Minister of Lands v Kulitapa

Court of Appeal
Morling, Burchett & Tompkins JJ
App. 9/97

17 & 20 June 1997

Land - when land is available - required for government purposes
Limitation - accrual of cause of acton - land

The facts are set out in the headnote to the Land Court judgment reported above. On appeal.

Held:

1. There was no basis on which the factual findings could be successfully challenged.
2. Rejecting the appellants submission that the 10 year limitation period ran from the time of application (ie 1967), the respondent was seeking an order directing the registration of the town allotment in his name and he could not bring such an action until the appellant gave the decision (in 1987) declining the respondent's application. The right of action accrued when the decision was made and conveyed to the respondent.
3. The land reverted to the Crown 12 months after the death of the last holder in 1940 (s.87 Land Act) and s.88 Land Act applied i.e. the land should be available for grant "unless required for Government purposes". The court below made no express finding as to that.
4. The difference in the phraseology in s.138 from that in s.88 is significant. It is and was therefore a question of fact, to be determined by the Minister of Lands or the Land Court, whether the land is required for government purposes. If it is the land cannot be allocated under s.88. A finding must be made that the land is not so required before the Land Court has jurisdiction to make an order directing registration in the name of the respondent. That had not been made and that issue was remitted to the Land Court for determination, the order directing registration (made in the Land Court) being quashed. (The subsequent Land Court judgment follows next).

Statutes considered : Land Act ss 43, 170, 87, 88, 138

Counsel for appellant : Mr Cauchi
Counsel for respondent : Miss Tonga

Judgment

The respondent, the plaintiff in the Land Court, applied to that Court at Ha'apai for an order directing the appellant, the defendant in the Land Court, as Minister of Lands to register a town allotment at Pangai, Ha'apai in his name. The application was opposed. Following a hearing in the Land Court at Ha'apai, Hampton CJ, in an oral judgment delivered on 12th March 1997, made an order directing registration of the allotment in the name of the respondent forthwith. He made no order for costs. The appellant has appealed against the order made.

The Sequence of Events

The respondent was born on 26th June 1932. At the time of the hearing of the claim, he was aged almost 65.

The town allotment, the subject matter of the claim, and also the tax allotment to which we later refer, were registered to Sateki Palatea Kulitapa Senior on 01 November 1925. He died on 14 September 1940 leaving no issue. He was the eldest brother of the respondent's grandfather. The respondent is named after him. No claim to the allotment was made at or about that time by any person on behalf of the respondent, he being eight when his great uncle died, so the allotment reverted to the Crown in about 1941.

In 1967 the respondent applied to the appellant in writing for the grant to him of the tax allotment previously held by Kulitapa. That application was granted, the tax allotment being registered in August 1968. The respondent said that at the same time he also applied for the town allotment. It was then, and had for time before been, occupied, apparently informally, by what was then known as the Ministry of Agriculture, Fisheries and Forestry, now the Ministry of Agriculture and Forestry ("M.A.F.").

The Chief Justice found that also at about this time, the respondent approached the appellant about the town allotment, and he was told that he would have to wait until M.A.F. moved out and he would then be registered. The appellant having said that to him in or about 1967, repeated it on several occasions subsequently. He also found that during the 1970's the respondent kept referring the matter to the appellant, but he was told to wait. He referred specifically to a visit in 1975 to that effect.

In the late 1970's, the respondent was given by the Governor of Ha'apai temporary possession of land in the village of Koulo. This was without any formality or security of tenure. In the early 1980's the respondent made further trips to Tongatapu when he was again reassured by a noble and a Minister.

In 1985 there was a proposal to take land at Koulo required for the purposes of extending the aerodrome. The then Minister held a Fono at which the respondent was present. Land was re-allocated to persons whose land would be affected by the extension, but not to the respondent, apparently because he had no legal right to the occupancy of land in Koulo. On the day following the Fono, the respondent saw the Minister and he was again told to wait.

