

Tu'ipulotu v Ma'afu

10 Supreme Court, Nuku'alofa
Lewis J

Civil Case No 721/94

17 October, 3 November 1994

Land Court - jurisdiction

20 *Supreme Court - jurisdiction*

Equitable charge - to what attaches

The defendant applied to strike out a claim for possession of buildings and rent on the basis that it was a matter within the jurisdiction of the Land Court. The plaintiff argued that the equitable mortgage which created the rights and obligation in this case was a floating charge and attached to the building and not the land. The defendant submitted that since a dwelling house was involved and the dwelling attaches to the land, the claim was within the scope of s.149 Land Act.

30

Held:

1. The building attached to the land and so it could not be made the subject of an order for possession adverse to the holder of the land.
2. The proper forum was not the Supreme Court but the Land Court.

Cases referred to : Fua v Fua (Tonga Supreme Court No. 55/1986) (Tupou ACJ)
Sanft & others v Tonga Tourist and Devpt. Co. Ltd and others
(Privy Council 2/81)
40 Fua v Nakao (Privy Council 14/90)
Fua v Nakao (Martin CJ 6/88)

Counsel for plaintiff : Mr Macdonald

Counsel for defendant : Mr Edwards

Judgment

The Defendant to these proceedings moves to have the court dismiss the action on the basis that "the Supreme Court has no jurisdiction to hear and determine matters in dispute relating to questions involving interest on land or possession thereof."

The grounds which the Applicant sets out as the basis for the Court dismissing the Plaintiff's claim are expanded and make reference to a judgment of this Court in Action No.55/1986, Fua v Fua, a judgment of Tupou ACJ as he then was.

50 The question of jurisdiction at the centre of this Application is an important one. The Statement of Claim recites the allegation about which the Plaintiff makes complaint and then, in the prayer for relief, claims rental, Interest and costs. No mention is made of possession. However in an Application for an injunction accompanying the Writ and Statement of Claim, the Plaintiff claims:-

"1. Possession of the house be granted to the Plaintiff."

60 No Orders have been made concerning an Application for injunctive Orders lodged with the Court in No.696/94 indeed no mention was made of them. They have not been sought or pursued. They are neither abandoned nor prosecuted. There is a temptation to obtain from the existence of them, an indication as to the true nature of the claims of the Plaintiff, namely, that this is a claim to do with realty and not with personalty, namely the lease itself. However I decline to infer anything from the existence of the injunctive proceedings and devote my attention to the Statement of claim in Action No.721/94.

70 The Tongan Law is well settled. First there are the Tongan statutory imperatives of the Constitution, the Supreme Court Act and the Land Act. Next there exists the resort to the Laws of England pursuant to the provisions of the Civil Law Act Cap. 14 s.3 where no other provision has been "... made by or under any Act ... etc ... in the Kingdom" (of Tonga). The effect of the statutes and the law of England and the jurisdiction of the Land Court has been considered and reconsidered in quite recent cases.

The Privy Council considered the jurisdiction of the Land Court in the Land Case No. 16/80, O.G. Sanft and Sons v Tonga Tourist and Development Co. Ltd., and other, reported as Appeal No.2/1981. In that case the Privy Council made it clear that:-

80 "Whilst all interests in Tonga land are strictly governed by the Constitution and the Land Act, the legislation has recognised that such land may be leased. No code of law has been prescribed for the numerous claims and questions affecting such an interest and accordingly equitable principles may apply except to the extent that any express Tongan Statutory provision may affect any particular type of Lease, for, as an instance, those relating to Aliens. The control which is retained is that the consent of Cabinet is a prerequisite to any sublease or transfer of the interest."

The proposition of Law recited above was echoed in Privy Council Appeal No.14/1990, Paelata Fua and others v Tom Nakao. The Privy Council in that Appeal was called upon to rule on issues springing ultimately from a judgment of Martin CJ as he then was. One of the issues was an inquiry into the ownership of a lease at Koloua and on the ownership of the buildings on that land. In that sense it is germane to the question for resolution on the Motion here.

90 The Fua claim, under consideration in the Court of Appeal was instituted in the Supreme Court Civil jurisdiction, not the Land Court. The Privy Council upheld Martin J. There was however another issue, (indeed other issues), decided by Martin J

concerning the Fuas which were not made the subject of an Appeal to the Privy Council.

In Action No.6/88, (brought in the Civil jurisdiction), Martin J decided:-

"There was some doubt about the jurisdiction of this Court to determine a question of title to land, which is an issue allocated to the Land Court. It is obviously highly undesirable to put parties to the expense and delay of conducting two separate actions in two separate courts, necessarily involving lengthy repetition of much of the evidence and argument, in order to determine what is basically one matter. But even with the consent of the parties, this Court cannot assume a jurisdiction which it does not have."

