

Land Appeal No.1 of 2010

Between:

Patricia Kepae, Noah Neneiya, Nyoka Bill  
and Others

Appellants

V

Nauru Lands Committee

1<sup>st</sup> Respondents

Lucia Dabwadou & Others

2<sup>nd</sup> Respondents

Bobby Eoe and Others

3<sup>rd</sup> Respondents

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JUDGE: Eames, CJ.  
WHERE HELD: Nauru  
DATE OF HEARING: 18 March 2011  
DATE OF JUDGMENT: 18 March 2011 (Ex tempore)  
CASE MAY BE CITED AS: Kepae & Others v NLC and Others  
MEDIUM NEUTRAL CITATION: [2011] NRSC 3

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Land Appeal - Self executing orders - Leave to appeal out of time under s.7(1) purported to be given by Registrar - Order made by Millhouse CJ setting aside Registrar's order and striking out appeal - Order grants appellants liberty to appeal within 3 months - Application made outside 3 months to set aside order of Millhouse CJ and to allow appeal to proceed - Application dismissed.

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APPEARANCES:

For the Appellants	<u>Counsel</u> Mr R Kun (Pleader)
For the 1 <sup>st</sup> Respondent	Mr D Lambourne
For the 2 <sup>nd</sup> and 3 <sup>rd</sup> Respondents	Mr D Aingimea (Pleader)

## CHIEF JUSTICE:

1. This is an application to set aside a decision of Chief Justice Millhouse of the 22<sup>nd</sup> of May 2010 in which the Chief Justice dismissed Land Appeal 1/2008 on the basis that the appeal involved an application for leave to appeal outside the 21 days time limit fixed by the s.7(1) of the Nauru Lands Committee Ordinance 1956-1963.
2. The order made by Chief Justice Millhouse in effect set aside a purported grant of leave grant of leave to appeal out of time that had been made by the Registrar of the Supreme Court on 12<sup>th</sup> of March 2008.
3. In so ruling Millhouse, C.J. concluded that there was no power to extend the time for leave to appeal. That question has been discussed by me in the decision of *Giouba v NLC*<sup>1</sup>, and I agree with the interpretation of the legislation by Millhouse C J.
4. When his Honour delivered his ruling Mr Kun, who represented the appellants, was not present. In his reasons for judgment the Chief Justice said:

“Mr Kun who unfortunately is Off Island for medical treatment is the representative of the appellants. The Court was not able to hear him. Out of deference to Mr Kun liberty is given to the appellants to apply within the next three months. In the meantime the Interlocutory Injunction order dated 9 June 2008 remains in force. Otherwise the Appeal stands dismissed and the Injunction Order is quashed”

5. Given the conclusion reached by the Chief Justice on the preliminary jurisdiction issue, it seems that whether or not application had been made by Mr Kun on behalf of the appellants, no other outcome could have been achieved. His Honour’s interpretation of section 7(1) was plainly right and would not have been reversed by him no matter what arguments Mr. Kun might have advanced.
6. Accordingly, there was an order made which was to come into effect upon the expiration of 3 months after the decision of the Chief Justice on the 22<sup>nd</sup> of May 2010. Notwithstanding, that order, which meant the proceedings were at an end, application was made by Mr. Kun to Justice Von Doussa on a subsequent sittings of the Supreme Court to re-open the proceedings on a basis that the appellants had already received leave to appeal from the Registrar, and the decision of Millhouse C J. could not reverse that.
7. Justice Von Doussa heard arguments on that matter and on the 19<sup>th</sup> October 2010 stood the matter over to the present sittings of the Supreme Court, expressing no concluded view as to whether the arguments with respect to section 7(1) should or should not be upheld. The matter has now been argued before me. The first issue which arose today was whether the order of Justice Millhouse was a self executing order which could not be re-opened, that is, that the proceedings had been brought to an end and could not be revived by any application outside the 3 months period.

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<sup>1</sup> [2011] NSC 1, judgment 15 March 2011.

8. I heard the arguments from Counsel with respect to the relevant principles and apparent difference in the approach adopted by the High Court in *FAI General Insurance Co Ltd & ors v Southern Cross Exploration* (1988) 77 ALR 411 and the English Courts in *Whistler v Hancock* [1878] 3 QBD 83 as to the inherent power of the court to revive proceedings notwithstanding a self-executing order. It is unnecessary to discuss that issue further because there is a statutory power to extend time given to the court, permitting the court to re-open a self-executing: s.70 of the *Civil Procedure Act 1972*. Where such legislative power existed the High Court plainly was in agreement with the English Courts that a Court could set aside a self-executing order, so as to revive proceedings which have otherwise been dismissed.
9. Even allowing that I have such power, and assuming I exercised it in favour of the appellants, that would only bring Mr. Kun to the position where he has got the right to seek to overturn the decision of Millhouse, C. J. so as to seek leave to appeal out of time. However, the Court would be unable to accede to any such application. It would be a futile exercise, having regard to the interpretation of s.7(1) that was adopted by Millhouse C J, which I endorse, and which, as I discuss in *Giouba v Nauru Lands Commission* [2011] NRSC 1., has been expressed by many judges of this Court. There is no right of appeal outside the 21 days.
10. As I discuss in *Giouba*, there remains the right of a party nonetheless to seek relief by way of other civil proceedings for judicial review, rather than under the Nauru Lands Committee Ordinance. Mr Kun proposes to commence such proceedings. That may well require leave under Order 38 of the *Civil Procedure Rules 1972*, given that the 3 months time period has expired for the issuing of a proceedings by way of Certiorari, Mandamus or like relief.
11. The application now made to me to set aside the decision of Chief Justice Millhouse and to revive the proceedings by way of appeal will be refused, with the effect that those proceedings by way of appeal under the Lands Committee Ordinance should stand dismissed. My orders are as follows:

Orders:-

1. That Land Appeal No. 1/2008 is dismissed, but liberty to apply is given to appellants to seek leave under order 38 of Civil Procedure Rules 1972.
2. I direct that any such application by the appellants should be made promptly.
3. I direct that any such application must be accompanied by a draft proposed statement of claim, and any affidavit evidence on which the applicant seeks to rely in support of the application for leave under Order 38.
4. I further direct that the proposed statement of claim and material in support of the application be filed with the court and served on opposing parties not later than 7 days before the date fixed for the hearing of the application by the Court.

Geoffrey M Eames  
Chief Justice  
18 March 2011