IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Civil Action No.16 of 2000
Civil Action No. 17 of 2000
Land Appeal No. 12 of 2010

In Action No. 16 of 2000
Kinza Clodumar — Plaintiff

v

Nauru Lands Committee — 1st Defendant
Janelle Atsime and Others — 2nd Defendant

In Action No. 17 of 2000
Kinza Clodumar — Plaintiff

v

Curator of Deceased Estates — Defendant

In Land Appeal No. 12 of 2010
Same parties as Action No. 16/2000

JUDGE:	Eames, C.J.
DATE OF HEARING:	18-19 March, 5 August 2013
DATE OF JUDGMENT:	12 August 2013
CASE MAY BE CITED AS:	Kinza Clodumar v NLC and Atsime and Others
MEDIUM NEUTRAL CITATION:	[2013] NRSC 13

CATCHWORDS:
Injunction – Determination of Nauru Lands Committee in 1999 determines owners of land "Dabwodine" and "Iro", in Yaren – Plaintiff claims a right to ownership by virtue of transfer inter vivos – Supreme Court rejects claim because approval by President under s. 3 *Lands Act* 1976 for transfer of land in 1999 had not been proved – Signed approval document found nine years later – High Court allows appeal and refers civil case to Supreme Court to rehear.

APPEARANCES:

The Plaintiff	In person
For the Nauru Lands Committee and the Curator	Mr S Bliim
For Second defendants (Jim Brechterfeld)	Mr D. Aingimea (Pleader)

CHIEF JUSTICE:

1 These proceedings have a complicated history, which is set out comprehensively in the majority judgment of the High Court in *Clodumar v Nauru Lands Committee,* delivered 20 June 2012[1].

2 The High Court had before it two civil proceedings brought in the Supreme Court of Nauru by the plaintiff, Kinza Clodumar. The appellant commenced proceedings in the Supreme Court on 9 August 2000 in Civil Action No. 16/2000, in which the Nauru Lands Committee was defendant, and by Civil Action 17/2000, in which the Curator of Intestate Estates was defendant.

3 In the first action the plaintiff sought to prevent the Nauru Lands Committee from giving effect to its determination published on 12 July 2000 in GNN 209 of 2000, whereby it purported to distribute the estate of the widow of the late Rick Burenbeiya, with respect to land known as "Dabodine", Portion 5, and "Iro", Portion 30, in Yaren District.

4 Rick Burenbeyia died on 11 June 1999. By a notice published in the Gazette on 20 October 1999, subsequent to the death of his widow, the Nauru Lands Committee stated that Rick Burenbeiya had been the owner of lands including the two disputed blocks, and declared that his widow was a beneficiary of those lands following her husband's death. On 12 July 2000 in GNN 209 of 2000, the Committee dealt with the estate of his widow and listed a number of beneficiaries of lands including the two disputed blocks, the beneficiaries not including Kinza Clodumar.

5 The appellant contended that the Committee should have held that a half interest in the land had been transferred to him in April 1999, from Rick Burenbeiya.

6 The plaintiff contended that in April 1999, before his death, Rick Burenbeiya had transferred to him one half of each of the two lands. He led evidence that Mr Burenbeiya had written to the Nauru Lands Committee on 13 April 1999 asking it to process the transfer of ownership. That would usually involve the Committee

[1] *Clodumar v Nauru Lands Committee* [2012] HCA 22.

referring the matter to the President of Nauru, seeking written approval for the transfer, as was required by s.3 of the Lands Act 1976 for the transfer to be effective. Documents showed that the Committee took that step on 29 April 1999 and that by Minute dated 29 May 1999 the Acting Secretary for Island Development and Industry (which had administrative control over such matters) referred the matter to the President with recommendation for approval.

7 The hearing of the two civil actions came before Connell C.J. on 21 March 2001. His Honour made orders in those cases on 19 February 2002.

