IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Land Appeal No.2/2011

CEILA CECILIA GIOUBA (Nee LIMEN) Appellant

V

NAURU LANDS COMMITTEE Respondent

JUDGE: Eames CJ

WHERE HELD: Nauru

DATE OF HEARING: 8 March 2011

DATE OF JUDGMENT: 15 March 2011 (Revised 21 July 2011)

CASE MAY BE CITED AS: Giouba v Nauru Lands Committee

MEDIUM NEUTRAL CITATION: [2011] NRSC 1

Nauru Lands Committee Ordinance 1956-1963 – s.7(1) – Application for leave to appeal out of time against determination of Nauru Lands Committee – *Administration Order No 3 of 1938* - Whether application competent – Inherent jurisdiction of Supreme Court – *Civil Procedure Act* 1972, s.72 – Whether Court may give declaratory relief– *Practice Note No 1 of 2006* discussed – Application dismissed.

APPEARANCES: Solicitors

For the Plaintiff In person

For the Defendant Mr David Lambourne

CHIEF JUSTICE:

1. The appellant seeks leave to appeal out of time against the decision of the Nauru Lands Committee, published by Government Gazette No 68 dated 9 June 2010, concerning the intestate estate of the late Rose Maria Limen and the late Michael Limen, who were the full siblings of the appellant, having the same mother and father. Section 7(1) of the *Nauru Lands Committee Ordinance* 1956-1963 requires that notice to appeal a decision of the Committee must be given within 21 days of its publication. The appellant did not file a notice of appeal until 22 February 2011, more than seven months late.

2. The Nauru Lands Committee made a separate decision concerning the personalty of the estates of the same siblings, that decision being published in the Nauru Government Gazette No 17, dated 16 February 2011. The appellant gave notice of appeal concerning that decision on 22 February 2011, that is, within 21 days of the Gazettal of that decision.

3. The language of s.7(1) does not itself provide for an extension of time to appeal. Some uncertainty as to the right of the Court to grant leave to appeal out of time arose from a decision of Chief Justice Thompson in 1970 (see *Dibebe Beiyoun v Adeang Deireragea & ors*[1]), where his Honour expressly held that in the absence of legislative authority the Court had no power to extend the time limit imposed by s.7(1). His Honour added however:

   > "It is only, therefore in cases where there was such irregularity in the proceedings before the Nauru Lands Committee that its determination can be regarded as a nullity, which the Supreme Court should declare void, *that an extension of time can properly be granted* in order to enable that declaration to be made . . .(my emphasis).

4. The Chief Justice concluded that the applicant had not demonstrated such an irregularity in the proceedings of the Committee as to render the determination void. His Honour concluded that "this is not a case, therefore, in which this Court should extend the time for appealing." Although the Chief Justice expressed his conclusion in those terms, he otherwise made it clear that he was not ignoring the terms of s.7.

5. Although an application for a declaration that a determination was a nullity would ordinarily be pursued by way of a civil action seeking such a declaration, pursuant to the inherent powers of the Supreme Court under s.72 of the *Civil Procedure Act* 1972, it seems that Chief Justice Thompson accepted that an application for a declaration might be dealt with in the context of a misguided application for an extension of time under s.7(1). Strictly speaking, were the applicant successful in persuading the Court that relief by way of a declaration was appropriate, that decision would not entail or require an extension of time under s.7(1). The order would involve the application of equitable remedial powers of the Court. (I note that a declaration might not suffice to address the finding that the determination was a nullity. It might well be that further relief by way of certiorari and/or mandamus

[1] *Land Appeal No 20 of 1970, Nauru Law Reports 1969-1982, Part B, pages 27-28*

would be required to address the consequences of the irregular determination. Thus, there is all the more reason why it would be appropriate to seek relief by civil proceedings rather than as an application for leave to appeal out of time under s.7.)

6. The learned Chief Justice made clear the distinction between proceedings for a declaration, on the one hand, and for leave to appeal out of time, on the other hand, in *Ralph Eoe v James Ategan Bop and Eiwata Adimim*[2], a case where applications for such a declaration were expressly made. Chief Justice Thompson held that the decisions of the Committee were final:

> "Its decisions are statutorily declared to be final, subject to appeal to this Court within a certain time. The only circumstances in which they can be set aside, otherwise than on an appeal commenced within the time limit, are where there was such gross impropriety in the manner in which the Committee reached its decision that its decision must be regarded as a nullity.
>
> The burden on any person seeking to prove such impropriety is heavy. It is not enough to show that there is an absence of certainty that all proper procedures were followed. It must be proved that they were not and that the resulting impropriety was of a gross nature which led to serious injustice".

