IN THE NAURU COURT OF APPEAL
AT YAREN
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 2 of 2019
Supreme Court Land Appeal Case No. 76 of 2016

BETWEEN

LETIMA ADIRE and MITCHUM SOLOMON

APPELLANTS

AND

WIRAM WIRAM, TAMANEAK BATSIUA, ENRICO SOLOMON and CORRIN SOLOMON

RESPONDENTS

AND

NAURU LANDS COMMITTEE

AMICUS CURIAE

BEFORE:	**Justice R. Wimalasena,** **President** **Justice Sir A. Palmer** **Justice P. De Silva**
DATE OF HEARING:	**31 October 2023**
DATE OF JUDGMENT:	**28 June 2024**
CITATION:	**Letima Adire & Ors v Wiram** **Wiram & Ors**
KEYWORDS:	Appeal from Nauru Land Committee decision; personalty estate and realty estate; objects erected on land under the common law; can objects erected on land be severed from land at common law; degree of annexation and purpose of annexation; objective intention; objects erected on co-owned land; alteration of common law; can common law be altered in Nauru; customs to be accorded recognition by courts; customs be abolished, altered or limited by legislation; definition of land; finality of NLC decision if not appealed
LEGISLATION:	Nauru Land Committee Act 1956; Magistrate's Court Act of Tonga; Lands Act of Tonga; Lands Act 1976 of Nauru; Customs and Adopted Laws Act 1971; Constitution of Nauru; Sea Boundary Act 1977; Nauru Housing Ordinance 1957; Regulations Governing Intestate Estates 1938 (Administration Order No 3 of 1938); Interpretation Act 2011; Nauru Court of Appeal Act 2018
CASE CITED:	Cook v Fritz [2013] NRSC 2; Kolo v Bank of Tonga [1997] Tonga LR 181 (7 August 1998); Bank of Tonga v Paea He Lotu Kolo Civil No 1019/92 dated 21 April 1995;TongavVaka'uta19/91;Mangisi v Koloamatangi [1999] TOCA 9; CA 11 1998 (23 July 1999); Cowley v Tourist Services Ha'pai Limited [2001]

TOCA 5; CA 27 2000 (27 July 2001); Niu v Takealava [2013] TOCA 2; AC 15 of 2012 (17 April 2013); Lopeti v. Lopeti [2022] TOLC 7; LA 7 of 2019 (27 October 2022); Dive and Fly Samoa Ltd v. Schmidt [2005] WSSC 40 (22 December 2005); Elitise v. Lutuiloa [2018] WSSC 52 (6 April 2018); Itimwemwe v. Tekina [1997] KICA 24; Land Appeal 04 of 1996 (25 March 1997); Noel v Toto [1995] VUSC 3; Civil Case 018 of 1994 (19 April 1995); Holland v Hodgson (1872) LR 7CP 328; Deireragea v Adun [2015] NRSC 10; Eobob v Amandus [2018] NRSC 38; Haris v Batsiua [2012] NRSC 13; Tsiode v Adeang [2021] NRCA 3; Civil Appeal 07 of 2020 (19 November 2021); Palumberi v Palumberi (1986) NSW ConvR 593; Agripower Barabba Pty Ltd v Blomfield [2015] NSWCA 30; May v Ceedive Pty Ltd [2006] NSWCA 369; Elitestone Ltd v Morris [1997] 2 All ER 513; Aliklik v Nauru Lands Committee [2013] NRSC 8 (19 June 2013); Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd, [1970] 2 All ER 871

APPEARANCES:

COUNSEL FOR the Appellants:	**Mr. V Clodumar**
COUNSEL FOR the Respondents:	**Mr. R Tagivakatini**
COUNSEL FOR the Amicus Curiae:	**Ms. B Narayan**

JUDGMENT

1. This is an appeal against the final judgment of the Supreme Court delivered on 7 November 2018. The Supreme Court judgment relates to an appeal on a decision made by the Nauru Lands Committee (NLC) concerning the personal

estate of Irene Wiram, who passed away on 15 May 2016. The decision of the NLC, which was appealed to the Supreme Court, was published in Gazette No. 592/2016 on 20 July 2016. According to that NLC decision the personal estate of the late Irene Wiram, namely all monies, rentals, and royalties were divided among the beneficiaries in 1/8 shares.

Background

2. The late Irene Wiram had eight children who were the beneficiaries in the NLC determination. She passed away intestate, leaving her shares of ownership in 17 lands. Irene Wiram had two marriages and an additional relationship in between. Her first marriage to Ricardo Solomon produced five children: Rykers Solomon, Corina Solomon, Enrico Solomon, Mitchum Solomon, and Richene Kam (nee Solomon). Following her separation from Ricardo, she entered into a relationship, resulting in the birth of her daughter, Letima Adire. Irene's second marriage was with Tamoa Wiram, with whom she had two children, Wiram Wiram and Tamaneak Batsiua (nee Wiram).

3. After the demise of Irene Wiram, the eight children went before the NLC seeking distribution of her intestate estate. On 02 June 2016 and 06 June 2016, they had meetings with the NLC but could not agree on two of the properties. On 6 July 2016, the NLC held an unscheduled meeting attended by Letima Adire and Mitchum Solomon, in the absence of the other children. The NLC informed them that they had made a decision to distribute all real and personal property equally among the children pursuant to Administration Order 38, 3(c). Accordingly, on 20 July 2016, the NLC's decision on the personal estate of Irene Wiram was published in Gazette No. 592/2016, and the decision on the distribution of the lands owned by the late Irene Wiram was published in Gazette No. 595/2016.

4. There was no dispute regarding how the shares were divided among the eight children concerning the 17 lands that comprised the realty estate, as published in Gazette No. 595/2016. Consequently, no appeal was filed regarding Gazette

No. 595/2016. The dispute arose only in respect of the personalty estate, involving rental money from two buildings located on Portion No. 165 Ataro in the Menang District (Portion 165).

Appeal in the Supreme Court

5. On 09 August 2016, Tamaneak Batsiua, Wiram Wiram, Enrico Solomon, and Corina Solomon filed a notice of appeal in the Supreme Court seeking to challenge the decision of the NLC regarding the personalty estate, as published in Gazette No. 592/2016. They named the NLC as the first respondent and Letima Adare, Mitchum Solomon, Richene Kam, and the Estate of Rykers Solomon as the second respondents. Later, on 09 June 2017, an amended notice of appeal was filed with the following grounds, seeking, among other things, that Gazette No. 592/2016 concerning the personalty estate be quashed and the matter remitted to the NLC for redetermination:

> "2.1 That the First Respondent erred in law and in fact when it held a meeting on 6th July 2016 with Letima Adire and Mitchum Solomon of the Second Respondents without giving any prior notice of the meeting to the Appellants and possibly other beneficiaries.
>
> 2.2 That the First Respondent erred in law and in fact when it did not call for another meeting after 6th July 2016 to properly accommodate and further hear all the beneficiaries as it usually does for other family meetings.
>
> 2.3 That the First Respondent erred in law and in fact when it decided that equal shares in the personal estate was to be shared equally when the wording of Section 3(c) of the Administration Order of 1938 is restricted to land not property.

2.4 That the First Respondent erred in law and in fact when it made a decision that did not reflect the views and opinions of all of the beneficiaries.

2.5 That the First Respondent erred in fact when it failed to facilitate a proper investigation of the individual and actual personal estate of the late Irene Wiram during the estate/family meetings.

2.6 That the First Respondent erred in law and in fact when it did not specify and/or itemize the individual and actual personal estate belonging to the late Irene Wiram during its meeting(s) with the Appellants and Second Respondents.

2.7 That the First Respondent erred in law and in fact when it did not specify and/or itemize the individual and actual personal estate belonging to the late Irene Wiram in the gazette.

2.8 That because the Frist Respondent failed to specify the individual and actual personal estate in its meetings and in the gazette, Wiram Wiram and Tamaneak Batsiua's respective and/or collective properties have now been included as part of the estate of late Irene Wiram.

2.9 That the Appellants further reserves the right to add or amend the grounds of appeal."

6. Portion 165 is one of the 17 lands in which the late Irene Wiram had shares. According to the agreed facts filed in the Supreme Court by the parties, the following buildings existed on Portion 165 at the time of Irene Wiram's death:

   a. Family House (Tamaneak and Mitchum occupying)
   b. Residential Property (HK Logistics occupying) - Disputed
   c. Residential Property (Mitchum Solomon)
   d. Commercial Building (I' Capital Restaurant and Salvage Store) - Disputed

7. Wiram Wiram, claimed the rental income from the HK Logistics property. The rental income from the restaurant and the salvage store was claimed in equal shares by Wiram Wiram and Tamaneak Batsiua.

8. Consequently, the Supreme Court decided to hear the appeal *de novo* and evidence was adduced on behalf of the Appellants and Respondents. In paragraph 22 of the Supreme Court judgment the learned judge noted that appeals under section 7 of the NLC Act is by way of re-hearing *de novo* and substantiated his Honour's decision to do so, by referring to Cook v Fritz [2013] NRSC 2.

