Land Case 6/63

1. SIONE MA'U 2. FILIMONE PELEKI 3. SINISA MA'U	v	1. MINISTER OF LANDS 2. LOSINI LEONE

(Land Court. Roberts J. Hon. Luani, Assessor, Nuku'alofa 9th, 13th, 17th and 19th November, 1964).

Section 49—Grant in excess of statutory area—Null and void if made after coming into force of the Act.

The first plaintiff alleges that as heir he was the rightful holder of a town allotment in excess of the statutory area. Plaintiff in 1960 asked for a sub-division and the allotment was accordingly sub-divided and distributed as plaintiff requested. This distribution was opposed by the second and third plaintiffs, the eldest and second son of plaintiff respectively. Plaintiff now asks that the original distribution be cancelled and grants be made to his sons second and third plaintiffs.

Held: That as first plaintiff's father did not register the allotment in question and that as registration was not made until 1928 for the first time by plaintiff for an undetermined area, pending survey, he was not entitled to any portion in excess of the statutory area. Held also that the determining date of a grant in relation to Section 49 is the date of registration. There was no reason in law or in equity to vary the subdivision or allocations made by the Minister, the first defendant.

Verdict for the defendants

Tu'akoi and Finau for Plaintiffs

Kiekie Mo'unga and Hahano Vaha'i (clerks to the Minister) for the first defendant,

Tupou and Mele Tu'ipulotu and Taufa for the second defendant.

ROBERTS, J: On 26th October, 1962 a writ of summons in this matter, (No. 110/62) was issued jointly by Filimone Peleki and Sinisa Ma'u, the eldest and second son respectively of Sione Ma'u, and Sione Ma'u was joined as co-defendant with the defendants, the Minister of Lands, Sione Tu'i'onelua (the third son of Sione Ma'u) and Losini Leone.

On the 5th June, 1963 a writ of summons (No. 6/63) on precisely the same matter was issued jointly by Sione Ma'u against the Minister of Lands and Losini Leone and the Crown. The Crown was joined as co-defendant on the grounds that Cabinet had given consent to the lease granted to Losini Leone, This is a misjoinder. The Cabinet gave no order but merely consent. It follows that no judgment or order of this Court in relation to this matter can affect the Cabinet either directly or indirectly. Accordingly the Crown as co-defendant has been excluded and the pleading against the Crown struck out.

The facts of the case are as follows:—

The town allotment "Maka" was registered by Sione Ma'u on 18th December, 1928 and as a result he was given a temporary document (Exh. B.) which specified no area and which stated that it was given pending survey when a proper Deed of Grant would be issued.

In 1960 Sione Ma'u by letters (Exh. A1 and A2) asked the Minister of Lands to subdivide and give a portion to himself, a portion to his third son (Sione Tu'i'onelua) and a leasehold to Losini Leone. This was opposed by the 1st and 2nd sons (plaintiffs 2 and 3).

The estate holder Tungi endorsed the application for sub-division and allocation but in 1959 town allotments from the estate of Tungi had been given to plaintiff 2 and plaintiff 3 and in 1959 they settled on those town allotments and are still occupying them.

The third son Sione Tu'i'onelua had no allotment in 1960. The sub-division into three portions was made, namely one of 1r. 8p. retained by Sione Ma'u, one of 1r. 8p. to Sione Tu'i'onelua and the third portion of 39.7p. reverted to the estate holder Tungi who, as requested by Sione Ma'u, gave it on lease to Losini Leone (the 2nd defendant).

Plaintiffs have brought this action for an order that the lease to 2nd defendant be cancelled and the area given to Sinisa Ma'u (the 3rd plaintiff) as a town allotment and that the grant to Sione Tu'i'onelua be cancelled and his allocated area given to Filimone Peleki.

Before dealing with the merits of the case the inconsistent conduct of Sione Ma'u must be considered. He had requested, it would seem most earnestly, a sub-division and allocation and has been cited as co-defendant by his two sons who opposed it. He has since entirely shifted his position and has issued a writ as co-plaintiff and precisely the same issue. In other words he has approved and disapproved in the same matter. The law of estoppel has to be considered. However as there is no claim for damages it matters little whether he appears as plaintiff or defendant. It is his evidence that the Court looks to in relation to the claims of the other two plaintiff's who took no part in Sione Ma'u's inconsistent conduct.

Accordingly these two cases have been treated as one, the former merging in the latter.

