IN THE SUPREME COURT OF NAURU

[LAND APPEAL] Case No 7 OF 2014

BETWEEN **SYLVANUS KAM & OTHERS** **APPELLANTS**

And **NAURU LANDS COMMITTEE** **FIRST RESPONDENT**

And **ESTATE OF EINGARA OLSSON** **SECOND RESPONDENT**

Before: Madraiwiwi CJ, Hamilton-White J and Khan J

For the Appellants: V Clodumar
For the First Respondent: GE Leung
For the Second Respondent: N Ekwona

Date of Hearing: 4 December 2014

Date of Ruling: 11 December 2014

CATCHWORDS:

Motion to remove party – Civil Procedure Rules Order 12 Rule 7 – Application of Practice Note 1/2002 – Nauru Lands Committee – Current practice motion dismissed

RULING

1. This is an application by Motion dated 2 December 2014 pursuant to Order 12 rule 7 (2) (a) of the Civil Procedure Rules seeking the removal of the Nauru Lands Committee as a party in these proceedings. This decision will also set a precedent for all other cases which are the subject of appeals from the Nauru Lands Committee.

2. The First Defendant relies on the affidavit of Joseph Daurewa sworn on 24 November 2014 in which reference is made to Practice Note No. 1 of 2002 dated 1 August 2002 in which Connell CJ expressly stated that the Nauru Lands Committee was not to be named as a party in land appeals (see paragraph 13).

3. Reliance is also placed on *Benjamin v Republic* of Nauru[1] in which this Court held that the English Judges' Rules should be observed in Nauru. Accordingly, procedural rules of the Supreme Court of Nauru such as the said Practice Note should likewise be observed.

4. In submissions before us Counsel for the First Defendant emphasised that there was nothing to suggest that the Practice Note had been revoked, varied or amended. They were practice or procedural guidelines that were meant to be followed. The equivalent of Practice Directions in Western Australia, for example, was the Red Book. They were supposed to be obeyed and practitioners could not circumvent them. It was open to the Chief Justice to revoke the one in contention, but Connell CJ must have had good reason for issuing it. They were analogous to the Rules of the Supreme Court. There was no reason why directions could not be issued or application made for the Nauru Lands Committee to be made amicus curiae in these cases. None of the First Defendant's arguments derogated from the concession that if it had arrived at a legally defective conclusion, the Court could order a rehearing.

5. Learned Counsel for the Second Defendant supported the application. The Practice Note was issued by Connell CJ on the basis of his long tenure in Nauru where he served for over thirty years. He was well-attuned to the situation here. Originally appeals were filed with the clerk to the Administrator to be dealt by the latter sitting in a civil capacity. After promulgation of the Nauru Lands Committee Act 1956 (the "Act"), Nauruans assumed responsibility for dealing with land and customary matters. The 1956 legislation was also introduced to allow the Administrator to validate decisions. The motion would ensure good administration in keeping the First Defendant separate from the Department of Justice. It should carry out its duties in a transparent manner. It was also time-consuming for the Justice Department to appear for the First Defendant. This situation worsened from 2007 when it decided to assist in a manner that traversed the independence of the First Defendant. The fundamental issue was its independence which has been breached. It is a Court of record and must be able to produce it and give reasons. The First Defendant should be able to represent itself and give reasons. The tendency for the Justice Department to appear for the First Respondent was undesirable.

6. Counsel for the Plaintiffs disclosed to the Court the number of land appeals that had been dealt with since 1969. Between 1969 and 1980 there were four (4) cases, twenty-one (21) appeals between 1980 and 2010 and between 2011 and 2014 there were eleven (!!) cases

[1] *[1975 NRSC1; Nauru Criminal Cases 44 [1 November 1975]*

alone in 2011. The First Defendant is a statutory body. Since Connell CJ's tenure and Eames CJ's term, there appears to have been a shift in opinion. Counsel for the Plaintiffs submitted that Connell CJ held the view that the First Defendant was an inferior Court. Under the Ordinance it had authority to determine rights to land between Nauruans and between Nauruans and Pacific Islanders. Under section 7 appeals lay to the Central Court. The First Respondent made decisions over land and rights thereto according to Nauruan custom and usages as per section 3 of the Nauru Lands Act 1976, the Adoption of Children's Ordinance 1965, the Custom and Laws Act and the Administration Order No 3 of 1938. It was the First Respondent's role to determine intestate estates for intestate Nauruans. Beneficiaries of estates were better informed when decisions are challenged. The First Defendant had to defend its decision and therefore could not be neutral. In Marissa Cooke v NLC[2] Eames CJ held that appeals under section 7 were not confined to a determination stricto sensu but were treated as hearings or as rehearings de novo. There was an inconsistency between the Act and the Practice Note in that the rules of evidence did not apply and the First Respondent did not have to give reasons whereas the Practice Note required reasons.

