IN THE SUPREME COURT OF NAURU

AT YAREN
[CIVIL JURISDICTION] Civil Case No. 55 of 2014

Between

MANUELLA APPIN, MILO RENZO, EBENI TOM, NORA AKUBOR, CHRIS QUADINA, OTTO WHIPPY, KATHLEEN MOSES, SIMON MOSES, PAULINE GRUNDLER, VENBESSA DABUAE, JOSEPHINE DAME, BETTINA DEIRERAGEA, EMONIBA ADEANG, MARGARETTE DAGGIO, GLORIA HARRIS, CHRIS KAMORIKI, LILLIAN KAPUA AND ELIZABETH GOBURE — Plaintiffs

and

NAURU PHOSPHATE ROYALTIES TRUST — 1st Defendant

and

SECRETARY FOR JUSTICE — 2nd Defendant

Before:	Khan J
Date of Hearing:	30July & 3 August 2016
Date of Ruling:	19 August 2016
Case may be cited as:	Appin v NRPT and Others

CATCHWORDS:
Claim against Republic – whether section 3 of Republic Proceedings (Amendment) Act 2010 infringed- when consent of Cabinet not obtained - Plaintiffs seek rights under Constitution- whether proceedings required consent from Cabinet - whether proceedings seek to "enforce a claim" - Court Procedure- Declaratory relief - proceedings by writ- whether judicial review only remedy - whether claim an abuse of process court – when it related to public law matter

Constitutional challenge - challenge of validity of Ronwan Consolidation Act 2014 - to be ultra-vires the Constitution - whether action should have commenced by judicial review- under Order 38 which is equivalent to Order 53.

Held – no cause of action against first defendant- claim against the second defendant struck out as an abuse of process of court- action should have been instituted by judicial review rather than writ.

APPEARANCES:

For the Plaintiffs:	V. Clodumar (Pleader)
For the First Defendant:	D. Aingimea (Pleader)
For the Second Defendant:	J. Udit (Solicitor- General)

RULING

1. There are 2 applications for dismissal and strike out of the plaintiffs' action. Before I deal with these applications in more detail I shall give the background to this matter.

BACKGROUND

2. Under the *Nauru Phosphate Royalties Act* 1968 the plaintiffs were entitled to a life time interest pursuant to the provisions of section19 (6)(b) which provides that:

> "A person who is entitled to a lifetime interest only in any land as aforesaid is, while living, a beneficiary of the Fund in respect of Ronwan Interest, to the exclusion of the person who has the beneficial interest in the land.
> (9) For the purpose of any written law and any custom of the Nauruan people, the interest of a beneficiary in the Fund is a real property and of a beneficiary in the Ronwan Interest of the Fund is a personal property."

2. The plaintiffs' and other peoples' rights as life time owners (LTO) was extinguished by *Ronwan Distribution Act* 2013 (2013 Act).

3. The plaintiffs filed actions Nos 21 and 22 of 2014 challenging the validity of the 2013 Act, claiming amongst other things that, it was enacted in breach of Articles 62 and 84 of the Constitution.

4. On 1 October 2014 the Full Court of the Supreme Court of Nauru held that the 2013 Act was enacted in breach of Articles 62 and 84 of the Constitution was ultra-vires the Constitution and therefore void.

6. On 28 October 2014 the Parliament passed *Ronwan Consolidation Act* 2014 (2014 Act).

7. As a result of the enactment of the 2014 Act the plaintiffs filed this action on 31 October 2014 and made an application for ex parte interim injunction against the First Defendant to restrain it from releasing personality funds, capital or interest.

8. The application for the injunction was heard on 7 July 2014 inter parte by me and it was refused, as the representative of the Second Defendant gave me a repealed copy of the Republic Proceedings Act 1972 (RPA 1972). I relied on that and held that the first defendant Nauru Phosphate Royalties Trust (NPRT) was an instrumentality of the Republic of Nauru and the application for interim injunction was refused on that basis. At the hearing of this matter all counsels agreed that I was mislead by the representative of the Second Defendant and I should not rely on my previous ruling and that the issue of res judicata does not apply.

