IN THE SUPREME COURT OF NAURU
AT YAREN DISTRICT
APPELLANT JURISDICTION

Land Appeal No.76 of 2016

BETWEEN

Tamaneak Batsiua, WiramWiram, Enrico Solomon and Corina Solomon

Appellants

And:

Nauru Lands Committee

First Respondent

And:

Letima Adire, Mitchum Solomon, Richene Kam and Estate of Rykers Solomon

Second Respondent

Before: Khan, J
Date of Hearing: 4, 5, 6, 7 and 8 June 2018
Date of Judgement: 7 November 2018

Case may be cited as: Wiram Wiram v Nauru Land Committee and Others

CATCHWORDS: *Nauru Lands Committee determination – Whether houses built by the children on the land owned by parents as landowners is their personal property or whether it forms part of the estate upon death of the parent owning the land – Whether common law of England that any fixtures on the land becomes part of the land is still applicable to Nauru or whether it ought to be altered pursuant to the Custom and Adopted Laws Act 1971 – Held that common law that houses form part of land is not suitable to Nauru and thus amended – The common law in Nauru is that houses built by the children of the landowning unit will be their personal properties.*

APPEARANCES:

Counsel for the Appellants: J Daurewa
Counsel for the First Respondent: J Udit (Solicitor General)
Counsel for the Second Respondent: V Clodumar

JUDGMENT

INTRODUCTION

1. This is an appeal against the decision of Nauru Lands Committee (NLC) published in the Gazette No. 592/2016 on 20 July 2016 in respect of personalty estate of the late Irene Wiram (deceased). In its decision the NLC gave all the monies, rental and royalties to all 8 children of the deceased, namely:

    1) Rykers Solomon
    2) WiramWiram
    3) Richene Kam
    4) LetimaAdire
    5) Mitchum Solomon
    6) TamaneakBatsiua
    7) Enrico Solomon
    8) Corina Solomon

    Each of the children was given 1/8th share.

2. On 20 July 2016 the NLC also made determinations in respect of the realty estate of the deceased relating to the various lands that she owned and in particular Portion No. 165 Ataro in Meneng District and distributed the deceased's share portion 165 between her 8 children referred to in paragraph 1 by way of 5/1152 share each, constituting the realty aspect of the deceased's estate. The deceased had 5/16th share in Portion 165 together with her other siblings.

3. The property (houses, stores and restaurant) which are subject to this appeal are situated on Portion No. 165 in which the deceased had 5/144th share over a total area of 2444.84 square metres.

4. This appeal is only in respect of the personalty estate and not the realty estate and is filed pursuant to the provisions of s.7(2) of Nauru Land Committee Act 1956 ('the Act') which provides:

    (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.

5. This appeal was heard *de novo* and evidence was adduced on behalf of the appellants and the respondents.

BACKGROUND

6. The deceased died intestate on 15 May 2016. She inherited her share in Portion 165 from her mother, Lily June, who died in 2009.

7. The deceased was married twice:

1) Her first marriage was to Ricardo Solomon and from this marriage she had the following children:

(1) Rykers Solomon (son)
(2) Corina Solomon (daughter)
(3) Enrico Solomon (son)
(4) Mitchum Solomon (son)
(5) Richene Kam (nee Solomon) (daughter)

2) Her second marriage was to Tamoa Wiram and she had 2 children namely:

(1) Wiram Wiram (son)
(2) Tamaneak Batsiua (nee Wiram) (daughter)

8. After her separation from Ricardo Solomon and before her marriage to Tamoa Wiram she had another relationship and had a child, namely, Letima Adire (daughter).

9. The appellants lived with the deceased and her late husband, Tamoa Wiram, on Portion 165. This appeal relates to the improvements that were carried out by Wiram Wiram to a house (HKL Building) allocated to him by his parents and 2 shops which the appellants contend were constructed by them.

10. Tamoa Wiram died in 2005.

11. After the death of the deceased all her children attended Nauru Lands Committee meeting scheduled for 2 June 2016. Since the deceased died intestate and did not leave any 'last instructions' the NLC was trying to ascertain as to whether the children had come to some agreement as to the division of the deceased's estate. There were 2 meetings held on 2 June 2016 and no resolution was reached between the children as to the division of the estate.

12. On 6 July 2016 the NLC held an unscheduled meeting which was attended to by Letima Adire and Mitchum Solomon. At this unscheduled meeting the NLC made a decision by applying s.3(c) of the Administration Order 1938 and divided the land as well as the personal estate between all 8 children in equal shares.

AGREED FACTS AND ISSUES FOR DETERMINATION

13. On 4 June 2018 the parties entered into an agreed facts and issues for determination in which it was agreed that:

a) There were other lands belonging to the deceased in which the determination was made by NLC which is not appealed against and this appeal is confined to Portion 165 of Meneng District;

b) The following buildings were constructed on Portion 165 which are:

i) Family House (Tameneak and Mitchum Solomon occupying)
ii) Residential property which is rented to HKL Logistics (HKL Building)
iii) Residential property occupied by Mitchum Solomon
iv) Commercial buildings ('I'Restaurant and Salvage Store)

14. It is not part of the agreed facts, but is in evidence, that the 3 buildings excluding the building occupied by Mitchum Solomon, were constructed by the deceased and her second husband Tamoa Wiram.

