IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Land Appeal No.43 of 2012
Land Appeal No. 53 of 2012
Land Appeal No. 16 of 2012
Land Appeal No. 7 of 2013

JEROME REWERU & ORS

Appellants

v

NAURU LANDS COMMITTEE & ORS

Respondents

JUDGE:	Eames, C. J.
WHERE HELD:	Nauru
DATE OF HEARING:	12-16 August, 19-21 November 2013
DATE OF JUDGMENT:	27 November 2013
CASE MAY BE CITED AS:	Re: "Abotijij": Reweru and Ors v NLC and Ors
MEDIUM NEUTRAL CITATION:	[2013] NRSC 18

Land Appeals - *Nauru Lands Committee Act 1956* - Land known as "Abotijij" subject of gazetted determination by Lands Committee in 1933 that it was owned jointly by Dedage and Peter D - No further determination until 2010/2012 - Nauru Lands Committee published determination in 2012 of ownership rights to Dedage's interest in Abotijij - Consolidated hearing of four separate appeals against NLC decision.

Attempt in 2010/2012 to challenge correctness of 1933 Determination - Attempt to appeal that decision in 1970 rejected by Supreme Court: *Dogirouwa v Enna Gadabu and Others,* Land Appeal No 9 of 1970 - Held: 1933 determination remains final and conclusive as to ownership of Abotijij as at 1933 - .

Ownership of Abotijij in 2012 must be decided by past or present family agreements or, failing past or present agreement, by Determination by Nauru Lands Committee, applying principles of *Administrative Order No 3 of* 1938 - Whether deceased Dedage was married at

time of death - Applying par 3(b) of 1938 Order - Whether descendants of Dedage's nephew, Gumwear, gained interest in Abotijij by virtue of adoption or under a will - Meaning of "returned to the family or nearest relatives of the deceased".

Claims that Lands Committee and Nauru Lands Committee recognised family agreements in and after 1951 which acknowledged and sought to correct errors in 1933 determination - Whether adequate evidence of family agreements - Decisions of Committees not gazetted - Whether decisions effective without being gazetted - Relevance of past treatment by Lands Committee and Nauru Lands Committee of other blocks of land owned by Dedage.

Identification of beneficiaries - "family and nearest relatives" of Dedage as at 1942 and 2012 - Determination set aside - Matter remitted to Nauru Lands Committee.

APPEARANCES:

For Nauru Lands Committee	Mr S Bliim, Solicitor-General
For Jerome Reweru and Ors	Mr V Clodumar
For Antonius Heinrich & Ors	Mr Pres Nimes Ekwona
For Brenda Caleb &Ors	Ms G Hartman
For Josephine Gadeouwa	Mr R Kun
For Tyran Capelle & Ors	Ms M Depaune
For Parcelle Bop & Ors,	Ms M Depaune
Andrew Gadabu & Ors	Ms M Depaune

CHIEF JUSTICE:

1 This judgment addresses the identification of beneficiaries to the half interest in land known as "Abotijij", Portion 94, Buada District which had been held by Dedage. The land is phosphate land and has been substantially mined, yielding significant royalty payments, the distribution of which have been prevented by injunctions granted by the Court. The dispute over ownership has given rise to a blizzard of proceedings of which four separate actions have been consolidated in the present hearing.

2 The Nauru Lands Committee made a determination about Abotijij in 2010, which I set aside in my judgment in *Antonius Heinrich v NLC and Others*[1], because the Committee had failed to give notice to all relevant people for the purpose of conducting family meetings. I directed the Committee to re-convene family meetings. There having been no agreement among those attending the new family meetings as to the beneficiaries of the land, the Committee was once again required to make a determination in 2012 as to the beneficiaries of Abotijij . It did so, but came to the same conclusion, based on the same evidence, as it had relied on in 2010[2]. Those decisions have given rise to these proceedings.

3 The task in trying to determine today the beneficial owners of Abotijij is a formidable one. It is necessary to trace the history of dealings with that land by the Lands Committee and the successor body, the Nauru Lands Committee, which was created by the *Nauru Lands Committee Act* 1956.

The history of dealings with Abotijij

4 In the 1928 Land Register Book Abotijij was claimed as owned by Erina[3] and Peter Didaku[4]. The first and, until 2010, the only formal determination of ownership, occurred in 1933, when Dedage was declared to have a half interest in that land, Peter Didaku having the other half interest. Thus, in 1933, Erina's claim was, it seems,

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[1] [2012] NRSC 11.
[2] Government Gazette No. 124, GNN 501 of 2012, 12 September 2012.
[3] Also known as Elina.
[4] Ex TC/21, at Tab L 38.

neither advanced nor recognised. In their submissions, both Mr Ekwona, representing the Heinrich interests, and Ms Depaune, representing the Capelle/Gadabu/Bop interests, sought to challenge the correctness of the 1933 determination.

5 The 1933 determination was published in the Government Gazette No. 24 on 10 June 1933. Its title made clear that it was a "Determination of Ownership of Lands". The gazette notified parties that, by notice given before 19 June 1933, there was a right of appeal against the determination.

6 No appeal was brought in 1933, but the 1933 decision was the subject of an abortive appeal in 1970. In *Dogirouwa v Enna Gadabu and Others*[5] the applicant sought "special leave to appeal" from the 1933 determination concerning Abotijij in Buada District and also "Atabata", in Aiwo District. The applicant, Dogirouwa, was the widow of Agiriouwa, who died during the Second World War in Truk. She claimed that her husband was the rightful owner of those lands, not those who were identified in the judgment merely as "the predecessors in title of the two respondents". Only one of those respondents was named, being Enna Gadabu, an ancestor of Tyran Capelle and her family, they being the third respondents to the appeal brought by Jerome Reweru in Land Appeal No 43/2012.

7 Thompson C.J. held that an "appeal" so long out of time could only be brought if there was some gross irregularity in the way the decision had been reached. In effect, His Honour was treating the application as seeking leave to commence proceedings for judicial review, since there was no right to seek leave to appeal out of time under the legislation at that time. His Honour refused leave, finding that the appellant's husband, Agiriouwa, was alive in 1933 (finding that he could have brought an appeal within the 21 day time limit), and that there was no reason to think there had been "any irregularity whatsoever" in the decision-making process.

8 In *Charlie Ika v NPRT and Others*[6] I held that a determination by the Committee

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[5] Land Appeal No 9 of 1970, decision of Thompson C.J.

[6] [2011] NRSC 6 at [105]-[107]. See, too, *Egadeiy Itsimaera v Eidwaidi Grundler & others* [1969-1982] Nauru Law Reports, Part B, 107, at 111.

becomes final and conclusive upon publication in the Gazette, with notice of the right to appeal. Before publication, the Committee was able to change its decision. The conclusive effect of the 1933 determination is subject only to amendment, by agreement, of names omitted by mere slip, or by virtue of family agreement to alter the disposition of a deceased estate.[7]

9 Thus although he did not have to consider the merits of the claim, the 1933 decision was accepted by Thompson C.J. as a final and conclusive determination as to Dedage's half share of ownership in Abotijij in 1933. I will discuss further the submissions of Mr Ekwona and Ms Depaune but, in my opinion, it is not now open to go behind that decision to explore whether the determination was correct.

10 Given that the starting point for the Committee in 2012 was the 1933 determination, then the question was, "Who had succeeded to Dedage's interest in Abotijij?" Having failed to make a will, the rights of Dedage's family or relatives to claim an interest in his estate would either have been determined by family agreement or, in the event of disagreement, by application of the principles of succession and reversion governing the distribution of intestate estates as set out in *Administration Order No 3 of 1938* (hereafter called "the 1938 Order").

11 Once it is apparent that there is no family agreement as to the distribution of an intestate estate, paragraphs 3(a) or 3 (b) of the 1938 Order apply. The critical sub paragraphs read:

> (3) If the family is unable to agree, the following procedure shall be followed:
>
> (a) In the case of an unmarried person the property to be returned to the people from whom it was received, or if they are dead, to the nearest relatives in the same tribe.
>
> (b) married - no issue - the property to be returned to the family or nearest relatives of the deceased. The widower or widow to have the use of the land during his or her lifetime if required by him or her.
>
> (c) (Not relevant)

[7] See *Charlie Ika*, at [104]-[107], [110] re correction of a slip and at [107]-[110] about alteration by way of family agreement.

12 Paragraph 4 of the *Administration Order No 3 of 1938*, which all parties agree has continuing application, reads:

> "No distribution of land of a deceased estate, whether published in the Gazette or otherwise shall be final unless the ownership of the deceased has been determined previously by the Lands Committee or other (sic)[8] authorised by the Administrator and published in the Gazette with the usual opportunity given for protest".

