Palu v Minister of Lands & ors

Land Court, Nuku'alofa
Lewis J
L.1124/94

11, 12 & 15 January 1996

Land - surrender - conditional - right of inchoate heir

A prelimary issue arose as to whether the plaintiff had standing to bring a claim, as eldest legitimate son of a still surviving father who on succeeding to an 8 acre tax allotment in 1991 lodged a claim to and was registered as holder of one half only, and purported to surrender the balance to the children of his illegitimately-born niece. The balance was registered in that way. The plaintiff claimed that the surrender was flawed in that it failed to comply with s.54 Land Act and that it attempted to impose conditions on a surrender. The plaintiff claimed an anticipatory right to sue, based on s.170 Land Act.

Held:

1. s.170 intended to limit claims under the Act, not create them. It may only assist to demonstrate that rights which are in existence are not yet extinguished by statutory bar.
2. It was common ground that ss.51 and 54 Land Act had not been complied with, which meant the conveying away of 4 acres from the registered allotment was done unlawfully by the father (who was not a party to this action) and the Minister.
3. The conditional surrender was and is void ab initio. But that did not give the plaintiff any standing, although it did give the Minister a duty to put matters right.
4. No right of action accrues to an eldest legitimate Tongan son of a registered holder by reason of the unlawful activity of the holder. Were it so all potential but inchoate heirs would be entitled to claim notwithstanding that the day of their inheritance might never come.
5. The plaintiff here had no right of action and no right to seek a declaration as to the purported surrender.

Case considered : Motuliki v Namoa & ors [1990] Tonga LR 61

Statutes considered : Land Act

Counsel for Plaintiff : Mr Niu
Counsel for first defendant : Ms Weigall
Counsel for second to thirteen defendants : Mrs Vaihu

Judgment

The facts upon which the court is asked to make a preliminary ruling regarding the standing of the plaintiff are as follows.

The plaintiff is the eldest legitimate heir and successor of one Tevita Latu Palu in respect of a Tax Allotment at Koloua Tongatapu which is recorded in the Register of the Minister of Lands page 169 Folio 6. It was first registered in the name of Palavi Palu on 17 February 1917 being in area 8 acres 1 Rood 1.8 perches and known as "Konga Toafa". It was registered in the name of Tevita Latu Palu on the 18 November 1991 and the area in respect of which Tevita Latu Palu was registered was recorded and changed to "four acres exactly" by Ministerial endorsement on the register (Exhibit P4).

The father of the plaintiff, Tevita Latu Palu ("Tevita"), succeeded as holder of the allotment after the death of his sister-in-law Ma'ulu Palu and the extinguishing of her life interest in the allotment. Tevita filed an affidavit of heir and a claim to the allotment with the first defendant the Minister of Lands.

At the time of lodging his claim with the first defendant Tevita requested that one half of the Tax Allotment (4 acres) be given to or for the children of Manu Ma'u, the illegitimate daughter of one Tevita Tekitau Palu the deceased brother of Tevita. It is unclear just how the subject of the conveyance away of four acres from the allotment did arise. Tevita says that the Minister asked him to do it. Perhaps the Minister did. For present purposes it is of little consequence. In fact the Minister granted four acres to Tevita and the other four or thereabouts to Manu.

Tevita's evidence is - "I gave it to her to show my natural love and affection - I expected no compensation - I consented in Manu's favour - I gave it for Manu not her children - I withdrew my consent when my son (the plaintiff) came and said that he would not consent."

Thereafter, a subdivision of the four acres given to Manu occurred. For present purposes it is sufficient to say that the plaintiff, the eldest legitimate son of Tevita, did not consent to any of the transactions associated with the reduction of the 'Api Tukuhau from 8 acres to 4 acres.

Counsel for the defendants each make the point that Tevita (not a defendant to these proceedings), was never a holder in possession of the Tax Allotment comprised of 8 acres. He was, at his own request only ever the holder of 4 acres. The rest he "surrendered" within the meaning of the Land Act (without the plaintiff's consent.)

Those being the material facts, I now turn to the submissions of counsel for the first defendant.

The first defendant submits that the plaintiff's case is premature since he has not and cannot have standing as a claimant to the 'Api pursuant to the provisions of the Land Act. He can not qualify to file an affidavit of heir unless and until one of three statutory events occurs namely that the registered holder:-

- dies
- becomes insane or,
- surrenders his interest in the allotment

and that if he cannot claim title by reason of the continued existence of a registered holder then he has no rights in law, only the expectation that he may one day succeed the holder by virtue of the rules of devolution under the Act. And that if he has no rights under the Land Act then he has no right to sue; that is he has no standing.

Ms. Weigall adds that in this case that Tevita made a "purported" surrender only, since the requirements of the provisions of section 54 as of the Land Act amended by amendment 18 of 1991 section (2) were not met.

Section 54 of the Land Act as amended provides as follows

"(1) Whenever the holder of a Tax or Town Allotment desires to surrender any such allotment or any part thereof, it shall be lawful for such holder with the consent of the Cabinet to surrender the said allotment or any part thereof as aforesaid, and any allotment or part thereof so surrendered shall, subject to the provision of this act, immediately devolve upon the person who would be the heir of the holder if such holder had died; and if there be no person on whom the allotment or any part theeof can so devolve the allotment or any part thereof if situate on crown land shall revert to the crown and if situate on an hereditary estate shall revert to the holder thereof.

