



IN THE SUPREME COURT OF NAURU

[CIVIL JURISDICTION]

Civil Suit No. 53 of 2016

Between **FRANCIS DEIRERAGEA & CONNIE APPI (NEE DEIRERAGEA)** Plaintiff

and

JANCI KUN & THERESEA KUN Defendant

Before: Crulci, J.

Plaintiff: V. Clodumar

Defendant: K. Tolenoa

Date of Hearing: 25 May, 9 June 2017

Date of Decision: 14 June 2017

CIVIL – Can ownership be acquired through tenancy – Proportion of Landowners Consent Required - section 3 of the Lands Ordinance 1921-1968 – section 6 Nauru Lands Committee Act 1956 – sections 3, 6 Lands Act 1976 – Lawful owners of land

JUDGMENT

1. This action is commenced by Writ of Summons on the 19 July 2016 in relation to trespass and construction of a building on land Portion 84, known as 'Atomo', in Yaren District.

BACKGROUND

2. This matter came before the Registrar on the 21st of July, 2016 following an *ex parte* application by the Plaintiffs for an interim injunction to stop the Defendants from the construction or continuing to construct a building on the land portion 84 'Atomo' until such time as a matter was disposed of by the courts.
3. Attached as exhibits to the Plaintiff affidavit were copies of Gazette notices indicating that the Plaintiffs had a share in the land which is held in common ownership by the Mwareow and Samson families.
4. It was noted that there is land adjacent to Portion 84, also called Atomo which is Portion 85. The Plaintiffs also hold shares 1/14 in this adjacent land.
5. The Registrar made the following orders on the 21st of July, 2016 based on the evidence before him that the Plaintiffs had warned the Defendants on a number of occasions that they were not permitted to build on land Portion 84 as they were not part-owners of the land, nor had the Defendants sought and obtained as required, the agreement of the majority of all the land holders of Portion 84:
 1. That the interim injunction is granted stopping and restraining the Defendants/Defendants, Janci Kun and Theresa Kun, their servants, agents, construction company or who so ever from construction and/or continuing with the construction of a building on the land Portion 84 in Yaren District until such time as the matter is disposed of by the court or as the court or otherwise decides;
 2. That the Plaintiff/Applicants serve the Defendants this order and all the documents in support; and
 3. The matter is adjourned before the Registrar to the 4 August 2016 for mention.
6. Subsequently it transpired that the Plaintiffs did not file an affidavit of service as required by Order point 2 above; there was some confusion in the Registry resulting in neither the memorandum of appearance nor the affidavits filed by the Defendants being stamped or dated by the Registry. The return date came and went and the court was seized again of the matter on the 3 of November, 2016 subsequent to the Plaintiffs filing a fresh *ex parte* summons on the 31 of October, 2016.

7. In the intervening time the building had been completed and the Defendants had commenced operating a betting business from the building. To allow all parties to prepare documents in light of the new developments further time was granted.
8. At the hearing of the matter on the 3 November 2016, it was established that the Defendants had obtained a gaming licence under the *Gaming Act* 2011, which permits the operation of the betting shop. The cost of such a licence for 12 months is \$5000, and in this case the licence dated 4 of August, 2016 to the 4 of August, 2017.
9. The Defendants claim that up until the 3 of November, 2016 when the business was halted due to the injunction, the profit being made was in the region of \$3000 per day (Monday to Saturday).
10. It was noted that the licence under the *Gaming Act* 2011 specifies explicitly where a business is to be conducted and this licence stipulates "At the following place/s: Yaren Pago District (Therese Kun's Residence)". Therese Kun's residence is at Atomo Portion 85, whereas the newly made building in which the betting shop was operating is located on Atomo Portion 84.
11. Having heard from both parties the Registrar found that the balance of convenience favours the Plaintiffs and made orders as follows:
 1. That the injunction of 3 November, 2016 is to continue until the matter is disposed of by the court, or as it otherwise decides.
 2. That the matter takes its normal course.
 3. That costs be in the cause.