ISSUES FOR DETERMINATION

15. The issues for determination are:

a) Whether the residential property rented to HKL Logistics forms part of the estate of Irene Wiram, the deceased or it belongs to WiramWiram?

b) Subject to the finding in issue (a) whether the rental income of the said property belongs to all the siblings in equal shares or solely to WiramWiram?

c) Whether the rental income from the restaurant belongs to all the siblings in equal shares or solely to WiramWiram?

d) Whether the rental income from the store belongs to all the siblings in equal shares or solely to TamaneakBatsiua?

e) Whether NLC erred in prematurely determining the estate of the late Irene Wiram after the second meeting without giving opportunity to all the siblings to entering into a family arrangement to produce all evidence for NLC to make a determination?

f) Whether NLC should have in its decision clarified the ownership of buildings on Portion 165?

g) Whether a residential property constructed by a member of her family on a piece of land belonged to a family in undivided share is a personality or realty?

h) Whether a commercial building constructed by a member of her family on a piece of land belonging to a family in undivided shares is personality or realty?

i) Whether a commercial building constructed by a member of her family on a piece of land belonging to a family in undivided shares, is personality or realty?

j) Whether the first respondent erred in law and in fact when it decided that equal shares in the personal estate was to be shared equally when awarding

of s.3(c) of the Administration Order 1938 is restricted to land and not property.

16. In order for me to decide the issues, I shall refer to the evidence and will consider the evidence separately for the HKL Building, the store and restaurant, the family house and the building occupied by Mitchum Solomon.

WRITTEN SUBMISSIONS

17. Upon completion of the case the counsels filed very well researched and extensive written submissions.

CONSIDERATION

THE APPEAL

18. The NLC divided the entire estate of the deceased both real and personal by invoking the powers under s.3(c) of the Administration Order 1938 which included the personality estate as well, instead of using the powers under s.6 of the Nauru Lands Committee (Amendment) Act 2012 (2012 Act).

19. For the NLC to determine the distribution of the personalty estate of the deceased it was obliged under s.6 of the 2102 Act to hear evidence to be able to determine the ownership of the various houses situated on portion 165 as to whether it belonged to the deceased or her children.

20. In respect of the two stores the NLC stated the since there was no will it formed part of the estate of the deceased under common law and consequently her children are entitled to 1/8 share each.

21. Counsel for the appellants submits that Regulation 3(c) of the Administration Order did not empower the NLC to deal with the personal estate, and its powers were only limited to the division of the land. Mr Udit for NLC agrees with that submission, and in my view quite rightly so. He submits that the personal estate could only be determined by NLC but under the Nauru Lands Committee (Amendment) Act 2012 only after hearing evidence from the parties.

22. I stated earlier that the appeal under s.7 of the Act is by way re-hearing *de novo*. Further an appeal is in the exercise of the original jurisdiction rather than the appellant jurisdiction. In *Cook v Fritz*[1] stated as follows at [122], [124] and [130] was stated by Eames CJ as follows:

> [122] Were appeals to be restricted to appeals is stricto sensu, that would raise serious questions about the entitlement of the parties to call fresh evidence, a course which has regularly been permitted by the Court. Notwithstanding the language in s.7 restricts the appeal to one conducted strict sensu, and the grant of power 'to make such orders on the hearing of the appeal... as it thinks just' should be regarded as enabling the Court

[1] [2013] NRSC2

to hear fresh evidence when it is just to do so. Thus, a re-hearing is certainly contemplated by the Act.

[124] As Handley JA held in (Sheller JA agreeing, and Kirby P likewise in separate reasons) in *Workers Compensation (Dust Diseases) Board v Veksans* an appeal from an administrative body to a Court carries a 'strong presumption' that the appeal authorises a fresh hearing by the Court, in the exercise of an original rather than an appellate jurisdiction. That was a case, like the present, in which the legislation did not, in terms, provide for a 're-hearing'. In concluding that there was a case requiring re-hearing de novo, Handley JA held:

> "In the present case neither the Board nor the authority was required by statute to conduct a hearing, to keep a record of its proceedings, or to provide reasons for its decision. Neither body is bound by the rules of evidence and the authority in particular is entitled to act on the expert knowledge and experience of its members. These factors all point towards a conclusion that the appeal to the Compensation Court conferred a jurisdiction which is original rather than truly appellate: see *Builders Licensing Board v Sperway Constructions Pty Ltd (at 621) per Mason J.* Moreover, a period of 6 months is allowed for an appeal. These matters reinforce this strong presumption which arises when a right is conferred to an appeal forum and administrative authority to a Court, and lead to the conclusion that a compensation Court was entitled to conduct a fresh hearing."

[130] By illustration of the approach to date, in the case of *Etto Aingimea and Others v Bertha Agoko and Others* [25] the appellants claimed that the Committee had failed to invite them to put their case to the Committee. Thompson CJ heard evidence as to that suggested omission, but concluded that the appellant had already been heard, and that it was not unreasonable that the Committee believed him to have been speaking for all the appellants/claimants who were now said to have not been heard, at all. Had the appeal been stricto sensu that would have been sufficient to dispose the appeal but Thompson CJ who had great experience in conducting land appeal cases over many years, ruled that an appeal under the Act was by way of re-hearing de novo, and he directed the appellant to present evidence to the Court in support of their claim, which they did.

POWERS OF COURT ON APPEAL

23. The Court's power is extremely broad, with no express limitation imposed at all.[2] The Court can apply the law and equity. Under s.4(3) of the Customs Adopted Laws Act 1971 the common law and principles and rules of equity in force in England on 31 January 1986 has been adopted in Nauru (s.4(1) and (2) of Customs and Adopted Laws Act 1971.

[2] *Cook v Fritz* [2013] NRSC 2 at [112].

