BENISIMANI PELIATISI v. DEPUTY MINISTER FOR LANDS.

(Land Court, Stuart J. Assessor Veikune, Vava'u and Nuku'alofa, 3rd, 7th, and 29th November, 1938 and 12th January, 1939).

Claim for Town Allotment — Evidence of Title — Land Registers in Vava'u — Presumption of genuineness of documents — Rent paid to Government — Costs against the Minister — S. 50 (IV) of Cap. 9 — SS. 77 and 144 of Land Act (Cap. 27).

This was a claim for a Town Allotment, portion of which had been leased. Owing to the imperfect condition at that time of the Land Registers in Vava'u it was not clear that the Plaintiff's Title had been registered. The Court accepted the incomplete Registers, plus other evidence, as sufficient proof of the Plaintiff's title. The facts of the case are sufficiently set forth in the judgment.

HELD: The Plaintiff was rightful holder of the allotment and that the Minister should pay the taxed costs of the action.

Tafolo appeared for the Plaintiff.

Minister of Lands appeared in person.

STUART J.: This is a matter which has been before the Land Court before and the facts in the case are barely in dispute.

They appear to be as follows — In or about 1916 one Lapota was holder of an 'api known as 'Ahosi, situated in the township of Neiafu in Vava'u. Part of this 'api was leased to a certain Fritzy Wolfgramm who subsequently transferred the lease to his wife Martha. It is not relevant to the case to decide when this transfer was made.

The rent from the Wolfgramm was £11 per annum and at all relevant times has been paid according to law to the Government who up to 1931 gave a receipt showing 10% deducted for the Government as commission for collection. This left £9/18/0 available for the holder of ('Ahosi) and up to the death of Lapota he regularly received this sum.

When Lapota died he died without an heir and Section 77 of the Land Act then applied. Unless the Government required the allotment it would be granted out in terms of the Act.

Actually there was living one Peliatisi, a grandson of Lapota; son of Lapota's elder daughter, who being married had of course lost her rights as Lapota's heir.

Upon the application of Peliatisi's father, 'Ahosi was granted out by the Governor of Vava'u, then Tungi, to Peliatisi.

No complete document of title has ever been drawn up, but in the Register of allotments which is in slow and gradual process of compilation in the Office of the Minister of Lands and which will eventually exists in terms of Section 94 of the Land Act we have the nearest approach to tittle.

According to the evidence of Sione Finau clerk in charge of the register (as far as it exists) Book 26 page 68 has the name of Penisimani Peliatisi the Plaintiff written in pencil.

I am asked to disregard this document as incomplete.
But to do this would be to bring chaos into the land holdings of Tonga.

Of the titles in this book I find the following evidence of Finau, which I have personally verified by inspection.

"No single document in this register is complete; where a map has been added the pencil name has been rubbed out and the name so rubbed out appears on the map indelibly.. For reason either of economy on the part of the land holders or of delay on the part of the Department books 26, 27 and 72 are all in this same condition.

One title exactly alike to the title with Plaintiff's name on it has the name of the Governor of Vava'u, 'Akau'ola.

I would be surprised to hear, and so I have no doubt would 'Akau'ola, that he had no clear property right, as far as a man can hold land in Tonga to the land the title deed of which has his name written on it in pencil.

I must accept and I do accept Book 26 page 68 as evidence, from the real though incipient register of allotments of Tonga : and what it tells me is that Plaintiffs holds an allotment.

It has never been suggested anywhere that there is any other allotment with which this ('Ahosi) can be confused.

Charlie Stephen Wete produced the Land Office records of Vava'u. And he produced what he certainly called and what was certainly labelled as the 'Town 'Api Register.' Ata has argued with great force and insistence that this Register is not a Register. The first difficulty he has to face is that it hardly lies in his part to contradict what a document apparently properly kept by the proper person says about itself.

S. 50 (iv) Cap. 9 of Tonga says that "The Court shall presume until the contrary is shown the genuineness of every document purporting to be a document directed by law to be kept, if the document is kept substantually in the form required by law is produced from the proper custody.

On reading Section 94 of Chap. 27., I have come to agree with Ata that this document is not the register of allotments referred to in the Act : such a register as I have said really does not completely exist as yet.

