

Land Appeal No.12 of 2010

KINZA CLODUMAR

Appellant

V

JANELLA ATSIME & Others

Respondents

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JUDGE: Eames, CJ.  
WHERE HELD: Nauru  
DATE OF HEARING: 21 March 2011  
DATE OF JUDGMENT: 21 March 2011 (Ex tempore) (First revision 9 August 2011)  
CASE MAY BE CITED AS: Kinza Clodumar v Janella Atsime and Others.  
MEDIUM NEUTRAL CITATION: [2011] NRSC 17

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Land Appeal - *Nauru Lands Committee Ordinance 1956-1963* - Appellant's claim to entitlement to land by way of gift inter vivos rejected by Connell C.J, in judgment in 2002 in civil proceedings by present appellant - Whether present appeal constitutes collateral attack on previous judgment of the Court - Successful appeal to High Court against 2002 decision a pre-requisite for maintenance of present proceedings - leave given to consider application to High Court - Land Appeal adjourned pending outcome of appeal to High Court.

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APPEARANCES:

For the Appellant	<u>Counsel</u> Mr L Keke
For the Nauru Lands Committee	Mr D Lambourne
1st Respondents	In person

CHIEF JUSTICE:

1. The appellant, Kinza Clodumar, appeals against a determination of the Nauru Lands Committee concerning the estate of Rick Burenbeiya, which was published in Government Gazette No.64 of 2 June 2010 in Gazette Notice No.273/2010, at page 7. That determination was subsequently amended by a determination in Gazette No. 416/2010, which was published on 11<sup>th</sup> August 2010 to make a minor amendment, adding the name of one of the beneficiaries. The appeal is against Gazette Notice No.273/2010, as amended by Gazette Notice 416/2010.
2. Rick Burenbeiya died in 1999, leaving no issue. He was survived by his wife, Mary, a Fijian. The Committee considered the question whether Rick Burenbeiya had during his life sought to transfer to the appellant his interests in two portions of land - being "Dabodine, 5" and "Iro, 30", in Yaren district. Under section 3 of the *Lands Act* 1976, such a transfer required the President's approval. There was no evidence that approval had been given.
3. By Gazette Notice No. 267/1999 Mary had received a lifetime interest in her husband's estate, including the two disputed portions. On the death of Mary, the Nauru Lands Committee determined a distribution of her estate, although she was not a Nauruan. That led to Land Appeal No. 4/2000 *Eimut Edward v Deliah Deduna, Tagamoun Family and Nauru Lands Committee*, Judgment dated 20 February 2002, by Connell CJ.
4. The decision of the Committee was also the subject of a challenge by way of Civil proceedings brought by the appellant: Civil Action 16/2000, *Kinza Clodumar v Nauru Lands Committee*. The appellant sought a declaration from the Court that the lands in question had been the subject of a transfer *inter vivos* made to him prior to the death of Rick Burenbeiya.
5. On 19 February 2002 Chief Justice Connell rejected the plaintiff's claim, finding on the evidence that:
  - (i) the projected transfer *inter vivos* to the plaintiff was not perfected, by virtue of the absence of approval in terms of section 3 of the *Lands Act* 1976;
  - (ii) The gift was not a *donatio mortis causa*, as the conditions were not fulfilled for such a grant;
  - (iii) There was no customary will created by the correspondence that passed from the deceased, Rick Burenbeiya, to the Nauru Lands Committee or by virtue of his wishes as disclosed by his wife.
2. In rejecting the three alternative basis on which the plaintiff claimed an interest in the two blocks Connell, C.J. said he did so upon his consideration of the evidence that had been presented in the case. Connell, C.J. held, however, that the Committee should have distributed the reversionary interests along with its determination of an LTO interest in favour of the widow. His Honour held that in order to determine that estate a family meeting should be called by the Nauru Lands Committee to take

account of all those who can properly claim an interest.

3. His Honour made orders discharging an interlocutory injunction ordered against the Nauru Lands Committee, but ordered that the Gazette Notice which purported to determine the estate and beneficiaries of the estate of Mary Burenbeiya be withdrawn, and further ordered that the Committee, without delay:

“ . . . call a family meeting to determine the reversionary interests in the estate of the late Rick Burenbeiya. At that meeting apart from the nearest blood relatives, the members of the Edward family and Kinza Clodumar are to be invited to attend.”