8 His Honour dismissed the plaintiff's action against the NLC on the basis that s.3 of the *Lands Act* 1976 required that a transfer of land be approved by the President. According to an affidavit from the appellant which was filed in the High Court, the Committee told Connell CJ that presidential approval had not been granted. The appellant was unable to produce any evidence that the transfer had in fact been approved by the President. A copy of the signed written consent emerged more than nine years later. The President had signed his approval on 21 May 1999.

9 Connell C.J. held that the Committee had failed to make a determination of the estate of Rick Burenbeiya, and directed the Committee to withdraw its determination as to the widow's estate, in GNN 209 of 2000, and convene a family meeting so as to determine the distribution of the reversionary interests of Rick Burenbeiya. After an extraordinary delay in convening family meetings on 2 June 2010 by GNN 273 of 2010, the Committee determined that the interests in the two lands belonged to the second respondents. From that decision, the appellant appealed pursuant to s.7 of the *Nauru Lands Committee Act* in Land Appeal No 12 of 2010. That gazette notice was subsequently superseded when the Committee amended its earlier determination by GNN 416 of 2010, published on 11 August 2010.

10 In the course of the hearing of that appeal in March 2011, a document was discovered in circumstances described in the majority judgment in the High Court. The document was a copy of an approval of the transfer of the interest in the lands to

the appellant. Accompanying the transfer were documents that had been presented to Cabinet recommending approval of the transfer. The documents comprised:

(a) Letter dated 13 April from Rick Burenbeiya to the chairman of the Nauru Lands Committee;

(b) Submissions dated 29 April 1999 from Nauru Lands Committee to the President of the Republic of Nauru;

(c) Presidential approval dated 21 May 1999;

(d) Death certificate relating to Rick Burenbeiya.

11 Faced with the need to overturn the finding and decision of Connell C.J. in the civil proceedings, that there had been no presidential transfer, the appellant sought leave to appeal in the High Court against that decision of Connell C.J. in Civil Actions Numbers 16 and 17 of 2000.

12 The High Court granted leave to appeal out of time, allowed the appeal and remitted Civil Action No. 16 of 2000 to the Supreme Court for re-trial.

13 Upon the return of the matter to the Supreme Court the plaintiff sought leave, which I granted, to amend the statement of claim in Action No. 16 of 2000, to reflect the fact that the approval document had been found. The High Court did not deal with the separate action No. 17 of 2000 which was brought against the Curator. That action seems to have been put to one side, since it depended on the eventual finding as to whether approval had been proved to have been given by the President. Mr Clodumar sought to amend the pleadings similarly in that action. I approved the amendment, but given that the Curator had played no part in these proceedings since their inception, I thought it appropriate to ensure that he was represented in the current proceeding. I am satisfied that he was given proper notice and Mr Bliim has appeared for him.

14 I turn then to the re-consideration of Civil Actions Numbers 16 and 17 of 2000.

15 In remitting the action the High Court had regard to affidavit evidence relating to the discovery of the presidential approval document. Mr Remy Namaduk, then a

Minister in Cabinet in the government of President Harris, deposed on 7 December 2011 that he had seen the President sign the approval in this case, but the President had given him the file and asked him to retain it until after discussions had concluded among members of the government about the approach that should be adopted to such applications in future.

16 Mr Namaduk retained the file in his office until the government was defeated in April 2000, then took the files home with him, where they remained until in November 2011 he conducted a search at the request of the appellant's solicitor. He located the relevant documents. The plaintiff identified the signature as being that of the President.

17 In the majority judgment of French, C.J., Gummow, Hayne and Bell JJ., their Honours held:

> "[21] On the face of it, the evidence that President Harris was asked to approve and did approve the transfer of the disputed lands to the appellant during the lifetime of Mr Burenbeiya was cogent. That conclusion does not mean that the evidence must be accepted. It was not tested in this Court. What, if any, weight is to be attributed to it will be a matter for the Supreme Court of Nauru to determine on retrial. But it is clear that if accepted the evidence could alter the outcome of the proceedings".

