IN THE COURT OF APPEAL OF TONGA

LAND JURISDICTION **APPEAL NO. AC 23 of 2011**

NUKU'ALOFA REGISTRY **[LA 21 of 2010]**

BETWEEN : 1. AIVENIHOU LISIATE
2. LAUTAIMI LISIATE - Appellants

AND : 1. MELE 'ELI
2. VIKA HUI
3. TAPA'ATOUTAI 'ELI - Respondents

Coram : Burchett J
Salmon J
Moore J

Counsel : *Mr. Niu* for the Appellants
Mr. Edwards for the Respondents

Date of hearing : 17 April 2012

Date of judgment : 27 April 2012

JUDGMENT OF THE COURT

[1] This appeal arises out of disputes between members of an extended family over the ownership of approximately 8 acres of land at Ha'ateiho.

[2] The claim began with proceedings by the respondents who claim to be the owners of the land seeking an injunction to restrain the second appellant from entering or interfering with the first and third respondents' tax allotments and judgment for damages relating to the actions of the second appellant in entering their land and destroying crops on it.

[3] The first appellant was joined by the second appellant as a third-party to the proceedings. The first appellant filed a counterclaim in which he claimed to be the owner of the land and that he had authorized the second appellant to enter upon it and plant crops. He claimed orders directing the Minister of Lands to cancel the grants made to the first and third respondents and for an order directing the Minister of Lands to register and issue a Deed of Grant of the whole of the land to the third party.

[4] The claims were heard in the Land Court presided over by the Lord President with an assessor. For reasons set out in the judgment,

which will be discussed later, the Court found for the plaintiffs, the respondents in the appeal, and directed that matters of damages and further consequential orders would be the subject of further submissions by counsel.

BACKGROUND

[5] It is necessary to give a history of the ownership of this land, the circumstances leading to its subdivision, the vesting of half of it in each of the first and third respondents and the reasons why the first appellant claims to be entitled to ownership. The story starts in 1963. Around that time the appellants' father Sione Siuaki 'Eli (Siuaki) began occupation of the land. The appellants claim that from that time Siuaki was the rightful owner of the land which had a total area of 8 acres 1 rood and 1 perch.

[6] He was still in occupation in September 1984 when his mother Vika Tupou died. His mother was the widow of Lisiate Tupou who was the owner of a tax allotment at Kauvai. Siuaki was the eldest child. His brother Vaitulala Tauatevalu filed an affidavit in the Land Court and undertook the necessary procedures to enter Siuaki as the eldest son on the Land Register as the holder of the tax allotment at Kauvai.

[7] As will be discussed later it is contrary to the provisions of the Land Act for a person to hold more than one tax allotment. There is a procedure whereby an election can be made as to which of two tax allotments a holder wishes to choose. This will be discussed in more detail later. There is no specific evidence that Siuaki ever made such an election but there is evidence that he continued to occupy the land at Ha'ateiho. It appears that Siuaki despite having occupied the land since 1963 may not have had a Deed of Grant issued to him. There was no clear evidence one way or the other. However in 1995 Siuaki (or his son) paid a survey fee for the land at Ha'ateiho and was issued with a Deed of Grant. He also registered a mortgage over the land at that time which was discharged some months later. So it appears that Siuaki may have remained in occupation of the land at Ha'ateiho at least from 1963 to 1995.

[8] However in his counterclaim the third-party pleads that the second appellant "*continued to occupy and cultivate the Ha'ateiho allotment*" and that in 1995 he (the second appellant) paid the survey fees for that allotment. For his part in his statement of defence the second appellant pleads that he commenced farming the tax allotment in 2008.

[9] In November 1997 the youngest brother of Siuaki, Naulala 'Eli, signed an application form for half of the tax allotment at Ha'ateiho. He paid the survey fee for that allotment. In January 1998 he ordered the second appellant off the land.

[10] Siuaki died in New Zealand in September 1998. In his pleading the first appellant claims that in August 2008 there being no one occupying or cultivating the Ha'ateiho allotment, he instructed the second appellant to enter and occupy it and cultivate it on his behalf and that the second appellant did so without any objection or complaint by any person until June 2010. In August of 1999 the first appellant wrote to the Minister of Lands and claimed the tax allotment at Ha'ateiho. The Minister advised that the question of a grant of the tax allotment could only be resolved through court action.

