



IN THE SUPREME COURT OF NAURU
AT YAREN
CIVIL JURISDICTION

CIVIL SUIT NO. 33 OF 2020

BETWEEN

REAGAN ALIKLIK OF BAITSI DISTRICT

Plaintiff

AND

FRANCIS DEIRERAGEA OF BAITSI DISTRICT

Defendant

Before: Khan, J
Date of Hearing: 22 and 23 February 2021
Date of Submissions: 25 and 26 February 2021
Date of Judgement: 3 March 2021

Case to be referred as: Aliklik v Deireragea

CATCHWORDS: Where plaintiff obtained consent by the landowners of Portion 111 to utilize their land – Where the defendant with adjoining boundary of Portion 114 raised the issue of lost grant by the owners of Portion 111 – Whether a grant was made – Whether the grant was in compliance with Lands Ordinance 1921 -1968 or Lands Act 1976.

APPEARANCES:

Counsel for the Plaintiff: E Soriano
Counsel for the Defendant: A Amwano

JUDGEMENT

INTRODUCTION

1. The plaintiff obtained consent of the registered landowners of the land namely, 'Yaredobu' Portion No. 111 in the district of Baitsi to utilize it for his own purposes.

2. Portion No. 114 belongs to the defendant. His late father Maein Deireragea built a house on this Portion in or around 1975 and 1976 when the defendant was 7-8 years old. The defendant's parents and the defendant have been in occupation of the house since it was built.
3. Portion 111 adjoins Portion 114. Neither the plaintiff nor the defendant is landowners of Portion 111. After the plaintiff obtained the landowners consent, he went on to Portion 111 with his 2 surveyors to identify the common boundary between the two portions of land and as they were doing so the defendant came out and asked them to get off Portion 111 where a fence had been erected. He was wielding a knife at the plaintiff and his surveyors.

CLAIM

4. After the above incident the plaintiff filed a writ and interlocutory summons seeking declarations that the defendant had no right to use Portion 111, that he removes his water tank and fence and he be refrained from interfering in the plaintiff's use and enjoyment of the land.
5. On 28 September 2020, an order was made by consent for the Director of Lands and Survey to carry out a survey between Portions 111 and 114 to ascertain as to whether the defendant was encroaching on to Portion 111.
6. Following this order, a report was submitted to the Court on 5 October 2020 which showed that the defendant was encroaching on to Portion 111 by 300.8m² (disputed area) and that the total area of Portion 111 is 812m².
7. The defendant in his statement of defence pleads that the fence was erected some 44 years ago by virtue of a 'loss grant' and that he has acquired non possessory interest and has been in occupation of it for the last 44 years.

ISSUES FOR DETERMINATION

8. The parties agreed to the issues for determination which are:
 - 1) Whether the plaintiff is entitled to use the entire Portion 111?
 - 2) Whether the defendant is entitled to use part of Portion 111?
9. It is common ground that neither the current registered landowners of Portion 111 or the plaintiff were not aware of any grant having been made in favour of the defendant's deceased father. If the defendant succeeds in establishing that a grant was made some 44 years ago then the landowners would be bound by that, and their consent to the plaintiff to use or utilize their land would be subject to that grant. I raised with Mr Amwano the need to join the landowners as parties to the proceedings, as any findings in this matter had the potential of adversely affecting their rights but he decided against doing so.

WHAT IS THE DOCTRINE OF LOST GRANT?

10. In *Gale on Easements*¹ it is stated at page 125 as follows:

Application of doctrine of lost grant

It should be noted here that in modern times the courts have had frequent recourse to this doctrine and have repeated and applied in various ways the words of Lord Herschell in *Phillips v Halliday*:

“Where there has been a long-continued possession in assertion of a right, it is well settled principle of English law that the right should be presumed to have had a legal origin if such a legal origin was possible, and the courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title.”²

11. In this matter the onus is on the defendant to prove that Baberaga Dannang the owner of Portion 111 made a grant in favour of his late father, and that grant was subsequently perfected in accordance with the provisions of Lands Ordinance 1921-1968 or Lands Act 1976 to create a valid title.

