

Ma'umalanga v Tupou

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Land Court
 Dalgety J and assessor
 Land case No.867/93

7, 8, 9, 10 March & 8 April 1994

Land - alien - entitlement to hold land - permit to do so.

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Lease - alien - permit to hold - effect of no permit.

Words and phrases - alien

The Plaintiff Tongan born, but a citizen of the U.S.A. since 1970, held leasehold land since 1993, not having disclosed his U.S. citizenship when he acquired the lease. He wished to evict the Defendant, squatter, who pleaded that the Plaintiff could not have a valid lease of the land because he had not obtained a permit under s. 14 Land Act. Those facts were not in issue.

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Held:

1. The Plaintiff was no longer a Tongan subject and was an alien within the meaning of that term in the Land Act.
2. He should have had a permit before obtaining the lease but the absence of a permit did not render the lease void ab initio or entitle the Land Court to revoke it; although the Minister of Land might elect to review the lease.
3. Under the Land Act land may be leased to aliens.
4. An order for possession to the Plaintiff (as put, an order for eviction of Defendant) would be made.

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Statutes referred to : Interpretation Act s.2
 Land Act ss. 14, 15, 124-136

Regulations referred to : Land (Occupation by Aliens) Regulations 1929

Counsel for the Plaintiff : Mr Niu

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Counsel for the Defendant : Mrs Tu'ilotolava

Judgment

This case is inextricably linked with Land Court action number 05/91 and the Trial in both cases were conjoined. Had I found in favour of Feongoi Tupou who was the Plaintiff in action 05/91 then I would have required to dismiss this action. However that was not the decision in that action and I must now turn to consider the merits of this case.

The Plaintiff Metui Ma'umalanga on 28th May 1993 received a Lease, number 5397, of Land at Tatakamotonga known as "K. Molitonga". The Defendant Feongoi Tupou has been habitually resident on the Plaintiff's leasehold land since January 1991, and has built a Fale Tonga thereon. He refuses to quit although asked to do so in writing by the Plaintiff. Consequent upon the decision in case 05/91 the Defendant's continued occupation of the leasehold subjects is precarious. He has no legal right, title or interest to be there. He is in fact no more than a squatter. The Plaintiff now seeks an eviction order against the Defendant.

In his amended Defences the Defendant claims that the grant of the lease is void ab initio, which failing is revocable by the Minister of Lands in that -

- (i) The Plaintiff misled the Minister and the estate holder, the Hon. Tungi, that he was "Metui Ma'umalanga of Tatakamotonga" when in fact he is "Metui Ma'umalanga of the United States of America";
- (ii) He misled the Minister and the estate holder by failing to disclose to either or both of them that since about 1970 he had been a citizen of the United States of America;
- (iii) Citizenship was a material factor when consideration was being given by the proper authorities to whether or not to grant him a Lease;
- (vi) As an "alien" he requires a Permit before he can reside or occupy land in Tonga;
- (v) He has no such Permit;
- (vi) As an alien he is not entitled to lease Tongan land; and
- (vii) A lease is not the same thing as a Permit.

In his evidence the Plaintiff admitted that he now lives in Hawaii. He is a native born Tongan but emigrated to the United States of America at the age of about 23 years. He is now aged 54 years, so he has been ordinarily resident outwith the Kingdom of Tonga for over thirty years. He said that by 1970 he was already an American citizen. He admitted that he had not told the Hon. Fielakepa, the estate holder's land representative, that he was an American citizen when he applied for the lease. Indeed the candidly admitted that he was an American citizen on 28th July 1970 when he was granted an Api Kolo of land at Tatakamotonga known as "San Bruno". In re-examination he admitted that he was aware that a foreigner was not allowed to hold an Api Kolo in Tonga. In this case I am concerned only with the Leasehold Land. Whether or not he is entitled to hold "San Bruno" is not a matter I require to decide today.

