06/04/23

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

AC 29 of 2021
[LA 17 of 2021]

BETWEEN:

DR FILIMOTO MAKAMEONE TAUMOEPEAU — Appellant

AND

1. SIOSIFA TAUMOEPEAU
2. MINISTER OF LANDS — Respondents

JUDGMENT OF THE COURT

Coram: Whitten P
White J
Morrison J

Counsel: Mr. D Garrett SC for the Appellant
Mr. D Corbett for the First Respondent
Mr S. Sisifa for the Second Respondent

Hearing: 28 March 2023
Judgement: 6 April 2023

[1] This is appeal from orders of the Land Court made on 4 October 2021 (*Siosifa Moala Taumoepeau v Hon Minister of Lands and Dr Filimone Makameone Taumoepeau* LA 17 of 2020 (Niu J assisted by Assessor Tu'ifua).

[2] The appeal concerns land known as Konga o Kape, Allotment 3, which is located at Kolofo'ou. The following facts are taken from the reasons of the primary judge.

[3] The land is a town allotment. It was granted to Mr Matei Taumoepeau ("Matei") on 25 September 1952. Matei did not marry and died without children. He had an older brother, Siosifa, and three younger brothers, Vakava'inga, 'Onehunga and Alekisanita.

[4] Matei died on 6 November 2005. His brothers Siosifa and Vakava'inga predeceased him.

[5] Vakava'inga had three sons. The eldest was Paula. The second was the first respondent and plaintiff below, (also called Siosifa).

[6] Matei's eldest brother, Siosifa, had an illegitimate son, Makameone ("Maka"), the appellant. Matei adopted Maka.

[7] Matei died intestate. Three houses had been built on the town allotment at the time of his death. Maka occupied the land and used the houses for different purpose including, in the case of one of them, for a mortuary business and, for another, for a time, as a medical clinic.

[8] Pursuant to s 82(e) of the *Land Act*, Paula was entitle to succeed to Matei's town allotment because Maka, although adopted by Matei, was not his son born in wedlock, Matei's eldest brother Siosifa died without leaving a legitimate son. Matei's second eldest brother had died and Paula was the eldest make heir of his body. However, Paula would not have been entitled to succeed to the allotment if he already held a town allotment (*Land Act* s 48). Paula sought to nominate the first respondent, his younger brother, Siosifa, as heir. As the primary judge found, the allotment reverted to the Crown because Paula did not claim the allotment as heir pursuant to s 87 (at [29]). Contrary to the claim made by Siosifa in these proceedings, Siosifa was not the heir to Matei's allotment. Paula was not entitled to nominate him as the heir. Paula could have taken the allotment as heir if he did not already own a town allotment, but he did not make a claim as heir.

[9] Maka also lodged a claim as heir to the allotment. But he was not entitled to claim as heir because he was not a legitimate son of either Siosifa nor Matei. His adoption by Matei did not give him that status. Maka had a moral claim to a grant of the land in the absence of an heir. He was Matei's adopted son. He claimed to have cared for Matei and he had occupied the land and used the buildings in his profession for many years.

[10] Although the first respondent maintained he was entitled as heir, a claim abandoned in closing submissions, his moral claim to a grant was based upon that being the wish of the heir.

[11] Although Maka had lodged his claim as heir to the allotment with the Land Office on 20 December 2005, that application had not been dealt with before the then Minister of Lands consented to the grant of the allotment to Mr Mapili To'a ("Mapili") on 29 April 2011. The grant to Mapili was registered on 7June 2011. (Mapili was the grandson of Mr Semisi To'a, who was also the grandfather of Matei's adoptive mother.

[12] Mapili sought to evict Maka from the land. Maka brought proceedings in the Land Court. On 13 March 2015, Scott J, sitting in the Land Court with Mr Assessor G Blake, dismissed Mapili's claim to evict Maka and ordered that Mapili's registration be set aside (*To'a v Makameone Taumoepea and Minister of Lands* (LA 10/2012; [2015] Tonga LR 62). Scott J held that the Ministry breached the principles of natural justice in granting the land to Mapili and that the competing applications should be referred back to the Minister for due consideration according to law (at [63]).

