



IN THE SUPREME COURT OF NAURU
AT YAREN
CIVIL JURISDICTION

Civil Suit No. 3 of 2018

BETWEEN

Ding Ding Jodie Bam

Applicant

AND

Angelina Samson (aka Angelina Temaki)

Respondent

Before: Khan, J
Date of Hearing: 2 June 2020
Date of Ruling: 9 June 2020

Case may be cited as: *Bam v Samson*

CATCHWORDS: Application for a stay of execution pending appeal to the Nauru Court of Appeal – Whether the Nauru Lands Committee could determine the realty estate of a deceased who died intestate prior to the amendment of the Nauru Lands Committee (Amendment) Act 2012.

APPEARANCES:

Counsel for the Applicant: V Clodumar
Counsel for the Respondent: R Tagivakatini

RULING

INTRODUCTION

1. This is an application for a stay of execution filed by the applicant/intended appellant (intended appellant) following decisions delivered by Vaai, J on 26 July 2019 and 17 January 2020.

2. The two judgements are related or connected with each other and I shall discuss them separately later. In the judgement delivered on 17 January 2020 Vaai, J made an order that the defendant (intended appellant) vacate the house by 30 January 2020.
3. On 30 January 2020 Mr Clodumar filed an Originating Summons and appeared before me with Mr Valenitabua, counsel for the respondent. On that day Vaai J was out of the island and therefore I dealt with this matter in his absence.
4. It was brought to my attention that the judgement dated 17 January 2020 stated that the appellant should vacate the dwelling house by 30 January 2020 which is in conflict with s.22 of the Nauru Court of Appeal Act 2018 (the Act) which states that a person has 30 days from the delivery of the judgement to lodge an appeal, whereas the judgement stated that the house is to be vacated by 30 January 2020 – within 13 days.
5. In light of the conflict between the judgement date for vacation of the house and s.22 of the Act I ordered that execution be stayed until 17 February 2020, when the 30 days would lapse to allow the appeal and stay of execution to be filed.

APPLICATION FOR A STAY OF EXECUTION

6. On 17 February 2020 the intended appellant filed an application for a stay of execution and in the application attached a proposed Notice of Appeal. The application was filed pursuant to Rule 12(2) & (3) of the Nauru Court of Appeal Rules 2018 which states:

Rule 12(2) – Where an intended appellant or appellant seeks an order for a stay of execution or proceedings against the judgement, decision or order of the Supreme Court, before or after filing of the notice of appeal respectively, he or she may file and serve:

- a) a summons seeking an order for a stay of execution or proceeding with any other appropriate orders in Form 3 in Schedule 1; and
- b) one or more affidavits in support of the application for a stay of execution or proceedings for and on behalf of the applicant.

Rule 12(3) – The affidavit in sub-rule (2)(b) shall include:

- a) reasons as to why the failure to stay execution or proceedings would render the appeal nugatory;
- b) the prospect of the success of the appeal or where an appeal is not filed, exhibit a duly completed copy of the proposed notice of appeal in Form 1 in Schedule 1;
- c) the effect of stay on third party;
- d) the balance of convenience and competing rights of parties to the intended appeal or appeal filed.

7. I stated earlier that the two judgements/ruling are related or connected to each other. In the judgement dated 26 July 2019 the intended appellant had raised the defence that the Nauru Lands Committee did not have jurisdiction in 2010 to determine the ownership of the house (realty) on Portion 156 in Ewa District and the proposed grounds of appeal states that the learned judge erred in law when he struck out and dismissed the intended appellant's defence. The second judgement relates to a counterclaim filed by the intended appellant relating to the repairs that she carried out to the house.

BACKGROUND TO THE JUDGEMENT DATED 26 JULY 2019

8. The intended respondent's father Eugene Amwano died in May 2010 and in September 2010 Nauru Lands Committee made a determination in relation to his estate – both real and personal and published its finding on 29 September 2010 in which the estate was distributed between his wife and her children. Nauru Lands Committee made a determination that the house which is the subject of the dispute is to be given to the proposed respondent.
9. The intended appellant took occupation of the house in 2010 and she alleged that the keys were given to her by her sister and she did not have to ask the intended respondent and she has been in occupation of the house since then to date.
10. The intended appellant pleaded in her defence that the house was not to be included as part of the estate of Eugene and at paragraph 7 of the judgement dated 26 July 2019 it is stated as follows:

[7] The defendant disputes the inclusion of the restaurant in the estate of Eugene. She claims:

- 1) 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.
- 2) When the restaurant closed in 2009 it was left unoccupied and was at times vandalised.
- 3) Eugene then gave the key of the restaurant to the defendant's sister who was told by Eugene that the restaurant belongs to Esmeralda's family and for the sister to renovate.
- 4) In 2010 the defendant moved into and occupied the restaurant and has spent \$6,000 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.
- 5) 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.

11. Vaai, J stated as follows at [21], and [22]:

[21] The focus of these proceedings is to determine whether the Court should entertain the defendant's defence of jurisdictional error levelled against the third party, the Nauru Lands Committee, alleging that the Nauru Lands Committee has no jurisdiction to deal with the personal estate of Eugene.

