

Kefu  
31/10/14

IN THE COURT OF APPEAL OF TONGA

LAND JURISDICTION

AC 23 of 2014

NUKU'ALOFA REGISTRY

[LA 7 of 2014]

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**BETWEEN : PENITO'A MOKOFISI**  
  
- **Appellant**

**AND : 1. MINISTER OF LANDS**  
**2. TONGA FALEOLA TONGA**  
  
- **Respondents**

**Coram : Salmon J**  
**Handley J**  
**Hansen J**  
**Tupou J**

**Counsel : Mr Fonua for the Appellant**  
**Mr Kefu, A/AG for the First Respondent**  
**Mr Fakahua for the Second Respondent**

**Date of Hearing : 23 October 2014**

**Date of Judgment: 31 October 2014**

## JUDGMENT OF THE COURT

[1] This is an appeal from the decision of the Lord Chief Justice who summarily dismissed the appellant's application for an order for mandamus to require the Minister to perform his duty to hold an enquiry under the proviso to s.82 of the Land Act. This states:

*"Provided always that the failure of the deceased lawful male holder of any town or tax allotment to register the same under the provisions of Division II or (should read "of") 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."*

[2] Section 4 provides that the holder of a tax or town allotment has a life estate in the land. Section 82 provides, subject to the rights of a widow under s.80, for the order of succession to such allotments on the death of the last lawful male holder.

[3] Section 122 relevantly provides:

*"Whenever any person becomes entitled under the rules governing the devolution of allotments ... to an allotment he shall*

*within one month of so becoming entitled present to the Minister  
the deed of grant formerly in the possession of his predecessor  
in title ...”*

It then provides for the registration of the successor on the original and duplicate deeds of grant.

- [4] The appeal relates to town allotment *Ha'akune* DG 109/61 and tax allotment *Konga Nualei* lot 40. Esafe Tonga (the great grandfather) became the registered holder of these allotments on 3 August 1907 and remained the holder until his death on 10 January 1928. His widow Seini then became entitled to a life estate under s.80 but it is not known whether she sought or obtained registration before her death on 3 February 1929.
- [5] The great grandfather and his widow were survived by their eldest son Mokofisi Tonga, who was the former's heir, and by at least one younger brother, 'Olive Tonga. Mokofisi Tonga was the appellant's grandfather.
- [6] Under the rule of succession in s.82(c) the grandfather, the heir of the deceased last male holder, became entitled to the allotments. It seems that the grandfather did not lodge a claim and his younger

brother 'Olive became the registered holder on 1 August 1929. This result might have been achieved lawfully by the grandfather surrendering the allotments under s.54(1) or by operation of law under s.87 and subsequent grant to 'Olive under s.88. There is nothing before the Court which reveals the basis of 'Olive's registration, but we do know that the grandfather did not challenge that registration in his lifetime.

[7] Sione Moala Tonga (the father) was the eldest son and heir of the grandfather. If the grandfather and father had lodged their claims to the allotments within the 12 months set by s.87, had become registered, and remained the holder until their deaths, the appellant, who was his father's heir, would have become entitled to those allotments on the death of the father on 13 January 1982, subject to lodging his claim within 12 months.

[8] Section 170 relevantly provides:

*"No person shall bring in the Court [the Land 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 ..."*

[9] The appellant claims through his father and grandfather. Assuming in the appellant's favour that the registration of 'Olive Tonga on 1 August 1929 was wrongful for some reason, the grandfather's right to bring an action in the Land Court to recover the allotments accrued at that time, and his claim would have been barred in 1939 by the then equivalent of s.170, prior to his death some time in the 1940's.

[10] On 30 January 2014 the solicitor for the appellant wrote to the Minister outlining the appellant's claim to the allotments through his father and grandfather. The Minister was asked to exercise his powers under the proviso to s.82; hold an enquiry, and effect a posthumous registration of the allotments in the name of the appellant. The letter concluded by stating that if no reply was received within 28 days proceedings would be commenced "to give effect to the proviso ..."

[11] Unfortunately the Minister did not reply to this letter and on 28 March the appellant commenced proceedings in the Land Court claiming an order of mandamus requiring the Minister to conduct an inquiry under the proviso to determine if the grandfather "failed"

to have himself registered following the death of his mother on 3 February 1929.

