SUPREME COURT OF NAURU

[CIVIL JURISDICTION] **Civil Suit No. 1 of 2019**

Between: **Darky Jeremiah** PLAINTIFF

And: **Dogabe Jeremiah** 1ST DEFENDANT

&

Tyke Jeremiah 2ND DEFENDANT

Before: Judge R. Vaai

APPEARANCES:

Appearing for the Plaintiff: K.Tolenoa (Pleader)

Appearing for the Defendants: Julie Olsson (Pleader)

Date of Hearing: 30/4/19 and 7/5/19
Date of Judgment: 24/5/19

Judgment

1. This action is concerned with an unfortunate dispute between two elderly blood brothers concerning the use and occupation of a

relatively small area of vacant land within a parcel of land Atai, portion 375 Meneng district jointly owned by them and other family members as tenants in common.

2. Both plaintiff and defendant own1/10 share each in the land which has a total area of 5,327.78 square meters. Other co-owners hold 1/10. 1/50 and 1/80 shares. The land fronts onto the main road. On the other side of the road is the Menen Hotel and the sea to the East, North East. The main road goes southward to the right to the airport and to the left it goes north towards Boat Harbour and Anibare.

3. There are several residential and business buildings on the land. Facing the road and beginning from the airport (south) direction is the residential home of the plaintiff, home of Anvick (brother), a building which houses Anvick's restaurant, the plaintiff's store and Harold (brother) store. Next door to this building is a vehicular track (track) which goes inland towards the rear of the land. Next to this track close to the main road is an uncompleted building of the defendant, construction ceased as a result of an interim injunction arising out of these proceedings. That building is identified on the diagram as Dogabe's project.

4. This partly constructed building is not the subject of these proceedings. These proceedings are concerned with the track which goes to the rear, referred in paragraph 3 above. The track and layout of the land and buildings thereon is best demonstrated by reference to the following diagram which is not to scale:.

5. The track is represented by the dotted line commencing from the main road. It turns left and ends where there is an arrow and the words "Blocked Area". It does not continue on as indicated by the arrow at the end of the dotted line. The same track continues on to the rear of the land to the right of the building labelled Dogabe and Tyke. (Tyke's house)

6. At the time of the site inspection by the Court and counsels a tent was erected where the black arrow and the words "Blocked Area" appear on the diagram. The tent is supported by six posts bolted onto concrete pilings about half meters high above the ground. It adjoins the front part of Tyke's house.
   Tyke is the son of the first defendant. The tent was erected by the first defendant, who is temporarily occupying Tyke's house.

7. This action is concerned only with the area marked "Blocked Area" on the diagram, where the tent is erected.
   The interim injunction sought by the plaintiff was to restrain the first defendant from constructing on the "Blocked Area". The partly constructed building of the first defendant by the main road labelled Dogabe's Project on the diagram and to the north of the pathway was not the subject of injunction sought by the plaintiff. The injunction order however included that building.

8. The interim injunction order is accordingly amended to exclude the first defendant's partly constructed building referred to above in paragraph 7. He is at liberty to continue construction of that building.

The plaintiff's claim

9. Behind the buildings facing the main road are three water tanks which belong to the defendant, the plaintiff and plaintiff's son.

To fill the water tanks the water tanker truck goes to the rear of the land using the pathway, parks at where the tent is erected and fills the three tanks using hoses.

10. The plaintiff has also built an extension at the rear of his house to accommodate for his disabled son who was involved in a traffic accident. It is contended that in the event of any emergency, the Blocked Area should be kept clear and free for any necessary assistance to access the disabled son.

11. By erecting the tent at the Blocked Area the plaintiff contented that the first defendant has effectively claimed possession of the land underneath the tent. In doing so the first defendant has permanently prevented the water tanker from parking at that particular area to fill the water tanks of the plaintiff and his son.

12. The land upon which the tent is erected is land commonly owned by the plaintiff, the defendants and several other land owners; the first defendant has neglected and failed to seek the approval and consent of the other landowners as required by law.

13. The plaintiff is the younger brother of the first defendant; he is 59 years old and had been living on the land with his parents, brothers and sisters including the first defendant.

The First Defendant

14. The first defendant, the principal target of the plaintiff's complaint, is the older brother of the plaintiff. He is seventy (70) years old. He too has lived on the land all his entire life together with his parents when they were alive. The second defendant the son of the first defendant is about 30 years old.

15. The house to which the tent is attached was built by the first defendant many years ago, some 50 years ago while his parents were still alive. He has given the house to his son Tyke. He occupies the norther part of the land on which he and his children have constructed several houses. These other houses are accessed by a separate pathway as depicted on the diagram.

16. The first defendant does not deny that he erected the tent on the spot where the water tanker often park to fill the water tanks. He says so at paragraph 33 of his affidavit ("Exhibit D1").

