

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

AC 3 of 2019
[LA 12 of 2018]

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06/09/19

BETWEEN : MINISTER OF LANDS

- Appellant

AND : 1. KENETI MATEASI PENITANI
2. KILISITINA FUIMAONO
3. PATELESIO FUIMAONO

- Respondents

Coram : Whitten P
Handley J
Blanchard J
White J

Counsel : Mrs. L. Folaumoetu'i SC Attorney General for Appellant
Mr. D. Corbett for First Respondent
No appearance for Second and Third Respondents

Hearing : 2 September 2019

Date of Judgment : 6 September 2019

JUDGMENT OF THE COURT

Introduction

- [1] Sitting in the Land Court, Niu J, having raised the point himself without being urged to do so by a party to this litigation, has held that the system used for registration of leases in Tonga for the past 92 years or so – since 1927 – does not comply with the Land Act (Cap 46.02) and registrations under that system have been invalid. The Judge has ruled that, although such a lease - of which there are thousands - may have been validly granted, it is not until validly registered effectual to pass or affect any interest in land: s.126 Land Act. That is the position, in the view of the Judge, because s.127 (and in particular its inclusion of “Book” and “Folio” nos.) has not been complied with:

127. Registration of a lease or of a permit as the case may be shall be effected by the Minister filing one original thereof in the register of leases in his office and by endorsing the other with the following memorial of registration:

Registered the day of20.....

Register of Leases (or Register of Permits *as the case may be*)Book: Folio:

.....

Signature of Minister

The lease (or permit as the case may be) endorsed with the memorial of registration shall be delivered by the Minister to the person entitled thereto.

- [2] The Minister of Lands appeals against the order made as a result at this ruling.

The judgment below

- [3] Niu J had been hearing formal proof of an unopposed claim by the plaintiff and first respondent to this appeal, Mr. Penitani, for an order that the defendants/second and third respondents, Mr & Mrs Fuimaono, vacate a tax allotment at Ma’ufanga which the plaintiff has been leasing from the owner,

Richard Mafi. Mr Mafi was granted the tax allotment and it was registered in his name on 10 April 2017. No challenge has been made to that registration.

[4] On 21 July 2017, a lease of the allotment for 20 years from that date approved by Cabinet was granted to Mr Penitani. No challenge is made to the grant. The Minister registered the lease as No.9075 on the same day. It is that registration that has been held to be invalid. As a consequence of that ruling the plaintiff has not been unable to progress his claim against the second and third respondents and obtain the orders that he is seeking. All the Judge has found he is presently entitled to under his grant of lease is the right to have the lease registered, which in the Judge's view has not yet occurred. Niu J therefore joined the Minister as a third party to the proceeding and ordered him to effect the registration in the manner the Judge considered would comply with s.127. The Minister was required by the Judge to write into "the 2 originals of [the] deed of lease registered as lease no.9075, the Book no. in which the deed would be bound and the Folio no. which [the] deed will constitute in that book and he shall sign and date those entries on the deeds accordingly".

[5] The process of reasoning that led the Judge to make this order was as follows. Having correctly found that Richard Mafi had been lawfully registered as holder of the tax allotment and that he could therefore lawfully grant a lease of the whole of it to someone else in accordance with s.56 of the Act, ie with the approval of Cabinet, Niu J observed that by reason of s.126 a lease is not effective until registration in the manner prescribed in s.127.

[6] Niu J said that it was clear that "the same way in which deeds of grants of allotments are registered is to be used for registration of leases, hence the requirement for "Book.....Folio...." "He then described the process actually being used by the Ministry:

But it appears that what is being done by the Minister with registration of leases is to bind the deeds of leases which are kept but instead of having the books numbered, and the pages of the leases therein numbered numerically therein, and the number of the book and of the page of the book being written on the deed of the lease "Book ...

Folio...”, he has a separate book which he calls the register of leases in which he has entered all the particulars of all the leases that have ever been granted in Tonga from the beginning up to now in numerical order. In that register of leases, the lease granted to the plaintiff has been registered as lease no.9075, on 21 July 2017.

