



**SUPREME COURT OF NAURU**

**[CIVIL JURISDICTION]**

**Lands Appeal No. 02 of 2017**

Salote Kepae & Ors

and

**Applicant**

Nauru Lands Committee

and

**1<sup>st</sup> Respondent**

Jandi Janka Kam

and

**2<sup>nd</sup> Respondent**

Rosalinda Harris

and

**3<sup>rd</sup> Respondent**

Isca Kam

**4<sup>th</sup> Respondent**

Before:

**Chief Justice Filimone Jitoko**

**Appearances**

Appearing for the Applicants:

Julie Olsson

Appearing for the 1<sup>st</sup> Respondent:

M Eoe

Appearing for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondent:

A Lekenaua

Date of Hearing: 9 August, 2018

Date of Judgment: 8 November, 2019

**CATCHWORDS:** *Administration Order No. 3 of 1938 – determination of Nauru Lands Committee – family meetings – court’s discretion to grant leave and extend time – applicable principle – Capelle v NLC & Ors [2013] NRSC 4 – concept of part-owners and co-owners – interests of justice*

## **RULING**

This is an application for grant of leave to file an appeal out of time.

The applicant, Salote Kepae, on behalf of herself and her three brothers, Crosby Kepae, Rhymer Kepae, and Adios Detageauwa, is seeking leave to appeal out of time the decision of the Nauru Lands Committee on March 1997 that determined that Jandi Janka Kam, otherwise known as Jandi Harris, was the sole beneficiary of the estate of Luannah Talitha Kam, the applicants’ father, Eodebe Kepae’s sister, their aunt. The Nauru Lands Committee’s determination was published in the Gazette (GN No. 132/1997). The land in question is Land Portion No. 333 otherwise known as “Abio” in the Meneng District.

Leave of the court is required because the challenge to the Nauru Lands Committee’s decision is being made outside the permitted period to file an appeal, it being 21 days after the publication of the Government Gazette Notice.

The guiding principle to the issue of leave to file an appeal out of time is set out by the full court in **Vernier & Ors v Nauru Lands Committee & Or** Land Appeals Case No. 10 of 2014 endorsing the statement of Eames CJ in the earlier case of **Capelle v Nauru Lands Committee & Ors** [2013]NRSC 4, that states:

*“An application for leave to appeal out of time should not be judged by any strict formula or rigid formula. The relevant principles are well described in Halsbury’s Laws of Australia: The discretion is unfettered and should be exercised flexibly with regards to the facts of the particular case. The court will not decide the application according to a formula created by erecting what are merely relevant factors into the arbitrary principles so as to allow the automatic production of a solution. **However, since the discretion to extend time is given for the purpose of enabling the court to avoid an injustice, the court must determine whether justice as between the parties is best served by granting or refusing the extension sought.** A consideration relevant to the exercise of the discretion is that upon expiry of the time allowed for the appeal the respondent has a vested right to retain the judgment unless the application is granted. Other relevant matters include the length of the delay in commencing the appeal, the reasons for the delay, the chances of the appeal succeeding if time is extended and the blamelessness of the applicant.”(emphasis added)*

It is the whole circumstances of the case that has to be taken into consideration by the court to decide whether leave is to be granted or otherwise. These circumstances as identified in **Capelle (supra)** include:

- (i) The length of delay in bringing the appeal against the decision of the Nauru Lands Committee;
- (ii) The reason(s) for the delay;
- (iii) The merits of the case, that is, the chances of the appeal succeeding if leave is granted for extension of time to appeal;
- (iv) The blamelessness of the applicant; and
- (v) The degree of prejudice to the respondent if leave is granted and the time for appeal is extended.

### **Factual Background**

There are no agreed facts filed. As far as the court can discern, the relevant uncontested facts of the case are as follows:

1. The land in question is Land Portion No. 333 Menen District otherwise known as **Abio**
2. The estate in issue is of the late Luannah Talitha Kam (Talitha), part owner of Land Portion No. 333,
3. Talitha married Isca Kam on 5 April 1974
4. Talitha died in 1993
5. Isca Kam subsequently re-married after the death of Talitha
6. Talitha and Isca did not have any children of their own but had raised a child named Jandi Janka (JJ) ever since he was 3 months old
7. JJ is the son of Rosalinda, Talitha's sister, and one Bendi Harris; the couple resided at Talitha's family home
8. Bendi Harris was being treated for cancer and, accompanied by his wife Rosalinda, travelled for medical treatment to Australia, leaving JJ with Talitha and Isca
9. Bendi Harris eventually succumbed to cancer and died from it in 1983
10. JJ was eventually formally adopted by Isca Kam as a solo parent in April 1998
11. Adoption Order No. 8/1997 formally changed JJ's name to Jandi Janka Kam (JJKam)
12. JJ Kam subsequently on 17 October 2013, by Deed Poll, changed his name to Jandi Harris
13. The applicant, Salote Kepae, is the daughter of Eodebe Kepae, Talitha's and Rosalinda's brother.

