



**IN THE SUPREME COURT OF NAURU**

**AT YAREN**

[CIVIL JURISDICTION]

Civil Suit No. 107 of 2016

Between

**EMILY ROBERTSON**

Plaintiff

and

**LEONA CAIN and Others**

Defendant

Before: Crulci, J.

Plaintiff: J. Daurewa

Defendant: V. Clodumar

Date of Hearing: 16, 17 June 2017

Date of Decision: 31<sup>st</sup> August 2017

**CATCHWORDS**

**CIVIL** – *Nauru Housing Ordinance 1957* – *Nauru Housing Scheme* – *Nauru Local Government Council* – *Tenancy Agreements* – *Order 32 rule (2)(1) of the Civil Procedure Rules 1972* – *Nauru Island Council (Dissolution) Act 1999* - *Nauru Local Government Council Dissolution Consequential (Amendments) Act 1997* - *Lands Ordinance 1921-1968* – *Nauru Lands Committee Act 1956* – *Lands Act 1976* – *Nauru Lands Committee Act 1956*

## JUDGMENT

1. This is an action commenced by Writ of Summons on the 30 November 2016 in relation to rental payments of and occupancy rights to the house on Portion 59 'Banun', in the Boe District, and the rights of the defendants to construct other buildings on this land.
2. The Plaintiff's father was Agio. He entered into a rental agreement with Erbuda,<sup>1</sup> for the use of a house erected and rented on Agio's land. This agreement was under the Nauru Housing Ordinance 1957 and managed by the Nauru Local Government Council.
3. The first Defendant Leona Cain is the daughter of Ross Cain. Ross Cain is the son on Callus Cain. Callus Cain, in turn, is the adopted son of Erbuda. Thus the Defendant Leona Cain, is the great-granddaughter of Erbuda, and is currently living with others in the house erected on Agio's land.
4. Portion 59 was inherited by Agio from Eriow (his mother, the Plaintiff's grandmother); as published in the Government Gazette in 1962:

Gazette No 39 of 15<sup>th</sup> October 1962

### COCONUT LANDS – BOE

Portion No.	CL PL	Name of Land	Reference	Former Owners	Share	Proposed Owner	Share
59	CL	Banun		Eriow (dec'd)	All	Agio	All

5. After Agio passed away, Portion 59 was determined as follows:

GNN 220/1968 No. 42, 18<sup>th</sup> November 1968

### DECEASED ESTATES

The Nauru Lands Committee, having made all due enquiries, hereby determines the following Deceased Estates and phosphate royalties as appears below.

### ESTATE OF LATE AGIO ARUWADAR

#### PHOSPHATE LAND - BUADA

Portion No	Type of Land	Name of Land	Former Owner	Share	Gaz. No.	Land Vol	Record Folio	Proposed Owners in Equal Shares
11	PL	Metub	Agio Aruwadar (dec'd)	3/4	3/55	49/61	11	Askenasi Agio Emily Robertson Andromeda Arububum Elsie Agio (LTO)
<u>COCONUT LANDS – BOE</u>								
59	CL	Bwanun	Agio Aruwadar (dec'd)	All	39/62	6	69	As for Portion No. 11

<sup>1</sup> Also referred to as Erobudo and Erabubdo

Any other remaining blocks of land owned or shared by late Agio Aruwadar should now be owned and shared by Askenasi Agio, Emily Robertson, Andromeda Arububum, Elsie Agio for the duration of her lifetime only. Upon her death, her shares will revert to Askenasi Agio, Emily Robertson and Andromeda Arububum in equal shares.

6. The following are the Agreed Facts:
  - a) That the defendants' ancestors, Erbuda and Rahel entered into a tenancy arrangement with Nauru Local Government Council with the Plaintiff's father Agio at the material time.
  - b) That Agio was the owner of Portion 59, Boe District by virtue of Government Gazette No. 39 of 1962.
  - c) That the relevant legislations that governed the housing arrangement for Portion 59, Boe District and other similar housing were the Nauru Local Government Council Ordinance and the Nauru Housing Ordinance.
  - d) That the payment structure at the material time was in accordance with the Nauru Housing Ordinance whereby rent was paid by the Defendant's ancestors to the Nauru Local Government Council and the Council in turn pay rent to the Plaintiff's father.
  
7. The parties seek that the following matters be determined by the Court:
  - a) Who is the owner of the house occupied by the defendants?
  - b) Whether in the absence of any written or verbal agreement between the Plaintiff's and the Defendants, the Defendants can continue their occupation of the house?
  - c) Whether the defence of adverse possession is applicable under the circumstances?

