



IN THE SUPREME  
COURT OF NAURU

Civil Suit No.89/2015

BETWEEN:

**DARRYL TOM &ORS}**

**Plaintiff(s)**

AND:

**TRANSOME DUBURIYA}**

**1<sup>st</sup> Defendant**

AND:

**SUMALA DUBURIYA**

**2<sup>nd</sup> Defendant**

Before: F JITOKO, Registrar

Date of Hearing: 18<sup>th</sup> August 2016

Date of Decision: 26<sup>th</sup> August 2016

## **APPEARANCES**

For the Plaintiffs: Mr. K. Tolenoa

For the Defendant: Mrs. A. Lekenaua

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## **DECISION**

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On 26 August 2015, the plaintiff, by an *ex parte* application, obtained an interim injunction restraining the 1<sup>st</sup> defendant from building a house on the land referred to as Portion 135 known as Imeto in Anetan district. The 2<sup>nd</sup> defendant is the 1<sup>st</sup> defendant's mother and has a life interest in the property through her late husband Tony Duburiya, the 1<sup>st</sup> defendant's father.

With the consent of the parties at the day of hearing, the court ordered that proceedings against the 2<sup>nd</sup> defendant be discontinued.

In his affidavit in support to the *ex parte* application, the plaintiff says that the total land area comprising Portion 135 is 0.4165 hectares equivalent of 4165 sq. metres. In his amended affidavit of 26 August 2015, the plaintiff claims that the land in question is owned by 4 families with shares as follow:

1. Tom's family : 4/5 shares
2. Eduar's family : 1/5 share
3. Duburiya's family : 1/5 share
4. Akibwib's family : 1/5 share

One may assume that there has been a mistake in the allocation of shares above and Counsel now confirms that "1/5 shares" should read "1/15 shares". Be that as it may, there is no disagreement with the fact that the defendant began constructing a house on part of Portion 135 early in 2015. The foundation of the building is complete but further works were stopped when the injunction was served on the defendant in September 2015.

The plaintiff asserts that the defendant's building when completed will exceed his entitlement to Portion 135 which he calculates to be 7/16200 share, in his letter to the 1<sup>st</sup> defendant of 17<sup>th</sup> July 2015. In the same letter the plaintiff warned the defendant to stop further construction as it was illegal. In addition, the plaintiff alleged in his second (amended) affidavits that the construction of the house was being pursued without the agreement of the majority of the landowners as requires by law. Subsequently, the plaintiff on 26 August sought and successfully obtained an interim injunction preventing the defendant from completing the construction of his house on the property. The claim by the plaintiff that the defendant had not obtained the consent of the majority of the land owners brought some urgency to the decision to grant the injunction.

The defendant entered his appearance through counsel on 3 September 2015 and filed his statement of defence on 19 October 2015. On 28 October the defendant filed his affidavit in reply to the plaintiff's affidavit in support of his injunction.

The defendant in his affidavit stated that like the plaintiff, he is also a landowner of Portion 135 and he agreed that the land is shared between the four (4) families as identified by the plaintiff. He also confirmed that he had earlier this year, started to build his residential home on part of the land. Contrary to the plaintiff's claim however, the defendant asserted that he had obtained the consent of at least seventy five (75%) percent of the landowners whose names and signatures verified and checked by the Lands and Survey Department, were attached as an annex to his affidavit. The defendant stated that he did not receive the defendant's letter dated 17 July 2015 which warned that by constructing the building the defendant was in fact using more than the equivalent of his share of the land and which the plaintiff translated as meaning or analogous to the defendant taking some of his 2/25<sup>th</sup> share of the land.

There is no argument as to the status of the parties in the proceedings. Both are land owners of Portion 135, although in differing proportions with the plaintiff owning by far the larger shares compared to the defendant's. There is also no doubt that the defendant had obtained around 75% of the landowners' consent to build on the land. The critical issue as identified by Mr. Tolenoa, Counsel for the plaintiff, is to what extent does the right of a landowner limited, if at all, in a tenancy in common situation, to the proportion of shares one holds over the whole.