13 That paragraph answers the first submission made by Mr Ekwona, who submitted that the 1933 decision could not have constituted a determination as to land ownership because it was made before the 1938 order came into existence. Furthermore, he argued, land ownership was then governed by different rules as to inheritance compared to those set out in the 1938 Order, and the Committee in 1933 had failed to apply the customary laws that then operated.

14 In my opinion, par 4 of the 1938 Order makes plain that a published determination made before 1938 by the Lands Committee was final and binding, if not overturned on appeal. Thus, the starting point for tracing ownership of Abotijij is 1933, when Dedage had a one half interest in Abotijij with Peter Didaku. It is Dedage's estate with which we are now concerned.

15 If there was family agreement to as to the distribution of lands in an intestate estate then, as von Doussa J held in *Kerrilyn Scotty and Penzance Tamakin v NLC and Milton Benjamin*[9], the mere fact that it had not been confirmed by a published determination from the Committee would not mean that the agreement was not effective, even though the Committee was under a duty to have made a determination to that effect and published it in the Gazette[10].

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[8] The author no doubt meant to say "otherwise" or perhaps "other body".

[9] [2013] NRSC 9 at [29]-[32], [36]-[37].

[10] Failure to publish a decision of the NLC in the Gazette, including particulars of a family agreement, was said by Thompson C.J. in *Daniel v Cook & Ors*[1969-1982] NLR (B) 33-38, to be highly desirable, "although not strictly required by statute". However, publication of such an agreement may well now be a pre-condition for the validity of a decision of the Committee. On 10 October 2012 s.6A commenced to apply under the *Nauru Lands Committee Act* 1956. That provides that "A decision of the Committee must be published in the Gazette within 21 days after the decision is made". That may now elevate the requirement for publication to a pre-requisite for validity of decisions made after that date. It is not necessary to decide that question in this judgment. See *Clodumar v NLC and Atsime* [2013] NRSC 15, fn 9.

16 Failure of the Committee to make and publish in the Gazette a formal determination, carries the risk that parties will dispute that there had been such an agreement. Where there had been genuine family agreement, family members would not be entitled to later withdraw their consent, except in circumstances where the agreement had been procured by fraud, coercion, undue influence or want of understanding brought about by improper conduct of one of the parties, or the Committee.[11]

17 As Thompson CJ held in *Eiduguneida Gobure v Eigoriedu Denea*[12] (a decision which was cited with approval by von Doussa J[13]), the question whether there had been a family agreement that became "complete and irrevocable" is a question of fact in each case.

18 Clear evidence of a family agreement would be binding on future claimants, unless a new family agreement was reached. However, the failure of the Committee to formally determine and publish the terms of a family agreement greatly increases the chance that an alleged agreement will be denied and contested, as occurred here.

19 I return to the narrative concerning the dealings with Abotijij after 1933.

20 Dedage died intestate on 18 September 1942.[14] Had the then Lands Committee met soon after Dedage's death so as to consider the distribution of his estate, the issue would have been governed by the terms of *Administrative Order No 3 of 1938*. As I shall discuss, if there had been no agreement among his family as to the distribution of his estate then, provided Dedage was married at the time of his death, the task of the Committee would have been guided by paragraph 3(b) of the 1938 Order. That paragraph required that his estate be "returned to the family or nearest relatives of the deceased" (subject to his widow having the use of the land for her lifetime, if she required that). As I later discuss, I am satisfied that Dedage was married at the date of his death, thus par 3(b) applied.

21 Unfortunately the Lands Committee did not publish in the Gazette a formal

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[11] *Kerrilyn Scotty* case, at [32]-[33].
[12] Land Appeal No 2 of 1972 (1969-1982) NLR (B) 55, at 57.
[13] *Kerrilyn Scotty* case, at [29].
[14] That date of death is now agreed on all sides.

determination of ownership of Dedage's estate after his death. However, in later years the Lands Committee or its successor, the Nauru Lands Committee, did determine ownership of some of the lands in Dedage's estate (other than Abotijij), and published the determinations in the Gazette. The records reveal that the Committees did occasionally discuss the ownership of Abotijij in the decades after 1933, but they did not at any time publish in the Gazette a formal determination, nor did they record a family agreement. Those dealings with lands in Dedage's estate have nonetheless been relied upon by some of the parties as justifying their claims to Abotijij today.

22 Although Dedage had been the owner of many lands the only portion of his estate on which the Committee was required to make a decision in 2010 was the highly valuable "Abotijij". The body responsible for distributing Ronwan royalties, Ronphos, acts upon the advice of the Nauru Lands Committee as to who was entitled to share the royalties, and in what proportions. In this case, the Nauru Lands Committee was asked to identify those persons who had inherited an interest in Abotijij sufficient to give them a share in the royalties. Numerous family groups made competing claims to the Committee of an interest in Abotijij. The imminent distribution of royalty payments in accordance with its 2010 and 2012 determinations was halted by a successful application for an injunction brought by the Heinrich claimants.

23 In its gazettal notice, the Nauru Lands Committee identified a number of documents from its files as being the source on which its determination was based. As listed in the Gazette, the relevant documents on which it relied were:

- Land lease No 1295 of 1951.
- An entry in Minute Book No 50 at page 74, and
- An entry in Minute Book No 81 at page 143.

24 As I shall discuss, none of those documents amounted to a valid and final determination as to ownership of Abotijij, because none was followed by a published gazettal. Furthermore, none of those documents evidenced a family agreement.

25 By reference to those specific documents and after examining all extant records, the NLC concluded that Dedage's half interest in Abotijij as "Original Owner", had passed to "Former Owners" Gadabu (as to ¼), Gumwear (1/8) and Dogirauwa (1/8).

26 The NLC conclusions as to how the interests of those three people had then passed may be summarised as follows:

(a) Gadabu's interest passed to Jockinal Gadabu, Ray Gadabu, Doris Bop and others, and thence to Gadabu and Bop family descendants (who included Tyran Capelle).

(b) Gumwear's and also Dogirauwa's interests passed to Gumwear Jones and thence to Josephine Gadeouwa and her family.

27 All of those descendants, whose claims to Abotijij were accepted by the NLC, are represented as the 2nd to 7th respondents to the Jerome Reweru land appeal No. 43/2012.

28 Separate appeal proceedings between and against the successful claimants, as well as against the NLC itself, have also been brought by claimant families represented by Antonius Heinrich and by families represented by Brenda Caleb. I will discuss their claims later.

29 The primary dispute now is between, on the one hand, those who contend that by reference to the 1938 Order they are now the closest descendant relatives with respect to Dedage's interest in Abotijij, and, on the other hand, those who contend that their entitlement to Abotijij flows from family agreements that have been accepted, perhaps even promoted, by the Nauru Lands Committee, or its predecessor.

30 This consolidated appeal is by way of re-hearing de novo[15]. Whilst I will have regard to the material on which the NLC relied for its decision, I am not confined to that material and a substantial amount of additional evidence was provided by the parties. Given the significance the NLC attached to the three source documents it is

[15] See *Marissa Cook v Arubuwe Fritz and NLC* [2013] NRSC 2

nonetheless appropriate to examine them in some detail.

31 I set out below the foundation for the competing claims to Abotijij.

The Gadeouwa, Capelle, Bop and Gadabu families[16].

32 The NLC accepted the claims to Abotijij by the Gadeouwa, Capelle, Bop and Gadabu interests primarily by reference to the above three source documents.

(a) The 1951 Lease document

33 The first of these documents was a 1951 lease over Abotijij with British Phosphate Commission. The Lands Committee in 1951 was concerned to find who were the owners, and should therefore be signatories to that lease. On the plan showing the proposed leasehold area the names of "Peter D" and Dedage appear, but were crossed out. Presumably it was discovered that they were both dead. In their place the names "Dogirauwa, Gumwear, Deigaeruk and Gadabu appear as the lessors. Those four names appear in the signatory section of the lease but there are not signatures, nor even crosses to mark their agreement. Instead, in the same hand, the four names were printed as "lessor" (and I will refer to them henceforth as the "four lessors").

