IN THE SUPREME COURT OF NAURU
YAREN DISTRICT
CIVIL JURISDICTION

CIVIL CASE NO. 18 OF 2021

BETWEEN

PATRINA BOTELANGA OF MENENG DISTRICT — First Plaintiff

AND

RONAD DEDUNA OF MENENG DISTRICT — Second Plaintiff

AND

PERSIS BOP OF MENENG DISTRICT — Third Plaintiff

AND

TAWAKI KAM OF MENENG DISTRICT — Defendant

Before: Khan, ACJ
Date of Hearing: 13 December 2021 and 4 March 2022
Date of Judgement: 9 May 2022

Case may be referred to as: *Botelanga & Ors v Kam*

CATCHWORDS: Co-owners of land – Application by a co-owner to build a house – Consent form consented to by 77% of the landowners – Whether the consent form was in compliance of s.6 of the Lands Act 1976 – Whether the consent form was illegal as the consent of the President was not obtained in accordance with s.3(3) of the Lands Act 1976.

APPEARANCES:

Counsel for the First Plaintiffs: A Amwano
Counsel for the Defendant: L Scotty

JUDGEMENT

INTRODUCTION

1. Both the plaintiffs and defendant are landowners of land namely "Karawinroro" Portion No. 142 CL in the District of Meneng. In 2014 the defendant applied for the consent of other landowners including the plaintiffs to build a house thereon.

2. The consent form was prepared by the Directorate of Lands and Survey which states as follows:

   "We the undersigned hereunder are the landowners of the land namely "Karawinroro" Portion No. 142 CL in the District of MENENG. We have agreed for Mr Tawaki Kam to utilize part of the land for his housing."

3. The landowners gave their consent mainly in 2016 and after 77% gave their consent it was approved by the Acting Secretary of Land Management on 6 June 2016.

4. After the defendant obtained the consent of the landowners, he cleared the land and laid the foundation slab in 2016 and thereafter he slowly built his house due to budgetary constraints and the house was almost half complete when this action was instituted on 5 July 2021.

CHRONOLOGY OF PROCEEDINGS

5. As stated earlier the action against the defendant was instituted on 5 July 2021 by writ of summons and statement of claim in which the plaintiffs claimed that the defendant repeatedly refused to meet the landowners to cease the construction of the building and sought orders that the defendant be restrained from continuing with further construction of the dwelling pending the determination of this action.

6. Prior to instituting the proceedings, the plaintiffs in January 2021 instructed Mr P Ekwona to write a letter to the defendant to cease construction of the building as he had obtained the landowners' consent by exercising undue influence.

7. During the course of the proceedings on 24 July 2021 and 7 October 2021 the plaintiffs amended their statement of claim and pleaded that the consent form to build the house was void as the consent of the President was not obtained as required by section 3(3) of the Lands Act 1976 (the Lands Act).

PRE-TRIAL CONFERENCE

8. In a pre-trial conference finalized on 28 October 2021 the parties agreed to the following facts and issues for determination:

   Facts

   1) The plaintiffs and the defendant are co-landowners of the land called "Karawinroro" Portion No. 142 Meneng District.

2) On various dates in 2016 a consent form was circulated by the defendant Tawaki Kam with aspirations to build a house on a part of the land.

3) The document i.e. the consent form was obtained from Lands & Survey Department to seek landowners' consent for the defendant to build on part of the noted land.

4) The authority under the form states:

"We the undersigned are the landowners of the land namely "Karawinroro" Portion No. 142 in the District of MENENG. We have all agreed for Mr Tawaki Kam to utilize part of the land for his housing."

5) After circulation of the consent form the signatures collected amassed to 77% approval and the space for 23% was still vacant without those other landowners' endorsement.

6) The Secretary for Land Management had then endorsed the defendant's consent form on 6 June 2016. The defendant then started construction of his building.

7) The plaintiffs and the defendant have different shares in the land as follows:

The first plaintiff has 1/18th, second plaintiff has 1/16th, third plaintiff has 1/72nd. The defendant has a share of 1/60th.

8) The first plaintiff signed the consent form sometime in 2016 but reneged on 5th July of 2020 when she made this claim.

9) The second plaintiff refused to sign the consent form.

10) The third plaintiff also refused to sign the consent form.

11) No other form of written consent by the co-landowners was made in the matter, apart from the consent form.

12) The plaintiffs stated that discussion had taken place with the defendant who had agreed to build on a spot between Dereye's residence and the disability centre commensurate to his smaller share in the land, but that he had balked and built on a bigger site where his building is now situated.

