Tonga Government and Minister of Lands v Fakafanua

Privy Council
App 3/1976

21 February 1978

Land - appeal to the Privy Council - errors in judgment of Land Court - case remitted to the Land Court for new trial

Land - decision by the King in Council with regard to Crown land conclusive

Land - decision as to whether or not land is Crown land to be determined by Land Court

The noble Fakafanua claimed that two areas of land known as Tukutonga and Finepani were part of his tofi'a. The Government claimed however that the areas were part of Crown Land.

The claim of the noble was upheld by the Land Court, but the Government appealed to the Privy Council.

HELD:

Upholding the appeal

(1) An earlier decision of the Land Court in 1924 had decided in a case between the noble's father and the Government where the eastern boundary of the noble's land lay, and so this was res judicata and should have been accepted by the Land Court;

(2) A decision by the Privy Council in 1972 which had rejected a recommendation by a Lands Committee that the two areas be included in the noble's tofi'a was not invalid, as held by the Land Court, if the disputed areas were Crown Land, since a decision by the King in Council with regard to Crown Land was binding;

(3) The fact that the Cabinet had consented to an application by the noble to lease the land, which consent was later withdrawn, was not conclusive that the disputed areas were in the tofi'a of the noble;

(4) This case should be sent back to the Land Court for a new trial.

Privy Council

Judgment

Respondent claimed that area of land known as "Tukutonga" situated at the end of Tukutonga Road and facing the island of Nukunukumotu together with an area known as "Finepani" comprising two tax allotments originally registered in the names of Sosefo Katoa and Kelepi Ve'ehala. In relation to Tukutonga it was established that an American, one Drucker, applied for a lease of part of the area. Respondent supported this application. It was approved by Cabinet Decision No.1041 dated October 1, 1971. It was contended that by this decision the Government recognised respondent as the Tofi'a holder and the lessor. This was supported by a letter from the Minister which referred to the land as "a portion of the land at Ma'ufanga, the estate of the Hon. Fakafanua." On May 10, 1972 Cabinet informed Drucker of its decision that the lease was over a portion of Crown Land. Respondent claimed that this was an arbitrary determination by the Minister of areas and boundaries without notice and without application to the Land Court in accordance with Sections 23 and 29 of the Land Act. It was contended that the Cabinet Order was invalid. Respondent maintained that from time immemorial Tukutonga had been regarded as part of Ma'ufanga and of his Tofi'a. Five witnesses, four over 70 years old, were called who had occupied portions of Tukutonga. They said that they always regarded this land as part of Ma'ufanga and part of the estate of respondent. They said also that the Minister had so informed them.

In evidence respondent stated that Tukutonga began from the Shell Depot and included all the land to the east as far as Nukunukumotu. This means to the sea-coast and does not include the island of Nukunukumotu because, as will later be seen, an earlier claim for the island failed. Respondent also said that the allotments known as "Finepani" are a part of Tukutonga. An area called "Fangaloto" was also referred to, this land being in the area in which respondent claimed generally that his Tofi'a extended. It was said to be in the middle of Ma'ufanga. It was occupied for many years by 'Ulukalala who drove everyone else out. 'Ulukalala died in 1961 without issue. Respondent wrote to the then Minister of Lands asking that Fangaloto be restored to him. In a letter dated June 25, 1962 the Minister informed respondent that Fangaloto reverted to the Crown and so, if respondent wished to make a claim, he must submit his case direct to Government. It seems the matter was not taken further.

An important matter happened in 1972. A number of nobles were seeking additions to their Tofi'a. In general the claims were based on the ground that the additions traditionally belonged to them. A Committee was set up to inquire into the claim and to report to the Privy Council. The Committee consisted of the Minister of Lands, the Crown Solicitor and the Clerk to the Privy Council. The Committee (whether unanimous or not is not stated in evidence) recommended that Finepani and Tukutonga be included in the Tofi'a of respondent. A number of recommendations were made in respect of the other nobles. All recommendations were rejected by the Privy Council on February 16, 1973. Respondent was so advised on April 18, 1973 but no reasons were given. The Chief Justice held that the decision of the Privy Council was ultra vires. He also held that the Committee was ultra vires and therefore its findings must be considered to be of no effect.

