

4/10/13

LA 27 of 2009

rec'd 10/10/13.
Jatw

2. The dispute between the parties, which concerns a town allotment at Tofoa Lot 36 on Survey Plan 3403, has a long history which must first be summarized.
3. In 1993 the then Minister of Lands approved the grant of the allotment to the Second Defendant, however that grant was cancelled and the allotment was instead granted to one 'Enele Ongoongotau. Shortly after this grant the Plaintiff, being a relative of 'Enele, moved onto and began to clear the land.
4. In 1997 the Second Defendant brought proceedings in the Land Court LA 628/97 to set aside the grant to 'Enele. In 2001 the Land Court found in favor of the Second Defendant, ordered the cancellation of the grant and directed the Minister to reconsider the Second Defendant's claim to have the land granted to him. An appeal by 'Enele was dismissed by the Court of Appeal in July 2003 and in June 2004, after meetings were held at the Ministry to consider the competing claims, the Ministry advised the Plaintiff that it had been decided to grant the land to the Second Defendant. The Plaintiff was given notice to quit but he did not comply.
5. On 19 January 2007 the allotment was granted to the Second Defendant and a second notice to quit was served on the Plaintiff. He did not comply.
6. On 14 February 2008 the Second Defendant commenced proceedings for a vacant possession against the Plaintiff (LA 5 of

2008). A certificate of service was filed but no defence was filed by the Plaintiff.

7. On 8 September 2008 the Second Defendant's case was formally proved and on 12 September 2008 the Plaintiff was ordered to vacate the allotment forthwith. Paragraph 3 of the order warned the Plaintiff that failure to comply with the order "will amount to a contempt of Court". The Plaintiff did not comply.
8. On 12 February 2009 the Plaintiff filed an application for leave to apply for committal of the Plaintiff for failing to comply with the order of 12 September 2008 and leave was granted on 15 April 2009. On 23 May 2009 the Plaintiff applied for a stay of the order of 12 September 2008.
9. Both applications were heard together and on 3 July 2009 the Plaintiff was found to be in contempt of court. He was again ordered to vacate the allotment, by 3 August 2009. The application for a stay of the Order of 12 September 2008 was refused. The Plaintiff did not comply with the Order of the Court.
10. On 14 August 2009 the Plaintiff appealed (AC 28 of 2009). He sought an order quashing "the orders" of the Land Court and a stay of the judgment of 18 September 2008. It will be noted that there was no appeal against the *judgment* of 18 September 2008 and, as appears from the judgment of the Court of Appeal dated 14 July 2010, the only "orders" considered were the orders of 3 July 2009.

11. The Court of Appeal allowed the appeal against the orders of 3 July 2009. It took the view that the Land Court had no power to commit for contempt for failure to obey its orders. No order was made on the application for a stay. The Court concluded its judgment with the following remarks:

“... it should be quite clearly understood by the Appellant that his success in this appeal is likely to prove Pyrrhic unless he takes prompt steps to resolve the very longstanding dispute about this land. He should be in no doubt that his present success is only procedural and that in any further substantive proceeding he would face the problem of the accumulated past decisions. We discussed with counsel the present position which, on any view, is very unfortunate for both parties. Ms Tonga indicated her client would allow some further reasonable

- time for the Appellant to obtain another allotment and move his house there. It may be, bearing in mind that the long saga of this litigation began with some errors in the Ministry of Land, that the present Minister may be able to assist in the solution by making an alternative allotment available to the Appellant, to which he could move his house. We can only express our strong encouragement to all parties to make the endeavour.”

12. On 17 September 2009, a month after the 14 August 2009 appeal AC 28/09 was lodged, the present action LA 27 of 2009 was commenced. Paragraph 5.5. of the Statement of Claim states:

"As a result of the mistake advice by the staff (of the Ministry of Lands] ... 'Enele's entitlement to the Allotment was treated as a new applicant with the result that the Land Court held in 2001 in proceedings LA 628 of 1997 that the Minister of Lands at the time erred in granting the Allotment to 'Enele Ongoongotau and registered him in 1993."

