

Sakalia v Vaiea, Schaumkel & Minister of Lands

Land Court, Nuku'alofa

10 Hampton CJ

L496/94

20, 21 & 24 September 1995

Land - surrender - conditions - cancellation

Land - registration - setting aside

20 The plaintiff applied as next eligible heir to be registered (and was) as the holder of a tax allotment surrendered by second defendant over a year earlier. The second defendant attempted to attach a condition to his surrender, that the land should be divided equally between 3 other family members. That was not done by the Minister. The second defendant, on finding out about the registration of the plaintiff, wrote to the Minister and Cabinet asking for cancellation of his surrender and reversion of the land to him. The Minister confirmed the land in the plaintiff, but subsequently recommended to Cabinet the cancellation of the second defendant's surrender. Cabinet approved that and the Minister of Lands advised the plaintiff that his registration had been cancelled and that the grant had reverted to the second defendant.

30 Held:

1. The only power to surrender was in s.54 Land Act and there is no power to impose conditions on surrender. Succession is determined by law.
2. The plaintiff, as next eligible heir, was entitled to claim and be registered.
3. The Cabinet Decision cancelling the surrender and the implicit setting aside of the registration of the Plaintiff was done without reference to the plaintiff's position or his registration as holder of the land and was unlawful and invalid and should be set aside.
4. The registration of the second defendant as holder of the land should be cancelled and the name of the plaintiff restored to the register.
[An appeal was taken by the first defendant and the Court of Appeal judgment is reported immediately following]

40 Statute considered : Land Act s.54

Counsel for plaintiff

Mr Edwards

Counsel for second defendant

Mr Tonga

Counsel for third defendant

Ms Simiki

Judgment

A. Chronology of Events (taken from the agreed documents).

1. On 29 January 1935 the Second Defendant was registered as the holder of a Tax allotment, 'Uvea, at Ha'apunga, on Crown Land, being Lot 81 Rik. 77/90, situated in Block XXIX in the District of Tongatapu and consisting of some 12 acres 1 rood and 20 perches (hereinafter called "the land"). The Second Defendant signed the Deed of Grant (Book 57, Folio 81) on 8 August 1935.
2. On 7 November 1990 Cabinet (by decision C.D. 1549) approved an application by the Second Defendant to lease the land to the First Defendant for a period of five years to be effective from the date of registration (as will be seen later in this judgment registration was not made or purported to be made until September 1992). Both the First and Second Defendants were informed of this approval by a letter from the Third Defendant, the Minister of Lands, of 15 November 1990.
3. On 27 March 1991 the Second Defendant wrote to the Third Defendant in effect seeking to surrender his holding the land (presumably, and as discussed below and this being the only power to so do, pursuant to s.54 of the Land Act (Cap.132). It should be noted that s.54 had not been amended, at that time, so that notice of Cabinet's consent to the surrender did not have to be published by Notice in the requisite form). At the trial no one argued that this was not a surrender, and the Third Defendant, in his pleadings admitted it was such. The Second Defendant, in effect, requested the Third Defendant to sub-divide the land into 3 blocks and allocate one each to 3 named grandchildren (the children of his daughters, he having no legitimate sons and a deceased illegitimate son). On the Second Defendant's letter of 27 March 1991 someone, presumably in the Ministry of Lands Survey and Natural Resources, has noted various particulars about the land, including the lease mentioned in C.D. 1549 of 7 November 1990.
4. On 11 April 1991 the Third Defendant, treating the application as being one to surrender, submitted it to Cabinet for consideration (noting that the purpose of the surrender was to allow the grandchildren of the Second Defendant to apply for the allotment).
5. On 2 May 1991 the Cabinet decided (C.D.631) to consent to and approve the surrender of the land by the Second Defendant. No conditions of any sort were attached, nor was there any reference to any subdivision; nor to the lease mentioned in C.D. 1549.
6. On 22 July 1992 the Plaintiff, as the next eligible heir of the Second Defendant, made claim to be registered as the holder of the land. (In the argument before this Court it was not claimed that in fact the Plaintiff was not the next eligible heir to the land. Nor was any point raised in relation to the effect, if any of ss.87 (unamended) and 88 of the Land Act in this situation - see for example the Judgment of the Privy Council in Vakameilalo v Vakameilalo and the Minister of Lands of 14 February 1989 (No. 2/89) holding that an heir must lodge his claim within 12 months of the surrender and if a grant is made to another after that time, then that other's rights to the land are valid and the heir cannot claim. During the preparation of this Judgment this

point was brought to the attention of Counsel and further brief submissions were made. Both Mr. Edwards and Ms. Simiki were in agreement that s.87 was not a concern here. The land here, after the 12 month period, would have reverted to the Crown and therefore the Crown, acting through the Third Defendant, had the power to grant the land to the Plaintiff, the person who would otherwise have been entitled. And in distinction to Vakameilalo, no grant had been made to another person).

