IN THE SUPREME COURT OF NAURU

Notice of Appeal 128/2015

BETWEEN

Beneficiaries of the Estate of Maria Marie Smith (Margaret Daoe) (nee Murdock), Louisa Kamtong (nee Murdock), and James Murdock

APPLICANTS

AND

Nauru Lands Committee — FIRST RESPONDENT

AND

Beneficiaries of the Estate of Martha Grundler — SECOND RESPONDENT

Before: Khan J
Date of Hearing: 13 December 2017
Date of Ruling: 12 February 2018

Case may be cited as: *Estate of Maria Smith v Nauru Lands Committee and Estate of Martha Grundler*

CATCHWORDS:
Application for leave to appeal out of time under section 7(1) and (2) of the Nauru Lands Committee(Amendment) Act 2012- whether the application should be granted if there have been multiple subsequent decisions by the committee which has been gazetted since the original decision.
Held: Application dismissed as this court will not have powers to hear the appeal against the original decision of the committee as all subsequent decisions will be valid and binding until appealed against.

APPEARANCES:

Counsel for the Applicant: V Clodumar (Pleader)
Counsel for the First Respondent: J Udit, Solicitor General
For the Second Respondent: Mr Sprent Dawido (in person)

RULING

APPLICATION

1. The applicants seeking leave of this court to file an appeal against the decision of the first respondent in Gazette No. 29 dated 20 May 1992 (GN29) in respect of Portion 191 name of the land being Ibaidubu (Portion 191). This application is made pursuant to s.7(1) of the Nauru Lands Committee (Amendment) Act 2012 (the Act).

2. Portion 191 belongs to the Estate of Agnes Tokinais in GN29 the Nauru Lands Committee (NLC) made a determination in respect of the beneficiaries in the estate of Agnes Tokinais in respect of various lands including the land known as Ibaidubu.

RELATIONSHIP OF PARTIES

3. The second respondent, the late Martha Grundler (Martha) is the eldest sister of Maria Smith (Maria Smith).

4. Martha had 4 children who are deceased now, and their names are:

   a) Robert Grundler;
   b) Augusta Grundler;
   c) Walter Grundler;
   d) Elsie Agio.

   Martha's children are survived by their own children and grandchildren.

5. Maria Smith had only one child whose name was Agnes Tokinais. Freddy Murdoch is Agnes's Tokinais's son and Freddy's children are Margaret Daoe, Louisa Kamtong and James Murdock. They are the great-grandchildren of Maria Smith.

HISTORY OF THE OWNERSHIP OF IBAIDUBU

6. According to the application the land ownership was as follows:

   i) In the German Ground Book on 15 September 1902 there was only 1 land named 'Weitubu' solely owned by Maria Halstead (Maria Smith) a gift from 'Aweieda'.

   ii) Registered in Lands Register Book (LRB) of 1922 as 'Baidubu' owned by Maria Smith.

   iii) Gazette No. 37 of 23 August 1952 block No. 5 original owner: Maria Halstead, and Present Owner: Martha G (as Trustee) All.

   iv) 1954 – the Administrator by Gazette No. 36 (GN36/1954) amended the determination of ownership of Gazette No. 37 of 1952. In GN No. 36 were

two lands namely Block No. 1 'Ibaidubu' in Aiwo CLoriginal owner Martha G and present owners Martha G, All; 'Ibaidubu' Block No. 6 AiwoCLoriginal owner: Maria Smith, all and proposed owner Martha G (trustee), All. Block No. 1 was allocated Portion No. 186 whilst Block No. 6 was allocated Portion No. 191.

7. Martha Grundler passed away in 1956 whilst Maria Smith passed away in 1969.

WHAT PROMPTED THIS APPLICATION?

8. The applicant in support of his application dated 29 January 2016 states as follows:

(7.4) In Minute Book 36 at page 157, recorded a meeting between the members of the Committee and Agnes Tokinais and her son Freddy, along with Lily Miowo (nee Grundler) and Elsie Agio (nee Grundler) on 25 January 1974. The Committee acknowledged that there was only one land Ibaidubu recorded in the German Ground book. They also mentioned that Agnes owned other land that has been given to strangers erroneously. The Committee stated that they will summon, as soon as possible, all the land owners who acquired her land erroneously so that the error can be rectified.

(7.5) Another meeting was held a few weeks later. At this meeting, the Committee acknowledged that 'Ibaidubu' is now shared with Martha Grundler. On record however it should all belong to Agnes. The Committee stated that for the land that has been erroneously given to other people, the responsibility rested with the plaintiffs' descendants to do something about them as the Committee '*do not have the jurisdiction*'.

(7.6) On 21 June 1974 the Committee published in Gazette No. 25 vide Gazette Notice No. 163/1974 the determination of land owned by Agnes Tokinasi inherited from Maria Smith as agreed at the meeting referred to in paragraph 7.5 above with the exception of the land 'lost' to other persons. On her death on or about 1992, her estate was inherited by her son, Freddy Murdoch vide GN29 of 20 May 1992, GNN176/1992.

