Lautaha v Minister of Lands & Tapueluelu

Land Court, Vava'u
Hampton CJ
L.883/93

6, 7, 8 November 1995

Land - registration - Deed of Grant - paramount - exceptions
Land - mistake of fact alleged - burden of proof

The first defendant (the Minister) in 1980 allowed steps to be taken to allow the plaintiff to be registered as the holder of a town allotment although no registration was completed and no Deed of Grant issued. In 1992 the first defendant allowed the second defendant to take steps to be registered as holder of the same allotment, registration was completed and a Deed of Grant issued. A substantial house was then started to be built. In 1994, after the issue of these proceedings, the first defendant, without notice to the second defendant purported to cancel the registration of the second defendant and directed the land should be registered in the plaintiff's name. The issue for the Court was as to which of the 2 claimants should be registered

Held:

1. There was no evidence indicating a misleading of the first defendant by either claimant.
2. No steps were taken by the plaintiff, or on his behalf by his father, to obtain completed registration and a Deed of Grant, although that could have been done. The plaintiff was in the U.S.A. for most of the time.
3. The second defendant was referred to the land, as being vacant, by the assistant Registrar of Lands, a search of plans and an inspection of land was made, registration applied for, and granted, and a Deed of Grant issued.
4. The purported cancellation of the registration of the second defendant, by the first defendant was done in knowing breach of the second defendant's rights to be heard on the matter, was in breach of the rules of natural justice and was set aside.
5. The title to land, perfected and with a Deed of Grant issued, is regarded, ordinarily, as paramount and as conclusive and binding on the Court, unless it can be shown that the entries in the register have been obtained by fraud or the wrong application of principle or a mistake of fact.
6. Neither fraud or wrong principle were relied on or relevant here. Mistake of

fact was not pleaded by the plaintiff but was by the first defendant, without particulars and without any evidence (the Minister choosing not to be represented at trial and abiding the judgment of the court). There is a burden on the party alleging a mistake to prove it. The court cannot guess or enter into the realms of conjecture.

7. No mistake having been shown, the Deed of Grant of the second defendant was paramount and conclusive and should stand. In addition equity and justice were in favour of the second defendant.

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Cases considered : Tokotaha v Dep. Minister of Lands (1958) 2 Tongan LR 159
Ma'asi v 'Akau'ola (1956) 2 Tongan LR 107

Statutes considered : Land Act ss 43, 120, 121

Counsel for plaintiff : Mr Piukala
Counsel for second defendant : Mr Niu

Judgment

The First Defendant in 1980 allowed steps to be taken towards having the Plaintiff registered as the holder of a town allotment at Neiafu, Vava'u, being lot 52 on plan 4027, of 999.1 m2 (or 39.5p.) in area.

Suffice to say, at present, that that registration was not carried through and completed and perfected by the issue of any Deed of Grant.

The First Defendant, in 1992, allowed steps to be taken to have the Second Defendant registered as the holder of the self same allotment.

Again suffice to say, that that registration was carried through and completed, and perfected by the issue of a Deed of Grant in the name of the Second Defendant (Tohi 280 Folio 46 of 25 August 1992).

The Second Defendant commenced to build a substantial 7 room house on the allotment and that activity came to the notice of the Plaintiff's father.

The Plaintiff's father took certain steps, through his lawyer, but also was in contact with the Minister of Lands and in February 1994, without notice to the Second Defendant, the First Defendant purported to cancel the registration of the Second Defendant and in effect said the land should be registered in the Plaintiff's name. I add that these steps were taken after the issue and service on the First Defendant of these present proceedings (and I find that an extraordinary step by the First Defendant in those circumstances - ignoring validly issued Court proceedings).

The question here is in whose name should this allotment be registered, and as a consequence who can lawfully occupy the land? What is the status and effect of:-

(a) the 1980 documents (Plaintiff's)?
(b) the 1992 registration (Second Defendant's)?
(c) the purported cancellation in 1994 by the First Defendant of the Second Defendant's registration?

Detailed History

From the evidence, I have not heard anything which makes me believe that either the Plaintiff (or his father) or the Second Defendant have tried to deliberately mislead the Minister of Lands, or the registration officials.

To a greater or lesser extent there seems to have been some ineptitude in the handling of the various documents.

