IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Judicial Review No. 12 of 2012

Kerrilyn Scotty & Penzance Tamakin	Applicant
v	
Nauru Lands Committee	1st Respondent
Milton Benjamin	2nd Respondent

JUDGE:	von Doussa, J
DATE OF HEARING:	13 June 2013
DATE OF JUDGMENT:	18 June 2013
CASE MAY BE CITED AS:	Kerrilyn Scotty & Penzance Tamakin v NLC; Milton Benjamin
MEDIUM NEUTRAL CITATION:	[2013] NRSC 9

CATCHWORDS: Application of Administration Order no 3 of 1938 – customary adoption – whether succession applies – Gad Demaunga v NLC [2012] NRSC 17 referred to – later family agreement for NLC to amend decision – subsequent retraction by one party – NLC fails to implement the agreement – *Nei Takea Akamwarar v Eiraidongio and Others* applied – family meeting binding.

APPEARANCES:

For the Applicant	Lionel Aingimea
For the 1st Respondent	Steven Bliim, Solicitor-General
For the 2nd Respondent	Miniva Depaune

HIS HONOUR:

This is an application for judicial review.

1. The power of a court on an application for judicial review is restricted to considering questions of law and the processes of the decision-making tribunal leading up to the decision or decisions under review. The court has no power on such an application to review the merits of a decision. If an error of law or an error in process is established, the remedy which the court will grant is an order setting aside the decision or decisions under review and returning the matter to the tribunal with a direction that the matter be decided again by the tribunal in accordance with law and the decision of the court.

2. There is a degree of imprecision in the drafting of the application for judicial review in this matter but, as I interpret it, the application seeks the review of two separate decisions.

3. The first decision is that set out in a determination of the Nauru Lands Committee (the Committee) concerning the estate of the late Maureen Tamakin (the deceased) published as GN 93 of 2004 on 31 March 2004 (the Determination). The deceased died intestate in 2003.

4. The second decision is the refusal of the Committee to revoke the Determination, and to publish a new determination reflecting an agreement reached by members of the family on 12 March 2012.

5. The grounds of the application are briefly stated and can only be meaningfully understood by reading them with the particulars and the affidavits in support. As stated, the grounds are simply:

    a. *Breach of Natural Justice, and*
    b. *Gross irregularity, by the Nauru Lands Committee regarding the determination of the land estates of the late Maureen Tamakin.*

The parties

6. The first applicant has for a long time been recognised as the daughter of the deceased, adopted by custom. She was born on 29 September 1977 and the adoption occurred in the late 1970s. The second applicant is the legally adopted son of the deceased. He was born on 31 January 1985 and his adoption, under the *Adoption of Children Act 1965,* was approved by order of the Family Court made on 3 July 1992.

7. The deceased was survived by the two applicants and by her husband, Kelson Tamakin (Kelson).

8. The deceased had seven siblings, most of whom were alive at the time of her death. Four of the siblings have now died, two of them leaving many children. The second respondent, Milton Benjamin is one of the siblings. The Determination distributed

the property of the deceased between her siblings to the exclusion of her husband and children.

The Administration Order

9. The division of the property of a person dying intestate is governed by the Administration Order, No 3 of 1938 (the Administration Order) which relevantly provides in clause 2 that the distribution of the property shall be decided by the family of the deceased person assembled for the purpose. Clause 3 makes provision for the division of the estate where the family is unable to agree. Relevantly, clause 3 (c) provides:

> *Married – with children – the land to be divided equally between the children, and the surviving parent to have the right to use the land during his or her lifetime. When an estate comprises only a small area of land the eldest daughter to receive the whole estate and other children to have the right to use the land during their lifetime.*

10. The expression "children" would also include a single child where the deceased was survived by only one child recognized in law as a child of the marriage. The singular includes the plural and the plural includes the singular.[1] I mention this as the second respondent before this Court says he now relies on the decision of Eames CJ in *Gad Demaunga v NLC & Another* [2012] NRSC 17. In that case Eames CJ held that the *Adoption of Children Act 1965* is a code that completely supersedes the customary adoption laws so that unless an adoption is approved by order of the Family Court it cannot be recognised for the purpose of succession. The second respondent argues that this means that the first applicant cannot receive an interest in the deceased's estate as a child of the deceased under clause 3 (c) of the Administration Order. It will be necessary to return to this submission later.

