



NAURU COURT OF APPEAL  
AT YAREN  
**CIVIL APPELLATE JURISDICTION**

Civil Appeal No. 1 of 2023  
[Supreme Court Civil Case  
No. 9 of 2013]

BETWEEN:                   **GRETA HARRIS**

APPELLANT

AND:                         **KHEMINDRA DOWEIYA**

RESPONDENT

BEFORE:                   **Justice C. Makail**

DATE OF HEARING:   **30/06/2023**

DATE OF RULING:     **30/06/2023**

**CITATION: GRETA HARRIS v. KHEMINDRA DOWEIYA**

**KEYWORDS: COURT OF APPEAL – Whether leave is required by the appellant to appeal the granting of the injunction by the Supreme Court; Whether an appeal against an injunction granted in an interim application by the Supreme Court is interim or permanent; Struck out for non-compliance; No leave granted to appeal by Supreme Court.**

**LEGISLATION: Naoero Roads Act 2017; Nauru Court of Appeal Act 2018; Nauru Court of Appeal Rules 2018.**

**CASES CITED: Keppa v Adeang [2022] NRCA 7; Civil Appeal No. 2 of 2021(14 October 2022); Alona v Narayan [2022] NRCA 1; Civil Appeal 4 of 2019 (26 August 2022).**

**APPEARANCES:**

**COUNSEL for the Appellant: Ms. J Olsson**  
**COUNSEL for the Respondent: Ms. A Lekanaua**

## **RULING**

**1.** There are two summonses placed before me sitting as a single judge of the Court of Appeal. These are:

- (a) First, the appellant’s summons seeking an order for a stay of the execution of the injunction granted by the Supreme Court on 21<sup>st</sup> June 2023, and

- (b) Secondly, the respondent's summons or counter summons to the summons by the appellant which seeks to strike out the summons for seeking an order for a stay of the execution of the injunction and secondly, the appellant for non-compliance with the Nauru Court of Appeal Act 2018 (Court of Appeal Act) and the Nauru Court of Appeal Rules 2018 (Rules of the Court of Appeal).

### **Respondent's Summons to Strike Out**

2. I will first address the summons to strike out the summons seeking an order for stay of the execution of the injunction and then I will address the summons for the stay of the execution of the injunction.
3. I begin by highlighting the common facts. The common facts in their simplicity are these, the appellant owns land that is two blocks or portions away from the respondent. They have portion numbers given to them. Portions 124, 125, 126 and 127. The blocks or portions are identified by these portion numbers.
4. In real time, the respondent has been using part of the appellant's land to access her land and her home. In the Supreme Court, it was found that the respondent had been accessing her land and home through the appellant's land for eight years and recently, that access has now been subject of a dispute between the appellant and the respondent. The appellant has decided to put up a water tank and is in the process of doing so by mobilizing building materials including piling sand or gravel and moving in a water tank on site. As a result, the access point or route that the respondent has been using has now been blocked.
5. On the question of strike out of the summons for stay and the appeal, I have heard the counsel for the respondent, Ms. Lekanaua and in response the counsel for the appellant, Ms. Olsson and it comes down to the way Section 19 which seems to be the primary focus of consideration and how it is to be construed with reference to the type of relief or order that has been granted by the Supreme Court. There are also other provisions of

the Court of Appeal Act that require consideration such as Sections 20 and 21(3).

