



SUPREME COURT OF NAURU  
YAREN  
CIVIL JURISDICTION

Civil Case No. 14 of 2020

BETWEEN

ANGELA GAIROE

Plaintiff

AND

MILTON ROSS DUBE

Defendant

Before : Fatiaki CJ.

Date of Hearing : 15 July, 2021

Date of Ruling : 22 Sept, 2021

CITATION : Gairoe v Dube

CATCHWORDS: “*strike out application*”; “*frivolous and vexatious*”; “*abuse of process*”  
“*wrong defendant*”; “*trespass to land*”; “*non-joinder or misjoinder of parties*” ;  
“*relationship of parties a question of law*” ; “*assessment of mesne profits*” ; *value of market  
rent for premises* “

LEGISLATION : Civil Procedure Rules 1972 (CPR) ; Order 15 rule 19(1)(a) ; Order 15 rule 20 & 4 ;  
Order 12 rule 5(3) ; Order 12 rule 7 ; Lands (Review of Rental Rates) Order 2014.

CASES REFERRED TO : Smith, Stone & Night Ltd v Birmingham Corporation [1939] 4 All ER  
116; Ferguson v John Dawson & Partner (Contractor) Ltd [1976] 3 All ER 817 ; Ministry of Defence  
v Thompson [1913] 2 E.G.L.R 102 ; Lamru Pty Ltd v Kation Pty Ltd (1988) 44 NSWLR 432

APPEARANCES:

Counsel for the Plaintiff : R. Tagivakitini  
Counsel for the Defendant : D. Aingimea

## RULING

### INTRODUCTION

1. This is a civil action filed by the plaintiff a Nauruan woman residing with her family at Yaren district who claims ownership of Land Portion 114 located at Boe District and traditionally known as "Ianepe" or "Ijanepe" ("**Portion 114**"). She is suing the defendant who is a business man residing in Aiwo District. The defendant is also a Member of Parliament.
2. The plaintiff claims that the defendant owns many shops in Nauru and one of his shops referred to as "**Od-n Boe**" is the subject matter of this claim. It is located in a building on "**Portion 114**" which encroaches onto a significant part of the plaintiff's share of "**Portion 114**" ( the '*encroaching building*' ).

### THE CLAIM

3. Plaintiff claims that her father **Gairoe Kun Eodebe** allowed a Marshallese man called "*Wynn*" to build a dwelling house on an unsurveyed piece of land in "**Portion 114**". It was a verbal agreement which was never reduced into writing. The plaintiff later inherited a half ( $\frac{1}{2}$ ) share of "**Portion 114**" after the death of her father. (see : GN.08 of 1981).
4. "*Wynn*" erected his dwelling house on "**Portion 114**". After his demise, his sister Nina Dube and her husband John Dube approached the plaintiff to transfer to them , the piece of land where the dwelling house was built. John Dube is the father of the defendant while Nina Dube is his step-mother.
5. Plaintiff states she transferred a part of her inherited share in "**Portion 114**" to Nina Dube on 18 June 1986. The transfer is recorded in GN. No.35 of 1986. This transferred portion was later inherited by John Dube on a life time only basis in the year 2002 as the surviving spouse of Nina Dube. When John Dube passed away in 2017 his life only inherited share of "**Portion 114**" was transmitted to Poncianna Audoa who is the biological daughter of Nina Dube and step-sister of the defendant.
6. The plaintiff denies she ever intended or agreed to transfer the entire area of "**Portion 114**" to Nina Dube. Instead , she transferred a quarter ( $\frac{1}{4}$ ) of her share as reflected in the gazetted transfer (see : GN 271 of 1986). She further deposes that the encroaching building is built and occupies more than three quarter ( $\frac{3}{4}$ ) of the total area of "**Portion 114**", whereas the transfer of her share of the disputed land to Nina Dube was only meant for the purpose of building a dwelling house on the portion and not to erect a large commercial encroaching building.
7. The limited nature of the plaintiff's transfer to Nina Dube is reinforced by the defendant's later requests to the plaintiff to transfer to him (**not** to Poncianna) the remaining untransferred share of "**Portion 114**" with the latest request, being made on 16 May 2020, which the plaintiff also declined. The plaintiff had also issued a "*letter of demand*" on 2 April 2020 , after which , the defendant made unsuccessful attempts to convince the plaintiff's family members to transfer the whole of the "**Portion 114**" to him.

