Minister of Lands, Tupou and Vakasiuola v Vakasiuola

Privy Council
App 4/1978

30 April 1979

Land - subdivision of excessive allotment - requirement as to written notice directory not mandatory and failure to comply does not invalidate subdivision
Statutes - interpretation - directory requirement

The Minister of Lands, after discovering that a tax allotment held by Filipe Vakasiuola was larger than the area permitted by the Land Act, proceeded to exercise his power under s86 Land Act to subdivide it. The Minister omitted however to give 21 days notice in writing to Vakasiuola as required by s86(1) of the Act.

Vakasiuola brought proceedings in the Land Court to challenge the subdivision, and the Land Court held that the written notice must be given, before the subdivision could proceed.

The Minister appealed to the Privy Council, but also gave written notice and proceeded with the subdivision.

HELD:
Reversing the decision of the Land Court

(1) The requirement for 21 days written notice imposed by s86 Land Act was directory, not mandatory, and so did not invalidate a subdivision which was undertaken in breach of it;
(2) The breach of the requirement of written notice imposed by s86 Land Act had been cured by the Minister.

Cases referred to:
Mateitalo v Naufahu II Tongan LR 95
Katoanga v Hingano II Tongan LR 113
Pua v Noble Luani and ors. [1962-73] Tongan LR 3

Statutes considered
Land Act s86

Privy Council

Judgment

The sole question in this appeal is the true construction and application of Section 86 subsection 1 of the Land Act (Cap.63). This provision reads as follows:

> "86. (1) Whenever it is found that any person is holding land as a tax allotment which is of greater area than the statutory area, the Minister may give twenty-one days notice in writing to such person informing him that the intends to subdivide such land and to grant from out of the same to such person a tax allotment of the statutory area".

Subsection (2) provides for the case where improvements have been made over a greater area. In such a case a lease may be granted for all or any part of the improved portion.

The learned Judge in the Land Court held that the statutory notice must be given before a valid subdivision may be made. We were informed that such a notice has since been given and a sub-division made in pursuance of that notice. Thus, if there were any defect it has now been cured. But it was said that this decision is in conflict with the cases of Lu'isa Mateitalo -v- Viliami Naufahu 2 Tongan Law Report 95. Sefo Mahe Katoanga -v- Siosaia 'Ofa Hingano, 2 Tongan Law Reports 113, and Telesia Pua -v- Noble Luani and others 3 Tongan Law Report 3. We do not find it necessary to consider the facts or the decisions in any of these cases except one reference to the first-named case. It is sufficient if we proceed at once to give an opinion on the true construction of the words used in Section 86(1).

The question is whether the requirement for the Minister to give notice in accordance with the section is mandatory or directory. If it is mandatory then a failure to comply renders the act of the Minister invalid and no subdivision or grant made or given has any effect. Section 86(1) does not unconditionallly give the Minister power to subdivide. His power so to do arises if he decides to exercise it by giving the statutory notice. There is no doubt but that he is required to give the notice but what is the result if a sub-division is carried out without the requisite notice having been given? It is true that the section uses the word 'may'. This enables the Minister to exercise the power but he must comply with the giving of notice for a proper exercise of his function. To hold otherwise would render all the statutory requirements of notice completely unnecessary. All the legislature would require to enact is that the Minister may subdivide any land held in excess of the statutory area. All the words of the enactment must be given meaning and force. The Minister must observe its terms if he decides to exercise the power even though the empowering word is "may".

This is an enabling statute. The law is laid down in Halsbury's Laws of England 3rd Edition Volume 36 paragraph 656 page 435 as follows:

"No universal rule can be laid down for determining whether provisions are mandatory or directory; in each case the intention of the legislature must be ascertained by looking at the whole scope of the statute and, in particular, at the importance of the provision in question in relation to the general object to be secured. Thus it is not possible to generalise by reference to the nature of what is prescribed. No great reliance can be placed, either, on the suggestion that provisions framed purely in affirmative language are normally construed as directory, though the converse proposition, that negative provisions are prima facie mandatory, would seem on principle to be less open to criticism.

