NAURU COURT OF APPEAL
AT YAREN
APPELLATE JURISDICTION

Civil Appeal No. 2 of 2020
[Supreme Court Civil Case 1 of 2018]

BETWEEN: **RICKSON HERMAN**

APPELLANT

AND: **JANET DEIRERAGEA (nee Eongen) of Baitsi District, Widow IBAN RODIBEN of Anabar District and SUSAN (Zola) QUADINA (nee Eongen of Anabar District)**

RESPONDENTS

BEFORE: **Justice Dr. Bandaranayake**
Acting President
Justice R. Wimalasena
Justice C. Makail

DATE OF HEARING: **30/08/2022**

DATE OF JUDGMENT: **14/10/2022**

CITATION:	**RICKSON HERMAN v. JANET DEIRERAGEA & OTHERS**
KEYWORDS:	**COURT OF APPEAL – Civil appeal – Appeal against order for eviction – Vacation of property – Right to occupation of property – Invitee – Whether invitation was terminated upon death of Life Time Only beneficiary – Administrative Order No. 3(3)(b) of 1938 of Regulations under Section 4 of the Native Administration Ordinance 1922** **DECEASED ESTATES – Inheritance of deceased real and personal property – Life Time Only interest to surviving spouse – Death of surviving spouse – Proof of death – Administrative Order No. 3(3)(b) of 1938 of Regulations under Section 4 of the Native Administration Ordinance 1922** **PLEADINGS – Admissions – Admissions in pleading – Alleged admission in defence – Alleged admission of death of surviving spouse – Proper test to determine whether pleading constitute admission – Admission must be strong and unambiguous – Civil Procedure Rules, 1972 – Order 24, rule 3**
LEGISLATIONS:	**Statute Law Revision Act, 2011; Nauru Lands Committee Act, 1956**
CASES CITED:	**Dep International Private Limited v. Ambogo Sawmill Pty Limited [1987] PNGLR 117; Imawe Bogasi Land Group Inc v. Bank South Pacific and Toale Hongiri ILG & Ors (2011) SC1102; Chard v. Chard (otherwise Northcott) [1955] 3 All ER 721**

APPEARANCES:

COUNSEL for the Appellant:	**Mr. R. Tagivakatini**
COUNSEL for the Respondents:	**Mr. V. Clodumar**

JUDGMENT

1. **BY THE COURT**: This is an appeal against an order for eviction issued by the Supreme Court on 10th March 2020 to have the appellant vacate a property comprising of a house located on a portion of land described as Portion 46 in Anabar District.

Brief History of Case

2. The respondents are children of the deceased one late Rodiben Eongen (*deceased*) and Lingue. The deceased owned Portion 46. Upon his death the respondents with four others including Robert Ijaeb Rodiben (Robert) inherited Portion 46.

3. Robert married Teneke Rodiben (Teneke) on 6th October 1979. Teneke was from Kiribati. They did not have any children and Robert died intestate in 2011. He was survived by his widow, Teneke.

4. The family held a meeting at the Nauru Lands Committee on 27th July 2011. Late Robert's siblings, his nieces and nephews attended. According to the meeting minutes it was agreed that Teneke would inherit whole of late Robert's real and personal estate for life and will be returned to his siblings upon her death. Accordingly, Teneke was granted what is called a Life Time Only (LTO) interest of Portion 46 which comprised of 1/24 share. The break-up of the estate was as follows:

   a. Janet Deireragea – 1/24 share
   b. David Dedagrin – 1/24 share
   c. Helen Herman – 1/24 share
   d. Iban Eongen – 1/24 share
   e. Teneke Rodiben (LTO) – 1/24 share
   f. Iageo Eongen – 1/24 share
   g. Susan Quadina – 1/24 share

5. Following the meeting Teneke took occupation of her late husband's house and was collecting rent from the restaurant which was let to Chinese nationals. Teneke lived in the house and sometime in 2015 she invited the appellant to move in with her.

