

ALAE LUA (VA'ALEPA SALE'IMOA VA'AI) v  
LAND AND TITLES COURT AND OTHERS

Supreme Court Apia  
Lussick, ACJ  
18 June, 16 July 1992

CONSTITUTIONAL LAW - Jurisdiction - Land and Titles Court -  
whether a decision of Land and Titles Court could be sought to be  
set aside as nullity in the Supreme Court.

- Orders not available under S4 of the Declaratory Judgments Act 1988.
- S3 and S12 of the Declaratory Judgments Act 1988 do not confer jurisdiction additional to matters in S4 of the Act.
- Discretion under S11 to make judgment refused.
- Extent of S71 of Land and Titles Act as an ouster clause even when pleading a decision of the Land and Titles Court is a nullity.
- Nature and jurisdiction of Land and Titles Court.

HELD: S71 Land and Titles Act 1981 operates to oust the jurisdiction of the Supreme Court even when pleading a decision of the Land and Titles Court is a nullity.

CASES CITED:

- NZ Times v Commissioner of Police (1909) 29 NZLR 53
- Lyttleton Harbour Board v Welsh [1945] GLR 56
- Wellington Municipal Officers's Association v Wellington City Council [1951] NZLR 786
- Fletcher and Anor v Winono Drainage Board [1917] NZLR 405
- Anisminic Ltd v The Foreign Compensation and Anor [1969] 1 All E.R. 208

LEGISLATION:

- S4 Declaratory Judgments Act 1988; Ss 3, 4, 12
- Land and Titles Act 1981; Ss 7, 34, 37, 47, 71,
- Samoan Land and Titles Ordinance; Ss 2, 61
- Constitution of Western Samoa - Arts 100, 101, 111, 103
- Native Land and Titles Protection Ordinance 1934; S 34

L R Va'ai for Plaintiff  
M B Edwards for Defendants

Cur adv vult

This is an application brought by the First, Second and Third Defendants to strike out the Plaintiff's Notice of Motion and Statement of Claim. (The parties as shown include Fourth and Fifth Defendants but they have not answered the pleadings. By order of former Chief Justice Ryan made on 28th May 1990 they were declared to have no further part in the proceedings).

The Plaintiff's complaints arise from a decision of the Land and Titles Court of 8th October 1986, a decision by the President (the then Chief Justice Maxwell) on 21st June, 1988, dealing with an application for leave to appeal, and another decision by the same President on 4th April, 1989, refusing leave to file a fresh petition.

By way of Notice of Motion filed on 16th November, 1989 entitled "Notice of Motion for Declaratory Orders Under the Declaratory Judgments Act 1988" the Plaintiff seeks the following orders:

- "1. THAT the practice and procedure adopted by the First Defendant in its determination of Petitions A.L.C. 1617 P1, A.L.C. 3631, A.L.C. 3631 P1, A.L.C. 3631 P2, A.L.C. 3631 P3, A.L.C. 3631 P4, A.L.C. 3631 P5, A.L.C. 3631 P.6, A.L.C. 3631 P7, A.L.C. 3631 P8 was contrary to section 47 of the Land and Titles Act 1981 which required the First Defendant to act in a manner most consistent with natural justice and convenience.
2. THAT the practice and procedure adopted by the Second Defendant in arriving at his decision delivered on the 21st day of June 1988 was contrary to section 47 of the Land and Titles Act 1981 which required the Second Defendant to act in a manner most consistent with natural justice and convenience.

