

Fakaanga v Mataele & Minister of Lands

10 Land Court, Nuku'alofa

Ward CJ
Land case 737/93

6, 7, 8 & 17 February 1995

Fraud - burden of proof - standard
Land - exchange of allotments - fraud - setting aside

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This was an action by the heir of a deceased holder seeking an order declaring a purported exchange of tax allotments as unlawful and invalid, as obtained by the first defendant by way of fraud on the deceased.

Held:-

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1. Whilst the burden of proof of fraud in civil proceedings is the same as other matters requiring proof, such an allegation is a serious one and the trial judge, in the circumstances here, should not find such proved unless it is proved beyond reasonable doubt.
2. That had been done here, and the declaration sought was made, the transfer to the first defendant cancelled and the second defendant to follow normal procedures in considering the plaintiff's application to be registered as heir.
3. (Obiter) It was wrong that the Ministry of Lands should have carried out no independent checks but accepted instead without check or question, the word of the person (the first defendant) accused of impropriety.
4. That the first defendant had, illegally, had two tax allotments registered in his name since 1989 without apparent concern to the Ministry.

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Counsel for Plaintiff	:	Mr Edwards
Counsel for First Defendant	:	Mrs Vaihu
Counsel for Second Defendant	:	Miss Tapueluelu

Judgment

This is an unusual case involving an exchange of tax allotments in 1989.

The first allotment is in Tokomololo and was registered in the name of Sione Fakaanga, the father of the plaintiff. The second allotment is in Vaini and was registered in the name of the first defendant.

The main chronology of events is not in dispute. The intention and motives of the parties to the exchange undoubtedly are.

50 During 1989, Sione Fakaanga was an old, sick man. He lived in a house in Tokomololo with one of his sons, Samisoni, and the son's wife, 'Asena. His oldest son and heir, the plaintiff, was living in Australia. Sione, during most of 1989, was virtually unable to walk and was looked after by his daughter in law. He was a Free Wesleyan as was his family.

In the latter part of 1989 - the precise dates are in dispute - the first defendant and his wife visited him. The first defendant is a Mormon and was, at that time, the head of Missions for that church. I shall return to his motives and intentions later but it is not disputed that, subsequently, a document was typed by him dated 22 September 1989 which was an agreement between Sione Fakaanga and him to exchange their allotments. It appears to have been signed by both parties.

60 There is no suggestion it was shown by the first defendant to any of Sione's family but it is clear it was passed to the Minister of Lands on or before 27 September 1989 because there is a note on it of that date in the Minister's hand writing

"Check and if it is in order then submit to Cabinet"

Clearly the details of the two allotments were checked because the details have been written on the bottom of the document and dated 4 October 1989. It shows that the allotment were indeed registered in the two names that appear on the letter of 22 September 1989 and also demonstrates a fact I shall return to later, namely that the area of the Tokomololo allotment was almost one acre greater than that in Vaini.

70 Sione Fakaanga died on 28 October 1989 and the plaintiff came from Australia for the funeral. When that was over, he went to the Minister and swore an heir's affidavit. That was dated 8 November 1989 and, of course, referred to his father's death and the plaintiff's claim to the allotment in Tokomololo.

As it happens that was the same date that Cabinet consented to the transfer, the Minister having written to them on 1 November, 1989. It was suggested to the plaintiff that he only swore the heir's affidavit because he heard Cabinet had made a decision. I do not accept that. There is absolutely no evidence before me to suggest he had any means of knowing of the Cabinet decision until it was circulated.

80 On 23 November 1989 the Minister wrote a letter to the first defendant advising him of Cabinet's decision. The letter was copied to Sione Fakaanga, to the estate holder and to the Secretary of Lands and Surveys. A witness from the Ministry testified to that being the usual way the two parties are advised in such cases although he did not explain which of the two equal parties is chosen as the addressee and which receives only a copy. That it was not seen by Sione Fakaanga is manifest but the plaintiff denies receiving it also and I accept that is the case.

In the meantime, the plaintiff was advised by the Minister of the purported exchange and challenged the legality of the document of 22 September 1989. The actual date this occurred is unclear but I do not need to resolve it.

What is clear is that, on 8 November 1989, a minute was addressed to the Minister written by one of the Ministry officials and signed by the plaintiff seeking the transfer of his father's town and tax allotments. Written on the bottom of that minute is a note signed "Tauki'uvea".

"Note. This allotment is presently in Cabinet for an exchange. Please put this on hold."

