IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Civil Case No.8 of 2011

Patricia Kepae and Others
Noah Neneiya and Others
Nyoka Bill and Others — Applicants

V

Lucia Dabwadouw and Others — 1st Respondents
Estates of Eoe, Atte, and Arububwin — 2nd Respondents
Nauru Lands Committee — 3rd Respondent
Secretary for Justice — 4th Respondent
Ronphos Corporation — 5th Respondent

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JUDGE:	Eames, C.J.
WHERE HELD:	Nauru
DATE OF HEARING:	12 July 2011
DATE OF RULING:	12 July 2011 [Ex tempore]
CASE MAY BE CITED AS:	Kepae and Others v NLC and Dabwadouw and Others (2)
MEDIUM NEUTRAL CITATION:	[2011] NRSC 15

Judicial review - Application under Order 38 *Civil Procedure Rules* 1972 for leave to commence proceedings for judicial review of determination of Nauru Lands Committee - Applicants initially brought application for leave to appeal out of time under *Nauru Lands Committee Act* 1956 - Leave purported to be "granted" by former Registrar - Two years after ostensible grant of leave, Court held leave invalid - Whether leave to commence judicial review should be granted.

APPEARANCES:	PRACTITIONERS
For the Applicants	Mr R Kun (Pleader)
For the 1st and 2nd Respondents	Mr D Aingimea (Pleader)
For the 3rd, 4th Respondents	Mr D Lambourne

CHIEF JUSTICE:

1 The applicants have applied under Order 38 of the Civil Procedure Rule s1972 for leave to commence proceedings for judicial review. The applicant also seeks declaratory relief. An application for leave must be made by originating summons and be heard ex parte by virtue of order 38 1(2). By order 38 rule 2 leave may not be granted unless the application or leave is made within three months after the date of the decision (in this case the date of published determination) under challenge. The court may allow an application for leave made later than three months provided that "the delay is accounted to the satisfaction of the registrar". If leave be granted to commence proceedings for judicial review the suit must be commenced by writ of summons.

2 In this case the determination of the Nauru Lands Committee which is under challenge was published in Government Gazette Number 8 on 23 January 2008, by Gazette Notice Number 32 of 2008. The applicant, Patricia Kepae, has deposed the applicants, who make up the majority the family, were not informed of a family meeting to be conducted by the Nauru Lands Committee and so did not attend. She further states, "if the majority of the Epera family were unable to attend the meeting, for whatever reason, then it could not have been a true family meetings".

3 Mrs Kepae swears that she first became aware of the Committee's decision more than a week after it had been published in the Government Gazette on 23rd of January 2008. She did, however, attend a family meeting called by the Committee and held on 15th of January 2008. She says that at the meeting only four families were invited, out of 10 interested families. That meeting was convened by the Nauru Lands Committee two days after the 21 day time limit for an appeal had expired under the *Nauru Lands Committee Act.*

4 It is apparent that the Nauru Lands Committee and those who attended the meeting believed that the Committee had power to reconsider its determination and reverse it. It did not in fact have the power to reopen the matter after its determination had

been published, it being functus officio (see *Charlie Ika v Nauru Lands Committee*[1]).

5 Although the meeting allowed the family and others with an interest in the land to express their disagreement with the Committee's decision, the committee did not change its mind.

6 The applicants issued an application for leave to appeal out of time.

7 I delivered judgment in *Giouba v Nauru Lands Committee*[2] on 15 March 2011 wherein I dismissed a land appeal on the basis that there was no right to apply for an extension of time for an appeal under section 7 of the Nauru Lands Committee Act 1956. The same conclusion had been reached by Millhouse, C.J. in his ruling in this case on 22 May 2010, but he delayed making a final order dismissing the appeal, permitting Mr Kun to be heard if he sought to be. Mr Kun had not been able to attend court dues to illness. It is clear, however, from his judgment that Millhouse, C.J. held there to have been no right of appeal.

8 Millhouse C.J. noted that on 12 March 2008 the former Registrar had purported to grant leave to appeal to the applicant. He had no power to do so. However, from 12 March 2008 until the decision of Millhouse C. J. on 22 May 2010, the applicants not unreasonably proceeded on the assumption that their proceedings by way of appeal were regular.

9 I permitted the applicant to apply for leave under O 38, and I directed that such an application be made promptly. I directed that the application be accompanied by a draft statement of claim and by affidavit evidence on which the application was supported. I also directed that the proposed statement of claim and affidavit evidence be filed with the court and served on opposing parties.