9. Accordingly, the Supreme Court made the following orders in its judgment dated 07 November 2018, upon hearing the evidence of the parties:

> "66. I therefore declare that:
>
> 1) The house built by Mitchum Solomon is his personal property;
> 2) The HKL Building is the personal property of Wiram Wiram;
> 3) That the 2 commercial properties are the personal property of Wiram Wiram and Tamaneak Batsiua – the green restaurant names "I's Capital" is the property of Wiram Wiram and the blue shop is the personal property of Tamaneak Batsiua;
> 4) The main house or the family house shall belong to all 8 children of the deceased. I note that Tamanaek Batsiua is in occupation and in the event of the need by any of the children of the deceased she is to provide them shelter therein.
>
> 67. Since the HKL Building and the stores are rented, the other co-owners may be entitled to occupation rent but they will only be able to do so upon compensating them for the improvements they

carried out. I note that Wiram Wiram's share in Portion 165 has been enlarged to 27% of 2,444.84 square meters when David Dengea and Darcy Deigaeruk gave their 1/8th share to him (see Gazette Notice No. 884/2016 dated 4 November 2016).

69. I order that the injunction orders made on 23 September 2016 shall be dissolved and all the monies held by the Court in respect of the HKL Building be paid to Wiram Wiram and Tamaneak Batsiua in the shares as stated in paragraph [66] and subparagraph 3 above".

Appeal to the Nauru Court of Appeal

10. Aggrieved by the Supreme Court judgment, Letima Adire and Mitchum Solomon filed a notice of appeal with one ground of appeal, naming Wiram Wiram, Tamaneak Batsiua, Enrico Solomon, and Corina Solomon as the Respondents. Later, a supplementary notice of appeal was filed on 12 October 2021, adding grounds 2 to 6. The grounds of appeal advanced by the Appellants are as follows:

> "1. That the learned judge erred in law in holding that the common law of Nauru, a house is a personal as opposed to real property (chattel real) at paragraph 55 of the Judgment.
>
> 2. That the learned Judge erred in law when he altered the English common law applicable to Nauru that fixtures are (chattel real) part of the land and made chattel real as part of personal property which is repugnant to or inconsistent with Nauruan custom. (para 51 of judgment)
>
> 3. That the learned Judge lacked jurisdiction by going beyond the subject matter of the appeal by altering the common law of Nauru

that recognized fixtures as part of the land. (para 50 and 51 of the judgment)

4. That the learned Judge erred in fact as to the crux of the matter before the Court and therefore made erroneous decisions in respect of the properties in question. (para 47 of the judgment)

5. The learned judge erred in fact when he stated that there was agreement between Irene Wiram and Wiram Wiram and Tamaneak Batsiua that after her death, Wiram and his sister Tamaneak would take all the rents on the store and restaurant and therefore made an erroneous decision in regards to the rent from the two properties. (par 30)

6. The learned judge erred in fact as to the reason why the house occupied by Wiram and his family was rented to HKL and therefore made an erroneous decision in regard to the rent from the property. (par 38)"

11. At the outset, it should be noted that although the phrase "chattel real" is used within brackets to identify fixtures on real property in the first and second grounds of appeal, the learned counsel for the Appellants conceded that this was due to a misreading of the definition of "chattel real." He accepted the submissions by the *amicus curiae* regarding the misapplication of the phrase. Hence, I find that this does not affect the grounds of appeal, as it is clear that the Appellants were referring to fixtures on real property in their grounds of appeal.

12. On 06 May 2022, the Court ordered the Solicitor General to be made *amicus curiae*, as the NLC was a party to the appeal in the Supreme Court. Consequently, the learned Solicitor General, appeared in this appeal as *amicus curiae* representing the NLC. The Appellants, Respondents, and the *amicus curiae* filed their written submissions, and the parties were heard during the appeal hearing. The main issue argued by the parties revolves around whether

a house or building forms part of the land or can be considered personalty under common law. In this regard the NLC made extensive submissions.

Submissions by the NLC

13. In paragraph 55 of the judgment of the Supreme Court, the learned judge made a finding that:

> "I accept that when a co-owner as a tenant in common builds a house or structure on a property owned by other tenants in common that particular structure or house is a personal property of the co-owner".

14. The finding of the learned judge seems to be largely persuaded by the submissions made on behalf of the NLC. The learned Solicitor General, appearing as *amicus curiae* in the present appeal, invited this court to consider the submissions made on behalf of the NLC in the Supreme Court, in addition to the submissions made before this Court. The *amicus curiae* asserted that the general common law principle that houses securely fixed to the ground are part of the land should be altered to cater to the circumstances in Nauru. It was argued that such houses should be severed from the land and considered personal property. Furthermore, the Respondents of this appeal also argued that the learned judge did not err by making a finding that a structure or house built by a co-owner is the personal property of the co-owner. In contrast, the Appellants argued that it is inconsistent with common law to consider houses as personal property.

15. In the Supreme Court, the NLC argued that the principles of common law might not be applicable in Nauru concerning land ownership and its transfer across generations. The NLC's submissions were premised on the unique situation in Nauru, where land portions are relatively small and typically co-owned by multiple individuals. It was pointed out that if a person wants to buy a house, they must also purchase the land it is built on. The NLC emphasized

that it is rare for lands to be divided and given to a single person. In their submissions, the NLC discussed the complexities of land ownership in Nauru, where they raised the issue of what happens when one sibling builds a residence on communal land with the consent of the parent owning the land. They questioned whether such a house should belong to all siblings once the parent dies, considering the customary practice in Nauru where extended families often live together on communal land. The NLC suggested that the Court should consider these customs and historical practices to find a solution that respects the co-existence of extended families. They also highlighted the added complication of commercial buildings owned by a sibling with the parent's permission on communal land, posing a prevalent issue in Nauru. The submissions filed on behalf of NLC in the Supreme Court discussed these issues in paragraph 30 as follows:

> " The next hard but real question is what happens to the parcel of land over which one of the siblings builds his or her residence with the consent or approval of the parent owning that land. During the lifetime of the parent, the other siblings do not question the building of the house as they do not have any right over it. This is a customary practise in Nauru. Rarely the land is divided and given to any one person. The question is *"does such a house belongs to all the siblings once the parent dies?"* That would be a reasonable conclusion to draw if a house is treated as a fixture over a parcel of land with undivided shares as to the land. *"However, does this reflect the customary or more closer the co-existence of extended families in Nauru?"* Extended families living in one house or place are customary in Nauru. Should this be disturbed, or the Court must accept this to find a solution which is palatable and conforms to the custom and historical co-existence of extended families. In this submission, another complication is added where commercial building and operation exists and is owned by a sibling (*permission granted by the parent*) over a communal land. *How when what should the court do in such circumstance which is again becoming a prevalent situation in Nauru?"*

16. Therefore, it was proposed on behalf of the NLC that "anything attached to the land, irrespective of how firm or permanence, they are to be treated as chattels and personal property" as a solution and it was argued that it will be consistent with the written laws of Nauru. Furthermore, it was submitted in paragraph 32 of the written submissions filed in the Supreme Court that:

> "the Court in construing ownership of land after the death of a parent must recognize and give precedence to:-
>
> (a) Every Nauruan shall be entitled to a house.
>
> (b) The fact that land is hardly sold or purchased, every member of a family is at least entitled to a parcel or piece of community owned undivided share of land to build a house for living purpose."

17. The written submissions filed by the NLC in the Supreme Court contain lengthy arguments on how the Court should consider this issue in relation to residential and commercial properties. In paragraph 33 of these submissions, the following suggestion was made regarding residential properties:

> "Due to lack of any specific written law, as a general rule, it is submitted that this court must lay down a general rule that every family member who has vested or contingent beneficial interest in the undivided communal land has a right to a piece of land of reasonable size to build his or her residential purposes to accommodate his or her family. It is stressed for "residential purposes". This piece of land will still be communally owned but the occupant of the same shall not be liable to pay any rent for the space. The rationale for this is straightforward. If every family is recognized to have a right to build his or her residence on the communal land, all will be building houses on each other's undivided shares respectively. This will set-off any claims for rent amongst co-owners."

18. It appears that the NLC's submissions do not merely propose treating a residential house as personal property severed from the land but also emphasize the recognition of an entitlement for every family member to be allocated a "piece of land of reasonable size" to build a residential house. Furthermore, the following solution was proposed in paragraph 36 of the written submissions filed in the Supreme Court on behalf of the NLC concerning commercial buildings:

> "In summary commercial building or business will be as follows:-
> (a) In case of intestate estate, the land belongs to all the close relatives as provided for in the regulations governing intestate estates 1938.
> (b) The commercial buildings or business on such land must be treated as personal property.
> (c) Where the parents own the commercial buildings or business activities, it shall be divided to the siblings in equal shares unless the same as disposed testate.
> (d) Where a commercial building or business activity is owned by a sibling and has been so during the lifetime of their parents the property remains the personal property of the particular sibling. For avoidance of doubt the subject property does not fall to be part of the estate. Equally he or she will receive all income or rent from such property.
> (e) Since the land belongs communally as tenants in common in undivided shares, the siblings as co-owners may seek the owner of such business activity or building to pay rent for the use of the land. The members may agree to land rent or use the statutory land rates. The business or building operator will be a tenant for his of land and for other siblings. Thus the rent is to be proportionately distributed to all the landowners including the owner of the business as he or she will also have a share."

