# Finau v 'Alafoki & Other

Land Court
Case No.10/1989

4 October, 1989

*Constitution - principles of interpretation - meaning of clause 104*
*Land - granting of allotment not sale even if payments made to estate holder*

The plaintiff was the registered holder of a town allotment upon which the first defendant built a house. The plaintiff brought proceedings to evict the first defendant, which the first defendant resisted on the ground that the plaintiff had made payments to the estate holder to obtain the allotment and this was contrary to the prohibition in Clause 104 of the Constitution against the selling of land.

HELD:
Upholding the plaintiff's claim:

(i) The Constitution was to be interpreted generously giving attention to the purpose of the Constitution.

(ii) As so interpreted, the prohibition clause 104 of the Constitution against the selling of land meant the permament selling of land and not the allotment of land.

Cases considered
Hinds v The Queen (1976) 1 All ER 353
Minister of Home Affairs v Fisher, [1979] 3 All ER 21
Attorney General v Olomalu, 5895/1981 Western Samoa
Henry v Attorney General, No.1/1983 Cook Islands
Reference by the Queen's Representative, (1985) LRC (Const) 56
Attorney General v Prince Ernest Augutus of Hanover [1957] 1 All ER 49
James v Commonwealth (1936) 55 CLR1

Statutes considered
Constitution of Tonga, Clause 104

Counsel for plaintiff : Mr Tonga
Counsel for first defendant : Mr Tofa
Counsel for second defendant : Mr Martin

Webster J

**Judgment**

The Plaintiff Petelo Sinisa Finau is the registered holder of a town allotment at Ma'ufanga numbered lot 20 on Plan 3727 with an area of 30.1 perches. He was registered on 24th August, 1988 under reference 298/13.

The Plaintiff seeks the eviction of the First Defendant Viliami Fangupo 'Alafoki from the allotment, where the Plaintiff claims that the First Defendant has built a Tongan house and a shelter. The First Defendant claims that the Plaintiff bought the allotment, contrary to clause 104 of the Constitution, and that his registered title is therefore unconstitutional, illegal and a nullity.

The Second Defendant says that title to an allotment is decided by registration and that whatever arrangements took place before registration they were not a sale of land contrary to clause 104 of the Constitution and section 6 of the Land Act. As Minister of Lands he had no knowledge of anything except the application for registration with consent of the estate holder, the Hon. Fakafanua.

There is little, if any, dispute about the facts of this case: where the dispute arises is in the legal consequences following from the facts. It is therefore convenient to set out as background the apparent history of the piece of land-in-question in the order in which it occurred, though some of the story is derived from hearsay rather than valid evidence.

The land was originally part of a tax allotment and in 1983 was surrendered by the then holder Vitale Veamatahau, which was approved by the Cabinet (Decision 57) on 18th January, 1983. The land therefore apparently revereted to the estate holder, presumably under section 54 of the Land Act, and the tax allotment was subdivided into town allotment, some of which have been registered.

At some stage a man called Tevita Nafe or 'Aholelei had some kind of interest in this town allotment.. Tevita's wife is Lufina. The First Defendant says Tevita's name was on this allotment on the plan at the Ministry (though this was not produced to the Court) and that (although this is clearly hearsay) Lufina told him that she and her husband bought the allotment from 'Amato Veamatahau (who is the brother of Vitale)

Tevita's sister is married to the brother of the First Defendant's wife. In 1986 Tevita and Lufina were not occupying the land-in-question, which had nothing on it. Lufina allowed the First Defendant Viliami to move onto it and in exchange Viliami gave Lufina Tongan goods including tapa and mats worth several hundered pa'anga. Viliami said in an affidavit before the Court (though he was not asked about this in evidence) that Lufina said she would arrange with 'Amato and the estate holder for him to have the allotment. In evidence Viliami said he could not then afford to proceed with registration and Lufina told him to wait, but then she went to New Zealand.

On the town allotment Viliami built a Tongan fale with a toilet and shower on a concrete floor and a shelter, where he lives with his wife and 1 child. Viliami did not get the consent of the estate holder or of 'Amato before the occupied the land and had not submitted any application for registration of this town allotment.

The Plaintiff, Petelo, who is a Tongan working in the United States, gave evidence that, dealing through Fa'aliu Fine, he gave 'Amato Veamatahau, whom he understood to be the land holder of the land-in-question, $2,500 to buy this town allotment. They then went together with an application from to the estate holder and with a gift of a TV set from Petelo to the estate holder, who signed the application form. The land was registered in name of Petelo on 24th August, 1988.

Viliami said in evidence (though obviously hearsay) that he was told by Fa'aliu that he gave Lufina $1,000 so that she would approach 'Amato for this allotment to be sold to Petelo.

Petelo claimed that he had not seen the land before he applied for it, though this is difficult to believe with something so special as a town allotment. After registration he found out that Viliami was on the land and he had asked him to vacate it at least 3 times, but Viliami refused to go even when shown a letter form the Minister of Lands saying that Petelo could order him off the allotment. On his third visit Viliami had asked if Petelo would gave him "back his money" so that he would move off, but Petelo did not do so. Petelo then raised the present action.

