Kilifi & Kilifi v Heimuli, Minister of Lands & Kilifi

Land Court, Nuku'alofa
Hampton CJ
L.193/95 and 575/95

29, 30 & 31 January 1996

Land - setting aside grant - mistake
Land - ladder of succession

Tax and town allotments had been registered in the name of the first respondent, on the basis of his claim to be the heir of the deceased holder.

Held:

1. The Minister acted on a mistaken basis namely that the first respondent was entitled to claim as heir (as stated in the affidavit before him) when the law (s.82(b) and (d) Land Act) made it clear that that could not be so.
2. The Minister made an honest mistake and it may be that he was not given all relevant information. The court has long recognised that, in cases of mistake, there is jurisdiction to rectify matters and, if necessary, set aside registration.
3. The registration of the first respondent should be cancelled and a direction made that the matter be referred back to the Minister for him to consider (a) whethers there are any heirs, and if so which should succeed; and (b) if there are no heirs then to apply his discretion and make grants of the allotments.
4. (Obiter) Only a son or grandson of a deceased holder can succeed as heir to an allotment of the same kind as he already holds, if he so elects. No other person holding allotment (s) shall be permitted to succeed as heir to an allotment of the same kind as he already holds. Such a person cannot elect.
5. (Obiter) If a father already hold allotments, at the relevant time, which barred him from taking or succeeding to other allotments, his son likewise would not succeed. The son did not have any better or further claim to succeed to the allotments than this father.
6. (Obiter) discussion of the claim of succession in s.82(e) Land Act; and if there is no succession under s.82(e) and (f) then the land would revert, if Crown land, to the Crown and it would be for the Minister, in his wide discretion, having heard representations from all claimants, to decide to whom the allotments should go. It would be wrong for the court to try and substitute or impose it's views .

Cases considered : Ma'afu v Minister of Lands (1959) 2 Tongan LR 119

Statutes considered : Land Act s.82, s.84

Counsel for first plaintiff : Ms Tonga
Counsel for second plaintiff : Mr 'Etika
Counsel for first respondent : Mrs Vaihu
Counsel for second respondent : Ms Bloomfield

Judgment

I intend to give an oral judgment now, in relation to these matters because I have a clear view as to what should occur. I say at the outset that I intend making an order cancelling the registration of both allotments which have been placed inthe name of Sione Mapumeihengalu Heimuli, and secondly I am going to direct that the matter be referred back to the Minister of Lands for him to consider two aspects: (1) in the light of what I am going to say whether there are any heirs and if so which of them should succeed, and (2) if there are no heirs then to apply his discretion, having been given all necessary information, and make grants of the town and tax allotments here.

As to the first aspect then. I will make an order at the outset, so I do not forget the formal part later, that the registration of Mapu (as I will call Sione Mapumeihengalu Heimuli in this judgment) as holder of both allotments should be cancelled. The town allotment, (and I will not give the full description) is the land that is comprised in Book 125 folio 27 and is known as "Nailililili" and the tax allotment is in Book 8 folio 32 and is described as "Konga 'o Nualei".

I have reached a conclusion, which is very clear, namely that the Minister of Lands, when registering Mapu as the holder of both allotments, acted on a mistaken basis. The mistaken basis was that the Minister seemed to accept that Mele Vea Vake Uikilifi or as she is know 'Ani Heimuli and her son, i.e. her second son Mapu, were entitled to claim as heirs of the holder 'Olive (full name Siosiua Makafana Kilifi, commonly known as 'Olive Uikilifi).

On the evidence of the Registrar of Lands, and on the documents which have been produced, it would seem that the Minister acted on the affidavit of heir sworn by 'Ani, Exhibit P.12, and on the accompanying application by her which was contained within, Instruction Book 37 at page 138, Exhibit P.13. In particular the Registrar's evidence was clear about that; especially in his answers to the Land Court Assessor. It seems that the Minister did not act on the other application, an application for grant of allotment, which was put in evidence as Exhibit P.18.

'Ani and through her,the second son Mapu, could not claim as heirs as a matter of law. That is clear having regard to the provisions of section 82 of the Land Act (Chapter 132) particularly paragraph (b) which provides that only persons born in wedlock may inherit ('Ani was not born in wedlock) and parargraph (d) which provides that only if there is no son or heir male of the body of a son surviving the deceased holder then any unmarried daughter of the holder shall inherit for life. There were no sons or heir male of the body of a son here but 'Ani was married. In any event, (d) only allows for a life interest. On the materials before me, and reviewing all the evidence, I have reached the conclusion that the Minister has made an honest mistake. It may be that he was not given all relevant information.

This Court has long recognised that, in cases of mistake, there is jurisdiction to rectify matters and if necessary to set aside registration. It is on that basis that I have made the Order I have referred to.

The second of the Orders I make is to direct that the matter be referred back to the Minister of Lands for him to reconsider the whole position and in particular two matters.

The first is for him to consider all the information about this family and decide on that whether there is, within the meaning of section 82, an heir of 'Olive who can take either or both the tax and town allotments.

On the evidence I have heard, I have some clear views about the matter and I will express those views because they may be helpful to the parties and the Minister, but I am not prepared to go so far as to make formal declarations or orders in relation to this aspect, given the arrival before this Court today of a fresh writ in relation to the same two pieces of land. That writ, under the No.L82/96, may yet come to some sort of hearing before the Court and it is for that reason that I will not go further, as I have said.

