Manu v Royco Amalgamated Co. Ltd

Supreme Court, Nuku'alofa
Dalgety J.
Civil Cae No.623/93

9, 14 February, 11 April 1994

Land - when lease valid
Leasehold - Legal commencement of

The Plaintiff claimed damages from the Defendant on the basis that the Defendant had quarried, unauthorisedly on the Plaintiff's leasehold land. An issue was raised whether the Plaintiff was in fact the lease-holder at the relevant times and at a preliminary trial to determine that question it was,

Held:

1. That the Plaintiff's lease was not registered until 19 March 1993 and that was the date of his rights in rem.
2. That his action as pleaded was based on such rights in rem and a claim that rights existed when the quarrying took place.
3. The quarrying had taken place before 19 March 1993 and therefore the Plaintiffs causes of actions had no legal foundation and should be (and were) dismissed.

Cases referred to : Frazer v Walker [1966] NZLR 1069
Tupou v Min. of Lands (5/91; Dalgety J, 8/4/94)

Statutes referred to : Land Act s.126, s.54, s.13
Constitution Cl.110, Cl.114

Counsel for Plaintiff : Mr K. Taufaeteau
Counsel for Defendant : Mr Edwards

Judgment

This is an action in which the Plaintiff claims damages of over 70,000 pa'anga from the Defendants alleging that the Defendants entered upon the Plaintiff's leasehold land and there carried out quarrying operations thereby causing loss and damage to the Plaintiff. These works are said to have taken place after June 1991. In his pleadings the Plaintiff avers that he was the leaseholder of the land in question since the 26th June 1991. A Preliminary Trial was fixed for today to determine whether or not in fact the Plaintiff was the leaseholder at the time of the quarrying operations. If he was then this action will require to be remitted to probation on the merits and quantum; if he was not then he has no title to pursue this action and it will require to be dismissed.

This action concerns all and whole that piece of land at Ma'ufanga extending to some 1520 m2 or thereby delineated as lot 1 on Survey Office Plan number 5943. A lease in respect of that land was granted to the Plaintiff, Mosese Senituli Manu, on the 19th March 1993 and that lease, number 5386, was registered in the Register of Leases maintained by the Minister of Lands of even date therewith. A copy of that lease was produced (Document P.5). His Majesty's Cabinet had approved the grant of this lease on 4th September 1992 (P.11) and this decision was communicated to the Plaintiff - and copied to the Estate Holder, Hon. Fakafanua; the Secretary of Lands; and the Inspector of Leases - in a letter from the Minister of Lands dated 14th September 1992 (P.4). In their decision the Cabinet directed that the "effective date" of the lease was to be the "date of registration" of the lease. The Plaintiff had applied for a lease of these land on 3rd April 1992 (P.10). Thereafter on 13th May 1992 the Minister of Lands approved that application and on 14th July 1992 remitted the papers to the Cabinet Office with a covering letter seeking a Cabinet decision (P.7).

Prior to the Plaintiff's lease application, the land in question had been made available for lease by Tevita Ikuvalu Latu. The land in question had formed part of his Api Tukuhau and on 26th June 1991 he wrote to the Minister of Lands seeking leave to surrender this land. The application was countersigned by his heir. That letter (P.13) was produced. It is important to note its terms -

> "I respectfully pray herein for leave to surrender part of my tax allotment at Pili, Government Estate, to MOSESE SENITULI MANU. The allotment is number 22 on Block 79/93 and has a total area of 2.547 hectares (6 acres, 1 rood, 7 perches) and the part to be surrendered is numbers 12 and 13. The area thereof is 1520 m2 (1 rood, 20 perches). I hope that you will kindly allow this application."

This application came before Cabinet on 27th November 1991 and was approved, although the area which was allowed to be surrended had obviously grown from the original request for 1 rood, 20 perches to 3 acres, 0 roods and 11 perches (roughly one - half of the area of the Api) - see document P.12. Latu was obviously wrong in describing his Api as Government estate, for in fact it was part of the Tofi'a of the Hon. Fakafanua (seeP-4, 7, 10, 11 and 15).

The Plaintiff clearly considers that Latu's letter of 26th June 1991 granted him a lease of the land in question - "I think the letter means I own the land". He did explain in Re-Examination that he thought leasing and owning were one and the same thing. In Cross-Examination he confirmed his impression of the letter - "I think the letter means the land was given to me."

The quarrying had ceased prior to 19th March 1993 when the Plaintiff's lease was registered. Quarrying was under way in June 1991 at Pili Quarry which was adjacent to Latu's Api. Latu himself gave evidence, which I accept, that quarrying operations did not encroach upon any part of his Api (including the area now leased to the Plaintiff) prior to 3rd April 1992 when the Plaintiff applied for his lease. Whether or not they did thereafter is not a matter I need to resolve at this preliminary stage, but 3rd April 1992 is an important date for it is the title of the Plaintiff to the land in question on or after that date which is highly relevant at this juncture.

