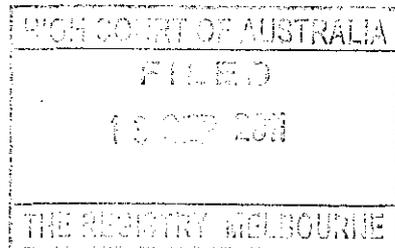


ON APPEAL FROM THE SUPREME COURT OF NAURU

BETWEEN:

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KINZA CLODUMAR
Appellant



and

NAURU LANDS COMMITTEE
Respondent

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SUBMISSIONS OF THE APPELLANT

Part I: Publication of submission

The appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: Issues presented

The appellant contends that the appeal presents the following issues:

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1. Whether fresh evidence can be received by the High Court of Australia on an appeal brought pursuant to the *Nauru (High Court Appeals) Act 1976*.
2. Whether the fresh evidence in this case justifies its reception on appeal.
3. Whether the fresh evidence warrants a rehearing of the orders made below.
4. Whether the time limit for bringing this appeal should be enlarged, or compliance dispensed with, so as permit the appeal to be heard and determined on its merits.

Part III: Judiciary Act certification

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The appellant certifies that he has considered whether notice should be given in compliance with section 78B of the Judiciary Act 1903. No such notice has been given, or is proposed to be given.

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Part IV: Citation of primary decision

No citation of the primary decision is available, save to say that it comprises Orders made by the Supreme Court of Nauru (Connell CJ) on 19 February 2002 in Civil Action No. 16 of 2000.¹ The decision is not published on the internet. There is no intermediate court decision.

Part V: Relevant findings of fact

- 10 The Court found² that the transfer of the land in question from the deceased to the appellant was not approved in accordance with s.3 of the *Lands Act 1976* (Nauru).³

In substance, that finding amounted to a finding that the transfer had not been approved by the President of the Republic of Nauru.

Part VI: Argument

Introduction

- 20 1. This appeal depends upon the reception by the Court of fresh evidence. No error on the part of the Court below is relied upon.
2. The fresh evidence, if received, points to an overwhelming likelihood that the judgment below was based on a mutual mistake by the parties, expressed by them to and adopted by the Court at first instance, as to the existence or non-existence of a fact which was decisive in the outcome of the case. The critical fact was that the then President of the Republic of Nauru had authorised the land transfer which is the subject of the case. The parties believed, on the best (and only) information available to them, that His Excellency had not done so. They made their
- 30 submissions to the Court below on that basis. The Court accordingly, and of course properly, gave its judgment on the basis that the Presidential approval had not been given.

The Nauru Appeals Act confers jurisdiction

3. The Court's power to hear and determine the present appeal is derived from the *Nauru (High Court Appeals) Act 1976* ("the **Nauru Appeals Act**"). The validity of that Act has been upheld by the Court.⁴
- 40 4. The Nauru Appeals Act confers jurisdiction on the Court to hear appeals in matters specified in the "Agreement between the Government of Australia and the Government of the Republic of Nauru Relating to Appeals to the High Court of Australia from the Supreme Court of Nauru" ("the **Agreement**"). The text of the Agreement is set out in the Schedule to the Nauru Appeals Act.

¹ AB 26-27

² Finding numbered (1), at AB 26

³ See Part VII below

⁴ *Ruhani v Director of Police* (2005) 222 C.L.R. 489

5. The present appeal is against a final judgment, decree or order in a civil case involving the exercise by the Supreme Court of Nauru of its original jurisdiction. Paragraph A(b)(i) of Article 1 of the Agreement accordingly confers jurisdiction, subject to any relevant exception specified in Article 2.

10 6. The only exception in Article 2 which calls for reference in the circumstances of this appeal is paragraph (d) of that Article. That paragraph provides that an appeal does not lie “*in respect of appeals from the Nauru Lands Committee or any successor to that Committee that performs the functions presently performed by the Committee*”. The Nauru Lands Committee is a respondent to the present appeal. However neither the appeal, nor the case before the Supreme Court of Nauru to which it relates, could be described as an appeal from the Nauru Lands Committee. It is merely an appeal from a decision of the Supreme Court of Nauru in a case to which the Committee was a party.