24. There were 4 properties built on Portion 165 at the time of the death of the deceased. The main house, the HKL Building, a store and restaurant, and Micthum's house. I shall discuss the evidence separately as to how and who built the houses.

HOUSES ON PORTION 165

MAIN HOUSE BUILT 1984

25. This house was built in 1984 by the deceased and her late husband, Tamoa Wiram. At the time it was built Lily June was the owner of Portion 165. In the agreed facts and issues this house is not in dispute except that it is occupied by Tamaneak Batsiua and I am not called upon to make a determination on the ownership of this house. It is not in dispute that the deceased exercised full control over the house until her death and she allowed her son, Micthum Solomon to live in there without seeking anyone's consent as she was the owner as submitted by Mr Clodumar.

26. The house is known as the 'customary family house' and known to Nauruan as '*EmetEwak*'. The Vice-Chairman of NLC, Mr Diringa, explained that a 'customary family house' is a refuge (safe house) where any family member who is displaced can seek shelter as of right.

27. The Vice-Chairman of NLC further explained that the person who occupies the family house is only a 'keeper' and not an owner. In respect of this house I find that it is occupied by Tamaneak Batsiua and she is only the 'keeper' thereof and being a property of the deceased, all her 8 children are entitled to a share by way of 1/8th share each.

MITCHUM SOLOMON'S HOUSE

28. Once again there is no dispute about this house and it was built by Mitchum Solomon at his own expense.

STORES AND RESTAURANT

29. It is not in dispute that the respondents did not make any contribution to the construction of the stores and restaurant. The stores were divided into 2 to cater for the setting up of the Salvage and Savers store. The building materials including bricks, and roofing was provided for by WiramWiram, Tamaneak Batsiua and their father, Tamoa Wiram. This building was built some time before 2004.

30. At the time of the death of the deceased she was in receipt of rental in sum of $1,300 and she kept $800 for her personal use and gave $500 to Tamaneak Batsiua; and the deceased continued to receive the rents until her death. Upon her death it was paid to WiramWiram and Tamaneak Batsiua as was agreed between them and their late mother.

31. The rental was paid to them until October 2016 when it stopped because Letima Adire filed Action No. 82 of 2016 in the Supreme Court.

32. I must say that the evidence adduced by MrDaurewa as to the occupation of these premises is not very clear, but what is not in dispute, is that all the expenses for the construction of the building was borne by TamoaWiram, WiramWiram and Tamaneak Batsiua.

33. Both Wiram Wiram and Tamaneak Batsiua claimed that the store and the restaurant were theirs as they incurred all expenses towards the construction. Their version is supported by Corina Solomon who is the eldest of the deceased's children after Rykers Solomon. Further in the 2 meetings held by NLC on 2 June 2016 no one disputed this and Rykers Solomon stated in the meeting:

> "However, 'with the 2 stores they don't have any shares'..."
>
> The only person who raised an objection was Letima Adire and I also note the comments of the Vice-Chairman, Mr Diringa, who stated as follows:
>
> "2. The 2 business houses were building by Wiram's and Tamaneak's father as attested by Rykers Solomon.
>
> 4. For whatever it's worth, RykeSolomon is the eldest son of Irene Wiram from her first marriage, a member o f Parliament and a Minister of State. His voice as a senior is always adhered to under Nauruan Customary Practices. So his submissions to clarify the matters on the estate carries weight. Rykers Solomon has since passed away.
>
> 5. There is clarity in where the siblings stand as far as the 2 stores is concerned. They knew well that it's not theirs.
>
> 6. Greed became the underlying factor because the mother died intestate so there was an inkling that through this agreement, they will have shares in the two stores."

HKL Building

34. This building was constructed in 1986. It initially consisted of one bedroom and a toilet and it was used as a store and restaurant. It currently consists of 3 bedrooms, one double garage, a balcony with roof, 3 toilets, 2 showers, a laundry, back wall 70 metres and septic tank. All the renovations to the house were done around 2004 and the estimated cost is $100,000 according to Wiram Wiram. The respondents dispute that amount and suggest that a more realistic figure is $22,800 approximately. I accept that all the expenses for the renovation were borne by Wiram Wiram.

35. Wiram Wiram was given permission in 1996 for him and his girlfriend, Wanda, who is now his wife, to live in there. I note that at the time Portion 165 was owned by Lily June and she was alive, so I presume and there is no evidence to

the contrary, that she gave consent to the deceased and her husband to build the original structure in 1986. I also presume that when WiramWiram was given permission to move into this house Lily June was aware of it being the maternal grandmother.

36. It is important to note that when the first appellant Wiram Wiram was given possession of this building by his parents in 1996 his mother was not the owner of Portion 165. She only became an owner in 2009 when her mother, Lily June, passed away. After taking possession in 1996, Wiram Wiram carried out substantial improvements to the building. I find it is also important to note that the improvements to the building, which is still in the same state today, were carried out when the deceased's mother, Lily June, was alive. On 1 June 2004 WiramWiram rented it to HKL Shipping Pty Ltd (HKL) for a term of 12 months by entering into a Residential Tenancy Agreement (RTA) in which Wanda and WiramWiram are described as landlords. The rent for the premises was $300 per week.

37. The RTA states inter alia that:

> **Legal title to the premises.**
> "The landlord agrees that no legal basis exists that the landlord knows of, or should know about, when signing this agreement, why the premises could not be used as a residence for the term of this agreement. ..."

