Kulitapa v Minister of Lands

Land Court, Pangai, Ha'apai
Hampton CJ
L9/88

11 & 12 March 1997

Land - limitation - available land
Limitation - time runs from refusal

The plaintiff applied for orders in his favour for the grant to him of a town allotment in Pangai, Ha'apai occupied by the Ministry of Agriculture and Forestry and used, inter alia, as a town market. The plaintiffs paternal great uncle had held both this town allotment and an associated tax allotment but upon his death in 1940 the plaintiff was only some 8 years of age and it was not until 1967 that the plaintiff applied for and was granted (in 1968) the tax allotment but not the town allotment.

Held:

1. Although the Ministry of Agriculture and Forestry had occupied the town allotment none of the formal requirements of part IX Land Act, and particularly s 138, had been applied or complied with.
2. That "informal" occupancy had also extended to the tax allotment, until it was granted to the plaintiff in1968.
3. That the plaintiff had applied for the town allotment as well in 1967 but was told to wait until the Ministry found other land and moved out, and that the grant would be made then. That was reaffirmed by the defendant, who was also the Minister of Agriculture and Forestry at relevant times, over the years.
4. It was not until 1987 that the plaintiff was told that he would not be granted the land and proceedings in the Land Court were commenced (in May, 1988). The 10 year limitation period in s 170 Land Act could not bar his claim therefore. The cause of action stemmed from that refusal in 1987.
5. The land is and was available and should be granted to him.

(NOTE - The defendant appealed and the appeal is reported next following).

Statutes considered - Land Act ss 138, 170

Counsel for plaintiff - Mr Paasi
Counsel for defendant - Mr Cauchi

Judgment

Thank you for your patience. As always I was grossly optimistic as to how quickly I would be able to review the evidence and submissions and arrange my thoughts into a logical and sensible pattern.

But I have in the interval reviewed the notes, my notes of the evidence given by the Plaintiff and the 5 witnesses during the course of yesterday, and the submissions made to me, carefully, by both counsel this morning.

It is important, as I said before I retired and after hearing submissions, it is important that when a court, such as the Land Court comes on circuit but once a year and hears a case such as this, that the parties themselves and those interested, if at all possible, should hear the result of the case.

The Plaintiff, now 65 years of age, gave evidence himself and called 5 other witnesses, including the Assistant Land Registrar, to give evidence on his behalf. The Defendant, the Minister of Lands, as is his option and his right, chose to call no evidence but relied, as Mr Ca[illegible]i said, on the evidence, in particular, of the Assistant Land Registrar and of the records produced.

Time is a corrosive agent and it exercises power both over human beings and on the human memory. And given the period covered in this litigation, and in the evidence, of some 57 years, it is not surprising that corrosive effect has been demonstrated both by the removal from the list of the living of certain persons who would have been witnesses and by the effects on human memory of others who still live.

Those are general comments and need to be made, I think, to put some matters properly into context before I start on my findings.

The Plaintiff is a descendent of, and I find named after, the last registered holder of two allotments. Those two allotments being a tax allotment which is not really germane as such although relevant to the discussion of the evidence and this town allotment "Feletoa" which is in question here. That town allotment "Feletoa" is in the heart of, the centre of, Pangai township. The Plaintiff is named after a person who was his great uncle, on his father's side. That person died on 14th September 1940. When he died, he was the holder and had been the holder for some considerable number of years, (at least 15) of both the tax and town allotments which I have mentioned, both of them in Pangai.

There are, I find, historical links of this family, the Plaintiff family, with this land, both tax and town allotments. Both are part of the Crown Estate. When the great uncle died, the Plaintiff was then about 8 years of age, he having been born in June 1932. He would have turned, that is the Plaintiff, he would have turned 16 in 1948. Leading up to that birthday, the 16th birthday, no one applied on his behalf; nor in the 10 years following the 16th birthday did he apply (up until, as I come to it, 1967) for a grant of either or both allotments.

