Second Respondent

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

AC 18 of 2015
[LA 11 of 2014]

BETWEEN : 1. SOSEFO VAITAFE PALU
2. TUPETAIKI MANUOTALAHA
- Appellants

AND : 1. TALANOA NIKOLA SETE
2. MINISTER OF LANDS
- Respondents

Coram : Moore J
Handley J
Blanchard J
Tupou J

Counsel : Mr. S. Tu'utafaiva for the Appellants
Mrs. M. T. P. Palelei for the First Respondent
No appearance for Second Respondent

Date of Hearing : 30 March 2016

Date of Judgment: 8 April 2016

JUDGMENT OF THE COURT

[1] The issue on this appeal from the Land Court is whether the Minister of Lands was empowered by the Land Act to cancel a deed of grant to the first respondent, Talanoa Sete. If that cancellation was invalid, it will follow that a grant subsequently made to the appellant, Sosefo Palu, was unlawful and so is the occupation of the land by both appellants, as Lord President Paulsen has found.

The facts

[2] In 1948 a town allotment at Ma'ufanga, known as Mamakoula, was registered in the name of 'Etuate Palu. Sosefo is 'Etuate's son and heir.

[3] 'Etuate died in 1958 when Sosefo was 10 years old. In 1959 the Minister appointed a trustee to hold Mamakoula on trust for Sosefo.

[4] Penisimani Sete, the father of Talanoa, was 'Etuate's younger brother. He and his wife raised Sosefo as if he were their own child and an older brother of Talanoa.

[5] On 26 May 1971, and therefore after Sosefo was of full age, the Minister of Lands directed a subdivision of Mamakoula into two allotments of roughly equal size. One of them, Lot 1, the subject of this case, was to be for Penisimani. The other, Lot 2, was for Sosefo who had already been given a tax allotment at 'Eua by Penisimani.

[6] Sosefo says that neither he nor his trustee consented to the subdivision of Mamakoula in this way. However, he proceeded to build a house on Lot 2 around 1977 and the Lord President noted the absence of any evidence that Sosefo ever used or occupied Lot 1. The Lord President was satisfied that Sosefo was aware of the subdivision and said that his conduct was consistent with having given up rights to Lot 1.

[7] It was the unchallenged evidence of Talanoa that in 1980 Sosefo requested him to let the second appellant, Tupetaiki Manuotalaha, occupy Lot 1, which was also consistent with Sosefo recognising Talanoa's rights as Penisimani's heir.

[8] Although the Minister had allocated Lot 1 to Penisimani, it had not been registered in his name. In 1987, with the written consent of Penisimani who stated that he wished to surrender his interest, Talanoa applied for registration to himself of Lot 1. A deed of grant for Lot 1 was issued to Talanoa on 24 November 1989. At the same time a deed of grant of Lot 2 to Sosefo was prepared but it was not signed by the Minister.

[9] Tupetaiki had continued in occupation of Lot 1 with Talanoa's permission. In 2010 Talanoa asked him to pay rent. Talanoa also did some fencing work. That seems to have led to the current dissension. Sosefo made representations to the Minister who, in May 2013, cancelled Talanoa's 1989 deed of grant. The Minister said he considered that the 1971 subdivision had been unlawful because of the existence of the trust (which was not formally ended until 2003). The Minister told Talanoa that he would find him another allotment. Talanoa indicated his acceptance of the Minister's decisions but it seems to us unlikely that he was properly informed about his rights in the matter when he did so. The Minister then issued a posthumous grant to 'Etuate for the

whole of Mamakoula and on 13 January 2014 it was transferred to Sosefo.

[10] In this proceeding Talanoa has successfully challenged in the Land Court the lawfulness of the actions of the Minister in cancelling his grant and issuing a grant to Sosefo. Sosefo and Tupetaiki appeal against the Land Court's order directing the Minister to cancel the deed of grant of Mamakoula held by Sosefo and to re-issue the deed of grant of Lot 1 dated 24 November 1989 to Talanoa.

The position of the Minister

[11] Although the Minister opposed Talanoa's claim in the Land Court, he has not appealed. He should have been named as a respondent to the appeal by Sosefo and Tupetaiki, but was not. We directed that an amended notice of appeal, including him as a respondent, be filed and served. That was done and the Solicitor General has written to the Court advising that the Minister accepts the decision of the Land Court that he had no power to cancel Talanoa's grant.

