Brown, Kali & Minister of Lands v Tali 'Ofa

Court of Appeal
Roper, Morling and Cooke, JJ
Appeal No. 1/1990

12 September 1990

Appeal – question of fact – principles to be applied by appellate court
Practice – appellate court – principles upon which decision appealed from will be reversed

The appellants appealed to the Court of Appeal from a decision of the Land Court that the holder of a tax allotment, Sefo Kali, had made an arrangement with Tali 'Ofa that Tali 'Ofa would be allowed to stay on part of the allotment and be registered as holder of that part. On appeal, the appellants argued that the decision by the Land Court as to the nature of the arrangement was wrong.

HELD :

1. The appeal related to a pure question of fact;
2. When reviewing a decision on questions of fact an appellate court should not interfere with the decision unless it was plainly unsound by reason of material inconsistencies or inaccuracies, or unmistakable failure to take advantage of having seen and heard the witnesses, or failure to appreciate the weight and bearing of circumstances admitted or proved;
3. Applying this test the decision appealed from was not shown to be plainly wrong and the appeal would be dismissed.

Case considered :
Watt (or Thomas) v Thomas [1947] A.C. 484, [1947] 1 All E.R. 582 (H.L.)

Counsel for the second appellant : Mrs F. Vaihu
Counsel for the third appellant : Mr K. Whitcombe
Counsel for the respondent : Mr S. Talanoa

Judgment

This is an appeal against the decision of Martin C. J. in the Land Court and concerns the title to part of a tax allotment. The Appellant Selovia Brown has no interest in the appeal and was not represented.

According to the Respondent he moved from Ha'apai to Tongatapu in 1976 with the intention of finding land for his family and educating his many children. He said he was introduced to the Appellant Sefo Kali by a lawyer and it was agreed that in return for a payment of $700 the Respondent could occupy a piece of land held by Kali, with the intention that when a subdivision of a larger area was finalised the Respondent would become the registered holder. The Respondent erected some sub-standard accommodation and a store on the land but it seems that in 1978 Kali made some attempt to evict him on the basis that all the land was for Kali's relatives. That problem was resolved but the Respondent built a more permanent home on some other land not held by Kali. Members of his family still used the Kali section. In 1986 the Respondent went to New Zealand and later to America but a son remained in Tonga and continued to use the land in dispute and it is really on behalf of that son that the Respondent made his claim.

The Appellant Kali agreed that there had been an arrangement with the Respondent concerning the occupation of the land but claimed that the payment of $700 was only for temporary occupation until such time as the Respondent's children completed their education. He further claimed that the full $700 was never paid, but the Respondent was able to satisfy Martin J. that it had by reference to entries in a diary.

There is certainly support for Kali's version of the agreement in that at one point he prevented the Respondent from building a permanent home, and in about 1982 complained that the Respondent or his family had removed bread-fruit from the land. The Respondent claimed that he was only prevented from building because the boundaries were then uncertain.

As against that it appears from the record that the Respondent's children had completed their schooling shortly after the land was occupied, making the "temporary" occupation an expensive exercise.

Kali's evidence was supported by that of his son but Martin C.J. seems to have had some reservations about his credibility.

Martin C.J. also took into account that Kali had taken no serious steps to evict the Respondent or his son for 13 years.

In the result he accepted the evidence of the Respondent as to the occupation agreement.

The only issue on this appeal is - what was the agreement between the Respondent and Kali?

After reviewing the relevant facts that we have outlined Martin C.J., who was assisted by an Assessor Mr 'Alatini Havili, in what is a specialist tribunal, concluded that Kali had made no reservation concerning occupation of the land and had given the Respondent to understand that in due course the Respondent would eventually be registered as holder of the land in dispute.

We are faced with a pure question of fact and an appellate court's approach in reviewing the record. We can do no better than cite from the headnote to Watt or *Thomas* v *Thomas* [1947] A.C. 484:

"When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved."

Mrs Vaihu has referred to a number of circumstances which, she submitted, should have led the Trial Judge to a contrary conclusion. Martin C.J. did take those matters into account, and we must agree that they were certainly relevant considerations. However, we are not convinced that he failed to appreciate their weight.

The only other matter raised by Mrs Vaihu concerned the area of the piece of land in question. In the notice of appeal it is alleged that "The Land Court erred when it ordered the registration of this allotment with the area indicated on the plan as 36.6p. In fact the only order the Chief Justice made was that "the Plaintiff is entitled to be registered as holder of the land the subject of this action."

It was Counsel for the Minister of Lands at the lower Court hearing before the Land Court that identified the land as being of 35.6 perches.

The appeal is therefore dismissed with no order for costs.