IN THE COURT OF APPEAL OF TONGA
NUKU'ALOFA REGISTRY **AC 14 of 2012**
[LA 18 of 2007]

BETWEEN: **1. MAKAFALANI SCHAUMKEL**
2. SATEKI SCHAUMKEL
- Appellants

AND : **1. SOANE VAKAMEITANGAKE 'AHOLELEI**
2. MINISTER OF LANDS
- Respondents

Coram : **Salmon J**
Handley J
Blanchard J

Counsel : **Mr. L. Niu SC for the Appellants**
Mrs. A. Taumopeau SC for the First Respondent
Mr. A. Kefu SG for the Second Respondent

Date of hearing : **12 April 2013**

Date of judgment : **17 April 2013**

JUDGMENT OF THE COURT

[1] This appeal is against a decision of the Land Court given on 24 August 2012. The appellants, who were the plaintiffs in the court below, occupy a town allotment known as Tali ki 'Okalani. The first appellant (Makafalani) has occupied the land since about 1978. He was given permission to occupy the land by his wife's mother Siu and brother Lisiate. He was also given permission to erect a house on the land. The land is now registered in the name of the first respondent (Soane). He and his father (Lisiate) have at various times over the last few years ordered Makafalani to leave the land which he has refused to do. The proceedings brought by the appellants in the Land Court sought an order requiring the second respondent to forthwith cancel the registration of the land in Soane's name and any deed of grant issued in respect thereof.

[2] Soane filed a defence to the claim and in that defence sought an order that Makafalani and his family vacate the property. The Land Court refused the relief sought by the appellants while making it clear that it would be inequitable for Makafalani to lose the whole of his investment in the land. The Court said that there must be an order for vacant possession but the precise terms of the order were left for further argument if not agreed.

Background

[3] Makafalani's first wife Siosi'ana was the sister of Lisiate. Soane and his family maintain that the right to occupy the land given to Makafalani was to provide a home for Siosi'ana. Siosi'ana died and Makafalani remarried. The second appellant (Sateki) is the son of Makafalani and Siosi'ana. It can be seen that this is a family dispute and that Sateki and Soane are first cousins. Makafalani maintains that the substantial sum of money spent on the land to build a house and other buildings was expended as a result of promises made by Lisiate to Makafalani that he and his family could occupy the land and that it would eventually go to Sateki.

[4] Soane is the second son in his family. In accordance with the provisions of the *Land Act* inheritance would usually go to the eldest son. In this case as a result of decisions made by the second respondent the land

was transferred from Soane's grandfather to Lisiate, then to his mother, who had a life interest when Lisiate died, and then at the request of his mother and his elder brother 'Aisea to Soane. A more complete history and background to these proceedings appears in the judgment of the Land Court.

Legal Issues

[5] The essential issues in this appeal concern the grant made to Soane. The appellants maintain that the grant to Soane should not have been made because the land had reverted to the Crown. In those circumstances it was argued that the fact of possession by the appellants required the second respondent to make inquiry of them before a decision was made as to the grant of the land (see *Tafa v Viau* [2006] Tonga L.R. 207). On the other hand the respondents say that the land never reverted to the Crown, but was transferred to Soane in accordance with the succession provisions of the *Land Act* [Cap 132].

[6] It is helpful before going further to refer to relevant provisions of the *Land Act.* A useful starting point is the Privy Council decision of *OG Sanft & Sons v Tonga Tourist and Ors.* [1981-1988] Tonga L.R. 26 where the Privy Council stated:

> "...the *Land Act* is a complete code which...rigidly controls by its express terms all titles and claims to any interest in Tongan Land except in respect of leasehold interests...[W]ith that exception there is no room for the application of any rule of equity - all claims and titles must be strictly dealt with under the Act..."

[7] It was shortly afterwards explained by the Land Court in *Veikune v To'a* [1981-1988] Tonga L.R. 138 that although an equitable interest in land could not be created, equitable defences such as estoppel were available.

[8] Section 5 provides that:

> "Every estate and allotment is hereditary according to the prescribed rules of succession."

