SUPREME COURT OF NAURU
AT YAREN
CIVIL JURISDICTION

Civil Case No. 22 of 2020

BETWEEN

LEILANI GADEANANG Plaintiff

AND

JEFFERY IKA Defendant

Before : Fatiaki CJ

Date of Submissions: 8 July & 10 August 2021 (plaintiff)
26 July & 11 August 2021 (defendant)

Date of Oral Hearing: 12 August, 2021

Date of Judgment : 12 November, 2021

CITATION : Gadeanang v Ika

CATCHWORDS: *"historical origins of consent form" ; "competing consent forms" ; "meaning and effect of a consent form" ; "priority of consent forms" ; "registration of a consent form" ; "different generation of signatories" ; "relevance of intention to build" ; "withdrawal of consent" ; "equitable maxims" ; "waiver and laches".*

LEGISLATION : ss 3, 4 , 6 & 15 Lands Act 1976 ; Laws Repeal and Adopting Ordinance 1922 ;

CASES REFERRED TO : Capelle v Capelle [2018] NRSC 39 ; Demaunga v Deireragea [2017] NRSC 87; Allen v Overseers of Liverpool (1874) LR 9 QB 180 ; ANZ (Vanuatu) Ltd v Gougeon [1999] VUCA 15; Kepae v Jeremiah [2019] NRSC 29 ; Hiram v Solomon [2011] NRSC 25 ; Koroa v Landowners of Portion 15 [2011] NRSC 22 ; Deireragea v Kun [2017] NRSC 35 ; Admur v Dongobir [2018] NRSC 40 ; Kamoriki v Kamoriki Civil Suit No 2 of 2017 ; Harris v Batsuia [2012] NRSC 13 ; Lindsay Petroleum Company v Hurd [1874] UKPC 2 .

APPEARANCES:

Counsel for the Plaintiff : L. Scotty
Counsel for the Defendant : J. Olsson

JUDGMENT

INTRODUCTION

1. This case concerns competing claims by close relatives to the use of a small piece of land in Anibare District known as *"Land Portion 108 Atomaneab"* (**"the disputed land"**). Both the plaintiff and the defendant have provided a *"consent form"* each with more than the requisite minimum percentage of landowner signatures on each form. Each form authorised the named beneficiary to use the disputed land for residential purposes.

2. The plaintiff's *"consent form"* is dated 29 August 2016 , with **77%** of landowner signatures collected over three (3) months between August and November , 2016 as clearly recorded in the form. The form was prepared and verified by Lands Department officials and has been approved by the Acting/Secretary for Land Management.

3. On the other hand , the defendant's *"consent form"* which is clearly older , was signed by persons who are claimed to be the landowners of the disputed land at the time and includes , the plaintiff's grandmother, *"Buramen Edowa (IKA)."* The defendant's form although undated as to the signatures , bears a hand-written date : *"22/05/2020"* and initials , over the official stamp of the Director of Lands & Survey. It contains no verification or approval signatures nor what percentage of landowners signed the form.

THE CLAIM

4. On 6 July 2020 the plaintiff issued proceedings against the defendant *"...for illegal interferences with legitimate authority"*(whatever that means). The plaintiff avers that the disputed land is undivided common land that belongs to the extended *"Ika family"* of which she is a third-generation member and the defendant belongs to a second (older) generation together with the plaintiff's mother.

5. In December 2020 after obtaining the necessary landowner signatures , start-up funds , and official approvals , the plaintiff began clearing , levelling and marking-out works on the disputed land with a view to building the foundation slab for her family home. The defendant stopped the plaintiff's works.

6. Then in May 2021 when the works resumed , the defendant again stopped the works which led to the issuance of the present proceedings together with an inter-partes Motion and affidavit in support , seeking an interlocutory injunction to restrain the defendant from interfering with the plaintiff's building works until the substantive matter is determined by the Court.

7. In her affidavit , the plaintiff confirms that she is the *"biological daughter of Febrina Buramen"* who is a co-owner of the disputed land. That in 2016 , she obtained the written consent (signatures) of a requisite majority of the landowners (**77%**) to build her family's house on the disputed land. After accumulating the necessary funds and materials over four (4) years , the plaintiff began preliminary works to measure and peg-off a suitable site on which to build her house foundation in December 2020.

