



IN THE SUPREME COURT OF NAURU
AT YAREN

Civil Case No. 34 of 2017

BETWEEN

Anthony Audoa

Plaintiff

And:

Masako Appi

Defendant

Before: Khan, J
Date of Hearing: 7 and 8 February 2019
Date of Judgement: 22 February 2019

Case may be cited as: *Audoa v Appi*

CATCHWORDS:

Nauru Housing Ordinance 1957- Nauru Housing Scheme- House built by the Nauru Local Government Council- Customary grant -Whether the grantee acquired an equitable interest in the land- Dissolution of Nauru Housing Ordinance 1957 by Nauru Islands Council (Dissolution) Act 1999- Nauru Local Government Dissolution (Amendment) Act 1997- Whether the Nauru Housing Ordinance 1957 survived by virtue of section 28 of Interpretation Act 2011.

APPEARANCES:

Counsel for the Plaintiff: V Clodumar
Counsel for the Defendant: PE Ekwona

JUDGMENT

INTRODUCTION

1. The plaintiff's father Joseph Detsimea Audoa was the tenant of a property (house known as 'Yaren Lodge') which was built on Land Portion 91 land known as Abetoweo (Portion 91). Yaren Lodge was built around 1962-1963 under the housing scheme which was governed by the provisions of Nauru Housing Ordinance 1957 (NHO).

2. After the Yaren Lodge was built the plaintiff's parents took occupation and the plaintiff lived with them in the lodge. The plaintiff's father died intestate in 1984. During the lifetime of the plaintiff's father the building was improved on and other structures were constructed.
3. The plaintiff continued to live in the lodge until 2005 when he left for Australia for medical treatment.
4. The plaintiff has been living in Australia since 2005 to date and due to his medical conditions he requires continuous medical treatment and has been unable to return to Nauru.
5. Yaren Lodge was destroyed in a fire in 2010.
6. By Gazette No. 14 of 7 April 1956 portion 91 was owned by Mwareow and Samson in equal shares. Upon Samson's death his estate including Portion 91 passed on to his daughter May Deireragea (Gazette No. 17 of 29 April 1974) and upon her death in 2005 her estate which included Portion 91 passed to her two children Francis Deireragea and Connie Appi.
7. That upon Mwareow's death his estate passed on to his children and subsequently to his grandchildren.
8. The defendant in this matter is Connie Appi's son.
9. After Yaren Lodge was burned down the property was abandoned by the plaintiff.
10. The defendant in early 2017 obtained consent of 90% of the landowners to build a house on Portion 91. Having obtained the consent of the defendant started clearing the land and in particular where Yaren Lodge was built.
11. In late 2017 the plaintiff made an application for an order for injunction. On 29 November 2017, the application was heard inter parte and orders were made restraining the defendant from entering the property where Yaren Lodge was situated and he was also restrained from carrying out any construction works until the determination of this matter.

PLAINTIFF'S CLAIM

12. The plaintiff's claim is that his father in early 1960 acquired by way of a customary grant from Mwareow to use the land where Yaren Lodge was built as his family house and the plaintiff accepts that Yaren Lodge was built by the Nauru Local Government Council (NLGC).

MATTERS NOT IN DISPUTE

13. When Yaren Lodge was built in 1962-1963 Portion 91 was owned by Mwareow and Samson in equal shares¹.

¹ Gazette 17 of 29 April 1956

ISSUES FOR DETERMINATION

14. 1) Whether the plaintiff acquired proprietary interest in the land by way of customary grant?
- 2) Alternatively, whether the plaintiff acquired interest in the land recognized under the rules of equity?
- 3) Whether the property Yaren Lodge is to be recognized as independent of the land Portion 91 in Yaren District with its own boundary?
- 4) Whether the defendant has a right to build on land 91 since he is not a land owner?

AMICUS CURIAE

15. Although the dispute was between the plaintiff and the defendant, I invited the Secretary for Justice be joined as Amicus Curiae to assist the Court in respect of the legislations that were in place when Yaren Lodge was built and the subsequent amendments thereto.

WRITTEN SUBMISSIONS

16. The Solicitor General Mr J Udit filed a very comprehensive submission on 13 November 2018 in respect of NHO and the subsequent amendments thereto.

