Vailea v Sakalia, Schaumkel & Minister of Lands

Court of Appeal
Burchett, Tompkins & Neaves JJ
App. 11/95

27 & 31 May 1996

Land - surrender - conditions - cancellation
Land - registration - setting aside
Land - application of equity

The facts are set out in the first instance decision immediately above. On appeal (taken by the first defendant in the Land Court);-

Held:

1. The reason set out in the judgment below were correct in law.
2. There is no provision in the Land Act for a person surrendering land to impose conditions to that surrender.
3. So the wishes of the appellant (before or after the surrender) had no legal consequences.
4. The first respondent as next eligible heir, was entitled to claim the land and be registered; and his position was confirmed by issue of a certificate of statutory land holding and a memorandum on the Deed of Grant.
5. No provision of the Land Act makes any provision for cancellation of the surrender of an allotment (and no view was expressed on the Land Court's comment that a significant mistake or fraudulent conduct causing the surrender might give the court jurisdiction to set aside a surrender).
6. Equity can achieve much in appropriate circumstances. But where the law is set out in a statute, and the circumstances come squarely within the statutory provisions, equity is powerless. The Land Court does not have jurisdiction to do what is fair and equitable when that means departing from the law. The Land Court must apply the law. Where the law allows the court a discretion, the court can act accordingly. But where (as here) it does not, the court has no option but to determine the case in accordance with the law.

Statute considered : Land Act s.54

Counsel for appellant : Mr L Foliaki
Counsel for first respondent : Mr W. Edwards

Judgment

The appellant, Mikaele Vailea, the second defendant in the Land Court, has appealed against the judgment of Hampton CJ, delivered on 29 September 1995. The action concerned a tax allotment, 'Uvea, at Ha'apunga, being lot 81 77/90 situated in Block XXIX in the district of Tongatapu, consisting of some 12 acres 1 rood 20 perches ("the land"). The Chief Justice made the following orders.

1. Declaring that the Cabinet decision (CD.982) of 22 June 1994 is unlawful and invalid and should be set aside.
2. Cancelling the registration of the land in the name of the appellant.
3. Restoring the registration of the land into the name of the first respondent.

The appellant challenges each of these orders.

In the notice of appeal, I opeti Schaumkel is shown as an appellant. That is clearly incorrect. For reasons that will later appear, he has no interest in the appeal. He is more correctly described as the second respondent.

The sequence of events

Mr Foliaki, for the appellant, accepted that the details of the events set out in the Chief Justice's judgment are accurate. He does not seek to challenge any of those findings. It is therefore not necessary to repeat that chronology in the same detail. The following facts are relevant to the issues raised in the appeal.

On 29 January 1935 the appellant was registered as the holder of the tax allotment consisting of the land.

On 27 March 1991 the appellant wrote to the Minister seeking to surrender his holding in the land. At the hearing, it was accepted that this letter amounted to an application to surrender, under s.54 of the Land Act (Cap.132). It is also accepted that, when the appellant asked to surrender his holding, he also asked that the land should be divided equally between Lafaele Leisi Sakalia, the son of Kamelieli Kailao Sakalia, the son of the Lafaele Kamelieli Sakalia, the elder brother of the appellant, and Kalolo Tausinga and Mikaele Kolio, the latter two being grandsons, children of his daughters.

On 2 May 1991 the Cabinet (C.D. 631) consented to an approved the surrender of the land. No conditions of any sort were attached.

On 22 July 1992 the first respondent applied to the Minister to be registered as the holder of the land as the next eligible heir of the appellant. His father Kamelieli Kailao Sakalia is he eldest son of Lafaele Kamelieli Sakalia, the appellant's brother. As the appellant had no eligible sons, his brother is dead, and the first respondent's father was ineligible because he already had a tax allotment, the first defendant was the next eligible heir. That was accepted in the Land Court. It was initially challenged by Mr. Foliaki at the hearing of the appeal, but in the course of argument, he acknowledged that the first respondent was the next eligible heir.

On 21 August 1992 the land was granted to the first respondent and registered in his name. On 22 March 1994 the Ministry of Lnad, Survey and Natural Resources issued a certificate of statutory land holding, certifying the first respondent's registration as holder of the land.

On 8 April 1994 the appellant wrote to Cabinet asking it to cancel the first respondent's registration in relation to the land, and that the land revert to him. Although on 20 April 1994 the Minister noted the appellant's application, a month later, on 20 May 1994, the Minister signed and confirmed the "reservation" of the land to the first

respondent, referring to the appellant's surrender as approved by Cabinet on 21 August 1992.

On 1 June 1994 two events occurred. The first respondent issued his original statement of claim. On the same day, the Minister submitted to Cabinet the appellant's application to cancel his surrender, and an earlier Cabinet decision concerning a lease, with which this court is not concerned.