13. The Statement of Claim does not refer to the fact that LA 628/97 was the subject of an appeal to the Court of Appeal that was dismissed (AC 14/202).
14. On 3 November 2009 the Second Defendant filed his Defence. He pointed out that LA 628/97 which had decided against 'Enele was unsuccessfully appealed. Furthermore, no defence was filed in LA 5/2008 and no appeal was filed against the Land Court's judgment in favour of the Second Defendant. It will be seen from the introduction to the Plaintiff's Statement of Claim that his claim to a right to reside on the allotment is dependent on the validity of 'Enele's claim, 'Enele being his brother.
15. In the supporting affidavit to this application, in addition to the facts already summarised, the Second Defendant averred that he and the Plaintiff had several meetings with the Minister of Lands between 2001 and 2007 when he received his deed of grant. He also deposed that in an attempt to resolve the impasse he had approached the Ministry which on 13 September 2012 wrote to the Plaintiff [Exhibit A] notifying him that an allotment had been found for him at Hofoa to

allow him to comply with the remarks of the Court of Appeal set out in paragraph 11 above. The Plaintiff has not complied.

16. On 28 August 2012 the action was called on for mention before the Court. Mrs Tupou appeared to represent the Plaintiff. She told the Court that she had just been briefed and obtained leave to inspect the file. On 21 September 2012 Mrs Tupou withdrew. I told the Plaintiff that further delay in advancing his action would not be acceptable. Ms Tonga advised the Court that she would be making the present application which was eventually filed on 13 March 2013.
17. On 27 August the parties appeared. The Plaintiff was unrepresented. No affidavit or other submissions were filed by him. The Plaintiff repeatedly suggested that his case had never been properly heard. He denied ever meeting the Minister. He admitted that he had not responded to the letter from the Ministry dated 13 September 2012. The Plaintiff plainly felt aggrieved by what had taken place but did not appear to be able to understand the consequences of the previous determinations of the various courts which have handled this dispute since 1993.
18. It is plain to me that the verdict of the Court in LA 5/2008 which has not been appealed stands. It is also plain to me that 'Enele's appeal having been dismissed there is now no available ground on which to re-open consideration of the issues between the parties. Given the long drawn out nature of this dispute it was incumbent on the Plaintiff to prosecute his action with reasonable despatch. He has failed to do

so, the result being that the Second Defendant has remained deprived of the possession of the allotment awarded to him by the Court in 2008. This is clearly most unsatisfactory.

19. The application succeeds on both grounds and the Statement of Claim is struck out.
20. Before leaving the matter, I wish to raise, with the greatest respect, the question whether the Land Court has power to commit for contempt on the ground of disobedience of its orders.
21. In allowing the Plaintiff's appeal [AC 28 of 2009] the Court of Appeal held that an order for possession of land could not be enforced by an order for committal since the Rules of the Land Court provide that only orders *other than* orders for possession can be so enforced. The Court expressed the view that:

"It needs to be borne in mind that the Land Court is a purely statutory court and it is questionable whether a power to commit for contempt in any manner could be implied into the rather terse statement of its powers in the Land Act."

22. This judgment was followed in 2011 by the *Executors of Dr Sam Lin Wang v Commercial Factors Ltd* [AC 6 of 2011], in which the power of the Supreme Court to appoint a receiver was considered. During discussion of the issue the Court held that the appointment of a receiver was purely procedural and that the Court had the power to

make a rule governing the procedure whereby such appointments should be made. The Court also approved *Lever Bros Ltd v Kneale and Bagnall* [1937] 2 KB 87 in which "the issue before the Court was whether ordering a person to be committed to prison was a matter of practice and procedure. The Court of Appeal concluded it was." This conclusion, adopted by the Court of Appeal suggests that there is no objection to a rule being made (similar to O 29 R.5 of the Supreme Court Rules) specifically allowing the orders of the Court to be enforced by committal (if such power is not already imported by O.2 r 2 of the Land Court Rules).

23. There is a further consideration. It has generally been accepted that the power of superior court of record to enforce its orders by committal is part of its inherent jurisdiction (see e.g. *Taylor v Attorney-General* [1975] 2 NZLR 675 and that this power is not derived from statute (in this case, the Land Act) but instead flows from the very concept of a court of law (see *Connelly v DPP* [1964] AC 1254; [1964] 2 All ER 401). In my respectful opinion it cannot be doubted that the Land Court is a superior court of record and therefore it has an inherent right to enforce its orders by way of committal. Although the power to commit is not now before this Court for decision I respectfully express the opinion that it would be desirable if an opportunity were to be found for the Court of Appeal to review its conclusion reached in AC 28 of 2009.

Result:

The Application succeeds. The Statement of Claim is struck out. I will hear counsel as to costs.

DATED: 28 August 2013.

N. Tu'uholoaki
28/8/2013




PRESIDENT