8. The plaintiff claims that she never received any rental from the defendant for his occupation and use of her land as the defendant's shop building is encroaching into her untransferred inherited share of "Portion 114". She filed the claim to obtain restitution or compensation for the loss of opportunity to occupy and use her aforementioned share of "Portion 114" for the last 19 years, and also, to regularise the defendant's occupation and use of her land in the past and into the future.
9. The amount of compensation claimed is conveniently based on the lowest land rental rate prescribed under the Lands (Review of Rental Rates) Order 2014 for use of her land by the defendant for the past 19 years.
10. In her Claim the plaintiff seeks the following reliefs :
  - (a) *A declaration that the defendant has not acquired proper documentation, Approval or consent from the plaintiff and landowners of Portion 114, to build and run his business on Portion 114.*
  - (b) *An order that the defendant pays a lump sum payment of \$153,232.56 to the Plaintiff for uncollected rent over the last 19 years.*
  - (c) *An order for the defendant to enter into a lease agreement with the plaintiff for the use of her land at portion 114.*
  - (d) *An order, subjecting the defendant to pay monthly rent of \$1060.80 per month to the defendant for the commercial use of her land at portion 114.*
  - (e) *An order for the defendant to pay cost to the plaintiff.*
  - (f) *And for any other order which this Honourable court deems just."*
11. Notable by its absence is a claim for vacant possession of "Portion 114" and/or an injunction prohibiting the defendant from entering or continuing to operate his business on "Portion 114".

#### THE DEFENCE

12. On 16 July 2020, the defendant filed his Statement of Defence unconditionally admitting paras 1, 2, and 3 of the plaintiff's Statement of Claim which reads :
  1. *At all material times, Angela Gairoe ("the Plaintiff") is a 63 years old Nauruan woman and resides with her family at Yaren District.*
  2. *At all material times, Milton Ross Dube ("the Defendant") is a Nauruan man and resides with his family at Aiwo District. He is a Member of Parliament and a well-known businessman in Nauru.*
  3. *The defendant owns a chain of shops in Nauru which bear his first and second name. One of his shops is located at Boe District which is commonly referred to as Od-n- Boe. The details of the land in which the shop is situated are as follows:*
    - a. *Portion Number : 114*
    - b. *Land Name : Ianepe (hereinafter referred to as "Portion 114")"*  
(my highlighting)

13. The defendants also “admits in part and denies para 5 to para 29 of the plaintiff’s claim” (whatever that means) and the defendant specifically pleads as follows (in para 3) :

- “ (a) *The land was granted by way of customary grant to Wynn by the plaintiffs father.*
- (b) *When Wynn died, the sister of Wynn, Nina Dube ..... inherited the Land. It is now owned by the step-sister of the defendant, Poinciana Audoa Nee Dube. (no Gazette Nos are identified.)*
- (c) *That transfer made were to legitimize the customary grant which the plaintiff is/was aware of. The transfer was made across to Nina Dube as the next of kin of Wynn. The transfer was deliberately made to be 25% despite the plaintiff knowing it should have been 100%.*
- (d) *The defendant received promises from the plaintiff that the balance of 75% of the land/ownership was going to be transferred across to the defendant. (not to Ponciana) This promise was never transacted by the plaintiff, although she claimed to have gone to the Nauru Lands Committee to perfect it but that the NLC was closed.*
- (e) *The defendant has continuously supported the plaintiff through (unquantified) cash grants over the years amounting to thousands of dollars.*
- (f) *The defendant’s step-mother over the years had enjoyed use of the land in accordance with the customary grant.*
- (g) *The commercial enterprise built on the said land was built in accordance to the wishes of the defendant’s step-mother. The rights and entitlements to the enjoyment over the said land rests with the defendant’s step-mother (deceased since 2002).”*  
(my highlighting and insertion in brackets)

#### REPLY TO DEFENCE

14. In her Reply the plaintiff denies para 3 of the Statement of Defence and responds seriatim :

- “(a) *Plaintiff agreed that Wynn had asked the plaintiff’s father to give him Portion 114 by way of customary grant but the plaintiff verily believes that this did not happen. When the Plaintiff’s father died, the Plaintiff inherited the land.*
- (b) *The plaintiff denies that Wynn ever owned Portion 114. The plaintiff transferred the land to Nina Dube in 1986. Following Nina’s death in 2002, her estate was inherited by her husband John Dube on a Life Time Only basis. Following John’s passing in 2017, Poncianna Audoa inherited Portion 114.*
- (c) *The plaintiff denies that transfer of portion 114 was supposed to be 100% transfer. The intention was for 25% and that reflects on the transfer documents. The plaintiff is not aware of any legitimization of the customary grant but duly transferred the land after John and Nina requested to do so.*
- (d) *The plaintiff denies that there was any promise whatsoever to transfer the remaining 75% to Nina. As far as the plaintiff is aware, the Nauru Land Committee has always remained open and was never closed.*

