

## Kulitapa v Minister of Lands (No.2)

Land Court, Pangai, Ha'apai

Finnigan J

10 L9/88

13 & 14 March 1998

*Land - when available - required for government purposes*

*Evidence - whether land required - letter from Minister*

20 This is the hearing on the referral back to the Land Court for determination of the issue whether the land is required for government purposes. A letter from the Minister of Lands was produced, from the bar, stating the land was required by the Government as an office and market place.

Held:

1. The letter was recognised as being signed and sealed by the Minister.
2. There was still no lease or registration or anything formal done about government occupancy of the land; and the defendant accepted, that there was a lack of government assurance in occupying the land.
3. The government may want the land but that is different to the issue of whether under s 88 Land Act, the Government has required it for its purposes.
- 30 4. Both use as an office and as the market could constitute government purposes.
5. The onus of proving the requirement is on the defendant, on the balance of probabilities.
6. Proof by certificate by the Minister is not allowed. The letter was the first time a requirement had been claimed and was different to the pleading in the Minister's statement of defence.
7. The other site was available for use by the Ministry of Agriculture and Forestry.
- 40 8. It had not been proved by the defendant that the 'api in question was needed by M.A.F., i.e. required for government purposes.

(A subsequent Court of Appeal judgment immediately follows).

Statute considered : Land Act s.88

Counsel for Plaintiff : Mr Paasi

Counsel for Defendant : Mr Cauchi

### Judgment

The Land Court is sitting in order to decide an issue which was stated for it by the Court of Appeal. I am reading from page 8 of the Judgment of the Court of Appeal. "The issue whether the allotment is available to be granted to the respondent, that is the plaintiff, which will depend upon the Land Court's finding on whether the land is required for Government purposes, is referred back to the Land Court for determination."

So, the question is this: Is the land, the town 'api known as Feletoa required for Government purposes? That issue is an issue of fact as the Court of Appeal has said. I'm reading from page 6 of the Court of Appeal Judgment. "It therefore becomes a question of fact to be determined by the Minister or the Court whether the land is required for Government purposes."

There is further help from the Court of Appeal at page 7 of that Judgment: "It is clear from section 88 that a finding that the land was not required for Government purposes, is necessary before the Court has jurisdiction to make the order directing registration in the name of the respondent i.e. the plaintiff. That finding has not been made on any proper basis. Land that has not been leased or tied up to a Government Department could still reasonably be required for Government purposes. In view of the general nature of the evidence to which we have referred, and in the absence of any clear evidence on behalf of MAF or any other Government Department that the land is so required, this Court is not in a position to make such a finding of fact. This issue will have to be determined in the Land Court."

Now what is the evidence about that issue of fact? The evidence is under a number of headings.

- (1) There are the findings about facts which were made by the Land Court that are relevant to this issue. They are in the Judgment of the Chief Justice, dated 12 March, 1997, subject to whatever was said about those findings by the Court of Appeal.
- (2) Second there is the evidence of the witnesses heard yesterday, so far as it is relevant.
- (3) There is a letter from the Minister of Lands, Exhibit J which was tendered at the hearing by Mr Cauchi.
- (4) For what it may be worth, there is a view which the Court and Counsel took not only of the one 'api Feletoa but the other 'api which was referred to by the Chief Justice in his Judgment and referred to yesterday in evidence.

First so that my Judgment is complete, I will read some passages from the Judgment of the Chief Justice. These are findings of fact which are relevant and which are not contested. I read first from page 6, "The Minister was both Minister of Lands and Minister of Agriculture and Forestry, and MAF had been occupying the particular allotment for some years, but not occupying the allotment, I find, with any degree of assurance. And I note in particular the fact that there was no lease or license or even any sort of letter indicating occupancy by MAF. Let alone any of the formal requirements which Mr Paasi, on behalf of the Plaintiff, points to in relation to the provisions of Part IX of the Land Act, "Land for Public Purposes" and in particular section 138. I note that the Assistant Land Registrar told me that normally a Government Department such as MAF indeed would enter into a lease, as seems to be the case with other land that MAF has here in Ha'apai. From what I am told it is unusual for a Government Department not to have a lease of land

that it occupies, and that to me, points up what I have said to be the lack of assurance in terms of the occupancy by MAF of this land."