THE DEFENCE

8. The Statement of Defence was filed on 10 September 2020. In it , the defendant avers that he is the first cousin of the plaintiff's mother. That he has a *"consent form"* signed by 100% of the owners of the disputed land including the plaintiff's father , uncles , and aunts who are all deceased *"except for one"*. The defendant claims that being a *"co-owner"* of the disputed land from a *"higher generation"* than the plaintiff and , being the bearer of a *"consent form"*, he too , possesses *"over-riding rights"* to that of the plaintiff , to use of the disputed land.

9. Whatsmore , his form *"carries more weight"* having been obtained earlier in time and being endorsed by the *"elder landowners of the first generation"* as opposed to the signatories of the plaintiff's form who are mainly sourced from the more recent third and fourth generations and includes , at least one signatory who has subsequently retracted her signature.

10. The defendant also asserts that the plaintiff and her mother knowingly failed to inform the co-owners whose signatures they had obtained on the plaintiff's form , of the potential conflict with the defendant's earlier acquired consent of the then landowners for him to use the disputed land.

11. More specifically , and given the limited area of the disputed land (estimated at : "*50 feet x 75 feet*)" , the defendant claims that he and the plaintiff's mother reached a *"family agreement"* in which *"... the defendant and the plaintiff would fairly share the land with the defendant building near his wife's family land* (which shares a common boundary with part of the disputed land) *and the plaintiff to build on the opposite end"* of the disputed land.

12. If I may so , assuming it is feasible , this *"family agreement"* sounds eminently sensible and reasonable in the circumstances even though the plaintiff was not a party to it. and , the defendant has evinced no clear intention or indeed a need , to commence any construction soon on the disputed land.

13. In summary , the defendant denies deliberately *"interfering with the plaintiff's legitimate authority"* and asserts his own prior *"legitimate authority"* to use the disputed land to the plaintiff and her mother's knowledge. The defendant , in turn , seeks the dismissal of the claim and an injunction restraining the plaintiff from constructing any housing on the disputed land until the matter is finally resolved by the Court.

REPLY TO DEFENCE

14. In her Reply , the plaintiff denies that the defendant had obtained the requisite percentage of consenting landowners insofar as the majority of the co-owners who signed the defendant's *"consent form"* were his own siblings and not unrelated *"arms-length"* owners.

15. The plaintiff denies defrauding or *"hoodwinking"* the landowners who signed her *"consent form"* and claims instead , that the defendant had no real intention of ever building on the disputed land because he has had over twenty (20) years to build but has not done so and

because he now already has *"....many other homesteads for his personal use."* In other words, the defendant was being unfairly acquisitive in acting pre-emptively against more genuinely needy relatives.

16. With the plaintiff's Reply , pleadings were closed and the parties filed ten (10) *"agreed facts"* on 29 June 2021 with a single *"agreed issue"* as follows :

AGREED FACTS

" 1. The land under dispute is Land Portion No. 108 aka Atomoneab , Anibare. It lies on the inner ring of the main road , across from the sand and sea.

2. That the two (2) parties belong to the Ika family.

3. That the Plaintiff's grandmother and the Defendant's biological father were siblings and they are deceased.

4. That the Defendant obtained 100% consent from original owners to use and build a house on the said land portion.

5. That the Plaintiff obtained 77% consent from contemporary owners.

6. That the Plaintiff's grandmother signed consent for the Defendant to use LP108

7. That the only living original owner , Dogadaube , signed the Defendant's consent at the material time , but refused to sign the Plaintiff's consent.

8. That the Defendant was not able to identify another piece of land for the Plaintiff to use and build , therefore the parties agreed to build on opposite ends of the said land.

9. That the Defendant stopped workers carrying out construction on the land.

10. That the Plaintiff received Housing Scheme start-up assistance towards the construction of her house."

AGREED ISSUE :

"Whether the second consent for the Plaintiff superseded the first consent for the Defendant to use and build on LP 108 ? "

17. Given the agreed facts , counsels were ordered on 29 June 2021, to file written submissions on the above issue under appropriate subheadings including :

(a) whether registration determines the validity and priority of a consent Form ? and
(b) what constitutes registration ?

18. The plaintiff filed two (2) written submissions on 8 July and 10 August 2021 , and the defendant filed three (3) response submissions on 26 July and 11 August, 2021. I am grateful for the submissions provided to the Court as well as Counsels' oral submissions on 12 August 2021 at the hearing of the case.

PLAINTIFF SUBMISSIONS

19. Counsel for the plaintiff opened his submissions with an analysis of the signatories on the defendant's *"consent form"* to the effect that most are siblings of the defendant who may have affixed their signatures to the form well after their father Billy Ika's demise in 1985.

