SUPREME COURT OF NAURU

[CIVIL JURISDICTION] **Civil Suit No. 47 of 2015**

Between: **Handsome Adumur & Ors**

PLAINTIFFS

And: **Starret Dongabir & Ors**

DEFENDANTS

Before: Chief Justice Filimone Jitoko

APPEARANCES:
Appearing for the Plaintiff: D. Aingimea
A.Lekenaua
Appearing for the Defendant: V. Clodumur (Pleader)

Date of Hearing: 9 November, 2017
Date of Judgment: 13 July, 2018

Catchwords: *Land- Common Ownership – Family agreement – Customs – Rights of landowners- Whether plaintiffs have unfettered rights built on commonly owned land.*

JUDGMENT

BACKGROUND

The land in dispute are land portions 129 and 130 Denigomodu District. The parties to the proceedings, the plaintiffs and the defendants are first cousins. They are all landowners, that is, owners in common, of both portions 129 and 130.

Tsiminita, the grandfather to the plaintiffs and the defendants, was the original common owner with others, of the land portions. Tsiminita had four children; three (3) daughters, Eidme, Eben and Eigabwairo and a son (adopted) Akerungu Dongobir. Tsiminita died some time ago and all his four

children are also deceased. The plaintiffs in this proceeding are the children of the three daughters while the defendants are the issues of Akerungu, the son.

It is accepted that the proprietary rights in Tsiminita's shares to portions 129 and 130, were inherited and passed down to the parties in this proceeding through the four children of Tsiminita. The Nauru Lands Committee had confirmed their rights in the decisions published and gazetted in G/N 19 of 26 March 1986 in respect of the plaintiffs and G/N 74 of 7 November 1990 in the case of the defendants. It is also agreed and established that while every member of the Tsiminita family were owners of the land portions 129 and 130, their shares differed depending on the number of siblings of Tsiminita's children.

It is also agreed that during the lifetime of Tsiminita's children, the three sisters, with the agreement of Akerungu and the family, occupied and developed portions 129 and 130 and built a shopping complex on them. Part of the structure constructed on the property was converted into a store under the name **E & E Store** whilst the Chinese business was also operating from the premises. According to the Register of Business Names' record, produced as *Exhibit E*, **E & E Store** was registered in the names of the first and second-named plaintiffs and one Benoni Detenamo. Similarly, with the consent of the three sisters, their brother Akerungu was permitted to occupy, build and operate a shop named **Star Donna** on the family's commonly owned land known as portion 267 Denigomodu district. The third branch of the family, the Garoa family, were allowed to occupy and develop their other commonly owned property known as land portion 186 Nibok district. The allocation of blocks between the three families of their Location property Denigomodu district were shared along the same line. All these land allocations between the three branches of the family were made on the understanding that any developments and commercial use of the properties with incomes through rentals derived from them, accrued to the benefit of each of these individual families. There was no sharing between them of the incomes derived from each of their economic activities.

With the downturn in the country's economy in the late 1990s, financial and economic hardships affected everyone on the island. Small businesses suffered. The business ventures operating from portions 129 and 130 fizzled out. The Chinese traders closed their shops and left. The shopping complex fell into disuse, vandalized and eventually razed to the ground around 2000. When the plaintiffs tried to build and replace the destroyed building on the land, with the help of Chinese interests, the defendants stopped it.

Mediation

As the dispute involves very close family members, all first cousins, the court entertained the suggestion from the plaintiff's counsel on 29 January 2016 for the dispute to be referred to mediation. The court duly appointed a mediator and for more than one year, he tried his best to bring the two factions together to an agreement.

On 5 May 2017, counsel for the plaintiffs informed the court that her clients have rejected the draft agreement that the parties and especially the Mediator had been working so hard on and that they were proceeding with their action. Thereafter, the parties became very obstinate to the extent that counsel could not even agree to the filing of agreed facts.

Legal Issue

This case turns on one single legal issue and that is whether the plaintiffs have unfettered rights to re-build or build anew on portions 129 and 130 after the old building which they had inherited from their parents/mothers had been destroyed and razed to the ground.

