IN THE COURT OF APPEAL OF NAURU
AT YAREN
APPELLATE JURISDICTION

Civil Appeal No. 03 of 2020
Supreme Court Land Appeal No. 13 of 2018

BETWEEN

NOVA DONGABIR

AND

APPELLANT

HANSOME ADUMAR and JOHN ADUMAR

AND

1st RESPONDENT

ZALINE GADEANANG and DETOBA DETENAMO

AND

2nd RESPONDENT

NAURU LANDS COMMITTEE (NLC)

3rd RESPONDENT

BEFORE:	**Justice Dr. Bandaranayake,** **Acting President** **Justice R. Wimalasena** **Justice C. Makail**
DATE OF HEARING:	**29 August 2022**
DATE OF JUDGMENT:	**14 February 2023**
CITATION:	**Nova Dongobir v** **Handsome Adumar & Ors.**
KEYWORDS:	Appeal out of time, Interlocutory application, Final or interlocutory order, Nauru Lands Committee, Civil proceedings, Order approach and application approach
LEGISLATION:	Section 3, 19, 20 of the Nauru Court of Appeal Act; Section 7 of the Nauru Lands Committee Act; Section 13(4) of the Limitations Act
CASES CITED:	Kepae v Nauru Lands Committee [2011] NRSC 3 (18 March 2011); Robertson v Estate of Juda [2017] NRSC 18; Civil Suit 53 of 2013 (17 March 2017); Bozson v Altrincham Urban District Council [1903] 1 KB 547; Blakey v Latham (1889) 43 ChD 23; Computer Edge Pty Ltd v Apple Computer Inc (1984) 54 ALR 767; Capelle v Nauru Lands Committee [2013] NRSC 4

APPEARANCES:

COUNSEL FOR the Appellant:	**E Soriano**
COUNSEL FOR the 1st and 2nd Respondents:	**A Lekenaua**
COUNSEL FOR the 3rd Respondent:	**B Narayan and M Lemeki**

JUDGMENT

1. This is an appeal from a ruling of the Supreme Court on an application for leave to appeal out of time. The application for leave to appeal out of time had been filed in the Supreme Court by way of interlocutory summons dated 11 July 2018, pursuant to section 7 of the Nauru Lands Committee Act. It was in respect of a determination of the Nauru Lands Committee published in Gazette on 4 April 2001. The Supreme Court had refused the application for leave to appeal out of time on 29 May 2020. Being aggrieved by the said ruling the Appellant filed a notice of appeal in the Court of Appeal on 28 June 2020.

2. The Appellant's Notice of Appeal states that the appeal is made pursuant to section 19(2)(c) read with section 20 of the Nauru Court of Appeal Act 2018.

3. On 29 September 2021 the Appellant sought permission to amend the Notice of Appeal and abandoned the third ground of appeal. Further the nature of the interlocutory relief or order sought was amended to read as; "*that the order of the Supreme Court is set aside and that the matter be transferred to the Supreme Court and for it to consider the matter.*"

4. Accordingly, the Appellant now relies on the following grounds of appeal:

    (a) The learned Judge erred in law by not determining the issue of the Nauru lands committee Distributing the estate of Kent Adumur to Handsome and John Adumur when Kent Adumar was a Life Time Only beneficiary of Gumu's estate. (refer to Gazette No.18 of 4th April 2001 read with Gazette No. 36 of 14 October 1968). The Kent Adumur's estate is not barred by the Limitation Act 201. The reference to gazette No. 36 of 1968 is

for the Court to verify that indeed Kent Adumur was a Life-time-only beneficiary.

(b) The learned judge erred in law when he did not take into account Section 28 (1)(b) of the limitation act 2017 in respect of the effect of a mistake on the limitation.

5. We will first discuss the legal background of the application filed in the Supreme Court for leave to appeal out of time in order to put the matters in context. The Appellant had filed their interlocutory summons in the Supreme Court pursuant to section 7 of the Nauru Lands Committee Act, which stipulates as follows:

> *Section 7(1) A person who is dissatisfied with a decision of the Committee may appeal to the Supreme Court against the decision:*
> *(a) Within 21 days after the decision is published; or*
> *(b) With leave of the Court.*

6. There is no dispute that it was on 11 July 2018 that the Appellant had filed their application for appeal out of time against the determination of the Nauru Lands Committee published in Gazette on 4 April 2001. Thereby the Appellant had been clearly out of time by more than 17 years. The Appellant had relied on section 7(1)(b) of the Nauru Lands Committee Act to seek leave to appeal out of time.