The time limit for appeal should be extended or dispensed with

20 7. The present appeal lies as of right.⁵ The appellant is out of time, but that is a matter of procedural irregularity only.⁶ The relevant time limit is found in this Honourable Court’s own Rules⁷, and the Court is empowered to enlarge the time,⁸ or dispense with compliance with it.⁹ Albeit that the extension sought is a long one, no prejudice has been shown to flow from that fact, and the reasons for it have been explained in the appellant’s affidavit. The interests of justice call for an extension or dispensation to be granted.

Fresh evidence may be admitted on a Nauru appeal

30 8. The jurisdiction which is conferred upon the Court by s. 5 of the Nauru Appeals Act is original jurisdiction arising from a law validly made under s.76(ii) of the *Constitution*, rather than appellate jurisdiction as such.¹⁰

9. The appeal thus does not arise pursuant to s.73 of the *Constitution*.¹¹ Accordingly, the prohibition imposed by that section on the High Court receiving new evidence on appeal¹² is of no application. That is primarily because the principal objection to that course, namely that any other reading of s.73 would involve the Court in an impermissible encroachment into State judicial power¹³, does not arise where original jurisdiction is invoked and no question of State judicial power arises.

⁵ s.5 of the Nauru Appeals Act, *supra*

⁶ *High Court Rules 2004*, Reg. 2.03.1

⁷ Reg. 42.03, applicable to Nauru appeals by reason of Reg. 43.02

⁸ Reg. 4.02

⁹ Reg. 2.02

¹⁰ *Ruhani* (*supra*): per Gleeson CJ at [10]; per McHugh J at esp. [14], [52], [82]; per Gummow and Hayne JJ esp at [106], [118]; cf per Kirby J esp. at [172], [206] and per Callinan and Heydon JJ esp. at [287], [288]

¹¹ *Ibid.*

¹² *Mickelberg v The Queen* (1989) 167 C.L.R. 259; *Eastman v The Queen* (2000) 203 C.L.R. 1

¹³ *Mickelberg* (*supra*), esp. per Toohey and Gaudron JJ at 298-299

10. The Court is required to apply the law of Nauru in hearing and determining the appeal.¹⁴ The starting point for the common law of Nauru is the common law of the United Kingdom as it stood on the day that Nauru achieved its independence, namely 31 January 1968.¹⁵ The House of Lords and the English Court of Appeal then received (and still receive) fresh evidence on appeal in cases where that evidence meets certain tests as to cogency and significance.¹⁶ The High Court should accordingly adopt the same approach in relation to Nauru appeals.

10 11. The power exercised by this Honourable Court, when the jurisdiction conferred by s.5 of the Nauru Appeals Act is engaged, is expressed in s. 8 of that Act in the following terms:

“The High Court in the exercise of its appellate jurisdiction under section 5 may affirm, reverse or modify the judgment, decree, order or sentence appealed from and may give such judgment, make such order or decree or impose such sentence as ought to have been given, made or imposed in the first instance or remit the case for re-determination by the court of first instance, by way of a new trial or rehearing, in accordance with the directions of the High Court.”

20 These terms are wide enough to empower the Court to receive fresh evidence on appeal. That is especially so where, as here, what is sought is not a new verdict on the basis of the fresh evidence, but merely an order for rehearing by the Supreme Court of Nauru.

The fresh evidence should be admitted

30 12. If the Court is empowered to receive fresh evidence, the present case is a compelling one for the exercise of that power. The test for when fresh evidence should be admitted has been variously expressed¹⁷, but on any formulation must be acknowledged to be stringent. Nonetheless, the evidence here meets the test however formulated.

13. The evidence comprises an apparently aged copy of an official government minute recording the critical fact of the Presidential approval. It has come to light only in 2011, in fortuitous circumstances unconnected with the parties.

14. The circumstances of the evidence being found are set out in the affidavit of the appellant sworn on 18 May 2011.¹⁸ That evidence is uncontradicted.

40 15. No suggestion has been made by the respondent to the effect that the signed Minute which has come to light¹⁹ is not authentic and cogent. The Respondent has had

¹⁴ *Ruhani* (supra) per McHugh J at [66].