[9] Section 6 provides

> "Every verbal or documentary disposition by a holder of any estate or allotment which purports to effect a voluntary conveyance, an out-and-out sale, or a devise by will of such estate or allotment is

null and void."

[10] These sections do not of course prevent a land holder from allowing a relative to have possession of his land. However the Act does not allow a landholder to promise the land to someone who is not within the prescribed rules as to succession. In relation to tax and town allotments those rules appear in sections 82 and 84-86 of the Act. Inheritance is traced through the male line of the family - wives obtain only a life interest on the death of a husband.

[11] Section 83 is of some importance. It provides:

> "On the death of the lawful male holder of any tax or town allotment without leaving any person entitled to succeed thereto in accordance with the provisions of this Act such allotment shall if situate on Crown Land revert to the Crown and if situate on an hereditary estate shall revert to the holder thereof."

[12] In his submissions before us Mr. Niu confirmed that his case rested on the proposition that despite the fact Mateline had lodged a claim, the Minister of Lands had not granted the allotment to her as her widow's estate. When she, 3 years after her husband's death, surrendered her interest, the allotment reverted to the Crown because the heir 'Aisea had not made a claim to the land within the 12 month period required by s.87 which provides:

> "If no claim to a tax or town allotment has been lodged by or on behalf of the heir or widow with the Minister or his Deputy within 12 months from the death of the last holder or by the date specified in the notice made pursuant to section 54 of this Act, such allotment if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder."

[13] We reject this submission because s.87 cannot apply. A claim by the widow Mateline was made within 12 months from the death of Lisiate. The waiver or surrender of her claim does not alter that fact.

[14] Unfortunately that is not the end of the matter. During the course of the appeal hearing it became apparent that it was necessary to examine the procedure approved by the Minister whereby the land was transferred to Soane.

[15] Mr. Kefu for the Minister argued that the appellants had no standing to challenge Soane's registration because they had no right of occupation. However they are in fact in occupation and are entitled to challenge Soane's claim that he is entitled to eject them. If Soane is not validly registered as owner he cannot eject them. It is necessary therefore to determine whether Soane's registration as owner is valid.

[16] The first question is whether s.54 applies to the surrender by Mateline of her widow's interest. If so, then it is acknowledged by Mr. Kefu that it has not been complied with. The consent of Cabinet has not been obtained. Subsection (1) of s54 provides:

> "Whenever the holder of a tax or town allotment desires to surrender such allotment or any part thereof, it shall be lawful for such holder with the consent of the Cabinet to surrender the said allotment or any part thereof as aforesaid, and any allotment or any part thereof so surrendered shall, subject to the provisions of this Act, immediately devolve upon the person who would be the heir of the holder if such holder had died; and if there be no person on whom the allotment or any part thereof can so devolve the allotment or any part thereof if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder thereof."

[17] We accept Mr. Niu's submission that s.54 does not apply to a surrender by a widow. The "holder" referred to in the section must have an "heir". A widow cannot have an heir; therefore s.54 must only apply to male "holders". We accept that a widow must be able to surrender her right to an allotment, and in the absence of a statutory procedure directed at such a surrender we are satisfied that the procedure approved by the Minister was appropriate.

[18] 'Aisea as the heir then became entitled. However because he already holds a town allotment he was required by s.84 to make an election between the allotment held by him and that of his deceased father. We are satisfied that the letter dated 27 February 2006 to the Minister of Lands signed by Mateline and 'Aisea, seeking to vest the allotment in Soane, constitutes a waiver by Mateline of her widow's interest and a s.84 election by 'Aisea in favour of the allotment already held by him. Although the letter of 27 January 2006 was not signed by Soane, we have no doubt that he was aware of the proposal and approved the request as is evidenced by his confirmation of receipt of a copy of the Deed of Grant. The original Deed of Grant to 'Aisea Senior (Soane's

grandfather) was endorsed with the transfer on 21 May 2007 and on 27 May Soane signed the endorsement to confirm he had received a "true copy".

[19] Clearly the Minister was in no doubt that Soane wished the allotment to be transferred to him. Mr. Halatanu, a Registrar with the Ministry of Lands, wrote to the Minister on 31 October 2006 recommending that the land be directly transferred from "the deceased Lisiate to the second son (Soane), in accordance with the wish of the widow and the heir". The recommendation was accepted by the Minister on the same day.

