Mr. Sisifa

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IN THE COURT OF APPEAL OF TONGA
LAND JURISDICTION
NUKU'ALOFA REGISTRY

AC 21 of 2015
[LA 14 of 2008]

08/04/16

BETWEEN : FILILANGI NAULU

- Appellant

AND : 1. 'AMANAKI TUPOU
2. HON. HAVEA LASIKE
3. MINISTER OF LANDS

- Respondents

Coram : Moore J
Handley J
Blanchard J
Tupou J

Counsel : Mr. L. M. Niu SC for the Appellant
Mr. S. Tu'utafaiva for the First & Second Respondents
Mr. S. Sisifa SC for the Third Respondent

Date of Hearing : 31 March 2016

Date of Judgment: 8 April 2016

JUDGMENT OF THE COURT

[1] This appeal concerns whether the Minister of Lands, the third respondent, fulfilled his duty, in the circumstances of the case, to make reasonable inquiries to determine whether there was any impediment to the making of a grant of a tax allotment to the first respondent, 'Amanaki Tupou. The appellant, Fililangi Naulu, says that his father, Tevita Naulu, had occupancy of the allotment and that it was not available. Tevita brought this proceeding along with Fililangi but died shortly before the hearing in the Land Court.

The facts

[2] The allotment in question is known as Lokoloko and is in the Lakepa estate. The estate holder, Hon. Lasike, is the second respondent.

[3] Siosaia 'Oto Tupou ('Oto) was granted the allotment in 1948 but lived until 2001 in England. In his absence and, as Scott J found, with his permission Tevita Naulu went on to the land, lived there in a fale and an uncompleted house and cultivated it. Tevita and his family ceased residing on the land in about 1993 but he continued to cultivate it. Fililangi Naulu, Tevita's oldest son, lives in the

United States but a younger brother took over the planting from Tevita and is still working the land.

[4] There was evidence that after 'Oto returned to Tonga, Tevita offered to "return" the allotment to him but was told to stay on the land "and continue to carry out your obligation .... to look after your children". 'Oto was not however, willing to surrender the land so that it could be re-granted to Tevita.

[5] 'Oto died in November 2002 without an heir able to claim the allotment. The land reverted to the estate holder. Tevita approached Hon. Lasike who was aware that he had long been cultivating 'Oto's land. He asked Hon. Lasike if the land could be registered in his name but was told that the land had reverted and would be re-granted as provided for in the Land Act. Hon. Lasike's evidence was that he told Tevita that he could plant kava on the land. He denied promising Tevita the land at any time and said he knew nothing at all about Fililangi. He considered that the provisions of the Land Act favoured an applicant who was descended through the male line. 'Amanaki is related to 'Oto through the male line whereas Tevita was related through the female line.

[6] 'Amanaki grew up on the Lakepa estate. His father's land is alongside Lokoloko. About four years after 'Oto's death, on 5 November 2006, and while Tevita himself was still cultivating the land. 'Amanaki made an application for a grant under s.43 of the Land Act. His application was supported by Hon. Lasike who certified that there was no impediment to a grant of the allotment to 'Amanaki. 'Amanaki met with the Minister of Lands. He told the Minister that Tevita was farming the land. His evidence was that he had looked at the land before making his application and that the fale and the uncompleted house were no longer there. Only a concrete slab remained.

[7] The only application, formal or informal, for the land was from 'Amanaki. The Ministry prepared a brief for the Minister but no inspection was made of the land. A Lands Registration Officer, W. Vea, gave evidence that the Ministry's policy was not to inspect unless some dispute in regard to the land was brought to their attention. Otherwise they relied on the estate holder who in this case had certified that there was no impediment to 'Amanaki's application being granted.

[8] Six days after receiving the Ministry's brief the Minister approved the granting of the allotment to 'Amanaki. A deed of grant was

issued to him on 3 March 2007. He had already given Tevita notice to quit, evidently anticipating the grant. Tevita did not cease cultivating the land and on 24 June 2008 the present proceedings were issued.

The case for the appellant

[9] What Scott J described as Mr. Niu's "central submission" for Fililangi, and the only ground pursued in this Court, was that the Minister was in breach of his duty to make reasonable inquiries before issuing the grant to 'Amanaki. If he had done so he would have discovered that Tevita was, as Scott J held, in lawful occupation. Accordingly, it was submitted to Scott J and to us, the land was unavailable to be granted. The grant was vitiated by the failure to make due inquiries and should be set aside. It was submitted that the matter should be remitted to the Minister for reconsideration after giving rival claimants an opportunity to be heard.

The Land Court judgment

[10] Scott J said that lawful occupation by someone other than the potential grantee does not render land unavailable. But the Minister must consider whether it is available before making a grant. The extent of the inquiries he must make depended upon

the circumstances. As the Judge said, "where there are competing applications or when the position is not at all clear then a detailed investigation has to be carried out". In the present case, the Judge said, there was only one applicant and the land had reverted to the estate holder. The person cultivating the land (Tevita), who did not himself apply for a grant, was doing so with the consent of the estate holder who had supported 'Amanaki's application. Scott J was satisfied that adequate consideration was given by the Minister to the question of whether the land was available for grant and had correctly concluded that it was.

[11] Fililangi's claim, as heir to Tevita, was therefore dismissed.

