Not Restricted

IN THE SUPREME COURT
REPUBLIC OF NAURU

Land Appeal No. 5 of 2008

Rejoice Agir
Appellant

V

Nauru Lands Committee
1st Respondent

Secretary for Justice
2nd Respondent

Jolin Raidinen, Beneficiary of Estate of Bennie Harris
3rd Respondent

JUDGE:	Eames, C.J.
DATE OF HEARING:	6 July 2011
DATE OF JUDGMENT:	13 July 2011
CASE MAY BE CITED AS:	Rejoice Agir v NLC and Others
MEDIUM NEUTRAL CITATION:	[2011] NRSC 10

Land Appeal under s.7 *Nauru Lands Committee Act 1956* – Preliminary question whether appellant has standing to appeal - Nauru Lands Committee grants equal shares in estate of deceased Nauruan to adopted son and daughter – Son deemed Nauruan by virtue of formal adoption pursuant to *Adoption of Children Ordinance 1956-1967* daughter not formally adopted – Daughter not Nauruan citizen within terms of s.4 of *Naoero Citizenship Act 2005* – Supreme Court held in 1970 that customary law prohibited a Non-Nauruan inheriting Nauru land – *John Aremwa & Others v Nauru Lands Committee* [1969-1982] NLR (B) 17 – Whether s.3(1) of *Custom and Adopted Laws Act 1971* renders 1970 decision binding today on Supreme Court as to content of customary law – Whether decision involves finding of fact or ruling as to law – Similar ruling in 1992 in *Lucy Ika & Kinza Clodumar v Nauru Lands Committee*, unreported decision of Donne C.J., 21 August 1992 – *Lands Act 1976*, s3.

APPEARANCES:	PRACTITIONERS:
For the Appellant	Ms M Depaune (Pleaders)

For the 1st and 2nd Respondents	Mr D Lambourne Mr D Lambourne
For the 3rd Respondent	Mr D Aingimea (Mr D Aingimea)

CHIEF JUSTICE:

1 The Nauru Lands Committee distributed the estate of Bennie Harris (deceased) by a determination published on 1 October 2008 by Gazette Notice Number 382/2008. The deceased was survived by his wife Eonjin Harris. Their one natural child had died young, and they had subsequently adopted two children, a female, Jolin Raidinin (born 27 November 1983), and a male, Hechie Joseph Benjamin Harris (also known as Joseph Benjamin Eddie Harris, born 18 September 2002.)

2 Although Mrs Harris considered that she and her husband had "adopted" both children, in fact only the boy, Hechie, was formally adopted, on 26 January 2007 pursuant to the *Adoption of Children Ordinance* 1965-67. Jolin is a national of the Republic of the Marshall Islands. I was told that Hechie Harris is a Nauruan, being the grandson of Jenny Capelle, who was the sister of Bennie Harris. As I shall discuss, he would in any event have been deemed to have become a Nauruan by virtue of his formal adoption.

3 When the Nauru Lands Committee met on 19 August 2008 to consider the distribution of the estate, only Jolin Raidinen attended. She was then aged 24 and had lived with the deceased from the age of three. She regarded him as her father. She asked that the estate be divided equally between herself and her brother. That request was subsequently supported by Mrs Harris, who spoke to the secretary of the Committee when he visited her at her home in the Marshall Islands.

4 Mrs Harris told the Committee that she did not want to be granted a lifetime interest in the estate (as would have been the usual order pursuant to regulation 3(c) of the regulations set down in *Administration Order No 3 of 19381*) but said, instead, that she wanted the estate to be divided equally between the two children. If, however, Jolin was not to be entitled to any interest then, she said, her wish was that the estate would go entirely to her son, Hechie, but that Jolin would act as trustee.

5 The Committee again considered the matter and ruled that the two children should equally inherit the estate. That decision was confirmed by the determination published in the Gazette.

The right of appeal

6 The appellant in this case, Rejoice Agir, is the daughter of Rennie Harris (deceased), who was the brother of the late Bennie Harris. She has appealed against the determination of the Committee on the basis that upon correct application of customary law, and the regulations set down in *Administration Order No.3 of 1938,* the entire estate should have been awarded to the legally adopted child, Hechie, but with a life interest being granted to Mrs Harris. The basis of that assertion is said to be that by customary law only a Nauruan could inherit land in Nauru.

