



IN THE NAURU COURT OF APPEAL

AT YAREN

APPELLANT JURISDICTION

Civil Appeal No.1 of 2020

BETWEEN: **Rickson Herman**
Appellant

AND: **Janet Deireragea & Ors**
Respondent

BEFORE: **Chief Justice F. Jitoko**

APPEARANCES:

Counsel for the Appellant: **R. Tagivakatini, PLD**

Counsel for the Respondent: **V. Clodumar**

Date of Hearing: 24th August, 2020

Date of Ruling: 24th August, 2020

Case may be cited as: *Herman v Deireragea and Ors*

RULING
(EX-TEMPORE)

1. Two important issues are raised by this application for stay while appeal is being made to the Nauru Court of Appeal. They both involve issues of law and go to the merit and chances of success of the appeal.

2. The first is the issue of the presumption of death. The Supreme Court had come to the conclusion that a person by moving off the island and relocating overseas and there since, being no evidence of the person being alive, that there is a presumption of death. The Counsel for the appellant had clearly refuted the presumption in his arguments and submissions to the Court.
3. It is unfortunate that the Court in arriving at its conclusion of presumption of death, had not considered the common law rule, applicable to Nauru on the presumption of death. At common law, the Court will only assume a person to be dead when there is no evidence of his or her continued existence for a period of seven (7) years. Even then, this presumption is rebuttable. I am guided in this regard by Sachs J's analysis and conclusion in the case of *Chard v Chard [1955], 3 All ER 721.*
4. The Court notes that in this case, the person in question Mrs Teneke Rodiben had relocated to Kiribati in June 2015 or thereabouts. Efforts to ascertain from her relations and relevant authorities of Kiribati, had failed, according to the respondents, to elicit the confirmation or otherwise of the rumour that she had died. Applying the common law rule of the presumption of death may only be considered by the Court after seven (7) years have lapsed from June, 2015.
5. It follows that the invoking of the Administrative Order No.3 1938 will only operate once death is established and decided by the Court applying the common law rule.
6. The second legal issue is the status of the applicant, the defendant in the proceedings below, in his occupation of the house on Portion 46, Anibare District. There is agreement that the applicant had the approval, and consent of Mrs Teneke Rodiben to move in and occupy the house. It is also agreed that the NLC had granted, following the agreement of the family, a Life Time Only (LTO) interest in the property, to Teneke Rodiben. That being so and given the fact that she had authorised the applicant to move into the house, would this not have granted him some legal rights to remain in the house? It appears that the finding of illegality by the Court, of the applicants' occupancy of the house is premised

on the presumption by the Court of the death of Teneke Rodiben and therefore remains an issue. Whether Mrs Teneke Rodiben had abandoned her LTO is both an issue of fact and law.

7. The subsequent transfer of the applicant's mother's shares in Portion 46, is not relevant, in the Courts consideration, to the grounds of appeal.
8. In the Court's view, there is not a doubt that the grounds of appeal have merits on important issues of law.

STAY APPLICATION

9. The prospect of success of the appeal weighs heavily in the application for stay. There a numerous case law that adds substance to the exercise of the powers of the Court of Appeal to stay the execution of judgments, decisions, or orders, under section 17 of the Nauru Court of Appeal Act 2018. It is sufficient to summarise the grounds upon which the Court will consider before it arrives at its decision. They are set out under Rules 12 (3) of the Nauru Court of Appeal Rules as follows;


- (a) failure to stay the execution will render the appeal if successful, nugatory,
- (b) there is some prospect of success of the appeal.
- (c) the effect of the stay on third party, and
- (d) balance of convenience

10. As to (a), the appeal if successful would clearly be rendered nugatory if there is no stay of the order of the Supreme Court. As to (b), as the Court has already alluded to in its deliberation on the leave, there are some merits on the grounds of appeal that lends some belief of prospect of success of the appeals. As to (c) there are no third parties that stand to be adversely affected by the stay.
11. Finally on the balance of convenience, the Court believes that this favours the appellant overall.

12. Application for stay is granted.

ORDER

(1) The Supreme Court's Order of 13 March, 2020 is stayed pending the hearing and disposal of the appeal in the Court of Appeal.



[Handwritten Signature]
Emimone Jitoko
Chief Justice
President Court of Appeal