Cocker v Palavi & Minister of Lands

Court of Appeal
Morling, Burchett & Tompkins JJ
App. 2/97

16 & 20 June 1997

Land - natural justice - Minister - competing claims
Land - resumption - land court jurisdiction
Practice & procedure - appeal - point not taken below

The judgment below was reported in 1996 Tonga LR. The first defendant below appealed.

Held:

1. The Court below was right in referring the matter back to the Minister of Lands when he had not considered, as he should have, competing claims.
2. The Land Court was not prevented from having jurisdiction by s.149(1) Land Act, that being directed to questions affecting the rights of persons claiming to have interests in resumed land at the time of resumption. Such claims would no doubt give rise to claims for compensation which are reserved for the Supreme Court.
3. Although the point (of jurisdiction) was not taken below this was one of those exceptional circumstances where it was proper to allow the point to be raised.
4. Orders below, with some amendment, confirmed.

Cases considered : Vailala v Futu (1958) 2 Tonga LR 165
Hakeai v Min. of Lands [1996] Tonga LR

Statutes considered : Land Act s.149(1)

Counsel for appellant : Ms Tonga
Counsel for first & second respondents : Mrs Vaihu
Counsel for third respondent : Ms Bloomfield

Judgment

This appeal arises out of the lease of a small area of land at the corner of Wellington Road and Fatafehi Road, Kolofo'ou. It is part of the government estate. It seems to have been voluntarily surrendered to the Crown in 1933 or thereabouts. It was acquired by the Crown for the purpose of building and maintaining a public water tank. This purpose was exhausted about 30 years ago when the tank was no longer required as a source of water supply and the tank thereafter fell into disrepair.

The predecessor of the first and second respondents ("the Palavis") was registered as the holder of all the land in the immediate vicinity of the subject land. It has always been regarded by the Palavis and their predecessors as belonging to their family. Indeed, after the tank fell into disrepair they took steps to make it secure and maintain the land upon which it stands.

The Palavis made enquiry of the Ministry of Lands as to what was to happen to the land after it was no longer required for public purposes. They claim that over a number of years they were encouraged to think it would be returned to them. At one stage they entered into negotiations with the Ministry for a lease of a small part of the land which was overhung by a building erected on their adjoining land.

In January 1989 the second respondent (who is the father of the first respondent) applied for a lease of the land. His application set out in some detail the grounds upon which he relied. He stated the land was next to land leased by his son, that a commercial building was erected on that land, that it was hoped to extend the building on to the land applied for, that "we" (obviously referring to himself and his family) had looked after and maintained the subject land for many years and that the development of the land by the extension of the commercial building would be an improvement to the township of Nuku'alofa.

In May 1989 the appellant applied to lease the subject land. His application was approved on 24 July 1989, and a 50 years lease was granted to him. Apparently, no notification was given to the second respondent of the making of this application.

Upon hearing of the grant of the lease to the appellant the Palavis approached the Minister seeking to have the position rectified. They were informed that the appellant would be required to sign a release of his lease whereupon the land could be leased to them. But apparently nothing came of these discussions and in due course the Palavis commenced proceedings in the Land Court seeking orders that the lease to the appellant be declared null and void and that a lease be granted to them.

At the hearing in the Land Court it was submitted on behalf of the Palavis that the subject land having been voluntarily surrendered for the specific purpose of a community water tank and that purpose being exhausted, the land should revert tothem because the land had been, in effect, given in trust to the government only for that particular purpose.

Hampton C.J. found it unnecessary to decide that point. He found that the decision to grant the lease to the appellant was made in ignorance of the application made almost contemporaneously by the second respondent. He concluded that the Minister had not considered the second respondent's application and had failed to give either of the Palavis an opportunity to be heard in support of it. He accepted the evidence of Mr Moala, a Land Registry Clerk, that the Minister was unaware of the second respondent's application when the appellant's application was submitted to Cabinet for approval. In these circumstances, Hampton C.J. set aside the Minister's decision and referred the appellant's

application back to him to be dealt with according to law.

In doing so, he applied the following observation made by this Court in Siaosi Hakeai v Minister of Lands & others [1996] Tonga LR Appeal 50/94 - judgment 31 May 1996 at page 3:

> "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 by 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 purported 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."

We think His Honour's decision was correct. Indeed, on the hearing of the appeal the decision was supported by counsel for the Minister.

Ms Tonga submitted that since the subject land had been resumed by the Crown for the purposes of a public water tank the Land Court had no jurisdiction to deal with a dispute concerning it. She cited sub-section 149 (1) of the Land Act Cap. 132 in supported of this submission.

The argument based on s.149(1) was not raised in the Land Court or in the Notice of Appeal to this Court. Mrs Vaihu accordingly submitted that we should not allow the point to be raised. She relied on Vailala v Late Futu (1958) 2 T.L.R 165, a decision of the Privy Council, where Hammett C.J. said:

> "We wish to emphasise that we will not allow any grounds of appeal to be raised at the hearing of an appeal lodged by or with the aid of a lawyer other than those set out clearly in the Notice of Appeal save in exceptional circumstances."

However, as Ms Tonga's submission goes to the Land Court's jurisdiction we think this is one of those exceptional cases where it is proper to allow the point to be raised.

Sub-section 149(1) provides:-

> "(1). The Court shall have jurisdiction - (a) to define the area and boundaries of every parcel of land in the Kingdom; (b) to hear and determine all disputes, claims and questions of title affecting any tofi'a, tax or town allotment, or any interest therein; excepting any disputes,claims and questions affecting any land or interest in land resumed by the Crown under Part IX of this Act."

We do not think s.149(1) has any application to the facts of the present case. It is directed to questions affecting the rights of persons claiming to have interests in resumed land at the time of resumption. Such claims would no doubt give rise to claims for compensation, which are reserved for decision by the Supreme Court. But s.149(1) has no application to a dispute concerning a lease by the Crown of land which has been resumed at some earlier point in time.

Ms Tonga also raised the point that in making his formal orders Hampton CJ remited the matter tothe Minister of Lands "for hearing and determination of both applications by first plaintiff and first defendant, according to law", whereas it was the second plaintiff, not the first plaintiff, who made the application in January 1989. This point is validly

made and calls for an amendment to the formal orders. However, we should make it plain that on the reconsideration of the matter it would be proper for the Minister to have regard as a factor to the history of the Palavi family in connection with the land. Also the Minister could consider any further application by either of the Palavis.

Hampton C.J. ordered the appellant to pay the costs of the application in the Land Court. We do not think this order was appropriate having regard to all the circumstances of the case. The appellant was entitled to apply for the lease. It was not his mistake that led to it being granted. It was the Minister's. Under all the circumstances we think that all parties should have borne their own costs of the hearing before Hampton C.J. The appellant should pay one half only of the Palavis' costs of the appeal since he has had partial success, if only on the question of costs. The Minister should bear his own costs.

The orders of this Court are therefore as follows:

1. Order 2 made by Hampton C.J. varied by substituting the words "second plaintiff" for the words "first plaitiff".
2. Order for costs made by Hampton C.J. set aside and in lieu thereof order that all parties to pay their own costs of the proceedings in the Land Court.
3. Otherwise orders made by Hampton C.J. confirmed.
4. Appellant to pay one half of the first and second respondents' costs of the appeal. Third respondent to bear his own costs.