7 Initially counsel for the third respondent submitted that the appellant was not entitled to appeal against the decision of the Nauru Lands Committee as she had no interest in the outcome of the appeal. In the course of argument, however, Mr Aingimea conceded that the right of appeal under section 7 of the *Nauru Lands Committee Act 1956* was very broad, allowing an appeal to be brought by any person "who is dissatisfied with a decision of the Committee". In any event, I am satisfied that the appellant and the members of her family have a direct interest in the outcome of the appeal. Should the entire estate be given to Hechie and were he to die childless the land would return to the nearest relatives of Bennie Harris, which would include the appellant.

The content of customary law concerning inheritance of Nauruan land

---

[1] The appellant did not contend that Eonjin Harris was not entitled to inherit a life time only interest.

8 In support of her contention that it was contrary to customary law for a non-Nauruan to inherit land from a deceased Nauruan, the appellant relied upon a decision of Thompson, C.J. in *John Aremwa and Others v Nauru Lands Committee.*2

9 Thompson, C.J held that by Nauruan customary law a person who is not Nauruan cannot inherit land as a beneficiary under the will of a deceased Nuaruan. In that case, the appellant was a native of the Gilbert Islands. Both his father and mother were Gilbertese. His father died and his mother re-married, to a Nauruan. He was treated as a member of the family but was not formally adopted. Before the Nauruan stepfather died he had made an oral will providing that the appellant was to share his estate. The Nauru Lands Committee refused to so determine, because the appellant was not a Nauruan. In his Judgment Thompson C.J. held:

> "I have no doubt that the Nauru Lands Committee is normally bound to distribute a deceased person's estate in accordance with his dying wishes, certainly if the details of those wishes are agreed to by the members of his family. (Two witnesses) have given evidence, however, that that obligation does not exist when the deceased person's wish is that someone outside his family or a non-Nauruan should inherit land. They assert that in those circumstances Nauruan custom requires that the land should be distributed only among Nauruans, who, if they wish to share it with a non-Nauruan to comply with the wishes of the deceased, must apply under section 3 of the Lands Ordinance 1922-1967 for the written consent of the President for them to transfer that share to him".

10 His Honour concluded that the *Nauruan Community Ordinance* 1955-1966 had provided a basis whereby non-Nauruans, having been adopted into the Nauruan community and accepted as Nauruans, could be formally declared to be Nauruan3. Where, however, a person was not accepted as Nauruan then, according to the evidence of the witnesses (which his Honour accepted) such non-Nauruans could not inherit land under a will. They could only receive land in those circumstances if the transfer was approved by the President under section 3 of the *Lands Ordinance* (now the *Lands Act 1976).*

11 As I have noted, his Honour's conclusion that Nauruan custom required that land be inherited only by Nauruans was based on the evidence of two witnesses who, it seems, were members of the Nauru Lands Committee.

12 I queried with counsel whether the judgment of Thompson C.J amounted to a finding of fact as to what the Nauruan custom was in 1970, rather than a finding of law4. In determining the content of customary law in 2011, was that not a matter for evidence?

13 Mr Lambourne, for the Committee, said that the Committee was unaware of the decision of Thompson C.J. when it made its determination. Had it been, it would have treated that decision as binding on them and as precluding any interest being granted to Jolin, with the possible exception of a lifetime interest.

14 Mr Lambourne accepted that the decision of Thompson C.J. may have amounted to a finding of fact, but submitted that it was a finding of fact as to the content of customary law in 1970, and I was bound to accept that what was then the customary law is the customary law today.

---

2 [1969-1982] NLR (B) 17, delivered 11 June 1970.

3 S.5 of the *Nauruan Community Ordinance 1956-1997* provided for an application to be made to Cabinet for admission into the Nauruan community. Pacific Islanders who had married a Nauruan before 1954 were deemed members of the Nauruan community (s.4(b)). The Ordinance was repealed and replaced by s.13 of the *Naoero Citizenship Act 2005.*

4 See, too, my discussion, below, about the case of *Lucy Ika & Kinza Clodumar v Nauru Lands* Committee and Others.

15 Given the fact that culture is generally regarded as not being frozen in time, but as capable of adaption and change (matters about which the Nauru Lands Committee, as an expert body interpreting and applying customary law from time to time, would be expected to appreciate)5, the proposition that I am bound to accept a finding of fact in 1970 as binding on me today is surprising, but that submission is said to be supported by the terms of s.3(1) of the *Custom and Adopted Laws Act 1971,* which came into effect in 1972. That section provides:

> **NAURUAN INSTITUTIONS, CUSTOMS AND USAGES**
>
> **3.** (1) The institutions, customs and usages of the Nauruans to the extent that they existed immediately before the commencement of this Act shall, save in so far as they may hereby or hereafter from time to time be expressly, or by necessary implication, abolished, altered or limited by any law enacted by Parliament, be accorded recognition by every Court and have full force and effect of law to regulate the following matters –
>
> (a) title to, and interests in, land, other than any title or interest granted by lease or other instrument or by any written law not being an applied statute;
> (b) rights and powers of Nauruans to dispose of their property, real and personal, inter vivos and by will or any other form of testamentary disposition;
> (c) succession to the estates of Nauruans who die intestate; and
> (d) any matters affecting Nauruans only.

16 Mr Lambourne submitted that the 1970 decision of the Chief Justice stated what was customary law concerning inheritance of land by non-Nauruans, and that statement has not "hereafter" been altered or limited by any subsequent enactment.

17 Ms Depaune supported the submission of Mr Lambourne. She contended that while the outcome of this appeal depends on interpretation of customary law (and to that extent, she submits, the interpretation cannot be at variance with the 1970 judgment) the customary law on this topic , as stated by Thompson C.J., remains consistent with the approach adopted in the *Lands Act 1976.* Section 3 of that Act provides:

> **"PROHIBITION OF CERTAIN TRANSFERS, ETC OF LAND**
>
> 3. -(1) Transfer inter vivos of the freehold of any land in Nauru to any person other than a Nauruan person is prohibited, and any such transfer or purported transfer, or any agreement to execute any such transfer, shall be absolutely void and of no effect.
>
> (2) Any person who transfers, or agrees attempts or purports to transfer, the freehold of any land in Nauru to any person other than a Nauruan person is guilty of an offence and is liable to imprisonment for six months.
>
> (3) 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 the transfer, sale or lease of, or for the granting of any estate or interest in any land in Nauru, is guilty of an offence and is liable to a fine of two hundred dollars.

---

[5] In his historical review, *"Land Ownership and Control in Nauru"*, Vol 2, No 2, July 1995, Peter H MacSporran, warned that the "gravest danger" to the customs and practices of Nauruans, would be for decisions of the Supreme Court to lead to customs being "cast in concrete" by virtue of the principle of stare decisis, so that "its vitality and ability to change as the people change, indeed its very character as custom, is lost".

(4) 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.

(5) 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.

(6) For the purposes of this section the expression "transfer inter vivos" includes transfer to a corporation or 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.

18 Thus, a transfer to a non-Nauruan of an interest in Nauru land during the lifetime of the donor is prohibited. Ms Depaune submits that that legislation is consistent in principle with the customary law - as stated by Thompson C.J. - prohibiting transfers of interests to non-Nauruans pursuant to a determination of the Nauru Lands Committee concerning intestate estates.

19 The decision of Thompson, C.J. was cited without disapproval in a 1992 judgment of Donne, C.J, in *Lucy Ika and Kinza Clodumar v Nauru Lands Committee and Others*[6]. In that case the Nauru Lands Committee was concerned with the administration of the estate of a deceased Nauruan, who had made an informal customary will, leaving his property to his wife, a non-Nauruan. The Committee rejected that wish, concluding that as a non-Nauruan the widow was not entitled to succeed to her husband's property. In considering that question, Donne, C.J. heard evidence from the then deputy chairman of the Nauru Lands Committee as to Nauruan customary law. The Chief Justice concluded:

> "On that evidence and after considering the submissions thereon, I find that there is an established Nauru custom which does not allow a testamentary gift or devise of an absolute freehold interest in Nauruan land to any non-Nauruan person. The Lands Act 1976, section 3, gives statutory recognition to that custom in relation to transfers 'inter vivos' of Nauruan freehold"[7].

20 Whilst, no doubt, this judgment would have been equally persuasive for the Committee as that of Thompson, C.J. - had the Committee been aware of it, too - the judgment, once more, amounts to a finding as to the content of customary law at a given moment, not a finding, of fact or law, as to the content of customary law today.

Had Jolin become a Nauruan?

21 The need to determine what constitutes customary law and the effect of s.3 of the *Custom and Adopted Laws Act* would only arise if Jolin could not have been regarded by the Committee as being Nauruan.