34 This is the first record held by the Lands Committee suggesting that Dogirauwa, Gumwear, Deigaeruk and Gadabu had taken over or inherited Dedage's interest in Abotijij. Of those four, only Deigaeruk's name was omitted from the list of "former owners" in the 2012 determination. That is consistent with an entry that appears in Minute Book No 41, at page 268. It is undated. It records that Committee members asked the Clerk of Courts for a copy of "its decision" regarding Abotijij, which, so it was said, belonged to Deigaeruk (1/4), Gadabu (3/8), Dogirauwa (3/16) Kumwear (sic) (3/16). It was noted that Deigaeruk wanted to give away his interest to Deidienak Daniel.

35 The lease was dated 10 February 1951. Clearly, it was a significant document, suggesting that the four named lessors were regarded by the persons granting the

[16] These being the 2nd to 7th respondents to the Reweru appeal.

lease as inheritors of the interests in Abotijij that had been held by Dedage and Peter. That conclusion gains support from a note "To Whom it may Concern" signed and sealed by Mr Timothy Detudamo, Chairman of the then Lands Committee, on 14 August 1951. In that document the Chairman records that that portion of Abotijij that was subject of the lease was to be distributed as follows:

Gadabu 3/8

Deigaeruk ¼

Gumwear 1/8 (this may be an error, and should be 3/16)

Dogirauwa 1/8 (3/16?)

36 The note records that the unleased remaining portion of Abotijij was to be distributed to Gadabu (1/4), Deigaeruk (1/2), Gumwear (1/8) and Dogirauwa (1/8).

37 I do not know why there were different proportions assigned to the named owners of two areas of Abotijij. There is no contemporaneous document explaining why those four people were named as owners of Abotijij. There is nothing in the records to indicate that the Chairman had regard to the question of whether each of them qualified as "family or nearest relatives" of Dedage at his date of death. Deigaeruk, for example, was the son of Peter Didaku, and was not a blood relative of Dedage.

38 Insofar as the 1951 note might be claimed to be a determination, it was not published in the gazette, and no opportunity for appeal was given. If the pronouncement was the result of family agreement, then no record is given of who participated in the family meeting. The decision to adopt the family agreement, if it happened, was not published in the Gazette. If the pronouncement was not the result of a family agreement, but was a determination made, in response to family disagreement, by the Lands Committee, then no indication is given as to the principles of the 1938 Order that were being applied. It is plain that the 1938 Order was not being applied at all.

39 In her submission, Ms Depaune, pleader representing the families of Tyran Capelle,

and the Bop and Gadabu families, offered an explanation for the approach that was taken in 1951. Ms Depaune submitted that the Chairman of the Lands Committee, Timothy Detudamo, had access to land records even earlier than the 1928 Land Book concerning the ownership of Abotijij. These records included a 1914 registration of Abotijij in the name of Gadabu's sister. The 1928 land register showed Gadabu and Erina's claim to ownership of "Atabato", and Erina's claim to share Abotijij with Peter. This information, Ms Depaune submitted, motivated the Chairman in 1951, so that "the Committee's decision to reinstate the rightful owners while retaining Dedage's and Peter D's families was made judiciously". Ms Depaune concedes that even if that was the motivation for its decision, the Committee failed to formalise that arrangement by a published determination.

40 There may be some force in Ms Depaune's contentions as to the motivation behind the 1951 decisions. Ms Depaune and also Mr Ekwona for the Heinrich family both contend, for different reasons, that the 1933 determination wrongly overlooked the interest of their clients' ancestors, in one case ignoring Gadabu claims, in the other case ignoring claims by Erina, through which Heinrich now traced their interest.

41 In my opinion, however, the 1933 determination cannot be merely put to one side. The 1951 decisions did not give any weight and effect to the 1933 determination, nor to the fact that Thompson C.J. had upheld that determination. At the same time, the 1951 documents do not establish that there was a binding family agreement as to ownership of Abotijij in 1951 in terms proposed by Detudamo.

42 What is clear is that chairman Detudamo did not explain the basis for his decision that the four "lessors" had inherited Dedage's half share in Abotijij. If he did have regard to the 1938 Order, which I doubt, then it seems likely that the Committee was of the opinion that Dedage had died unmarried, which was not the case. Thus, if regard was given to the 1938 Order the wrong paragraph was treated as applicable. That would have focussed attention on returning the land to people in the same tribe as Dedage, rather than to the question, who were his family or nearest relatives when he died.

43 In the absence of family agreement, the question of who were the owners as at 1951 would have to be established by applying par 3(b) of the 1938 Order.

(b) Minute Book 50, page 74

44 The second reference document relied on by the NLC in 2012 was Minute Book No 50, at page 74. That document records a meeting of the Nauru Lands Committee on 8 February 1993. The Committee referred to two blocks in Dedage's estate "just uncovered", one being Abotijij and one being "Adedako" in Yaren. Under the heading "Determination - Dedage", which was dated 8 February 1993, the minute noted that Abotijij was to be regarded as shared, as set out shown in Minute Book 41 page 268. The Committee resolved that Abotijij be given to Dedage's families who resided in Aiwo district, and Dedage's interest in Adedako be given to his families residing in Yaren.

45 The NLC recorded that "Abotijij is to be referred to as shared in Minute Book 41 page 268", i.e. shared between the four "lessors".

46 Minute Book 41 at page 268 had recorded Abotijij as belonging to the four "lessors", but noted that Deigaeruk wanted to give away his interest. This entry was undated but came before Minute Book 50 entry on 8 February 1993, on which occasion it was referred to as recording that Abotijij was "shared" between the four people in the proportions set out in Minute Book No 41.

47 Adopting and relying on Minute Book 41, the Committee, as later shown in Minute Book 50 page 74, purported to distribute one of the lands, Abotijij, to those claiming from the tribe of Dedage's mother and one land "Adedako", to the descendants in the tribe of his father, a neat solution, if it was done by agreement.

48 This Minute adds some weight to the suggestion that there had been family agreement that the four "lessors" inherited Dedage's interest in Abotijij. Once again, however, the Minute does not purport to record a family agreement, and gives little information. If it was a "decision" of the NLC, then it was not gazetted.

(c) Minute Book No. 81, page 143

49 The third reference document was Minute Book No 81 at page 143.[17] That records discussions of the NLC on 14 August 2002. I have not been provided with a translation of that page of the minute, but it apparently notes that the 1933 decision was taken into account, together with the 1951 decisions, wherein the four "lessors" were declared owners, together with a 1977 minute which also named those persons. I will refer to the 1977 minute later.

50 Although in the Gazette notice in 2012 the NLC cited only the above three documents as sources for its determination, there were a number of other relevant documents on their files to which they may well have made reference and which I have taken into account.

Additional NLC documents

51 On 21 January 1963 (TC 25) the Committee discussed land in the Wireless station area. As Ms Depaune noted, this was one of a number of references which reflected that there was a close connection of Gadabu family to lands owned by Dedage.

52 Then, on 9 November 1977 Abotijij was referred to in Minute Book 41/23. The Committee noted that Erina's interest had been replaced by Dedage between 1928 and 1933. The members understood that Abotijij had passed from the estate of Erina by being distributed to Dedage, and also Agiriouwa, Udibe and Peter D in equal shares. The Committee recorded that the present owners were Deigaeruk, Gadabu, Dogiauwa and Gumwear, thus adopting the 1951 opinion.

53 The 1977 Minute shows that there was some concern about how Erina's 1928 interest in Abotijij had become Dedage's in 1933. The minute records that:

> "Members also found that it was dealt in the Estate of the late "Eirina D *(estate No 30 or 32)?? And was distributed as follows, Agiriouwa, Edibe, Dedage, Peter D in equal shares 23/5/1939".

[17] Exhibit 11, Tab A 30-31.

54 That entry might suggest that there had been either a determination or an agreement recognised by the Committee in 1939. Unfortunately, no trace can be found of the 1939 minute. It is impossible to know its relevance.

55 The Committee in 1977 recorded puzzlement about Peter's 1933 interest in Abotijij, and asked "Why was it included in the discussion of the Late Eirina Estate"? That question was repeated: "Why was the share of the Late Dedage also included in the discussion of the Late Eirina Estate?" Those notes display uncertainty about the entitlements of Erina and Dedage, but the information is far too vague to demonstrate that there was a family agreement in 1939 to the effect that Agiriouwa, Udibe, Dedage and Peter now shared Abotijij "in equal shares". Nor does the note demonstrate that the Committee's conclusion in 1977 that "present owners" were Deigaeruk ¼, Gadabu 3/8, Dogirauwa 3/16 and Kumwear 3/16 was the result of family agreement. We do not know if the minute or determination of 23 May 1939 (which seems not to have been gazetted) was in existence and was taken into account as evidence of family agreement or prior determination when Chairman Detudamo made his decisions in 1951 allocating ownership to the four "lessors".

