



IN THE SUPREME COURT OF NAURU

CIVIL JURISDICTION

LAND APPEAL NO. 136/2015

BETWEEN

Henry Kingrae

APPLICANT

AND

Nauru Lands Committee

FIRST RESPONDENT

AND

The Beneficiaries of the Estate of Eugene Amwano

SECOND RESPONDENT

AND

The Beneficiaries of the Estate of Esmeralda Oscar
(nee Amwano)

THIRD RESPONDENT

Before: Khan, ACJ
Date of Hearing: 18 January 2017
Date of Judgement: 8 February 2017

Case may be cited as: Kingrae –v- NLC and others

CATCHWORDS:

Whether NLC can revisit its earlier determinations- or whether it is functus officio in relation to earlier determinations – Application for leave to appeal out of time will be “moot” if NLC cannot revisit its earlier decisions.

APPEARANCES:

Counsel for the Applicant: V Clodumar (Pleader)
Counsel for the First Respondent: J Udit, Solicitor General
Counsel for the Second and Third Respondents: K Talenoa (Pleader)

BACKGROUND

1. The applicant is seeking leave to file an appeal against the determination of the Nauru Lands Committee (NLC) made on 6 April 1983 and gazetted in Gazette No. 21 of 1983 on the distribution of the estate of Deradob Amwano (deceased). The deceased's estate was distributed between his two legitimate children, namely, Esmeralda Oscar (Esmeralda) and Eugene D Amwano (Eugene).
2. The deceased died on 26 November 1982 aged 59 years. He was married to Eingio and Esmeralda and Eugene were their daughter and son respectively.
3. The applicant claimed to be an illegitimate son of the deceased. He is 43 years old married with 3 children. At the time of the distribution of the deceased's estate by NLC he was 10 years old. He claims that he was not invited by the NLC to attend the family meeting when it distributed the deceased's estate.
4. Both Esmeralda and Eugene, are now deceased.

ESMERALDA

5. Esmeralda died in 1998 and the NLC distributed her estate to her children as published in Gazette No. 74 dated 23 December 1998 in G. N.No. 312/1998. The beneficiaries in her estate are as follows: -
 - a) Dalys Dannang;
 - b) Loretta Dekarube;
 - c) Sunrise Amoe Deiranauw;
 - d) Jodie Barn;
 - e) Glemdora Dekarube;
 - f) Laisa Oscar;
 - g) Wreck Oscar;
 - h) Graham Oscar;
 - i) Kurt Oscar.

Dalys Dannang (Dalys) is now deceased.

EUGENE AMWANO

6. Eugene died in 2010 and his estate was distributed by the NLC on 29 September 2010 in Gazette No. 128 in G & A No. 517/2010 to his beneficiaries, namely:
 - a) Koskie Amwano;
 - b) Kakiko Amwano;
 - c) Angelina Temaki;
 - d) Mandy Eimamae Diringa;
 - e) Rose Amwano;
 - f) Chantelle Aremwa;

- g) Clara Agir;
- h) Eita-Nio Amwano;
- i) Francia Amwano (LTO).

7. It seems that the applicant never had any contacts with Esmeralda and he first met Eugene in 1991, who asked him if he was building his house. The applicant replied that he was and Eugene then asked him as to whether he was happy with the location and if he wanted to then he could build it on their father's land. The applicant declined Eugene's offer.
8. Following the first meeting applicant met Eugene 6 months later when he requested him for \$1,000 from the royalty monies paid to him as a beneficiary of their deceased father's estate. The applicant account is that about 2 months later, Eugene came to his house and gave him \$3,000. The applicant told him that he was not able to pay this back, whereupon Eugene told him 'not to worry' as it was his gift to him from their deceased father's estate.
9. The applicant continued to visit Eugene and repeatedly requested him to include him in their father's estate and Eugene response that he will let him know later. The next time he saw Eugene was walking with a limp. He asked him as to what had happened and he told him that he had suffered a stroke. He again reminded him to have him included in their father's estate.
10. The applicant next met Eugene in 2010 when he was admitted in hospital. He again raised the issue of being included in their late father's estate and Eugene mumbled something to him. He was incoherent and he started to cry. He died not long after that in 2010.

VISIT TO NLC

11. The applicant went to NLC on 21 August 2014 to enquire whether he could be included in the deceased's estate. He was told that he would not be able to do so unless all the beneficiaries agreed to his inclusion. The applicant approached the beneficiaries of Esmeralda and Eugene and some agreed to him being included in the deceased's estate but majority refused to do so.

APPLICATION FOR LEAVE TO FILE APPEAL OUT OF TIME

12. The applicant made an application for leave to file an appeal out of time pursuant to the provisions of s7(1)(b) of the Nauru Lands Committee (Amendment) Act 2012. His main ground of appeal is that he was not invited by the NLC to attend a family meeting when it invited Eugene and Esmeralda and distributed the deceased's estate between them.
13. This application is opposed by the NLC and the second and third respondents.

WRITTEN SUBMISSIONS

14. All the parties have filed very well researched written submissions which have been of great assistance to me and I am indeed very grateful to them.