22 Had she become a Nauruan? Mr Aingimea submitted that she had. Not only was she a resident in Nauru, she had married a Nauruan, and had a Nauruan passport. Those considerations, however, are not sufficient in law to constitute her to be a Nauruan citizen.

23 The *Nauru Lands Committee Act* 1956 defined the word "Nauruan" as having the same meaning as used in the *Nauruan Community Ordinance 1956*. That Ordinance, in turn, defined

---

[6] Civil cases 2/91, 3/91, 8/91, unreported judgment delivered 21 August 1992.
[7] At pages 43-44.

"Nauruan" as a person included in one of the classes or persons who constitute the Nauruan Community. Section s.4 defined "the Nauruan Community" by five categories, none of which applied to Jolin. Nor had application been made to Cabinet under s.5 for her to become a member of the Nauruan Community. That Ordinance was repealed in 2005 and replaced by the *Naoero Citizenship Act 2005.* That provided in s. 4:

> **Nauruan Citizen**
>
> **4**. For the purposes of the laws in force in Nauru the following persons are citizens of Nauru;
> (a) Persons deemed to be a Nauruan citizen pursuant to Part VIII of the Constitution.
> (b) Persons who were admitted as members of the Nauruan Community or granted citizenship after 31st January 1968, whether by the Nauru Local Government Council or the Cabinet.
> (c) A child of a Nauruan.
> (d) Persons admitted as a Nauruan under this Act.

24 By s.4 of the *Adoption Ordinance* 1965, the boy Hechie was deemed, upon formal adoption, to be the child of Bennie and Eonjin, and since Bennie was Nauruan, Hechie was deemed a Nauruan citizen by virtue of s.4(c) of the *Naoero Citizenship Act.* For Jolin, however, the mere fact that she had married a Nauruan would not give her Nauruan citizenship. She has not taken steps to be granted citizenship under the *Naoero Citizenship Act 2005* and her passport, while providing prima facie evidence of her Nauruan citizenship, is not deemed to be proof of citizenship under s.3 of that Act.

25 Part VIII of the Constitution of Nauru, s.75, permits Parliament to grant citizenship to a person otherwise not eligible. No application has been made under that provision.

26 I was not told whether Jolin intended to make an application under the *Naoero Citizenship Act 2005* or s.75 of the *Constitution.* If she did and it was approved by Cabinet or Parliament before the Nauru Lands Committee reconsidered the distribution of this estate that would obviously have a bearing on the outcome.

Customary law 1970 and 2011

27 The question whether s.3 of the *Custom and Adopted Laws Act* freezes in time customary law requires close analysis. If evidence was led in 2011 on an appeal to the Court under the *Nauru Lands Committee Act 1956* which demonstrated to the Court's satisfaction that what had been customary law in 1970 had been modified over recent decades it would be an anomalous situation if the Court was bound to ignore that evidence and rely instead on a finding of fact made by another judge, based on evidence presented to him, in 1970.

28 Having regard to the unfettered discretion given to the Supreme Court by s.7 of the *Nauru Lands Committee Act,* when deciding appeals from decisions of the Nauru Lands Committee, I would be very slow to conclude that the Court would be bound to accept a previous ruling on the content of customary law, when faced with persuasive evidence challenging that earlier interpretation as being applicable today.

29 I can understand that the Nauru Lands Committee took the view that the previous judgment was binding on them[8], even if they disagreed with its relevance or correctness today. It is appropriate that the Committee should have regard to such decisions of the Court as providing guidance as to the content of customary law. However, I am not persuaded that the Committee would have been precluded from applying its own interpretation of customary law were it at variance with the earlier finding by the Court.

---

[8] The Committee did not learn of the judgment of Donne, C.J. until shortly before this appeal.

30 In the event that the Committee concluded that the earlier findings of the Court as to the content of customary law were not applicable today the issue might then have fallen to be determined on appeal, in which case the Court would have regard to the evidence led before it in support, or opposition, to the Committee's interpretation of customary law. The appeal court would have regard to previous decisions of the Supreme Court, and consider whether the Committee should have, and did, give appropriate regard to those decisions when making its determination as to the content of customary law today.

31 The Committee is the expert body charged with responsibility for identifying and applying customary law, applying *Administration Order No 3 of 1938,* and its seems to me consistent with that duty that the Committee could recognise modifications to customary law, if the Committee found there to have been such. In my view, that approach would also be entirely consistent with the requirement of s.3 of the *Custom and Adopted Laws Act.*

32 When s.3 was passed the *Nauru Lands Committee Act* had long been in operation9. It had given the Committee wide discretion to interpret customary law, which discretion the Committee had applied, interpreting customary law as it understood it in the context of each case that came before it. The "institution, customs and usages" recognised by s.3 in 1972, were those both immutable and evolving as recognised by the Committee.