19. Undoubtedly, the proposals made on behalf of the NLC are grounded in compelling justifications that reflect the evolving needs of Nauruan society. As articulated by the learned Solicitor General, there is an undeniable necessity to craft legal frameworks that meet modern socio-economic demands. The existing laws do not sufficiently address these evolving demands, creating uncertainty around the ownership of properties by co-owners on communal lands. It is clear that this ambiguity in property ownership does not encourage investment in residential or commercial properties. To foster a thriving and dynamic economy and enhance the well-being of family units, it is essential to reform laws to cater to modern-day demands. There is no doubt that, as asserted on behalf of the NLC, such changes will invariably incentivize individuals to invest in building homes and commercial buildings, which are crucial for catalyzing socio-economic progress. Reducing disputes over property ownership and creating certainty will also enable individuals to secure their family's future and contribute to broader economic vitality.

At common law can fixtures be severed from land?

20. The *amicus curiae,* as well as the Respondents, relied on several decisions from Tonga and Samoa to support the assertion that a house built on communal land is not considered part of the land. I have considered those judgments, along with others from the region, which have discussed matters related to this issue. This court was invited to consider Kolo v Bank of Tonga [1997] Tonga LR 181 (7 August 1998), where the Tongan Court of Appeal held that in Tonga, buildings are generally regarded as items of personal property rather than accreting to the land and thus forming part of the realty. Interestingly, Tongan Court of Appeal also noted that the possible implications have not yet been fully explored and highlighted the potential need for their resolution through the gradual development of Tonga's legal system on a case-by-case basis, as mentioned on page 183:

"Clause 90 of the Constitution reserves to the Land Court, and on appeal to the Privy Council, "cases concerning titles to land". Thus the appellant's argument raises a constitutional question of great importance. The Constitution directs attention to "titles to land", rather than to the incidents of the possession of land. In commercial practice, that is how the constitutional limitation has been understood. Buildings as Ward CJ pointed out in the judgment to which reference has already been made, have been regarded items of personal property rather than as forming part of the realty. Because of the Constitution of Tonga, and because of Tonga's traditions, the intricate law of fixtures and of accretions to land which applies elsewhere is not wholly appropriate to Tonga. Although all the implications have not yet been worked out, and their working out should be left to the process of development of the law of Tonga case by case, we think that the broad proposition stated by Ward CJ should be accepted. That means that it was open to Mr Kolo to pledge his house to the bank as an item separate from the land on which it stood".

21. Nevertheless, I have considered the position in Tonga as it could shed some light on this issue as submitted by *amicus curiae*. The above judgment of the Tongan Court of Appeal refers to a proposition stated by Ward CJ in an unreported judgment in Bank of Tonga v Paea He Lotu Kolo Civil No 1019/92 dated 21 April 1995. In that unreported judgment Ward CJ discussed section 54 (d) of the Magistrate's Court Act of Tonga where it is stipulated that "houses, fixtures, growing crops, the clothing of a person and his family, and, to the value of $200, the tools and implements of his trade shall not be taken under a warrant of distress", which is now repealed by Magistrate's Court Amendment Act 2000. Ward CJ expounded in Bank of Tonga v Paea He Lotu Kolo (supra) why houses and fixtures cannot be subject to distress:

"The provisions of section 54(d) follow the general pattern of the English Magistrates' Courts Act 1952 and the 1968 Magistrates

Courts Rules. Under these Rules, bedding, wearing apparel and, to a limited extent, the tools of trade of the warrantee are protected. The provisions under our law are wider because of the nature of land ownership in Tonga. I accept the reasoning of Dalgety J in Bank of Tonga v. Vaka'uta 19/91 that properties such as houses and fixtures which cannot be subject to distress in England because they accrete to the land are considered severable from the land under our law and are properly described as goods and therefore subject to distress".

22. Since Ward CJ, in the judgment of Bank of Tonga v Paea He Lotu Kolo (supra) refers to the reasoning of Dalgety J in Bank of Tonga v Vaka'uta 19/91, I have also considered that decision to ascertain the basis for the said proposition. Dalgetty J drew a distinction between houses and motels in the judgment by stating that a motel is not a house for the purposes of Section 54(d) of the Magistrate's Court Act but comprises personal property or chattels. It is interesting to note the remarks of Dalgety J in Bank of Tonga v Vaka'uta (supra), where it was stated, referring to section 54(d) of the Magistrate Court's Act of Tonga:

> "It may seem unusual to see 'houses' dealt with in an enforcement provision relating to movable or personal property, for in most major jurisdictions within the Commonwealth, so I am informed, houses accrue to and form part of the land upon which they are constructed and therefore fall to be dealt with as heritable or real property. In Tonga, however, land and property built thereon comprise separate legal estates. Thus, a charging order can be made over land or other real property" (emphasis added).

23. In my opinion, the remarks by Dalgety J in Bank of Tonga v Vaka'uta (supra) suggest that in Tonga, land and the buildings upon it are treated as separate legal entities. I believe this distinction does not necessarily imply that buildings

are considered personal property; instead, it suggests that buildings are regarded as separate legal estates, distinct from the land itself. Thus, when Dalgety J stated that "a charging order can be made over land or other real property," this indicates that both the land and the buildings on it can independently have legal claims or liens placed upon them. This legal separation seems to allow buildings to be dealt with separately in legal and financial contexts, such as transactions or the imposition of legal charges, while they remain classified as real property. The key distinction here is that, unlike many jurisdictions where buildings are typically treated as inseparable from the land (forming a single real property entity), in Tonga, they are legally distinct (forming separate real property entities). This distinction is significant for legal processes and rights management, particularly in the context of Section 54 of the Magistrate's Court Act of Tonga, which relates to charging orders. The separation of these entities may have stemmed from the fact that land in Tonga is owned by the Crown, while the ownership of the buildings is vested in individuals.

24. It appears that in a long line of cases in Tonga, the proposition by Ward CJ (supra), which is claimed to be based on the reasoning of Dalgety J (supra), has been consistently followed. (see Mangisi v Koloamatangi [1999] TOCA 9; CA 11 1998 (23 July 1999); Cowley v Tourist Services Ha'pai Limited [2001] TOCA 5; CA 27 2000 (27 July 2001); Niu v Takealava [2013] TOCA 2; AC 15 of 2012 (17 April 2013)). Beyond these cases, I was not able to trace any additional sources that indicate the origin of this proposition or provide any customary or legislative background to support the notion that houses are, in fact, considered personal property.

25. In any event, it is important to recognise that the nature of land ownership in Tonga differs significantly from that in Nauru. According to section 3 of the Lands Act in Tonga, all land within the Kingdom is the property of the Crown. This could be one likely reason why, in Tonga, buildings are considered separate from the land on which they are constructed, diverging from the

general common law principle where buildings secured to the land form part of the land. Additionally, in a subsequent case Whitten CJ discussed another possible reason for this unique approach in Tonga in the case of Lopeti v. Lopeti [2022] TOLC 7; LA 7 of 2019 (27 October 2022). In that decision Whitten CJ briefly explored the potential implications of treating buildings as personal property while referring to the decision of the Court of Appeal of Tonga in Kolo v Bank of Tonga (supra):

> "64. One of the implications, perhaps presciently alluded to by the Court of Appeal in Kolo, 'yet to be fully worked out', is that with more modern building techniques and materials being employed, there is a growing incidence in Tonga of buildings, both residential and commercial, being constructed with concrete foundations or raft slabs and concrete post and beam frames and block walls. The practical reality therefore is that if the general principle was originally based on the ability to fairly easily dismantle the generally smaller, older style traditional Fales and re-assemble them elsewhere, that will rarely be the case with more modern concrete structures. At most, fittings such as roof sheeting, trusses, windows, doors and any internal timber framed walls may, to varying extents, be salvaged and reused. However, the remaining bulk (and cost) of the concrete construction will more often than not have to be demolished, with little if any salvage value, or left behind as a virtual shell.
>
> 65. As this issue was not agitated (or perhaps even realised) in this proceeding, it is not an appropriate case for further consideration of it. As the Court of Appeal indicated, any change in the law in this regard should be developed on a case-by-case basis (where the issue is raised in such cases). Otherwise, it may be a matter for Parliament".

26. This consideration by Whitten CJ becomes increasingly relevant in today's context where modern structures tend to be more permanent compared to traditional timber houses and fales. Therefore, it can be inferred that in Tonga, the separation of buildings from land is being reconsidered, particularly in light of whether this principle offers a practical solution to modern-day demands.

