



SUPREME COURT OF NAURU

[CIVIL JURISDICTION]

Civil Suit No. 128 of 2015

Between: **Enrico Solomon & Letima Adire** PLAINTIFF

And: **Ali Kakiouea** 1st DEFENDANT

And: **Capelle and Partner** 2nd DEFENDANT

Before: Chief Justice Filimone Jitoko

APPEARANCES:

Appearing for the Plaintiff: A. Lekenaua
Appearing for the First Defendant: N/A
Appearing for the Second Defendant: V. Clodumar

Date of Hearing: 5 April 2018
Date of Judgment: 16 August 2018

Catchwords: *Native land consent to build - Lease for commercial purpose- claim to the rent - Court's equitable jurisdiction*

JUDGMENT

On 18 December 2015, the plaintiff obtained an interim injunction preventing the second defendant from paying to, and the first defendant from receiving the rental from the building now known as "The Bay Restaurant" situate on the land known as Agabwe, Portion 50 Anibare District. Instead, the court ordered that all future rent money was to be paid into court until the issue of who should rightfully receive the rent is decided by the court.

Background

The second-named plaintiff, Letima Adire and Ryke Solomon her brother, hold 1/24th shares each in land Portion 50. The first-named plaintiff is the brother to both. He does not own any shares in the land in question.

In his affidavits in support of the interim injunction of 18 December 2015, the first-named plaintiff, Enrico Solomon, stated that around the year 2000, he sought and obtained the majority consent of the landowners of Portion 50 to build on the land. A house was subsequently built on it with the financial support from brothers Antonio and Anthony Dimapilis. The restaurant business that operated from the premises did not flourish and the building fell into disuse until the second defendant approached him with the proposal to lease the building for commercial purpose. Agreement was reached, including the right for the second defendant as lessee to use part of the rent money to repair the building. In the course of the negotiation, the second defendant learnt from Antonio and Anthony Dimapilis that they had largely funded the construction of the building and that the plaintiff, Enrico Solomon still owed them money.

The first defendant, Ali Kakiouea, was not an original party to the negotiation to the lease and use of Portion 50, although he is a landowner. He claims in his affidavit, that around 1988, his father had given him the sole possession of Portion 50 and therefore the house that Enrico Solomon had built with the Dimapilis brothers' finance, belongs to him.

The court is not clear on how the second defendant, having first approached Enrico Solomon and obtained his approval for the lease of the building, ended up signing a five (5) year leasing agreement of the same building with the first defendant, Ali Kakiouea. Counsel submitted that in the course of the negotiations, the Dimapilis brothers approached the second defendant and told its executive, Sean Oppenheimer, that Enrico Solomon owed them money used in the construction of the building, and that Ali Kakiouea has taken on and inherited the debt and has ownership of the building. It is probably based on this representation that the lease agreement between the first defendant and the second defendant was entered into.

In summary, the court is faced with the following set of facts:

- (i) The first-named plaintiff, Enrico Solomon, not a landowner of Portion 50, but with the approval of the majority of the Portion 50 landowners, built a house on the land;
- (ii) Enrico Solomon received the finance assistance of some \$43,400.00 for the construction of the house on the land from the Dimapilis brothers;
- (iii) The second defendant had initially sought and obtained verbal approval from Enrico Solomon to lease the building;
- (iv) The Dimapilis brothers made representation to the second defendant that Enrico Solomon was not in a position to pay back the money they lent to him for the building, and the first defendant, Ali Kakiouea, a landowner of Portion 50, has taken on Enrico Solomon's debt, and also, the Dimapilis brothers claim, the house;
- (v) On the strength of the representation at (iv), the second defendant and the first defendant entered into a five(5) year land lease agreement of the building from January 2015; and
- (vi) The lease is due to expire on 31 December, 2020.

Representation and Documentation

Following the granting of the interim injunction by ex parte motion on 18 December 2015, orders were made for any future rent from the property to be paid into court. The Order was to be served on the defendants. The matter was

listed for 25 January 2016. Service of documents including the Statement of Claim, were made on the defendants on 21 December 2016 and affidavits of service duly filed. Notices of Appearance were made by counsel for first defendant on 8 January 2016 and second defendant counsel by 26 January 2016. Affidavit in reply was filed on behalf of the second defendant on 29 January 2016, while counsel for the first defendant merely filed an outline of legal arguments on 5 May 2016. In fact no affidavit was filed by the first defendant but a Statement of Defence was finally filed on 24 November, some 10 months late. On 29 November 2016, Ali Kakiouea, the first defendant, wrote to the court requesting that the case already set down for hearing on 30 November, be abandoned and adjourned as he would wish to change counsel.

