Court.

Minister of Lands, Fotu, Ma'u and Pohiva v Ngahe

Privy Council
App 3/1974

21 February 1978

Land - grant of second allotment void unless grantee succeeds to second allotment as son or grandson of former holder - right of election of grantee

Land - right of grantee succeeding as son or grandson of deceased holder who already had been granted an allotment to elect which allotment he will retain

Ngahe, who was at the time already registered as the holder of a town allotment, was in 1964 registered as the holder of another town allotment after the death of his uncle and aunt. When the Minister of Land discovered in 1973 that Ngahe was registered as the holder of two town allotments, he cancelled the registration of the second allotment and grant it to Fotu, who subdivided it and granted portions to Ma'u and Pohiva.

Ngahe appealed to the Land Court from the Minister's decision, and that Court held that Ngahe had a right under s78 Land Act to elect which of the two allotments he would retain. The Minister of Lands and the other parties appealed to the Privy Council.

HELD:
Reversing the decision of the Land Court

That the grant of a second allotment is rendered null and void by s48 Land Act, unless it is saved by s78 of the Act which gives to a son or grandson who is entitled to succeed to an allotment the right to elect whether to escape that allotment or another allotment already held, but since Ngahe did not succeed to the allotment as son or grandson, he had no right of election, and the grant of the second allotment was accordingly void and the registration was correctly cancelled by the Minister of Lands.

Cases referred to:
Ma'afu v Minister of Lands II Tongan L.R. 119

Statues referred to
Land Act ss48, 78

Privy Council

Judgment

This appeal concerns a claim by respondent to a town allotment at Leimatu'a which was registered in his name in 1964. At that time an allotment known as "Tefisi" was also registered in the name of respondent. The Minister of Lands ascertained this latter fact in 1973. Under sec.48 the grant of a second allotment is null and void unless it is saved by Sec.78 which gives to a son or grandson, who becomes entitled to succeed to his father or grandfather, a right to elect which allotment he will take. The registration was cancelled by the Minister in 1973 and the land was granted to second appellant who subdivided it and granted a portion to each of the third and fourth appellants. The Chief Justice held that in 1964 respondent had the right to elect whether he would take this allotment or Tefisi and that, since respondent was unaware that Tefisi was registered in his name, respondent had not lost his right of election. From this finding the present appeal has been brought.

The determination of the appeal turns on the question whether or not respondent was a person to whom section 78 of the Land Act (Cap.63) gave a right of election in respect of the said allotment. This section applies only to a son or grandson who becomes entitled to succeed to an allotment previously held by his father or grandfather. No other person has a right of election, and, if such a person becomes entitled to a second grant such grant is declared null and void: vide Sec.48.

A family tree was put in evidence and was accepted by counsel for respondent. Tevita Puaka (male) and Toakase Luani (female) had two sons, namely Esafe Kilikiti and Siosaia Ngahe. It was claimed that Esafe was illegitimate but that Siosaia was legitimate. Esafe married 'Ana Maumi and Siosaia married Funaki Ngahe. Esafe and 'Ana have both died leaving no issue. Siosaia and Funaki had a son 'Amini Ngahe who is the respondent and who now claims to have a right to elect whether or not he will take the said allotment.

The records of registration are incomplete. Ana Maumi was registered as holder in 1947 which was after her husband Esafe died. She could take only as the widow of Esafe although there is no record to show that this was so. When Ana Maumi died in 1964 respondent was found to be the heir and he was registered as the holder. The right of Esafe to take was challenged on the ground that he was not born in wedlock but the fact is that Ana Maumi was registered 1947. The title of Esafe to which Ana Maumi succeeded cannot now be challenged by respondent because any such action is barred by Sec.148 of the Land Act.

The Chief Justice found that respondent became the heir and that he was registered in 1964 as the holder. No details were given to show the relationship which constituted respondent the heir but it is clear that, Esafe Kilikiti and Ana Maumi having died without issue, the heir would have to be traced back though the family tree which shows that respondent would take as the son of Siosaia Ngahe who was the brother of Esafe Kilikiti. The follows from the application of Sec.76(e) which is the provision which applies to the circumstances of the family existing at the time of the death of Ana Maumi.

The crucial question is whether, in the circumstances, respondent had a right of election under Sec.78 when he succeeded to the allotment in 1964. The only persons who have a right to elect are the son or a grandson in respect of succession to an allotment which was held by his father or grandfather. Respondent became entitled to succeed through the interest of Esafe Kilikiti and his widow coming to an end with no issue who could succeed in the direct line. The fact of the registration of Esafe Kilikiti's widow interest in 1947
100 precludes any possibility that respondent could succeed to an interest to which Sec.78 applied. He therefore had no right of election. The Minister was correct in treating the registration of respondent as null and void under Sec.48.

The case of Vitikami Ma'afu -v- Minister of Lands Vol.II Tongan Law Report page 119 is in accordance with our present findings.

The appeal is allowed and the orders of the Chief Justice are set aside and judgment is given for appellants as defendants in the Land Court. No costs are allowed.