Palavi v Cocker & Minister of Lands

Land Court, Nuku'alofa
Hampton CJ
L216/94

5 & 6 November 1996

Land - public works - exhausted - reversion
Practice & procedure - deceased defendant - estate
Land - mistake - set aside lease

A small piece of land on a corner in Kolofo'ou was voluntarily surrendered to the Crown in 1933 for the purpose of building and running a community water tank. What happened to that land when that purpose was exhausted or completed - should it revert to the original holder (or his descendants, the plaintiffs here) or could the Crown lease to someone else (as here, to the first defendant)?

Held:

1. That question did not need to be answered here, in the circumstances.
2. The plaintiff (and family) had been trying to lease back the piece of land for some years.
3. In January 1989 the plaintiffs tried again, with the Minister, to lease the land. No response was made to then, but the Minister received an application from the first defendant to lease the same land in May 1989 and granted that.
4. The lease to the first defendant should be set aside because the decission to grant it was made by the Minister in mistake in ignorance of the earlier application by the plaintiffs. The plaintiffs' application was not considered, the plaintiffs had no opportunity to make representations or be heard and there was a breach of the rules of natural justice.

   The matter was referred back to the Minister, for him to decide on the competing claims (and some comments were made as to those claims).

Cases considered : OG Sanft v Tonga Tourist Co. [1981-88] Tonga LR 26
Hakeai v Min. of Lands [1996] Tonga LR

Statutes considered : Land Act s.141

Counsel for plaintiffs : Mrs Vaihu
Counsel for first defendant : Mr L. Foliaki
Counsel for second defendant : Ms Bloomfield

Judgment

I record at the start of this judgment that at the commencement of the proceedings an amendment or rather amendments were made both to the entitulement and to paras 1 and 12 of the statement of claim to show that the second plaintiff should properly have been named as Sione Feleti Palavi.

Secondly, an amendment was made in relation to the named first defendant. In the original pleadings the first defendant was named as Roy Cocker. Mr Cocker has died after the commencement of these proceedings. Under Order 9 rule 6 sub rule 1 of the Supreme Court Rules (which I am entitled to have regard to in terms of Order 2 r.2 Land Court Rules) the action brought against the first defendant continues, the action being treated as if it were against the estate of the first defendant. Properly the first defendant now being the administrator of the estate of Roy Cocker deceased.

This case involves a small piece of land situate right on the corner of Wellington Road and Fatafehi Road, Kolofo'ou. The area of land, if one looks at the documents which have been exhibited, is a somewhat variable amount it having being described at various times as 8 perches, at another time as 9.77 perches, yet other time as 8.05 perches and another time as 7.35 perches. Certainly it is this small area of land right on the corner and it is well deliniated in the various plans which have been produced in front of this Court.

This area of land seems to have been voluntarily surrendered (and not compulsorily taken), but voluntary surrendered to the Crown possibly somewhere back in 1933 or thereabouts. It is an open question in my mind whether the land was surrendered under the provisions of section 138(1) of the Land Act or, perhaps more appropriately given the evidence I heard, was resumed by the Crown following a voluntarily relinquishment for public purpose under ss 3 of section 141.

The land is part of the government estate. It is clear that, whatever section it was done under in the Land Act, it was resumed for a specific purpose that is for the buiding (and then the running and maintaining) of a public or community water tank for Kolofo'ou. The question, as it initially seemed to this Court and as the case was argued, seemed to revolve about what could or should happen to such an area of land if the specific purpose for which it was surrendered was completed or exhausted. Did the government continue to hold the land and therefore was the government able to lease the land to someone else, as happened here in relation to the first defendant or, as claimed by the plaintiffs, did it in effect, or should it in effect, revert to the original land holder or to the descendants of that original land holder, who are the plaintiffs in these proceedings?

That seemed to be, initially, the question for determination, but as the evidence unfolded a second question has arisen, which in my view means that this Court in this case does not have to determine the various arguments which have been put forward as to what should or could occur on the exhaustion of the specific purpose as I have outlined. From what I am told it may well be that that question will arise at some date in the future in relation to other litigation and other pieces of land taken for specific public purposes.

Here, on the evidence before me, I find that one of the predecessors or the plaintiffs, Lisala Fatai, was registered as the land holder of all the area of land that ran along the frontage of Wellington Road between Fatafehi Road and 'Unga Road.