The passage of time has not aided the parties (or the Court) in terms of recall of events. Nonetheless this Court finds the following facts.

In the late 70's, probably in 1977, the Plaintiff's father, Sione Lautaha (hereinafter called "the father") started the first steps over this allotment, which was vacant (hereinafter called "the land" and being described above). He seems to have started to do things with, and on, the land, including clearing and planting.

I add that the Plaintiff himself did not give evidence. He is in Hawaii, where he has been from 1977 to 1981; and again, continuously, from 1984 to present. He is married and has a family there. It is said he will return to Vava'u, sometime. It is significant, in my view, that the father in evidence spoke of the land as if it were his and effectively he has treated it as if it were so. He planted it, he maintained it, he built on it, he let relatives live on it, he took the house down. Decisions with regards the land seem to have been his entirely. He has his own allotment (being lot 2 on the same plan 4027); so do his other sons, the Plaintiff is his heir (in terms of the Land Act).

1977: the Plaintiff went to Hawaii.

1979: the father erected a wooden house towards the rear of the land; and maintained the land and fruit trees.

1979 - 81 (or 82): the father and family lived on the land.

20 May 1980: at P.28 of the so called "Register" Book for Neiafu Exh P.4 (so-called because it is not the official Register under sect. 121 of the Land Act, Cap 132) particulars of the Plaintiff were entered as follows:- "520 Siaosi Lautaha ($19.25 - 196629, 20-5-80) Navu Talaufanga Oa. Or. 39.5p., 20-5-1980)." The columns in the book which were left blank were as to the lot and the Block or plan. Later, and it is not known when (but it must be after the rewriting of this book about 1985) or by whom, added in pencil were the words "52, part? 216/157." As it turned out that plan reference number 216/157 is completely irrelevant and that plan relates to entirely different land.

It would seem that, some time earlier, the father went in to the office of the Governor of Vava'u to register the land for the Plaintiff. The father says he signed the application on behalf of the Plaintiff and paid the necessary registration and survey fees.

The Court is left with the entry in the so called "Register" Book, incomplete, without even lot and plan numbers. What is certain is that, for whatever reason, no Deed of Grant was issued; although the father knew one was required. On the evidence if a Deed is required one can be obtained - in haste (say 1 to 2 days) if all the information is available; but often it takes months (or years even). The father says he knew no Deed was issued and he claims he tried to follow that up over the years. On the evidence I am not convinced as to that. If he had then, on what I have heard, something would have happened. Second, originally in evidence in chief he was asked to explain what he did to try and get the Deed of Grant and his reply was that he went in to the office and was told by the Clerk that it (i.e. the land) had been given to the Second Defendant. That means that that enquiry must have been in 1992, or later, and at least is open to the suggestion that by then he knew the Second Defendant was on the land. Thirdly on the same page of the so called "Register" Book (P.28) his own registration for lot 2 plan 4027 is shown - and later in time than the Plaintiff's entry. In that entry lot and plan are filled in, and, noteworthily, so are the details of the Deed of Grant issued to the father with respect to that allotment.

1981 - 84: Plaintiff was back in Vava'u; but nothing seems to have been done to perfect title; although it is said he lived on the land for 1 year.

1982 (at latest): the father (with family) moved to father's own allotment.

1984: Plaintiff returned to Hawaii; and has not been back since.

1991: Last person lived in the father's house on the land - another son who then went to live in Pago Pago.

June 1992: the father pulled down the house on the land, which was dismantled and used as pieces for other things. This was done because the father was thinking of going to live in Hawaii and is an indication of the proprietorial way he thought of the matter.

July 1992: Second Defendant returned to Vava'u from the USA and tried to acquire an allotment to build a house upon. Significantly he did not know anything of the land in question. It is not as if he started out with designs upon the that land.

On the suggestion of the First Defendant then visiting Vava'u, the Second Defendant through the Assistant Registrar of Lands in Vava'u (who gave evidence), looked for a vacant allotment in a particular area, but found none. The First Defendant then suggested another area of Neiafu and, through the Assistant Registrar of Lands, the present land

under discussion was sorted out as being vacant (the Assistant Registrar of Lands said the land was available). Plan 4027 was consulted; no name was written in on Lot 52. The necessary application (produced in Court) birth certificate, survey and registration fees presented (receipts for fees were produced) and in due course the Second Defendant's name was entered into p.36 of the "Register" Book, together with all the necessary details including reference to lot and plan numbers, and the D.G. 280/46 cross reference.