MATERIAL BEFORE THE COURT

12. The Plaintiff and Defendant have filed with the Registry the following:
 - Plaintiffs' Writ of Summons, 19 July 2016
 - Plaintiffs' Interlocutory summons and Affidavit, 19 July 2016
 - Court Order, 21 July 2016
 - Memorandum of Appearance for Defendants, 17 August 2016
 - Defendants' Affidavits in support, dated 17 August 2016, unstamped
 - Plaintiffs' affidavits in reply, 31 October 2016
 - Interlocutory summons, *ex parte* 31 October 2016
 - Record of Order, 3 November 2016
 - Defendants' submission and Affidavits in support, 22 November 2016
 - Plaintiffs' affidavit in reply, 30 November 2016
 - Defendants' statement of defence (amended), 5 December 2016
 - Plaintiffs' reply to amended statement of Defence, 9 December 2016
 - Statement in Defence and Reply, 15 December 2016

- Plaintiffs' reply, 20 December 2016
- Decision of Registrar and Court order, 19 January 2017
- Agreed facts, 21 February 2017
- Plaintiffs' submission on issues to be determined by Court, 19 May 2017
- Defendants' submissions, 25 May 2017

Agreed Facts

13. The following are listed as agreed facts:

- i. The land in issue is Atomo Portion 84 in the Yaren District.
- ii. The land is owned by the Samson and Mwareow family as determined by the Nauru Lands Committee. The estate of Samson was published in Gazette Number 18 of 12 April, 1978.
- iii. That the building constructed by the Defendant is on land Portion 84 in Yaren District.
- iv. The construction of the building was authorised by Mrs. Eniga Debao, the mother of Teresa Kun after receiving consent from Roger Mwareow and five of his siblings. This is confirmed at paragraph 9 of her affidavit dated 22 November, 2016.
- v. Roger Mwareow at paragraph 15 of his affidavit dated 22 November, 2016 confirmed that he and five of his siblings granted consent to Mrs Eniga Debao to use the land Portion 84 in the YAREN District.
- vi. That the consent was less than the precedent threshold of 75% of landowners and it did not involve the Samson family who are 50% owners of the land Atomo Portion 84 in Yaren District.
- vii. That the landowners of portion 84 had consented to Mrs May Deireragea to use the land for personal purposes as per exhibit "FD/03" enclosed with the affidavit of Francis Deireragea dated 19 July, 2016.
- viii. The Nauruan Housing Ordinance 1957 was repealed in 2011 by the *Statute Revision Act 2011*.
- ix. The Defendant Theresa Kun holds a business licence to conduct gaming at her residence in the Yaren District.
- x. The Court has ruled on 19 January, 2017 that the interim injunction granted by the Court on 3 November, 2016 to restrain the Defendants from conducting their gaming in the building on portion 84 is to continue until the matter is disposed of by the Court.
- xi. A family tree showing descendants of Mwareow and Samson.

ISSUES TO BE DETERMINED

14. Counsel have put forward the following as matters to be determined by this Court:
- (a) The Plaintiff asserts that the Defendants are trespassers on the land Portion 84 Atamo, in Yaren District: 'Who are the land owners of Portion 84 Atamo, in Yaren District?';
 - (b) The Plaintiff denies that the Defendants have any 'status quo rights' to be on the land Portion 84 as a result of Samson' acquiescing to people being on the land';
 - (c) Must any action before the Court be on behalf of all the landowners or can the Plaintiffs bring an action that does not include representatives of the Mwareow family;
 - (d) As the Nauru Lands Committee ("the NLC") has jurisdiction to determine land ownership, have the Plaintiffs brought the matter prematurely before the Court, prior to the NLC deciding the rights of the Defendants to the land;
 - (e) The veracity of the Plaintiffs document, undated, in relation to May Deireragea's right to use the land for domestic purposes is questioned by the Defendants.