It would seem he was registered as the holder in 1928 (and I refer to exhibits 18 & 21). The plan in exhibit 21 shows part of Lisala Fatai's original holding being surveyed off and leased off to someone else in March or April 1933; and that plan shows also that

the small area in the corner at Wellington and Fatafehi corner was already surveyed off, or was surveyed off at that time, and marked as a government tank.

The evidence I had from the second plaintiff, who is the father of the first plaintiff, who is the present lessee of the land immediately surrounding this disputed corner piece, is that he (the second plaintiff, who is now 65 years of age and was born on this holding) was brought up there having in mind the understanding of the family that the corner (water tank) piece of land was still the family's; they still maintained it because the water tank which was constructed did not occupy all of the disputed area of land. The evidence, which is uncontraverted, is that the family has continued to maintain that area of land and indeed, once the tank fell in to disuse (as it has for the last 30 years or so) the Plaintiffs have taken what might be described as a public safety stance to try and secure the tank from persons such as children getting into it. The second plaintiff described in evidence being brought up to believe that, although the government owned the water tank itself the belief was (and this may well have been a traditional belief in that situation, in family legend or history as it were), within the family, that the land on which the tank was situated was still part of the family land holding. The tank use as a community water tank seems to have to come to an end in the early 1960s and it may be, as was pleaded by the plaintiffs, that that was about the time of the establishment of, the Tonga Water Board.

The last of the family holders of this whole area of land between Fatafehi and 'Unga Road, along the Wellington Road frontage, on the evidence, was Siaosi Palavi who was, respectively, the great uncle and the uncle of the two plaintiffs. In 1976 it would seem that he, Siaosi Palavi, surrendered the land holding and then three persons, all members of the family, applied for and obtained lease-hold interests in this subdivided land holding. Three separate lots were created as can be seen on the plan produced as Exh.17. Two of the holdings, i.e. the lots two and three, went to cousins of the second plaintiff; the third, lot one, which is the area of land surrounding the disputed water tank area went to the first plaintiff. The three lots are clearly shown on Exh.17, as is the tank.

Eventually in May of 1992 the lease no. 3690 (Exh.3), a lease of 99 years from March 1981 to March 2080, was entered into by the first plaintiff as lessee. It is clear that the tank was separate and was not included in that lease.

On the evidence I have heard, from that time on the Plaintiffs and their family have been trying to find out what was to happen to the water tank no longer in use and to the land it was on. On the evidence, again uncontraverted, it would seem that what they got over the years from the Minister of Lands, the Second Defendant, and indeed to some extent from officials in the Ministry, were a series of reassuring noises indicating that the Minister would try to get it back to them at some stage, that is try to get the disputed land back to them at some stage.

It is worth looking at some of the documents which went to and from the Minister and/or the Ministry over the years particular through the 1980s it being accepted by all Counsel that those documents did in fact come into the possession of, or originate from, the Ministry of Lands.

In 1982 it is apparent from Exh.4 that the plaintiffs were trying to find out from the Ministry of Health what was happen to the water tank. Later, in 1982, and it can be seen from Exhs. 5 & 6, the plaintiffs were trying to achieve some sort of agreement with the Ministry of Lands that the tank should be destroyed and the land go to the Plaintiffs, so that they could build on it or extend onto it the building that were intending to place on

the area of land surrounding the disputed area and already leased by the first plaintiff.

Building was in fact commenced by them, that is on the surrounding land. It is clear from Exh.7 that they was still making attempts to try and achieve the return to them of the corner disputed area, and in fact Exh.7 is notable as setting out their view to the Minister, or the view of the first plaintiff to the Minister, that there had been a mistake made in the lease no.3690, that is the disputed land had not being included.

It is evident from Exh.8 and the plan which was attached to it, that in fact the building which was erected, (and which is now is use in Wellington Road as the German Medical Clinic) but its stairway and a landing and a light on it encroached on or extended over the separate area of land on which the water tank was situated. The Ministry advised the plaintiffs of that and they amended their building accordingly.

In 1985, and this is apparent from Exhs. 9 & 10, the plaintiffs suggested a compromise whereby they could have leased back to them just a very small portion of the disputed area (0.52 perches) to enable them to satisfy the problem with the overhang of the building that had encroached on the disputed area.

