

IN THE SUPREME COURT
REPUBLIC OF NAURU

Civil Action No.23 of 2011

Between:

Donna Adam

Appellants

V

Nauru Lands Committee

Respondents

JUDGE: Eames, CJ.
DATE OF HEARING: 5 June 2012
DATE OF RULING: 7 June 2012
CASE MAY BE CITED AS: Donna Adam v NLC
MEDIUM NEUTRAL CITATION: [2012] NRSC 10

CATCHWORDS

Practice and Procedure - Civil Action - Application to Judge for leave to commence proceeding, by writ, for judicial review of decision of Nauru Lands Committee - Application is sought under Order 38 of Civil Procedure Rules 1972 - Whether the application should be referred for hearing by the Registrar, not by a judge.

APPEARANCES:

Counsel

For the Appellants

Mr P N Ekwona (Pleader)

For the 1st Respondent

Ms L Lo Piccolo

For children of Morde
Amandus (dec'd)

Mr D Aingimea (Pleader)

CHIEF JUSTICE:

1. This is an application for leave to commence proceeding, by writ, for judicial review of decision of NLC. The application is made under Order 38 of Civil Procedure Rules 1972. This is one of a number of similar applications proposed to be made to the Court during the circuit session of the Supreme Court in June 2012. The application has come before me, as a judge of the Supreme Court, rather than being made ex parte to the registrar, as is provided in the Rules. A threshold question has arisen as to whether I should decline to hear the application and should refer it back to the Registrar.
2. Proceedings by way of judicial review are rare in Nauru. The heightened interest in bringing such application arises from the case of *Giouba v NLC* 2011 NRSC 1 in which I ruled that there was no power to extend the 21 day time limit for bringing an appeal under the Nauru Lands Committee Act 1956, but I held that a determination of the Nauru Lands Committee could be accessible to judicial review under Order 38.
3. In the present case Mr Pres-Nimes Ekwona, pleader for the plaintiff, raised a preliminary question which is of importance to all practitioners and parties who may wish to pursue or defend judicial review proceedings. Mr Ekwona submitted that his client's application under 038 should not be heard in the first instance by a judge of the Supreme Court but should be heard by the Registrar. The relevant provision Order 38 Rule 1 and (2) read:

NO SUIT FOR ORDER OF MANDAMUS, ETC., WITHOUT LEAVE (O.38, r.1)

1. (1) No suit for an order of mandamus, prohibition or certiorari shall be commenced unless leave therefore has been granted in accordance with this rule.
- (2) An application for such leave must be made by originating summons ex parte to the Registrar and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits, to be filed before the application is made, verifying the facts relied on.
- (3) In granting leave the Registrar shall direct upon whom the writ of summons is to be served.
- (4) The Registrar may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit.
- (5) The grant of leave under this rule to commence a suit for an order of prohibition or an order of certiorari shall, if the Registrar so directs, operate as

a stay of the proceedings in question until the determination of the application or until the Court otherwise orders.

(6) Where an application for leave under this rule is refused by the Registrar, the applicant may make a fresh application for such leave to a judge and such application shall be heard only by a judge.

(7) An application made to a judge by virtue of the last preceding paragraph must be made within 8 days after the Registrar's refusal to give leave or, if no sittings of the Supreme Court are held within that period, on the first day of the next such sittings.

TIME FOR APPLYING FOR LEAVE LIMITED IN CERTAIN CASES (O.38, r.2)

2. Leave shall not be granted to commence a suit for an order of certiorari to remove any judgement, order, conviction or other proceeding into the Supreme Court for the purpose of its being quashed, unless the application for leave is made within 3 months after the date of the proceeding or such other period, if any, as may be prescribed by any enactment or, except where a period is so prescribed, the delay is accounted for to the satisfaction of the Registrar; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the Registrar may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

4. I had indicated to parties bringing Order 38 application that in some circumstances I would be minded to override the requirements of Rule 38 both as to the requirement that application be first made to the Registrar and also the requirement that the application be made ex parte. Mr Ekwona submitted that I should not adopt either course, but should refer the matter to the Registrar to hear this application ex parte.
5. Because the matter was of general interest, and with consent of the parties in this case, I invited submissions from any practitioners on the issue. I received helpful submissions from Mr Clodumar, Mr Aingimea and Ms Lo Piccolo in support of Mr Ekwona's position.
6. In contemplating overriding the terms of Order 38 I sourced my power to do so as deriving from s72 of the Civil Procedure Act 1972 which reads:

72 Saving of inherent powers of the Courts

Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of any Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

7. As Mr Ekwona submitted, Order 38 gives an applicant a double opportunity to press an application for leave. If the ex parte application to the registrar fails then a fresh

application can be made to a judge of the Supreme Court. My proposal, however, would deny an applicant that double opportunity.

8. Mr Clodumar pointed out that there are particular benefits in having leave application brought to the Registrar. The Registrar is a resident of Nauru, whereas a judge visits only every three months, approximately. Thus, an application can be promptly made to the Registrar and if unsuccessful a fresh application could be brought to a Judge not later than three months after the Registrar's decision, with the added advantage of being able to take into account the registrar's grounds for refusal of the first application. Given the fact that an application brought later than three months after the decision under attack faces an additional obstacle of the requirement of being excused by the Registrar for the delay, the court should make an initial application to the Registrar the requirement in all cases
9. Although no practitioner opposed Mr Ekwona's submissions, there are factors that might suggest that an application to a judge at first instance was appropriate in certain circumstances.
10. In most if not all of the cases before me now, the Order 38 applications follow an unsuccessful attempt to bring an appeal against a decision of the Committee which was out of time by virtue of s7 of the Nauru Lands Committee Act 1956. That meant that the facts in the case had been the subject of affidavit evidence and submissions from all interested parties. In those circumstances there would be an air of unreality in conducting an ex parte application before the Registrar seeking leave to commence judicial review proceedings, but without hearing from the other parties. A judge, having heard and ruled against the land appeal would be well placed to deal with an application for leave to commence judicial review proceedings, and would no doubt have regard to the earlier proceedings when assessing the Order 38 Application. The registrar would not have the same level of familiarity with the case.
11. Having regard to the submissions of practitioners, however, I am persuaded that the usual course should be that applicant for leave should comply with Order 38, bringing the application before the Registrar, as an ex parte application.
12. I do not rule out, however, that there may be circumstances where the judge should determine the leave application in first instance, particularly where the matter has already come before the judge, where all arguments has been heard on issues relevant to the application and where further delay could be avoided.
13. Accordingly, I propose that all future applications under Order 38 be made to the Registrar, and comply with the procedures set out in Order 38. In rare circumstances application might first be made to the judge where the interests of justice justify that course.
14. I therefore direct that the application under Order 38 be referred to the registrar, to be heard ex parte.

15. I publish these reasons for guidance of practitioners.

Geoffrey M Eames
Chief Justice
12 June 2012