Whatsmore , all other signatories are dead except for the defendant's adoptive father Dagadaube Ika who himself is a *"first cousin to the defendant"*. The meaning and relevance of these latter claims concerning the defendant's late *"father"* and *"adoptive father" ,* is not entirely clear.

20. Given that a number of the defendant's signatories had passed away long before the defendant's *"consent form"* was stamped and dated on 22 May 2020 , counsel quaintly submits that the consent Form should be : *"....considered an unfinished historical ancient-relic or a half caste between old and new that does not comply with the Lands Act 1976 and would be of no legal effect."*

21. Somewhat less quaintly and perhaps more realistic , plaintiff's counsel writes :
" .... Evolution of time , generations of beneficiaries , present day circumstances (population growth) *and went* (breakdown of family ties) *have overtaken , the Defendants consent which in simple terms – had missed the bus thereby superseded by the later plaintiff's consent form....."*

22. Counsel also submits that the defendant's consent Form has : *"....no proper government registration endorsed* (on it) *... nor....any endorsements by appropriate official checks and no clear record of final approval by the Secretary for Nauru Land Management...under Section 6 & 15 of the Lands Act 1976."*

23. **Section 6** of the Lands Act provides :

> *"(6) Where the owners of any land have been notified by the Minister under section 5 of any such requirement as is referred to in that section* ***and not less than three-fourths of the owners of that land, both by number and by interest in the title thereto, have executed the instrument granting the lease, easement, wayleave, other right or licence, as the case may be, required,*** *then, if any of the other owners of that land refuses or fails to execute that instrument or is unable by reason of absence from Nauru or physical or legal disability to do so, the Minister shall inform the Cabinet thereof and if the Cabinet is satisfied:*
>
> *(a) that the lease, easement, wayleave, other right or licence is required for a public purpose; and*
>
> *(b) that the refusal or failure of that owner to execute the instrument is unreasonable or, in the case of a person who is absent from Nauru or under a disability, that if he were present in Nauru or not under a disability his refusal or failure to execute the instrument would be unreasonable,*
>
> *it may direct that the instrument is to be executed on behalf of that owner by the public officer nominated under section 15; and the Secretary to the Cabinet shall forthwith send to the public officer nominated under section 15 to execute the instrument or instruments of the class of the instrument a notice in writing under his hand requiring him to execute the instrument on behalf of that owner. "*

24. In this latter regard , plaintiff's counsel submits that based on the *"three-fourths"* requirement in Section 6 of the Lands Act 1976 , the Supreme Court *"....has set the common law ceiling of 75% to be applicable to landowners' consent on coconut land usage to run in tandem with the Statutory Provisions....."*. Unfortunately no particular judgment or *"paclii"* case citation was referred to or drawn to the Courts' attention , as expected.

25. Be that as it may , by way of contrast , the plaintiff's *"consent form"* is *"……endorsed by 77% of living beneficiaries is registered and approved by the Secretary for Land Management on 10 June 2017. It falls within the law as stipulated under the Lands Act 1976 enforced by the decision in the* (unidentified) *case".*

26. I confess to some difficulty in understanding the submission and its relevance to the present case because the long title of the Lands Act reads :

"To repeal the Lands Ordinance 1921-1968 and ***to make new provision for the leasing of land for the purpose of the phosphate industry and other public purposes,*** *and for the removal of trees , crops , soil and sand and the payment of compensation and other moneys."* (my highlighting)

27. I accept that **Section 3** absolutely prohibits and criminalizes the *"inter-vivos"* transfer of any land on Nauru to a *"non-Nauruan".* Similarly, section 3(3) criminalizes the transfer , sale, lease , or grant of any estate or interest in land or any contract or agreement to do any of the aforesaid things , in favour of any non-Nauruan *" without the consent in writing of the President",* and any act done in breach of subsection (3) is also rendered *"..absolutely void and of no effect."*

28. Conversely , **Section 4** comprehensively validates and continues the existence of :

"...all Crown grants , titles , certificates , licenses , orders , appointments , warrants , notifications , seals , registers , memorials , books , records , entries , instruments and generally all acts of authority affected by the Laws Repeal and Adopting Ordinance 1922 which were subsisting or in force immediately before the commencement of this Act shall , …… continue to be valid and to subsist....." (my underlining)

29. Whatsmore , where land is required for *"..the phosphate industry or for any other public purpose.."* , a formal instrument will need to be executed in terms of section 6 by *"....not less than three-fourths (¾) of the owners of the land both by number and by interest in the title thereto…."*.

