



**IN THE SUPREME COURT OF NAURU
AT YAREN
CIVIL JURISDICTION**

Civil Cause No.01 of 2025

BETWEEN: Zita Itsimaera & Ors of Nibok District, Nauru
Plaintiff

AND: Teresa Menke & Ors of Denigomodu District, Nauru
Defendant

BEFORE: Keteca J

DATE OF HEARING: 21st March 2025

DATE OF RULING: 28th March 2025

CITATION: Itsimaera v Menke

KEYWORDS: Injunction against Counsel not to represent the Defendants;
Conflict of interest and the relevant test; the law of confidence
and Courts inherent jurisdiction to control the integrity of its own
process

APPEARANCES:

Counsel for the Plaintiff: Mr Victor Soriano

Counsel for the Defendant: Mr Vinci Clodumar

RULING

BACKGROUND

1. The plaintiffs are the children of the late President Bernard Dowiyogo. The defendants are the children of the late June Amwano. Bernard Dowiyogo is June Amwano's brother. The parties to this dispute are first cousins and are co- owners of 'Ariyen' land portion 279, in Denigomodu District.

2. On 19th March 2025, the plaintiffs filed a Motion seeking the following orders:

(a) That Mr V. Clodumar be disqualified from representing the Defendants in Civil Cause No. 1 of 2025;

(b) Costs

3. The grounds for the application are:

(a) Mr Clodumar may be a potential witness in this matter;

(b) His representation of the Defendants 'constitutes a threat to the integrity of the trial and create the appearance of impropriety.'

(c) The court has a duty to ensure that legal practitioners observe the highest standards of professional conduct in matters they deal with.

4. The applicant, Zita Itsimaera, deposes as follows:

i. She is the 8th child of Bernard Dowiyogo (Bernard) and 2 of her siblings are plaintiffs in this case;

ii. The defendants (respondents) are the children of her aunt, June Amwano. The plaintiffs and the defendants are first cousins;

iii. Her late father Bernard was the president of the Republic of Nauru in 2003 when Mr Vinci Clodumar (VC) was the ambassador and PRUN at New York. In the same year, president Bernard executed his last Will. This was witnessed by VC and the then ADC Jansen Agir. VC was a cabinet member in Bernard's government and a close friend of the former president;

iv. VC's legal representation of the defendants/ respondents may give rise to a conflict of interest as he is a potential material witness in the current case as he prepared her father's Will.

v. VC may have had discussions with her late father that may be material to the current suit;

vi. VC's legal representation of the defendants/ respondents may 'bring disrepute to the administration of justice and defeat the principle of finality in litigation.'

vii. She prays for the following:

- a. VC be disqualified from representing the respondents for conflict of interest;
- b. An interim injunction be granted against the respondents, her siblings and her agents to immediately cease all business and construction activities on '*the properties mentioned above*' – (I note that these properties are not described and unspecified in the affidavit);
- c. The respondents be directed to cease the occupation of 'the said properties' (unspecified property)

5. In response, Teresa Menke deposes:

i. She is the daughter of June Amwano, the sister of the late president Bernard.

ii. VC served as Nauru's PRUN in New York from 1999- 2005 and he witnessed president Bernards' Will at a hospital in New York 22 years ago.

iii. Her brother Franz had approached VC several years ago for legal representation. The dispute concerned 'land against the daughter of the late Bernard Dowiyogo. In that instance,

VC declined to be the legal representative of Franz as the ‘issue related to matters in the Will of the late president Bernard.

iv. The current matter before the court ‘is not related to any of the matters or personal affairs in the Will of the late president Bernard Dowiyogo.’ It concerns the ownership of a house that has been left derelict for many years on a land that the children of June Amwano’ are occupying.

6. The Application was heard on 21st March 2025. Mr Soriano relies on *Agnew v Polynesian Airlines Holdings Ltd* [1997] WSSC 8 and *R v Agege & Others* Criminal Case No. 20 of 2020 and submits:

i. The information given confidentially to VC by the late president Bernard maybe relevant in the Applicants/ Plaintiffs claim;

ii. The relevant issue from the above *Agnew v Polynesian Airlines Holdings Ltd* case is- ‘*The issue is whether a fair minded reasonably informed member of the public would conclude that the proper administration of justice required the removal of the solicitor.*’

Counsel adds- ‘*The public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the general public... The goal is not just to protect the interests of the individual litigant but more importantly to protect public confidence in the administration of justice.*’

iii. Just as Khan J recused himself in the *R v Agege & Others* case, legal practitioners should do likewise.

7. In response, Mr Clodumar submits:

i. The *Agnew Polynesian* case is distinguishable. The dispute in this case is to do with ownership of a particular property which the defendants have occupied all their lives.

ii. He is only privy to what was in president Bernard’s Will. The Will has been settled and distributed 20 years ago. He excused himself as in [9] of Teresa’s affidavit then as it related to matters in the Will. That does not arise here.