33 Thus, if the Nauru Lands Committee, notwithstanding the two previous decisions of the Court, had maintained its opinion that customary law did not prevent Jolin from receiving an equal share in her father's estate, then I would have been required on the appeal to consider whether that opinion should be upheld or be ruled to be in error. That would primarily be a question of fact, but the previous decisions would be relevant and provide important guidance as to the correct answer.

34 The Nauru Lands Committee did not, however, stand by its original interpretation of customary law. The Committee regarded itself as bound by the ruling of Thompson, C.J. As I have discussed, that was not necessarily the case if, having regard to that decision and the decision of Donne, C.J., the Committee, in good conscience, stood by its interpretation of customary law as at 2011.

35 The fact remains, that the Committee made its decision without taking into account the two previous decisions of the Supreme Court. The Committee does not necessarily have any legal training, and it can not be expected that its members must read and understand decisions of the Supreme Court before they undertake their already onerous tasks. Their duty is to know and apply customary law, not to become experts on the past judgments of the Supreme Court. However, the judgments of the Court may provide important guidance to the Committee and when it becomes aware of relevant decisions then it ought to consider them before making its determinations. In this case, the Committee has acknowledged that had it known of the two previous decisions it would have had regard to them, because they were relevant to its decision.

36 In these circumstances, I conclude that the decision of the Nauru Lands Committee was tainted by error in failing to have regard to a relevant consideration, namely the prior decisions of the Supreme Court. The determination, therefore, should be set aside and the Committee should be ordered to reconsider the distribution of the estate of Bennie Harris deceased.

A life-time-only interest for Jolin?

---

[9] Initially, the Council of Chiefs determined land ownership, with a right of appeal to the Administrator, then in the 1920s a Lands Committee filled that function, until in 1956 the Nauru Lands Committee was created by the *Nauru Lands Committee Act.*

37 One further matters remains. Mr Lambourne indicated that if the Committee was aware of the decisions of Thompson, C.J. and that of Donne, C.J, it would not have granted an equal interest to Jolin and her brother, but instead, and in accordance with the wishes of Mrs Harris, it would have granted a life interest to Jolin. Mr Aingimea submitted that I should direct the Committee to make such an order, but Ms Depaune objected to that course on behalf of her clients. She submitted that Jolin had no right to any interest in the land, including a life interest.

38 In the *Lucy Ika* case Donne, C.J. rejected an argument that Thompson, C.J. had held in *John Aremwa v Nauru Lands Committee* that a life interest could not be granted to a non-Nauruan. He said that the decision was authority only for the proposition that non-Nauruans could not gain an absolute title to Nauruan land, and it did not address the question of a life interest. Donne C.J. concluded that a life interest could be granted to a non-Nauruan, and he noted that the *Administration Order No 3 of 1938* provided for the grant of a lifetime interest to a widow, without specifying that she had to be Nauruan.

39 I have not heard full argument on the question of my powers or the appropriateness of ordering that a life interest be granted to Jolin. I note that a life interest may entail very significant financial benefits, given that there are some 20 properties involved in the estate. In the event that a life interest was granted to Jolin not only would she have rights of occupancy but also access to rents and other benefits, possibly including mining royalties, connected with the lands.

40 The Committee will have to conduct a further family meeting prior to making a new determination. I should not prejudge what might emerge from its deliberations and consultations. It is possible that agreement may be reached among those currently in dispute. Thus, the question whether a life interest could be granted to Jolin should be left open, for full argument in the event it becomes a live issue, on appeal, at a later time.

41 I mention that Mr Aingimea submitted that the family of Rejoice Agir would not be entitled to attend a new family meeting conducted by the Committee. Whether that contention is correct is also a matter that I leave open.

Orders

42 I order that the determination of the Nauru Lands Committee as to the distribution of the estate of Bennie Harris, deceased, published on 1 October 2008, in Government Gazette No. 112, as Gazette Notice Number 382/2008, be quashed.

43 I direct the Committee to reconsider the distribution of the estate and to publish its determination thereafter with all practicable expedition.

Dated this 13th day of July 2011
Geoffrey M. Eames AM QC
Chief Justice