The next passage of the Judgment is on page 8, the last paragraph of which is as follows: "Not only the plaintiff's account, but the whole history which I will come to, indicates support for the plaintiff's claim, that he did apply, he was told to wait until MAF moved out, found other land, and that the grant would be made to him then."

I read next from page 9, some of the words in the last two paragraphs as follows: "Insofar as the town 'api was concerned, he was told, though, that he should wait until arrangements were made for MAF to move out. And given the generality of the evidence I have heard from the present and/or ex MAF employees about that time, I find some steps were taken towards shifting (in some respects) towards the other allotment that MAF held on the outskirts of the town. And on which allotment, interestingly, some rather more permanent buildings were erected than are present on the allotment in question in the center of town."

I move to the page 11 of the Judgment where there are more findings of the same sort. On page 11, there are findings about the Fono held at the establishment of the Airport and the re-allocation of land to villagers from Koulo. At the bottom of the page in the second last paragraph the Chief Justice found, "He was told to see the Minister the next day to get registered in Pangai." However as the Judge found on page 11 & 12 the Minister was wearing two hats and was unable to consent to his registration. He found at page 12, "The Government, presumably MAF, wanted the land." At the bottom of page 12 the Judge found the plaintiff was told to be patient to wait in the meantime the Ministry would try and find another piece of Land to move to. There was an entry in the Minute Book for 17th October, 1985 which was equivocal (unhelpful).

Finally, at page 15, the Chief Justice found in the second paragraph and I'm quoting: "Contrary to the defendant, that is the Minister, I find that the land in question is available and was in all material times available, it is not leased, tied up in any way, whether to a Government Department, MAF or otherwise."

That is a finding which was made by the Court, because that is the issue, which was stated for the Court in its Statement of Defence by the defendant. The defendant did not plead that the land was required for Government purposes, but pleaded instead, that the land is not available to be the subject of a Grant. The proper issue at law, however, is the one now being decided by this Court.

The next source of evidence, and the anchor point of the Minister's case is a claim in a letter written subsequently by the Minister, which was tendered as Exhibit I. That letter is as follows: (In part)

The land in question is required by His Majesty's Government to be retained for a Government office and a market-place in accordance with section 88 of the Land Act.

I do hope that this will give evidence to the Court that the land in question is required for Government purposes.

The letter is recognized by the Court as bearing the signature and the seal of the present Minister of Land, Survey and Natural Resources.

The crucial distinction for the Court is the finding of the Land Court made at page 15 of the Chief Justice's Judgement, which is highlighted by the Court of Appeal in page 6 of its Judgement, when that court stated that the Chief Justice had made no express

finding whether at the time of the hearing the land was required for Government purpose. He had found only that the land was available and it was at all material times available.

For the third source of evidence, the Court looks now to the evidence given yesterday by Makafilia Taungatu'a, the Assistant Land Registrar. He gave evidence, that the 'api is the Crown's Land - 'Api Pule'anga. It came back to the Crown after there was no claim for it upon the death of Sateki Palatea in 1940. The Crown took back the land in 1941. The witness said also, that MAF has other land apart from this land and they used it, and he said, that new offices and/or new buildings of MAF are situated on the other allotment. There was evidence also from two other witnesses, one was Seilala Fe'ao, but he told the Court he can add nothing to the evidence because he left MAF in 1993. The only other witness was the plaintiff who gave evidence only of his passion, and his earnest desire to possess the 'Api Feletoa. His passion was warmly acknowledged by Mr Cauchi in submissions. But, as for evidence he knows and cares nothing about whether the land is required by the Government for Government purposes.

So, that is the evidence which the Court has upon which to make its decision. There is still no lease or registration by MAF and nothing formal has been done, even since the Judgement of the Chief Justice, about the Government occupancy of this Land.

In this hearing, following the Judgement of Court of Appeal, the Minister of Land accepts the findings of both this Court and the Court of Appeal about the lack of Government assurance in occupying the land.

The only item that has been added to the evidence since the hearing in this Court, 12 months ago, is the letter of the Minister, which I forgot to note, was dated 30 September, 1997.