7. A cursory glance at the decided cases recorded on Nauru's Online Legal Database reveals that eight cases involving the First Respondent were decided in 2013, four in 2012 and at least eleven in 2011 despite the existence of the Practice Note and the decision in *Benjamin's* case supra.

8. One of those decisions was *Marissa Cooke & Ors v Aburu Fritz & Ors* and NLC which was cited earlier.

9. In a very comprehensive judgment Eames CJ considered the competing clams to the subject land by the parties and the nature of appeal under section 7 of the Act.

10. While the facts of the case are not relevant for present purposes, the involvement of the First Defendant, passing reference to the Practice Note and the consideration by the learned Judge of the nature of appeals under section 7 of the Act are relevant.

11. His Honour refers specifically to the Practice Note at paragraphs 130 to 133 of the judgment but makes no mention of or comment on paragraph 13 which counsel for the First Defendant prays in aid in this application supported by the Second Defendants.

12. We can only respectfully conclude that the learned Judge simply chose to disregard those provisions without comment because he did not take exception to the First Respondent's presence as a party to those proceedings. This conclusion is reinforced, in the Court's respectful opinion, with reference to how Eames CJ contrasted the nature of appeals as conceived under the Practice Note and section 7 of the Act respectively.

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[2] *[2013] NRSC 2*

13. At paragraph 132 Eames CJ stated as follows:

> *"132.The tenor of the Practice Note is that the appeal involves identification of error on the part of the Committee."*

14. His Honour then continued at paragraphs 133 and 134:

> "133. *Over the decades, the Supreme Court has interpreted its powers of appeal in the broadest possible way, an approach consistent with the language of s.7 (2) appeal decisions have sometimes been made by judges of the Court on the basis of findings of error of fact or law, or failure to apply proper procedure, on the part of the Nauru Lands Committee. In some cases, where an appeal succeeded, the decision would be quashed and the Committee asked to reconsider the matter. The Court, however, often substituted its own decision, having regard not just to the evidence considered by the Committee but also fresh evidence. Thus the Supreme Court has not confined the appeals to a determination strict sensu; indeed, the appeals have generally been treated as re-hearings or as re-hearings de novo.*"
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> *The circumstances that the legislation grants an appeal as of right, and that it is an appeal from an administrative tribunal to the Supreme Court, with no further appeal provided for, are all factors militating against adopting a restrictive interpretation of the legislation granting the right of appeal."*

15. The learned Judge implicitly differed with the approach taken by Connell CJ in the Practice Note in finding that appeals were broader then what was suggested therein i.e. only errors of law, which in turn begs the question as to what Eames CJ actually considered the efficacy of the Practice Note to be.

16. Taken together with the other reported cases in the last few years in which the First Defendant featured, it appears to us the Practice Note has been honoured more in the breach rather than the spirit and the letter thereof. It therefore makes little sense to now insist the First Defendant be removed as a party in this and similar proceedings when the practice for a number of years has been otherwise. We therefore accept counsel for the Plaintiffs' contention that there has been a change in approach by this Court as regards the involvement of the Nauru Lands Committee in legal proceedings.

17. Counsel for the First Defendant suggested that the First Respondent could always appear amicus upon direction by the Court. That is a perfectly reasonable option, but what needs to be considered in the context of Nauru is what is a practical and workable response that takes account of the dearth of legal and other resources. The relative size of Nauru in no way diminishes the intensity, importance and volume of disputation over land, together with the corresponding need to facilitate their expeditious resolution in a systematic and orderly manner. In such circumstances, the focus ought to be, in our respectful opinion, on solutions rather than technicalities.

18. Notwithstanding the procedural distinction between an appeal and judicial review, the involvement of the First Defendant in land appeals (and legal representation by the

Secretary for Justice and Border Control) seems to us to be an exercise in pragmatism. It ensures not only that relevant matters are before the Court, but that there is some mechanism for allowing the issues to be properly considered by it. This appears to have been the tacit rationale for this Court condoning the inclusion of the First Defendant in legal proceedings over the years, contrary to the Practice Note.

19. The argument put by counsel for the Second Defendants that the Nauru Lands Committee should be independent and be legally represented independently is incontrovertible. However, until the First Defendant has the means to do so, the present arrangement imperfect as it is must suffice. In any case, the Department of Justice as the legal adviser to the Government of Nauru is well-placed to initiate reform in this regard.

20. The reality is that in a significant number of situations, disaffected parties are likely to move the Court without proper or appropriate legal representation thereby complicating matters for all concerned. The involvement of the First Defendant and representation by the Secretary for Justice (or its own legal representative), is in our respectful opinion, the most convenient and efficacious means of ensuring some legal expertise is available to assist the Court in making a determination in land appeals.

21. For those reasons, the motion is dismissed and the Practice Note withdrawn, pending the issue of new guidelines shortly. Costs are in the cause.

DATED this 11th day of December 2014.

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Joni Madraiwiwi
CHIEF JUSTICE

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Jane Elizabeth Hamilton-White
JUDGE

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Mohammed Shafiullah Khan
JUDGE