The Plaintiffs' Claim

9. The Plaintiffs' action was filed by way of a civil claim and it was subject to numerous amendments. An amended statement of claim was filed on 18 May 2016 in which they claimed as follows:

- The Plaintiffs are lifetime owners only (LTO beneficiaries);
- the First Defendant is a Body Corporate and is not subject to the direction of the Cabinet or a Minister;
- The Second Defendant is sued in the representative capacity or on behalf of the Republic of Nauru.
- Paragraphs 4, 5, 6, 7, 8 and 9 of the claim states that the plaintiff is seeking orders for injunction against the First Defendant, and declaratory orders against Second Defendant that the 2014 Act was certified by the Speaker in breach of Article 84(5) of the Constitution.
- In the alternative, it is claimed that the 2014 Act is ultra-vires the Constitution.
- It is also claimed that sections 31, 36 and 45 is inconsistent with the provisions of Article 62 of the Constitution and should be set aside.
- It is alleged that sections 17, 22 and 29 is contrary to the provisions of Article 8(1) of the Constitution.

In the prayers the plaintiffs seek the following relief or remedies:-

(a) A declaration that the Act has never come into effect as having been certified in breach of Article 84 and is void *ab initio*; or in the alternative

(b) A declaration that the provisions of sections 2, 10, 17, 20, 22, 23, 23(A), 29, 31, 36 and 45 of the Act are inconsistent with the Constitution and are void.

In addition to a declarations under 1 or 2 above:

(c) A declaration that the right to Ronwan Interest of the plaintiffs and other persons have a life time only interest in phosphate land and the capital of the Ronwan Fund

representing that land, is a property right protected by Article 8 of the Constitution; and

(d) A permanent injunction directed to the first defendants its servants and agent forbidding the distribution directly or indirectly of any monies from Ronwan Fund except in accordance with, and in protection of, the property rights of the plaintiff and in accordance with law; and if the Court deems fit

(e) A permanent injunction preventing the winding up of Nauru Phosphate Royalties Trust unless and until its legal and constitutional obligations are undertaken by another responsible body.

10. It can be seen from the outline of the plaintiffs' claim that it is full of Constitutional challenges; it being suggested that the 2014 Act was certified by the Speaker in breach of Article 84(5) of the Constitution and it is ultra-vires the Constitution and that various sections are inconsistent with the provisions of Article 62.

First Defendant's Application for Dismissal of Plaintiffs Claim

11. The First Defendant filed a Notice of Motion under Order 7 Rule 2 of *the Civil Procedures Rules* 1972 (CPR 1972). In the motion it seeks orders for dismissal of the plaintiffs' action and that the plaintiffs be granted leave to issue proceedings under Order 38 of the CPR 1972, or alternatively that the action be stayed until the plaintiffs obtain leave of the Cabinet to continue with the proceedings under *the Republic Proceedings Act* 1972 (RPA 1972).

12. Mr Angimea submitted that the first defendant is set up by statute. He relied on the Government Gazette Notice No 136/2016 under which a Minister is appointed as the Minister for Nauru Phosphate Royalties Trust (NPRT) and that NPRT is an instrumentality of the Government. He further submitted that the whole proceedings are a constitutional challenge and should have been filed under Order 38 of CPR 1972 and the proceedings are wrongly instituted.

13. Mr Clodumar in response submitted that the plaintiffs are entitled to as a right to institute the proceedings as they have done so pursuant to their rights under the Constitution. He further submitted that Section 3 of the RPA 1972 is ultra-vires the Constitution.

The Second Defendant's summons to strike out the claim

14. The Second Defendant's application was filed pursuant to Order 15 Rule 19 of the CPR 1972, Section 3 of the RPA (Amendment) Act 2010 (RPA 2010) and the inherent jurisdiction of the Court.

15. Mr Udit submitted that the leave of the Cabinet was not obtained prior to the commencement of the action as required by Section 3 of the RPA 2010, no reasonable cause of action has been disclosed as the action is commenced as a private

law suit when the issue is a matter of public law and the plaintiffs' action is an abuse of process of the Court.

16. It is not in dispute that any person challenging that an Act of Parliament is enacted in breach of the Constitution does need leave of the Cabinet to file the proceedings provided, firstly, that the person has sufficient interest or standing(*locus standi*) to institute the claim, and, secondly, the action is properly instituted.

