Minister of Lands, 'Ilavalu and Halaevalu v 'Ilavalu and 'Ilavalu

Privy Council
App No.5/1980

16 February 1981

Land - allotment exceeding size permitted by Land Act 1927 was not unlawful if held before 1927 and is entitled afte that date to be succeeded to in its entirety.

Estoppel - failure of predecessors in title to challenge unlawful reduction of allotment does not bind person entitled to succeed

When Pauliasi 'Ilavalu died in 1941 he was the holder of a town allotment granted before 1927 containing 3r18.9p, but when his widow Ilaisoane applied for registration of a widow's interest in the land, a posthumous registration of an allotment comprising only 1r24p was made, and this was later transferred on her death to Pauliasi's heir, Tevita 'Ilavalu, and on his death in 1965 to his widow, 'Ofa. In 1967 and 1968 the Minister made grants of the balance of the original allotment to Fie'ila 'Ilavalu and Manukafaa Halaevalu

In 1977 'Ofa brought proceedings in the Land Court claiming that the areas granted in 1967 and 1968 were part of the original allotment and should not have been granted, but should be part of the allotment in which she had an interest. Before the Land Court decided her claim, the son of Tevita and 'Ofa, Pauliasi II, came of landowning age in 1979 and was added as a party to the proceedings. The Land Court dismissed 'Ofa's claim holding that it was barred by the time limitation provisions in the Land Act, but allowed the claim of Pauliasi II.

The Minister of Lands and the two grantees, Fie'ulo 'Ilavalu and Halaevalu appealed to the Privy Council.

HELD:
Dismissing the appeal

(1) Since the allotment held by Pauliasi 'Ilavalu was made before 1927 he was entitled to be registered in respect of the whole are of the allotment.

(2) The time limitation provisions of s148 Land Act did not apply to Pauliasi II until he became entitled to possession of the allotment which had not occurred and would not occur until the death of 'Ofa.

(3) The fact that Pauliasi II's predecessors in title had not contested the reduction of the allotment in 1941 and the grants did not extinguish the constitutional and statutory rights of Ilaisoane or her successors.

Statutes considered
Land Act s148

Cases considered
Minister of Lands v Manase Kamato II Tongan LR 132

Privy Council

Judgment

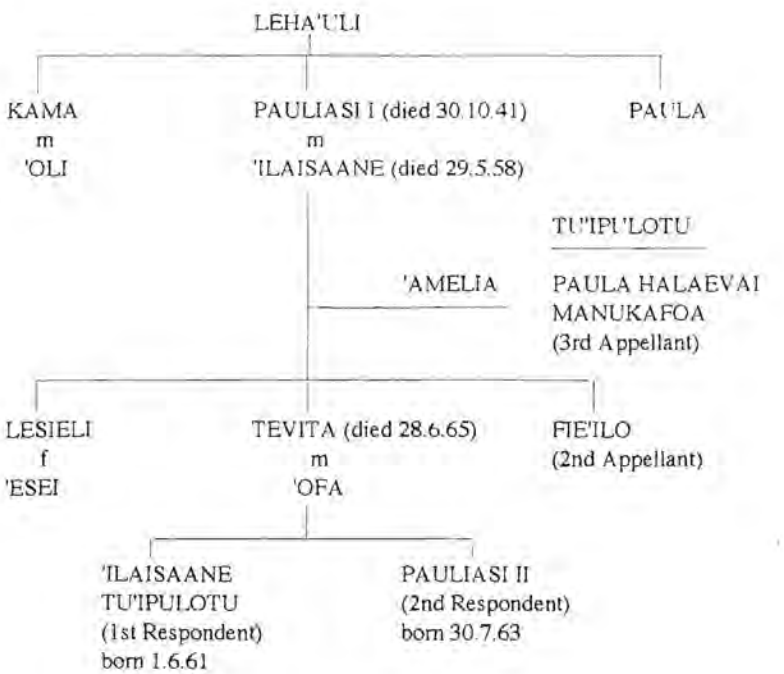
This appeal concerns two parts of an area of Crown Estate called "Halapaini" which originally contained an area of 3r.18.9p. but is now divided into 3 parts. It is a town allotment situated in Kolofo'ou. The respective areas now are:

(1) An area of 1r.24p. posthumously granted on October 27, 1942 to Pauliasi I in respect of which his widow 'Ilaisaane, was then granted a widow's interest. She died on May 29, 1958 and the interest was then registered in the name othe heir of Pauliasi I, namely Tevita 'Ilavalu who died on June 28, 1965. Tevita's widow, 'Ofa, took a widow's interest and their son, Pauliasi II is now the heir expectant to take in possession on his mother's death. He is the second respondent.