Although a good deal of this background is hearsay and may be no more than that, the facts on which this case has to be decided are the -

(1) this town allotment was registered in name of the Plaintiff on 24th August 1988;

(2) the Plaintiff made payments or gifts to certain people, including the estate holder, in connection with his land;

(3) the First Defendant is residing on the land in buildings which he constructed;

(4) the First Defendant also made a gift to his predecessor on the land, who in turn had made a payment in connection with the land;

(5) the First Defendant was not put onto the land by the estate holder, or even by the former landholder, and has never applied for registration of it.

All these facts were proved in evidence and were not disputed. Though (4) was partly hearsay, it was admitted by the First Defendant, against whom the fact tells.

The heart of this case is whether the various payments or gifts, in cash or in goods, admittedly made by the Plaintiff - and also by the First Defendant - made the transactions with which they were connected sales of land and so contrary to clause 104 of the Constitution.

Clause 104 (Land vested in crown) reads:-

"104. All the land is the property of the King and he may at pleasure grant to the nobles and titular chiefs or matabules one or more estates to become their hereditary estates. It is hereby declared by this Constitution that it shall not be lawful for anyone at any time thereafter whether he be the King or any one of the chiefs or the people of this country to sell any land whatever in the Kingdom of Tonga but they may lease it only in accordance with this Constitution and mortgage it in accordance with the Land Act. And this declaration shall become a convenant binding on the King and chiefs of this Kingdom for themselves and their heirs and successors for ever."

Apart from the phrase dealing with mortgages, this clause has not been amended since the Constitution was granted by King George Tupou I in 1875. It is the leading clause in the final part of the Constitution, Part III entitled "The Land".

The interpretation of a constitution involves special principles which have been fully considered by the highest courts in recent years.

In Hinds v The Queen [1976] 1 All ER 353, in the Privy Council in London, Lord Diplock said at page 359 a -

"A written constitution, like any other written instrument affecting legal rights or obligations, falls to be construed in the light of its subject - matter and of the

surrounding circumstances with reference to which it was made."

Then in the leading case of Minister of Home Affairs v Fisher [1979] 3 All ER 21 again in the Privy Council in London, Lord Wilberforce refers "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism" (page 25h) and said that the approach must be -

"... to treat a constitutional instrument such as this as sui generis [that is in a class of its town], calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law."

"This is in no way to say that there are no rules of law which should apply to the interpretation of a constitution. A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language." (page 26 c-d)

In the South Pacific, what was said in Fisher's case was adopted by the Court of Appeal of Western Samoa in Attorney-General v Olomalu, 5895/1981, which further said -

"... a Constitution cannot be interpreted in vacuo ... and its interpretation can be affected by the conditions, but ... the prime matter is the words used by the framers."

"This involves, we think, still giving primary attention to the words used, but being on guard against any tendency to interpret them in a mechanical or pedantic way."

In Henry v Attorney-General, No.1/83, the Court of Appeal of the Cook Islands also adopted Fisher and said -

"[a constitution] must be interpreted according to principles suitable to its particular character."

"The construction of the Constitution involves paying proper attention to the language used in the particular provisions but at the same time giving full weight to the overriding objects and scheme of the Constitution so as to avoid a bland literal and legalistic interpretation."

This was amplified by the Court of Appeal of the Cook Islands in Reference by the Queen's Representative, (1985) LRC (Const) 56 in interpreting their Constitution, where it indicated "that a broad contextual approach is even more appropriate in the case of constitutions" (page 68b) after considering Viscount Simonds words in the UK House of Lords in Attorney-General v Prince Ernest Augusts of Hanover, [1957] 1 All ER 49 -

"For words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is tht I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense ... as including not only other enacting provisions of the same statute but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy." (p.55).

"The elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he has read the whole of it. Until he has done so he is not entitled to say that any part of it is clear and unambiguous." (p.55)

Applying all these principles to clause 104 of the Constitution it is clear that this

clause sets out the principles of land holding in Tonga, namely that all land is the property of the King.

Land may be granted as hereditary estates, but clause 112 makes it clear that such estates will revert to the King if there is no legitimate heir, with the plain inference that the grant is not a permanent alienation.

By clause 113 every tax payer has "the right to hold an hereditary tax and town allotment."

Clause 104 also prohibits the sale of any land whatever, but allows dealings in cr alienation of land by way of lease or mortgage, making it quite clear that it is only permanent alienation of land which is banned.

Mr Tofa for the First Defendant submitted that "sell" in clause 104 meant giving a person a piece of land and receiving money and/or goods in return, but this cannot be the meaning of "sell" in the clause, even giving primary attention to the words used. As stated in Prince Ernest Augustus, words take their colour and content from their context. Here the mischief aimed at is to be taken from the other words in the clause, and in Part III of the Constitution dealing with land, and the mischief is selling land by way of total alienation, not selling land in a commercial transaction for value. Using the meaning of "sell" submitted for the First Defendant any lease for value could be construed as a sale and so the provision allowing leases would become ambiguous.