3. THAT the practice and procedure adopted by the Second Defendant in arriving at his decision delivered on the 4th day of April 1989 was contrary to section 47 of the Land and Titles Act 1981 which required the Second Defendant to act in a manner most consistent with natural justice and convenience.
4. THAT in the determination by the First Defendant of Petitions A.L.C. 1617 P1, A.L.C. 3631, A.L.C. 3631 P1, A.L.C. 3631 P2, A.L.C. 3631 P3, A.L.C. 3631 P4, A.L.C. 3631 P5, A.L.C. 3631 P.6, A.L.C. 3631 P7, A.L.C. 3631 P8 the First Defendant acted contrary to section 37 of the Land and Titles Act 1981 and Article 9(1) of the Constitution.
5. THAT in the determination by the Second Defendant of the Plaintiff's application for leave to appeal, which decision was delivered on the 21st day of June 1988, the Second Defendant acted contrary to section 37 of the Land and Titles Act 1981 and Article 9(1) of the Constitution.
6. THAT in the determination by the Second Defendant of the Plaintiff's application to file a fresh petition, which decision was delivered on the 4th day of April 1989, the Second Defendant acted contrary to section 37 of the Land and Titles Act 1981 and Article 9(1) of the Constitution.
7. THAT the correction of the Western boundary of the land Papalao in Vaisala, from Leali'ifano to Malolo, as advertised in the Savali of August 1913 was by operation of law registered on 1 December 1913 pursuant to section 5 of the Ordinance of the Governor to Regulate Land and Name dispute of the Samoans dated 15th July 1913.
8. THAT the Agreement of 2nd July 1915 between Malolo and Tuiasau purporting to give Leali'ifano the land Papalao II has no legal effect as it was not published in the Savali or through a public announcement as required by section 5 of the Ordinance of the Governor to Regulate Land and Name disputes of the Samoans dated 15th July 1913.
9. THAT the control (pule) of part of the land Papalao, also known as Papalao II in Vaisala is in the title Malolo of Vaisala.
10. FOR an order quashing or setting aside:
  - (i) the decisions of the Court namely A.L.C. 1617 P1, A.L.C. 3631, A.L.C. 3631 P1, A.L.C. 3631 P2, A.L.C. 3631 P3, A.L.C. 3631 P4, A.L.C. 3631 P5, A.L.C. 3631 P.6, A.L.C. 3631 P7, A.L.C. 3631 P8;

- (ii) the decision by the President of the Land and Titles Court dated 21 June 1988;
- (iii) the decision by the President of the Land and Titles Court dated 4th April 1989."

In a Statement of Claim filed earlier on 10th May 1989, after lengthy pleadings (which are summarised infra) in relation to the same decisions of the Land and Titles Court and its President, the Plaintiff prays:

- "(i) For a declaration under Article 4 of the Constitution that the Plaintiff and his family have been denied their right to a fair and public hearing by an independent and impartial tribunal;
- (ii) For a declaration under s.31 of the Judicature Ordinance 1961 that the proceedings and decisions of the Court were vitiated by breaches of the rules of natural justice;
- (iii) For an order quashing or setting aside the purported decisions of the Court referred to in paragraphs 3, 4, 9 and 14 hereof;
- (iv) For a declaration that the control (pule) of part of the land Papaloa, also known as Papaloa II, in Vaisala, is in the title Malolo;
- (v) For the costs of and incidental to this action: and
- (vi) For such further and other relief as may be just."

In their motion to strike out these pleadings, the Defendants argue:

- (a) that the orders sought by the Plaintiff in his Notice of Motion are in essence an application for the Supreme Court to review the practice, procedure, and findings of the Land and Titles court and are ultra vires the Supreme Court's jurisdiction under section 4 of the Declaratory Judgments Act 1988;
- (b) that the orders sought to quash or set aside the decisions of the Land and Titles Court and the President are not available under section 4 of the Declaratory Judgments Act 1988;
- (c) that the Statement of Claim does not disclose a cause of action, or alternatively, if a cause of action is disclosed then the Supreme Court ought to exercise its inherent jurisdiction to strike out the whole of the Statement of

Claim on the grounds that a Statement of Claim is not the appropriate proceeding for a declaration under Article 4 of the Constitution and that the orders sought by the Plaintiff would result in an unlawful interference by the Supreme Court with matters exclusively within the jurisdiction of the Land and Titles Court.

Resisting the application to strike out, counsel for the Plaintiff submits that, because of the wide powers given to the Court by sections 3 and 12 of the Declaratory Judgments Act, the Supreme Court does have jurisdiction to make the declaratory orders sought. Furthermore, that notwithstanding the provisions of section 71 of the Land and Titles Act 1981, the Supreme Court has power to review decisions of the Land and Titles Court where that Court has breached the rules of natural justice or has done something which makes its decision a nullity. (Section 71 is discussed infra.)