30. Nowhere in the Lands Act , however , is there any mention either directly or indirectly of dealings (to adopt a neutral term) with commonly-owned land and , specifically , with any requirements to obtain the written *"consent"* of a requisite number or majority percentage of co-owners of the land sought to be dealt with and , how the same is to be evidenced and what use can be made of the land. In short , the Lands Act 1976 does not expressly apply to the disputed land or to the competing *"consent forms"* obtained by the parties to use it. (**see** : *per* Vaai.J in Kepae v Jeremiah [2019] NRSC 29)

31. In the absence of any affidavit evidence from the Nauru Lands Committee (**NLC**) and the Director of Lands and Survey (**DLS**) , plaintiff's counsel writes :

"The Lands and Survey registry records consist of the name of the owner(s) , along with the value of shares , name of the land and portion number , situated in which district , records of phosphate mining leases , Government portions for public purposes , and major showing the boundaries , size and measurements of the land."

32. The Lands and Survey records are earlier derogatorily described in counsel's submission as:

" ...unkempt and at times a frustration to aggrieved landowners' approach to check out their lands..."

33. Counsel also writes about the **Nauru Lands Committee** that :

" ..... (it) *has its own historical land records and customary inheritances. It is empowered under section 6 of the Lands Committee Act 1956 ..... to determine questions as to the ownerships of or rights in respect of , land ..... "*

and later :

"... the Lands Committee maintains the important role of calling up family meetings or putting on field trips for interested people to identify possible boundaries of their land with regards to any undetermined land sites."

34. Specifically , with regards the *"Consent Form"* , Plaintiff's counsel writes without affidavit support :

*"**... The proper process to obtain a 'consent form' is then to approach the Directorate of Lands and Survey** a section operating under the ambit of the Department of Lands Management occupied by a Government Secretary who is head of the Department and directly answerable to the Minister of Lands".*

and later :

*"**.... After circulation to gather endorsement signatures from landowners , it must surpass the three-fourths (¾) criteria of consent set by the Lands Act 1976 and the 75% mark set by the Court** , to receive the Secretary for Land Managements approval. The completed 'consent form' should then pave the way for registration in the offices of the Directorate of Lands and Survey and the Department of Land Management"*

finally, counsel writes :

*"**.. The 'instrument' referred to by the*** (Lands) ***Act is the 'consent form'... It need be noted that even through the practice of the 'consent form' has been in existence and been accepted as a legal process** , there tend to be a drawback where it can develop immoral practices upon execution of signatures where forgeries can be made .... As the process now stands anyone can sign for another co-landowner in his absence and without that other person's knowledge....."* (my highlighting)

DEFENCE SUBMISSIONS

35. From the three (3) submissions provided I extract the relevant passages concerning the *"consent form"* . Here too , the defence has not provided any affidavit(s) from the relevant public institutions and government departments to verify the claims made as follows :

" The consent form is a written agreement between customary landowners **(family members)** ***that gives permission/licence to the applicant to use and build a dwelling/house on a piece of land.***

The applicant is required to first obtain 75% minimum consent of landowners.

The Nauru Lands & Survey Unit of Lands management , issues , assesses , and stores the consent form with the names of landowners , so determined by the Lands Committee, merely reproduced for the consent form.

Unlike the requirements for the determination of landowners , there is no requirement to publish the consent form in the government gazette ; and , the landowners' agreement does not invite appeal to the Supreme Court.

Salient features of the consent form include *:* (i) *minimum 75% consent of landowners* (ii) *consent to be the first obtained before access to land* (iii) *states specific use* (iv) *does not transfer ownership of land* (v) *user is non-transferable* (iv) *individuals can revoke consent* (vii) *there is no consideration* (vii) *does not endow the user exclusive or extensive or inexhaustible rights to the use of the land* (ix) *specifies a particular use to build a house* (x) *applies to both landowner and non-landowner.*

The consent form is at best permission or licence to use the land and does not confer interest let alone interest in a statutory sense. (Capelle v Capelle [2018] NRSC 39 ; ……

The consent form could only be legal in a common law sense and court has power to grant a remedy to a licencee which will protect but not exceed legal rights granted under the licence. [***per*** Blackburn J in Allan v Overseers of Liverpool Inman (1874) LR 9 QR 180]…. "

36. Defence counsel also submits :

"In the present situation , the Defendant is title holder ; and both parties have obtained licence by virtue of consent form to use and build a house on the land. ***It is accepted that where equities are equal, the law prevails ; which in this case the Defendant's statutory rights must prevail."***

37. If I may say so the reference to equity in the above extract fails to articulate another relevant equitable maxim which states :

" Where the equities are equal , the first in time prevails "

(***see*** : the judgment in ANZ (Vanuatu) Ltd v Gougeon [1999] VUCA 15)

38. Accordingly , the plaintiff as the later consent holder has the onus to establish any grounds or inequalities that may exist in his favour and which may be found in another relevant maxim :

" Equity aids the vigilant , not those that slumber on their rights".

