

IN THE COURT OF APPEAL OF TONGA
LAND JURISDICTION
NUKU'ALOFA REGISTRY

AC 10 of 2017
[LA 26 of 2015]

BETWEEN : TOAKASE PANUVE

- Appellant

**AND : 1. TAPU PANUVE
2. MINISTER OF LANDS**

- Respondents

**Coram : Handley J
Blanchard J
Hansen J**

**Counsel : Mr. L. M. Niu SC for the Appellant
Mr. W. C. Edwards SC for the First
Respondent
Mr. A. Kefu SC for the Second Respondent**

Date of Hearing : 21 March 2018

Date of Judgment : 26 March 2018

JUDGMENT OF THE COURT

- [1] The appellant (Toakase) appeals against the ruling of the Lord President in which he directed the Minister of Lands to cancel her registrations as owner of tax and town allotments formerly owned by her late husband, Sionatapi Panuve, on the ground that she was not a Tongan subject at the date of his death. The Lord President was also required to consider Toakase's challenge to a lease of the town allotment to the first respondent (Tapu) and the ownership of a house built on the town allotment.

Background

- [2] Sionatapi and Toakase married in 1991. Both had been married previously. Sionatapi's first wife 'Ana died in 1989. She and Sionatapi had two sons, Tapu and Semisi, and a customarily adopted daughter, Juliet. Sionatapi had a town allotment at Haveluloto and a tax allotment at Pelehake. In 1989 Sionatapi and his two sons agreed to build a house on the town allotment. They jointly borrowed the money required to build the house and all agreed to share in repayments. Sadly, 'Ana died before the house was completed. The

remaining members of the family moved in and lived there together.

[3] Toakase was born in Tonga in 1948. She married a Tongan man in the United States in 1974. In 1982 she became naturalised as a citizen of the United States. She and her first husband divorced in 1986.

[4] After their marriage in the United States, Sionatapi and Toakase moved back to Tonga and into the house on Sionatapi's town allotment. Initially they shared the house with all three of Sionatapi's children. In 1991 Tapu married and left to live elsewhere. Semisi married in 1992 and he and his wife lived in the house until 1996 when they left to build a house of their own. Juliet also left in 1996. When Semisi left he asked to be released from his obligations under the house loan. Sionatapi and Tapu agreed and from then until 2003 shared responsibility for repayments. In 2003 Sionatapi got into financial difficulties and Tapu agreed to pay off the balance of the loan, then \$21,582.34. In return Sionatapi offered Tapu a lease of the town allotment. An application was made and

approved in 2004 although for reasons that were not explained, the lease was not registered until 2015.

[6] Sionatapi and Toakase lived in the house together until 2000 when Toakase left to work in the United States where she remained until 2009. The couple visited one another during this time and Toakase sent Sionatapi money. They lived together in the Haveluloto house from 2009 until Sionatapi's death on 23 July 2012.

[7] At that time Toakase was still a citizen of the United States. Shortly afterwards she applied for and, on 25 October 2012, was re-admitted to Tongan nationality. She then lodged her claim as widow for Sionatapi's town and tax allotments. They were registered in her name in 2013.

Issues

[8] Before the Lord President, Tapu and the Minister of Lands contended that Toakase was not entitled to Sionatapi's allotments as she was not a Tongan national at the date of death. For Toakase it was submitted that there is no requirement for a widow to be a Tongan national in order to

claim her deceased husband's allotments but, if there is, it is met if the widow is a Tongan national when she makes her claim. Tapu sought cancellation of Toakase's registration of the two allotments and a declaration that he is the owner of the house on the town allotment. Toakase, for her part, sought a declaration that the lease to Tapu was null and void by virtue of her prior registration as holder of the town allotment.

[9] The Lord President held that in order for a widow to claim a tax or town allotment, a widow must be a Tongan subject at the date of death of her husband. Accordingly, Toakase was not entitled to claim Sionatapi's tax and town allotments. The Lord President directed the Minister of Lands to cancel Toakase's registration as holder of the tax and town allotments. In the circumstances Toakase had no standing to challenge the lease and the Lord President made no finding in relation to it. He was, however, not satisfied that Tapu owned the house and declined to make an order to that effect.

[10] The first and primary question that must be considered, then, is whether the Land Court was right to hold that a widow must

be a Tongan subject at the date of her husband's death in order to claim an interest in his tax or town allotments.