DISCUSSION.

8. In *Agnew v Polynesian Airlines Holdings Ltd* [1997] WSSC 8, CJ Sapolu observed-“ It is now well established that the Court has jurisdiction to intervene and grant an injunction to restrain a barrister or solicitor from further acting for a client or party in a litigation, or to grant a declaration that a barrister or solicitor should not further act in a litigation, or to order that the name of the barrister or a solicitor should be removed as counsel or solicitor on record. For cases on the Court’s jurisdiction to intervene in respect of barristers: see *Everingham v Ontario* (19920 88 DLR (4th) 755; *Black v Taylor* [1993] 3 NZLR 403. For cases on the Court’s jurisdiction to intervene in respect of solicitors: see *Rakusen v Ellis Munday & Clarke* [1912] UK Law Rp Ch 47; [1912] 1 Ch 831; *Mac Donald Estate v Martin* [1990] 3 S.C.R. 1235; *Supasave Retail Ltd v Coward Chance* (a firm) [1991] 1 All E R 668; *Re a firm of solicitors* [1992] 1 All ER 668.

9. For barristers, CJ Sapolu said- ‘ It appears from the judgment of the Court in *Everingham v Ontario* (1992) 881 JLR () 755 and the judgment of Richardson J in *Black v Taylor* [1993] 3 NZLR 403 *that the test to be applied in determining whether to invoke the Court’s inherent jurisdiction to prevent a barrister from further acting as counsel in a litigation is whether a reasonable member of the public who is informed of the relevant circumstances would conclude that a barrister should be prevented from further acting as counsel.*’

10. For solicitors, CJ Sapolu said: ‘*It appears from the cases in other jurisdictions that the Court’s jurisdiction to intervene in litigation proceedings and restrain a solicitor from further acting as a solicitor for a party because of a conflict of interest or apparent conflict of interest is based either on the law of confidence or the court’s inherent jurisdiction to control the integrity of its own process.*’

He adds: ‘*The jurisdiction based on the law of confidence has as its main focus the affording of protection against the danger of misuse of confidential information by a solicitor who acquired such information from a professional relationship or association with a client against whom he is now acting. Therefore, the primary concern here is to protect against breach of confidence by a solicitor in relation to a client.*’

11. On the inherent jurisdiction of the Court – he said- ‘*When the inherent jurisdiction of the Court is invoked to restrain a solicitor from further acting for a party in litigation proceedings because of conflict of interest or apparent conflict of interest, the concern has been to preserve public confidence in the integrity of the judicial process and to uphold the right to a fair hearing. The consideration that not only must justice be done but it must also be seen to be done is often emphasised in this connection. The fact that solicitors are officers of the Court and therefore subject to the Court’s inherent jurisdiction to control its process has also been mentioned in some cases.*’

12. In *Mac Donald Estate v Martin* [1991] 3 S.C.R. 1235, Sopinka J said:

‘The Courts which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact lawyers are officers of the Court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction.’

His Honour added:

‘Typically, these cases require two questions to be answered: (1) Did the lawyers receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk it will be used to the prejudice of the client?’

APPLICATION OF THE PRINCIPLES

13. To determine whether there is an actual or apparent conflict of interest which warrants that the Court intervenes to restrain Mr Clodumar from acting for the defendants, I ask the two questions posed by Sopinka CJ in the *Mac Donald Estate v Martin* case.

- a. *Did Mr Clodumar receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?*

From the affidavits and submissions by Counsels, Mr Clodumar did not receive any instructions from or represent the plaintiffs at any time. He witnessed the Will of the plaintiff's late father more than 20 years ago. The Will has been administered. The current dispute between the parties are not related to the Will at all. This question is therefore answered in the negative.

- b. *Is there a risk that it will be used to the prejudice of the client?* As the answer to the first question is in the negative, it follows that the second question becomes otiose.


14. Having answered the above questions in the negative, it follows that there is no conflict of interest or apparent conflict of interest in Mr Clodumar representing the defendants in this matter. In the exercise of Courts inherent jurisdiction and based on the law of confidence, I refuse to grant an injunction as sought by the plaintiffs.

14. In her affidavit, the plaintiffs are also applying for an injunction against the defendants to cease 'all business and construction activities' and cease occupation over some unspecified property. The Motion before me seeks the disqualification of Mr Clodumar only. I cannot consider the additional injunction sought. In any event, it lacks the particulars of the property in question.

ORDERS

1. The injunction sought by the plaintiffs against Mr Clodumar not to represent the defendants in this matter, Civil Cause No. 1 of 2025 is refused and dismissed.
2. Costs are summarily assessed at \$500 and are to be paid by the plaintiffs within 14 days of this ruling.

DATED this 28th day of March 2025


Kiniviliame T. Keteca
Judge