[13] In the course of Scott J's reasons, his Honour said (at [31]):

> "The Plaintiff [Mapili] applied for the land to be granted to him on 13 April 2011. The position on the eve of that application I find to be as follows:
>
> (a) Matei had died on 6 November 2005 therefore:
>
> (b) The rules of succession (section 82) applied, but;
>
> (c) Dr Maka could not inherit since he was not as a matter of fact "born in wedlock" (section 82) (b); and
>
> (d) His legal adoption could not operate to overcome section 82(b); therefore, as Matei had not natural legitimate son;
>
> (e) Section 82(e) came into play; however
>
> (f) It is accepted that Matei's brother Siosifa already had an allotment of his own; but
>
> (g) By virtue of section 84 Siosifa was not permitted to choose between the land and the allotment he already held; and therefore:
>
> (h) The land reverted to the Crown on 6 November 2005 (section 83).
>
> (i) Dr Maka then continued to occupy, work and occasionally reside on the land undisturbed by any claim against him either by a claimant to the land or by the Crown for a period of approximately 51/2 years."

[14] In the present case, the primary judge rightly observed that Scott J could not have come to his conclusion expressed in paras (f) and (g) if he had been informed that Matei's brother Siosifa had died in 1960.

[15] The first respondent, Siosifa, took no part in the 2012 proceedings.

[16] A meeting took place with the Minister of Lands on 27 October 2015, attended by Mrs Petunia Tupou, Dr Maka, Mapili To'a and Siosifa Taumoepeau (the first respondent). Mrs Tupou had appeared for Maka in the hearing before Scott J. The minutes of that meeting, which the judge accepted as being an accurate record, state the following (in translation):

> "'KAPE' KOLOFO'OU 27/10/2015
>
> Minister of Land
>
> Petunia Tupou
>
> Dr Makameone Taumoepeau Mapili To'a
>
> Sifa Taumoepeau
>
> Petunia -Introduced themselves and Makameone. The decision of the court for the allotment "Kape" in Kolofo'ou is that the grant you made to Mapili To'a is to be set aside.
>
> But Maka and I believe that our work should be considered as it has been put on hold for a long time.
>
> M/L -I ordered to grant this part for Mapili and it was my shortcoming as I did not inform you Maka, Sifa and family before proceeding with the grant. I acknowledge that was a shortcoming on my part.
>
> 2. I ask you – Do not let me make the decision.
> 3. Perhaps you could discuss as a family before we meet again.
> 4. I am troubled with having to decide a matter which I had already decided.
>
> M/L -My question Petunia, am I allowed to grant land to Mapili?
>
> Petunia -The decision of the Judge was that Sifa is barred from the claim to 'Kape'. As to Mapili the M/L is allowed to grant Crown Land to Mapili – and that means anywhere.
>
> Sifa - I do not have a registered allotment. What does this mean?
>
> M/L -The Judge stated that you are barred from making a claim to this allotment.
>
> Sifa -Maka is the only one who has an allotment in Ngele'ia.
>
> Maka -No. I do not have an allotment in Ngele'ia.
>
> Sifa -Matei was registered in 1947. The allotment should have devolved through the heirs from there.

M/L -this does not mean that the matter be re-debated, we only follow the decision of the Judge.

2. -My wish is that you can discuss and then I would assist.

3. -Perhaps we may allowed 2 weeks to complete our investigation and then we will inform you.

Maka -the issue – Lot #3 is the object of this argument.

M/L - This can be considered.

Maka -The decision of the M/L, Ma'afu Tupou, was terminated by Tu'ipelehake and was reviewed by Fakafanua.

Mapili -At this time Tu'ipelehake had already retired from work for a long time

M/L -We will meet on Monday of the week after next week. If when the time approaches anyone is busy then inform us – we shall postpone until we can all meet.

16/11/2015 – 10:00am

Petunia - Thank you very much, Honourable Minister.

Mapili - There is nothing left for us to discuss. Maka has no say in what happens to the allotment.

M/L - That's fine, you should all go and discuss and we will meet again at the end of the week after nest week.

A. Ma'afualu [Signed] 27/10/15" (Underlining added)

[17] A further meeting took place on 10 November 2015, the minutes of which read as follows:

"Kolofo'ou Makameone & Sifa 2:00pm 10/11/2015

Ma'afu - I will speak with Mapili, but I will not alter the decision of the Judge as it was out shortcoming to grant the allotment to Mapili while Maka was living there and carrying out work there and we granted it to another person and that is the reason I am a little troubled as you hold a large allotment compared to our number. However, I hope this can be resolved today as it has been going on for too long.

Maka - I am asking Sifa to let me hold the allotment.