24 August 1992: the application by Second Defendant was made.

25 August 1992: Deed of Grant (280/46) in his name was issued and a copy given to the Second Defendant; the First Defendant having signed and approved each of the application, the plan (as in para 28 below) and the Deed of Grant all in the Second Defendant's name. The Deed of Grant was entered into the Register of allotments (s.121 Land Act Cap.132).

August 1992: or thereabouts it would seem the First Defendant wrote on Lot 52 of the plan 4027 (in the same green ink, apparently, as on the Second Defendant's application for registration) as follows: "Falakesi Tapueluelu, S. Ma'u Lautaha hiki no.2". The significance is in the name "S. Ma'u Lautaha" and the word "hiki" (meaning move or shift to) no.2"; the fact is that the father is, and was, registered as holder of Lot 2 on 4027. (D.G. 280/1). That seems to be significant. Why the Minister of Lands acted in the way he did I have not been told but, by the notation, he seems to have been aware of some connection of the Lautahas with this allotment (i.e. Lot 52).

August 1992: shortly after 25 August 1992 the Second Defendant, along with others, but significantly including the Assistant Registrar of Lands, went and inspected the land. It was empty. There was no sign of a house. There was a remnant of old fencing. There was an outside toilet floor, but outside the boundaries (the survey pegs were located). There were fruit trees, but in bush and scrub. It would seem all in the party were satisfied the land was in fact available.

September/October 1992: the Second Defendant started to clear and fence the land.

October 1992: the father went overseas, not knowing of this activity (which perhaps demonstrates a lack of continuing interest on his part in the land).

November 1992: The Second Defendant went overseas, (and did not return until July 1993).

November 1992: The father heard, through family, of the fencing.

December 1992: The father, on his return, saw the First Defendant and got a hand written note from First Defendant of 30 December 1992 to the Assistant Registrar of Lands in Vava'u telling the Assistant Registrar to, in effect, cancel the Second Defendant's registration because the Plaintiff was registered on "20:5:82" (the wrong date).

January 1993: The Assistant Registrar of Lands, when he got that note, did nothing on this document, it seems because it was handwritten and not on letterhead. He kept it in the office and apparently did not even get back to the First Defendant to check or confirm or verify it. No notification of these events was given to the Second Defendant, by anyone.

April 1993: the father returned to the U.S.

July 1993: the father came back to Vava'u, and stayed until November 1993.

July 1993: the Second Defendant came back to Vava'u.

July - August 1993: the Second Defendant started levelling the section and then commenced building a substantial house on it.

September - October 1993: the Second Defendant raised moneys on Bank loans on the security of the land and building (and the Deed of Grant is still held by a Bank).

Late September - early October 1993: the father saw a lawyer to try and stop the Second Defendant's building.

7 October 1993: the father's lawyer wrote to the Second Defendant telling him in effect to stop building and pointing out, and attaching, the 30 December 1992 letter.

By that time the concrete slab/foundations were down - wall studs were erected; and roof joists going up on the Second Defendant's house.

In response the Second Defendant was somewhat indignant, I find. First he went to the Assistant Registrar of Lands. The plan 4027 was checked and the Second Defendant saw for himself, then, the First Defendant's own green ink writing.

Thus confirmed the Second Defendant saw the father's lawyer. He showed him the Deed of Grant. I find the lawyer was somewhat surprised on seeing the Deed of Grant, and I suspect that that reaction, plus what the Assistant Registrar had shown him, conditioned the Second Defendant into acting the way he subsequently did (although, in any event, I do not attach any great significance to what followed over the Court proceedings).

25 October 1993: these proceedings were issued - significantly originally with the father as the First Plaintiff. The accompanying Writ was in the old form and not per the 1991 Land Court Rules; so it did not inform the Second Defendant that he had to file a defence within a prescribed time.

29 October 1993: the Writ and Claim were served on the Second Defendant.

12 November 1993: the father obtained a letter from the Vava'u Governor's Office confirming, as it was put to him in his evidence-in-chief, 'the registration of your town allotment" (my emphasis). This letter was not sent or given to the Second Defendant though (by anyone).