Section 126 of the Land Act (cap.132) provides in clear and unambiguous terms that "No lease, sub-lease, transfer of permit until registered in the manner (prescribed by the Act) shall be effectual to pass or affect any interest in land ..." Clearly therefore the Plaintiff could not have acquired any real interest in the leasehold land prior to the registration of the lease on 19th March 1993 "see Frazer -v- Walker [1966] NZLR 1069 (Privy Council) and Tupou -v- Minister of Lands, an unreported decision of mine dated 8th April 1994 in case number 05/91. The Cabinet Decision of 4th September 1992 that the effective date of the lease was the date of its registration is in obedience to and demonstrates knowledge of the provision of Section 126. Furthermore, Section 110 of the Act of Constitution of Tonga (cap.2) states that "no lease ... will be considered valid .... unless registered in the office of the Minister of Lands". The Plaintiff had no lease prior to 19th March 1993. Nothing prior to that date, unless a registered lease, could vest him with any legal title to the leasehold land.

Latu's letter of 26th June 1991 gave the Plaintiff no legally enforceable rights whatsoever to what is now the leasehold subjects. It is no more than a request or application which the Cabinet may or may not grant. Its outcome is highly speculative until the Cabinet has made up its mind. Section 114(a) of the Constitution requires lease to be submitted to Cabinet for approval. A lease application cannot be made until such time as the surrender is effectual. Surrender is not automatic upon a decision by a registered holder of an Api. This is made perfectly clear by Section 54 of the Land Act which says that that where the holder of an Api Tukuhau desires to surrender the whole or any part of his Api

> "... it shall be lawful for such holder with the consent of the Cabinet to surrender the said allotment ...."

Again, the intervention of Cabinet is required and in my opinion the surrender is not effectual until Cabinet approves the surrender. In this case that was on 27th November 1991. Before that Latu was the undisputed holder of this land. Any illegal quarrying on the land up until then would have grounded an action against those responsible at the instance of the Latu, certainly not at the instance of the Plaintiff.

Despite Latu's wish to surrender the land to benefit the Plaintiff Section 54 of the Land Act leaves no room for doubt that land once validly surrendered, and there being no heirs or the heir (as here) consenting to the surrender, reverts to the estate holder. Thus on 27th November 1991 this land reverted to Hon. Fakafanua and again became his to do with as he wished. He was under no enforceable legal obligation to honour the wish of Latu to lease this land to the Plaintiff. What Latu wanted was purely precatory. In practice however estate holders do try and accommodate the wishes of the person who has surrendered the land, but the final decision is not theirs to make. Where land is to be leased that decision is for the Cabinet to make. The first stage in the leasing process is the

Application and that the Plaintiff did not make until 3rd April 1992. In my opinion any illegal quarrying on the land between 27th November 1991 and 3rd April 1992 was no concern of his : only the estate holder, if so inclined, would have had a title to pursue such a matter in Court. The Plaintiff had no legally enforceable right, title or interest whatsoever in respect of anything that took place on the land in question between 27th November 1991 and 3rd April 1992.

The Application for a lease having been made an applicant does not thereby obtain any title to the land or any interest thereon. This is merely an application, which may or may not be accepted by Cabinet. In this case Cabinet approval was given on 4th September 1992. Until then the land was undisputably that of the estate holder and the Plaintiff had no right, title or interest therein.

Certainly thereafter the Plaintiff had an obvious interest in the land. Cabinet had approved his application and all that was awaited was a survey of the land and the preparation and registration of the lease. This is all fairly routine. He had no rights in rem after 4th September 1992 but he may well enjoy certain rights in personam enforceable at law. Quite what they might be may not be an issue explored in depth at the preliminary trial diet. Given the state of the Pleadings this is not a matter that concern me unduly in this case. In paragraph 4 of his Statement of Claim the Plaintiffs avers that Latu "did grant a lease" to him of the lands in question on 26th June 1991. He continues in paragraph 7 that he was "at all material times the holder of the said leasehold land since 26th June 1991." The basis of his claim is that the Defendants entered upon his "leasehold land" and removed "soils, gravels or uncrushed rocks" therefrom, thereby creating undue disturbance to the leasehold land, disfiguring it, and creating an ever present danger of subsidence and possible fatal accident (paragraphs 8, 10 and 11). From his evidence it is clear that all this took place (if indeed it happened at all) before his lease was registered. But until then he was not the holder of the leasehold lands. His primary cause of action, as pled, has no legal foundation whatsoever. Even his secondary cause of action, which relied upon a failure by the Defendants to comply with Section 13 of the Land Act again proceeded upon the basis that at the material time he was the holder of the "leasehold land", and must suffer a similar fate. In any event that statutory provision was purely penal and does not create an obligation enforceable by an affected landholder (or someone with an interest in land) at civil law.

This action will therefore be dismissed. Costs will follow success. Accordingly I shall pronounce an ORDER in the following terms :-

> IT IS ORDERED AND ADJUDGED THAT [1] this action be dismissed and [2] the Plaintiff be found liable to the Defendants in Costs as same might be agreed, which failing as taxed.