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IN THE COURT OF APPEAL
LAND JURISDICTION
NUKU'ALOFA REGISTRY

AC 5 of 2020
(LA 22 of 2019)

BETWEEN:

KA'ILI TU'ALAU Appellant

-and-

[1] KALAUSA TU'ALAU
[2] MINISTER OF LANDS Respondents

JUDGMENT OF THE COURT

Coram: Whitten P
Moore J
Randerson J

Counsel: Mr S. Fonua for the Appellant
Mr W.C. Edwards SC for the First Respondent
Mr S.F. Sisifa SG for the Second Respondent

Hearing: 22 March 2021

Judgment: 30 March 2021

Introduction

[1] This appeal relates to town and tax allotments situated in the estate of Lavaka at Pea.

[2] The appellant is the older brother of the first respondent. A dispute has arisen between them as to who is lawfully entitled to succeed to the allotments after the death of the last registered holder on 7 June 2007.[1]

[3] Neither party applied as heirs for registration of the allotments within the 12 month period after the holder's death as required by s 87 of the Land Act. In consequence, the allotments reverted by virtue of that section to the estate holder on 6 June 2008.

[4] The allotments were later granted by the second respondent to the first respondent with the consent of the estate holder. At all material times, the first respondent had been in possession of the allotments. Both the appellant and first respondent have since died. On

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[1] The last registered holder was another brother of the appellant and first respondent, Lotolua Tu'alau.

26 February 2021, the Lord Chief Justice ruled that the appeal would proceed in the absence of counsel representing the respective estates of the parties and that the appeal would be treated as having been brought by the appellant's estate against the first respondent's estate.

[5] The appellant's claim to be entitled to the allotments was dismissed by Niu J sitting with an assessor in the Land Court. Two issues are advanced on appeal:

(a) The appellant submits that s 87 of the Land Act is *ultra vires* principally because it is inconsistent with clause 113 of the Constitution of the Kingdom of Tonga;

(b) The second respondent was obliged to investigate whether there was an heir after the allotments reverted to the estate holder and before granting registration of the allotments to the first respondent.

The judgment in the Land Court

[6] The judgment in the Land Court canvassed all the relevant arguments and concluded that the appellant had failed to prove his claim. Niu J's key findings were:

> *[43] I agree with Mr Edwards that because S.87 has provided that the allotments are to revert to the estateholder when the plaintiff did not claim them within 12 months of his brother's death, there is no longer anything in respect of which the plaintiff is heir. There is nothing he can now claim as heir. That is the intention of S.87. It thereby renders the provisions of S.82 spent, as far as the plaintiff is concerned. Accordingly, any person can apply to be granted the allotments as his. And that is what the first defendant has done. And the Minister has, with the consent of the estateholder to whom the lands of the allotments have reverted, validly granted them to the first defendant as his town and tax allotments.*
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> ...
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> *[47] Now having considered the submissions of the plaintiff and the submissions of both defendants, I am not satisfied on a balance of probability that the plaintiff has made out or proved his claim in this action. He has failed to satisfy me that the provisions of S.87 are to be read as subject to S.82. On the contrary, I am satisfied that S.87 means exactly what it provides, namely, that the allotment reverts to the estateholder and that it no longer exists as an allotment. It can be re-granted to another person, as is the case in the present case.*

[7] The Land Court did not deal expressly with the *ultra vires* argument but it appears to have accepted the first respondent's argument that s 87 does not prohibit or take away the inheritance right of the heir but simply provides that the heir must make his claim within 12 months and, if he fails to do so, he loses it and the allotments revert to the estate holder.

[8] Niu J did not make any express finding on the appellant's argument that the second respondent was obliged to inquire as to the existence of an heir but the Court seems to have accepted the second respondent's argument that there was no such duty since there was no claim made by the heir within the stipulated 12 months.

The *ultra vires* argument

[9] The essence of Mr Fonua's argument on the first point is that clause 113 of the Constitution grants a hereditary right by male Tongan subjects to inherit allotments. The right to allotments by grant is conferred by ss 7 and 43 of the Land Act and by succession under s 82. It was submitted that s 87 of the Act is subject to s 82 and that the right to hold allotments could only be extinguished or terminated when there was no longer an heir. To the extent s 87 purported to take away that right, it was inconsistent with the Constitution and *ultra vires*.

