

Tu'ipulotu v Kingdom of Tonga

Supreme Court, Nuku'alofa
Hampton CJ
C 237/96

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9 April, 22, 28 May, 11 July, 29 August 1997

Hereditary estates and titles - jurisdiction of Land or Supreme Court
Royal prerogatives - not subject to judicial review
Constitution - position of Monarch - royal prerogatives

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The plaintiff sought an order directing the defendant to publish in the Gazette, in the name of the King, that the plaintiff was the lawful successor to the noble title and estates of Niukapu. The defendant applied to strike out the action.

Held, striking out the action.

1. The matters were not within the jurisdiction of the Supreme Court but in that of the Land Court, being matters which related to questions of title affecting land and related to the determination of hereditary estates and titles.
2. The named defendant had no power to make the publication sought. Such publication was within the sole prerogative of the King; and had nothing to do with the exercise by the King of his role as a member of the executive branch of the Government of the Kingdom.
3. Leave to apply for judicial review and leave to amend (to name the King as a defendant) should be refused as well for the reasons above and for the reasons that the King cannot be sued (the Courts are his Courts and can have no jurisdiction over him) and that the King cannot be subject to judicial review (the exercise of jurisdiction and power by the Courts under the prerogative writs is the exercise of a part of the Royal prerogatives assigned to the judiciary by the King).

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Statutes considered : Constitution clauses 36 to 49, 51, 54, 56, 61, 50, 90, 91, 92, 112
Land Act, ss 11, 22, 38, 39, 40, 57, 141, 143, 149, 162
Court of Appeal Act, s11
Crown Proceedings Act, s5

Counsel for plaintiff : Mr Niu

50 Counsel for defendant : Mr Taumoepeau

Judgment

This is an application to strike out these proceedings on the basis, as set out in the motion:

- (1) that the statement of claim does not disclose any reasonable cause of action against the defendant;
- (2) the claim has no basis in law as against the defendant;
- (3) the defendant has no power, in law, to carry out the orders prayed for in the statement of claim, because the law does not vest in the Government of Tonga the power to cause the gazetting of the appointment of any noble.

I have reached the view that these proceedings must fail and will be struck out; and I have reached that view on a number of bases.

First, Central to, and essential to, the claim as set out in the statement of claim, (whether in its original, or it's now proposed amended form) is the assertion that the Kingdom of Tonga (in the statement of claim) or the Kingdom of Tonga and His Majesty the King (in the proposed amended statement of claim) has or have failed to publish the plaintiff's name in the Gazette, pursuant to s.38(1) Land Act. In referring to the statement of claim I refer in particular to paras. 14 & 15 and prayer (c); and in terms of the proposed amended statement of claim to paras 14 & 15 and prayer (c). I will read the following paras. from the statement of claim (they are, in fact, the same in the proposed amended statement of claim):

"3. Section 38 of the Land Act (Chapter 132) provides (where relevant) as follows:

38.(i) Upon the death of a holder of an hereditary estate ..., His Majesty shall cause the name of the lawful successor to the title of such holder to be published in the Gazette together with the date of his succession thereto which shall be the day following that on which the death of the holder took place ..."

4. Section 39 of the Land Act also provides as follows:

"39. The successor to the title if he has attained the age of 21 years shall as from the date of succession published in the Gazette possess and enjoy the hereditary estate appurtenant to the title to which he has succeeded together with the rents and profits thereof and all other rights and privileges attached to the title."

5. His Majesty did not cause the name of the Plaintiff to be Gazetted. He instead caused the name of one Kanitesi Mahe to be gazetted and he, the said Kanitesi Mahe, possessed and enjoyed the hereditary estate of the title and of the rents, profits rights and privileges thereof.

6. The appointment of Kanitesi Mahe took place on 4/9/89. The Plaintiff brought an action in the Land Court on 16/9/92 claiming the title and estate from him. On 28th April 1994 the Land Court gave judgment in favour of Kanitesi Mahe and dismissed the Plaintiff's claim. The Plaintiff appealed to His Majesty in Privy Council and on 28th April 1995, His Majesty and Privy Council upheld the appeal of the Plaintiff and ordered as follows:

- "1. The appeal be allowed, and the orders made by the Land Court on 28th April 1994 be set aside;
2. It be declared that the appellant was entitled to succeed, upon the death of his father, to the title and estate of Niukapu;

3. Each party bears his own costs of the action and of the appeal."
14. The failure of the Defendant to make the publication of the Plaintiff's name in the Gazette in accordance with s.38(1) of the Land Act has resulted in the deprivation of the right of the Plaintiff to the emoluments to which he would otherwise have been entitled. He is properly entitled to those emoluments together with interests at 10% per annum thereon from the date upon which they were payable until payment of the same.
15. The said failure has further resulted in deprivation of the right of the Plaintiff to hold and enjoy the lands of the estate appurtenant to the title. To date he has not been consulted with regard to grants of tax or town allotments or of leases out of those lands, and he has not been allowed to draw or receive the rents and profits of those lands. He is entitled to those rents and profits as from the day when they were received by the Defendant and the Plaintiff is properly entitled to interests at 10% per annum from the date of receipt of the same by the Defendant until payment of the same."