Discussion

[12] We consider that Scott J erred in coming to this conclusion. The continued cultivation of the land by Tevita and his occupation of it for that purpose with the consent of Hon. Lasike may have constituted a practical impediment to 'Amanaki's application. The land, upon proper investigation, may have been found not to be available in fact for a grant to him. He certainly had the estate holder's support but s.34(2) makes it clear that, although the Minister must consult the estate holder and hear his objections to a proposed grant, in the event of disagreement the decision is for

the Minister to make, subject to review by the Land Court within three months. The Minister can therefore override the estate holder if he considers after proper investigation that the land is occupied by another and in the circumstances should not be treated as available for grant to an applicant who has the estate holder's support.

[13] In this case there was no competing application by Tevita. We do not accept that his approach to Hon. Lasike should be taken to be an informal application. Any application must be directed to the Minister, even if it is not accompanied by a statement of support from the estate holder. However, the absence of an application by Tevita is not fatal as the Minister was still obliged to make such inquiries as the information before him made reasonably necessary.

[14] The leading case on this Ministerial obligation is *Tafa v Viau* [2006] Tonga LR 287. In that case a grant of a town allotment had been made to Tafa when it was in the lawful occupation of the Viaus who had built a house on it. The Minister was not aware of this when he made the grant. This court determined the case on the basis of what it found to be the true construction of the Act. It referred to sections, including s.7 and s.50, in which reference was

made to the question of whether a piece of land is "available" to be granted. The scheme of the Act, the Court said, made availability "an essential requirement" before a grant can be made. Therefore the discretion conferred on the Minister (in that case under s.50(e), in the present case under s.50(a)) must take account of availability.

[15] The Court drew attention to two aspects of the Minister's functions and duties which, it said, combined to require him to take steps, which must be reasonable in the particular circumstances, to ascertain whether the land is in fact not subject to some other claim that might be an impediment to a grant or make it unavailable. The first was the need for him to sign a declaration that there was no impediment. He could not do so if he simply did not know because he had made no sufficient inquiry.

[16] In the case of a grant from a hereditary estate, however, the declaration is made by the estate holder. Nevertheless, even if the estate holder supports the application and makes the declaration in Form 11 of Schedule IX, we are of the view that the Minister may be put on inquiry or further inquiry by some other matter that comes to his attention and is in apparent contradiction of the estate holder's declaration.

[17] The second aspect to which the *Tafa v Viau* Court drew attention was that, as it said:

> *"... the administrative decision to make the particular grant cannot properly be made in the absence of the same inquiry in any case where the Minister does not actually know whether the land is available, or whether any competing claim has been appropriately resolved." (at [12])*

[18] The Court stressed that the Minister does not have to make the inquiries personally and may rely on his officers "but, if he does so, and they fail to perform the task properly, a person affected may have a remedy for that failure as if it were a failure of the Minister." (at [12])

[19] In *Tafa v Viau* reasonable steps had not been taken by or on behalf of the Minister to acquaint him with relevant information about the land so that a most material factor, the occupation of the land and the building of the house, was not taken into account in determining whether the land was available.

[20] In the present case, as we have noted, a declaration of no impediment was made by the estate holder. There was no competing application from Tevita. If there was nothing else to put

the Minister or the officer handling the application on alert it might be reasonable for the Minister to rely upon the estate holder's certification, though better practice would be for an inspection of the allotment to be made in every case and anything of concern it revealed followed up. We say this in the hope that such a change of practice may reduce the incidence of litigation challenging the making of a grant.

[21] In this case, there was some further, and we think significant, information available to the Ministry, namely that it had been told by the applicant, 'Amanaki, that Tevita was farming the land. That surely should have alerted the Ministry to the fact that there was some form of occupancy, which might well involve the growing of crops. This might not be a short-term project. We were told from the bar that kava, which the Hon. Lasike had suggested Tevita grow on the land, takes five years to grow. In our view the Ministry should have investigated what was happening on the land by way of farming and only then, in the light of what it found, should the Minister have decided whether the land was available. Occupation of land does not necessarily mean it is unavailable. That will depend upon the nature and history of the occupation.

[22] In the circumstances of the case the Minister did not discharge his duty to make reasonable inquiries about the availability of the land and consequently the grant to 'Amanaki was invalidly made. The Minister is directed to cancel the grant. He must then make a fresh decision after giving both 'Amanaki and Fililangi the opportunity to be heard. If Fililangi wishes to avail himself of this opportunity he should make a formal application for a grant of the allotment, which we understand he has not yet done.

[23] We should emphasize that all we have decided is that the Minister failed to make adequate inquiries. We should not be taken to be indicating any view on whether 'Amanaki or Fililangi should have the grant. That is a matter for the Minister to decide, after hearing from them both, making such further inquiries as may be reasonably necessary and then assessing the competing applications.

[24] We should add also that we are not determining the "real question" left unanswered in *Finau v Minister of Lands* [2012] Tonga LR 127 at [16] concerning whether the Minister's determination as to availability (after due inquiry) is one of fact or law.

Result

[25] The appeal is allowed and directions given to the Minister as set out in para [22] above. The appellant is entitled to his costs in this Court and in the Supreme Court against the first and third respondents, to be taxed if not agreed. No order for costs in either Court is made against the second respondent.

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Moore J

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Handley J

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Blanchard J

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Tupou J