IN THE KIRIBATI COURT OF APPEAL] **LAND JURISDICTION]** **HELD AT BETIO]** **REPUBLIC OF KIRIBATI]**		**Land Appeal No. 7 of 2014**

BETWEEN	**ROMY POSADA** **TEANAU POSADA**	**APPELLANTS**
AND	**RIIN POSADA** **ARITAAKE KIENENE**	**1st RESPONDENT** **2ND RESPONDENT**

Before: Paterson JA
Blanchard JA
Handley JA

Counsel: *Banuera Berina* for appellants
Kiata Kabure for 1st respondent
Taoing Taoaba for 2nd respondent

Date of Hearing: 12 August 2014
Date of Judgment: 15 August 2014

JUDGMENT OF THE COURT

1. This is an appeal by the former husband and a daughter of the first respondent (the former wife) who owned land at Annauau (the land) from the dismissal by the Chief Justice and magistrates of

their application to review a decision of the Betio Magistrates' Court authorising the sale of part of that land to the second respondent (the purchaser). The Magistrate acted under the *Native Lands Ordinance*.

2. On 28 March 2012 the Betio Magistrates' Court, on the application of the purchaser, and purporting to exercise jurisdiction under s.14 of the *Land Code*, "accepted" the sale of the land, "confirmed" that both parties were bound by the agreement for sale which was an exhibit in those proceedings, and ordered that the purchaser's name be registered on the land as defined.

3. Section 14 provides:

> *"An owner may sell a land ..... if his next-of-kin agree and if the Court, having considered the matter, approve. Before reaching its decision the Court should first consider if the lands remaining to the owner after the sale are sufficient for him and his children".*

4. The magistrate found that the former wife has "more lands left unsold for your children and .... there is still some land left for your children" and noted that "your children have consented to the sale of your land".

5. There was some evidence before the magistrate of the extent and value of the land retained by the former wife after the sale. She retained half of the land at Annauau shown on an exhibit in the proceedings which was presumptuously worth the purchase price

of the half that was sold. There was no evidence about the other parcel she retained, its size or value.

6. The former wife told the Court that she had seven children, but only four "now" because three have been adopted, that her two daughters were married and her two sons who were in Court consented. The sons confirmed their consent to the sale.

7. The requirement in Section 14 for the agreement of the next-of-kin is not subject to any express or implied qualification in respect of married daughters, and if the magistrate acted on a different view he erred. As it happened, one of the married daughters either consented to, or ratified, the sale. The other married daughter, the second appellant, did not consent to the sale and continues to seek to have it set aside.

8. The first appellant (the former husband) claimed to have an interest in the former wife's land, or at least to have standing in the proceedings in the Magistrates' Court.

9. He is a Filipino, and not a native as defined in s.2 of the *Native Lands Ordinance*. As such he was prevented by s.5(1) from acquiring "native land" by sale, gift, lease or otherwise. Land in a statute includes an interest in land. The former husband claimed an equitable interest in the land based on improvements constructed at his expense under a proprietary estoppel by encouragement but s.5(1) prevents any such estoppel being

recognised: compare *Chalmers v Pardoe* [1963] 1 WLR 677, 685 PC a decision on the *Native Land Trust Ordinance of Fiji*.

10. The former husband said that he had a claim, following the divorce, to orders determining "the extent of my interest in our matrimonial property". Proprietary claims are barred by s.5, but, without expressing any opinion on the question, he may have a monetary claim.

11. The former husband was not one of the former wife's next of kin, and had no rights under s.14 of the *Code*. No other basis was suggested for him having standing to oppose a sale of the former wife's land under s.14. The appeal by the former husband should be dismissed.

12. The daughter, being one of the former wife's next of kin, has rights under s.14 and clearly had standing to object to the sale.

13. She was not notified of the proceedings, and the former wife did not seek her consent to the sale.

14. The daughter said that she knew the purchaser and her husband because they were customers of the shop she owned with her husband, and they knew she was a daughter of the former wife. When the daughter heard about the sale she went to see the purchaser who told her that she and her husband asked the former wife about the daughter and were told that if the daughter asked about the sale to send her to the former wife. (Record p. 231).