In particular, no application was made within the one year period under section 87 of the Land Act. The Plaintiff in terms of the ladder of succession set out in the Land Act, section 82, can be found in para. (e) of section 82. When it comes to it, at all relevant times the Plaintiff, as a male Tongan over 16, never had a town allotment formally granted to him, as is his right on application (and being the effect of sections 7 and 43 of the Land Act). But he did have, and still has, the grant and deeds of grant (16/44) of the tax allotment which had been held by his predecessor and which was registered in the Plaintiff's name in August 1968.

The original Statement of Claim reads this way in its relevant part:

> "The Plaintiff claims the town allotment 1r. 4p in Pangai, Ha'apai, Government Estate on the corner of the Holopeka Road in Pangai, and Fa'aui Road. The Plaintiff is a Tongan subject without a town allotment. The allotment in question was granted by the Minister of Lands in 1967, together with a tax allotment to the Plaintiff, and the tax allotment was registered on 10th August 1968. Document 196 Block 153/138 Lot 50. But the Plaintiff was asked not to register the town allotment yet under claim until the Ministry of Agriculture, who were occupying it move out. The Plaintiff kept this grant up to 1987. The Minister of Lands (Hon. Tuita) that the town allotment would not be granted to him. The Minister of Lands have repeatedly told the Plaintiff that the town allotment will be granted to him and there was hope on this matter.
>
> The Plaintiff have already left an application for allotment with the Defendants' Governor of Ha'apai Office in Pangai plus a birth certificate and the Governor's Office refused the survey fee.
>
> The Ground of claim:
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> One: the allotment was granted by the Minister of Lands in 1967.
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> Two: the Plaintiff has fulfilled the requirements of section 43 and the Defendant has caused great hope on the Plaintiff on this matter."

The Statement of Defence filed to that, first, denied that the town allotment claimed had been granted to the Plaintiff and, secondly, said that the allotment had been utilised or "has been utilised by Government as the headquarters of the (then) Ministry of Agriculture, Fisheries and Forestry in Ha'apai."

If in this judgment I refer to the Ministry from now on, or it may be under the initials MAF, then it means either the present Ministry of Agriculture and Forestry or its predecessor, which included Fisheries as well.

The pleading in this Statement of Defence went on to say that the land, the allotment, was not available to be the subject of the grant and furthermore the claim was time barred under the present section 170 (formerly 148) of the Land Act.

As to that claim of a time bar, on 7 July 1989, Mr Justice Webster in this Court declined that application by the Defendant and said that:

> *"The Plaintif is entitled to the chance to prove his allegations."*

and he (the Plaintiff) was ordered to file further particulars of the allegations particularly as to meetings with the Minister of Lands.

The amended Statement of Claim giving those particulars was filed, and it sets them out in detail in some 13 paragraphs concluding this way:-

> "That the Minister had promised registration to the Plaintiff on different occasions and the Plaintiff has expended money, time and things which he took to the Minister and is greatly aggrieved by his decision." And then it prayed for "an order directing the Defendant to register the town allotment in question under (the Plaintiff's) name."

It is that amended Statement of Claim, and that prayer, which has come to trial before me.

In general terms, I say this: That I have no reason to doubt the evidence of the Plaintiff and that he is doing, and has done, his honest best to recall events over a very long period of time. Nor do I have any reason to doubt the evidence or the best recall of the

other witnesses and in particular the witness Sione Palu. And I note that nothing has been put against that evidence by the Defendant, no contradictory evidence to that. And what I will say about the evidence and my view of the evidence, is not just based on the Plaintiff's thoughts and beliefs which I accept he strongly holds that the land in question should properly be his. But is based instead on what I find, acceptably (and acceptably proved) were things that he was variously told, assured, promised and, in effect, granted over the years.

On the account, which I accept, there was a stringing along of him until finally, as I find, in 1987 he was told in effect to take the matter to Court, that the Minister was in a position of conflict.

