SUPREME COURT OF NAURU

[CIVIL JURISDICTION] **Land Appeal No. 5 of 2017**

Between:	**Eben Tom & Ors**	**1st Appellants**
	Antonius Heinrich & Ors	**2nd Appellants**
	John Julius & Ors	**3rd Appellants**
	Darren Tsiode & Ors	**4th Appellants**
And:	**Beneficiaries of the estate of Ediribaini Thoma**	**1st Respondents**
	Beneficiaries of the estate of Gadabu	**2nd Respondents**
	Beneficiaries of the estate of Gumware Jones	**3rd Respondents**
	Nauru Lands Committee	**4th Respondents**

Before: **Judge Rapi Vaai**

APPEARANCES:

Appearing for the Applicant (1st Respondent):	D. Aingimea
Appearing for the 2nd Respondent:	M. Depaune
Appearing for the 3rd Respondent:	K.Tolenoa
Appearing for the 4th Respondent:	No Appearance
Appearing for the 1st Appellant:	J.Olsson
Appearing for the 2nd Appellant:	P.Ekwona
Appearing for the 3rd Appellant:	J. Julius
Appearing for the 4th Appellant:	No Appearance

Date of Hearing: 15/5/2019
Date of Ruling: 24/5/2019

Ruling

Introduction

1. By Notice of Motion dated the 26th April 2019 the First Respondent Ediribaini Thoma (Applicant) seeks orders:

    (i) that the determination by the Nauru Lands Committee in gazette No.70 dated 5th May 2017 be upheld as it was in line with the Supreme Court directives, and

    (ii) that the issue of ownership of Abotijij has been dealt with by the Nauru Lands Committee through its determination, and therefore the issue is estopped by way of issue estoppel.

Background

2. In 2010 the Nauru Lands Committee made and published its determination of the beneficiaries of the half interest in the land known as Abotijij portion 94 Buada District which had been held by one Dedage. The land was substantially mined for phosphate; distribution of royalty payments still awaits the determination of ownership of the land. The determination was appealed against to the Supreme Court which allowed the appeal in 2012 and remitted it back to the Nauru Lands Committee to re-convene family meetings to determine the beneficiaries of Abotijij. No agreement was reached at the family meetings and the Lands Committee was once again required to make a determination pursuant to the Administration Order No.3 1938, to determine the family or nearest relatives of Dedage. It reached the same conclusion in 2012 as did in 2010. Four appeals were lodged against the determination of 2012.

3. Eames CJ heard the four consolidated appeals in 2013. During the course of his judgment he made several findings to a number of factual issues as well as the law.

4. Eames abstained from attempting to define the meanings of words "family" and nearest relatives as used, in the 1938 Administration Order. He said at paragraph 156:

> " These are questions on which I have received little by way of submission. In my view, they are issues in which the Nauru Land Committee ought to venture an opinion after consulting with the community."

He also suggested the engagement of an expert anthropologist or genealogist to assist in preparing a definite and agreed genealogy and in the absence of agreement, for the expert to give independent evidence relevant to identification "of family or nearest relatives."

5. At paragraph 164 he:

> "... urged the parties to attempt to reach, agreement before I make final determinations."

6. In conclusion he set aside the determination of the Nauru Lands Committee of 2012 and remitted the four proceedings to the Land Committee to conduct family meetings having regard to his findings in his written judgment.
   Failing any agreement, the committee should then make a determination as to the beneficiaries applying the principles of Administration Order No. 3 of 1938 as discussed in the judgment.

7. The Nauru Lands Committee in compliance with the Supreme Court judgment did summon and held family meetings in an effort to resolve by agreement the family or nearest relatives of Dedage. No agreement was reached. As a consequence the Nauru Lands Committee was obliged to determine the beneficiaries by applying the principles of succession and reversion governing the distribution of intestate estates as set out in the Administration Order No. 3 1938.

8. Determination by the Nauru Lands Committee was published in the Government Gazettes No. 70 of 5th May 2017.

9. In rejecting the determination of the Nauru Lands Committee the four appellants lodged their appeals to the Supreme Court pursuant to section7 (i) Nauru Lands Committee Amendment Act 2012.