9. The applicant further states in his application at paragraphs 9 and 10 as follows:

[9] In regards to the chances of appeal succeeding if extension of time is allowed it is clear from the Nauru Lands Committee records that the Committee agreed that the land 'Ibaidubu' should all belong to Agnes Tekinasi but were unable to correct the error due to lack of jurisdiction. The Committee is referring to the fact that ownership of the land had been determined as far back as 1954 and published in the Government Gazette. Therefore the Committee was functus officio. Only the Supreme Court has the authority to vary the decision vide section 7 of the Nauru Lands Committee Act 1956-2012.

[10] In fact one of the respondents namely, Libbe Whippy, informed Lendl, the son of Margaret Daoe, that the surviving children of Martha at that material time did sign an agreement to return that part of the land which was under the trustee of Martha back to the descendants of the applicant. This was how the

ownership of Portion 191 in 'Aiwo' changed to the applicants. The other portion, namely 186, was not returned.

PRELIMINARY ISSUE

10. Mr Udit has raised a preliminary issue that this application has no merit as it is in effect challenging the determination made in GN/1954; and he further submitted by that if GN29 which is already in the applicants' favour is set aside that will not assist them as GN 36/1954 will still stand in their way. The second respondent supported Mr Udit' submissions.

11. In response Mr Clodumar submitted that the Court should deal with the entire matter, that is, as to how the land known as 'Ibaidubu' changed ownership.

12. It is not in dispute that the land known as 'Ibaidubu' was split into two portions by GN36/1954; Portion 191 was given to late Maria Smith whilst Portion 186 was given to Martha Grundler.

13. In relation to the change in ownership of Portion 186 Abawo Diranga, the Deputy Chairperson of Nauru Lands Committee stated in his affidavit at paragraph 4 as follows:

> [4] In the passing away of Martha Grundler her personal estate was distributed amongst her surviving children Walter, Robert, Augusta and Elsie. Since the passing away of all 4 Walter, Robert, Augusta and Elsie there has been seven occasions that their personal estates were distributed and Gazetted to their beneficiaries. Since the passing away of Walter there has been two Gazette Notices 28/72 and GW50/73, since the passing away of Robert there has been two Gazette Notices 1/94 and C35/94, since the passing away of Augusta there has been one Gazette Notice 79/01, since their passing away of there has been two Gazette Notices Elsie 38/99 and 08/61.

14. After the determination in GN36/1954 Portion 186 was given to Martha Grundler and upon her death to her four children who are all deceased now and then to their children resulting in multiple gazettes each time there was a death.

15. Mr Udit's submits that the applicants want to appeal against the determination in GN36/1954 in favour of the second respondent and his submission is it not possible under the Act. He submits at [15], [16], [17] and [19][1] as follows:

> [15] In Nauru, the applicable test for appeal is similar to the one pre-existing before the CPR. Eames CJ in *Cappelle v Nauru Lands Committee* [2013] NRSC 4 (8 March 2013) citing from Halsbury's Law of England stated the test to be as follows:

[1] First Respondent's written submissions dated 26 Jun 2017

"The discretion is unfettered and should be exercised flexibly with regard to the facts of the particular case. The Court will not decide the application according to a formula created by erecting what are merely relevant factors into the arbitrary principles so to allow the automatic production of solutions. 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 between the parties is best served by granting or refusing the extension sought. A consideration relevant to the exercise of the discretion is that upon the expiry of the time allowed for appeal, the respondent has vested right to retain the judgment unless the application is granted. Other relevant matters include the length of the delay in commencing the appeal. The reason for the delay, the chance of the appeal succeeding if an extension of time is granted, the degree of prejudice to the respondent if time is extended and the blamelessness of the application. Leave to appeal out of time may be subject to specified terms. The interest of justice and the hearing upon merits are the basal consideration."

[16] In 2014 the said test was affirmed by the full Supreme Court in ***Addi v Nauru Lands Committee*** **[2014] NRSC (October 2014).**

[17] Be that as it may, as a general rule, a decision of the Committee can only be altered by consent of all parties and/or by an order of the Court. The decision of the Committee once made cannot be altered or changed except on the grounds of injustice. Injustice must be caused by one or more of coercion (force), undue influence or want of understanding. In ***Nei Takea Akamwarar v Eiraidongio and others Land Appeal No. 21 of 1970 (1959-1982) NLR (B29 at 11-12) Thompson CJ said:***

"Mr Adeang has submitted, however, that, even though the Committee's original determination may have been correct it should have cancelled it when the appellant came back 8 days later. I am unable to accept that argument as sound; there must be a point of time when, the matter having been decided, it is unalterable except on the grounds that an injustice has been done, eg because of coercion, undue influence or want of understanding. That point of time is clearly the moment when the Committee has made its decision and sent it for publication. At that stage the Committee has finalised its duty in the matter and cannot properly re-open it except with the consent of all parties concerned or on the order of this Court."

