IN THE SUPREME COURT OF NAURU

CIVIL SUIT No.36 /2012

BETWEEN

ROSANI AMWANO (NEE ALIKLIK) & ORS. } **APPELLANTS**

AND

VERNIER ADDI & DONEKE KEPAE & ORS. } **1ST RESPONDENT**

AND

NAURU LANDS COMMITTEE } **2ND RESPONDENT**

Before: Khan, J
Date of Hearing: 15 December 2015
Date of Ruling: 19 January 2016

CATCHWORDS:

Estoppel- Doctrine of Res Judicata- appeal grounds raised same issues that were raised in previous appeal- which made determination against the appellant- whether the appellant can raise grounds.

APPEARANCES:

For the Appellant: G Hartman
For the 1st Respondent: V Clodumar (Pleader)
For the 2nd Respondent: J Udit

RULING

Background

1. On 9 September 2009 the 2nd Respondent (NLC) published its determination in Gazette Notice No. 358/2009 in G.N 93 (G.N 93) is respect of land Adungeouw portion 130 in Ijuw District as formerly owned by Eimakomoi Aliklik (deceased) and present owners being Sonny Aliklik, Rosanny Aliklik, Romanny Aliklik, Roxanny Aliklik and Mary Aliklik. Sonny Aliklik is the son of Eimakomoi Aliklik and Rosanny Aliklik, Romanny Aliklik, Roxanny Aliklik and Mary Aliklik are his daughters.

2. On 9 October 2009 Vernia Addi, Doneke Kepae and others (the respondents in this matter) filed an appeal on their behalf and on behalf on their other siblings against the determination in G.N. 93 in which Sonny Aliklik was the respondent.

3. On 11 February 2011 Mr. Peter Law, the Registrar of this Court recorded an order in following terms:

   "Decision of NLC 9.9.2009 re GN No. 398/2009 quashed NLC directed make fresh determination."

   Mr. David Aingimea appeared for appellant and Mr. Lambourne appeared for the Nauru Lands Committee, the 2nd respondent and it appears that there was no appearance of the respondent Sonny Aliklik.

4. On 10 May 2012, Mr. Victor Soriano appeared for the appellant and Ms Li Piccolo appeared for the respondent Sonny Aliklik. The Registrar's note reads:

   "Parties advise- Sup CRT order made in July 2012 (which should read 2011) referring the matter to NLC for fresh determination."

5. On 1 August 2012 NLC made a fresh determination by Gazette Notice Number 403/2012(G.N .403/2012) in relation to portion 130 Adungeow, Ijuw. Its finding was that the original owners were Eidamwarrio(1/2 share) and Eipogio (1/2 share) and the present owners were Eimankomwi Aliklik (1/2 share), Addi Adip(1/8 share), Eideranago Kun (1/8 share), Joseph Eona (1/8 share), Eibogoneida Hubert (1/8 share) and the proposed owners were in respect of Eimankomwi Aliklik were Rosannie Aliklik, Romannie Aliklik and Kenye Aliklik and in respect of Addi Adip the proposed owners were Louise Aingimea, Lupino Addi, Vernier Addi, Donovan Addi and others.
The Gazette Notice stated that those who disagreed with the above determination may appeal within 21 days.

Appeals

6. The appellants filed an appeal on 21 August 2012, in which they claimed that NLC erred in its decision to include Eipogo as the other half owner and that the appellants had full right as to the ownership of the estate of Eidamwarrio in respect of Adungeow portion 130, Ijuw.

7. The appellants filed another set of grounds of appeal on 28 October 2014 in which they claimed that the appeal in respect of G.N.93 was filed out of time, in that the determination was published on 9 September 2009 and the appeal was lodged on 8 October 2009, which was outside of the 21 days appeal period as provided for in the Nauru Lands Committee Ordinance 1956(Ordinance). The appellants submitted that G.N 403/2012 should be quashed G.N.93 should be reinstated.

8. On 23 April 2015 an order was made for the appellants to file amended grounds of appeal to include the NLC as the second respondent. On 28 April 2015 the appellants filed amended grounds of appeal and added the NLC as the second respondent. The appellants in their grounds of appeal again stated that the NLC made an error in giving one half of land to the first respondent and that the G.N.403/12 should be quashed and G.N.93 to be reinstated.

9. The appellants filed another set of grounds of appeal on 14 August 2015, in which at[13] it was again stated that the NLC made an error in giving

half of appellant's grandmother's land to the first respondent and at [17]the appellants seek a final declaration as to the rightful owner of the land.

Answer to the grounds of appeal

10. The first respondent filed a reply to the appellants' grounds of appeal. Instead of filing the reply the first respondent should have filed an answer. In **Kam v Nauru Lands Committee [2015] NRSC 3** I issued a direction at [15e] that upon receipt of the grounds of appeal the respondent should file an answer. So the respondent should have filed an answer instead of filing a reply.

11. The first respondent filed an amended reply to the grounds of appeal. The respondent should have filed an answer as stated in [10] above. The respondent also made a counter-claim in which he pleaded that G.N 403/2012 should be quashed and that the NLC should redistribute the ownership of portion 130, Adungeouw, Ijuw to the 1st respondent. If the respondent felt that the NLC had made an error in its determination of G.N 403/2012 then he should have file an appeal within 21 days or perhaps a cross appeal in response to the appeal by the appellants provided it was filed 21 days.

Issue of res judicata/issue estoppel

12. The first respondent in its response/answer has raised the issue of res judicata, in that the issue which is being raised in this appeal was already determined in the appeal in case number 7 of 2009. The issue of res judicata has been raised as a preliminary issue and the 2nd respondent supports that submission. If that issue is resolved in the favour of the 1st respondent then effectively it is the end of the matter.

