

BETWEEN: ROSE MARIE ASSANOUMA
Appellant

AND: GRATIENNE NANGARD
Respondent

Coram: Hon. Justice J. Von. Doussa
Hon. Justice R. Young
Hon. Justice O. Saksak
Hon. Justice N. R. Dawson
Hon. Justice D. V. Fatiaki

Counsel: Mr. James Tari for the Appellant
Mr. Stephen Tari Joel for Respondent

Date of Hearing: 7th July, 2010

Date of Decision: 16th July 2010

JUDGMENT

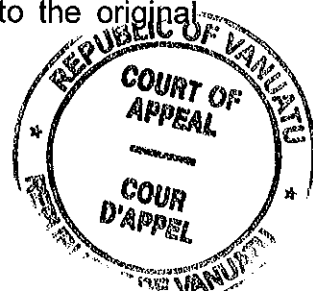
1. When Paulette Galipert (Assanouma) died on 24th October, 2002 she left a will dated 15th November, 1989. At her death none of her six children, Virginia, Rose Marie, Chantal, Gratienne, Ferreol and Fabiola knew of the will. Paulette left property in Vila and Epi Island. In 2006 a copy of the will came to light. The will appointed the Respondent Gratienne as sole executor of the estate. However in August, 2007 the Appellant Rose Marie applied for letters of administration of her mother's estate. Gratienne opposed the application and filed an application for probate of the will in the Supreme Court. The Chief Justice concluded the will was a valid will and he granted Gratienne's application for probate as trustee and sole executor of Paulette's estate.



2. In this appeal Rose Marie, the Appellant, submits the Chief Justice erred:-
- a) when he rejected the Appellant's claim that Paulette's actions during and after her will in 1989 amounted to a revocation of the will;
 - b) When he concluded there was certainty about the description of land in the will;
 - c) When he concluded the Respondent was entitled to act as the sole executor and trustee of the estate and;
 - d) In failing to appoint the Appellant as joint administrator of the estate.

Background Facts

3. Paulette's will provided:-
- a) the property described as Lot 6 title 451, at Anamburu Port Vila No. 2123 was bequeathed to Gratienne and Ferreol in equal shares.
 - b) the property described as Lot 7 title 451 at Anamburu Port Vila No. 2123 was bequeathed to the other four children in equal shares.
 - c) the remainder of her estate was divided equally between her six children.
4. Those two pieces of land (identified above in (a) and (b)) were, after Vanuatu gained independence, re-registered in one title, 11/OG23/029. Subsequently this title was surrendered and two lots created as leases 11/OG23/056 and 11/OG23/057. These leasehold titles followed the same boundaries as the original lots 6 and 7. The parties agreed that leasehold 056 is that parcel of land referred to in the will as bequeathed to Gratienne and Ferreol. Leasehold 057 is that parcel of land referred to in the will as bequeathed to the remaining four children. However, in October 2001 Paulette transferred ownership of the 057 lease from herself to Rose Marie. After signing the will Paulette acquired an Epi agricultural lease title No. 10/1133/001.
5. During her lifetime Paulette gave a power of attorney (dated 30th October 2000) in favour of Rose Marie with respect to the agricultural lease (001) and power of attorney (dated June 1999) in favour of Rose Marie in relation to the original



lease 029. On 20th February 2009, purporting to act with the authority of the power of attorney given by Paulette, Rose Marie transferred the agricultural lease (001) into her own name.

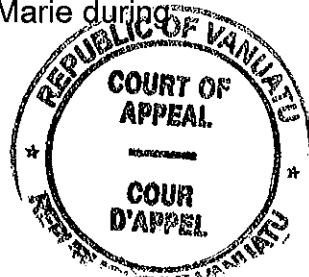
6. After Paulette died in 2002 it seems that the assets of her estate, primarily the commercial and agricultural leases, were administered by Rose Marie and Gratienne. In 2006 what was described in the evidence before the Chief Justice as a "certified" copy of Paulette's will was found. The original of the will at that stage had not been found. It was produced in the evidence at the hearing of these proceedings before the Supreme Court.
7. After discovering the certified copy of the will Gratienne consulted her sisters about what should be done with respect to their mother's estate. Eventually however Rose Marie gave notice that she intended to apply for letters of administration with respect to her mother's estate. Shortly afterwards Gratienne applied for probate and gave notice she opposed Rose Marie's application. Rose Marie then sought an order that she, along with Gratienne, should be appointed joint administrators of their mother's estate. This application was also opposed by Gratienne.
8. Finally in October 2008 Gratienne, acting as executor in Paulette's estate, issued proceedings against Rose Marie alleging Rose Marie's transfer of agricultural lease 001 to herself was unlawful. Gratienne said that the agricultural lease was properly an estate asset. Gratienne claimed that Rose Marie's authority for the purported transfer of the land from her mother to herself was based on the erroneous claim that the power of attorney subsisted beyond Paulette's death.

