TAUFA v VILINGIA, TUPOUTO'A, AND MINISTER OF LANDS

Land Court, Ha'apai
Harwood J
Land Case No. 2/83

24 October 1984

Land - application for grant must be considered by Minister

Land - application for succession made later than 12 months from death of previous holder - cancellation of registration

Registration - cancellation of registration made on basis of application to succeed made more than 12 months after death of previous holder.

The elder brother of Taufa was the holder of a tax allotment, and when he died in 1981, without issue, Taufa made an application for the tax allotment in February 1982, but for some reason, possibly because of the effects of a disastrous cyclone, this application was not considered by the Minister.

In August 1983 Vilingia, who was the son and heir of the eldest brother of Taufa, made an application to succeed to the tax allotment, and this was granted by the Minister. Taufa applied to the Land Court to cancel the registration of the grant to Vilingia.

HELD:
Upholding the plaintiff's claim

(1) The registration of the first defendant to the tax allotment by virtue of succession must be cancelled, because the application had been made more than 12 months after the allotment holder had died, so that the allotment had reverted to the holder of the hereditary estate by virtue of section 81 (now section 87) Land Act.
(2) The plaintiff was entitled to have his application considered by the Minister and he could submit a fresh application by 31 December 1984.
(3) If the plaintiff submitted a fresh application by the prescribed date it would be of equal status with that of first defendant, and both applications must be

considered by the Minister on their merits.

(4) If the plaintiff failed to submit a fresh application for the allotment the registration of the first defendant would be restored.

Statutes considered

Land Act, ss43, 76 and 81 (43, 82 and 87 of 1988 Rev Ed)

Counsel for Plaintiff: Mr Talanoa
Counsel for First Defendant: Mr Palu
Counsel for Second Defendant:
Counsel for Third Defendant: Mr Martin

Harwood J:

Judgment

This case concerns a claim to part of the estate of Crown Prince Tupouto'a on the island of Nomuka. The only pleading is the Summons taken out by the Plaintiff. Apart from giving evidence himself, the Plaintiff called the Assistant Land Registrar, Ha'apai, as a witness. Although I permitted the First Defendant to testify, his evidence was of but little assistance towards elucidating the material issues for my decision raised by the Plaintiff in his Summons and as they emerged in the course of the hearing. Assistance is, however, to be gained from a form of "family tree" agreed by all parties and tendered in evidence.

The Plaintiff claims to be entitled by succession to two allotments, namely, a town allotment named "Talaheu" and a tax allotment named "Mata'au". Both allotments were duly registered in the name of Tevita Taufa, an elder brother of the Plaintiff, on 13 May, 1943. These bare details of registration endorse the Plaintiff's recollection of the devolution of both allotments, for he stated that they were granted to Tevita Taufa by the (then) Crown Prince Tupouto'a-Tungi at a meeting attended by himself, Tevita Taufa and Sione Vilingia (his brothers in ascending order of age) whereat Crown Prince Tupouto'a-Tungi declined to grant them to the eldest brother because he already had an allotment of his own, granting them instead to Tevita. However, it would appear from the Summons, and from the Plaintiff's evidence, that he is not aware of what really occurred after that. In fact, "Talaheu" must have become split into two parts because one part named "Kong-'o-Talaheu" was registered on 19 February, 1948, in the name of the eldest brother Sione Vilingia who then predeceased Tevita Taufa. The devolution of that part thereafter is obscure; indeed the Assistant Registrar, in his evidence, stated that very few of the town allotments in Nomuka have ever been registered and that neither part has since been registered at all. It is not clear which part, if not both, the Plaintiff is claiming by his Summons - and the Summons incorrectly alleges that "Talaheu" has been registered in the name of the First Defendant. But the Plaintiff also claims the tax allotment "Mata'au" and alleges (correctly) that it has been so registered. He says that both "Talaheu" and "Mata'au" were originally owned by his grandmother and considers it somewhat unfair that they should be granted to a distant male heir of his eldest brother instead of to himself, and later his heirs.

On or about 23 October, 1981, Tevita Taufa died leaving no issue. At this time Sione Vilingia's son and heir, Ma'afu, was resident in the U.S.A. The applicable rule of succession is to be found in section 76(e) of the Land Act, and under that paragraph Ma'afu was prime facie entitled to a grant by succession. Nevertheless, according to the Plaintiff's evidence, when Tevita Taufa died he received a letter from the lawyer of Crown Prince Tupouto'a as a result of which he swore an affidavit and filled in an application form in February, 1982, in Nuku'alofa. He was applying for the tax allotment Mata'au, but it is not clear precisely which town allotment or allotments he was applying for. He says that he left these two documents with the land agent of the Crown Prince to be processed and was told to "occupy the land". He therefore went to Nomuka, entered into occupation, but returned to Nuku'alofa in March, 1982, to see the land agent, only to be told that he must wait, until after receipt of an anticipated claim by Ma'afu, for a decision. He waited in vain.