The factual background

11. The deceased died in 2003. The Response of the Committee attaches the minutes of a meeting of the Committee that occurred on 28 January 2004. This meeting was held to discuss the distribution of the deceased's estate. Three members of the Committee and the secretary were present. The original minutes record that only the deceased's husband Kelson was at the meeting. The translation of the minutes given to the court by the Committee records that the second respondent was also present, but the parties are agreed that the inclusion of his name is an error. The word appearing in the original minutes is "metuen". That word has been wrongly transcribed in the interpretation as "Milton".

12. The minutes of the Committee do not record who was invited to attend, and make no reference to children of the deceased. The minutes record that the Kelson said he wanted the personalty to go to the deceased relatives but he did not want to be included, and as to the real estate the minutes record him saying "I would also like this to go to the brothers and sisters of Maureen as per Personalty". The

[1] See the Acts Interpretation Act 1971, s.2 (5).

Determination gave effect to such a distribution. The decision published in the Determination is the first decision that the applicants seek to have reviewed.

13. The applicants say that they were unaware that they had been excluded from the distribution of the deceased's estate until early in 2012. The first appellant then learned of their exclusion and informed the second applicant. The first applicant made inquiries with her uncle, Rinson Benjamin, and with the Committee. The Committee said that Kelson had been to a meeting, but could not say who also had been invited. The Committee said another meeting would be arranged.

14. The Committee called a meeting of the family on 12 March 2012 which was attended by the surviving siblings and a number of the children of the deceased siblings. All those then present agreed that the deceased's lands should go to the husband and the two children (the applicants). There was discussion about the occupancy of the home which had been occupied by the deceased and Kelson, but as that house is on someone else's land the question of its ongoing use and occupancy was not part of the agreement. The Committee said that the Determination would be revoked and the land distributed according to the agreement reached at that meeting. All the family members present at the meeting signed the minutes, thereby confirming their agreement.

15. However 11 days later, on 23 March 2012, before the revocation of the Determination was published in the Gazette, the second respondent informed the Committee that he no longer agreed with the proposed distribution. He now says that he agreed at the meeting on 12 March 2012 as he thought it was the first family meeting called to consider the distribution of the estate. Afterwards he found out that Kelson had met with the Committee in 2004, and had said that the land should go to the siblings. He therefore objected to that agreement being disturbed eight years after Kelson had said that he did not want to be included.

16. The Committee called another meeting of the family on 27 March 2012. The Committee informed the family of the second respondent's retraction of his agreement. As the second respondent maintained his opposition to the agreement, the Committee closed the meeting. The Committee has not revoked the Determination and published another which reflects the agreement reached on 12 March 2012. It is to be inferred from the Committee's failure to do so that it made a decision not to amend its published decision. This is the second decision that the applicants seek to have reviewed and set side.

17. The first applicant and her uncle then organised for all the family, save for the second respondent, to sign a letter addressed to whom it may concern in which they agreed to the distribution of the deceased's estate to "be inherited by her spouse Mr Kelson Tamakin and their two (2) children, Mrs Kerilyn Scotty and Mr Penzance Tamakin".

Discussion – the first decision

18. The applicants allege that they were wrongly excluded from the distribution of the deceased's estate. They seek to set aside the Determination on the ground that they

were not notified by the Committee of the meeting held on 28 January 2004 to consider the division of property, and were given no opportunity to be heard before the Committee reached its decision.

19. The Committee as a public body carrying out statutory functions must comply with the rules of natural justice. It must give those who have a direct interest, i.e. as potential beneficiaries, notice of the Committee's intention to determine the distribution of an intestate estate. It must give the interested persons the right to be heard. And it must act fairly and independently in reaching a conclusion that is open on the evidential material which it has assembled.