4. On the day following his order in the civil action, Connell, C.J. gave judgment in the land appeal in which Eimut Edward was the appellant. Consistent with the ruling which he'd made in the civil case, his Honour found that the Committee should have called a full family meeting upon the death of Rick Burenbeiya, and have made a determination of the reversionary of estate upon the death of Mary Burenbeiya, who had been granted an LTO.
5. Connell CJ ordered the NLC to withdraw Gazette Notice No. 209/2000 and ordered that without delay the NLC call a family meeting to consider distribution of the reversionary interests in the estate of R.B (deceased) following the death of Mary Burenbeiya. His Honour ordered, in addition, that “apart from the parties represented and the NLC, notice of this order also be given to Kinza Clodumar and the Curator of Intestate Estates”.
6. Pursuant to those orders the Committee held a meeting in which all interested parties attended, including Kinza Clodumar, in order to determine the reversionary interest in the estate of Rick Burenbeiya. At that meeting, on 22 February 2002, as the minutes show, the appellant again raised with the Committee his claim to an interest by way of a gift *inter vivos* from Rick Burenbeiya in the two blocks of land which he disputed. He asked whether the Committee would give effect to the wishes of Rick Burenbeiya, to which the Committee responded “we cannot say now; we will have to discuss it further”.
7. The minutes record that some others who were present did not accept that a gift *inter vivos* had been made. Instead, the minutes of the Committee's deliberations with respect to the estate, record “all members agreed that Deliah and the Tagamoun siblings will be the beneficiaries, but the Committee has yet to decide about Rick's transfer of two lands to Kinza Clodumar.”
8. The appellant claims that he was denied the opportunity to place information before the Committee, in particular that Rick Burenbeiya had decided to transfer the two blocks to the appellant because of the assistance rendered to him and his family by the appellant in the past, thus demonstrating that it was not a spur of the moment decision. The appellant claims that not only was this information not provided to the Committee, but it had not been provided to Connell, C.J. either.
9. Subsequent to the meeting on 28 February 2002 the Committee met twice more on

this matter, first on 13 February 2009 and again on 18 February 2010. To neither meeting was Kinza Clodumar invited.

10. In 2010 the Committee published a Gazette Notice purporting to distribute the reversionary estate, and it rejected the contention that the appellant should become the owner of the two blocks in question.
11. As is clear from the notice of appeal and the affidavit evidence, Kinza Clodumar makes claim to the two blocks of land on precisely the same basis that he made his claim before Connell, C.J. He contends that the Committee's determination should be set aside and it should be ordered to hold a new meeting so that he can place fresh evidence before the Committee in support of a determination that a gift *inter vivos* to him had been perfected. This invites the Committee to make a finding directly against the finding of Connell, C.J. and the orders then made by the Court.
12. Mr. Lambourne, for the Committee, submitted that the Nauru Lands Committee could not disregard the decision of Connell, C.J. and, by way of a collateral attack on that judgment (under the guise of a Land Appeal), overturn the decision of Connell, C.J. He submitted that for the present appeal to succeed, the decision of Connell, C.J. on the Civil Action would first have to be set aside. That would involve a successful application for leave to appeal being brought in the High Court and/or a successful appeal to that Court pursuant to the Nauru *Appeals Act* 1972-1974 (and, see too, Article 1A(b) of the agreement between the Australian and Nauru governments referred to in the *Nauru (High Court Appeals) Act* 1976, of Australia).
13. Mr. Keke conceded that the appeal faced those formidable obstacles. I intimated to Mr. Keke that on the present material, were I to give judgment I would be bound to follow the decision of Connell, C.J., and the appeal would be likely to be dismissed. I would however allow him time to consider whether an attempt would be made to set aside the decision of the Chief Justice.
14. Accordingly I made the following orders on 21 March 2011;
  1. That the further hearing be adjourned for mention in the call over on 28<sup>th</sup> April, at 10:00am
  2. That the appellant have 28 days to initiate an application for leave to appeal to the High Court against the decision of Connell, C.J., in Civil Action No. 16/2000, Judgment 19 February 2002.
  3. Upon initiation of such application this land appeal to be adjourned pending the outcome of that application.
  4. That the appellant have liberty to apply to the Registrar within 28 days for an extension of time to initiate the application for leave to appeal in the High Court, such extension to be granted at the discretion of the Registrar upon being satisfied that proceedings by way of application for leave to appeal were being taken.
  5. File Note: It is noted by His Honour that in the event that High Court proceedings are not initiated within the time allowed by the preceding orders, his Honour will deliver judgment in this appeal without further submissions from the parties.

Dated this 21<sup>st</sup> day of March 2011

Geoffrey M Eames AM QC  
Chief Justice.