The Chief Justice referred to an entry in the Minute Book for 17 October 1985 relating to this land, the latter part of which states

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

The Chief Justice commented that this entry was equivocal. It is consistent with what the respondent said he was told by the Minister, that M.A.F. would try to find another piece of land to which to move.

In 1987 the respondent again went to Tongatapu, saw the Minister and the was told that if he wished to proceed with his claim, he should take it to Court. The Chief Justice found that this was the first indication of a refusal of the respondent's application for this town allotment. In March 1988 the respondent filed with the appellant a further application seeking the grant of this town allotment. These proceedings were commenced in October 1988.

The Chief Justice found the respondent to be a straight forward, direct, honest, humble, and patient man giving a credible account of the events that had occured.

Submitting the Application

Section 43 deals with the grant of a tax or town allotment. The relevant parts of that section provide:

> "43. (1) Every male Tongan subject by birth of 16 years of age not being in possesion of a tax or town allotment shall be entitled to the grant of a tax or town allotment or if in possession of neither to the grant of a tax and town allotment.
>
> (2) The grant shall be subject to the provisions of the Act and shall be made in accordance with the following rules -
>
> (a) the applicant shall make an application on the prescribed form to the Minister;
>
> (b) ....
>
> (c) ....

The appellant contended in the Land Court, and in this Court on appeal, that no application as required by that section was made in respect of this town allotment until March 1988.

The Chief Justice found otherwise. He accepted that the application that was produced to the Court was for the tax allotment, and there was no mention in it of the town allotment. The respondent said in evidence that in 1967, he applied for the grant of both the town and the tax allotment. The Chief Justice, for reasons he set out in his judgment, found that in 1967 the respondent did apply for both allotments. The absence of the 1967 application for the town allotment in the materials produced to him was not, he considered, determinative.

He held that the 1988 application was, perhaps, filed out of an abundance of caution, but he regarded it as "a further application" in relation to the grant of the town allotment. For that reason, he did not consider the 1988 application to be of relevance. His Honour had before him the evidence of the respondent detailing his dealings with the Ministry and the various Ministers. It was open to him to accept, as he did, that evidence. We find no basis upon which the factual finding that the respondent had made a written application for the town allotment in 1967, can be successfully challenged on appeal.

The limitation submission

The appellant submits that, even if there were an application for the town allotment loedged in 1967, the respondent was, by s.170 (formerly s 148) of the Land Act (Cap 132) ("the Act"), barred from bringing the action directing the appellant to register the town allotment in his name. This issue was raised before Webster J on an application to strike out the claim, that was dismissed by him on 7 July 1989. But he did not affirmatively decide that the application was not time barred, but rather that it was not appropriate to strike the claim out on that ground.

Section 170 of the Act provides that no person shall bring any action "... but within 10 years after the time at which the right to bring such action shall have first accrued ..."

Mr. Cauchi for the appellant submitted that, if the Court found that the respondent had made a proper application for the town allotment in 1967, the limitation period ran from that time. These proceedings were commenced in October 1988. As this was more than 10 years after the lodging of the application in 1967, it was barred by s.170.

The Chief Justice held that the right to bring the action first accrued at the time when the Minister expressly refused to grant the allotment to the respondent and told him that he would have to go Court. That was not until 1987. That statement contrasted with the assurances that he found the respondent had been given, when he was told on numerous occasions that he would be registered in respect of this town allotment.

We agree with the Chief Justice. The proceedings commenced by the respondent sought an order directing the appellant to register the town allotment in the respondent's name. The respondent could not bring such an action until the appellant had given his decision the respondent's application. Had it been commenced before the decision, it would have been met with a plea that it was premature, as the application was still being considered. It was the making of the decision that gave the right to bring the action. That right accrued when the decision was made and conveyed to the respondent. The action was, in effect, a challenge to that decision. Since the action was commenced about a year later, it was well within the limitation period.

Was the land available?

Section 87 of the Act provides, *inter alia*, that, if no claim to a tax or town allotment has been lodged within 12 months from the death of the last holder, the allotment, if situate on Crown land, "shall revert to the Crown."