Although no universal rule can be laid down, provisions relating to the steps to be taken by the parties to legal proceedings in the widest sense have been construed with some regularity as mandatory; and it has been observed that the practice has been to construe provisions as no more than directory, if they relate to the performance of a public duty, and the case is such that to hold null and void acts done in neglect of them would work serious general inconvenience, or injustice, to persons who have no control over those entrusted with the duty, without at the same time promoting the main object of the legislature".

We turn then to consider the object of the legislature. Part IV of the Land Act gives to every Tongan subject by birth the right to apply for and hold a tax and town allotment. Section 7 limits the area of a tax and town allotment. Sections 46 and 47 are sections which enable, in some circumstances, the granting of a greater area. Sections 49 declares all grants in excess of the statutory to be void. Section 53 provides for the subdivision of tax allotments. Section 78 deals with leaseholders of allotments whose son or grandson succeeds. If such son or grandson already holds an allotment he must elect which one he desires to hold. He cannot hold both. It is in this context that the Minister is given power on notice to subdivide the holding of any person who holds more than the statutory area. The clear intention is to make land available to every Tongan as defined and to limit the holding of each to a defined area so that land is available for Tongan subjects.

The power of the Minister is to extinguish the title of excessive holdings (earlier declared to be void) by subdividing and eliminating the excess - The excess is then available for allotment to eligible Tongans who may in due course be granted a title. The only deprivation suffered by a holder of an excess area is that he loses an area to which

he is not entitled under the statute. To hold invalid a subdivision made by the Minister and subsequent re-allocation for Government or other use of excess areas (which the holder is not entitled to) would cause general inconvenience in dealing with titles and also possible injustice to persons to whom the unlawful excess may have been granted. In any event, the Minister could when challenged forthwith give notice and proceed to subdivide afresh and a declaration that his former act was invalid would be to no purpose. In our view the provision is directory and failure to give notice does not invalidate a subdivision and the titles which issue as a result. In our opinion Hunter J. correctly stated the law in Lu'isa Mateitalo v. Viliami Naufahu 2 Tongan Law Report 95 when he said:-

> " The Plaintiff submits that the failure on the part of the Minister to give notice to the Plaintiff of the proposed subdivision renders the subdivision illegal and that therefore the subsequent transfer to the Defendant is invalid and confers no title upon him. He relies on Section 81 of Chapter 27. I can not agree with this. Whatever the effect of failure to give the notice required by Section 81 may be, I do not think that such failure invalidates a grant made with approval of Cabinet and evidenced by registration.
> The statutory area for an allotment is 81/2 acres and no one, except as provided by Section 45 which does not apply here, is entitled to a larger area. It may be that this Plaintiff has some right of action against the Minister for failing to advise her of the proposed subdivision as affecting her right to lease given in sub-section (2) of Section 81 but it is not necessary for me to express an opinion on that point".

This case dealt with similar provisions in an earlier act, namely Cap.27 (1928 Laws) but there is no material difference on this point.

Although Section 86(1) uses the word "may" this merely enables or empowers the Minister to exercise the power of subdivision. The holder is entitled to be given notice so that he can make representations to the Minister on the manner of subdivision, the effect of improvements, and, indeed, challenge the question whether or not there is an excess, or press any other relevant consideration. If the Minister fails to give notice the question of what rights the holder may have must be determined when it arises and after full argument. This present decision is solely on the point whether a failure to give notice invalidates the subdivision. In our opinion it does not. The limitation of area by subdivision to a permitted area and the disposal of any surplus is not invalidated. The question whether or not a holder may waive the requirement for notice or be estopped from denying that he has had notice will not arise unless he brings an action against the Minister for failure to give the statutory notice.

The appeal will be formally allowed and the judgment will be set aside to enable the Land Court to determine the case in accordance with our judgment, but this, of course, is now a mere formality as it is conceded that the Minister has since subdivided the land after giving the statutory notice.