Mr. Semisi Moala, Land Registrar of the Ministry of Lands, gave evidence and stated that all the deeds of lease have been bound in books but the pages or folios of those books are not numbered. On the front cover and spine of each book is written the number of the deed at the front and the in the book in numerical order from the number of the first deed to the number of the last deed in it. He said that in all, there are some 80 books of the deeds, and that the deed of this lease of the plaintiff, together with other deeds of lease, have all been put together but not yet bound into a book yet, until, he said, the Ministry would have 50 leases before they can be bound into a book like the last book., book no.79.

Mr. Moala said that to date, there are 4 books which constitute the register of leases. All the other 3 books are all full of the list [sic] and particulars of all the leases there are in the Kingdom. The particulars of the lease of the plaintiff, ie. Lease no.9075, have been entered as no.9075, in book no.4 of that register.

- [7] The Judge concluded from this evidence that the book which the Minister has used and which he has called the “Register of Leases” is a book wherein he has entered only the particulars of the lease and that he has given the leases the numerical number by which he has entered them in it. Niu J said, however, that this book was not the register of leases which s.127 requires the Minister to keep:

The register of leases required by s.127 is the deeds of lease themselves, not the particulars only of the leases. S.127 requires that the deeds of leases are bound in a book as the register of those leases, with the number of that book and the page or folio of each lease being written on each deed as “Book ... Folio ...”, and the deed for the lessee being handed to the lessee with the “Book Folio ...” numbers being already written on it. So that if one looks at the lessee’s deed, he would see the number of the book and of the page in which that deed of lease has been registered, without the need for him to check any book in the Land Office to see if the deed has been registered. But with the register of leases which the Minister now keeps, all that the deed which the lessee has is a register number. If he checks that number, he only finds that it is a number in a book of

particulars of leases. He does not find the deed in that book. He has to look for one of some 80 books to find the book with the numerical number by which his deed has been registered. Those 80 books are not numbered and the pages are not numbered. Although they contain the deed of lease, they are not the register because they are not numbered as required by s.127 and the Minister has a different book which he calls the register of leases.

[8] Accordingly the Judge said, the lease had not been registered in accordance with s.127 and therefore, because of s.126, it was “ineffectual to grant [the plaintiff] any interest in the land on which the defendants reside.”

[9] The Judge said that he had received a memorandum from the Acting Attorney General on behalf of the Minister which explained that the Ministry does not use the memorial in s.127 because, it says, the form of the deed of lease is prescribed in Schedule IX of the Act (Form 3) which instead requires a memorandum as follows:

Registered in the Registry of Leases of the Tonga Government in the
Office of the Minister of Lands, Nuku'alofa, on the day
of the month of 20.....
No
.....
Minister of Lands.

The memorandum from the Acting Attorney General contended that the requirement for a memorial in s.127 was administrative, and not a substantial procedural matter that was mandatory.

[10] Niu J's answer to this submission was that the prescribed form in Schedule IX was provided for in s.124 (1):

124(1) All applications, leases, sub-leases, transfers and permits shall be in the forms prescribed in Schedule IX with such variations as circumstances may require and in the cases of leases, sub-leases, transfers and permits shall be in duplicate.

That meant, Niu J said, that the forms in the Schedule must be varied as required and, in the case of leases, must be varied as required by s.127:

Otherwise, the form, which is prescribed by regulation made under the Act, would result in changing the requirement of the Act itself.

[11] Prior to 1927, when s.127 was enacted, the regulation of leases (and allotments) had been done by entering them in a register just like registration of births, deaths, marriages, vessels, motor vehicles etc. But after 1927, the Judge said, a separate and different system was required. The Minister had chosen, however, to continue to register leases as he had done prior to 1927. That was not a procedural error but “a substantive and substantial departure from the requirement of the Act”, making the purported registration invalid.

Submissions

[12] For the Minister, Mrs Folaumoetu'i SC, supported by Mr. Corbett, for the plaintiff, submitted that the current practice complies with s.127. The Ministry deemed, or treated, the 80 books of bound deeds of leases as the register of leases. It used the memorial provided for in the prescribed statutory form (Form 3 of Schedule IX). The use of an index to the register and of the lease number as a way to find the location of the lease met the intentions of s.127. The memorial in s.127 was not mandatory. The form of the lease, including the memorial actually used, was prescribed by s.124 and had been enacted by Parliament as part of the Land Act. It was not prescribed by regulation as the Judge had stated. The reference in s.124 to variation as circumstances required did not necessitate any variation of the memorial in Form 3.

