Moa v Faka'osita, Afu Ha'alaufuli & Minister of Lands

Land Court, Vava'u
Webster *J.*
Assessor: S. M. Kupu
Land Case No. 2/1990

25 October, 15 November 1990

Land – registration – principles applicable
Registration of land – cancellation – principles applicable

The plaintiff applied to the Land Court to cancel the registration of the first defendant as holder of a tax allotment on the estate of the second defendant on the ground that the first defendant was not resident in an estate of the second defendant. The plaintiff also claimed that he should be registered as the holder of that allotment.

HELD

Dismissing the plaintiff's claim:

1. Registration of allotments by the Minister of Lands could be cancelled by the Land Court if made on wrong principles or under a mistake;
2. The rules for allocation of allotments as set out in section 50 of the Land Act (Cap. 132) required that allotments should be made out of the hereditary estate in which the applicant for allotment was resident, and only if there is no land available in that estate should the allotment be taken out of another hereditary estate;
3. Since the first defendant was resident in a hereditary estate other than that in which the allotment was made, and there was no evidence to suggest that there was no land available for allotment in that estate, the rules prescribed by section 50 of the Land Act had not been followed and the registration of the first defendant should be cancelled;
4. Alternatively, as the first defendant had stated in his application that he was of the area in which the hereditary estate was located, which was not correct, the registration should be cancelled since it was based upon a mistake made by the Minister of Lands.
5. No order for registration of the land in the name of the plaintiff should, in the circumstances be made, but he could, if he wished, renew his application to the second and third defendants.

N.B. On 5th June 1991 the Court of Appeal dismissed an appeal by the Plaintiff.

Statutes considered: Land Act (Cap 132) section 50

Counsel for the plaintiff	:	Mrs F. Vaihu
Counsel for the first and second defendants	:	Mr S. Vaipulu
Counsel for the third defendant	:	Mr K. Whitcombe

Reasons for Oral Decision

The Plaintiff Koliniasi Moa (also known as Koliniasi Moa Vaitai) asks the Land Court to cancel the registration of the First Defendant Tevita F. Faka'osita (also known as Tevita Fatai) as holder of a tax allotment called Angitoa at Ha'alaufuli (Lot 44 Block 220/160) on the estate of the Second Defendant, Afu Ha'alaufuli. The registration was made by the Third Defendant, the Deputy Minister of Lands for Vava'u, on 23rd November, 1987. The Plaintiff claimed that the First Defendant is resident at Fangale'ounga, Ha'apai and not in an estate of the Second Defendant and therefore that the registration is not valid. The Plaintiff further asks for registration of this allotment in his name on the grounds that an application in his name had been approved by the Second Defendant and filed with the Third Defendant in 1974.

All three Defendants opposed the Plaintiff's claims on the grounds that the registration was lawful and the allotment did not become available until it had been surrendered by the first Defendant's father Saimone Vaitai in 1987. The second Defendant also claimed that the Plaintiff's application was not for the land in question. No issue of estoppel was raised by any party.

Evidence for the Plaintiff was given by himself, by his father Sunia Vaitai by this cousin Mavae Tangi Vaitai, and by the Registrar of Lands for Vava'u, Maka Filia Taungatua. The First and Second Defendants gave evidence in person. The Third Defendant led no evidence.

While the decision of the Court turns on some very straightforward facts, it will be helpful to outline the salient facts which were established in evidence –

1. The land in question was originally part of a larger allotment called Angitoa.
2. The Plaintiff's father Sunia Vaitai and Sione Vaitai, the father of Saimone Vaitai (who in turn is the First Defendant's father), were half brothers, having the same father.
3. The larger allotment was subdivided and allocated by the present estate holder and the Minister of Lands in the general allocation of 1964. The Plaintiff's father Sunia Vaitai was the person who decided the allocation, having been told by the original owner to share the land amongst the children of the brothers.
4. The land in question was allocated to the first Defendant's father Saimone Vaitai, who filed an application for registration with the Third Defendant around 1964. The application was signed by the Second Defendant on 21st January 1964. Saimone's name was entered on the land in question on the Third Defendant's estate plan.
5. Thereafter Saimone Vaitai went to Fangale'ounga, Ha'apai and was registered as the holder of a tax allotment there on the estate of Niukapu on 31st August, 1966.