## THE HEARING

8. In brief, the Plaintiff's recollection is that her father Agio allowed Callus to live in a house on Portion 59 temporarily before moving on to Yaren with his future wife; at some point Callus' sister and children moved in to the house but the Plaintiff does not believe that they had permission to do so. The sister was Erbuda.
  
9. Although the Plaintiff has been living away from Nauru for many years she returns regularly and now that her children are grown she returns more frequently. However she has nowhere to stay and wishes to have a house on her land at Portion 59.
  
10. The Plaintiff has attempted on a number of occasions to ascertain the standing of the Defendants who are residing in a house previously

managed by the NLGC. She has sought to prevent further structures being erected on the land until there is clarity as to the lawful rights of all concerned.

11. The Plaintiff wishes to live on Portion 59 and secure the property for her children. She has never received any rental income from the Defendants. She does not understand why the Defendants are living in the house on the land of which she is a 1/3 landowner.
12. The Plaintiff and three others Askenasi Agio, Andromeda Arububum, and Elsie Agio, a Life Time Owner ("LTO") are the landowners of Portion 59, determined by the Nauru Lands Committee ("NLC") as gazetted at [5] above.
13. Andromeda has passed away and her husband Frank Karl remarried and resides in another house on Portion 59, nearby to the house previously managed by the NLGC. Askenasi is deceased without issue and his wife Ruth Agio is a LTO. Ruth commenced construction of a house on Portion 59 and this has been halted by a court injunction.
14. The defendant Leona Cain lives in the house previously managed by the NLGC on Portion 59. Living there with her are her brother and sister and their children, also an aunt and a cousin. All in all some five adults and ten children live in that house. When she was around 19 years of age she came to know that the land they were living on belonged to Askenasi Agio's family.
15. After the Defendant Leona Cain had given evidence, Counsel for the Defendants then sought to reopen the pleadings and seek further affidavits in support of the Defendants case. Counsel for the Plaintiff resisted this application.
16. Both parties asked for time to prepare submissions for the Court to consider whether to allow the Defendants to file additional evidence by way of affidavit under Order 32 rule (2)(1) of the Civil Procedure Rules 1972:

#### EVIDENCE BY AFFIDAVIT (O.32, r.2)

2. (1) A Court may, at or before the trial by it of a suit, order that the affidavit of any witness may be read at the trial if in the circumstances of the case it thinks it reasonable so to order.

(2) An order under the last preceding paragraph may be made on such terms as to the filing and giving of copies of the affidavits

and as to the production of the deponents for cross examination as the Court thinks fit but, subject to any such terms and to any subsequent order of the Court, the deponents shall not be subject to cross-examination and need not attend the trial for the purpose.

## CONSIDERATIONS

17. Owing to some administrative difficulties there was a delay in consideration of those submissions. In determining whether the Defendants may reopen the pleadings the Court has considered in detail the questions posed by counsel at the commencement of the hearing and the provisions of the governing regulations. The Court has also read through the affidavits of Ruth Agio (widower of Askenasi Agio) and Edwina Karl (daughter of Andromeda and Frank Karl) sought to be adduced by the Defendants.
18. It is apparent to the Court that there is no advantage to the Defendants' case in refusing to allow the admission of the affidavits sought, as in the Court's opinion the case turns on the legislation applicable to the tenancy and not to third party opinions.
19. The Nauru Housing Ordinance 1957 ("NHO") was enacted for a particular purpose:

*"To vest in the Nauru Local Government Council the ownership of certain houses erected by the British Phosphate Commissioners, to provide for the Renting and Sale of those houses, and for other purposes."*<sup>2</sup>
20. Under section 4 'Definitions' NHO: *"the Nauru Housing Scheme" means the scheme under which the British Phosphate Commissioners erected, with the approval of the Minister of State for Territories, three hundred and fifty houses for occupation by Nauruans.'*
21. Section 7(1) NHO clarifies the ownership of the houses built under the Scheme: *"From the date of commencement of this Ordinance, the ownership of the dwelling-houses erected in pursuance of the Nauruan Housing Scheme is vested in the Council."* (emphasis added)
22. Who owns the land on which the houses were built is clarified by section 8 NHO: *The land upon which a dwelling-house was erected under the Nauru Housing Scheme is vested in the person in whom it was vested*

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<sup>2</sup> Preamble from the Ordinance, No. 1 of 1957

immediately before the date of commencement of this Ordinance."  
(emphasis added)