[12] On 9 May the Minister applied for an order that the statement of claim be struck out because it did not disclose a reasonable cause of action. On 27 June the Chief Justice held that the appellant's action was time barred because he claimed through ancestors whose claims were time barred and he dismissed the action. This is the clear effect of s.170 and is settled law: *Motuliki v Namoa & ors* (1981-1988) Tonga LR 141; and *Lokotui v Fifita & ors* [1992] Tonga L.R 18 CA.

[13] Mr Fonua, counsel for the appellant, submitted that an inquiry by the Minister under the proviso, and administrative action to give effect to the findings, did not involve or require an action in the Land Court. He also submitted that mandamus proceedings to require the Minister to perform his duty under the proviso were not within the jurisdiction of the Land Court and should have been brought in the Supreme Court. The appellant attempted to file the proceedings in the Supreme Court but the Registry would only accept them in the Land Court.

[14] Mr Fonua submitted that the Land Court had no power to issue the prerogative writs and the case should be treated as if it had been heard in the Supreme Court.

[15] This Court would long hesitate before deciding that a case should fail because it had been brought in the wrong Court when the plaintiff had been prevented from filing it in the correct Court by Court staff. It is not necessary to decide the point because the action was brought in the correct Court.

[16] In our judgment the appellant's claim, as the letter of demand and the relief claimed in the statement of claim made clear, was within s.149(1)(b) because it involved a "dispute", "claim", or "question of title" affecting land or any interest in land. The Minister can be sued in the Land Court in accordance with s.158, and the Court has jurisdiction under s.149(1)(b) to "hear and determine" relevant disputes, claims and questions. Accordingly all appropriate orders can be made against the Minister, including orders requiring him to perform his duties under the Act. It is not necessary to decide whether the Land Court can issue a writ of mandamus for this purpose.

[17] The proviso to s.82 protects an heir to a deceased male holder if the latter failed to register his allotment under Division II of (not “or”) Part VIII of the Act, which relevantly includes s.122.

[18] The proviso to s.82 does not refer to s.87 or to the failure of “the deceased male holder” to claim the allotments as heir within 12 months from the death of the last holder.

[19] It states that the failure to register “shall not of itself be a bar to the grant to his heir,” allowing full scope for the operation of any other bars to such a grant, including the time bar in s.170. Moreover the proviso can only assist an heir who is the heir of “the deceased lawful male holder.” The relevant deceased male holder was the great grandfather who died on 10 January 1928. His heir was the grandfather.

[20] It was not alleged or proved that the grandfather ever became “the lawful male holder” of these allotments, but even if he did the proviso could only help his heir, the father. However the grandfather’s claim, if any, became time barred in 1939 in his lifetime before the father became his heir on his death.



[21] The father never became “the lawful male holder” of these allotments because ‘Olive Tonga and his successors were then the registered holders. The proviso does not assist the heir of the heir, let alone the heir of the heir of the heir.

[22] We have not overlooked the definition of holder in s.2 which applies unless the context otherwise requires. The definition includes in paragraph (c) *“any Tongan subject claiming to be interested in land which he is legally capable to hold.”*

[23] There is nothing to indicate that the grandfather ever “claimed” to be interested in the allotments, and there is certainly nothing to indicate that he lodged a claim within 12 months of the death of his mother.

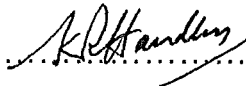
[24] We are inclined to the view that the context requires there to be only one “holder” as defined at any given time. On that basis the grandfather ceased to be “the holder” of these allotments at the latest on 1 August 1929, when ‘Olive Tonga became the registered holder. Accordingly, when the grandfather died he was not “the deceased lawful male holder” of the allotments for the purposes of the proviso, and the appellant’s claim fails for that reason also.

[25] We hold, in agreement with the Chief Justice, that the proviso to s. 82 does not enable the appellant to avoid the operation of s.170 and establish a claim to these allotments.

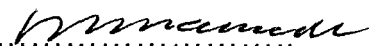
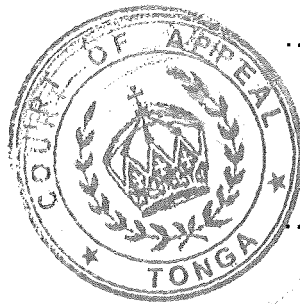
[26] The appeal fails, and is dismissed with costs.



**Salmon J**



**Handley J**



**Hansen J**



**Tupou J**