KAUFUSI v TAUNAHOLO

Privy Council
Appeal No. 2/1984

21 April 1984

Land - surrender - waiver by heir of rights of succession
Land - residence of grantee in estate not necessary
Registration of land - Land Court or Privy Council may order registration

In 1981 the holder of a tax allotment wrote to the Minister of Lands expressing his wish to surrender a portion of it to Taunaholo, and this was consented to by his heir. Cabinet approved the surrender, and application was made to the Minister of Lands to register the surrender. It was then discovered that two persons had been living for some time on the surrendered portion of land, and they refused to allow Taunaholo to enter the land.

The Supreme Court upheld Taunaholo's claim and ordered that the surrendered portion of the allotment be registered in his name, but the occupiers then appealed to the Privy Council..

HELD:

Dismissing the appeal.

(1) The Land Act does not require that a grantee of a tax allotment must be resident in the estate out of which the allotment is granted;

(2) The arrangement between the holder of the tax allotment and Taunaholo was not a sale of land and therefore not forbidden by clause 104 of the Constitution or section 6 of the Land Act;

(3) When the Land Court or Privy Council makes a decision as to the entitlement of a person to land, it is appropriate for it to order the registration of that entitlement.

Cases referred to
Afu v Falakiko II Tongan LR 167
Statutes referred to
Land Act s6, s50, s138, s139
Constitution of Tonga C1.104

Counsel for Appellants: Mr Niu

Privy Council

Judgment

This is an appeal against a decision of the Land Court in which Harwood J. upheld the Respondent's claim to a 35 perch,town allotment at Haveluloto by making an order that the Minister of Lands should forthwith register the Respondent as the holder of the allotment. There is very little dispute on the facts. In July 1981 one Feleti Vanisi wrote to the Minister seeking Cabinet consent to his surrendering the 35 perches from his tax allotment with effect that it should become the Respondent's town allotment. The letter went on to say that his heir, Sione Vanisi (aged 20), consented to the surrender. The letter was signed by both Feleti and Sione.

Cabinet approved the surrender on the 17th August 1981 and two days later the Respondent signed a form of application, which was lodged with the Minister on the 25th August together with proof of age and the survey fee of $17.50. It was then discovered that the two Appellants had been living on the land in question for a number of years and it came as a surprise to them that anyone should apply for a grant. The Minister became aware of the problem but preferred to remain neutral and let the law take its course. In the meantime the first Appellant resorted to forcible means to keep the Respondent out of possession so that he was unable to carry out certain work which the Minister had made a condition of a grant.

The Trial Judge concluded that the Respondent had done everything necessary to entitle him to a grant.

Before Harwood J. the Appellants raised only two defences, the first being that Feleti Vanisi had in fact surrendered the land to them. There was no acceptable evidence of that and Harwood J. had no difficulty in rejecting that ground. The second was that as the Respondent had never been a resident of Haveluloto, S.50 of the Land Act debarred him from a grant of the Land. S.50 provides the rules for taking land for allotments from hereditary estates, which was the position which prevailed here, the land being in the estate of the Hon. Fielakepa. S.50, so far as is relevant, provides:-

"50. Land for allotments shall be taken from the hereditary estates in accordance with the following rules -

(a) an applicant for an allotment lawfully resident in an hereditary estate shall have his allotments out of land available for allotments in that estate;

(b) where there is no land available in the estate in which the applicant is resident, then the allotment shall be taken out of some other estate held by the noble or matapule in one of whose estates the applicant is resident;

(c) if no land is available in any hereditary estate held by the noble or matapule in one of whose estates the applicant is resident then the allotment shall be taken out of the hereditary estate of any other noble who is willing to provide such allotment;

(d) if no land is available under rule (c) then the applicant may have his allotment from Crown Land;"

In the lower Court the argument appears to have been simply a plea that as the Respondent had not been a resident of Haveluloto he was not eligible for a grant but that is not the effect of S.50. On the appeal Mr Niu, who did not appear in the lower Court, took a rather different approach and submitted that evidence should have been adduced by or on behalf of the Respondent to prove that he was not a resident in some other hereditary estate from which an allotment could be taken in terms of S.50. Such an

allegation was never raised in the Statement of Defence, or at the lower Court, and the Respondent was never cross examined on the issue. It is a submission which we are not prepared to consider at this stage and it is therefore rejected.