13) The defendant denied the comments proffered by the plaintiffs in [12] above and made reference that there still reasonably available vacant sites on the land for others to build on.

ISSUES FOR DETERMINATION

a) Whether the said defendant's consent form is legally accepted by law in compliance with s.6 of the Lands Act 1976;

b) Whether the said defendant's consent form is illegal and not accepted by law by not complying with s.3(3) of the Lands Act 1976;

c) Whether the President's consent of approval is always required under such circumstances as contended in this matter pertaining to the two specific areas of law noted in (a) and (b) above.

SUBMISSIONS

9. In his submissions Mr Amwano stated as follows:

ISSUE (A) – WHETHER THE DEFENDANT'S CONSENT FORM IS LEGALLY ACCEPTED BY LAW IN COMPLIANCE WITH S.6 OF THE LANDS ACT 1976

He cited sections 5 and 6 of the Lands Act which provides:

Section 5 Leasing, etc., of land for public purposes

i) Where the Council, the Corporation or any other statutory corporation requires to obtain for purpose of phosphate industry or for any other public purpose a lease of any land for a period not exceeding seventy-five years, and easement, wayleave, or other right similar or analogous thereto in respect of any land, or a license to enter upon any land and remove sand therefrom, it shall inform the Minister in writing of its requirement and of the reason for it.

ii) Where the Minister is informed in writing under the previous subsection of any such requirement as is referred to in that subsection, he may, if he is satisfied that the lease, easement, wayleave, or other right or license is reasonably required by the Council, the corporation or other statutory corporation, as the case may be, for public purpose, notify the owners of the land of the requirement and the public purpose and request them to grant the lease, easement, wayleave, other right or license, as the case may be, or may cause them to be so notified and requested.

iii) Where the Republic requires to obtain for public purposes a lease of any land for a period not exceeding seventy-five years, and easement, wayleave or other rights similar or analogous thereto in respect of any land, or a license to enter upon any land and remove sand therefrom, the Minister may notify the owners of the land of the requirement and the public purpose and request them to grant the lease, easement, wayleave, other rights or license, as the case may be or may cause them to be so notified and requested.

Section 6 Where minority of owners refuses to execute lease

Where the minority owners refuse, etc., to execute lease, etc, where the landowners of any land have been notified by the Minister under s.5 of any such requirement as referred to in that section and not less than 3/4th of the owners of that land, both by number and by interest in the title thereto, have executed the instrument granting the lease, easement, wayleave, other right or license, as the case may be, required

them, if any of the other owners of that land refuses or fails to execute that instrument or is unable by reason of absence from Nauru of physical or legal disablement to do so, the Minister shall inform the Cabinet thereof and if the Cabinet is satisfied:

a) That the lease, easement, wayleave, other right or license is required for public purpose; and

b) That the refusal or failure of that landowner to execute the instrument is unreasonable, or in the case of a person who is absent from Nauru or under disability, that if he were present in Nauru or not or under a disability his refusal or failure to execute the form would be unreasonable,

It may direct that the instrument is to be executed on behalf of that owner by the public officer nominated under s.15; and the Secretary to the Cabinet shall forthwith send to the public officer nominated under s.15 to execute the instrument or instruments of the class of the instrument are noted in writing under his hand requiring him to execute the instrument on behalf of that owner.

10. Mr Amwano submitted that the consent form was not for "public purposes" and was purely a private land transaction between family members for use of land, and therefore section 6 was not applicable since the consent was neither for "phosphate mining or for public purposes" between landowners and the government, however, he further submitted that 75% of the landowner's consent in "number" and "interest" as required by section 6 was not obtained; that the consent form only had 64.95% of interest and 62.5% by number and therefore it did not meet the threshold of 75% as provided for in section 6; and it cannot be accepted for the purposes of section 6.

11. Mr Amwano further stated that having obtained the consent the defendant built on another site other than the agreed site. I do not have any evidence of this and the plaintiff's chose not to call any evidence in light of the issues agreed on for determination in the pre-trial conference.

ISSUE B - WHETHER THE SAID DEFENDANT'S CONSENT FORM IS ILLEGAL AND NOT ACCEPTED BY LAW BY NOT COMPLYING WITH S.3(3) OF THE LANDS ACT 1976?

12. On this issue Mr Amwano relied on section 3 of the Lands Act which states:

Prohibition of Certain Transfers, etc., of land

1) Transfer inter vivos of the freehold of any land in Nauru to any person other than a Nauruan is prohibited, and any such transfer or purported transfer, or any agreement to execute any such transfer, shall be absolutely void and of no effect.