> 33. *"The tanker operator prefers to fill the said water tanks from this central position at Tyke's doorstep because it is convenient for him to fill the tanks from one position. Nauru ingenuity".*

17. But he went on to say that there is alternative way for the water tankers to fill the water tanks.
He said so at paragraph 34;

> *34. The tanker operator is however able to fill the three water tanks via hose from outside the compound. The plaintiff's water tank can be filled with the water tanker parked on the vicinity of the plaintiff's front yard. The tanker operator is able to pull the water hose through the walkway between the plaintiff's house and the parent's home to fill the plaintiff's water tank....*

18. He also emphasized at paragraph 35 the safety risk to other occupants of the land when the water tanker goes to the tent area to fill the tanks;

> *35. The water tanker access through the back way is increasingly becoming a risk to the residents and their small children living in the houses behind the plaintiff's houses. The water tanker is too big to safely maneuver itself on the narrow back passages. Once the large tanker is in the compound and is reversing to back out, the view of the driver will be blocked because of its sheer size and therefore risk to children running near or behind the tanker.*

Findings of Facts

19. The plaintiff and the first defendant are two of the several co-owners of the land Atai. They each hold 1/10 shares. Tyke's house which adjoins the disputed land area was built with the consent of the father of the plaintiff and defendant. He was then the sole owner.

20. In 2018 the first defendant and his family moved into Tyke's house. Soon after he erected a tent on the disputed land which had been left vacant for some years although it was used by Tyke to park his car.

21. Although the tent can be easily removed, its existence tantamount to exclusive possessions of the land underneath it by excluding and preventing other land owners and third parties like water tank drivers from accessing the disputed area and beyond. In response to questions from the bench, defendant's counsel objects to the water tankers parking under the tent when filling the plaintiff's water tanks.

22. The alternative method to fill the water tanks suggested by the first defendant is illogical and a lot more burdensome for the tanker drivers.
The tent is about 50 meters from the main road. The tent and Tyke's house can be seen from the main road; the tanker truck only travels about 50 meters, makes a left turn and stop, and from that central position can fill the three water tanks. The first defendant himself described the operation as Nauruan ingenuity.

23. The safety risks imposed by the tanker truck going to the tent as alleged by the defendant is over exaggerated. The track from the main road to Tyke's house is wide and about 50 meters long. Either the truck can reserve back to the main road or it can turn around at Tyke's house. In any event to fill the defendant's water tank the truck needs to travel along the same track to Tyke's house.

24. Reasons given by the first defendant for erecting the tent were for protection against heat of the sun and to keep the rain from washing inside the house.
Both excuses are inherently weak and intrinsically untrustworthy. The house has been built for many years and Tyke himself did not consider building a tent or any other structure for reasons advanced by the defendant. The tent was built deliberately to inconvenient the plaintiff.

Discussion

25. Upon the death of their father the plaintiff, the first defendant and others inherited the land Atai portion 375 as, tenants in common. Buildings, rights of way and tracks have been erected on the land. Other areas including the disputed area where the tent is erected have been left vacant.

26. The rights of legal owners in common were referred to by Denning LJ in *Bull v. Bull*[1] :

> *" ...but there is plenty of authority about the rights of legal owners in common. Each of them is entitled to the possession of the land and enjoyment of it in a proper manner. Neither can turn out the other; but if one of them should take more than his proper share, the injured party can bring a action for an account. If one of them should go as far as to oust the other, he is guilty of a trespass".*

This statement of the law is reflected in Clarke and Lindsell on Torts[2].

> *"One co-owner of land can only bring an action of trespass against the other if he has been actually ousted or dispossessed of the land. Each co-owner is entitled to possession of the whole land so that if one turns out the other off the land or part of it, it is a trespass... It is not a trespass, however, if one co-owner uses the land in the ordinary and natural way".*

27. In : The law of Real Property by Sir Robert Megary and Wade[3] it is stated:

> *"Unlike joint tenants, tenants in common hold in undivided shares; each tenants in common has a distinct share in properly which has not yet been divided among co-tenants. Thus tenants in common have quite separate interest; the only fact which brings them into*

[1] (1955) 1 QB 234 at 237
[2] (14th Ed.) page 768 paragraph 1328
[3] 4th Ed. Page 396

co-ownership is that they both have shares in a single property which has not been divided among them. While the tenancy in common lasts, no one can say which of them owns any particular parcel of land."

28. While a tenant in common is entitled to exercise acts of ownership over the whole of the common property without liability to be called upon to account in respect thereof, this general rule will be displayed, however, where a tenant in common has wrongfully excluded a co-tenant from exercising the right to occupation[4]. By excluding a co-owner from the exercise of his legal rights the tenant in common who so excluded his co-owner has committed a legal wrong[5].

29. The true nature of ouster is that it constitutes a trespass by one co-tenant of another co-tenant's right in respect of the property. But a temporary disturbance to an access way to the property would not amount to an ouster[6].

