

In the Supreme Court of Nauru

Civil Action No. 14/2004

BETWEEN: DECI TEMAKI PLAINTIFF
AND: RENE HARRIS DEFENDANT

Reuben Kun for Plaintiff
Pres Nimes for Defendant

Hearing dates 3,6 7 December 2004
Friday 10th December 2004

DECISION

The Plaintiff is the joint occupier with her brother Calvi Canon of a dwelling house situated on land known as CL Biteiye Portion 25 Yaren. The mother of the plaintiff, Lydia Canon, who died on 8 December 2002, was the previous occupier of the house. The plaintiff and Calvi Canon have continued in occupation following the death of the mother.

Lydia Canon was a one-sixth landowner of Portion 25 and, upon her death, this was distributed as 1/18" to the son Calvi and 1/18 to the grandson, Silas Paul Canon.

There are no other dwelling houses on the Portion in question. However, there is a small Restaurant, known as Wokinn restaurant, which adjoins the dwelling house of the Plaintiff, and there is a government building which houses the Nauru Telecommunications. The restaurant is a small business whose operation is completely controlled by the children of Lydia Canon. On the other hand the site for the Telecommunications building is leased by the Government, with rentals paid to the present landowners of Biteiye Portion 25.

The defendant is one of the landowners with a 1/42" share.

The land in question traces back to the marriage of Awita (born 1885) to Emwarinet Abubu (1881). Emwarinet bore Awita nine children. The present landholders of Biteiye Portion 25 derive from five of those

Children, namely, Etouwomo Awita, Mabel Eidamagin Awita, Edouw Dorcas Awita, Eipumwen Awita, and Noel Awita.

The matter involving the Court has arisen from a dispute concerning the construction of a building by the defendant on portion 25. This dispute arose in the following manner.

During the year 2000 there was a discussion between the defendant and his two sisters Lydia Canon and Paula Mwardaga relating to the land in question. Apparently, Elizabeth Amram, then holding 1/7" of the land, had requested to build on the land for her son Jeremy. The three were not partial to the request but discussed a business arrangement that involved defendant and Lydia.

It appears that this would, at least, thwart the request of Elizabeth Amram and at the same time provide a business opportunity for the defendant and Lydia and her family. It was to be a hardware store. There is some discrepancy about how the ultimate proposal arose between the accounts of both sides, but there was a proposal and it appears that the expense of the enterprise so far as the construction, fitting out and the goods supply would be that of the defendant. It seems the input of Lydia C. was to be the land so far as she was able to grant it. The arrangement was entirely verbal and neither side in evidence was very clear as to its content except to say that the defendant's view was that it may provide employment for the plaintiff and brother but profits would stay with the defendant as he would be the supplier of the capital.

In or about August 2000, the defendant commenced building but it ceased in October of that year. The plaintiff says this stopped because of a change of heart by the sister, Lydia Canon, whilst the defendant states that it was because of a lack of materials and, more importantly, at that time he was President and he felt that he should not engage in the construction of a business at that time. The defendant denies that his sister request he cease the project. The explanation given by the Plaintiff for her mother stopping the project was a worsening relationship between families of sister and brother in what was described as a family quarrel between the grandchildren.

In December 2002, the mother of the Plaintiff, Lydia Canon died. Her husband had predeceased her, as had one of her sons, Micah. The beneficiaries of the estate were the Plaintiff Deci Tamaki, Calvi Canon a son, and Silas Paul Canon, the first son born to Deci out of wedlock.

Whilst the evidence of Calvi was that the mother, Lydia, just before her death made a declaration to him that the construction by the defendant should not continue and that a purported gift to the defendant of Lydia's entire interest, which was wholly owned by her, of the power station land was to be rescinded. It had at that stage never been perfected by transfer under the Lands Act. The Plaintiff said this declaration was not conveyed to the defendant brother as the plaintiff simply waited to see if the defendant made any attempt to resume construction on the land, in which case she would stop the construction. The defendant denies he was aware of any of the declarations by the sister and his visits and those of John Dube to her in hospital in Melbourne revealed nothing of this. He stated he remained on good terms with Lydia right up to the date of her death.

The defendant attempted to resume the construction of the building in October 2004, but was stopped by the Plaintiff who sought the assistance of the Police and took action in the Supreme Court.

What plaintiff is seeking

1. A declaration that the 'family agreement' produced in evidence by Bobby Eoe is determinative of the issue.
2. Orders from the court to prevent any further construction work on portion 25.
3. A further order restraining the defendant from entering upon portion 25 without the consent of the plaintiff.