56 The Nauru Lands Committee regarded this material as demonstrating that Dedage's interest had passed to the Gadabu and other families who it named as beneficiaries in 2012, presumably by virtue of family agreement. Had such a family agreement been confirmed by a published determination, then that would be conclusive support for the claim by the named beneficiaries.

57 Opponents of the NLC decision contend, however, that there is not sufficient evidence to justify the conclusion that there had been such an agreement. Thus, they contend that the principles of the 1938 Order must be applied to determine who Dedage's beneficiaries were at the time of his death, and, by descent, then tracing how his estate passed from one generation to the next, or reverted to an ancestor.

58 In summary, the claims by Gadabu, Capelle, Bop and Gadeowa families which were recognised by the NLC in 2012 were not supported by the evidence on which the

Committee relied. The Committee did not apply the 1938 Order, as it was bound to do. Insofar as it may have had any regard to the 1938 Order, it proceeded on a mistaken assumption that Dedage was unmarried. Insofar as it purported to apply a family agreement, no evidence is provided to show who constituted "family" for the purpose of a family meeting, when it was held and what the terms of the agreement were. The decision of the Committee was not published in the Gazette.

59 It follows that, if the Gadabu, Capelle, Bop and Gadeouwa claimants are to succeed, then they must either do so by virtue of a family agreement (which has not happened to date) or by demonstrating that they can trace their claim from ancestors who constituted family or nearest relatives of Dedage when he died.

60 I will consider that basis for claim later.

The claims by Brenda Caleb

61 The family of Brenda Caleb claim Abotijij through Enokori Caleb, who was the daughter of Eidiribaina. They contend that the NLC had made previous determinations that acknowledged that Eidiribaina was the sole inheritor of the estate of Dedage. The Caleb family reject the suggestion that ownership of Abotijij was decided by the purported decisions of the Lands Committee and NLC in 1951 and later.

62 The Caleb claimants refer to a number of published determinations which they contend demonstrate that Eidiribaina's exclusive claim to Dedage's estate was accepted by the NLC.

63 First, they refer to the personalty estate of Dedage which, they say, was awarded solely to Eidiribaina (See Government Gazette No 1 of 1961[18]) However, that notice records that it related only to the personalty estate "derived from Block 629, Lease 1064", which is not Abotijij.

64 Next, the Caleb claimants point to Government Gazette No 212/1960, published 3

[18] Only one page, out of three, of this notice was exhibited before me.

December 1960, which refers to land called "Ibea". It is signed by the Secretary of the Nauru Lands Committee. It records that Ibea was shared one third each by Dedage, Udibe and Agiriouwa. The proposed owner of the whole of Dedage's interest was Eidiribaina. Ray Gadabu gained Udibe's third share and Doris Bop, Jackinal, Gumwear and Dogirauwa shared the remaining third interest.

65 Next, Government Gazette No 243/1973(Ex 5) was a re-publication of a 1963 notice in GG No 31 of 1963. It was signed by the Administrator, not the Nauru Lands Committee. This listed the intended beneficiaries of royalties for mining phosphate on German Wireless Station land. Three of the listed claims are said by the claimants to have been the property of Dedage. The claims identified are given Numbers 14, 24 and 76 in the Gazette Notice. As to those three claims the Notice records that Eidiribaina was to receive one third of the royalties and the remaining shares were divided between Dogirauwa, Gumwear, Gadabu Ray, Doris Bop and Jockinal Gadabu.

66 However, the extract provided to me gives little information: indeed it does not expressly say that the three "claims" related to blocks owned previously by Dedage.

67 It may be seen, therefore, that these gazettal notices do not relate to Abotijij, nor do they provide any information as to the reasons why Eidiribaina inherited those lands, or royalties, from Dedage. In each instance it is not known whether the 1938 Order was being applied. In my opinion, these notices provide no reason for concluding that Abotijij must have been owned by Eidiribaina.

68 In addition to those gazette notices Geoffrey Thoma, on behalf of the Caleb claimants, supports the Caleb claim by noting that the late Eidiribaina's family and descendants now live on Dedage's lands in Aiwo "without dispute from other claimants".

69 Ms Hartman, pleader for the claimants, claims that the above material demonstrates that there was family agreement that Eidiribaina was to inherit, and be sole owner, of all unallocated property of Dedage. In my view, although it seems that there is no record of objection by Dedage's family or nearest relatives to Eidiribaina gaining interests in certain property owned by Dedage there is little evidence to demonstrate

that there had been family agreement in any such instance, and no evidence at all with respect to a family agreement concerning Abotijij.

70 As Ms Depaune, counsel for Tyran Capelle has pointed out, in one instance, at least, the NLC expressly overlooked Eidiribaina when distributing Dedage's land "Atabato" (which he owned jointly with Gadabu).

71 The improbability of there having been complete or genuine family agreement to Eidiribaina gaining any lands of Dedage may be illustrated by reference to references in NLC Minutes concerning Ibea and Atabato.

72 The distribution of Dedage's interest in Ibea to Eidiribaina was made by Gazette NN 212/1960 on 3 December 1960. Dedage had held a one third interest and that went to Eidiribaina. In November 1960 Dogirouwa, who was Dedage's nephew's widow, complained about that decision to the Government Surveyor, but did not appeal it.

73 At a meeting of the NLC on 24 November 1960, which was considering Atabato, someone asked "Why Eidiribaina? Notwithstanding that expression of doubt, the Minute of the meeting (Minute Book 14 page 49) recorded that the Committee members proposed that Eidiribaina should gain a ½ interest in Atabato, and each of Ray Gadabu, Jockinal and Doris Bop would receive 1/6. However, there was no determination published concerning Atabato until (by GNN 229/1963) 18 September 1963, at which time Eidiribaina was excluded from the list of owners, the three Gadabu family being named as owners. That seems not to have been appealed.

74 Thus, it is not true to say that Eidiribaina was regarded as the rightful and sole owner of all of Dedage's lands. The question "Why Eidiribaina?", was not however answered in the NLC records. Eidiribaina's claim to Dedage's estate seems to first arise only in 1960, with Ibea.

75 In its response dated 8 May 2013 to the claim by the Caleb family, the Vice Chairman of the NLC rejected the suggestion that Eidiribaina had any interest in Abotijij, noting that no record in the NLC stated that to be the case. Additionally (but without saying so clearly), the Vice Chairman seems to have rejected any suggestion that Eidiribaina could have been described as being family or nearest relative of Dedage. He noted

that she was not a blood relative in the family tree on Dedage's mother's side, and in fact appeared only as a blood relative of Peter Diduku, as was the case for her descendants, the Caleb claimants.

76 The claimants also rely upon a genealogy (Ex 7) which they contend was produced by the Nauru Lands Committee. There is no date on this document, and none has been suggested for its production. That genealogy[19] has a foot note that records that the Committee "awarded the estate's to the following persons listed. It then listed the estates of Erina, Udibe, Agiriouwa and Dedage. Eidiribaina was recorded as the sole beneficiary of Dedage's estate.

77 This document is of little assistance. Although it was said to have been produced by the NLC, the Vice Chairman Abano Diringa gave evidence that he had never seen it before, that it was not an NLC document, that he did not think it had anything to do with Abotijij and that he had certainly not referred to it when making the 2012 determination. The document itself does not suggest that Eidiribaina is a close relative of Dedage; she does not appear on the genealogy, at all. Of course, as Ms Hartman submitted, the document may have been an NLC document without the Vice Chairman having discovered it. She submitted that her clients claimed to have found it on NLC records and in its terms it reads as being an NLC document. The document, however, provides no basis on which the Committee could determine that Eidiribaina inherited Dedage's lands.

78 It may have been, as Ms Hartman contended, that Eidiribaina was "like a niece" to Dedage. But there is no record of a family agreement that she should be the owner of all of his property, including Abotijij, for that reason.

79 In summary, the basis on which the Caleb family claim has been advanced could not justify them being declared either the sole of part owner of Abotijij. The claim has no regard for the principles of the 1938 Order, but assumes that Eidiribaina gained her interest by a process to which the 1938 Order had no bearing.

80 If the Caleb claim is to succeed then they must show their descent from the family or

[19] Tab A page 23, Exhibit 7 to affidavit of Geoffrey Thoma.

nearest relatives of Dedage. So far, they have not attempted to do so.