6. The appellant is the son of Helen Herman (nee Rodiben). Helen is the respondents' sister. The appellant is their nephew and of their late brother, Robert.

7. On an unknown date, the appellant and Teneke went to the Nauru Lands Committee because Teneke wanted to transfer her rights in the house and the Chinese Restaurant to the appellant. The Chairperson of Nauru Lands Committee, Tyran Capelle, told Teneke that she could not do so because she was only a Life Only beneficiary.

8. The appellant and Teneke lived together in the house for sometimes until she moved to Location Compound, as she was feeling weak and wanted to be closer to her family from Kiribati. In or about June 2015 Teneke left for Kiribati.

Civil Action in the Supreme Court

9. About two and a half years after Teneke left for Kiribati on 8th January 2018, the respondents commenced civil proceedings to evict the appellant from the property. The appellant filed a statement of defence. In the statement of defence, the appellant pleaded that he consulted Teneke's Kiribati family living at Location Compound and was informed that she had passed away while she was in Kiribati sometime in 2017. He attempted to confirm her death with legal documents of Births, Death and Marriages in both countries. It was further alleged in the statement of defence that it is reasonable to presume that she had died in Kiribati and she has property in Nauru.

10. There is no dispute that after the civil proceedings was filed the appellants mother, Helen Herman, transferred her 1/24 share in Portion 46 to the appellant and the transfer was registered in G.N. No. 192/2018.

11. At trial, it was common ground that in a case where a married person dies with no issue, Administrative Order No. 3 of 1938 of the Regulations made under Section 4 of the *Native Administration Ordinance* 1922 (*"Administrative Order No. 3 of 1938"*) applied. (Note the *Native Administration Ordinance* 1922 was repealed by the *Statute Law Revision Act,* 2011). In this case, Order 3(3)(b) applied. However, learned counsel for the appellant had contended that notwithstanding the admission made in the statement of defence that Teneke had died, he could not concede that she had in fact died in the absence of a death certificate.

12. The Supreme Court accepted the respondents' submission and held at [18] of the judgment that, *"On the issue of the death of Teneke the onus is on the plaintiffs [respondents] to prove her death for the purpose of Administrative Order 1938 but by the defendant's admission that is no longer necessary for the purposes of this action, however, Nauru Lands Committee may need to see the proof of death by way of a death certificate."*

13. The Supreme Court further held that based on Administrative Order No.3(3)(b) of 1938, *"Upon Teneke's attempts to transfer her as Life Time Only in favor of the plaintiff (defendant) and upon her death which took place in 2017, the 1/24 share which she held as Life Time Only would have to be distributed to the plaintiffs [respondents] and the remaining landowners which included the defendant's [appellant's) mother."*

14. It concluded that the appellant had no legal right to occupy the property, that he was a trespasser and ordered that he vacate it forthwith.

Grounds of Appeal

15. There are seven grounds of appeal. Some of them overlap each other and will be taken up together. We summarize them as follows:

    a. Ground one brings up the question of *locus gstandi* of the respondents to commence civil proceedings in the Supreme Court.

    b. Ground two brings up the question whether Teneke had died.

c. Ground three and five bring up the question whether the dispute fell within the jurisdiction of the Supreme Court.

d. Ground four, six and seven bring up the question whether Teneke's attempted transfer of interest as Life Time Only beneficiary constituted a surrender of her interest in the house.

Issues

16. We consider the question whether Teneke had died pivotal to the appeal. If it is decided in favour of the appellant, alternatively, it will be necessary to consider the grounds of appeal which raise the question whether Teneke's Life Time Only interest in the property ended or was terminated upon her attempt to transfer it to the appellant.