38. Wiram Wiram and his wife rented out this building from I June 2014 to the date of the death of his mother on 15 May 2016; and prior to that until the death of her grandmother in 2009. There is no evidence to suggest that either his grandmother or his mother or any other sibling questioned his right to rent the premises. It is fair to say that both the grandmother and mother were quite happy to allow Wiram Wiram to rent out the premises as there is no evidence to the contrary.

39. Wiram, his wife and children, alllived in Australia from 2004 to 2009 for their children's education, and the premises were rented out on 1 June 2004 and rent was paid into their joint account. They returned from Australia in 2009 and during their absence for 5 years nobody including his grandmother, mother or his other siblings questioned his right to rent out the premises. The renting continued until after the death of the mother in May 2016 and further until 13 October 2016 when the Supreme Court action No. 82 of 2016 instituted by Letima Adire, ordered that all future rentals are to be paid into court pending the determination of this appeal.

40. If NLC had taken details of all the properties then at the first meeting it could have given the HKL Building to WiramWiram as there was no dispute between the beneficiaries.

TRANSFER OF LAND OF INTER VIVOS

41. Mr Udit submitted that when certain land and a building thereon is transferred from one Nauruan to another then the consent of the President is required pursuant to s.3 of the Land Transfer Act 1976. He further submitted that the

deceased's act of giving land to Wiram Wiram and the house during her lifetime is void as it was not consented to by the President.

42. Mr Udit further submitted that under the common law a gift of land does not vest unless the whole conveyance process is completed and relies on *Milroy v Lord* (1862) 4DeG.F&J.267 where it was stated:

> "I take the law of this court to be well settled, that in order to surrender a voluntary settlement valid in this section, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the person for whom he intends to provide, and the provisions will then be effectual, and it will be equally effectual if he transfers the property for the purposes of settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these models, must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect and imperfect gift. The cases I think go further to this extent, that if a settlement is intended to be effectuated where one of the modes to which I have referred, the Court will not give effect to it applying another of those modes. If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust. These are the principles by which, as I conceive, this case must be tried."

43. Mr Udit further submitted at [16][3] 'However, *Milroy v Lord* does not concern real property. The question is, does the same principle extend to a gift of real property. The Privy Council considered this in *Macedo v Stroud* [1922] 2AC 330, where the donor purported to give real property by a memorandum. It was an unregistered memorandum under the law of Trinidad. The donor handed all the documents to the solicitors with express instructions to merely keep in custody and not register the memorandum. Later the donor died. The memorandum remained unregistered. In fact the donee was receiving the rent from the property. The trial Judge held that the memorandum was intended to effect immediate unconditional transfer. On appeal that decision was reversed by the Privy Council. At pages 337-338 their Lordships held;

> "The memorandum of transfer ... was never made subject to registration, nor did Ribeiro [the donor] present it, or handed it to the transferee, for that purpose. It therefore, having regard to the terms of the ordinance, transferred no estate or interest either at law or in equity. At the most it amounted to an incomplete instrument which was not binding for want of consideration. Had it been in terms a declaration of trust, a court of equity might have compelled the trustee to carry out the trust, which would have been binding on him, even if voluntary. But it does not purport to be a declaration of trust, or anything else then and inchoate transfer. As such, and as it is voluntary, their Lordships think

[3] Written submissions filed on 12 August 2018

that it is no more than imperfect gift of which a court of equity will not compel perfection. The judgments of Lord Eldon in *Ellison v Ellison* (1802) 6 Ves 656 and of Turner LJ in *Milroy v Lord* (1862) 4DeGF and; J264 have placed this principle beyond doubt."

44. At [24] of his submissions Mr Udit relied on *Hedmon v Eka*[4] where Thompson CJ stated:

> "A gift of land made without valuable consideration can be revoked, at any time before it is perfected by a transfer of ownership made following the President's approval to the transfer being under s.3 of the Lands Act 1976."

WHETHER THE BUILDING FORMS PART OF THE LAND

45. Mr Clodumar submits that the general principle of ownership in Nauruan custom is that parents own the land and any building built thereon is deemed to be owned by the parents.[5] The effect of his submission is that at common law the house which is affixed to the ground becomes part of the land.

46. Mr Udit was, whilst conceding that common law provides that houses which are securely fixed to the land become part of the land, he submits that the common law principle may not be applicable to Nauru as the land passes from one generation to the other under the rules of intestacy as provided for under the Administration Order 1938 subject to the disposal of the land by way of a will.[6]

CRUX OF THE CASE

47. The crux of this case is whether the building on the land becomes a fixture and thus becomes part of the land under the common law principles or whether they should be treated as personal properties of the appellants. The whole case depends on how this issue is resolved.

WHETHER BUILDINGS/HOUSES BUILT WITH THE APPROVAL OF LAND OWNERS(PARENTS) FORM PART OF THE ESTATE UPON DEATH?

48. Mr Udit posed a very relevant and pertinent question as to what if the children of land-owning unit built a building or carried out substantial improvements to the existing structures with the consent of the landowners and they are given exclusive possession thereafter; whetherupon the death of the landowners the houses/buildings form part of the land, and if so; whetherall other siblings become entitled to a share regardlessof whether or not they made any contributions to the construction of the houses/buildings. This is exactly what has happened in this case. The children of the deceased and Ricardo Solomon did not lay any claim to the houses and the shop buildings at the NLC meeting except for LetimaAdire but subsequently she was joined in by Mitchum Solomon and Richene Kam. Their claim is that the building/store formed part of the estate of

[4] 1980 NRSC2
[5] Written submissions dated 25 September 2018 [4]
[6] Written submissions filed 12 August 2018 [28], [29], [30]

the deceased, and therefore under the law of intestacy all the children are entitled to an equal share.