39. Later , in criticising the *"consent form"* process , counsel writes :

" ***The 75% minimum requirement is a statutory requirement in section 6 Nauru Lands Act 1976 and which is applicable only to phosphate lands and lands for public purposes via lease and other legal instruments.*** *A public officer is empowered* (section 15 Nauru Lands Act) *to execute the consent of the remaining 25% of landowners who will also receive royalties and rents like the other 75%.*

Again, the principle majority share of customary landowners is disregarded in this consent process.

For family use of land, there is nothing in stature that stipulates 75% consent to apply to approve the use lands to build a house amongst landowners. *The consent form in effect denies 25% of landowners their right to speak on the use of their land.*
Jitoko CJ gave his view on 75% in Darryl Tom v Transome Duburiya [2016] : ***" It is now a generally accepted rule that the majority to three-quarters consent of the landowners if required for a person to use any part of the land , in this case "***

(my highlighting)

40. Finally , defence counsel writes :

" Nauruans identify themselves as customary landowners and the label and practices of owners in common is alien to them.

Registration of shares of landowners becomes evident that it is for the purpose of calculating not only royalties and rents but useful to the Lands & Survey to calculate the 75% consent for consent forms. It is certainly not for identifying customary landowners who may have greater weight in decisions to transfer the use of their lands.

That custom is unwritten does not invalidate land practices that are legitimized by the people it serves ; customary landowners is a dying race…..

In the particular aspect of collective ownership , ***Nauru's land tenure system is described to be "primarily based on the concept of common ownership something akin to tenancy in common. Land is held by individuals as unsevered separate shares of portions of land. It is defined in equal or unequal shares.*** *For example , as between two co-owners of a portion of land , amongst others , one may hold only one-quarter share as compared to the second who holds one-twentieth shares in the same but undivided portion of the land.* ***The law does not recognise any exclusive right of claim to any particular part , section or plot of the land ; nor does it grade their priority of right of use in terms of their portions of shares. Having a bigger portion of land does not necessarily entitle one to first claim over any particular section of the portion."***

The above description is erroneous and it opposes the claim of customary landowners that the owner with the greater share in a piece of land has right to greater weight in decision making as to the usufruct use of the land ……

In Capelle v Capelle [2018] , the defendant held majority shares of 25% in the land while the plaintiff had neither title nor equitable interest in the land portion , but only a license through a consent form. ***The Court was of the view it has ample power to grant a remedy to a licence which will protect but not exceed his legal rights granted under the licence…."***

CONSIDERATION & DECISION

41. Although there were **no** affidavits filed by the parties from the Nauru Lands Committee or from the Lands and Survey Department explaining the origin , use , and purpose of a *"consent form"* and the processing of it , I have been assisted by the following passage that I have extracted from the judgment of Vaai. J in Capelle v Capelle (*op.cit*) where he observes (**at paras 16 to 24**) :

" 75% Consent and the Majority rule

Counsel for the defendant in his oral submissions discussed and criticized the majority rule concerning the landowner's written consent which is required by those who wish to use, work or deal with the land.

On a number of occasions he emphasized the custom of discussion, mediation and reconciliation which played an important role in Nauru society which therefore makes consent form unnecessary.
Unfortunately as he developed his argument he tended to contradict himself and the submissions become confusing and difficult to follow and understand.

He did emphasise however that the plaintiff should never have been allowed to initiate these proceedings and obtain an interim injunction against his brother without consulting and liaising with the brother.

The interim injunction however was granted in June 2016 and there has been no attempts of reconciliation or negotiation but several incidents of intimidation and confrontational conduct by the defendant.

It is plainly apparent that the defendant wants the plaintiff to dismantle the garage.
The majority rule as counsels agree has been in existence since the Housing Scheme was introduced under the Nauru Housing Act 1957. If all landowners were required to give their written consent the Housing Scheme would have been a failure.

The consent form was accordingly drafted giving permission to use the land only but not to create or grant interests in the land.

It is a modification of the English common law which requires all land the owners of a particular land to consent. Accordingly it has been termed as customary law.