6. The question is whether leave is required by the appellant to appeal the granting of the injunction by the Supreme Court. I have heard from Ms. Lekanaua that the injunction is characterized as an interim relief rather than permanent or final. By virtue of Section 19(3), an interim injunction is not covered by this provision and consequently, does not fall within the exception of Section 19(3) where leave is not necessary.
7. I have also heard the counter submissions from Ms. Olsson that the word “injunction” used in Section 19(3)(f) cannot be broken down into two different words as it were interim or permanent, but it should be read as a whole to mean one and not the other. Thus, Section 19(3)(f) grants or confers on the appellant a right to appeal without leave. Ms. Olsson also reinforced the construction of Section 19(3)(f) by referring to the terms of the order or relief that was granted by the Supreme Court under the heading prayer for relief at paragraph 17 and relied on the words used at (3), “*This order is to remain in force*”. She submitted that it means the order is permanent or characterized as permanent or final, in this case, a permanent injunction and it would fall within the exception provided under Section 19(3)(f) of the Court of Appeal Act.
8. I prefer the submissions made by Ms. Lekanaua and accept that the construction of these provisions of the Court of Appeal Act, an appeal against an injunction granted in an interim application by the Supreme Court is interim or interlocutory and leave is necessary. First reason I give is of because of the fact that the substantive matter is still pending in the Supreme Court. In the interim, the respondent had applied before the Supreme Court for an injunction and was granted an injunction to preserve the status quo until the matter is determined by the Supreme Court. I note that the substantive matter is based on a provision of the Naoero Road Act 2017 (Naoero Roads Act). It is still pending where the respondent has sought in the statement of claim in the prayer for relief, an injunction.
9. The second reason is that having read the ruling of the Supreme Court and at paragraph 17(3), the order is quite clear and specific. It reads,

*“This order is to remain in force until the determination of this matter.”* The phrase or expression “until the determination of this matter” is a commonly used by the Court when it speaks of an interim measure in terms of orders of the Court. Reading it in full context “This order is to remain in force until the determination of this matter” simply means that the order made by the Supreme Court at paragraph 17(1) and (2) are to remain in force until the proceeding in the Supreme Court is heard and decided or determined. Without speculating it may be that the proceeding will be dismissed, and the interim injunction granted by the Supreme Court will die a natural death or vice versa. The respondent’s action in the Supreme Court may be upheld and the orders made in the interim will be made permanent. Thus, that is how the phrase or expression *“This order is to remain in force until the determination of this matter”* operates to give effect to the order of the Supreme Court.

10. Bringing it into the wording of Section 19(2)(a), (3)(f) and (4) and reading together with Sections 20 and 21(3) of the Court of Appeal Act, it is clear to me that an interim injunction is not covered by Section 19(3)(f) of the Court of Appeal Act and the converse of that is, where an appellant seeks to appeal an interim injunction granted by the Supreme Court, leave is necessary and the first place to go to seek leave to appeal the grant of an interim injunction is the Supreme Court pursuant to Section 20.

11. Section 19(4) of the Court of the Appeal Act states:

*“Where leave is required of the Supreme Court to appeal to the Court, the order in which the application shall be made is first to the Supreme Court and if declined, to a single Justice of Appeal.”*

12. Thus, the Supreme Court is the first Court for the appellant to go to seek leave. In this case the appellant has by-passed the Supreme Court to seek leave and has filed the summons for interim stay of the execution of the injunction in the Court of Appeal. Furthermore, she has filed the appeal without leave. Ms. Lekanaua has referred me to two decided cases by the Court of Appeal as recent as last year in *Keppa v Adeang* [2022] NRCA 7; Civil Appeal No. 2 of 2021(14 October 2022). I note what the

Court of Appeal stated in the context of compliance with the Rules of the Court of Appeal and the essence of it is this, there must be strict compliance and non-compliance can have serious consequences including strike out or dismissal of appeals in the Court of Appeal. This principle has been reinforced in another decision in *Alona v Narayan* [2022] NRCA 1; Civil Appeal 4 of 2019 (26 August 2022). I read from paragraphs 8 and 9 of the judgment as cited by learned counsel in the written submissions.