[13] Counsel contrasted s.127 (“filing one original thereof in the register of leases”) with what was specified for the registration of tofia (allotments for nobles) in s.116, which expressly requires the tofia certificate to be bound up in a book called the register. For a lease, there was no such requirement for a book, merely for a filing in a register. Schedule IX Form 3 referred only to a “No.” or “Fika” in the Tongan language version. A unique single identification had for 92 years been assigned to each lease. All the Minister had failed to do, if there was indeed any failure, was to call that identification “Book/Folio” in the endorsement on the copy of the lease given to the lessee.

Analysis

- [14] Like the Supreme Court, we had the benefit of inspecting specimens of the records used by the Land Registry and the lease in question. The Ministry keeps what are in effect (now) four Index volumes in which it records, separately for every district, each lease, assigning it a number, and particulars of the leased land and other details. It appears to us that such index books cannot be regarded as the Register and, despite what Mr Moala may have said in his evidence, as the Attorney General has submitted, the Ministry does not so regard them. They are not intended to be more than a guide to the Register proper. They are useful to persons wishing to consult the Register and to Registry staff but are not called for by the Land Act.
- [15] What must be regarded as the actual legally required Register is a set of (now) 80 volumes of bound original leases. Volume 81 is in the course of compilation and present Registry practice is that the leases in that volume will be bound together in book form when there are 50 of them. We pause to make the obvious point that, although s.127 (if it is in fact the governing provision in all respects) speaks of the Register of Leases in terms of a "Book", that could never be strictly complied with until there are sufficient individual leases to create a book, and the legislation leaves it to the Minister to decide how many leases a book should consist of. This is an indication that not every part of the relevant provisions should be regarded as mandatory. Sensibly, a measure of discretion in some matters is left for administrative decision.
- [16] The 80 volumes must be recognised as being the Register which the Act requires be kept. They have not been numbered 1 to 80 but because, as we will explain, it is a simple matter to determine in which volume a particular lease is to be found, that again cannot be a sufficiently important non-compliance to invalidate the treatment of the volumes by the Ministry as the Register. What does distinguish each volume (Book) is that on its cover and spine the first and last numbers of the contained leases are written. So all a searcher who knows

the number of a lease has to do is to look for the volume containing the sequence of leases which includes the lease in question.

- [17] Each lease is given the number identifying it that appears in one of the Index volumes. That number is recorded in both copies of the lease on its second page in a memorandum as prescribed in Form 3 of Schedule IX (see [9] above). (A lease usually has four pages). It becomes upon incorporation in the Register a component of the Book of which it is a part. In our view, it becomes a "Folio" of that Book. A folio can mean any separately identified document in the Register Book. We repeat that it would not be sensible to deny registered status to a lease until the volume is completed by the binding together of the individual folios (leases). In the interim – a period usually of at least months and possibly more than a year – before there is a new set of 50 leases, the unbound leases are kept together as a consecutive series. That is a practical way of achieving compliance.
- [18] How then does this treatment of the leases by the Ministry measure up to the specifications of the Act? We see no way in which it does not meet the truly important requirements found in Part VIII Division III which provides for registration of leases. Section 124(1) requires that leases be in the form prescribed in Schedule IX "with such variation as circumstances may require", and in duplicate. The leases follow Form 3 and are in duplicate (the second copy being issued to leaseholder). Both copies include the memorandum required by Form 3. Thus they state the lease no.
- [19] The only possible deficiency in meeting the requirements of Division III is the failure to include in the memorandum a reference to Book and Folio nos. as stipulated in s.127. (As an aside, if that were done, and the Folio no. were to be different from the lease no., there would be non-compliance with Form 3).
- [20] This suggested deficiency, which Niu J believed to be a substantial non-compliance, stems entirely from the fact that s.127 and Form 3 of Schedule IX

create apparently inconsistent requirements. We have however explained how the Register in fact contains Books and Folios and that a Book can exist before binding into a completed volume. Was it therefore wrong for the Minister back in 1927 to adopt the memorandum specified in Form 3? We think not. That decision (not apparently challenged for nearly 100 years) was open to the Minister. The only true non-compliance with s.127 was in not endorsing the Book no. of which the lease was to form part and in not calling the lease no. a Folio no., as it in fact was. For the following reasons this cannot be regarded as a significant non-compliance leading to invalidity of the registration system.