20. The Administration Order gives no guidance as to who should be called to a meeting for the purpose of clause 2. The notion of "family" is a broad one but for the purpose of this case it is not necessary to explore how widely in the extended family an invitation to attend a meeting need go to constitute a valid meeting.[2] As clause 3 (c) is the provision that would operate in default of agreement, at the very least the surviving spouse of the deceased and her issue were people with a direct interest in the division of her property who should have been called to a meeting, and were entitled to be heard before the Committee made its decision.

21. As I have already observed the minutes of the meeting held on 28 January 2004 make no reference to the deceased's children. The minutes do not indicate that any enquiry was made by the Committee whether the deceased had a child or children. If the Committee was aware of the existence of children, there is no note of any question being asked about their age or wishes.

22. On the evidence there is no basis for inferring that the applicants must have received notice of the meeting of the Committee on 28 January 2004. They both say that they did not, and I accept their evidence. The absence of any reference to them in the Committee's minutes carries the inference that the Committee did not consider the interests of the issue of the deceased.

23. On behalf of the second respondent it is submitted that the children must have known that they were not included in the distribution much sooner than 2012. However both applicants gave evidence that they did not know that they had been excluded until 2012, and they were not challenged on this in cross-examination. I therefore find that they were not aware until early 2012. As soon as they became aware they acted quickly. The Committee called the family meeting and when the second respondent shortly afterwards withdrew his consent, the first applicant arranged to have the agreement of all family, other than the second respondent, recorded in the letter. The applicants then instructed a lawyer to commence these proceedings.

24. It is a matter of concern that Kelson has allowed the Determination to stand for so long and has stood by without making his children aware that they had been excluded from sharing in their mother's estate. However his idleness is no ground

[2] In *Eiduguneida Gobure v Eigoriedu Denea* (1969-1982) NLR, (B) 55 at 57 Thompson CJ held that the Committee need not call family members whose degree of relationship is comparatively remote.

for prejudicing the rights of the applicants who, as I have held, were not aware of the situation. There is no ground for denying the applicants the right to pursue whatever rights they would otherwise have in relation to the Determination.

25. I have found that they were not informed of the meeting, and they were plainly not heard. That is enough to invalidate the Determination. Had the applicants, or one of them, been at the meeting I think it is reasonable to assume that they would not have agreed to the distribution proposed by their father, and in that event the distribution would have gone according to clause 3(c) of the Administration Order.

26. The Determination GN 93 of 2004 must therefore be set aside.

Discussion – the second decision

27. The applicants base their challenge to the decision of the Committee not to implement the agreement reached on 12 March 2012 on the ground of "gross irregularity". I understand this to mean that they did not give effect to an agreement reached by the family as required by clause 2 of the Administration Order. That is in substance an allegation of an error of law by the Committee, and if the error is established the decision will be set aside.

28. Whether there was an error of law as alleged turns on whether the agreement reached on 12 March 2012 remained binding on the family, and in particular the second respondent, even though the second respondent sought to resile from it 11 days later.

29. In *Eiduguneida Gobure v Eigoriedu Denea*[3] Thompson CJ held that whether or not a family agreement before the Committee has become complete and irrevocable is a matter of fact in every case. In that case there had been an agreement reached by the family in a meeting with the Committee but about a week later one party notified the Committee that he no longer agreed. The Chief Justice found that the agreement remained binding nonetheless.

30. In *Nei Takea Akamwarar v Eiraidongio and Others*[4] Thompson CJ said:

> *Mr. Adeang has submitted, however, that, even though the Committee's original determination may have been correct, it should have cancelled it when the appellant came back eight days later. I am unable to accept this argument as sound; there must be a point of time when, the matter having been decided, it is unalterable except on the ground that an injustice has been done, e.g. because of coercion, undue influence or want of understanding. That point of time is clearly the moment when the Committee has made its decision and sent it for publication. At that stage the committee has finished its duty in the matter and cannot properly reopen it except with the consent of all parties concerned or on the order of this Court.*

31. In the present case the minutes of the meeting of the family in the presence of the Committee on 12 March 2012 record an agreement reached by the parties, and,

[3] Land Appeal 2 of 1972 (1969 – 1982) NLR (B) 55 at 57

[4] Land Appeal No 21 of 1970 (1969 – 1982)NLR (B) 29 at 11-12.

moreover, the members of the family including the second respondent formally confirmed the agreement by signing the minutes.