27. Furthermore, the *amicus curiae* and the Respondents referred this court to two other Samoan decisions that followed the precedent set in the Tongan cases referred to above. In Dive and Fly Samoa Ltd v. Schmidt [2005] WSSC 40 (22 December 2005), Sapolu CJ ruled that a fale built on customary land is not a fixture, aligning with the Tongan position. Conversely, Sapolu CJ decided that 'when a structure is built on freehold land, both the degree of annexation and the purpose of annexation must be considered to ascertain whether the structure qualifies as a chattel, a fixture, or part of the land'. Endorsing the determination in Dive and Fly Samoa (supra), Nelson J in Elitise v. Lutuiloa [2018] WSSC 52 (6 April 2018) stated that "the parties did not dispute, as a matter of law, that the building in question is personal property capable of ownership divorced from the customary status of the land upon which it sits".

28. Apart from the decisions referred to by the *amicus curiae* and the Respondents, courts in other jurisdictions within the Pacific region have also considered similar issues, particularly in the context of customary and communal lands. In Itimwemwe v. Tekina [1997] KICA 24; Land Appeal 04 of 1996 (25 March 1997), the Kiribati Court of Appeal dismissed the appeal, maintaining its stance that the house remains part of the land in the absence of substantial evidence or a clear principle of customary law to override the common law. Tekina, a registered landowner, allowed his daughter and her husband, Miita, to reside on his land. Although a house was constructed for them, the details of its funding and construction were unclear. Following Miita's death, his sister claimed that the house was part of Miita's estate. The claim was initially upheld by the South Tarawa Lands Court, but the High Court ruled that the house did not belong to Miita's estate but to Tekina, the landowner, based on the common

law rule that treats buildings or structures on the land as integral to the land itself, thus owned by the landowner. The appellant argued before the Court of Appeal that the High Court should have considered customary law, which might differentiate the ownership of houses from the land upon which they are built. However, he failed to present any evidence or articulate specific principles of customary law that could challenge the common law principle applied by the High Court. Thus, the appeal was dismissed.

29. In the Supreme Court case in Vanuatu, Noel v Toto [1995] VUSC 3; Civil Case 018 of 1994 (19 April 1995) Kent J found that the nature of custom ownership is such that the land cannot actually be disposed of. It is retained for the benefit of future generations. The court considered the distribution of income derived from customary land and noted that, since the land remains communally owned, any income generated should be fairly and reasonably distributed among the custom owners, respecting the communal nature of the ownership. It also advised against subdividing the land into smaller parcels, emphasizing the importance of maintaining the land as a single entity to preserve its value for future generations. Although this case did not discuss if the fixtures on the customary land should be considered separate from the land, the Supreme Court of Vanuatu noted that the individuals who have done improvements and contributed to the value of the land should be entitled to be compensated from the income generated from the land.

30. Be that as it may, the general common law principle is that what is attached to the land becomes part of the land. However, it should be noted that common law does not completely preclude the possibility of separating houses, from the land. In various common law jurisdictions, this principle has developed over time to meet contemporary demands. As much as the degree of annexation is important, it appears to be crucial to determine the intention behind placing an item on the land, whether it was meant to be part of the land or considered separate from it, in order to decide if the item is part of the land.

31. In Holland v Hodgson (1872) LR 7CP 328, Blackburn J suggested considering the facts and circumstances of each case to ascertain this issue and formulated two rebuttable presumptions to determine whether an item is a fixture or a chattel: first, articles that are not attached to the land other than by their own weight are not to be considered part of the land unless there are circumstances that show they were intended to be part of the land; and, secondly, an article that is affixed to the land, even slightly, is to be considered part of the land unless the circumstances show it was intended to continue as a chattel. As Blackburn J explained in Holland v Hodgson (at 334-5):

> "There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances, as indicating the intention, viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, then by its own weight it is generally to be considered a mere chattel; see *Wiltshear v. Cottrell*, and the cases there cited. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land: see *D'Eyncourt v. Gregory*. Thus blocks of stone placed one on the top of another without any mortar or cement for the purpose of forming a dry stone wall would become part of the land, though the same stones, if deposited in a builder's yard and for convenience sake stacked on the top of each other in the form of a wall, would remain chattels. On the other hand, an article may be very firmly fixed to the land, and yet the circumstances may be such as to shew that it was never intended to be part of the land, and then it does not become part of the land. The anchor of a large ship must be very firmly fixed in the ground in order to bear the strain of the cable, yet no one could suppose that it became part of the land, even though it should chance that the shipowner was also the owner of the fee of the spot

where the anchor was dropped. An anchor similarly fixed in the soil for the purpose of bearing the strain of the chain of a suspension bridge would be part of the land. Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the onus of shewing that they were so intended lying on those who assert that they have ceased to be chattels, and that, on the contrary, an article which is affixed to the land even slightly is to be considered as part of the land, unless the circumstances are such as to shew that it was intended all along to continue a chattel, the onus lying on those who contend that it is a chattel."

32. In Holland v Hodgson (supra) and subsequent cases, the courts have focused on fact-specific inquiries to determine whether an object affixed to the land was intended to become part of the land. According to Blackburn J's judgment, it is essential to consider all the circumstances surrounding each case to discern the affixer's intention. Given that decisions hinge on the unique facts and circumstances of each case, one cannot presume that an item deemed a fixture or personal property in one instance will be classified similarly in another. Therefore, depending on the specifics, a house could be considered either a fixture or a chattel. Additionally, the type of land ownership or interest held by the person who affixed the item to the land also plays a crucial role in these determinations. Therefore, it is evident that considering a house sperate from the land depending on the circumstances is not repugnant to common law.

33. The learned Solicitor General in the present appeal drew the attention of this Court to a couple of decisions in Nauru where the courts considered buildings as personal property. In Deireragea v Adun [2015] NRSC 10, Crulci J made a decisive ruling by separating the building from the entitlements of other beneficiaries to the subject land. She declared that the building was part of the personal property of the Plaintiff's deceased husband. This decision was based

on the fact that the Plaintiff's late husband had both purchased and renovated the building, intending it to be a family home for his wife and children without any interference from other family members. Consequently, the court determined that the exclusive use of the property belonged to the Plaintiff. It appears that in Deireragea v Adun (supra), the focus was on the specific intent of the deceased husband, who renovated and treated the building exclusively as a family home for his immediate family, without involvement from other family members. The court recognized the building as personal property because it aligned with the deceased's clear intent to make it a separate entity for his family, despite its physical attachment to the land. This reasoning aligns with the principles discussed in Holland v Hodgson (supra), where the circumstances and intention indicated that the building was intended to remain a chattel.

34. In Eobob v Amandus [2018] NRSC 38, the house involved was built under the Nauru's Housing Scheme, where the repayment for the houses built by the government is by the person who resides in the house. The Supreme Court severed the house from the land it sits on since the ownership of the house was vested in the Republic and held that "the ownership of the house did not form part of the personal estate".

35. On the other hand, the learned counsel for the Appellants in the present appeal referred to Haris v Batsiua [2012] NRSC 13, where Eames CJ made the following statement regarding the Nauruan Housing Ordinance 1957, which governed the position of land for the housing scheme and the tenancy of the houses:

> "12. It is not possible for the court to resolve the question of the status of the plaintiff's and defendants' claims, and those of the three grandchildren, as to rights of tenancy of the house. There was simply not enough time for a hearing as to those questions and it was obvious that no research had been done by either side on the common law

implications of the repeal of the relevant legislation that previously governed the rights of tenants. It is possible that the repeal of the legislation means that the house is now a fixture to the land. If that is so, the house would likely be owned by all of the landowners."

36. The learned counsel for the Appellants further submitted that under the said Ordinance, the lands were acquired by the Nauru Local Government Council without a lease. He said that the landowners retained the ownership of the land while the houses were owned by Nauru Local Government Council. He further stated that Nauruan Housing Ordinance was repealed in 2011.

37. In any event, it appears that, in Nauru the question of whether houses built on "co-owned customary lands", (a term used in this case to refer to collectively owned communal lands), form part of the land or can be considered personal property has been a bone of contention over the years. Although there seems to be no consistent pattern in the local decisions discussed above, the ambiguity surrounding the issue has led to inconsistent legal interpretations regarding what constitutes personal estate and whether houses can be treated as separate estates from co-owned lands. The learned Solicitor General, serving as *amicus curiae*, has invited this Court to make an authoritative decision on this issue, not only for the purposes of the current appeal under consideration but also as a matter of general public interest. To highlight the significance of this issue, she referred to Tsiode v Adeang [2021] NRCA 3; Civil Appeal 07 of 2020 (19 November 2021), where Fatiaki CJ, who was also the President of the Court of Appeal, remarked:

> "39. ... The distinction between what fixtures comprise the *"real estate"* and *"personalty"* has been a long-standing issue in Land appeals and has not been the subject matter of an Appeal Court determination in the past three (3) years since its creation. It is an issue that is surrounded by legislative provisions as well as a variety of Court

decision that requires to be determined finally and is plainly arguable. (*see for eg.* Eobob v Amandus [2018] NRSC 38)."