Submissions

Plaintiffs Arguments

In their submission, the plaintiffs contend that the family arrangements that resulted in the allocation of various portions of family owned land namely, portions 129 and 130 Denigomodu to the three sisters (Eidme, Eben and Eigabwairo), portion 267 Denigomodu to their brother(Akerangu Dongobir) and portion 186 Ribok to the Garoa family, were intended to be permanent arrangements. In other words, these allocated land were intended to remain with the families for all times and be passed on to their children, heirs and successors upon their demise.

The plaintiffs' counsel argued that family agreements of allocating of portions of commonly held land to individuals or individual families, amounted to customary grant that bestow "beneficial interest", that is, economic interest or benefit of and from the property, to the holder. In this case, the benefit holders are the plaintiffs. Counsel however conceded that "both the plaintiffs and the defendants have a legal interest in the said lands."

As to the structures on the land, counsel argued that the legal interests of portions 129 and 130 vested in the plaintiffs extended also to the residence, homes and buildings erected on the land. Normally, under the law, permanent structures on land are deemed part of real property. However, the plaintiffs suggest that the customs as well as under the now abolished Nauru housing legislation, gave recognition to these structures as capable of being passed on and inherited by the heirs and successors. Counsel pointed to the Nauru housing scheme under the Nauru Housing Ordinance 1957 and the Nauru Local Government Council 1952 in support of this contention.

The importance and respect given to family agreement or arrangement in deciding land rights and entitlements, the plaintiffs argue, is a major contributing factor to the stability and good order on Nauru. That is also the reason it is given prominence for example in the distribution of intestate estates under the 1938 Regulations. The Supreme Court decision in **Daniel v Cook [1971] NRSC 2** recognised and supported the relevancy of family arrangements, even if such agreement is not published (as was in the case).

The plaintiffs finally argued that while the issue of the demolition and rebuilding was relevant especially with regards to the financial losses that had been incurred, the case is all about "the beneficial ownership or beneficial interest given by agreement". They submit that:

" Where all the parties have a legal interest, and by consent and agreement, they have split the beneficial interest among the family tree. This allows good order to prevail. The Defendant confirmed his knowledge of the agreements in place. He is in fact a beneficiary of the agreement to divide the Location

blocks along the same line. If the plaintiffs renege on that agreement, there would be no way forward as evidenced by the lack of consensus when this matter was in arbitration."

The plaintiffs' redress is for a court's declaration that they have a right and are entitled to build on land portions 129 and 130 Denigomodu district by virtue of the family agreement entered into between their parents and the defendants' parent. Damages and costs are also pleaded.

Defendants Arguments

Counsel for the defendants submit that they remain as owners of land portions 129 and 130 as proven and decided by the Nauru Lands Committee published in Gazette Notices 19/1986 and 74/1990.

The gist of the defendants' legal argument is that a family arrangement only goes to the use of the land but not ownership. The use of the land by a co-owner only gives him/her possession until the purpose of the use is complete or until his/her death. The ownership of the land remains throughout in the beneficiaries as certified by the Nauru Lands Committee.

While the defendants concede that it is perfectly within the right of the three sisters to transfer within their lifetime, the ownership of the shopping complex on land portions 129 and 130 to the plaintiffs, the right to continue to occupy and operate the commercial activities in them was extinguished with the destruction of the buildings that made up the shopping complex.

Analysis

1. Rights and Interests in Property

It is perhaps useful to remember in deciding this case and the issue raised, of the distinction between the rights and interests in property under the law.

A right to property including real property or land entitles the holder of that right to the ownership which includes the right to use, destroy, transfer or alienate the property in question.

An interest in property, entitles the holder of that interest to take some action with regard to that property less the ownership. For example, it entitles him/her to have exclusive possession, to occupy for limited periods or use the property for limited purposes. What the interest holder may not and cannot do, is alienated the property.

Both the right and interest in property can be given or authorized by written law, common law or customary law.

2. Competing Rights and Interests to Land on Nauru

The Nauru land tenure system is based on the concept of common ownership. Land is owned by individuals in common with others. They have rights over the whole land even although they hold only a of it. This is because their rights or ownership are undivided, that is, they cannot be separated from the whole. This is normally referred to as the "unity" of title.