13. Before I decide on the issue of res judicata and issue estoppel I have to address two issues which the appellants have stated in their grounds of appeal which are:

(a)-The first issue is that the appeal was lodged out of time as prescribed by Section 7 (1) of the Ordinance and it should not have been entertained. Although the appellants have raised that in the grounds of appeal filed on 14 August 2015 in the submissions filed earlier on 3 August 2015 they seemed to be quite content with the Supreme Court's decision, except that they raised the issue that the Supreme Court did not consider the issues on appeal by way of hearing, but only made an order that G.N 389/2009 should be quashed and ordered the Lands Committee to make a fresh determination. The appellants further submit that the Supreme Court did not deliver a judgment which binds the parties and that there was only an order made by the Registrar. Although the appellants are not challenging the Supreme Court's decision of 2009, however, it is implicit in their submissions that the Registrar made the orders and he did not have powers to do so. The file in respect of appeal No. 7 of 2009 has not been located and Mr Clodumar filed an affidavit of the former the Registrar Mr. Peter Law on 6 August 2015 wherein it is apparent at [10] that a full hearing was not conducted by Eames CJ who was seized of the matter. He only made an order quashing the determination and that a fresh determination was to be made. In so far as I am concerned there was an appeal against the determination of G.N 398/2009, and an order was made quashing the determination of the NLC, and a fresh determination was made in G.N 403/2012 in which the appellants participated. Further this appeal is not the forum for the appellants to be raising this issue, if the appellants felt that the decision was wrong then they should have appealed against it or have it set aside.

(b)-The second issue that the appellants have raised is that G.N 403/2012 itself provides as follows:

> *"Those who disagree with the land determination may appeal to the Supreme Court Registry within 21 days of the publication of this Government Gazette."*

The above is the statutory right provided to any aggrieved parties including the appellants under the Ordinance to lodge an appeal and the appellants have exercised those rights to lodge this appeal and are therefore entitled to be heard.

14. Of course those are the statutory rights of any aggrieved parties but in my view the appellants position is different as they would be bound by the principles of res judicata as provided for in the Civil Procedure Act 1972(CPA).

15. So whilst on the one hand the appellants are vested with the statutory right to lodge an appeal pursuant to Section 7 of the Ordinance, on the other hand they are also bound by the provisions of Section 4 of the CPA which reads as follows:

> *"**RES JUDICATA***
>
> ***4.** (1) No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try that subsequent suit or the suit in which that issue has been subsequently raised, and has been heard and finally decided by such Court:*
>
> *Provided that the matter in issue must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*
>
> *(2) In this section the expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.*
>
> *(3) For the purposes of this section, the competence of a Court shall be determined irrespective of any provision as to right of appeal from the decision of that Court.*
>
> *(4) Any matter which could properly have been made a ground of support for, or of defence against, any claim, counter-claim or set-off pleaded in any former suit shall for the purposes of this section be deemed to have been a matter directly and substantially in issue in that suit.*
>
> *(5) Any relief which has been claimed in a suit and is not expressly granted by the decree, shall for the purposes of this section, be deemed to have been refused.*

(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons, interested in that right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

BAR TO FURTHER SUIT

5. *Where a plaintiff is precluded by rules of court from instituting a further suit in respect of any particular cause of action, he shall be barred from instituting a suit in respect of that cause of action.*

PREVENTION OF VEXATIOUS SUITS

6. *(1) Where any person has frequently and without any reasonable ground commenced suits in any Court, a judge may, upon the application of the Secretary for Justice or the Registrar, order that no suit shall, during such period as may be specified in the order, be commenced by that person without the leave of a judge.*

(2) No order shall be made under this section unless the person to whom the order relates has been given an opportunity to be heard in the matter."

17. Section 4 of CPA states that no Court should try any suit or issue which has been subject to a former suit between the same parties. In **Rogers v The Queen [1994] 68 ALJR 688** it was stated McHugh J as follows:

"The policy of the law is to prevent ultimate issues of fact of any law in dispute between parties from being adjudicated in judicial proceedings more than once. A final determination on an ultimate issue of fact or law, once given by a judicial tribunal acting within its jurisdiction, forever binds the parties or those claiming through them. As a result of this policy, neither the parties nor those claiming through them can dispute the correctness of the determination in subsequent litigation. The remedy for the incorrect determination of an ultimate issue is to set it aside; it cannot be attacked collaterally in other judicial proceedings. However, a judicial determination is only binding in respect of maters that were fundamental to the determination. Those matters include every matter that was essential to the decision even if that matter was not itself contested in the litigation."

In the above case Deane and Gaudron JJ at pp698 stated:

> *"The first expresses the need, based on public policy, for judicial determinations to be final and binding and conclusive. The second looks to the position of the individual and reflects the injustice that would occur if he or she were required to litigate afresh matters which have already been determined by the Courts."*

18. What the appellants are seeking is to restore themselves to the position as provided for in G.N.93 which made a determination that they were the sole original owners to the exclusion of the first respondent who were given ½ rights in the said land. That issue was determined by the Court in appeal No. 7/2009 and the appellants are bound by the principle of and res judicata and issue estoppel from raising that issue again and therefore the appeal is dismissed.

19. I order the appellants to pay the 1st respondent cost which I summarily assess in the sum of $1000. I do not make any orders for cost in favour of the 2nd respondent.

Dated this day of 19 January 2016

Mohammed Shafiullah Khan
Judge