IN THE SUPREME COURT
REPUBLIC OF NAURU

No. 2 & 12 of 2011

CEILA GIOUBA
Plaintiff

v.

NAURU LANDS COMMITTEE
1st Defendant

ALFONSO HARTMAN & ORS
2nd Defendant

JUDGE:	EAMES, C.J.
DATE OF HEARING:	21, 28, 29 November 2011
DATE OF JUDGMENT:	30 November 2011
CASE MAY BE CITED AS:	Giouba v NLC and Alfonso Hartman & Ors
MEDIUM NEUTRAL CITATION:	[2011] NRSC 23

Judicial Review – Determinations of Nauru Lands Committee – Denial of Procedural Fairness – Failure to hear Party as to Personalty Estate Distribution – Certiorari granted – Claim that Committee misinterpreted phrase "Nearest relatives in the same tribe", Paragraph (3)(a) of Administration Order No. 3 of 1938 – No Jurisdictional error – Certiorari and Declarations refused.

APPEARANCES:	Solicitors
For the Appellant	In person
For the Respondent	David Lambourne
For the 2nd Respondents	In person

CHIEF JUSTICE:

1. The plaintiff, Ceila Cecilia Giouba, has applied by writ of summons for orders in the nature of certiorari and mandamus to quash decisions of the Nauru Lands Committee concerning distribution of the personal estates (Civil Action No 2 of 2011) and real estate (Civil Action No 12 of 2011) of Maria Rose Limen and Michael Limen, who died intestate.

2. The submission of the Secretary for Justice on behalf of the Nauru Lands Committee accurately sets out the history of the litigation and I borrow from it.

3. The applicant is the daughter of Agnes Eigudina Waibeiya and Imitsi Limen. Her full siblings were Michael, Rose Maria and Cindy. After her husband's death, the applicant's mother married again, she then having four children with her new husband Fritz Hartman. Those children, the half siblings of the applicant, were Alfonso, Christabeth and Virginski.

4. Michael and Rose both died in 2006. Neither had married and they had no children. They had inherited personalty and realty from their parents.

5. The Nauru Lands Committee accepted responsibility to deal with the distribution of the estates pursuant to the Nauru Lands Committee Act 1956. To that end, the Committee met with Cindy Limen on 19 June 2008. The applicant did not attend the meeting. Cindy proposed a distribution that would have land which had been inherited from their father passing in equal shares to herself and the applicant and land inherited from their mother would pass with equal shares to herself, the applicant and also their four half siblings. Cindy Limen told the Committee that the applicant did not agree with this proposal and suggested that if she was not happy she could appeal. No decision was taken by the Committee on that day.

6. On the 15th February 2010 Cindy Limen wrote to the Committee noting that decisions had been delayed due to "differences of opinion" and asked the Committee to act on her proposal, which she said was just and fair, and asked for the decision to be expedited. The Committee agreed, that day, to her proposal. The determination as to distribution of the real estate was published in the Government Gazette on 9 June 2010, the real estate of Michael being dealt with in GNN 287/2010 and the real estate of Rose Maria Limen being dealt with in GNN 289/2010.

7. The determinations concerning distribution of the personalty estates were not published until 16 February 2011. On that day, Michael Limen's personalty was dealt with in GNN 121/2011 and that of Rose Maria Limen by GNN 120/2011.

8. The Nauru Lands Committee purported to apply the principles of the Administration Order No 3 of 1938, concerning the distribution of estates of intestate Nauruans.

9. The applicant was unhappy with both the realty and personalty determinations and sought to appeal both pursuant to section 7 of the *Nauru Lands Committee Act 1956 - 1963*. Her notice of appeal with respect to the determination about realty was not filed within the 21 day time limit provided under the Act. I ruled that the court had no power to grant an extension of time in which to appeal1. The applicant's appeal with respect to the determinations concerning personalty was brought within time, however I ruled that there was no right of appeal under the Nauru Lands Committee Act with respect to determinations concerning personalty2.