38. As previously stated, various common law jurisdictions have considered the degree of annexation and the purpose of annexation to decide whether a house is a chattel or part of realty. However, numerous authorities from England, Australia, and other common law jurisdictions indicate that over time, courts have tended to assign varying weights to the degree and purpose of annexation, depending on the specific circumstances of each case. Most notably, courts seem to have gradually placed less emphasis on the degree of annexation when determining this issue as the common law principles have evolved. This shift is highlighted by the remarks of Kearney J in the Supreme Court of New South Wales in Palumberi v Palumberi (1986) NSW ConvR 593, demonstrating a decline in the significance attached to the test of degree of annexation.:

> "It would seem from perusal of these and other authorities in the field that there has been a perceptible decline in the comparative importance of the degree or mode of annexation, with tendency to greater emphasis being placed upon the purpose or object of annexation, or, putting it another way, the intention with which the item is placed upon land. This shift has involved a greater reliance upon the individual surrounding circumstances of the case in question as distinct from any attempt to apply some simple rule or some automatic solution."

39. Numerous authorities, including Holland v Hodgson (supra) from across common law jurisdictions indicate that treating a house as chattel is not inconsistent with common law principles. Although the general rule asserts that what is attached to the land becomes part of the land, the authorities discussed clearly demonstrate how common law can accommodate deviations from this rule, depending on the circumstances. However, to apply a pragmatic and context-specific approach to the determination of this issue, courts must consider factors beyond the tests of degree of annexation and purpose of

annexation. These factors include the legal interests of the person who built the house on the land, the rights of other interested parties where applicable, the objective intention behind building the house in light of all relevant circumstances, and underlying legal provisions and regulations when determining whether a house or building is considered personalty or realty.

40. Therefore, the discussion above demonstrates that, at common law, it is not inherently alien to treat an object as separate from the land, categorizing it as personal property rather than real estate, based on the specifics of each case.

Applicability of the common law position to the present appeal

41. The learned Solicitor General in the present appeal has pointed out that the old common law principle distinguishing realty from personalty should be revisited to better meet the modern demands of Nauru. This argument aligns with the development of common law principles in various jurisdictions to address contemporary needs. As Sackville AJA stated in Agripower Barabba Pty Ltd v Blomfield [2015] NSWCA 30 at [75], "the law of fixtures is somewhat a relic from a period when greater emphasis was placed on physical acts, such as the annexation of chattels to land, rather than on whether there were good commercial or policy reasons for concluding that those acts should produce changes in title".

42. In that backdrop, I will now explore the applicability of the above discussed principles to customary co-owned lands in Nauru. It is evident that treating a house as chattel on a well-identified or demarcated parcel of freehold land is straightforward and less complicated compared to applying the same principle to co-owned or undivided land. In Nauru, we are dealing with undivided customary lands that have numerous co-owners. As the learned counsel for the Appellants submitted, the interest of one such co-owner could be as fragmented as one in over one hundred thousand in a small block of land due to the expansion of extended families. For instance, in the present appeal,

although the eight siblings share a 1/8 share of the late Irene Wiram's real estate, she only owned a 5/144 share of Portion 165. This indicates that there are numerous other co-owners of the said portion as well, beyond the children of the late Irene Wiram.

43. The learned counsel for the Respondents submitted in paragraph 43 of the written submissions that financial contributions for the construction of the two shops and the restaurant were borne by Wiram Wiram, Tamaneak Batsiua, and their father, Tamoa Wiram. Moreover, the *amicus curiae* drew this Court's attention to paragraph 29 of the Supreme Court judgment, where the learned judge found that the Appellants made no contribution to the construction of the store and restaurant, and that Wiram Wiram, Tamaneak Batsiua, and their father Tamoa Wiram made the contributions. Furthermore, the *amicus curiae* submitted that the Respondents made substantial improvements to the buildings and have demonstrated a lawful expectation that the buildings will eventually devolve to them. I consider this assertion by the *amicus curiae* arguable, particularly in light of the parties' intention. It would have been relevant if it was argued that the Respondents intended at the time of erecting the structures that they would be considered chattel rather than part of the land. However, it should be noted that when considering the intention of the parties, what is relevant is the objective intention based on the circumstances of the case, rather than subjective intention. If the Respondents built the buildings with a lawful expectation that those buildings would eventually devolve to them, and they continued to reap the benefits of the buildings with the agreement of the parents and other siblings, as submitted by the *amicus curiae*, that would be relevant in assessing objective intention. However, in paragraph 14 of the judgment, it was noted by the learned Judge in contrast: "it is not part of the agreed facts, but is in evidence, that the three buildings, excluding the building occupied by Mitchum Solomon, were constructed by the deceased and her second husband, Tamoa Wiram" and no such objective intention was found by the learned judge.

44. In May v Ceedive Pty Ltd [2006] NSWCA 369, Santow JA discussed assessing the circumstances to identify objective intention in considering if the building was intended to be a chattel at the time of its construction. At paragraph 65, it was stated that; "the intention which determines the question of whether an object has, in law, become affixed to the land, or, to use the paraphrase emphasized in Elitestone Ltd v Morris [1997] 2 All ER 513 at 516–17, 519, become part and parcel of the land by affixation is, at least predominantly, 'the objective intention of the person who brings the object onto the land and affixes it there'". In my opinion, in circumstances such as those presented in this appeal, the objective intention should be assessed considering whether other co-owners were aware that the building was intended to be considered separate from the land as personal property. Without the co-owners' awareness of such an intention, it is unlikely that the required threshold to establish objective intention would be met. Furthermore, once a building is constructed, its classification cannot be altered from real to personal property at a later date. The intention to classify the building as personal property must be explicit and evident at the time of construction.

45. However, when a house is built on co-owned land, even with the consent of parents who hold undivided shares in a portion of land as often happens in Nauru, the house sits on land that has interests represented by undivided shares of other co-owners. If such a house is considered the personal property of a co-owner who built it, despite the extent of their entitlement to an undivided share, it still encroaches on the interests of the other co-owners of the communal land. Even from an equitable perspective, it is clear that treating such property as the personalty of the builder affects the rights of the other co-owners, particularly given the scarcity of land in Nauru. Houses and buildings today are predominantly built on concrete pads as permanent structures, unlike the easily dismantled wooden houses of the past. As Whitten CJ noted in the Tongan case Lopeti (supra), such permanent concrete structures cannot be removed without destruction. Therefore, the implications of potential disputes among co-owners are far more complex than they would have been a

hundred years ago when most structures were made of timber and could be easily dismantled and erected elsewhere. As the learned Solicitor General suggested, in the case of a commercial building, the payment of rent to the other co-owners may mitigate the implications for their rights. But what happens in the case of a residential house? The NLC suggested that no rent should be paid for residential houses, possibly because it would be impractical to expect the person residing in such a property to pay perpetual rent to the co-owners under the circumstances in Nauru. However, I doubt that this would be an equitable response to compensate the interests of other co-owners.

46. Complete enjoyment of a residential house or a commercial building on undivided land involves certain rights and obligations. Unlike a house that sits on freehold land with well-demarcated boundaries, the enjoyment of a house on undivided land requires certain rights over the co-owned land, such as rights of way and the laying of utility lines, including electricity, water, and sewerage facilities. Beyond these rights, it is important to ensure the enjoyment of common areas to enhance the liveability of a house. In some jurisdictions, a model of property ownership such as strata title scheme allows for a combination of individual ownership of some parts of the property such as a townhouse or a unit, and shared ownership of other parts such as the common areas and buildings. In such a property ownership model, the enjoyment of privately and communally owned parts of the property are clearly identified and each registered proprietor is the owner of a lot in the strata title scheme and enjoys certain rights and obligations. The owner of a lot owns a proportional share of the land without it being a defined section of the property. Beyond this, there is importance placed on the access and the enjoyment of common areas to enhance the liveability of a unit or townhouse owned by individuals. For example, in jurisdictions where freehold lands are converted into strata title properties, depending on the scheme, the townhouse or the unit may be allocated a private land area for the enjoyment of their respective properties together with access to shared common areas available for the use of the occupants. Furthermore, in strata title model of property

ownership, what you can and cannot do is regulated by by-laws to enhance the enjoyment of such properties by setting out the accepted conduct and governance standards of owners and occupants. Focusing on the present matter, on co-owned land, if a house is severed from the land and considered personal property, it would be imperative to ensure associated rights for the better enjoyment of the house by the interest-holders and occupants. As long as the co-owners are on good terms, one can argue that no disputes will occur. However, when a principle is formulated and a precedent is set, it must encompass solutions to address foreseeable and potential issues such as those mentioned in the example of strata title. In the absence of associated solutions to such potential issues, treating a house as separate from the land will invariably give rise to further complications and may prove futile on co-owned communal lands.

