Fasi v Fifita & others

Land Court, Nuku'alofa
Lewis J
L 305/93

1 & 8 March 1996

Land - equity - estoppel
Estoppel - not create an interest in land - a defence

The plaintiff, on behalf of his parents, who had lived on and cared for a town allotment for 49 or more years on the basis of promises made to then by successive holders, claimed an interest in the land.

Held:

1. Although, with the exception of leasehold interests after they have been validly granted, equitable principles do not apply to any other title, claim or interest in any other Tongan interest in land, nonetheless an equitable defence such as estoppel which does not create an interest in land, can be used as a defence.
2. Even if the promises alleged were made out the plaintiff could not succeed - he was not entitled to the orders sought.

Cases considered : Veikune v Toa [1981-88] Tonga LR 138
Sanft v Tonga Tourist & Devpt. Co [1981-88] Tonga LR 26

Counsel for plaintiff : Mr L. Foliaki
Counsel for first and second defendants : Mr 'Etika
Counsel for third defendant : Ms Tapueluelu

Judgment

This claim proceeds to Judgment on the basis of agreed facts which are contained in a memorandum prepared and signed by Counsel and their clients.

The statement of claim was amended by the order of this court dated 21 April 1995. Amended defences have been filed. The facts as I find them to be having regard to the productions of evidence which have been filed by the parties and the agreed facts and the submissions of counsel, are as set out in the following narrative.

The allotment the subject of this dispute is a town allotment (being part of the hereditary estate of the Crown) known as "Napulo" in Fatafehi Road Kolofo'ou. The allotment was originally registered in the name of one Sione Faiva. He died in 1961.

Of their 12 children Sione Faiva and his wife Lu'ulofia had a daughter Nau. Maka, their eldest male child left the family home in the 1950s and has lived and remained in Navutoka ever since.

Nau married Semisi Fasi. Nau and Semisi are the parents of the plaintiff Tevita Manu. The plaintiff alleges that Nau was told by the her father that she was to remain on the allotment and to care for her mother Lu'ulofia and himself and than in return for the care she would be given a portion of the allotment for herself and her children. The promise by Sione to Nau was communicated to each of her brothers and sisters. The defendants deny the promise and the communication.

When Sione died in 1961 the allotment passed to Lu'ulofia who held it in widow's interest until she died in June 1981. Upon her death there being no heir's claim, the defendant Funaki Faiva applied for and obtained registration as the holder of the allotment.

In 1987 the Plaintiff Fasi and the defendant Funaki Faiva entered into an agreement concerning the allotment and by letter dated 14 August 1987 (B1) Funaki Faiva surrendered his interest in the part allotment in question to the plaintiff Tevita Fasi. The letter recites that the surrender was done in order to give recognition to the fact that Funaki's Aunt (Nau) her husband and their children lived on and cared for the allotment for "43 years".

The plaintiff Tevita Fasi took the letter P1 to the Minister and made application to have the land surrendered to the Crown. The Minister explained that the provisions of the Land Act made it necessary by operation of law to have the land which can devolve upon heirs, be not claimed and then application for grant would be open to the plaintiff.

The plaintiff was informed by an officer of the Ministry that he should obtain from the brothers Tevita Finau Faiva and Sione Faiva, (the former at that time living in New Zealand, the latter living in Australia,) that they had no objection to the surrender. Tevita was of unsound mind and gave no approval. The brother in Australia did so approve.

The letter containing the information was sent to the Ministry of Land and the plaintiff was given an assurance that it would be placed before Cabinet. A long delay followed to Cabinet decision was taken.

Funaki Faiva wrote to the Ministry of Lands on 24 August 1992 requesting that his application for surrender of his allotment to the plaintiff be cancelled. No reason for Funaki's change of heart is given.

The next step in the process raises some difficulty. In a statement of agreed facts there is included a statement of dispute. The defendant Funaki Faiva denies that a document dated 10 October 1992 bears his signature. The document purports to be a letter

dated 10 October 1992 from Funaki Faiva to the Minister of Lands cancelling the surrender of Funaki's allotment to Manoa Fifita. The plaintiff seeks to tender it and the third defendant acknowledges that the letter was received from the plaintiff.

What is the Court to do in such circumstances? The cases of all the parties are closed. The letter is prima facie admissible as a public document. It is relevant. The Evidence Act however requires that it be formally proved if it is objected to. The only proper course in the presence of objection is exclude the letter as evidence. I do so.

As to the letter of 24 August 1992, the document bears certain handwritten notes. The parties agree that insofar as the note may be significant they are:-

- Note dated 8 September 1992.
  An instruction from the Minister of Lands to the Ministry of Lands Surveyor Paula Moala to check the surrender.
- Note dated 18 September 1992.
  The surveyor's reply to the Minister reporting that the surrender has not been submitted to Cabinet.
- Note dated 18 September 1992.
  Minister to surveyor directing the surveyor's acceptance of the surrender.
- Note dated 23 September 1992.
  Surveyor to the Minister informing that the applicant seeks to cancel his surrender since it is not before Cabinet.

On all sides the plaintiff called at the Ministry of Lands in late 1992 and early 1993 enquiring about the surrender which he understood had been lodged, but was not able to obtain any clear information.

On 6 January 1993 Cabinet approved an exchange of allotments between the defendant Faiva and the defendant Fifita effectively bringing to an end to the quiet enjoyment Nau had and terminating any rights Nau's children may have acquired.