Sifa - I think that we should keep the allotment because if Matei was still alive he would have not wished to grant it to Maka.

Ma'afu - Sifa you are explaining what has already been decided by the judge. On Friday, a letter will be delivered to Petunia informing her of my decision to grant the allotment to Makameone's application.

Fataua - You have ordered to grant the allotment to Maka and if Maka thinks to postpose until he offers a part for Sifa to apply for then we can postpone and if not then we will proceed with your decision.

Maka - I do not wish for any further postponement.

Ma'afu - That's the end of the matter I will grant the allotment to Makameone.

[Signed] F. Halatan"

[18] On 12 November 2015, Siosifa wrote a letter to Mrs Tupou. He wrote:

> "Following are the reasons why I will take this matter up with the Land Court if Dr Makameone does not see the Minister tomorrow morning before he writes up his final decision and tell the Minister Dr Makameone withdraws his claim."

[19] Siosifa contended in that letter that he entitled to the land as Matei's heir, a proposition which is untenable.

[20] On 20 November 2015 the Minister advised the parties of his decision in the following terms (as translated):

> **"REGARDING MATEI TAUMOEPEAU'S TOWN ALLOTMENT AT KOLOFO'OU THAT WAS REGISTERED BY TEVIT MAPILI NISA ON THE 07.06.2011**
>
> I submit my respects herein and would like to convey my directions regarding the town allotment stated above. Like I mentioned in our meeting that was held on the 10.11.2015, I must gift this allotment so it could become Filimoto Makameone Taumoepeau's registered allotment based on the reasons stated below.
>
> You are all already aware of the ruling make by the Land Court to consider Mapili's registration dated 07.06.2011 as invalid and to return the matter back to me so I can make a decision on it. Therefore, after examining it, it is clear that Matei Taumoepeau does not have an heir after his death and I must gift this allotment to any persons who goes through the application process.
>
> Even though I am legally permitted to gift this allotment to just any one, but because there is a dwelling house and works that are currently being conducted by Filimone Makameone Taumoepeau in this allotment, therefore I might gift him this allotment so he could register it to become his town allotment. The Ministry is currently working on completing the registration process on this allotment for this person.
>
> I do hope that you understand this letter and that you'll be satisfied with it.
>
> ....sgd....
>
> HON. MA'AFU
>
> (Minister of Lands)"

[21] The grant of the allotment to Maka was registered on 8 July 2016.

[22] It should have been evident to all those attending the meeting of 27 October 2015 that when Scott J said it was accepted that Matei's brother Siosifa already had an allotment of his own that he was not referring to the first respondent. Scott J did not say that the first respondent was barred from making a claim to the allotment. He made no decision concerning the allotment.

[23] On 16 November 2020 (more than four years after registration of the grant and five years after threatening proceedings), the first respondent filed a statement of claim seeking cancellation of the grant of the allotment to Maka on the grounds that:

> (a) the Minister did not make proper enquiries to ensure that the allotment was available [to] grant;
>
> (b) on 14 September 2006 the first respondent, through his eldest brother, Paula, made a claim to the allotment with the Minister within one year as required by the *Land Act*.
>
> (c) The Minister mistakenly regranted the allotment to Maka contrary to s 82 of the *Land Act* because the allotment should never have reverted to the Crown as the plaintiff was a true blood relative of Matei, is alive, and held no allotment at any time; and
>
> (d) Maka already held a town allotment and the grant to him was in breach of s 48 of the *Land Act*.

[24] In his reply, the first respondent also alleged that he was denied natural justice because, so it was said, the Minister had already made up his mind at the meeting on 27 October 2015 and he was not given an opportunity to make representations about his claim.

[25] It is well settled that registration of a grant may be set aside if it has come about as the result of an error of law (that is, as being contrary to the Land Act) or fraud, mistake, breach of promise made by the Minister, or breach of the principles of natural justice (*Tafa v Viau* [2006] Tonga LR 118 at [50]; and on appeal [2006] Tonga LR 287 at 293; *Kaufusi & Anor v Veatupu & ors* (AC 3 of 2020, 6 November 2020 at [38]-[39], [44]); *Tali-ki-Ha'amoa Fatafehi v Sione Afemeimou'nga* (AC 10 of 2021; 28 September 2021 at [24])).

[26] The primary judge recorded (at [27]) that no evidence had been produced that Maka had already been granted a town allotment and that no submission was made in support of that contention. He then said:

> "[28] Therefore, the only issue to be decided is whether or not, in making the grant to the second defendant, the first defendant Minister breached the principles of natural justice."