7. On 21 August 1992 the land was granted to the Plaintiff and was registered in the name of the Plaintiff (that having been admitted by the Third Defendant in his Amended Statement of Defence, and the date confirmed by the endorsement on the back of the Deed of Grant, which endorsement is referred to in para. A.1? below).
8. On 8 September 1992 the First Defendant entered into a Deed of Lease, for lease of the land for a term of five years, that lease being registered as No.5319. (and the Deed signed, inter alia, by the Third Defendant). Quite how this came about almost two years after the question of a lease from the Second Defendant had originally been approved (para. A.2 above) and despite the surrender of the land by the Second Defendant (paras. A.3 & 5 above) is a mystery which has not been explained to this Court. The effect of this document, if any, will be discussed later in this judgment.
9. On 22 March 1994 the Ministry of Lands, Survey and Natural Resources issued a certificate to the Plaintiff (A Certificate of Statutory Land Holding) certifying the Plaintiff's registration as holder of the land.
10. On 8 April 1994 the Second Defendant wrote to Cabinet referring to his earlier surrender of the land and, although in somewhat different terms, to his earlier stated reasons for surrender (para. A.3 above). He asked for Cabinet to cancel the Plaintiff's registration to the land and that the land revert to him.
11. On 20 April 1994 the Third Defendant, in a minute on the Second Defendant's letter of 8 April 1994, noted the application as being to cancel the Second Defendant's surrender of the land and to cancel the Plaintiff's registration.
12. On 20 May 1994 however - just one month later and in what could be seen as a contradictory step - (and this is to be found on the reverse of the certified true copy of Deed of Grant Book 57 Folio 81, referred to in para. A.1 above) the Third Defendant signed and confirmed the "reversion" of the land to the Plaintiff referring to the Second Defendant's surrender as approved by Cabinet on 21 August 1992 (C.D. 631); and the Plaintiff was given, and signed for, a copy of the Deed.
13. On 1 June 1994 the Plaintiff issued the original Statement of Claim in these proceedings and stated, albeit in a different way, the facts (or the essential ones as known then to the Plaintiff, the major exception being those matters in paras. A.10 and A.11 above). The Plaintiff sought orders cancelling Lease 5319 (see para. A.8 above) and evicting the First Defendant from the land. The same three Defendants were named.
14. On 1 June 1994 the Third Defendant submitted to Cabinet the Second Defendant's application to cancel both his surrender and the earlier Cabinet decision (C.D. 631), on the ground of the 5 year lease (Lease No.5319). The

Third Defendant recommended the cancellation of C.D.631. No reference was made, at all, to the Plaintiff's position or his registration. That, to say the least, is surprising, (especially given the recent events mentioned in paras. A.9 & 12 above).

15. On 9 and 10 June 1994 all three Defendants were duly served with the Writ and Statement of Claim.
16. On 14 June 1994 Cabinet considered the Second Defendant's application to cancel his surrender and deferred it until the Third Defendant was present in Cabinet (C.D. 946).
17. On 22 June 1994 Cabinet further considered the matter of the Second Defendant's application to cancel his surrender and approved the Third Defendant's recommendation i.e.

"That the application to cancel Cabinet Decision No.631 of 2 May 1991 be approved" (C.D. 982).

There appears to have been no reference however to the Plaintiff's position, or his registration as holder of the land.

18. On 25 July 1994 the Third Defendant wrote a letter to the Second Defendant (and sent a copy to the Plaintiff) stating that Cabinet had approved the cancellation of the Second Defendant's surrender of the land, previously approved (by C.D. 631 of 29 May 1991). The letter went on to say that the land had reverted to the Second Defendant from 22 June 1994 and that the reversion of the land to the Plaintiff had been cancelled (i.e. as this Court sees the position, this purports to be a setting aside of the registration of the land in the Plaintiff's name).
19. On 23 August 1994 application was made by the Plaintiff to amend his Statement of Claim in effect to incorporate the events set out in paras. A.10, A.11 and A.14 - 13 above and leave was granted to the Plaintiff.
20. On 20 September 1994 the Amended Statement of Claim was filed seeking, in effect, Orders (inter alia);

- (e) cancelling Lease No.5319;
- (b) directing the First Defendant to vacate the land;
- (c) declaring void the Cabinet decision approving both the cancellation of the surrender by the Second Defendant and the cancellation of the registration in the name of the Plaintiff; and
- (d) consequently, cancelling the registration of the land in the name of the Second Defendant and restoring the registration in the name of the Plaintiff.