Admissions in pleading on death of Teneke

17. The pivotal question is captured in Ground two as follows:

> *"His Honour, the Honourable Judge of the Supreme Court, erred in law and in fact in determining the Plaintiff's action in the absence of a proof of death for Teneke Rodiben, if indeed Teneke Rodiben had died, and relying on a supposed admission by the Defendant in his pleadings. There was no admission by the Defendant in his pleadings and by Counsel for the Defendant during the hearing."*

18. Learned counsel for the appellant contended that there was no unequivocal admission by former counsel at the hearing before the Supreme Court that Teneke had died and upon which the Supreme Court may find that upon Teneke's death, the permission she gave to the appellant to live on the property ended or was terminated. Learned counsel reinforced his contention by contending that there was no unequivocal admission in the pleading (statement of defence) that Teneke had died. It only stated that *"There is reasonable grounds to suppose that Mrs Teneke Rodiben has died in Kiribati..."* after the appellant had been trying to confirm her death.

19. Counsel made no submissions in relation to the proper test to apply to determine whether a pleading of an allegation of fact in a statement of defence constitutes an admission. However, it is noted that in Nauru, Order 24, rule 3 of the *Civil Procedure Rules,* 1972 permits a party to a suit to apply to the Court to enter judgment or make any order to which the applicant is entitled on admissions in the pleading or otherwise, by the other party, without waiting for the determination of any other question between the parties in the following terms:

> *"3. Judgement on admission of fact. (O 24, r 3)*
>
> *(1) Where admissions of fact are made by a party to a suit by his or her pleadings or otherwise, any other party to the suit may apply to the court for such judgement or order as upon those admissions he or she may be entitled to, without waiting for the determination of any other question*

between the parties, and the court may give such judgment, or make such order, on the application as it thinks just.

(2) *An application for an order under this rule shall be made by motion."*

20. The Court sought guidance from other jurisdictions on the proper test. The equivalent of Order 24, rule 3 in Papua New Guinea (*PNG*) is Order 9, rule 30 of the *National Court Rules*. Rule 30 permits a party to apply to the Court to enter judgment or make any order to which the applicant is entitled on admissions in the pleading or otherwise, by the other party in the following terms:

"30. Judgement on admissions. (18/3)

(1) Where admissions are made by a party, whether by his pleading or otherwise, the Court may, on the application of any other party, direct the entry of any judgement or make any order to which the applicant is entitled on the admissions.

(2) *The Court may exercise its powers under Sub-rule (1) notwithstanding that other questions in the proceedings have not been determined."*

21. The proper test to apply is, the Court may enter judgment or make an order to which the applicant is entitled where the admission in the pleadings (statement of defence) is strong and unambiguous. This test was adopted in the case of *Dep International Private Limited v. Ambogo Sawmill Pty Limited* [1987] PNGLR 117 at 118, where Woods, J explained how the Court may exercise its discretion when dealing with an application for judgment by admissions:

> *"The principles here are that if a defendant makes admissions sufficient to support the claim against him the plaintiff may apply for judgment based on admissions. These admissions may be based either on formal admissions in the pleadings or on informal admissions. For judgment to be entered under this rule the defendant's admissions must be strong and unambiguous."* (Emphasis added).

22. The Supreme Court of PNG adopted the test applied by Woods J in *Dep International Private Limited* case in *Imawe Bogasi Land Group Inc v. Bank South Pacific and Toale Hongiri ILG & Ors* (2011) SC1102 and further clarified the confusion between a summary judgment and judgment by admission and emphasised that:

> *"………… admissions may be based either on formal admissions in the pleadings or on informal admissions.* ***For judgment to be entered under this rule, the respondents' admissions must be strong and unambiguous.*** *Judgment will not be entered on admissions where serious questions of fact or law require consideration."* **(Bold and Underlining added).**

23. We consider that the test is not limited to an application for entry of judgment or order by admission in a summary hearing but can be applied where an admission in the pleading is relied upon at trial.