It is necessary now to go back in time. During the hearing it became apparent that

a decision had beengiven in a 1923 Land Case brought by respondent's father (the then Fakafanua) against the Minister of Lands. Judgment was given in 1924. This raised a question of a plea of res judicata. The Chief Justice after examining this claim at length held that the plea had not been established. He found that the areas now claimed had not been in issue and the case was treated as "throwing some light on the history of the whole area". The Chief Justice said the Committee was unanimous. There is no evidence of this. He referred to the fact that the Committee stated that the tax allotments of Kelepi Ve'ehala and Sosefo Katoa were held by Fakafanua people and that geographically it was considered that Tukutonga should be included with these allotments. It is to be noticed tht the governing word appears to be "geographically". The Chief Justice then went on to say:-

> "It is clear, therefore, that the Minister of Lands himself was of the opinion that geographically and by occupation the area should be included in the tofi'a of Fakafanua and his opinion is supported by the entries in the register of the tax allotments of Ma'ufanga".

Appellant submitted at the hearing in the Land Court that, since the areas claimed are widely separated from Ma'ufanga they are not part of Ma'ufanga, and, in relation to Finepani that there was no proof that the allotment formerly held by Kelepi Ve'ehala reverted to respondent. It was also contended that the Privy Council had already ruled on the matter but, as earlier stated, the Chief Justice rejected these submissions.

There are now nine grounds of appeal - one having been abandoned. Six refer to the case in which judgment was given in 1924. This will be referred to as 'the 1924 case". Counsel for respondent took the objection that the plea of res judicata was not available to appellant. He cited Sections 99 and 100 of the Evidence Act (Cap.13) in support. Sec.99 defines the effect of an earlier judgment between the same parties or their privies and declares that in certain matters the judgment is conclusive proof. Sec.100 defines the evidence which may be given in explanation of the effect of the judgment. Such evidence may be:-

(a) of the judgment itself;

(b) of observations made by the Court in delivering the judgment;

(c) of the proceedings in the case prior to the judgment.

The submission of counsel was that no such evidence had been given. The record is not clear but an adjournment was asked for to study the judges' notes of the 1924 case and other records of 1924 and the question of res judicata was clearly raised by the Court itself. The Chief Justice's Minute Book for 1923-1924 was produced and the judgment was discussed. It is not clear whether the judgment itself was produced in evidence but even if it was not it was clearly a part of the trial. We will ourselves admit the judgment if, in fact, it was not formally made part of the evidence in the lower Court. We thus have both the judges notes and the judgment before us.

The grounds of appeal may be summarised under three main heads, namely:-

(a) The effect of the 1924 case

(b) The effect of the decision of the Privy Council rejecting the recommendation of the Committee in 1972 and the effect of the proceedings in and the findings of that Committee.

(c) The effect of the facts concerning the lease to Drucker.

We commence by dealing with A. The 1924 case was a claim for Nukunukumotu, Ha'a'uvea and Vaolahi. These specific areas are not now in question. Ha'a'uvea is on the mainland but across the water called Fanga Kakau. It does not seem to have any particular importance in the present case. But Nukunukumotu is an island to the immediate east of the lands now claimed. The then Fakafanua claimed that his tofi'a extended to the East so as to include the island and the lands at present in issue as well. This claim was rejected. Respondent cannot now make the extensive claim of his father, so, his present claim is that his tofi'a extends to the sea, that is to the end of the Peninsula and thus included the lands now claimed but excluding Nukunukumotu. The change of his claim when compared with that of his father is not unimportant because it shows that the eastern extent is and was a matter of contest as far back as 1924.

But it is the decision in relation to Vaolahi which is important. The decision fixed an eastern boundary of the tofi'a at least to the extent that Vaolahi is bounded on the west by a boundary which is also an eastern boundary of Ma'ufanga. Respondent cannot now dispute this boundary which has been surveyed and settled. Tongalata is in the same area and respondent has not contested the claim that this is Crown Land. A block of Government land is now established which isolates the areas now claimed from the main area of Ma'ufanga and part of this boundary is a line fixed by the 1924 case as being the eastern boundary of respondent's tofi'a.

The grounds of appeal which refer to the 1924 case may now be taken each in turn

Ground 1:

The Learned Chief Justice and Judge of the Land Court erred in holding that the Land Court decision in the 1923 (1924) Case between the Respondent's father and the Minister of Lands was on the grounds that the claim in that case was out of time. No where in that judgment was there any statement that the claim was not accepted because it was out of time. In fact it was decisively held that these lands had always been Government lands and that was the Court's judgment.

The Chief Justice was wrong. The judgment was given on the ground stated. The judgment speaks for itself and we need not repeat the clear findings made.

Ground 2:

The analogy of the Chief Justice that the estate of Ma'ufanga is like the form of an animal with the centre part cut out and alienated is unfounded because the Land Court in 1924 decisively held that those lands, now referred to by the Chief Justice as the "centre part", had always been Government lands and had never been part of the estate of Ma'ufanga.

This analogy is false. Counsel for respondent did not attempt to justify it. If it stood alone it would not be important as it was not essential to the final finding of the Chief Justice but it was part of his reasoning which must be taken into account if other matters are not correctly stated or found.