32. As a matter of general law, at that point in time the agreement was binding on all the family. Further, as a matter of general law, the otherwise binding agreement so reached could only be set aside if it could be shown that it was entered into through fraud, coercion, undue influence or want of understanding induced by improper conduct by one of the parties. It was this principle that Thompson CJ referred to as the grounds on which a party could withdraw from an agreement.

33. In the present case, the second respondent does not allege fraud , coercion or undue influence or anything of that kind. He says that he wanted to resile from the agreement as he had been under a misunderstanding, believing that the meeting on 12 March 2102 was the first meeting of the family assembled to decide the distribution of the deceased's estate. As it now turns the meeting on 12 March 2012 was in fact the first assembly of the family properly constituted for the purpose of the Administration Order. What had occurred on 28 January 2004 was not a meeting to which all relevant family members, in particular the applicants, had been called and did not meet the requirements of the Administration Order.

34. In any event, the meeting on 12 March 2012 was plainly understood by those present to be an assembly of the family to consider and decide the division of the deceased's property. The second respondent was under no misunderstanding as to the purpose of the meeting, and the nature of the agreement he then accepted. Even if he was under a misapprehension about the circumstances that led to the publication of the Determination in 2004, that is not a misapprehension that in anyway could invalidate the decision he freely made knowing that the applicants were the acknowledged children of the deceased.

35. The fact that the second respondent has since learned of the decision of Eames CJ in *Gad Demaunga v NLC* cannot provide any ground for him now resiling from the agreement, as he must have known at the time that the first applicant was a child adopted in custom. The *Adoption of Children Act* had been in force since 1965, and the decision of Eames CJ simply confirmed the position as it had been since that date.

36. As Thompson CJ held in *Eiduguneida Gobure v Eigorieda Denea,* whether a family agreement before the Committee has become complete and irrevocable is a matter of fact to be decided on the particular circumstances of the case. In this case I consider the formality of signing the agreement at the conclusion of the meeting on 12 March 2012 signifies the time when the agreement became binding on everyone, and irrevocable. The agreement remained binding on the family notwithstanding that the second respondent sought to withdraw his agreement 11 days later.

37. As a binding family agreement had been reached at a family meeting assembled by the Committee for the purpose of deciding the division of the deceased's estate under the Administration Order the Committee fell into error of law in not putting that agreement into effect by revoking the 2004 Determination, and publishing a new one in terms of the agreement. The decision of the Committee not to do so must

therefore be set aside, and the matter returned to the Committee to give effect to the agreement reached on 12 March 2012.

38. Under the agreement reached on 12 March 2012 it is beside the point that the first applicant was adopted in custom. The family is entitled to decide that the distribution of the estate will include a child or children adopted only in custom, and they have done so.

39. At the hearing of this appeal the second respondent argued that the delay should prevent the applicants and Kelson reopening the distribution. I have already given reasons why the childrens' rights should not be prejudiced by the delay. The distribution of the estate in accordance with the Administration Order will primarily benefit the deceased's issue. The fact that Kelson gets a benefit as well is a consequence which must follow, notwithstanding his past conduct.

The formal orders of the court are therefore:

a) Application for judicial review of Determination GN No 93 of 2004 allowed and the Determination is set aside.

b) Application for judicial review of the decision of the Committee not to give effect to the family agreement reached on 12 March 2012 allowed and the decision is set aside.

c) The matter is returned to the Nauru Lands Committee to give effect to the family agreement reached on 12 March 2012

d) The second respondent is to pay the applicants' costs of these proceedings.

von Doussa J
Judge
18th June 2013