*“The Nauru Court of Appeal Rules 2018 provides for orderly expeditious and inexpensive disposal of applications and appeals that enables the parties to ....an application or appeal to prepare and present the cases and responses to the other parties comprehensively and in fair manner. It is imperative to note that the Rules should be complied with unless waived by the Court.”*

13. And speaking of the Rules, the same principles apply to complying with the requirements of Statutes, and in this case, the Court of Appeal Act. Where there is non-compliance, the appeal filed by an appellant stands the risk of being struck out or dismissed as being an abuse of process. In this case. I am satisfied that there has been non-compliance by the appellant of the requirement to apply in an appeal to the Court of Appeal where no leave has been sought and granted by the Supreme Court to appeal an interim or interlocutory injunction. The appeal will be dismissed, the summons for stay of the execution of the injunction granted by the Supreme Court which stands on the appeal is also, dismissed or struck out as being an abuse of process.

### **Appellant’s Summons to Stay Execution of Injunction**

14. If I were to accept the appellant’s submissions that she has a right of appeal, and for completeness’ sake, as counsel have taken time to address the issue of stay of the execution of the interim injunction, I rule on whether or not the order sought to stay the execution of the injunction be granted. Proceeding on the premise that the appellant has a right of appeal and has correctly engaged the jurisdiction of the Court, the matters

I consider relevant as the legal principles for the exercise of discretion are as follows:

- a) serious issue to be tried or an arguable case; and
- b) balance of convenience.

15. There may be an additional consideration such as damages as an adequate remedy. On the first issue of serious issue to be tried or arguable case, I have heard the learned counsel address me on Section 24 of the Naoero Road Act. Ms. Olsson has taken me through and if I understood her submissions correctly, Section 24(a) and (b) create a statutory right of access. The key or pertinent factor in Section 24(a) and (b) is the period of ten (10) years. Ten years of uninterrupted usage of land by the party, in this case, the respondent. This is a remedy that is available under statute to a person who seeks to have a right of access way or usage of land. I want to be clear that it is not ownership but access rights. This is what Section 24(a) and (b) of the Naoero Road Act entails. This is the first limb of Section 24.
16. The second limb is Section 24(c) which recognizes what is called a prescriptive right. A prescriptive right depends on the period of usage or uninterrupted access of the land such as accessway or access road. I note Ms. Olsson's correct summation of prescriptive right is common law. Then, there is the Article 18(1) of the *Constitution of Nauru* where it talks about no person will be deprived of property, that is the protection from unjust deprivation of property to Nauruans. Thus, it is arguable there is a conflict between the common law and the *Constitution of Nauru* under Article 8(1). Arguably, a prescriptive right could override or breach Article 8 of the *Constitution of Nauru*. It has the potential of breaching or interfering with the rights of Nauruans and depriving them of property, in this case, land. The appellant potentially could lose out on that part of her land because of the common law right of prescription. The significant issue of the application of customary laws of Nauru, the Nauru people, and the adopted common law principles prescriptive right.
17. If broken down further, the question is, how does one apply the doctrine of prescriptive rights in Nauru? Does a person who is having access to

this part of the land for a month entitled to prescriptive right, or a person who has been having access or usage for nine years before entitled to claim prescriptive right to use it? These are issues that come up, in this case.

18. Next, I note the point made by Ms. Lekanaua in her submissions that the issues raised by the appellant were not raised in the Supreme Court and I do appreciate the position the appellant was in at that time, that she has not able to quickly have access to the court, that she was away overseas and counsel was not able to put the relevant information together to raise Article 8 in a statement of defence due to less time. Eventually, the appellant run out of time to put in a statement of defence and rely on Article 8 of the *Constitution of Nauru* before the Court when the Supreme Court was considering the application for interim injunction. Accepting that to be the position, rightly or wrongly, it would be a matter for another time.
19. I turn to the question of balance of convenience. I have heard counsel for both parties speak on the current situation on the ground. The evidence before the Court and I suggest the helpful piece of evidence is a photograph that has been tendered by the respondent of where the disputed part of the land is located. I am able to observe from the photograph that is before the Court a view of a pile of sand or gravel and a tank. The tank appears to be made of plastic material and green in colour and located in the way or more or less blocking the access road. Also, I have heard that the appellant has now returned to Nauru, back to her land and she wants to build a house which she has done and to have a tank for source of water.
20. In my respectful view, the appellant's loss at this time is temporary because she will construct and complete the water tank if the appeal were to progress and be successful in the end. Then, there is the respondent's loss. In my respectful view, it is far greater than the appellant's. The access road is now cut-off, there is no road for motor vehicles to use, ambulance services access and garbage truck collection access. They are all, cut-off. There was a mention of an alternative route by Ms. Olsson by which the respondent may access. However, the evidence that I have