Notice of Motion by the First Respondent

10. The notice of motion to strike out and dismiss all the four appeals is made pursuant to the inherent jurisdiction of the court.

11. In Halbury Laws of England[1] the legal position is stated at paragraph 435:

> " In addition to its powers under the Rules of the Supreme Court, the court has an inherent jurisdiction to strike out pleadings and other documents ... So, under its inherent jurisdiction the court may strike out the whole or part of the endorsement on a writ or stay or dismiss an action which is frivolous or vexations or an abuse of process or which must fail or which the plaintiff cannot prove and which is without a solid basis...The power to strike out, stay or dismiss under the court's inherent jurisdiction is discretionary. It is a jurisdiction which will be exercised with great circumspection and only where it is perfectly clear that the plea cannot succeed, it ought to be exercised sparingly and only in exceptional cases."

Issue Estoppel

12. The requirements for issue estoppel in a particular proceeding were stated by Lord Guest in _Carl Zeiss Stifting v. Rayner & Keeler Ltd (No. 2)_[2];

> " The requirements for issue estoppel still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

[1] 4th Edn. Vol 37

[2] (1967) 1 AC 853 at 935

13. As distinct from cause of action estoppel which precludes litigation of the same action where the cause of action was the subject of a final decision of a court of competent jurisdiction, issue estoppel is wider and applies to separate cause of action. It arises where the same question on fact or law has been decided, the judicial decision which creates the estoppel is final and the parties to the decision or their privies are the same persons as the parties to the proceedings in which the estoppel is raised.
The distinction was explained by Fullagar J in
Jackson v. Goldsmith[3].

> "In the first place, if A sues B to judgment and in subsequent proceedings between them a plea of res judicata is raised, the primary question will be whether the cause of action in the later proceedings is the same as that which was litigated in the former proceedings. This was the question which arose in the well-known case of *Brunden v. Humphrey*[4]. It was held there that the causes of action were not the same. The injuria was the same but the dammun was different, and, since damage was "of the gist" of the particular action, the causes of action were not the same. The plea therefore failed. On the other hand, if A sues B to judgment and in subsequent proceedings between them a plea of issue estoppel is raised; the plea may succeed although the causes of action in the two cases are entirely different. The question will be whether an issue on fact or law which is raised in the later proceedings was an issue of fact or law which was also raised in the earlier proceedings and therein determined."

The estoppel, so far as it applies to facts is confined to ultimate facts. It does not extend to mere evidentiary facts. This was explained by Dixon J in *Blair & Others v Curran & Others*[5].

> "Nothing but what is legally dispensable to the conclusion is finally closed or concluded. In matters of facts the issue

[3] (1950) 81 CLR 446 at 467
[4] (1884) 14 QBD 14
[5] (1939 -40) 62 CLR 464 at 532

estoppel is confined to those ultimate facts which form the ingredients in the cause of action, that is, the title to the right established. Where the conclusion is against the existence of a right or claim which in point of law depends upon a number of ingredients or ultimate facts the absence of anyone of which would be enough to defeat the claim, the estoppel covers only the actual ground upon which the existence of the right was negatived. But in neither case is the estoppel confined to the final legal conclusion expressed in the judgment, decree or order.
In the phraselogy of Coleridge J in _Rv. Inhabitants of the Township of Hartington Middle Quarter_[6], the judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually decided as the groundwork of the decision itself, though not then directly to the point at issue. Matters cardinal to the latter claim or contention cannot be raised if to raise them is necessarily to assert that the former decision was erroneous"

14. Dixon J also pointed out at page 533 the difficulty in the actual application of the conceptions, is to distinguish the matters fundamental or cardinal to the prior decision or order, or necessarily involved in it as its legal justification or foundation, from matters which even though actually raised and decided as being in circumstances of the case the determining considerations, yet are not in point of law the essential foundation or ground work of the judgment, decree or order.

15. Policy considerations underlying issue estoppel, abuse of process, and cause of action estoppel have been expressed in a number of ways but the underlying policy considerations is that there should be finality in litigation and that a party should not twice be vexed in the same matter.
This public policy interest as Lord Bingham stated in _Johnson v. Gorewood & Co_[7].

[6] 119 ER 288 at 293
[7] (2001) 1 All ER 481 at 499

" is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole."

