IN THE SUPREME COURT
REPUBLIC OF NAURU

Land Appeal No.2 of 2011

CEILA CECILIA GIOUBA
Appellant

V

NAURU LANDS COMMITTEE
Respondent

Land Appeal No 4 of 2011

CLARA AGIR
Appellant

V

DANIEL AEMWAGE & Others
1st Respondents

NAURU LANDS COMMITTEE
2nd Respondent

JUDGE:	Eames, C.J.
WHERE HELD:	Nauru
DATE OF HEARING:	8 July 2011
DATE OF JUDGMENT:	13 July 2011
CASE MAY BE CITED AS:	Giouba v NLC; Agir v NLC (No.2)
MEDIUM NEUTRAL CITATION:	[2011] NRSC 11

Ruling on Preliminary issues - Following Giouba v NLC; Agir v NLC [2013] NRSC 7;

Nauru Lands Committee Act 1956 ss.6,7 – *Succession, Probate and Administration Act* 1976 ss. 3, 37, 63 - *Custom and Adopted Laws Act* 1971, s.3

Held:

1. Nauru Lands Committee is not empowered by statute but applies customary law in determining questions as to the distribution of personal estate of intestate Nauruans. That

customary law role is not prohibited by any statute.

2. Supreme Court does not have jurisdiction under *Nauru Lands Committee Act* 1956 to hear an appeal from a decision of the Nauru Lands Committee concerning distribution of personal estate of a deceased Nauruan.

3. Whilst there is no right of appeal to the Supreme Court, in appropriate cases the customary law role of the Nauru Lands Committee may be open to judicial review and/or declaratory relief in the Supreme Court.

APPEARANCES:	COUNSEL
For appellant Ceila Cecilia Giouba	Appellant in person
For appellant Clara Agir	Mr R Kun (Pleader)
For Nauru Lands Committee	Mr D Lambourne
For affected beneficiaries	Mr D Aingimea (Pleader)

CHIEF JUSTICE:

1 In my earlier judgement concerning these two cases I expressed some tentative views including as to the jurisdiction of the Nauru Lands Committee to deal with the personal estate of deceased intestate Nauruans. My views were expressed tentatively because much of the legal analysis in my judgment arose from personal research conducted after I had concluded my sittings in Nauru and on which I had not had the benefit of hearing argument on behalf of the parties.

2 My tentative views were that although the role of the Nauru Lands Committee in dealing with the distribution of personalty was recognised in the *Succession Probate and Administration Act 1976* neither that nor any other Act granted statutory power to the Committee to perform that role. The provisions of the *Nauru Lands Committee Act 1956* provided statutory power to the committee only with respect to determining questions as to the ownership of or rights in respect of land, not personalty.

3 I concluded that the power of the Committee to deal with matters of personalty derived from customary law, and had been exercised by the Committee since 1956. The same customary role had been undertaken by its predecessor bodies, initially the Council of Chiefs, as recognised by the Administrator in *Administration Order No 3 of 1938*, which set down regulations for the distribution of deceased estates, both real and personal.

4 I also expressed as a tentative conclusion, the opinion that the Supreme Court was not granted jurisdiction by the *Nauru Lands Committee Act* to hear appeals against

determinations of the Committee as to the distribution of personal estates.

5 I invited the parties to consider my judgment and to make further submissions to me, should they wish to do so concerning my tentative conclusions in those respects. They have now done so, Mrs Giouba, appearing in person. Both Mrs Giouba, and the representatives of the other parties provided helpful and thoughtful written and oral submissions. I am indebted to them for their assistance.

Is there a right of appeal concerning personalty?

6 As to my tentative conclusion that the Supreme Court was not empowered by the *Nauru Lands Committee Act* to hear appeals from decisions of the Committee concerning personalty, the parties' relied on their previous submissions. However, Mr Kun advanced some new arguments by way of written submission. He noted that *Administration Order No 3 of 1938* expressly stated that it applied to both real and personal estates, and in paragraph (4) it provided that "no distribution of land" was to be regarded as finalised until "the usual opportunity given for protest". Mr Kun submitted that the word "land" should be understood to have included personalty, the omission being a mere slip. Historically, protests were directed to the Administrator, he submitted, both as to land and personalty, and it should be understood that the 1938 Administration Order was intended to provide a mechanism of appeal, one which the Court should now recognise as being available under the *Nauru Lands Committee Act.*

7 As to that argument, I do not consider that an administrative order, especially one in the terms the 1938 order is written, can provide a right of appeal on personalty. A right of appeal is a creature of statute and the *Nauru Lands Committee Act* does not provide that right with respect to personalty.