[27] According to the pleadings, the issue to be decided was whether the Minister breached the principles of natural justice either because he had prejudged the issue, or had denied Siosifa the opportunity of making representations. The pleadings did not raise an issue that the Minister's decision should be set aside and the registration of the grant cancelled on the ground of mistake. If that issue had been raised it would at least have raised further questions as to whether the Minister continued to labour under the mistake prior to making his decision and whether the court in its discretion should refuse relief on the ground that it was open to the first respondent to have pointed out to the Minister that Scott J's reference to Siosifa's already having a town allotment was not a reference to him but his uncle.

[28] The judge did not find that the Minister's decision was vitiated by bias by prejudgment or denial of the opportunity to make representations. Rather, he found:

> "[38] The Minister asked her, 'My question Petunia am I allowed to grant land to Mapili?' Petunia replied, 'The decision of the Judge was that Sifa is barred from the claim to "Kape". As to Mapili the Minister is allowed to grant Crown Land to Mapili – and that means anywhere.'
>
> [39] The person 'Sifa' to whom Petunia meant was the plaintiff who was at the meeting and who was one of the 3 applicants for the allotment 'Kape' which Matei had held. Mapili was the second applicant and the second defendant, Maka, was the third applicant. All 3 applicants were at the meeting. Petunia therefore, in replying to the Minister's question, stated that the first applicant, Sifa, was barred by the Judge from making any claim to the allotment 'Kape' and that Mapili could be granted an allotment from Crown Land anywhere.
>
> [40] The Minister accepted Petunia's advice that the plaintiff was barred from being granted the allotment Kape, because when the plaintiff said that he did not have an allotment and asked what did this mean, the Minister said to him: 'The judge stated that you are barred from making a claim to this allotment.' Petunia did not correct the Minister.
>
> [41] When the plaintiff said that the allotment should have devolved through the heirs from Matei, the Minister told him that that could not be re-debated and that they should follow the decision of the judge.

[42] At the next meeting of 10 November 2015, when the plaintiff said that had Matei still lived he would not want Maka to have the allotment, the Minister again said to him, 'Sifa you are explaining what has already been decided by the Judge.

[43] In fact, it is clear that after saying that, the Minister made his decision that the allotment was to be granted to Maka.

[44] I am satisfied that the advice of Petunia Tupou that the Land Court had barred Sifa (the plaintif) from any claim to Matei's allotment, when there was no such order or statement by the Land Court, caused the Minister to eliminate Sifa from applying for the allotment, and thereby leaving only Mapili and Maka as the applicants for it. The Minister ought to have had independent advice from the Solicitor General but he chose not to. In all, it is a breach of natural justice."

[29] The first respondent did not plead that he had been denied natural justice because the Minister was misled by the representation by Mrs Tupou, and that the Minister failed to obtain independent advice. Nor was this contention advanced in submissions.

[30] The primary judge did not refer to the contents of the Minister's decision quoted at [20] although it was referred to by Maka's counsel in final submissions. The letter of 20 November 2015 makes it clear that before he make his decision the Minister realised or was advised that he was legally able to grant the land to anyone. In other words his initial mistake expressed in the meeting of 27 October and 10 November 2015 had been corrected. There is no evidence he did not receive independent advice. At a meeting with Mapili on 17 August 2015 the Minister said he would obtain advice from the Crown Law Office. The inference is that he did.

[31] The fact that at the meeting on 27 October 2015 the Minister said that the judge had stated that the first respondent was barred from making a claim, did not mean that the Minister was not open to persuasion. The Minister's statement at the second meeting (10 November 2015) that ".... You are explaining what has already been decided by the judge" may refer to the same subject. Or it may refer to the first respondent's contention that he was entitled to a grant as heir, or in accordance with the heir's wishes. In any case it did not indicate that the Minister's mind could not be altered (*Minister for Immigration v Jia Legeng* (2001) 206 CLR 257; [2001] HCA 17 at [71], [185]).

[32] The first respondent was given multiple opportunities to put his case to the Minister. He could have responded to Mrs Tupou's statement and the Minister's statement on 27 October 2015 that the judge had stated that we was barred from making a claim by

saying that the judge had said no such thing but was referring to his uncle, Matei's brother.