7. Section 7(1)(b) was introduced by the amendment No 9 of 2012 to the Nauru Lands Committee Act. Prior to that there was no specific provision to appeal out of time on a Nauru Land Committee determination. That had been the legal position existed prior to the amendment and it was held in **Kepae v Nauru Lands Committee [2011] NRSC 3 (18 March 2011) :**

"It would be a futile exercise, having regard to the interpretation of s.7(1) that was adopted by Millhouse C J, which I endorse, and which, as I discuss in Giouba v Nauru Lands Commission [2011] NRSC 1., has been expressed by many judges of this Court. ***There is no right of appeal outside the 21 days****. (emphasis added)"*

8. However, this position was completely changed after the amendment to the Nauru Lands Committee Act in 2012 with the introduction of section 7(1)(b), as it was discussed in **Robertson v Estate of Juda [2017] NRSC 18; Civil Suit 53 of 2013 (17 March 2017):**

> *"The Nauru Lands Committee Act 1956 (the Act) was amended in October 2012 which now allows courts to grant leave for an appeal to be filed outside of the 21 days' appeal period. Prior to the amendment in 2012, the courts did not have any powers to grant any extension of time. However, parties could challenge the determination of NLC by way judicial review applications. In many cases leave to file judicial review was granted even after long periods of delays and parties successfully were able set aside NLC's determinations where it was established that a party was not invited to attend the family meeting pursuant to Administration Order 1938."*

9. Thus, it is evident that although section 7(1)(b) is worded as 'with the leave of the court' the sole purpose of the introduction of that provision appears to be to allow leave to appeal out of time applications. As such the Appellant had applied to the Supreme Court for extension of time pursuant to section 7(1)(b) and this position was not disputed by the parties as well.

10. In that backdrop when the Supreme Court refused the application to appeal out of time in respect of the determination of the Nauru Land Commission, the Appellant filed this instant appeal before the Court of

Appeal. As earlier noted, the Appellant's Notice of Appeal states that the appeal is made against the ruling of the Supreme Court pursuant to section 19(2)(c) read with section 20 of the Nauru Court of Appeal Act 2018.

11. Section 19(2)(c) reads as follows:

> *"Subject to subsection (3), an appeal shall lie under this Part in any civil proceeding to the Court from any final judgment, decision or order of the Supreme Court* ***on an appeal*** *from a decision of the Nauru Lands Committee on questions of law only. (emphasis added)"*

12. It is very clear upon the plain reading of the section that this provision applies to "*any final judgment, decision or order of the Supreme Court on an appeal from a determination of Nauru Lands Committee*". Undoubtedly, the proceeding before the Supreme Court was not an appeal and was only an interlocutory application to appeal out of time. Therefore, it is crystal clear that the Appellant cannot rely on section 19(2)(c) of the Court of Appeal Act to invoke jurisdiction of this Court to hear an appeal from a ruling of an application to appeal out of time which is not a final judgment, decision or order on an appeal.

13. However, when this appeal was taken up for hearing the Counsel for the Appellant took a strikingly different stance and submitted that the Appellant no more relies on section 19(2)(c) as it is not applicable to this application. The Appellant's counsel submitted that this is not an appeal against a decision of a land appeal. Further it was brought to the notice of the Court by the Appellant's counsel that although the application before the lower court was registered as a land appeal case it was merely an application for appeal out of time.

14. However, the Appellant did not seek to amend the sections relied upon in the Notice of Appeal or to state the correct provision that they rely on. Until the Appellant's counsel made submissions at the hearing that the Appellant abandons the provision that the appeal is premised, it

was considered as an appeal filed pursuant to section 19(2)(c) of the Nauru Court of Appeal Act for all purposes. Nevertheless, there was still no mention of the relevant provision under which the jurisdiction of the court is invoked even after jettisoning section 19(2)(c).

15. In any event, the 1st and 2nd Respondents argued the matter without any regard to this issue and made submissions on the basis that only questions of law must be considered pursuant to section 19(2)(c). The main contention of the 3rd Respondent *inter alia,* was that the lower court should have dismissed the application in any event, as it was time barred pursuant to section 13(4) of the Limitation Act 2017.

16. Be that as it may, after the hearing was concluded, the parties were invited to file further submissions on whether the ruling of the Supreme Court was interlocutory or final, in order to ascertain the correct legal provision that enables this appeal to be brought in.

17. The Appellant conceded in the supplementary submissions that the application before the lower court was not an appeal but only an application to exercise discretion to consider leave to appeal out of time. Also, the Appellant noted that the previous position is abandoned, and the Appellant no longer relies on section 19(2)(c) of the Nauru Court of Appeal Act as the enabling provision for the appeal before the Court of Appeal.