Mr Niu's next submission was that the surrender approved by Cabinet on the 17th August 1981 was limited to the surrender by Feleti Vanisi of his interest, and did not extend to the interest of his heir Sione Vanisi. This is the lettter of surrender sent by Feleti Vanisi:-

"Dear Sir,

(1) I respectfully ask that you kindly forward this to H.M. Cabinet. I consent to surrender a portion of land from my tax allotment situated at Haveluloto the estate of Hon. Fielakepa. The area of this portion which is to be the town allotment of Tevita Ului Taunaholo is 35 perches. He is 28 years old a Tongan national and is not a holder of any town allotment.

(2) This allotment is to the west of the allotment of 'Anau Pulu on my own allotment.

(3) My heir is Sione Vanisi, male, aged 20, and he consents to this surrender.

(4) I hope that you will kindly accept this. Tevita Ului Taunaholo is from Hunga the estate of Fulivai, he is the holder of a tax allotment but not a town allotment.

(SGD) Feleti Vanisi (Mafua)
The Holder

Sione Vanisi (The Heir)"

The Minister of Lands' letter confirming Cabinet approval is unqualified and must be taken as approval to surrender by both Feleti and his heir. A limited approval would have been pointless, for it would have been apparent to Cabinet that Feleti's desire that the Respondent should have the allotment could not be fulfilled unless Sione's surrender was also approved. We therefore reject Mr Niu's submission.

The next ground of appeal was that the arrangement between the Respondent and Feleti was null and void pursuant to S.6 of the Land Act, or unlawful in terms of Clause 104 of the Constitution. Both provisions forbid the sale of land and in the present case the Respondent agreed that he had paid Feleti $600.

In our opinion there was simply no element of sale in this transaction. Following the surrender there was no guarantee that the Respondent would obtain a grant.

Mr Niu's remaining submission was not one raised in the Court below, or in the Notice of Appeal, but we propose to deal with it because it bears on a point raised by the Council itself in the course of the hearing. Mr Niu's point was that the Minister of Lands was wrong in taking a neutral stand, and should have made a grant either to the Appellants or Respondent pursuant to his powers under S.19 of the Act.

This really amounts to a challenge to the jurisdiction of the Land Court to decide

such an issue as is now before this Council. The Minister is a party to almost every land case that comes before the Court, and it is clear from SS. 138 and 139 of the Act that the Land Court has jurisdiction to hear and determine such issues as arise in the instant case. Those sections read:-

"138. Whenever by any judgment of the Court from which no appeal has been taken any person is adjudged entitled to any lands the Judge shall forward to the Minister a copy of such judgment under his hand and the Seal of the Court.

139. (1) The Minister shall on receipt of such copy of a judgment as is mentioned in section one hundred and thirtyeight hereof and on payment of the fees prescribed by law prepare in duplicate a tofia, certificate or a deed of grant as the case requires in favour of the person entitled to the lands specified in the judgment."

The question raised by this Council was whether Harwood J.'s order should be varied so that it might be left to the Minister to determine finally whether the Respondent should receive a grant in the light of the findings of the Land Court and this Council. However, a study of the decided cases shows that it is not unusual for the Court or this Council to make the final determination. For example, in Lisiate Afu v Falakiko Vol. 2 Tongan L.R. 167, this Council made an order that the registration of one party as the holder of an allotment be cancelled, and that it be granted to another named party.

The appeal is therefore dismissed with no variation of the terms of the Order made in the Court below. No order for costs.