WHETHER THE BUILDING SHOULD BE SEPRATED FROM THE LAND?

49. Mr Udit submitted that to overcome this problem the Court should separate the fixtures to the land from the land. He submitted:

> *".....That is, land is separate from all buildings and all structures. Anything attached to the land, irrespective of how firm or permanence, they are to be treated at chattels and personal property. This general rule of acceptance will pave for the passing under the rules of inheritance, testate or intestate consistent with the written laws of the Republic."*[7]

50. Mr Clodumar in reply submits that the submissions advanced by Mr Udit is inconsistent with the common law rights of co-owners and the way in NLC performs customary functions in respect of personalty and realty. He relies on *RomysEobob v Nauru Lands Committee and Others*, Land Appeal 1/2017 (3 August 2018) Vaai,J stated at [35] that:

> *"Ownership of house on Portion 65 at Boe does not form part of the personal estate."*

STATUS OF CO-OWNERSHIP IN NAURU

51. Before I address the issues as to whether the buildings/shop is to be treated as a chattel or personal property or otherwise, I shall discuss the position of co-owners in Nauru.

52. Mr Clodumar in his submissions referred to a draft judgment of Eames, CJ who prepared it after he heard submissions from the parties including MrBliim, the Solicitor General then. I have since obtained a copy of the draft judgment which was in the matter of *Robert Atsime v Tisai Notte*[8]. Mr Clodumar referred to this case at [51] of his written submissions dated 27 June 2018. I have perused the judgment and adopt the findings of Eames CJ on the question of law.

53. I refer to the above judgment where he stated at [14], [28], [29], [34], [42], [43], [44], [46],]47], [48], [49] and [60] as follows:

> [14] Co-Ownership
>
> The issues raised by this case concerning the rights of co-owners of Nauruan land have very wide significance. Almost all land in Nauru is co-owned and the scarcity of housing means overcrowding is a significant problem. Disputes between co-owners and the families as to the use of the land and profits from it are very common.
>
> [28] Tenants in Common

[7] [31] of written submissions dated 12 August 2018
[8] Civil Action No. 30 of 2012

The interests of tenants in common are described by Brennan J in *Nullagine Investments Pty Ltd v Western Australia Club Inc* (1992-1993) 177 CLR 635 [643 – 644] as follows:

> "The share or interest which a tenant in common has in land is an "undivided" share, that is to say, "A distinct share in property which has not yet been divided up among the co-tenants". A division of the property is repugnant to the nature of tenancy in common, for it is an essential characteristic of tenancy in common that each of the tenants has the right to occupy the whole of the property in common with others. Like joint tenants, the tenants in common have a unity of possession; unlike joint tenants, they need not have a unity of interests, nor a unity of title, nor need there be unity in the time when the interests of the co-owners vest. Each tenant in common has a separate and individual title to the property, limited according to the estate or term granted to or acquired by the tenant. Thus one tenant in common may seized of an estate in fee simple, another seized of an interest for life, while a third may be a tenant for a term of years, each of the interests being separately acquired at different times. There is on right of survivorship among tenants in common. And thus, at common law, a tenant in common who wishes to sell his interest in land was constrained to sell subject to the right of any co-tenant to remain in possession of the whole land. The vendor could neither seek a division of the land among the co-tenants nor compel other co-tenants to join in the sale of land."

[29] Thus at common law each co-owner is in possession of the whole of the land unless the co-owners have agreed otherwise.

[34] The courts have interpreted this provision narrowly, such that account need only be made where a co-owner receives the income of profits from third parties who usedor occupied the land. Therefore, the provision has been held not to change the right of a co-owner to return the whole income or profits if that co-owner developed or worked the property at his expense and initiative, and the other co-owners decided not to participate.

[42] The UK Law of Property 1925[9]provided that legal estate in land held by tenants in common was no longer capable of subsisting or being created in an undivided share of the land which could only be created so to take effect behind a trust for sale. Thus, the owner of an undivided share held in a tenancy in common has no estate in the land itself, merely in the proceeds of the sale and the income from the land until sale, (subject to the principles discussed later). *For the reasons to be discussed, the Law of Property Act 1925 is undoubtedly part of the law of Nauru."(emphasis added by me)*

[9] Section 34 and s. 36.

[43] The principles applying to tenants in common since 1925 are governed by the principle that the tenants now hold the land on trust. It has been held that where they are entitled to receive rents and profits the claims derived from an interest in the nature of personalty, not realty.[10] Upondeath of a tenant in common, Halsbury states "There is no right of survivorship, and on the death of a tenant in common his share passes according to its own limitations".[11] Thus, an undivided share is not absorbed by other tenants into the total estate (as with joint tenancy), but forms part of the estate of the deceased, to be dealt with any other property of the deceased may be dealt with under Nauru law.

[44] Although the Statute of Anne was repealed in 1924, the 1925 Act had the result, as Denning LJ noted in *Bull v Bull*[12], that thereafter there was no such thing as a legal tenancy in common;all tenancies in common were now equitable only. He held:

"Each (equitable tenant in common) is entitled in equity to an undivided share in the house, the share of each being in proportion to his or her respective contribution. The rights of equitable tenants in common as between themselves has never been so far as I know, been defined but there is plenty of authority about the rights of legal owners in common. Each of them is entitled to the possession of the land and to use and enjoyment of it in a proper manner. Neither can turn out the other; but if one of them should take more than his proper share, the injured party can bring an action for an account. If one of them should go so far as to oust the other he is guilty of trespass: see *Jacobs v Seward*[13]. Such being the rights of legal tenants in common I think that the rights of equitable owners in common are the same, save only for such differences as are consequent on the interest being equitable and not legal. It is well known that equity follows the law, and it does so in cases about tenants in common as in others.