24. In the present case the issue of admission of death of Teneke derived from the pleading was raised at trial and regardless of whether it was opposed or not, it was necessary for the Supreme Court to first determine whether the admission in the statement of defence was strong and unambiguous. We are obliged to determine that question first. In this respect, we have not had the benefit of perusing the statement of defence as it was not included in the appeal record book but the contentious part of the statement of defence has been reproduced in the judgment of the Supreme Court at [11] as follows:

"*[1e] The defendant [appellant] received the plaintiffs [respondents'] Writ of Summons in January 2018. He consulted with Mrs Teneke Rodiben's I-Kiribati family in Location Compound to make contact with her in Kiribati for her to return to Nauru on account of the court proceedings. The Defendant [Appellant] was informed that Mrs Teneke Rodiben had passed away while she was in Kiribati sometime in 2017.*

[1f] The Defendant [Appellant] has been trying to confirm the death of Mrs Teneke Rodiben with legal documents with I-Kiribati family in Nauru and in Kiribati; the Kiribati Births, Deaths & Marriages, and, also with the assistance of Nauru Births, Deaths and Marriages.

[1g] There is reasonable grounds to suppose that Mrs Teneke Rodiben has died in Kiribati; and, she has property on Nauru."

25. We have examined closely the pleading at [1e] and are of the view that it is merely a report by the appellant of his inquiries with the Kiribati family of Teneke at Location Compound to make contact with Teneke in Kiribati to return to Nauru for the court proceedings. Furthermore, the statement that "*The Defendant [Appellant] was informed that Mrs Teneke Rodiben had passed away while she was in Kiribati sometime in 2017*" is a communication from a third party and requires proof.

26. As to the statement at [1f], similarly, it is a report of attempts by the appellant to confirm the death of Teneke from legal documents such as Births, Deaths and Marriage certificates from both countries. As to the statement at [1g], it is a presumption that Teneke had died in Kiribati.

27. The pleading as outlined above does not demonstrate a clear and unequivocal admission by the appellant that Teneke had died. It fell short of putting the respondents and the Court on notice that Teneke died on a specified date in Kiribati. Proof of Teneke's death is pivotal to the contentious issue whether as the surviving spouse of late Robert, her Life Time Only interest in the house has come to an end upon her death. This in turn will determine whether the appellant's continued and uninterrupted occupation on the property (house) has come to an end upon Teneke's death. In our opinion, the admission in the pleading is not strong and unambiguous to support the finding by the Court that Teneke had died. On the other hand, the pleading raised serious questions of fact and law in relation to whether Teneke had died and if so, its legal consequence on the appellant's continued and uninterrupted occupation of the property (house).

28. The Court was further referred by learned counsel for the appellant as well as learned counsel for the respondents to relevant parts of the transcript of the trial where it was pointed out by learned counsel for the appellant that the former counsel for the appellant had not conceded that Teneke had died. The Court further notes at [16] of the judgment that the Supreme Court also acknowledged that the appellant's former counsel, *"submitted that notwithstanding the admission in the defence that Teneke had died he could not concede that she is indeed dead in the absence of her death certificate……."*

29. Despite the appellant's former counsel insisting on proof of Teneke's death, the Supreme Court failed to satisfy itself whether there has been an admission made in that part of the statement of defence. In holding at [18] of the judgment that *"On the issue of the death of Teneke the onus is on the plaintiffs [respondents] to prove her death for the purposes of Administrative Order 1938 but by the defendant's [appellant's] admission that is no loner necessary for the purposes of this action…."* without first being satisfied that the admission in the pleading was strong and unambiguous, the Supreme Court misdirected itself. In misdirecting itself, the Court's finding that the appellant had admitted in his pleading that Teneke had died is unsupported. This is where the Supreme Court fell into error.