30. It is not disputed that the tent was constructed when the first defendant and his family moved in and occupied Tyke's house. His occupation is temporary. Similarly it is not disputed that the erection of the tent by the first defendant tantamount to the exercise by the first defendant of ownership over the land covered by the tent. In doing so he has wrongfully denied to the plaintiff and other co-owners access to the area of land underneath the tent and beyond.

31. The element of ouster necessary to the establishment of trespass committed by the first defendant has been established, which justify the granting of the injunction.

Nuisance

32. I invited counsels to address the issue of nuisance when preparing their written submissions.

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[4] Luke v. Luke (1936) SR (NSW)310
[5] Luke v. Luke at page 314
[6] Ferguson v. Miller (1978) 1 NZLR 819

It was in my view open to the plaintiff on the general nature of the pleadings to allege nuisance as an alternative cause of action. Both counsels have addressed the tort of Nuisance. I shall briefly deal with the issue of nuisance despite the fact that the tort of trespass has been established.

33. Salmond on Torts[7] suggests that one co-owner cannot bring an action in nuisance against another co-owner of the land. It says:

> *"As nuisance is a tort arising out of the duties owed by neighboring occupiers, the plaintiff cannot succeed if the act or omission complained of is on premises in his sole occupation. The nuisance must have arisen elsewhere than in or on the plaintiff's premises, whether it is common law or a statutory nuisance. A nuisance is therefore usually created by acts done on land in the occupation of the defendant, adjoining in the neighborhood of the plaintiff."*

34. There are however authorities to the contrary. In *Hargrave v. Goldman*[8] Windeyer J said:

> *"Moreover it is not an essential element in liability for a nuisance that it should emanate from land belonging to the defendant, although commonly it does..."*

And in *Southport Corporation v. Essopetroleum Co. Ltd*[9] Devlin said at pages 1207 – 1208:

> *" I think that it is convenient to begin by considering whether there is a cause of action, in nuisance. It is clear that to give cause of action for private nuisance the matter complained of must affect the property of the plaintiffs. But I know of no principle that it must emanate from land belonging to the defendant."*

Mahon J in *Clearlight Holdings Ltd v. Auckland City Corporation*[10] followed the English and Australian authorities and held that the fact that

[7] 17th ed pp 51-52
[8] (1963) 110 CLR 40 at 60
[9] (1953) 2 All ER 1204

the nuisance had occurred on the plaintiff's land was no bar to his success.

35. In *Hopper v. Rogers* (1974) Ch 43 the plaintiff and defendant were owners of adjacent farmhouses and owners and occupiers in common of the immediately surrounding land which sloped steeply down from the plaintiff's house. The defendant deepened the track using a bulldozer subjecting the land to soil erosion which would eventually deprive support to the footings of the plaintiff's farmhouse and cause it to collapse.

The Court of Appeal upheld the granting of the injunction.Lord Scarman at page 51 observed:

> *" In my view, the plaintiff's position, as co-occupier of the land where the act he complaint of was done, is an irrelevant coincidence, unless it can be used to raise a defense of contributory negligence or violenti non fit injuria, neither of which is to be found in this case. He has only to show that the land of which he is the occupier is damaged or threatened by a wrongful act done upon land of which the defendant is an occupier, and either created, continued or adopted by the defendant, to establish his cause of action. In the present case he has established a threat of harm created by the defendant and, for reasons given by Russel LJ, that is enough, to entitle him to the relief he seeks"*

36. A wrongful interference with a right of way constitutes a nuisance. However, unless the interference is substantial no action will lie: *Pettey v. Parsons*[11]. The court here recognized that so long as there is a reasonable access to the land and a reasonable opportunity of exercising the right of way there is no obstructing and there is no derogation. It is a question of fact. The court held that the plaintiff was entitled to erect a ten foot gate on the condition that it would be kept open during business hours and must always be unlocked. It could not

[10] (1976) 2 NZLR 729
[11] (1914) 2 ch 653 (CA)

be permanently closed and locked as that would then become a substantial interference.

37. Since *Sturges v. Bridgman*[12] it has been accepted that the conduct complained of must be reviewed in the context of the surrounding circumstances. Changes in the character of the land and of the neighborhood in which it is situated must be considered. What constitutes a substantial interference with the enjoyment of the plaintiff falls to be determined against that test.

38. Although the tent by its nature is a temporary structure, the inconvenience and obstruction it has created is substantial. The first defendant will not allow water tanker trucks to park under the tent when water tanks of the plaintiffs and his son need re-filling.

39. An action grounded on nuisance has also been made out.

Orders

1. The interim injunction granted on the 11th February 2019 is now discharged and replaced by this order.
2. The first defendant is ordered to remove the tent he erected at the front part of the second defendant's house.
3. Both defendants, their families, agents and servants are prohibited from erecting or constructing on the area where the tent is erected.
4. The first defendant is permitted to complete construction of his house referred to in paragraph 8 above.
5. Each party will bear its own costs.

Dated this 24th day of May2019

Judge R.Vaai

SUPREME COURT OF

[12] (1879) 11 ch 852