2) Any person who transfers, or agrees, attempts or purports to transfer, the freehold of any land in Nauru to any person other than a Nauruan person is guilty of an offence and is liable to imprisonment for six months.

3) Any person who, without the consent in writing of the President, transfers, sells or leases, or grants any estate or interest in, any land in Nauru, or enters into any contract or agreement for the transfer, sale or lease of, or for the granting of any estate or interest in, any land in Nauru, is guilty of an offence and is liable to a fine of two hundred dollars.

4) Any transfer, sale, lease, grant of an estate or interest, contract or agreement made or entered into in contravention of the last preceding subsection shall be absolutely void and of no effect.

5) Any transfer, sale, lease, contract or agreement made or entered into in contravention of s.3 of the Lands Ordinance 1921-1968 shall continue to be absolutely void and of no effect.

6) For the purposes of this action the expression *'transfer inter vivos'* includes transfer to a corporation or an unincorporated body of persons and the expression *'a Nauruan person'* does not include a corporation or an unincorporated body of persons of whom some are not Nauruan.

13. Mr Amwano submitted that the consent form obtained by the defendant did not make any provisions for it to be consented to by the President and therefore "should not be considered legal within the meaning of section 3". He further submitted that in respect of issues (A) and (B) that: "a number of land transfers have been executed over the years with complete disregard of section 3(3); and that the defendant's consent form failed to comply with sections 3 and 6 and thus is not lawful.

14. Mr Scotty in his written submissions made reference to the preamble to the Act and stated that its main purpose was:

"To repeal the Lands Ordinance 1921-1968 and to make provision for leasing of land for the purposes of phosphate industry and other public purposes and for removal of trees, crops, soil and sand and payment of compensation and other monies."

15. He also gave a very useful insight and background of the Nauru Local Government Council (NLGC) and the part that it played in the development of Nauru. In the footnote to the Lands Act at page 1 it is stated as follows:

"Section 2(7) of the Interpretation Act 1971 provides:

'Subject to the Nauru Island Council Act 1992, a reference to the Nauru Local Government Council established under the Nauru Local Government Council Ordinance 1951-1967, the Head Chief, the Deputy Head Chief, a Councilor of the Nauru Local Government Council in any written law, including the principal Act, means a reference to the Republic, the Cabinet, the Chairman of the Cabinet or a Cabinet minister as the case may be.'

16. Mr Scotty at [3], [4] and [5] discussed the role played by NLGC where it is stated:

[3] The defendant refers to historical fact that after Nauru achieved its independence and around the period when the Act was created, there were still two (2) Nauruan

Land Administration operating in tandem where one party – the Nauru Local Government Council (NLGC) was still in existence and was led by the Head Chief with its Councilors. The other party – the Nauru Government was led by the President, with its Members of the Parliament. Both parties were headed by the same one person, the founding father of Nauru holding on to both powers. The elected members of both houses were most of them the same persons.

[4](a) The defendant refers to the era's confusing the state of affairs to reflect on the framing of the Lands Act 1976. The NLGC also referred to as the 'Council' was long in existence before Nauru's independence when Australian colonial rule was in situ of administrating the Island. Its role was to work with the Australian administrator, locally based, on local politics and to monitor how local circumstances affecting Nauruan interests were being handled by foreign entities particularly the Australian administration, on phosphate mining, land issues and other local matters affecting the lives, welfare and properties of local native populance.

(b) The NLGC secondary authority at the time was with great zeal to protect Nauruan rights and interests from foreign entities against any irregular happenings, however effective at political bodies impact was against the might of Australia, New Zealand and Great Britain combined.

(c) The NLGC was still operating as an influential authoritative body after Nauru achieved self-government in 1968, and where a complex form of Government took effect on Nauru in so far as the Head Chief consults the President (same person) on the requirements of NLGC otherwise known as 'Council'. Hence the many reference to the 'Council' can be noted in s.2, 5, 7, 9, 10, 11, 12, 13 and 14 of the Lands Act 1976 somewhat a confusing issue.

(d) In s.5 the Government and Council are both granted powers over land matters particularly on commercial land leases and other public purposes. The main focus on pecuniary proceeds on phosphate mining royalties and compensation payments for removal of permanently affixed items on customary lands those mentioned in the long title of the Act and also in the various sections of the Act.

[5] The NLGC was later abolished by the Parliament and replaced by another political body with nationally elected members. It was officially titled Nauru Council (NC) headed by a person apart from the President with the title of High Chief. That system did not work out well on local politics, hence the establishment met its end when in turn it was later abolished by Parliament, leaving the Central Government as the sole executive branch of administration. But as mentioned in (c) above, the role of the 'Council' is still reflected in the Act, a confusing state of affair in the real application of the Act.