30. The Court further notes that even after Supreme Court concluded that Teneke had died, it was still not satisfied that she had indeed died because it then stated that *"… however, Nauru Lands Committee may need to see the proof of death by way of a death certificate."* In this respect, it will be noted that there are two ways for the Court to arrive at a finding that a person has died. First, by direct evidence. Direct evidence may come in the form of a death certificate issued by Government authority such as a Public Hospital or Civil Registry for Births, Deaths and Marriages to verify the death of the deceased. Evidence of a death certificate is generally preferred as being authentic. However, where access to a hospital and a medical doctor to confirm the death of the deceased is not readily available, eyewitness account of the death of the deceased is considered another best option.

31. In the present case, it is common ground that there was no evidence of a death certificate or eyewitness account to verify that Teneke had died. Given this, the Supreme Court was left with no evidence to make a finding that Teneke had died. As the onus of proof is on the respondents, the lack of evidence was sufficient reason for the Supreme Court to dismiss the civil proceedings.

32. However, as we had pointed out earlier, the Supreme Court passed on that responsibility to the Nauru Lands Committee to verify the death of Teneke. The judgment under appeal was delivered on 10th March 2020. The hearing of the appeal was on 30th August 2022, about 2 years and five months after the judgment was delivered. In the intervening period, it is not known if the Nauru Lands Committee or better still, the parties in this appeal have verified if Teneke had died and obtained a death certificate. If one or all of them did, it would have settled the issue. Regrettably, this information was not forthcoming.

Presumption of Death

33. Learned counsel for the appellant relied on a further ground in his submissions in relation to the presumption of death for a period of 7 years which had not yet been satisfied. He referred to the decision of Sachs J *Chard v. Chard (otherwise Northcott)* [1955] 3 All ER 721 which he contended is one of the many case authorities that acknowledged 7 years as the time-period of the presumption of death.

34. The issue of presumption of death is a significant one which would require detailed consideration at its own time as it was not raised and canvassed by the Supreme Court nor a ground of appeal which would enliven the jurisdiction of this Court to determine it. Moreover, the Supreme Court made no finding on it. For these reasons, it is not properly before this Court and is disregarded.

Life Time Only Interest

35. The judgment of the Supreme Court brings up an alternative question which is whether Teneke's Life Time Only interest in the property (house) ended or was terminated upon her attempt to transfer it to the appellant. This question is captured in Ground 4 which is in the following terms:

> *"His Honour, the Honourable Judge of the Supreme Court, erred in law when he considered that Teneke Rodiben had surrendered her interest as a Life Time Only beneficiary of Robert Rodiben's estate at the point of her intended transfer of the house to Rickson Herman."*

36. At [19] of the judgment the Supreme Court gave this reason for reaching this conclusion:

> *"Teneke as a Life Time Only beneficiary was entitled to the exclusive use of the house and there were no restrictions as to who lived on the house with her, however as Nauru Lands Committee advised her when she visited them to transfer the house in favour of the defendant [appellant] that she did not have any powers to do so as a Life Time Only beneficiary. Notwithstanding, that advice which in my opinion was correct, she allowed the defendant [appellant] to continue with the occupation of the house. If she had asked the defendant to stay in the house on a temporary basis whilst she visited Kiribati would have been proper but her intentions were otherwise, in that she wanted to transfer the ownership of the house to the defendant [appellant] and in my respectful opinion at that point in time she surrendered her interest as a Life Time Only beneficiary."*

37. Learned counsel for the appellant contended that the reason and conclusion reached by the Supreme Court is unsupported by law as there is nothing in the Administrative Order No 3 of 1938 which states that Teneke's right and privilege to the estate of late Robert had come to an end immediately upon her attempted act of surrendering her interest.

38. Learned counsel for the respondents maintained that the Supreme Court's reasons and conclusion are correct and should not be disturbed. Learned counsel further contended

that by her conduct in attempting to transfer the house to the appellant, it was open to the Supreme Court to infer that she surrendered or parted with her interest in the house.