RELEVANT LEGISLATION

17. The NHO was made by the Administrator on 29 April 1957 and its preamble reads as follows:

“To vest in Nauru Local Government Council the ownership of certain houses erected by British Phosphate Commissioners, to provide for the renting and sale of those houses, and for other purposes.”

18. NLGC was established by NHO.

19. The NHO inter alia provided as follows:

- a) Vesting of houses in council

The ownership of the dwelling houses erected in pursuance of Nauru Housing Scheme is vested in the Council².

- b) Land to remain vested in owners

The land upon which a dwelling house was erected under the Nauru Housing Scheme is vested in the person in whom it was vested immediately before the date of commencement of this Ordinance³.

² Section 7(1) NHO

³ Section 8 NHO

c) All writing including deed or agreement is done by the Cabinet, the President, or a Minister. This included the ownership of houses from the Council to the Republic.

[16] All this has been implemented and given effect to in July 1996. This means that the role and function of the Council is now performed by the Cabinet. All assets now belong to the Republic. The Cabinet, President or Minister can communicate or perform the function of the Council, if Ministerial assignments have not been done properly this can be done.

[17] After the consequential legislation was implemented in 1999 the Council was dissolved pursuant to Nauru Island Council (Dissolution) Act 1999. The assignment effected by the Nauru Local Government Council (Dissolution) Consequential Amendment Act was reiterated in s.3 of the Nauru Island Council (Dissolution) Act 1999, which provided inter alia as follows:

1) Upon commencement of this Act –

a) The Nauru Island Council is dissolved; and

b) The terms of the office of all councilors then current expire; and

c) Any money then held by or on account of the former Council shall vest absolutely in the Republic and shall be paid into the Treasury Funds; and

d) All other assets of the former Council shall vest absolutely in the Republic and shall be dealt with as directed by the Cabinet.

2) Any act, deed or writing required to be done by or on behalf of the former Council may be done as necessary or appropriate by the Cabinet.

3) The common seal of the former Council may be affixed by or with the authority of the Cabinet and in the presence of the President and one other Minister.

Housing Scheme

[18] With effect from 1 July 1996 the Housing Ordinance 1957 was amended as discussed above. In the Act:

a) Reference to Administrator was amended to President.

b) Pursuant to section 7(1) of the Nauru Housing Ordinance, the dwelling houses built and maintained were owned by the Council. These houses were assets of the houses. With effect from 1 July 1996, these houses have been interruptedly owned by the Republic pursuant to section 5(3) of the Nauru Local Government Council (Dissolution) Consequential Amendment Act 1997 because as assets of the Council they are vested to the Republic.

- c) Since 1 July 1996, the Republic became the owners of the Council houses and its tenants became the tenants of the Republic. The leasing agreement contained as schedule to the Housing Ordinance became the leasing agreement between the Republic and the tenants occupying such houses.
- d) Pursuant to Housing Ordinance, the Republic is to pay compensation to the landowners pursuant to section 18 with effect from 1 July 1996. This I take it was a form of rent to landowners for using the land.
- e) Further, the Republic ought to have been collecting the rent from the tenants in the same manner in which the Council was collecting.

[19] The Statute Law Revision Act 2011 was a process by which the laws of Nauru were revised and consolidated. In that process the following relevant Statutes were repealed:

- a) Nauru Housing Ordinance 1957;
- b) Nauru Local Government Council Dissolution Consequential Amendment Act 1997;
- c) Nauru Island Council (Dissolution) Act 1999;
- d) Nauru Local Government Council Ordinance 1951-1965.

[20] The Statutes referred to in paragraphs (b), (c) and (d) had lapsed as they had served their purposes. They were accordingly properly repealed.

[21] The issue is with the Nauru Housing Ordinance which was also repealed. The Ordinance established the relationship amongst landowners, Council (landlord) and the tenant and the terms and the conditions of the lease of the houses built under the Housing Scheme pursuant to the Housing Ordinance 1957. This statute should not have been repealed for the following reasons:

- a) By virtue of the Nauru Local Government Council (Dissolution) Consequential Amendment Act 1997 the Republic has become owners of the dwelling houses constructed under the Housing Ordinance. This is correctly reflected in the Ordinance.
- b) The repealing of the Ordinance has repealed the terms and conditions of the tenancies. The only instrument left is the acknowledgement of the tenancy provided for in the schedule to the Act.

