



SUPREME COURT OF NAURU

[CIVIL JURISDICTION]

Civil Case No. 07 of 2019

Between: **Dodo Kepae & Ors** 1st Plaintiff
Carlin Kepae & Ors 2nd Plaintiff

And: **John Jeremiah** 1st Defendant
Tehani Jeremiah 2nd Defendant
Secretary of Justice 3rd Defendant
Nauru Lands Committee 4th Defendant
Palik Agir 5th Defendant
Tyran Capelle 6th Defendant

Before: **Judge Rapi Vaai**

APPEARANCES:

Appearing for the Plaintiff: **J Olsson**
Appearing for the 1st and 2nd Defendant: **E. Soriano**
Appearing for the 4th Defendant: **J Udit**

Date of Hearing: 7th October, 2019
Date of Ruling: 16th October, 2019

Ruling

1. This ruling deals with two applications to strike out the statement of claim.

Background

2. The plaintiffs and the second defendant were some of the part owners of the land Atai Portion No. 197 in the district of Meneng (the land).
3. The second defendant is the mother of the first defendant. His house is built on part of the land.
4. By Cabinet approval dated 7th March 2013, Cabinet approved the consent of the President to the transfer of shares of the plaintiffs and others, in the land to the first defendant. Cabinet approval was published in the Government Gazette of the 13th March 2013 so that as from the 13th March 2013 the plaintiffs ceased to be owners of the land. Their shares were registered in the name of the first defendant.
5. The land transfer forms which put into motion the transfer of the plaintiffs shares to the first defendant were allegedly signed by each of the plaintiffs and each transfer and signature was witnessed by the 5th and 6th defendant as member and chairperson respectively of the Nauru Lands Committee the 4th defendant.
It is the Nauru Lands Committee which submitted the purported transfers to Cabinet for approval.

The Claim

6. Some of the plaintiffs claim they did sign forms but they did not sign before any member of the Nauru Lands Committee. The forms they signed were personally given to them at their homes or their workplace by the second defendant who requested them for their written consent to allow her son, the first defendant to extend his house on the land. On some occasions, the second defendant was accompanied by the first defendant; on others she was accompanied by the 5th defendant but it was the second defendant who talked to them, not the first or fifth defendant who stayed in the car.
7. Some of the plaintiffs claim they did not sign any form at all and their alleged signatures were obviously forged.
8. All of them claim they would never have agreed to sign away their lifetime inheritance.

The Strike out motions by the first and second defendants

9. The first and second defendant moved to strike out the plaintiffs suit pursuant to Order 15 rule 19 (1) (a) (b) (d) Civil Procedure Rules 1972 on the basis it discloses no reasonable cause of action, it is frivolous and vexatious or otherwise an abuse of process.
10. The motion is supported by the affidavits of the first defendant and of the Mr Agir the 5th defendant.
11. Both affidavits deposed of facts which conflicted with the facts alleged in the claim. The plaintiffs in response to the strike out motions filed numerous affidavits disputing the affidavit statements by the first and fifth defendant.
12. The thrust of the two affidavits in support of the strike out motion was against the allegations of forgery, false pretense, dishonesty and deceit.
13. Counsel in support of the motion also submitted that the claim is an abuse of process in that the proper course for the plaintiffs to take was to challenge the decision of the Nauru Lands Committee which resulted in the transfer of shares from the plaintiffs to the first defendant. Appeal against the decision of the Nauru Land Committee by virtue of section 7 Nauru Lands Committee Act 1956 should be filed within 21 days after the decision is published. The decision of the Nauru Lands Committee was published in 2013 and time for appeal has long expired. It is contended therefore that the plaintiffs claim is a subtle attempt to appeal the Nauru Lands Committee decision through the back door.

Strike Out Motion by the fourth defendant – Nauru Lands Committee.

14. The fourth defendant moved to strike out the claim pursuant also to Order 15 Rule 19 Civil Procedure Rules 1972 on the basis it discloses no cause of action. It is the contention of the Nauru Lands Committee that the plaintiffs claim challenges the decision of the Nauru Lands Committee which can only be challenged by an appeal under the Nauru Lands Committee Act 1956.
15. Both strike out motions therefore challenged the plaintiffs claim on the basis that the claim is appealing or questioning the decision of the Nauru Lands Committee by civil proceedings as opposed to an appeal under the Nauru Lands Committee Act.
16. I will deal with the Nauru Lands Committee appeal submission first.

Challenge to the Nauru Lands Committee decision.

17. The strike out submissions are completely misconceived. Both submissions assumed or adopted the publication in the Government Gazette of 13th March 2013 as a decision of the Nauru Lands Committee when it was clearly not the case. It simply can never be a decision of the Nauru Lands Committee.

It is simply a publication of grant of approval by Cabinet of transfers of land ownership.

18. The publication in the Gazette was to comply with Cabinet directive of 7th March 2013 when Cabinet granted the approval to transfer shares. Paragraph 3 of the Cabinet directive states:

3. The cabinet directs the Secretary to Cabinet to publish such transfers in the Government Gazette and to notify the Nauru Lands Committee of the transfers.

19. The notice of motion by the Nauru Lands Committee to strike out is denied.

No cause of Action submission

20. Counsel in support of the motion to strike out did not actively pursue the no cause of action submission obviously because it is a bitterly contested issue which cannot be resolved by conflicting affidavits on the facts.

