



THE SUPREME COURT OF NAURU

[CIVIL JURISDICTION]

Civil Suit No. 03 of 2018

Between: Angelina Samson a.k.a Angelina Temaki

PLAINTIFFS

AND: Ding Ding Jodie Bam

RESPONDENT

Before: Judge Rapi Vaai

APPEARANCES:

Appearing for Plaintiff:	V Clodumar (Pleader)
Appearing for the Respondent:	S Valenitabua
Appearing for the Third Party:	Solicitor General

Date of Hearing: 12th July, 2019

Date of Decision: 26th July, 2019

Introduction

1. The court in these proceedings is asked to determine the occupation and ownership of a dwelling house on land known as Aiburi, Portion 157, Ewa District. It was also used and operated as a restaurant which was then known as MJR Restaurant (restaurant).
2. Upon the death of Eugene Amwano (Eugene) in May 2010 the Nauru Land Committee ascertained, determined and distributed his estate which was

duly published in the Government gazette. The beneficiaries of Eugene's estate were his wife and children.

The restaurant was determined by the Nauru Land Committee to go to the plaintiff Angelina and was published in Government Gazette dated 29th September 2010.

By the same publication those who disagree with the publication have 21 days to appeal to the Supreme Court.

3. The restaurant is currently occupied by the defendant, first cousin of the plaintiff, who is disputing the ownership of the restaurant and the validity of the order of the Nauru Land Committee which granted ownership and occupancy of the restaurant to the plaintiff.
4. The plaintiff wants vacant possession of the restaurant and seeks order to evict the defendant therefrom.

Background

5. Eugene and his sister Esmeralda each held 1/3rd share in land portion 157; shares which they inherited from the estate of their late mother. The plaintiff is the daughter of Eugene while the defendant is Esmeralda's daughter. Both Eugene and Esmeralda have died.
6. The plaintiff claims that the restaurant was built on portion 157 by her father Eugene as a dwelling house. It was subsequently turned into a restaurant. As the Nauru Lands Committee accepted that the house built on portion 157 was built by Eugene, it therefore included it in the personal estate of Eugene.
7. The defendant disputes the inclusion of the restaurant in the estate of Eugene.
She claims:
 - (i) *The restaurant was built by the mother of Eugene and Esmeralda as a dwelling house and was occupied by different families at different times including the defendant's mother, as well as the plaintiff's father before it was operated by a Chinese as a restaurant.*
 - (ii) *When the restaurant closed is about 2009 it was left unoccupied and was at times vandalized.*

- (iii) *Eugene then gave the key of the restaurant to the defendant's sister who was told by Eugene that the restaurant belongs to Esmeralda family and for the sister to renovate.*
- (iv) *In 2010 the defendant moved into and occupied the restaurant and has spent about \$6000 in renovations. She was given the key to the restaurant by one of her sisters. She did not ask or obtain permission from the plaintiff.*
- (v) *The Nauru Lands Committee has no jurisdiction to determine and distribute the personal estate of Eugene. The committee's jurisdiction in 2010 was limited to the ownership of, or rights in respect of land. Its decision and determination of the personal estate of Eugene published in September 2010 was a non-jurisdictional error and has no effect.*

The Nauru Lands Committee Act 1956

8. Section 6 of the Act sets out the powers of the Nauru Lands Committee. It reads as follows:

6. (i) The committee has power to determine questions as to the ownership of, or rights in respect of land, being question which arise.

(a) between Nauruans or Pacific Islanders; or

(b) between Nauruans and Pacific Islander.

(2) subject to the next succeeding section, the decision of the committee is final.

9. A right to appeal the decision of the Committee is provided in section 7 which reads:

7 (i) 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.

Undisputed Facts

10. It is not disputed that the Nauru Lands Committee determined both the real and personal estate of Eugene which were published in the gazette of 29th September 2010.
11. The same publications included a note that those who disagree with the distribution may appeal to the Supreme Court within 21 days of the publication.
12. No appeal was lodged, neither was leave of the Court sought to appeal out of time, nor was the decision challenged by judicial review.