The position of the Defendant

1. Whilst the plaintiff has a right to occupy and enjoy the land, the plaintiff does not have exclusive possession of the land to the exclusion of other landowners including the defendant.
2. The defendant contests that the plaintiff herself has a right further to build on the land.
3. The defendant maintains that there was an understanding between himself and his two sisters that whoever settles first on any land owned by the family will have first right to build and that if others wish to build on the same land the consent of the first settler will have to be sought.
4. However, the defendant denies that there was a family agreement in the terms stated by Bobby Eoe.
5. The defendant maintains that the proposal accepted by his sister Lydia to build a hardware store on portion 25 has not ceased and the arrangement still subsists after her death, and

further that there have been no objections conveyed to him by other landowners other than the present occupiers, that is, the Plaintiff and Calvi Canon.

Salient Facts

The Court accepts Deci Tamaki and Calvi Canon, present landowners from the estate of Lydia Canon, as the present occupiers of the dwelling house situated on Biteiye Portion 25.

The list of landowners presented to the Court by the Plaintiffs as landowners of Portion 25 Biteiye has not been challenged and is accepted save and except for the fact that the list contains two significant groups of landowners not yet fully described under the estates of Elizabeth Amram (deceased) and Jenny Eoe (deceased).

On Biteiye portion 25 there is a building housing the Telecommunication station. The area of land housing the building is under lease to the Nauru Government for which the Nauru Government pays rent. The rental received is distributed to all the listed landowners in the proportion of their stated interest.

The Court acknowledges that there was a proposal emanating from the meeting of the defendant and his two sisters, Lydia and Paula, in 2000 to build a store on Portion 25. However, on the evidence it is unclear what were the terms and conditions of the proposal, particularly, in respect of the share, if any, of Lydia in the proceeds. On balance, the Court accepts what was stated by the defendant that in return for consent to build he would finance the project and take the profits but offering employment to the family. The building was then commenced in August 2000 and it stopped in October 2000.

Contentious matter

The plaintiff contended that her mother was surprised at the speed with which the defendant commenced the project in 2000, and because of a family quarrel surrounding grandchildren determined that the building should cease and it did in October 2000. The defendant, on the other hand, stated that he had told his sister when he commenced and she said to go ahead. The stops and starts to the building, he stated, were due at various times to lack of equipment and lack of back fill for the foundations but, particularly, on two occasions when he was President he

considered it was not in the interests of the Presidency to continue the building.

The second contentious matter was the evidence of the Plaintiff and particularly of Calvi Canon of certain declarations of her mother as she neared death to the effect that the children should ensure that the building was not completed and that her gift, following the death of Micah, of the power station land to the defendant should be revoked and not perfected by transfer. The defendant maintained that he had a good relationship with his sister right up to her death. She never mentioned either about the building or the power station in his meetings in hospital with her in Melbourne and John Dube, a close relative, who visited her continuously was never ever informed of the situation. To the Plaintiffs, this matter came to a head when the mother was informed by Calvi that the arrangements for her funeral at Aiwo had been cancelled by the defendant.

The third matter was the family agreement introduced in evidence by Bobby Eoe. The statement regarding the family agreement had been attached as an exhibit to an affidavit sworn by the Plaintiff on 15 October 2004.

Bobby Eoe held in his own right a 1/7" interest in Biteiye Portion 25. He was an acknowledged elder of the wider family, the source of his share coming from the seventh child of Awita and Emwarinet, namely, Eipumwen Awita who had married Ralph Eoe Deadu. His statement is an exposition of family practice in relation to lands held by the family, namely, the children of Awita and Emwarinet. The object of the exercise was to arrive at a formula that would avoid, in the words of Bobby Eoe, 'unnecessary conflicts and pains now and in future amongst the family'. He stated that, in the past, this family agreement was verbal and unwritten and was passed down by the older members by word of mouth and needs to be respected. He has, therefore, taken it upon himself to reduce it to writing.

Simply put, the family agreement endorses the member of the family who first decides to build on a certain piece of land in that no other member will build subsequently on that land without the consent of the first occupier.

Bobby Eoe applied this rule to Biteiye Portion 25. He stated that as Lydia Canon first built on the land, therefore, Lydia's wish or those of her immediate family successors must prevail over other family members.

The defendant denied the validity of the formula and did not believe it to be an unswerving rule of the family. In any event, it was the defendant's contention that he had obtained the consent of his sister Lydia and that this still prevailed.

The Court and the outcome of the dispute

Nauruan land law does not provide any effective or sure answer to the problem of the usage of land amongst landowners. There are under the Lands Act 1976 provisions for dealing with land acquired or rented by the Government for public purposes. But the rules contained in the Act certainly do not apply with respect to usage of the land among existing landowners.

When land portions were larger and land was more closely owned, these problems of usage, particularly with a smaller population were comparatively insignificant or, at least, easier to resolve. However, as land ownership develops over and over again into diminishing fractions with more broadly based family interests and there is a rising population, the usage problem becomes ever so more acute. There is no guiding light, to this point of time, through legislation.

Probably, for that reason, the simple formula contained in the Eoe family statement is superficially attractive but it may introduce more problems than it solves. If a small landholder is fortunate enough to be the first occupier and he or she proves recalcitrant towards the development of the block in the interests of all landholders should that landholder and successors be permitted to resist in perpetuity.

