



IN THE SUPREME COURT OF NAURU

CIVIL JURISDICTION
AT YAREN

CIVIL SUIT NO. 53/2013

BETWEEN

Emily Robertson

APPLICANT

AND

Beneficiaries of the Estate of Juda (Maren,
Portion 202 of Meneng District)

FIRST RESPONDENT

AND

Nauru Lands Committee

SECOND RESPONDENT

Before: Khan, ACJ
Date of Hearing: 24 and 25 January 2017
Date of Ruling: 17 March 2017

Case may be cited as: Robertson -v- Estate of Juda and Nauru Lands Committee

CATCHWORDS:

Application for leave to appeal out of time - the application was incomplete as it failed to join in all interested parties - applicant claimed that her father was not invited by NLC to attend a family meeting in 1950 - NLC records showed that he attended the meeting- application refused.

APPEARANCES:

Counsel for the Applicant:
Counsel for the First Respondent:
Counsel for the Second Respondent:

J Daurewa
V Clodumar (pleader)
J Udit, Solicitor General

RULING

INTRODUCTION

1. This is an application for leave to file an appeal out of time in respect of a determination made by the Nauru Lands Committee (NLC) in Government Gazette No. 229/1963 published on 18 September 1963 in respect of Portion 202 in Maren (Maren). This land was previously owned by Juda who died in 1930. He was not married and he did not have any children.
2. Juda is the applicant's great uncle (grandfather's younger brother). Her grandfather was Aruwadar.
3. According to G. N.229/1963 Maren was determined to be owned by Eigaiwe. She was the only child of Bwaidi who was the elder brother of Juda.
4. The applicant's father was Agio and her mother Elsie. Her father died on 31 May 1968 aged 51 years.
5. Eigaiwe was married to Heine and they had 5 children namely, Epikoko, Baida, Joy, Eileen, Archie (aka Adrian). Eigaiwe died on 17 November 1979 aged 66 years and she was survived by Joy, Eileen and Archie. Her estate was determined by the Nauru Lands Committee in G. N.172/1980 and it was determined that Joy, Eileen and Archie were his beneficiaries together with the children of Epikoko and Baida. This gazette notice was provided to the court by Mr Clodumar.

This Application

6. This application was filed on 22 November 2013 by the applicant in person by way of a Writ of Summons. The respondent was described as "The Beneficiaries of the 'Estate of Juda', Joy Heine and Others".
7. Joy Heine filed an affidavit on 2 October 2014. It appears that she was not legally represented. In her affidavit, she stated that the plaintiff (applicant) should outline who were the other parties against whom this application or claim was made.
8. On 17 October 2014 Joy Heine wrote to the Registrar enclosing copies of G.N.172/1980 together with G.N.229 of 1963, the death certificates of Eigaiwe and Agio. She expressed concern that there was no appeal in 1963 when determination was made by NLC that her mother was the sole beneficiary of the Estate of Juda and in 1980 when her mother's estate was determined by NLC.
9. The present application was filed by Mr Joseph Daurewa, as counsel for the applicant, on 23 September 2016 in which the first respondent has been described as "Beneficiaries of the Estate of Juda (Maren, Portion 202 of Meneng District).

10. Despite Joy Heine's request on 2 October 2014 to clearly state as to who the application was against the applicant did not specify or name the parties against whom this application was filed and even Joy Heine's name was deleted as one of the respondents.
11. The applicant knew that Eigaiwe and her children had died and her estate was divided amongst her children and her grandchildren (see paragraph 27 of her affidavit) but she did not produce the determination of NLC to show how her estate was divided.
12. In paragraph 31 of the affidavit the applicant stated that one of the beneficiaries sold and transferred one-tenth of the land to Mr Kinza Clodumar. The documents relating to sale transaction was not produced nor was he not made a party to this application. The applicant submits that he was a bona fide purchaser and if this application were to be granted, then his portion will not be affected.
13. Although the applicant was aware that the estate of Eigaiwe had been distributed between her children and her grandchildren she did not bother to produce a copy of NLC's determination. As an applicant, she was clearly obliged to include that material information in her application and it would have assisted her in identifying the parties to this proceeding. G.N. No 172/1980 shows how Estate of Eigaiwe was distributed between her children Joy, Eileen and Adrian and the grandchildren Imo, Azyla and Grace who were the children of Baida and Epikoko respectively.

