



HIGH COURT OF AUSTRALIA

20 June 2012

KINZA CLODUMAR v NAURU LANDS COMMITTEE & ORS

[2012] HCA 22

On 20 April 2012, the High Court allowed an appeal by Kinza Clodumar from the Supreme Court of Nauru. A majority of the High Court held that, on appeal from the Supreme Court of Nauru, the High Court may receive evidence that was not before the Supreme Court, where that evidence was not discoverable by the exercise of reasonable diligence on the part of the party seeking now to adduce the evidence. Today, the High Court published its reasons for allowing the appeal.

Mr Clodumar is a citizen of Nauru. In 2000, Mr Clodumar commenced proceedings in the Supreme Court of Nauru, to prevent the Nauru Lands Committee from distributing certain interests in land. The Nauru Lands Committee ("the Committee") is a statutory body empowered, under Nauruan legislation, to determine questions concerning land ownership. Mr Clodumar claimed that certain interests in the land had been transferred to him by the previous, now deceased, landowner. The Supreme Court held that the asserted transfer was void because there was no evidence that the President of Nauru had consented to the transfer. Under s 3 of the *Lands Act 1976* (Nauru), the President's consent in writing is required for the transfer of any interest or estate in Nauruan land. However, for other reasons, the Supreme Court ordered the Committee not to distribute the land and to call a meeting of interested parties to determine the ownership of the land.

In 2010, following these meetings, the Committee re-determined the distribution of the land. The distribution did not give effect to the transfer asserted by Mr Clodumar, who appealed to the Supreme Court of Nauru. According to Mr Clodumar, during the course of this hearing in the Supreme Court, he was given some documents by a pleader of the Supreme Court. One of the documents was a copy of a signed Presidential Approval of the asserted transfer of interests in the disputed land to Mr Clodumar ("the Approval"). The Supreme Court adjourned the further hearing of the appeal to allow Mr Clodumar to appeal to the High Court from the Supreme Court's decision in 2000. Pursuant to s 5 of the *Nauru (High Court Appeals) Act 1976* (Cth) ("the Nauru Appeals Act"), appeals lie to the High Court from the Supreme Court of Nauru.

In the High Court, the Committee did not contest the authenticity of the Approval. According to an affidavit sworn by a former Minister of Nauru, the Approval had been removed from a ministerial office following a change in government, and remained in that person's home until being discovered in November 2011. However, the Committee contended that the High Court could not receive the Approval because it had not been in evidence before the Supreme Court in 2000. The Committee submitted that the use of the term "appeal" in s 5 of the Nauru Appeals Act indicates that an appeal under that section is an appeal in the strict sense and is to be decided on the basis of the evidence before the Supreme Court. The Committee also opposed Mr Clodumar's application for an extension of time to appeal to the High Court.

By majority, the High Court held that an appeal under s 5 of the Nauru Appeals Act is not limited to the hearing of an appeal in the strict sense because it engages the High Court's original jurisdiction under s 76(ii) of the Constitution. For the purpose of an appeal under s 5 of the Nauru Appeals Act, the High Court can therefore receive fresh evidence. The Court held that, in light of the circumstances, even if Mr Clodumar had exercised reasonable diligence, he could not have discovered the Approval before the proceedings commenced in 2000. Furthermore, Mr Clodumar sought to adduce evidence of some cogency, which, if accepted on a retrial in the Supreme Court, would be likely to determine the outcome of those proceedings. The High Court therefore granted the necessary extension of time, allowed the appeal and remitted the matter to the Supreme Court for retrial.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*