

10 **Lokotui v Fifita, Lokotui, Minister of Lands and others**

Court of Appeal
 Roper, Ryan, Morling, JJ
 Appeal No.20/1991

25 & 26 March 1992

Land - town allotment - subdivision - limited by then s.51 Land Act

20 *Land - limitation - s.170 Land Act*

Limitation - Land Act s.170 - 10 years - father not exercise right of action within his lifetime - no independent limitation period for son.

A town allotment was divided in two by appellant's grandfather in 1965, with the one lot in issue on appeal to go to a foster son. That foster son died and in 1983 the Minister of Lands, on the first respondent's application, granted the allotment to him. The appellant (grandson of the original holder) applied to the Land Court to set aside that grant claiming that he was entitled to the land. The Land Court rejected his claim and he appealed.

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HELD:

1. That in 1965 the subdivision could only have been made and allowed pursuant to s.51 Land Act.
2. That the subdivision and purported grant to the foster son could not stand under s.51.
3. That the foster son's title was open to challenge but the 10 year limitation imposed by s.170 took effect; the right of action accrued to the appellants father in 1965 but he did not exercise it and by the time of his death in 1982 the limitation period had long expired and the appellant had no independent period of limitation.
4. That the appeal be dismissed as the appellant was prevented from challenging the first respondent's title.

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Statutes considered : Land Act, ss.51, 54, 170.

Judgment

This appeal is concerned with a town allotment known as Ofolanga in 'Aua'ahau, which was granted to 'Apolosi Lokotui Senior (hereafter referred to as 'Apolosi) the Appellant's grandfather, in 1942. It originally had a total area of 1 rood 24.5 perches but has now been surveyed into two allotments each of 32.3 perches. Although not so designated on the plan they will be referred to hereafter as lots 1 & 2. At the time of the commencement of these proceedings lot 1 was held by the first Respondent Semisi, he having received the grant in August 1983; and lot 2 was held by the third Respondent, Manoa, who had received title in 1988 from the second Respondent Sela, who is the adopted daughter of 'Apolosi. Sela obtained title in January 1987 following the surrender of lot 2 by 'Apolosi in June 1986.

In the lower Court the Appellant claimed that as grandson he was entitled to both lots. The trial Judge held in his favour in regard to lot 2 and also rejected the fifth Respondent's claim that she was entitled to lot 2. The fifth Respondent is 'Apolosi's widow he having died in June 1987. There has been no appeal against that part of the judgment.

This appeal is against the trial Judge's decision that the Appellant could not challenge Semisi's title to lot 1. The history of this lot following the grant of the whole allotment to 'Apolosi in 1942 is as follows:

On the 2nd Nov. 1965 'Apolosi applied to the Minister of Lands for Ofolanga to be subdivided into two lots with effect that one be granted to Falani Peini (Frank Payne) 'Aka'u'ola, a foster son of 'Apolosi.

The Minister duly instructed the Chief Surveyor to subdivide Ofolanga and draw up the necessary deed of grant. This was done but the deed was never signed by the Minister. It is not clear why it was not signed but the trial Judge thought a notation on the copy of the deed in the register was some help. It reads "ML ordered this to wait until check the sworn affidavit for heir by the widow". There is no evidence clarifying that comment.

Sometime after 1965, and there is no evidence as to when, 'Aka'u'ola died overseas. Nor was there any evidence as to whether he ever occupied lot 1. The evidence suggests that no-one occupied the lot from 1965 to 1983 when the first Respondent applied for a grant. It appears that he did so at the instigation of 'Apolosi who seemed determined that his son and grandson should not take title to any part of Ofolanga. Whether 'Apolosi believed he still held title to lot 1 at that time is not clear, but it is certain that the Minister of Lands thought otherwise. On the 1st July 1983 the Minister wrote to the Chief Surveyor as follows:

"Deed of Grant of Town Allotment of Semisi Fonua Fifita of Kolofono'u, Govt. Estate.

Please draw and prepare deed of Grant town allotment for the person above mentioned.

This allotment is on the name of Falani Peini 'Aka'u'ola deceased, and this person has applied to it. It is No. 1 on Plan 1037 and with an area of 32 p. Survey fee has been paid on Rec. 472833 = \$17.50 on 14.7.82 and his application was completed.

(Sgd) Baron Tuita
Minister of Lands

Lot 1 was duly granted to the first Respondent Semisi on the 10th August 1983 and a substantial dwelling has been erected on the property.

The trial Judge approached the matter on the basis that 'Apolosi's 1965 application for Ofolanga to be subdivided, with one lot to go to 'Akau'ola, was made pursuant to s.51 of the Land Act (Cap 132) and we must agree that in the circumstances no other statutory provision was available. S.54 of the Act authorises surrender, but prior to its amendment in 1973 surrender was only available in the event of old age, illness or infirmity, conditions which did not apply to 'Apolosi who didn't die until 1987.

s.51 reads:-

"51. (1) Where a town allotment is not less than 1618.7 square metres in area the holder thereof may apply to the Minister requesting him to subdivide the allotment between such sons, grandsons, brothers or nephews, of the applicant, being more than 16 years of age, as the applicant shall appoint, but the Minister shall not grant an allotment less than 752 square metres in area."

(2) Where the holder of an allotment as in subsection (1) hereof set out has no relatives as aforesaid he may apply to the Minister for permission to surrender a part, or the whole of so much of his allotment as exceeds the statutory area, and the land so surrendered shall be available for subdivision at the discretion of the Minister.

In 1965 'Apolosi's son (the Appellant's father) 'Isime'eli was alive and would then have been about 30. It follows that s.51(1) was not available to 'Apolosi as 'Akau'ola was only a foster son and not one of the specified classes; and s.51(2) was not available as 'Apolosi did have a "relative as aforesaid", namely 'Isime'eli.

It follows that the subdivision and purported grant to 'Akau'ola could not stand. It is true that 'Akau'ola's deed was never signed by the Minister, but the grant to the second Respondent Semisi was made on the basis that 'Akau'ola was the registered owner and it appears from the Minister's letter of the 1st July 1983 that he regarded 'Akau'ola as the title holder.

'Akau'ola title was open to challenge but s.170 of the Act imposes a limitation. It reads:-

"170. No person shall bring in the Court any action but within 10 years after the time at which the right to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims then within 10 years next after the time at which the right to bring such action shall have first accrued to the person bringing the same."

The right of action, accrued to the Appellant's father 'Isime'eli in 1965 but he did not exercise it and by the time of his death in 1982 the limitation period had long expired and the Appellant has no independent period of limitation.

The trial Judge concluded that s.170 prevented the Appellants challenge to the first Respondents title. It is a decision which does justice and we agree with it.

The appeal is dismissed with costs to the first Respondent of \$400.