7. Subsequently, in *Practice Note No 1 of 2006*, Connell, C.J. addressed the exercise of the Court's inherent power under s.72 of the *Civil Procedure Act* 1972. His Honour referred, throughout, to "appeals" and to the "granting of leave", where an appeal was out of time, but it is plain that the Chief Justice was only concerned with stating parameters for the exercise of inherent powers to make a declaration of nullity in an appropriate case, and was not purporting to extend the terms of s.7 so as to allow appeals out of time. Whilst it may be doubted that a Practice Note could confine the range of factors to which a Court might have regard in entertaining an application for a declaration, they would certainly include those grounds identified in the Practice Note, being allegations of gross irregularity of procedure, proven fraud and failure of natural justice. The Practice Note asserted (and it would no doubt usually be the case) that a complaint that the Committee had merely erred in its application or interpretation of existing law would not be a basis "for acceptance of appeal out of time", which again, in context, might read "for exercising the declaratory power of the Court" in favour of the applicant.

8. In *Lydiana Adun and Others v Beneficiaries of the Estate of Eigaga Heinrich and Nauru Lands Committee*[3], Millhouse CJ. also held that the inherent powers of the Court did not extend to permitting an appeal out of time under s.7(1), where the legislature did not empower the Court to so act. His Honour referred to the Practice Note as disclosing "how limited are the grounds of appeal given by s.7(1) of the Ordinance", but his Honour approved the decision of Thompson CJ to which I have referred, and accepted that proceedings to have a determination declared a nullity were open, but would be unlikely to succeed except on limited grounds.

9. Were the court empowered by s.7 to grant leave to appeal out of time in an

[2] Land Appeals Nos 18 and 19 of 1972, 27 February 1973.
[3] Land Appeal No 3 of 2009, 21 May 2010.

appropriate case, then that would involve the exercise of a discretion and one critical consideration would no doubt be whether the applicant had proffered a good explanation for delay in lodging an appeal; other considerations would be the length of the delay, prospects of success of the appeal if leave was granted, and the prejudice to the other party that was likely to be suffered[4]. Likewise, delay in seeking relief is also a relevant consideration as to the appropriateness of granting a declaration[5].

10. For the purpose of dealing with this application it is unnecessary for me to further address the question of the power of the Court to grant "leave to appeal out of time". The "Notice of Appeal" filed by Ms Giouba sought relief by way of allowing her "application for leave to appeal out of time in the inherent power of the Court under s.72 of the *Civil Procedure Act* 1972", which, in the absence of objection, I am prepared to regard as constituting an application for a declaration, as an alternative to a grant of leave to appeal out of time. In any event, Ms Giouba accepted that she was obliged to persuade me that I should exercise my discretion in her favour, and that one relevant consideration was whether she had provided a substantial and satisfactory explanation for the delay in lodging her notice of appeal.

11. In explanation for the delay the appellant, who appeared in person, said that the decision of the Committee concerning the distribution of the realty estate was made in 2006, but was not gazetted until 9 June 2010. The appellant said that throughout those years she had been waiting for the gazettal of the Committee's determination, in order to appeal the decision of the Committee. She was aware that there was a 21 day time limit and she took all possible steps, she submitted, to ensure that she would be able to meet that deadline. In particular, she said she had alerted those responsible for publishing the gazette of her interest in this matter and requested that she be sent all copies of the Gazette as they were published. Over the following years she received Gazettes, but the Gazette with the relevant determination did not appear. She says that she received Gazettes published prior to No 68 and subsequent to No 68, but for some reason the relevant Gazette was never provided to her. Having realized that she had missed Gazette No 68 she inquired about it with the "officer in charge of gazette distribution" and was told, incorrectly, that it had not yet been published. When finally she was provided with that copy of the Gazette, and discovered that it contained the relevant determination, she was then outside the 21 day time limit.