18. Finally, the Appellant's counsel now submits that the Appellant relies on section 19(2)(a) of the Court of Appeal Act and the ruling of the Supreme Court is a final order by operation of section 20 of the Court of Appeal. Regrettably, Appellant's counsel submitted the new provision that the Appellant relies on, only after the appeal hearing was concluded and as a result no party did even get an opportunity to respond.

19. Before examining the correctness of this new position of the Appellant, we are compelled to note this. A party who seeks a relief must properly plead the provision under which the jurisdiction of a Court is invoked and there is no procedure to change it as and when it seems convenient to such party. The Appellant did not even make a formal application to change the provision under which this appeal was brought in and only at the very tail end of the matter the counsel informed the court that the Appellant wishes to rely on a different provision, when it was realized that section 19(2)(c) cannot be relied upon. The Appellant was not forthright on this issue even when the original submissions were filed. It was only at the oral hearing, the Appellant's Counsel briefly stated that the order appealed against is an interlocutory order and he no longer wish to rely on section 19(2)(c). But even at that stage it was not submitted by the Appellant of the new provision they rely on to invoke jurisdiction of this Court. It was only after this Court invited the parties to make further submissions after the hearing, the Appellant came up with a new provision.

20. It therefore becomes necessary for the court to examine this matter further as it raises an important issue which will have a bearing on future applications as well. Thus, it is worthwhile to consider whether the Appellant can rely on section 19(2)(a), as claimed in the supplementary submissions.

21. Section 19(2)(a) provides that:

> "*subject to subsection (3), an appeal shall lie under this Part in any civil proceedings to the Court from any final judgment, decision or order of the* ***Supreme Court sitting in the first instance*** *including a judgment, decision or order of a Judge in chambers*" *(emphasis added).*

22. The new stance of the Appellant clearly fails as the ruling of the Supreme Court in the appeal out of time application was not a ruling delivered by the Supreme Court sitting in *the first instance.* As it is agreed by all the parties, the application before the Supreme Court was an application to appeal out of time and certainly the Supreme Court was not exercising its jurisdiction sitting in the first instance. In that backdrop we are not impressed with the contention that the Appellant can rely on section 19(2)(a) of the Court of Appeal Act.

23. It should also be noted that regardless of this issue all the Respondents as well as the Appellant argued that the ruling of the Supreme Court is a final order pursuant to section 20 of the Court of Appeal Act. At this juncture, it is also pertinent to consider the validity of this argument, given the importance of this issue. Section 20 of the Nauru Court of Appeal Act provides that;

> *"A judgement, decision or order which results in the final determination of a* ***civil proceeding****, despite the application being interlocutory in nature, shall not be constituted as an interlocutory order for the purposes of Section 19(3)(f)" (emphasis added).*

24. As all the parties correctly pointed out, the legislature in Nauru has apparently introduced section 20 to settle the longstanding debate about interlocutory and final orders based on order approach and application approach. It can be thus inferred that order approach is the preferred test to be applied in this jurisdiction in relevant circumstances. However, it must be carefully considered if section 20 has any relevancy to the issue under consideration.

25. Section 20 clearly stipulates that it applies only if the order finally determines a **'civil proceeding'.** Part 6 of the Court of Appeal Act deals with appeals in civil proceedings and section 19(1) defines the term 'civil proceedings' as follows:

"For the purposes of this Part, 'civil proceedings' means any cause or matter which when commenced in the District Court or the Supreme Court was not a criminal proceeding."

26. The term 'cause or matter' is interpreted in section 3 of the Act:

"Cause or matter includes any appeal, action, suit or other original proceeding in any Court between the person originating the proceeding and one or more other parties as defendant or respondent, and includes any original proceeding."

27. It is clearly discernible that the application for appeal out of time in the court below was merely an interlocutory application which was not an appeal, action, suit or other original proceeding commenced in the District Court or the Supreme Court. The counsel for the Appellant also submitted in his oral submissions during the hearing that the proceedings before the lower court was an interlocutory proceeding. The substantive matter commenced in the Nauru Lands Committee and what was before the Supreme Court was merely an interlocutory application.

28. In the circumstances, we are not inclined to accept that the refusal of appeal out of time application against a determination of the Nauru Lands Committee amounts to a final determination of a ***civil proceeding*** within the scope of Part 6 of the Nauru Court of Appeal Act. Therefore, we decide that section 20 of the Nauru Court of Appeal Act has no relevancy to a refusal of an application for appeal out of time in respect of a determination by the Nauru Lands Committee.

29. Be that as it may, it is vividly clear that the proper construction of the legislation is to prefer the order approach instead of application approach in determining if an order is final or interlocutory. In so far

as the instant case is concerned the court must objectively look at the nature of the ruling to apply the order approach test. In that regard the court must consider the legal effect rather than the practical effect of the ruling.

