IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Land Appeal No 17 of 2012

Lyn Akibwib and Others	Appellants
And	
Patricia Kepae and Others	1st Respondents
Ricky Tom	2nd Respondent
Nauru Land Committee	3rd Respondent

JUDGE:	von Doussa J
DATES OF HEARING:	5 June 2013
DATE OF JUDGEMENT	18 June 2013
CASE MAY BE CITED AS	Lyn Akibwib & Oths v Patricia Kepae & Oths

MEDIUM NEUTRAL CITATION: [2013] NRSC 6

Catchwords:

Land appeal – *Nauru Lands Committee Act 1956, s.7* – Appeal against determination of Nauru Lands Committee concerning land called "Anwanga" portion 374 Anibare District- Nauru Lands Committee failed to summons interested party to family meeting – Apparent pre-judgment by Committee – Failure to accord procedural fairness– Scope of appeal by way of re-hearing discussed - Determination set aside.

APPEARANCES

For the appellant's	Mr D Aingimea (Pleader)
For the first respondents	Mr R Kun (Pleader)
For the second respondents	No appearance
For the third respondents	Mr S Bliim, Solicitor-General

HIS HONOUR

1 In this appeal brought under *Nauru Lands Committee Act 1956,* the appellants and the family groups they represent seek to set aside Determination GN 224 of 2012 published by the Nauru Lands Committee on 2 May 2012 concerning ownership interests in "Anwanga", portion 374 in Anibare District.

2 That Determination followed a Consent Order made in the Supreme Court on 28 November 2011, in earlier proceedings concerning the same portion of land, which returned the matter to the Nauru Lands Committee to determine anew the beneficial interest holders in portion 374.

3 The first ground of appeal in the present proceedings is that the Nauru Lands Committee did not call the appellants to a meeting to present their submissions, which was the reason the matter was referred back to the Committee in the first place.

4 When the appeal came on for hearing the Court invited the parties to address this ground of appeal first. They did so. Having heard the parties, the Court announced that the appeal would be allowed on the ground that the appellants had not been given the opportunity to be heard to present their case to the Nauru Lands Committee before Determination GN 224 of 2012 was made; and that the matter would again be returned to the Nauru Lands Committee to be re-determined anew.

5 The reasons for this decision now follow. It is necessary to explore the claims of the parties only so far as is necessary to indicate that the Nauru Lands Committee should have heard the appellants.

6 The matter has a long history and involves four family groups who are descendants, according to the present assessment of the Nauru Lands Committee, from two Eamwitamwit tribe sisters who were both married to Adako. The appellants represents three family groups named as Eoe, Atte and Arobobwin, who were descendants of one of the sisters, Eidian, and the first respondents represent a fourth

family group who are descendants of Eipera, a daughter of the other sister, Eirurunang. The second respondent, Ricky Tom, is a member of the appellant's family.

7 Most of the historical facts about these families seem to be in dispute, at least as to the detail, and even the family tree from which this basic background is taken is not agreed in its totality. But the background just given identifies the four family groups presently contesting ownership interests in portion 374.

8 The full history is a matter that must ultimately be determined, and probably the less discussion about it at this point, the better. Suffice it to say that by Determination GN 32 of 2008 the Nauru Lands Committee determined that the four owners were the families of Eipera, Eoe, Atte and Arububwin as to a one quarter interest each, and distributed ownership interests between the descendants in each family group.

9 The Eipera family challenged this Determination in the Supreme Court, represented by amongst others the first respondent in the present proceedings. The Supreme Court proceedings were in Civil Case No 8 of 2011. The estates (families) of Eoe, Atte, and Arobobwin were included as respondents, as was the Secretary of Justice representing the Nauru Lands Committee.

10 Civil Case No 8 of 2011 was ultimately settled between the parties and by consent the following orders, insofar as they are relevant, were entered:

By consent:
1. The decision of the Nauru Lands Committee as regards PL Amwnge, Portion 374 in Anibare and published as GN 32 of 2008 in Government Gazette No. 8 of 23rd January 2008 is set aside and the matter of the beneficiaries of the said PL Amwange is to be redetermined anew by the Nauru Lands Committee.

2 The new decision of the Nauru Lands Committee shall be gazetted with the usual provision for appeals.

11 The direction to the Nauru Lands Committee was clear: the beneficiaries of portion 374 were to be re-determined anew.

12 It now transpires that the Determination No 8 of 2008 had been replaced by further Determinations in 2008 and 2009 but to the same effect. Nothing turns on this. The parties agreed that following the Consent Order the Nauru Lands Committee was to determine anew who were the rightful beneficiaries.

13 The Nauru Lands Committee held a family meeting on 15 March 2012. The Committee invited a number of members of the Eipera family but no-one from the Eoe, Atte or Arububwin families.

14 The Nauru Lands Committee in its Response in these proceeding says it did this as it considered the Land Register Book of 1928 showed Eipera as the sole owner of portion 374. The Nauru Lands Committee considered further support for the conclusion that the Eipera family were the beneficial owners could be found in the outcome of another set of proceedings in the Supreme Court, Land Appeal No 1 of 2008, which had been abandoned by the Estates of Eoe, Atte and Arobobwin.

