

IN THE SUPREME COURT OF NAURU
(Land Jurisdiction)

LAND APPEAL NO. 2/2000

BETWEEN:

SHRASHA PHILIP AND ORS.

1ST APPELLANT

**AKEIDU KEPAE AND
JONATHAN DEMAUNGA**

2ND APPELLANTS

**IVAN MOTITI, PHILIP GAUBIDI,
LORITA AGIGO, JIM MOTITI,
KIM CANON, MONIN AGADIO,
BRADOGY, BUGAEIO, MERRIM & ORS**

3RD APPELLANTS

AND:

NAURU LANDS COMMITTEE

1ST RESPONDENT

**GAMANOVA JORAM, DEIYEYIYA JORAM
& REGINA JORAM**

2ND RESPONDENTS

Mr. B. Dowiyogo for the 1st Appellant
Mr Russell Kun for the 1st Respondent
Mr Pres Nimes for the 2nd Respondents
There was no appearance for the 2nd or 3rd Appellants

Date of Hearing: 27 September 2001
Date of Decision: 28 September 2001

DECISION OF CONNELL, C.J.

The matter surrounded a Land Determination made by the Nauru Lands Committee ("N.L.C.") in G.N. No. 251 of 1999 which was printed in Gazette No. 63 dated 13 October 1999 with regard to land in Meneng District Portion No. 433 phosphate land named "ATEBI" where the former owner was Ebeiwade (deceased).

The Appellant sought that she be allowed to appeal out of time and, or in the alternative, that the determination is void for irregularity in that she and her family were denied an opportunity to be heard by the N.L.C.

The Appellant entered an appeal against the determination on 14 March 2000. The gazette whilst it was dated 13 October 1999 was not published until 7 December 1999. Mr. Dowiyogo vigorously asserted that as the Gazette was dated 13 October 1999, before it was available for public view, the date by which an appeal has to be entered was well-past and it would be unfair to prevent an appeal for that reason.

As long ago as 1970, the Supreme Court was seized of the matter of appeals out of time in regard to determinations of the N.L.C. In *Dibebé Beiyoun v Adeang Deireragea and Others* Land Appeal No. 20 of 1970, the then Chief Justice, Thompson C.J., stated:

"The time for appealing to the Supreme Court against the determination by the Nauru Lands Committee of questions of ownership of land is limited by Section 7 of the Nauru Lands Committee Ordinance 1956-63 to 21 days. No provision is made in that Ordinance or any other law, for the Supreme Court to have power to extend that time."

In Section 7 there is no mention of publication of the decision. Section 7 (1) simply states where a person is dissatisfied with a decision, that person "may, within twenty-one days after the decision is given, appeal to the Central Court against the decision".

It is noted that the Ordinance provision does not mention the necessity of publishing in the Gazette though this is now the regular practice. There is no statement in the provision how the decisions are to be given. In *Livingstone Aiy v Edemerout Garabwan and others* Land Appeal No. 1/2001, I held that a letter from the N.L.C. ●

the Registrar of the Court, which was provided to the parties was the given and, thus appealable, decision under Section 7 of the Ordinance. But that is not clearly satisfactory for the purposes of establishing when time begins to run to limit the appeal process. That was simply a case where the two sides were already in Court and awaiting a determination of decision of the N.L.C.

The matter, in earlier years, was a concern of Thompson, C.J. Once it was established by his judgment, and I do not deviate from it, that there cannot be an appeal from a decision after 21 days, it becomes vital both for the parties and the Court to establish the point at which time begins to run.

In Ralph Eoe v James Ategan Bop and Eiwita Adimim Land Appeals 18 & 19 of 1972, Thompson C.J. made the following observations –

"Publicity was given to the decisions of the Lands Committee, and still is given to the decisions of the Nauru Lands Committee, by their publication in the Gazette. Before the war, when meetings were held by the Chiefs at which the Gazette was read and at which attendance was compulsory, there can be no doubt that the publicity afforded by such publication was excellent. At present, because few people apparently read the Gazette and no public meetings are held, this method of giving publicity to the Nauru Lands Committee's decision is less satisfactory. With the advent of a local broadcasting service, better means of publicity are available and it is to be hoped that advantage will soon be taken of them."

In my comments during the hearing, I suggested that Gazettes not only be published to the regular distribution list, but that Gazettes, or, at least, N.L.C. gazetted determinations be securely published in public places where the people gather regularly. I endorse the use of broadcasting as Thompson C.J. suggested and, of course, would add now television. Land and its ownership plays a major role in Nauruan society and it is unfortunate when a Nauruan loses a chance to assert his or her rights on account of inadequate publicity.

Eidawaidi Grundler v Eibaruken Namaduk and others Land Appeal No. 1 of 1974 was an example where the Appellant was again out of time, in that instance five weeks, and the Court stated it had no jurisdiction, as to time, to entertain the application. However, in the course of the judgment, the Court in an *obiter dictum* stated that it appears to be still open for this Court, while treating a decision as valid, to hold in an appropriate case that the giving of the decision was ineffective due to

gross irregularity. Although pressed by the Appellant as to the gross irregularity in the giving of this decision because of the date of the Gazette and its date of publication, I do not so find this to be an appropriate case of finding gross irregularity. In using the publication date of the gazette as the benchmark from which time would run, any time up to December 28, 1999 would have been within 21 days. I, however, am prepared to make a court ruling that time will run for the purposes of section 7 of the Nauru Lands Committee Ordinance 1956-63 from the date of the publishing of the Gazette and not from the date of the Gazette itself. For prospective parties and the Court itself, action should be taken by government gazette authorities to ensure that the date of publication is marked clearly on all Gazettes, not just in their records, especially when the date of the gazette may be earlier.