GAZETTE NOTICES

15. Published in 1956 was a NLC decision in relation to determination of certain coconut lands in Yaren, excerpt as follows:

Gazette No 14 of 7th April 1956
COCONUT LANDS IN YAREN

Name of Block	Portion	B.P.C. No.	Ref. No.	Original Owner	Share	Proposed Owner	Share
Atamo	84 & 85	-	Disp. Book 2 & 3	Mwareow	All	Mwareow Samson	½ ½

16. Samson's (also known as Dampton) estate was determined as follows:

GNN 88/1978, No. 18, 12 April 1978
Determination of the Beneficiaries of the Estate of the late Peter D SAMSON of Uaboe District

ESTATE

1. The Nauru Lands Committee has ascertained that the late Peter D SAMSON had been determined by the decisions of the Nauru Lands Committee (or its predecessor the Lands Committee) to be the owner of the following lands:-

District	Portion No.	Type of Land	Name of Land	Gazette Notice of Ownership	Share
Uaboe	29	p.l.	Aroni	17/74 35/76	1/16
Yaren	84	c.l.	Atomo	17/74 35/76	1/16
Yaren	85	c.l.	Atomo	17/74 35/76	1/16

DETERMINATION OF BENEFICIARIES

2. The Nauru Lands Committee has determined that the beneficiaries of the estate of the late Peter D SAMSON are:

(a) in respect of the land shown in paragraph 1 above:

District	Portion No.	Name of Land	Beneficiaries	Share
Uaboe	29	Aroni	May M DEIRERAGEA	1/56
			Almo SELO	1/56
			Delano A SAMSON	1/56
			Lo-Ruahma SAMSON	1/56
			Enfanta D EDOAR	1/56
		May D. T/ee	Dennis D SAMSON	1/56
		Ruahma S. T/ee	Gerry Kenloe SAMSON	1/56
Yaren	84	Atomo	As for portion 29, p.1. Uaboe	
Yaren	85	Atomo	As for portion 29, p.1. Uaboe	

17. Determination of the Beneficiaries of the estate of May Derireragea was published in the Gazette in 2005 as follows:

GNN 292/2005, 88/1978, No. 87, 19 October 2005

Determination of the Beneficiaries of the Estate of the late MAY DEIRERAGEA of Baitisi District.

ESTATE

1. The Nauru Lands Committee has ascertained that the late MAY DEIRERAGEA had been determined by the decisions of the Nauru Lands Committee (or its predecessor the Lands Committee) to be the owner of the following lands:-

District	Portion No.	Type of Land	Name of Land	Gazette Notice of Ownership	Share
Yaren	04	c.l.	Atomo	10/70	1/14
Yaren	85	c.l.	Atomo	18/78	1/14

DETERMINATION OF BENEFICIARIES

2. The Nauru Lands Committee has determined that the beneficiaries of the estate of the late MAY DEIRERAGEA are:

(a) in respect of the land shown in paragraph 1 above:

District	Portion No.	Name of Land	Beneficiaries	Share
Aiwo	354	Eataeo	Francis Deireragea	1/28
			Connie Appi	1/28
Yaren	84	Atomo	-do-	
Yaren	85	Atomo	-do-	

18. In August 2016 the details of the following land transfer was published in the Gazette:

GNN 724/2016, No. 164 31st August 2016

LAND TRANSFER

It is notified for general information that Cabinet at its meeting held on Wednesday 24th August, 2016 has approved the transfer of land ownership as per the table below:

DISTRICT	PORTION No.	TYPE OF LAND	NAME OF LAND	ORIGINAL LANDOWNERS	SHARES	PROPOSED LANDOWNER	TOTAL OF PROPOSED SHARE
Yaren	84	c.l.	Atomo	Dorua Eduar (LTO)	1/14	Francis Maaki Deireragea	19/42
				Gerry Samson	1/14		
				Dennis Samson	1/14		
				Ruahma Adar	1/14		
				Sally Samson (LTO)	1/14		
				Conni Appi	1/28		
				Kerrylynn Akubor	1/84		
				Junior Selo	1/84		
				Kunut Selo	1/84		
				Lyrich Selo	1/84		
			Tammy Selo	1/84			

19. In February 2017 the details of the following land transfer was published in the Gazette:

GNN 61/2017, No. 20 10th February 2017

LAND TRANSFER

It is notified for general information that Cabinet at its meeting held on Friday 3rd February, 2017 has approved the transfer of land ownership as per the table below:

DISTRICT	PORTION No.	TYPE OF LAND	NAME OF LAND	ORIGINAL LANDOWNERS	SHARES	PROPOSED LANDOWNER	TOTAL OF PROPOSED SHARE
Yaren	84	c.l.	Atomo	Reneide Selo	1/84	Francis Maaki Deireragea	1/12
				Gabriel Mwareow	1/28		
				Samuel Mwareow	1/28		