Talitha and Salote Kepae's father, Eodebe Kepae, are half brother and sister. They have a common mother, Elise. Talitha with her sister Rosalinda and brother Crosby

are the children of Elise and Martin, her first husband. Salote Kepae's father, Eodebe, is the son of Elise and her second husband, Kepae.

When Elise died, the Nauru Lands Committee determined that she was the owner of 29/63 shares of **Abio**, being Land Portion No. 333, Menen District. The Committee further determined that there were five (5) beneficiaries to Elise's shares in **Abio**, including both Talitha and Eodebe. The five beneficiaries inherited 1/5 share each of Elise's 29/63 share of **Abio** (Annexure 4 of Salote Kepae's affidavit of 9 May, 2017).

Talitha died in 1993, but her estate was not determined and distributed until March 1997. The Nauru Lands Committee in GN No. 486/1994 determined that Talitha's 5/16 shares in **Abio** was to be inherited by Jandi Harris.

Eodebe died in May 1994. The Committee, in December 1994, determined and distributed his estate to the beneficiaries. In GN No. 487/1994, the Committee determined that Eodebe's 5/16 shares in **Abio**, were to be inherited by six (6) of the members of his family. One of the members of the family and a beneficiary is Adios Detageauwa, was adopted by customs, into the Kepae family.

Salote Kepae and her co-applicants seek, should leave be obtained, to challenge the Nauru Lands Committee's determination that Jandi Harris is the sole beneficiary to Talitha's 5/16 shares in **Abio**.

## **CONSIDERATIONS**

### 1. The Length and Reason(s) for the Delay

The Nauru Lands Committee's determination and decision was made in March 1997 (GN No. 132/1997) and published in the Government Gazette No. 28 of 19 March, 1997. The footnote to the Notice states:

*Those that disagree with the distribution of this estate may appeal to the Supreme Court Registry within 21 days of the publication of the Government Gazette Notice.*

The Applicants filed their application for leave to appeal on 9 May, 2017, a period of over 20 years from the date of the publication of the decision. The intervening 20 years from the date of the decision of the Nauru Lands Committee to the challenge date filed by the Applicants is way beyond the 21 days envisaged and permissible under section 7(1) of the Nauru Lands Committee Act 1956. Sub-section (1) states as follows:

### 7. *Appeals from the decisions of the Committee*

*(1) A person who is dissatisfied with a decision of the Committee may appeal to the Supreme Court against the decision:*

*(a) within 21 days after the decision is published, or*

*(b) with leave of the court.*

Counsel for the Applicants argue that the court should apply section 7(1)(b) notwithstanding the requirement of 21 days because of extenuating circumstances.

In her affidavit in support, Salote Kepae that she and the other applicants only became aware in 2014 that they were “co-owners” of **Abio** with the respondents, Jandi Harris and their auntie Rosalinda. In any event, she argues that when the Nauru Lands Committee determined Talitha’s estate in 1997, she was only 17 years old. The essence of this argument is that she was only a minor and not in a position to understand how the decision affected her and her brothers.

While there be some merit in the argument, the court notes that if indeed the applicants only became aware in 2014, that Jandi Harris was the sole beneficiary to Talitha’s shares in **Abio**, it took them another three (3) years, to 2017, before they finally filed these proceedings challenging the Committee’s decision. There certainly did not seem to be any sense of urgency in the applicants attempt to question the Committee’s decision.

The applicants also appear to be questioning the issue of Rosalinda’s interest as a beneficiary of shares in **Abio**. Rosalinda’s shares in Abio however, is derived directly from her mother, Elise (GN No.104/1976). She is not a beneficiary to her sister Talitha’s estate.

## 2. Merits of the Case

Firstly, the applicants take issue with the right of the second respondent, Jandi Harris, to inherit Talitha’s estate, given the fact that he was not her natural son, although he was raised by her and her husband Isca Kam. It is conceded that Jandi Harris was later legally adopted by Isca Kam after Talitha had died, but at the time of Committee’s determination, the applicants argued that Jandi Harris was not “blood” relative and “is the son of Isca Kam and not Talitha”.

