



 **Ombudsman**
T O N G A

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OMBUDSMAN FINAL REPORT ON THE COMPLAINT BY

MAKALITA TUFUI

CASE NO. OMB 17/38

Whether the decision in 2016 by the Ministry of Lands & Natural Resources to allow Makalita Tufui to fortify a town allotment in Popua while her application for said allotment was pending was reasonable.

04th May 2018

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EXCECUTIVE SUMMARY

1. Mrs. Makalita Tufui (complainant) is 49 years of age and lives at Popua. The complainant works as a domestic housewife and is married to Sione Tufui. They have 10 children of which 6 are boys and 4 are girls. Mr. Sione Tufui is the registered holder of the town allotment on which the family is residing.
2. On 25 February 2016, the complainant submitted a grant application for an allotment in Popua with the Ministry of Lands and Natural Resources (the Ministry). While her grant application was pending, the complainant on the 4 May 2016 requested the Ministry to fortify the concerned plot. The Ministry approves this request and the complainant started fortifying the land with about 7 truckloads of clay and rocks on the same day.
3. On the 5 May 2016, the Ministry received a complaint from Mrs Heimoana Lavemai and thereafter directed the complainant to halt fortification. The Ministry then offered the complainant an alternative of another new plot in Popua on 18 November 2016 as a remedy for the costs she had incurred on the plot. The complainant did not accept the offer and insisted that the Ministry pay the costs of \$15,000. The Ministry refused to pay the costs.
4. The complainant refused the offer of the alternative plot and insisted on pursuing with her claim of the concerned plot. This became the basis of her complaint to my Office on 27th March 2017.
5. The investigation culminated in a hearing being called on the 21st and 22nd of November where we heard from the complainant and relevant officers from the Ministry including the Chief Executive Officer Rosamond Bing.
6. After reviewing comments from the Ministry to my provisional report on 22 January 2018, I have incorporated both of the Ministry's response and my feedback on it.
7. On that note, I am recommending four (4) things in this Report pursuant to section 18 (3) of the Ombudsman Act 2001 (the Act)-

Firstly, that the Ministry acts to finalize the grant application of the complainant;

Secondly, that the Ministry complies with its policies in terms of conducting site visits and provide proper advice to the public of its established policies.

Thirdly, that the Ministry documents all its internal correspondences (including Ministerial decisions) and policies and advise the public adequately;

Lastly, that the Ministry reports to me within **two months** of the date this report is finalized to provide a follow up report on the recommendations.

BACKGROUND

8. The complaint was received on the 27th March 2017.
9. I assigned the investigation to my Investigation Team who undertook the investigation and corresponded with the complainant and the Ministry and included meetings.
10. A referral letter was sent to the Ministry on 12 May 2017.
11. On 3 August 2017, my investigation team received a written response from the Ministry.
12. As the facts of the complaint were contested by both parties I called a number of hearings on the 21 & 22 November 2017 and on 28 February 2018 pursuant to section 15(2) of the *Act*.

THE OMBUDSMAN'S ROLE

13. Under section 11 of the Act, the Ombudsman has the authority to investigate the administrative acts, decision, omissions and recommendations of an officer of a Ministry in his capacity as an officer of that Ministry.
14. My investigation is not an appeal process nor am I conducting a judicial proceeding. I would not generally substitute my judgment for that of the decision maker. Rather, I consider the substance of the act or decision and the procedure followed by the Ministry. I then form an opinion as to whether the act or decision was one the Ministry could reasonably make or that the procedures followed by Ministry was properly followed.
15. My role in pursuant with section 18 (1) and (2) of the Act is to consider the administrative conduct and decisions of the Ministry and to form an independent opinion on whether that conduct was fair and reasonable.

THE 2015 LEASE APPLICATION

16. On or about early 2015, the complainant approached the Minister about her intention to lease the concerned plot in Popua¹. The complainant advised the Ministry that she was applying for the lease for her daughters. The Minister approved her request in 2015 and directed the complainant to submit a lease application.
17. While her lease application was being processed, the Ministry reviewed their records to ensure that the concerned plot was available for lease. When doing so, Mr. Moala, the designated Ministry official conducted a search and found that the concerned plot had been allocated to a Mr. Siosaia Pinomi in the 1980s when Popua Township was first subdivided by the former Minister, Hon Tuita².