Status of the application

14. What is the status of this application? The application is only against the beneficiaries of the Estate of Juda and his sole beneficiary was Eigawe who is now deceased and upon death her estate devolved to her surviving children and her grandchildren. The onus was on the applicant to join the Estate of Eigawe and each of her beneficiaries as well as the Estates of Baida and Epikoko and their beneficiaries as respondents but she failed to do so. In Kam -v- Nauru Lands Committee & Others NRSC 3 I stated at paragraph 6 as follows:

"I have this repeatedly that when a claim is made against an estate, then naming of the personal representative or executor would suffice, but when NLC determines the beneficiaries of the estate there is no need to produce Probate or Letters of Administration, and, the need to name all the beneficiaries as determined by the NLC."

So, this was as an incomplete application as all the necessary parties were not joined in and obviously, there was no cause of action against the beneficiaries of the estate of Eigaiwe, and thus, this was an appropriate case for a strike out application under the provisions of order 15 rule 19 of the Civil Procedure Rules 1972.

Proposed Grounds of Appeal

15. The only ground of appeal is that NLC did not invite Agio to attend any family meeting as it was required to do pursuant to the provisions of the Administration Order 1938 in the determination of Juda's Estate in 1963 who died without any issue; that the applicant's father, Agio, was denied the rights of natural justice.

Law on appeal out of time

16. The Nauru Lands Committee Act 1956 (the Act) was amended in October 2012 which now allows courts to grant leave for an appeal to be filed outside of the 21 days' appeal period. Prior to the amendment in 2012, the courts did not have any powers to grant any extension of time. However, parties could challenge the determination of NLC by way judicial review applications. In many cases leave to file judicial review was granted even after long periods of delays and parties successfully were able set aside NLC's determinations where it was established that a party was not invited to attend the family meeting pursuant to Administration Order 1938.
17. The applicant states that her father did not know about the determination by the NLC in G.N.229/1963 until 1966 and no application for judicial review was made and only made this application after the Act was amended in 2012.
18. The applicant's counsel relies on the case of Capelle -v- Nauru Lands Committee¹ where Eames CJ stated:

"...A consideration irrelevant to the exercise of the discretion is that upon the expiry of the time allowed for the appeal, the respondent has a vested right to retain the judgement unless the application is granted. Other relevant factors include the length of delay in commencing the appeal, the reason for the delay, the chances of appeal succeeding if an extension is granted, the degree of prejudice to the respondent if time is extended and the blamelessness of the applicant. Leave to appeal out of time may be given subject to specified terms. The interest of justice and hearing upon the merits are the basal considerations."

In his written submissions, Mr Daurewa omitted to include **"the degree of prejudice to the respondent if any time is extended"**. I believe that it was purely an oversight on his part, but the fact remains that it is an important and relevant matter for consideration by the court.

19. Mr Daurewa also relies on the case of Addi -v- Nauru Lands Committee² a decision of the Full Court of the Supreme Court of Nauru in which leave was granted after a delay of some 41 years and in granting leave following the decision of Capelle the Full Court stated as follows at [16]:

"[16] In this matter the land has not changed ownership, nor is the title in dispute."

Application is opposed

20. The application is being opposed by both respondents and they have filed affidavits in response to the application. The second respondent filed an affidavit of Tyran Capelle, the chairperson of the NLC on 10 November 2016, and annexed a copy of the minutes of a meeting held on 10 August 1950 by the NLC which shows that the applicant's

¹ [2013] NRSC4

² [2014 NRSC2]

father attended that meeting together with Eigawe when NLC made the determination of Maren in favour of Eigawe. The typed Nauruan version of the meeting was translated by Tyan Capelle which reads as follows:

*"TRANSLATION MEETING HELD 10TH AUGUST, 1950
NAURU LANDS COMMITTEE*

9:15AM

*MEMBERS; CHIEF NOBOB, DENEA, THOMA, KAPUA,
TSIMINITA, JEREMIA, AKUBOR AND JOHN
HARRIS*

Agio and Eigaiwe came to the office to claim JUDA'S estate.