The claim by Antonius Heinrich and family

81 The Heinrich claim is predicated on my finding that the 1933 determination was wrong, and substituting a different finding as to ownership at that date. Mr Ekwona submitted that in 1933 the Committee should have declared that Abotijij was owned by Erina and Peter. He submitted that prior to the introduction of *Administration Order No 3 of 1938* the prevailing custom was that the estate of a married person would pass to the spouse, as nearest surviving family. He submitted that that was the custom before the 1938 Order took effect and Nauruan customs had to be recognised by the Court[20].

82 That there had been such a custom before 1938 was recognised by Thompson C. J. in *Ikirir v Duburiya and Others*[21] where his Honour observed: "Prior to 1938, it was apparently not uncommon for wives to inherit their husband's land". Mr Ekwona referred me to a number of 1922 cases that recognised surviving spouses gaining the estate in this way.

83 Relying on that principle, Mr Ekwona submitted that since Erina had been married to Detagaroa the latter inherited her interest, which she had retained until her death in 1928. He would have held the estate during his lifetime and, according to Mr Ekwona's interpretation of customary law pre-1933, Detagaroa's interest would have passed to their two children upon his death[22]. The children of Erina and Detagaroa were the daughter, Eigigu, and son Appa. Both children died in early 1938, before the 1938 Order came into effect.

84 As may be seen, this analysis must start with the proposition that Erina retained ownership of Abotijij, notwithstanding the 1933 determination.

85 Mr Ekwona submitted the 1933 decision did not amount to a determination of ownership in Abotijij, and that insofar as Dedage was shown as having the half interest

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[20] *Custom and Adopted Laws Act* 1971, s.3.
[21] [1969-1982] NLR (B) 39 at 42.
[22] Whether under the pre-1938 custom the whole of the interest or only two thirds would have passed to the children (with one third retained in Detagaroa's estate), need not be explored.

in Abotijij in 1933 he could only have been holding it in trust for Eigigu, who died in about 1938, or Appa.

86 That presents a further difficulty for Mr Ekwona's analysis. As set out in his written submission of 18 November 2013, it required that Dedage pre-deceased Eigigu and Appa, so that their estates would have included his interest in Abotijij. In his written submission Mr Ekwona claimed that Dedage had died in 1937 or 1938, however when the hearing resumed conclusive evidence was led which established that Dedage died in 1942, that is, after the deaths of the two children of Erina.

87 What I understand to be an alternative basis for the Heinrich claim to Abotijij is as follows.

88 If Dedage died before Detagaroa , as seems likely[23], Mr Ekwona submitted that that meant that Detagaroa was in a position to claim Dedage's estate and to be awarded it on the basis that he was "family or nearest relative" to Dedage upon his death in 1942 by virtue of his marriage to Erina, notwithstanding her death had occurred in 1928. That would have meant that Detagaroa's interest in Abotijij would have passed on his death to his sister Eidunga, and also to her husband, Doburae, and from them to their daughter Dogitaoe. It is through Dogitaoe that the Heinrich claimants claim their inheritance of what was, they say, Erina's 1933 interest in Abotijij, which the Committee had wrongly failed to recognise. The Heinrich family claims that they are the descendants of Dogitaoe Heinrich, the daughter of Eidunga and Doburoe, and that Eidunga was the sister of Detagaroa.

89 That claim depends on Detagaroa having inherited an interest in Abotijij that he could pass on to his sister and her husband, and they in turn could pass on to their daughter Dogitaoe. However, par 3(b) of the 1938 Order provides a life time only interest for a spouse. Detagaroa had nothing to pass on, even if it was accepted that he inherited the land in the first place.

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[23] He had been at the Leper Station in Truk and was presumed to have been killed by the Japanese on 11 July 1943.

90 For reasons earlier stated, I do not propose to go behind the 1933 determination, which in my opinion must be accepted as a final statement of ownership at that date. The whole basis of the Heinrich claim depends on my rejecting the 1933 finding as to ownership, substituting a finding that Abotijij had not passed to Dedage, but remained with Erina. It is not open to me, however, to overturn the 1933 decision.

91 That however, leaves open the question whether, by reference to par 3(b), the applicable paragraph from the 1938 Order, the Heinrich claimants are able to trace a claim to Abotijij through ancestors who were "family or nearest relatives" of Dedage, when he died.

92 In submissions, Mr Ekwona sought to argue that Detagaroa should be regarded as "family" of Dedage, by virtue of being the spouse of Dedage's sister Erina. However, while a spouse could be "family" for the purpose of attending a family meeting, the 1938 Order merely granted a life time only interest to surviving spouses, and thus he would not have passed on an interest in the land.

93 Apart from that contention, no attempt has been made to advance the claim on the basis of descent from family or nearest relatives of Dedage.

94 The NLC said in the response dated 8 May 2013 that the Heinrichs were not related by blood to Eirina or Dedage. The Vice Chairman contended that Abotijij did not pass to the Heinrich ancestors "as they are not the nearest relatives of Dedage in the same tribe from where the land had come".

95 That shows that the NLC presumed, wrongly, that Dedage was not married when he died, and thus in their response assumed that par 3(a) of the 1938 Order applied, rather than paragraph 3(b). Nonetheless, it is difficult to see any basis on which the Heinrich claimants can be said to have descended from family or nearest relatives of Dedage.

96 I will, however, leave that question open, for the moment.

97 There is one further factor that needs to be considered. In his judgment in Land Appeal No 14 of 1969, *Dogirouwa v Gadabu,* Thompson CJ declared the customary will

of Agiriouwa to be valid and to have passed Agiriouwa's interest in two lands, Portions 128 and 274, both named Amwareobwiden, to his widow Dogirouwa and to Gumwear, who she claimed was her adopted son. In his judgment the Chief Justice referred to a family agreement that had been made after the death of Eigigu, daughter of Erina and Detagaroa.

98 Thompson CJ said that the land had been owned by Eirina and had passed to Eigigu. Upon the death of Eigigu, the family agreed that it was to be distributed as to a quarter share to each of Agiriouwa, Udibe and Dedage and one eighth to both parents of Dogitaoe. Those parents were Eidunga and Doburao. Dogitaoe was the grandmother of the respondent Heinrich.

99 Dogitaoe could not have gained an interest in those lands pursuant to par 3(b), as she was not family or closest relative of Erina, but she could gain an interest in any lands by virtue of family agreement. The terms of this family agreement were provided to Thompson CJ by way of a Committee document that was incomplete and fragile due to age. It seems to have disappeared. It does not seem to be the case that Abotijij was subject to family agreement. Thompson CJ held that upon the death of Dedage, his interest in the lands "Amwareobwiden" were inherited, half each, by Agiriouwa and Udibe. As I later discuss, he agreed that Gumwear and Dogirouwa gained a half share each in Agiriouwa's estate.

100 The fact that Dogitaoe (and, thus, Heinrich) had benefitted from an agreement concerning land in Erina's estate is significant, but does not advance the Heinrich claim to Abotijij as there is no evidence that it was also subject to such agreement. Indeed, Thompson CJ noted that an attempt to reach family agreement as to the distribution of Udibe's estate had failed.

Claim by Jerome Reweru, Ebeni Tom and Agigo families

101 The Reweru claim was radically altered during the hearing. Affidavits and genealogies that had been relied on were "withdrawn", and a new affidavit and genealogies substituted in support of a newly formulated claim. So far as I understand

the amended claim, as set out in the affidavit of Jerome Reweru, sworn 23 August 2013, and supported by genealogy Exhibit JR/R.04B, they now claim an interest on the basis that they are descended from Agigo and his wife Iteira, thence to their son Odonga.

102 Originally, the Reweru claim was said to derive from Adira, the father of Dedage. The basis of the initial and rather complicated claim was set out in the NLC response dated 8 May 2013:

> "The appellants claim to be the descendants of Agigo the great grandson of Abugeow. They say that the half-sister of Abugeow, Ebenua, was the mother of Dedege's father Adira. Abugeow's son Aboaion and Adira were both adopted by Abugeow's cousin Kawaw. They claim that because the descendants of Adira had died then those descendants' estates would be re-distributed to their next of kin in accordance with Administrative Order No 3 of 1938. They claim that the next of kin are the children of Abaoin and of Adira's sister Eigaga".

103 As to that original claim, the NLC accepted that they were related to Adira as members of the Eano tribe, but said that Abotijij came to Dedage through the Emea tribe from Aiwo. The Committee did not consider the Reweru family to be nearest relatives to Dedage in the same tribe from which the land had come.

104 That response by the NLC to the original Reweru claim assumed that Dedage died unmarried, and that the land had to be returned to the people from whom it came in the same tribe. However, given that Dedage was married, as I later find to be the case, the requirement of the "same tribe" was not applicable. The critical question, however the claim is to be framed, is: were the Reweru ancestors "family or nearest relatives" of Dedage?