Ground 3:
The Land Court in 1924 held, and is res judicata, that the estate of Ma'ufanga (of the Plaintiff) ended on the eastward side where the Government lands began. The Learned Chief Justice therefore erred in holding that this separated area of Tukutonga and Finepani are parts of the estate of Ma'ufanga because it is contrary to the judgment of the Land Court in 1924.

We have dealt sufficiently with this earlier to demonstrate that at least a part of the eastern boundary was fixed and cannot now be disputed. The Chief Justice should have dealt with the case on this basis.

Ground 4:
The eastward area and boundary of the estate of Ma'ufanga was surveyed by the Minister of Lands in 1932 in accordance with the decision of the Land Court and Privy Council in 1924 and with the provision of Section 26 of the Land Act (Cap.63). The Learned Chief Justice therefore erred in maintaining and granting the Respondent's claim because Section 28 Land Act prohibits such claim.

This has been sufficiently dealt with

Ground 5:
The Learned Chief Justice erred in holding that in the 1924 case no mention was made in relation to Finepani because the Plaintiff in that case in his evidence stated in respect of Vaolahi (which was the area then claimed) that: "A portion called Finepani pay rent to me". Furthermore witness Sosefo Katoa for that Plaintiff also stated (under cross-examination) "Finepani is in Vaolahi".

The claim made here is substantiated by the Minute Book. These are matters of importance and ought to have been considered together with any other relevant and admissible matter in the Minute Book.

We turn next to the heading B above which refers to the recommendations of the Committee and the decision of the Privy Council in rejecting respondent's application. Ground 7 and 8 are the relevant ones. They read:

Ground 7:
The Learned Chief Justice erred in holding that the Privy Council decision, in respect of recommendations of the Land Committee of 1972, was ultra vires, because there was no evidence what soever other than that the Privy Council was sitting as His Majesty in Council deliberating upon requests from Nobles for further grants and additions to their existing tofi'as, which was in His prerogative to do.

Ground 8:
The Respondent, by submitting his request to the Land Committee of 1972 for submission to His Majesty in Council, acknowledged that the area claimed was not in his tofi'a of Ma'ufanga and accordingly requested, upon the grounds which the Land Committee found, that the area be included in his tofi'a. Those grounds were of course short of establishing any legal rights.

Ground 7 in particular gave concern to counsel for respondent because, if His Majesty The King were dealing with Crown Lands this decision is binding. This could not be questioned. But it was argued that if this land were part of Ma'ufanga as claimed, then His Majesty The King had no jurisdiction to determine the question whether or not it was part of Ma'ufanga. Counsel for appellant on the other hand strongly stressed that it was an exercise of the Royal Prerogative. We are of opinion that the Chief Justice was wrong in holding that the commission and the decision of the Privy Council were invalid. He could not so find until he determined this case. The point in issue was whether this was or was not Crown Land or the tofi'a of respondent so the answer could not be found until this case was decided. The effect of respondent submitting his claim to the Committee and the material he supplied, as given in evidence, were matters which ought to have been carefully weighed by the Chief Justice. The recommendations and reasons should also be appraised as also the fact that the Privy Council rejected them. The recommendation is that the areas are "to be included" and not that they are part of the tofi'a of respondent. The circumstance that it was based on "geographical" considerations is also important. The fact that the two tax allotments in Finepani were held by Fakafanua's people is also important but the importance of this type of evidence has been discussed in the 1924 case. This may throw some light on its value when fully considered and discussed.

The last ground of appeal is No.6 which deals with the lease to Drucker. The Chief Justice held that the decision to revoke the grant was ultra vires. This begs the question because it involves the very point in issue, namely were the Lands Crown lands or were they part of respondent's tofi'a. It is not a question of ultra vires but of what weight the Court ought to place on the actions of the parties in relation to this transaction under which the Crown ultimately asserted its title, and apparently no action was taken to dispute the title asserted by the Crown.

Counsel for respondent made a strong point of the fact that no evidence was called by appellant. Nothing turns on this. The Court had before it all material which the Crown considered to be available and relevant. It was simply a matter of deciding on the evidence produced.

It is our opinion that there were errors in the judgment of the Chief Justice on matters of importance in the trial. These errors are such that the judgment ought not to stand. This does not necessarily mean that the result is wrong. That can be determined only by a proper evaluation of all relevant evidence which will include the matters we have commented on and dealt with in the several grounds of appeal. This can be done satisfactory only by ordering a new trial. It is unnecessary to state that the new trial is
300 not confined only to the evidence given in the first trial. The whole question is again open.

The appeal is allowed and the judgment in the Court below is set aside. An order is made for a new trial of the case. No costs are allowed.