8 Alternatively, Mr Kun submitted that I should conclude that the inherent powers of the Court are wide enough to permit the Court to provide a "right of appeal" rather than allow the situation that no right of appeal would be available to Nauruans concerning personalty. As I later discuss, the inherent powers of the Court do allow a remedy by way of judicial review and declaratory relief, but only a statute can create a right of "appeal".

9 I therefore state my concluded opinion that there is no right of appeal concerning personalty. That conclusion is in accord with the judgment of Thompson C.J. in *Detamaigo v Demaure*[1], as discussed in my earlier judgment in these cases.[2]

Does the Nauru Lands Committee have power to deal with personalty?

10 With the exception of Mrs Giouba, none of the parties sought to advance any further argument against my tentative conclusion that the Nauru Lands Committee was not empowered by statute to make determinations concerning personalty, but did so in the exercise of customary law.

11 Mrs Giouba submitted that the Nauru Lands Committee had no jurisdiction, at all, to determine questions concerning personalty. She submitted that the *Nauru Lands Committee*

[1] [1969-1982] NLR (B), 7, judgment 30 April 1969..
[2] [2011] NRSC 7

Act confined the power of the Committee to dealing with matters concerning land, and deliberately omitted a grant of similar power with respect to personalty. The intention of the legislature was clear, she submitted, the Committee was not permitted to undertake any role, including a customary law role, concerning the distribution of personal estate of Nauruans.

12 Accordingly, she submitted, the determination of the Committee in her case (and it would apply also to the appeal of Clara Agir) should be declared null and void and be quashed. That contention was not supported by the representatives of the other parties.

13 In the alternative, Mrs Giouba submitted that if the Committee was held to have been exercising customary law power, the decisions of the Committee concerning personalty should be open to judicial review in the Supreme Court, by way of prerogative writ or declaration. Mr Kun and Mr Lambourne agreed with that alternative submission and expanded on Mrs Giouba's arguments in that regard.

14 I will deal with the first argument of Mrs Giouba.

Was the Nauru Lands Committee prohibited from exercising customary law power?

15 The *Nauru Lands Committee Act* 1956 (then Ordinance) was introduced when Nauru was under Australian administration. By s.4 of the 1956 Ordinance the constitution and procedures of the Nauru Lands Committee were to be determined by the Nauru Local Government Council, which was established by the *Nauru Local Government Council Ordinance 1951-1955*. That Council also had responsibility for paying Committee members. The Nauru Local Government Council was given power to co-operate with the Administrator in providing any public or social service to the Nauruan community[3]. Mrs Giouba noted that the Nauru Local Government Council was not given statutory power to deal with phosphate royalties. Likewise, she noted, when the Legislative Council was created by the *Nauru Act 1965* it was given power to make Ordinances but that power expressly excluded the making of ordinances with respect to phosphate royalties[4].

16 Mrs Giouba submitted that since personal estates very often comprised monies received by way of phosphate royalties, it followed that the Nauru Lands Committee could not deal with personalty estates, because that would mean, in many cases, that it was making determinations about the distribution of funds received from royalty payments.

17 This was an interesting argument, but I do not agree with the interpretation of the legislation for which Mrs Giouba contends. In the first place, in dealing with personalty the Committee was not making determinations about phosphate royalties; it was not determining the rate of royalty payments or who was entitled to receive royalties. The concern of the Committee was about who should be entitled to receive money then vested in the Curator of Intestate Estates by s.37(1) of the *Succession, Probate and Administration Act 1976*. The fact that the money may have originated as royalty payments was not a matter of relevance to the Committee.

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[3] S.43(c)

[4] S.26(d). This Act was repealed by the *Nauru Independence Act* 1967. Today, the Constitution gives Parliament unfettered jurisdiction to make laws for the peace, order and good government of Nauru: s.27.

18 Secondly, neither the *Nauru Local Government Council Ordinance* nor the *Nauru Act* prohibited the Nauru Lands Committee from performing a customary law role in determining the distribution of personalty estates. The fact that its predecessor body had taken that role over many decades was known to the Administrator in 1956 and to the Legislative Council in 1965. The role was specifically recognised by s.37(3) of the *Succession, Probate and Administration Act*. Furthermore, this customary law role must be considered as being included among the institutions, customs and usages of Nauruan people which s.3 of the *Custom and Adopted Laws Act 1971* required be recognised by the Courts of Nauru.

