

FINE HAFO'OU v. 'AISEA FOTU.

(Land Court. Richardson J. Vava'u, 5th March, 1948).

Tax and town allotments — Simultaneous claims — Promise by Tofia Holder — Equitable adjustment — Grant not to exceed statutory area

This was a claim for the registration of tax and town allotments on behalf of the plaintiff. The previous holder of the Tofia had promised the Plaintiff a certain area as a town allotment but died before registration. The Plaintiff had also applied for an area as a tax allotment. There was considerable delay in the Minister for Lands Office and before the application was granted the defendant applied for a tax allotment from the same area. Both applications were granted and registered on 13/11/49. The Plaintiff claimed that as his application had been prior in time he should have been given first choice of the site.

HELD: With regard to the town allotment the present Tofia holder was bound by his predecessor's promise and with regard to the tax allotment the priority of the Plaintiff's application gave him a right to be treated on an equal footing with the Defendant.

Havili appeared for the Plaintiff.

V. Tu'ifua appeared for the Defendant.

RICHARDSON J.: This action is concerned with two quite separate claims, (a) in respect of a town allotment known as Ma'u-he-'Ofa, and (b) in respect of a tax allotment known as Fa'akape. With these two claims it is convenient to deal separately:—

(a) The town allotment known as Ma'u-he-'ofa. Confusion has arisen over the question of the nature and extent of an area in the town of Leimatu'a known as Funga-Saione. Plaintiff alleges that this area was considerably larger than a statutory town allotment but that previously it had been occupied by the late Fotu as his town residence: it was not however registered by Uotu as a town allotment as he had one elsewhere in Neiafu. Shortly before his death Plaintiff alleges that the late Fotu discussed with him and Plaintiff's counsel the matter of the provision for Plaintiff of a Town Allotment, and promised that he would divide the area of Funga-Saione into two portions, retaining the southern portion for himself and giving the northern portion which he named Ma'u-he-'ofa to Plaintiff. The late Fotu did not inform the Deputy Minister of Lands of this sub-division of Funga-Saione nor of the naming of the area Ma'u-he-'ofa, and shortly afterwards before Plaintiff could fix matters up legally with the Deputy Minister of Lands the late Fotu died and with him disappeared the evidence of his intentions. Consequently when the present Fotu agreed to give this area to his son the Defendant for his town allotment and Defendant came to register it the Deputy Minister of Lands was faced with two claimants for what appeared to him to be the same area, and quite rightly gave first choice to the son of the present Fotu and refused the Registration of Plaintiff. Later Plaintiff succeeded in registering an area which he called Ma'u-he-'ofa, but the Deputy Minister of Lands cancelled this registration when he discovered that he had no official knowledge of more than the one area Funga-Saione.

Defendant admits that the area of Funga-Saione was greater than a statutory town allotment but is reluctant to surrender the remainder voluntarily to Plaintiff. Furthermore the present Fotu states that he is not agreeable to the grant of a portion of Funga-Saione to Plaintiff as his town allotment but will give him one elsewhere.

I find that the area of Funga-Saione has not previously been granted out as a town allotment, and is therefore not subject to the laws relating to the devolution of allotments. In November 1944 it was still part of the Tofi'a holder's estate and therefore at the disposal of the Estate holder. I find therefore that the grant to Defendant was legal and binding to the extent of a statutory town allotment: the grant however cannot purport to convey to Defendant more than the statutory area and the rest must remain for the time being in the estate.

I accept the evidence of the Plaintiff however as to the intentions of the late Fotu and believe that he did intend that Plaintiff should be granted a portion of Funga-Saione as his town allotment. This consent of the late Fotu was given before his death and had there not been delays Plaintiff could doubtless have effected registration. I find therefore that, despite the present Fotu's opposition to this sub-division he must be regarded as being bound by his predecessor in title's decision in this matter and that therefore Plaintiff has a right to a portion of the area known as Funga-Saione, such portion being that which was referred to as Ma'u-he-'ofa.