- (e) ***The plaintiff denies that she has received continuous support from the Defendant.***  
*On one rare occasion during the plaintiff's preparation for her 60<sup>th</sup> birthday in November 2017, she loaned \$10,000.00 from the defendant, which he gave her. She re-paid the \$10,000.00 to the defendant.*
- (f) *The plaintiff is not aware whether Nina enjoyed the use of her land. The plaintiff is only aware of the 25% transfer to Nina, not the customary grant.*
- (g) *The plaintiff did not know of Nina's wishes to build a commercial enterprise because when she transferred the land, the agreement was for Nina to build her dwelling house. **The rights and entitlements to the land should only be on 25% of the land but the shop at Od-n-Boe sits on more than 75% of the land.***  
 (my highlighting)

15. With the filing of the plaintiff's Reply, pleadings were closed and no further pleadings could be served thereafter without leave of the Court. (see : Order 15 rules 20 and 4)
16. On 24 June 2021, Defence Counsel deposed an "Affidavit to Confirm Discovery" attaching handwritten minutes of a Meeting of the Nauru Lands Committee which was attended by the Plaintiff and Nina Dube on 15 August 1983. The Minutes records the plaintiff as transferring her land in Boe entitled : "*Ianepe, P/N 114 C/L*" to her "*friend Nina Dube*". The transfer was effected by GN. 271 of 1986 and clearly shows that the plaintiff transferred one quarter ( $\frac{1}{4}$ ) of her share of "*Portion 114*".
17. At the time when this transfer was gazetted in 1986 , the plaintiff held a half ( $\frac{1}{2}$ ) share in "*Portion 114* " and the remaining half ( $\frac{1}{2}$ ) share was held by her mother. Accordingly, the effective transfer that took place was : ( $\frac{1}{4}$  of  $\frac{1}{2}$ ) = one-eighth ( $\frac{1}{8}$ ) of the area of "*Portion 114* " and that was what Nina Dube received and subsequently was inherited by her daughter Poncianna Audoa.
18. The remaining seven-eighth ( $\frac{7}{8}$ ) share of the land area of "*Portion 114* " is comprised of the plaintiff's own three-eighths ( $\frac{3}{8}$ ) share plus her mother's half ( $\frac{1}{2}$ ) share which she inherited on her father's demise and which remained with the plaintiff since then. The relevant area to be considered is the alleged encroachment of the commercial building that Poncianna inherited from her late father's estate.
19. In the absence of a proper survey plan and calculation of the precise percentage of encroachment it is difficult to verify the extent of the encroachment or how much compensation or restitution should be awarded for such encroachment.

#### MOTION TO STRIKE OUT

20. The defendant also filed a Motion to strike-out the claim as "*scandalous, frivolous, and vexatious*". The Motion also points out that the claim is an "*abuse of process*" as the defendant is not the correct party to the claim.

21. In this latter regard Order 12 rule 7(1) relevantly provides :

*“No suit shall be defeated by reason of the misjoinder or nonjoinder of any party ; and the Court may in any suit determine the issue or questions in dispute far as they affect the right and interests to the suit”* (my highlighting)

Furthermore rules 7(2) and 7(3) permits an application to be made to the Court to remove or join a necessary party in any suit. However neither paragraph identifies or limits the person who can apply to the Court unlike in a Third Party Notice under Order 13 rule 1 which is confined to a Defendant.

22. In light of the foregoing , the plaintiff cannot be forced to apply to join a party to her suit , neither is the defendant prevented from applying to join an additional party “...whose presence is necessary to ensure that all matters in dispute in the suit may be effectually and completely determined and adjudicated...”

23. The Motion to strike is supported by an affidavit sworn by the defendant. In it , he deposes that the encroaching building was not constructed by him nor is it owned by him. The building was apparently constructed by his step-mother Nina Dube in early 1990 and after the death of Nina Dube, her estate which included the encroaching building was inherited by her husband (the defendant’s father) for his lifetime and on his demise , Nina Dube’s daughter Poncianna Audoa inherited the land and building. The defendant further states that the business operations out of the encroaching building is being conducted “*under the authority of his step-sister Poncianna.*” (whatever that means).