12. a) I shall first set out the law on the transfer of grant of an interest in Nauru and then address the evidence. In *Robertson v Cain*³ Crulci J stated at [32] as follows:

[32] The ownership of land in Nauru is determined by Nauru Lands Committee established under the Nauru Lands Committee Act 1956. The Lands Act 1976 sets out quite clearly what the process is for land to be transferred, sold, leased or the grants of any estate or interest in land in Nauru. Only the President can approve the transfer of land ownership. Prior to this Act, in place of the consent in writing of the President, any land transfer required the consent in writing of the Administrator.

b) In *Deireragea v Kun*⁴ Crulci J stated at [43] as follows:

[43] The Lands Act 1976 stipulates that the purpose is ‘An Act to repeal the Lands Ordinance 1921-1968 and to make new provision for the leasing of land for the purposes of phosphate industry and other public purposes, and for the removal of trees, crops, soil and sand and for the payment of compensation and other monies’. It lays out quite clearly what the process is for land to be transferred, sold, leased or a grant of any estate or interest in land:

(3) Prohibition of certain transfers, etc., of land

a) Transfer inter vivos of freehold of any land in Nauru to any person other than a Nauruan is prohibited and any such transfer or purports

¹ 13th Edition by Michael Bowles

² [1891] A.C. 231

³ [2017] NRSC 68 Civil Suit No. 107 of 2016

⁴ [2017] NRSC 35 Civil Suit No. 53 of 2016

to transfer, or any agreement to execute any such transfer, shall be absolutely void and of no effect.

- b) Any person who transfers, or agrees, attempts to purports to transfer, the freehold of any land in Nauru to any other person other than a Nauruan person is guilty of an offence and is liable to imprisonment for 6 months.
 - c) Any person who without the consent in writing of the President, transfers, sells or leases, or grants any estate or interest in, any land in Nauru, or enters into any contract or agreement for transfer, sale or lease of, or for the granting of an estate or interest in, any land in Nauru, is guilty of an offence and is liable to a fine of \$200.
 - d) Any transfer, sale, lease, grant of an estate or interest, contract or agreement made or entered into in contravention of the last preceding subsection shall be absolutely void and of no effect.
 - e) Any transfer, sale, lease, contract or agreement made or entered into in contravention of Section 3 of the Lands Ordinance 1921-1968 shall continue to be absolutely void and of no effect.
 - f) For the purposes of this section the expression ‘transfer inter vivos’, includes transfer to a corporation or to an unincorporated body of persons and the expression ‘**a Nauruan person**’ does not include a corporation or an unincorporated body of persons of whom some are not Nauruans.
- c) In *Narayan v Alona*⁵ Crulci J stated at [31] and [32] as follows:

[31] The Court considers that had she wished to do so, there was nothing in custom that would have prevented Eba from gifting land to the defendant. Nor was there anything preventing Detageouwa, in compliance with any request from his mother, to have transferred the land during his lifetime to the defendant.

[32] In either of the above situations, in order to perfect the gift or transfer of ownership, compliance with Section 3 of the Lands Ordinance 1921-1968 or the Lands Act 1976 is required.

CONSIDERATION

13. I will now consider as to whether or not Baberaga Dannang made a grant in favour of the defendant’s father.
14. The defendant’s evidence is that he was told by his late father that Baberaga Dannang the landowner of Portion 111 gave verbal consent to him to build a fence, and the fence has

⁵ [2017] NRSC 2 Civil Suit 85 of 2016

been in existence for the last 44 years. The land between the fence and the boundary of Portion 114 was used by his father and later by him uninterrupted for that period.

