

Moa and Moa v Moa

Privy Council
App 2/1980

30 April 1980

Land - allotment may be registered posthumously

Land - widow, even if registered, has no power to subdivide allotment

Registration - posthumous registration of land and request of widow valid

10 Sione Moa, who was the holder of a town allotment, applied in 1967 for a subdivision of the allotment into three areas, one to be held by himself, and the other two by each of his sons, Terry and Harisi. Sione died in 1975 and when his widow, 'Ana, applied for her widow's interest it was discovered that no grant had been made to Sione, and that the proposed subdivision had also not been registered. 'Ana then applied for a posthumous registration of Sione to the whole allotment and a transfer of the allotment to her for her life, and a subdivision of the allotment into three areas, but allocated differently from that proposed in 1967, and this was granted by the Minister.

20 Terry Moa, who was the heir of Sione, challenged this subdivision and this was upheld by the Land Court. 'Ana and Harisi appealed to the Privy Council.

HELD:

Dismissing the appeal.

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- (1) The Land Act permitted posthumous registration of the interest of a holder of an allotment, and the registration of the life interest of the holder's widow, but the holder's heir was entitled to succeed to the allotment in its entirety;
 - (2) The widow of the holder of the allotment has no power to subdivide an allotment and the Minister of Lands had no power to authorise a subdivision and make grants of such subdivided land.

Statutes considered

Land Act ss74 and 76

Cases considered

40 Tu'inukuafe v Minister of Lands (1962-73) Tongan LR 15

Privy Council

Judgment

Sione Moa was in 1967 the holder of a town allotment which was in excess of the permitted size. It had been in the Moa family for many years. In 1967, Sione Moa made an application for the subdivision of the allotment so that he kept Lot 1, Hanisi got Lot 2, and Terry Moa got Lot 3. There was some mistake about the number of Hanisi's Lot but it is accepted that it was lot 2. On May 19, 1969 the Minister of Lands wrote to the Senior Surveyor stating that he approved a sub-division of Sione's town allotment into 3 lots with provision for a road. There was an attached sketch plan. From the Falaleu Road boundary the sections were:-

Lot 1 Sione Moa Area 1r 24p

Lot 2 Hanisi Moa Area 1r 24p

Lot 3 Terry Moa Area 1r 36p

Road access was provided by a proposed road which ran from the Falaleu Road alongside Lots 1 and 2 to Lot 3. A further letter was sent by the Deputy Minister of Lands to the Acting Minister on February 17, 1970 submitting Sione's application for subdivision. This confirmed the previous intention to subdivide. The reason given was that his sons Hanisi and Terry wished to build on their lots.

Sione died on July 15, 1975. The subdivision had not then been completed by the issue of grants. There was no reason why this should not have been done. Ana, Sione's widow, went to claim her widow's estate. It was found that no grant had been made to Sione. As a result of a visit by Ana and Hanisi an application was made for Hanisi to lease Lot 1 and for Ana to take Lot 2. The Letter from the Deputy Minister of Lands Vava'u to the Minister of Lands dated 16 January 1970 was as follows.

"Application for lease of Town Allotment (residential site) by Hanisi Moa of Neiafu, Vava'u."

I respectfully forward herein application for lease of a town allotment by Hanisi Moa of Neiafu for your deliberations with His Majesty's Cabinet:-

- (1) The portion subject to application for lease is 1r.24p. is situated on Crown estate in Neiafutahi. Survey fee of T\$7.50 was paid on the 16/7/76 under Receipt 736174.
- (2) The whole portion was occupied by deceased, Sione Moa who had not registered it though it has been divided into 3 portions.
- (3)
 - i. Lease is applied by Hanisi Moa.
 - ii. One portion for the widow, Ana Moa.
 - iii. Terry Moa's portion.
- (4) The sketch map for your perusal. Surveyor is requested to provide a portion of about 3 perches for a small road.

- (5) The total area of the allotment is 1A 4.4p. That is the nature of the allotment's division."

On February 2, 1976 the Deputy Minister of Lands, Vava'u, wrote to Hanisi as follows:-

100 "I acknowledged receipt of the Minister of Land's letter re: the allotment portion of Sione Moa, Hanisi Moa and Terry Moa that was surveyed and divide by the surveyor into 3 portion which stands in the following order:-

- (1) Nearest the road is Sione Moa's portion, 1r, 23.73p.
- (2) In the centre is Hanisi Moa's portion, 1r, 18.57p.
- (3) To the rear is Terry Moa's portion, 30.37p.

