

Ponitini v Fale, Kalaniuvalu-Fotofili and Minister of Lands

Land Court
 10 Harwood J
 Land Case 11/1981

29 April 1985

*Land - allotment of excessive size void only as to excess not in its entirety
 Land court - conflicting decisions of Privy Council - Land Court may choose which
 to follow*

20 Sione Ponitini was in 1928 registered as the holder of a town allotment which contained some 3r 1.4p, and was therefore in excess of the area permitted for a town allotment by the Land Act, and in 1946 he was registered as the holder of a second town allotment, which was of the permitted size. After the Minister discovered the second registration, he cancelled the first allotment.

Sione Ponitini brought proceedings in the Land Court to challenge the Minister's decision, and these proceedings, after Sione's death in 1983, were carried on by his son Nona Ponitini.

30 HELD

Upholding the claim

- (1) The first allotment, although in excess of the size permitted by the Land Act for a town allotment was not wholly void, but void only as to the excess.
- (2) The grant of the second allotment was void.
- (3) When faced with conflicting decisions of the Privy Council, the Land Court is entitled to choose which it prefers.

Statutes considered

Land Act s49

40 Cases referred to

Finau v Sikha App 3/1963

Fifita v Minister of Lands and Fakafanua 1962-1973 Tongan LR 45 and 1974-1980

Tongan LR 1

Counsel for plaintiff	:	Mr Koloamatangi
Counsel for first defendant	:	Mr Manu
Counsel for second defendant	:	Mr Niu
Counsel for third defendant	:	Mr Taumoepeau

50 Harwood J

Judgment

The original Plaintiff in this case was Sione Pontini. He filed his Summons on 31st July, 1981, but later died and on 12th August, 1983, his son and heir Nova Pontini was substituted as Plaintiff in an amended Statement of Claim. The essence of the claim is the "return" by the Third Defendant of a town allotment at Lapaha known as "Lakifue" to the Plaintiff. In both pleadings of the claim the area of the allotment is stated to be 3 roods and 1.4 perches. This area has not been denied in the defence of the Minister of Lands filed as recently as 28th February, 1985, by order of this Court, nor has any evidence as to area been given, therefore I assume that the area of the town allotment is admitted to be 3 roods and 1.4 perches. The Second Defendant has, by Notice given dated 22nd February, 1985, indicated his intention not to defend the action. The First Defendant omitted to appear before the Court on 17th January, 1985, and neglected to file any defence, as ordered, within 28 days of that date.

On 18th June, 1928, "Lakifue" was registered in the name of Sione Pontini. The area was not specified in the Register of town allotments at Lapaha (Exhibit 3). From the evidence of the Plaintiff which I do not doubt it appears that Sione Pontini lived on that allotment for a considerable number of years; the actual period was never stated but is probably in the region of 50 years.

It is unfortunate that there is no evidence either way to indicate whether Sione took a grant of the allotment, or inherited it by succession, but he was certainly registered as the holder thereof. The second of the only two witnesses in the case - called on behalf of the Plaintiff - was a clerk in the Ministry of Lands. Looking at the entry number 54 at page 447 of the Register (Exhibit 3) he expressed the opinion that it evidences a new grant, though there has been no evidence given, nor is there any reference in the Register, concerning the making of any application for a grant, the furnishing of any evidence of date of birth of the applicant, the payment/receipt of any survey fee or the issue of any Dced of Grant. I think it is unlikely that there was any survey of the allotment at the time when Sione Pontini became the holder - having regard to what happened later on in 1971. But on balance I think I should accept the evidence of the clerk, which was not challenged, that this was probably a new grant of the allotment to Sione Pontini in 1928.

On 30th November, 1971, a letter was written by the Minister of Lands addressed to "Sione Pontini, Lapaha" to inform him that the registration of Lakifue in his name was null and void. Whether he ever received that letter I do not know, because no search has been made for any reply to it. The Minister went on to say that the registration of Lakifue had been cancelled. The reason given was because Lakifue was said to exceed the area of one acre. The Minister alleged that Sione Pontini was also registered on 28th May, 1946, as the holder of a second town allotment - one called "Matapa" at Kolovai. Sure enough, the Register of town allotments at Kolovai at page 253, entry number 53, does show a "Sione Pontini" as having been so registered, and also shows Cabinet approval of a surrender thereof having been given on 4th February, 1976. Having regard to Exhibit 2, a letter dated 27th January, 1976 signed by the Plaintiff jointly with one Sione Pontini addressed to the Minister of Lands and requesting approval of the surrender of a town allotment at Kolovai, I am satisfied (from the evidence of the Plaintiff) that it was Sione Pontini the original Plaintiff who was after 28th May 1946, the registered holder of the two town allotments. This being so, the question that I have to decide is whether the Minister acted correctly in actually cancelling, as he did, the earlier registration of the

entire holding of Lakifue, as distinct from only such area thereof as exceeded the maximum permissible area. The relevant sections of the Land Act for consideration are sections 7 and 49, particularly the latter.