The competing rights to real property under the Nauru land system is discussed by this court in ***James Demaunga & Ors v Windy Deireragea CA No. 8 of 2016***. It explained as follows:

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

*The right to use can only be obtained through the consent of the majority of all the co-owners of the portion."*

In this case the plaintiff has the much bigger shares (2/25<sup>th</sup>) as compared to the defendant's shares which the plaintiff estimates as 7/16200<sup>th</sup> shares. However the fact that the plaintiff has a bigger share does not give him exclusive rights to the use to any particular part of Portion 135; nor does it accord him priority rights over the same. Conversely, the defendant's right to Portion 135 is not in respect to any particular part of the Portion or a priority right of use of a part. Both the plaintiff and defendant are owners in common of the whole of Portion 135. Their shares of the whole are indivisible (**unity of possession**). Each has the same bundle of rights as the other to the land, such as the right of use, and the right to transfer or alienate.

Having defined the rights of both parties to Portion 135, there remains still the contention by the plaintiff that the defendant cannot use or occupy an area of the land that far exceeds his shares in proportion to the shares of the others. Thus if the court were to accept that the total land acreage of Portion 135 was 0.4165 hectares then the defendant's intention of building a dwelling house anywhere on the property would be in excess of his share of 7/16200<sup>th</sup>. The plaintiff also pointed out that the defendant has already a family home built on the property and the new incomplete building would accentuate the problem further.

There are two arguments raised by the defendant to counter the plaintiff's argument of proportionality of shares to land usage. First is the fact that the authority to build on the land had been given by three quarters of all the landowners. Evidence of this is provided by the Lands and Survey Department document filed into court. Thus notwithstanding the defendant's shares in the land, the other landowners had, by their consent, authorized him to build a home on Portion 135. The consent documents from the Lands and Survey Department states:

*"We the undersigned hereunder are owners of the lands formally name "juw" portion no.135 in the District of Anetan have all agreed for Mr. Transom Duburiya to utilised part of the land for his dwelling"(underlining is mine)*

This is conclusive evidence that not only did the landowners agree for the defendant to build on Portion 135, but the purpose of the building was specifically for a *dwelling* meaning a residence for him and his family to live in. So not only is the defendant legally entitled to enter and build on Portion 135 by virtue of his shares, albeit, if one is to adopt the plaintiff's argument, proportionate to share capacity, the majority of the landowners have given him licence to build a dwelling house on the land. Whether the dwelling house, when completed, will occupy more than the defendant's share capacity is no longer an issue, given the majority approval. In any case, Counsel for the defendant submitted that the incomplete building is no more than 16 X 8 m and will occupy only a small area of Portion 135.

The defendant also raised the issue of damages he is suffering. In reliance of the approval of the landowners, he had proceeded to build and also purchased building materials, which as of now he estimates to be around twenty six thousand dollars (\$26,000.00). The project is now put into jeopardy by the injunction that has prevented further construction. Any further delays will not only affect the state and conditions of the materials but also their price on the market.

This court does not doubt the genuineness of the concern by the plaintiff on the available land on Portion 135 for the use of his Tom family especially as it holds the largest of the four family shares in the property. There is no evidence before the court to show that the plaintiff has commercial or other ulterior motives in attempting to deny the defendant of the opportunity to construct a dwelling house on the land. However, this must be taken together with the fact of the concession given to the defendant by the majority of landowners plus the fact that a good number of those who signed and consented to the defendant's request were from the Tom family.

Finally, the issue of consent of landowners was raised by Counsel for the plaintiff arguing that there is no law that requires a majority or 75% of landowners for a person to use or build on any land on the island. The nearest comparison one can come to is the exercise of the Government's prerogative to acquire land for public purpose under the Lands Act 1976. Section 6 of the Act stipulates the procedure to be adopted by the Government when it requires, through lease or license to acquire land after having obtained three-

*Oneill's* case. The court is satisfied that the plaintiff has not made a *prima facie* case.