While counsel for the defendant agreed with the majority rule as discussed in paragraph 20 above he objected to the 75% bench mark which was introduced by section 6 Lands Act 1976. He is quite correct that the 75% figure was introduced by the 1976 legislation

Crulci J acknowledged that in her judgment in Deireragea v Kun (3). She states at paragraph 49 :

'I consider that the Lands Act 1976 where section 6 refers to a requirement of no less than three fourths of the land needing to give their permission in respect of granting of a lease or other license, as the basis for consolidating the legal requirement that three fourths or 75% of the land owners need to agree in relation to the land.'

Counsel however contended that the other 25% which did not give their written consent (following the formula in the 1976 Legislation) must still be consulted or considered. Again this contradicts what he conceded to that the majority rule introduced by the Lands Committee to facilitate the building of houses under the Nauru Housing Act was widely accepted as customary law since 1957.

This majority rule has been in place and judicially recognized. In Harris v Batsiua for instance, Eames CJ dealt with a bitter dispute amongst members of a family over the occupation of a house which was then occupied by the plaintiff and his family. He said at paragraph 12 :

"The plaintiff is one such landowner, having a 1/3 interest. He may well occupy the house under a tenancy at will, in which case a majority of landowners may well have a right to terminate his tenancy, if it exists."

Since <u>Deireragea v Kun</u>, the majority rule has since been accepted as the 75% majority rule.

The Lands Committee as an institution under the customs and Adopted Laws Act 1971 has adopted 75% as the benchmark for the majority required of the landowners to agree in relation to the land. Its consent form is accordingly worded and formatted to reflect it."
(my highlighting)

42. Likewise , Khan J in <u>Capelle & Partner Pacific Occidental v Tom</u> [2019] NRSC 17 referred to relevant extracts from the judgments in the following five (5) cases :

(1) <u>Hiram v Solomon</u> [2011] NRSC 25 (*Eames CJ*)
(2) <u>Koroa v Landowners of Portion 15</u> [2011] NRSC 22 (*Eames CJ*)
(3) <u>Deireragea v Kun</u> [2017] NRSC 35 (*Crulci J*)
(4) <u>Admur v Dongobir</u> [2018] NRSC 40 (*Jitoko CJ*)
(5) <u>Ramanmada Kamoriki v Sharon Sio Kamoriki and other</u> Civil Suit No 2 of 2017 (*Vaai.J*)

and said (**at para 27**) :

"as can be seen from the cases discussed above that 75% or more of the landowners need to give their approval/consent to constitute the majority and once 75% give their consent/approval then it has effect of binding the remaining 25%. ***This has been the practice in this country and that practice has to be followed to provide certainty and continuity , unless of course that practice is changed by*** (the) ***legislature"***

43. Finally , I refer to the observations of Jitoko CJ in <u>Tom v Duburiya</u> [2016] Civil suit 89/2015 delivered 26 August 2016 (unreported) where he said (**at pp 4/5**) :

" Finally , the issue of consent of landowners was raised by Counsel for the plaintiff arguing that there is no law that requires a majority of 75% of landowners for a person to use or build on any land on the island. *The nearest comparison one can come to is the exercise of the Governments' prerogative to acquire land for public purpose under the Lands Act 1976. Section 6 …… stipulate that procedure to be adopted by the Government when it requires , through lease or licence to acquire land after having obtained three-fourths of the land owners consent.* ***A similar process can be applied to that of …… a landowner wishing to utilize a part of Portion 135 that is commonly held*** **(undivided)** ***and commonly owned*** **(in unequal shares).** ***Given the complexity of the land tenure system , to require a 100% landowners'' consent , …… as contended for by the plaintiff , is almost asking for the impossible.*** *In my view the formula and procedure adopted under section 6 ……. acknowledge this difficulty and at the same time also lays recognition to the practice long established by customs and customary law of the people of Nauru and that is the use of commonly -owned land was by a consultative process but ultimately decided by the consensus of the co-owner of property.* ***Consensus here means general agreement not necessarily unanimity. It is now a generally accepted rule that the majority to three-quarters (¾) consent of the landowner is required for a person to use any part of the land…."*** (my highlighting)

44. In light of the foregoing it would be nigh impossible now , for the Court, to seek to undermine , reverse , or overturn the generally accepted rule and practice that has developed around the existence and use of the *"consent form"* as an integral, foundational document in obtaining authority from landowners to use their land for residential purposes by Nauruan individuals.