[46] In the later case of *Jones v Jones*, Lord Denning further considered that the rights of equitable tenants in common, one holding a three quarter share the other one quarter share. He held[14]:

> "Now the common law said clearly that one tenant in common is not entitled to rent from another tenant in common, even though the other occupies the whole ....Of course if one of the tenants let the premises at a rent to a stranger and received rent, there would have to be an account, but the mere fact that one tenant was in possession and the other out of possession did not give the one who was out any claim for rent. It did not do so in the old days of legal tenants in common. Nor does it in modern times of

[10] *Halsbury's Laws of England* 4th Ed, "Co-Ownership, par [548]
[11] *Halsbury's Laws of England* 4th Ed, Vol 39 "Real Property/Co-ownership, par [548], Lexis Nexis
[12] 1955 1QB 234 [237]
[13] 1872 LRHL 464
[14] [1977] 20ER2N3 at 235

equitable tenants in common .... As with tenants in common, they are both equally entitled to occupation and one cannot claim rent from the other. Of course, if there were an ouster, that would be another matter; or if there was a letting to a stranger for rent that would be different, but there can be no claim for rent by one tenant in common against the other whether in law or in equity."

[47] The courts in Nauru administer law in equity concurrently (see *Customs and Adopted Law Act 1971, s.4(3)*, and the common law and the principles and rules of equity in force in England on 31 January 1968 have been adopted in Nauru (s.4(1) and (2)). The long-standing principles of equity, discussed above apply to Nauru."

[48] Although Lord Denning suggested that the fact that the rent was received *from a third party* would in itself give a right to an account, there are qualifications to the broad statement, as I later discuss. In particular the principle that the tenant in common is only accountable for such sums as constitute more than "his just share or proportion" continues to be relevant in equity (As indeed, Lord Denning acknowledged, in the passages cited above). Furthermore, a co-tenant would only be entitled, if at all, to such share as represents his interest in the land. In the case of the plaintiff that seems to be one ninth interest (assuming he was entitled to any sum at all).

54. By way of summary, the driving principles of law and equity that govern a claim by one tenant against another are as follows:

a) An equitable tenant in common, with an interest, even if a lesser interest than a co-tenant in common, was entitled with the other to the whole of the property, and could not be evicted[15];

b) A co-tenant in common who voluntarily fails to exercise his right to use and occupation cannot establish a claim for an occupation fee against a co-tenant who did exercise his rights[16];

c) One co-tenant may not oust another who is in possession. To so is a trespass and may constrained by the Courts[17];

d) Where a person has ousted another tenant in common, he will also be liable to an occupation fee[18] and the excluded owner may be entitled to mense profits[19];

[15] *Bull v Bull* [1955] 1QB234 [237]
[16] *McCormick v McCormick* [1921] NZLR 384 [395], per Salmon DJ, Hinde, McMorland and Sim, Land Law in New Zealand, CH13 [1300] 'Concurrent interest in land'
[17] *Wilkinson v Haygarth* [1874] 12 QB837; *Murray vHall* [1849] 7CB 441; 137 ER 175
[18] *Forgeard v Shanahan* [1994] 35 NSWLR 206 [223] per Meagher JA
[19] *Halsbury's Laws of Australia Real Property/Co-Ownership* [355-11625]

e) It does not constitute ouster merely for a tenant in exclusive possession to remain in possession, despite the wishes of a co-tenant than he depart[20];

f) Even if an owner has not actually ousted a co-owner, so as to be liable for an occupation fee, the court might nonetheless require that a fee be paid where, given the circumstances including the nature of the relationship between the parties, and the nature of the property in dispute, it would be unreasonable to expect the co-owner to exercise his right to occupation. [21] In those circumstances it cannot be said that the co-owner is not in possession because he voluntarily chose to exercise his right to possession.[22]

g) One co-tenant may not demand rent from another who is in possession, even if he occupies the whole property;[23]

h) A tenant in possession is not obliged to account to others for income gains by virtue of his improving the land by his own labours or at his own cost;[24]

i) The Statute of Anne gave a tenant who was out of possession the right to claim an account for rent and profits received from a third party by the co-owner in possession which continued more than is a 'just share or proportion'.[25] A similar claim for account may now be made in Equity. What constitutes more than a tenant's share or proportion is a question of fact, to be determined by the Court;

j) Where a tenant not in occupation is entitled to share in rents and profits gained from a third party his entitlement is in proportion to his interest in the land;[26]

k) Prima facie, since 1925 a tenant in possession who receives rent and income from a third party for use of the land in question which constitutes more than his share will be bound to account to the other co-tenants[27].In my opinion, that presumption could be rebutted where in all the circumstances it could not be said that the tenant in possession received more than his "just share or proportion". Furthermore, a claim to rents and profits would not apply with respect to any co-tenant who by agreement, expressed or implied, has waived such claim;

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[20] *Luke v Luke* (1936) 36SR(NSW) 310 [314]

[21] HindleMcMorland& Sim, Land Law in New Zealand, Ch 13, at 13002; see *French v Barcham* [2009] 1 All ER 145 at [34]; *Mckay v Mckay* [2008] NSWSC 177 at [45]-[54]; *Callow v Rupchev*[2009] NWSCA 48.