October - November 1993: the Second Defendant's house was virtually completed on the exterior; and a large part of the interior ceiling and wall linings, joinery and so on were complete. This at a cost of some TOP$50,000. The Court has viewed it - still in virtually that state. It is a substantial solid and well built - house. Much money time and effort have been expended on it.

November 1993: the Second Defendant left for the USA again - and did not return until January 1995.

25 February 1994: i.e. after these proceedings were issued and served on both Defendants, the First Defendant sent a telegram to the Governor of Vava'u directing him to cancel the Second Defendant's registration, as the land was first registered by the Plaintiff in May 1980.

28 February 1994: without any notice to the Second Defendant (whether by the First Defendant, or his office, or the Governor of Vava'u, or his office, or the Registrar of Lands, or his office) the entry in the "Register" Book, at p.36 showing the registration of the Second Defendant as holder of the land, was purportedly cancelled by means of a clerk making this entry : "Minister of Lands telegrammed here to cancel this registration because Siaosi Lautaha first registered it on 20/5/1980. Therefore the registration has been cancelled 28/2/1994."

2 March 1994: still without notice to the Second Defendant a Savingram was sent by the Governor to the First Defendant, acknowledging the telegram, and stating that he

regarded the Second Defendant's registration as "void".

As to these events the father acknowledged in cross examination that he had made further contact with Tongatapu to get that telegram sent cancelling the Second Defendant's registration; and that he had not even told his own lawyer that he, the father, had pulled down his own house on the land in June 1992 (because, as he said, he believed it was "my allotment" - my emphasis added). As I have said already these are extraordinary events, particularly by the First Defendant. They fly in the face of valid Land Court proceedings which were afoot. They allowed no chance for the Second Defendant to be heard at all on the cancellation.

January 1995: the Second Defendant returned to Vava'u and learnt, for the first time, of the "cancellation" of his registration.

Apart from some remedial work to save the house from subsidence (and indeed house-breaking) damage the house sits in a substantially complete, but, as yet unfinished, state.

What is to be done? If the Second Defendant remains registered and completes his house the Plaintiff (or his father) loses the bare land (i.e. unbuilt on) plus mature fruit trees. If the Plaintiff is confirmed as the registered holder the Second Defendant will suffer the loss of a substantial investment in clearing levelling and building on the land.

In that sense it would seem apparent that the lesser loss and, given the history as set out above, in my view the fairer of two potentially unfair results (if there can be, by strict definition, such a creature) is achieved by (a) declaring the First Defendant's purported cancellation of February 1994 void and of no effect it being, as it undoubtedly is, in breach of the rules of natural justice; (b) confirming the registration of the allotment in the Second Defendant (c) rejecting the Plaintiff's application for declarations voiding the Second's registration and placing the Plainiff on the register as holder; and (d) urging the First Defendant to fulfil the obligation he would seem to be under to find another allotment for the Plaintiff. The Court has some sympathy for the Plaintiff.

But what does the Law say and does it affect that tentative view? I remind myself I am dealing with this case alone, and its peculiar circumstances.

The Law and This Court's Conclusions

There is no difficulty with regards to the purported cancellation in February 1994 by the First Defendant of the Second Defendant's registration. That cannot stand. It clearly was done in knowing breach of the Second Defendant's right to be heard on the matter. As I have said it was a clear breach of the rules of natural justice, and must be, and is, set aside.

I now look at the scheme of the Land Act (Cap 132) with regards registration of allotments.

I start in Part IV "Tax andTown Allotments" at s.43. (Read). I stress the words in s/section 2 "The grant shall be subject to the provisions of this Act."

I go then to Part VII "Registration of Title" and read in full s.120 and s.121.

> "s. 120. All deeds of grants of allotments shall be in duplicate and in the form prescribed in Schedule V and in addition to proper words of description shall contain a diagram of the land."
>
> "s. 121. The Minister shall sign and deliver to the grantee one duplicate and shall register the other by binding up the same in a book to be called the register of allotment."

The provisions of s. 121 are why I referred earlier to the so called "Register". It (Exhibit P4) may have been the Register under the pre- 1927 Act. It is not now.