Part of Exh.19 is a recommendation from the Ministry of Lands about that application stating, inter alia, that this application is "not recommended for a government cistern is located on this site". Also is should be noted that the application which had been made for the 0.52 perches would not have interfered in any way with the government cistern, the water tank. It stopped short of the water tank, deliberately so.

The result was, however, that on 9th July 1985 (Exh.11) the plaintiffs were advised, or the first plaintiff was advised, that his application to lease that very small area had been refused.

The plaintiffs did not give up and in January 1989 (and I refer to Exh.12) the second plaintiff wrote a detailed letter to the second defendant setting out considerable information as to, or in support of, the applications which were being made yet again to try and lease the entire disputed area.

On the evidence, and this is important, there seems to have been no response made to that application and no opportunity presented to the plaintiffs to be heard in support of that application or further that application.

The next step was that in May 1989 the first defendant Mr Cocker applied to lease the entire disputed area for use as a car park and, despite the argument of Mr Foliaki on behalf of the first defendant estate, I do not accept that that can be seen as being a public purpose within the understanding of that expression as used in part IX if the Land Act. The application by the first defendant and then the treatment of that application can been seen in the various Exhs 13 and 13A - 13D. It would seem that his application was approved on the 24 July 1989 (50 year lease of the area the purpose being described in the formal approval as being for a garage). Whether a car park or a garage it would seem that, from the evidence, the first defendant has not formally used the land in any way.

That decision to grant the lease to Mr Cocker was confirmed and resulted in a lease 4974 which is Exh.15. The evidence I have heard satisfied me that the plaintiffs, having heard of this lease being granted to Mr Cocker, made attempts to rectify the position from their point of view. Approaches were made to the Minister of Lands and then with Mr Cocker himself but again, on the evidence I have heard and again not contradicted, they were repeatedly put off by reassuring noises being made to them. On the evidence I find the Second Defendant did what the second plaintiff said he did namely the Plaintiff was

told that in effect Mr Cocker would be got to sign a release of the lease and then it could be leased to the first plaintiff. The letter Exh.16 written on the behalf of the plaintiffs is again an indication of first the Plaintiffs continued concern and attitude about this land and secondly the attempts they were trying to make to have the position rectified.

In effect the second plaintiff's evidence is the only evidence in relation to these matters. With the one exception of the Land Registry Clerk or employee called, Mr Moala, who gave evidence on behalf of the first defendant. His evidence does not take me any further on this particular issue; and indeed on one other issue which I will come to shortly it assists the plaintiffs. In general terms therefore, I conclude that to the greatest extent the allegations made by the plaintiffs in this statement of claim are made out on the evidence.

Those allegations are supported in very considerable extent by the documentary exhibits, some of which I have already referred to. The only qualification might be that the evidence does not, to quite the extent pleaded, fulfill the second part of para.8 of the Statement of claim. And indeed to some limited extent para.11 of the statement of claim. Those matters, however, do not affect the point which I will come to, which decides the matter in this judgment.

It is claimed on behalf of the plaintiffs, both in the statement of claim and in argument today, that the land having been voluntarily surrendered or relinquished by the plaintiffs' family for the specific public purpose of a community water tank and that purpose now being exhausted that the land should revert to the plaintiffs, because in effect the land was given in trust to the government for the particular purpose and on completion of that purpose it should revert.

Mrs Vaihu for the Plaintiffs traverses certain of the provisions in part IX of the Land Act and in particular section 141. The Crown, through Ms Bloomfield, and Mr Foliaki for the other defendant argue in relation to that, that there is no room in the Land Act for such a notion of trust and therefore of reversion on the exhaustion or completion of the purpose. The argument is that the land in dispute had been lawfully resumed back in 1933 or thereabouts; that it was part of the government estate in any event; it is held properly and lawfully by the Crown; that part IX of the Land Act is silent on any question of reversion of resumed land; that part IX is a complete code and that notions of equity should not, and cannot intrude into it, (finding support for those propositions, in the Privy Council decision in 1981 of O.G. Sanft -v- Tonga Tourist Development Company. [1981-88] Tonga LR.

I have set out the arguments in a little detail because it may be helpful to do so from two points of view. The first from the point of view of the Minister for the reasons which I am going to go on to shortly. The second from the point of view of possible future litigation which I have said may be in the pipe line regarding such matters as water tanks. But I am not going to decide that issue in this case.