21. On 20 September 1995 this action was heard. At the outset the Court was informed of the following:-

- (a) That the Plaintiff and the First Defendant had settled matters between themselves on the basis of an undertaking by the First Defendant to vacate the land no later than 31 March 1996; and that consequently no orders were sought in relation to the Lease No.5319 or against the First Defendant and that he might be (and was) dismissed from these proceedings.
- (b) That the action would continue against the Second and Third

Defendant (as occurred thereafter).

- (c) That Mr. Tonga, who had filed, initially, a defence on behalf of the Second Defendant, would seek leave to withdraw from so acting because of the absence of instructions. Leave was granted.

B. The Issues

The issues, as argued, revolve entirely around the effect of the various documents and decisions outlined above, especially the effect, if any, of

- (a) the surrender of the land, by the Second Defendant, of March, April and May 1991
 (b) the registration, of the Plaintiff as holder of the land, of August 1992
 (c) the lease of the land from Second Defendant to First Defendant, of September 1992 (and the earlier lease documents of November 1990)
 (d) the cancellation of the Second Defendant's surrender of the land and the consequent cancellation of the Plaintiff's registration as holder and replacement by the Second Defendant, of June and July 1994.

C. The Answers

1. The Surrender by the Second Defendant

- (a) Whatever the Second Defendant's intentions may have been (refer his letters of 27 March 1991 and 8 April 1994, i.e. to divide the land in three and thence to three of his daughters' children, who were not in line and not able to succeed as a matter of law) his actions of March 1991 amounted to a surrender by him of his allotment (the land); were seen as such by the Third Defendant; and Cabinet consented to the surrender. (By his Amended Statement of Defence the Third Defendant admitted that, in April 1991, the Second Defendant surrendered all his rights titles and interest in the land; and that the Cabinet had approved that surrender). Perhaps the Second Defendant may have misunderstood the position and what he could achieve; but the Court has not had the benefit of evidence about that matter or of argument on behalf of the Second Defendant. The Court is aware of the line of cases in this Court (e.g. Ma'asi v 'Akau'ola and anor. [1956] 2 T.L.R. 107; Hema v Hema and anor. [1959] 2 T.L.R. 126; and Moa v Faka'osita and ors. [1990] T.L.R. 195) as to the effect of proven mistake or fraud on entries in the register. Lacking any evidence and/or argument to the contrary (because of the absence of the Second Defendant), this Court acts at this stage on the basis that the surrender was a valid one. This is not to be seen as determinative of the position of the Second Defendant in relation to his rights, viz a viz the Minister of Lands, to contest the 1991 surrender. This Judgment is not conclusive in those matters; but nor is this Judgment necessarily to be seen as an invitation for further litigation.
- (b) The only power to surrender the land was that contained in s.54 of the Land Act.
- (c) S.54 is quite explicit - on surrender the allotment so surrendered shall devolve upon the person who would be the heir of the holder as if the holder had died and, failing devolution, then the allotment reverts to the Crown.

- (d) The person surrendering (here the Second Defendant) is not given power to impose conditions on the surrender e.g. as to who should succeed him to the land; succession is determined by the law.
- (e) The surrender of the land by the Second Defendant was complete when Cabinet gave its consent (C.D. 631) and the Second Defendant had no more interest in the land.

2. The Registration of the Plaintiff

- (a) The Plaintiff was the next eligible heir of the Second Defendant.
- 250 (b) The Plaintiff was entitled to claim the land and be registered as the holder.
- (c) The Plaintiff's position was confirmed by the Third Defendant, or his Ministry, by
 - (i) the registration in August 1992
 - (ii) the issue of the Certificate of Statutory Land Holding in March 1994
- (d) Those latter two acts (i.e. c(i) & (ii) above) are especially significant in terms of when they occurred, and particularly the last as it took place after the first two steps (paras A.10 and A.11 above) in the cancellation of surrender events.
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3. The Lease from Second Defendant to First Defendant