¹ Rosamond Bing, CEO, Ministry of Lands & Natural Resources, 3 August 2017, *Complaint by Makalita Tufui Case No/OMB 17/38.pg.1.*

² Semisi Moala, Land Registrar, MLNR, 22 November 2017 at 9:00am, *Transcript of Sworn Statement, Ombudsman Conference Room.*

18. As per process, Mr. Moala advised both the Minister and the complainant of his findings and that the lease application would be on hold until Mr. Pinomi was found. The Ministry asked the complainant at this point in time if she knew Mr. Pinomi and the complainant advised that she didn't³.

19. It was an undisputed fact that the complainant lodged a lease application.

THE 2015 GRANT APPLICATION

20. During 2015, the complainant was persistent in visiting the Ministry to follow up her lease and had even gone to the Minister's residential home for that purpose. Due to her persistency, the Minister directed through his secretary, Mrs. Paongo to advise the complainant "if she has a son of legal age, she could submit a grant application under her son's name"⁴.

21. On 25 February 2016, the complainant submitted a grant application under her son, Mr. Uatesoni Tufui⁵. While her grant application was being processed, Mr. Moala gave the complainant the same advice that her application would be pending until Mr. Pinomi was found as per process. At this point, Mr. Moala again asked the complainant "if she had known Mr. Pinomi and the complainant again confirmed that she had no knowledge of him"⁶.

22. A copy of the grant application was produced by the Ministry as part of its evidence at the hearing.

23. While the grant application was pending, the Ministry carried out a search for Mr. Pinomi. In the hearing the Ministry explained the normal procedure for conducting a search is by –

a. *"usually asking them (applicants) to contact the allocated person or find their whereabouts, but if its involved serious legal issues then we do it ourselves to ensure we have communicated"*.⁷

b. In this case, the Ministry on numerous occasions asked the complainant about Mr. Pinomi and the complainant denied any knowledge of him or his whereabouts.

24. I note that the Ministry did not produce any evidence of its search policies being documented.

THE FORTIFICATION OF THE CONCERNED PLOT

25. On or about 4 May 2016, the complainant approached the Ministry about her request to fortify the concerned plot⁸. In this instance, she talked to two officials in the Office, Mrs. Paongo, the Minister's Personal Assistance on land related matters and Mr. Moala.

³ Ibid no.2.

⁴ 'Ana Mafualu Paongo, Senior Registrar/PA Minister MLNR, 21 November 2017 at 11:30am, *Transcript of sworn statement*, Ombudsman Conference Room.

⁵ Ibid no.1. Attachment A – Foomu Tala'api 'a Uatesoni mo'ui he Lotu Tufui, 25 February 2016.

⁶ Ibid no.2.

⁷ Rosamond Bing, CEO, Ministry of Lands & Natural Resources, 21 November 2017 at 3:00pm, *Transcript of Sworn Statement*, Ombudsman Conference Room.

⁸ Ibid. No 4.

26. According to Mrs. Paongo, who conveyed the complainant's request to the Minister, the Minister made an oral approval for the complainant to go ahead and fortify the land. In addition, Mr. Moala stated that the complainant approached him with her request and stated that the Minister had given his approval so he just advised her to go ahead if that is the Minister's decision⁹

THE DECISION TO HALT FORTIFICATION

27. Following the Minister's approval, the complainant on the same day started fortifying the concerned plot with clay and stones.

28. On the 5 May 2016, the Ministry received a complaint from Mrs. Heimoana Lavemai, who claimed to be Mr. Pinomi's sister¹⁰. Mrs. Lavemai approached the office and met with the Minister in person on which she explained to him that she is the custodian of the concerned plot under the consent of her brother.

29. Mrs. Lavemai further states that she is staying nearby to where the concerned plot is situated and had close relationship with the complainant who knew that she was the caretaker for the concerned plot.

30. The Minister on the same day directed Mr. Moala to arrange a visit to the complainant's home. The Minister and Mr. Moala made a site inspection to the concerned plot on that same evening and notified the complainant and her husband to stop all activities on the concerned plot as there was a forthcoming claim¹¹.

31. On the 5 May visit, Mr. Moala reported 2 truckloads of clay poured on the plot as opposed to the 7 truckloads of clay and stones claimed by the complainant.

32. Notwithstanding the notice to stop the work, the complainant failed to comply and continued to fortify the land¹².

33. Further to that, the Ministry confirmed to have a set procedure for carrying out site inspection which involves a site inspection pink form which should be filled out by the inspection official¹³. Mr. Moala admitted that he did not fill out this form when he went with the Minister on the 5 May 2016 to conduct the inspection in Popua¹⁴ and this was a failure on his behalf.