105 The claim, as now advanced in the affidavit of Jerome Reweru, sworn 23 August 2013, is "that lands owned by Dedage or Elina are the same lands inherited by the Agigo family". Mr Clodumar conceded, I believe, that although this was presented as an "Alternative" basis for claim, the former basis of claim has been abandoned.

106 Mr Reweru claims that his mother was the daughter of Odonga, who was the son of

Agigo. He claims that at a family meeting with the NLC the Vice Chairman "admitted... that the children of Agigo were the rightful heirs of the estate of Dedage", but said they could not act on that because the Committee was bound by the 1951 decision of Head Chief Detudamo. The NLC denies that any member said this.

107 Mr Reweru contends that Odonga had met with the NLC and at that meeting: "Odonga had discussed land owned by Dedage, Erina, Udibe and Agiriouwa and had settled them favourably. This claim on Portion 94 Abotijij as far as I know was one of the land issues settled by Odonga".

108 There is no evidence of such an agreement.

109 Mr Reweru says that the NLC is hiding the record; the NLC denies that any such record ever existed, but if it did then it has been lost.

110 Mr Reweru claims that those who gained Abotijij by virtue of the NLC decision in 2012 were "persons/families distant from Dedage and those not related to Dedage at all".

111 The Reweru claim asserted that Dedage died after Agiriouwa (1944) and Udibe (1945) and led evidence that sought to establish that Dedage was alive in 1946. However, that evidence was plainly wrong, as the death of Dedage in 1942 was established by a death certificate. The implications of that setback from the Reweru case cannot be fully appreciated while there remains a dispute about what constitutes the correct genealogy. Suffice to say, it is very unclear to me how the Reweru family traces its descent from ancestors who were family or nearest relatives of Dedage, thus making them, now, the surviving family or nearest relatives.

112 The genealogies relied on by the Reweru claimants were subject of radical amendment during the course of the hearings, yet still, at the end of the submissions and evidence, there remained fundamental disagreement between the NLC genealogy and that presented on behalf of the Reweru interests. As I later discuss, I found it impossible to resolve the conflict on the basis of the present information.

113 The genealogies produced, then amended or withdrawn after the completion of

several days hearing, have created uncertainty as to the relationship claimed with Dedage. The situation is not helped by the fact that all of the many genealogies have gaps and in some cases, errors. The Reweru claim to be nearest relatives of Dedage is at the moment too uncertain for me to declare it valid.

114 A primary objective of the Reweru family seems to be to ensure that descendants of Gumwear and Gadabu are ruled ineligible to inherit any of the estate of Dedage.

115 Mr Clodumar submitted on behalf of the Reweru claimants that neither Gadabu family nor Gumwear's had any claim to Abotijij. In the case of Gumwear, he submitted that he was neither adopted nor gained an interest through the will of Agiriouwa.

It is the claim of Josephine Gadeouwa, and her family, that depends on tracing their interest in Abotijij through Gumwear.

The Claim of Josephine Gadeouwa

116 Josephine Gadeouwa and family claim an interest in Abotijij solely on the basis that they are the descendants of Gumwear. If Gumwear gained an interest in Abotijij, then they have succeeded to it. Mr Kun, their pleader, submitted that Gumwear had gained such an interest, either by virtue of adoption or by gaining his interest through the will of Agiriouwa.

Gumwear's claim to Abotijij

117 Mr Clodumar contended that in my judgment in *Antonius Heinrich v NLC and Others*[24] I had made findings that Gumwear had no interest in Abotijij. That is not the case. In that judgment I was not called upon to determine whether Gumwear had a valid claim; those questions were not the subject of evidence before me. Rather, in an action seeking relief by way of certiorari, I was considering whether the NLC had afforded procedural fairness to the plaintiff and had taken into account all relevant matters and/or had failed to take relevant matters into account. Having found that the

[24] [2012] NRSC 11

decision was defective I quashed it and referred the case back to the NLC[25].

118 The question is now before me. Did Gumwear gain an interest in Abotijij either as adopted son of Agiriouwa or under the will of Agiriouwa? I am satisfied that, on one basis or both, he did.

Gumwear's claim to Abotijij through adoption

119 In *Dogiouwa v Gadabu*[26], Land Appeal No. 14 of 1969, Thompson CJ considered an appeal by Dogiouwa, widow of Agiriouwa, in which she claimed under her husband's customary will ownership of two blocks both named Amwareobwiden, being portions 128 and 274. The appellant claimed that she and Gumwear should inherit under the will. She claimed that Gumwear was her adopted son and should take the estate of his adopting father.

120 Thompson CJ did not make a positive finding that Gumwear was not adopted. The Chief Justice found, however, that the evidence was not sufficient for him to find that Gumwear had been adopted.

121 It was only as to the subsequent distribution of Udibe's share that Gumwear missed out by not being adopted. There was no will from Udibe.

122 Thompson C.J. saw the question he had to decide as being whether in 1969 he could rule that Gumwear had been adopted in 1944. He said that the only evidence on the question was that of Dogirouwa. He held that she "is now unable to call any independent evidence on the matter".

123 Dogirouwa gave sworn evidence that she and her late husband had adopted Gumwear. That evidence was not challenged. With great respect to a very learned judge, I should have thought her uncontested evidence was adequate proof, yet there was very compelling additional, indeed independent, evidence available, none of which was referred to the judge.

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[25] See pars {52]-[53].
[26] [1969-1982] NLR (B) 9.

124 Dogirouwa swore that she and Agiriouwa had adopted Gumwear. The will of Agiriouwa left his estate to his wife and Gumwear, compelling evidence in support of the adoption. Furthermore, when Dogirouwa and Agiriouwa were removed to Truk, they took Gumwear with them, treating him as their child at that difficult time. In her notice of appeal Agiriouwa appealed on behalf of herself and "our adopted son, Gumwear". The 1951 and subsequent decisions of the Lands Committee were entirely consistent with a contemporary opinion that Gumwear was an adopted child of Agiriouwa.

125 In my opinion, it is not to point that Gumwear had not been the subject of formal adoption under the *Adoption of Children Act* 1965. If the evidence disclosed that he had been adopted under customary law at any time before that date then that was sufficient to give him or his descendants a right to share in the estate, a right that crystallised at that moment.

Does the decision of Thompson CJ preclude my finding that Gumwear had been adopted? In my opinion, it does not. His Honour did not make a positive finding that he had not been adopted, merely that there was no independent evidence to support her claim. That, with respect, was wrong. The evidence pointed only one way, and should have led to a positive finding of adoption. I am conducting a re-hearing de novo and am entitled to review all of the evidence anew. Having done so, I conclude that Gumwear was adopted.

Gumwear's claim to Abotijij through the will of Agiriouwa

126 In deciding the appeal by Dogirauwa[27] concerning the will of Agiriouwa and the inheritance of two blocks named in the will, the Chief Justice found that the land had been owned by one of the parents of Agiriouwa (that is, Eidibae and Detomwan), and then was inherited by his sister, Eirina. Eirina died in 1928 and her land went to Eigigu, who died unmarried and without children in 1939. Thompson C.J held that after the death of Eigigu "the family held a meeting" as provided by the 1938 Order

[27] *In Re Dogirouwa; Dogirouwa v Gadabu* [1969-1982] NLR (B) 9; [1969] NRSC 2 Land Appeal No 14 of 1969

and agreed that Amwareobwiden should be distributed ¼ to Agiriouwa, ¼ to Udibe, (brother of Agiriouwa and Eirina), ¼ to Dedage (Eirina's maternal uncle) and 1/8 each to the parents of Dogitao.

127 When Dedage died then, so Thompson C.J. held, his interest went to brothers Agiriouwa and Udibe. Agiriouwa died in Truk in 1944 and Udibe died in 1945, without issue. There was no family meeting or agreement as to how Udibe's interest was to be distributed.

128 In the will, Agiriouwa listed his properties and then added "if there are any remaining blocks, I have forgot to write them with above blocks, my share will pass to Dogirouwa and Gumwear". On 30 July 1944 Agiriouwa made a further, final, entry to his will which had been written the previous day. He stated "On the following day 30 July 1944, again I called in Jose to rewrite some more lands as I forgot them. Adedeko in Yaren (Coconut land) and Anemate in Meneng (Phosphate land)."