- (a) The Cabinet approved lease (C.D. 1549, 7 November 1990) was not in effect as at time of the registration of the land in the name of the Plaintiff, and could not affect that registration of the land.
- (b) At the time of the surrender by the Second Defendant there was actual knowledge in the Ministry of the earlier lease and of C.D. 1549 as can be seen from the note written on the Second Defendant's letter of 27 March 1991 (refer para. A.13 above).
- 270 (c) It is a curious coincidence (but no more than that given the absence of evidence on the point) that the registration of the Deed of Lease (para. A.8 above - 8 September 1992), should have followed so shortly after the Plaintiff's registration as holder of the land (21 August 1992).
- (d) If this Deed of Lease was to be seen as being in pursuance of the earlier approved lease (C.D. 1549) - and it is in the same essential terms - then the Third Defendant and the Ministry must have been aware that the Second Defendant no longer could agree to the lease of the land, as Lessor, because he was no longer the holder, yet apparently the consent of the Plaintiff as the holder, was not sought or obtained to the grant of the lease.
- 280 (e) The effect of s.59 of the Land Act was not argued before the Court and does not require decision here. The simple point may well be that there was, and could be, no granted lease which would bind an heir until the lease came into effect on registration.
- (f) In any event the matters are irrelevant now in view of the settlement achieved between the Plaintiff and the First Defendant.
- (g) And whatever the position s.59 makes it clear that a lease shall not affect devolution of an allotment to an heir.
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4. The Cancellation of the Second Defendant's surrender and of the Plaintiff's Registration.

- (a) S.54 of the Land Act does not make provision for the cancellation of a surrender of an allotment.
- (b) Nor does any other provision in the Land Act.
- (c) Without deciding the matter, (as was said in para. C.(1)(a) above - because it was not the subject of any evidence or argument before the Court) it may well be that, if there was proof of some sufficient mistake or some fraudulent conduct causing the surrender then this Court might exercise its power to set aside such a surrender. No such conduct is alleged or shown here. As was said above this Judgment is not determinative of the Second Defendant's position in relation to the surrender.
- (d) It would seem that what occurred here was that the Second Defendant wrote to Cabinet (the letter went to the Third Defendant) restating his reasons why he surrendered the allotment i.e. so it could go to his daughters (or their children).
- (e) As already stated in this Judgment, a person surrendering an allotment has no power to impose conditions on such a surrender.
- (f) The surrender here had been completed and, is treated by this Court, as having been validly made.
- (g) The reasons given by the Third Defendant in submitting, and recommending for Cabinet's approval, the application to cancel the surrender, surprisingly, were different to those put forward by the Second Defendant. The Third Defendant applying to cancel on the basis of the lease to the First Defendant and made no reference at all to the registration in the name of the Plaintiff (and as confirmed by the Third Defendant a mere 12 days before - see para. A.12 above).
- (h) The Cabinet decision (C.D.982) of 22 June 1994 makes no reference to the registration in the name of the Plaintiff, or to cancellation of the same.
- (i) The only reference to that comes in the letter of the Third Defendant of 25 July 1994 to the Second Defendant, and copied to the Plaintiff, advising that the application to cancel the surrender has been approved and going on to say that the grant of the allotment to the Plaintiff had been cancelled.
- (j) No reasons were expressed or given in the Cabinet decision (C.D. 982).
- (k) No opportunity at all was given to the Plaintiff to make representations in relation to his position, and the possible cancellation of his registration.
- (l) Yet by then these proceedings had been issued and served on the parties, including the Third Defendant (on 9 June 1994).
- (m) This was a very clear breach of the rules of natural justice and the right to be heard on matters affecting his (the Plaintiff's) interests.
- (n) It is not clear that, in fact, Cabinet did cancel the registration of the Plaintiff, but that must be implicit in, and follow from, the decision to, in effect, reinstate the Second Defendant to the land (by cancelling his previously approved surrender).

- (o) This court finds much force in Mr. Edward's submission that, if a registration is allowed to be cancelled in such a way, then there is no protection and security of tenure for any registered holder. Chaos could well result.
- (p) The Plaintiff, I find, was lawfully registered as the holder of the land. The purported cancellation of that registration, the purported cancellation of the surrender by the Second Defendant and the purported re-registration of the land in the name of the Second Defendant are all acts and decisions taken without proper procedural steps without fairness and without lawful authority; and are of no effect.

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D. The Orders

1. An Order declaring that the Cabinet decision (C.D. 982) of 22 June 1994 is unlawful and invalid, and should be and is set aside.
2. An Order cancelling the registration of the land in the name of the Second Defendant.
3. An Order restoring the registration of the land into the name of the Plaintiff.