25. In relation to the repealing of NHO 1957 Mr Ekwona submits that although it was repealed the rights of the tenants and the Council (now the Republic) is still protected by virtue of section 18(2)(c) of Interpretation Act 2011 which states:

28(1) The repeal or amendment of written law does not:

- c) Affect an existing right, privilege, obligation or liability acquired, accrued or inferred under the repeal or amended law.

26. The tenants and the Council (now the Republic) had an 'existing' right as provided for under section 28(1)(c) of the Interpretation Act 2011 and in my respectful opinion those rights survived notwithstanding the repealing of the NHO 1957.

CONSIDERATION

EVIDENCE

27. The plaintiff was not present to give evidence in this case and from his affidavit dated 28 August 2017 filed in the application for interim injunction, it is quite clear that his health was not good.

PLAINTIFF'S CLAIM

28. From the above affidavit the plaintiff's claims is that there was an agreement between Mwareow and his late father to allow him to build the Yaren Lodge on portion 91 and he therefore acquired an "equitable interest"¹⁷ in portion 91.
29. The plaintiff called Mr Abawo Diringa, Vice Chairman of Nauru Lands Committee as one of his witnesses. His evidence is that prior to 1900 landowners could give away land. He stated that: "once land was given it was not to come back" and he added that after 1900 there was a requirement for gazetting of the giving of land; and he further stated that since 1921 it became compulsory. He also stated that if the land was given after 1956 to the plaintiff's father then it had to be gazetted; and any land given between 1921 to 1986 required the consent of the Administrator, and land transferred after 1976 requires the consent of the President under the Lands Act 1976.

NAURU HOUSING SCHEME

30. Yaren Lodge as I mentioned earlier was built by the NLGC under NHO and s.8 of the Ordinance clearly stated that the land on which the dwelling house is built belongs to the owner and land portion was owned by Samson and Mwareow in 1956.
31. If, indeed the plaintiff had acquired a right over the land on which Yaren Lodge was built, then why should he pay the rent? The plaintiff did not adduce any evidence as to what were the arrangements between his late father the NLGC. Was his late father paying the rent as stipulated in the NHO? In the absence of any evidence I will have to accept that the plaintiff's father was paying the rent.

INSURABLE RIGHT

32. Mr Ekwona submits that the Administrator previously and now the Republic was required to pay the insurance for the house. It is correct that s.10 of NHO required the Council to insure the house against fire, but that amount had to be reimbursed by the tenant to the Council¹⁸ and again there is no evidence that the plaintiff's father or the

¹⁷ [19] of Plaintiff's Affidavit dated 23 March 2017

¹⁸ S14(2)(c) NHO

plaintiff after he took possession of Yaren Lodge that the insurance premium was reimbursed.

33. The plaintiff's father died in 1984 and s.17(1)(a) of NHO states that the Council may terminate the tenancy when the tenant dies. Did the tenancy continue after 1984 and was the plaintiff accepted as the tenant by the Council? The onus was on the plaintiff to prove this and once again he has failed to do so.

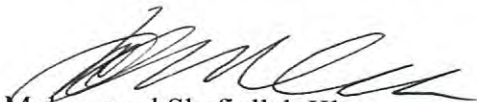
VESTING OF THE COUNCIL'S PROPERTY IN THE REPUBLIC

34. With the dissolution of the Council its properties are now vested in the Republic. If Yaren Lodge was not destroyed by fire then it would have vested in the Republic, but once it was destroyed there is nothing left in terms of properties (house) to vest in the Republic, except the insurable right provided the insurance premium was paid and reimbursed in accordance with the provisions of NHO. In the absence of any evidence by the plaintiff I can safely assume that no premium was paid otherwise the property would have been rebuilt.

CONCLUSION

35. In light of the above discussions I hold that neither the plaintiff or his late father acquired any proprietary or equitable interest in Portion 91. I further hold that Portion 91 in 1956 was owned by Samson and Mwareow and it continued to devolve to their descendants upon their death and the death of their children.
36. I feel it is not necessary for me make a determination on issue 3 and 4 set out in paragraph 14 above and I refrain from doing so.
37. The injunction orders made on 29 November 2017 is dissolved.
38. In the circumstances, the plaintiff's claim is dismissed with costs summarily assessed in the sum of \$2000.

DATED this 22 day of February 2019


Mohammed Shafiullah Khan
Judge