18 In their conclusion, at [35], their Honours said of the affidavit evidence that it:

> " . . . was not inherently improbable. On the face of it, it was evidence of some cogency. If accepted on a retrial in the Supreme Court it would be very likely to determine the outcome of the civil proceedings commenced in that Court in 2000".

19 The affidavit evidence has now been considered by me. No party sought to cross examine the deponents. Mr Aingimea, for the second respondents to the land appeal, submitted that I should require formal proof that the transfer approval document was signed, but he did not press that submission. He frankly conceded that it was open to me on the affidavit evidence to be so satisfied, and said he would not present any arguments to the contrary. Mr Aingimea agreed that the evidence, if accepted, would mean that the Committee's determination could not stand. He

submitted however, that the evidence should be formally proved, having regard to the delay in the case and the need for scrutiny of the process of Presidential approvals of this kind.

20 Mr Aingimea submitted that the Presidential approval was not effective unless and until it was published in the Gazette, and that had not happened here. As Mr Aingimea rightly noted, determinations of land ownership by the Nauru Lands Committee have been held to be ineffective unless published in the Gazette: see *Egadeiy Itsimaera v Grundler and Others*[2]. Likewise, it was the practice for the Nauru Lands Committee to record in the Gazette any transfers of ownership which had followed upon the Committee (as a matter of custom) referring the transfer to Cabinet for its approval. The Committee took this referral role, although it was not obliged to do so.

21 Mr Aingimea tendered evidence to show that on many occasions transfer approvals under s.3(3) of the *Lands Act* had been followed by publication in the Gazette. One such instance, in 1997, concerned approval of a land transfer being made by Kinza Clodumar, the appellant.

22 Mr Clodumar told me that until recent years it had not been the practice to Gazette Presidential approvals of this kind, and today the applications are referred to Cabinet, not just to the President. In any event, whilst it is correct that Gazettal of such approvals was the more recent practice, the *Lands Act* did not impose that obligation. The High Court acknowledged that, in saying: "Although not a legal requirement, it was standard practice for all transfers to be gazetted once approved".[3]

23 Mr Aingimea did not cite any authority for the contention that the presidential approval was not effective unless the decision was published in the Gazette. It is notable that none of the judges in the High Court so concluded, and if Mr Aingimea's submission was correct that would have been fatal to the appellant's

[2] Land Appeal No 2 of 1974, NLR "B" at page 107.
[3] [2012] HCA 22 at [22].

application for leave to appeal out of time.

24 Legislation in Nauru expressly states when a decision must be published in the Government Gazette. For example, s.16 of the *Interpretation Act* 2011 imposes such a requirement with respect to the making of subsidiary legislation and, likewise, s.17 provides that disallowance of subsidiary legislation must be published in the Gazette.[4] In 2009 the *Nauru Lands Committee Act* 1956 was amended by the addition of section 6A, which obliged the Nauru Lands Committee to publish any decision in the Gazette, within 21 days. Prior to that provision being introduced it had been the practice, and a prudent one, that the Committee did publish its decisions, but the new section imposed a statutory obligation.

25 Although it is no doubt a prudent practice to do so, there was no legislative requirement that the approval by the President in this case had to be published in the Gazette.

26 In my opinion, the provenance of the document containing the President's signature has been established by the affidavit of Mr Remy Namaduk, sworn 7 December 2011. In addition, as the High Court noted, Mr Clodumar, who was a member of Cabinet at the time, confirmed the president's signature, and the Nauru Lands Committee did not dispute the authenticity of the document.

27 Mr Aingimea accepted that original documents were in existence and were in terms identical to the copy documents before me. A copy document may be accepted as best evidence[5] but given the concession of Mr Aingimea, I need not explore that question further. I accept the evidence contained in the documents filed before me.