45. Having said that , there is not the slightest doubt in my mind that the *"consent form"* can and needs to be improved to clarify its limitations that have been highlighted and exposed in the numerous land cases that have been instituted over the past decades.

46. In this latter regard , the customary land tenure of Nauru has been described as :

".... based on the concept of common ownership. ***Land is owned by individuals in common with others. They have rights over the whole land even although they hold only a portion or part of it.*** *This is because their rights of ownership are undivided , that is , they cannot be separated from the whole. This is normally referred to as the 'unity of title...'*

In my respectful view the presumption that the family agreement subsists and binds future interested parties is not supported by the law. *The nature of land ownership on Nauru will not allow the possible perpetual alienation of the common ownership of land in favour of a particular family or person" (****per*** Jitoko CJ in Adumur v Dongobir [2018] NRSC 40)

47. As for competing '*consent forms*' , Vaai. J said :

"it is also common ground that the rights to use the land owned by a number of co-tenants, can only be obtained through the consent of the majority of all the co-owners ..... the plaintiff did not consent to the defendant building on the spot assigned to the plaintiff ..... The equitable doctrine of unjust enrichment comes into play. ***Contrary to the contention by the defendant the consent granted to her by the landowners does not rival the consent granted earlier to the plaintiff. Both consent forms allowed both the plaintiff and defendant to occupy the land.***

the Law does not recognize any exclusive right of claim to any particular part , section or plot of the portion of the land ; nor does it grade their priority of rights of use in terms of their portion of shares. *Having a bigger share in a portion of land does not necessarily entitle one to first claim over any particular section of the portion. The right to use can only be obtained through the consent of the majority of all the co-owners of the portion."* (***see*** : Demaunga v Deireragea [2017] NRSC 87).

48. In the present case however , although both parties have a signed *"consent form"* with the requisite minimum percentage of landowners , It is common ground that the disputed land area is unable to accommodate two (2) residential dwellings. It is therefore necessary to consider and determine as between the competing parties , who has the better equity ?

49. In this regard the Lord Vice-Chancellor Kindersley in Rice v Rice (1853) 61 ER 646 in discussing the principles applicable to competing equities and the effect of priority in point of time said (at p **648**) :

"To lay down the rule ..... with perfect accuracy , I think it should be stated in some such form as this : ***'as between persons having only equitable interests , if their equities are in all other respects equal , priority of time gives the better equity ; or qui prior est tempore portion est tempore portion est jure'.....***

I think the meaning (of the rule) *is this :*
That in a contest between persons having only equitable interests , priority of time is the ground of preference last resorted to , ***ie*** *, that* ***a Court of Equity will not prefer the one to the other , on the mere ground of priority of time , until it finds upon an examination of their relative merits that there is no sufficient ground of preference between them*** *or in*

other words , that their equities are in all other respects equal ; and that if the one has on other grounds a better equity than the other , priority of time is immaterial.

In examining into the relative merits (*or equities*) *of two parties having adverse equitable interests ,* ***the points to which the court must direct its attention are obviously these : the nature and condition of their respective equitable interests , the circumstances and manner of its acquisition , and the whole conduct of each party with respect thereto*** *: And in examining into these points it must apply the test , ...* (namely)*.... the same broad principles of right and justice which a Court of Equity applies universally in deciding upon contested rights. "*

50. In this latter regard , the Privy Council restated the relevant principle in Abigail v Lapin (1934) AC 491 as follows (at p **504**) :

".... it is now clearly established that prima facie priority in time will decide the matter unless , as laid down by Lord Cairns LC in Shropshire Union Railways v The Queen LR 7 HL 496 , that which is relied on to take away the pre-existing equitable title can be shown to be something tangible and distinct having grave and strong effect to accomplish the purpose..... ***the conduct of the parties having the equitable interests and all the circumstances must be taken into consideration in order to determine which has the better equity."***

and later :

" Apart from priority in time ***the test for ascertaining which encumbrancer has the better equity must be whether either has been guilty of some act or default which prejudices his claim ; ……"***

51. In Lapins' case the Privy Council in agreeing to the postponement of the earlier equity in time agreed with Gavan Duffy and Stake JJ of the High Court of Australia where they opined in their joint judgment (set out at p 499 as follows) :

".... The Lapins are bound by the natural consequences of their acts in arming (a third party) *with the power to go into the world as the absolute owner of the lands and thus execute transfers or mortgages of the land to other persons , and they ought to be postponed to the equitable rights of Abigail……"*

52. So too , in the present case although the defendant did nothing in the sense of *"arming"* anyone , his prolonged inactivity in not building or doing anything on the disputed land after having obtained a consent to build and his omission in not filing or lodging the same for registration and processing by the relevant authorities , gives rise to a representation that he is no longer interested in building on the disputed land and that he will not seek to enforce his *"consent form"* against any other consent holder building on the disputed land.