The new counsel took up the first defendant's brief in January 2017. On 30 March, she applied for the dispute to be referred to mediation, which the court agreed to. A mediator was appointed but on 21 June the mediator reported that mediation had failed to resolve the dispute and blamed the failure of the first defendant to attend the meetings he had called, as the main reason. A statement of defence for the first defendant was finally filed on 27 July and the default judgment application filed earlier by the plaintiff in November 20126, was abandoned by the plaintiff.

The first defendant's new counsel like the first, also experienced a great deal of difficulties and communicating let alone meeting with the client and on 18 September 2017, counsel sought and was granted leave of the court to withdraw from the case.

The hearing was set for 5 April 2018. The defendant was served with a notice of hearing and the affidavit of service filed into court on 29 March 2018. The first defendant failed to attend the hearing of 5 April. In the light of the first defendant's failure to attend the hearing, court ordered counsel for the plaintiff and the second defendant, to file submissions and the judgment was on notice.

Consideration

The delay in the hearing and disposal of this case is the result of inattentiveness on the filing of proper documents by counsel on time coupled with a defendant who did not seem to have regards to legal procedure and processes, notwithstanding that his disregard may have adverse consequences on his rights and interests in property.

It is conceded by the first defendant that while the first-named plaintiff was not a landowner of Portion 50, he had in fact sought and obtained the signatures of the majority of the landowners permitting him to build on the land portion. The consent form clearly stipulates as follows:

“ We the undersigned as part owners in the Land name AGABWE portion No 50 District of Anibare, have no objection what so ever for Mr. Enrico to build/construct a house on this Land.”

Although both defendants have entertained some doubt as to the veracity of the landowners' signatures, they failed to produce any evidence casting doubt on the authenticity of these signatures.

The ownership of the house, in the absence of any compelling evidence to the contrary, the court must assume, belongs to Enrico Solomon. The fact that the financing of the construction of the building was mainly contributed to by the Dimapilis brothers does not dent the fact that the ownership of the building remains with Mr. Solomon. It could very well be that he had difficulties in the end to repay the \$43,000 given by the Dimapilis brothers for the project, but there is no evidence before the court to suggest that the ownership of the house had been forfeited to the Dimapilis brothers or Ali Kakiouea because of the unpaid debt.

There is an assertion by Mr. Kakiouea that Enrico Solomon had conceded the ownership of the land and the house, after sighting certain documents that “proved” that Portion 50 was gifted to him by his father, Dibanga Kakiouea. Again

no documentary or other evidence in support was produced in court. In any case, land Portion 50 is owned in common with other persons and the first defendant, even if he had inherited his father's right to the land portion, such right would still be as a part owner. The first defendant therefore does not have an exclusive right of ownership of any part of Portion 50, nor to any structures erected on it, notwithstanding his claim that his father, Dibanga Kakiouea and Jenny Kakiouea, his sister and the first defendant's aunt, had bigger shares or "belonged to the higher hierarchy of land rights holders" of Portion 50.

In the light of the paucity of evidence to substantiate the claim by Ali Kakiouea that the first plaintiff had "surrendered" the ownership of the building on Portion 50 to him, or the land had been gifted to his father by his father's family and relatives for him to be the "sole owner", the court has no alternative but to hold that the house constructed on land Portion 50 Anibare district and from which "The Bay Restaurant " is located, remains the property of Enrico Solomon. Whatever arrangements entered into between Enrico Solomon and the Dimapilis brothers on how the "loan" was to be repaid and whether they had been allowed "to take care for the house till Mr. Enrico is able to pay up our total expense (\$43,400.00) on the house" was not substantiated by any supporting evidence before this court. There was failure too to produce the "factual documents" referred to in the Dimapilis brothers "To whom it may concern" Notice of 29 January 2013 that convinced them that Dibanga Kakiouea, the first defendant's father, "rightfully owned" Portion 50 which persuaded them to transfer "the full ownership of the house" to Ali Kakiouea in return of Ali Kakiouea's repaying the \$43,400.00 allegedly owed by the plaintiff to the Dimapilis brothers.

The law is clear. At no time did the Dimapilis brothers have the legal right to the house and the land on Portion 50 upon which it stands to give away to Ali Kakiouea. The property right, in the absence of evidence proving its transfer, remained with Enrico Solomon throughout. At the very most, the Dimapilis brothers possessed an equitable right to the property, as did Ali Kakiouea later, if he had in fact repaid the brothers their money. I will revert to the question of equitable rights later.