⁹ Ibid No. 2.

¹⁰ Ibid No.4.

¹¹ Ibid No. 2.

¹² Makalita Tufui, complainant, Popua, 21 November 2017 at 10am, *Transcript of Sworn Statemnt*, Ombudsman Conference Room.

¹³ Ibid No.7.

¹⁴ Ibid No.2.

THE CLAIM FROM MR PINOMI

34. On 1 June 2016, the Ministry received a letter from Mr. Pinomi relating to the concerned plot. The content of the letter stated Mr. Pinomi's wishes for the land to be looked after by his sister, Heimoana Lavemai and his intention to authorize her to register the concerned plot under his own name.
35. On receipt of this letter, the Ministry advised the complainant and continued to hold her grant application

THE OFFER OF AN ALTERNATIVE PLOT

36. On 14 November 2016, the Ministry received a compensation claim from the complainant requesting for the Ministry to pay the costs for the work she had done on the land¹⁵. The Ministry advised her that she would need to take this matter to court in order to decide the liability of the Ministry¹⁶.
37. On or about 18 November 2016, the Minister called a meeting with the complainant and Mrs. Lavemai to discuss the concerned plot with the view to settle the matter¹⁷. The Minister in this meeting made an offer of an alternative plot in Popua to either one of them who is willing to take and forgo the concerned plot. Neither the complainant nor Mrs. Lavemai took up the offer. Mrs. Lavemai asserted that her brother promised her that he would give the concerned plot to his son, who is named after him. Whereas the complainant claimed that she had fortified the concerned plot. In addition, the government road had not yet reached the new plot so a lot more work would be needed to ready that plot for habitation.
38. The Minister then decided in this meeting that the complainant and Mrs. Lavemai go back and try to reconcile amongst themselves and would meet again when they are on agreed terms¹⁸.

SWORN STATEMENT OF HEIMOANA LAVEMAI

39. I summoned Heimoana Lavemai of Popua on 28 February 2018 to give her understanding on the issues of this complaint. Mrs Lavemai is the sister of the allocated person, Mr Pinomi.
40. She states that she knew the complainant very well as they both go to the Free Wesleyan Church of Tonga. On the same note, both the complainant and her are in the same women fellowship group in their church.

¹⁵ Ibid No. 1, Attachment C, Makalita Tufui, 14 November 2016., Tohi ki he Minista Fonua, Savea & Koloa Fakaenatula.

¹⁶ Ibid No.7.

¹⁷ Ibid No. 2.

¹⁸ Ibid No. 2

41. Mrs Lavemai states that she could not recall having any direct conversation with the complainant about the concerned plot and that it belonged to her brother. However she believed that the complainant should have been aware of that fact, for several reasons below;
- a. They had close friendship with the complainant and her family in Popua. She described their close friendship as like “they are staying under one roof”.
 - b. The complainant could have heard around in Popua about the plot belonging to her brother as majority of the residents in Popua knew of this.
 - c. One of the complainant’s daughters is adopted by a lady who is the complainant’s neighbor. This lady knew very well that the concerned plot is her brother’s as she is on the same church with both the complainant and her.
 - d. Her husband often talked with the complainant’s husband about the concerned plot and at one time they were planning to plant taro leaves on the concerned plot.
42. Mrs Lavemai further confirmed having no prior knowledge of the complainant’s intention to claim the concerned plot until the day she started the fortification.
43. She again corroborated the statement by the Ministry about making a complaint about the complainant’s fortification and latter submitting a letter of claim on behalf of Mr Pinomi.
44. She further recalled her meeting with the Ministry and the complainant but could not recall talking about an alternative plot as an offer. She admitted hearing about the alternative plot from the complainant’s husband who later approached her at her home.

THE MINISTRY’S POSITION AFTER THE HEARING

45. A hearing was called on 21 and 22 November 2017 to clarify the position of the Ministry in this complaint.
46. The Ministry¹⁹ holds the following views:
- a. That the Ministry had an internal policy in 2015 in relation to the reallocation of Popua. The Minister made known to the staff the need to confirm and make sure that families in Popua who have had allotments are not given additional allotments until all families are confirmed to have had one. The Ministry confirms at the hearing that this internal policy was never communicated to the complainant.
 - b. That the Ministry “*if proved to have made a mistake would offer an alternative plot as a remedy and only does so in very exceptional circumstances*” which is what it had done in this case.