53. In similar vein , the Privy Council said in Lindsay Petroleum Company v Hurd [1874] UKPC 2:

".... the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically ***unjust to give a remedy , either because the party has , by his conduct , done that which might fairly be regarded as equivalent to a waiver of it , or where by his conduct and neglect he has*** *, though perhaps not waiving that remedy ,* ***yet put the other party in a situation in which it would not be reasonable to place him*** *if the remedy were afterwards to be asserted , in either of these cases , lapse of time and delay is most material."*
and later :

"Two circumstances , always important in such cases , are , ***the length of the delay , and the nature of the acts done during the interval , which might affect either party*** *and cause a balance of justice or injustice in taking the one course or the other so far as relates to the remedy."* (my highlighting)

54. In this particular regard plaintiffs counsel submits without dispute or denial , concerning the fourteen (14) named signatories to the defendant undated *"consent form"* as follows:

" The family connection to the defendant , date of death and age of some of the original signatories to his consent form , from family records are : ***(a) Adion Ika*** (uncle) *died 13th Nov 1988 ,aged 69 years ;* ***(b) Edouwa Buraman*** (auntie and grandmother to plaintiff) *died 5th September, 2002 , aged 79 yrs.* ***(c) Beiyoun Ika*** (uncle) *died 15 December 2007 , aged 76 years.* ***(d) Dogodag Ika's*** *data is unknown."*

additionally :

*"..... **Dagadaube Ika*** (first cousin to defendant) *is now very old and sickly .... and who adopted the Defendant as his only child"* and finally *"……*(the defendant's father) ***Billy Ika's*** *demise in 1958 at age 58"*.

55. It is clear from the foregoing undisputed facts and computing from the earliest date of death , that the defendant's *"consent form"* would be at least 23 years old since it was signed. In all that time until the present day , the defendant has not cleared , pegged, or built a foundation or house on the disputed land as he was authorized to do.

56. As for *"the acts done during the interval"* and by way of contrast with the defendants' inactivity , the plaintiff has gone to the trouble over several months , of obtaining the necessary signatures of 77% of the landowners of the disputed land to her *"consent form"* as well as securing its endorsement and registration by the relevant authorities.

57. In addition , the plaintiff and her family who were living out of rented accommodation as a *"single-income"* family, have had to save for over four (4) years to acquire some building materials and awaited her turn for assistance from the Government housing scheme in order to begin marking out the area on the disputed land to build her house foundation.

58. The plaintiff's equity is also assisted in my view , by some of the short-comings in the *"consent form"* as follows :

- The *"consent form"* although commonly described as such , does **not** say within its body that consent is given by the signatories , rather , the form says : *"we have no objection…."* which is , strictly speaking , not the same as affirmatively , giving consent ;
- The *"consent form"* does **not** have any sketch or survey plan attached to it identifying the particular land portion referred to or the specific site or area approved to the grantee of the *"consent form"* to erect his/her house nor is there a narrative description of the same ;
- The *"consent form"* does **not** clearly state that it is valid for only one (1) house or residential dwelling or alternatively , that no more than a single house is authorised by it ;
- The *"consent form"* does **not** exclude a house extension(s) or a water tank site and carport which latter two improvements might be considered as normal ancillary attachments to a residential dwelling ;

- The *"consent form"* does **not** have an expiry term or date as it should have , such as , *"within five (5) years* ;
- The *"consent form"* does **not** clarify the maximum number of bedrooms or maximum floor area that is approved for the dwelling house ;
- The *"consent form"* does **not** in terms prohibit the obtaining or registration of another *"consent form"* over the same land and during the validity and duration of a subsisting *"consent form"* ;
- There is no legislative or administrative requirement to publish a duly completed and registered *"consent form"* in the Gazette. ;

59. In light of the foregoing , the defendants' earlier equitable interest in the disputed land is postponed to the later equitable interest of the plaintiff.

60. Accordingly , the Court grants a permanent injunction against the defendant as follows :

" The defendant , his servants and agents are restrained from further interfering directly or indirectly with the construction of the plaintiff's house on the disputed land."

61. Standard costs are summarily assessed at $1000 payable to the plaintiff within thirty (30) days.

DATED : this 12th day of November , 2021

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D.V.FATIAKI
Chief Justice