The second defendant entered into a land lease agreement with the first defendant from which the above-said restaurant is operating. From the affidavit of its Managing Director, Sean Oppenheimer, it appears that the company had entered into the agreement, following the Dimapilis brothers' representation on the debt owed to them by Enrico Solomon. Given the court's finding above, that the rightful owner of the house on Portion 50, the land lease agreement entered into between the first and second defendants is not a valid document. The Agreement is invalid as one of the parties, Ali Kakiouea, the Lessor did not possess the right and therefore the legal authority and/or capacity to enter into an agreement for the renting by Capelle & Partner of the house on Portion 50.

Clause 13 of the Agreement state as follows:

" 13. Severance

If any provision of this Agreement is judged invalid or unenforceable for any reason whatsoever by a court of competent jurisdiction, such invalidity or unenforceability (unless deletion of such provision would materially adversely affect one of the parties) will not affect the operation or interpretation of any other provision of this Agreement to the intent that the invalid or unenforceable provision will be treated as severed from this Agreement."

This severance provision however cannot save the Agreement as the deletion of the invalid part that is, the name and identity of Ali Kakiouea as the Lessor, "would materially adversely affect one of the parties."

Nevertheless there exists, in the absence of a formal agreement, an understanding at the very least, which is shared by both Ali Kakiouea the first defendant, and Enrico Solomon, the first-named plaintiff, with the second defendant, that the house on Portion 50, was to be rented out and used for commercial purposes by Capelle & Partner, the second defendant.

The preamble to the Agreement also refers to a previous Agreement made on 5 October 2011 that was deemed to have terminated on 31 December 2014 to be supplanted by the 2015 Agreement, and which was between the first-named plaintiff, Enrico Solomon and the second defendant.

Both these factors, in the court's view, lend some support to the argument that the arrangement for the lease of the building on the land Portion 50, still subsists as between the second defendant, Capelle & Partner, and the first-named plaintiff, Enrico Solomon, albeit through an oral agreement. The court is prepared to accept this proposition of the understanding between the parties as capable of extending the continuing use of the house and land on Portion 50 for The Bay Restaurant operation. However, given the court's determination of ownership above, it is suggested that it would be in the second defendant's best interest that the lease document be amended or changed to reflect the position of the parties.

There finally remains the vexing issue of whether the first defendant Ali Kakiouea had in fact inherited the \$43,400.00 debt or loan owed by Enrico Solomon to the Dimapilis brothers for the construction of the building and further, whether this sum of money been paid by Ali Kakiouea to the Dimapilis brothers as stated by them in their "To whom it may concern" note.

The non-cooperation, for whatever reason(s), by Mr. Kakiouea to work together with both his counsel, and then finally failing to make an appearance at the hearing, has not helped his cause. Nevertheless, this court may not and cannot totally ignore what in a court of equity would regard as "fair and equal", where conscience commands that that the court may apply its equitable jurisdiction. While there is no longer any court of equity, the principles it espoused are now assumed as part of the common law which in turn is part of our laws here on Nauru. To ensure therefore that the possible rights and/or interests of Mr. Kakiouea in Portion 50 receives a fair hearing, the court decides that part of the rent money be retained by the court for a fixed period of 30 days to allow him to file his claim and substantiated by proper evidence, to the property.

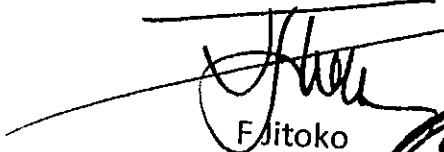
Orders


In the final, the court finds and Orders as follows:

1. That the building on land Portion 50 Anibare district on which The Bay Restaurant is located, remains the property of Enrico Solomon, the first-named plaintiff;

2. That the Land Lease Agreement dated 29 December 2014 between Ali Kakiouea the first defendant, and Capelle & Partner, the second defendant, is without legal effect and is invalid;
3. That notwithstanding the invalidity of the lease document, the original oral agreement between Capelle & Partner and Enrico Solomon subsists allowing the commercial activities from the locality to continue;
4. That two-thirds (2/3) of all the rent money collected by and deposited with the court since 18 December, 2015, be paid out to Enrico Solomon, the first-named plaintiff;
5. That one-third(1/3) balance of the rent money to be kept in the custody of the Registrar until further order(s) of the court;
6. That Ali Kakiouea, the first defendant, file into court, within 30 days, his claim(s) if any, to share the rent money;
7. If Ali Kakiouea does not file within the 30 days prescribed, his claim(s), the plaintiff is at liberty to apply for the release of the balance of the money to him.
8. I make no order as to costs.

Dated this 16th day of August, 2018.


F. Jitoko
Chief Justice



The seal of the Supreme Court of Nauru is circular. It features a central emblem with a bird (likely a frigatebird) perched on a shield. The shield contains a triangle and a circle. The words "SUPREME COURT OF NAURU" are written around the perimeter of the seal.