10. I granted leave to the applicant under Order 38 of the Civil Procedure Rules 1972 to enable her to make application by way of judicial review in support of her attempts to quash the decisions of the Committee. I directed that the judicial review applications with respect to personalty and realty determinations be consolidated.

11. To understand the claims for relief as to both realty and personalty determinations, it is necessary to set out relevant parts of the *Administration Order No 3 of 1938*.

12. Paragraph (2) of the Administration Order provides that the distribution of the real and personal property "shall be decided by the family of the deceased person, assembled for that purpose", and then continues:

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

[2] *Giouba v NLC; Agir v NLC No.2* [2011] NRSC 11

"(3) If the family is unable to agree, the following procedure shall be followed:

(a) In the case of an unmarried person the property to be returned to the people from whom it was received or, if they are dead, to the nearest relatives in the same tribe".

13. In the first place, Mrs Giouba contends that the Committee erred because it made its own determinations rather than obey the requirement that the issue "be decided by the family". The short answer to that, as Mr Lambourne pointed out, is that in this case the family were not in agreement. That was obvious from the first contact Cindy Limen had with the Committee, when she told the members, rightly, that there was no agreement, because Mrs Giouba did not agree to her proposals for distribution. Accordingly, as paragraph (3) expressly provided, the Committee made its own determinations.

14. The application to quash the personalty decisions by a grant of certiorari may be disposed of shortly, on a threshold issue, without addressing the primary argument that Mrs Giouba advanced with respect to the determinations concerning both the personalty and realty determinations.

Judicial Review of the Personalty claims: - A threshold issue (Civil Action No 12 of 2011)

15. In the case of the decisions concerning personalty, the applicant's first contention was that the Committee failed to give her the opportunity to be heard prior to making its decision. It is conceded by Mr Lambourne on behalf the Committee that it did not give proper notice to the applicant. Indeed, the Committee did not give notice to Cindy Limen, either, before making its determination. Although the Committee had spoken to Cindy Limen and had received a proposal from her by letter, she had only addressed the realty, so the Committee had not heard from the family, at all, as to personalty.

16. A question arises whether the Court has power to exercise judicial review with respect to decisions concerning distribution of personalty estates, which were taken by a body solely exercising customary law (as I held to be the source of its power in *Giouba v NLC and Agir v NLC).* Further questions might arise from the fact that I also held that there was no right of appeal to the Supreme Court as to decisions concerning personalty.

17. I put to one side those interesting questions, which were not argued before me. Making no concessions as to what might be the correct answer to those questions, Mr Lambourne did not seek to argue that the failure to give a hearing to Mrs Giouba, in this case, did not constitute a jurisdictional error on the part of the Committee. He conceded that it was an omission which would justify the court granting certiorari so as to quash the decision. He accepted that the appropriate course, in those circumstances, would be to refer the question of the personalty estates back to the Nauru Lands Committee for reconsideration.

18. Whilst it seems likely that the Nauru Lands Committee would reach the same conclusion as it had already reached concerning the distribution of personalty, Mr Lambourne conceded that that factor was not a barrier to a grant of certiorari for jurisdictional error3. Mrs Giouba will therefore succeed in her application for judicial review concerning the personalty determinations. I shall grant certiorari to quash the Committee's determinations as to personalty.

19. Mrs Giouba, however, wanted the Court to go further, so as to ensure that the Committee would reach a different conclusion on the merits of the proposed distribution of personalty. She urged the Court to direct the Committee to apply an interpretation of par 3(a) of the *Administration Order No 3 of 1938* that would, if correct, achieve that result. She sought to achieve that result by

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[3] *SAAP v Minister for Immigration, Multicultural and Indigenous Affairs* (2005) 228 CLR 294, at 323-324, 346, 355.

obtaining an order for mandamus directing the Committee to act according to the interpretation she favoured, or else by a declaration as to the "correct" interpretation. Although there is some doubt whether the prayers for relief advanced in her many proceedings actually included an application for a declaration, such relief was discussed many times, and I will assume that such an application is part of her case; Mr Lambourne did not seek to dissuade me from that approach.