Section 88 provides:

> "88. Where any tax or town allotment shall revert to the Crown under the preceding provisions of this Division, such allotment unless required for Government purposes shall be granted out by the Minister in accordance with such regulations as may be made under this Act."

The last holder died on 14 September 1940. No claim was made by any person on behalf of the respondent, who was then only 8. Pursuant to s.87 the allotment reverted to the Crown. However, the Minister was enabled by s.88 to grant out the allotment to the respondent on his application, and the Court on proceedings brought to it could do likewise, unless the land was required for Government purposes.

In the course of his judgment, the Judge considered the manner in which M.A.F. had used the land in the past. But he made no express finding whether, at the time of the hearing, the land was required for Government purposes. He said:

> "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, M.A.F. or otherwise."

Miss Tonga submitted that land is not required for Government purposes within the meaning of that phrase in s 88, unless it has been reserved under s 138. That section reads:

> "138. The Minister shall with the consent of the Cabinet reserve such portions of Crown Land as may from time to time be required

> for roads, public ways, commons, cemeteries, school sites, playgrounds, public health purposes and for use by Government Department or for other public purposes and may grant a lease of land to trustees to be used as a cemetery for Europeans."

We do not accept that submission. The difference in the phraseology from that used in s 88 is significant. Had the draftsman intended the phrase in s 88 to be read in the way Miss Tonga submitted, the section would either have referred expressly to s 138, or, as was done in s 140, have used the phrase "Crown land reserved for public purposes", which is clearly a reference to Crown Land reserved pursuant to s 138. Further, the restricted meaning for which Miss Tonga submitted may not accord with the statutory purpose of the section. We were informed from the bar that there are numerous examples of Crown land that is being used for purposes related to the Government, that has not been reserved under s 138. It may well have been the intention of the legislature that such land should not be granted out to an applicant for an allotment while it is required for those purposes.

It therefore becomes a question of fact to be determined by the Minister or the Court whether the land is required for Government purposes. If it is, the land cannot be allocated under ss 88.

At the hearing, evidence was given by Mr Soakai, who was then the Senior Agricultural Assistant with M.A.F. He had been employed by M.A.F. from 1968 until the present. In his evidence in chief he described, but only in a general way, the buildings on the land. He explained that M.A.F. had not otherwise built on the land because of some uncertainty concerning it. He said that the primary activity on the allotment is the market, which had been in operation from the 1970's. He did not say whether the market is operated by M.A.F., or whether it was operated privately by the stall holders.

To the Court, he said that there were 3 fales on the land, that he described as office, accommodation, and home economics used by women. He did not state expressly who used the office, but it is a reasonable inference from his evidence that it was used by M.A.F. He did not say by whom the accommodation was used, nor that he say whether the home economics activity was run under the auspices of M.A.F. or some other Government department, or privately. Nor did he give any evidence expressly directed to whether the land was required for Government purposes, in which case one would have expected him to say what were the nature of those purposes.

We were informed from the bar that, in the course of the hearing, the Chief Justice inspected the site, and was therefore in a position to make his own assessment from what he saw, of the uses to which the land was being put.

It is clear from s 88 that a finding that the land was not required for Government purposes is necessary before the Court has jurisdiction to make the order directing registration in the name of the respondent. That finding has not been made on any proper basis. Land that has not been leased or tied up to a Government Department could still reasonably be required for Government purposes. In view of the general nature of the evidence to which we have referred, and in the absence of any clear evidence on behalf of M.A.F. or any other Government Department that the land is so required, the Court is not in a position to make such a finding of fact. This issue will have to be determined in the Land Court.

The Result

The findings of the Chief Justice that the application by the respondent for this town allotment was properly made in 1967, and that these proceedings are not statute barred, are confirmed. The order directing registration of the allotment in the name of the respondent is quashed. The issue whether the allotment is available to be granted to the respondent, which will depend upon the Land Court's finding on whether the land is required for Government purposes, is referred back to the Land Court for determination.

There will be no order for costs on the appeal.