6. In March 1974 the Plaintiff's father Sunia went to the estate holder Afu, who was in Ha'apai, and applied for an allotment on behalf of his son the Plaintiff, who was then aged just over 16 (having been born on 10th October, 1957). Afu signed the application on 20th March 1974 and it was filed with the Third Defendant on 5th September 1974. The name of the allotment on the application form was "Angitoa 'Uta" or "Angitoa Bush". The name of the last registered owner was left blank. The Plaintiff was unaware of his father's application on his behalf.

7. The evidence of Sunia and Afu conflicted as to whether at that time Saimone Vaitai, who was agreed to be in Ha'apai then, went to Afu with Sunia and surrendered his interest in the land in question. Sunia said he did, but Afu denied this and said he thought it may be a vacant plot in the larger Angitoa which Sunia had located. Afu said he had not inquired further. Sunia said Saimone had written a letter to Afu but this was not produced to the Court. The First Defendant was born in 1968 so Saimone had 2 sons of his own by that time.

8. Thereafter there was no record of the Third Defendant taking any action on the Plaintiff's application until after the grant of the land to the First Defendant. It was accepted by Plaintiff's Counsel that writing on the Plaintiff's application dated "3.11.87" was a subsequent notation of the decision on the First Defendant's application on that date. Sunia said he had been told that confirmation would have to be obtained from Ha'apai that Saimone had a registered allotment there. He said he had enquired about progress 3 times before he went to the United States in 1980 and again when he returned in 1986 and had always been told there had been no contact.

9. Equally the Plaintiff had done little or nothing with the allotment since 1974. The whole family had planted coconuts in the coconut replanting scheme in 1966 but after 1974 the Plaintiff had grown some manioca there in 1975, but not for long. In this own words he would go and look at the allotment and then return to town: he admitted deserting the allotment and never going back to it. Sunia contradicted this and said he grew crops there until he went to the United States in 1980.

10. In 1980 the Plaintiff and his father went to the United States. Sunia returned in 1986 but the Plaintiff worked with a firm catering for airlines and did not return until July 1989. His visit then was "just a holiday to visit my father" and he remined in Vava'u for 10 months until May 1990, returning again for this case. On his own evidence the Court finds that the Plaintiff is substantially resident in the United States.

11. On 9th October 1987 the First Defendant, through his married sister 'Onita Tausinga of Ha'alaufuli, applied for the land in question as

Lot 44 called Angitoa. In the form it is stated that he is "of Ha'alaufuli." The application was signed by the estate holder on the same date. He also filed with the Third Defendant at the same time letters of surrender of the allotment to him by his father Saimone Faka'osita Vaitai of Fangale'ounga, Ha'apai dated 18th September 1987; and by his elder brother Uilifooti Faka'osita of Brigham Young University, Hawaii dated 31st August 1987. There was no evidence that the Second or Third Defendants were informed or knew whether there was any available land on the estate of the Hon. Niukapu at Fangale'ounga at that time.

12. On 3rd November 1987 the Third Defendant (then Hon Dr Ma'afu Tupou) wrote himself on the first defendant's application that the survey fee was to be paid and the applicant then registered. This was done and the land in question was registered in name of the First Defendant as Tevita Fatai on 23rd November 1987. There was no evidence that the Plaintiff's application was mentioned or considered by the Third Defendant in October – November 1987.

13. The First Defendant admitted in evidence that his present home was at Fangale'ounga, Ha'apai and that was his permanent residence of domicile. He settled in Vava'u because of the uncertainty over the land in question. His sister 'Onita was taking care of the land.

14. The Plaintiff and his father knew nothing of the First Defendant's application or registration until a notice was broadcast over the radio in 1988 that people were not to go over the land in question.

15. After that it is clear from notations on the applications of both the Plaintiff and the First Defendant that the matter was raised with the Third Defendant on behalf of the Plaintiff on 19th February, 1988. The Third Defendant then recognised that the Plaintiff's application had not been withdrawn, but on 23rd May 1988 the Second Defendant wrote to the third Defendant cancelling his agreement to the application of the Plaintiff "for it does not say whose allotment" and saying that they should stick to it being Saimone's transferred to his son.

16. The Second Defendant said that he believed that at present there was no vacant land in his estate in Ha'alaufuli.

17. No evidence was given as to whether land was available in any hereditary estate held by Hon. Niukapu, in whose estate at Fangale'ounga the first Defendant is resident.