The so called "Register", although still in use, is no more than a convenient clerical record - one of the clerical steps used towards final registration.

It is clear and certain that the Plaintiff's claim to title to this land was not perfected. No legal title was granted to him. Perhaps his absence for so much of this time under discusssion contributed to that (i.e. away for 15 of the 18 years under scrutiny).

On the other hand the Second Defendant's title was perfected and a Deed of Grant issued to him and a copy placed in the Register of Allotments (shown to the Court in evidence but not formally produced, by consent).

Such title has been often described in this Court, and on appeal, as paramount and as conclusive. Why shoud that principle not apply here?

I refer to just two cases mentioned in argument, as examples of the principle:-

(i) Tokotaha v. Deputy Minister of Lands (1958) 2 Tongan LR 159, in a passage in the Privy Council, at 159 "... the conclusion that the title to an allotment is not complete until the holder's name is both entered in the Register and a deed of grant issued to him," said in the course of a judgment on facts rather similar to those here and upholding the claim of the second person in time whose title was complete by entry in the Register and by issue of the Deed of Grant. The first in time there, the Plaintiff, had never had a complete title.

(ii) Ma'asi v. 'Akau'ola (1956) 2 Tongan L.R. 107, Hunter J at 108 - "the Court is bound by the entries in the Register, unless it can be shown that they have been made by fraud, mistake, without jurisdiction etc."

The exceptions referred to are, as is very well known, in cases of fraud or through the application of a wrong principle or a mistake. As I have read the judgments referred to me in argument it seems clear to me that a mistake in this context means a mistake of fact.

Fraud is not alleged or relied on (or pleaded) here. No allegation of wrong application of principle by the Minister, is made. Neither of those then are relevant.

So what of mistake? It was not pleaded as such by the Plaintiff. The First Defendant in his Statement of Defence, in a bald and bland pleading devoid of any particulars, says the registration of the Second Defendant was "made by mistake".

How or what or why or by whom is not pleaded. Nor is this Court helped by the absence of any evidence from the First Defendant. How does he say he made a mistake (if it is him who made one)?

There is no evidence offered as to that. I accept that there is a burden on the person alleging such a mistake to prove it. The Court cannot guess. Convincing proof would be needed particularly before a duly registered Deed of Grant, a paramount and conclusive title, could and should be over thrown or set aside. The circumstances here, as I have already commented, are somewhat akin to those in Tokotaha's case (see para 68). There the completed title was upheld.

Here on the evidence before me it is clear that in 1992 the First Defendant himself turned his mind to this allotment. He himself wrote on the plan, on Lot 52, the notations already mentioned (para 28). All I can conclude, on the state of the evidence, is that he was aware of the connection of the Lautaha family with this allotment at some time but

nonetheless agreed and allowed the registration in the name of the Second Defendant. And that on an allotment where it was known that no previous Deed of Grant had been issued. I am not prepared to enter into the realms of conjecture in such a matter.

On the evidence I cannot, within the principles in the cases mentioned in argument, find a mistake by the Minister of Lands had been shown.

The Deed of Grant of the Second Defendant is paramount and conclusive and should stand.

It is also my view that an even graver injustice would be perpetrated if I was to order the cancellation of the registration of the Second Defendant given his commitment to and expenditure on the land and house.

I add that I believe in any event, even if I am wrong in any of the above findings and conclusions, that in these circumstances the Court must have a discretion. It should, as best it can, achieve justice. Equity and justice seem to this Court to indicate that that discretion should be exercised in favour of the Second Defendant, for the factual reasons already outlined.

This Court therefore makes the following Orders:-

(1) setting aside the First Defendant's purported cancellation of the Second Defendant's registration.

(2) declaring and confirming the Second Defendant to be the legal registered holder of the land.

(3) dismissing the various claims and prayers of the Plaintiff for cancellation of the Second Defendant's registration and for registration of the Plaintiff as holder of the land.

(4) The injunction of 27 May 1995 against the Second Defendant be discharged.

(5) That the Second Defendant have costs against the Plaintiff as taxed.

I again go on to urge the First Defendant to give consideration to the Plaintiff's position and fulfil the obligation he has to find the Plaintiff another equivalent allotment.