Issue for Determination

13. During the course of discussions with counsels in chambers it was agreed that the issue for determination shall be confined to the defendant's defense which challenged the validity of the determination of the Nauru Lands Committee published in September 2010 as specified in paragraph 7 (v) above.
14. In his written submissions counsel for the defendant submitted two instances upon which the Nauru Lands Committee committed error.
The first one was a breach of the rules of natural justice or procedural unfairness through the committee's failure to invite the defendant and her siblings to the family meeting. The second ground, the main ground, is that the committee has no jurisdiction to determine question concerning personal estate of an intestate Nauruan.
15. The first ground was not pleaded or raised in the pleadings and other counsels accordingly did not address the issue in their submissions.
In any event, the defendant and her siblings were not beneficiaries of the estate of Eugene so that the Nauru Lands Committee was not obligated to invite them to the family meeting to discuss the estate of Eugene.

16. As to the second ground, counsel conceded no appeal was filed within 21 days as required under section 6 of the Nauru Land Committee Act. However he contended that section 13 of the Limitation Act 2017 permits the defendant to effectively challenge the Committee ruling within 20 years. Sub section (i) (b) of section 7 Nauru Lands Committee Act enables the defendant to appeal outside the 21 days with leave of the court. And section 13 (5) of the Limitation Act 2017 permits the defendant to appeal within 20 years, so that he can seek leave to appeal outside 21 days and within 20 years.

Response by the Third Party

17. The Solicitor General for the third party submitted that since neither appeal was filed within 21 days, nor leave of the court was sought to appeal out of time, the decision of the Nauru Land Committee has crystallised into finality and is not capable of being varied, altered or tampered with by the court or any other body.

18. It is also submitted that the defendant instead of appealing the decision of the Nauru Land Committee as provided for by statute, the defendant has sought in these proceedings to challenge the Nauru Lands Committee decision by judicial review.

The challenge should be disallowed. Counsel rely on the decision of Madraiwiwi CJ in *Rodney Henshaw v., Secretary for Justice*¹ which adopted the approach of Lord Templeman in *Regina v. Inland Revenue Commission Ex parte Preston*² at page 862:

“ Judicial review is available where a decision making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers. Judicial review should not be granted where an alternative remedy is available. ”

¹ (2015) NRSC 9

² (1985) iAC 835

Submissions by the Plaintiff

19. Mr Valenitabua for the plaintiff surprisingly did not vigorously argue the finality status of the determination by the Nauru Lands Committee. He contended that the defendant has acquiesced and her conduct constituted laches by failing to challenge the decision for over eight years.
20. A great deal of the submissions focused on the Nauru Lands Committee power to deal with the personal estate of intestate Nauruans. Briefly the submissions can be adequately summarized as follows:

(i) *The Administration Order No. 3 of 1938 states at the opening paragraph:*
"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."

(ii) *The Administration Order 1938 is still alive even after the enactment of the Nauru Lands Committee Act 1956. It was confirmed by Eames CJ in Agir v. Aeomage³ that the Nauru Lands Committee established by the 1956 Act continue to deal with personal estate.*

Jurisdictional Error Challenge

21. The focus of these proceedings is to determine whether the court should entertain the defendant's defense of jurisdictional error leveled against the third party the Nauru Lands Committee alleging that the Nauru Lands Committee has no jurisdiction to deal with personal estate of Eugene.
22. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all⁴.

³ (2012) NRSC 14

⁴ Minister for Immigration and Multicultural Affairs v. Bhardmaj (2001 – 2002) 209 CLR 597 at 614 -615.