28 What then should be the relief in the civil actions?

29 In the Amended statement of claim the plaintiff's prayer for relief in Action No. 16 of

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[4] All Australian jurisdictions require that delegated legislation be gazetted: see *Halsbury's Laws of Australia* [385-770], Lexis Nexis, reflecting the importance for the rule of law of members of the public knowing "what the law is": per Scott L J. in *Blackpool Corp v Locker* [1948] 1 KB 349 at 361.

[5] See *Cross on Evidence*, pars [1090], [1095] and [1460], [1465],Lexis Nexis; see too Sections 4 and 7 of the *Civil Evidence Act* 1972.

2000, apart from seeking costs, was in these terms:

> "A: A declaration that the Plaintiff is and has been since 21 May 1999 the owner of the half interest in the lands formerly owned by the Transferor.
>
> B: A declaration that the half interest in the lands formerly owned by the Transferor did not form part of the Transferor's estate, nor the estate of the Transferor's widow."

30 In Action No. 17 of 2000 the relief sought against the Curator, other than costs, was:

1. A declaration that he is entitled to be acknowledged and registered as the absolute owner of a one half share in the lands "Dabwodine" and "Iro" being coconut lands known as respectively, Portions 5 and 30 at Yaren.

2. A declaration that he is entitled to the rents and profits of the said land from 21 May 1999.

3. I make orders in those respective terms on each file.

31 At the hearing on 18 March 2013 I asked Mr Clodumar whether, if I agreed to make the orders he seeks, the beneficiaries represented by Mr Aingimea would be required to repay any royalty and rental payments that might have been paid out of the estate by the Curator since 21 May 1999. Mr Clodumar said he believed that there had been orders restraining the Curator from making any payments, at all, pending determination of his appeal.

32 Without deciding whether I had any discretion to decline to make the orders sought by Mr Clodumar, it seemed to me reasonable that the previous beneficiaries knew whether they were at risk of being obliged to repay any sums that they had received in good faith over the past 13 years. I invited Mr Bliim, who appeared for the Nauru Lands Committee and also the Curator to seek instructions from the Curator on that question.

33 During the earlier hearing of this case, Mr Bliim advised that it seemed there had not

been a restraining order against payments arising from the lands, and that in fact payments had been made to beneficiaries. He sought the opportunity to gain further instructions and to file an affidavit from the Curator. I made orders to that effect and adjourned the matter to the next sittings.

34 The Curator of Intestate Estates, Mr Kelson Tamakin, has filed an affidavit dated 30 May 2013. In that he deposes that his records reveal that the only payment received in respect of these two lands was a rental payment from the Republic paid on 15 May 2000 in the sum of $967.56. That money was transferred on 31 October 2000 to the account of the estate of Mary Burenbeiya, the widow of Rick.

35 In his latest submission, Mr Clodumar noted that in recent times the applications for approval of land transfers have been referred to and considered by Cabinet, rather than solely by the President. He submitted that that was contrary to the requirements of s.3 of the *Lands Act*, which specifies that it is the President who must give consent. He sought an advisory opinion on that question. Mr Aingimea joined in that request.

36 In the present case the approval was that of the President, not Cabinet. The issue therefore does not arise. The Court has power under Article 55 of the Constitution to give advisory opinions, otherwise it is inappropriate that it do so, except perhaps in special circumstances.

37 I do not consider it appropriate to give an advisory opinion on this question.

38 I gave directions on 19 March 2013 for the parties to exchange submissions as to the proposed orders once they had considered the affidavit of the Curator. I asked that those submissions also address the orders for costs that the appellant seeks in both civil actions. I have not received submissions as to the orders I should make, and I will address those questions after I deliver my judgment.

39 In concluding that the plaintiff should succeed in the two civil actions it follows that the determination of 2 June 2010 published in GNN 273 of 2010 (and as modified by

GNN 416 of 2010 published on 11 August 2010) cannot stand. Those determinations should be quashed, as sought by the appellant in Land Appeal No. 12 of 2010. Once again, I will hear the parties as to the appropriate orders to make in disposing of that appeal.

Geoffrey M Eames AM QC

Chief Justice

12 August 2013