lies with the Parties – in this case the Second Respondents.

[101] I therefore direct that the officers of this court and that of the District Court who are responsible for enforcing decisions or orders of the LTC are made aware of the terms of the interim injunction that is granted in this case. I further direct that a copy of this decision be forwarded to the President of the Land and Titles Court and the Commissioner of Police,

[102] Costs are reserved as part costs in the cause.

[103] The resolution of the substantive issues in this matter are to be dealt with on an urgency basis, and I will issue a Minute dealing with case management matters within the week.

Perese C.J.

CHIEF JUSTICE

THE SEAL OF THE SUPREME COURT SAMOA

[19] *Meredith Ainuu Lawyers v Muagututagata Ah Him* [2006] WSSC 55.