(2) An area of 30p. on the southeastern corner in respect of which a lease was granted by the Minister of Lands to Fie'ilo 'Ilavalu (the second appellant) on May 23, 1967.

(3) An area of 39p. on the northwestern part which was granted by the Minsiter to Manukafoa Halaevalu (the third appellant) on March 28, 1968.

The relevant family is as follows:-



It has been found by the Land Court that, when Pauliasi I died on October 30, 1941, he was the holder of the whole area of 3r.18.9p. which had come down to him through his grandfather, Tevita Latu. This finding is not disputed. After the death of Pauliasi I his widow, 'Ilaisaane, applied for a widow's estate. To comply with the proviso to Section 74 of the Land Act, the Minister entered a posthumous registration in the name of Pauliasi I and granted his widow a widow's estate. The posthumous registration of Pauliasi I was entered in the Registry Book as containing only 1r.24p. It is not clear why this was so because the evidence shows that the town allotment of Pauliasi I contained 3r.18.9p. and had long been in possession of his predecessors in title. It can only be assumed that it was thought that the grant to the widow must, by reason of Section 49, be confined to an area not greater than 1r.24p. Since the title of Pauliasi I existed before 1927 he was entitled to be registrered in respect of the whole of his holding: Minister of Lands v Manase Kamoto 2.T.L.R.132. Subsequent transfers were made of the limited area to the heir Tevita 'Ilavalu, and, on his death, to his widow 'Ofa. The rest of the original town allotment remained unregistered, until the Minister made the grants to second and third appellants in 1967 and 1968.

In 1977 Tevita's widow, 'Ofa, brought an action claiming a widow's interest over the areas granted to second and third appellants but the Court held that, since her action had not been commenced within 10 years of the grants to second and third appellants, it failed. She has not appealed against that finding. But, in the course of litigation the heir of Tevita, namely, Pauliasi II, having become of land-owning age, was joined as a plaintiff. The Land Court found that Pauliasi II "succeeds to the whole area" and ordered that the Register be amended accordingly. This is not correct at least in that 'Ofa still holds the area of 1r.24p. in respect of which Pauliasi II is the undoubted heir expectant. It should also be noted that the interest claimed by Pauliasi II may also be subject to 'Ofa's life interest. The question which arises on this appeal is whether or not the rights of the heirs of Pauliasi I to the said areas have been extinguished so that the grants to second and third appellants are valid.

It is clear from a recital of the foregoing facts that Pauliasi II, as the lawful heir of Pauliasi I, is the heir expectant to the parts granted to second and third appellants unless some intervening legal event hs occurred, since the death of Pauliasi I, which would extinguish the title to which his heirs were entitled to succeed.

No claim was made that the Minister had a legal right to make the grants to second and third appellants. Counsel relied upon three main grounds to support those grants, namely,

(1) That there was adverse possession for a period sufficient to debar any claim by Pauliasi II,

(2) That the Land Court erred in holding that the entry in the Register showing that 'Ilaisaane's holding contained only 1r.24p. was a mistake and should have been for the whole allotment, and,

(3) That the entry was accepted by 'Ilaisaane and on her death by Tevita so that it was not now competent for Pauliasi II to question the area accepted by his predecessors.

Dealing first with the question of adverse possession and the right to bring an action, it was conceded that there was no evidence of adverse possession by either of the second

and third appellants prior to the grants made in 1967 and 1968. It should be noted that the only adverse possession which is relevant is that of the second and third appellants in respect of the land now occupied by each. The evidence appears to be that by consent the whole area was occupied by the family but once the grants were made and possession taken thereunder then there was clearly adverse occupation by second and third appellants. The action was commenced in April 1977 and Pauliasi II became a claimant by joinder sometime later. It is common ground that time does not normally run against an infant, but, as will be seen later, a submission was made that time running against a predecessor in title may affect the interest of an infant and did in this case preclude the claims of Pauliasi II. Pauliasi II came of land-owning age on July 30, 1979 so unless some earlier period of time can be added only a period of some two years had expired, but even then the time for possession had not arrived.

The first claim is that Section 148 applies. Section 148 reads:

> "No person shall bring in the Court any action but within ten years after the time at which the right to bring such action shall have first accrued to some person through whom he claims, of if such right shall not have accrued to any person through whom he claims then within ten years next after the time at which the right to bring such action shall have first accrued to the person bringing the same."