#### NOTICE OF MOTION

I propose to first deal with the Notice of Motion for Declaratory Orders under the Declaratory Judgments Act 1988.

The jurisdiction of the Supreme Court to make declaratory orders under the Declaratory Judgments Act 1988 is set out in section 4, which provides:

- "(1) Where any person has done or desires to do any act the validity, legality, or effect of which depends on the construction or validity of any statute, or any regulation made by the Head of State, acting on the advice of Cabinet, under statutory authority, or any bylaw, or any deed, will, or document or instrument of title, or any agreement made or evidenced by writing, or any memorandum or articles of association of any company or body corporate, or any instrument prescribing the powers of any company or body corporate; or
- (2) Where any person claims to have acquired a right under any such statute, regulation, bylaw, deed, will, document or instrument of title, agreement, memorandum, articles or instrument, or to be in any other manner interested in the construction or validity thereof, -- such person may apply to the Supreme Court by motion for a declaratory order determining any question as to the construction or validity of such statute, regulation, bylaw, deed, will, document or instrument of title, agreement, memorandum, articles, or instrument, or any part thereof."

It was said by Cooper J in NZ Times v Commissioner of Police (1909) 29 NZLR 53 that:

"the Act was intended to give a speedy and inexpensive method of obtaining a judicial interpretation of a deed, agreement or instrument in cases where the matter could not be conveniently brought before a court in its ordinary jurisdiction, and where a declaratory judgment would be the appropriate relief."

The Plaintiff here is not asking the Court to determine any question as to the construction or validity of any of the statutory provisions mentioned in his application. There is no question of the doing of any act the validity, legality, or effect of which depends on the construction or validity of any statute or any regulation, or any bylaw, or any deed, will, document, instrument or title, or any agreement made or evidenced in writing, or any memorandum or articles of association of any company or body corporate.

The issues raised in paragraphs 1, 2 and 3, of the Notice of Motion call for a study of the respective facts to determine whether the Land and Titles Court, or the President, have followed the requirements of section 37 of the Land and Titles Act 1981; but no question or doubt appears to be raised about the meaning of the section or of its applicability. In paragraphs 4, 5 and 6, the Land and Titles Court and the President are said to have acted contrary to section 37 of the Land and Titles Act and Article 9(1) of the Constitution, but again no such question as to meaning or applicability is raised.

The orders sought in paragraphs 7, 8 and 9, are for the purpose of reversing findings of fact by the Land and Titles Court and the President (such findings are set out in the Plaintiff's Statement of Claim, paragraphs 3 and 10), and the orders sought in paragraph 10 are to reverse the decisions of the Land and Titles Court and the President.

I cannot see how any of the subject matter of the Notice of Motion relates to the "construction or validity of any statute" or comes under any of the words in section 4 of the Declaratory Judgments Act. Accordingly, the Plaintiff cannot bring these matters before the Court by way of motion under the said Act. I do not think the Declaratory Judgments Act applies to the present case, and the Court has no jurisdiction.

I do not follow counsel for the Plaintiff's submission that this Court has jurisdiction under the Declaratory Judgments Act because of the wide powers given by sections 3 and 12.

Section 3 enables the Court to make declarations where no consequential relief is claimed. Section 12 provides that:

"the jurisdiction hereby conferred upon the Supreme Court to give or make any declaratory judgement or order shall not be excluded by the fact that the Court has no power to give relief in the matter to which the judgement or order relates, or that such matter would, independently of this Act, be within the exclusive jurisdiction of another Court".

I do not take either of those sections to confer jurisdiction which is additional to the matters enumerated in section 4.

Assuming, however, that the present class of case does come under the Declaratory Judgments Act (not that this is strictly necessary, but I am mindful of the possibility that this matter may go further) then the Court has a discretion under section 11 of the Act to refuse to give or make any judgment or order on any grounds which it deems sufficient.

There are numerous cases defining the attitude of the courts in the exercise of this discretion (see Sim's Practice and Procedure 12th Ed. p763 dealing with the New Zealand Act, which is similar in its provisions).