[11] Naulala 'Eli died in April 2008 and his widow the first respondent claimed the allotment for which Naulala 'Eli had applied. In 2010 a Deed of Grant was issued to the third respondent for the northern half of the Ha'ateiho tax allotment and later in the same year a Deed of Grant was issued to Naulala 'Eli posthumously for the southern half and transferred to the first respondent.

[12] Meanwhile after the death of Siuaki his widow Kolosia Lisiate who was the second wife of Siuaki claimed the tax allotment at Kauvai. It seems that she still holds that land.

THE RELEVANT PROVISIONS OF THE LAND ACT

[13] Section 43 provides for the Grant of allotments:

> *"(1) Every male Tongan subject by birth of 16 years of age not being in possession of a tax or town allotment shall be entitled to the grant of a tax or town allotment or if in possession of neither to the grant of a tax and town allotment.*
>
> *(2) The grant shall be subject to the provisions of this Act and shall be made in accordance with the following rules-*
>
> *(a) the applicant shall make an application on the prescribed form to the Minister;*
>
> *(b) the applicant shall produce for the inspection of the Minister his birth certificate or some other proof of the date of his birth;*
>
> *(c) The applicant shall pay the prescribed fees."*

[14] Sections 120 and 121 relate to the registration of allotments and provide as follows:

> *"120. All deeds of grants of allotments shall be in duplicate and in the form prescribed in Schedule V and in*

addition to proper words of description shall contain a diagram of the land.

121. The Minister shall sign and deliver to the grantee one duplicate and shall register the other by binding up the same in a book to be called the register of allotments."

[15] Part IV of the Act deals with tax and town allotments. Division VII of that part makes provision for the devolution of allotments. Section 80 provides that the widow is entitled to a life estate. Section 82 sets out the rules of succession subject to the life estate of the widow. Section 84 provides for election by a son or grandson of a deceased holder when that son or grandson already possesses an allotment of the same kind. Sections 85 and 86 make further provision for this eventuality. Where a son or grandson elects to take the allotment of the deceased father or grandfather and to surrender the allotment of the same kind already held by him 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*". Section 86 goes on to provide that as between 2 or more such sons the oldest shall be preferred. Section 85 makes provision for the circumstance where the son or

grandson of the deceased holder elects to retain the allotment he already holds.

[16] Section 87 provides as follows:

> *"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, such allotment if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder."*

[17] Other relevant provisions include section 48:

> *" Where any tax or town allotment shall revert to the Crown under the preceding provisions of this Division, such allotment unless required for Government purposes shall be granted out by the Minister in accordance with such regulations as may be made under this Act"*

[18] Section 122 requires any person entitled under the rules governing the devolution of allotments contained in Division VII of Part IV to present the Deed of Grant formerly in the possession of his predecessor in title for endorsement. That step is required to be taken within one month of becoming entitled.

[19] Section 123 provides that where the successor is unable to produce the relevant Deed of Grant he is to produce such evidence as the Minister may require to prove his title and if the Minister is satisfied as to the entitlement he may register that person as the holder of the allotments and issue a new Deed of Grant.

THE PROCEEDINGS IN THE LAND COURT

[20] The parties agreed that there were principal issues which should be tried first. Those issues were set out in paragraph 12 of the judgment as follows:

1) whether Siuaki became the registered owner of the Ha'ateiho land either in 1963 or in 1995.

2) the consequences, if any, of the third party's failure to apply for the registration of the Ha'ateiho land in his name.

3) the consequences, if any, of not joining the Minister as a party to the proceedings.

[21] Before addressing these questions the court noted that where cancellation of a grant is sought, there is a rebuttable presumption that the registration was validly made; that the court will only overturn the grant if the person challenging the grant establishes

that the Minister has acted contrary to statute or in breach of the rules of Natural Justice, or in breach of a clear promise by the Minister; and that the burden of proof is upon the challenger to produce sufficient evidence to establish that the minister has indeed breached one or more of these principles. No challenge was made in the hearing before us to these propositions.

[22] We consider it convenient to address the same three issues in the same order as was done in the Land court.

DID SIUAKI BECOME THE REGISTERED OWNER OF THE HA'ATEIHO LAND EITHER IN 1963 OR IN 1995?

