SEFO MAKA KATOANGA v. SIOSAIA 'OFA-HENGAUE.

(Land Court. Hunter J. Tongilava ,Assessor. Nuku'alofa, 23rd, 26th and 27th November, 1956).

Subdivision — No written notice to holder — Validity — Tongan custom — Court not bound by technicalties — Land Act (Cap. 27, 1928 Edition) S. 581.

The plaintiff was the registered holder (as a widow) of an area much larger that the statutory area for tax allotments. The tofi'a holder with the consent of the Minister subdivided this area, and granted 8¼ acres out of the land to the defendant. The Minister omitted to give the holder of the large area written notice of his intention to subdivide in accordance with the provisions of Section 81. The plaintiff submitted that the failure to give notice rendered the subdivision invalid and that the defendant was wrongly registered.

HELD: The tofi'a holder had a right to subdivide and that his failure to give written notice did not invalidate the subdivision.

Verdict for the defendant.

Mika appeared for the plaintiff.

Finau appeared for the defendant.

C.A.V.

HUNTER J. : The Plaintiff, a widow, is the holder of a tax allotment named Piu which previously belonged to her husband Maka. Maka was registered as the holder on 20. 12. 1915; after his death the allotment was transferred to the widow. The allotment is a large one of some 39 acres and of course since the 1927 Act came into force such a grant would be void as being in excess of the statutory area.

The defendant is a son of the elder brother of Maka. The allotment originally belonged to their father, and for some reason which does not appear in the evidence, descended to Maka rather than to his elder brother.

In 1929 Maka "gave" to the Defendant a portion of this allotment, and the Defendant started to improve it by planting it with coconut palms etc. The Plaintiff says that it was never "given" to the Defendant at all but that he was allowed to use it to grow food for his family and that the coconut palms were planted by the Defendant in payment for the use of the land and that such planting is in accordance to Tongan custom. The learned assessor advises me, and I accept his advise, that there is no such Tongan custom. He says that it is a custom to allow another man to have a garden on your allotment in which to plant yams and such things and that when the crop is harvested the owner of the land is recompensed with some of the crop, but he says he has never heard of a custom whereby the gardener plants rows and rows of coconuts (as the defendant in this case did) for the benefit of the holder of the land. I am satisfied that when Maka set aside a

portion of this allotment for the Defendant and his family he intended it to belong to them and had the defendant taken steps to register it he would have received no opposition from Maka, and I am further satisfied that this portion has been held on this footing ever since. The defendant said that the holder of the Tofi'a in 1929 was agreeable to this division.

The present owner of the estate Lauaki, gave evidence. I am quite satisfied that his evidence was truthful. He said that in his tofi'a there are a number of holdings of more than the statutory area and that this year he saw the Minister and suggested that these large holdings should be cut up into the statutory size so that as many of his people as possible can have allotments. He said that the Minister told him to go ahead and make rough and ready subdivisions, the boundaries of which could be corrected later when surveys are made. The Minister was not called and although this piece of evidence was inadmissable (in the way it was given) as heresay it was not objected to and I accept it.

Acting on the Minister's advice Lauaki then made a subdivision of this allotment. He gave to the defendant (or really the son of the defendant, as the defendant himself already holds an allotment elsewhere) an area of $8\frac{3}{4}$ acres, as nearly as he could judge, at the site of the land the Defendant has occupied since 1929. This resulted in the defendant losing some of the land he had planted with coconuts as the area he had been occupying was more than $8\frac{1}{4}$ acres. It will be noted that the Plaintiff (the widow) is still left with a piece of land sufficient for nearly four allotments of statutory area.

Lauaki then informed the Plaintiff of what he had done and she objected. As far as I can gather from her evidence her objection was not because the defendant was getting a piece of her allotment but that he was getting this particular piece planted with coconuts. She said that she and her husband and their son planted them but I am quite satisfied that these trees were planted by the Defendant and the members of his society.

Section 81 (i) of the Land Act 1927 provides "Whenever it is found that any person is holding land as a tax allotment which is of greater area than the statutory area, the Minister may give twenty-one days notice in writing to such person informing him that he intends to subdivide such land and to grant from out of the same to such person a tax allotment of the statutory area." In the present circumstances I regard what has happened as a subdivision by the Minister under the section. Lauaki was actually the person who made the subdivision, but I am satisfied that he made it with the Minister's advice and approval. It is true that Section 81 requires that the holder of the allotment be given twenty one days notice in writing and that no such notice was given in this case. However I don't think that omission invalidates the proceedings. The widow received notice, verbal notice, and as a result has taken the only action that I can see is open to her — this application.

My view is that when the Minister decides to subdivide one of these large allotments there is nothing the holder can do to prevent it. He has a right to lease any excess (Section 81 (2)) but he can not prevent the subdivision. May be if the action proposed by the Minister or the Estate Holder was quite unreasonable the Court could interfere, but in the present cases I regard the action of Lauaki as reasonable and proper.

Strictly speaking Lauaki and not Siosaia 'Ofahengaue should have been the defendant in this case but no objection was taken that the correct parties were not before the Court. This Court should not stand on technicalities. I regard my duty as the Land Judge to endeavour to see that justice in land matters is done between the people and not to allow justice to be defeated on a technical ground, if I can reasonably do so. The fact that the wrong person has been made a defendant can hardly be called technical but in the present case as the real question in issue has been argued and as Lauaki gave evidence and was fully cognisant of the proceedings I do not think that the case should be dismissed on the ground that he was not made a defendant.

From what I have already said it will be seen that I regard the subdivision of this allotment as a proper one and that the Plaintiff has no legal justification for objecting to it. This means that there must be a verdict for the Defendant. It must be understood, however, that a verdict for the Defendant does not mean that this piece of land is vested in him or his son. In any case it could not be vested in the Defendant as he is already holder of an allotment. All the verdict means is that Lauaki's action in cutting off this piece was proper. No doubt if the son of the Defendant makes a proper application for a grant of this piece he will receive Lauaki's consent and as far as I can see on the evidence before me the application should be approved by the Minister.

Verdict for the Defendant.

Finau : We don't ask for costs.

No order as to costs.