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IN THE COURT OF APPEAL
LAND JURISDICTION
NUKU'ALOFA REGISTRY

AC 10 of 2020
(LA 21 of 2018)

BETWEEN:

[1] SIONE MA'AKE KAUFUSI
[2] SITIVENI KAUFUSI

Appellants

-and-

[1] LORD MA'AFU TUKUI'AULAHI
[2] MINISTER OF LANDS

Respondents

JUDGMENT OF THE COURT

Coram: Whitten P
Moore J
Randerson J

Appearances: Mr P. Piukala – Friend of the Appellants
Mr S. Taione for the First Respondent
Mrs L. Folaumoetu'i SC for the Second Respondent

Hearing: 22 March 2021

Judgment: 30 March 2021

1. This is an appeal against a judgment of the Land Court of 20 October 2020 constituted by Nui J and an assessor. The appellants were the plaintiffs in those proceedings and were seeking to establish they were the lawful heirs to a tax allotment at Tokomololo. The central legal issue was, if a brother of the holder of a tax allotment who would have been entitled to the grant of the allotment by succession is then dead and also, at that time, the brother's son is dead, whether a son of the brother's son is entitled to be granted the allotment by operation of s 82(e) of the Land Act. The Land Court concluded a grandson had no such entitlement.

2. The relevant facts are not in issue and were summarized in the judgment of the Land Court:

> *[21] Sione Kaufusi and his wife 'Ofa had several children of whom there were 6 sons in this order:*
>
> *(a) Finau, who had no children;*

(b) Filipe, who married 'Ana and had a son, Samuela. Samuela married Vika and had children of whom Sitiveni [the second appellant] was the eldest son and another son Sione, who is the [the first appellant]. Filipe held his own tax allotment at Pea.

(c) Potemani.

(d) Peni.

(e) Suli.

(f) Vili Heti who married Meliame. They had no children and they fostered Luke Fifita as their son. Luke Fifita got married and had a son, Vili Fifita. Vili Heti held his own tax allotment at Tokomololo, which is the estate of Lord Ma'afu, the first defendant, who also happens to be the Minister of Land, the second defendant.

[20] Vili Heti died in 1989. His tax allotment was transferred to his widow, Meliame, in 1991.

[21] Filipe died in 1974 and his tax allotment was transferred to his widow, 'Ana. In 1995 'Ana died and the tax allotment was transferred to Samuela in 1996. Samuela died in 2007 and the tax allotment was transferred to his widow Vika in 2008. Vika died on 17 May 2017 and the tax allotment was transferred to Sitiveni, the [second appellant] on 15 June 2017.

[22] On 2 April 2013, Meliame, widow of Vili Heti, wrote to the Minister of Lands that she wished to surrender her widow estate [there is then a discussion in the Land Court judgment of the detailed steps taken to effect the surrender] .....

[24] No claim was made by any person for the tax allotment surrendered by Meliame by 16 August 2014.

[25] On 30 October 2014 Meliame died.

[26] In late January 2015, [the first appellant] went and inquired at the Land Office about Meliame's tax allotment because she had died and he wanted to apply for it and was told to come in the following week and see the Minister himself because Meliame had already surrendered the allotment.

[27] On 4 February 2015, [the first appellant] met with the Minister and told him that Vili Heti had told him that when he and his wife Meliame would die he, [the first appellant], would have the tax allotment and that was why he came to see him. The Minister told him that Meliame had already surrendered the allotment to her foster son but the foster son had let other people farm it instead and that he, as estateholder, had taken the allotment off him.

3. Subsequent events are not relevant in addressing the central legal issue. But it can be seen that the first and second appellants were the sons of Samuela, the son of Filipe who, in turn, was the brother of Vili. That is, the appellants were the grandsons of Filipe.

4. The centrally relevant parts of the Land Act are:

Rules of successions to allotments

82. Subject to the life estate of the widow, the succession to a tax or town allotment shall be as follows:

(a) descent shall be traced from the last lawful male holder;

(b) only persons born in wedlock may inherit;

(c) the inheritance shall descend in the first place to the eldest son of the deceased holder or if such son is dead to the eldest male heir of the body of such son. If the eldest son of the deceased holder be dead without leaving any male heir of his body the succession shall devolve upon the next eldest son of the holder or if such son is dead to the eldest male heir of such son's body. If the second son of the deceased holder be dead without leaving any male heir of his body the succession shall go to the next eldest son of the deceased holder or the eldest male heir of his body and so on taking all the deceased holder's sons in succession in order of their ages;

(d) if the holder dies without leaving any son or heir male of the body of a son him surviving then any unmarried daughter of the deceased holder shall inherit for her life and if there are two or more unmarried daughters they shall inherit all together jointly for their lives. The life estate of any daughter shall terminate on her marriage or upon proof in proceedings against her in the Land Court to recover such allotment (after the manner provided in section 81 that she has committed fornication or adultery;

(e) in default of any unmarried daughter of the deceased holder an allotment shall descend to the deceased holder's brother or if such brother be dead to the eldest male heir of the body of such brother. If the deceased holder's eldest brother be dead without leaving any male heir of his body then the holder's next eldest brother shall succeed or if he be dead the eldest male heir of his body and so on taking the deceased holder's brothers in succession in order of their ages;