The words "some person through whom he claims" are technical words and are confined to the line of descent. The line of descent of Pauliasi II is through his father, Tevita. Pauliasi II does not claim through 'Ofa. Her interest only postpones the date of his right to possession - a right which comes through his father, Tevita. Tevita died before the present grants were made so there was no adverse possession in his lifetime. Any adverse possession during 'Ofa's lifetime is not included in Section 148. The possession of second and third appellants does not affect Pauliasi II until he becomes entitled to possession on the cessation of 'Ofa's interest so, up to the present time, under Section 148, no time has yet commenced to run against Pauliasi II.

The next claim was founded on English legislation which it was argued applied in this case. Assuming that this legislation does apply, and we do not concede that it does, the first provision referred to did not help because it gave Pauliasi II 6 years from the time when his interest vested in possession. That time has not yet arisen.

Counsel then relied on a further provision which, in certain circumstances excluded the period of 6 years and confined it to the period of 12 years from the death of Tevita. This, if it applied would bar any action by Pauliasi II. The text book reference reads:-

> "Entails. A reversioner or remainderman expectant upon an entail in possession is not entitled to the alternative six-year period if his interest could have been barred by the tenant in tail."

Pauliasi II is a remainderman expectant upon an entail in possession so if this rule applies he is out of time. But the rule is confined to cases where such an interest could have been barred by the tenant in tail. It is conceded and properly so that a holder of an estate in Tonga cannot effect what is technically called "barring the entail" so this provision will not help appellants.

The position is therefore clear that neither legislation in Tonga nor the application of English law has retrospective effect in the calculation of the period of adverse possession, so appellants cannot rely upon any claim that an action by Pauliasi II is barred

by a time limitation

Grounds 2 and 3 may be dealth with together. No case and no principle of law was cited to support the contention that either the entry of 1r.24p. or the acceptance of the predecessors of Pauliasi II of the registration entry would extinguish the title which was acquired by Pauliasi I and which, by the Constitution and the Land Act, passed to his successors. This appears to be a plea of estoppel or waiver or surrender of the area in excess of 1r.24p. but no such plea can extinguish the constitutional and statutory rights of either Pauliasi I or his successors. Whatever the reason for confining 'Ilaisaane's registered interest to an area of 1r.24p. may have been, it does not extinguish contitutional and statutory rights of successors. In any event the evidence is not clear that anyone accepted the reduced area or attempted to surrender the balance.

Pauliasi II is not yet entitled to possession. His interest is expectant upon the death of 'Ofa in his lifetime. He could not now sue for possession but he is entitled to protect his expectancy from the unlawful grants of interests which affect his expectant right to possession. If the life tenant being a widow made an unlawful grant beyond her life or attempted to subdivide or to surrender some of the estate, the heir could intervene to prevent her from doing so. That did not happen here. Both the life tenant and the heir were ultimately plaintiffs in the action to protect the estate from erosion by the grants to second and third appellants. But the Land Court has held that the life tenant could not sue and dismissed her action. Whether or not this decision is correct is not before the Privy Council. But no act or omission on the part of the life tenant of a widow's estate can diminish the estate (including possession) which must pass on the death of the life tenant to the heir who takes through the same person whose estate also supports the widow's interest. The inability of the life tenant to sue for possession against persons in adverse possession, if the decision against her is correct, does not prevent an expectant heir from taking proceedings to protect his expectancy to ensure that it passes in full (either to him or his successor, if he pre-deceases the life tenant). The expectancy can be diminished or extinguished only by due operation of law. The matters put forward on behalf of appellants do not have that effect.

Accordingly to protect the expectancy and to ensure that it will pass according to law on the death of 'Ofa, the following declaration are made:-

(a) that the grants to second and third appellants are void,

(b) that Pauliasi II is entitled, for the protection of his estate in expectancy, to have 'Ofa registered as the holder of the balance of the original holding so that the heir of Tevita can succeed to the whole estate on her death. This may be effected by amending the area in the original posthumous grant so as to include the whole area of which Pauliasi I was the holder but that is a matter for the Minister to give effect to these findings as he thinks proper.

The appeal is dimissed but the order made by the Land Court is varied in accordance with the above. No costs are allowed. We note, as did the Land Court, that it is not the intention of Pauliasi II to disturb the possession of his aunt, the second appellant.