15 The Nauru Lands Committee concluded its Response by informing the court:

> "*…the Appellants were not invited to the family meeting because they were not descendants of Eipera. They are descendants of Eidian. Although Eidian's sister was Eirurunang, the mother of Eipera, she* (i.e. Eidian) *was not the recorded owner of Amwange.*"

16 That the present appellants, the families of Eoe, Atte and Arobobwin, claimed an interest in portion 374 was well known to the Nauru Lands Committee. They had been earlier named as beneficiaries in the Determination set aside by the Consent Order, and had been parties to the Supreme Court proceedings in which the Consent Order was made. For these reasons alone, the Nauru Lands Committee should have included representatives of the appellant families in the family meetings, or at the

very least held a separate meeting with them to give them the opportunity to be heard and to lay out their claim to be entitled to beneficial interests. The failure of a decision-maker to give an opportunity to a party with a known interest in the matter is to deny the interested party procedural fairness. The relevant legal principle which applies in cases such as this to the Nauru Lands Committee has been succinctly stated by Eames CJ in *Marisa Cook & Oths v Aburuwe*[1]:

> *"The Nauru Lands Committee was obliged to give to those with an interest in its decision a fair opportunity to present their claims* (Adiedabwe v Bill [1975] NRSC 3). *What constitutes a fair hearing must be judged by the whole of the circumstances of the case."*

17 In this case the failure to accord a hearing to the appellant families is made the more serious by the fact that enquiries had been made by the appellants with the Nauru Lands Committee as to when they would be called and heard, thereby emphasizing the need for them to be heard, but they heard nothing from the Nauru Lands Committee before they learned of the publication on 2 May 2012 of the new Determination that removed them as beneficiaries.

18 The appellants informed this Court that they consented to the earlier Determination in their favour being set aside as they wished to have the opportunity on the reconsideration of beneficial ownership by the Nauru Lands Committee to adduce further material which their researches had uncovered that would make their claims even stronger than appeared from the material before the Nauru Lands Committee in 2008. They wanted to be heard by the Committee so as to give them the opportunity to produce and explain this material.

19 Besides failing to accord the appellants, as interested parties, the opportunity to be heard it seems that the Nauru Lands Committee had predetermined the matter in favour of the Eipera family even before the family meeting was called. To prejudge an issue in this way constitutes another failure to accord natural justice which

[1] [2013] NRSC 2 at [107]

renders the decision null and void as a matter of law.

20 This is a plain case where the Determination must be set aside because procedural failures occurred in the decision-making process.

21 Mr Kun boldly sought to avoid this result by saying that because this appeal is an appeal by way of rehearing the appellant's could have their hearing before this court which could then undertake the task of deciding the beneficial entitlements in portions 374. Whilst new evidence can be received by an appellate court hearing an appeal by way of rehearing, it is not the intent of such an appeal that the court should start with a completely vacant file and proceed to hear a fresh case presented as if the court was sitting as a trial court. The appellate court starts with the evidentiary material that was before the tribunal, receives additional evidence so long as that was not evidence that the party seeking to tender it could have called before the original decision-maker but simply failed to do so, and then decides the merits of the case on all that material then before it including the material before the original decision-maker.

22 Here the decision of the Nauru Lands Committee was so plainly wrong that it must be set aside. Moreover the Committee has not had the benefit of receiving, let alone considering, the case which the appellant wishes to present.

23 The Nauru Lands Committee is a statutory body whose members are appointed by Cabinet because of their particular experience and backgrounds which equip them to undertake the very difficult task of determining beneficial ownership according to the customs and laws of Nauru. The court should be careful not to usurp that function by allowing parties to present on appeal an entirely new basis for their claim that the Nauru Lands Committee has not seen, and which it has had no opportunity to analyse against its own records and registers.

24 The appellants have expressed concern that because the Nauru Lands Committee has now made two different Determinations, they have lost confidence in it. Although the Committee fell into error in reaching a decision in the present case without hearing the appellants, there is nothing before the court to suggest that the members of the Committee who considered the material available at the time of their decision acted otherwise than in good faith and in a conscientious attempt to reach the correct answer. I am not persuaded that there is any reason to doubt that if the appellants produce additional evidence, including further public records relating to portion 374, that the new material will not be properly considered and accorded due weight. However, as a matter of prudence, the Committee should consider including in the quorum of members now to consider afresh portion 374 members who have not been parties to the earlier Determinations.

25 Although this appeal must be allowed, I do not consider that any order for costs should be made. The parties will use the research work that they have undertaken to support their respective positions before the Committee, and that is the tribunal which should receive and consider it, at least in the first instance.

26 The appeal will be allowed. Determination GN 224 of 2012 is set aside. The matter is returned to the Nauru Lands Committee to consider anew the beneficial ownership of portion 374. There will be no order as to costs.

The Hon Justice J W von Doussa AO QC

18 June 2013