[20] The relationship between ss 82, 84, 85 and 86 of the *Land Act* gives rise to difficult questions of construction. 'Aisea, the eldest son of Lisiate, already had a town allotment when his father died on 4 July 2004. He could not succeed to his father's town allotment without electing to take that allotment (s.84 proviso) and surrendering his existing allotment (s.86). Since he elected to retain his existing allotment, s85 conferred successive rights of election on sons or grandsons of Lisiate, in order of seniority. The next son in the line of succession was the first respondent, Soane.

[21] Mr. Niu submitted that Soane could not take, following the election of 'Aisea, because, he did not have a town allotment and could not elect. Since he had no other claim to the allotment it reverted to the Crown. Mr. Kefu and Mrs. Taumoepeau submitted that Soane succeeded to the allotment under s.82.

[22] Section 82 provides that, subject to the widow's life estate, "the succession to ...a town allotment shall be as follows". In this case the line of succession is clear. 'Aisea being the oldest son of Lisiate would be entitled, subject to his mother's life estate. He already held a town allotment, and s.84 prevented him from succeeding to a second allotment of the same kind. Section 48 which prohibits a second grant did not apply, because Lisiate received a grant in his lifetime, and s.122, which applies to successions does not provide for a new grant.

[23] The question raised by Mr. Niu is whether s.85 governed the succession to the allotment in dispute following the election by 'Aisea to retain his existing allotment, and applied to the total exclusion of those entitled under the line of succession in s.82. The contrary

argument was that s.85 applied only to those successors who already possessed an allotment of the same kind and had to elect.

[24] If Mr. Niu's argument is correct the line of succession in s.82 could be displaced by s.85 once a son or grandson entitled under s.82 already had an allotment of the same kind which he elected to retain. In his submission the line of succession then passed down the line of younger sons or grandsons who already had an allotment which required them to make an election, bypassing sons or grandsons entitled under s.82 who had no such allotment. If Mr. Niu's submission is correct, in such a case they can never become entitled to the allotment.

[25] The anomalies that Mr. Niu's construction of s.85 would produce are reinforced when one considers the terms of s.86 which applies where a son or grandson elects to take his deceased father or grandfather's allotment and surrender his existing allotment. In such a case s.86 relevantly provides:

> "...the allotment so surrendered shall be granted to any son of the person surrendering it who does not already hold an allotment of the same kind, and where such son is under 16 years of age the allotment shall be granted to one or more trustees...In default of any such son the allotment so surrendered shall be granted...to any brother of the person surrendering it provided such brother...does not already possess an allotment of the same kind. As between two or more such brothers the eldest shall be preferred..."

[26] The scheme of s.86 is consistent with that in s.82 where the property descends to the eldest son, and then to the eldest male heir of his body. If the eldest son dies without leaving any male heir of his body "the succession shall devolve upon the next eldest son of the [deceased] holder."

[27] In our judgment the scheme of these sections, read as a whole, is that the allotment of a deceased holder descends in accordance with the line of succession in s.82 until one identifies a successor who already holds an allotment, so that the prohibition in s.84 applies. This then enlivens the right of election conferred by the proviso. If the election is against the succession the allotment again descends in accordance with s.82, until the prohibition in s.84 and the right of election under the proviso to s.84 and s.85 apply. If that son or grandson elects

against the succession the allotment will continue to descend in accordance with s.82, until a successor without an allotment is identified, or an election is made in favour of the succession and the successor surrenders an existing allotment. This surrendered allotment will then descend in accordance with s.86 down the line of succession in s.82 until a successor is identified or an election is again required. The proviso to s.85 operates to restart the s.85 election process after recourse has been had to a s.82 successor who is not required to elect, but does not wish to take the allotment.

[28] Mr. Niu's construction would produce arbitrary and unjust results. It would disturb the line of succession in s.82 on an arbitrary basis depending on the existing entitlement of a successor to another lot of the same kind, and the election of that successor. If the election was against the succession s.82 is excluded; if it is in favour of the succession s.82 continues to apply. There is no discernible reason why the entitlement of a son or a grandson to succeed to his ancestor's allotment should be defeated by the fact that a successor with a prior entitlement does or does not already hold an allotment, and does or does not make a particular election.