47. In the submissions filed in the Supreme Court by the NLC, it was stated that it is rare for the land to be divided and given to any one person. Additionally, it was submitted that since the land is hardly ever sold or purchased, every family member should be entitled to at least a parcel or a piece of the communally owned, undivided share of land for building a house for living purposes. Furthermore, in paragraph 33 of the closing submissions, the NLC requested that the Court establish a general rule stating that every family member with a vested or contingent beneficial interest in the undivided communal land has the right to a piece of land of reasonable size for building a house to accommodate his or her family. It was also asserted that for such residential purposes, no rent should be payable to other co-owners, as all would be building houses on each other's undivided shares. I agree with this proposition by the NLC to a great extent, as it proposes a practical solution to the emerging housing problems in Nauru. If the person who builds the house is entitled to a piece of land of reasonable size, none of the issues mentioned in the preceding paragraphs regarding the enjoyment of the house would arise. However, it should be noted that this assertion of allocating a piece of land cannot be superimposed or merged with the concept of treating a house as

personal property separate from the land unless it is proposed as an alternative solution to the current disputes over lands in Nauru. The only practical way to employ such a solution would be through the division of the land into lots and gifting or selling these lots and as the NLC correctly noted by perfecting the gift or by transferring the land in accordance with the Lands Act 1976 by conforming to the stipulated requirements. As the NLC highlighted, although it is rarely done, there is a possibility of dividing the lands as per the governing laws. Therefore, it does not appear that there is no solution at all under the law, as the lands can be divided into reasonable lots as practicably as possible, based on the entitlement of shares and merging small shares by compensating those who miss out for their respective shares used to form those lots, as done in some common law jurisdictions concerning co-owned lands. Allocating a piece of land as proposed by the NLC could well be done in that manner. Otherwise, it would not be feasible for the Court to formulate a principle to allocate pieces of land of reasonable size in a practical sense unless the legislature, having taken into account all the circumstances, introduces a legal framework that defines the minimum size of land to which an owner of a house is entitled for better enjoyment of a house situated on co-owned land.

48. In any event, it is possible to classify a house or building on co-owned land as chattel if the objective intention at the time of construction is clearly established, indicating that the structure was intended to be treated as such, regardless of how firmly it is annexed to the land. However, in making such a determination, courts must consider all relevant circumstances, including the factors outlined in paragraph 44 above. For example, it would be pertinent to confirm that the co-owners were also aware that the building would be considered chattel, which is crucial in assessing objective intention. Furthermore, it is essential to address potential issues, as described in paragraphs 44-46 above, that may arise from treating a structure on co-owned land as chattel, to minimize the risk of subsequent disputes stemming from such a declaration.

49. Be that as it may, the learned trial judge identified the crux of the case at paragraph 47 of the judgment as follows:

> "The crux of this case is whether the building on the land becomes a fixture and thus becomes part of the land under the common law principles or whether they should be treated as personal properties of the appellant. The whole case depends on how this issue is resolved'.

50. In paragraph 60 of the judgment, the learned judge noted that "the common law of England regarding land is that any fixture on the land becomes part of the land". It was further remarked in paragraph 61 that "if I were to treat the buildings built by the appellants as their personal property, then I would effectively be amending the common law applicable to Nauru". However, with respect, I am not inclined to accept the opinion of his Honour in light of the discussion above. Common law acknowledges the possibility of separating a house from the land and considering it a chattel, based on the circumstances of each case, irrespective of the firmness or permanence of the annexation. I am of the view that the learned judge erred in law on this point.

51. Nevertheless, the pertinent issue in this appeal arises only when the learned judge decided to formulate a universal proposition by completely altering the common law. His Honour determined that houses built by the children of land-owning units in Nauru, with parental approval, are personal property, and decided to apply this rule across the board as concluded in paragraph 65:

> " In light of the changes that have taken place in Nauru over the years about building on family owned land, I am satisfied that the common law position that building/fixture is part of the land is to be altered, and henceforth all buildings built by the children of a land owing unit with the approval of their parents should be treated as the personal properties of the children as I am satisfied that this alteration will better suit the circumstances of Nauru."

52. Moreover, that conclusion was reached despite there being no finding that the buildings on Portion 165 were built by the children. This conclusion was arrived at against the backdrop of a clear finding in paragraph 14 of the judgment:

> "It is not part of the agreed facts, but is in evidence that the 3 buildings excluding the building occupied by Mitchum Solomon, were constructed by the deceased and her second husband Tamoa Wiram."

Can common law be altered in Nauru?

53. I will now consider the argument by the Appellants in regard to altering common law in Nauru. The learned counsel for the Appellants argued that Nauru has unique customs and usages regarding land, which is why section 3(1) of the Customs and Adopted Laws Act 1971 was legislated and made section 4 subject to section 3(1). He further asserted that the purpose was to protect the customs and usages of Nauruans that existed before the commencement of the Act unless abolished, altered or limited by law enacted by Parliament. Section 4 of the Customs and Adopted Laws Act 1971 provides as follows:

> **4. English laws adopted**
>
> (1) Subject to the provisions of subsection (4) and of Sections 3, 5 and 6, the common law and the statutes of general application, including all rules, regulations and orders of general application made thereunder, which were in force in England on the 31st day of January, 1968, are hereby adopted as laws of the Republic.
>
> (2) Subject to subsection (4), the principles and rules of equity which were in force in England on the 31st day of January, 1968, are hereby adopted as the principles and rules of equity in the Republic.

(3) In every civil cause or matter instituted in any court of law and equity shall be administered concurrently but, where there was before the commencement of this Act or is any conflict or variance between the rules of equity and the rules of the common law relating to the same matter, then the rules of equity shall prevail.

(4) The principles and rules of the common law and equity adopted by this Section may from time to time in their application to the Republic be altered and adapted by the courts to take account of the circumstances of the Republic, and of any changes of those circumstances, and of any alterations or adaptations of those principles and rules which may have taken place in England after the 31st day of January, 1968, whether before or after the commencement of this Act, but:

(a) nothing in this subsection shall be taken as requiring that any principle or rule of the common law or equity adopted by this Section be altered or adapted in its application to the Republic; and

(b) a principle or rule of the common law or equity adopted by this Section shall not be altered or adapted in its application to the Republic unless the court which makes the alteration or adaptation is satisfied that the principle or rule so altered or adapted will suit better the circumstances of the Republic than does the principle or rule without that alteration or adaptation. (emphasis added)

54. It is clear from a plain reading of section 4(4)(b) that a principle of common law adopted under section 4 can be altered if the court is satisfied that the altered principle will better suit the circumstances of the Republic. Therefore, the simple answer to whether common law principles can be altered by the courts is, yes. But it is subject to qualifications.

55. To understand those qualifications, it is important to consider the entire construction of the provision when interpreting section 4(4)(b). To ascertain the

meaning of "a principle or rule of common law... adopted under this Section," the entire context of section 4 must be considered. Section 4(1) stipulates that the common law in force in England on January 31, 1968, is adopted as the laws of the Republic, subject to the provisions of subsection (4) and sections 3, 5, and 6 of the Act. Thus, when section 4(4)(b) refers to "a principle or rule of common law... adopted under this Section," it means the common law rules and principles so adopted, subject to the provisions of section 3 (and subsection (3), sections 5, and 6), shall not be altered unless the court which makes the alteration is satisfied that such alteration will better suit the circumstances in Nauru.

56. I will now explore section 3(1) to better understand the qualification it imposes on section 4.

3. Nauruan institutions, customs and usages

(1) The institutions, customs and usages of the Nauruans to the extent that they existed immediately before the commencement of this Act shall, save in so far as they may hereby or hereafter from time to time be expressly, or by necessary implication, abolished, altered or limited by any law enacted by Parliament, be accorded recognition by every court and have full force and effect of law to regulate the following matters:

(a) title to, and interests in, land, other than any title or interest granted by lease or other instrument or by any Nauru written law;

(b) rights and powers of Nauruans to dispose of their property, real and personal, inter vivos and by will or any other form of testamentary disposition;

(c) succession to the estates of Nauruans who die intestate; and

(d) any matters affecting Nauruans only.

57. This section simply means that Nauruan customs and usages that existed immediately before the commencement of the Act are recognized by law and must be acknowledged by every court. These customs have the full force of law in regulating specific matters outlined in (a) to (d). These customs will remain in effect unless they are expressly or impliedly abolished, altered, or limited by any law enacted by Parliament. When section 4 of the Customs and Adopted Laws Act 1971 is read in light of section 3, it is clearly discernible that what is meant by "a principle or rule of common law... adopted under this Section" in section 4(1) are the common law principles from England, which were not repugnant to the customs specified in section 3, subsections (a) to (d). Therefore, the court has the power under section 4(4)(b) to alter these common law principles so adopted, provided such alterations are done to suit the circumstances do not affect those specified customs. This is because such customs, usages and institutions can only be abolished or altered by the legislature.