Reverting to the facts; prior to the Land Act of 1927 Sione Ma'u occupied a town allotment known as Maka of 3r. 6.7p. It was not registered nor was there any Deed of Grant issued. The only documentary evidence of his ownership would appear to be a chart held by the Minister of Lands on which the name of Sione Sama was entered in pencil on an outlined area marked 3r. 6.7p. Sione Ma'u has stated that Sione Sama is the name he is known by in the village. His father, who died in 1915 was, however, also known as Sama. The name Sione Sama has been crossed out and the sub-

division referred to is now shown. The following points must be considered:— Firstly, although registration was compulsory by section 557 of the Land Act of 1903 neither Sione Ma'u nor his father registered as owners of the allotment under that Act. Secondly when registration was applied for in 1928 under the 1927 Act only a provisional registration was granted, no area being specified, pending survey. It may be that the Minister of Lands was mindful of the statutory maximum area as provided by the 1927 Act.

In this regard if we refer to Section 49 of the Act we find the word "grant". "It as unlawful to grant any allotment in excess of the area specified," etc.

How is the term "grant" to be interpreted? What is the determining factor as to area? It is a name written on a chart—and names are so written frequently in pencil and almost illegibly. There is no signature and no stamp or other indication of Ministerial authority—or is it registration, or is it the issue of a Deed of Grant? It has been noted by this Court that registrations have been entered in the register without any reference to the area. What is then to be the final and determining factor as to area? Counsel for defence has submitted and is supported by the evidence of plaintiff's 3rd witness, a clerk of the Ministry of Lands, that the Deed of Grant is the determining factor.

Counsel for plaintiffs, however, has gone to considerable trouble to show, and has in fact shown, that in several cases registrations have been effected and Deeds of Grant issued since the 1927 Act came into force for areas exceeding the statutory maximum. In some cases there was entry in the register before the 1927 Act and the issue of a Deed of Grant for the same area after the Act. Counsel has cited these in support of his submission that for a grant to be valid there need not necessarily be registration or the issue of a Deed, that the term "grant" cannot be so limited.

The Court cannot however support this view for although the holding of allotments exceeding the statutory maximum have in some cases been evidenced by registration or Deeds of Grant made or issued subsequent to the 1927 Act, this must not be considered as a precedent to be followed, for it is contrary to the provisions of the Act.

Ownership relating to land is a very important matter. It is too important to depend for proof on entries on maps or plans. A method of registration is provided for and there are special Registers kept by the Minister for the purpose. Registration is the key to ownership and the Deed of Grant may be termed the seal of ownership.

This Court holds, therefore that for the application of Section 49 a grant is made when registration is effected by proper entry in the register kept for the purpose and as to area the Deed of Grant is the determining factor.

Applying this principle to the present case it results that the grant of the allotment in question was made to Sione Ma'u when he was registered as holder in 1928 after the provisions of the Land Act of 1927 had come into force. He was accordingly registered for an indetermined area which would be determined after survey when a Deed of Grant would be issued. The Deed of Grant if it would have been for an area exceeding 1r. 24p. would have been contrary to the provisions of Section 49 of the 1927 Act. In the meantime Sione Ma'u asked the Minister of Lands to subdivide the area, apparently under the impression that he was entitled to the whole area, and grant a portion to his third son Sione Tu'i'onelua. He also asks for a separate portion to be set aside as a leasehold to be leased to Losini Leone. After subdivision and allocation the holder of an allotment i.e. either Sione Ma'u or Sione Tu'i'onelua in this case, would with consent of Cabinet, be entitled to grant a lease out of their allotment but there is no provision in Section 51 for the separation of a portion of the whole and granting a lease in this way. What did the Minister of Lands and the estate holder Tungi do? Tungi in 1959 had agreed to the grant of town allotments to the first and second sons of Sione Ma'u (the 2nd and 3rd plaintiffs) which they have occupied since that date. He was not obliged to do so by law and has agreed to confirm, out of the provisional grant made in 1928, the granting to Sione Ma'u of a town allotment of 1r. 8p. and to his third son an adjoining grant of 1r. 8p. and has with the consent of Cabinet, himself granted a lease to Losini Leone. The Ministry of Lands would have been within the law if they had merely confirmed the grant of a town allotment of 1r. 8p.—more or less but not exceeding 1r. 24p.—to Sione Ma'u but they went beyond this and did what Sione Ma'u requested. All the sons are thus provided with allotments and in addition the heir of Sione Ma'u will acquire by succession, and Losini Leone—the son in law of Sione Ma'u—has his leasehold.

As a result of Sione Ma'u's request (Exhbs. A & A2) both the estate holder and the Minister of Lands have gone to expense and trouble to give him what he specifically requested and they have done more than they were legally required to do. Furthermore, the lease document has already been issued to Losini Leone.

Counsel for plaintiffs has referred to Privy Council Appeal Case No. 11 of 1958. The facts in that case, however, were quite different from the present case in that registration was effected in 1915 and allocation was made to a son-in-law contrary to the provisions of Section 51.

In conclusion this Court sees no reason either in law or in equity to vary the subdivision or allocations made or to cancel the leasehold and accordingly enters judgment for the defendants with costs.