

MESUI MOALA v. TU'IAFITU AND FOUETI
HALALILO.

(Land Court. Hunter J. Fevaleaki Tupou, Assessor, Vava'u,
23rd, 24th and 25th October, 1956).

Registration of allotments — Registration not the only test of ownership
— Widow's life estate — Husband died in 1931 — No notice required
by widow — Land Act Cap. 27 (1928 Laws) Ss. 69, 71, 76, 83, 94 and 95.

This was a claim for a tax allotment and a town allotment. These allotments had been occupied for many years by the plaintiff's father and subsequent to the father's death by the widow. The allotments had never been registered. In 1953 the defendant Foueti made an application to the estate holder for these allotments, which was approved but the grant was not registered.

HELD: That as the plaintiff's father had been in undisturbed possession for many years although not registered, the plaintiff was entitled to succeed to the allotments and that he should be registered as the holder.

Verdict for the plaintiff.

M. Finau appeared for the plaintiff.

Mafua and Pousima appeared for the defendant.

C.A.V.

HUNTER J. : The Plaintiff is claiming from the Defendants a town allotment and a tax allotment described as "Fongotofe". These allotments are situated at Makave on the hereditary estate of the Defendant Tu'iafitu. No evidence has been offered as to the precise situation of these allotments but apparently no dispute arises about that. The defendant Foueti Halalilo is at present in occupation of the allotments in question.

I am satisfied that the Plaintiff's father Sunia Nau or Sunia Fakahala was in occupation of these allotments for many years probably before 1900 (See the evidence of Sione Laupe) until his death in 1931, and that after his death his widow occupied them until her death in 1944. It appears to have been accepted generally at the time that the widow's occupation was by virtue of her right to a life estate in her husband's allotments (Section 69).

The defendants' case is that the Plaintiff's father never held these allotments in the legal sense and that therefore there was no interest to which his widow or his eldest son, the Plaintiff, could succeed.

I am satisfied that on the death of the widow the Plaintiff gave notice to the Minister within the twelve months as required by Section 76. It is true that no notice, under this section was given by the widow on the death of her husband, but the provision that the widow should give notice was not inserted in the Act until 1943 and as the widow succeeded (if she did succeed) on her husband's death in 1931, no notice was required from her. As

laws can not have a retrospective operation (Clause 20 of the Constitution) it follows that notice is only required from widows who succeed after the 1943 Amendment.

On the 14th May, 1953 the defendant Foueti made application to the Estate Holder for a grant of these allotments (Exhibit B). This application was approved by Tu'i'afitu and submitted to the Deputy Minister but no registration of a grant was made. Foueti Halalilo is a son of the Plaintiff's younger brother.

The Plaintiff's father was never registered as the holder of these allotments; neither was the widow nor the plaintiff.

As Pousima pointed out in his address to the Court. The question is whether Sunia Fakahala was ever the "holder" of these allotments in the strict legal sense. He submitted "No" and suggested that although Fakahala "occupied" these allotments for many years he was there merely at the pleasure of the estate holder, whose Matapule he was; and that whatever interest he took, it was certainly not an interest that could be transmitted by heredity. As I understand his argument he based this submission on the necessity for registration to perfect a title and that although Fakahala lived until 1931 (well after Chapter 27 came into force) he never took any steps to register his title and that therefore whatever interest he had lapsed at his death.

There appears to be nothing in the Act to provide that no allotment can be lawfully held unless it is registered. On the contrary there are many sections which suggest that an allotment may be lawfully held although it has not been registered. My view is that registration is only evidence of ownership. No doubt in competing claims the registered holder would take priority over the unregistered (all things being equal) but that does not mean to say that in no circumstances can an unregistered holder establish his title. This must be so as the rights of holders were recognised before registration came into being.

The Act clearly contemplates this: see Division II of Part II and particularly provisos to Section 69 and 71 which clearly recognise that a person may be a lawful holder though not registered.

I am satisfied that according-to-Tongan custom, and I think the learned Assessor agrees with me on this, that since Fakahala had undisturbed possession of these allotments for so many years he must be regarded as having been the "holder" in the fullest sense although he never was registered.

It is further submitted by the defendants that even if Fakahala were the holder there is no evidence that this was an "hereditary" allotment and that therefore it could not have descended to his heir. Section 5 of the Act which provides that every allotment is hereditary is a complete answer to this. If Fakahala was the holder of these allotments and I have found that he was, then they descended to the Plaintiff, subject to the widow's life estate, pro-

vided that a claim was made in accordance with Section 76, and I find that the claim was made when the Plaintiff and his wife interviewed the Deputy Minister either directly or through their legal adviser Puli'uva Afuha'amango.

Registration of allotments is dealt with in Division II of Part VII of the Act.

Sections 83 and 94 deal with deeds of grants and are not applicable to the case under consideration. Section 95 provides that a person becoming entitled on devolution shall within one month present the deed of grant of his predecessor to the Minister. In this case the Plaintiff could not present the deed of grant because none had been issued, and it can not be assumed that in such a case the Legislature intended that the heir should be deprived of his inheritance. Section 96 is not in point as it deals only with lost grants. 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 that it is implied, that registration is the test of "Ownership" and that unless a person is registered he can not be regarded as the holder.

My view is that the Plaintiff succeeded to these two allotments as the heir of his father and I direct that his name be entered in the register as the holder of these two allotments by succession.

Verdict for the Plaintiff.

EDITOR'S NOTE: The defendant appealed. On the 25th January, 1957, the Privy Council (Hammett C.J.) dismissed the appeal. See page 153.