(f) if the holder dies without leaving any brother or heir male of the body of a brother him surviving the inheritance shall go to the eldest brother of the deceased holder's father or if such brother be dead to the eldest male heir of the body of such brother. If the eldest brother of the deceased holder's father be dead leaving no male heir of his body then the next eldest brother of the deceased holder's father shall succeed or if he be dead the eldest male heir of his body and so on taking the brothers of the deceased holder's father in succession in the order of their respective seniority;

(g) in default of brothers of the deceased holder's father or male heir of the body of such a brother the allotment if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder thereof:

Provided always that the failure of the deceased lawful male holder of any tax or town allotment to register the same under the provisions of Division II or Part VIII of this Act shall not of itself be a bar to the grant to his heir under this section, and that provided the Minister of Lands is satisfied upon enquiry that the deceased person was the lawful holder of the said allotment it shall be lawful for him to effect posthumous registration at the request of the heir.

5. The gravamen of the appellants' argument is that the expression "... the eldest male heir of his body.." in the second last line of s 82(e) comprehends any male offspring descended, through the male line, from the "...next eldest brother..." and similarly in relation to other brothers and their male offspring as referred to in the concluding words of s. 82(e). The appellants' argument went so far as to say the male heir could be the great-great grandson of the brother.

6. However this construction of s 82(e) is at odds with both the general scheme of the section as well as the language used. The general scheme is one in which lines of succession are identified but with cut-off points referable to generational status. It has been described as "the ladder of succession" see *Kilifi v Heimuli and the Minister of Lands* [1996] Tonga LR 31 at 33. Subsections 82(c) and (d) plainly limit succession rights to three or two generations. That the section is intended to operate this way, is quite obvious having regard to the provisions of s 82(g) which provides for reversion to the Crown in the event that there is no two generational succession. It would create an anomaly to construe s 82(e) as having any wider operation than two generations unless the language of the subsection dictated such a conclusion. To the contrary, it does not. In that subsection, and elsewhere, the formulation " .... the male heir of his body ..." or " ... the male heir of the body of [named male relative] ..." serves to identify, with precision and particularity, the nature of the relationship between the ordinarily deceased male relative and his male offspring. That is to say, it concerns the heir of ***his*** body and not the body of his male offspring in subsequent generations.

7. While this precise point about the construction of s 82(e) has not been addressed by a Court in the Kingdom (as far as we are aware), it is consistent with the construction of s82 and other provisions of the Land Act, adopted in earlier proceedings on slightly different issues: see, for example, *Fifita v Minister of Lands* [1981-1998] Tonga LR 65.

8. One of the appellants' arguments concerned the general meaning of the word "heir" and this was allied to an argument concerning, in particular, the provisions of clause 111 of the Constitution together with clause 4. The word "heir" in s82(e) and elsewhere in that section has a meaning influenced by the context in which it appears. It does not have a meaning in a vacuum which can be transposed into the statutory provisions irrespective of context. Insofar as the Constitution is concerned, the provisions about the law of succession to hereditary estates and titles, found in clause 111, are directed quite clearly to a narrow and specific subject matter. It must be borne in mind that the general declaration in clause 4 that the law must be the same for chiefs and commoners is in the same instrument (the Constitution) as clause 111 and must be read subject to that latter provision.

9. An issue arose during the hearing of the appeal first alluded to by the second respondent. It was whether the Tongan language version of s 82(e) is different to the English language

version. The submission was initially made by the second respondent that the Tongan version made more clear that the construction of the Land Court of the subsection was correct. However the second respondent's ultimate position was that there was no difference between the two versions. However in their subsequent written submissions the appellants' took the approach there was a difference and the Tongan version supported their construction of s 82(e). The difference concerns the concluding words of the subsection which in the Tongan version are "... pea 'e pehē aipe 'a e hokohoko 'o a'u ki he 'osi 'a e fanga tokoua *mo honau ngaahi 'ea tangata*' and in the English version are "... and so on taking the deceased holder's brother is in succession in order of their ages". The appellants contend the italicized words mean "…. and their male heirs succeed"

10. Even assuming, for the moment, that the appellants are correct in identifying that difference and the Tongan version prevails, it would be curious indeed to treat the subsection as creating an open ended generational succession for brothers other than the first and second brother of the estate holder while the latter brothers and their progeny are restricted to succession for one further generation only. This is not the intended effect of the subsection. Section 82(e) cannot be considered in isolation and both the English and the Tongan versions must be construed in the context of the whole of s 82.

11. The Land Court addressed and decided three additional issues. It is unnecessary to particularise them save to note that one was whether Meliame's surrender of the widow's estate was lawful and effective. However that Court's conclusion on this central issue resolved the proceedings before it as does this Court's conclusion on the same issue, namely the proper construction of s 82(e). It is unnecessary, and probably undesirable, for this Court to venture into a consideration of those three additional issues which may raise important questions of principle that should not be dealt with tangentially. Moreover anything the Court of Appeal might say in this judgement on those three issues would not create a binding precedent.

12. For the preceding reasons the appeal should be dismissed. The appellants must pay the respondents' costs as agreed or taxed.

Whitten P

Moore J

Randerson J

COURT OF APPEAL TONGA