If there is any ambiguity in clause 104, it then becomes legitimate, especially because it is a Constitution which is being construed, to look at the circumstances in which the Constitution of Tonga came into being. What better guide is there than the speech of King George Tupou I at the time just before he granted the Constitution, the opening of Parliament in 1875 (2 TLR 1) -

> "There is another matter it is right that I should speak about and that concerns the soil (land) of this Country. It is quite true that matters of this nature do not as a rule belong to the Constitution of other Countries but we are different from all other countries of the world, for no part of Tonga has yet been sold, the whole of the land being intact up to the present time: and in the Constitution I have again made sure that this law shall be perpetual, that it is absolutely forbidden to sell any part of Tonga forever. Nevertheless it appears to me just to make a regulation and it is in the just Constitution to allow leases to be given for pieces of land and for sites by the Government and by the Chiefs."

This passage clears up any doubt that clause 104 refers only to the prohibition of sales for ever.

Now a subsequent statute cannot be a guide to the interpretation of a constitution except perhaps in the sense expressed by the Privy Council in James v Commonwealth (1936) 55 CLR 1, [1936] 2 All ER 1449:-

> "The words used [in a constitution] are necessarily general and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning."

But even so, it is worth noting that section 6 (Dispositions of land prohibited) of the Land Act, which states -

> "6. Every verbal or documentary disposition by a holder of any estate (tofi'a) or

allotment ('api) which purports to effect a voluntary coneyance, an out-and-out sale, or a devise by will of such estate or allotment is null and void."

is consistent with the view of the meaning of clause 104 taken by this Court.

There is one further aspect of the interpretation of clause 104 in the light of the observation in James. It is I think within judicial knowledge, and was confirmed by the learned Assessor, that no Tongan will obtain the grant of an allotment from an estate holder without making a presentation to the estate holder of such nature as is appropriate to the occasion under old established Tongan custom. If this makes the particular grant a sale, then it would probably result in all the allotments granted by nobles for over a hundred years being unconstitutional. it is clear that since the Constitution was passed the people of Tonga have not interpreted it in that way.

So for all these reasons the Court rules that clause 104 of the Constitution only prohibits permanent out-and-out sales of land.

While some of the transactions which have taken palce in connection with this town allotment may indeed be strange, it is clear that none of them were done with the intention of effecting a permanent out-and-out sale of the allotment. They appear to have been transactions in which some interest in the allotment passed from one person to another for a consideration. It does not make any difference whether the consideration was by way of cash or gift or Tongan goods, except that in some cases such as the presentation of a TV set to the estate holder, the gift may be seen as a traditional Tongan gift or its modern equivalent and so not strictly a consideration (a view with which the learned Assessor concurs), though the boundary between the two is not at all clear.

It has to be pointed out that while the witnesses spoke to having "bought" the land, they were obviously using the word in its colloquial sense and not with the special meaning which it would take as the complement of "sell" in clause 104.

In legal terms what took place were transactions - in all probability sales, but it is not necessary to make any finding on this - concerning interests in, and in some cases rights to, land. The transactions do not purport to be out-and-out sales for ever but were all aimed at registration of the land under the Land Act as a town allotment. So they did not offend against clause 104 and were not unconstitutional.

It also has to be remarked that even if the view argued before me for the First Defendant were right, his predecessors Tevita and Lufina appear to have "bought" the allotment and he himself probably "bought" it from Lufina, so his argument would rebound and apply to prevent him himself obtaining a good title to the allotment.

The result is that the defence put forward by the First Defendant fails and there is no reason why the order of eviction sought by the Plaintiff should not be granted. This is unfortunate as the First Defendant finds himself in this position through no positive fault of his own, as there may have been (on what was only hearsay evidence before the Court) machinations and double dealings behind his back. But it has to be said that the First Defendant took obvious risks in that he went onto the land and built his fale without any consent from the estate holder or his representative, and then against advice failed to secure his position by obtaining registration of a grant. Be that as it may, the law has to be applied.

This is another case where the Court heard evidence that apparently before the estate holder would agree to registration of a town allotment, he required a dwelling-house with toilets and bathrooms to be built on the land. On the evidence it is certainly not clear that

his requirement was met in the case of Petelo's grant, unless ironically Viliami's buildings were taken to be those meeting the requirements. But if this evidence about the estate holder's requirements is correct - and the Court can see the logic behind it to avoid precious town land being used as a commodity or an investment rather than for people actually living on it - it does seem to differ significantly from the provisions of the Land Act. It appears unfair to make people go to the risk of spending their money building a permanent house on land to which they have no title. It is to be hoped that the Minister of Lands may be able to devise and legalise some procedure - possibly conditional registration rendering
310 a grant null and void if a house is not built within a certain time - which gives more satisfactory protection to the rights of potential holders.

For all the reasons stated the Court will accordingly grant the prayer of the Plaintiff for eviction of the First Defendant from the land in question.