IN THE SUPREME COURT OF NAURU

CIVIL ACTION NO. 21/1999

BETWEEN : **EIDINGAERO DAKE**

PLAINTIFF

AND : **NAURU LANDS COMMITTEE**

1st DEFENDANT

CURATOR OF INTESTATE ESTATES

2ND DEFENDANT

MUSHELLY DEINGOA

3RD DEFENDANT

ANTONIUS ATUEN MAYBIR

4TH DEFENDANT

AMERIA ATUEN

5TH DEFENDANT

Date of Hearing : 6 November, 2001
Date of Judgment: 7 November, 2001

Mr. P. Aingimea for the Plaintiff
Mr. B. Dowiyogo for 3rd-5th Defendants

JUDGMENT OF MILLHOUSE, J.

This is a will case. It concerns the validity of the will of Atuen Atam who died on the 30th of June 1996. The only point is whether the will were properly executed.

The plaintiff has brought a petition against the defendants. In it she claims: -

> "1. That there are no signatures of those witnessing the said will, i.e. both the 1st witness and the 2nd witness. Only their names are recorded.
>
> 2. There are two dates of signatory, which shows some amendment taking place again without proper witnesses.
>
> 3. The will does not fall within customary wills as outlined in the report of the Nauru Lands Committee to the Supreme Court dated 7/9/99."

The plaintiff asked that the will be declared invalid.

The photocopies of the will and the papers in the Court file and the English translation of the will, are misleading. It is only by looking at the original will that I now can understand the issue. I was reminded of the saying, "One picture is worth a thousand words".

Written in Nauruan, the will is on a will form. I was told from the Bar table that the Nauru Lands Committee sells forms for $5 each. The form is the same as may be bought from any law stationer in Australia and I imagine in New Zealand and many other countries which inherited the English Wills Act 1837. It is dated 5th of September 1980.

The body of the will, when one sees the original, was obviously written (I assume by the testator in his own hand) at two different times. Most is written in blue ink. The testator's

signature and the name, Retsiyo Dabwadauw, of one witness are in ink of the same colour. The name, Agiaiyaiy D., of the other witness in black ink. The translation:-

"Sir,

> Please, I will be happy if you will receive my Will, and follow what I have instructed. All my properties, including all my lands to my immediate family.
> (1) Ameria Atuen (2) Molly Deingoa also known as Tiau (3) Mushielly Dengoa. Ameria A. to be on L.T.O. It has been agreed between myself and my brother Imitsi Dekeka before the Nauru Lands Committee in the year 1980 and together we have agreed by signing our names that my brother Imitsi D. shall not share in our mother's properties or estate. This my last Will and Testament, can be revoke if I do change my mind. If there is none than it must be accepted. " .....

All this is in blue ink. The second part is in red ink and follows immediately after the phrase, "it must be accepted":-

> "Please take note that it must include my first grandson A. Atuen to share too. 18/3/1985."

[The date 18/3/1985 on the original has been wrongly transcribed in the typed English translation (also on a will form), as "18/3/1980".] That sentence is a codicil to the original will.

I was told the grandson A. Atuen was born in 1982. The testator wanted A. Atuen to share in his estate and simply added the sentence and the date. That is clear from the different coloured ink used.

I shall consider first the validity of the original will.

The point taken by the Petitioner is that the will was not properly witnessed.

The testator has executed the will with his signature: the two witnesses have printed their names, addresses and

occupations. The way in which they have written their names may not be their usual signatures. Does it matter? I have come to the conclusion that it does not. Unfortunately, both witnesses are dead.

There is a presumption of due execution [50 Halsbury (4th Edition) para 268]. The way in which the witnesses have written their names, may, for all we know, be the way in which they always signed. Relying on the presumption, I accept that the will was duly attested and would be valid according to English law.

That is not the end of it. I must have regard to Section 3(1)(b) of the Custom and Adopted Laws Act 1971. I have been unable to reconcile the decisions, in the Nauru Law Reports, all of Thompson CJ, on the validity of wills. In Land Appeal No. 3

of 1969, **Appellants: Giouba and Eidiatarab** and in Land Appeal No. 14 of 1969, **Appellant: Dogirouwa**, His Honour seems to take a wider, more flexible view than he does in his later decision in Land Appeal Nos. 3, 4 and 5 of 1980, **Eidiogin Rasch and Others v Natalie Akibwib and Another, Deatak Daragauw and Another v Natalie Akibwib and Another** (NLR 1969-1982 Part B, Land Appeals 145 at 146,147).

In the 1980 decision he says: -

> " ..... The Wills Act 1837 of England does not apply to the disposition of Nauruan land, by reason of section 3 of the Custom and Adopted Laws Act 1971. Nauruan custom governs that. In early times it was common for Nauruans to express their testamentary wishes orally to their Chiefs and the Chiefs ensured that effect was given to those wishes. Later, at the behest of the First Australian Administrator, Brigadier Griffiths, either the testator himself wrote down in the presence of his Chief and another person of standing the manner in which the estate was to be disposed of, or he orally told his Chief in the presence of another person of standing, and his Chief wrote it down. In

> either event, the testator signed it and the Chief and the other person signed it as witnesses. That is Nauruan custom to-day, with Councillors and Members of Parliament taking the place of Chiefs. It is quite as strict as English law, so far as witnessing of wills is concerned. A will not properly witnessed is not valid, even though there may be no doubt that it was made by the deceased person." .....

I have come to the conclusion that the original will was properly attested and is valid.

I now consider the codicil to the will. It was an addition, not witnessed at all, only written in by the testator and dated.

The requirements for the making of a codicil to a will are the same as for making the will itself. This codicil would not be valid under English law and it is not, if I follow, as I propose to do, the dicta of Thompson CJ in the 1980 case: -

" ..... It is quite as strict as English law, so far as witnessing of wills is concerned. A will not properly witnessed is not valid, even though there may be no doubt that it was made by the deceased person." .....

I find the original will is valid but the codicil is not.

I shall hear the parties as to the orders I should make.

Robin Millhouse J

ROBIN MILLHOUSE, J.

A Certified True Copy
of the Original:

SAMPATH B. ABAYAKOON
REGISTRAR, SUPREME COURT