IN THE SUPREME COURT OF NAURU

AT YAREN

CIVIL JURISDICTION Civil Suit No.29/2018

BETWEEN

Rosehilda Dediya

Chrishilda Akubor

And

Eneasi Ketner

Before: Rapi Vaai, J

APPEARANCES:

Counsel for the Plaintiffs:	V. Clodumar
Counsel for the Defendant:	K.Tolenoa
Date of Hearing:	5th December 2019
Date of Submissions:	18th and 24th April 2020
Date of Ruling:	8th May 2020

Case may be cited as: Rosehilda Dediya v Eneasi Ketner

RULING

Introduction

1. On the 21st December 2018 the plaintiffs, younger sisters of the defendant, obtained ex-parte an interim injunction to remove and prevent the defendant from entering the family home which the plaintiffs and their other sister occupied since their mother died in 2003.

2. Attempt by the defendant to discharge the interim injunction failed. The plaintiffs now seek a permanent injunction.

Background

3. Julius Akubor (Julius) the owner of the land and grandfather of the plaintiffs and the defendant got the house constructed for him on his land under the Nauru Housing Scheme pursuant to the provisions of the Housing Ordinance 1957. The characteristics features and nature of the housing scheme are well known, and will be briefly discussed later in this ruling. Suffice however to emphasise at this stage that under the housing scheme, the ownership of the house was vested in the Local council, so that Julius the owner of the land was the tenant of the house under a tenancy agreement.

4. When Julius died in 1974 his daughter Gloriana inherited the land and continued to occupy the house. The local council did not terminate the tenancy upon the death of Julius, neither did it collect or demand rent from Gloriana and her children before Gloriana's death in 2003. The Housing Ordinance imposed a duty on the Council to pay compensation to Gloriana the land owner and to carry out renovations to the house. Requirements envisaged by the Ordinance were not done by the Council.

5. Before Gloriana's death, she and her children including the plaintiffs and the defendant treated the house as their own. They renovated it to render it habitable, and paid no rent. So when Gloriana died in 2003 the plaintiff's and their elder sister who has since died continued to live in and exclusively occupied the house. They also did renovations. The defendant and his other brothers lived elsewhere.

6. In 2018 the defendant who was then having marital problems as well as health issues requested the plaintiffs for permission to move into the house. Permission was granted but soon after the defendant and his daughters moved in, the former peaceful family atmosphere was replaced by conflict and hostility concerning the ownership and right to possession of the house.

7. To restore peace and avoid possible fatalities the court issued an interim injunction against the defendant to vacate.

The Nauru Housing Scheme and Housing Ordinance 1957

8. Ownership of the house built under the Scheme was by virtue of the Housing Ordinance 1957 vested in the then Local Council. The Ordinance provided for a tenancy agreement between the tenant and Council; rent to be paid by the tenant and the land owner to receive a yearly rent or compensation. It also provided that the council may terminate the tenancy if the tenant dies, or if rent is not paid or if other conditions are not complied with. Tenants were not permitted to make additions to the house. Council was responsible for renovations.

9. As a consequence of the dissolution of the Local council by subsequent legislations, the ownership of houses previously vested in the Council were vested in the Republic, specifically the President and Cabinet.

Defendant's Case

10. Initially the defendant contended that as part owner of the land upon which the house is erected he is entitled to occupy so that the plaintiffs cannot evict him. And in any event it was the plaintiffs who initiated the disagreements which led to the hostility and bitter dispute as alleged.

11. He also testified that according to his mother's written will, he was entitled to share the house with all his siblings.

12. He conceded that since 2003 only the plaintiffs and other sister, who had since died occupied the house. In his affidavit he deposed that the dead sister paid for the renovations to the house.

13. Due to his marital problems in 2018 he sought permission from the plaintiffs to move into the house.

Interim Injunction

14. The interim injunction was granted to avoid the volatile hostility amongst the parties pending the hearing of the action. At the hearing of the defendant's application to

discharge the interim injunction it was established that the defendant was the source of the conflict between the parties.

Application to discharge the interim injunction

15. In support of his application to discharge the interim injunction the defendant filed an affidavit in which he deposed inter-alia:

> 3.2 That the house was built by the Nauru Local Government Council, but the said house was owned by Julius our grandfather.
> 3.4 Since the dissolution of the Nauru Local Government Council, the house was no longer maintained by its successor, the said house was then financially maintained by our late mother until she died.

16. He also deposed that the mother had a written will in which she directed that the house was to be shared equally amongst her surviving children. During his oral testimony he conceded there was no will when he was asked to produce a copy. He also conceded that since the mother's death in 2003 the plaintiffs and the other sister who has since died occupied the house exclusively with their families. Repairs and renovations were also done to the house to make it habitable.

17. The other brothers of the defendant have not claimed ownership or right to possession of the house since their mother's death. The court accepted that the defendant sought permission from the plaintiffs before he moved into the house in 2018 and the court was also satisfied he was the source and instigator of the hostility which led to the granting of the interim injunction.