But that does not mean that I am going to discard the evidence of a book which has admittedly been the guide and key to problem of land possession in Vava'u for many many years.

If this is not the Register, it is a good working practical duplicate kept in short form at Vava'u for obvious practical purposes, and I am estopped by both law and fact from permitting Ata effectively to deny this.

He may be correct, but in law he cannot be heard to say it. The position so far then is this.

According to the legal register of allotments Plaintiff has an allotment.

According to the legal duplicate or guide to allotments in Vava'u ''Ahosi' stands opposite the name of Plaintiff and has stood so since 1917 : and it is apparently by the Minister that the unimproved unleased portion of ''Ahosi' belongs to Peliatisi.

Now the Crown contention in this case is that when ''Ahosi' was granted it was granted without the portion leased to Wolfgramm. In neither of the two documents I have referred to is there any indication whatsoever of any limitation.

In the case of the Vava'u so called register this is of great importance, because in the register in two places personally noticed by myself on inspection there are deductions and conditions laid down limiting the enjoyment of other 'apis. I have asked for any evidence prior to 1931 to show any attempted Limitation but I find none and have been given none, presumably because none exists.

The actual references are No. 106 (page 3) which shows a deduction, and 170 (p. 5) and 226 (p. 7) which shows conditional variations. All these are in Exhibit 'A' marked at Vava'u and left there for the convenience of the office.

If there had been no such entries, it might have been argued with some show of success that the bare ('Ahosi) might be limited by some other document. But where three entries show a feature which the fourth has not got, it is my duty to assume that the fourth never had that feature : I find as a fact that ('Ahosi) meant in Plaintiff's time what it meant in his predecessor's time : (all 'Ahosi).

Looking through the Vava'u Book 'A' I found another 'Ahosi' but I availed myself of the local knowledge of Veikune who was sitting as my assessor and who by agreement has been dispensed from sitting here, and Veikune said that he knew that other ''Ahosi' which has nothing whatever to do with this case.

At this stage I have not yet considered the fact that from 1917 to 1932 payments of the £9/18/0 per annum were made to Plaintiff.

The Minister produced the first receipt from Exhibit 'B' and some patience and an adjournment or two has produced more of these exhibits.

I now adjourn the Court and will resume at 2.15 to consider the effect of these documents and to conclude my judgment.

I now come to the effect of the various counterfoils which are now in the possession of the Court.

They consists of the stubs from 1917 to 1931 inclusive showing the nature of the receipt given to the lesser Wolfgramm by the Department of Lands at Vava'u or Nuku'alofa according to where payment was made.

Incidentally each of these documents shows the allocation of the money into 10% for the Government and 90% for somebody else.

Throughout the stubs that is to say for over 12 years wherever money was received solely on the a/c of the Government a plain undivided receipt is given and no such allocation is made.

Therefore I am compelled by the evidence of these stubs including Exhibit B produced by the Minister at Vava'u to attempt to prove something quite different — to conclude that who ever was entitled to the money from the Wolfgramm leases from 1917 to 1931 inclusive in the opinion of the responsible Government official at Vava'u, acting as the other stubs show, within the scope of his authority, whoever the money belonged to it was not claimed by the Government.

Now who did it belong to if not the Government. For 14 years the Government paid it to the Plaintiff.

During those 14 years 11 stubs assign the 90% to the previous owner of 'Ahosi and three assign it by name to the Plaintiff.

In other words the allocation is always to the holder dead or alive of 'Ahosi and this is the very reverse of the Crown Case : it is a complete recognition by the Crown that there is an essential link between the descriptive word " 'Ahosi" in Annexure 'A' and the money payable from the Wolfgramm lease.

The position of the Land Court Judge in Tonga is a very complicated and anomalours one. The same person occupies simultaneously the offices of Privy Councillor Member of the Cabinet, Legal Advisor to the Queen, Chief Justice of Tonga, Chief Police Magistrate of Tonga and Land Court Judge.

I conceive that this embarrassing galaxy of functions can only adequately be discharge by the most profound severance of the various functions from time to time.

Sitting as a Land Court Judge I am the servant of the Land Act and of the litigants of Tonga and am not for the purpose a Cabinet Minister or a Privy Councillor.

I mention this because the fact can never be stated too often.