19 I conclude, therefore, that decisions of the Committee concerned with personalty were taken in the exercise of a customary law role which is not prohibited by statute.

Are proceedings for judicial review or declaratory relief available?

20 I turn to the submission that decisions of the Committee concerning personalty should be amenable to judicial review and/or to declaratory relief, notwithstanding that the Committee is not exercising statutory power, and that the Supreme Court does not have statutory power to conduct appeals concerning personalty determinations.

21 Mr Kun and Mr Lambourne submitted that it would be a serious deficiency in the power of the Supreme Court if it could not exercise judicial review of decisions of the Nauru Lands Committee concerning personalty, as it can do with respect to decisions of the Committee concerning land[5]. Personal estates can be very valuable, where the deceased person has received phosphate royalties; indeed, even small estates can be very valuable to potential beneficiaries in a community where personal incomes are often very modest.

22 There may be some potential difficulties if the Court was to exercise that jurisdiction. In the absence of a statute granting power to deal with personalty it might be more difficult to apply the principles of judicial review and declaratory relief to the determinations of a customary law body than would be the case in the context of bodies operating in England or Australia. How, for example, would the Court determine whether the Committee had been acting within jurisdiction when it made a determination? There would be only limited guidance as to the role of the Committee to be gleaned from s.37 of the *Succession, Probate and Administration Act*, and by the terms of *Administration Order No 3 of 1938*[6]. The latter instrument, a one page document, has been much criticised for its appalling drafting and the limited guidance it gave to the then Lands Committee, and now to the Nauru Lands Committee, in performing a customary law role.

23 It may be observed, however, that the Supreme Court, and its predecessor, the Central Court, have had to interpret and apply the 1938 Administration Order and make pronouncements on customary law when conducting appeals under the *Nauru Lands Committee Act*, and that Act, itself, gives almost no guidance to the courts in performing that task. Thus, the challenges of applying customary law and reviewing its exercise, have been met by the Court in the past. The Court's undoubted power to exercise judicial review and declaratory relief remedies with respect to land issues is no more or less difficult to apply than it would be with respect to determinations concerning personalty.

[5] See *Charlie Ika v NPRT and Others* [2011] NRSC 5, Eames, C.J.

[6] Promulgated under s.4 of the *Native Administration Ordinance No 17 of 1922*.

24 By s.4(2) of the *Custom and Adopted Laws Act 1971* the principles and rules of equity which were in force in England at 31 January 1968 were adopted as the principals and rules of equity in Nauru[7]. Judicial review in general law is an exercise of inherent jurisdiction of a superior court to supervise inferior courts, tribunals and administrators. At general law the remedies are prerogative remedies of prohibition, certiorari and mandamus, and also the equitable remedies of injunction and declaration.[8]

25 By s.5(1) of *the Custom and Adopted Laws Act 1971* the common law of England was adopted "only so far as the circumstances of Nauru and the limits of its jurisdiction permit" and s.5(3) provides that to facilitate the application of laws adopted from England and elsewhere, the judiciary is permitted to construe the laws "with such verbal alteration not affecting the substance as may be necessary to render it applicable to the matter before (the Court)".

26 Most importantly, s.3 of the *Custom and Adopted Laws Act* provides:

> **NAURUAN INSTITUTIONS, CUSTOMS AND USAGES**
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> **3.** (1) The institutions, customs and usages of the Nauruans to the extent that they existed immediately before the commencement of this Act shall, save in so far as they may hereby or hereafter from time to time be expressly, or by necessary implication, abolished, altered or limited by any law enacted by Parliament, be accorded recognition by every Court and have full force and effect of law to regulate the following matters –
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> > (a) title to, and interests in, land, other than any title or interest granted by lease or other instrument or by any written law not being an applied statute;
> >
> > (b) rights and powers of Nauruans to dispose of their property, real and personal, inter vivos and by will or any other form of testamentary disposition;
> >
> > (c) succession to the estates of Nauruans who die intestate; and
> >
> > (d) any matters affecting Nauruans only.

27 In my opinion, that section imposes a positive obligation on the Court to apply, with such modification as necessary to meet Nauruan needs, the supervisory powers of the Court with regard to decisions of the Nauru Lands Committee. Were the Committee to act in a way, while exercising customary law power, that would infringe judicial review principles then the intervention of the Court would enhance, not undermine, the institutions, customs and usages of Nauruans in that respect.