¹⁹ Ibid No.7.

- c. That the Ministry has set procedures for reporting site inspection, including a site inspection form that needs to be filled by the inspection officer. The Ministry admitted that it failed to fill out this form when it visited the complainant on 5 May 2016.
- d. That as per process, the Ministry advises the applicants to assist in locating an allocated person, which it had done in this case, or landholder unless the pending application involves serious legal issues then the Ministry does the communication to ensure it is done.
- e. That this complaint could have been resolved at the outset had the Senior Ministry officials been included in the chain of communication rather than the complainant moving around the office and getting conflicting advice.
- f. That the Ministry had initially made an offer of the alternative plot as a way forward of settling this issue but none of the parties accepted it. The Ministry further confirmed that the alternative plot is still available and on hold for the complainant to apply for subject to the approval of the Minister.

THE COMPLAINANT'S POSITION

- 47. On 21 November, a hearing was called and the complainant was summoned to answer some questions in relation to her complaint.
- 48. After hearing her story, I advised the complainant that she should decide on a way forward for her complaint as it was clear that the Ministry was waiting on her and Mrs. Lavemai to resolve the matter either by one of them taking up the offer from the Ministry of the alternative plot. The other alternative was that she could pursue her claim for the concerned plot but that it was unavailable.
- 49. The complainant reiterated the issues with her costs to fortify the concerned plot but she was reminded that she had done so at her own request. She was advised to provide a final response of a way forward for her complaint by Friday 24 November.
- 50. On 23 November, the complainant visited my office and advised that she had considered her options and was willing to withdraw her claim from the concerned plot and take up the offer by the Minister of the alternative plot²⁰.

OMBUDSMAN OPINIONS

- 51. In respect of the 2015 lease application, I am satisfied that this was an undisputed fact.
- 52. In respect of the 2015 grant application, I find that the decision by the Minister to submit a grant application for the concerned plot was reasonable.

²⁰ 'Elisiva Lui, Visit Record of Makalita & Sione Tufui on 23 November 2017 at 4pm, Office of the Ombudsman Consultation Room

It should be understood by the complainant that the decision to submit a grant application is not final and at that point there is no inference that grant will be given unless the Minister endorses the application.

53. In respect of the Ministry's initial decision to fortify the concerned plot, I find that to be unreasonable. While I note that such decision was made at the persistent request of the complainant, the issue remains that the Ministry should not make that decision based on the persistency of the complainant. In addition, Mr Moala from the Ministry admitted to his reliance on the oral representation by the complainant and advised her to go ahead with the fortification. I conclude that decisions by the Ministry should be made on firm statutory grounds and reasonable considerations rather than mere persistent conduct or an oral representation by the complainant.
54. In respect to the Ministry's decision to halt fortification, I conclude from the evidence of both parties and later corroborated by Mrs Lavemai that the Ministry did notify the complainant to stop all activities on the plot and she failed to comply but continued with the fortification. At this point I am satisfied that the complainant was acting to her own detriment when she failed to abide by the Ministry's instructions.
55. In respect to the completing claim by Mrs Lavemai on behalf of Mr Pinomi, I find that the Ministry followed process when it withheld the complainant's application and tried to locate Mr Pinomi.
56. I further note the denial by the complainant that she knew Mr Pimoni but admitted to knowing his sister Mrs Lavemai. I find the conduct of the complainant and her evidence to this effect not credible. I considered Mrs Lavemai's evidence over hers when she states that they had close relationships and that it was common knowledge that the land in question was her brothers.
57. In respect to the offer of the alternative plot, both the Ministry and the complainant have the same accounts on this offer whereas Mrs Lavemai did not recall discussing the offer at their meeting with the Minister. She was only aware of the offer from the complainant's husband weeks after their meeting with the Minister. I consider the accounts of the Ministry and the complainant to be consistent and reliable as the Ministry also produces evidence of minutes of that meeting.
58. Again, I reviewed the comments made by the Ministry to my provisional report that they have withdrawn the offer regarding the alternative plot as the Minister holds the view that the complainant has rejected the offer when she complained to my Office.
59. In light of the alternative offer, I am satisfied that the complainant's complaint to this office is an act of rejection of the offer as she insisted on her initial claim on the concerned plot. Although the complainant after the hearing changed her position and was willing to take up the alternative offer, a final decision on that aspect is entirely vested on the Ministry.
60. While it is clear that the Ministry had received the competing claim from Heimoana Lavemai and has now located Siosaia Pinomi, the Ministry has yet to decide on the complainant's grant application. I am of the view that the Ministry should now be in a position to act and finalize the application from the complainant.