I have been referred by Mrs Taumoepeau to an unreported judgment of Privy Council in Appeal No. 3 of 1963 - Solomone Finau & another v 'Atonio Sika - in support of the proposition that the registration of Sione Ponitini's title to Lakifue was null and void in its entirety under section 49 of the Act. The written judgment is short and emphatic and does support this proposition. However, she quite rightly points out that this judgment is not consistent with the later judgment of Privy Council in the case of Mele M. Fifita v Minister of Lands & Noble Fakafanua [1962-1973] Tongan LR 45 and [1974-1980] Tonga LR 1 in the course of which case there is no record of the earlier appeal court decision having been mentioned.

It is not clear to what extent, if at all, Privy Council can be said to be bound by the doctrine "stare decisis". Certainly Chief Justice Roberts, who himself collated and reported the decisions which are included in the 1962-1973 volume, either by accident or design did not include the earlier decision. In his Preface to the volume he speaks of "the principles embodied in the judgments" as being "precedents which, where applicable, it is the practice to follow". I do not think that the stage of legal development in Tonga has yet been reached where Privy Council is bound by its decisions and it would I think be very dangerous in any event if I were to accept the uncompromising statement made in the case of Solomone Finau as being an expression of a fixed and immutable principle applicable in all cases. The facts are not dealt with in any great detail in the judgment and it is therefore difficult if not impossible to discern the reasoning behind the decision concerning section 49. By contrast in the later decision of Mele M. Fifita v Minister of Lands & Noble Fakafanua Privy Council was expressly dealing with the question of the proper construction of section 49, and the judgment at first instance is also reported (at page 30 of the same 1962-1973 volume). For my part I consider that I am quite entitled to decline to follow the earlier decision and to seek whatever assistance I can from the later one - and I do indeed find it to be of considerable help in reaching what is, I believe, the right decision in the present case.

There is no evidence to suggest that in 1928 Sione Ponitini acted in bad faith or exercised any sort of deception to obtain the grant of Lakifue. He lived there for a great number of years, as I have said, and no doubt regarded it as his home. Why and in what circumstances he applied for the second town allotment is not in evidence. The allegation in paragraph 2 of the defence "that contrary to law the Plaintiff knowingly registered two town allotments" seems to be a slip and is intended to refer to Sione Ponitini, the original Plaintiff, in which case the allegation is probably correct for if the grant of Lakifue to Sione was valid he was clearly not entitled to the second grant that he got and, in accordance with section 48, it would have been null and void. But on behalf of the Minister Mrs Taumoepeau has submitted that the grant of Lakifue is to be regarded as null and void and, therefore, the grant of Matapa as valid. I have given the matter very careful consideration as the result of which I hold as follows.

Privy Council in Mele Fifita's case enumerated two classes of case which might arise under section 49. To these may now be added a third class, based on the facts of this case, namely, "3. Where the entry in the Register evidencing the grant of a town allotment gives no indication of the area intended to be granted". I can see no reason to make any

practical distinction between this situation and that which existed in Mele Fififa's case, even though (despite what appear to be various misprints in the report) the area there was exceeded by a mere 2 perches. I agree with the finding of Privy Council "that section 49 must be read as enacting that, where a grant is made of an allotment in excess of the specified area what is rendered null and void is the grant of the excess and not the whole grant". It does not seem to me to matter that, in the present case, the area was not specified at all - at least in the Register, which is the only evidence of the grant apparently available. It has not been suggested that Sione Ponitini was for any other reason not entitled to the grant of Lakifue, and I am quite satisfied that he should be held to have been entitled to an area of 1 rood 24 perches only, subject to an extra one-half perch (now 12.6 square metres) under the proviso to section 49 if necessary to facilitate a survey. It would seem to me quite wrong to hold otherwise in the absence of any evidence of deception by the grantee and, as with the second class of case under consideration by Privy Council in Mele Fififa's case, I hold that notwithstanding Sione Ponitini's subsequent acquisition of a second town allotment there is no good reason on that account or any other to treat the grant of Lakifue as wholly null and void. It should be noted that the Minister of Lands at the time was in fact following the (unreported) decision of Privy Council given in 1963, but in the light of the decision in Mele Fififa's case given the year after the Minister's purported cancellation this can be seen now to have been incorrect.

An heir's affidavit is annexed to the amended statement of claim sworn by the present Plaintiff in 1983 on the 26th day of a named month which at the hearing it was not possible to decipher even on the original owing to its obliteration by the rubber stamp of the magistrate before whom the affidavit was sworn. No one has suggested that section 81 of the Act operates as a bar to the Plaintiff's claim and I hold that it is in the circumstances proper and justified.

I give judgment for the Plaintiff and declare that he is entitled to receive from the Minister of Lands in pursuance of section 7 of the Land Act, but by inheritance from his father under section 76, an area of town allotment not exceeding 1 rood 24 perches (subject to the proviso to section 49 of the Act) taken from the total area of the allotment "Lakifue" at Lapaha, and to be registered at the holder thereof accordingly. I have no doubt that the Minister will take the appropriate steps in pursuance of this judgment without the necessity for further order, but I give liberty to both parties to apply, in connection with the giving of practical effect to the judgment, should the need arise. In compliance with section 130 of the Act I make no order as to the costs of the action.