

IN THE SUPREME COURT
REPUBLIC OF NAURU

Civil Suit No. 37/2013

TRACEY DENUGA

Plaintiff

v

TONILLA BRECHTEFELD &
KANE AMANDUS

1st Defendant

&

NAURU LANDS COMMITTEE

2nd Defendant

&

CURATOR OF INTESTATE ESTATES

3rd Defendant

JUDGE:

Eames, C.J.

DATE OF HEARING:

25 November 2013

DATE OF JUDGMENT:

27 November 2013

CASE MAY BE CITED AS:

Tracey Denuga v Tonilla Brechtefeld & NLC

MEDIUM NEUTRAL CITATION:

[2013] NRSC 19

CATCHWORDS:

Judicial Review - Certiorari - Determination by Nauru Lands Committee on 17 March 1993 as to personal estate of Fanny Eibeni Amandus - Plaintiff then suffering effects of serious mental and physical injuries - NLC grants half share of personalty to Fanny's son, Morde Amandus, and half to plaintiff, held on trust by Morde Amandus - Determination by NLC of real estate on 28 April 1993 grants entire real estate to Morde Amandus - Plaintiff's claim to inheritance by customary adoption rejected as not subject of formal adoption order under *Adoption of Children Act 1965 - Gad Demaunga v NLC and Dongibir* [2012] NRSC 18 - Whether Morde Amandus also held half interest in real estate on trust for plaintiff.

APPEARANCES:

For the Plaintiff

For the 1st Defendant

For the 2nd & 3rd Defendant

Solicitors

Mr P Ekwona (pleader)

Mr D Aingimea

Mr S Bliim (Solicitor-General)

CHIEF JUSTICE:

1. This is an application for judicial review. Leave was granted by the Registrar on 11 March 2013 to issue a writ seeking certiorari in respect of a determination of the Nauru Lands Committee concerning the real estate of Fanny Ebeni Amandus, who died intestate in 1993. The determination published in Gazette Nos. 166/93 and 167/93, dated 28th April 1993, granted all the lands in the intestate estate of Fanny Amandus to her son Morde Amandus.
2. Prior to making that determination the Nauru Lands Committee had, on 17 March 1993, published a determination in Gazette Notice No. 111/93. That determination related to the personal estate of Fanny Amandus. In that determination the Committee awarded equal shares in the personalty to Morde Amandus and the plaintiff, Tracey Denuga. The determination declared that Morde Amandus held Tracey Denuga's 50% share of personalty in trust for her.
3. The plaintiff contends that the Nauru Lands Committee erred in law by failing to conclude that Morde Amandus also held a half share of his mother's real estate on trust for the plaintiff.
4. Only one family meeting was called by the Nauru Lands Committee and that was conducted before the determination of the personalty estate. The only member of family who attended was Morde Amandus. The Nauru Lands Committee and Morde Amandus both contend that Tracy Denuga was not a member of the "family" of Fanny Amandus.
5. The plaintiff first brought an appeal in 2009 against the land determination, in which she claimed that she was an adopted daughter of Fanny Amandus, under customary law. Chief Justice Connell noted that due to a serious motor vehicle accident on 29 June 1989, which caused the Plaintiff to be hospitalized in Victoria in 1989, the plaintiff had suffered brain damage and had been unable to attend to her own affairs. That was still the situation in 1993, so that she was still recovering from her mental and physical injuries when the NLC made its determinations. The

plaintiff's mental incapacity continued until about 2000.

6. On 13 April 2005 Connell, CJ allowed the appeal to proceed notwithstanding that notice was given out of time. When he announced that he would allow the appeal to proceed the Chief Justice also ruled that the plaintiff could initiate an action for 'breach of trust'. In his order, Connell CJ granted leave to the plaintiff to amend her grounds of appeal and pleadings "relating to the trust over the personalty estate"
7. On 28 December 2005, however, the plaintiff wrote to her pleader, Mr Pres Nimes Ekwona, asking him to notify the court and the parties that she was abandoning the appeal, which he did.
8. Morde Amandus died on 25 June 2009 and the Curator of Intestate Estates published a determination as to his personalty in Gazette Notice 342/2009 on 2nd September 2009 whereby he granted the personalty estate to Kane Amandus, Tonilla Brechtefeld and Talima Whippy in equal shares of one third. The Curator later revised that decision and issued a fresh determination of the estate of Morde Amandus whereby he granted equal shares to Tonilla Brechtefeld and Kane Amandus, the present defendants.
9. On 13 January 2010 the NLC published a determination in GNN 17/2010 in relation to the real estate of Morde Amandus, and granted equal shares to Tonilla Brechtefeld, Kane Amandus and Tahlma Whippy. A notice of appeal against that determination was filed by the plaintiff under the *Nauru Lands Committee Act 1965* on 11 February 2010, and was thus out of time, there being no provision at that time for the court to grant leave to appeal where notice was given beyond the 21 day time limit. The plaintiff then made application on 10 November 2011, under Order 38 of the Civil Procedure Rules for leave to commence judicial review proceedings. I refused that application on 28 November 2011.
10. On 24 October 2012 the plaintiff filed a fresh application under Order 38 which I referred to the Registrar for determination. The Registrar granted leave to