is inconclusive because it is insufficient. I am not satisfied that there is an alternative route for the respondent to use at this point in time. One thing is clear from the record that is placed before the Court and that is, the gazettal notice and the judgment of the Supreme Court refer to two different Districts where the alternative route is located. Uaboe District and Baitisi District. Thus, the portions of land are located somewhere there. This leave the respondent one access point and that is, through the appellant's land for the time being. That is not to downplay the significance of the dispute but also recognizing, as I have heard, there is no dispute that the matter will return before the Supreme Court on 4<sup>th</sup> July with a related matter for mention and possibly for directions to progress the matter in the Supreme Court.

## **Conclusion**

21. In summary, the Court of Appeal will only interfere and stay the order, in this case, an injunction granted by the Supreme Court where there is an arguable case. But the points I have highlighted sufficiently show or demonstrate that there are serious issues that are to be dealt with in the Supreme Court. His Honour, the presiding judge in the Supreme Court was satisfied that Section 24 of the *Naoero Road Act* raised fundamental and significant issues about access rights under the doctrine of prescription or prescriptive rights and allowed those issues to go to trial and in the interim, put in place an interim injunction. The balance of convenience will favour the respondent.
22. There is a final point to address before I close. Ms. Olsson pointed out that interim injunction appears to have or has disrupted the progress of the appellant's work. I note from the photograph that mobilization of the material for the construction of the water tank has taken place and it would seem to me that the Supreme Court recognized that by making an order to stop further work on the portion of land where the access route is located while the matter is pending before the Court for determination. I may have mentioned paragraph 17(1) of the statement of claim, but I refer to it again. It states, "*The defendant shall forthwith remove the slab constructed on the access way on land portion 126.*"

23. It would seem to me that this is a description of mandatory injunction. The test for a mandatory injunction is that the applicant must be able to show that there is a strong case, not only an arguable case, a strong chance of success such that it will undo what has taken place. In this case, there has been work on that part of the land. Now that the order or injunction has been put in place, it is to undo what has taken place. This is where the mandatory injunction comes in to undo the work that has already started. The points I mentioned about an arguable case, serious issues to be tried show to me that there is a strong case, and this is why the Supreme Court has decided to grant the order. It is characterized as a mandatory injunction to compel the appellant to clear the access way or road for the respondent to use. It is only for an interim period until the trial in the Supreme Court takes place and a decision to follow.
24. I conclude by saying the interim injunction is to preserve the status quo that was prior to what had happened, that is the actions of the appellant. For all these reasons, sitting as a single justice of the Court of Appeal, I am not satisfied that the interim injunction should be disturbed, or the order made by the Supreme Court should be stayed.

## Order

25. The final terms of the Order are as follows:
- i. The appeal is struck out as being incompetent for non-compliance of the *Nauru Court of Appeal Act 2018*.
  - ii. The Summons for an order to stay the execution of the injunction granted by the Supreme Court on 21<sup>st</sup> June 2023 is struck out.
  - iii. In the alternative, the Summons for an order to stay the execution of the injunction granted by the Supreme Court on 21<sup>st</sup> June 2023 is refused.

- iv. Costs of the summonses shall be assessed and paid to the respondent in due course.

*Ruling and orders accordingly.*



A handwritten signature in black ink, appearing to read "Colin Makail", written over a horizontal line.

**Justice Colin Makail**  
Justice of the Court of Appeal

**Dated this 30 day of June 2023**