28 It is, however, important to stress that the remedies of judicial review and declaratory relief are discretionary. Even when the Court finds error in the conduct of a body it may be

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[7] The prerogative writs of certiorari, prohibition and mandamus were developed by English Courts over centuries: "Prerogative Orders: the Nature and Origins of Orders and Writs", the Laws of Australia, [2.6.82], Thomson Reuters Legal On line.

[8] *Halsbury's Laws of Australia*, "Administrative Law/ Judicial Review/Remedies" Lexisnexis [10-2425].

inappropriate to grant relief. Furthermore, the principles that govern relief by way of judicial review, are not the same as those applied by the Court in conducting appeals against land decisions under the *Nauru Lands Committee Act*. Under that Act the Court can conduct what amounts to a complete re-hearing of the questions decided by the Committee and can substitute its own opinion for that of the Committee. With judicial review, the Court may quash the decision and/or send it back to be re-considered, but it could not substitute its own decision for that of the Committee.9 Judicial review is concerned with the process whereby a decision is made, not with the merits of the decision.

29 I reached my conclusion that there was no right of appeal to this Court concerning personalty with some reluctance. Judicial review and declaratory relief processes do not provide the comprehensive scope for reviewing such decisions as would be available by way of appeal. Very often precisely the same issues would be raised concerning determinations about the distribution of the real estate and personal estate of the deceased person. It is inconvenient to have to apply quite distinct legal principles and remedies for land and personalty disputes. Under the somewhat archaic Civil Procedure Rules, quite elaborate processes are required to be undertaken by litigants who apply for judicial review, compared with the relatively simple procedural steps required in launching an appeal under the *Nauru Lands Committee Act*. It would be a very valuable reform were the Act to be amended to include a right of appeal against determinations concerning personalty.10

The further disposition of these cases

30 I heard these two cases together because they raised common preliminary issues. Both were initially brought as appeals under the *Nauru Lands Committee Act* in the belief that the Court had jurisdiction to deal with appeals concerning personal estates. In anticipation that the Court might rule to the contrary, Mr Kun has issued civil proceedings described as "Application for leave for declaratory or other judicial review relief". In addition, Mr Kun had earlier issued civil proceedings by way of a writ accompanied by a statement of claim, which seeks orders quashing a determination of the Committee concerning personalty and a declaration that Mrs Agir is the sole beneficiary of the estate of Augusta Harris.

31 Under Order 38 of the *Civil Procedure Rules 1972* leave to issue proceedings for certiorari, prohibition or mandamus must be applied for. Order 38 Rule 2 requires that where the application is made more than 3 months after the decision in question the delay must be accounted for to the satisfaction of the court.

32 In this case the writ was issued within the 3 months, but the "application for leave" was not. That amounts to a reversal of the procedural steps required by the Rules, but in my view that should not preclude me granting leave to commence proceedings. An application for leave should be made ex parte (O38 r.1(1)) but I will proceed as though it had been.

33 I am satisfied that any delay was understandable, as steps taken to answer the legal

[9] See my discussion in *Charlie Ika v NPRT and Others* [2011] NRSC 5, at [34]-[38]

[10] If amending legislation was to be considered, the 21 day time limit might also be reviewed, and, too, whether the Court should be given power to grant extensions of time. The time limit runs from the date of publication of a determination in the Government Gazette, but hard copies of the Gazette are no longer published. Internet access is available to those with computers, but in many cases interested persons do not learn of the determination until after 21 days.

questions which I have now resolved took time. In any event, Mr Kun has provided a clear outline of the basis upon which judicial review relief is sought, and affidavit evidence supporting those contentions. I am satisfied, too, that there is an arguable case for the relief sought. It is not necessary that I elaborate as to the merits of the grounds to be argued.

34 The notice of appeal was issued by Mr Kun within time but was not appropriate insofar as the challenge concerned a determination as to personalty. The determination in question being GNN No 76 of 2011 is titled "Personalty estate of the late Augusta Harris (LTO)", but one complaint made is that it included references to land. If it is intended to challenge a decision affecting land, not personalty, then the notice of appeal would have continuing relevance, but as presently advised that does not seem to be the case.

35 In Mrs Giouba's case, the preliminary issues about personalty arose on the file, Land Appeal No 2 of 2011, which concerned determinations as to the personalty estates of Rose Maria Limen and Michael Limen published in the Government Gazette No 17 of 16 February 2011 as GN No 120 of 2011 and GN No. 121 of 2011. Mrs Giouba lodged an appeal within 21 days, but as I have now ruled, no appeal was available concerning personalty.