AGIO: It is correct that Juda's estate to be divided between us for it is not his property but ALL the families and he's only the caretaker. I too benefitted from Juda's estate when he was alive.

EIGAIWE: As far as I'm aware, everything and anything of Juda to come to me. Juda lived with me and Aruwadar's share from Juda to come to me too. I should be inclusive in Aruwadar's share for I treat him as my father too and also lived with me anywhere I was moved during the Japanese occupation.

When Agio was chosen to be the first transported to Truk, he called them both to go with him but they declined for they wanted to remain with me.

AGIO: When I was to leave for Truk, I only asked my father. I went to their place (Nibok) but my father was not at home for he was out gathering palms and coconuts for me to take on my trip.

Baidi, Juda and some relatives of Ebontoro were the only people in their house.

Juda asked me what I wanted with him and said I want to tell him to come with me. I am in a hurry because the registration of names will close tomorrow. Juda said, why are you taking him? There will be less of here remaining. It's unnecessary for we'll all be on the same

journey but there's only you and man to handle it yourself. I will send him to you when he returns.

Aruwadar came that night at 8.00pm and I repeated my wish as said earlier. He said he won't come with me because Juda have asked him to stay but they will come after.

C/AKUBOR: Eigaiwe, did you and Juda discussed anything about MAREN?

EIGAIWE: We did discuss Maren and Metub. Both of these lands belonged to him. Maren will be mine only. He told me about Metub in Truk that I will share with Aruwadar for he already asked Juda a share.

C/AKUBOR: Agio, did Juda say anything to you about Maren?

AGIO: I already know about Maren, it belongs to Elizabeth, mother of Katarina. She gave this land to Aruwadar in exchange for the land ORRO in Aiwo where Abia built his house. They did exchange in order for Elizabeth to have a place in Aiwo for she's from Aiwo District and to start a family there. When the landowners were called to topside by the surveyors for field day, Aruwadar send Juda to walk the boundary for him for he was busy. When Juda came back he told Aruwadar the outcome of the field day. "I met with Katharina there and we disputed". Aruwadar said, why is she greedy when she's already been given a land? What about us? That is all I know about Maren. I forgot to mention Juda said he got the land from Katharina. As far as I know the land belongs to Aruwadar and he included Juda for his good deeds but I cannot see why Eigaiwe said it's the other way around.

C/TSIMINITA: Do you know if there's any rental paid for this land Maren?

AGIO: I know that it was paid one time 150 recorded in some paper and Juda took it Araduwar

C/TSIMINITA: Who is receiving money from Juda's estate now?

EIGAIWE: I am and at times Heine went to cash the withdrawal signed by Juda at the office.

C/EOAE: Any lands that were solely owned by Juda?

EIGAIWE: Only Maren and Metub but Arudawar is included in Metub.

C/AKUBOR: What about Maren?

AGIO: Correct for us both to have equal share as there are not enough evidence to prove that is should only be me.

EIGAIWE: Since it's Juda's land, then I should be the sole owner. He has no WILL but told me before he got sick that anything of mine and lands to go to you. The reason I stayed with you is because I selected you to be my beneficiary. Other estate were already set, thus the reason my estate is to be yours. Juda said this because my father was not included in their mother's and father's estate. There is nobody alive now who witnessed his words for they are all dead.

AGIO: My evidence to Lands Committee is the field mentioned earlier Juda with Katharina disputing in front of the chiefs and surveyors.

C/AKUBOR: My decision to Maren was this land was originally owned by Juda as per records and gazettal. Juda died without a WILL. Eigaiwe, daughter of Baidi and Agio son of Aruwadar who are brothers of Juda claimed Maren. There were no witnesses to testify for their statements. I've asked them to prove witnesses but neither can so I say for them to have equal share for this reason.

C/TSIMINITA: I say Committee have already determined Maren when the rentals and want to know the beneficiary. Agio of Eigaiwe? It is good if I just decide without knowing the person collecting the rentals and why did the Committee gave him/her the payment. I want the records. Committee found that they already determined Juda's estate in file 186/5/2 to be transferred to Eigaiwe's account.