16. The doctrine of estoppel has extended to the decision of tribunals. The High Court of Australia in *Kuligowski v. Metrobus*[8] cited with approval the passage by Gibbs J in *Administration of Papua and New Guinea v. Daera Guba*[9]:

> " The doctrine of estoppel extends to the decision of any tribunal which has jurisdiction to decide finally a question arising between parties even if it is not called a court, and its jurisdiction is derived from statute or from submission of parties, and it only has temporary authority to decide a matter at hoc"

In *Halbury Laws of England*[10]_ it is stated at para 1012:

> "The doctrine of estoppel by record has been extended by analogy to the decisions of all tribunals which have jurisdiction whether by the law of England, or by the consent of parties, or by the law of the country to whose tribunal the parties have or may be presumed from their conduct to have submitted themselves"

The Supreme Court Ruling

17. The Supreme Court did determine the appeal lodged against the determination by the Nauru Lands Committee of the heirs of Dedage who were to inherit Dedage's half share in Abotijij pursuant to the Administration Order No. 3 of 1938.
Instead of determining the heirs of Abotijij Eames CJ delivered the following conclusions and orders: at paragraphs 169 to 174.

[8] (2004-05) 220 CLR CLR 363 at 373
[9] (1973) 130 CLR 353 at 453
[10] 4th ed. Vol 16

169. The determination of the Nauru Lands Committee dated 12 September 2012, published in Government Gazette No 124 by GNN501 of 2012, concerning Portion 94, Abortijij is set aside,

170. I remit the four proceedings that were the subject of his judgment to the Nauru Lands Committee to conduct a family meeting or meetings having regard to my findings in this judgment.

171. The primary purpose of the new family meetings will be to encourage parties to reach agreement as to the beneficiaries of Abotijij, but failing agreement to make a determination as to the beneficiaries applying the principle of the Administration Order No.3 1968 as discussed in this judgment.

172. In conducting further family meetings, the committee should endeavor to produce an agreed comprehensive genealogy, utilizing such independent expert advice as it deems appropriate. The Committee may require any parties attending the family meetings to contribute equally to the reasonable costs of engaging one or more expert consultants to assist the Committee in its endeavors.

173. I grant the parties to apply to the Registrar or a judge, upon 48 hours' notice to the court and other parties, for the purpose of seeking directions.

174. It has been the general policy of the court not to make costs orders in land appeal cases. I have returned this four cases to Nauru Lands Committee in the hope that once findings of law and fact are considered, agreement may be possible as to the persons who constitute "family or nearest relatives". An agreed genealogy should lead to resolutions of that question.If, however, the determination by the Committee as to that question leads to unmeritorious appeals that disregard my findings, it should be assumed that there would be no penalty as to costs.

Submissions by the First Respondent

18. Mr Aingimea for the first respondent submitted that the Supreme Court in its written judgment directed the Nauru Lands Committee to conduct family meeting or meetings to encourage parties to reach agreement as to the beneficiaries of Abotijij; to endeavor to produce an agreed comprehensive genealogy of the heirs of Dedage, and to utilize independent expert where appropriate. However, if agreement could not be achieved then the Land's Committee was to make the determination as to the beneficiaries by applying the principles of the Administration Order No.3 1968 as discussed in the judgment of the court.

19. Mr Aingimea contended that the Nauru Lands Committee did exactly and complied with the directions and orders of the Supreme Court. It called several meetings; it endeavored to reach agreement as to heirs and genealogy. It also, when agreement was not achieved, determined the beneficiaries of Abotijij by applying the principles of the Administration Order No 3 1938 as discussed by Eames CJ in his judgment.

20. It was contended that since the Supreme Court has directed the Lands Committee to determine the issue of the beneficiaries of Abotijij, and because the Land Committee did so in compliance with the principles of the Administration Order 1938 as directed by Eames CJ, the appellants are therefore estopped from challenging and re-litigating heirs of Abotijij.

Discussion

21. The notice of motion by the applicant is misconceived and is flawed for very obvious reasons. Firstly the Nauru Lands Committee cannot be the judge of its own cause. Its determination of the heirs of Abotijij was challenged by the appellants in the Supreme Court by way of appeal. The Supreme Court has not ruled on the appeal; it has simply set aside the decision of the Nauru Land Committee, it has not given a decision to substitute for the decision it set aside; it has instead remitted the issue back to the Nauru Lands Committee with directions, if the parties could not reach agreements at the family meetings.