The Minister was both Minister of Lands and Minister of Agriculture and Forestry, and MAF has been occupying the particular allotment for some years, but not occupying the allotment, I find, with any degree of assurance. And I note in particular the fact that there was no lease or licence or even any sort of letter indicating occupancy by MAF. Let alone any of the formal requirements which Mr Paasi, on behalf of the Plaintiff, points to in relation to the provisions of Part IX of the Land Act, "land for public purposes" and in particular section 138.

I note that the Assistant Land Registrar told me that normally a Government Department such as MAF indeed would enter into a lease, as seems to be the case with other land that MAF has here in Ha'apai. From what I am told it is unusual for a Government Department not to have a lease of land that it occupies, and that, to me, points up what I have said to be the lack of assurance in terms of the occupancy by MAF of this land. And that may be seen to accord or agree with the account which the Plaintiff gives.

As does (and I do not put any great weight on any of this really), as does the evidence of the 3 persons called, employees, current or past, of MAF with their suggestion of a shift at some time from this piece of land to other land in Pangai. All indications of, as it were, insecurity of tenure; none of it contradictory to and indeed can be seen to be in accordance with, the account of the Plaintiff.

Now I want to go back a little to 1967. The Plaintiff says in 1967 he applied for the grant to him of both town and tax allotments. He said in answer to me, that there was just the one application for both. When it comes to it and I look at the application that was made for the tax allotment (and it is in Exh.4), I find that the application was just for the tax allotment and there was not a mention of the town allotment. There are two different forms required for the two different types of allotments. One's memory can play tricks on one, as to what one did 30 years ago; undoubtedly. If you are not versed in Government red tape and forms it might well be that you could think you signed just one application 30 years ago when, in fact, if what you are saying is correct, two would be required.

So I do not see any great importance or significance in the Plaitiff stating that he made just the one application. What he said in evidence, and has always said consistently, it seems to me, is that he applied for both tax and town allotments to be granted to him in 1967. At that time MAF, and indeed perhaps other Government Departments, were occupying, informally it seems (and I mean informally in terms of no lease or other formal document, or written document of any sort) both tax and town 'api.

The Plaintiff was then about 34 years of age. He had no 'api, whether tax or town, and he knew of the family history with regards to this land. And when I say land, I mean both pieces of land, tax and town. He, in accordance with custom in such matters,

approached the Minister and when I mention custom, the subsequent approaches that I will talk of were also in accordance with Tongan custom and practice I find, on advice.

He approached the Minister and was told in effect to go ahead and apply and obtain registration of the tax 'api but to wait, he would have to wait, for registration of the town 'api until MAF moved out and then he would be registered.

On the evidence before me, MAF moved out of the tax 'api and all the evidence accords with that. The plaintiff applied in 1967 and was registered in 1968. As to the town 'api, the Crown says, look at the record, and nothing has been produced to show any such application for grant of the town 'api to the plaintiff in 1967. And from that, the Crown says, no application in fact was made, let alone any oral indication that the grant would be given.

The Crown points to the fact, in support of their submissions about the lack of record of the 1967 application, the fact that there was a record of a 1959 application for the same town 'api by a different person which was turned down.

I find that the absence of a 1967 application in the materials produced to me, is not determinative of this action. That not only the plaintiff's account, but the whole history which I will come to, indicates support for the plaintiff's claim, that he did apply, he was told to wait until MAF moved out, found other land, and that the grant would be made to him then.

That I find, was the effect of what the Minister said to him back in or about 1967 and on many occasions subsequently. He had, in 1967, neither town nor tax 'apis. Both town and tax 'apis he was interested in obtaining grants for were, historically, linked to his family. No reason at all has been given to me, or suggested by the Crown in cross-examination or submissions, why the plaintiff would not apply for both 'apis when they were and had been linked together in the way they had in family history.

He had no tax 'api. He applied for one with historical links. It was granted to him. Why at the same time would he not apply for the town 'api? He did not have a town 'api.