Prayer (c) seeks an order directing that the defendant (ie the Kingdom of Tonga) do publish forthwith in the Gazette, in the name of the King, that the plaintiff is the lawful successor to the title and estates of Niukapu with effect from 1 September 1984.

The corresponding provisions, in the proposed amended statement of claim under the same numbers and/or letters, are for all present purposes identical. Prayer (c) seeks an identical order but directing the defendants (ie the Kingdom of Tonga and His Majesty, the King) "to publish forthwith in the Gazette, in the name of" the King, that the plaintiff is the lawful successor to Niukapu.

I have the clear view that such matters are not within the jurisdiction of the Supreme Court but, if they are within any jurisdiction, they are within the jurisdiction of the Land Court (because those are clearly matters which relate to questions of title affecting land, this is a case concerning titles to land, and is a matter relating to the determination of hereditary estates and titles).

Significantly the first round of this litigation (which is referred to in para 6 of the statement of claim) took place in the Land Court and the successful appeal from that Land Court judgment went to the Privy Council. That was, and is, because the matter, in the first instance, came within s.149(1)(b) Land Act which provides that the Land Court shall have jurisdiction to hear and determine all disputes, claims and questions of title affecting any land or any interest in land in the Kingdom and because of clause 90 of the Constitution which provides that the Supreme Court shall have jurisdiction in all cases in law and equity arising under the Constitution and laws of the Kingdom except cases concerning titles to land which shall be determined by a Land Court, subject to an appeal to the Privy Council in matters relating to hereditary estates and titles or to the Court of Appeal in other Land matters. Those provisions still apply to this round of the litigation, before me here.

On appeal, the matter is controlled by section 162(1)(a) of the Land Act, as amended in 1990, which provides for an appeal to the Privy Council if the order or judgment relates to the determination of hereditary estates or titles; and most importantly by clauses 50, 90 (which I have just read) 91 and 92 of the Constitution. Those Constitutional provisions (along with e.g. s.11 Court of Appeal Act) make it clear that appeals in matters relating to the determination of hereditary estates or titles must go to the Privy Council. And I stress

the words in those clauses of the Constitution ("matters relating to the determination of hereditary estates or titles".)

Furthermore, secondly, and in any event, the original statement of claim and pleadings must be struck out on the following basis.

The claim is as set out in paragraphs 14 and 15 of the Statement of Claim.

The failure of the Kingdom of Tonga is the alleged cause of action. But there is no power in the Kingdom of Tonga to make the publication under section 38 of the Land Act.

That is a matter entirely for the King. It is entirely his prerogative - a part of, an essential part of, the prerogative to appoint nobles.

I note that section 38 does not use words such as "His Majesty in Council" or "His Majesty - or the King - with the consent of the Privy Council." That is to be contrasted with other provisions where such phrases are used, for example in the Land Act (and this is not exhaustive) sections 11, 22, 57, 141, 143. On the other hand in sections 38 (and 40) the words "His Majesty" are used, and deliberately used.

The Constitution also makes such a distinction. Again not exhaustively, clauses 37, 54 and 56 use words such as "the King with the consent of the Privy Council" or "the King with the consent of Cabinet", or "the King and the Legislative Assembly" whereas other clauses (and again not exhaustively) for example 38, 40 to 46 and 48 to 51 inclusive, 61 and 112 simply use the expression "the King".

Clauses 36 and 39 are quite instructive, each clause holding examples of both formulations. In clause 36 the King, for example, shall appoint all military officers and make military regulations but the King cannot make war, lawfully, without the consent of the Legislative Assembly. So also with clause 39: the King, lawfully, may make treaties with foreign states, but it shall not be lawful for the King to alter the customs duties without the consent of the Legislative Assembly. It is clearly envisaged that the King does retain the sole prerogative to do certain things.

Clause 112 is significant dealing, as it does, with the situation where, in an estate, there are no heirs. The estate reverts to the King and it is for the King to confer the title and estate upon any other person. Clause 44 is also especially significant: "44. It is the King's prerogative to give titles of honour and confer honourable distinctions ..."

The Kingdom of Tonga, therefore, has no power to confer nobility on the plaintiff or rather to appoint the plaintiff as a noble. It is only His Majesty, the King, who can do that. It is entirely his, that is His Majesty's, prerogative and that is in keeping with the Constitution.

I look at Clause 41. It provides that "The King is the Sovereign of all the Chiefs and all the people. The person of the King is sacred. He governs the country but his ministers are responsible. All Acts that have passed the Legislative Assembly must bear the King's signature before they become law." I also look at Clause 31 which says that "The form of Government ... is a Constitutional Government under (and I stress the word "under") His Majesty his heirs and successors."

My view as to those matters is reinforced by section 2(1) of the Interpretation Act where it is said that "His Majesty", "The King" means "His Majesty the King of Tonga or the Sovereign reigning for the time being over (and I stress the word "over") the Kingdom of Tonga."