Martin CJ went on to say in 6/88:-

"Jurisdiction is determined by the basic nature of the claim. If the claim is essentially concerning title to land it must go to the Land Court. If it is essentially about something else it must go to the Supreme Court. Whichever Court may try the case the court has power to determine all the issues which arise and may make any Orders necessary to conclude the matter. To rule otherwise would lead to judicial chaos, if only because the findings of the Land Court are not binding on the Supreme Court, and vice versa."

The Respondent argues that an Equitable Mortgage is a floating charge which can attach to the property of the Mortgagor (M.K. ESAU Co. Ltd.). The Respondent further argues that the subject matter of the claim is not realty but personalty, ie, a dwelling which is merely situated on the land, that the Equitable charge merely attaches to the building. The Respondent argues that this case is about moveable assets not about the land on which the building is sited, that the case only incidentally is about land, that there is no dispute about the ownership of the building.

In Fua, Martin CJ said at page 14 in No.6/99:-

"The buildings on the land were clearly paid for by the company. I find as a fact that they are fixtures - they cannot be moved and therefore form part of the land."

In this case, whoever may be the owner of the building in the present case, the building attaches to the land. If the building attaches to the land then it cannot be made the subject of an Order for possession adverse to the Holder within the meaning of the Land Act as amended or any other person legitimately holding under him.

I am of the opinion that questions of possession in the present case cannot properly be resolved by the Supreme Court. The proper forum, in my opinion in the present case, is the Land Court. The authorities cited by Counsel for the Respondent are distinguishable.

The Respondent Plaintiff to this Application submits that the Receiver Plaintiff in the present case claims possession and rent, not land. He argues that the Equitable Mortgage which creates the rights and obligations in the present case is a floating charge. It is submitted that such a charge does not give rise to the issue of whether the building to which it attaches is in its turn, attached to the land.

The equitable mortgage, the subject of this Application was not Exhibited to the Application. Nor were the two leases around which this Application centres. A consideration of those documents is, in my opinion, crucial to a fair determination of the questions which arise for determination here. I called for production of the documents. With the consent of counsel, I have now had the opportunity of examining them.

The lease were made security for the Mortgage by the Mortgagor land holder. The right to do so arose from the fact that although the Lessee Company, M.K. Esau Company Limited was not an heir or an holder pursuant to the Land Court, it acquired the rights of a lessee to the land and was, in Tongan land law as I understand the submission, the owner of the materials and the art which made those materials into the building that it has become. The Company may if it so decides, with the consent of the rightful owner, remove its materials. Without such consent it may not.

150 The Applicant Defendant in this Application as far as I am able to say, is a tenant, residing in the subject premises, pursuant to a tenancy on the land, the nature and extent of which tenancy I am unable to know given the evidence before me. He probably has occupancy by reason of some form of licence. I am just unable to say.

The Respondent Plaintiff is, according to the pleadings, (Statement of Claim paragraph 4,) an "Administrative Receiver of the Defendant." The Defendant before me, (the Applicant here), is "Samuela Ma'afu". The Application emanates from File No. 721/94.

160 In the Statement of Claim bearing the number 721/94, the Respondent Plaintiff further recites (paragraph 1, Statement of Claim,) ... "The Defendant executed an Equitable Mortgage dated 9 August 1982 in favour of the Plaintiff." (my emphasis). If the Defendant did so execute an Equitable Mortgage in favour of the Plaintiff, then there is no evidence of it before me. The only Equitable Mortgage before me (and produced with the consent of the (parties), is one between M.K. Esau Company Limited, Mortgagor and the Bank of Tonga, Mortgagee. The date of the Mortgage before me is the ninth day of August 1982.

170 I am in the present circumstances, driven to conclude that the Pleadings are in error and in particular that the Statement of Claim needs to be examined and redrafted. However, assuming for present purposes that the pleader who drafted the Statement of Claim in Action No. 721/94 meant to join the M.K. Esau Company Limited as the Defendant to the Action and if the present Motion to dismiss the Plaintiff's Claim for want of jurisdiction was directed at the M.K. Esau Company Limited, this court would still be constrained to conclude on the facts before it that these proceedings are properly justiciable in the Land Court and not in the Supreme Court.

The Applicant Respondent must succeed given the circumstances as I have them before me presently, but I will hear Counsel on the course the Court ought to adopt for a proper resolution of these matters.

180 I draw to the attention of counsel the Defence filed by Mr. Ma'afu's solicitors on the 19th of September 1994. One would have thought that the Defence made (and makes) it perfectly plain to the Plaintiff that the Defendant would say when called upon, that the Land did not belong to the M.K. Esau Company Limited and the Company had no interest in the land at any material time.

If ever there was an issue of factual and legal ownership joined by a Defendant in the plainest possible way, this is such an example. The immediate consequence of the issue of legal ownership to land is that all Actions disputes etc. must be brought in the Land Court.