IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC 18002

IN THE MATTER of The Declaratory Judgments Act 1988

A N D

IN THE MATTER of the Administration Act 1975

BETWEEN: IONA UIAGALELEI of Matautu-uta for and on behalf of the heirs of UTULAINA SAMAU UPUSE, Domestic, Deceased

Applicant

A N D: THE PUBLIC TRUSTEE as Trustee of the Estate of SAMAU UPUSE of Matautu-uta, Deceased

First Respondent

A N D: SAMAU SOLITAMALII TIMANI of Matautu-uta, Planter

Second Respondent

Counsel: Mr Nelson for applicant
Mr Eti for first respondent
Mr Enari for second respondent

Hearing: 2 November 1994

Judgment: 2 November 1994

JUDGMENT OF SAPOLU, CJ

At the commencement of these proceedings, Mr Enari for the second respondent has made a preliminary submission, namely, that the application for a declaratory judgment in this case is inappropriate because the proceedings involve mixed questions of fact and law. He relies for that submission on the decision in Van Kessel v Human Rights Commission [1986] 1 NZLR 628.

Now before I come to that decision, the question of the appropriateness or otherwise of an application for a declaratory judgment under the New Zealand Declaratory Judgments Act 1908 was discussed by McCarthy P in the case of New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd [1976] 1NZLR 84. At page 85, His Honour said :

> "The Court will not answer purely abstract questions in "anticipation of an actual controversy. It will not deal "with mixed questions of fact and law. The procedure is "designed to provide a speedy and inexpensive method of "obtaining a judicial interpretation where the matter in "dispute cannot conveniently be brought before the court "in its ordinary jurisdiction and where a declaratory "judgment would be appropriate relief. But the procedure "should not be adopted where the party who institutes them "can without real difficulty have the matter in dispute "disposed of in an ordinary action".

That passage from the Court of Appeal decision was adopted with approval by the New Zealand High Court in the case of Van Kessel v Human Rights Commission cited by Mr Enari in support of his submission.

I must say that this point was adverted to by this court in its recent judgment in the case of Leota Leuluaialii Ituau Ale v Afamasaga Fatu Vaili, an unreported judgment delivered by this Court on the 29th of June this year. At page 8 of that judgment I said :

> "The question in dispute whether the respondent did or "did not terminate the applicant's parliamentary seat "is a question of pure fact. In general, the Courts "are disinclined to make declarations on pure questions "of fact, especially where the facts of a case are in "dispute".

I then referred in that judgment to the authorities cited by Mr Enari, namely, Kessel v Human Rights Commission and New Zealand Insurance Co Ltd v Prudential Assurance Co Ltd as well as other authorities.

It appears to me that the declaratory judgment sought by the applicant in this case relates to factual issues which are strongly contested by the respondents. And from the New Zealand authorities I have stated, it is clear that in such a situation, the declaratory judgment is not the appropriate relief and the originating summons in those cases were struck out.

Looking at this case, the first declaratory judgment is sought to declare the applicant as the sole heir of Samau Upuse through Utulaina his daughter in accordance with the Samoan custom.

There is no doubt in my mind that factual issues are involved in that question. And it may be disputed on the facts whether the applicant was adopted in accordance with the Samoan custom, and, if so, whethere he or she can be described as an heir of the owner of the estate. Then there is also an application for a declaration that the second respondent has no beneficial interest in the estate of Samau Upuse; it is clear to me that that application would also involve disputed questions of fact and not merely questions of law (if any).

I refer also to section 4 of the Western Samoa Declaratory Judgments Act. I have perused that section during the short adjournment taken by the Court and it is my clear view that that provision does not assist the applicant either. So eventhough the second respondent has raised a preliminary submission for the first time before the commencement of this case, and the applicant, as his counsel says, has been caught by surprise, I have come to the view that the submission must succeed, considering the authorities that I have referred to as well as the wording of section 4 of the Declaratory Judgments Act 1988.

The application is therefore struck out. Costs are awarded to the second respondent in the sum of $200.

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CHIEF JUSTICE