The court in James **Demaunga & Ors v Windy Deireragea Civ.Case 8**/2016 had described the land ownership as follows:

"For example, as between two co-owners, one may hold one-quarter shares as compared to the second who holds one-twentieth shares in the same undivided portion of the land. The law does not recognize any exclusive right of claim to any particular part, section or plot of the portion of the land; nor does it grade their priority of rights of use in terms of their portion of shares. Having a bigger share in a portion of land does not necessarily entitle one to first claim over any particular section of the portion. The right to use can only be obtained through the consent of the majority of all the co-owners of the portion."

On the other hand, situation may arise where only the interest in the land is vested, not the rights to the land. For example, if in this case the three sisters in their lifetimes had transferred the ownership of the building or shopping complex on land portions 129 and 130 to the plaintiffs, they, the plaintiffs, would have acquired only the interests to the land by virtue of their ownership of the structures on the two portions. The interests entitled them to exclusive possession of the land to which the structures are built over but the interests exist only so long as the structures of the buildings remain.

Considerations

There is no dispute to the fact that both the plaintiffs and the defendants are co-owners of the land known as portions 129 and 130 Denigomodu district. There is also no dispute to the fact that during the lifetime of the parties' parents, a family agreement was reached wherein, inter alia, the above-named two land portions were to be occupied and used by the three sisters, Eidme, Eben and Eigabwairo.

In his evidence, the first-named plaintiff, Handsome Adumur stated that the structures built on the two land portions and from which the shop **E & E Store** operated from, was started by the three sisters. The business licence for the store, the record in the Register of Business (Exibit E) shows, that the shop had been in the names of Handsome Adumur, John Adumur and Benoni Detenamo since 1977. According to Handsome Adumur, the store's ownership was transferred to him and the others only after their mothers, the 3 sisters, had died; the presumption being that the sisters were all deceased by 1977.

The ownership of the land, that is, specifically the shares of the three sisters in portions 129 and 130, did not pass to the plaintiffs, until 1986 (GN19/1986). Between 1977 and 1986, the plaintiffs are assumed to have inherited the shopping complex including **E & E Store** and acquired only the interests in the two portions of land. The interests to the land only accrued to them by virtue of the shopping complex on it. It is only when they inherited their mothers' shares and became beneficiaries in 1986 that they acquired the rights that the other co-owners have over the two portions.

It is a common expectation and accepted practice through the years on the island, that a landowner who has legitimately built on a portion of land commonly owned with others, can pass on the ownership of the house and the right in continuing to occupy the land to his/her beneficiaries. There is this fallacious presumption in law that the beneficiaries have not only inherited the deceased's shares in the land but also the right to the continuing occupation of the land upon which the house stands, to the exclusion of all other landowners.

The presumption is borne out by the plaintiffs arguing that their rights to occupy and build on land portions 129 and 130 as allowed under the family agreement, is "binding" and is a "permanent arrangement". In the plaintiff's view, such an arrangement, given the circumstances on Nauru was

intended to "last forever". This in effect means that all other landowners are excluded from exercising their rights to the land now and into the future. To entertain this interpretation is tantamount to accepting the alienation of the land from all other common owners in favour of the plaintiffs. This is contrary to the concept of common ownership meaning the undivided ownership (unity of title) of the land by all the co-owners at any one time (unity of time).While the shares in the land may be alienated or passed on to the beneficiaries and heirs, the ownership of the land firmly remains in the hands of all the landowners.

The customs the plaintiffs rely upon does not in its application deny the right of ownership all other landowners have on land portions 129 and 130. The expectation of the beneficiaries of the deceased that they will be allowed by the other co-owners to continue to occupy and use the land including the house(s) on the land, is based on the common belief that they, the other landowners, have tacitly agreed to continue with the existing family agreement or, at the very most, they are morally obliged to do so.

Family agreement only endows the recipient to the right over the land portion given him and to no other. The successor, as beneficiary to the deceased's estate should, in fact and in law, seek anew the approval of the majority of the other landowners, in order to continue to live in occupation of the land and the house built on it by his/her benefactor. However, as the court has observed, the tradition and customs of Nauru, expects that the beneficiaries can continue to remain in possession of the land as if the approval previously obtained from the other landowners or through family agreement, equally applied to them.