It is common ground that the plaintiff has lived on the allotment in question for 49 years, cared for it, planted fruit trees and built a family house on it.

Nau for her part was born on the allotment was raised on it was married and lived with her husband, cared for her parents. It is equally clear that the defendant Faiva has neither lived on the place nor cared for it.

The plaintiff seeks orders that:-

- The exchange of town allotment between defendant Faiva and defendant Fifita be set aside and cancelled.
- The Minister of Land submit to Cabinet the application of the defendant Faiva of 14 August 1987 to surrender the allotment and allow the Plaintiff Fasi to apply for it.
- Costs.
- Granting other relief.

The law of Tonga presently is as Martin CJ succinctly put it in Latu Popi Veikune v Sione Kataina Toa [1981-88] Tonga LR 138 [1988] S.P.L.R. 384 @ 386. Having referred to the decision of the Privy Council in Veikune v Toa which referred the matter back to the Trial Judge to determine findings and having referred to O.G. Sanft and Sons Ltd. v Tonga Tourist and Development Co. Limited [1981-88] Tonga LR 26 Martin CJ. considered the notion of the application of equitable principles to the Land Act Cap.132.

He referred at p.140 to the oft quoted dictum of the Privy Council in Sanft:

"In respect of Tongan Land, the Land Act is a complete code which ... rigidly controls by its express terms all titles and claims to any interest in Tongan land except in respect of leasehold interests once they have been created ... with that exception there is no room for the application of any rule of equity. All claims and titles must be strictly deal with under the Act."

And later:

"... Equitable principles can only apply to leasehold interests after they have been validly granted. Such principles have no application to any other title, claim or interest in any other Tongan interest in Land."

If found to exist, the promise to Nau and her children by her father is accepted as being in the nature of a licence in a manner similar to that in Veikune. Martin CJ continues at p.140 and observes that what Sanft does not say is "That the Defendant cannot avail himself of an equitable defence which does not create an interest in land. Inoke's promises cannot be enforced by way of a contructive trust. The Defendant cannot be given a grant of land. But the Defence of estoppel is open to the Defendant."

I agree with Martin CJ in the circumstances as he was considering them in Veikune. However, those circumstances are different to the circumstances of the present case. The party asserting the promise to allow Nau and her children to occupy the land is the plaintiff because he appears to have been by-passed in the transactions leading to the registration of Funaki leaving Fasi with the task of setting aside events which may displace Nau and her children.

Mr. Foliaki for the plaintiff submits that if the defendant in Veikune (Supra) could be granted a life estate as a defendant the reverse can occur. By that I understand him to mean that a plaintiff may be able to assert a right to occupy by showing that in the particular circumstances the Defendant is estopped from denying the existence of an agreement between the earlier holder and the occupier whom the defendant seeks to remove from a life occupancy for herself and that of her children.

Mr. 'Etika of counsel for the first and second defendants argues that the acquisition of the subject land by Funaki and the exchange thereafter with Fifita were done lawfully, i.e. according to the Land Act which rigidly controls such transactions [Sanft, (Supra)]. Moreover he argues that the doctrine of laches applies to the Plaintiff.

As has been made clear, the defendants deny the existence of any argreement or promise from Funaki Faiva's grandfather that the land would be available to Nau and to her children as alleged in paragraph 8 of the statement of claim.

From the whole of the evidence I suspect that Nau's father made her the promise alleged in the statement of claim paragraph 8. It is the sort of arrangement that people make in life. The agreed facts and the exhibits all point to it. But how am I able to make any finding about it? At the moment there is only the bare assertion in the statement of claim and inferences which may be drawn from the surrounding circumstances, eg, the fact of Nau having lived on the place all her life having quite enjoyment of the land consistent with her father's wish until the arrival on the scene of Funaki.

If one assumes for the purposes of the resolution of this case that the plaintiff is able to succeed on every allegation, (leaving aside the application of the equitable doctrine of laches), in the statement of claim, in light of the decision in Sanft but bearing in mind the reasoning of Martin CJ in Veikune (a case plainly distinguishable from the present,) the plaintiff simply cannot succeed. He seeks from the Court (standing as he does as the

descendant of a mere licencee, not the descendant of a holder by lease, not the descendant of a holder by grant) declarations and orders to which the Privy Council have made it as plain as can be, he is not entitled.

The case not only cries out for a more just result but is only one of many which are brought before this court. It may be that a necessity for legislative intervention may arise enabling the parties to agreements or promises such as the one under consideration to resort to the registration of the agreement with Ministry administration so that there will in the future be no time consuming and costly litigation like the present.

190 The plaintiff must inevitably fail in this case. My concern is that counsel have presented the court with some agreed facts. However the major issue is in dispute and that can only be resolved by hearing from Nau and anyone else who may have been placed on notice about the wishes and the promise Nau's father is said to have given her.

The defence of laches may be dealt with quickly. From the evidence before this court there was no delay in bringing proceedings. The action evolved after Funaki commenced by applying for a surrender in favour of the Plaintiff and then withdrawing it. There is much to be explained about Funaki's behavour. The plaintiff was then faced with the fact of the registration of the land. He was thereby forced to sue.

200 How this came about when one considers the earlier altruism of Funaki, remains a mystery. The defence of laches cannot be said to be appropriate in the circumstances of this case.

I am of the opinion that this matter cannot be properly determined as to the real issues given the state of the so - called agreed facts. However if the facts were to be determined at a full hearing the plaintiff must fail for the reasons I have given.

I will hear Counsel further as to the course which the court should take.