Unfortunately that note is undated but the contents suggest it was certainly written before the Cabinet decision was circulated to the Ministry. That date cannot be accurately 100 ascertained. The notification of the Cabinet decision is dated 8 November 1989 but was stamped in the Prime Minister's Office on 9 November 1989. The letter advising the first defendant was, as has been said, dated 23 November 1989 and I can only say the note must have been some time between those dates.

However, having been told by the Minister of the letter of exchange and having disputed the signature of his father, the plaintiff went to see a lawyer, Laki Niu, and, on 17 November 1989, Mr Niu wrote a letter to the Minister. He sets out the dispute in the following passage.

"He (the plaintiff) told me that you have told him that there has been a tax allotment 110 exchange between Sione Fakaanga and a man called Kalani Mataele, but Sione died before that exchange was done. And Kepu and those that cared for Sione Fakaanga alleged that at the time that Sione Fakaanga signed the letter of application for the exchange, Sione's mind was not good and Kalani Mataele knew about it and they say that is not the signature of Sione Fakaanga on the application for exchange (of 22 September 1989).

Therefore I convey the request of Kepu to transfer this tax allotment to him according to his Heir's Affidavit."

Although Mr Niu never received the courtesy even of an acknowledgment of this 120 letter or, indeed, subsequent letters in May and October 1990, it is clear it reached the Minister. He had written on the bottom of the letter a note, dated 25 November, 1989.

"Please check exchange of tax allotments whether this was approved by Cabinet or not?"

On 27 November 1989 an officer in the Ministry wrote

- "1. Exchange of allotment already approved in C.D. 1613 of 8/11/89 but the map hasn't been drawn.
2. Sione Fakaanga died on 28/10/89 and Kepu Maiafu Fakaanga swore the Heir's Affidavit on 8/11/89

P. Moala 27/11"

130 The Minister has then written, without a date.

"Forward and advice (sic) to Crown Law: Kalani Mataele assured me that Sione Fakaanga was quite normal and sensible."

Exactly when or how the Minister obtained that information from the first defendant is not demonstrated on the evidence before the Court. Certainly the heir, the other party to the challenge tells the Court, and I accept it, that he was not asked, after his original 140 complaint, for any further comment. What also appears clear is that this remarkable statement effectively resolved the conflict as far as the Ministry was concerned. The matter was not submitted to Crown Law and the account given by the first defendant was accepted. On 1 December 1989 the first defendant signed the registration of the

Tokomoloto allotment.

Needless to say in view of his challenge to the legality of the exchange, the plaintiff never registered the Vaini allotment in his name. The result is that the first defendant has two tax allotments still registered in his name, an illegality that causes no apparent concern to the Ministry responsible.

Those facts are undisputed but there is very sharp and bitter dispute about the surrounding facts and it is in them that the resolution of this case is to be found. (A detailed account of the facts followed, and is omitted).

150 I am satisfied beyond any doubt the first defendant has not told the truth. I am equally satisfied that, however the signature was obtained, Sione Fakaanga was not capable of entering into such an agreement. I am satisfied it was obtained by a trick or some other improper means.

It is correct the transfer was approved by Cabinet and he has since registered the allotment in his name. I am appalled that, having been warned of the dispute, the Ministry could have allowed the normal procedures to continue. Despite the complaint, no check was ever made on the old man and his circumstances. The word of one person, the person being accused of impropriety, was accepted without check or question and the complaint thereafter ignored. As a result of their failure to make any further enquiry the first
160 defendant has had two tax allotments in his name ever since 1989.

I bear in mind that, whilst the burden of proof of fraud in civil proceedings is the same as other matters requiring proof, such an allegation is a serious one and I therefore consider I should not find it proved unless it is proved beyond reasonable doubt. I do so find.

The defendant obtained his agreement by fraud. The exact way he did so is not provable; only he and the deceased party know that. I am satisfied however by the surrounding conduct by which he managed to see Sione Fakaanga, the failure to witness
170 the signatures, the hiding of the agreement from the old man's family and his lies about his intentions and desire for the transactions, that the transfer was obtained by fraud.

The plaintiff seeks an order declaring that the transfer was unlawful and therefore invalid. I make such a declaration.

I order the second defendant to cancel the transfer of Sione Fakaanga's allotment to the first defendant. I am also asked to direct the Minister to register it in the name of his heir. I cannot do that on the evidence before me. However, I do order that the second defendant shall follow the normal procedure for considering the application of the plaintiff for registration of the land in his name as heir.

180 The first defendant will pay the costs of the plaintiff but the second defendant must pay his own costs.