Without this Court having to decide between competing applications, the issues can be resolved very simply. It is clear from sections 7 and 43 (2) of the Land Act that it is the Minister of Lands or his Deputy who is to decide on grants of allotment: see eg. Tu'iono v Tulua [1973] 2 T.L.R. 36. Section 50 of the Land Act provides –

"50. Land for allotments shall be taken from the hereditary estates in accordance with the following rules –

(a) an applicant for an allotment lawfuly resident in an hereditary estate shall have his allotment out of land available for allotments in that estate;

(b) where there is no land available in the estate in which the applicant is resident, then the allotment shall be taken out of some other estate held by the noble or matapule in one of whose estates the applicant is resident;

(c) if no land is available in any hereditary estate held by the noble or matapule in one of whose estates the applicant is resident then the allotment shall be taken out of the hereditary estate of any other noble who is willing to provide such allotment;

(d) if no land is available under rule (c) then the applicant may have his allotment from Crown Land ....."

On the evidence the First Defendant does not reside in the hereditary estate of the Second Defendant Afu Ha'alaufuli. He resides in Ha'apai in the estate of Hon. Niukapu, so his allotments should be taken from that estate under section 50 (a). There was no evidence as to whether or not land is available in Niukapu's estate so section 50 (b) and (c) cannot apply. Therefore the Third Defendant made the grant to the First Defendant on wrong principles and the registration should be cancelled: *Afu v Lebas [1958] 2 T.L.R 167 (PC); Maka v Minister of Lands & 'Asipa (1958) 2 T.L.R. 155 (PC).*

Additionally or alternatively, the Third Defendant was misled by the First Defendant stating that he was "of Ha'alaufuli" and the registration was made under a mistake and should equally be cancelled: *Ma'asi v 'Akau'ola and Deputy Minister of Lands [1956] 2 T.L.R. 107 and Hema v Hema and Minister of Lands [1959] 2 T.L.R. 126.*

The rules in section 50 are those laid down by Parliament and the task of this Court is to apply them as they are, and not to question them or wonder whether they are still relevant or comment on the policy behind them. But given the scarcity of land for both tax and town allotments, the rules still seem extremely relevant today as a means of giving allotments to those who will actually be working or living on them.

The Plaintiff also sought registration of the land in question in his own name, but the Court cannot order this for the following reasons –

(a) on his won evidence the Plaintiff is substantially resident in the US and not in the estate of the Second Defendant at Ha'alaufuli: whatever his residence was when he applied for an allotment, the court cannot ignore his present residence;

(b) the Second Defendant has now cancelled his agreement to the Plaintiff's application;

(c) the dates of competing applications for allotments are only one consideration for the Minister of Deputy Minister: *Veikoso v Tu'ipulotu [1957] 2 T.L.R. 151 (PC).*

(d) the Minister or Deputy Minister has a wide discretion in deciding who should be granted allotments and this Court should only interfere if it is clearly shown to have been exercised on wrong principles: *Maka* and *To'ofohe v Minister of Lands & Afeaki [1958] 2 T.L.R. 157 (PC).* In this case for whatever reason the Third Defendant did not grant this allotment to the Plaintiff in 13 years despite promptings by his father Sunia and it has not been shown to the satisfaction of the Court that this was due to fraud, mistake or wrong principles;

(e) even if the Third Defendant had established that Saimone was registered as holder of a tax allotment in Ha'apai in 1966, it was fair and equitable that he should not register the Plaintiff's application for the land in question until he had received a document from the allocated holder Saimone indicating to whom he wished to surrender the land in question;

(f) there was no evidence that, before he granted the First Defendant's application, the Third Defendant considered the 2 applications together in competition;

(g) there was no sound evidence that during the 13 years the Plaintiff made any serious attempt to cultivate the allotment. This is a factor the Deputy Minister could have taken into account: To'ofohe;

(h) As mentioned in (d) above, the Third Defendant has a wide discreation in making his executive decisions on the granting of allotments. While it is appropriate for the Land Court to review a disputed positive decision by him or settle competing claims, both in the light of the law, it is not a function of this court to substitute its own discretion for that of the Deputy Minister as to whether the Plaintiff should be granted his allotment or not. I do not believe that section 127 (1) (b) of the Land Act goes that far in all the circumstances of this case, expecially that the Deputy Minister did not consider the two applications simultaneously in competition.

The land in question is now available and if the Plaintiff believes he is eligible he can if he wishes renew his application to the Second and Third Defendant.

The Court therefore orders that the registration of the tax allotment Angoa (Lot 44, Block 220/160) in the estate of Ha'alaufuli, Vava'u in name of the First Defendant Tevita Fatai Faka'osita (where he is named Tevita Fatai) shall be cancelled. No other order is made.