Maliepo v Faka'osilea & Minister of Lands

Court of Appeal
Ward CJ, Burchett J, Tompkins J
Appeal 12/94

2, 3 March 1995

Legitimation - date of parent's marriage - land - succession
Land Act - succession - legitimated person.

The appellant was born illegitimate but his parents subsequently married. After the marriage the first respondent, the appellant's younger brother, was born legitimate. Upon the father's death the appellant claimed and was granted by the second respondent the tax and town allotments as the rightful heir. The first respondent obtained declarations in the Land Court that the appellant could not take (because of his "status" his birth never having been registered or a decree of legitimacy made) and that the grants to him were invalid and the allotments should be registered in the first respondent's name.

On appeal it was:

Held

1. Under the Legitimacy Act (cap 32) the date of legitimation is the date of the marriage and not the date of re-registration or of a decree made under s.9 Legitimacy Act; and no such act of re-registration or the obtaining of a decree is required to become legitimated.
2. Accordingly the appellant's rights to claim to be the rightful heir were controlled by s.4 Legitimacy Act and he was entitled to succeed.
3. The orders of the judge below should be set aside.
4. The appellant was entitled to resume his occupation of the land in question.

Cases considered: Fonokalafi v Kamea (Dalgety J 28-3-94)
Colquitt v Colquitt [1948] P19

Statutes considered : Legitimacy Act ss 2, 3, 4, 6, 9
Land Act s 28
Constitution cl s, 111, 112

Counsel for appellant : Mr Niu
Counsel for first respondent : Mr Tu'ivai
Counsel for second respondent : Mrs Taumoepeau

Judgment

This appeal raises a short but important question of law. The question arises out of the provisions of the Legitimacy Act Cap.32 ("the Act") insofar as they make provision for the rights of legitimated persons to take interests by descent under the laws relating to succession to a town or tax allotment.

The facts giving rise to the question which arises on the appeal are not in dispute and can be shortly stated. They are as follows:

(a) The appellant was born illegitimate on 18 June 1927, before the Legitimacy Act came into force in 1930.

(b) He was the eldest son of his parents who married on 3 August 1938.

(c) The appellant's father was domiciled in Tonga at the date of the marriage.

(d) Neither the appellant's father nor his mother was married to a third person at the date of the appellant's birth.

(e) No steps were taken to re-register the birth of the appellant under the provisions of the Schedule to the Act.

(f) No petition has been made to the Supreme Court for a decree declaring that the appellant is the legitimate child of his parents.

(g) The first respondent is the appellant's younger brother and was born legitimate after the marriage of his parents.

(h) Upon his father's death the appellant claimed that he was the rightful heir to his father's town and tax allotments. This claim was recognized by the second repondent, whereupon the appellant was granted the allotments.

(i) Thereafter, the first respondent commenced proceedings in the Land Court seeking declarations that the grant of the allotments to the appellant was invalid and that they should be registered in his name.

(j) The proceedings came before Lewis J who granted the declarations sought by the first respondent.

In reaching his decision Lewis J appears to have followed the decision of Dalgety J in Fonokalafi v. Siona Kamea and the Minister of Lands - unreported, 28-3-1994. In that case his Honour made an order under the Schedule to the Act the re-registration of the birth of a person born illegitimate in 1936 but subsequently legitimated by virtue of the marriage of his parents in 1943. His Honour was of the view that for the purposes of determining a legitimated person's property rights, the date of his legitimation is not the date of his parents' marriage, but the date when the details of his birth are re-registered, or when a decree recognizing his legitimacy is made under s.9 of the Act.

We shall refer to Dalgety J's reasons for reaching this conclusion but before doing so it is necessary to refer to the relevant provisions of the Act.

Sections 2, 3 and 4 are in the following terms:

"2. In this Act unless the context otherwise requires - 'legitimated person' means a person legitimated by this Act;

'Court' means the Supreme Court.

3. (1) Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, where before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in Tonga, render that person, if living, legitimate from the commencement of this Act, or from the

date of the marriage, whichever last happens.

(2) Nothing in this Act contained shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born.

(3) The legitimation of a person under this Act does not enable him or his spouse, children or remoter issue to take any interest in real or personal property save as is hereinafter in this Act expressly provided.

(4) The provision contained in the Schedule to this Act shall have effect with respect to the re-registration of the births of legitimated persons.