17. I have summarised the plaintiff's claim in paragraph 9 above and I have said earlier the plaintiff's claim alleges that the 2014 Act was enacted and certified by the Speaker in breach of the Constitution. The entire body of the claim does not state that the plaintiffs are seeking declaratory orders pursuant to Article 8 of the Constitution as LTO they have a property right. That is only stated in paragraph (c) of the prayer where it is stated as follows:

> "A declaration that the right to Ronwan Interest of the plaintiffs and other persons have lifetime only interests in Phosphate and in the capital of the Ronwan Fund representing that land, is a property right protected by Article 8 of the Constitution."

18. In civil proceedings obviously a prayer follows a claim, and evidence can only be adduced if the claim is properly pleaded. Paragraphs 10, 12 and 13 of the Statement of Claim state that the plaintiffs have been deprived of their rights under Article 8 of the Constitution. LTO right is not an entrenched right under Article 8 of the Constitution and that is why the plaintiff's right as LTO is not a property right protected by that Article of the Constitution. That declaration for property right under Article 8 would only appear to be the only claim against the Second Defendant and the question is whether it is caught by the provisions of Section 3(1) of RPA 2010. This issue was considered by Eames CJ in the matter of *Eidagauwe Clodumar and others –v- Secretary for Justice*[1] where it was stated as follows:

> *"5. Mr Ekwona submitted, in written submissions that the proceedings were not contrary to the Act.*
>
> *6.In the course of discussion, Mr Bliim fairly considered that subsection 3(2), in its reference to "enforce a claim against the Republic", was not infringed in this case. He accepted that the relief sought in these proceedings is only by way of declaration of the rights of the plaintiff under Article 8 of the Constitution. Accordingly, these proceedings do not seek to enforce a claim against the Republic, but merely to obtain a declaration of rights.*

[1] (2103) [NRSC16]

7. In the event that the plaintiffs were successful, they would not be able to enforce the declaration and would need to obtain a Court Order for some other remedy by way of an injunction or the relief against the Republic before they would be able to enforce the legal ruling made in that declaration.

8 .Mr Bliim conceded that subsection 3(2) did not, therefore, prohibit the claim, for the reasons just explained, and accordingly I dismiss the application for Notice of Motion bought on behalf the Defendant."

19. It can now be quite clearly seen that the plaintiff's claim was only against the Second Defendant and the plaintiff had no claim against the First Defendant. The First Defendant was only carrying out its duties under the provisions of the 2014 Act, which it was required and obliged to do under the law. So I find that the plaintiff's claim against the First Defendant was filed without any basis and no reasonable cause of action is established and is therefore dismissed.

Claim against the Second Defendant

20. Mr Udit has submitted that the 2014 Act is being challenged and it is a matter of public law and the challenge should have been by way of a judicial review and not a civil claim. In his written submissions he submitted as follows [14], [16], [17], [18], [19] and [20] as follows:-

> [14] "The test for whether an administrative or legislative decision is governed by public or private law was settled in *R –v- Panel on Take-overs and Magers, ex parte Datafin PLC and another* [1987QB185]. Lord Lloyd at page 847
> ***"But in between these extremes there is an area in which it is helpful to look not just at the source of the power but the nature of the power.*** *If the body in question is exercising public law functions, or if the exercises of its functions have public law consequences, then that may as Mr Lever submitted be sufficient to bring the body within the reach of Judicial Review".*
>
> His Lordship further submitted:
>
> *"I do not agree that the source of the power is the sole test whether a body is subject to Judicial Review, nor do I so read Lord Diplock's speech.* ***Of course the source of the power will often, perhaps usually, be decisive. If the source of the power is a statute, or subordinate legislation under statute, then clearly the body in question will be subject to Judicial Review."*** *(emphasis added)*

[16] "The nature and source of the Parliament's power to legislate Ronwan Consolidation Act has its genesis in Constitution. Thus it is submitted that it is a public law and not private law matter.

***Rule in O'Reilly –v- Mackman* (1983) 2AC237**

[17] It is trite law that where a public authority infringes the rights to which a person is entitled to protection under the public law he or she must seek review of such a decision by way of judicial review and not by way of a private action. Where an action must be brought by way of Judicial Review application that is commenced by way of a private suit (originating Summons or writ of summons), its consequences are:

The action discloses no reasonable cause of action
The action is an abuse of process of Court.