¹⁵ Article 4 of the *Customs and Adopted Laws Act 1971* (Nauru)

¹⁶ See eg *Curwen v James* [1963] 1 W.L.R. 748; [1963] 2 All E.R. 619; *Jenkins v Richard Thomas and Baldwin's Ltd* [1966] 1 W.L.R. 476; [1966] 2 All E.R. 15; *Mulholland v Mitchell* [1971] A.C. 666; *Murphy v Stone Wallwork (Charlton) Ltd* [1969] 1. W.L.R. 1023; [1969] 2 All E.R. 949;

¹⁷ See e.g. *Orr v Holmes* (1948) 76 C.L.R. 632; *Commissioner for Government Tram and Omnibus Services v Vickery* (1952) 85 C.L.R. 635 at 642-643; *McCann v Parsons* (1954) 93 C.L.R. 418 at 426-429.

¹⁸ AB 38-65 (including exhibits)

¹⁹ Exhibit “KGC-3”, specifically the Minute Paper at AB 55 addressed to His Excellency the President and dated 21 May 1999, bearing the stamped word “APPROVED” adjacent to what appears to be the signature of the then President and the handwritten date “21/5”

ample opportunity to dispute the authenticity of the document, and has not done so.²⁰ Nor has it been suggested that the appellant could or should have discovered it earlier.²¹ It is plain on its face that if the evidence had been before the Court at first instance it is very likely that the order appealed from would not have been made, and that instead an opposite result would have occurred.

16. Further or alternatively, if the Court is not satisfied that the document satisfies the ordinary test for the reception of fresh evidence, the Court should apply a less strict test having regard to the evidence of the appellant,²² also uncontradicted, that the critical fact of the Presidential approval was a matter which was or should have been known to the respondent at the time of the proceedings below.
17. For the above reasons, the appropriate disposition of the appeal is to set aside the order below, and to remit the matter to the Supreme Court of Nauru for rehearing.

Part VII: Applicable Constitutional Provisions, Statutes and Regulations

Subsections (3) and (4) of section 3 of the *Lands Act 1976 (Nauru)* provided at all relevant times, and still provide, as follows:

“(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.

“(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.”

- 30 Section 4 of the *Custom and Adopted Laws Act 1971 (Nauru)* provided at all relevant times, and still provides, as follows:

“4. (1) Subject to the provisions of subsection (4) and of sections 3, 5 and 6 of this Act, the common law and the statutes of general application, including all rules, regulations and orders of general application made thereunder, which were in force in England on the thirty-first day of January, 1968, are hereby adopted as laws of Nauru.

“(2) Subject to subsection (4), the principles and rules of equity which were in force in England on the thirty-first day of January, 1968, are hereby adopted as the principles and Rules of equity in Nauru.

“(3) In every civil cause or matter instituted in any Court law and equity shall be administered concurrently but, where there was before the commencement of this Act or is any conflict or variance between the rules of equity and the rules of the common law relating to the same matter, then the rules of equity shall prevail.

“(4) The principles and rules of the common law and equity adopted by this section may from time to time in their application to Nauru be altered and adapted by the Courts to take

²⁰ Affidavit of the appellant sworn 18 May 2011 at [15], [16] (AB 43)

²¹ *Ibid*, at [13], [14] (AB 42-43)

²² *Ibid*, at [17] (AB 44)

account of the circumstances of Nauru, and of any changes of those circumstances, and of any alterations or adaptations of those principles and rules which may have taken place in England after the thirty-first day of January, 1968, whether before or after the commencement of this Act, but-

(a) nothing in this subsection shall be taken as requiring that any principle or rule of the common law or equity adopted by this section be altered or adapted in its application to Nauru; and

(b) a principle or rule of the common law or equity adopted by this section shall not be altered or adapted in its application to Nauru unless the Court which makes the alteration or adaptation is satisfied that the principle or rule so altered or adapted will suit better the circumstances of Nauru than does the principle or rule without that alteration or adaptation."

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Section 8 of the *Nauru (High Court Appeals) Act 1976 (Commonwealth)* provided at all relevant times, and still provides, as follows:

"8. The High Court in the exercise of its appellate jurisdiction under section 5 may affirm, reverse or modify the judgment, decree, order or sentence appealed from and may give such judgment, make such order or decree or impose such sentence as ought to have been given, made or imposed in the first instance or remit the case for re-determination by the court of first instance, by way of a new trial or rehearing, in accordance with the directions of the High Court."

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Part VIII: Orders sought

The appellant seeks the following orders:

1. The Orders made by the Supreme Court of Nauru on 19 February 2002 in Civil Action No. 16 of 2000 are set aside.
2. Civil Action No. 16 of 2000 is remitted to the Supreme Court of Nauru for rehearing.
3. The respondent pay the appellant's costs of this appeal.

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