On 22 June 1994, after the Minister had been served with the first respondent's proceedings, Cabinet approved the application to cancel the surrender of 2 May 1991 (CD 631). The Chief Justice found that there was no reference to the first respondent's position or his registration as holder of the land. On 25 July 1994 the Minister advised the appellant of the Cabinet decision, informing him that the land had reverted to him from 22 June 1994, and that the reversion of the land to the first respondent had been cancelled. The Chief Justice found that this purported to be a setting aside of the registration of the land in the first respondent's name.

The course of the proceedings

On 20 September 1994, the first respondent filed an amended statement of claim, seeking *inter alia*, orders directing the appellant to vacate the land, and declaring void the Cabinet decisions approving the cancellation of the surrender, and the cancellation of the registration of the appellant.

The first respondent also sought relief in connection with a lease that had been given by the appellant to the second respondent. We need not detail the circumstances or the pleading, since the issues relating to the lease were settled by agreement. But it does have a bearing on a representation issue, to which we shortly refer.

The hearing commenced on 20 September 1995. The first respondent's claim against the appellant and the Minister continued, it being argued on agreed documents. Mr Tonga, who had appeared on behalf of the second respondent, and who had also filed a defence on behalf of the appellant, was granted leave to withdraw because the second respondent was no longer involved, as a result of the settlement. Mr Tonga advised the court that he had been unable to obtain instructions from the appellant.

The judgment, delivered on 29 September 1995, made the orders set out above, the result being that the first respondent has been restored to the register as the person entitled to be the registered holder.

The position of the appellant

At the commencement of the hearing in this court, Mr Foliaki sought leave to file an affidavit by the appellant. In view of the circumstances revealed in the affidavit, that the appellant was not represented at the hearing, and in the absence of opposition by Mr Edwards, leave was granted.

The appellant is aged 84. Since 1973, he has been bedridden as the result of an accident. He said that he did not appear at the hearing - indeed he did not know when it was to be - because he thought, as the result of a conversation with the second respondent, that Mr Tonga would represent him. Certainly, Mr Tonga must have had some instructions, because he filed a statement of defence on behalf of the appellant, but the appellant says that Mr Tonga did not contact him before or after the hearing.

The appellant has explained the reason why he sought to surrender the land, and have it divided between the named persons. This was that his daughters had taken him into their homes, provided and cared for him, and probably will until the day he dies. Had he known

that the division of the land in the way he proposed was not legally possible, he would not have surrendered his tax allotment.

Mr Foliaki produced a document dated 29 June 1991. Although this document had not been produced at the hearing in the Land Court, and had not even been annexed to the affidavit of the appellant filed in this Court, we listened to a translation of it. It is signed by the appellant's father, and the Minister. It records the appellant's wish to surrender his allotment, and divide the land between the three persons named. It is apparent from it that, at least from that date, if not before, the Minister was fully aware of the wishes of the appellant. Although it is dated after the Cabinet consent to the surrender, Mr Foliaki submitted, although there is no evidence to prove it, that the Minister was aware of these wishes before the Cabinet decision.

The submissions for the appellant

Mr Foliaki responsibly recognised that the reasons for the decision set out in the Chief Justice's judgment are correct at law. There is no provision in the Land Act for a person surrendering land to impose conditions to that surrender. So the wishes expressed by the appellant, certainly shortly after the surrender and probably before, have no legal consequences. T' first respondent, as the next eligible heir of the appellant, was entitled to claim the land and be registered as the holder. Whether as the next eligible heir, or as a person entitled to make an application for the land, his position was confirmed by the issue of the certificate of statutory land holding on 22 March 1994 and the confirmatory memorandum of grant on the Deed of Grant dated 20 May 1994. Neither s 54, governing surrenders, nor any other provision in the Land Act, make any provision for the cancellation of the surrender of an allotment. Without deciding the matter, the Chief Justice commented that a significant mistake or fraudulent conduct causing the surrender may give the court jurisdiction to set aside a surrender. As the issue does not arise in this case, we express no view on it.

Despite this legal position, Mr Foliaki made an eloquent plea for the judgment in the Land Court to be set aside, and the matter to be sent back to that court, so that the appellant could place all his circumstances before that court, to enable it to do what was equitable and just. We have some sympathy for the appellant. We accept that, had the appellant been properly advised of the effect of surrendering the allotment, in particular that the persons he wished to take would not, he would not have made the surrender. If we could find grounds upon which the Land Court may be able properly to remedy the position, we would accede to this request. After all, the first respondent, as the eligible heir, will become the holder in any event, on the death of the appellant.

But the die has been cast. There is no way in which the position can be changed. In appropriate circumstances, equity can achieve much. But where, as here, the law is set out in a statute, and the circumstances come squarely within the statutory provisions, equity is powerless. The Land Court does not have jurisdiction to do what is fair and equitable, when that means departing from the law. The Land Court must apply the law. Where the law allows the court a discretion, the court can act accordingly. But where, as here, it does not, the court has no option but to determine the case in accordance with the law.

For these reasons, the appeal must fail. It is dismissed. There will be no order for costs.