

Land Case No. 26/67

PENI PAU -v- 1. MINISTER OF LANDS
2. TAHOLO LELEA

(Land Court. Roberts J., Hon. Luani, Assessor, Nuku'alofa, 9th May, 1969).

1. Area of Allotments—Section 568 of Land Act of 1903—Deed of grant issued after 1927.
2. Cemetery—Reservation by Minister of Lands—compulsory resumption—Sections 116 and 117.

Held: (1) Limitation of area of an allotment as provided by Section 568 of the Land Act of 1903 does not apply to area comprised in Deed of Grant subsequently issued pursuant to the Act of 1927.

- (2) That any compulsory resumption of land for public purposes—and these include a cemetery—can be effected only by Order in Council pursuant to Section 117 of the Land Act.

'Ahiu for the Plaintiff.

Tu'akoi for the 2nd Defendant.

Clerk to the Minister of Lands, Na'a Lemoto represent the Minister of Lands.

ROBERTS, J: Plaintiff claims that he has been unlawfully deprived by the Minister of Lands, the first defendant, of a portion of his tax allotment in the village of 'Ahau which the first defendant cut off on a subdivision for use as a cemetery.

The said taxallotment, in the estate of Noble Lasike was registered, no area being mentioned, by plaintiff's father, Pauliase Tu'itahau in 1921. The allotment was then already surveyed. A Deed of Grant (Exh C) was given to plaintiff's father dated 1.5.51 on which the area of 8 acres 1 rood 6 poles is entered. There is nothing to indicate the burial ground on the plan. Plaintiff's father died in 1956 and his son and heir Peni Pau, the plaintiff, was granted registration of the allotment. From 1936 to 1962 one corner of the allotment facing the road has been used as a burial ground for the deceased relatives of Taholo Lelea second defendant, some six persons having been buried there with the permission of plaintiff's father, and plaintiff after he inherited the allotment.

In 1966 the estate holder, Lasike, made an application to the Minister of Lands asking that a portion of 2 acres be subdivided from the allotment to be used as a cemetery, giving as a reason that people were already buried there and there was ill feeling between the allotment holder and people visiting the burial ground. A subdivision was made and an area of 1 rood 37.5 poles (and not 2 acres as requested) was cut off by the Minister of Lands for use as a cemetery.

Plaintiff is asking to have the area which was subdivided and cut off, namely 1 rood 37 poles restored to him. The graves occupy a very small part of this area and plaintiff states that he will respect and look after the graves already there but will not agree to allow any additional area for burials.

Defendant's case is that there was a mound on the area in question on which his ancestors had been buried and that he wishes that this burial ground continue to be used for his family and relatives. His advocate has referred to Section 568 of the Land Act of 1903 which was in force at the time of the registration in 1921. Section 568 provides to the effect that the area of tax allotments in Hihifo in Tongatapu and Ha'apai shall not exceed half the statutory area of tax allotments in other districts and that consequently plaintiff is not entitled to the area he claims.

The Court will firstly deal with the defendant's submission relating to the application of Section 568 of the 1903 Act. Plaintiff has raised doubts as to whether the said allotment is in Hihifo. The clerk to Minister of Lands referring to the map has stated that it is. In the absence of evidence to the contrary the Court must accept statement of the Clerk of Minister of Lands.

There is no doubt that when the registration was made in the name of plaintiff's father in 1921 he was entitled to only approximately four acres. However, he planted and improved the whole area and it is clear that he regarded the whole area as his. There is no evidence of any objection being raised against his occupation of the larger area by the Minister. By 1951 after thirty years of such occupation it is possible that he would have acquired an equitable title. There is, however, no need for plaintiff to plead in equity, for in 1951 twenty-four years after the repeal of the 1903 Act, plaintiff's father was given a Deed of Grant of the whole area of 8 acres 1 rood 6 poles which is the statutory area plus the permissible extra provided by Section 49 of the 1927 Act. Thus by issue of the Deed of Grant in 1951 plaintiff's father received a legal title to the statutory area and it is this area which his son the plaintiff inherited.

Plaintiff therefore has a legal title to the whole area of the allotment, namely 8 acres 1 rood 6 poles.

With regard to the subdivision for the purpose of the cemetery. The provisions relating to land for public purposes, which includes cemeteries, are set forth in Part VIII of the Act, Section 118 of which provides to the effect that any such order for sub-division, as made in the present case, shall be made by the King with the consent of Privy Council. There has been no notice given to plaintiff as required by Section 119. There has been no such Order-in-Council given in relation to the sub-division now in dispute. The Minister of Lands has acted ultra vires in the sub-division made of plaintiff's allotment. If it is sought to establish the cemetery in question, which owing to its size of approximately 50 yards square must be

considered a public cemetery, the matter must be referred to His Majesty in Council pursuant to Section 118.

I therefore give judgment for Plaintiff.

Editor's Note: The defendants appealed to the Privy Council. On 11.12.72 the Privy Council (Marsack A.C.J.) dismissed the appeal and confirmed the decision.