As Land Court Judge I find as a fact that Plaintiff is the holder of 'Ahosi, that 'Ahosi includes the Wolfgramm lease.

In so far as the problem is a mixed problem of fact and law I find that mixed problem must be answered in favour of the plaintiff.

On the various points of Law, I have endeavoured to show that Plaintiff has been recognized as owner of 'Ahosi both in the register (more or less proper) in Nuku'alofa and in Annexure 'A' in Vava'u. Every document that has been produced has confirmed that view, but I have one last point to consider.

It has been suggested by Ata that the Clerk at Vava'u must have gone mad in two or three of the years from 1927 to 1931 when he entered Plaintiff's name in the receipt.

I see no insanity latent or patent in an officer entering as payee in 1927 the name of the man who had in fact been paid for the previous ten years. If anything it would seem that a gleam of sane efficiency had at last mitigated the inaccuracies in the Land Office at Vava'u.

It has also been suggested not without a good deal of force that Plaintiff's father obtained the allocation of 'Ahosi to his son by some methods of part concealment not wholly respectable.

In the box under cross-examination by Ata, he undoubtedly contradicted himself quite seriously.

Let me suppose that there was some irregularity unless it amounted to deliberate fraud, and unless Plaintiff then of almost tender years was quite aware of it and approved of it, it could not taint his holding of the 'Api.

I asked Ata in argument if he suggested fraud and he said no he did not.

On this point I wish emphatically to indicate that in contested cases in the Land Court, I will in future expect both sides to give me a written statement or declaration or pleading as the case may be, showing their contention as to facts and in law.

My reason for this is clearly illustrated in the present case.

According to the Law of England, according to Roman Law according to every law I have ever heard of fraud cannot be alleged unless pleaded specially. Here it was more or less alleged without pleadings : and had I been dealing with someone less scrupulously fair than the Minister of Lands. I might have been faced with a most impossible problem of procedure and practice.

However fraud though hinted at the inception of the Plaintiff's case is not alleged; and in any case it would only be his fraud on the clearest possible evidence.

I imagine that what happened was this, Plaintiff's father knew that the vacant 'api was much more valuable then the usual Tongan 'api. He asked the Governor Tungi for this 'api for his son. The Governor agreed and the 'api was entered in Annexure 'A' without comment because the Governor either did not know or forgot that the Wolfgramm lease was on this 'api, and Plaintiff's father took good care not to tell him.

To use an expressive but crude phrase (Plaintiff's father got away with it) and I have to do my duty and say that he was successful in his paternal effort to provide a cripple son with a fair income for life.

The very fact that Plaintiff is a cripple, coupled with the fact that Tungi, who's whereabouts are not unknown has not been called, makes me feel, that it just conceivable that the Governor of Vava'u at the time may have not desired too fully to know the facts.

This consideration does not weigh with me in formulating my judgment.

The last point. Has Plaintiff been in any way at fault or negligent in preserving his rights.

He was deprived of this income in 1932; he appealed to the Cabinet at once : he was referred to his legal rights. He sued at once but he only got judgment in the Land Court in 1936 according to his own evidence.

It took a year to obtain an order for rehearing from the Privy Council.

I have read Mr. Scott's judgment and I am at profound loss to understand on what grounds the Privy Council sent this case for rehearing. This I mention because it suggests that on a similar basis this judgment may be upset on the same lack of grounds — though I trust better counsels will prevail.

I do not see how Plaintiff could have been quicker about the defence of his rights. There was no sitting of the Land Court in 1938 prior to October when this case was heard.

Judgment will be entered for Plaintiff as prayed.

The provision in Section 144 of the Land Act, to the effect that no fees shall be payable by the Minister in respect of any proceeding instituted by him in his official capacity.

Here he has not instituted this action.

Cabinet when it had a clear opportunity of deciding the matter without expense told the Plaintiff to test his legal rights.

If such advice did not carry costs as a penalty upon successful action by a Plaintiff it would mean that liberty would cease in Tonga except for the fortunate few rich enough to sustain an action for 7 years.

I order the taxed costs of the Plaintiff to be paid by the defendant.

EDITOR'S NOTE : The Minister appealed to the Privy Council. On 21/8/40 the Privy Council (Stuart C.J.) dismissed the appeal except as to the order as to Costs. No reasons were given.