Therefore your application for lease should be made to your own portion, that is, No.2 according to the sub-division made.

110 Please contact this office if there is anything you do not understand."

A further letter was produced at the hearing which the Deputy Minister at Vava'u wrote to the Minister of Lands in which it was stated (inter alia) that:-

- 120 *(a) Sione Moa's name was written on the whole town allotment however, he did not register it. That was discovered by the widow when she came for its transfer after his death. The said allotment was then registered under deceased, Sione Moa's name on the 16/1/1976 and transferred to the widow that same day.
- (b) The widow then consented to Hanisi Moa's application to lease the portion nearest the road, then the widow second, and Terry Moa third as forwarded in letter ref.2B/64/76 of the 16/1/1976 in Hanisi Moa's application for lease (Residential Site)."

130 From this letter it is clear that a posthumous registration of Sione's whole allotment was effected on January 16, 1976 and that the widow's estate was duly recognised by transfer on the same day.

The steps that followed are set out in paragraph (c) and (d) of the same letter which read as follows:-

- 140 *(c) Therefore as regards the division on the map received there is request that Hanisi Moa move into allotment portion No.(1) while the widow move into No.(2) as was the widow's wish that day when the said town allotment portion was registered.
- (d) The area of the portion registered under the widow on the 16/1/1976 is 1r.14p. and called "MA'U'FO'OU".

The claim of appellants is that 'Ana and Hanisi were entitled to exchange Lots and that Hanisi was then entitled to a lease of Lot 1 and that the action of the Minister in making the grant of a lease to Hanisi and releasing the allotment from the subdivision in favour of Hanisi in respect of Lot 2, was lawful and within the powers of the parties and the Minister. The respondent claimed that such transactions were unlawful and without authority. The Land Court upheld respondent's contention. From this judgment the present appeal has been brought.

To determine this appeal the nature and effect of a posthumous registration under Section 74 of the Land Act must be considered. The purpose of that section is to confer on a widow a registered life estate in an allotment held by her late husband. Section 76 makes devolution subject to the life estate of the widow. It was recognised that failure of the holder to register his estate might defeat the life estate of a widow so the proviso gave the Minister power to effect posthumous registration of the husband's holding at the request of his widow. This is registration of the husband's title - not that of the widow's interest which is effected by the registration of a subsequent transfer. This was done in the present case. The result was that the widow became the holder of a life estate in the whole allotment, and, subject to that life estate, succession followed Section 76 which meant that by sub-section (c) Terry became the heir.

The effect of the application made by the widow and Hanisi is that they have requested the Minister to sub-divide the allotment and to appoint herself and Hanisi to two of the sub-division leaving the third to Terry. It is immaterial that the same boundaries were adopted. It is a different and new exercise of the power to sub-divide and appoint in accordance with Section 51. The widow, either alone or with the concurrence of Hanisi, had no power to sub-divide the allotment and to exercise the power to appoint by taking Lot 2 herself and consenting to Hanisi leasing Lot 1. To allow this the widow would effect a new subdivision and appointment and so override the provisions of Section 76 of the Land Act and Section 107 of the Constitution. It would deprive the heir (Terry) of his rights arising from the posthumous registration of Sione's holding in the allotment. It was decided by Roberts C.J. in Viliami Tu'inukuafe v. Minister of Lands and another (1962-73) Tongan Law Reports 15 that the widow had no power to subdivide. With the reasons given in that case we entirely agree. The Minister had no authority or power to disregard the application of Sione and to give effect to a new scheme of sub-division and appointment on representations from the widow and Hanisi and thus deprive Terry of the rights he acquired on posthumous registration. Hence all proceedings after the issue of posthumous registration and transfer to the widow of her life estate are contrary to the statute and void and should be set aside. This will not prejudice or effect the carrying out of the subdivision made by Sione and approved by the Minister. Hanisi and Terry may still apply for registration of their lots pursuant to that subdivision. That is a matter for each, but until title is perfected by registration succession to the whole allotment will be governed by Section 76 under which Terry is the present heir. No application to the Minister and no action by the Minister on such an application by the widow and Hanisi can deprive Terry of his right as heir under Section 76.

The appeal will be dismissed but the orders made in the Land Court will be set aside

and varied by an order declaring that all transactions entered into and registered since the transfer of the widow's estate are void and accordingly set aside, but reserving the reserving the right of Hanisi and Terry to make such application as they may be advised in respect lots 2 and 3 respectively of the subdivision made by Sione and approved by the Minister.

200 The appeal is accordingly dismissed and the orders of the Land Court set aside and varied as above set out. No costs are allowed.