Discussion

9. We are satisfied the Chief Justice was correct to reject the challenge to the will and also correct to grant probate to Gratienne.

Will challenge

10. The essence of the Appellant's case is that the actions of the deceased during her lifetime amounted to a revocation of her will. The particular actions said to justify such a conclusion are; giving two powers of attorney to Rose Marie during



Paulette's lifetime and transferring the lease No. 057 to Rose Marie. Further the Appellant says the will is unclear as to what property was the subject matter of the specific bequests.

11. The Wills Act [CAP. 55] provides for two circumstances under which a valid will may be revoked. Firstly by subsequent marriage (section 8) and secondly by the completion of a subsequent valid will. Section 7 of the Wills Act provides as follows:-

“7. Revocation of will

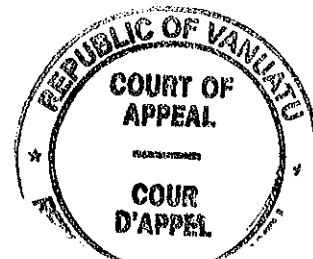
A testator may, by a new document made and executed in accordance with the provisions of this Act, or by its destruction, revoke a will already made.”

12. In this case there has been neither marriage nor a subsequent valid will. The requirements of section 7 are quite specific. There is no suggestion of a “new” will and no document which could be considered to be a new will signed after Paulette's 1989 will.
13. In any event there was nothing inconsistent with her will in Paulette giving Rose Marie power of attorney to act on her behalf during her lifetime with respect to managing her properties. As to the transfer of lease 057 to Rose Marie this transfer, although in conflict with a provision in the will, does not affect the efficacy of the will. The transfer of leasehold 057 to Rose Marie during Paulette's lifetime simply means that the particular bequest with respect to that land fails.

We therefore reject this ground of appeal.

Should Rose Marie have been appointed a joint administrator?

14. The Appellant's submission began as a claim that because of her inaction in seeking probate from Paulette's death in 2002 until 2007 Gratiene should be disqualified as an executor. In particular reliance was placed on regulation 27 and 31 and 33 of the Probate Administration Regulations 1972. Those regulations provide:-



"27. In case of renunciation or failure to take probate, right of Executor gone

Where an executor renounces probate of the will, or dies without having taken probate, or where, being personally cited to take probate; he does not appear to such citation, the right of such executor in respect of the executorship shall wholly cease; and the representation to the testator and the administration of his estate shall go, devolve and be committed in like manner as if such person had not been appointed executor.

31. Administration with the will annexed

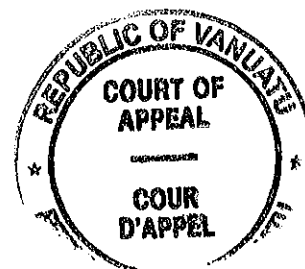
Where a person dies leaving a will but without having appointed an executor, or leaving a will and having appointed an executor who is not willing and competent to take probate, the court may appoint an administrator of the estate of the deceased, or of any part thereof, upon his giving security as aforesaid, and such administration may be limited as the court thinks fit.

33. Special letters of administration if personal representative not within jurisdiction

(1) If, at the expiration of three months from the date of grant of probate or administration of the will or estate of any deceased person, the personal representative is residing out of the New Hebrides, the court may, upon the application of any creditor or person interested in the estate, grant to the applicant special letter of administration of the estate, grant to the applicant special letters of administration of the estate of such deceased person, with such limitation as to powers and duration as the court may decide.

(2) The applicant shall satisfy the court that the personal representative is resident out of the jurisdiction, and that the applicant is thereby delayed in recovering or obtaining payment of moneys, or the possession of goods and chattels, or any other part of the estate to which he is by law entitled, or that the estate is liable to loss or wasted."

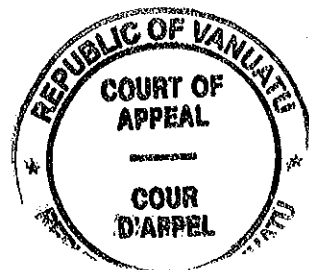
15. Neither Regulation 31 or 33 appear to have any relevance in this case. Gratiene is certainly willing to take probate and her preparedness to do so has not been challenged (R.31). Regulation 27 provides that where an executor denounces probate or dies without taking probate or is cited (invited by the Court) to take probate but refuses, then the executor should cease to so act. None of these situations apply here.

