



IN THE SUPREME COURT OF NAURU
AT YAREN
CIVIL JURISDICTION

CIVIL SUIT NO. 38 2017

BETWEEN

SPRENT DABWIDO, ROB GRUNDLER,
EDWINA KARL AND TRININA DAGAGIO
OF NIBOK DISTRICT, NAURU

Plaintiffs

AND

MELBA AKUA OF NIBOK DISTRICT, NAURU

Defendant

Before: Khan, ACJ
Date of Hearing: 2 November 2020
Date of Ruling: 8 December 2020

Case may be referred to as: Dabwido and ors v Akua

CATCHWORDS: Application for interlocutory injunction – Ex parte application for interim injunction should be made for a short time or until further order of the Court – Where Naoero Roads Act 2017 provides for public roads – Gives powers to the Supreme Court to determine dispute as to access way.

APPEARANCES:

Counsel for the Plaintiffs: A Amwano
Counsel for the Defendant: V Clodumar

RULING

INTRODUCTION

1. The plaintiffs filed an ex parte originating summons on 20 November 2017 seeking an order for injunction against the defendant to restrain her from blocking the road in front of her house in Portion 202 providing access to the houses in Portions 200, 201 and 208.

2. In support of the application all the four plaintiffs filed affidavits.
3. This application was heard ex parte by Acting Registrar P.R. Lomaloma (Acting Registrar) on 20 November 2017. After hearing the application, he gave a ruling on and made the following orders and also issued directions which are as follows:

1) Orders

- a) The defendant by herself, her servants, her agents and her relatives is hereby restrained from blocking the access road coming from the main island ring road adjacent to Nibok Infant School and going inland in front of her house at Portion 202 and leading to the plaintiffs' houses on Portions 208, 200 and 201 (the 'access road') at Nibok until further order of this Court.
- b) The plaintiffs shall do their utmost to obtain legal consent of the majority of the owners of Portion 202, Nibok for the said access roads; and
- c) The Nauru Police Force is to assist in enforcing these orders.

2) Directions

Further I make the following directives to be served with interim injunctive orders:

- a) The plaintiffs are to serve copies of the injunctive orders and these directions to the defendant and to the police;
- b) The plaintiffs are to serve on the defendant copies of the Ex Parte Summons and Affidavits filed in support thereof within the next 2 days;
- c) The defendant is given 14 days from the date of this order to file any affidavits opposing the continuation of these orders;
- d) This matter is for mention before the Registrar on Friday 8 December 2017.

CHRONOLOGY OF PROCEEDINGS

4. The defendant was served with the orders and all other documents on 20 November 2017 and she filed an affidavit in response on 1 December 2017. She stated that she closed the access road after obtaining legal advice, and she was advised that her property on Portion 202 was a private property, and there were no easements or way leave in place, and therefore she was entitled to use her land as she wished. The defendant also stated that there are 2 other roads – one going through Portion 202 and other going through Portions 206 and 208. The second road was used for delivering of water to the camp and to the neighbours but was closed by the refugees because of heavy traffic flow.
5. The Acting Registrar adjourned this matter to 8 December 2017 before the substantive Registrar who in turn adjourned it to 5 February 2018 before me and Mr Dabwido appeared for all the plaintiffs, whilst Mr Clodumar appeared for the defendant. Mr

Dabwido complained that the road was still blocked despite the court order, whilst Mr Clodumar stated that the road was open. Mr Dabwido sought time to consider filing contempt proceedings. This matter was adjourned to 6 February 2018 when Mr Clodumar informed the court that the defendant will open the road to allow access to the people whose names appear in the order. The case was adjourned to 13 February 2018 to allow time for Mr Dabwido to consult the landowners.

6. There was significant delay in filing the contempt proceedings and it was not filed until 8 June 2018 and as the defendant was overseas and Mr Clodumar could not file documents in response.
7. On 20 June 2018 Mr Clodumar filed a motion to strike out the application for contempt and Mr Dabwido filed a response to this motion on 26 July 2018.
8. On 27 July 2018 Vaai J minutes state that the plaintiff had filed a response to the defendant's reply to strike out the application and that the contempt of court proceedings will be on papers only. The matter was adjourned to 31 August 2018 to fix a hearing date of this strike out application.
9. On 14 September 2018 Vaai J was advised that the plaintiffs, Mr Dabwido, had gone overseas for medical treatment.
10. Because of Mr Dabwido's illness this matter was adjourned from 14 September 2018 to 21 November 2019 when Romys Eobob entered an appearance on behalf of all the plaintiffs including the estate of Sprent Dabwido. Unfortunately, it is not clear from the records as to when Mr Dabwido passed away.
11. On 21 November 2019 Ms Eobob appeared and sought further time to get familiar with this matter and it was adjourned to 25 November 2019.
12. On 25 November 2019 Ms Eobob sought a hearing date of the injunction application and also sought time to explore settlement. Some discussions took place between counsels and on 12 December 2019 the matter was adjourned to 19 December 2019. On 19 December 2019 the parties agreed to a 'Negotiated temporary Injunction' which was signed by the counsels for the plaintiffs and the defendant in which it was stated as follows:

'Agreement: Access road on PT 202 Nibok on defendant's land is open.

Conditions: 1. Residents of PT 200, 201 and 208 use only.

2. Use before 11pm at night.

Issue: Barricades at junction PT 202 and PT 208 to be removed by the plaintiffs.

Request: Judge Khan assured me that the Registrar can make order for injunction.

Continue: To trial for substantive matter of 'unlawful road closure of the 10 years plus road.'

Apply contempt of court if defendant disobeys temporary injunction.

13. On 9 June 2020 Mr Amwano filed a notice of change of solicitors and the parties sought time to explore settlement and settlement was not successful so the matter was set down for hearing before me on 2 November 2020.

SUBMISSIONS

14. Mr Amwano submitted that this inter parte hearing has taken place 3 years after the ex parte injunction was granted by the Acting Registrar, and that the application was properly filed by the plaintiffs; and that the Acting Registrar was correct in making the orders for interim injunction against the defendant.
15. Mr V Clodumar submitted that there are serious flaws in the orders made by the Acting Registrar in that:
 - a) The application was not in accordance with order 25 of the Civil Procedure Rules 1972 (CPR) which states that ‘application for grant of an interlocutory injunction may be made by any party to a suit commenced by writ of summons’; and that the action was commenced by way of an originating summons.
 - b) That the defendant complied with the directions of the Acting Registrar in filing her affidavit in reply and the matter was not heard on 8 December 2017.
16. Mr Clodumar concedes that the access for which the injunction was granted has been in existence for more than 10 years and section 24 of the Naoero Roads Act 2017 applies, and the defendant has provided alternative access which goes through portions 206 and 208; and that the defendant only closed the road after giving due notice.
17. Mr Amwano submitted in response that the defendant has not provided an alternative road access in accordance with section 24 of Naoero Roads Act 2017.

CONSIDERATION

18. Mr Clodumar is correct that the application for injunction was filed in non-compliance of order 25 of the CPR. The plaintiffs were represented by Mr Dabwido, who was a lay person, and perhaps was not familiar with the rules however the Acting Registrar should have pointed those defects to Mr Dabwido, but it appears that he also overlooked to do so. Non-compliance with the rules ‘shall be treated as an irregularity and shall not nullify the proceedings or any document, judgement or order therein’ – see (O.2, r.1(2) of CPR).
19. The defendant did not make an application to set aside the proceedings on the grounds of it being irregular, and in fact participated in this proceeding. O.2, r.2 provides that an application to set aside an irregularity any proceedings, any step taken in any proceedings or any document, judgement, order therein shall not be allowed unless it is made within a reasonable time before the party applying has taken any fresh steps after becoming aware of the irregularity. The defendant has actively participated in these proceedings for the last 3 years without taking any steps to set aside the proceedings on the grounds of irregularity and it is too late now to raise the issue of irregularity.

EX PARTE APPLICATION

20. This was an ex parte application and the Acting Registrar should have made orders for a short time or up to a certain date to allow for service of the documents on the defendant. However, the Acting Registrar granted orders 'until further order of the Court' which order is usually made after an inter parte hearing.
21. The orders were made on 20 November 2017 was before the Naoero Roads Act, 2017 was enacted on 19 December 2017. The preamble of this Act provides:

'An Act to provide for public roads and maintenance and for related purposes.'
22. Section 24 of this Act will be applicable in this case as the access road has been used for more than 10 years and under section 25 the Supreme Court is vested with the power to determine any disputes relating to access ways.

CONCLUSION

23. Whilst this matter is being determined, I confirm the orders of the Acting Registrar that all the plaintiffs are entitled to the use of the access way through Portion 202 to go to their lands on Portions 200, 201 and 208 and I further order that the defendant, her servants or agents be restrained from blocking the access way.
24. I order that costs shall be in the cause.

DATED this 8 day of December 2020.



Mohammed Shafiullah Khan
Acting Chief Justice

