

Pahulu v Mottini & anor

Land Court, Nuku'alofa

Lewis J

L.201/96

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21 October, 5 December, 1996

*Land - Tongans - non Tongan cannot hold
Nationality - take another - loss of rights*

The plaintiffs, citizens of the U.S.A., were father and son, the father being registered as the holder of a town allotment on which the first defendant ran a business. The second defendant, a younger brother, of the first plaintiff, had held a lease from his mother over the allotment, from her widow's interest in the land. She died in May 1995. The second

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defendant applied for the land, as heir, in July 1995 and leased to the first defendant (who had been leasing from the widow since March 1994). The first plaintiff was granted the land, and registered, however:

Held:

1. The question was whether the first plaintiff was a lawful registered holder of the allotment.
2. The first plaintiff (and by operation of law, his son the second plaintiff) became US citizen(s) in 1971 and by s.4 Nationality Act they ceased to be Tongan subjects and that the rights accrued by operation of the Land Act were extinguished for both father and son. Only Tongan subjects can hold tax and town allotments.
3. Upon the voluntary taking by a Tonga subject of the nationality of another state that person ceases to be a Tongan subject and while the obligations as a Tongan remain with the person the rights he formerly possessed as a Tongan are extinguished.
4. The registration of the first plaintiff should be cancelled and the second defendant registered instead.

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Statutes considered : Land Act s.82, 2, 80, 42, 11, 87
Nationality Act ss.5, 59

Counsel for plaintiffs : Mr L Folihi
Counsel for defendants : Mr Niu

Judgment

The facts in this land case are not in dispute. The plaintiffs are citizens of the United States of America domiciled in Pasifica, California. The defendant is a resident of Nuku'alofa Tonga and is the owner of the "Fasi Moe Afi Guest House" and the "Italian Restaurant" at Fasi Moe Afi.

The first plaintiff is the registered holder of a town allotment located in Fasi Moe Afi. The first defendant carries on business from a building on the allotment. An issue in this case is whether the first plaintiff is the lawful registered holder of the allotment. The first defendant alleges that the first plaintiff may hold the deed of grant but he does not hold the allotment legitimately since he is now not a Tongan subject. Lata-i-anamanu Pahulu held a widow's interest in the subject land following the death of her husband Paula Lava Pahulu. Lata died on 31 May 1995.

A "Residential Lease" dated 14.3.94 between Lata and Feleti Alani Kupa Pahulu her son, is exhibited to Feleti's affidavit. Feleti the second defendant is the second eldest legitimate son of son of Lata and the deceased holder Paula Lava Pahulu. The first plaintiff Sione Folaumoelau Pahulu was at all material times the eldest legitimate son of Lata and Paula Lava.

On 6 July 1995 Feleti filed an affidavit of heir in respect of the land in question. His mother having died on 31 May 1995, the affidavit of Feleti was within the limitation imposed on heirs claims by The Land Act Cap. 132 S.5.

On 7 July 1995 the second defendant Feleti and the first defendant Mottini executed a document entitled "Agreement to continue tenancy agreement". The document appears to be intended to secure the tenancy of the first defendant on the subject land by -

- Accepting and endorsing the terms of the "Tenancy Agreement" dated 14 March 1994 (between Anamanu Pahulu and the first defendant Mottini) as their own Agreement, and,
- By recording the payment of certain rents and making arrangements for further payments of rent due,

Thereby purporting to affirm the continuation of the tenancy and rights of the parties pursuant to the agreement of 14 March 1994 until 30 June 1997. On 19 March 1971 the first plaintiff became naturalised as a citizen of the United States of America. At that time, the second plaintiff, his son was under the age of 16 years and by operation of the law of the United States of America acquired American Citizenship.

The issue arising from the facts of this case is one of law. The question which the facts pose amounts to this:-

"Does a person born to a father who has relinquished his Tongan nationality lose rights he possessed while a Tongan subject to succeed to his father's town allotment pursuant to the Land Act Cap 132 Section 82?"

The Land Act Cap 132 Section 82 provides as follows:-

82. Subject to the life estate of the widow, the succession to a tax or town allotment shall be as follows:
- (a) descent shall be traced from the last lawful male holder;
 - (b) only persons born in wedlock may inherit;
 - (c) the inheritance shall descend in the first place to the eldest son of the deceased holder or if such son is dead to the eldest male heir of the body of such son. If the eldest son of the deceased holder be dead without

leaving any male heir of his body the succession shall devolve upon the next eldest son of the holder or if such son is dead to the eldest male heir of such son's body. If the second son of the deceased holder be dead without leaving any male heir of his body the succession shall go to the next eldest son of the deceased holder or the eldest holder or the eldest male heir of his body and so on taking all the deceased holder's son in succession in order of their ages;