39. The Court notes that the Supreme Court was correct, in our view, to observe that *"Teneke as a Life Time Only beneficiary was entitled to the exclusive use of the house and there were no restrictions as to who lived on the house with her."* However, it should be noted that the right to have *"no restrictions as to who lived on the house with her"* is distinct from transferring the house in favour of the appellant.

40. The right to exclusive occupation and use of the house is derived from the Life Time Only interest. As the term itself suggests, the interest is for life and is irrevocable until death. This term appears to be derived from Administrative Order No. 3 of 1938. Order 3(3)(b) states:

> *"Married - No issue, - the property to be returned to the family or nearest relatives of the deceased. The widower or* ***widow to have the use of the land during his or her lifetime if required by him or her;****"* **(Bold and Underlining added).**

41. The Court also notes that parties recognized what a Life Time Only interest entails when they agreed at the Nauru Lands Committee meeting that Teneke inherit whole of late Robert's real and personal estate for life and will return it to his siblings upon her death. It follows that even if Teneke attempted to transfer the house to the appellant, as correctly advised by the Nauru Lands Committee, she had no power to do so. In our opinion, the Nauru Lands Committee's refusal or advice against her request to transfer the house to the appellant did not alter her position in relation to the entitlement or right to the exclusive use of the house including allowing the appellant to live in the house with her. The appellant's uninterrupted occupation of the house at the invitation of Teneke will end or terminate when Teneke as the Life Time Only beneficiary so decides. It will be only materialized when she is located and so decides.

42. At this point as Teneke's death has not been established, it is premature for the parties to call a meeting with the appellant and the Nauru Lands Committee to redistribute the interest or 1/24 share of Teneke from the estate of late Robert.

43. For these reasons, the Court upholds the submission of learned counsel for appellant that the finding by the Supreme Court, *"........but her intentions were otherwise, in that she wanted to transfer the ownership of the house to the defendant [appellant] and in my respectful opinion at that point in time she surrendered her interest as a Life Time Only beneficiary."* is unsupported by law and constitutes an error of law.

44. Finally, at common law no trespass is committed if the owner of the land/property consented to another person to enter and occupy it. In this case, Teneke invited the appellant to live in the house with her. As the Supreme Court described the appellant, he was a "licensee" or "invitee" and that position remained unaltered until Teneke decides otherwise. It follows that the finding that the appellant was a trespasser and

had no legal right to occupy the house is unsupported by law and constitutes an error of law.

Conclusion

45. In conclusion, there are other grounds of appeal which are not necessary to consider suffice to note that under Section 23 of the *Nauru Court of Appeal Act,* 2018, the Court of Appeal is conferred discretion to affirm, vary or reverse a judgment, decision or order appealed from the Supreme Court. Where the Court varies or reverses a judgment, decision or order of the Supreme Court, it may substitute its own judgment. Further, where the Court varies or reverses a judgment, decision or order and orders a retrial of the whole or part of the cause or matter, the Court shall also make orders for the retrial either (a) before the judicial officer who heard the original cause or matter or (b) before another judicial officer of the same hierarchy of the Court.

46. Given the error in holding that there was admission in the pleading that Teneke had died, but further the Supreme Court's finding that Teneke surrendered her Life Time Only interest to the house when she attempted to transfer the house to the appellant, it is appropriate that the appeal be allowed, the judgment of the Supreme Court of 10th March 2020 be reversed with costs to the appellant.

47. Cost is summarily assessed at $700.00.

Order

48. The orders of the Court are:

    a)The appeal is allowed.

    b)The judgment and order for eviction of the Supreme Court of 10th March 2020 is reversed forthwith.

    c)The respondents shall pay the costs of the appeal, which is, summarily assessed at $700.00.

Dated this 14 day of October, 2022.

Justice C. Makail

Justice of the Court of Appeal

Justice Dr. Shirani A. Bandaranayake

I agree.

Acting President of the Court of Appeal

Justice Rangajeeva Wimalasena

I agree.

Justice of the Court of Appeal