For instance, the Supreme Court of New Zealand (as it then was) has indicated that it will not assume an appellate jurisdiction by use of the Declaratory Judgments Act in respect of a decision of the Arbitration Court whose decisions are by statute declared final. In Lyttleton Harbour Board v Welsh [1945] GLR 56, Northcroft J said:

"This is an application for a declaratory order to determine questions arising upon, as it was stated by counsel, a contract of service between master and servant but really arising upon an award of the Court of Arbitration... The Court of Arbitration has already pronounced favourably to the Defendant and I cannot escape the view that this Court is really being asked for a declaratory order to pronounce in appeal upon the decision of that Court. Having regard to the provisions of the Industrial Conciliation and Arbitration Act and to the legislative policy that the decisions of the Court of Arbitration should be final, I think it would not be proper to assume an appellate jurisdiction in a matter of this sort by the machinery of the declaratory judgment. If the matter stood there, then I would think it would be the duty of this Court on that consideration alone to decline to entertain this application for a declaratory order."

A similar problem confronted the Court in Wellington Municipal Officers' Association v Wellington City Council [1951] NZLR 786 where a declaratory order was sought in relation to an agreement made pursuant to the provisions of the Labour Disputes Investigation Act 1913. Gresson J said at p788:

"Having regard to the special and exclusive jurisdiction of the Court of Arbitration in the making of industrial awards, and having regard to the fact that the matters raised in this summons are matters in the industrial sphere, I think such intervention on the part of this Court in the business of the Court of Arbitration as the answering of the questions submitted by this summons would compel, would be contrary to the spirit and purpose of the Industrial Conciliation and Arbitration Act, 1925. The Legislature having created a special court to deal with the matters with which this application is concerned, I do not think this court should determine the questions now submitted to it, since to do so would be at the same time to interpret in a somewhat oblique fashion an Award made by the Court of Arbitration. For these reasons, in my opinion, it is undesirable and inexpedient to give or to make such a declaratory order as is here sought."

In Fletcher and Anor v Wainono Drainage Board [1917] NZLR 405 the Court of Appeal expressed strong reservations about the Declaratory Judgments Act being used to seek redress from decisions of other tribunals. In that case, the Appellants, who were ratepayers in the district, contended that the report of a commission set up under the Land Drainage Amendment Act, 1913, ought to be declared a nullity and the Order in Council based on it be set aside, on the ground that the Commissioner had failed to observe the principles of natural justice. Chapman J at p423 said:

"I think it would be a very dangerous thing to plunge the Court into a career that would be opened up by allowing this indirect mode of procedure by way of seeking redress in matters of this sort. So far as the first three objections are concerned it seems to me to be totally foreign to the scheme and spirit of the Declaratory Judgments Act, and would be a very dangerous thing, even supposing a clear case was made out that we should exercise our discretion in the way of entertaining such an application. The statute is passed to enable the Court to hear argument upon the construction of statutes and other instruments. If one is to go further than that, the limit should be a case where the facts are clear-cut and absolute and the determination to be arrived at upon them determines some right."

In the present case, notwithstanding section 12, the Court would be entitled to take into account the fact that the subject matter of the application falls within the exclusive jurisdiction of the Land and Titles Court, which has its own appellate procedure, and the decisions of which are not questionable or reviewable in any other Court, and this would, in my view, be sufficient grounds for the Court to refuse to make the orders sought.



## STATEMENT OF CLAIM

The Plaintiff's pleadings, in summary form, are as follows:

- (1) That the Land and Titles Court acted in breach of the rules of natural justice because of certain procedures it followed.
- (2) That the Land and Titles Court failed to take into account certain relevant material.
- (3) That the Land and Titles Court acted contrary to section 37 of the Land and Titles Act by failing in a certain respect to apply custom and usage and the law relating thereto.
- (4) That the President's decision of 21 June 1988 was not supported by the evidence nor by custom and usage.
- (5) That the President "failed properly" to consider the existence of new material.
- (6) That the President's decision of the 4 April 1989 "failed, or failed properly" to consider whether there was any new evidence or "whether the decision was against the weight of evidence".
- (7) That the Court or the President, as the case may be, thereby denied the Plaintiff and his family a fair and public hearing as required by Article 9(1) of the Constitution and, contrary to s.47(2) of the Land and Titles Act, failed to act in a manner consistent with natural justice and convenience.