[23] The Court held, citing the Privy Council decision of Folau Tokotaha v Deputy Minister of Lands & Anor [1923-1962] Tonga LR 159 that for the title of an allotment holder to be complete it is necessary for him to be issued with a Deed of Grant and for that Deed of Grant to be registered. Registration is not complete until the Deed of Grant is prepared and a duplicate signed by the Minister and handed to the applicant and the original registered and bound up. In the present case the Court said that Siuaki did not become the registered owner of the Ha'ateiho land at any time prior to 1995. That appears to be correct. The court then went on to

consider whether Siuaki was the "lawful holder" of the land and if so what the consequence was when his mother died in 1984. The court concluded that when, following the death of his mother, Siuaki purported to exercise the right conferred by section 84 to choose between the Ha'ateiho land and Kauvai, that while he may have been the lawful occupier of the Ha'ateiho land he did not "*possess*" it within the meaning of the proviso to section 84. It followed that the decision to take Kauvai did not result in any surrender of the title to the land as envisaged by section 86 because no title was available to be surrendered.

OUR CONCLUSIONS ON THIS ISSUE

[24] We first set out our understanding of the facts relating to this issue. Mr. Niu explained to us, and there was no dispute as to what he said, that the books of Deeds of Grant have no index and that as a consequence finding any particular deed is a very difficult exercise. The books of Deeds are referred to in section 121 of the Land Act as the Register of Allotments. However the volumes of deeds are labelled Deeds of Grant and it is by that name that they are known in the Ministry. The Minister keeps two other books labelled Register of Town Allotments and Register of Tax

Allotments. There are separate books for each of the Islands of Tonga and there are pages within the books for particular villages. Those pages record the names of the Grantees to whom an allotment has been granted, the area of the allotment and the page number in the Deeds of Grant volumes where the deed is to be found. These register books also record the map in which the allotment may be found and the date of the Grant. The books record the names of persons to whom an allotment is transferred upon death of the Grantee or of a subsequent holder. So effectively the Register is an index to the Deeds of Grant which have been made.

[25] A copy of the relevant page from the Register of Tax Allotments is contained in the appeal booklet. There is an entry for Siuaki which indicates a date of registration on 6 June 1963. It records the area of the allotment, a reference to the map upon which the allotment can be found and a reference, made in 1995, to Deed of Grant 67/71. A copy of the Deed of Grant is also contained in the appeal booklet. It is apparent that the written content of that Deed has been made by two different people. Mr. Niu submitted and we accept that some of the writing was included at the time of the survey in the 1950s. However the name of the Grantee and

the date of the Grant were included in 1995 when Siuaki visited the Lands office and paid or arranged payment of the survey fee and was issued with a copy of the Deed of Grant. The Deed also shows an endorsement for a mortgage registered on the 24 July 1995 and the discharge of that mortgage on the 18 December 1995. There is no dispute that Siuaki occupied the land at least up until the death of his mother in 1985 and there is no evidence to suggest that he did not continue in occupation until 1995.

[26] We now turn to the law relevant to the issue. The Land Court judgment relied upon the Privy Council decision of Folau in 1958. At that time the only right of appeal against Land Court decisions was to the Privy Council. The decision is that of a single judge. Appeals in respect of Land Court decisions, except in the case of disputes concerning nobles, have for many years now been determined by the Court of Appeal whose determination is final. Although the Folau decision has been relied upon in subsequent Land Court decisions there is other authority which took a different view. The starting point is the Act itself. The Act in s.2 contains a definition of "landholder" or "holder". There are several clauses in that definition. The relevant ones in this case are:

".....(b) any Tongan subject holding... A tax allotment or town allotment;

(c) any Tongan subject claiming to be interested in land which he is legally capable to hold;.....

(f) any person who claims to be entitled to any land or interest in land whether in actual possession or occupation or otherwise."

[27] In the case of mortgages and leases there is express provision (section 103 (4) and section 126) that they will not be effective until they have been registered. No such provision exists in the case of grants of land. In our opinion the provisions of sections 120 and 121 are procedural. That has also been the view of other courts. In 1956 in the case of Mesiu Moala v Tu'i'afitu & Anor [1956] Vol II Tonga LR 104, Hunter J at page 106, referring to these sections said:

"It is interesting to note that in this division of the act which is headed "Registration of Allotments", it is not stated nor do I think it is implied, that the registration is the test of "ownership" and that unless a person is registered he cannot be regarded as the holder."