23. However, ownership of the land on which the house is built does not extend to the house built on it, as per section 9 NHO: "The dwelling-house shall be deemed to have been erected on the land with the consent of the owner on the basis that compensation at the rate specified in section eighteen of this Ordinance is paid, and the owner does not obtain, by reason only of the ownership of the land, any right, title or interest in the dwelling house." (emphasis added)
24. Division 2 of the NHO specifies to whom the houses should be rented, stating variously:
- (a) Matters of hardship to be taken into account [at s11(3)];
  - (b) Preference to be given to the person upon whose land the dwelling-house is erected [at s11 (4)];
  - (c) Tenant to sign an acknowledgement of tenancy [at s12(1)];
  - (d) The tenant has rights in respect of the land [at s13(1)];
  - (e) These rights extend to thirty feet around the dwelling-house if another dwelling-house is not closer than this distance [at s13(2)];
  - (f) Tenants to pay an annual rent [at s14(1)];
  - (g) The Council may vary the rent [at s14(3)];
  - (h) The Council may terminate a tenancy if a tenant dies [at s17(1)(a)];
  - (i) The Council may terminate a tenancy where a tenant ceases to pay rent or fails to comply with conditions of tenancy [at s17(1)(b)];
  - (j) A person who fails to vacate a dwelling-house after the termination of the tenancy is guilty of an offence [at s17(5)];
  - (k) The owner of the land is to be compensated at a yearly rate [at s18(1)];
  - (l) The compensation is to be paid from the date of the NHO [at s18(2)];
  - (m) Compensation claims not admitted by the Council<sup>3</sup> can be determined by the Lands Committee [at s 20(1)];
  - (n) The Lands Committee shall hear and determine the claim [at s 20(3)];
  - (o) The Council, applicant or any person affected by an order under s20(3) may appeal to the Central Court<sup>4</sup> [at s21(1)];

<sup>3</sup> The Nauru Local Government Council constituted under the Nauru Local Government Council Ordinance 1951-1956

<sup>4</sup> The 'Central Court' as constituted under the Judiciary Ordinance 1922-19??



- (p) The decision of the Central Court on appeal is final [at s21(3)];
  - (q) The Council may sell a dwelling-house to the owner of the land where the owner is also the tenant [at s24(1)];
  - (r) The Council may make rules to give effect to the Ordinance [at s 27(1)]. (emphasis added)
25. Attached to the NHO is a Schedule, section 12. which detailed the tenancy agreement between the tenant and the Nauru Local Government Council ("NLGC") wherein amongst other matters, the tenant agreed to pay rent fortnightly in advance<sup>5</sup>; not assign the tenancy or sub-let without written consent of the Council<sup>6</sup>; and not erect any new buildings or additions without written permission<sup>7</sup>.
  26. It is clear that the NHO provided for a formal tenancy agreement between the NLGC and a tenant. The Defendants were not the original tenants agreed under the NHO and managed by the NLGC housing scheme. The Defendant Leona Cain has no tenancy agreement; there has not been any rent paid by her, and on the evidence for many years, possibly decades.
  27. The NHO envisages that rent will be paid by the tenant occupying the house and that in turn the landowner will receive a yearly rent or 'compensation'. The Plaintiff and other owners of land on which a dwelling-house is situated would have been entitled under the NHO to be paid an annual sum in rent. On the evidence before the Court, the Plaintiff has never received any rents for Portion 59.
  28. The *Nauru Local Government Council Dissolution Consequential (Amendments) Act 1997* purpose was '*To make consequential changes to the laws of the Republic following the dissolution of the Nauru Local Government Council and for related purposes.*'
  29. This Act along with the Native Island Dissolution Act 1999, divested property and funds previously managed under these Ordinances and Acts to the Republic of Nauru, specifically the President and Cabinet.
  30. The Act provided for amendments of written law, vesting of property and funds, actions by or on behalf of the NLGC and regulations. As such, from the 1 July 1996, the following (amongst others) is relevant:
    - (a) All references to the Council or the Nauru Local Government Council are references to Cabinet;<sup>8</sup>

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<sup>5</sup> Clause 1

<sup>6</sup> Clause 11

<sup>7</sup> Clause 12

<sup>8</sup> Section 4(a) Nauru Local Government Council Dissolution Consequential (Amendment) Act 1997

- (b) All references to any payment made to...the NLGC Fund are reference to payments authorised to ...Treasury;<sup>9</sup>
- (c) Reference to the Nauru Council is reference to the NLGC;<sup>10</sup>
- (d) All the properties and assets of the Nauru Council situate in Nauru are the property and assets of the Republic;<sup>11</sup>
- (e) The President or the Cabinet may as a consequence of section 4, vest all or any power or obligation in or upon a person or body corporate as appropriate;<sup>12</sup>
- (f) Where any property... is vested in, transferred to the Republic pursuant to section 5(3), Cabinet may direct that such ...be made to an instrumentality... of the Republic.<sup>13</sup>