18. The defendant is now contending that the house belongs to the Republic so that the plaintiffs have no standing to evict him. This submission is in line with the Court's ruling on the defendant's application to discharge the interim injunction. At paragraph 16 and 18 of the ruling it is stated:

> (16) If the house was built under the Nauru Housing Scheme does the late mother have the right to decide the ownership of the house?

(18) Ownership and occupancy of the house are issues for trial. It is an arguable case.

Tenant or Licensee

19. In determining whether the plaintiffs have locus standi to seek an order of eviction the first step the court has to determine is whether in law the relationship between the plaintiffs as occupiers and the Republic as owner of the house amount to a tenancy at will or licence.

20. In *"Emily Robertson v Leona Cain and Others* [1] Khan J held following the earlier judgement of *Crulci J in 2016* [2] in the same proceedings, that the present occupiers of the houses built under the Nauru Housing Scheme do so as tenants at will, on the basis that since the death of the original legal tenant, his or her beneficiaries continued to occupy the houses without entering into a tenancy agreement.

21. The nature of a Tenancy at will is described in *Halsbury's Laws of England; Fourth Edition Volume 27(1) paragraph 168:*

> "A tenancy at will is a tenancy under which the tenant is in possession and which is determinable at the will of either the landlord or the tenant. Although on its creation such a tenancy is expressed to be at the will of the landlord or, as the case maybe, the tenant only, the law implies that it is to be at the will of the other party also because every lease at will must in law be at the will of both parties. As in other tenancies, a tenant at will arises by contract binding both the landlord and the tenant, and the contract may be expressed or implied. An express tenancy at will may have effect as such even though an annual rental is reserved. The use of the words *"Tenant at will"* in an agreement does not create a tenancy at will where the remainder of the agreement is inconsistent with such a tenancy."

22. It is of the essence of a tenancy at will that it arises by contract express or implied, and it should be determinable by either party on demand. Since both requirements are absent the relationship between the plaintiffs and the Republic cannot be described as tenancy at will. The plaintiffs are licences having permissive occupation short of a tenancy. Neither can a tenancy at will be implied. Paragraph 169 of Halsbury describe implied tenancy at will:

---

[1] (2019) NRSC (4/7/19)
[2] (2017) NRSC (31/8/17)

"A tenancy at will is implied where a person is in possession by the owner's consent, and his possession is not as employee or agent or as a licensee holding under an irrevocable licence, and is not held in virtue of any freehold estate or of any tenancy for a certain term. Such a tenancy is implied accordingly in cases of mere permissive occupation without payment of rent. Such a tenancy is also implied upon a mere general letting, unless there are circumstances from which the court may infer that the tenancy is to be a periodic one. The payment of a periodic rent is only one, albeit an important one, of the circumstances to consider."

23. Where the agreement is merely for the use of the property in a certain way or on certain terms while the property remains in the owner's possession and control the agreement operates as a license; *"Luganda v Service Hotels* [3].

24. In *Marcroft Wagons Ltd v Smith* [4] the daughter of a deceased tenant who lived with her mother claimed to be a statutory tenant by succession against the Landlord's action for trespass after 6 months of occupation while the landlords considered her position and accepted rent from her. The court of Appeal held the daughter was a licensee.

25. And in *Cobb v Lane* [5] the Court of Appeal held that the owner of the house who allowed her brother to occupy the house rent free did not intend to create a legal relation so that the brother was a licensee, not a tenant. It could be described as an act of friendship or of generosity.

26. In *Binions v Evans* [6] the occupier of a cottage was allowed by agreement to occupy as tenants at will free of rent for the remainder of her life or until determined as hereunder provided was held not a tenancy at will.

Does a licensee have a right to sue in trespass?

27. The traditional view was that a licensee could not sue in trespass because he or she did not have exclusive possession of the land. But doubts have been expressed as to the validity of the traditional view. In the Law of Torts in *New Zealand 1997 2nd Ed pages 469 – 473 para 8.4.3* it is stated:

---

[3] (1969) 2 All ER 692
[4] (1951) 2 All ER 271
[5] (1952)1 All ER 1199
[6] (1972) 2 All ER 70

The traditional view was that a licensee could not sue in trespass because he or she did not have exclusive possession of the land. But that view, if it was ever right, certainly cannot be sustained today. It remains the case that a bare licensee cannot sue in trespass because he or she has no intention to possess the land and does not exercise control over it to the exclusion of other persons. But other licensees have such possession or part of it that it would be absurd to deny their interest in preserving such possession and the Courts have so held. For example if a building owner leaves a contractor in sole and undisputed control of a building site, that contractor may sue, even though he is only a licensee.
While there is authority that a lodger in a house although he has the exclusive use of rooms cannot being bring action in trespass, it is submitted that each case must turn on its facts, and that a lodger with power under his or her licence to bar access to the room could maintain an action in trespass with respect to unauthorised entries to those rooms.