[21] It is worth drawing attention at this point to a remark in the plurality judgment of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky v ABA* [1998] HCA 28, 1994 CLR 358 at [93] in which they recommended that the test for determining an issue of validity of this kind should be “to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid”. Furthermore, and especially apposite in the present case, the four Judges commented (at [97]) that:

Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act.

[22] The non-compliance which was particularly singled out by Niu J is that because the Registry has followed Form 3 rather than s.127 in what that section calls the “memorial of registration”, the duplicate copy of the lease issued to the leaseholder does not, as required by the section, state Book and Folio nos. for the lease.

[23] As we have explained, that appears to be of no great practical significance. The purpose of the legislation is fulfilled if, as is the case, each lease is filed in a Register and the duplicate copy is marked (numbered) so that the original can be located in the Register. As we have seen, a lease no. is given in both copies in compliance with Form 3 and there is a workable method of locating each lease in the Register. The Judge considered that the Ministry should not have

followed the form of memorandum or endorsement in Form 3. He said it should have varied that form and strictly complied with s.127 because s.124 provided that forms should be varied as circumstances required and Form 3 was “prescribed by regulation” made under the Act. In other words, the Judge was saying that the form should be varied to comply with s.127 because it did not have equal standing with s.127 and the latter must prevail. That reasoning is incorrect because the form was enacted as part of the Act. It was not a regulation. It was not the product of subordinate legislation. The Ministry was entitled to follow the form specified for leases in s.124 without variation to the memorandum it contained. We take the reference to variation in s.124 to be intended, in relation to leases, to cover a situation where some special term or qualification was needed to be included in a lease to cover a circumstance not commonly found. It would not have been intended to require a variation in respect of *all* leases otherwise such a matter would surely have been dealt with in Form 3 itself: the memorandum would have been identical to that in s.127. It seems to us, rather, that the drafter of the Act has simply overlooked s.127 when drafting Form 3, thereby creating an appearance of inconsistency. The Ministry has followed Form 3 and cannot be said to have erred in doing so.

- [24] We do not regard the non-compliance with s.127 as so significant as to justify the invalidation of nearly a century of lease registrations. Certainly, the first requirement of s.127 – filing the original in a register in the Minister’s office – was essential and had to be complied with, but the exact text of the endorsement specified in the second part of the section (after the word “and”), applicable only to the duplicate copy, was not of a significance that could possibly require the latter portion of the section also to be treated as mandatory. To do so would produce what in *Blue Sky* was called “public inconvenience” and in this case, as the Attorney General submitted, would cause chaos as thousands of leases would have to be re-called for correction of their memoranda. Issues would probably then emerge about the effect of leases not having been validity registered in past years. The stability of an already fragile registration system would be put at considerable risk.

[25] Accordingly, the Judge was wrong to find that the plaintiff's lease had not been validly registered and that s.126 rendered it ineffectual to pass or affect any interest in the allotment. His orders to the Minister must be set aside.

Orders

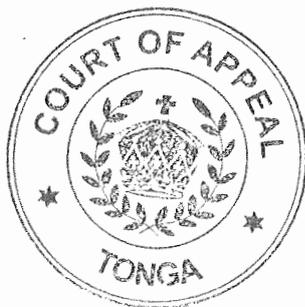
[26] The following orders are made:

- (1) The appeal is allowed
- (2) The orders made by Niu J on 21 May 2019 are set aside
- (3) The case is remitted to the Land Court for the first respondent's case against the other respondents to be heard and determined.

[27] There will be no order for costs in this Court.



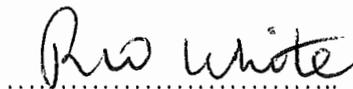
Whitten P



Handley J



Blanchard J



White J