As I have said I do have some views however, and the first of those views is that, on the evidence before me, there would seem to be no such heir, entitled under section 82, to take or succeed to those allotments. 'Olive, on the evidence before me, married twice but did not have any sons of those marriages. From what I have heard it would seem that for the reasons already expressed in relation to section 82 paragraph (b) and (d), the one daughter of the first marriage, 'Ani, could not be an heir; and that the four daughters of the second relationship, it would seem, were born before the marriage and, from what I have heard, would probably be similarly disqualified under section 82 (b) and (d).

If I am correct in that then the next paragraph to be looked at in the ladder of succession, is paragraph (e). That paragraph relates to the brothers of a deceased holder and it is in this paragraph that the two actions before me at present are founded, that is the actions 575/95 and 193/95. There were three younger brothers of 'Olive, namely Viliami, Mesui and Vaine. Only Vaine is still alive.

Viliami was the next eldest, after 'Olive. On the evidence before me it seems clear that he, Viliami, had town and tax allotments in Ha'apai and that his son,the plaintiff in 575/95 who I will call Le'ota in this judgment, has succeeded to, and holds, those town and tax allotments.

That being so, Le'ota cannot take the town and tax allotments in question here because of the provisions of section 84 of the Land Act. That section provides that no person, other than a son or grandson of a deceased holder, holding town or tax allotments shall be permitted to succeed as heir to an allotment of the same kind as he already holds. It is clear that such a person is not able to elect between the allotments he already holds and ones which he might succeed to as heir.

The proviso to section 84 applying only to a son or grandson of a deceased holder, does not apply to such a person as a brother of a deceased holder, and does not apply to Le'ota in these circumstances. I find that his claim under 575/95 cannot succeed and nor do I find any support for the argument made by Mr. 'Etika on his behalf in relation to the proviso to section 82. It seems to me that submission is quite misconceived and ignores the plain words of the section and indeed of what "holder" means in terms of section 2 of the Act. Viliami died long before he would ever have been entitled even to be considered at all as a possible successor to these allotments.

Furthermore and in any event, Le'ota's father Viliami, as I have already said, did hold tax and town allotments which would made him (Viliami) ineligible under section 84 as well.

The other action before me, 193/95, is brought by Sifimeta Kilifi, the elder son of

Mesui. I accept the submission made on behalf of the Crown, and indeed on behalf of Mapu as well, that Sifimeta's claim is governed by the position of his father, Mesui.

The submission is based on the judgment of this Court by Hunter J. in the case of Vitikami Ma'afu v Minister of Lands (1959) 2 Tongan LR 119. There, in effect, it was held that, because a father already held allotments at the relevant time, which barred him from taking or succeeding to other allotments, his son likewise could not succeed. The son did not have any better or further claim to succeed to the allotments than his father.

Here the evidence is clear that Mesui held town and tax allotments and indeed that was the family land. The fact is that those holdings, pursuant to section 84, would have prevented him taking and therefore his son, Sifimeta, is prevented as well.

In addition, there is this feature in relation to section 82(e) which has, I believe, some force. Paragaraph (e) reads that "an allotment shall descend to the deceased holder's brother or if such brother be dead to the eldest male heir of the body of such brother. If the deceased holder's eldest brother be dead without leaving any male heir of his body then the holder's next eldest brother shall succeed" and so on. If I apply that to the situation here that would mean that the allotments here should descend to, in order, Viliami as the eldest brother but as he was deceased then to the eldest male heir of Viliami. That eldest male heir is Le'ota. As I read the clear words of this paragraph, the chain within paragraph (e) down to other brothers can only continue if that eldest brother, Viliami does not leave any male heir of his body; then the succession would go on to the next brother. That of course would be Mesui in this case. But here the eldest brother, Viliami, did leave a male heir of his body. The scheme or the chain stops there. The fact that Viliami's son, Le'ota, is disqualified under section 84 does not make a difference to the operation of paragraph (e).

Therefore, for that second reason, I am of view that Sifimeta, claiming through Mesui, cannot be an heir under paragraph (e). Likewise that affects the next brother down, Vaine, although he has not been a party to the proceedings. He was a witness, but he did not seem to express any interest in taking these allotments, and indeed he does have a town allotment of his own.

That being the case on paragraph (e) of section 82, I look then at paragraph (f). It seems to me, from the evidence I have heard, that there is no one surviving who could fall within the categories in paragraph (f).

Which brings me then to paragraph (g) which says in default of all that chain then the allotment, if situated on Crown lands, shall revert to the Crown. And that of course has the same affect as section 83. In this case it seems to me that these two allotments indeed will revert to the Crown. I have expressed that conditionally because, as I said earlier, I leave the decision about heirs to the Minister, in view of the third writ, L82/96 which has just come into this Court today.

But if I am right and if the Minister sees it in the same way, then I move to the second part of what the Minister would have to consider. That is the question of who should be granted the tax allotment and/or the town allotment in question. It does not necessarily follow that, and it is for the Minister to decide whether, both allotments should go to the one person. The Minister has, and no doubt will exercise, his wide discretion and certainly it seems to me that he should see and hear representations from all of the three claimants I have heard in these two cases, and indeed the fourth claimant in the pending case 82/96.

There may be others that he should see and hear as well within this family. It would

be wrong I believe for this Court to try and substitute or impose it s views, as to who should be granted either or both these allotments. It is properly a matter for the Minister with all the information put in front of him.

Those are the orders I propose making on both of these actions. On the 193/95 action, I refuse the plaintiff's prayers (a) (b) and (d) which are the substantive prayers by that plaintiff, apart from seeking the cancellation. In relation to the 575/95 action I similarly decline to make the orders sought in the prayers (c) and (d) which are the substantive applications there, seeking registration in that plaintiff's name.

210 In all the circumstances, and in relation to the facts to which I have referred, I make an order that each party should bear their own costs. I am not prepared to make any other orders in relation to costs other than that.