It is very clear from the affidavit evidence of the respondents that Jandi Kam also known as Jandi Harris, was raised from very early age, when he was only 3 months old, by Talitha and Isca Kam. At various times they had lived together as a family, had travelled overseas including to Europe together and to all intents and purposes, Jandi had been adopted by Nauruan customs as the child of Talitha and Isca Kam.

There is enough evidence also to support the contention, including the affidavit of Jandi’s natural mother Rosalinda, that Jandi’s natural parents, Bendi Harris and Rosalinda, Talitha’s sister, had given their consent that Jandi be adopted by Talitha and Isca Kam.

The issue of customary adoption via a vis the Adoption of Children Act 1965, was fully discussed by Eames CJ in *Gad Demaunga v Nauru Lands Committee Civil Case No. 15 of 2012*. This case is however different because the process of customary

adoption is, in the court's view, complete. Both the natural parents had consented to the child to be adopted and furthermore, the adopting parents have, by their words and actions, accepted Jandi as their son. The adoption ordered by the court in 1998 was merely to formalise the customary adoption that had been in place since Jandi was 3 months old.

There is also the argument advanced by the applicants that Jandi is not a "blood" relative. The fact is that Jandi is the natural son of Rosalinda, who is Talitha's natural sister, as well as sister to Eodebe Kepae, the applicants' children. Surely the degree of kinship and family affinity as between Eodebe's children and Talitha and that between Jandi as Rosalinda's child, and Talitha are the same. The applicants and Jandi enjoy the same degree of consanguinity and the applicants' argument that Jandi is not "blood" relative is inaccurate.

It may also be relevant for the applicants to bear in mind that in the distribution of Eodebe's their father's estate, his children and the only beneficiaries to his estate, included a son who was also adopted into the family by customs.

### 3. The Requirement of Family Meetings

The requirement for family meetings to assist the Nauru Lands Committee in the decision as to how the deceased's estate will be distributed is based on the ***Administrative Order No.3 of 1938 (Regulation made under section 4 of the Native Administration Ordinance 1992)***. It states:

*" On the death of a person who dies intestate, the division of the property of the deceased, shall be decided in the following manner. Such division shall include all real and personal property.*

1. *The Chief of the District will make the list of the property of the deceased*
2. *The distribution of the property shall be decided by the family of the deceased person, assembled for that purpose."*

*The distribution of the property agreed to by the family of the deceased shall be reviewed by the Government Surveyor to ensure that there is no apparent irregularity, who will refer any doubtful matter to the Administrator.*

*(3) If the family is unable to agree, the following procedure shall be followed:*

*(a) in the case of an unmarried person the property to be returned to the people from whom it was received, or if they are dead to the nearest relatives in the same tribe;*

*(b) Married - No issue – the property to be returned to the family or nearest relatives of the deceased. The widower or widow to have the use of the land during his or her lifetime if required by him or her;*

*(c) Married – with children – the land to be divided equally between the children and the surviving parent to have the right to use the land during his or her lifetime. When the estate comprises only a small area of land the eldest daughter to receive the whole estate and other children to have the right to use the land during their lifetime.*

The role of the Chief of the District has now been succeeded by the Nauru Lands Committee.

What is a “family”, and who comprises the, “*family of the deceased person*” and how wide is the Nauru Lands Committee required to cast its net to meet the requirement of family of the deceased person under Clause (2) above?

In *Scotty v Nauru Lands Committee* [2013] NRSC 9 the court (per von Doussa J) stated that:

*“ The Administration Order gives no guidance as to who should be called to a meeting for the purpose of Clause 2. The notion of a family is a broad one but for the purpose of this case **it is not necessary to explore how widely in the extended family an invitation to attend a meeting need to go to constitute a valid meeting. As a clause 3© is the provision that would operate in default of an agreement, at the very least the surviving spouse of the deceased and her issue were people with direct interest in the division of her property who should have been called to a meeting, and were entitled to be heard before the Committee made its decision.**” (emphasis added)*

A much fuller examination of what constitutes a “family” of a deceased person in the context of the Administration Order No. 3, was made by Doone CJ in the earlier case of **Eidingairo Dake v Eiderairok Akua & Ors** Civil Action No. 2/99. After discussing the term “family” and referring to English and Canadian authorities, he concluded that the Nauru Lands Committee had not complied with the requirement of Order No. 3 in inviting to the meeting the brother and sister of the deceased, the issues of his father and second wife, but excluded the plaintiff, the child of his father and his first wife.