The determinations as to realty

20. No complaint about denial of procedural fairness is made concerning the realty determinations. Mrs Giouba acknowledges that she and her sister, Cindy Limen, met with the Nauru Lands Committee4 and thus the family had been assembled for the purpose of considering the distribution, thereby satisfying the threshold requirement of par (2) of the Administration Order.

21. In addition, no complaint is made that when it came to exercise its powers to make its own determination under paragraph (3)(a) the Committee did not give Mrs Giouba the opportunity to present her argument as to interpretation of the phrase "nearest relatives in the same tribe". She agrees that she did make that argument to the Committee.

22. Thus the primary complaint made with respect to the realty determinations is the same as that which she sought to make concerning the personalty determinations. She wants the Court to declare her interpretation of the phrase to be correct, and to rule that the Committee failed to apply the correct interpretation, and to direct it to re-consider, and apply the correct test when doing so.

23. This, then, brings me back to the primary argument that Mrs Giouba advanced in challenging all of the determinations.

"The nearest relatives in the same tribe"

24. The primary contention that Mrs Giouba advanced in both actions concerned the proper interpretation of the phrase "the nearest relatives in the same tribe" that appears in the *Administration Order No 3 of 1938*. Mrs Giouba seeks a direction to the Committee by way of mandamus, or guidance by way of a declaration, that the half-siblings are incapable of meeting that description, and that only full siblings could do so in the present case.

25. As noted earlier, paragraph (3) of the Administrative Order provides

> "(3) If the family is unable to agree, the following procedure shall be followed:
> a. In the case of an unmarried person the property to be returned to the people from whom it was received or, if they are dead, ***to the nearest relatives in the same tribe".*** *(my emphasis)*

26. Mrs Giouba submitted, "traditionally tribes cannot marry within their tribe. It was forbidden. When a man has two marriages, his children from the two marriages will have different tribes." Mrs Giouba relied on an undated paper from anthropologist, Nancy Pollock5, who confirmed that to marry, the husband had to be of a different tribe to the wife. Descent in Nauru was matrilineal and only the female carries the tribal name.

27. Thus, so Mrs Giouba argued, when Mr Hartman married the applicant's mother it must follow that he was of a different tribe to his wife, and their children were of a different tribe to his wife's children from her first husband. They could not, therefore, be nearest relatives in the same tribe as that of Cindy Limen and Ceila Giouba.

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[4] The minutes of this meeting cannot be found.

[5] Pollock, Nancy J, "Countries and their Culture, Nauru", www.everyculture.com/Ma-Ni/Nauru .html

28. There are several answers to this. In the first place, as Mrs Giouba agrees, for a very long time the strict customary laws had been broken by many Nauruans, with inter-marriage often taking place. The Nauru Lands Committee is charged with determining the content of customary law, and it might well be that the Committee accepted that those laws had changed over the years. Nancy Pollock recognised that changes were taking place, in that that marriage had becomes a largely Christian affair, and elders were concerned that many young people were opting not to marry. Indeed, Cindy Limen told me, and Mrs Giouba did not dispute this, that in the present case the traditional rules of not marrying the same tribe had been broken because Mr Hartman was from the same tribe as his wife, the mother of the applicant and Cindy Limen. Mr Hartman and his wife were both members of the Eamwit tribe, and thus all the children were of that tribe.

29. In any event, even if Mr Hartman was of a different tribe to his wife, it would remain the case that, since children take their tribe from their mother, all of the children in this case, siblings and half siblings, would have taken the same tribe through the same mother.

30. Indeed, it seems to me that the proposal put to the Committee by Cindy Limen at her meeting with the Committee on 19 June 2008 may well have recognised those principles. She said, speaking first of herself and her sister, and then of both full and half-siblings: "What came from our father, the two of us will share, but what came from our mother all of us will take equal shares".