I have determined that the decision of the Minister to lease the land to the first defendant should be set aside, in any event, and, therefore, that the lease No.4974 to the first defendant should also be set aside. I am not however (as Mrs Vaihu seeks) going to make an order substituting in effect the first plaintiff as the lessee of disputed area of land. I am satisfied that the decision to lease the land to the first defendant was made in mistake, in ignorance of the applications made earlier that very same year by the plaintiffs for them to lease the disputed area. Made in ignorance of the repeated efforts which seem to me

had been made by the plaintiffs to secure that area for themselves.

On the evidence I conclude that the Minister did not consider the plaintiffs' January 1989 application to lease, and did not hear any representations from the plaintiffs or give them any opportunity to be heard in support of their application to lease the land. The evidence of Mr Moala supports the view that, indeed, the Minister in making the recommendation on Mr Cocker's lease when submitting it to Cabinet was unaware of the application by the plaintiffs of that same year, because Mr Moala said that he believed, from his experience as an officer in the Ministry of Lands, that if the Minister had been aware of both applications (i.e. the plaintiffs and Mr Cocker's) then both would been submitted to Cabinet.

It has long been recognized in this Land Court (and upheld on appeal) that there is ground to set aside (or jurisdiction to set aside) the decision of the Minister of Lands if a mistake has been made. On the evidence I consider such was the position here. I am reinforced in that view by that was said recently in the Court of Appeal in Siaosi Hakeai -v- Minister of Lands & others [1996] Tonga LR Appeal 50/94 Judgment 31 May 1996. And I read from page 3 of that judgment this passage -

> "It is clear law that a person whose rights interests or legitimate expectations are imperilled by an official's consideration of some other person's applications will generally be entitled to a fair opportunity to be heard before a decision adverse to him is made. This is what is known as natural justice. Here although the official of the Ministry of Lands knew the surrender had been arranged to enable him to apply for a grant of the allotments, he was not given any opportunity to argue that he should have priority before the parported grant was made to the Appellant. That was legally wrong. If he had been given the right to comment this whole matter might well have ended then. It is to enable both sides of a case to be considered that the principle of natural justice exists".
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> "But the Minister, on learning what had happened made the same mistake again. He should have given the Appellant an opportunity to answer the claim that his registration was wrong. Instead the Minister simply cancelled it and registered Manuao. That too was wrong. Whenever the Minister has competing claims for the same land, he should be careful to ensure that both sides get a hearing - not of course as in a Court, but an opportunity to put each point of view before a decision is made".
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> "In the present case the successive errors of the Ministry of Lands must lead to an order setting aside the actions taken by the Minister, and referring the matter back to him to enable the appropriate decision to be made, after a consideration of the contentions of both sides".

That passage in my view can be fitted to the case before me. There were competing claims. It was important that the plaintiffs were given the opportunity of making their representations in support of their claim. That did not happen.

I therefore set aside the decision made to lease the land to Mr Cocker and refer the matter back to the Minister to enable him to make the appropriate decision after consideration of all the contentions from both sides. If, as it seems, the public purpose or purposes for which the land was originally resumed is or are exhausted then he will have to consider the competing claims or applications on their merits.

It would seem to me, but it is of course a matter for the Minister, that, there are some

factors here which might be seen as supportive of the plaintiffs' claims. First, there was the history of the plaintiffs' family with this land. Secondly, there is the continuing and documented efforts made by that family to try and have the land made available to them again. Thirdly, there is the fact that they seem to have put effort into maintaining the land notwithstanding the fact it had been resumed by the Crown. Fourthly, it is a small area of land adjoined or surrounded on two sides by the first plaintiff's own leasehold land and that would indicate (the physical layout would indicate) that it is land far more appropriately useable, one might think, by the plaintiffs than by some other persons just leasing the very small corner piece.

I do not intend to say more. As I say it will be for the Minister. But, perhaps, I would also add this. That the learned Assessor sitting with me has indicated that it would be certainly in keeping with Tongan tradition and custom, and certainly as Tongan persons generally would see it, that land voluntarily given for public purposes should go back to, or revert to, the original landholding family when the purposes are expended; or at the very least that that family should have the first opportunity,a s it were the first option, to have back that land. It seems to me that there might be a deal of common sense in that view.

The formal orders of this court then are that the lease No.4974 in favour of the first defendant should be set aside and that the competing claims (the application to lease by the plaintiffs and the application to lease by the first defendant) be referred back to the Minister to be dealt with by him according to law.