RECOMMENDATIONS

I am recommending four (4) things in this Report pursuant to section 18(3) of the Ombudsman Act 2001-

Firstly, that the Ministry acts to finalize the grant application of the complainant;

Secondly, that the Ministry complies with its policies in terms of conducting site visits and provide proper advice to the public of its established policies.

Thirdly, that the Ministry documents all its internal correspondences (including Ministerial decisions) and policies and advise the public adequately;

Lastly, that the Ministry reports to me within **two months** of the date this report is finalized to provide a follow up report on the recommendations.

RESPONSE FROM THE MINISTRY TO THE PROVISIONAL REPORT

61. On 24 January 2018, I received a letter from the Ministry disagreeing with sections of the report. I respond as follows –

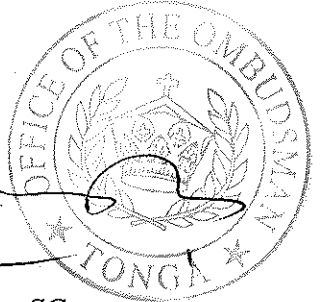

62. I note the suggestion from the Ministry in paragraph 4.b that it could have been useful to summarize my findings in relation to the decisions of the Ministry and the conduct of the complainant. In response I have provided my opinions based on my findings as stated on page 11 and 12.

63. I also note the Ministry's concern in paragraph 4.c that Heimoana Lavemai should have been summoned before the hearing to verify the complainant's knowledge on the allocation of the allotment. This was important as this was the principal reason for the delays in granting the complainant's application. In response, I did summon Mrs Lavemai on 28 February 2018 to provide evidence which I have considered.

64. I further note in paragraph 5 of the response about the Ministry disputing paragraph 32(f) of my report in relation to the offer of the alternative plot still being available to the complainant. I have reviewed the recorded transcripts of the hearing and found the correct statement by the CEO of the Ministry to be "*its still an option for her but the Minister's decision on it is a different matter*". Again in the statement of Mr Moala, he stated that the "*Ministry still holds on to the plot until the matter is settled and waiting on the parties to come back*".

65. I also note that the Hon. Minister has now directed this offer to be withdrawn based on the view that the complainant's complaining to my office is an indication that she had rejected the Offer. I find that the complainant complaining to my Office is a clear indication that she does not accept the alternative land offered by the Minister.

66. As required under section 18 (5) of the Act, a copy of the response from the Ministry is attached to this Report as Annex 1.

The seal of the Office of the Ombudsman, Tonga, is circular. It features a central emblem with a crown and a shield, flanked by two figures. The text "OFFICE OF THE OMBUDSMAN" is written around the top inner edge, and "TONGA" is written at the bottom inner edge, with two stars on either side.

Aisea H. Taumoepeau, SC
Ombudsman

04th May 2018



MINISTRY OF LANDS AND NATURAL RESOURCES
Government of Tonga

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'AISEA TAUMOEPEAU S.C.
Ombudsman
Nuku'alofa

22 January 2018

Dear Mr. Taumoepeau,

Complaint from Makalita Tufui against Ministry of Lands and Natural Resources :
Case No. OMB 17/38 : Provisional Report

1. Thank you for your letter dated 14th December 2017 and the attached Provisional Report. I also appreciate the opportunity you have given the Ministry to respond and I apologize for the delayed response.
2. The Ministry agrees with Recommendations 2.
3. The Ministry agrees with Recommendation 3 and is in the process of completing its Land Administration Manual which has been drafted over the past 5 years. In addition, the regular weekly radio program hosted by the Ministry will be emphasizing procedural issues for the public's information.
4. With regard to Recommendation 1, the Ministry is of the view that –
 - a. the alleged loss suffered by the complainant was caused primarily by her own actions including her blatant disregard of the advice and directions given to her by the Ministry and her denial of any knowledge of the allotment already being allocated to a specific person. The complainant has acknowledged her actions during the hearing.
 - b. it would have been useful to summarize the findings of the Ombudsman relating to the decisions of the Ministry and the conduct of the complainant.