20. In August 2016 the details of the following land transfer was published in the Gazette:

GNN724/2016, No. 164 31st August 2016

LAND TRANSFER

It is notified for general information that Cabinet at its meeting held on Wednesday 24th August, 2016 has approved the transfer of land ownership as per the table below:

DISTRICT	PORTION No.	TYPE OF LAND	NAME OF LAND	ORIGINAL LANDOWNERS	SHARES	PROPOSED LANDOWNER	TOTAL OF PROPOSED SHARE
Yaren	84	c.l.	Atomo	Dorua Eduar (LTO)	1/14	Francis Maaki Deireragea	19/42
				Gerry Samson	1/14		
				Dennis Samson	1/14		
				Ruahma Adar	1/14		
				Sally Samson (LTO)	1/14		
				Conni Appi	1/28		
				Kerrylynn Akubor	1/84		
				Junior Selo	1/84		
				Kunut Selo	1/84		
				Lyrich Selo	1/84		
				Tammy Selo	1/84		

PLAINTIFFS' SUBMISSIONS

21. The Plaintiffs points to the fact that the land in question Portion 84 'Atomo' is owned in equal shares by the Samson and Mwareow families. As such the Defendants need to show that they have permission from a majority of the landowners to use the land.
22. The Plaintiffs state that the Defendants have no right to the land on the basis of 'status quo' or that Samson 'acquiesced to these people being on the land'. This is in answer to the submissions by the Defendant that by virtue of a house on the land being rented out under the *Nauruan Housing Ordinance* 1957 and there being a link between the former tenant and the Defendants somehow enables the Defendants to point to use of the land for a significant period of time.
23. The house that was rented was destroyed by fire in 2010. The Plaintiffs say that the tenant does not acquire any ownership over the land by virtue of the previous tenancy. The building erected by the Defendants is on the same site as that of the formerly tenanted house destroyed by fire.

24. In rebuttal of the Defendant's claim of acquiring an interest in the land, the Plaintiffs point to the distribution of Samson's estate in 1978 which does not include the Defendants as beneficiaries.
25. The Plaintiffs submit that the concept of land being held on trust in Nauru only relates to the circumstances where a parent or guardian holds land for a minor child.¹
26. The Plaintiffs are part-owners of the land in that they were determined to be beneficiaries of the former landowner². As such they argue that they have a right to bring the matter to the Court to prevent the Defendants from illegally occupying the land.
27. The Plaintiffs point to the fact that the Second Defendant's mother is the surviving spouse of the late Debaio Aroneida. His estate was published in the gazette in 1989³ and does not contain Portion 84 in Yaren. Hence the second respondent has no lawful claim over the land as a part-owner.
28. In relation to using the building on Portion 84 as a Betting house for gaming, the Plaintiffs state that they have never had an issue with the process per se, rather where the gaming is conducted. The licence address is indicated to be at Therese Kun's residence which is on Portion 85.

DEFENDANTS SUBMISSIONS

29. The Defendants accept that the land Portion 84 'Atomo' is owned by the Samson and Mwareow clans, which includes the Plaintiffs and their families.
30. The Defendants submit that there is a previous arrangement between the Mwareow families and the Defendants' mother 'Iniga' to construct a house on the land in question.
31. The Defendants point out that the building constructed by them is on the same concrete slab, remaining from the house that was destroyed by fire. That house previously at that site, prior to the fire, was occupied by the aunt of the Defendant Theses Kun who lived there as a tenant under the Nauru Local Government Council ("the NLGC") housing policy.
32. The Defendants say that during this lady's tenancy of the house there was no complaint from the landowners, the Samson's or the Mwareow's as to her occupancy, nor following her death when the house was occupied by her son.