commence proceedings for judicial review and those proceedings, Civil Case No. 37 of 2013, commenced by writ on 28 May 2013. That proceeding is now before the Court with a statement of claim dated 14 November 2013 which makes it clear that the plaintiff is seeking only to overturn the 1993 determination concerning the distribution of real estate of Fanny Amandus, not the determination No 17/2010 concerning the distribution of the real estate of Morde Amandus, although reference is made to that determination in the statement of claim.

11. In granting leave, the Registrar required the plaintiff to state precisely the grounds on which the NLC decision was challenged and to file affidavit evidence identifying the nature and extent of the trust that is alleged to have applied in her favour relevant to the real estate of Fanny Amandus.
12. An interim injunction was granted by the Registrar on 29 July 2013 restraining both the Curator and NPRT from distributing Ronwan royalty payments from the estate of the late Morde Amandus, until further order.
13. The plaintiff contends, first, that she was entitled to share in the estate of the late Fanny Ebeni Amandus on the basis that she was the adopted daughter of the deceased. If that was so, she had not been formally adopted under the *Adoption of Children Act 1965*¹, which meant that she could not inherit land as an adopted child.
14. In the alternative, the plaintiff contends that a trust had been created by Morde Amandus which applied both to personal estate and the real estate of the late Fanny Ebeni Amandus. She contends that it was jurisdictional error for the Committee to have failed to recognise and apply that trust when distributing the real estate of Fanny Amandus.
15. The fact that there was such a trust meant, Mr Ekwona submitted, that the

¹ See my discussion in *Gad Demaunga v NLC and Anor* [2012 NRSC 17] concerning the *Adoption of Children Act 1965*.

Committee was obliged to give notice of the family meeting to the plaintiff. As to that contention, it is clear from the evidence that at the time when the family meeting was held the Committee was aware of the serious injuries then suffered by the plaintiff. She was not treated as "family", for the purpose of the *Administration Order No.3 of 1938*, she not having been formally adopted, but even if she had been, it would not have been possible for her to take any effective participation in the family meeting.

16. With a claim based on customary adoption having been ruled out, the plaintiff now seeks to advance the alternative basis for claim. In essence, the plaintiff's case was that a trust had been created and was announced to the Nauru Lands Committee by Morde Amandus, and the Committee had accepted that when it made its ruling that 50% of the personal estate of Fanny Amandus was held on trust for Tracey Denuga.
17. The plaintiff contends that, there being no fresh meetings before its determination with respect to realty, the Committee had failed to have regard to the fact that a trust had been created which extended to the real estate.
18. On 8 August 2013 I ordered that the hearing was to be confined to the question whether or not a trust had been created and, if so, as to the effect of such trust.
19. In support of that contention, Mr Pres Nimes Ekwona referred to minutes from the NLC files. The first is on 15 December 1992 at page 51 of the minute book. That reads:

"On Tuesday 15/12/92 at 9:15am Morde came in at the Nauru Lands Committee to testamonize what his mother said during the distribution of Daphne Fotu estate. He stated that Tracey has money from Ebeni but was travelling to Australia, he came back to Nauru and there was no money for her. So he nominated himself to be Tracey's trustee in her RONWAN shares until he sees her fit to look after her own affairs, when he will return back to the Nauru Lands Committee to give half share back to her so all her shares will be in name only until then.

Signed Morde G Amandus."

20. The second is in Minute Book, 9th February 1993, page 76. That reads as translated:

“Translation of the content page (blank) of the Minute Book dated 9th February 1993.