Meanwhile, on 14 April, 1982 unknown to the Plaintiff an heir's affidavit was sworn by Silia Hola on behalf of Ma'afu, but this was not apparently dealt with until 10 August

1983 when it was rejected by Hon. Ve'ehala the (then) Governor of Ha'apai

The Plaintiff continued his evidence by saying that, having heard nothing, he came again to Nuku'alofa in October or November 1982 to pursue his application but was told by the land agent to wait further until the expected arrival of Ma'afu from the U.S.A. He returned to Nomuka and remained there until his final visit to Nuku'alofa when he saw Hon. Ve'ehala, only to be told that the grant he was seeking had already been made to the first Defendant and that "all has been done, there's no other door but to claim in Court". He said that, thereupon, the Governor phoned the Crown Prince and afterwards told him to go and see the Crown Prince, which he attempted (unsuccessfully) to do at the Palace - and that he was merely told likewise by one of the staff there that he would have to claim in Court. The next day the Plaintiff gave instructions to a lawyer to commence proceedings in the Land Court. Despite the lact of documentary and other independent evidence to support the Plaintiff's account of his actions in this matter, I am quite satisfied that his evidence should be accepted; it is borne out to some extent by the preparationof the affidavit of 14 April 1982, by the registration of the grant of "Mata'au" to the first Defendant on 10 August, 1983, and the filing of the Summons in Ha'apai on 7 November, 1983, and his account is sufficiently detailed and cogent to convince me that it is probably true. Accordingly I am satisfied that the Plaintiff did all that was strictly necessary to apply so far as the submission of documents is concerned.

Now the first Defendant made no application for the grant of any of the land heldby Tevita Taufa until after the expiry of 12 months from the latter's death. His application for the grant of "Mata'au" was produced by the Assistant Land Registrar and it is dated 5 August, 1983; that allotment had by that date reverted to Crown Prince Tupouto'a as estate holder by virtue of section 81 of the Land Act. His application incidentally was also strictly not correct in stating, as it did, that he was then over 18 years of age.

The first Defendant's application shows that it was approved, almost immediately, by Hon. Ve'ehala on 10 August, 1983, and the land register shows registration of "Mata'au" to the first Defendant the same day. It seems to me quite evident that, when he signified his approval, Hon. Ve'ehala was probably completely unaware of the similar claim by the Plaintiff that had been outstanding for more than 12 months, and was possibly not aware either that he was dealing with the claim of a potential heir made more than a year after the death of the last holder. I can understand the disappointment of the Plaintiff at the seeming neglect of his own application and how incomprehensible he may have found the decision to award the grant of "Mata'au" to the first Defendant; at the same time I imply no criticism of Hon. Ve'ehala, nor necessarily of others concerned with the processing of the Plaintiff's application, for the Plaintiff's documents may have perished or become mislaid as a consequence of hurricane Izaac which struck the Kingdom only about 1 month after the Plaintiff says he first lodged it.

With regard to the Plaintiff's application for the whole or part of "Talaheu", that allotment has not, as I have indicated, been registered to the first Defendant as the Plaintiff alleges - though according to the first Defendant he has applied for the grant. The Plaintiff is free to do likewise if he wishes (for that allotment also would appear to have reverted to the Crown Prince by virtue of section 81) subject of course to the provision of section 43(1) whereby no entitlement can arise in favour of the Plaintiff if he already has a town allotment. It emerged in the course of his evidence that the Plaintiff may already have a town allotment of his own and be disentitled for that reason to apply.

In my judgment the first Defendant, by reason of his late application and section 81, had no right to a grant by descent from Tevita Taufa; nor did the Plaintiff, by reason of section 76(e). It follows that the applications of both these parties for the grant of "Mata'au" were of equal status under section 43(1) for neither of them appears on the evidence to possess a tax allotment of his own. In accordance with natural justice the Plaintiff is entitled to a fair adjudication of his application alongside that of the first Defendant, yet his (the Plaintiff's) application for some reason never achieved the opportunity to be considered. As I have said, I am satisfied that the Plaintiff did all that was necessary in order to apply; I am also satisfied that there has been a failure of natural justice.

Accordingly, the Plaintiff's claim for cancellation of the registration of the grant of "Mata'au" to the first Defendant succeeds on the ground alleged in paragraph 3 of the Summons and I order the cancellation of that registration forthwith. I further order -

(1) that the Plaintiff must, on or before 31st December, 1984, submit (in proper form and in accordance with the normal procedure) such fresh application as he desires with regard to the tax allotment "Mata'au";

(2) that if the Plaintiff makes such application it is to be considered together with the corresponding application already made by the first Defendant, and both applications are to be decided on their merits; failing such an application by the Plaintiff, the registration of the grant of "Mata'au" to the first Defendant is to be restored in favour of the first Defendant as soon as practicable after 31st December, 1984;

(3) that, if entitled to a grant of the whole or part of "Talaheu" by virtue of section 43(1) of the Land Act, the Plaintiff must, on or before 31st December, 1984, submit (in proper form and in accordance with the normal procedure) such fresh application with regard to "Talaheu" as he desires;

(4) that if the Plaintiff makes such application it is to be considered together with the corresponding application already made by the first Defendant, and both applications are to be decided on their merits;

(5) that registration of the grant of "Talaheu" is to be effected in favour of the grantee (if any) as soon as practicable after the decision ordered in paragraph (4) above is reached, or the 31st December, 1984, whichever sooner occurs.

I give judgment in those terms for the Plaintiff, with liberty to all parties to apply for the purpose of the working out (if necessary) of these orders.