4. (1) Subject to the provisions of this Act, a legitimated person and his spouse, children or more remote issue shall be entitled to take any interest -

(a) in the chattels of an intestate dying after the date of legitimation,

(b) under any will of chattels coming into operation after the date of legitimation, if and so far as a contrary intention is not expressed in the will,

(c) by descent under any law relating to succession to a tofi'a or a tax or town allotment, the holder thereof dying after the date of legitimation.

in like manner as if the legitimated person had been born legitimate. (Amended by Act 12 of 1978).

(2) Where the right to any property, real or personal, depends on the relative seniority of the children of any person, and those children include one or more legitimated persons, the legitimated person or person shall rank as if he or they had been born on the day when he or they became legitimated by virtue of this Act, and if more than one such legitimated person became legitimated at the same time, they shall rank as between themselves in order of seniority."

Section 9 provides, inter alia, that a person who is a natural-born Tongan subject may, in circumstances specified in the section, apply by petition to the Court for a decree declaring him to be the legitimate child of his parents. The Court is given power to grant the decree which, if made, is binding on the Crown and all other persons. The application for the decree must be served on the Attorney-General. There is nothing in the section to indicate that failure to obtain a decree derogates from a legitimation achieved under the provisions of s.3.

The Schedule to the Act lays down a procedure whereby the Registrar may, on production of such evidence as he considers satisfactory, "authorize at any time the re-registration of the birth of a legimated person whose birth is already registered ..." (emphasis added). The Schedule makes repeated reference to the person who is the subject of the application as "the legitimated person". As in the case of s.9 there is nothing in the Schedule to indicate that the granting of an application for re-registration is necessary to achieve legitimation. Indeed clause 3 gives the Registrar power to "request the parents of a person who he believes to have been legitimated by virtue of this Act" to give such information to him as he may think necessary.

In his reasons in Fonokalafi (which Lewis J appears to have accepted as correct) Dalgety J said:

> "There is a fundamental misconception by many that a legitimated child's property rights date either from the date of his birth or the subsequent marriage of his parents. This is how the Plaintiff had understood the law. I regret to say that my interpretation differs. Section 4(1) certainly says that any interest in

property 'by descent', including succession to a tax api, disolves [sic - scilicet devolves] in like manner as if the legitimated person had been born legitimate but that provision is qualified by the opening words of the subsection that this rule is 'Subject to the provisions of this Act ...' Even if the Act said no more it would only have deemed the Plaintiff to have 'been legitimate'. It could not alter the fact that he had been born out of wedlock. ... But the 1930 Act (ie the Act] does continue and with a very stringent requirement. Section 4(2) provides that -

> 'Where the right to any property, real or personal, depends on the relative seniority of the children of any person, and those children include one or more legitimated persons, the legitimated person or persons shall rank as if he or they had been born on the day when he or they became legitimated by virtue of this Act .....'

The Plaintiff did not become legitimated until 28th March 1994. ... The day when someone become legitimated is the day of the Court Order declaring him legitimated per subsequents matrimonium. If Parliament had meant to say in Section 4(2) that a legitimated child's ranking depended on the 'date of legitimation' it could have said so for that is a term defined in Section 2 as meaning 'the day of the marriage leading to such legitimation.' It did not use this defined form of words and in my opinion the words actually used must be regarded as having been deliberately chosen by Parliament. Applying everyday usage of the words in their context the day when a person becomes legitimated is something entirely different to the 'date of legitimation.' and can only mean the date of the Court Order sanctioning the legitimation."

With respect, we are unable to agree with this reasoning.

In our opinion His Honour misconceived the intent and purpose of re-registration of a birth under the Schedule and of a petition under s.9. Those provisions provide means whereby, if a person legitimated by the marriage of his parents subsequent to his birth chooses to adopt them, recognition of his legitimacy may be achieved through a Court order or re-registration of the details of his birth. That recognition is no more than a formal recognition of the legitimation brought about, in appropriate cases, by sub-s 3 (1) of the Act. Obviously, it may well be desirable from the legitimated person's point of view to obtain such a formal recognition of his legitimacy, thus avoiding any debate about the matter in the future. But we can find nothing in the Act to support Dalgety J's conclusion that the date of legitimation is the date of re-registration or of a decree made under s.9. Indeed, as we have pointed out, there are plain indications to the contrary in the Schedule and in s.9.