30. In **Bozson v Altrincham Urban District Council [1903] 1 KB 547** Lord Alverstone CJ stated as follows:

> *'Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not, it is then, in my opinion, an interlocutory order.'*

31. The court must determine that an order finally disposed the rights of the parties. In **Blakey v Latham (1889) 43 ChD 23** the court held that:

> *'Any order, in my opinion, which does not deal with the final rights of the parties, but merely directs how the declarations of right already given ... are to be worked out is interlocutory ...'*

32. In the present case, the rights of the parties were not dealt with by a court at any stage. A determination of the Nauru Lands Committee is not final and conclusive as there is an unfettered right of appeal from a determination of the Nauru Lands Committee. A refusal of an application for appeal out of time against such a determination given by the Nauru Lands Committee cannot be considered as a final determination of the matter under litigation or final disposal of rights of the parties in legal sense. In **Computer Edge Pty Ltd v Apple Computer Inc (1984) 54 ALR 767** it was stated that:

> *"'The test for determining whether a judgment is final, which has been laid down in a number of cases including Carr v Finance Corporation of Australia Ltd (No 1) (1981) 147 CLR 246 ; 34 ALR*

449 , is whether the judgment finally determines the rights of the parties, and the authorities have held that the court in applying the test must have regard to the legal rather than the practical effect of the judgment. So that the question in the present case is whether the whole judgment finally determined, in a legal sense, all the rights of the parties that were at issue in these proceedings. And the answer is, plainly, that it did not, because it left undetermined the question whether any, and what, damages were payable."

33. In the circumstances we are of the view that in this instance a refusal to appeal out of time in respect of a determination of the Nauru Lands Committee cannot be considered as a ruling which finally determined the rights of the parties in a legal sense. As such we conclude that the ruling of the Supreme Court is an interlocutory order.

34. Accordingly, the correct provision that the Appellant should have relied on was section 19(3)(f) of the Court of Appeal Act as it provides room for interlocutory orders to be appealed against with leave of the Supreme Court or the Court of Appeal. Section 19(4) provides that such a leave application is first filed in the Supreme Court and if declined, to a single justice of the Court of Appeal.

35. For the reasons mentioned above we are of the opinion that this appeal should be struck out as the Appellant failed to resort to the correct procedure to appeal against the ruling of the Supreme Court. Although the Appellant abandoned the original provision that was relied on, the failure to seek leave to appeal as per section 19(3)(f) was not remedied.

36. Be that as it may, in the interest of justice, we have considered the ruling given by the Supreme Court refusing the application to appeal out of time.

37. There is no dispute that **Capelle v Nauru Lands Committee [2013] NRSC 4** is considered as the authority in this jurisdiction regarding the

matters that need to be considered in an application for appeal out of time. It was discussed in the said judgment as follows:

> *"An application for leave to appeal out of time should not be judged by any strict formula or rigid formula. The relevant principles are well described in Halsbury's Laws of Australia:*
>
> *"The discretion is unfettered and should be exercised flexibly with regard to the facts of the particular case. The court will not decide the application according to a formula created by erecting what are merely relevant factors into the arbitrary principles so as to allow the automatic production of a solution. However, since the discretion to extend time is given for the purpose of enabling the court to avoid an injustice, the court must determine whether justice as between the parties is best served by granting or refusing the extension sought. A consideration relevant to the exercise of the discretion is that upon the expiry of the time allowed for appeal the respondent has a vested right to retain the judgement unless the application is granted. Other relevant matters include the length of the delay in commencing the appeal, the reasons for the delay, the chances of the appeal succeeding if an extension of time is granted, the degree of prejudice to the respondent if time is extended and the blamelessness of the applicant. Leave to appeal out of time may be given subject to specified terms. The interests of justice and a hearing upon the merits are the basal considerations."*

38. We are satisfied that the learned Judge of the Supreme Court judiciously exercised discretion by applying the correct test and carefully analyzing the facts. We are of the opinion that even if the Appellant relied on the correct provision to seek leave to appeal against the ruling of the Supreme Court there would be no reason to grant leave or to interfere with the ruling of the Supreme Court.

39. In the circumstances the appeal is dismissed. No costs ordered.

Dated this 14th day of February 2023.

Justice Rangajeeva Wimalasena
Justice of the Court of Appeal

Justice Dr. Shirani A. Bandaranayake

I agree.

Shirani A. Bandaranayake

Acting President of the Court of Appeal

Justice Colin Makail

I agree.

Justice of the Court of Appeal