¹ Administration Order 3, 1938, section 5

² Government Gazette No. 87, 19 October 2005, G.N.N 292/2005 at 17 above

³ Government Gazette No. 71, 6 December 1989, G.N.No. 440/1989

33. The Defendants state that at some point May Deireregea (late mother to the Plaintiffs) wished to 'take over' the house from the tenants but was unsuccessful.
34. Notwithstanding the above the Defendants state that from many years back until now the Plaintiffs have not had any interest in developing or financially investing in the land in question.
35. The Defendants submit that the use of the land Portion 84 is not a trespass, but they are enabled to use the land through their late mother and build on the site of the previously tenanted house, and with the permission of Rev. Roger Mwareouw.
36. To this effect the Defendants have spent tens of thousands of dollars in building materials and labour costs (estimated to be in the region of fifty to fifty-five thousand dollars) and in addition a further five thousand dollars for the gaming license fee.
37. The Defendants contend that the land transfers since the commencement of these proceedings should be disregarded by the Court and that all landowner shares be considered equally.
38. It is accepted by the Defendants that control or right to land property is decided by the majority of landholders in Nauru. Furthermore that the land Portion 84 'Atomo' is large enough for the Plaintiffs to build a house for themselves elsewhere on the land.
39. The Defendants ask the Court to consider allowing them to continue operating a gaming and betting house at the site for a period of twenty-four months to defray the costs expended to date if the Plaintiffs case succeeds.

CONSIDERATIONS

40. The NLGC was responsible for the renovation and extension of houses in Nauru in the 1970's. However the tenant did not by virtue of the tenancy, however long this was, acquire the rights of a landowner over the land on which the house was situated, see *Narayan v Alona*⁴.
41. The ownership of land in Nauru is determined by the *Nauru Lands Committee* established under the *Nauru Lands Committee Act 1956*.

6 Powers of Committee

- (1) The Committee has power to determine questions as to the ownership of, or rights in respect of, land, being questions which arise:
 - (a) between Nauruans or Pacific Islanders; or

⁴ *Narayan v Alona* [2017] NRSC2

(b) between Nauruans and Pacific Islanders.

(2) (1A) The Committee has power to determine the distribution of the personal estate of deceased Nauruans.

42. The Nauru Lands Committee ("NLC") decision is binding unless appealed to the Supreme Court within 21 days of the gazetting of the decision.⁵

43. The *Lands Act 1976* stipulated purpose is as '*An Act to repeal the Lands Ordinance 1921-1968 and to make new provision for the leasing of land for the purposes of the phosphate industry and other public purposes, and for the removal of trees, crops, soil and sand and the payment of compensation and other moneys*'. It lays out quite clearly what the process is for land to be transferred, sold, leased or the grants of any estate or interest in land in Nauru:

3 Prohibition of certain transfers, etc., of land

(1) Transfer inter vivos of the freehold of any land in Nauru to any person other than a Nauruan person is prohibited, and any such transfer or purported transfer, or any agreement to execute any such transfer, shall be absolutely void and of no effect.

(2) Any person who transfers, or agrees, attempts or purports to transfer, the freehold of any land in Nauru to any person other than a Nauruan person is guilty of an offence and is liable to imprisonment for six months.

(3) Any person who, without the consent in writing of the President, transfers, sells or leases, or grants any estate or interest in, any land in Nauru, or enters into any contract or agreement for the transfer, sale or lease of, or for the granting of any estate or interest in, any land in Nauru, is guilty of an offence and is liable to a fine of two hundred dollars.

(4) Any transfer, sale, lease, grant of an estate or interest, contract or agreement made or entered into in contravention of the last preceding subsection shall be absolutely void and of no effect.

(5) Any transfer, sale, lease, contract or agreement made or entered into in contravention of section 3 of the *Lands Ordinance 1921-1968* shall continue to be absolutely void and of no effect.

⁵ Nauru Lands Committee Act 1956, sections 6 and 7

(R) For the purposes of this section the expression '**transfer intor vivos**' includes transfer to a corporation or an unincorporated body of persons and the expression '**a Nauruan person**' does not include a corporation or an unincorporated body of persons of whom some are not Nauruans.