[33] The primary judge's finding at [44] (quoted at [28] above) was based on a contention that was not pleaded and was referred to only obliquely in the first respondent's closing submissions. His Honour failed to address the Minister's letter of 20 November 2020. That letter is inconsistent with the Minister's having acted under mistake. His finding that the Minister failed to obtain legal advice is unsupported by the evidence which rather suggests the contrary.

[34] The primary judge went on to suggest that in coming to his decision the Minister wrongly assumed that that Maka owned the three houses Matei had built on the allotment which Maka was using for his mortuary and clinic business (at [45]).

[35] The primary judge said that because ownership of the houses was not transferred to Maka during Matei's ownership, because Mated died intestate and because houses are regarded by law in Tonga as personal property the beneficiaries of Matei's estate entitle to the houses would be his nephews' and nieces' (at [47] – [50]).

[36] The primary judge said that the Minister did not consider those matters and he ought to have directed that an application be made to the Supreme Court for the grant of letters of administration to determine who owned the houses on the allotment, (at [51]). He stated that those properties are vested in the Supreme Court and it is an offence for anyone to deal with them before the Supreme Court has adjudicated on it. (at [53]); *Probate Act* s.11

[37] The judge ordered:

> "(a) The first defendant Minister of Land, shall forthwith cancel the deed of grant book 433 folio 58 in the name of the second defendant, Filimoto Makameone Taumoepeau..
>
> (b) The plaintiff, Siosifa Taumoepeau, shall forthwith take appropriate steps to apply for Letters of Administration, subject to approval thereof by the Minister of Justice, in respect of the estate of Matei Taumoepeau.
>
> (c) Upon grant of letters of administration, and ascertain the ownership of the 2 remaining houses on the allotment, the Minister of Lands shall invite plaintiff, the second defendant and Mapili To'a, and any other person who may wish to apply for the allotment, to attend before him and make representations to be granted the allotment, and he shall hear and decide their application in accordance with the principles of natural justice.

(d) The defendants shall jointly and severally pay the costs of the plaintiff, to be taxed if not agreed."

[38] These issues were not raised on the pleadings nor in the parties' submissions. They were not raised by any party for the Minister's consideration. Neither the judge nor counsel pointed to any legislation that required the Minister to give consideration to those issues. In saying that the Minister ought to have considered the question of ownership of the houses. The primary judge erred by embarking on a general merits review of the Minister's decision.

[39] We need not decide how far, if at all, a Minister's decision on the grant of an allotment can be reviewed on the ground of mistake going beyond the traditional grounds of error of law, failure to have regard to mandatory considerations, taking account of forbidden considerations, and manifest unreasonableness in the *Wednesbury* sense (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, (ie irrational or so unreasonable that no reasonable decision – maker would have so decided)). The Minister had regard to Maka's use of the houses and that was not, and was not contended to be, an irrelevant consideration.

[40] With respect, the judge should not have introduced a new issue which no party had raised and which would be likely to promote yet further litigation. His Honour did not have regard to the observations of this Court in *Kaufusi v Veatupu* at [35] that the vesting of personal property in the Supreme Court under s.11 of the *Probate Act* would not make the continued occupation of a licensee unlawful, notwithstanding that the licence came to an end with the death of the licensor. He did not consider the prospect that the beneficiaries of Matei's estate may be precluded from asserting any claim to ownership of the house on the grounds of laches, the limitation statute (*Supreme Court Act* s 16) or proprietary estoppel.

[41] Finally, we have referred to the long delay between the notification of the Minister's decision and the institution of proceedings seeking to quash the grant. While the proceedings were instituted within the limitation period of ten years prescribed by s 170 of the *Land Act*, the parties should bear in mind that proceedings for judicial review are in the nature of claims for prerogative relief formerly sought in England by writs of certiorari, prohibition or mandamus. The grant of prerogative relief is discretionary and may be refused if the applicant is guilty of unwarranted delay. As this was not raised as a ground of defence we say no more about it.

[42] The Minister took an active part in the proceedings in the Land Court but filed a submitting appearance in this court. He did not seek an order for costs of the appeal.

[43] For these reasons the appeal should be allowed.

[44] We make the following orders:

1. Appeal allowed.
2. Set aside the orders of the Land Court of 4 October 2021.
3. In lieu thereof, order that the first respondent's application to the Land Court filed on 16 November 2020 be dismissed with costs.
4. Order that the first respondent pay the appellant's cost of the appeal.

Whitten P

White J

Morrison J

COURT OF APPEAL TONGA