129 Thompson CJ accepted that the will was valid and that Gumwear shared with Dogirouwa - as to 3/16 each - Agiriouwa's interest in both of the two blocks named Amwareobwiden, those being the only lands then in dispute. Those blocks had been named in Agiriouwa's will along with a number of other lands.

130 Thompson C.J. upheld the will, so Gumwear got an equal share with Dogirouwa in the interest then held by Agiriouwa in those two blocks.

131 Mr Clodumar submitted, however, that it was not proved that Agiriouwa had gained any interest in Abotijij, so he could not leave it to anyone in his will. There had been no determination concerning Abotijij made by the Nauru Lands Committee or its predecessor since 1933, he submitted, and certainly none had been published in the Gazette. Thus, he submitted, it is mere assumption that Abotijij had passed from Dedage's estate to Agiriouwa, who died before Udibe, and then to Udibe. Until someone made a determination, or until there was family agreement, the estate of Dedage – at least, that portion of it known as Abotijij – remained undistributed, Mr Clodumar submitted.

132 That is an interesting argument. Certainly, it is true that a party who sought to dispose or deal with land before he had a determination or family agreement recognising his entitlement could be restrained where his entitlement was challenged. That, however, does not mean that the entitlement to land by way of inheritance, applying the principles of the 1938 Order, cannot be anticipated in advance of a determination. Had Agiriouwa named Abotijij, in the will, as one of his lands that would have been effective to transfer the land, provided his ownership of it was subsequently confirmed by a determination, family agreement or order of the court. The fact that Abotijij was not named specifically does not alter the position, providing the remainder clause was effective.

133 It is quite clear that the Nauru Lands Committee, and its predecessor, the Lands Committee purported to make orders or decisions concerning Dedage's interests in various blocks of land without having regard to the will[28], which if it was followed should have been the conclusive determiner of the passage of Dedage's interest in each block. That was true too for his interest in Abotijij. Among the many parties to these proceedings, no one has nominated anyone other than Agiriouwa who might have held Dedage's interest in Abotijij at the time when he made his will.

134 In his judgment in *Dogirauwa v Gadabu* Thompson C. J. held that when Dedage died his two surviving brothers Agiriouwa and Udibe inherited his estate as to half shares each. Agiriouwa's estate passed according to the terms of his will and when Udibe died his estate was governed by par 3(a) so that his nearest relatives by birth were all dead, namely his parents, his sister Eirina, Eirina's children and his brother Agiriouwa. The Chief Justice listed a number of persons as being the nearest relatives of Udibe. Among those listed was Dogitaoe, but her claim to an interest in the lands named Amwareobwiden, was based on family agreement, not on application of par 3(b). Likewise, Dogirouwa and Gumwear were named but would not have been

[28] Mr Kun, pleader for Josephine Gadeouwa contended in his written submission that the NLC did consider Agiriouwa's will when it considered Dogitaoe's application to the NLC to be given an interest in three lands. I cannot confirm if that was the case as no reference to a Minute book is given to confirm that discussion about the will.

nearest relatives of Udibe.

135 No genealogy was provided by his Honour and it is not clear to me whether those he listed as beneficiaries to Udibe's estate would constitute family or nearest relatives for the purpose of this case.

Application of the Administration Order No. 3 of 1938

136 This then brings me to the question of who has a right to claim any and what interest in Abotijij by application of the rules in the 1938 Order. That question requires me to first make findings as to a number of factual issues.

Was Dedage married?

137 In her affidavit dated 8 August 2013 Gaowa Doae of Meneng described herself as an elderly citizen of Nauru. She deposed: "That my aunty Epetom is (sic) married to Dedage and the property they occupied in Yaren which was owned by Dedage was with Epetom until her death in 1972". No party sought to cross examine that deponent on that assertion. The Vice Chairman of the Committee, Abawo Diringa, gave sworn evidence in which he said that he understood Dedage and Epetom to have been married in a customary way. Although he had not considered the question of his marriage as relevant to the Committee's determination as to Dedage's estate, the witness would have treated him as married if the issue had been raised. In her affidavit, Ebeni Tom, who was only eight years old at the time, claims that she saw Dedage in 1946 and says that Dedage was married to Epetom. Since her evidence was wrong (although she was entirely honest as to her belief) as to whether Dedage was alive in 1946, I place little weight on her evidence concerning his marital status.

138 Ms Hartman tendered evidence to show that Epetom was in 1946 married to a German named Gunter Rasch. He had married four times. The fact that she may have been married to Rasch is not inconsistent with her having been married in a customary sense to Dedage, at the time of his death in 1942.

139 No one cited any authority to suggest that the term "married" in the 1938 Order

applied only to marriages that had been formalised in a church or registry office, and could not apply to a customary marriage accepted as such by the community. Mr Diringa denied that only formal marriages were recognised by the Committee, which he said applied customary law.

140 On the evidence before me I find that Dedage had been married to Epetom at the time of his death and so the Committee was obliged to apply par 3(b) of the 1938 Order unless there had been a family agreement that overrode the principles of inheritance that governed that Order.

141 In distributing Dedage's intestate estate the Committee was obliged to find who, were the "family or nearest relatives of the deceased", and who today would be the successors of those family and nearest relatives. That, in turn, requires tracing - over very many generations since the death of Dedage - the inheritance and reversion of interests in Abotijij following the successive deaths of those who at each moment stood as the inheritors in whole or part of Dedage's estate.

142 The question of who comprised family and nearest relatives of Dedage at the date of his death in 1942 cannot be answered without first making a number of findings of fact. The issues, and my finding, are as follows:

The date of death of Eirina[29]

There is no dispute among the parties that Erina, named in 1928 as the holder of a half share of Abotijij, died in or about 1928.

The dates of deaths of Dedage and Agiriouwa.

Agiriouwa died on 30 July 1944 on Truk, the day after he made his will. Dedage died on 18 September 1942, that is, before the death of Agiriouwa and after the 1938 Administrative Order had come into effect, which thereafter governed the distribution of intestate estates.

[29] Also referred to as Erina.

143 The significance of the fact that Dedage died before Agiriouwa is that his interest in Abotijij was part of the estate of Agiriouwa which was distributed by his will. The will provided that all Agiriouwa's estate was to pass to Dogirauwa and Gumwear. As I have discussed, Abotijij was included in the estate by virtue of the phrase "if there are any remaining of the blocks I forgot to write them with above blocks. My share will pass to Dogirauwa and Gumaer (sic)".

The death of Udibe

Evidence given by the Acting Deputy Registrar of Births Deaths and Marriages to Thompson CJ in the above land appeal was accepted as establishing that Udibe died between February and April 1945. When Udibe died he had no issue, his children having predeceased him.

The date of death of Eigigu

Thompson CJ held that Eigigu died unmarried early in 1939, confirmed by a death certificate giving the date as 5 January 1939.

The date of death of Appa

Appa was the brother of Eigigu. He died on or about 30 March 1939. That is not disputed.

The date of death of Detagaroa

Erina's husband is believed to have died in 1943.

144 This, then, brings us to the application of paragraph 3(b) of the 1938 Order.

Who are family or nearest relatives of Dedage?

145 The question whether "family" includes a spouse is a live issue. The Heinrich claim depends on a finding that Detagaroa could have inherited his wife Eirina's interest in Abotijij.

146 As Thompson CJ observes in *Ikirir v Duburiya,* the word "family" is used with apparently different meanings in different contexts in the 1938 Order. His Honour held, and I agree, that "family for the purpose of a family meeting must include the spouse of the deceased[30]. It does not follow, however that a spouse is "family or nearest relatives" of a deceased intestate person.

147 I agree with the submission of the Solicitor-General, that the fact that a spouse is specifically provided for, and limited to a life time only interest, reflects or acknowledges that a spouse cannot take the estate of the deceased save for an LTO interest.

148 The word "returned" in par 3(b) should not be regarded as having the same meaning as is given to it in 3(a), as I discussed in *Ivan-Hoe Daniels v Tyran Capelle and Ors and the NLC*[31]. The word should be read as meaning "passed" to the family or nearest relatives" of the deceased, when determining who gains the interests in the estate.

149 In examining the substantial volume of evidence in this case, and recognising that what is missing may well be more significant than what has been located, it seems clear that there was very close historical relationships between all of the parties now seeking to gain or retain an interest in Abotijij. The notion of "family and nearest relatives" would I have no doubt have been fairly broadly interpreted in most circumstances except where land interests, and royalty payments, were involved.