[28] That decision was appealed to the Privy Council. In his judgment Hammett CJ [1956] Vol II Tonga LR 153 upheld the decision of Hunter J and agreed with the statement of law set out above.

[29] The question was considered again by the Privy Council in 1985 in the case of Ongosia v Tu'inukuafe and Minister of Lands 1981-1988 Tonga LR 113. In the judgment appealed against the decision in Folau was relied upon. The Privy Council noted (at p115) that what Harwood J appeared to be saying in the Folau case was that a plaintiff claiming an allotment could only succeed if he could prove registration and the issue of the grant. The Council went on to note that there was ample authority to the contrary, including at least one decision of the Privy Council. The Council then referred to a passage from the judgment of Hunter J in Fifita Manakotau v Vaha'i (Noble) Vol II Tonga LR 121 at page 123:

> *"Although registration is very strong evidence of ownership I can find nothing in the Act to say that a person claiming an allotment must be able to show he is registered as the holder of that allotment. Nowhere does the Act make registration the test of ownership. The intention of the Act is that registration will be a method of proof, nothing more. This was the view*

taken by the Privy Council in Tu'i'afitu and Anor v Mesui Moala (Privy Council 25.1.57). The Privy Council in the course of their judgment said: "It was one of the main contentions of the Appellant both in the Land Court and on the hearing of this appeal that the Respondent was not entitled to succeed in his claim because of his failure to become registered as the holder of these allotments. The learned trial judge held that the Respondent had taken all steps required by the Land Act Section 76 and that whilst registration is evidence of ownership it is not always necessary to prove registration before ownership can be established. With this statement of the law we agreed."

[30] The court then noted that each case must be decided on its own facts and the Folau case can be distinguished on its facts. We agree with this analysis. We conclude that Siuaki was certainly the holder of the land as that term is defined in the Act and that he was the lawful holder and indeed the owner although not registered in terms of sections 120 and 121 until 1995.

[31] It is true that the Minister must grant an application. It may in our view be properly inferred that the Minister did so in or around 1963. The evidence that supports this conclusion is the detail

included in the register of tax allotments which is a register kept by the Ministers department. In fact the very existence of the record in this register along with the inclusion of the uncompleted deed in the Register of deeds suggests strongly that a deed may have been issued at that time and subsequently lost. Whether or not that was the case we are satisfied that Siuaki was the lawful holder within any of the 3 meanings set out in para 26 above at the time of the death of his mother in 1984. It follows that Siuaki "possessed" the allotment in terms of the provision to s.84 at that time.

[32] Further support for the conclusion can be gained from the fact that when he did apply for a Deed of Grant in 1995 it was issued to him.

WHAT WAS THE CONSEQUENCE, IF ANY, OF THE THIRD PARTY'S FAILURE TO APPLY FOR THE REGISTRATION OF THE HA'ATEIHO LAND IN HIS NAME

[33] The first question is whether Siuaki made an election at the time of his mother's death to take the Kauvai land and to surrender the Ha'ateiho land. There is no doubt that he became the registered

owner of the Kauvai land and it is a reasonable inference that the affidavit made by his brother which resulted in that registration was made with his approval or at his request. This conclusion is supported by the fact that Siuaki's widow believed that his eldest son was entitled to the Ha'ateiho allotment and wrote to the Minister after Siuaki's death asking for that land to be transferred to the third party. It is inconceivable that Siuaki was not aware that the Kauvai land had been granted to him. Given the well known prohibition on the holding of more than one allotment of the same kind he must be taken to have surrendered the Ha'ateiho allotment. The fact that he continued to occupy the land is not inconsistent with this conclusion, nor is the obtaining of the Deed of Grant which may have been obtained so that the third party could have evidence of his entitlement.

[34] We proceed on the basis that there was an effective surrender in 1985. Mr. Niu argued that the effect of section 86 of the Act was that the third-party became the Grantee of the surrendered allotment. The relevant words of section 86 are: *"Where a son or grandson elects to take the allotment of his deceased father or grandfather as the case may be and to surrender the allotment of the same kind already held by him, 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.....As between two or more such sons the eldest shall be preferred." Thus there is a requirement to grant the allotment to the eldest son, in this case the third party.