The appellant's case

[11] Before us, as he did in the Land Court, Mr. Niu SC began his case by referring to clause 113 of the Constitution which provides:

Tongan male subjects by birth of or over the age of 16 years may be granted town allotments and tax allotments out of estates granted in pursuance of this Constitution with the consent of or upon consultation with the estate holder and out of the lands of the Crown, by the Minister of Lands. Such allotments shall be hereditary and shall be of such size and at an annual rent as may be determined by law. A widow shall have the right to succeed according to law, to her deceased husband's tax and town allotments.

[12] Mr. Niu submitted that, while the right of Tongan males to a grant of town and tax allotments is conditional on their being Tongan subjects by birth, there is no such qualification on a widow's right to succeed. Widows have the right to succeed according to law. And the law, submitted Mr. Niu, as provided by the Land Act (CAP. 132), (the Act) does not stipulate that

Tongan nationality is a pre-requisite to a widow's right to claim.

[13] Mr. Niu referred to S.80 of the Act which simply provides, without words of qualification, for "his widow" to be entitled to a life interest in allotments held by a lawful male holder on his death. He pointed out that ss.81 and 87 similarly refer merely to "a widow" or "the widow".

[14] Mr. Niu contrasted the requirement in s.64 of the Act for the 'holder' of a tax allotment to pay an annual rent with the obligation in s.66 for the widow or any daughter to pay rent during the continuance of a life estate. He pointed out that sections 56 and 58 dealing with the lease of a town or tax allotment similarly distinguish between the registered holder and 'a widow'.

[15] Mr. Niu argued that it followed that the definitions of 'landholder' or 'holder' in section 2 of the Act are intended to refer only to male holders.

[16] Finally, in support of his argument that the Land Act, properly construed, imposes no requirement that a widow must be a Tongan national to succeed to her husband's allotment, Mr. Niu referred to s.42, the concluding section of Part III of the Act which provides:

Nothing in this part of this Act shall apply to any person who is not of Tongan nationality.

[17] Mr. Niu submitted that, as there is no equivalent provision applicable to other parts of the Act, including, relevantly, Part IV Tax and Town Allotments, the Legislature must be taken to have intended that, unless expressly provided, there is no requirement for Tongan nationality in order for a person to succeed to and hold a tax or town allotment.

Discussion

[18] The careful arguments of Mr. Niu notwithstanding, we are satisfied the Lord President was right to find that the Land Act, read as a whole, intends and provides that only Tongan subjects may hold an interest in land. Widows are not exempt from this requirement.

[19] We begin with the definition of “landholder” and “holder”.

Section 2 relevantly provides;

“landholder” or “holder” means-

- (a) As regards Crown Land the Minister of Lands;*
- (b) Any Tongan subject holding an hereditary estate (tofia), a tax allotment (api tukuhau) or town allotment (api kolo);*
- (c) Any Tongan subject claiming to be interested in land which he is legally capable to hold;*
- (d) Any trustee duly appointed by the King, the Minister, or the Court on behalf of any person entitled to succeed to any land on reaching the lawful age of succession in respect of such land;*
- (e) Any person appointed as or acting as trustee or representative for any person beneficially entitled to any land or interest in land;*
- (f) Any person who claims to be entitled to any land or interest in land whether in actual possession or occupation or otherwise.*

[20] S.14 prohibits non-Tongans from holding, residing upon or occupying land without a permit, providing as follows:

“14. It is unlawful for any alien to hold or to reside upon or to occupy any land without having first obtained from the Minister of Lands a permit so to do issued by him in

exercise of the powers conferred under section 19(4) of this Act. Any alien who contravenes the provisions of this section shall on conviction be liable to a fine not exceeding \$20 or in default of payment to imprisonment for any period not exceeding 3 months.

[21] Contrary to Mr. Niu's submission, we are unable to accept that the definition of "landholder" or "holder" in subparagraph (c) is to be construed narrowly as referring only to males. That could only be so if the scheme and the provisions of the Act required it. In our view they do the opposite. Section 56, for example, makes it clear that the definition of 'registered holder' or 'holder' includes a widow. It relevantly provides;

56. The registered holder of a town or tax allotment may grant a lease over the whole or part of his town or tax allotment, provided that-

... (ii) the holder is not a widow holding the tax or town allotment of her deceased husband;...