[22] *French v Barcham,* at 158 per Blackburn J, giving as examples, situations where a family relationship is so broken down that a co-tenant has left or remained out of possession by virtue of threat or violence or other circumstances making it unreasonable to expect the party to try to exercise the right of possession. What constitutes 'ouster' is to be considered from a practical viewpoint, *Dennis v McDonald* [1981] 2 All ER 632 [638] Purchas J.

[23] *Jones v Jones* [1977] 2 All 231 [235] per Denning MR.

[24] Hinde McMorland and Sim, Landlord in New Zealand, CH13 [13002], e.g. where the owner in possession by his own work established a boarding house, from which business he derived profit.

[25] Hinde McMorland and Sim, Landlord in New Zealand, CH13 [1302]

[26] *Halsbury'sLaws of England Vol 39, para [548]*

[27] Hinde McMorland and Sim, Landlord in New Zealand, CH13 [13002]

l) The obligation of the tenant in common in possession to act as a bailiff for any co-owners[28], and the rights of any co-owners to share rents and profits to be received from a third party, may be rebutted where they did not require the co-tenant in possession, nor did he agree, to act as the bailiff for all or any of the period in which he received rent or profit from third parties;

m) Where a tenant not in possession is entitled to a share of rents or other income gained from a third party, for any relevant period, the co-tenants should account to each other for a "a just share or proportion" not just of the income, but also outgoings that are attributable to earnings, rents and profits[29];

n) A tenant in occupation who claims an allowance from co-tenants for improvements will generally be required to pay an occupation rent by way of offset[30];

o) A tenant in common will be restrained from committing destructive waste [31];

p) A bare licence, not coupled with an interest, granted by one co-tenant can be revoked by another[32].

[60] On the face of it, the opinion of those holding a majority interest in the land in question as to what constitutes fair share and proportion, and the fact, if it so, that a majority do not object to the tenant in occupation or his descendants continuing to retain exclusive right to the rents and profits is relevant evidence for the Court to take into account, just as it would be relevant to know whether the co-owners were being kept out of possession because of threats and pressure. The obligation of a co-tenant to pay occupation rent can always be the subject of agreement between co-owners, just as the owners in common might agree that the tenant in possession should be compensated for the improvements he made in return for him paying an occupation fee[33]. Once agreed, the Court would enforce the agreement.

ISSUES FOR DETERMINATION

55. I accept that when a co-owner as a tenant in common builds a house or a structure on a property owned by other tenants in common that particular structure or house is a personal property of the co-owner.

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[28] Hitchims v Hitchims (1998) 47 NSWR 35 [41-43]

[29] See Kirby WP at 202 *Forgard v Shanahan*(1994) 35 NSWR 206

[30] *Forgarth v Shannon* at 223-224

[31] *Halsbury's Laws of England Vol 39, para [547]*

[32] Robson- Paul Farrugian and another (1969) 20 P & CR; (1996) 1013 SOL JO 346, per Davis, McGow LJJ and Browman J

[33] See cases cited in Halsbury's Laws of Australia 'Real Property'/Co-Ownership, [355-1160]

56. Mr Udit in advancing in support of his submissions that houses built by the appellants should be treated as their personal properties made reference to the case of *Deireragea v Adun,*[34] where Crulci J stated:

> "At the time of his death this building formed part of the personal property of Ben Deireragea. The Court holds that the plaintiff is the owner of this building to use as she sees fit."

57. Mr Udit has also referred to the cases in Tonga and Samoa where the courts have held that buildings have been regarded a personal property rather than as forming part of realty. He discusses this at [38], [39], [40] and [41] of his written submissions. I just refer to [38] of his submissions where he states as follows:

> "[38] Nauru is not the only country in the Pacific which has recognised that a house built on the land may not constitute a fixture. The Tongan Court of Appeal on appeal upheld that a building is not a fixture to the land in *Kolo v Bank of Tonga (1998)* TOL Law Rp35; [1997] Tonga LR 181 (7 August 1998). The Court (Burchett, Tompkins, Beamount JJ) stated as follows:
>
> *"Clause 90 of the Constitution reserves the right to the Land Court and on appeal to the Privy Council, "cases concerning title to land".Thus, the appellant's argument raises a constitutional question of great importance. The Constitution directs to "title to the land" rather to the incidence of possession of land. In commercial practice, that is how constitutional limitation has been understood. Buildings as Ward CJ pointed out in the judgement to which reference has already been made, have been regarded at items of personal property rather than as forming part of the realty. Because of the Constitution of Tonga, and because of Tonga's traditions, the intricate law of fixtures and accretions to land which applies elsewhere is not wholly appropriate to Tonga. Although the implications have not yet been worked out, the working out should be left to the process of development of the law of Tonga caseby case, we think that the broad proposition stated by Ward CJ should be accepted.'*

58. I have 2 opposing submissions, one by Mr Udit and by Mr Clodumar and Mr Dawerea supports Mr Udit's submissions.

59. The situation faced by the appellants is not an isolated incident in Nauru. The practice in Nauru for parents to allow their children to build houses on their land is very common as the children themselves do not have access to any other land; and further, sale of real estate or land in Nauru is not available as in other countries. Any sale or transfer of land requires the consent of the President, and consequently the children have no place to live on, but to live on their family land. The land position in this country is that it devolves from one generation to another (Administration Order 1938). So, where the children having obtained consent of the parents or having been encouraged by their parents to build their houses have a lawful expectation that the land on which they build houses will eventually devolve to them (except by operation of Will which is very rare).