28. The authority referred to in the New Zealand text was the judgement of Blackburn J in *"Allan v Overseers of Liverpool Inman v Assessment Committee of West Derby Union*[7] held that a lodger in a house could not bring an action in trespass or ejectment.

29. The judgment of Blackburn J was commented on by the English Court of Appeal in *Dutton v Manchester Airport*[8] Laws LJ who wrote the leading judgment of the majority, quoted from the judgment of Blackburn J and said of page 688:

"As one might expect this is wholly in line with the old law. But I think there is a logical mistake in the notion that because ejectment was only available to estate owners possession cannot be available to licensee who do not enjoy de facto possession," He went on to say; *"I would hold that the court today has ample power to grant a remedy to a licensee which will protect but not exceed his legal rights granted by the license."*

30. It follows therefore from the strength of the above authorities that the plaintiffs who have had uninterrupted exclusive possession of the house for the last 15 years have locus standi to eject the defendant.

31. In the event that I am mistaken I move on to consider the equitable doctrine of proprietary estoppel which a licensee can claim for his benefit where a fact situation beyond the licence gives rise to equity in favour of the licensee.

---

[7] (1874) LR 9 QB 180
[8] (1999) 2 All ER 675

Proprietary Estoppel

32. A licence coupled with an interest is irrevocable. The interests maybe interest in the land or chattel and an injunction can be obtained to protect the interest. The licensee may claim the benefit of the equitable doctrine of proprietary estoppel or estoppel by acquiescence. The doctrine defines a factual situation beyond the licensee itself giving rise to equity.

33. Requirements to raise estoppel are analysed by Fry J in *Willmot v Barber*[9]

i. The plaintiffs must have made a mistake as to his legal rights.
ii. The representor (plaintiff) must have made some expenditure on the faith of his mistake or the expectation of a greater interest.
iii. The representor must be aware of his own rights, otherwise there can be no duty on him to assert them.
iv. The representor must be aware of the mistake of the plaintiff; and
v. There must be encouragement, either actively or by silence. It is enough if given the other requirements, the owner stands by and allows the plaintiff to proceed.

34. The doctrine allows the plaintiff to use the estoppel as a sword, and not merely as a shield; so that the plaintiffs can use the doctrine as a cause of action to eject the defendant or as a defence against the Republic as a defence for any action for revocation of the licensee.

35. The doctrine was applied by the English Court of Appeal in *Inwards v Baker*[10]. A son had built on land owned by this father who died leaving his estate to others. Lord Denning who wrote the leading judgement said of page 449 that all that was necessary;

> *"Is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so the court will not allow the expectation to be defeated where it would be inequitable to do so."*

36. Although the formulation by Fry. J has been accepted in a number of cases, there are others which purported to apply the doctrine, of which are difficult to bring within the requirements. The first requirement for instance is that the plaintiff must have made a mistake as to his legal rights. But there are other cases in which this requirement has been

[9] (1881 – 1885) All ER Extension Volume 1779 at 1784
[10] (1965) All ER 446

replaced by a situation in which the owner of the land has created or encouraged an expectation in the other person that he shall have a certain interest. In *Re Whitehead v Whitehead and others*[11] the deceased and his son built two cottages on the deceased's land. Both built the cottages and spent money on materials. It was agreed that one of the cottages would be gifted to the son. There was no undertaking to subdivide or transfer the land on which the cottages were built to the son. The father died without having made a provision for the promised cottage. Son sought a declaration that he became the equitable owner of the land during his father's lifetime; he also sought orders to enable title to be given the land or alternatively compensation. The Court of Appeal held that the son had acquired an equitable charge or lien to be reimbursed the value of the labour and materials expended on the building and property, as the father, with full knowledge, had not only stood by, but had also encouraged the son to make expenditures in the expectation that the cottage on the land was his.

37. Although the doctrine was not mooted by the parties, it is however in my view a vital issue of significant relevance. It must be stressed that its relevance is confined to those tenants or licensee who are owners of the land upon which the houses were built under the housing scheme.

38. Based on the requirements of the doctrine the plaintiffs have in my judgment acquired an equitable interest in the house to seek the order of ejectment. The plaintiffs as owners of the land have mistakenly believed they legally inherited the house; on that mistake they and their deceased sister incurred renovation costs to the house which needed to be renovated to make it inhabitable, and the Cabinet or Republic by its silence or acquiescence not only stood by but had also encouraged the plaintiffs to make the expenditures in the expectation that the house was theirs.

39. The plaintiffs through their equitable interest in the house have the locus standi to seek the order sought.

[11] (1948) NZLR 1066

Result

(i.) The defendant is ordered to vacate the house and stay away and shall not enter or attempt to enter the house on land known as Bogetsirir Yaren District.

(ii.) Each party to bear its own costs.

SUPREME COURT OF NAURU

Judge Rapi Vaai