

THE DEPUTY MINISTER OF LANDS, VAVA'U AND
SIONE MAILE FIFITA (Appellants.)

v
VILIAMI MOLI (Respondent)

This was an appeal by the defendants from a decision of the Land Court (Hunter J.) sitting in Vava'u whereby the Court allowed the claim of the plaintiff (respondent) to a tax allotment and a town allotment at Falevai. The facts are set out in the judgment of the Privy Council. The case is reported as illustrating the Privy Council's view of S. 101 of the Land Act (Chapter 45). There was an allegation before the Privy Council that the plaintiff was impersonating Viliami Moli and the Privy Council sent the case back to the Land Court for further evidence on this suggestion. The Privy Council also sets out the law governing the question of legitimacy of a person born during the marriage of his parents.

On the 5th October 1960, the Privy Council (Hammett C. J.) delivered the following judgment:

This is an appeal from the decision of the Land Court sitting at Vava'u dated 7th October, 1958.

The Plaintiff-Respondents claim in the Land Court was for the Tax Allotment called "Siliva" and the Town Allotment called "Vakataumai" or "Kepeli" in the hereditary estate of Fakatulolo at Falevai, Vava'u.

The learned trial Judge held, on ample evidence, that the facts were as follows:

Semisi Fifita who was the registered holder of these allotments, married 'Ana at Neiafu on 19th September, 1900. The Plaintiff-Respondent Viliami Moli, who is also known as Siale Hola, was born on 8th November, 1906 during the continuance of a valid marriage between his mother, 'Ana and Semisi Fifita. His birth Certificate shows he was registered as legitimate. He is the eldest surviving male issue of that marriage.

In 1911 Semisi Fifita and 'Ana were divorced. On 27th January, 1912 Semisi Fifita married 'Elina Ikahihifo at Neiafu. On 15th November, 1916 Sione Maile Fifita, the Defendant-Appellant was born. He is the eldest surviving male issue of that marriage.

On 4th September, 1953 Semisi Fifita died.

On 30th October, 1953 the Plaintiff-Respondent Viliami Moli (Siale Hola) wrote to the Deputy Minister of Lands, Vava'u claiming these allotments, as heir to his father Semisi, as must be done by Section 81 of the Land Act (Cap 45) within 12 months of the death of the last holder. He did not however present to the Deputy Minister of Lands the deceased holders deed of grant within one month of his death as is required by Section 100 of the Act, nor did he present an affidavit to the Deputy Minister which is the procedure required to be followed when the Deed of grant has been lost. In this connection, it is to be noted that the Land Act does not prescribe any specific time within which such an affidavit must be presented. Viliami Moli received no

reply to his letter to the Deputy Minister claiming these allotments.

On 30th June, 1954 the Defendant-Appellant presented an affidavit to the Deputy Minister of Lands Vava'u claiming that he was the rightful heir and the sole surviving male issue of the deceased holder.

On 12th August, 1954 the allotments were granted to the Defendant-Appellant who was registered as the holder thereof as the heir of last registered holder, less than 12 months after his death. Viliami Moli claimed these allotments in the Land Court on the ground that he, and not Sione Maile Fifita is the eldest surviving legitimate male issue of the deceased registered holder and is therefore entitled to them as the heir. His claim was upheld by the Land Court and Sione Maile Fifita has now appealed against that decision.

There are a number of grounds of appeal.

The first complains that in the claim in the Land Court these allotments were wrongly described as being situated in the estate of Fakatulolo at l'alevai at Vava'u whereas in fact they are on Crown Land in that area. The learned trial Judge considered that matter in his judgment and, in our view, very properly rejected it as being a matter of form rather than substance. The evidence of whether these allotments were in a Tofia or on Crown land given by the Appellant himself in the Land Court was conflicting. There was no suggestion that either side has been misled by any error, if there be an error, in the description of the land. It is abundantly clear that there is no suggestion that there are more allotments than one known by the names "Siliva" and "Vakataumai" respectively in Vava'u.

We do not consider there is any merit or substance in the first ground of appeal.

The second ground complains that the Respondent has not produced an affidavit to support his claim. This is so, but we agree with the learned trial Judge that this is merely a procedural matter. It is not a matter that must be done within 12 months, such as the making of a claim under Section 81 of the Land Act, the failure to do which is fatal. In our opinion the learned trial Judge was correct when he held that before the Deputy Minister of Lands registered the name of Sione Maile Fifita as the holder, he should, having had notice of Viliami Moli's claim, have called upon him to file the necessary affidavit in support, in the absence of the deed of grant. In any event Sione Maile Fifita was in no better position than Viliami Moli because the affidavit he did file did not comply with the provisions of Section 101 (1) of the Land Act. It did not state any reason why he did not present a deed of grant in support of his claim or what had happened to that deed and there is no evidence that the Minister published the notice in the Gazette required by Section 101 (2) giving the particulars of the lost deed and stating that after 10 days he intended to deliver a new deed of grant to Sione Maile Fifita. The second ground of appeal must also fail.

The 3rd, 4th, and 5th grounds of appeal suggested that Viliami Moli and Siale Hola were two different persons and that the Respondent was Siale Hola impersonating Viliami Moli. This was an allegation of such a serious nature that we considered a further investigation should be made into it and further evidence be called on the matter before the learned trial Judge. The hearing of the appeal was adjourned at the last sittings of the Privy Council for this to be done. We have now examined the record of those proceedings and we can find no evidence to support this ground of complaint.

The 6th and 7th grounds of Appeal are to the effect that Viliami Moli also known as Siale Hola, was the illegitimate son of 'Ana and not the heir of her husband Semisi Fifita. This matter was considered by the Land Court. Viliami Moli was proved to have been born during the continuance of a valid marriage between his mother 'Ana and her husband Semisi Fifita. By virtue of Section 44 of the Evidence Act (Cap 9) the Court on this evidence must presume conclusively that Viliami Moli was the legitimate son of Semisi Fifita in the absence of evidence that the parties had no access to each other at the material time. The Appellant brought no evidence of non access and the Land Court was correct therefore in following the presumption of law arising from the facts proved before it.

The Petition of Appeal stated that further unspecified grounds of appeal would be submitted at the hearing of the Appeal. We wish to repeat, what we have said on previous occasions, that no new grounds of appeal can be considered at the hearing of an appeal unless adequate notice thereof has been given to the other side, in order to avoid a Respondent being taken unfairly by surprise. We have therefore only dealt with the grounds of appeal of which notice was given.

In these circumstances the appeal is dismissed. The decision of the Land Court awarding these two Allotments to Viliami Moli, is upheld, subject to them being surveyed and to the surrender by him of any other allotments he may now hold.

The Appellant must pay the Respondents cost of the Appeal, the hearing of which he has caused to be unduly prolonged and which we assess at £15. 15. 0.