The second test is whether damages are adequate remedy. The key factor to be determined under this issue is whether irreparable damages will occur if the injunction is granted. If there is adequate remedy in damages then the injunction should not be granted. The plaintiff must show that the threat of irreparable injury which cannot be compensated for in damages. In this case, if the injunction is dissolved but the court later decides at the trial in the plaintiff's favour, the plaintiff is still able to seek compensation for the defendant's illegal building on Portion 135 including the dwelling house as possible asset for attachment proceedings should it be necessary. Insofar as the damages to the defendant are concerned, the court notes that there was no undertaking as to damages by the plaintiff at the hearing of his *ex parte* application.

The third test is the balance of convenience. The court will balance the cost and inconvenience of the grant of the injunction to the defendant (if the defendant is successful at the ultimate determination of the proceeding) with the inconvenience of a denial of the grant of an injunction to the applicant (should the applicant prove successful). The court in ***Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670 3All ER 772***, (per Hoffman J) stated it as follows:

*"The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition the risk that the court may make the "wrong" decision, in the sense of granting the injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party that succeeds (or would succeed) at the trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong" in the sense that I have described. The guidelines for the grant of both kinds of injunctions are derived from this principle."*

The defendant in this case has expended time and money not only in soliciting and collecting the signatures of consent of the majority of the landowners of

fourths of the landowners consent. A similar process can be applied to that of the present case of a landowner wishing to utilize a part of Portion 135 that is commonly held (undivided) and commonly owned (in unequal shares). Given the complexity of the land tenure system, to require a 100% landowners' consent for the defendant to use part of his property as contended by the plaintiff, is almost asking for the impossible. In my view the formula and procedure adopted under section 6 of the Lands Act acknowledges this difficulty and at the same time also lay recognition to the practice long established by customs and customary law of the people of Nauru and that is the use of commonly owned land was by consultative process but ultimately decided by the consensus of the co-owners of property. Consensus here means general agreement not necessarily unanimity. It is now a generally accepted rule that the majority to three-quarters consent of the landowners is required for a person to use any part of the land. In this case, the defendant in my view has complied with the rule.

In deciding whether to extend the interim injunction presently preventing the defendant from completing the construction of his dwelling house, we remind ourselves of the tests to be applied by the court as set out in ***American Cyanamid Co. (No.1) v Ethicon Ltd [1975] UKHLR 1***. Briefly, the first test is whether the plaintiff has a "strong arguable" case or a "serious question" raised. The test as succinctly stated by the court in ***Australian Broadcasting Corporation v Oneill (2006) 227 CLR 57*** is, "*... whether the plaintiff has made a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief.*"

The general requirement is that the applicant/plaintiff must establish "a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial."

The answer in this case, as evident from the court's assessment above, is that while the plaintiff may have a contentious issue on the rights of co-owners of a piece of land *vis- a- vis* their shareholding capacities in the same, the approval of three-quarters or approximately 75% of the co-owners has acted to negate it as a "strong arguable" case or raise it to satisfy the serious question test in

Portion 135 enabling him to start building on the land, but had proceeded in purchasing building materials and incurred other expenses towards the building of a family home. The costs he has incurred so far he estimates to be approximately \$26,000.00. In ***Organic Marketing Australia Pty Limited v Woolworths Limited [2011] FCA 279***, the court stated that an injunction should not be awarded because the costs of the injunction on the defendant are greater than the costs of not making the injunction on the plaintiff. Taking into account and weighing in this case, the inconvenience of the grant of the injunction to the defendant to the inconvenience of a denial of the grant on the injunction to the plaintiff, the court holds the view that the balance of convenience must favour the defendant.

In all the circumstances, the court makes the following **ORDERS**:

1. That the injunction granted on 26<sup>th</sup> August, 2015 is hereby dissolved.
2. That the matter is to proceed as in the normal course.
3. Costs in the course.



F. Jitoko  
Registrar