Mr. Kefu also referred to section 100 which relevantly provides:

100 (1) The registered holder of a tax or town allotment may grant a mortgage over the whole or part of his tax and town allotment provided that –

...

(ii) *the holder is not a widow holding the tax or town allotment of her deceased husband;...*

[22] The right of an unmarried daughter to inherit (s.82(d)) similarly shows that the definition of 'registered holder' or 'holder' is not confined to males. Indeed, Mr. Niu was obliged to concede that, if his argument is correct, it must follow that unmarried daughters who are not Tongan nationals could also succeed. That would be an extraordinary outcome and in our view most unlikely to have been intended.

[23] As we have noted, Section 42 was relied on by Mr. Niu as indicating an intention to permit succession by non-Tongan nationals in those parts of the Act to which it does not apply, unless there is express provision to the contrary. However, as this Court observed in *Taufa v Tahaafe* [2015] Tonga L.R 104 at [19], Part III of the Act applies only to noble estates. Such a provision could have been included in Part IV to put beyond doubt that a non-Tongan could not inherit a tax or town allotment, but when section 82 is read with the definition of 'landholder' or 'holder', such a provision would have been redundant. It may be noted also that one of the consequences

of section 42 is to make it clear that, in order to succeed to an hereditary estate, female issue and the sisters of the holder must be Tongan subjects. It would be anomalous if a different rule applied to a successor to tax and town allotments, an outcome that Mr. Niu's argument entails.

[24] In our view the provisions of the Act, read together, evince a clear intention that the requirement for Tongan nationality applies to all who have a right to succession under the Act. It is not made explicit in the case of widows only because the scheme of the Act can sensibly brook no other interpretation.

[25] We agree with the Lord President, that this outcome, while having the potential to cause injustice in individual cases, is consistent with what he described (at [36]) as a unique system of land tenure in Tonga whereby all land is given by grant and not sold for money and life interests in land are reserved for Tongan people. The principle of non-alienation to foreigners is discussed in The Royal Land Commission Final Report of 30 March 2013 at p 2 and encapsulated in the following excerpt from the speech of His Majesty Tupou I at the Opening of

Parliament 1875 [1921-1962] Tonga LR Vol II, 1 – 2 referred to by Mr. Kefu:

“There is another matter that is right that I should speak about and that concerns the soil (land) of this Country. It is quite true that matters of this nature do not as a rule belong to the Constitution of other Countries but we are different from all other countries of the world, for no part of Tonga has yet been sold, the whole of the land being intact up to the present time and in the Constitution I have again made sure that this law shall be perpetual, that is absolutely forbidden to sell any part of Tonga for ever. Nevertheless it appears to me just to make a regulation and it is in the Constitution to allow leases to be given for pieces of land and for sites by the Government and by the Chiefs”.

[26] We also accept that it would be anomalous if a widow in the appellant’s position could retain the right to hold land whereas a Tongan male who had ceased to be a Tongan national as a result of taking foreign citizenship, would lose that right. Such an outcome is unlikely to have been intended by the Legislature.

[27] In *Vea and anor v Vea and ors* (unreported Land Court, LA 22 of 2009, 1 October 2010, Andrew J) it was held that it was not the law in Tonga that in order to claim under section 80 of the Act a widow did not have to be a Tongan subject. We agree with the Land Court that that is not a correct statement of the law.

[28] We pass now to consider the consequential issue of whether the requirement to be a Tongan subject must be satisfied at the date of death or when the claim is made. The question was considered in *Taufa v Tahaafe*. This Court decided, without argument, that the point in time at which rights of inheritance are to be determined is the date of death.


[29] Although Mr. Niu valiantly sought to persuade us otherwise, we are in no doubt that *Taufa v Tahaafe* correctly decided the issue. The words of the statute leave room for no other conclusion. Section 80 relevantly provides:

“On the death of the lawful male holder of any tax or town allotment his widow shall be entitled to a life estate in such allotment which estate shall terminate on her re-marriage or upon proof in legal proceedings (as provided by section 81) of her having committed fornication or adultery:

[30] The entitlement arises on death. That is when the status of the widow must be considered. And, as the Land Court pointed out (at [40]), there are practical reasons why this should be so. If the right to succession could not be determined until a claim were lodged, there would be uncertainty and the potential for challenges to prior grants made to lawful successors.

Result

[31] The appeal is dismissed.


.....
Handley J




.....
Blanchard J


.....
Hansen J