[29] This approach to the construction of ss.82 and 85 is supported by authority. The scheme or policy of the Act is clearly set out in s.82. Inheritance is to be by way of descending seniority in the male line. In our view s.82 is the leading provision on inheritance. Sections 85 and 86 are subordinate provisions which must give way to s.82 where that is appropriate (*Halsbury's Laws of England* 4th Edition, Vol 44, para. 872).

[30] An alternative approach leading to the same result is that enunciated by Cooke J on behalf of the Court of Appeal in *Northland Milk Vendors v Northern Milk* [1988] 1 NZLR 530 at pp. 537-538:

> "...the Court must try to make the Act work while taking care not themselves to usurp the policy-making function, which rightly belongs to Parliament. The Courts can in a sense fill gaps in an Act but only in order to make the Act work as Parliament must have intended."

[31] In our judgment the approach to the legislative provisions we have set out above achieves that objective.

[32] We hold that the allotment did not revert to the Crown under the concluding provisions of s.85 when 'Aisea elected to retain his existing allotment simply because his younger brother Soane did not already hold a town allotment and had no right of election under s.85. The succession went to Soane under s.82.

THE FIRST DEFENDANT'S CLAIM FOR POSSESSION

[33] In our view the Land Court correctly concluded that a person who is given permission to occupy land by the landowner does not acquire a legal interest in the land. He is the holder of a license to occupy which may be terminated on reasonable notice. As the Court said, being lawfully on the land is not the same as having a right to continue that occupation indefinitely.

[34] Mrs. Taumoepeau submitted that, in accordance with custom, the purpose of allowing Makafalani to occupy the property was to provide a home for Lisiate's sister Siosi'ana and only secondly for her husband and children. She submitted that the license to occupy expired when Siosi'ana died.

[35] Whether or not that is the case, the license to occupy given by Lisiate must have come to an end, at the latest, on his death. There is no evidence that his widow had joined in the grant of the licence as was the case in *Matavalea v Uata* [1989] Tonga L.R. 101.

[36] There has been ample notice given by Soane of his wish to regain possession.

[37] There is one further issue arising in the judgment which necessitates comment. The Court said that, even though this case did not involve a new grant, Makafalani's occupation of the land was known to the Ministry and he should have been given an opportunity to express his view before the transfers were effected. The Land Court referred to the decision of this Court in *Hakeai v Minister of Lands & Ors* [1996] Tonga L.R. 142 to support this comment. That was a case of a surrender and a re-grant. It was in the same category as the grant in *Tafa v Viau*. It is not authority for the proposition that consultation with the occupier is required in a case such as this one.

[38] In *Hakeai* and in *Tafa v Viau* the Minister's duty was to determine who was entitled to the issue of a grant of surrendered land. It was his duty to determine whether there were competing claims. This is why

he is required to consult with the occupants of the property. This case, as we have said, involves the application of rules of succession of a property which has not reverted or been surrendered under s.54. In our view the Minister was not required to invite the occupier to express a view in this case. He did not have to exercise the discretion required in making a fresh grant. His duty in recording the waiver by the widow, the election by 'Aisea and registration of the succession by Soane was ministerial. If the provisions of the Act were met and the evidence of Soane's entitlement was clear the Minister's duty was to register the succession in favour of Soane.

CONCLUSION

[39] Soane was entitled in accordance with the provisions of the *Land Act* to have the allotment transferred to him. That having occurred, he was entitled to claim possession from the appellants and to an order for vacant possession.

[40] The appeal is dismissed with costs to the respondents.

[41] The case is remitted back to the Land Court to determine, if necessary, the terms of the order for possession and so that any issues as to compensation can be resolved.

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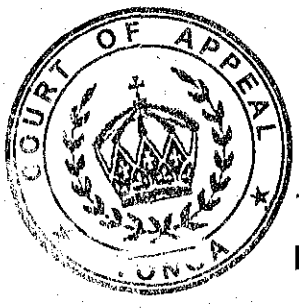
Salmon J



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