- 100 (d) if the holder dies without leaving any son of heir male of the body of a son him surviving then any unmarried daughter of the deceased holder shall inherit for the life and if there are two or more unmarried daughters they shall inherit all together jointly for their lives. The life estate of any daughter shall terminate on her marriage or upon proof in proceedings against her in the Land Court to recover such allotment (after the manner provided in section 81) that she has committed fornication or adultery;
- 110 (e) in default of any unmarried daughter of the deceased holder an allotment shall descend to the deceased holder's brother or if such brother be dead to the eldest male heir of the body as such brother. If the deceased holder's eldest brother be dead without leaving any male heir of his body then the holder's next eldest brother shall succeed or if he be dead the eldest male heir of his body and so on taking the deceased holder's brothers in succession in order of their ages;
- (f) if the holder dies without leaving any brother or heir male of the body of a brother him surviving the inheritance shall go to the eldest brother of the deceased holder's father or if such brother be dead to the eldest male heir of the body of such brother. If the eldest brother of the deceased holder's father be dead leaving no male heir of his body then the next eldest brother of the deceased holder's father shall succeed or if he be
- 120 dead the eldest male heir of his body and so on taking the brothers of the deceased holder's father in succession in the order of their respective seniority;
- (g) in default of brothers of the deceased holder's father or male heir of the body of such a brother the allotment if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder thereof;

130 Provided always that the failure of the deceased lawful male holder of any tax or town allotment to register the same under the provisions of Division II or Part VIII of this Act shall not of itself be a bar to the grant to his heir under this section, and that provided the Minister of Lands is satisfied upon enquiry that the deceased person was the lawful holder of the said allotment it shall be lawful for him to effect posthumous registration at the request of the heir*.

The Nationality Act Cap 59 S.4(1) provides as follows:-

*A Tongan subject who when in any foreign state and not under disability by obtaining a certificate of naturalization or by any other voluntary and formal act becomes naturalized therein shall henceforth be deemed to have ceased to be a Tongan subject.

140 (2) A female Tongan subject who married an alien, and exercises her right to

acquire the nationality of her husband, and does in fact acquire the nationality of her husband, shall cease to be a Tongan subject from the date on which she acquires foreign nationality".

Section 5 of the Nationality Act provides:-

"5. Where any Tongan subject ceases to be a Tongan subject he shall not thereby be discharged from any obligation duty or liability in respect of any act done before he ceased to be a Tongan subject".

150 It seems to me that the plain effect of section 4 of the Act is to bring to an end any rights enjoyed by a Tongan subject by reason of his being a Tongan subject prior to his acquiring another nationality. Section 4 "deems" him to be no longer a Tongan subject by operation of law without any other act taking place. It is an Act designed to have quite profound consequences including the preservation of liability with the destruction of rights.

I conclude that the first plaintiff ceased to be a Tongan subject as and from 19 March 1971. I conclude and find that as of that date his rights accrued as a Tongan subject by operation of the Land Act were extinguished as were those of his son and first heir the second plaintiff. The second son Feleti (the second defendant) remained a Tongan
160 subject.

The plaintiffs argue that the Land S.82 does not preclude any person who is no longer a "Tongan Subject" from having rights which may devolve to legitimate successors provided that they qualify in accordance within the provisions of the Land Act.

The plaintiffs submit that the intent of the legislature was not to exclude former Tongan subjects from the operation of the devolution provisions of the Land Act. There is, the plaintiffs claim, no differentiation for present purposes in the Land Act scheme of devolution of allotments between Tongan and former Tongan subjects.

170 The defendants submit that this dispute concerns both a town allotment and a tax allotment, that the Constitution has since 1875 always draw a distinction between Tongans and "Non-Tongan" subjects - (Foreigners or Aliens) and that only a Tongan subject may be a lawful holder of a Tax allotment. Those submissions are correct.

The Land Act (hereinafter "The Act") Section 80 makes provision for events upon the death of the lawful male holder of any town or tax allotment. As the defendants point out a lawful male holder is a person who holds or is granted a town and tax allotment in accordance with the provisions of the Act.

180 As can be seen from the provisions of S82 of the Act (Supra), descent shall be traced from the last lawful male holder and the defendants submit that if the deceased was not the lawful holder then no right of succession from him may be secured by a person claiming under him virtue of the provisions of S 82 of the Act.

Division II of the Act makes provision for the devolution of hereditary estates. And clear proscription is written around the part in Section 42. Which provides -

"42. Nothing in this part of this Act shall apply to to any person not of Tongan nationality".

The Defendants point out that S.11 of the Act enables the King in Council to grant hereditary estates to any person who may not be a Tonga subject, whereas the intention of Parliament is plain and unambiguous - only Tongan subjects may hold tax and town allotments.

190 In his closing submission Mr Niu emphasises that Parliament has drawn the Act in

such a way so as to enable a choice to be made by Tongan male subjects in the taking up of tax and town allotments - S.87 of the Act enables a lawful heir to choose not to take up an allotment and if within the passage of twelve months he has not taken up the allotment which may legitimately be his then the allotment reverts to the crown. The defendants draw an analogy between the provisions of S.87 of the Act with the free choice exercise by a Tongan subject who decides to become a national of another state.

200 I conclude that Parliament in enacting the Nationality Act, has spoken in clear and unambiguous words. Upon the voluntary taking by a Tongan subject of the nationality of another state the person ceases to be a Tongan subject and while the obligations as a Tongan remain with the person I conclude that the rights he formerly possessed as Tongan are extinguished. I so rule. I will hear counsel as to the appropriate orders in consequence of this ruling.

Later, in Court (after argument)

It is ordered that:-

- 210 1. The Hon. the Minister of Land cancel the registration in respect of the land the subject of this claim and in place of the First Plaintiff, Register the Second Defendant, Feleti 'Alani Kupa Pahulu as holder forthwith.
2. The Costs of these proceedings be those of the first and second defendants to be taxed or agreed.