58. The learned counsel for the Appellants submitted that the courts must give recognition to the institutions, customs, and usages of Nauruans in their deliberations unless these are altered, abolished, or limited by any law enacted by parliament. He emphasized that these institutions, customs, and usages relate to the title and interest in land, the rights and powers of Nauruans to dispose of their personal and real property, and the succession to their estates when Nauruans die intestate. He stated that these institutions, customs, and usages must be given the full force of law and only parliament has the power to change them. His argument was that the late Irene Wiram elected to dispose of her estates in the manner she did, by not making a will and the court must recognize the customs relating to distribution of intestate estate of Nauruans.

59. The Appellant's counsel submitted that the customs and usages of Nauruans regarding land and inheritance were documented in the Administration Order 3 of 1938. He argued that such customs cannot be altered unless by enacting laws by the parliament. Further, in the Appellant's written submissions,

instances of abolishing, altering, or limiting the customs and usages of Nauruans were illustrated, citing examples from the Nauru Lands Act, Article 83(1) of the Constitution, and the Sea Boundary Act 1977.

60. The Regulations Governing Intestate Estates 1938 (Administration Order No 3 of 1938) sets out the manner in which the property of a person who dies intestate shall be decided. As the Appellant's counsel submitted Nauruan customs and usages are codified in relation to the distribution of intestate estate. Regulations made under section 4 of the Native Administration Ordinance 1922 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" (emphasis added). Section 3 of the regulation speaks of the procedure if family is unable to agree as follows:

> "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 parents to have the right to use the land during his or her lifetime. When an 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.

61. Generally, customs can be written or unwritten, and in this instance, it appears that as the learned counsel of the Appellants submitted, the customary practice is codified in the Regulations made under section 4 of the Native

Administration Ordinance 1922 and the NLC has relied on it in making its decisions. The learned counsel for the Appellants drew the attention of the Court to a quotation in Aliklik v Nauru Lands Committee [2013] NRSC 8 (19 June 2013) by Doussa J:

> "50. In considering these cases I am mindful of the terms of Administration Order No 3 of 1938 (the Administration Order). It has frequently been applied by the Supreme Court in intestacy cases ever since. This Court is often told by counsel that the Order was not meant to change customary law, but to record it to assist in the administration of intestate estates. This assertion, however, is not universally accepted as correct. The late Mr Leo Keke, a respected lawyer in this Republic, in Chapter 22 of the "Pacific Courts and Legal Systems", University of the South Pacific, 1988, wrote:
>
> *This Order regulated the distribution of intestate estates in cases where the family of the deceased were not in agreement as to its distribution. Rules for distribution under the Order looked like the re-enactment of the general principles of intestacy under the English legal system. In short, the rules were a fusion of Nauruan custom and English law, and very much a source of confusion today for those who try to understand it as a restatement of Nauruan custom. In fact it is not. The Order was fraught with inadequacies of language and confusion typical of a layman's work."*

62. At this juncture, to avoid confusion, I will examine the scope of the Regulations Governing Intestate Estates 1938 as it is pertinent to this appeal. The heading of the Regulation clearly states that "Such division shall include all real and personal property" as noted in paragraph 60 above. Therefore, I am of the view that when the heading says, "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"(emphasis added), it relates to all the provisions in the regulation. However, the heading of the Regulation uses the word 'property' when laying down the procedure to

distribute the intestate estate by the family. When the family is unable to agree, it refers to 'property' in 3(a) and 'property' and 'land 'in 3(b).' However, in 3(c), it only refers to 'land.' I cannot agree more with the quotation by Doussa J in Aliklik v Nauru Lands Committee (supra) regarding the confusing manner in which the Regulations Governing Intestate Estates 1938 are drafted. It should be noted that although 3(c) of the Regulations Governing Intestate Estates 1938 speaks only about the distribution of lands, section 6(1A) of the NLC Act 1956 as amended by Act No 2012, provides that the NLC has power to determine the distribution of the personal estate of deceased Nauruans.

63. Be that as it may, as the learned counsel for the Appellants submits it is the law and unless amended or repealed, the Court must abide by it. At this point it would be worthwhile to look at the interpretation of the words 'property' and 'land' for better understanding of the application of the Regulations Governing Intestate Estates 1938. Section 65 of the Interpretation Act provides definitions applicable to all written laws as follows:

> 'Land' includes, messuages, tenements, and hereditaments, corporeal and incorporeal, of any tenure or description and whatever is the estate in the land;
>
> 'Property' includes a right, title or interest to or over property, whether it is vested or contingent;

64. The *amicus curiae* has noted in paragraph 28 and 29 of the written submissions that the Supreme Court has not done anything which goes against the spirit of Regulations Governing Intestate Estates 1938 and the decision of the Supreme Court in fact has given effect to what has always been a practice by the Nauruans and therefore is already part of the custom. In replying to this submission, the learned counsel for the Appellants challenged the assertion by the *amicus curiae* and submitted that the *amicus curiae* failed to submit any evidence to such assertion that the outcome of the decision has given effect to

the Nauruan custom that has been already there. I am not convinced that it has been part of the custom in the absence of any evidence to support the contention of the *amicus curiae*.

65. In any event, the learned counsel for the Appellants submitted that altering common law so that fixtures are not part of the land, but personal property is inconsistent with Nauruan custom of disinheritance as well. The learned counsel asserted that power of disinheritance was and is an important aspect of control of their ownership of the lands by the parents. He further argued that alteration of the common law will make the customary power of parents to disinheritance redundant as a child could argue the right to personal property in a court of law against a parent. He quoted Ms Camilla Wedgewood in her paper titled 'Report on Research work in Nauru Island, Central Pacific' Volume VII September 1936 at page 36 to support the Nauruan custom of disinheritance:

> "Parents have the right to disinherit their children if the latter flout their authority or unfilial in their conduct. Public opinion forbade that the eldest daughter should be wholly deprived of her inheritance, but a man could disinherit a son absolutely."

66. The learned counsel for the Appellants further pointed out that if the house is considered personal property and the parents wish for the house to be removed, it cannot be done without causing destruction to the house. Most importantly, he submitted that if the house is considered personal property, it can be sold to a stranger and a stranger living amongst the co-owners in the co-owned land would be repugnant to the co-owners.

67. Furthermore, it appears that if houses built by the children with the consent of their parents are treated as personal property severed from the co-owned land, it could lead to the diminishing of the Nauruan custom of the family home. When children build their houses and their extended families begin to live in

those houses, they will not be able to enjoy the full benefits of the house as it is considered personal property severed from the co-owned land.

68. Additionally, alienating such a house or building, considered as personal property, will no longer be governed by section 3 of the Lands Act 1976 of Nauru, which prohibits the transfer, sale, or lease of any estate or interest in any land without the written consent of the President. In view of the definition of 'land' in the Interpretation Act 2011, treating a house or building as personal property separate from the land will invariably render the provisions in section 3 of the Lands Act ineffective.

69. Section 3 of the Customs and Adopted Laws Act 1971 clearly sets out that customs related to land, property disposal, succession, and matters affecting only Nauruans are to be recognized by every court unless they are abolished, altered or limited by any laws enacted by the parliament. It elaborates a strong legislative intent to preserve these customs. Courts are expected to respect these customs unless there is a clear legislative mandate to alter them. While section 4 allows courts to adapt common law principles to better fit Nauru's circumstances, it does not explicitly state that courts can override the customs recognized in section 3 by doing so.

70. Furthermore, section 5 states that adopted common laws must fit within Nauru's circumstances and jurisdiction and must not be inconsistent with local laws, which includes the customs recognized in section 3. Section 5(1) of the Customs and Adopted Laws Act 1971 provides:

> **5 Adoption subject to Nauru jurisdiction and statutes**
>
> (1) The common law, statutes, rules, regulations and orders adopted by Section 4 shall have force and effect within the Republic only so far as the circumstances of the Republic and the limits of its jurisdiction permit and only so far as they are not repugnant to or inconsistent with the provisions of this Act or of any Ordinance or Act in force at the

commencement of this Act or from time to time with any law enacted hereafter by Parliament or with any Act, statute, Ordinance, law, rule or regulation of the Commonwealth of Australia, the State of Queensland, the Territory of Papua or the Territory of New Guinea for the time being expressly applied in, or adopted as the law of, the Republic by any Act or Ordinance.

71. Therefore, it appears that the alteration to the common law principle by the Supreme Court not only alters and limits Nauru customs but is also inconsistent with written laws. As per the definition of land it includes "messuages, tenements, and hereditaments, corporeal and incorporeal, of any tenure or description and whatever is the estate in the land". Declaring a general principle to treat buildings, built by children with the consent of their parents, as personal property could conflict with the definition of "land" in the Interpretation Act.

72. In the circumstances, I am of the view that the alteration to the common law by the declaration made by the Supreme Court "henceforth all buildings built by the children of a land owing unit with the approval of their parents should be treated as the personal properties of the children" is an error of law.

Was there a mandate to consider houses and buildings?