15. This is corroborated by the purchaser (Record p. 38) who said that she and her husband were told before the sale that they "had nothing to worry about because she [the former wife] would take care of everything". However, as the Chief Justice found, the former wife "deliberately bypassed her daughter who was an interested person in the ..... land" (p. 7).

16. The evidence of the former wife before the Magistrates' Court was certainly economical with the truth, but she is not recorded as saying that the daughter consented, and the magistrate's finding that all the children did (Record p. 130) was based on inferences from her evidence rather than any outright falsehood.

17. The purchaser, who was not cross examined in the High Court, was on notice before the hearing that the daughter might be a problem, and at the hearing, that the former wife did not actually claim to have the daughter's consent, and that, unlike her brothers, although living on Tarawa, she was not present at the hearing.

18. The contract of sale provided for a purchase price of $80,000; $40,000 being paid before and at the hearing in the Magistrates' Court, an immediate transfer of the registration to the purchaser, with the balance of the purchase money payable by monthly instalments of $5,000.

19. The purchaser's Certificate of Ownership of the land was not in evidence but it is reasonably clear from other evidence that she became registered as the owner of the land pursuant to the order of the Magistrates' Court.

20. The daughter learned about the sale on 18 April 2012, went to see the purchaser, and then sought legal advice. Her lawyer wrote a letter objecting to the sale the same day (Record p. 165) which the daughter said she delivered to the former wife and the purchaser. The purchaser admits receiving the letter (Record p. 118), and was thus in no doubt that the daughter was objecting to the sale.

21. The daughter had not been a party to the proceedings in the Magistrates' Court and could not appeal from the decision approving the sale. Her obvious remedy in the High Court was an application for review under s. 81(1) of the *Magistrates' Courts Ordinance*. On such an application the High Court may (subsection (3)) set aside the judgment or order below and substitute the judgment or order which ought to have been made, or grant a new trial or other relief. Relief in such review proceedings is discretionary ("the High Court may").

22. On 24 April 2012 the lawyer for the former husband and daughter filed in the High Court a notice of motion for review supported by their affidavits. The process was stamped with the seal of the High Court but, in accordance with what we understand to have then been the general practice in the Registry, the lawyer was not given

a return date for the notice of motion and the Court documents were not then served on the former wife or the purchaser.

23. Although the daughter and her lawyer knew from a copy of the record in the Magistrates' Court, that the former husband had obtained, that the purchaser was obligated to pay the former wife $5,000 a month off the balance of purchase money, nothing appears to have been done to obtain a return date until the lawyer wrote to the Chief Registrar on 23 April 2013. The first return date for the notice of motion was 12 September 2013.

24. A return date should have been granted within a reasonably short period, but in any event the former husband and daughter should have made an urgent interlocutory application to the High Court for an injunction to restrain further payments to the former wife. Such an application, intended to preserve the status quo, would have enjoyed good prospects of success.

25. The purchaser continued to pay the instalments under the contract increasing her equity in the property. She claims that, having taken possession, she and her husband spent money on improvements to the property and money and time in clearing and cleaning up the land.

26. The next move by the former husband and the daughter was to apply to the Magistrates' Court on 29 August 2012 for a stay of the order approving the sale. The application was heard on 25 September 2012. The former wife and the purchaser were

represented by the same lawyer. By that time the purchaser had paid $71,500 off the purchase price (Record p. 139). The magistrate delivered his reserved decision on 1 October (Record p. 162) and granted a stay of execution.

27. These proceedings were referred to in the High Court but the minute was not in evidence. We exercised our powers under s.81(1) of the *Magistrates' Courts Act* and admitted translations of the minute of those proceedings and the stay order granted by the magistrate. The stay was granted when only $8,500 remained unpaid of the original debt of $80,000. The minute does not disclose whether the lawyer for those respondents was present on 1 October to take the magistrate's reserved judgment, and if not, whether they or the lawyer was notified of the order.

28. However on 8 November 2012 (Record p. 189) the former wife and the purchaser applied to the Magistrates' Court for confirmation under s.14 of a variation to the agreement for sale to increase the frontage by 13.8 metres, and the price by $30,000. The Court accepted the variation and confirmed the registration of the purchaser in respect of the additional land (Record p. 136).