36 She brought separate proceedings on the file, Civil Action No 12 of 2011, concerning determinations as to the real estate of the same two deceased, published in Gazette No 68 on 9 June 2010, in GN Nos. 289 of 2010 and 287 of 2010. She was out of time in lodging her appeal and I ruled that there was no power of the Court to grant an extension of time[11]. In that case, on 6 June 2011 Mrs Giouba issued a document titled "Notice of Appeal Ex parte". Despite its title, the document in fact was an application for leave to apply for relief by way of judicial review and declarations. Mr Lambourne, for the Nauru Lands Committee did not oppose leave being granted. In both actions there are the same beneficiaries who would be affected by the outcome, although they are only named as respondents in Civil Action No 12 of 2011. I was advised that they did not seek to be heard on either matter, leaving it to the court to decide.

37 Mrs Giouba has not lodged a similar "Notice of Appeal Ex parte" on file Land Appeal No 2 of 2011, seeking leave to commence proceedings for judicial review and declarations with respect to the determinations concerning personalty. Instead, she lodged a large number of affidavits and documents with titles such as "Application for notice of Appeal for revocation" concerning the land determinations. With respect to the personalty issue the only relevant document was a "Notice of Appeal" dated 22 February 2011, thus before I ruled that there was no appeal permitted with respect to personalty.

38 It is clear that Mrs Giouba wishes to seek relief by way of judicial review and declarations in the personalty case, too, not just with respect to the real estate issue.

39 Notwithstanding my expressing doubts, obiter, in my judgment *Giouba v NLC*[12], about whether she had provided a satisfactory explanation for delay in lodging an appeal in the land case, she did not delay doing so in the personalty case and I think in the circumstances it would be just to grant leave to her to commence proceedings for relief by way of judicial review or declarations in that matter.

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[11] *Giouba v NLC* [2011] NRSC 1

[12] Giouba v NLC [2011] NRSC 1

40 In both cases, Mrs Giouba identifies the same errors that she says should cause the determinations to be quashed. One common complaint might amount to a contention that the committee wrongly interpreted one of the provisions of the 1938 Administration Order No 3, buy allowing half siblings to share in the estate together with the two full siblings, Mrs Giouba and her sister. It may be that this would, if accepted, amount to an error within jurisdiction and not an error that would justify an order quashing the decision[13], but if her argument succeeded then she might obtain a declaration to that effect. Whether that would achieve anything without a further order quashing the decision remains to be seen. Should the case get to that point the matter would, no doubt, be the subject of submissions.

41 I am persuaded that the issues are arguable and thus I grant Mrs Giouba leave under Order 38 to commence proceedings for review.

42 The current documentation concerning the personalty issue (appearing on Land Appeal file No 2 of 2011) is far from satisfactory. Mrs Giouba has filed a huge volume of documents concerning the land and personalty determinations, all of which appear to repeat the same arguments and factual contentions. She is required to issue a writ (by Order 38 rule 3(1)) identifying the decisions to be reviewed and the relief sought. She may in fact have issued a writ on Civil File 12 of 2011, but if not then she should, and it should set out both the real and personalty determination s that are under challenge.

43 No pleadings are required or permitted (Order 38 Rule 3 (3) but a statement must be filed with the writ setting out the relief sought and the grounds for it (see Order 38 Rule 1(2)). The document filed by her in Civil Action 12 of 2011, misleadingly titled "Notice of Appeal Ex parte", would suffice if it was reduced to the first three paragraphs and the final paragraphs concerning the relief sought, and if it, additionally, also identified the determinations about personalty that were to be reviewed. She must also file such affidavit evidence as she wishes to rely upon. I think the affidavits already on file are adequate but since leave has been granted, there is no longer any need for the affidavits to address the reasons for delay.

44 With these steps, the review of decisions involving both land and personalty could proceed together.

45 The proceedings involving Clara Agir and Ceila Giouba should now proceed separately.

46 I will hear the parties as to any further orders that are required.

Dated this 13th day of July 2011

Geoffrey M Eames AM QC
Chief Justice

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[13] However, certiorari can apply to non-jurisdictional error of law on the face of the record: The Laws of Australia, "Administrative Law, Grounds for granting Orders"[2.6.121] Thomson Reuters Legal Online. See, too, *Craig v South Australia* (1995) 184 CLR 163 at 177-8.