[18] The leading authority on point is ***O'Reilly –v- Mackman* (1983) 2AC237**. A prisoner was charged with disciplinary offences while in prison. A claim was brought in private law asserting a public law right. An issue arose as to whether the prisoner could have brought a private suit to enforce the breach of his public law right. The House of Lords unanimously held that **'any proceedings to enforce a public duty should not be by way of an ordinary action'**. Lord Diplock said:

*".. it would in my view **as a general rule be contrary to public policy, and as such an abuse of process of court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means** to evade the provisions of Order 53 for the protection of such authorities."*

His Lordship stressed:

*The purpose of the requirement was to protect the public administration against false, frivolous or tardy challenges to official action: **'The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority** has reached in the permitted exercise of decision making powers*

for any longer period than is absolutely necessary in fairness to the person affected by the decision".

[19] In order to ensure compliance of Order 53 procedure in England, it was adopted by the House of Lords that unless the actions which ought to begin by way of judicial review were not struck-out summarily as an abuse of process of a court, Order 53 procedure would be thwarted and so will be the requirement of good administration. Lord Diplock stated as follows:

"Unless such an action can be struck out summarily at the outset as an abuse of process of court, the whole purpose of the public policy to which the change in Order 53 was directed would be defeated."

[20] Lord Diplock with 4 other members of the House of Lords agreed with in *O'Reilly –v- Mackman* made the following points:-

(a) Order 53 provides a procedure whereby every type of remedy for the infringement of the rights of an individual that are entitled to protection in public law can be obtained.

(b) Built into those procedures are protections against groundless, unmeritorious or tardy harassment of public bodies. The requirements of leave and leave denied in case of dilatoriness.

(c) Such protections are necessary to satisfy the public policy which requires a speedy certainty in the resolution of such disputes both in the interests both of good administration and protection of rights of third parties indirectly affected by the challenge public law decision.

(d) So where an action is commenced by way of a writ or originating summons, or when the challenge such have been mounted under Order 53, unless such an action can be struck out summarily as an abuse of process of a Court, then the whole purpose of public policy towards Order 53 is directed would be defeated."

21. Our equivalent to Order 53 is Order 38 of the CPR 1972. The plaintiffs should have filed an action for judicial review under Order 38, and if leave was granted (and I see

no reason why it would not have been granted, as the plaintiff had a fairly strong and compelling case), the Registrar or a Judge also had powers to make an order for stay. In that event the implementation of the 2014 Act would have been stayed as well; thus obviating the need for the plaintiffs to file an application for interim injunction, as was done in this matter. Whilst the implementation of the Act was stayed the plaintiffs would have had ample time to establish their rights under Article 8 of the Constitution.

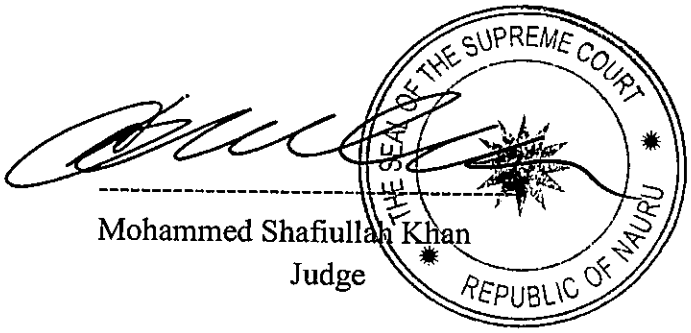
CONCLUSION

22. The plaintiffs' claim in relation to the Constitutional challenge was a public law matter and it should have been commenced by way of judicial review under Order 38 of CPR 1972. It was wrongly instituted by way of a writ and that portion of the claim is struck as an abuse of process of court. The only portion of the claim that survives is the declaratory claim under Article 8 of the Constitution that the plaintiffs are LTO. However that claim is not properly pleaded, and it would be very difficult to separate it, so the entire claim is struck out.

23. The plaintiffs are at liberty to file a fresh claim seeking declaratory orders under Article 8 to establish their rights as LTO if they so wish.

23. I believe the issue of public law and private law was raised for the first in this jurisdiction and I therefore reserve the question of costs. I will hear further submissions on costs.

Dated this 19th day of August 2016



Mohammed Shafiullah Khan
Judge