17. Mr Scotty submitted that the defendant had obtained 77% of landowners consent and that he has met all the legal requirements of section 6 of the Lands Act and obtained the approval of the Secretary of the Land Management.

18. He disagreed with Mr Amwano's contention that the consent of the President was to have been obtained in accordance with section 3 of the Lands Act.

19. He emphasized that under the Lands Act the President's approval is only required for dealings in land title right of outright sale, transfer, lease, contract or agreement of matters as the case may be to a non-Nauruan. He submitted that the Act is silent on private individuals as co-landowners to allow a person to build or share land as this has been the practice which has been approved by the Council.

20. He urged the court to consider that the defendant obtained 77% of the landowners consent some 5 years ago and has secured the endorsement of the government through the delegate of the Minister who has powers under section 6; and the landowners authority on the document reads in the following terms:

"We the undersigned hereunder are the landowners of the land namely "Karawinroro" Portion No. 142 in the District of MENENG. We have agreed for Mr Tawaki Kam to utilize part of the land for his housing."

CONSIDERATION

21. It is accepted by both parties that the consent that the defendant obtained was of a private nature of use of land to build a house, and as such section 5 of the Act does not apply as the land was not required for the purpose of phosphate industry or for other public purposes.

MAJORITY CONSENT

22. On the issue of "75% consent and majority rules'"Vaai J [1] discussed that after submissions were made before him by very experienced pleaders namely, Mr Clodumar and Mr Ekwona. In considering those submissions His Honour stated as follows at [16], [17], [18], [19],[20], [21], [22], [23] and [24]:

[16] Counsel for the defendant in his oral submissions discussed and criticized the majority rule concerning the landowner's written consent which is required by those who wish to use, work or deal with the land. On a number of occasions, he emphasized the custom of discussion, mediation and reconciliation which played an important role in Nauru society which therefore makes consent form unnecessary.

[17] Unfortunately as he developed his argument he tended to contradict himself and the submissions become confusing and difficult to follow and understand.

[18] He did emphasise however that the plaintiff should never have been allowed to initiate these proceedings and obtain an interim injunction against his brother without consulting and liaising with the brother.

The interim injunction however was granted in June 2016 and there has been no attempts of reconciliation or negotiation but several incidents of intimidation and confrontational conduct by the defendant.

[19] It is plainly apparent that the defendant wants the plaintiff to dismantle the garage.

[1] Capelle v Capelle [2018] NRSC 39; Civil Suit No. 12 of 2016 (3 August 2018)

[20] The majority rule as counsels agree has been in existence since the Housing Scheme was introduced under the Nauru Housing Act 1957. If all landowners were required to give their written consent the Housing Scheme would have been a failure.

The consent form was accordingly drafted giving permission to use the land only but not to create or grant interests in the land.

It is a modification of the English common law which requires all land the owners of a particular land to consent. Accordingly, it has been termed a customary law. (Emphasis added by me)

[21] While counsel for the defendant agreed with the majority rule as discussed in paragraph 20 above he objected to the 75% bench mark which was introduced by section 6 Lands Act 1976. He is quite correct that the 75% figure was introduced by the 1976 legislation

Crulci J acknowledged that in her judgment in *Deireragea V Kun (3).* She states at paragraph 49:

"I consider that the Lands Act 1976 where section 6 refers to a requirement of no less than three fourths of the land needing to give their permission in respect of granting of a lease or other license, **as the basis** for consolidating the legal requirement that three fourths or 75% of the land owners need to agree in relation to the land." (Emphasis added)

[22] Counsel however contended that the other 25% which did not give their written consent (following the formula in the 1976 Legislation) must still be consulted or considered. Again, this contradicts what he conceded to that the majority rule introduced by the Lands Committee to facilitate the building of houses under the Nauru Housing Act was widely accepted as customary law since 1957.

[23] This majority rule has been in place and judicially recognized. In *Harris V Batsiua(4)* for instance, Eames CJ dealt with a bitter dispute amongst members of a family over the occupation of a house which was then occupied by the plaintiff and his family. He said at paragraph 12;

"The plaintiff is one such landowner, having a 1/3 interest. He may well occupy the house under a tenancy at will, in which case a majority of landowners may well have a right to terminate his tenancy, if it exists."

[24] Since Deireragea V Kun, the majority rule has since been accepted as the 75% majority rule.