In Grundler v Namaduk, Thompson C.J. made it clear that there was no ability of the Court to exercise discretion, as in terms of the Ordinance it has none. However, when an application was based on allegations of irregularity which would justify rendering the decision of the N.L.C. null and void, then such application would proceed as the application to set aside the decision. In this matter, I followed this course, though I have been expansive, so far, on the question of the time factor not only because I was pressed by Mr. Dowiyogo for the Appellant but it appears that it was necessary to clear up some loose ends and rule on the question when time began to run.

Evidence was led by Mr. Dowiyogo for the Appellant why the Court should accede to the view that the decision was reached using an irregular procedure that so breached procedural fairness that the decision should be treated as a nullity.

The Appellant gave evidence, that, although a direct descendant of Ebeiwade, she, along with the then children of Demode, had been denied a right to be heard by the N.L.C. when the "Atebi" Portion No. 433 in Meneng District was determined. The first time she was aware of the situation was sometime in December 1999 or January 2000. She immediately approached the N.L.C. but was not offered any assistance. Following the determination on "Atebi", although her position and that of her immediate family must have been known to the N.L.C. neither she nor any members of her immediate family were notified of the decision.

The family tree submitted by the Appellant was not materially challenged by other parties to the action. It, at the very least, suggests *prima facie* that the Appellant and her immediate family members appear as direct descendants of Ebeiwade and should at least have been taken into consideration and called to a family meeting with the N.L.C.

Sometime after publication in the Gazette, a meeting was held between members of the appellant's family and the N.L.C. only to be informed that a descendant of Edoea, Jane, had spoken with the N.L.C. on a number of occasions that the children of Demode should not be part of the estate. Following that meeting, the Appellant with other members of the family determined to launch an appeal, as she and her family understood that they were entitled to share in the land through Ebeiwade.

The N.L.C. did not call evidence but Mr. Nimes for the Second Respondents, the descendants of Edoea, called the Acting Chairman of the N.L.C. Mr. Capelle. Mr. Capelle was not able to give direct evidence of the determination as he did not sit on that Committee. When asked by Mr. Nimes did he know why Shrasha Philip and family were not called to the meeting, in answer, he stated that he did not know why that group was not called and why Miss Temaki said the land belongs only to her group, the Second Respondents. In cross-examination, he agreed that the Demode group were related and when asked whether the proper course was to invite them to be present, he simply but positively answered, "That is the correct way".

It is apparent to me that there has been a breach of procedural fairness by the N.L.C. Whatever their reason, it was proper to call the children of Demode. This is a substantial irregularity. Further to that, it is surprising that all persons interested in the decision were not notified by the N.L.C. as Thompson C.J. enjoined in **Grundler v Namaduk**. That failure to notify only added to the irregularity. Although out of time as an appeal under Section 7, the decision of the N.L.C. is comparatively recent and the Appellant has taken every step to obtain redress as quickly as possible.

In a famous House of Lords decision, **General Medical Council v Spackman** [1943] AC 627, Lord Wright at p 644 said:-

"If the principles of natural justice are violated in respect of any decision it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision".

I am, therefore, adopting the procedure of Thompson C.J. in Grundler v Namaduk and treating the proceedings as an application to set aside the decision of the N.L.C. I so set aside the decision.

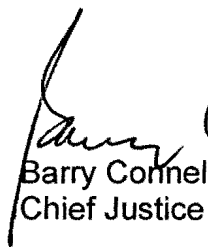
The effect of my decision is to treat the N.L.C. determination of the land "Atebi" Portion 433 PL in the district of Meneng as a nullity. The decision does not mean that this Court has come to any decision at all as to the rightful owners. All it has done is to say to the N.L.C. to look again at its land determination and in coming to a decision make sure that all possible interested parties are heard. On looking at the family tree provided there may be other parties and I note that more recently further parties were added, although not before the Court on this occasion.

I therefore **ORDER** that:

1. the decision of the Nauru Lands Committee G.N. No. 251/1999 with respect to Portion 433 PL named "Atebi" in the district of Menen is set aside and the publication of that decision in Gazette No. 63 dated 13 October 1999 should be officially withdrawn,
2. the Nauru Lands Committee makes a new Land Determination as soon as possible of this land ensuring that the Appellant and all other parties having a possible interest are given notice and accorded a proper hearing,
3. the Registrar of the Court sends this decision to the Chief Secretary drawing his attention to my remarks regarding the publicity of Government Gazettes and, in particular determinations of the Nauru Lands Committee,
4. in the event of future royalties being payable with respect to the phosphate land "Atebi", such moneys be held in trust by the Nauru Phosphate

Corporation until the final determination by the Nauru Lands Committee, and then paid to the landowners therein determined,

5. in the event of any change of ownership resulting from such determination to that of G.N. No. 251/1999, any past moneys paid as Royalties by N.P.C. will be the subject of an account,
6. costs be awarded to the Appellant against the Nauru Lands Committee,
7. other claims for relief by the Appellants are premature and are not now the subject of this action.


Barry Connell
Chief Justice