23. The defendant could have challenged the decision of the Nauru Lands Committee by way of appeal under section 7 (1) Nauru Lands Committee Act or else by way of judicial review proceedings which are not subject to the 21 days limit imposed by section 7 (1).
24. If there was failure by the Nauru Lands Committee to follow procedure as referred to in paragraphs 14 and 15 above, the Supreme Court in addressing the appeal brought within 21 days could uphold the appeal and pursuant to section 7 (2) make orders such as substituting a new decision on merits or set aside the Nauru Lands Committee decision and remit it back to the Nauru Lands Committee for re-consideration.
25. Since the publication of the Nauru Lands Committee decision in September 2010 the defendant has not filed an appeal, has not sought leave of the court to file an appeal out of time and has not challenged the decision by judicial review.
26. The defendant cannot by these proceedings challenge the validity of the Nauru Lands Committee decisions on the grounds of jurisdictional error. Firstly there are procedures under the Civil Procedure Rules which must be complied if judicial review is to be pursued. Those have not been complied with. Secondly the challenge mounted by the defendant in these proceedings is a subtle attempt to appeal the Nauru Lands Committee decision through the back door.
27. Regrettably, the plaintiff assisted the defendant to come in through the back door by seeking to join the third party to come in to defend and justify the decision of the Nauru Lands Committee. The Solicitor General was justified in insisting that the back door should be shut and the defendant be disallowed to raise the defense of jurisdictional error or any other challenge to the decision which for all purpose is final.

Jurisdiction of the Nauru Lands Committee to determine personal estate

28. Although the issue concerning the jurisdiction of the Nauru Lands Committee to distribute personal estate is not relevant for the purpose of this ruling, Mr Valenitabua has made considerable submissions which I consider as a matter of courtesy to address.

29. I agree with Mr Valenitabua that since 1938 the Lands Committee at the time had jurisdiction to deal with personal estates of intestate Nauruans. The opening paragraph of the 1938 Administration Order No. 3 provides:

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

30. The 1938 Administration Order has not been repealed. The 1938 order has been long accepted to govern the Nauru Lands Committee established under the Nauru Lands Committee Act 1956 just as it governed the former Lands Committee⁵.

31. In *Detamaigo v. Demaure (1969) NRSC 5* Thompson CJ said:

“ The Nauru Lands Committee may well have jurisdiction to determine the distribution of the part of the estate of a deceased person which consists of personalty, that jurisdiction being derived from customary law”

Although the observation of Thompson CJ was clearly obiter, Eames CJ in *Agir v. Nauru Lands Committee* and *Agir v. Aeomage*⁶ affirmed that the Nauru Lands Committee in making decisions about the distribution of personalty was not exercising statutory power but was guided solely by its interpretation of customary law.

32. On the issue of jurisdiction, it appears that the authorities do not support the contention of the defendant.

Limitation Act 2017

33. Section 13 (i) and 13(5) of the Limitation Act 2017 provides:
13 (i) A Proceeding to recover land shall not be commenced after a lapse of 20 years from the day the cause of action accrued.

⁵ Eames CJ in *Agir v. Aeomage* (2012) NRSC 14

⁶ (2011) NRSC 8

13 (5) A court shall not grant relief in any proceeding or appeals from the Nauru Lands Committee to the Supreme Court, which would result in a claim being barred under subsection (i)


34. The contention by the defendant that section 13 (5) of the Limitation Act enables the defendant to obtain leave of the court within 20 years to challenge the Nauru Lands Committee decision is totally misconceived. In the first place section 13 specifically addresses proceedings concerning recovery of land not personal property, and the defendant is conceding in these proceedings that the restaurant is personal, not real property. Indeed the Nauruans have never treated or regarded houses as fixtures. Secondly in considering the application for leave to issue judicial review proceedings pursuant to Order 38 Civil Procedure Rules, delay is one of the determining factors to consider. A delay of almost 9 nine years require some convincing explanation. Mr Valenitabua submitted that the defendant acquiesced and failed to assert her right to challenge for a long time so that it would be unreasonable and inequitable to grant leave or grant relief sought.
35. No explanation has been offered for the obviously undue delay, probably because there is none.
36. The Reality is, the defendant has not obtained leave to challenge the decision; there is no point in contending that he may be able to obtain leave; without that leave he does not possess the ticket to challenge the Nauru Land Committee's decision

Results

- (i) The defense by the defendant alleging that the Nauru Lands Committee had no jurisdiction to make the Order is struck out and is dismissed.
- (ii) Costs for the plaintiff and third party to be taxed by the Registrar if not agreed upon.

- (iii) Since the remaining allegations in the statement of Defense and Counterclaim do not implicate the third party, the third party is removed and withdrawn from this action.
- (iv) This matter is adjourned to the 23rd September 2019 for mention before me.

Dated this 26th day of July, 2019



Judge R. Vaai
Supreme Court