The importance of the consent of the other landowners through a family agreement was emphasized by the court in **Audoa v Finch (2008) NRSC 3**

where Milhouse CJ observed that the practice of seeking the consent of the landowners is both a moral and legal obligation, the failure to consult and seek their agreement will make the party liable to them. He added:

"The whole ethos of Nauru is toward consideration of feeling and rights of the others. The institutions of the country are based on that ethos. It is more than moral obligation. It should be and is a legal obligation as well...."

This court could not agree more. However, as important as the family agreement is to the right to occupy and build, the agreement is not, as I had emphasized above, good for all time or, in this instance, the plaintiffs' rights to occupy portion 129 and 130 is in perpetuity, for to do so, would deny the other landowners to the two portions from exercising any of their legal rights as owners of the land.

This court's decision in **Hiram v Solomon (2011) NRSC 25**, referred to by the plaintiffs, is not relevant in this case. The case dealt only with the interest in a house given to the daughter of the plaintiff but upon the death of the daughter, the plaintiff tried to claim the house back. The daughter had however, upon being gifted the house by the plaintiff, had gone around and collected the signatures and consent of the majority of the other landowners, including the plaintiff's, approving the gift. The court quite correctly recognized that the agreement was valid and the interest in the house had legally passed to the daughter.

Conclusion

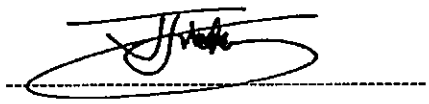
The family arrangement resulting in portions 129 and 130 being occupied by the 3 sisters, Eidme, Eiben and Eigabwairo, was voluntarily entered into between them and the defendants' father. It had, in the context of Nauru's customary practice, moral and even legal force as the court recognized as per Milhouse CJ in **Audoa v Finch (supra).** The agreement was binding on them but only during their lifetime.

Is such an agreement binding for all on all future generations? In my respective view the presumption that a family agreement subsists and binds future interested parties, is not supported by law. The nature of the land ownership on Nauru will not allow the possible perpetual alienation of the common ownership of land in favour of a particular family or person. In this case, whilst the plaintiffs may have legally inherited their shares in the two land portions in question and may in addition claim the continuing occupation of the property and the structures erected therein, albeit, by customs through the family agreement entered into between their parents and the defendants' parents, the law still recognizes the defendants' rights to the same land, including the right to be consulted on the future use. The right of a landowner to be consulted and to agree to the occupation and use of his/her land by another, including a co-owner, is trite law. This is especially so in the case where the assets, including structures and buildings on the land, had been destroyed or razed to the ground. The situation, where the beneficiaries and heirs intend to build totally new building(s) on the same land, is not the same as before. The parties are different and the use of the land may not be the same as when the approval of use was first sought. In this case, the defendants as the new landowners cannot be assumed in law that they have consented to the construction of new buildings by the plaintiffs, on the land portions that have previously been built on by the plaintiffs' parents, on the strength of the old family agreement. In **Alice Deirannauw & Ors v Ditto Dannang & Ors Civil Case 35/2016** the court arrived at a similar conclusion. Although the case involved tenants under the Nauru Housing Ordinance scheme, the court found that when the fire gutted the house, it also "extinguished any possible claim of interest by the respondents in the land."

In the end, the court finds that the plaintiffs, in wishing to construct a new building on land portions 129 and 130 Denigomodu district, will require the approval of the defendants and/or the three-quarter majority of the other landowners.

Having arrived at the above conclusion, the court is minded to remind the parties, especially the defendants, of the time-honored tradition and custom of the Nauru people that recognize and respect the practice of family agreement, informal and unpublished they maybe at times, as a guiding instrument in the orderly and peaceful sharing and allocation of property both real and personal amongst the family members on Nauru. It is a devise that has served the landowners faithfully in the past to ensure and protect the peaceful co-existence of the people on the island.

Dated this 12th day of July 2018.



F Jitoko
Chief Justice