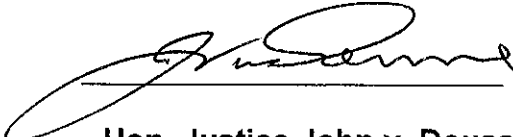


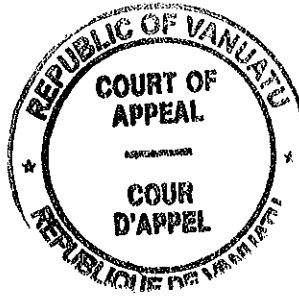
16. The Appellant's case reduced itself to the complaint that Gratienne made no application for probate with respect to her mother's estate from her death in 2002 to 2007 and this neglect showed her as illsuited to be an executor. However until 2006 no one knew there was a will. When the will was discovered initially only a copy was available. The Supreme Court accepted that initially Gratienne was uncertain about her obligations. But by 2007 she had applied for probate. Given those circumstances it was properly within the Chief Justice's discretion to refuse to remove Gratienne as executor. There was no reason to do so.
17. The appointment of Gratienne as executor was Paulette's wish, expressed in her will. The Chief Justice understandably concluded there was no reason not to give effect to Paulette's wishes. We therefore reject this ground of appeal.
18. Finally in any event it would have been wholly inappropriate to appoint Rose Marie as sole or joint administrator in this estate. The 2009 proceedings by Gratienne as executor challenged Rose Marie's transfer of agricultural lease 001 to herself. Gratienne's claim is that the power of attorney in favour of Gratienne expired when Paulette died and could not be lawful authority to transfer the land after Paulette's death.
19. If the Court had appointed Rose Marie as administrator of Paulette's estate then Rose Marie would have been faced, as administrator, with suing herself to get the return of the agricultural lease to the estate. This was clearly inappropriate.
20. For the reasons given therefore we dismiss the appeal and confirm the Chief Justice's Orders made in the Supreme Court.
21. The Respondent is entitled to costs on this appeal.

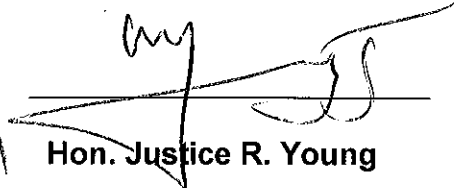
Dated at Port Vila, this 16th day of July, 2010

BY THE COURT




Hon. Justice John v. Doussa




Hon. Justice R. Young


Hon. Justice N. R. Dawson


Hon. Justice O. Saksak

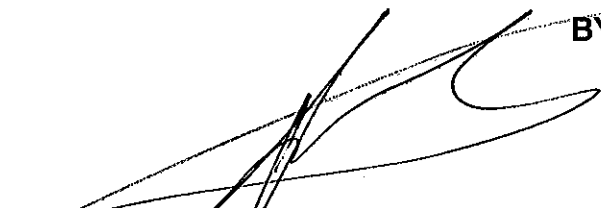

Hon. Justice D. V. Fatiaki

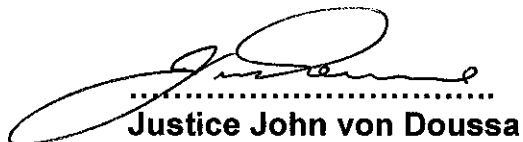
The Orders of the Court are therefore:-

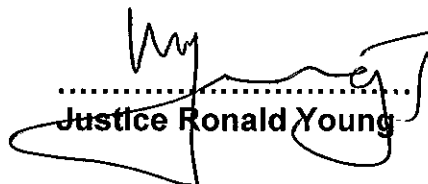
- 1) Leave to appeal granted;
- 2) The order for indemnity costs made on 14th May 2010 is set aside and an order for costs in the Court below at the standard rate is substituted;
- 3) The appeal against the eviction order made on 14th May 2010 is dismissed;
- 4) The order made on 28th June 2010 staying the Enforcement Warrant is extended to Friday 13th August 2010 to allow the Appellant to remove himself and his property from the leasehold land and to voluntarily deliver up possession;
- 5) The Appellant is to pay the Respondent's costs of the appeal at the standard rate;

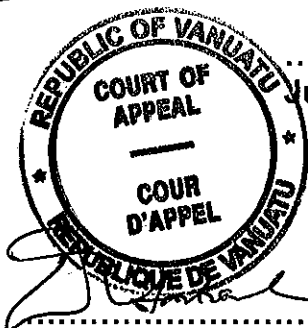
DATED at Port Vila, this 16th day of July, 2010.

BY THE COURT


.....
Chief Justice Vincent Lunabek


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Justice John von Doussa


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Justice Ronald Young




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Justice Nevin R. Dawson


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Justice Daniel Fatiaki