[22] A decision that involved jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all¹.

12. On the issue of the jurisdiction of the Nauru Lands Committee to determine personal estate it is stated in the judgement at [28], [29], [30], [31] and [32] as follows:

[28] Although the issue concerning the jurisdiction of the Nauru Lands Committee to distribute the 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 estate of intestate Nauruans. The opening paragraph of 1938 Administration Order No. 3 provides:

“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 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 Committee².

[31] In *Detamaigo v Demaure* (1969) NRC 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*³ 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.

¹ Minister for Immigration and Multicultural Affairs v Bhardmaj (2001-2002) 209 CLR 597 at 614-615

² Eames CJ in *Agir v Aeomage* (2012) NRSC 14

³ (2011) NRSC 8

13. The intended appellant's defence that the Nauru Lands Committee did not have jurisdiction was struck out and dismissed.

PROPOSED GROUNDS OF APPEAL

14. Mr Clodumar submits that Vaai J relied on *Agir v Nauru Lands Committee*⁴ and *Agir v Aeomage*⁵ both decisions of Eames CJ and held that Nauru Lands Committee had jurisdiction to deal with personalty estate in 2010 by way of customary law. He submitted that Eames CJ's finding was in conflict with Donne CJ in the case of *Lucy Ika and Others v Nauru Lands Committee and Others*⁶ where it was held that the Nauru Lands Committee did not have jurisdiction to deal with the personal estate of a Nauruan who died intestate as that role was performed by its predecessor, Lands Committee, was impliedly abolished by s.3 of the Customs Laws and Adopted Act 1971.

15. In *Agir v Nauru Lands Committee*⁷ it was stated at [2], [48] and [65] as follows:

[2] The two preliminary questions may be stated as follows:

- a) Does the Nauru Lands Committee have jurisdiction to consider and make decisions as to the distribution of personal property in an intestate estate of a deceased Nauruan, or is its jurisdiction confined to questions of the ownership and distribution of land of deceased Nauruans?
- b) If the Committee does have power to address and make decisions concerning the personal estate of intestate deceased Nauruans, is there any right of appeal to the Supreme Court against any decisions taken by the Committee concerning the personal estate of deceased Nauruan? Does the Nauru Lands Committee have power to deal with personal estate?

[48] In *Lucy Ika and Kinza Clodumar v Nauru Lands Committee and Others* Donne CJ also held that a decision of the Committee could only be subject of an appeal under s.7 of the Nauru Lands Committee Act if it concerned land. Such an appeal could assert error of facts or law and must be lodged within 21 days of the publication of the determination. He opined, however, that a challenge with respect to a land decision could also be made by way of judicial review, where error of law was asserted, and a successful challenge to which a 21-day time limit did not apply, or render the decision void ab initio.

[65] I am driven back to considering the terms of s.6 and s.7. They do not provide for an appeal against decisions concerning personalty. As presently advised, therefore, I conclude that there is no right of appeal under s.7 with respect to decisions of the Committee concerning personalty. The question is not beyond doubt, however, as to the intention of the legislative in this regard when 1956 Act was passed. It would be appropriate for the issue now to be resolved by Parliament.

⁴ (2012) NRSC 14

⁵ (2011) NRSC 8

⁶ Civil Appeal No. 2/91, 3/91 and 8/91

⁷ (2011) NRSC 8 (6 May 2011)

16. Following the decision in *Agir v Nauru Lands Committee*, the Nauru Lands Committee (Amendment) Act 2012 was enacted to give powers to Nauru Lands Committee to deal with personalty estates of deceased persons who died intestate.

17. In *Agir v Aeomage*⁸ it was stated as follows at [2] and [95]:

[2] In earlier proceedings No. 4 of 2011,⁹ the plaintiff had sought to appeal against the determination pursuant to s.7 of the Nauru Lands Committee Act 1956 ('the Act'). In a preliminary ruling I expressed what I said was a tentative opinion that in making decisions about the distribution of personalty the Nauru Lands Committee was solely exercising a customary law function. I also opined that s.7 of the Act did not grant a right of appeal with respect to decisions of the Nauru Lands Committee concerning personalty, the right of appeal being confined to decisions as to land. I invited further submissions on those issues. As I shall discuss, upon re-consideration of those questions, I do not maintain my tentative opinion.

- [95] 1) The Nauru Lands Committee when dealing with the ownership of or rights in respect of land, being Ronwan payments, rentals or other interests that flow from land, is not solely performing a customary function but is also subject to direction by way of statute (the Nauru Lands Committee Act 1956; the Succession, Probate and Administration Act 1976) and Regulation (Administrative Order 3 of 1938).
- 2) Decisions of the Committee affecting the distribution of Ronwan interest payments and other interests arising from the land, such as rentals, are open to appeal under s.7 of the Nauru Lands Committee Act 1956.
- 3) Contrary opinions as to the matters in paragraphs 1 and 2 above, tentatively expressed by me in *Giouba v NLC* and *Agir v NLC*¹⁰ are incorrect¹¹.
- 4) In considering the rights to the distribution of personal property other than property arising from the rights in respect of land, the Nauru Lands Committee is exercising customary law function, subject to the Administrative Order No. 3 of 1938 and the Succession, Probate and Administrative Act 1976. Decisions as to such personal property, such as chattels and cash are not subject to a right of appeal under the Nauru Lands Committee Act 1956.
- 5) The Nauru Lands Committee fell into jurisdictional error in making its Determination as to the Personalty Estate of late Augusta Harris (Life Time Only), which was published in G. N.No. 76/2011 in Government Gazette No.