[10] We do not accept that argument. Clause 113 of the Constitution provides:

> **113 Rights to allotments**
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> Tongan male subjects by birth of or over the age of 16 years may be granted town allotments and tax allotments out of estates granted in pursuance of this Constitution with the consent of or upon consultation with the estate holder and out of the lands of the Crown, by the Minister of Land. Such allotments shall be hereditary and shall be of such size and at an annual rent as may be determined by law. A widow shall have the right to succeed according to law, to her deceased husband's tax and town allotments.

[11] Clause 113 has the following features relevant to this appeal:

(a) It establishes a right by Tongan male subjects over the age of 16 to apply for the grant of town and tax allotments out of estates granted under the Constitution;

(b) The grant of allotments requires the consent of, or consultation with, the estate holder (or by the Minister of Lands in the case of Crown land); and

(c) Once granted, the allotments are hereditary and shall be of such size and at an annual rent as may be determined by law.

[12] Clause 113 may be regarded as foundational to the right to allotments provided for by ss 7 and 43 of the Land Act. Formal requirements for applications to the Minister are prescribed.

[13] Once granted, every estate and allotment is hereditary according to the laws of succession.[2] The relevant rules of succession are set out in s 82. There is no dispute that the appellant, as the older brother, would have been entitled to succeed as heir under s 82(c) had he applied for a grant no later than 6 June 2008. There being no application, the allotments reverted to the estate holder by operation of law on that date.

[14] It is evident that the right to succeed to allotments under s 82 is not an untrammelled right. It is conditioned by s 87 on the making of an application by a person claiming to be the heir within 12 months from the death of the last holder of the allotment. This is a strict requirement with no provision for the extension of time.

[15] It is not in dispute that if a law of the Kingdom of Tonga is inconsistent with the

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2 Section 5 of the Land Act.

Constitution as the supreme law, then it will be void to the extent of the inconsistency.[3] But we are not persuaded that s 87 is inconsistent with clause 113 of the Constitution. Section 87 does not extinguish or remove a person's right of succession conferred by s 82. Rather, the allotments are no longer available to inherit since they have reverted by law to the estate holder. As submitted by Mr Sisifa, for the second respondent, the reversion of land to the Crown or estate holder does not take away the right of a person to apply for the allotment. Rather, it allows others (including the appellant and the first respondent) to apply for the grant of the allotments.

[16] Confronting the proposition that the absence of the 12 month limit would create significant administrative and practical difficulties by indefinitely extending the time to make a claim as heir, Mr Fonua submitted that in most cases any such claim would emerge promptly. However, the facts of this case clearly demonstrate the lack of merit in this submission. It emerged that no claim was made by the appellant as heir until he issued proceedings in the Land Court in September 2019, more than 11 years after the expiry of the 12 month time limit in June 2008. In the meantime, the first respondent had applied for the allotments in April 2013 with the consent of the estate holder and became the registered owner of the town allotment in 2017 and the tax allotment in 2018.

[17] Mr Fonua raised an alternative ground to support his *ultra vires* submission. He submitted that s 87 was void under clause 82 of the Constitution because it infringed clause 4 of the Constitution which provides for one law for chiefs and commoners. Referring to clause 111 of the Constitution which prescribes the law of succession to hereditary estates and titles, Mr Fonua submitted that the Lords were treated differently from commoners because in the case of the former, there was no equivalent to the time prescribed by s 87.

[18] There are considerable difficulties in applying the "one law for all" provision in clause 4 of the Constitution. In fact, there are a number of inconsistent provisions under the Land Act applicable to nobles and commoners. To take just one example, there does not appear to be any equivalent for commoners to s 37 of the Land Act under which holders of hereditary estates may lose their rights in certain circumstances.

[19] The reality is that the Constitution itself differentiates between nobles and commoners. This necessarily arises from the complex land holding system in Tonga which provides differently for estate holders and Tongan subjects and recognises the distinct roles each of the key participants play in the system according to their respective functions and status. For example, all the land in Tonga is the property of the King who may grant hereditary estates to the nobles and titular chiefs or mataboules;[4] the law of succession for hereditary estates is set out in the Constitution;[5] and in the absence of legitimate heirs to an estate, it reverts to the King who may then confer the estate on someone else.[6] In contrast, commoners have the right to apply for allotments under clause 113 with certain limitations and conditions on the grant of allotments to Tongan male subjects; rights of succession are not set out in the Constitution but in the Land Act; and s 83 of the Land Act provides for different rights of reversion when there is no person entitled to succeed

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3 Clause 82 of the Constitution.
4 Clause 104 of the Constitution.
5 Clause 111 of the Constitution.
6 Clause 112 of the Constitution.

to an allotment, depending on whether the land is Crown land or a hereditary estate.