Both the plaintiff and the defendant accept the Supreme Court finding, that until now, the Ministry of Land had "wanted" the land. However, the issue for this Court now to decide is whether, pursuant to Section 88 of the Land Act, the allotment is "required" and if so, required for Government purposes. The meaning of the words 'Government Purposes' was considered by the Court of Appeal. It means more than "Public Purposes" in Part IX of the Act. It is a wider and more general term. Well within that term is the building on Feletoa which is being used as the MAF office for Ha'apai. That seems to be so, also for the other item mentioned in the Minister's letter - The Market.

There has been no evidence so far as I know about the market as a Government purpose, except that there is evidence of usage. The market was there from about 1970 as I recall. There was no evidence before the Land Court in 1997 whether a market is a Government purpose so far as I can ascertain from the Judgement. The only evidence before me is the Minister's Certificate in Exhibit 1, that it is a Government Purpose plus the fact that for perhaps 28 years, the Government has provided the site for the market, first on Feletoa for about 27 years and since the Land Act Judgement on its other 'Api. In my opinion, a public market may well be a government purpose and may even be within the narrower term "public purpose" used in section 138, but I have heard no argument about this. For present purposes, I find it is a Government Purpose.

The only question remaining is; Has the Minister established in this hearing that Feletoa is "required" as the site for that office and that market. Another word for required is needed.

Primarily, the Minister relies on his own statement as evidence. As Mr Cauchi stated in tendering that letter, it speaks for itself. It is not sworn. The Minister states that he

hopes it will be evidence that the land in question is required for Government Purposes.

It is only a statement of the very fact which the Minister in defence to the Plaintiff's claim, is praying the Court to find established by the evidence. As the statement of the Minister himself, it is accorded respect and evidential weight. It is a formal document executed by the Minister. However, in these proceedings the Minister as defendant assumes the onus of establishing on the balance of probabilities by evidence that the land in question is required. Unless the law allows proof of facts by the Minister by certificate, the Minister must prove his claims of fact as a litigant.

200 This letter of the Minister dated 30 September, 1997, written after the Court of Appeal stated this issue for determination, seems to be the first time in these proceedings that a Minister of Land has made this claim, that the land is required under section 88.

In the Minister's statement of Defence filed on May 31, 1988, the defendant's relevant pleading was the one I have mentioned, that the land is not available.

Bearing in mind that the onus on the Minister is to establish only on the balance of probabilities, I still do not think that the evidence before the Court at this hearing establishes what the Minister now states. It is the Court's function, in respect for both parties to decide the issue only on the evidence.

210 The only evidence which I have not yet mentioned is the evidence for what it is worth, of the view which the court took of the two allotments used by MAF in Pangai.

Feletoa is presently the site used for MAF's Ha'apai office. The office is in a building situated on the 'api. As well, there is a wooden residence occupied although not at present by the MAF clerk. There are other structures not presently used, both are old buildings. One was the site of the Home Economics classes mentioned in earlier Judgements. It is still usable, but presently stands empty. There is another small unused concrete block building. The market is no longer there. The office building although central, occupies well under one-quarter of the area of the 'api.

220 The market was moved by MAF and I accept that was in compliance with the Chief Justice's Judgement. The court saw that site on MAF's other 'api, or at least on a part of that 'api which is used by the now distinct Department of Fisheries. That site there may be regarded as temporary until this case is decided. It has been there for some months it seems, and could stay there if MAF so decide, although it is less convenient as a site. It is a short distance from Feletoa which I suggest is about 300 meters, but the Chief Justice was accurate in saying that it is on the outskirts of the town. The only current use of Feletoa for which necessity is claimed is the office. There has been little evidence about the office as the Judgements show, but this court has seen it. For MAF's Ha'apai office, there seems to be room on the other 'Api for a small new office building, if one of the existing buildings  
230 can not accommodate the office.

And all the other functions in Pangai of the MAF site or most of them appear to be on the other 'api: there is a training center, there is a machine shed and there is a residence. The market could be where it is and the office could be there if that was what MAF wanted along with the training centre, residence and the machine shed. That is a reasonable view in my opinion, and one reached easily on the balance of probabilities.

240 After careful consideration of the Ministers' statement and after giving it the weight which it is due, I can not find it proved even on the balance of probabilities by the evidence before this court, that the 'api in question is needed by MAF i.e. is required for Government Purposes.

I therefore make the order sought by the plaintiff in the terms that were settled by the Chief Justice on 12 March, 1997. As previously in both this Court and the Court of Appeal, each party should pay its own costs.