31. As this Court has previously noted in *Deireragea v Kun*<sup>14</sup> the transfer of land ownership has long been the subject of regulation in Nauru. The NLGC was responsible for the renovation and extension of houses in Nauru. 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*<sup>15</sup>
32. The ownership of land in Nauru is determined by the Nauru Lands Committee established under the Nauru Lands Committee Act 1956. The Lands Act 1976 sets 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. Only the President can approve the transfer of land ownership<sup>16</sup>. 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.
33. The Court has previously considered<sup>17</sup> what would constitute the requisite proportional permission of the landholders, which has in the past been referred to as 'the majority'.
34. This Court also notes the comments made by Millhouse CJ in *Audoa v Finch*<sup>18</sup> in relation to dealing with land that is owned by many; and considered section 6 of the *Lands Act* 1976 which refers to '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.

<sup>9</sup> Supra, section 4(e)

<sup>10</sup> Supra, section 5(1)

<sup>11</sup> Supra, section 5(3)

<sup>12</sup> Supra, section 7(1)

<sup>13</sup> Supra, section 7(2)

<sup>14</sup> *Deireragea v Kun* [2017] NRSC 35

<sup>15</sup> [2017] NRSC 2

<sup>16</sup> Lands Act 1976, section 3(3)

<sup>17</sup> Supra at [14]

<sup>18</sup> *Audoa v Finch*, [2008] NRSC 3



35. This Court has previously determined that the figure of three-fourths or 75% is the legal requirement of the landowners needing to agree in relation to decisions affecting land jointly owned by them.<sup>19</sup>
36. This Court could proceed under Order 32(r.3) and seek further evidence of particular facts in relation to houses tenanted under the NLGC whose original tenants are now deceased and are inhabited by others. However the Court notes that there is ample evidence as to the law before the Court, and further enquiry is unnecessary.
37. The NHO refers to some 350 houses to be managed under the scheme. Although there is no evidence before the Court as to how many of the houses remain habitable and are tenanted by those other than the landowners of the land on which the house stands, this is the third case before the Court this year which raises questions of tenancy rights of those living in houses on land where they are not the landowners.
38. The Court notes a letter dated the 30<sup>th</sup> of March, 2012 from the then Chairperson of the NLC, Tyran Capelle, referenced "NLGC Housing Scheme" in which she seeks guidance from the then President, His Excellency Sprent Dabwido, as to resolutions involving disputes between those tenants who occupy a house built on another landowners land, and the issue of the payment of rents pending. There is no indication of what, if any, response was received. The existence of the letter clearly indicates that difficulties surrounding this issue have existed for some time, and that the matter was of such importance as to require the guidance of the President of the Republic of Nauru.
39. These Defendants are 3<sup>rd</sup> generation occupants of the house. In law the Plaintiff is the landowner of Portion 59 with a 1/3 share. Any determination on this issue will have wide ranging social impacts on the lives of many people living on Nauru, far beyond the parties involved in this matter before the Court.
40. In the view of this Court the situation in relation to tenancies formerly overseen by the NLGC is for Parliament to resolve.
41. In answer to the questions put before the Court at paragraph 7, above, the answers are as follows:
  - (a) The house occupied by the defendants on Portion 59 was previously vested in the Council under section 7(1) of the NHO, is now vested in the Cabinet and the Republic pursuant to sections

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<sup>19</sup> Supra note 14 [at 45]

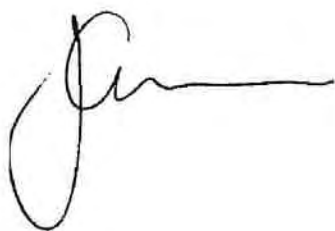
4(a)<sup>20</sup> and 5(3)<sup>21</sup> of the Nauru Local Government Council  
Dissolution Consequential (Amendment) Act 1997;

- (b) The defendants do not hold any legal tenancy in the house at Portion 59; at most they are tenants-at-will;
- (c) No; adverse possession does not apply. The rights of the landowners are protected under section 8 of the NHO.

## ORDER

42. I am prepared to hear further from counsel but the interim orders are as follows:

- (1) The injunction continues to prevent the Defendants from constructing any new building or altering any existing building on Portion 59, 'Banun', in Boe District;
- (2) No one is to interfere with the Plaintiff's rights to use the property or interfere with reasonable access and enjoyment of the property;
- (3) Costs awarded to the Plaintiff (costs to be taxed by the Registrar



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JUDGE JANE E. CRULCI

Dated this 31<sup>st</sup> day of August 2017

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<sup>20</sup> "all references to the Council or the Nauru Local Government Council are references to Cabinet"

<sup>21</sup> "All the property and assets of the Nauru Council situate in Nauru are the property and assets of the Republic"