73. The learned counsel for the Appellants argued that the dispute was only in respect of the personalty estate of late Irene Wiram and the appeal was confined to the NLC decision published in Gazette No 592/2016. It was submitted that the decision of the NLC in respect of the realty estate of late Irene Wiram was published in Gazette No 596/2016 and it was never challenged. However, the *amicus curiae* submitted that all the parties to the proceedings before the Supreme Court had given a mandate to the Supreme Court from the outset to determine whether a residential or commercial building on a piece of land belonging to a family in undivided shares was personalty or realty in view of the issues to be determined.

74. In the Supreme Court the parties recorded the following agreed facts and the issues to be determined:

Agreed Facts

a. There were other lands belonging to the deceased in which the determination was made by NLC which is not appealed against and this appeal is confined to Portion 165 of Meneng District;
b. The following buildings were constructed on Portion 165 which are:
    i. Family House (Tameneak and Mitchum Solomon occupying)
    ii. Residential property which is rented to HKL Logistics (HKL Building)
    iii. Residential property occupied by Mitchum Solomon
    iv. Commercial buildings ('I'Restaurant and Salvage Store)

Issues for Determination

a. Whether the residential property rented to HKL Logistics forms part of the estate of Irene Wiram, the deceased or it belongs to Wiram Wiram?
b. Subject to the finding in issue (a) whether the rental income of the said property belongs to all the siblings in equal shares or solely to Wiram Wiram?
c. Whether the rental income from the restaurant belongs to all the siblings in equal shares or solely to Wiram Wiram?
d. Whether the rental income from the store belongs to all the siblings in equal shares or solely to Tamaneak Batsiua?
e. Whether NLC erred in prematurely determining the estate of the late Irene Wiram after the second meeting without giving opportunity to all the siblings to entering into a family arrangement to produce all evidence for NLC to make a determination?
f. Whether NLC should have in its decision clarified the ownership of buildings on Portion 165?

g. Whether a residential property constructed by a member of her family on a piece of land belonged to a family in undivided share is a personality or realty?

h. Whether a commercial building constructed by a member of her family on a piece of land belonging to a family in undivided shares is personality or realty?

i. Whether a commercial building constructed by a member of her family on a piece of land belonging to a family in undivided shares, is personality or realty?

j. Whether the first respondent erred in law and in fact when it decided that equal shares in the personal estate was to be shared equally when awarding of s.3(c) of the Administration Order 1938 is restricted to land and not property.

75. There is no dispute that only the NLC decision published in Gazette Notification No. 592/2016, relating to the personalty estate, was appealed by the Appellants in the Supreme Court. Section 6 of the NLC Act stipulates that "subject to section 7, the decision of the Committee is final." Therefore, unless an appeal is preferred under section 7 of the NLC Act, a decision gazetted by the NLC is final. There was no appeal against the NLC decision published in Gazette Notification No. 596/2016, which distributed the realty estate of the late Irene Wiram, including Portion 165, among other lands. However, the judgment of the Supreme Court deals with the houses and buildings that were already dealt with by the NLC in the Gazette Notification No. 596/2016.

76. It appears that the issues framed by the parties for determination involve the buildings addressed by the NLC in Gazette Notification No. 596/2016. This raises the question of whether the parties to an appeal can confer jurisdiction on the Supreme Court to decide on the subject of another NLC decision, which was not appealed, by merely framing issues that encompass the subject of that other NLC decision. I believe that without adhering to the legislative provisions

regarding how an appeal can be made against an NLC decision, the parties to another appeal, even if they are the same parties, cannot confer jurisdiction on the Supreme Court to consider matters that were not appealed and have become final. As previously mentioned, if no appeal is filed against a gazetted decision of the NLC, that decision becomes final, and the law does not provide for it to be challenged in another appeal, even with the agreement of the same parties.

77. In the Supreme Court, the appeal against the NLC decision published in Gazette Notification No. 592/2016 was filed to challenge the NLC's decision regarding the personal estate of the late Irene Wiram and to seek an order to quash that decision. However, it appears that the learned judge fell into error by addressing issues framed by the parties without regard to the legislative guarantee of finality afforded to an NLC decision that was not appealed. Consequently, the judge went beyond the jurisdiction invoked by the appellants by dealing with properties subject to the NLC decision published in Gazette Notification No. 596/2016, which was never appealed. I am of the view that the learned judge erred in making a determination affecting the real estate of the late Irene Wiram, thus exceeding the jurisdiction invoked by the parties in the appeal against the NLC decision published in Gazette Notification No. 592/2016.

Conclusion

78. There is no doubt that the assertions by the NLC in the Supreme Court and the learned Solicitor General in this Court as *amicus curiae* have raised very valid points, taking a proactive stance to bring about a lasting solution to these issues, particularly when parents pass away leaving intestate estates. Furthermore, I fully concur that resolving the issues raised by the *amicus curiae* is essential for creating a conducive environment for commercial ventures to start and thrive, which in turn will strengthen the economy of Nauru. In light of the above-discussed matters, I believe that a viable solution can only be achieved through comprehensive legislative reforms. This includes introducing new legislation

that thoroughly assesses the circumstances and implications affecting Nauruan customs, usages, and institutions. Such reforms by the legislature should be based on broad engagement with the Nauruan people, ensuring that their wishes and aspirations are reflected through these reforms. Even according to the Appellants' counsel, he did not completely disagree with the concerns raised by the amicus curiae but submitted that it should be the legislature that takes steps to find a permanent solution to these issues. In Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd, [1970] 2 All ER 871, it was observed that: "If language is clear and explicit, the court must give effect to it:

> '... for in that case the words of the statute speak the intention of the Legislature.' [*Warburton v Loveland*, per Tindal CJ ((1832) 2 Dow & Cl 480 at 489, [1824–34] All ER Rep 589 at 591)]. 'And in so doing it must bear in mind that its function is ***jus dicere***, not ***jus dare***: the words of a statute must not be overruled by the judges, but reform of the law must be left in the hands of Parliament.' [Maxwell on Interpretation of Statutes 12th Edn, pp 1, 2]".

79. The learned judge in paragraph 55 of the judgment accepted that "when a co-owner as a tenant in common builds a house or structure on a property owned by other tenants in common that particular structure or house is the personal property of the co-owner". In paragraph 65 of the judgment, it was further decided that "henceforth all buildings built by children of a land-owning unit with the approval of their parents should be treated as the personal properties of the children." Accordingly, it was declared that the house on Portion 165 is the personal property of Mitchum Solomon. The HKL building and the restaurant named "I Capital" are the property of Wiram Wiram, and the Blue Shop (Salvage Store) is the personal property of Tamaneak Batsiua. It was also ordered that the main house shall belong to all eight children.

80. In light of the matters discussed in this judgment, I am of the view that the learned judge erred in law by altering the common law and declaring that all the houses built by children of a land-owning unit with the approval of their

parents should be treated as the personal properties of the children. This declaration is repugnant to or inconsistent with Nauruan customs and written law. Furthermore, I believe that the learned judge exceeded the scope of the appeal and thereby lacked jurisdiction to make a declaration involving properties that were the subject of another NLC decision. To that extent, I allow the appeal grounds two and three.

81. I dismiss appeal ground one due to ambiguity of the manner in which it is presented. Appeal grounds four, five and six are dismissed as they are based on errors of fact, which are not appealable under section 19(c) of the Nauru Court of Appeal Act 2018.

82. Finality of litigation is the most significant aspect of a legal system. The Nauru Court of Appeal, as the final appellate court, must ensure that once a decision is given, the matter is conclusively settled as much as possible, providing certainty to the parties involved. It invariably enables parties to move forward with their lives. I have considered the findings of the learned judge of the Supreme Court regarding the interests of the parties. As mentioned earlier, the dispute between the parties was confined to the rental income of two properties, namely the HKL building and the commercial property consisting of the 'I's Capitol Restaurant, and the Salvage Store named 'Blue Shop'. Based on the findings of the Supreme Court, I am of the opinion that it would be just and equitable for the rental monies from those properties to be distributed according to the interests of the relevant parties identified in the Supreme Court judgment. The rest of the distribution of the personalty estate of the late Irene Wiram, as determined by the NLC decision published in Gazette No. 592/2016 on 20 July 2016, remains undisturbed.

83. Accordingly, I make the following orders:

    a) The Supreme Court judgment dated 07 November 2018 is set aside.
    b) The rental from the properties is distributed as follows;

i. Wiram Wiram is entitled to receive the rent from HKL Building and the restaurant named 'I's Capital' on Portion 165 Ataro in Menang District.

ii. Tamaneak Batsiua is entitled to receive the rent from the salvage store named 'Blue Shop' on Portion 165 Ataro in Menang District.

iii. If there are other monies, rentals and royalties from the rest of the personalty estate of the late Irene Wiram it should be divided amongst the 8 beneficiaries in equal share.

Dated this 28 June 2024

Rangajeeva Wimalasena J.

President

Sir Albert Palmer J.
I agree

NAURU COURT OF APPEAL

Justice of Appeal

Prasantha De Silva J.

I agree

Justice of Appeal