Section 2(1) of the Interpretation Act (cap.1) defines an "alien" as a person "other than a naturalised or native - born Tongan subject." The Plaintiff was certainly a native - born Tongan subject, however he is no longer a Tongan subject. Section 4(1) of the Nationality Act (cap.59) provides that a Tongan subject who by any "voluntary and formal act becomes naturalised" in a foreign country thereupon is "deemed to have ceased to be a Tongan subject". The Plaintiff therefore ceased to be a Tongan subject when he

became a naturalised American citizen which he says predated 28th July 1970. For the purposes of Sections 14 and 15 of the Land Act (cap. 132) ("the Act") the Plaintiff is an "alien" : this has been his status at least since July 1970.

Accordingly he must comply with the requirements of Sections 14 and 15. The former makes it a criminal offence for an alien to hold or reside upon or to occupy any land without first having obtained a permit to do so from the Minister of Lands. The Land (Occupation by Aliens) Regulations 1929 repeats this requirement and stipulates that the duration of the permit be for a period of one year, a half-year or a quarter of a year. The terms of the permit itself are found in Form No. 2 of Schedule IX of the Act. The Plaintiff has no such permit. Section 15 makes it a criminal offence for a landholder to allow an alien to reside upon or occupy any part of his holding unless the alien "has been granted a lease or permit in accordance with the Act." The Plaintiff has a Lease for "K. Molitonga" thus the estate holder is not liable to prosecution under Section 15 given that the prerequisite to avoid prosecution is the obtaining by the alien of either a lease or a permit. Section 14, presumably quite deliberately, requires the alien to hold a permit whatever the nature of his holding, residence or occupation of land in Tonga. On the face of it the Plaintiff is in breach of the requirements of this section and therefore is liable to prosecution thereunder. But this section is criminal only and nowhere in the Act does it say that the absence of a permit renders the lease void ab initio or entitles the Land Court to revoke it. The Minister may elect to review the lease and attempt to have the lease revoked, but that is a matter entirely for him. He may choose to take no action given that the practice of recent years has been not to require a permit of aliens who resided on or occupied leased land. Indeed, these requirements as to permits seems to have fallen into desuetude in modern times.

There is nothing in Sections 124 - 136 of the Act, the part relating to leases, which in my opinion prohibits land being leased to aliens. Indeed the whole tenor of Section 125 is that land can be leased to foreigners for it specifies there that any Section 14 permit is non transferable and ceases to be valid upon the death of the grantee. Similarly the form of lease application prescribed by Section 124, which is Form 1 of Schedule 9, includes no declaration that the Applicant is a Tongan Citizen by birth (as is the case with an Application for an Allotment : see Form 9 of the Subsidiary Land Act Legislation at pages S-3 and 4). On the contrary it contains a Tofi'a summary to be completed by the Minister : he has to specify there inter alia the Area Leased to Foreigners and the Area Leased to Tongans.

If the Minister considers that he was misled by not being told that the Plaintiff was a foreigner then it is for him to consider his position and take such action, if any, as he thinks appropriate. I am not persuaded that it is open to the Court to usurp his function and purport to cancel the lease on this ground, or even to direct the Minister to cancel it. Leases are granted only with the consent of Cabinet and any action by the Courts, except upon an application by the Minister supported by a Cabinet Decision, would certainly be inappropriate and, in my opinion, also be incompetent.

In the whole circumstances I intend to grant an eviction order. I shall also direct that a copy of this judgment, as also the judgment in case 05/91, be transmitted to the Minister of Lands for his consideration. Costs will follow success. Accordingly I shall grant an Order in the following terms -

IT IS ORDERED AND ADJUDGED THAT [1] on or before 1800 hours on

30th April 1994 the Defendant do flit and remove himself, his family and his whole possessions and property from that piece of land known as "K. Molitonga", Tatakamotonga, land extending in all to some 813.20 m2 or thereby and delineated as lot 139 on Survey Office Plan 2551, being lands presently leased to the Plaintiff by Lease Number 5397 dated 28th May 1993 and Registered in the Register of Leases of even date therewith : [2] a copy of this Judgment and of the Judgment in the related case number 05/91 be transmitted without delay by the Registrar of the Land Court to the Minister of Lands ; and [3] the Defendant be found liable to the Plaintiff in the Costs of this action as same may be agreed which failing as taxed.