44. Prior to this Act, in place of the consent in writing of the President, any land transfer required the consent in writing of the Administrator.
45. The transfer of land either upon the death of the previous owner or if it is to be given to another is set out in the *Lands Act 1976*. In particular section 3 outlines the conditions governing the transfer of land from one Nauruan to another. There has been no such transfer of rights in this case from the landowners to the Defendants.
46. In consideration of the above the Court rejects the submissions of the Defendant that by a previously held tenancy of the late mother of the second Defendant that some ownership or right to the land in question was established. Therefore without the correct permissions the Defendants trespassed on the land Portion 84 'Atomo'.
47. In considering what would constitute the requisite proportional permission of the landholders, both Plaintiff and Respondent counsel have referred to 'the majority'.
48. The Court also notes the comments made by Millhouse CJ in *Audoa v Finch*⁶ in relation to dealing with land that is owned by many:
"In fact the building is only the focus of the plaintiffs' complaints. Douglas Audoa produced a sketch showing the defendant having fenced off about 85% of the whole Portion. Yet Douglas and his side of the family own half.

The question I have to answer is whether Mrs. E.E. Dick and her family members had in law an obligation to consult and agree with other land owners before demolishing the building and (apparently) appropriating more than half the Portion to their own use.

No doubt they have acted high handedly in not consulting. They had, I suggest, at least a moral obligation to consult. Courtesy, good manners, sensitivity for the feelings of others demanded it. ... From my observation of Nauruan people, they as much as any other community practice the courtesies common to all civilized people. Indeed their institutions (for example Nauruan Lands Committee) assume that disputes should be settled by

⁶ *Audoa v Finch*, [2008] NRSC 3

discussion, conciliation, agreement and good will. The defendant has acted quite to the contrary.

Is that moral obligation also a legal duty? Counsel have not been able to cite any authority. I myself have found none.

The whole ethos of Nauru is toward consideration for the feelings and rights of others. The institutions of the country are based on that ethos. It is more than moral obligation. It should be and is a legal obligation as well.

49. I consider that the *Lands Act* 1976 where section 6 refers to a requirement of '*not less than three-fourths of the owners of the land*' needing to give their permission in respect of granting of a lease or other licence, as the basis for consolidating the legal requirement that three-fourths or 75% of the landowners need to agree in relation to the land.
50. Therefore Rev. Roger Mwarouw cannot of his own volition permit the Defendants to use, build upon, conduct a business or otherwise exercise rights over land Portion 84 unless he speaks for 75% of the landowners of the land.
51. The Defendants have asked the Court to consider that they continue trading as a TAB betting house on Portion 84 'Atomo', in Yaren District. As the licence specifically refers to the residence of the second Defendant which is on portion 85, the Court is not minded to order that, as it is in breach of the terms of the licence.
52. The Court takes note of the significant sums (in the region of \$55,000) that the Defendant has expended; and in the interests of family and community harmony is prepared to consider submissions as to an equitable resolution of the sums outlaid.

ORDER

53. The Plaintiffs claims are upheld and the following declarations are made:
 - (1) The landowners of Portion 84 'Atomo', in Yaren District at this date are those as outlined in the Government Gazette including and up to GNN 61/2017, No. 20, 10th February 2017. The Defendants are not landowners of Portion 84 'Atomo';
 - (2) The Defendants do not have any 'status quo rights' or 'acquired rights' to Portion 84 'Atomo', in Yaren District;
 - (3) The Plaintiffs as landowners are able to bring a matter before the Court where the Defendants actions do not have the agreement of 75% of all the landowners;
 - (4) The Plaintiffs, in common with all other landowners on Nauru, have to show that their actions are on behalf of three-fourths of 75% of

the landowners of a particular portion of land, here Portion 84 'Atomo', in Yaren District;

- (5) No declaration is required in terms of the veracity of the document⁷ in relation to the landowners consent, as agreements are between the current landowners unless expressed otherwise by NLC or Cabinet decisions published in the Gazette;
- (6) Costs are awarded to the Plaintiff (Costs to be taxed by the Registrar, if not agreed).

The image shows a handwritten signature in black ink, which appears to be 'Jane Crulci'. To the right of the signature is a circular blue ink stamp. The stamp contains the text 'SEAL OF THE SUPREME COURT' at the top and 'REPUBLIC OF NAURU' at the bottom. In the center of the stamp is a starburst emblem.

JUDGE JANE CRULCI

Dated this 14 June 2017

⁷ Referred to in 14(e) above