I find on balance, he did apply for both 'apis. Both went together and had been seen as linked together, not just by his predecessor, his great uncle, but also interestingly by MAF, which had used both of them as well. So, there was an interesting linkage in family mind and as well, and importantly, in public mind.

So, I find he applied for both to be granted to him. But, insofar as the town 'api was concerned, he was told, though, that he should wait until arrangements were made for MAF to move out. And given the generality of the evidence I have heard from the present and or ex MAF employees about that time, I find some steps were taken towards shifting (in some respects) towards the other allotment that MAF held on the outskirts of the town.

And on which allotment, interestingly, some rather more permanent buildings were erected than present on the allotment in question in the centre of town. So, all the evidence before me, I find, is consistent with and points to the acceptability of the plaintiff's account.

In the 70's he kept referring the matter to the Minister from time to time, (and I accept the difficulties for an ordinary citizen in Ha'apai to get to Tongatapu and make representations to a Minister) but when he did he was told to wait. He was told to wait until MAF moved out and in effect it was re-affirmed to him, i.e. the Minister's direction of the grant of the land to the plaintiff.

The visits to the Minister included the 1975 visit. There was, I find, some confusion

in the account, at least initially given, by the plaintiff in evidence, between that visit and the 1987 visit (which I will come to) but it was clarified and I find that there was only one time that he was told by the Minister to go ahead and sue, and this was in 1987, and I will come to that in due course.

Meanwhile whilst still waiting for MAF to move and the Minister then to finalise matters (and these events again accord or agree with the plaintiff's account) this happened. The plaintiff was given temporary possession by the Governor, of a piece of land in the village of Koulo, until he could get his own grant back in Pangai.

This would seem to be in the late 1970's. It was temporary possession, there was no grant of land to him, he did not apply for such. That I find is important. That is, the fact it was a temporary arrangement without any formality, no security of tenure of any sort for the plaintiff. It assists the plaintiff and verifies in my mind what he said, namely he was just waiting for his own 'api to become available, and he was being given really a temporary place to settle. Given land tenure matters generally in Tonga and the importance of land to occupy, such casual informal arrangement was unusual to say the least. He built on this land at Koulo, it would seem, just a Tongan fale, in keeping with the temporary nature of arrangement.

In the 80's, I accept there were further trips by the plaintiff to Tongatapu. He was re-assured; he was very patient. He accepted the word of a noble and a Minister. Patient and accepting people can be used, if not abused, and care must be taken. And when I say "used" and "abused" I do not necessarily mean in any deliberate way but their patience and their acceptance can, in themselves, be seen as compliance and in effect be taken advantage of.

Then, adding to the plaintiff's misfortunes as it were, in the mid 1980's the land at Koulo on which he was, was required for the purposes of extending the aerodrome (as was other land). The Minister held a "Fono"; apparently re-allocated land to the 10 or so persons who were having to be shifted out, for the Airport development.

It would seem that land was re-allocated around and in Koulo, but the plaintiff was not re-allocated land, he was not a Koulo man. He was not a holder of land there, and he was not re-allocated land there. There was no evidence to show anyone else was discriminated against; others got land, he did not.

Why not? Well I see the answer as simple and in agreement or accord with what the plaintiff has said. That his connections were with the land in Pangai. He was told to see the Minister the next day to get registered in Pangai.

Mr Palu who I referred to, confirms that this was said. Public assurance given the plaintiff. The next day he sees the Minister, who was with the Town Officer in Pangai. But then the attitude seems to be different and that may well reflect, I find, the conflict that the Minister had between his land "hat" on the one hand and his Agriculture and Forestry "hat" on the other.

Once again, and consistent with what the plaintiff says throughout occurred, he was told to wait; that the Minister would have to go back to Tonga, to consider the position. The Government, presumably MAF, wanted the land.