15. Fortunately, Ron Keppa the person who erected the fence was called a defence witness. He is 70 years old. He recalls putting the fence in the presence of the defendant's late father and Baberaga Dannang who supervised and directed as to where the fence was to be placed. Mr Keppa did not see the boundary pegs. He saw Baberaga Dannang and the defendant's father speak to each other but he did not hear Baberaga Dannang say to the defendant's father that he was giving away his land to him.
16. Baberaga Dannag's son, Ditto Dannang (Ditto) was called as a witness for the plaintiff. He has given consent to the plaintiff to utilize Portion 111. He said that he enjoyed a very good relationship with his late father. His father died in 1994 when he was 17 years old. He said that his father used talk to him about his land and he never mentioned that he had given away any piece of Portion 111 to anyone.
17. Ditto also stated that he met the defendant at Bay Restaurant when the defendant literally begged him to transfer his share in Portion 111 to him. In respect of this meeting the defendant gave a different version. Firstly, he said that he could not recall meeting Ditto at Bay Restaurant and secondly, he said that he met Ditto outside Court No. 1 of the Court Complex when he saw him speaking to his wife and he approached him and said he heard his father's name being mentioned in Court and also heard that his father had given part of the land to his father. This version was never put to Ditto by the defendant's counsel in his cross examination and it is clearly in breach of the Rule in *Browne v Dunn*⁶. The rule in *Browne v Dunn* basically entails that a cross examiner cannot rely on evidence that is contradictory to the testimony of the witness without putting the evidence to the witness in order to allow them to attempt to justify the contradiction.
18. Further the defendant just before the end of his examination in chief was asked and he stated:

Question: Do you desire this matter to be settled amicably so that you can retain the perpetual use of that fence?

Answer: Yes.

19. The plaintiff's affidavit dated 2 December 2020 was put in by consent as exhibit P2 in which it is stated at [6] as follows:
 - [6] The statutory declaration by Dagadaube Ika was not in honour of some lost ground, but was the result of pestering by the respondent seeking for Mr Ika to transfer his shares to the respondent. I have append to this affidavit as exhibit RA-3, the declaration by Mr Ika of this account and his wish to revoke all and prior instructions giving his shares in Portion 111 to the respondent.
20. It is the defendant's case that his late father had been given a piece of Portion 111, and if that is the case then I cannot understand him when he says that he is happy to settle this

⁶ (1893) 6R.67, H.L.

matter in an amicable manner as long as he retains the perpetual use of the disputed area. If he did acquire an interest or a right in Portion 111 then why would he want to settle it?

21. Further if he acquired an interest in the disputed area then why did he approach Ditto to transfer his share or having Dagadaube Ika to transfer his 1/54th share in the land. Is this an attempt to add on to the disputed area? These are very pertinent and important matters that I have to address in determining whether Baberaga Dannang granted the disputed portion to the defendant's late father.
22. There is no direct evidence of the disputed land being given by Baberaga Dannang to the defendant's father and the defendant's act of asking Ditto Dannang for his share and getting Mr Dagadaube Ika to transfer his share and him agreeing to settle this matter creates doubt that a grant was ever made by Baberaga Dannang to the defendant's late father. In the circumstances I hold that the defendant has failed to establish that Baberaga Dannang made a grant to his late father and therefore neither his late father or the defendant acquired any right over the disputed area.
23. Insofar as the plaintiff is concerned there is evidence that he has already acquired 92% of the landowners consent and according to Mrs Yvette Duburiya, the Secretary for Land Management, her act of giving consent is matter a mere formality. She further stated that there are no restrictions in the consent form on the plaintiff's use of the land portion. So, I hold that the plaintiff is entitled to use the entire Portion 111.
24. I make the following orders against the defendant:
 - a) That the defendant is not entitled to use disputed area of Portion 111.
 - b) That he is to remove the fence and other material within the fencing boundary immediately; and
 - c) That he be restrained from interfering with the plaintiff's use and quiet enjoyment of Portion 111; and
 - d) That he be restrained from intimating or harassing the plaintiff, his servants or agents.

COSTS

25. I was informed that the parties are not seeking costs against each other and I therefore order that each party shall bear his own costs.

DATED this 3 day of March 2021

Mohammed Shafiullah Khan
Judge