C/TSIMINITA: Since this is the case that royalties from this land Maren owner Juda was paid to mentioned account then my decision is to remain the same as determined.

DECISION

1. *Akubor: Eigaiwe and Agio to have equal share for Maren*

Eoaeo seconded

For 3

2. *Tsiminita: Eigaiwe all Maren*

Thoma seconded

For 5''

21. When the above minutes was produced the appellant's, response was that she agreed that a meeting took place in 1950 and that it did not make any determination in regards to the ownership of Maren; in the absence of the original minutes it was subject to fabrication or the contents had been fabricated by (Ms Capelle). The applicant produced the minutes of a meeting held by NLC on 22 January 1964 and claimed that it showed the ownership of Maren had not been determined. The minutes reads as follows:

"Heine: I am interested in finding out the property of the late Juda and who is keeping the property now, because some time ago during John Harris's time when he was the chief, a land appeal between Agio and Eigaiwe that time they needed witnesses from people which resulted that Eigaiwe was found to be correct and that it should be herself that should inherit the property of late Juda's (deceased) estate because she was an adopted daughter of Juda. This was done during the chairmanship of late Timothy Detudamo. The people of ages were not understanding like the people of today. To prove my theory, Juda already had in his possession a phosphate land called "Maren" which is now owned by Eigaiwe herself. This is to prove that all of Juda's property should be owned by Eigaiwe. Time was allowed for people to claim against the decision of Eigaiwe inheriting Juda's property but no one went against the decision.

NLC: NLC mentioned that they will have to look for Minutes when Juda estate were determined. They found a Minute of 10th August 1950. In

these Minutes it is mentioned two (2) lands namely "Maren" and "Matub". These Minutes showed the ownership of land Maren, and the other land Matub not yet do

Written Submissions

22. All the counsels have filed very well researched written submissions and in addition thereto they made oral submissions which has been of great assistance to me.

Consideration

23. Mr Daurewa's submits that the NLC's minutes of the 1964 meeting suggests that it did not make any determination on the ownership in relation to both "Maren" and "Matub". Both Mr Clodumar and Mr Udit disagree with that contention as being flawed. When the whole document is read, it becomes abundantly clear that the determination of "Maren" was done by the NLC on 10 August 1950 in favour of Eigaiwe. The relevant portion of the minutes are: Heine said that:

"To prove my theory, Juda already had in his possession a phosphate land called "Maren" which is now owned by Eigaiwe herself.(emphasis added)

Then NLC states:

NLC mentioned that they will have to look for Minutes when Juda estate were determined. They found a Minute of 10th August 1950

*In these Minutes it is mentioned two (2) lands namely "Maren" and "Matub". **These Minutes showed the ownership of land Maren, and the other land Matub not yet done.**"(emphasis added)*


24. Mr Daurewa's interpretation of 1964 minutes is indeed flawed. The 1964 minutes made a very clear reference to the minutes of 10 August 1950 which had made the determination of Maren in favour of Eigawe and this meeting was also attended by the applicant's father. In the circumstances, there was no basis for the applicant and her counsel to make those unfounded allegations of impropriety against Ms Capelle. Counsels should always exercise great caution in making the allegations of impropriety and when they have clear evidence of it then they should do it fearlessly.
25. In light of the content of the minutes of 10 August 1950 there cannot be any doubt as to the ownership of "Maren" as NLC made a determination in favour of Eigaiwe and further this meeting was also attended by Agio, so the proposed grounds of appeal has no chance of success.

26. In the matter of Addi -v- Nauru Land Committee (supra) the full court held that “*land had not changed ownership*” and in this case the land has gone through the process of changes over two generations. The land is now owned by 3 surviving children of Eigawe and her grandchildren and none of them were made parties to this application. Furthermore, part of the land has been sold to Mr Kinza Clodumar so that part has changed ownership for good.

CONCLUSION

27. In the circumstances the application for leave to appeal out of time is refused.

DATED this 17 day of March 2017


Mohammed Shafiullah Khan
Acting Chief Justice