APPELLANT'S SUBMISSIONS

15. Mr Clodumar relies on the case of Aliklik –v- NLC and others [2013] NRSC 8 (von Doussa, J) [52, 69 and 71] where it is stated as follows:

“[52] Sub-clauses (b) and (c) deal with married people. In Geraldine Diema (nee Amwano –v- Leeman and NLC, Land Appeal No. 6 of 2008) Millhouse, CJ held that “Married – with children” should be construed to mean children of lawfully married parents. On this construction an illegitimate child of a married person was not within the contemplation of sub-clause 3(c) which only distributes the deceased’s assets to legitimate children of the deceased’s marriage. [It should now be noted that since the passing of the Interpretation Act 2011 the reasoning in that case no longer represents the law. Now by s73(1) and (2) of the Interpretation Act the word (Married) will include a couple in a defacto relationship.]

[69] As I have observed, the Administration Order did not purport to abolish Nauruan institutions, customs and usages. It simply overrode them. Now by force of the Custom and Adopted Laws Act 1971, Nauruan institutions, customs and usages override the Administration Order to the extent of any inconsistency.

[71] In the present case, the NLC did not apply the direction in sub-clause 3(a) of the Administration Order which probably would have led to a different result but made its determination based on custom. Their enquiries showed that custom they relied on was of long standing, and still existed. I consider the NLC was right to do so.”

16. It is Mr Clodumar’s submission that although the decision of NLC was made 32 years ago, and the fact that both the children of the deceased are now deceased themselves, including a child of Esmeralda, leave should still be granted so that the applicant can apply to the NLC to be included as a beneficiary in the deceased’s estate.
17. Mr Clodumar further relies on the case of Capelle –v- Nauru Lands Committee and others [2013] NRSC4 (Capelle) where Eames, CJ stated:

“...however, since the discretion to extend time is given for the purpose of enabling the court to avoid an injustice, the court must determine whether justice as between the parties is best served by granting or refusing the extension sought.”

18. He also relies on the case of Addi –v- Nauru Lands Committee [2014 NRSC2], a decision of the Full Bench of the Nauru Supreme Court (Addi).

SECOND RESPONENT'S SUBMISSIONS

19. At [24] of his written submission Mr Udit submits as follows:

*“The Full Supreme Court also alluded to this issue albeit very briefly in Addi –v- Nauru Lands Committee [2014 NRSC2]. An important fact referred to in the judgment was in this matter “the land has not changed ownership, nor is the title in dispute. It is indeed **a decisive factor** if the land ownership had changed or altered in any manner for the following reasons:*

- a) *Once the decision which is being challenged has been executed or acted upon, and following therefrom subsequent decisions are made, that decision or part thereof is no longer in existence to the appeal. Once the character or subject matter of the decision is changed, the remaining part of the decision can no longer be appealed without having any impact on the decision as a whole.*
- b) *Secondly, altering or changing a decision following which subsequent decisions have been made does not affect the subsequent decisions. This is because under the Act, each time NLC make a decision, it is a separate decision. Unless the subsequent decision is simultaneously changed, any variation of the earlier decision would have no impact on the subsequent decision. Any attempt to review the earlier decisions would at best be moot only as the subsequent decisions would all remain in place.*
- c) *Thirdly, as the differently constituted court has repeatedly echoed, that allowing a challenge to be made to a decision which itself has subsequently been transformed, would create a chaos in the land tenure system. With respect, this statement cannot be underestimated or likely disregarded by the court in the exercise of its discretion.*
- d) *After a decision is made by NLC, the land including any income derived therefrom are distributed to the beneficiaries. If after several years, on an appeal any such decision is reversed or set aside, it will require reversal of all such benefits including monetary income. It will encourage more litigation and animosity and fragmentation among family members. Where substantial time has lapsed, such decisions are best to be left with the family members to resolve it. One of the unique characteristics of Nauruan people is that they are still holding together and live cordially as family members.*

DELAY

20. In this case, there is a delay is 32 years before this application was lodged. This should be viewed against the fact that he first met Eugene in 1991 who was very generous. Without any prompting from the applicant he asked him to build his house on their father's land and that offer was declined. Why was such a generous offer declined when his complaint is that he should have been included in deceased estate? I am unable to understand this as acceptance of the offer would have meant that he

would have effectively '*put one foot in the door*' so to say. The applicant has not given any explanations as why this generous offer was rejected.

21. Further, the applicant claims that Eugene gave him \$3,000 when he only asked for \$1,000 and when he told him that he was not able to pay it back, he was told that it was a gift from him being royalty money from their father's estate. Once again Eugene was very charitable and, notwithstanding his generosity no efforts were made to take him to NLC to have him included in their father's estate. Why did he miss out on such a golden opportunity? And once again no explanation is given by the applicant. These are very important matters for considerations in determining this application.
22. Mr Udit is quite correct in his submissions that the original character of the land has changed with the passage of time and the death of Esmeralda and Eugene, the original beneficiaries and the death of Esmeralda's son, Dalys has further complicated matters.

In Capelle (supra) at [16] it was stated:

"There is no significant prejudice to any party if leave is granted."

23. If leave was granted in this matter, it would cause significant prejudice to the beneficiaries of the estate of Esmeralda, Eugene and Dalys. That prejudice would only eventuate if NLC could revisit its earlier determinations in regards to Esmeralda's and Eugene's estates. In my view NLC would be precluded from doing so as it will be '*functus officio*' in relation to those determinations, so the whole exercise of this application as Mr Udit put it will be '*moot*'.

CONCLUSION

24. In the circumstances the application for leave to file appeal out of time is refused.
25. I do not make any orders as to costs in this matter.

DATED this 8 day of February 2017



Mohammed Shafiullah Khan
Acting Chief Justice