⁸ [2012] NRSC 14 (31 July 2012)

⁹ The preliminary issue was considered jointly in two appeals: *Giouba v Nauru Lands Committee*; *Agir v Nauru Lands Committee* [2011] NRSC 7. The other appellant *Giouba* subsequently brought proceedings for judicial review on which she succeeded, the Committee's decision being quashed: *Giouba v NLC* and *Alfonso Hartman* [2011] NRSC 23

¹⁰ [2011] NRSC 7

¹¹ Likewise similar statements in *Detamaigo v Demaure* Nauru Law Report 1969-1982 Parts B, 7

14 of 9 February 2011. The determination was a nullity. The plaintiff's application for relief by way of certiorari should be granted. The Determination is hereby quashed.

18. In *Lucy Ika and Others v Nauru Lands Committee and Others*¹² it is stated at pages 7, 8 and 9 as follows:

[Page 7] If, of course the determination is claimed to be wrong in law, then if that is established, it is void 'ab initio' – it never was a lawful determination, and although appealable under section 7, it can also be reviewed at any time by the Supreme Court. Since however s.37(1) of the Succession Probate and Administration Act (supra) allows an estate to be released from the custody of the Curator of Intestate Estates after ascertainment of the beneficiaries (s.37(3)) proceedings by way of review would need to be commenced with that in mind.

After the Curator releases the estate, the land is effectively distributed by gazetting or other order made on appeal or review and personal bequests are transferred to the beneficiaries entitled thereto. This is done by the Curator in whose possession the personal property has been vested.

In the case of intestacy, the provisions of the Administration Order No. 17 of 1938 apply and in law the Committee must observe its requirement and distribute the estate in accordance with that Order.

[Page 8] The Nauru Lands Committee by custom administers the estate firstly by ascertaining the lands of the deceased, their boundaries, the extent of and his interest therein, his beneficiaries and the extent of their interests. Secondly, when that is ascertained, the Committee distributes the estate other than the personal property which has been vested with the Curator of the intestate estate and is distributed by him as aforesaid.

[Page 9] A determination of the Committee ascertaining the land of the deceased estate and his beneficiaries entitled thereto published in the Nauru Gazette as detailed in the above paragraph 2, is a determination of ownership and interests of Nauruan land within the meaning of section 6 of the Nauru Lands Committee Act (supra) and can, accordingly, be appealed against as provided in section 7 of the Act. Insofar as however, as the determination may touch on any interests other than that in respect of land, such determination is not one to which section 6 applies and no right of appeal in respect thereof.

19. In *Temaki v Secretary for Justice and Others*¹³ it is stated at [23], [24] and [25] as follows:

[23] Inherent jurisdiction being the common law of England became the law of Nauru pursuant to s.4(1) of the Custom and Adopted Laws Act 1971.

[24] The 'inherent' jurisdiction¹⁴ and 'supervisory' jurisdiction¹⁵ has now been codified in the Supreme Court Act. S.37 states:

¹² 2/91, 3/91 and 8/91 – decision of Donne CJ

¹³ Miscellaneous Cause 64 of 2014 NRSC 46 Khan, J

Supreme Court Supervisory Jurisdiction

- 1) The Court as the superior Court has the supervisory power and jurisdiction over subordinate or inferior courts and tribunals.
- 2) In the exercise of the supervisory jurisdiction, the Supreme Court shall grant such prerogative reliefs as it deems fit or as prescribed by the rules of the court.
- 3) Where an appeal procedure is provided to appeal a judgement, a decision or order of the subordinate or inferior court or tribunal of the Supreme Court, the only remedy or redress for review of decision of such subordinate court or tribunal is by way of an appeal.

[25] In this matter the plaintiff has not filed an appeal against the decision of the Nauru Lands Committee in respect of G.N. No. 907 12 2 under 2017 but since this Court is seized of this matter, I in exercise of the inherent jurisdiction in the supervisory capacity set aside all the orders made by the Nauru Lands Committee granting ownership of Portion 58 to the second defendants and quash those orders.

IMPORTANT ISSUE

20. The issue of whether Nauru Lands Committee could deal with and determine the personalty estate of a Nauruan who died intestate is an important issue. It has to be determined by the Nauru Court of Appeal to give clarity on that issue. There are two opposing decisions of this Court and for that reason alone I will grant a stay of execution of judgement pending the determination of the appeal.

DATED this 9 day of June 2020

Mohammed Shafiullah Khan
Judge

¹⁴ S.17(k) of the Supreme Court Act 2018

¹⁵ S.37 of the Supreme Court Act 2018