22. Eames CJ was not comfortable and was obviously reluctant to determine who are "nearest relatives" or family of Dedage as used in paragraph 3 (b) of the 1938 Administration Order. It said so in the following paragraphs of the judgment.

> 156. These are questions on which I have received very little by way of submission. In my view, they are serious issues on which the Nauru Lands Committee ought to venture an opinion after consulting with the community.
>
> 157. Likewise I consider that the Committee should conduct further meetings to identify who may be regarded as family and nearest relatives by reference to a family tree.
>
> 158. From the outset of this case, which has probably been the longest land appeal ever in this court, there has been a failure to agree on a genealogy. I have had multiple genealogies handed to me…
>
> 164. Whilst the 1938 Order must be applied leading to a close debate and examination of degrees of separation, rather than emphasizing the extent of past mutual support and co- operation – its strict rules as to "family or nearest relatives" can be overcome by agreement of the parties. I would urge parties to attempt to reach agreement before I make final determinations.

23. It was not the definition of nearest relatives or family that the court was concerned with; it was the task of identifying them given the numerous genealogies given to the court. It was for that disturbing complex issue that the court urged the parties and the Nauru Lands Committee to overcome through conciliation.

24. Secondly the doctrine of estoppel does not arise. The first two requirements of issue estoppel cannot be met by the applicant- there was no previous

proceeding which decided the heirs of Abotijij and the determination by Nauru Lands Committee in 2017 which is contended by the applicant to create the estoppel was not a final decision.

25. This land appeal which Eames CJ correctly labelled as the longest land appeal ever in the Supreme Court, commenced in 2010.
The determination of the heirs of Abotijij by the Nauru Lands Committee in 2010 was set aside because the Nauru Land Committee failed to give notice to all relevant persons for the purpose of conducting family meetings. The court ordered the Land Committee to re-convene family meetings. In 2012 the Lands Committee again made another determination of the beneficiaries when the family meetings failed to resolve the issue by agreement. The 2012 determination was appealed resulting in the judgment of the Court in 2013 which again set aside the determination of the Committee and directed the committee to once again convene family meetings and attempt to resolve who are the nearest-relatives and family of Dedage. Having failed to achieve any agreement the Land Committee once again made the same determination as to the heirs of Abotijij.

26. It was that determination in 2017 which the applicant has mistakenly labelled as a final decision.

27. I agree with Mr Ekwona, but for different reasons, that the determination of the Nauru Lands Committee was not final for the purpose of issue estoppel. What tantamounts to final decision was stated in *Kuligowski v. Metrobus*[11].

> *"A final decision, then, is one which is not of an interlocutory character, but is completely effective unless and until rescinded, altered or amended. The fact that an appeal lies from a decision does not make it any less final. It must be final and conclusive on the merits: the cause of action must be extinguished by the decision which is said to create the estoppel"*

28. I also agree with Mr Julius that the determination cannot be final because the appellants have a right to appeal against any determination by the Land Committee as provided under the Nauru Lands Committee Act and

[11] Supra at 375

Amendment, and this appeal proceeding which commenced in 2010 has not been finalized. The Supreme Court has not given a written judgment on the issue under appeal. The family and nearest relatives of Dedage to inherit the half share of Abotojij remain to be determined. There was no other proceeding, prior to 2010, which determined the issue of the hiers of Abotijij. The issue raised in the these proceedings was not decided in an earlier proceeding.

29. It should not be mistaken from what it stated above that a determination by the Nauru Lands Committee pursuant to its powers under the Nauru Lands Committee Act 1956 is not final. There are two instances in which its determination can be classified as final. Firstly when its determination is not appealed against and secondly when its determination is upheld on appeal. Both instances are absent in this proceedings.

Results

30. (a) The Notice of Motion to Strike out is denied and is dismissed.
    (b) Costs are reserved.
    (c) This matter is adjourned to 12th July 2019 for mention.

Dated this 24 day of May 2019

Judge R.Vaai