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[34] [2015] NRSC 10

60. I totally understand NLC's position when it made the determination about the buildings that "*it was simply following the common law*". The common law in this country is the common law of England which was in force on 31 January 1968 by virtue of Customs and Adopted Laws Act 1971. The common law of England in respect of land is that any fixture on the land becomes part of the land.

61. If I were to treat the buildings built by the appellants as their personal property then I will be effectively amending the common law applicable to Nauru. Under s.4(a) and (b) of the Customs and Adopted Laws Act 1971 the Court has power to alter the common law if it "*will suit better the circumstances of Nauru...*"(s.4(4)(b)).

WHAT IS COMMON LAW AND CUSTOM

62. In his paper presented on Land Ownership and Control in Nauru, Peter MacSporran stated as follows:

> "*The gravest danger to the customs and practices of the Nauruans is there being "cast in concrete" by decisions by the Courts. Once a particular practice becomes "recognized" then it is likely to cease to be a custom and become part of the common law of Nauru: custom falls prey to the doctrine of stare decisis and its vitality and ability to change as the people change, indeed its very character as custom, is lost."..... "It is possible that custom varies in different places in Nauru but that is part of the vitality of custom. What is important is that the values of the community changes, as needs change, so custom can change. Rather than being seen as writ in stone it is alive, vibrant and growing.*"

63. As I said earlier that it is the custom in Nauru for parents to allow their children to build on their land whilst the land is still owned by them on the understanding that not only are they owners of the house that they built but will ultimately inherent the land as well (subject to the children complying with the family norms and values failing the parents have the right to evict them as owners of the land) .

64. This is not the first time that the Court has been asked to alter the common law in Nauru. The common law relating to malicious prosecution was amended in the case of *Bernicke v Adeang*[35] and it was stated as follows at [28],[29],[30] and [31] as follows:

> [29] In this case there are no criminal charges and both counsels did not address me on Sagicor's case. As it was an important development in the area in law on malicious prosecution, I brought it to their attention. On 23 March 2016 I made orders for the parties to file further submissions as to whether I should accept the law as at 31 January 1968 or whether I should accept the changes brought about by Sagicor and thus alter the common law. The defendant's submissions were filed as ordered but Miss Hartman has not filed her submissions to date. I had the matter called twice in this session on 16 May and 19 May 2016 and Miss Hartman did not attend Court on both

[35] [2016] NRSC 5, Khan, J

days and instead got Mr Tolenoa to appear on her behalf with very limited instructions. I have therefore decided to complete by judgments only on the basis of submissions filed by Mr Clodumar.

[30] Section 4(4)(b) provides as follows:

> "A principle of rule of law or equity adapted by this section shall not be altered or adapted its application to Nauru unless the Court which makes the alteration or adaption is satisfied that the principle or rule so altered or adapted will suit better the circumstances of Nauru than does the principle or rule without that alteration of adaptation."

[31] Nauru is a very unique country. It is one of the world's smallest island nations but it has a very complex land law system and consequently there are a lot of disputes between land owners and many land disputes are pending before the Courts and the Nauru Lands Committee.

[32] This is a case between land owners who are tenants in common. As can be seen from the facts of this case that it is very easy to make reports which are completely unfounded. I am convinced that the law as stated in Sagicor should be adopted here because it will have many benefits to Nauru at large, most importantly people would feel more restrained in making unfounded allegations or reporting matters to police or filing cases without any basis as they would know that the consequences would be serious and dire. Making an unfounded claim or reports has all the potential of inflaming this situation between the land owners. So, if the law as stated in Sagicor is adopted people will think twice before making unfounded allegations or report and filing baseless claims in Court. For these reasons I accept the law in Sagicor better suits the circumstances of Nauru and to that extent the common law as it stood on 31 January 1968 is altered.

65. In light of the changes that have taken place in Nauru over the years about building on family owned land, I am satisfied that the common law position that the building/fixture is part of the land is to be altered, and henceforth all buildings built by the children of a land owning unit with the approval of their parents should to be treated as the personal properties of the children as I am satisfied that this alteration will better suit the circumstances of Nauru.

CONCLUSION

66. I therefore declare that:

1) The house built by Mitchum Solomon is his personal property;

2) The HKL Building is the personal property of Wiram Wiram;

3) That the 2 commercial properties are the personal property of Wiram Wiram and Tamaneak Batsiua – the green restaurant named "I's Capital" is the property of Wiram Wiram and the blue shop is the personal property of Tamaneak Batsiua;

4) The main house or the family house shall belong to all 8 children of the deceased. I note that Tamanaek Batsiua is in occupation and in the event of the need by any of the children of the deceased she is to provide them shelter therein.

67. Since the HKL Building and the stores are rented, the other co-owners may be entitled to occupation rent but they will only be able to do so upon compensating them for the improvements they carried out. I note that Wiram Wiram's share in Portion 165 has been enlarged to 27% of 2,444.84 square metres when David Dengea and Darcy Deigaeruk gave their 1/8th share to him (see Gazette Notice No. 884/2016 dated 4 November 2016).

68. I order that the injunction orders made on 23 September 2016 shall be dissolved and all the monies held by the Court in respect of the HKL Building be paid to WiramWiram and all the monies held in respect of the store/restaurant be paid out to Wiram Wiram and Tamaneak Batsiua in the shares as stated in paragraph [66] and subparagraph 3 above.

DATED this 7 day of November 2018.

Mohammed Shafiullah Khan
Judge

SUPREME COURT OF NAURU