29. The Magistrate found that the former wife "as well as her children have all agreed to the sale of this land". While this reflected the evidence, the magistrate was deceived by the son Carlo who was acting for the former wife, then in Rarotonga, and the purchaser who knew that the daughter did not consent.

30. We find that the confirmation decision of 8 November 2012 and the registered title to the additional land were obtained by and through fraud, and the purchaser's title is not protected by the indefeasibility provisions in section 4 of the *Native Lands Ordinance* as amended in 2011. Moreover, as the Chief Justice concluded (p. 8):

> *"No transaction over the land should have been done [following the stay], until this Review proceeding was determined".*

31. The application for review was heard by the Chief Justice and two magistrates on 26 February 2014 and dismissed on 27 June 2014.

32. The Chief Justice declined to find (p. 10) that the purchaser acted fraudulently in obtaining the magistrate's order of 28 March 2012. She was on notice that the daughter may not have consented to the sale but notice is not fraud. She was not cross examined in the High Court and this Court cannot find that she acted fraudulently at the hearing on 28 March 2012.

33. The former wife acted fraudulently before that hearing by telling the purchaser (Record p. 112) that "all my children agreed". The purchaser may therefore have obtained title "through" the fraud of the former wife and her otherwise indefeasible title may not have been protected by s.4 of the *Native Lands Ordinance* as amended. We do not need to decide this question.

34. The review proceedings before the High Court were not an appeal in the strict sense but it was accepted by Counsel that an order on

review setting aside the magistrate's decision of 28 March 2012 would defeat the indefeasibility conferred by s.4(2). We agree. This may be so because "appeal" in that subjection has a wider meaning, or because an order on judicial review setting aside an order of the Magistrates' Court approving a transfer would have retrospective effect. The nullification of the order would leave the transfer exposed as one which had not been approved by the Court. Unless the Court adopts one or other of these constructions an interested party, who was not joined and had no right of appeal, would be left without any remedy against the indefeasibility of the transferee's title.

35. The Chief Justice refused the application by the former husband on discretionary grounds (p. 10).

36. He refused the daughter's application because the other children consented to or ratified the sale, and the former wife was left with sufficient land for herself and her children. He construed s.14 of the *Lands Code* as requiring "consultation" (p. 10) and held that the strained relationship between the former wife and the daughter was not "conducive to any chance of a fruitful consultation" and dismissed the daughter's application. However s.14 does not require "consulting" with the next of kin but their approval.

37. The Chief Justice added that the Court could not overlook the fact that the daughter had later gone into possession of some of the mother's land and remained there without her consent. He said (p. 12):

"It would therefore take very hard convincing for the Court to grant her indulgence and accord her the relief that she is now seeking in those circumstances. He who comes to Court seeking justice and fairness must come with clean hands".

38. The principle referred to by the Chief Justice is that he who comes to equity must come with clean hands. The common law principle was a narrow one that barred plaintiffs whose cause of action arose from their own serious wrongdoing (*"ex turpi causa actio non oritur"*), or serious illegality.

39. The daughter was not seeking equity, and was not seeking an indulgence. In any event the maxim of equity only applies where the impropriety complained of has "an immediate and necessary relation to the equity sued for": *Moody v Cox* [1917] 2 Ch 71, 85-6 CA. The daughter's conduct in relation to other land owned by the former wife has no such relation to the relief claimed in respect of the land.

40. However the delay between 24 April 2012 and 12 September 2013 in obtaining a return date for the notice of motion for review of the decision of 28 March 2012 is significant, and the purchaser would suffer serious prejudice if that decision were now set aside. She has paid the whole of the initial purchase price of $80,000 and would lose both the land and its price, which the former wife has spent and could not repay. She would also lose the benefit of the improvements made by herself and her husband.

41. The purchaser first became aware of the existence of the review proceedings on 25 September 2012 when her lawyer was shown the documents at the hearing of the stay application in the Magistrates' Court. By that time all but $8,500 of the purchase price had been paid. Even then the High Court process was not served for another twelve months.