Discussion

[12] We need not give an account of the Lord President's reasons for concluding that the Minister lacked power to cancel Talanoa's deed of grant as in all essential respects we agree with them.

[13] Section 19(1) of the Act makes the Minister the representative of the Crown in all matters concerning land in the Kingdom. As the Lord President said, it is fundamental that in purporting to exercise a statutory power the Minister must act within the limits of the power conferred upon him.

[14] The Minister is given by the Act an express general power to grant allotments to Tongan subjects duly entitled thereto by law (s.19(2)). His powers are administrative. In making grants of land he performs an administrative function. He also has some express powers or obligations to cancel existing grants exercisable, or required to be exercised, only in particular and limited circumstances. Thus where a new allotment is granted on the removal of a holder from one district to another, s.73 requires the Minister to cancel the deed of grant previously held by that person. And, as occurred in *Fifita v Minister of*

Lands (1972) 3 Tonga LR 45, where under s.49 a grant is "null and void" because of excess area the Minister is under a duty to give effect to the section.

[15] But the Minister is given no express general power to cancel a deed of grant that has not been voluntarily surrendered by the holder with Cabinet consent under s.54. That is understandable as the circumstances in which cancellation might be sought by someone other than the holder are very likely to involve a dispute concerning entitlement to the land. Resolution of such a dispute would take the Minister beyond his administrative role under the Act and might require him in some cases to adjudicate in a dispute involving his own actions or those of a predecessor. Therefore, it is only the Land Court that is empowered by the Act, under s.149(1)(b), to hear and determine all disputes, claims, and questions of title affecting any land, which s.150 authorises it to do "on the application by any person claiming to be interested or on the application of the Minister".

[16] It follows that, like the Land Court, we do not accept the submission of the appellants that the Minister must be taken,

in the absence of an express power, to have an implied power to cancel a grant that he considers to have been issued unlawfully. Such an implied power, far from being suggested by what is said expressly or being necessary for the Minister to perform the functions given to him would, in our view, be inconsistent with the division of functions and powers under the Act between the Minister and the Court. If the Minister considers that a grant has been made unlawfully, and the holder, fully apprised of his rights, is unwilling to execute a surrender of it, the Minister's proper course is to apply to the Land Court for its cancellation, provided, of course, that such an action is not statute barred by s.170.

[17] Section 170 reads:

> ***Limitation of action***
> *No person shall bring in the Court any action but within 10 years after the time at which the right to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims then within 10 years next after the time at which the right to bring such action shall have first accrued to the person bringing the same.*

[18] The statutory bar applies only to court actions. But an exercise of the asserted Ministerial power of cancellation, if it existed, would, when done more than 10 years after the

making of the grant, involve a circumvention of s.170. To take the present case, it would not have been possible for the appellants, or indeed the Minister himself, to challenge Talanoa's title under his deed of grant in an action brought in the Land Court once the 10 year period had elapsed, which it did in 1999. How then can it be consistent with the statutory scheme for the Minister to have an implied power to cancel the grant, leaving it to Talanoa to review that decision in the Land Court? That would deny Talanoa the protection given to his title by s.170.

[19] As the Lord President remarked, citing *Lew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 (PC) at 563, when a period of limitation has expired, a potential defendant should be entitled to assume that he is no longer at risk of a stale claim. Certainty of land titles is of the utmost importance. It would be undermined if the Minister could cancel them without reference to the Court and without being controlled by any limitation period.

[20] For these reasons, we find that the Minister never had any power to cancel Talanoa's grant and we affirm the directions to the Minister made by the Land Court.

[21] The Land Court ordered Sosefo and Tupetaiki to vacate the land within 21 days. That time is now to run from the date of delivery of this judgment. In all other respects the appeal is dismissed.

[22] The appellants are to pay the first respondent's costs of his appeal, to be taxed if not agreed.

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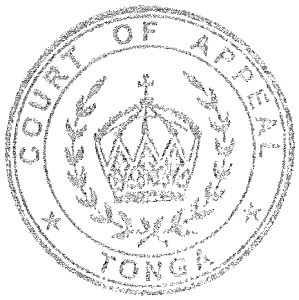
Moore J



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Handley J

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Blanchard J

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Tupou J