There is also Order 15 Rule 19 (2) which provides that no evidence shall be admissible on an application to strike out a suit or pleading on the ground that it discloses no cause of action.

21. There is logic and purpose for Order 15 Rule 19 (2). In a strike out motion which alleges a no cause of action, the court assumes that the pleadings in the statement of claim can be proven or are assumed to be correct.

22. Order 15 Rule 19 (2) however does not necessarily exclude the use of affidavits in support of a strike out motion, particularly so when abuse of process is advanced as a ground to strike out. The court however will not allow the use of affidavit in a strike out motion to determine contentious matters of facts. Such contentious matters must await the substantive hearing.

23. In the New Zealand Court of Appeal decision in *CED Distributions Ltd v. Computer Logic Ltd*¹ it was said:

¹ Unreported 345/90 – 26/7/1991

“ There will be occasions when brief affidavit evidence may assist a proper understanding of a pleading, may exhibit a pleaded document or may deal with factual material that is undisputed. This is appropriate for failure to disclose a cause of action will not attempt to resolve a genuinely dispute issues of fact or consider evidence inconsistent with the pleadings ”

24. If what the plaintiffs alleged in their claim (substantiated in details in the affidavits) are correct, there is a case for forgery, dishonesty. false pretense and deceit disclosed in the pleadings for the defendants to answer.
25. The strike out motion by the first and second defendant is also denied.

Secretary of Justice as party

26. The plaintiffs concede that there is no allegation against the Secretary of Justice. By consent the Secretary of Justice is struck out as a party.

Remedy sought against the Nauru Lands Committee

27. Counsel for Nauru Lands committee questioned the nature and basis of the remedy sought against Nauru Lands Committee. In the amended statement of claim a penalty is sought against the Nauru Lands Committee for their negligence and improper conduct.
28. The improper conduct is directed at the two members, the fifth and sixth defendants, who witnessed the signatures of the plaintiff when they were not physically present at time of signing.
29. The negligence is directed at the Nauru Lands Committee procedure and or failing to comply with procedure for obtaining consents and execution of transfer of shares documents and forwarding them to Cabinet for approval.
No procedure is provided by the Nauru Lands Committee Act or the Lands Act for transfer of land ownership. Procedure of the Nauru Lands Committee as the parties understand is that the consent forms are executed by the land owners and given to Nauru Lands Committee where they are kept for 21 days in the event a land owner has a change of heart.
After 21 days the Nauru Lands Committee seeks the approval of Cabinet.
30. The procedure is fully described by the fifth defendant in his affidavit which supported the motion to strike out by the first and second defendant. He deposed:

"5. I met and spoke to each of the person who signed the transfer form and explained fully about the transfer form and its effect. After explaining the form, each of the person whose name was in the covering letter sent to the Secretary of Cabinet, signed the form in front of me. I witnessed their signatures by signing on the form. The exception is the late Gregory Kepae family, which I have explained in paragraph 12 below.

6. I also told them very clearly that I will hold the forms for 21 days and he or she can come to the Nauru Lands Committee office and withdraw the form.

7. Not one of the persons came to the office.

8. After the 21 days expired, John Jeremiah visited the office and enquired if any one of the land owners, who signed the form withdrew their consent. I told him not one did.

9. After 21 days passed, I submitted the forms to the Chairperson, Mrs Tyran Capelle, to sign and remit them to the Secretary for Cabinet. That is the standing procedure in regards to land transfer. The Chairperson remitted the signed land transfer forms on 18 February 2013.

12. The only family group that had their form signed by their eldest sibling (Felix) was the family of Gregory Kepae (deceased). Their mother, Helena Kepae told us when we arrived at their house that her son Felix would sign for all his siblings, namely Franzine, Della, Lugano, Chucky and Marjordan. When I spoke to Felix he confirmed that he has been signing leases and other documents relating to land for and on behalf of his siblings. Therefore I did not question his authority to sign for his siblings.

31. Plaintiffs are alleging that the procedure was not followed when the application for transfer was submitted by the Nauru Lands Committee to cabinet before the 21 days grace period expired.

More importantly the Nauru Lands Committee was negligent in its procedure in allowing land owners to sign the consent forms on behalf of other land owners as admitted to in paragraph 12 of the affidavit of the fifth defendant.

32. Whether the Nauru Lands Committee is alleged to be vicariously liable for the alleged negligence and fraudulent acts of the fifth and sixth defendants cannot be determined with confidence from the pleadings. Nonetheless it's an obvious conclusion.

33. Counsel for Nauru Lands Committee correctly submitted and raised concerns about the confusing and convoluted nature of the statement of claim. However instead of seeking better and further particulars the Nauru Lands Committee opted to go for a strike out

motion. It must be the glut of affidavits filed which assisted the Nauru Lands Committee to digest and identify the essence and particulars of the plaintiff's complaints.

34. Nonetheless, the plaintiffs should specify the nature of relief and of damages, if any, they are seeking against the Nauru Lands Committee and other defendants, or whether they are simply seeking an order for costs.

Orders

1. Both Notices of Motion to strike out the plaintiffs' claims are dismissed.
2. The plaintiff is ordered to file an amended statement of claim stating if damages are sought against each defendant, and if so the nature and quantum of damages.
3. The Amended statement of claim to be filed by the 1st November and to be listed for mention before me on 29th November 2019.
4. The plaintiff costs are reserved.

DATED THIS 16TH DAY OF OCTOBER 2019

Mari

Judge R. Vaari