31. However, even if these propositions be wrong, and the strict rule of customary law should apply as Mrs Giouba contends, and even if in consequence (for reasons that are not apparent to me) the correct interpretation of customary law should have meant that the half-siblings were excluded, that amounts merely to a mistake made by the Committee, within jurisdiction, on a question of fact, namely, to what tribe do each of these children belong? Judicial review does not extend to review errors of fact.6

32. Even if that be regarded as a question of law, it would merely be an error within jurisdiction, not a jurisdictional error which invalidated the decision. Judicial review is not a substitute for an appeal; the issue is not whether the Tribunal made the right decision, but whether it was acting within jurisdiction when it took its decision. As Haydon J held in a recent case, in response to submissions by an applicant seeking certiorari, who alleged that errors of law had been made by the tribunal against which an order for certiorari was being sought: "The process by which constitutional writs are granted is not an alternative to the appellate process. The alleged errors do not go to jurisdiction."7

33. No jurisdictional error has been demonstrated such as would justify a grant of certiorari to quash the realty determinations. Furthermore, this would not be a proper case for the exercise of discretion to grant a declaration. The issue is primarily one of customary law, and as a matter of long practice, the appropriate customary law body, the Nauru Lands Committee, has interpreted and applied the 1938 Administration Order, subject to appeal to the Court. Although there would be no appeal against its decision concerning personalty, the question of interpretation will be before the Committee when the personalty question returns to it. I see no reason to fetter the Committee by making a declaration that will direct it to interpret the phrase a particular way. In any event, for the reasons I have given, I am not persuaded that the Committee was in error in the interpretation it adopted when deciding the realty issue. Judicial pronouncements should not be made unless there are circumstances calling for them to be made8. There has been no good basis shown for granting a

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[6] See *Halsbury's Laws of Australia, "Administrative Law, Judicial Review"*, Lexis Nexis Par [10-2293]

[7] *ACN 078 272 867 Pty Ltd Formerly Advance Finances Pty Ltd v DCT* [2011] HCA 46 at [60]; See too *Craig v South Australia* (1995) 184 CLR 163, at 179.

[8] *Ibeneweka v Egbuna* [1964] 1 W.L.R. 219 at 225.

declaration as to the meaning of the phrase "nearest relatives in the same tribe".

34. I conclude, therefore, that for the reasons stated, above, judicial relief by way of certiorari will be granted with respect to personalty decisions (Civil Case No 12 of 2011). The issue of the distribution of that estate will return to the Committee to be resolved. Mrs Giouba will have her chance to argue her interpretation of the phrase, although she would not have a right of appeal from the determination if she does not agree with it. It does not follow from my decision that the Committee must reach the same conclusion as it did before, because findings of fact are matters for the Committee to decide. Likewise, the meaning to be given to the phrase "nearest relatives in the same tribe" involves customary law interpretation, not just judicial interpretation. No doubt my judgment will be considered by the Committee and may be of assistance. 9

Orders:

35. As to the applications for judicial review concerning personalty determinations (Civil Case No 12 of 2011):

(a) The application for certiorari is granted. The determinations of the Nauru Lands Committee published on 16 February 2011, being GNN 120 of 2011 relating to the personal estate of Rose Maria Limen, and GNN 121 of 2011, being the personal estate of Michael Limen, are quashed.

(b) The issue of the distribution of the above personal estates is to be reconsidered by the Nauru Lands Committee, to be decided according to the Administration Order No 3 of 1938.

36. As to the applications for judicial review concerning realty determinations (Civil Case No 2 of 2011):

(a) The applications for certiorari and for a declaration are dismissed.

I will hear the parties as to the terms of the orders and such other orders as may be required.

The Hon Geoffrey M Eames AM QC
Chief Justice
29 November 2011

[9] The interpretation I have given to the phrase is consistent with the conclusion reached by Thompson, C.J. in *The Children of Eirenemi Samson (deceased) v Eirowida Aubiat* [1969-1982] Nauru Law Reports (Part B) 115 at 120, and by Dillon J in *Eididu Akubbor v Nauru Lands Committee and Rosalinda Jones*, Land Appeal No 5 of 1991, Unreported Judgment 16 December 1997. The issue of half-siblings was not, however, directly in issue in either case.