12. Whilst I accept that the appellant was interested in finding the determination of the Committee, and for that reason sought e mail copies of the Gazette, she was unable to provide a satisfactory explanation for the delay in giving notice of appeal. Gazette No 68 was published on 9 June 2010. When pressed as to when she located and read that Gazette she finally said it was in "July" 2010. Notwithstanding that she was aware that she had only 21 days in which to appeal, the appellant then waited more than seven months to do so. She said that in the meantime she had been embroiled in litigation brought against her by her half-brother, Roger Hartman, concerning the distribution of the personalty estate, and thought that, somehow, she could raise the

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[4] See *Komba v National Australia Bank Ltd* [2010] VSCA 232, at [29]-[31]

[5] See Meagher, Gummow and Lehane's *"Equity Doctrines & Remedies", 4th Ed, 19-130, 38-025.*

issues concerning the distribution of the realty estate, in the course of defending her brother's proceedings. In my view, that is not an adequate explanation for the delay.

13. As to the merits of the proposed appeal/application for a declaration, the appellant contended that the Committee had misinterpreted regulation (3)(b) of the Administration Order No 3 of 1938, which governs the distribution of intestate estates.

14. The Committee determined that the estates of the Rose Maria Limen and Michael Limen, who were the full siblings of the appellant and her sister, Cindy Limen, should be divided equally between not only the appellant and her full sister, but also between her half-siblings, who were born of the same mother as the applicant, but a different father, namely Fritz Hartman. Mr Hartman had married the appellant's mother after the death of the appellant's own father. The appellant contended that half-siblings could not constitute "the nearest relatives in the same tribe", for the purposes of regulation (3)(b). She submitted that the half-siblings belonged to a different tribe to the full siblings, because customary law did not permit marriage within the same clan. In the course of argument, Ms Giouba conceded that customary practice had changed in these respects over decades, and that strict rules relating to marriage, on which her argument was based, might not apply today. I took that to be a concession that, even accepting her own contention as to cultural norms, half-siblings might today be regarded as constituting nearest relatives, together with full siblings.

15. In my opinion, the arguments advanced by Ms Giouba fall far short of demonstrating that the proceedings of the Committee were so irregular as to render their determination a nullity. In effect, the contention is no more than an assertion that the Committee misinterpreted a phrase in Administration Order No 3 of 1938 that is not defined in the Order. I have not heard full argument on these questions, however, and express a tentative view only. Coupled with the fact of the unexplained delay for 7 months, this would not appear to be a case justifying a declaration that the proceedings were a nullity. Furthermore, even if the present application could lawfully be regarded as an application for an extension of time under s.7 of the *Nauru Lands Committee Ordinance 1956-1963*, this would not be a case that justified the exercise of the Court's discretion to grant leave to appeal.

16. The complaints of error that Ms Giouba makes against the Committee in its determination concerning the disposition of the realty in the intestate estates are the same as she proposes to make concerning the determination of the Committee as to the personalty estate of the deceased siblings. In other words, if "leave to appeal" or declaratory relief is refused with respect to the determination of the Committee concerning the realty estate, then an apparently anomalous situation could arise if the court were later to rule in favour of the appellant in her appeal concerning the personalty. That factor would not, however, justify granting the relief she seeks in this case.

17. I note in passing that doubt has been expressed by a former Chief Justice as to whether any appeal lies, at all, with respect to a determination of personalty estate. The right of appeal that s.7 provides is confined, in terms, to a determination under

s.6, which, in turn, grants power to the Committee to make determinations in respect of land, but does not mention personalty. Donne CJ in *Lucy Ika and Kinza Clodumar v Nauru Lands Committee and Others* (Civil Cases Nos 2/91, 3/91 and 8/91, unreported judgment 21 August 1992, at pages 18-22), held that whilst the Committee undertakes a customary role in making decisions as to the distribution of personalty, in addition to realty, no right of appeal as to a determination concerning realty is provided by s.7. It is unnecessary for me to decide this question, and the matter was not argued before me.

18. I therefore dismiss the application by Ms Giouba for an extension of time with respect to the decisions of the Nauru Lands Committee published on 9 June 2010 in Gazette No 68.

19. It will be necessary, to now give directions as to the conduct of the appeal brought by Ms Giouba, within time, concerning the decisions of the Nauru Lands Committee on 16 February 2011 in Nauru Government Gazette No 17. I will hear the parties as to that.

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Chief Justice G Eames AM