Any consideration of these claims would, of course, involve a review of the decision of the Land and Titles Court and the two decisions of the [President. I am in some doubt whether or not] I have the jurisdiction to embark upon such a review.

Section 71 of the Land and Titles act provides that:

"Subject to this Act, no decision or order of the Court shall be reviewed or questioned in any other Court by way of appeal, prerogative writ or otherwise howsoever."

Counsel for the Plaintiff argues, however, that this ouster clause does not operate to exclude an enquiry by the Supreme Court where the decision of the Land and Titles Court, because of the matters pleaded, is not really a decision at all but a nullity. For this proposition he relies on the decision of Anisimic Ltd v The Foreign Compensation and Anor [1969] 1 All E.R. 208.

In my view, the applicability of that decision to the present case is doubtful. The Anisminic decision was the product of a different legal system and was concerned with the review of a decision of an inferior tribunal entirely dissimilar in status and nature to the Land and Titles Court.

Western Samoa has two legal systems of law working side by side. On the one hand we have statute law, English common law and equity; on the other, custom and usage and the principles of customary law which govern the holding of matai titles and customary land. Each legal system has its own court: the former the Supreme Court and Magistrates Court, the latter the Lands and Title Court.

The difference between the two systems was well defined by former Prime Minister Tupua Tamasese Lealofi IV in his speech at the opening of an additional courthouse in Savaii in 1970:

"The respective roles and functions of the two courts are different. One is for the maintenance of law and order, the other is for the protection of rights to customary land and titles -- the two basic and fundamental things which form the very core of our Samoan society. The decision of the Criminal Court will affect only those accused, whereas the decisions of the Land and Titles Court have a far reaching effect for they are binding even on the unborn generations."

Samoa custom and usage is expressly recognised in the Constitution. The preamble, in part, reads:

"Whereas the leaders of Western Samoa have declared that Western Samoa should be an Independent State based on Christian principles and Samoan custom and tradition."

Matai titles and customary land are declared to be held in accordance with Samoan custom and usage (Articles 100, 101). The definition of "law" in Article 111 includes:

"any custom or usage which has acquired the force of the law in Western Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction."

Article 103 requires that there shall be a Land and Titles Court with such jurisdiction in relation to matai titles and customary land as may be provided by Act.

The Land and Titles Court was originally constituted under the German regime during the governorship of Dr Solf, and came into operation under the name of the "Land and Titles Commission" in 1903. The system of having disputes regarding Samoan land and Samoan titles determined by a tribunal of this kind was continued

after the occupation by New Zealand troops in August 1914. Section 34 of the Native Land and Titles Protection Ordinance 1934 constituted and established for a Samoan a Court of Record known as "The Native Land and Titles Commission", which name was changed by amendment in 1937 to "The Native Land and Titles Court" and changed again in 1951 to "The Samoan Land and Titles Court". It is now known as the Land and Titles Court. the Samoan Land and Titles Court Protection Ordinance was repealed by the Land and Titles Act, 1981.

The Land and Titles Court has exclusive jurisdiction in all matters relating to Samoan names and titles and in all claims and disputes between Samoans relating to Samoan land held in accordance with the usages and customs of the Samoan race (section 34). In reaching its decisions the Court applies custom and usage, the law relating to custom and usage, and the Land and Titles Act and any other enactments expressly applying to the Court and, subject thereto, the Court shall decide all matters in accordance with what it considers to be fair and just between the parties (section 37). "Custom and usage" is defined as the customs and usages of Western Samoa accepted as being in force at the relevant time and includes--

- (a) the principles of custom and usage accepted by the people of Western Samoa in general; and
- (b) the custom and usages accepted as being in force in respect of a particular place or matter. (section 2)

In so far as Samoan land and Samoan titles are concerned, the Court may in fact be regarded as the supreme authority on the subject of Samoan custom. (C.C. Marsack: Notes on the Land and Titles Court).