24. In opposing the strike-out Motion , the plaintiff filed an affidavit wherein she deposes :

“3. *I confirm that I am the landowner of Ianepe (also spelled as Ijanepe) , Portion 114 at Boe District.*

4. *In 1980, my father Gairoe Kun Eodebe passed away and his estate was distributed in 1981 on Gazette No. 2 of 1981 (GN.08 of 1981). The land at Ianepe was distributed equally to my mother Deirok Kun Eodebe as Life-Time Only interest and to me.....*

5. *I am also known by my Nauruan name as Eideraidid Dowedia, as per the Gazette Notice.*

6. *In 1986 I recall transferring 1/4 of my share to Nina Dube. I did not transfer my mother’s share.*

7. *The 1/4 Share that I transferred had a house sitting on it, which is why I transferred it to Nina, as per her request.”*

25. Later , the plaintiff deposed :

“10. *The Gazette Notice for 35 of 1986 is correct as it stipulates my intention of transferring only 1/4 share to Nina.*

11. *My mother passed away in 2002 and her estate was distributed in May 2003 on Gazette No. 37 of 2003 (GN.125 of 2003). Her half share of the land at Ianepe was transferred to me... ..*

12. *Nina passed away and her share was transferred to John Dube on a Life-Time Only basis. When John Dube passed away, the share was passed onto Nina's daughter Poncianna Audoa.*

13. *I am not aware of any discussion between Poncianna Audoa and the defendant."*

#### COUNSEL'S SUBMISSIONS

26. At the hearing of the defendants' Motion to strike, defence counsel confirmed that there was no lease over the property and the business has been conducted there for over twenty (20) years. Counsel also vaguely alludes to without details, that there is a life interest involved and there should be restoration or a reversion of the land should have occurred.
27. In particular, counsel disputes the extent of the alleged encroachment and submits that the defendant is the wrong party by virtue of the ownership of the underlying land and encroaching building. Counsel also submits:
- "The (unidentified) business owner has an (undefined) arrangement with the (undisclosed) owner of the building and that person should be sued and not the tenant business owner. There would need to be a lease between the landowner and building owner."*  
(my insertion in brackets)
28. Plaintiff's counsel in opposing the application states that the land is co-owned by the plaintiff "as to 75% share and Poncianna owns 25% of the land" and counsel submits that the plaintiff had initially sought a profit – sharing and back payment of rent for the last twenty (20) years and a lease agreement with the defendant as the person who is operating and profiting from his business utilising the premises which was originally built by Nina and John Dube.
29. In particular, plaintiff's counsel submits that the operation of the defendant's business in the encroaching building affects the plaintiff's majority share of the land on which the encroaching buildings sit and her enjoyment thereof. Whatsoever the plaintiff has received nothing for the use of her land by the defendant and she in turn, is being denied the use of her land. Accordingly, the plaintiff seeks compensation for the use of her share of "Portion 114".
30. Defence counsel in reply submits the plaintiff "still needs to correct the parties and Poncianna should be added as a defendant." Whatsoever the Order relied upon by the plaintiff to calculate compensation only applies to Government leases and has no bearing on Commercial leases. It may be a "benchmark" but is unenforceable against a private individual and, even then, compensation is only owed and due to the owner of the building.

#### ANALYSIS & DECISION

31. It is clear from a perusal of the Claim and Defence and the affidavits filed by the parties in support and in opposing the Motion to strike-out, that the circumstances surrounding the devolution of "Portion 114" at Boe District to its present-day owners and the exact area and portions of the share that was transferred by the plaintiff to Nina Dube including the purpose for which the transfer was made, are all disputed.