The Lands Committee as an institution under the customs and Adopted Laws Act 1971 has adopted 75% as the benchmark for the majority required of the landowners to agree in relation to the land. **Its consent form is accordingly worded and formatted to reflect it.** (Emphasis added)

23. The provision of section 6 only comes into play when the land is acquired for public purposes or for phosphate industry and it is agreed by both parties that the consent in this

case was of a private nature to allow the defendant to use their land to build a house thereon. S.6 states that after 75% of the owners of the land both by number and by interest entitled thereto give their consent and then if the 25% of the owners refuse or fail to execute the instrument or are unable to do so because of reasons of absence from Nauru or because of some physical or legal disability then the Minister shall advise the Cabinet who shall appoint a public officer to execute the instrument on behalf of the remaining 25%.

24. The reason for stating "both by number and by interest" in my respectful opinion is to pay the land owners their share for leasing of land for public purposes in accordance with their respective interests; but in this matter there is no question of payment and therefore section 6 does not apply to the consent form.

ISSUE C - WHETHER THE PRESIDENT'S CONSENT OR APPROVAL IS ALWAYS REQUIRED UNDER SUCH CIRCUMSTANCES AS CONTENDED IN THIS MATTER PERTAINING TO THE TWO SPECIFIC AREAS OF LAW NOTED IN (A) AND (B) ABOVE

25. S.3 of the Act prohibits transfer, sale or leasing etc without the President's consent and (3) provides that 'no transfer, sale, lease or grant any estate or interest in any land in Nauru or enters into a contractual agreement for the transfer etc' shall take place without the consent in writing of the President. In *Capelle and Capelle* (supra as stated in [20])

[20] The majority rule as counsels agree has been in existence since the Housing Scheme was introduced under the Nauru Housing Act 1957. If all landowners were required to give their written consent the Housing Scheme would have been a failure.

MAJORITY CONCEPT OR CONSENT

26. The majority concept rule has been in existence since 1957, if not longer, and it has become part of the Nauruan custom and under s.3(1) of the Custom and Adopted Laws Act 1971 the Courts are obliged to give full recognition to it. S.3(1) states as follows:

Section 3 - Nauruan Institutions, Customs and Usages

1) The Institutions, Customs and Usages if the Nauruans to the extent that they existed immediately before the commencement of this Act shall, save insofar as they may hereby or hereafter from time to time be expressly or by necessary implication, abolished, altered or limited by any law enacted by Parliament, be accorded full recognition by every Court and shall have full force and effect of law to regulate the following matters:

a) Title to, and interests in, land, other than any title or interest granted by lease or other instrument or by any Nauru written law;

b) Rights and powers of Nauruan's to dispose of their property, real and personal, inter vivos and by will or any other form of testamentary disposition;

c) Succession to the estates of Nauruan's who die intestate; and

d) Any matters affecting Nauruan's only.

27. Over the years the consent form has been carefully drafted to circumvent the provisions of s.3 of the Lands Act by using the words **"use"** or **"utilize"** or **"live"** (the word "live" was used in *Buramen v Dageago* Civil Action No. 6 of 2022 see – [11] judgement delivered on 2 May 2022) and for it to be consistent with the provisions of s.3(1)(a) of the Customs Laws Adopted Act 1971 where the words used are: "…**other than any title"… "or other instruments"**. In my respectful opinion the consent form would come within the definition of "other instruments"

28. In *Wiram Wiram v Nauru Lands Committee*[2] the common law concept of a fixture being part of land was altered pursuant to the provisions of s.4 of the Customs Laws Adopted Act 1971 and it was declared that buildings built by children of a landowning unit was to be treated as their "personal properties".

29. In this case 77% of the landowners gave their consents to the defendant to use the land and in accordance with the principle established in Wiram Wiram is his "personal property or his "personal estate" as defined in s.2 of the Nauru Lands Committee Act 1956 (as amended) or "personal property" as defined in s.3(1)(b) of the Customs Laws Adopted Act 1971.

30. For the reasons given above I find that there was no need to obtain the President's consent to the consent form and that it is legal and binding on all parties including the plaintiffs.

CONCLUSION

31. The plaintiff's claim is dismissed and I order that the defendant is entitled to continue with the construction of his house.

32. I order that the plaintiffs shall pay the defendant's costs to be taxed if not agreed.

DATED this 9th day of May 2022

SUPREME COURT OF NAURU

Mohammed Shafiullah Khan
Acting Chief Justice

[2] [2018] NRSC 47; Lands Appeal 76 of 2016 (7 November 2018) (Khan J)