(2) Notice of Cabinet's consent to the surrender shall be published by the Minister in one issue of the Tonga Government Gazette and in three Issues of a Tongan weekly newspaper within two months of the date of the Notice.

(3) The notice shall be in the form specified in schedule IV A and will require any person claiming to be the legal successor to the surrendered Land to lodge his claim in writing to the allotment or part thereof by the date specified in the notice which date shall not be less than twelve months from the date that the notice is first published in accordance with sub-section (2), failing which the said allotment or part thereof will revert to the estate holder."

The first defendant submits that because the surrender here, on any view of it, failed to comply with the provisions of the Act it was further flawed in that it was an attempt by the claimant to impose a condition that the surrender be for a specific objective i.e. the grant by the Minister to the Minister to the children of an illegitimate and specified donee. The grant, says the Minister, is therefore void.

As to the submission that the plaintiff has no standing, Mr Niu, of counsel for the plaintiff submits that the law is that if it can be shown that a surrender has occurred in law and fact with unlawful consequences - (here the conveying away of half of the estate to an illegitimate person or to her children) the unlawful conveyance creates a cause of action which cannot vest in any person save the plaintiff in this case and the plaintiff becomes possessed thereby of an anticipatory right to sue.

Mr Niu bases his submission upon the provisions of the Land Act Section 170 as amended the provisions of which are as follows:-

"170. No person shall bring in the court any action but within 10 years after the time at which the right to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims then within ten years next after the time at which the right to bring such action shall have first accrued to the person bringing the same."

The marginal note to the section, "Limitation of Action", allows a clue to the intention of the legislature. There is in my opinion no doubt at all the Parliament intended

that section 170 of the Land Act to limit claims under the Act, not to create them.

Section 170 with respect to the argument of Mr. Niu, cannot help the plaintiff establish that he has standing. S.170 may only assist to demonstrate to a court that rights which are in existence are not yet extinguished by statutory bar.

A case with facts similar to that of the present one was considered and determined by the Privy Council in Motuliki v Namoa, Motuliki and the Minister of Lands Privy Council Appeal 5/90 [1990] Tonga LR 61. In that case the father of the appellant in 1965 and 1966, surrendered his Town Allotment and it was allocated to 'Elisi Namoa by the
160 Minister of Lands. The surrender did not secure the consents necessary under ss 51 and 54 of the Land Act (Cap.132). At the time of the surrender the Applicant was about 5 years old. The Land Court dismissed the appellant's claim to the allotment. The appeal of the appellant to the Privy Council was dismissed.

The Privy Council held that the appellant was not prevented from bringing the proceedings insofar as the proceedings were brought outside the apparent limitation period set by section 170 of the Act but that the limitation period did not commence to run until the appellant attained his majority and was claiming, not through his father, but independently of him since his father had, by surrendering the allotments without the required consents, surrendered also his right to challenge the legality of the surrenders.
170 The Privy Council, (stressing that the reasoning used was only because of the particular circumstances of Motuliki), reasoned that

> "The legality of the surrender by Viliami could have been challenged by the Minister or by Viliami, but it was Viliami, who voluntarily surrendered his right to the allotment, although the surrender was unlawful. It appears to us that by so doing he also surrendered his right to challenge what he had himself done, to the detriment of his heir. In these special circumstances we consider that the appellant had an independent right of action which he could pursue."

The issue of limitation is not relevant to the present proceedings, and Motuliki must
180 be approached bearing in mind the caution of the Privy Council that there were special circumstances surrounding it. I judge that to mean that Motuliki ought not to be read as establishing general principle or precedent.

It is common ground that, here, Tevita failed to comply with the provisions of sections 51 or 54 of the Land Act. That means that the conveying away from the registered allotment of an area four acres was done unlawfully by the then holder Tevita and by the first defendant in the sense that even if the first defendant did not actually request the surrender but merely did what was asked of him by Tevita,i.e. effect the surrender, then the Minister facilitated the process by making the registration in the manner deposed to.

190 Ms. Weigall submits that any purported surrender must be void ab initio; that Motuliki involved at least a procedurally correct surrender albeit one with no consent whereas there was not the least compliance here; that since the conveyance of the land is void ab initio then no cause of action may accrue to him.

Mrs. Vaihu submits that if any one is entitled to a claim it is, and can only be, Tevita himself but not the plaintiff whom her clients maintain has no standing.

By what process of reasoning can it be asserted that any right of action will accrue to an eldest legitimate Tongan son of a registered holder by reason of the lawful activity of the Holder? I do not understand the Privy Council to be making any such assertion in
200 Motuliki. Were it so it would mean that all potential but inchoate heirs would be entitled

to claim notwithstanding that the day of their inheritance may never come by reason of their early death or supervening insanity.

The circumstance of the present case differ from Motuliki. The Minister argues that what was done by way of conveyance or surrender of 4 acres to Manu Ma'u was void ab initio since the application for surrender was made for a specific purpose that is to say to transfer to the land to Manu for herself and her children. The Land Act does not allow of such a transaction. In my opinion the conditional surrender was and is void ab initio. That does not give the plaintiff any standing but it does give the Minister a duty to put
210 matters right.

Therein lies the essential distinction between this case and Motuliki. There the infant plaintiff, by reason of the unlawful surrender by his father, had and preserved a right of action. Here, there is ground for an interested party seeking a declaration from the court of the nature of the purported surrender, but the interested party must have a right of action and the plaintiff in this case does not. Only Tevita (who has sought to withdraw his surrender) and the Minister are in any position to put the matter right. I rule that the plaintiff does not have standing in this claim.