10 As I have noted, leave to appeal out of time had been granted on a mistaken understanding of the legislation held by the former Registrar. Since he did so on 12 March 2008 the matter had been before the court on a number of occasions before

[1] [2011] NRSC 5
[2] [2011] NRSC 1

Millhouse CJ ruled on 22nd of May 2010 that the appeal should be struck out, subject to Mr Kun applying to be heard further. The matter came before Von Doussa J on 19 October 2010. He directed that the matter so be referred to the following sessions on the Supreme Court.

11 Upon hearing the matter, I concluded that the land appeal should be struck out. The orders that I made with respect to the filing and exchange of documents for the purpose of the application under order 38 were not consistent with the requirements of order 38, however they reflected the fact that there had been a series of hearings between the parties in of the progression of the misguided land appeal and with respect to the application for leave to appeal out of time. Accordingly, there was little point in treating the application for leave, as is specified under Order 38, as an ex parte matter. Nor was I correct to direst that a statement of claim be filed, because no pleadings are permitted in a suit for an order for certiorari. (See Order 38 rule 3(3).

12 The substantive question now for me is whether leave to commence proceedings under order 38 should be granted. Mr Aingimea submitted that leave should not be granted because it is now some 3 years and 9 months since the committee made its decision on 12 October 2007, and some 3 years 6 months since it published its determination. If leave is granted there will be many more months before the action could be heard and be disposed by a decision of this Court. If the Court quashed the decision and the matter was referred back to the Committee then further delay would occur.

13 Mr Aingimea submitted that the delay of that order offends the principal of having certainty as to questions of land title. Mr Kun, on the other hand, submitted that whilst there was substantial delay in this case, it can largely be explained because of the mistaken belief, widely held, that an application for leave to appeal out of time could be granted, and had been. Had it been appreciated that such an application could not succeed, then the applicants would have sought judicial relief at a much earlier time.

14 There is no doubt there was confusion among practitioners as to whether an extension of time could be granted, notwithstanding the fact that both Thompson, C.J. and Connell, C.J had published judgments holding to the contrary. My own decision on that matter was consistent with those previous decisions and with the decision of Millhouse, C.L. Nonetheless, I accept that there was a widespread misunderstanding as to the true position, and that is reflected by the language of Practice Note No 1 of 2006, which set down a procedure for launching land appeals, and which expressly provided for an application for leave to be granted out of time.

15 Mr Kun accepted that there was delay occasioned by his own serious illness from the middle of 2009 into 2010. He had been unable to transfer this case to another practitioner and delay over that period he says should be placed at his door and not that of his clients. Delay may be forgiven (but need not be) where it is the fault of the legal practitioner rather than the lay client.[3]

16 In this case, the most remarkable factor contributing to delay was the incorrect decision of the registrar. That mistake cost more than two years of lost time, which delay should not be visited on the applicants; it was the judicial system that was at fault.

17 It is appropriate to consider whether if leave were to be granted there would an arguable case for the relief sought. Leave would not be granted to pursue a futile claim for relief. For the purpose of this application, I need only consider whether there is an arguable case for relief, and in my view there is.

18 Mr Kun submitted that it would be unjust to deny the opportunity to challenge the decision because they were good grounds for contending that the decision denied natural justice to his clients, by virtue of being given no notice of Nauru Lands Committee meetings.

19 In 2003 and 2006 the Nauru Lands Committee had considered this very land, but without making a decision. On those occasions it invited all relevant people to

[3] *O'Neill v Kaddatz* [1964] NSWR 1280; *Sophron v Nominal Defendant* (1957) 96 CLR 469.

attend meetings, but the deponents contend that that did not happen in 2008, although it was on that last occasion that the Committee actually made a decision which led to a determination that was prejudicial to the interests of those people who had previously been consulted. It is arguable that those persons had a legitimate expectation that they would have been invited to the 2008 meeting. I do not at this stage have to consider and resolve. A decision taken in breach of procedural fairness could constitute an error going to the jurisdiction of the committee rendering it null and void: see *Anisminic Ltd v Foreign Compensation Commission.*[4].

20 I must also consider whether if the application is granted, it would cause prejudice to the respondents, and the degree of prejudice. In this case an interim injunction has been granted which freezes royalty payments. I accept that a grant of leave would produce significant prejudice by extending that order.

21 My initial view in this case was that the delay was so long that whatever be the explanation the interests of certainty required that leave be refused. However, considering the case further, and having regard to the submissions, it seems to me that it would be unjust not to accept that at least two years was lost not because of the fault of the applicants, but for an incorrect decision of the then Registrar. Whilst it is very regrettable that such delays have occurred, I accept that delay has been accounted for.

22 The Court should do all it can to expedite the case, but in all the circumstances, I consider it is appropriate to grant leave to the applicants to commence review proceedings by way of writ. Those proceedings will include claims for declaratory relief.

Dated this 12th day of July 2011

Geoffrey M Eames AM QC
Chief Justice

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[4] (1969) 2 AC 147