10.15 am. Enter Morde Amandus. A/Secretary read out what was said (before the Committee) at page 74 and to make clear to him (Morde) by reading out what was written at page 51 of the minute book. Morde indicated his consent, that the share shall be in one half each, but that he will be the Trustee for Tracey and that he will oblige to all of Tracey’s requirement.

Signature: P Abouke.

21. I have not seen an entry being page 74 of the Minute Book. It appears to be missing, but it seems nothing turns on it.

22. Mr Ekwona submitted that because there was only one family meeting, and that was conducted before the decision on personalty took place, the Committee and Morde must have been addressing both realty and personalty when Morde made his statement accepting that he held the 50% share in personalty in trust for Tracey. Mr Ekwona submitted that Ronwan payments come from land ownership and the declaration of trust to hold personalty was in the context that it was recognition of Tracey’s interest in the real estate.

23. Mr Aingimea submitted that a share of Ronwan payments did not mean that the recipient must be a landowner. A landowner could, by way of family agreement, benefit a non-landowner in that way. He submitted that when reference is made to sharing Ronwan, it refers to cash monies that are waiting for distribution; it is not an announcement that the recipient has an entitlement to share all Ronwan payments in the future, as though the person was a landowner.

24. In the Nauruan language version of the minute of 15 December 1992 appear the words “share atsin iat Ronwan . . .”. that was interpreted as meaning “even Ronwan”. Both Mr Aingimea and Mr Bliim challenged that interpretation. Mr Aingimea said that the words actually meant “sourced from Ronwan”. That reflected that it was a payment from a fund of money already received. Mr Ekwona accepted that the interpretation was wrong, but he said that the correct

interpretation was "share from Ronwan". If anything, that translation supports Mr Aingimea's contention that granting a share of Ronwan makes no statement about the recipient's rights to land.

25. In my view the clear terms of those notes are that they related solely to the personal estate. They cannot be read as extending to real estate.

26. I was referred by the plaintiff to another document, a notice in the Gazette No. 164/1972, published on 29 May 1972. That was a determination - "personalty only" - about the personal estate of Fanny's deceased husband, Amandus Auwobo. The deceased was shown as having held personalty on trust for Tracy Amram (the plaintiff). Fanny Amandus was declared to now hold that personalty, as beneficiary, on trust for Tracey. In addition, Amandus Auwobo had held personalty on trust for a number of other people.

27. I do not believe that that document assists the plaintiff. It was common practice for personalty to be held in trust for infants. In 1972 Tracey was four years' old. The fact that some personalty funds were held in trust for her says nothing about real estate. Indeed, the determination of ownership of the real estate of Amandus Auwobo shows that with one or two exceptions those named as trustees of personalty were not named as beneficiaries of the real estate.

28. Mr Ekwona filed an affidavit in support of the plaintiff's claim, but objection was taken to its admission by counsel for the respondents, primarily because it amounted to opinion and hearsay evidence from counsel. Those objections had merit, and Mr Ekwona did not seek to rely on the affidavit. It is fair to say, though, that, taken at its highest, the information in the affidavit took the case for a trust no further.

29. I feel sympathy for the plaintiff. As demonstrated in the determination of the real estate of Fanny Amandus, published in GNN 166 of 1993 on 28 April 1993, Morde Amandus inherited interests in very many portions of land from his mother. On any view, Tracey was close to Fanny Amandus and may well have been adopted

in customary law, although I am not deciding that question and, as I have said, customary adoption after 1965 had to be formalised under the relevant Act if it was to be relied on for inheritance.

30. The respondents have consistently rejected the suggestion that she had been adopted, but the plaintiff tendered an affidavit of Morde Amandus dated 9 September 1997 which he filed under the Matrimonial Causes Act supporting the application of Tracey's husband to divorce her. In that, he swore that he was responsible for Tracey's welfare and that she had been of unsound mind for seven years. He stated, categorically, "I am the brother of Tracey Deluckner by Nauruan custom". As revealing as that statement is, it does not amount to a declaration to hold his mother's land on trust

31. Sympathy for the plaintiff's position cannot make up for the absence of evidence to support her case. There is simply no evidence which would justify a finding on the balance of probabilities that a trust had been created by Morde Amandus in favour of Tracey Denuga as to 50% of the real estate, or indeed as to any real estate at all.

32. The plaintiffs claim for certiorari cannot succeed, and will be dismissed.

Geoffrey M Eames AM QC

Chief Justice

27 November 2013