A much later case of **Addi v Nauru Lands Committee** [2014] the Full Court granted leave to the adopted children of the deceased to challenge the Nauru Lands Committee’s determination, after inviting only the natural mother of the deceased, not the customary adopted children to the family meeting.

In this instance, the Nauru Lands Committee, had called what it considered the “people with the direct interest in the division of the deceased property” to attend the various meetings held and whose transcriptions are attached to the affidavits of Iturinmar Diringa, Vice President of the Committee.

It is conceded both by the Committee and the respondents that the attendance to these family meetings were limited to Isca Kam, Jandi Harris and Eigangar (Rosalinda)

Harris. There were at least five (5) of these meetings, not all three attended all of them.

It is obvious from the translated transcripts of these meetings that the Committee was attempting to resolve the legal issue of the deceased's (Talitha's) will recorded onto a cassette.

The Committee in the end, after receiving legal counsel, advised the family at their meeting of 12 July 1995 that the cassette-recorded will was invalid and therefore would not be accepted by the Committee. The Committee thereafter, after listening to the views of Isca Kam, Jandi Harris and Rosalinda Harris, proceeded to determine that Jandi Harris was the sole beneficiary to Talitha's 5/16 shares in **Abio**.

The court, while it does not dispute that Salote Kepae and her brothers are "blood" relatives of the deceased Talitha, as defined in **Eidingaero Dake** (supra), the decision by the Nauru Lands Committee to limit the invitation to Isca Kam, Jandi Harris and Rosalinda Harris only, is justified on the following grounds:

1. That Isca Kam (the deceased's surviving spouse), Rosalinda Harris (the deceased's sister), and Jandi Harris (the deceased adopted son) are persons with "direct interest" in the division of the deceased's property;
2. Salote Kepae and her brothers are already part-owners of **Abio** through their being the beneficiaries of Eodebe's (the deceased Talitha's brother) 5/16 shares in the property.

The Committee need not go to other relatives of the deceased if there are direct descendants that are alive and capable of inheriting property. This was clearly done in favour of the applicants in the case of Eodebe's estate determination by the Committee. Even if the children of Eodebe had attended the family meeting, and which would have most likely resulted in disagreement as to the beneficiary(ies) of Talitha's estate, the Committee would still be entitled, as suggested by the court in **Scotty v Nauru Lands Committee** (supra), to determine the question in accordance with Clause 3 © of Administrative Order No. 3 of 1938, which would have produced exactly the same results as determined by it. At the very least the clause serves as a useful guide to both the Committee and the court on the issue.

For the reasons explained above, the court is satisfied that the family meeting called by the Nauru Lands Committee to determine the beneficiaries to Talitha's estate, was in conformity with the requirements of the Administrative Order No. 3 of 1938.

#### 4. Quorum and Decision of the Nauru Lands Committee

There is evidence of the requirement of a quorum in the Committee's deliberations, only an assumption. In any case, this would have been set out in the Committee's constitution and procedure as required under section 4 of the Nauru Lands Committee Act 1956.



The presumption by the court, in the absence to the contrary is that, the Committee had, at the making of its determination, been properly constituted under law.

There is an additional argument and ground for appeal that is set out in the applicants' Notice of Application for Leave at paragraph 11.6. They argue that the Committee "allowed Isca Kam to make decision as to who should be beneficiary to Talitha Kam's intestate estate". The argument is misconceived and without merit. The Committee is entitled to ask and hear the surviving spouse of the deceased but in the end, it is the Committee alone that makes the final determination and decision.

#### 5. Change in Circumstances

The reason(s) why there is a need to limit the time for redress by an aggrieved party to a claim or cause are succinctly summarised under section 4 (the Purpose of the Act) of the Limitation Act 2017. It states:

*"(a) provide limitation periods for various different causes and classes of claims;*

*(b) encourage claims to be made without any undue delay;*

*(c) provide opportunities for persons against whom claims are made to defend a proceeding on the grounds of claim being stale or statute barred;*

*(d) encourage resolution of dispute between parties in the earliest possible time to avoid greater complications caused to late prosecution of the claims;*

*(e) resolve disputes when evidence is still fresh and be preserved for trial".*

More specifically, section 13 of the Act prescribes that proceedings for the recovery of land shall not commence after a lapse of 20 years from the day the cause of action accrued.

Although in this case, the filing of leave precedes the enacting and coming into force of the Act, it still provides a useful yardstick to help the court in its overall assessment as to whether the application has merits and should be allowed.