After all, a first landholder occupier is still only an occupier and is not an owner beyond the fraction that he or she holds.

At the same time, in this case, the defendant is putting to the Court that the consent he won from his sister entitles him to build a business and extract profits irrespective of any rights of other landowners of the said Portion.

Where, in fact, is the equity in all this? Furthermore, there was a paucity of evidence. For example, on the one hand the Court has been asked to accept the evidence of the Family Agreement simply on the exposition of Bobby Eoe without any other credible corroborating material to show where such agreement has been enforced on family lands. On the other hand, there was no other evidence produced to the Court of many assertions of the defendant. For example, his sister Paula present at

the meeting for the business proposal, was not called. There were many instances where assertions were made that supposedly had consequences fatal to one side or another that were nothing but bare assertions such as the family quarrel, stated as the enmity between grandchildren which resulted, so it was said by the plaintiff, in the stopping of the business proposal or agreement.

In all of this, the Court is being asked to exercise its judgment to make a pronouncement for one side or the other. There really is no hard law here, and the proposal cannot be enforced as contractual. It is more in nature of a private revocable licence of the occupier to the defendant. This in the context is unsatisfactory. Rather the Court has been called in to act, as it were, as a mediator. That is not the role of the Supreme Court. The solution in such a case as this must, in the end, rest with the owners of the land. Unfortunately, in such disputes as this there are no legislative guidelines. At least, it must be said for Bobby Eoe's family agreement that with all its imperfections it is an attempt to set guidelines within the confines of the family.

On the evidence before it, the Court is not prepared to pronounce upon the contentious matters, namely, the stopping of the business proposal, the mothers declarations, and the Eoe family agreement. The Court is not at this juncture, on the evidence, satisfied that there was a decision by Lydia to stop the project. Mr. Kun for the Plaintiff did not press that the evidence of Lydia constituted dying declarations and, as is stated above, the Eoe evidence regarded as a trump card, one suspects, was not backed by any tangible evidence of its enforcement or even other family evidence to support it.

At the same time, on such a verbal proposal without any corroborating evidence of the terms and conditions, the Court can hardly give the green light to the development. One can see that there is a fair measure of entrepreneurial value in the project but that in itself is not sufficient to permit its present development. It requires consent, and on terms, of the landowners, not just those presently occupying in a dwelling house part of the land in question. A meeting of all landowners may give support to the Eoe family agreement but it may not. Whatever direction such a meeting takes, it requires a decision one way or the other.

The Court is prepared to assist such a meeting by outlining matters which it could consider. Nauru has no legislative guideline or direction and there are no planning laws. Different considerations may well apply where there is a dwelling house proposal as against a commercial development as in the present case. One assists the housing of members

of the wider family whilst the other invites commercial considerations for the landowners.

Landowners, therefore, might consider the following in this sort of commercial case –

- a. The views of the present occupiers of the portion
- b. The size of the land portion
- c. The nature of the development to this point and its cost under the arrangement between the defendant and Lydia Canon.
- d. The entrepreneurial value of the site for a commercial entity.
- e. The sharing in the project as to cost of development, possibility of partnership, and returns.
- f. The overall value of the enterprise in terms of future employment and usefulness.

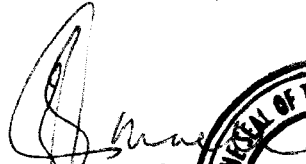
Of course, the landowners are at large. They may not wish to consider these matters at all and decide on the basis of the Eoe family agreement. However, the opportunity should be given and clearly enough a landowners vote at any such meeting should be based on the value of the fractional amount each landowner holds. Any such decision should be recorded and signed by a chosen representative. Often for such meetings, it is useful to have an acceptable independent Chairman but that, of course, is up to the landowners.


The Court has come to the firm conclusion at this point of time and on the evidence before it that it cannot itself determine this issue between the two parties. Where it is a dispute by landowners as to usage of land, the matter must be settled by the landowners as a whole. Landowners may determine a course of action for all future disputes by a formula agreement or they may decide to meet each time to decide the issue. That, of course, is up to them.

However, as the matter presently stands, the defendant has not the necessary consent of the landowners to proceed with the development on Biteiye portion 25.

The Court is not prepared to make an order for a declaration in terms requested by the Plaintiff.

To avert the stalemate, the Court, however, is prepared to make a consent order for a landowners meeting to determine the issue whether the development is to proceed or not and upon what terms.


BARRY CONNELL
CHIEF JUSTICE



The seal of the Supreme Court of the Republic of Mauritius is circular. It features a central sunburst emblem. The text "SUPREME COURT" is written along the top inner edge, and "REPUBLIC OF MAURITIUS" is written along the bottom inner edge. A handwritten signature, "10/10/04", is visible across the bottom portion of the seal.