150 In the 1938 Order par 3(a) applies to the estate of an unmarried person. In that case the property must be returned to the people from whom it was received. That should be relatively easy to determine. If, however, they are dead then it is "returned" to "the nearest relatives in the same tribe". In Nauruan culture children inherit their tribe from their mother. There is no dispute that Dedage's mother, Eidedarube, was of the Emea tribe. The Emea tribe are from the Aiwo District. Dedage's father, Adira, was of the Eano tribe, who came from Yaren District. Abotijij itself is in Buada District.

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[30] See *Hedmon v Detenamo* [1969-1982] NLR (A) 173
[31] [2011] NRSC 6

151 It is not clear to me whether under Nauruan custom being part of the same tribe also requires being what is known as a blood relative.

152 It is clear, however, that in the case of an unmarried person the 1938 Order provides a restricted range of people who might benefit by having "returned" land that they or their tribe had given away to the deceased. The category is "nearest relatives in the same tribe". Thus, it excludes spouses of members of that tribe, and those of same blood as the spouse, as spouses will come from a different tribe than their partner's.

153 That category is more restricted than for the case of a married deceased person. In that case the property is to be "returned", i.e. passed, to "the family or nearest relatives of the deceased". Thus the recipients need not be of the same tribe as the deceased, nor need they be "relatives". It is possible to envisage someone who is treated as a member of an extended family but without actually having any kinship connection.

154 What makes one person a nearer relative than another to a deceased person also needs consideration. Mr Bliim tendered some very helpful kinship reports for Dedage and Udibe, produced using Ancestry.com software. These showed the progression of descendants from the immediate surviving relative of Dedage at the time of his death (his nephews, Udibe and Agiriouwa) to a husband of a seventh cousin twice removed. At what point should the search for "nearest relatives" stop?

155 Mr Clodumar suggested that "nearest relatives" ought to be strictly confined. If, say, there is a surviving brother the whole estate goes to him, even if there are children of his deceased brother, or grandchildren. Such a restricted approach is consistent with the phrase "nearest relatives" but would the community really want the provision interpreted in such a restrictive way? If it is to be so restricted, what of "family". Surely the nephews and their children would constitute "family".

156 These are questions on which I have received little by way of submission. In my view, they are issues on which the Nauru Land Committee ought to venture an opinion after consulting with the community.

157 Likewise I consider that the Committee should conduct further meetings to identify who may be regarded as family and nearest relatives by reference to a family tree.

158 From the outset of this case, which has probably been the longest land appeal ever in this court, there has been a failure to agree on a genealogy. I have had multiple genealogies handed to me. In many cases, the gender of the people was not given; their children were not named; people who were claimed to be adopted were not listed; people were omitted; whole lines of ancestors were ignored. On the final day of hearing I was told by Mrs Capelle that she, and I believe this also applies to the Nauru Lands Committee, did not accept the genealogies presented by Mr Clodumar, which had been amended and replaced in the course of the hearing.

159 In those circumstances I could not hope to resolve these issues. During the course of the hearings I suggested to the parties that they should engage an expert anthropologist or genealogist to assist in preparing a definitive, and agreed, genealogy and, in the absence of agreement, for that expert to give independent evidence relevant to identification of "family or nearest relatives" in this case. The suggestion was not taken up, but I repeat it. No doubt cost is a factor, as is delay, and the probability that a witness would have to come from outside Nauru.

160 However, given the significant royalties attached to Abotijij, and given the number of competing claimants, those wishing to press their claims should be willing to contribute to the costs of engaging an expert to assist in this way.

161 Whether or not an outside expert is engaged, I think it is desirable that the matter be returned to the Committee to conduct further family meetings, taking into account the opinions expressed and findings of fact in this judgment.

162 There have been attempts to resolve this case by way of family agreement. Those efforts have failed. I do not underestimate the difficulties of those trying to find common ground. The situation has no doubt not been assisted by the fact accusations of impropriety have been made far too freely on occasion and good faith negotiations have sometimes been interrupted by angry words.

163 I realise that people will be annoyed by further delay, but this is a very complex case, in which the Nauru Land Committee and the Court are trying to piece together a jigsaw puzzle that has been modified and developed over nearly 80 years.

164 Whilst the 1938 Order must be applied - leading to a close debate and examination of degrees of separation, rather than emphasising the extent of past mutual support and co-operation - its strict rules as to "family or nearest relatives" can be overcome by agreement of the parties. I would urge the parties to attempt to reach agreement before I make final determinations.

165 Absent family agreement, the Court is given very wide power on appeal to make whatever order "it thinks just". In *Ikirir v Duburiya and Others* [32] Thompson C.J. took a broad, and wise, approach to ensure that justice was done in circumstances where by virtue of a 30 year delay by the Nauru Lands Committee a child of the deceased was denied the opportunity to attend a family meeting before the child's death. The Chief Justice ruled that although the spouse of a child of the intestate deceased was not "family" for the purpose of a family meeting, the spouse of the child should be permitted to attend the new family meeting. His Honour said that it would be anomalous and unjust were that not to be permitted and that "in order for justice to be done" the spouse should be given the opportunity to attend. His Honour described this decision as "an extension of the normal concept of the family, but it is necessary if injustice is to be avoided in cases where (there was) a failure on the part of the Nauru Lands Committee, or its predecessor to take the proper action at the correct time . . ."

166 In the present case so much time has elapsed from the original 1933 determination that it is quite understandable that parties might genuinely believe they have an interest when, strictly, they do not meet the terms of par 3(b) as nearest relatives. Because so many decisions were taken by one or other Committee without providing an explanation for the decision, and without publishing the decision in the gazette and thereby giving interested parties the right to appeal, a confused and uncertain situation has been allowed to fester. Had decisions as to Dedage's estate been taken

[32] [1969-1982] NLR (B) 39, Land Appeal No 10 of 1971.

soon after his death the competing claims could have been much more readily supported or discounted, by reference to contemporary records.

167 In order to provide an opportunity for family agreement to be explored and hopefully reached, I do not propose to rule at this stage that any of the claimants who have been represented to date either have or have not established that they are entitled to a share in Abotijij. Given the history of this case, even claimants who might not strictly fall within the terms of par 3(b) might nonetheless be recognised as being entitled to share by way of family agreement.

168 In conducting further meetings the NLC should regard all of the parties to the proceedings as being "family" for the purpose of a family meeting. It may be that joint meetings would be more productive than separate meetings, in which case the claimants ought to try to limit the numbers who will attend to represent them. Reduced numbers might also serve to reduce tensions.

Conclusion and Orders

169 The determination of the Nauru Lands Committee dated 12 September 2012, published in Government Gazette No. 124 by GNN 501 of 2012, concerning Portion 94, "Abotijij", is set aside.

170 I remit the four proceedings that were the subject of this judgment to the Nauru Lands Committee to conduct a family meeting or meetings having regard to my findings in this judgment.

171 The primary purpose of the new family meetings will be to encourage parties to reach agreement as to the beneficiaries of Abotijij, but failing agreement to make a determination as to the beneficiaries applying the principles of the Administration Order No.3 of 1938 as discussed in this judgment.

172 In conducting further family meetings, the Committee should endeavour to produce an agreed comprehensive genealogy, utilising such independent expert advice as it deems appropriate. The Committee may require any parties attending the family

meetings to contribute equally to the reasonable costs of engaging one or more expert consultants to assist the Committee in its endeavours.

173 I grant the parties liberty to apply to the Registrar or a judge, upon 48 hours' notice to the Court and other parties, for the purpose of seeking directions.

Costs

174 It has been the general policy of the Court not to make costs orders in land appeal cases. I have returned these four cases to the Nauru Lands Committee in the hope that once my findings of law and fact are considered, agreement may be possible as to the persons who constitute "family or nearest relatives". An agreed genealogy should lead to resolution of that question. If, however, the determination by the Committee as to that question leads to unmeritorious appeals that disregard my findings, it should not be assumed that there would be no penalty as to costs.

Endnote

175 After final submissions concluded, I reserved my decision. I had completed my judgment, ready for delivery, when I was informed that the NLC and Mr Clodumar had resolved their dispute as to the correct genealogy relevant to the Reweru claimants. Mr Clodumar had departed Nauru when I received this information and my own departure was imminent, thus a further hearing was not practicable. It is encouraging that one area of genealogical dispute has been resolved but it remains necessary for all parties to consider, and hopefully agree on, the appropriate family trees to be used for determining "family or nearest relatives". The apparent agreement between the NLC and Reweru claimants does not cause me to change the orders I had decided to make in this case, but it does encourage me that a family agreement might yet be possible.

Geoffrey M Eames AM QC

Chief Justice

27 November 2013