While the court may agree to the submissions by the applicants that they were only minors at the time of the determination by the Nauru Lands Committee of Talitha's estate, and that, as they claim, they only became aware in 2014 that Jandi Harris was part-owner of **Abio** by inheriting their auntie's Talitha's shares in the land, some 17 years after the determination. Yet, as the court has noted, it took the applicants another three (3) years before they filed this application. There does not seem to be any haste or sign of urgency in the concerns of the applicants to have their appeal dealt with by the court.

In the meantime, Jandi Harris, as the sole beneficiary of Talitha's estate, had proceeded to repair and renovate at his own costs, the 4 houses he had inherited. Two of the houses are rented out and he is receiving regular income from them.

Unlike the case of **Addi v Nauru lands Committee**(supra) where the court was amenable to granting leave although considerable time had lapsed after the appeal period had expired, partially on the ground that the ownership of the land had remained with the original beneficiary and circumstances had not changed, in this case Jandi Harris the respondent had in reliance of the decision of the Committee, had spent considerable time and money in upgrading the houses and have a viable business from renting of two of the houses he owns from his mother Talitha's estate in **Abio**.

### **Conclusion**

The court in **Capelle v Nauru Lands Committee** (supra) had established the guiding principle for the court in deciding whether leave should be granted. It is the exercise of the court's discretion to grant extension of time and may only be given if it is convinced that it will avoid an injustice that is, "whether justice as between the parties is best served by granting or refusing the extension sought."

Having taken all the relevant matters, including the length of and reason for the delay, the blamelessness of the applicants, the merits of the appeal, and prejudice to the respondent if time is extended, and the overall circumstances of the case, the applicants application for leave to extend time to appeal the decision of the Nauru Lands Committee of March 1997 is refused.

### **Order**

Leave for extension of time to appeal is refused.

Finally the court would like to address two other matters relevant to this case and are also matters of general application.

### Parties to Proceedings

The court notes that the applicants had included Rosalinda Harris as the third respondent, and Isca Kam as forth respondent. Our Civil Procedure Rules specifically requires that parties should have *locus standi* in any proceedings before the court.

The intending action and claim is being made against the decision of the Nauru Lands Committee correctly named as the first respondent and, Jandi Harris, the beneficiary to the Committee's decision, as the second respondent. The third and fourth respondents did not derive any benefit from the Committee's decision, although they were party to the consultation process as required by law. It nevertheless was the Committee's decision alone in the end as to who should inherit Talitha's shares in **Abio**' which decision is been challenged in these proceedings.

There are no specific remedies which the applicants are seeking from the third and fourth respondents neither are there any claims. The allegation forming a ground for appeal, that Isca Kam decided, not the Committee, who should be the beneficiary to

Talitha's 6/15<sup>th</sup> shares in **Abio**, the court has pointed out above, is totally misconceived.

Should and if this matter were to proceed further, Order is made that the third and fourth respondents be struck out as parties to the proceedings.

The Rights of the Applicants over Land Portion 333/**Abio**, Menen.

It is important to point out that the applicants and Jandi Harris, the second respondent, are all part-owners of Land Portion 333/**Abio**. They all hold undivided unequal shares in the land. No one person holds or owns any particular portion of the land in perpetuity; each part-owner is a co-owner of every inch and every metre of **Abio**. "Part -owner" denotes shares be they equal or unequal, in the land, whilst "co-owner" signifies that all part-owners own all of the property together.

The fact that **Abio** is physically divided up between the landowners is only in respect of the ownership of the structures built over the land, notwithstanding the common law rule that structures integrated with or affixed to the land become part of realty. The ownership of the land in which the structures are built still remain the property of all the co-owners at any one time. Should for example, a residence owned by a part-owner, falls into disuse and is abandoned, there is nothing to stop any other part-owner from building over the same land, subject only to the usual consent of majority of the other co-owners of the land. This fact is recognised by the second respondent Jandi Harris himself who at paragraph 20 of his affidavits, concedes that the applicants "are at liberty to build their house on the same land portion, no one is preventing them as they are also landowners."

Finally, the percentage of shares in a land portion only goes to weight or influence. Each part-owner, no matter how small or large the percentage of shares he or she may hold, is a co-owner of the land and as a co-owner, enjoys the same right as any other to utilise, give, grant or refuse the use of the land portion to which he or she is a part-owner.

Dated this 8th day of November, 2019.

  
**Filimone Jitoko**  
Chief Justice