32. I also note the defendant does not claim ownership or assert a right to occupy any part of “*Portion 114*” nor does he deny that the building out of which the shop is operated, is encroaching onto the plaintiff’s share of “*Plot 114*”. In my view no valid distinction can be drawn between the shop and the encroaching building for the purpose of the plaintiff’s claim of trespass which , by its nature , is a continuing tort.
33. In his amended Defence the defendant expressly claims that he received promises from the plaintiff that the balance of “*Portion 114* ” was going to be transferred to him which , arguably , would give him a personal right and equitable interest in the disputed land and yet , ownership of “*Portion 114*” and the encroaching building and retail shop and business being operated out the building are all denied by the defendant who maintains he is wrongly sued.
34. In this latter regard, a non-transferable Business Licence (produced by the plaintiff) was recently issued in the sole name of the defendant authorising him to operate *inter alia* a “*retail store*” business at a premises in Boe District from 17 July 2021 until 16 July 2022.
35. Clearly, the defendant’s denials about the nature and ownership of the business being operated out of the shop premises in the encroaching building on “*Portion 114* ” is seriously doubted and , to that extent and in the absence of an affidavit from Poincianna Audoa, clearly raises a triable issue involving the defendant personally.
36. Likewise, although the defendant was at pains to distance himself from any possible suggestion of ownership or having a legal interest in the encroaching building and even in the shop being operated out of it , his amended Defence and affidavit suggests that his interest in “*Portion 114*” extends beyond that of “*a mere*” commercial occupancy and operation by a completely disinterested party.
37. In this case by his own admission , the defendant and Poncianna are step-brother and sister but , beyond that , the undisclosed dealings , arrangements , or agreements between them (which is information only known to them) about the defendant’s occupation and use of the encroaching building and the operating of the retail store therefrom , remains obscure.
38. The absence however of the above information and details does not determine the matter as was succinctly expressed by Megaw LJ in Ferguson v John Dawson & Partner (Contractor) Ltd [1976] EWCA Civ 7 or [1976] 1 WLR 1213 in rejecting the appeal by the employer in that case , when he said :
- “ I find difficulty in accepting that the parties by a mere expression of intention as to what the legal relationship should be, can in any way influence the conclusion of law as to what the relationship is. I think that it would be contrary to the public interest if that were so ; for it would mean that the parties, by their own whim, by the use of a verbal formula, unrelated to the reality of the relationship, could influence the decision on whom the responsibility for the safety of workman as imposed by statutory regulations should rest.”* (my highlighting)
39. In similar vein in Smith, Stone & Night Ltd v Birmingham Corporation [1939] 4 All ER 116 Atkinson. J helpfully formulated six (6) questions to be considered in



determining whether a subsidiary (agent) is carrying on a business as the parent (principal) company's business or as its own, as follows :

- “(a) Were the profit treated as the profit of the parent ?  
(a) Were the persons conducting the business appointed by the parent ?  
(b) Was the parent head and the brain of the trading venture ?  
(c) Did the parent govern the venture , decide what should be done and what capital should be embarked on the venture ?  
(d) Did the parent make the profit by its skill and direction ?  
(e) Was the parent in effectual and constant control ? and  
(f) Whether the subsidiary has no office and staff of its own and all its affairs , including its finance are either directly or indirectly run and managed by the parent company.”*

40. In the present case the defendant appears to be suggesting that he is a mere volunteer , manager , caretaker , or representative of Poncianna Aduoa but , the answers to the six (6) questions posed by Atkinson J in the Birmingham Corporation case (ibid) may turn out that the defendant in operating the store on “*Portion 114*” is acting in his own personal and commercial interest or the evidence could lead to an inference that the defendant and his step sister's relationship is one of being joint-owners , occupiers and operators of the land , building , and business on “*Portion 114*” with joint liability for the trespass committed on the plaintiff's majority share of “*Portion 114*”.

41. In this latter regard Order 12 rule 5(3) of the CPR clearly provides :

*“Where relief is claimed in a suit against a defendant who is alleged to be jointly liable with some other person and also severally liable , that other person need not be made a defendant to the suit.....”*

42. Finally , reference may be made to Ministry of Defence v Thompson [1993] 2 E.G.L.R 102 where Hoffman LJ, in summarising the applicable principles in the assessment of mesne profits said:

*“First, an owner of land which is occupied without his consent may elect whether to claim damages for the loss which he has been caused or restitution of the benefit which the defendant has received. Second, the fact that the owner, if he had obtained possession, would have let the premises at a concessionary rent, or even would not have let them at all is irrelevant to the calculation of the benefit for the purposes of a restitutionary claim. What matters is the benefit which the defendant has received. Third, a benefit may be worth less to an involuntary recipient than to one who has a free choice as to whether to remain in occupation or to move elsewhere... ..”*

(my underlining)

43. In similar vein Cohen J said in Lamru Pty Ltd v Kation Pty Ltd (1988) 44 NSWLR 432 at p 439 :

*“Mesne profits are in effect damages for trespass. The authorities now seem to be clear that the usual measure is the value of the market rent for the premises which the trespasser should have paid for the period of its occupation. It will not depend on whether the plaintiff would have been able or willing to let the premises to someone else during the relevant period.”*

44. In light of the foregoing , the application to strike out the claim is dismissed with costs of \$300 to be paid to the plaintiff within 14 days.
45. By way of further directions , the plaintiff is ordered to file and serve an amended Claim by 6 October 2021 and thereafter the defendant is ordered to file and serve a Defence by 20 October 2021. The plaintiff may Reply if desired , by 29 October 2021.
46. The case is adjourned for mention on 01 November 2021.

DATED : this 22 day of September , 2021



**D.V.FATIAKI**  
**CHIEF JUSTICE**