The President of the Land and Titles Court is the Chief Justice or a Judge of the Supreme Court. On the hearing of a petition the Court is presided over by the President or Deputy President sitting with at least four Samoan Judges and Assessors. The President sitting alone hears applications for leave to appeal, and the President sitting with two Samoan Judges hears appeals where leave has been granted.

In matters of practice and procedure, where strict compliance with any rule may be inequitable or inconvenient, the Court may act in each case in such manner as it considers to be most consistent with natural justice and convenience. (section 47(2)).

The ouster clause in the repealed Samoan Land and Titles Ordinance, which was replaced by the aforementioned section 71, had the following wording:

"The Supreme Court shall not exercise control over the Samoan Land and Titles Court (whether in respect of want of jurisdiction or otherwise) by way of appeal, certiorari, mandamus, prohibition or otherwise howsoever. (section 61)".

It can be seen that section 71 of the present Act is a wider clause. "Supreme Court" in the previous legislation has been replaced with "any other Court." Not surprisingly, the words "(whether in respect of want of jurisdiction or otherwise)" were not carried over into the present Act. A new provision, section 79, left no doubt that want of jurisdiction was one of the questions to be decided by the Land and Titles Court on appeal.

Section 79 reads as follows:

"79 (1) Leave to appeal may be on any of the following grounds:

(a) that new and material evidence had been found since the hearing of the petition of which the applicant had no knowledge, or which could not reasonably have been adduced at the hearing of the petition;

(b) that the successful party had been guilty of such misconduct in relation to the hearing of the petition as to affect the result of the case;

(c) that a witness had been guilty of such misconduct in relation to the hearing of the petition as to affect the result of the case;

(d) that a member or officer of the Court had made a mistake or misconducted himself in relation to the hearing of the petition as to affect the result of the case;

(e) that the Court did not have jurisdiction to make the final decision or order;

(f) that the decision or order is wrong in law or not in accordance with custom and usage;

(g) that the decision or order was manifestly against the weight of evidence adduced at the hearing of the petition.

(2) Notwithstanding sub-section (1), leave to appeal shall not be granted unless the President is of the opinion that some substantial wrong or miscarriage of justice has occurred."

These grounds are broad enough, in my view, to include an appeal on the basis of a violation of natural justice. (Section 47(2) previously mentioned obliges the Court to consider natural justice).

The questions to be decided by the Land and Titles Court on appeal (want of jurisdiction, decision wrong in law or against the weight of evidence, etc.) are virtually the same questions which the Supreme Court would decide when exercising its supervisory jurisdiction in relation to a decision of an inferior tribunal. In other words, it is for the Land and Titles Court on appeal to decide whether a first instance decision is a nullity because of want of jurisdiction or because of any of the matters listed by Lord Reid in the Anisminic case.

#### SUMMARY

- i) The Land and Titles Court is a unique court, but not an inferior court.
- ii) It has exclusive jurisdiction over Samoan titles and customary land.
- iii) It has its own appeal procedure.
- iv) It governs a legal system different and separate from that of the Supreme Court.
- v) The status of the Land and Titles Court and its President is equal in some respects to that of the Supreme Court and its Chief Justice.
- vi) The Land and Titles Court is the supreme authority for Samoan custom.

In the light of all the foregoing considerations, the plain words of section 71 are capable of having only one meaning, and that is that a decision or order of the Land and Titles Court cannot be reviewed or questioned in any other Court for any reason whatsoever, even to enquire whether such decision or order might have been a nullity. The viewpoint that despite the plain words of section 71, a power to review still remains with the Supreme Court is simply not maintainable. I reject the submission that the jurisdiction of the Supreme Court is not ousted by that section.

In my opinion, the Anisminic case is distinguishable and does not apply here or to decisions of the Land and Titles Court in general.

I hold that section 71 operates to oust the jurisdiction of the Supreme Court and, consequently, that in the present case this Court has no jurisdiction.

I therefore make the following orders:

1. The Plaintiff's Notice of Motion for Declaratory Orders under the Declaratory Judgments Act, 1988, is struck out.
2. The Plaintiff's Statement of Claim is struck out.
3. The Plaintiff is to pay the Defendants' costs.