The King or His Majesty is not, therefore, the Kingdom of Tonga as envisaged in the Crown Proceedings Act (Cap. 13) section 5, and as sued as the defendant in the original

proceedings.

I conclude that, in keeping with the clear provisions and intent of the Constitution, it is only when formulations such as "His Majesty in Council" or "the King with the consent of the Privy Council" or "the King with the consent of Cabinet", are used that the King has a role, a part, in the executive branch of the Government of the Kingdom - see clause 30: "... 1st The King Privy Council and Cabinet (Ministry) ...". When such a formulation is not used, but as e.g. in section 38 Land Act the words used are "His Majesty" then that does not relate to any role or part of the King in the executive but solely to matters within his exclusive preserve or prerogative.

I look again at prayer (c). How can a Court direct that, i.e. direct the Kingdom of Tonga to do something which only the King has the sole right entitlement and prerogative to do.

So I conclude:

- (i) the wrong defendant is named and complained of, and the claim against the defendant has no basis in law because the defendant, that is the Government, has no power to appoint the plaintiff a noble and/or to publish the name of a successor to a noble title - only His Majesty can lawfully do those things.
- (ii) It follows that there can be no cause of action, as there is no duty owed by the named defendant to the plaintiff (and the affidavits of 3 nobles, namely those of Lasike (paras 3 - 5), Luani (para 6), Tu'ivakano (para 3) confirmed that their respective appointments as Nobles came from the King personally).
- (iii) It also follows, as I have said, that the defendant named in the Statement of Claim has no power to carry out the Order as sought (prayer(c)).
- (iv) And with regard to the monies prayed for, no amount of money is payable to the plaintiff because he has not been appointed a noble - that is the combined effect of sections 38(1) 38(2) 38(3), 39 and 117 of the Land Act.

The third basis for dismissing these proceedings is this. In effect the plaintiff is seeking Orders for judicial review. Order 27 of the Supreme Court Rules refers, and in particular Rule 1. That rule reads as follows.

"This Order applies to any action against an inferior court, tribunal or public body (including an individual charged with public duties) in which the relief claim includes an order of mandamus, prohibition or certiorari or declaration or injunction."...

The plaintiff has now applied for leave to apply for judicial review. That was done subsequent to the first argument which I heard on 9th April 1997. The application is supported by an affidavit and a proposed amended statement of claim (as per Order 27 Rule 2(3)(b)).

Effectively the only difference between the two statements of claim is the joinder of a further defendant, that is His Majesty as a second defendant.

I refuse leave to apply for judicial review on the following bases:

1. The matter is not within the jurisdiction of this Court, i.e. the Supreme Court, as I have set out above.
2. The Kingdom of Tonga cannot be made the subject of these proceedings

and of the Order sought, as I have set out above.

3. The King cannot be sued.

The only exception to the statement about the King not being able to be sued is to be found contained in Clause 49 of the Constitution, which states as follows:

"It shall not be lawful to sue the King in any court for a debt without the consent of the Cabinet".

280 Neither the Constitution nor any other statute make provision for the ability to sue the King in any other matters. And, accordingly, it is said by the Solicitor General that, through the Civil Law Act, the common law of England relating to such matters is made applicable, in Tonga. I accept that submission.

At common law the Sovereign's person is inviolable and he is immune from all suits and actions at law, whether civil or criminal. No proceedings are maintainable against the King in person. The courts are the King's court and the courts can have no jurisdiction over him. (Those rules apply to the Sovereign in his private capacity as well). In addition the maxim "The King can do no wrong" is applicable. (Refer to Halsbury's Laws of England, 4th Ed., "Constitutional Law", paras 894, 895, 896, 943 and 946 and the authorities and writings cited therein).

270 Those matters are reinforced by what is said in Clause 41 of the Constitution that the King is the Sovereign of all the chiefs and all the people and that the person of the King is sacred.

In addition, I set out a further, fourth, reason why leave should not be given to apply for judicial review i.e. that the King cannot be subject to judicial review. That is evident from Order 27 Rule 1 of the Supreme Court Rules which I have already read and, in addition, it is, historically, the case and still the case that the prerogative writs (that is the writs referred to in Order 27) cannot be issued against the King. That is because the courts, in exercising jurisdiction and powers under the prerogative writs, are actually exercising a part of the Royal prerogatives (i.e. the King's prerogatives), and a part assigned to His Majesty's Judges by the King himself. The King assigns to His judges certain prerogative powers relating to the administration of justice, such as the power to control inferior courts and public authorities by the prerogative writs and orders (see Halsbury, as above, para 891 (note 3)).

280 Therefore I make orders (i) striking out the original statement of claim and the proposed amended statement of claim; and (ii) refusing the application for leave to apply for judicial review (and incidentally to file an amended statement of claim).

In any event I note that application for judicial review is considerably outside the 3 month time limit referred to in (Order 27 Rule 2(2)).