[35] The provisions of s.87 are relevant:

> *"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, such allotment if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder."*

Mr Niu argued that s.86 created an entitlement to the grant and that he was not required to make a claim in respect of the allotment. He submitted that s.87 did not apply to the case of an heir taking land under the provisions of s.86

[36] We do not accept this submission. Although s.86 provides the third party with an entitlement to the land, the words "*shall be granted*" refer to a process which requires a claim to be made. In

our view s.87 applies to all types of devolution referred to in Division VII of Part IV.

[37] However the last holder was Siuaki. He died on the 18th September 1998. The third party made his claim on the 30th August 1999. A claim on his behalf was made earlier by Siuaki's widow in May 1999. So the claim was made within 12 months of Siuaki's death. It may be that s.87 was not intended to apply to a grantee under s.86 but if it was then it has been complied with. The claim having been made the allotment in terms of s.86 "*shall be granted*" to the third party.

[38] Section 122 is also relevant. That section provides that 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...*" Section 123 provides that if that person is unable to produce the relevant Deed of Grant he is to produce such evidence as the Minister may require to prove his title. Obviously the third-party did not follow that procedure within one month of the surrender. We do not regard that failure as fatal to his claim. We regard this

as a procedural requirement. Failure to comply with it would not invalidate his grant if it otherwise existed (see Maamakalafi v Finau Tonga LR 218 at 223). He did however make a claim to the land prior to the issue of Deeds of Grant to the respondents. The evidence called does not clearly establish who was in possession of the land at various points in time. The third-party in his pleading says that his brother the second appellant "continued" to occupy and cultivate the Ha'ateiho allotment but it is not clear as to the period of time over which this occurred. Nevertheless we are satisfied that the effect of s.86 is that the third party is entitled to be granted the Ha'ateiho land.

WHAT IS THE CONSEQUENCE OF NOT JOINING THE MINISTER

[39] As the Lord President said in the Land Court decision what happened to the Ha'ateiho land in the years following the "*decision to take Kauvai*" is not at all clear and in the absence of any evidence on the question of occupation it is impossible for the court to arrive at any conclusions as to the nature or extent of the occupation claimed by the defendant or third-party. It is clear however that because the third-party claims that the minister wrongly granted the land to the respondents the Minister must be

joined in the proceedings (see eg. Maamakalafi at p223). The consequence of this is referred to in the conclusion.

LIMITATIONS

[40] The Land Court held that the third party's claim was statute barred. Presumably this was based upon the provisions of section 170 which provides:

> *"No person shall bring in the 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, or if such right shall not have accrued to any person through whom he claims then within 10 years next after that time at which the right to bring such action shall have first accrued to the person bringing the same."*

[41] The first order sought against the Minister is the cancellation of the Grants to the first and third respondents. Those grants were made in 2010 so clearly that claim is not statute barred. The second order sought is for a direction that the Minister issue a Deed of Grant for the whole of the allotment to the third-party with effect from April 1985.

[42] Section 86 is the important section in this subject. The relevant part of it is set out in para 34 of this judgment. It provides for a statutory grant to the third party so that he has an ongoing entitlement. Until that entitlement is challenged he can, at any time up to one year after the death of Siuaki ask for the issue of his deed. There may be other ways in which his entitlement could be lost but in this case Deeds to the respondents were not issued until after the third party's claim had been lodged. The consequence is that the claim is not statute barred. It is important to note that the Minister at the time, recorded that the dispute as to the title to the Ha'ateiho land could only be resolved through Court action. The findings in this judgment are subject to the right of the Minister to challenge them in the manner recorded in the final paragraph.

CONCLUSION

[43] We have held that the Minister should have been joined in these proceedings. We order that he be so joined. We adjourn this appeal to the next sitting of the Court so that we can hear from the Minister if he wishes to appear. We would be prepared to hear

evidence called by him if necessary but we suspect that the evidence already given may suffice for his purposes. The parties have had their opportunity to call evidence relevant to the issues so that it is only the Minster who needs to be heard although of course counsel for the parties will have the opportunity to make submissions in response to the Minister's case. If the Minister does not wish to appear he may file a memorandum to that effect and the Court will make final orders. Alternatively the Minister may wish to provide written submissions which, subject to the provision of submissions in response, would enable the matter to be finally determined on the papers.

[44] Appeal adjourned accordingly.

Burchett J

Salmon J

Moore J