42. As we have stated already, review under s.81 of the *Magistrates' Court Ordinance* is discretionary. Relief by way of certiorari at common law is also discretionary and delay is a relevant factor: Halsbury 3rd ed Vol 11 Crown Proceedings para 264. The general principle, in its application to prohibition, was referred to in *Yirell v Yirell* (1939) 62 CLR 287, 306.

43. In our judgment the delay in effectively commencing the review proceedings, the failure to seek urgent interlocutory relief, and the prejudice the purchaser would suffer if the decision of 28 March 2012 were now set aside, provide sound reasons for refusing the daughter any relief in respect of that decision.

44. The position in respect of the decision of 8 November 2012 is very different. We have already held that it was procured by the fraud of the former wife to the knowledge of the purchaser. The decision was obtained after the daughter had obtained a stay order from the Magistrates' Court and after her lawyer had become aware of the pending proceedings in the High Court. In cases such as this, notice to a lawyer is notice to the client.

45. In agreeing to purchase additional land, and in joining with the former wife in seeking the approval of the Court contrary to the known wishes of the daughter, the purchaser was deliberately running the risk that the sale could be set aside. We can see no proper ground for exercising our discretion to refuse relief in respect of that decision, and good reasons for granting it.

46. The review proceedings were formally commenced on 28 April 2012, but not effectively commenced until the first return date was obtained on 12 September 2013. The proceedings did not, in terms, challenge the decision of 8 November 2012 but that challenge was fully litigated in the High Court, and the absence of any formal amendment cannot prevent this Court dealing with the challenge to that order, which must be set aside.

47. The appeal by the former husband failed completely, but took up very little time during the hearing. The appeal by the daughter has succeeded in part. In the circumstances we think that the daughter should receive a partial order for costs which we assess at $250.

48. Section 14 of the *Lands Code* should be reviewed by the Maneaba ni Maungatabu. On its face it appears to require the unanimous consent of the owner's next-of-kin. The need for their consent was emphasised by this Court in *Timi v Tong* [1997] KICA 8 and was again referred to in *Iererua v Kee* [2004] KICA 13. In both cases the owner's children were united in their attempts to have the sales set aside and the right of a single next-of-kin to prevent a sale

supported by his or her parent and siblings did not have to be considered.

49. We do not express a view on the construction of s.14 beyond saying that a construction which would give each next-of-kin an effective veto is at least open on the language of the section. The Magistrates' Court has not been given an express power to override the unreasonable opposition of a minority.

50. There are further problems. Some of the next-of-kin, whether children, or grandchildren whose parent has died, may be under 18 and unable to consent. It is not clear that a guardian other than the owner, appointed by the Magistrates' Court to represent under age next-of-kin, could consent; or that the Court could consent on their behalf. There may be other difficulties because next-of-kin are living abroad, or may have lost contact with their relatives in Kiribati.

51. For all these reasons it would be desirable if the Maneaba were able to give early consideration to the section, and, if appropriate, to clarify the meaning intended or amend the section.

52. The following orders are made:

1. Appeal by first appellant dismissed. No order as to costs.

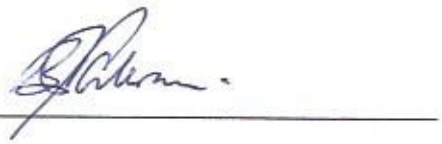
2. Appeal by second appellant allowed in part.

3. Set aside the judgment of the High Court of 27 June 2014 in so far as it dismissed the notice of motion by the daughter.

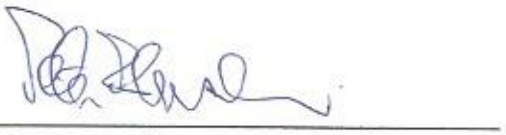
4. In lieu thereof substitute an order setting aside the decision of the Magistrates' Court at Betio of 8 November 2012 approving the sale of an additional frontage of 13.8 metres for $30,000 made in what was said to be a continuation of CN 343/12.

5. Appeal by the second appellant otherwise dismissed.

6. Respondents to pay $250 as a contribution to the second appellant's costs of the appeal.



Paterson JA



Blanchard JA

Handley JA