If the Government did want the land, or MAF did want the land, there is much in what Mr Paasi says. Why did not they take steps to register a lease themselves. He wsa told to wait again, that there was no land available in Pangai (and presumably, although this is equivocal, that meant for MAF, available for MAF to shift to).

Equivocal also is the entry in the Minute Book Exh.5, the entry for 17th October 1985, relating to this land. The later part of that Minute says that:

> "but according to the Minister, still no, they will wait and in the meantime, see if there is another piece of land."

As I say, that could be seen as equivocal. It could well accord with what the plaintiff says he was told by the Minister a couple of months or so before, and with his general account.

That is, for him to be patient, to wait in the meantime, the Ministry would try and find another piece of land to move to. No evidence is offered by the Defendant to explain, expand on in any way, that Minute of October 1985.

As I say, that could well agree, that Minute, with the plaintiff's account, that in public he was told yes, he would be registered; then when he sees the Minister in private, he is told "no" he will have to wait, MAF will have to shift, if they can find the land, but they have got to look for some in the meantime. That Minute of October 1985, some 2 months or so after the "Fono", accords with what the plaintiff has said, namely that he was told that the Minister will go back to Tonga and consider and let him know.

And so the plaintiff was strung along, I find. I have considered him with care when he was giving his evidence. I find him a patient and humble man, an ordinary man accepting of what he was told by those in authority and power over him. He was but a humble supplicant until finally, in 1987, when he again went to Tongatapu, saw the Minister and was told in effect of the conflict in the roles of the Minister ("land hat", "Agriculture and Forestry hat") and the Minister said to take it to Court.

I find that was the first indication of a refusal of the plaintiff's application (that is the application for the grant to him of the town 'api "Feletoa"). And on which application he had repeatedly, orally, been assured that the grant would be made to him.

In 1987 he was told, for the first time, he would not be registered; he should take it to Court, it was for the Land Court to decide.

I find the plaintiff straight forward, direct, an honest man giving a credible account. And that he has been the subject of much stringing along and, in the collequial, "duck-shoving" as it were, putting off, playing on his patience.

In 1988 (and I am not sure whether it was under advice or not, it is not clear, but perhaps with an abundance of caution if nothing else) he filed in March of that year a further application in relation to the grant of this town 'api. Indeed in the original statement of claim, there seems to have been a reference to that application in the last sentence of the body of the claim before we get to the stipulated grounds of claim.

I find that March 1988 application of no great relevance and it is not the subject of proceedings, as such, before this Court.

Given that account of the history of the matter, it seems to me that the limitation section, section 170 (originally 148) has no application here.

It was not, in effect, until 1987 that the plaintiff was told that he was not going to get this 'api, and would have to go to Court. As compared to all the assurance and re-assurances that had gone before, for the past 20 years, when he had been told on numerous occasions that the grant would happen, he would be registered.

It seems to me any cause of action stems from that refusal, from that advice, in 1987 and action was taken in May of 1988. It is unfortunate indeed that there have been further delays, at whose instance I am not sure, and I make no findings as to who is responsible;

but it may be a reflection of the lack of circuits by this Court to Ha'apai.

Although there may not be a great volume of work for either the Supreme Court or the Land Court in Ha'apai, it is important that the Court comes here, and comes here regularly, and that it is known to the citizens that this Court and the Supreme Court are available to them.

Contrary to the Defendant, I find that the land in question is available and was at all material times available. It is not leased, tied up in any way, whether to a Government Department, MAF or otherwise.

350 The Crown, in relation to this piece of Crown Estate, has made commitments promises and assurances over many years to the plaitiff. And in my view must now honour those obligations it made.

That is going to be the direction I make, in just a moment, in order to have the the Crown meet those obligations and to do justice within the provisions of the Land Act.

I therefore make an Order directing registration of the allotment in question "Feletoa" in the name of the plaintiff forthwith which is in accordance with the indications, orally given, of a grant of that allotment to the plaintiff. There will, and can, be no Order for Costs in these circumstances.