[20] In the end, in order to rely on clause 82, the appellant must demonstrate that s 87 of the Land Act is inconsistent with the Constitution. In circumstances where the Constitution itself necessarily differentiates between nobles and commoners, we are not persuaded that the attenuated argument advanced by Mr Fonua establishes an inconsistency of the kind contemplated by clause 82. This argument also fails.

[21] Our conclusions are consistent with the way in which the rules of succession have been interpreted and applied: see, for example, *Taufa v Vilingia, Tupouto'a v Minister of Lands*,[7] in which the Court cancelled the succession of the heir to an allotment because the claim had not been made until after the 12 month period had expired. See also the decision of this Court in *Holani v Tava*,[8] in which it was held that an application for an allotment in that case after the expiry of the 12 month period was simply an application for vacant land which was processed and granted in the usual way. The fact that the grantee's grandfather had been the registered holder of the land may have influenced the estate holder but had nothing to do with his entitlement to the grant.

[22] As counsel for the respondents submitted, the rules of succession must be determined to create certainty and the orderly disposition of land in accordance with laws.

[23] We conclude that the appellant's argument on the first issue must be dismissed.

Second issue: Duty to investigate

[24] Mr Fonua submitted that the Minister was aware from 1 August 2012 onwards that the first respondent had an older brother named Kaili who was said to be in prison in Pagopago. Advice to this effect was recorded on that date in brief records held by the Minister. It followed, counsel submitted, that the Minister was under a duty to investigate whether the appellant, as the identified older brother, wished to make a claim.

[25] This Court has held that in the period after an allotment has reverted to the estate holder under s 87, there may in some circumstances be an obligation by the Minister to undertake an inspection of the land at issue. However, this Court has held there is no requirement that such an inspection must always be carried out and that the extent of any inquiries will depend on the circumstances of each case.[9] As Paulsen LCJ said in *Finau v Finau*:[10]

> It is now well established that the Minister must make such inquiries as are reasonably necessary in view of the information before him to determine if land is or may be subject to some other claim that might be an impediment to a grant or make it unavailable.

[26] We are not persuaded there was any information before the Minister in the present case that required him to make any inspection or inquiry. To the contrary, the first respondent had been in occupation of the allotments at all material times; he had the estate holder's consent to the grant; the appellant was said to be in prison in Pagopago; no claim had

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7 *Taufa v Vilingia, Tupouto'a v Minister of Lands* [1981-1988] Tonga LR.
8 *Holani v Tava* [2003] Tonga LR 175.
9 *Naulu v Tupou and Ors* (unreported, Court of Appeal of Tonga, AC 21/15, 8 April 2016).
10 *Finau v Finau* [2017] TOLC 5, at para [41].

been made by the appellant as heir at any time since the death of the registered holder some five years before; and there was little realistic prospect the Minister would make the grant to the appellant rather than to the first respondent.

[27] There was some discussion in argument about whether a duty to investigate might arise during the 12 month period before reversion to the estate holder under s 87. There is nothing in s 87 to suggest there is any such duty. To the contrary, s 87 clearly places the obligation on an heir to bring a claim within the 12 month period. It would be a significant shift to find that the responsibility to inquire into possible heirs was effectively transferred to the Minister instead. While we would not necessarily rule out the existence of such a duty in some exceptional circumstances, we observe that the short period of 12 months in which to make a claim under s 87 would militate against the existence of such a duty on workability grounds alone. In any event, there was nothing during that period to alert the Minister to the appellant's existence. In fact, neither the appellant nor the first respondent made any claim to the allotment during that period and the first respondent was in possession of the land.

[28] We conclude that this ground of appeal must also fail.

Result

[29] The appeal is dismissed.

[30] The first and second respondents are entitled to costs against the appellant on the appeal.

[31] In the absence of agreement, the Registrar is to fix the costs payable.

Whitten P

Moore J

Randerson J

COURT OF APPEAL TONGA