[19] In ***Kingrea v Nauru Lands Committee [2017] NRSC; Lands Appeal No. 136/2015 (8 February 2017) as Khan ACJ said:***

"If leave is 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 determination in regards to Esmeralda's and Eugene's estate. 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'****."*

16. Mr Clodumar in his submissions[2] submitted that:

'At the outset I want to remind this Court what former Chief Justice Eames said in ***Cappelle*** (taken from Halsbury's Laws of England) on the Court's discretion to grant leave to expand time to appeal and I quote '*the discretion is unfettered and should be exercised flexibly with regard to the facts of the particular case. The Court will not decide the application according to a formula created by erecting what are merely relevant factors into arbitrary principles so as to allow automatic production of solutions.' (my emphasis)*

It is my observation that this Court, in the cause of dealing with the application for leave to appeal out of time, is in fact creating a standard for a formula that would in effect automatically open or close the gate on an application so to speak. We have in ***Addi*** the requirement that there should be no change to the title and/or ownership of the estate; in ***Kingrea*** the applicant cannot appeal directly to the source of the deceased estate where the descendants inherited the property because it would prejudice the descendants who have acquired the ownership of the estate by subsequent decisions of the Nauru Lands Committee. It was suggested that Henry Kingrea should have appealed the last decision of the Committee and work his way up the family tree until he reached the source of the estate which is his father! The net effect of this ruling in *Kingrea* is that Henry Kingrea is now awaiting the death of any family member of step-sister or brother so he can appeal in time and have his day in Court. With due respect it is..... of Nauruan custom to appeal against the children of the brother and sister but he has no option.

CONSIDERATION

17. Now I will discuss the cases that the parties relied on in their submissions. I shall start off with the case *Cappelle v Nauru Lands Committee*[3] (Cappelle). In this case the application for leave to appeal was in relation to the personality estate determined by the Nauru Lands Committee. The head note reads:

"*Leave to appeal – application for leave to appeal out of time against the determination by Nauru Lands Committee as to personality state – Nauru Lands Committee Act 1956, s.6(1A) and s.7(1)(A) – factors relevant to exercise of discretion.*"

18. In granting leave to file appeal out of time in respect of the personality state Eames CJ stated:

"*... that the Court will not decide the appeal by any strict formula ... degree of prejudice to the respondent, if time is extended ...*".

19. The Full Supreme Court in *Addi v Nauru Lands Committee*[4] (Addi) dealt with an application for an extension of time and relied on the principles formulated in Cappelle and it was recognised at [16] as:

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[2] Applicant's written submissions dated 11 December 2017
[3] [2013] NRSC 4 (8 March 2013)
[4] [2014] NRSC 2 (1 October 2014)

[16] In this matter the land has not changed ownership, nor is the title in dispute.

20. In *Kingrae v Nauru Lands Committee*[5]

"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'.***"

21. Mr Clodumar made very forceful submission that that the decisions in *Addi* and *Kingrae* impinges on the Nauruan customs; and he further submitted the two decisions have the effect of mounting a barrier in determining applications for leave to appeal out of time. I understand Mr Clodumar's concerns and reiterate that this Court is always mindful of the Nauruan customs and takes that it that into consideration in the determination of all matters particularly land matters. The decisions in Addi and Kingarae following the principles in Cappelle is consistent and in harmony with s7(1) and (2) of the Act.

22. Sections 7(1) and (2) provide:

(1) A person who is dissatisfied with the decision of the Committee may appeal to the Supreme Court against the decision:

a) Within 21 days after the decision is published; or
b) With the leave of the Court.

(2) The Supreme Court has jurisdiction to hear and determine an appeal under this section and may make such order on the hearing of the appeal (including, if it thinks fit, an order for the payment of costs by a party) as it thinks fit.

23. Section 7(1) relevantly states:

'...may appeal against the decision' (emphasis added)."

24. Prior to the amendment of the Act in 2012 a decision of the committee had to be appealed against within 21 days; and failure to do so meant that the decision of the committee stood. When the appeal was lodged within 21 days the ownership of the land could not change within the appeal period. Under s.7(2) the Supreme Court had jurisdiction to determine the appeal ***'against the decision'***; and in doing so it was entitled to hear the matter de novo and could allow the appeal and remit the matter for rehearing with directions, or it could substitute the committee's decision by its own decision. After the amendment of the Act in 2012 this court was given the powers and discretion to enlarge the appeal period '***against the decision***' and I reiterate nothing more; and the jurisdiction of the Supreme Court will only come into play if it were to hear the appeal ***'against the decision'*** which in my respectful opinion means the original decision. If in between the original decision there has been subsequent decisions, which is the case in this matter, then the Supreme Court would not be empowered to hear the appeal '***against the decision'*** as the effect of all subsequent

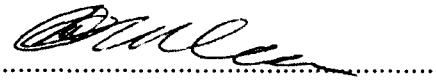
[5] [2017] NRSC 7; Land Appeal 137/2015 98 February 2017)

decisions is that they are valid and binding unless and until they are appealed against; so, it would be a futile exercise.

CONCLUSION

25. In the circumstances, the court cannot grant leave to the applicants to appeal against the determination made in GN36 of 1954 and the application for leave to file appeal out of time is dismissed. I further order that the injunction orders made on 30 November 2015 are dissolved.

Dated this 12 day of February2018



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Mohammed Shafiullah Khan
Judge