In order to determine the areas of the portions to which Plaintiff and Defendant are entitled as their respective town allotments I do direct that the whole area of Funga-Saione be surveyed afresh and that there be first demarcated therein the town allotment of Defendant which shall be of the normal statutory area and that Defendant shall register this allotment so surveyed as his town allotment and that the registered name thereof shall be "Funga-Saione". When this has been done I do direct that the survey shall continue over the balance of the old area Funga-Saione and that the balance thereof up to a maximum of the statutory area of a town allotment shall be demarcated and shall be known as "Ma'u-he-'ofa" and that the Plaintiff shall be entitled to register this area as his town allotment in that name. Should there be any further portion of the former area of Funga-Saione remaining over after the demarcation of these two statutory town allotments it shall revert to the estate of Fotu and shall be at the disposal of the present or any future holder of the title. Pending survey I do further order that the Deputy Minister of Lands and the Estate Holder shall demarcate the parties' respective town allotments in this area by rough demarcation on the ground of areas measuring 66 yds x 66 yds in the presence of both Plaintiff and Defendant in person, such demarcation to follow the order and form specified above for survey.

(b) The Tax Allotment known as Fa'akape. The former tax allotment known as Fa'akape on Fotu's estate at Leimatu'a is said to be of an area sufficiently large for at least two statutory tax allotments of $8\frac{1}{2}$ acres. Both parties made application for the grant of tax allotments out of the area of Fa'akape which, at the time of these applications, had been recovered by the Estate Holder, the late Fotu, from a widow who had forfeited her rights thereto under Section 70 of Cap. 27 and was therefore available for allocation. It has been established beyond all reasonable doubt that the application of Plaintiff for a tax allotment in this area was made some considerable time before that of Defendant and that therefore Plaintiff has an equitable right to first choice of the land available. Owing to delays in the office of the Deputy Minister of Lands however Plaintiff was unable to obtain his allotment until after Defendant had lodged his application for an allotment and both applications were considered together, the division of the land between the two made in November 1944 and both allotments registered on the same date on 13th November 1944.

Plaintiff however claims that his prior right to first choice of the available land was not respected in that Defendant was granted the area which faces onto the road frontage whilst Plaintiff was granted the back portion away from the road and adjacent to other allotments with the owners of which arguments are likely to arise as to the boundary. Plaintiff does not claim the right to a complete interchange of allotments with Defendant but only asks for a fair share of the road frontage and for the back portion to be shared between them.

I find that Plaintiff has satisfactorily established his claim to a first choice of the available land of Fa'akape and that if he so wishes he is entitled to at least an equal share with defendant of the road frontage in the vicinity.

I therefore order that the registrations of both Plaintiff and Defendant of 13th November, 1944 be cancelled and that a fresh sub-division of Fa'akape and fresh grants of tax allotments to the two parties be made as follows. Fresh demarcation of two tax allotments shall be made by the Deputy Minister of Lands and the Estate Holder Fotu in the presence of both parties in person giving to each party an equal share of the road frontage. Each tax allotment shall then be demarcated running back from the road frontage for such distance as may be necessary to give to each party a tax allotment of $8\frac{1}{2}$ acres only. Any balance of land that may then remain over shall revert to Fotu, the estate holder, to dispose of according to law. The two parties shall then re-register as their tax allotments the two areas facing onto the road frontage thus demarcated. Demarcation shall be by rough measurement in the first instance in accordance with local custom and shall be confirmed at as early a date as possible by accurate survey to be carried out by the Survey Department.

Judgment in this case is largely in favour of the Plaintiff, but in view of the fact that the case has been occasioned more by the action of the Deputy Minister of Lands acting in his official capacity and not as a private individual than by any wrongful action on the part of Defendant I make no order as to cost and consider that each party should bear his own costs.