In our opinion to give the Act the construction adopted by Lewis J (following Fonokalafi) would almost certainly work a substantial injustice to many persons born prior to the marriage of their parents. It is quite unlikely that the provisions of s.9 and the Schedule are known to all Tongan citizens. Even if they are, many may not have the money or motivation to make an application under the Schedule or s.9. They should not be placed in a less Act and have greater ability to take advantage of them.

Moreover, cases can be envisaged where there is insufficient time to seek re-registration or a decree before the death of the father of a child born before the marriage of his parents. In such a case, the child's right to take an interest by descent under the laws

relating to succession (para 4(1)(c) of the Act) would probably, if Fonokalafi is good law, be irretrievably lost. This would work a manifest injustice.

Counsel for the first respondent, Mr. Tu'ivai, sought to support the reasoning in Fonokalafi, as had Dalgety J. himself, by reference to s.82 of the Land Act and cl.111 of the Constitution. So far as the Land Act is concerned, it should be remembered that after passing it in 1927, the legislature passed the Legitimacy Act in 1930. The stronger point is the language by which the Constitution, though since an amendment only with reference to hereditary estates and titles, confines rights of inheritance to those "lawfully born in wedlock". But the Consitution is not law of marriage or legitimacy. On these matters, as on a host of others, it assumes that the legislature will pass suitable laws. The persons who are embraced by the constitutional reference to those "lawfully born in wedlock" can only be identified by the application of the laws of Tonga which determine who is lawfully married and who is born of a marriage. The legal presumption, for example, that a child born to a married woman is a child of her marriage may, in a particular case, decide the issue. The Constitution cannot do so. We did not understand counsel for the Crown, Mrs Taumoepeau, to dispute this. And, as Mr Niu, for the appellant, pointed out, cl.111 does not give the expression "lawfully born in wedlock" a meaning different from "legitimate", for it twice uses that word as a synonym for the longer expression, and it does so again in cl.112.

In Colquitt v. Colquitt [1948] P.19, Lord Merriman P. said (at 26):

> "It is not to be expected that Parliament will employ more than one of several synonymous terms, in the alternative, to express its meaning. When, therefore, in s.1 of the Legitimacy Act, 1926, Parliament enacts that in the case of a living illegitimate person whose parents marry or have married one another either before or after the commencement of the Act, the father being at the time of the marriage domiciled in England or Wales, the marriage shall render that person legitimate from whichever is the later of the two dates, it is difficult to see why, by the same process, that person is not also 'rendered' a child born in lawful wedlock, or a child of the marriage. Parliament, by the very use of the words 'rendered legitimate, ' recognizes that it is a notional process, and it seems to us that there is no reason, except the fact that Parliament has used one synonym rather than another to express the same notion, for holding that the historical fact that the person was born before his parents were married prevents him from acquiring the same status in whatever form of words it is described."

In our opinion, the Consitution does not lay down a definition of legitimacy, but contains a provision (in cl.111) about the rights of those persons whom the laws of Tonga make legitimate. By virtue of the Legitimacy Act, the appellant is, under those laws, a legitimate child of the marriage of his parents.

There is simply no reason why the words of s 3(1) of the Legitimacy Act should not be given their plain meaning. We observe that this must have been the view of the Minister when he first considered the appellant's application to be recognized as his father's rightful heir, since he granted it. It is true that the Minister's counsel at the hearing before Lewis J contended for a different construction of the Act, but it can be inferred that her contention was based only on the reasoning in Fonoklafi. Before us, counsel for the Minister did not seek to support the judgment of Lewis J.

Dalgety J was of the view that the opening words of subs 4(1) - "Subject to the provisions of this Act ....." - bring about the result that legitimation is not achieved until re-registration or the making of a decree. We do not agree. The opening words of the subsection are apt to apply to situations such as are referred to, for example, in s.6. They should not be interpreted as, in effect, negativing the plain meaning of 3(1). In our opinion, the statement of the law in Fonokalafi was wrong and should no longer be followed.

For these reasons we think the appeal should be allowed and the orders of Lewis J
250 set aside. The consequence is that the appellant is entitled to resume his occupation of the land in question. The respondent should pay the applellant's costs of the proceedings at first instance and on the appeal. The Minister should bear his own costs of the trial and of the appeal.