IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Appellate Jurisdiction)

Civil Appeal Case No. 35 of 2015

IN THE ESTATE OF
ALOANI KANO CHICHIRUA
Deceased's name

BETWEEN: **ANDREW CHICHIRUA**
Appellant

AND: **THE ATTORNEY GENERAL**
Amicus Curiae

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Oliver A. Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd

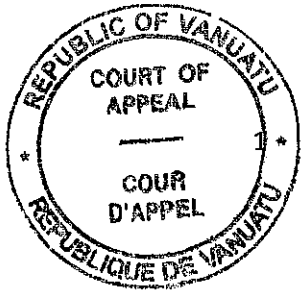
Counsel: ***Willie Daniel for the Appellant***
Viran Molisa Trief for the Attorney General

Date of Hearing: ***11th November 2015***
Date of Judgment: ***20th November 2015***

JUDGMENT

Introduction

1. This is an appeal against the judgment of Justice Harrop dated 31 August 2015 in Probate Case No. 17 of 2015 in which the Judge dismissed the appellant's application for administration with Will annexed in its entirety.



Background Facts

2. At the time of his death on 26 November 2014 the late Aloani Kano Chichirua (the deceased) was Chief of the Naflak Teufi tribe of Ifira Island, a right which was passed on to him by his late father Pastor George Kano. In that capacity the deceased held extensive and valuable customary land rights including in respect of Marobe Land. His father's entitlement in custom to that land was confirmed by the Efate Island Court on 28 October 2014.

The Will

3. The deceased executed a Will on 8 November 2014 in which he left among other property, all of this custom land to his eldest son Andrew Chichirua (the appellant) who then applied for a grant of administration with Will annexed in Probate Case No. 17 of 2015. The executor named in the Will was Mr Willie Daniel of Counsel but this appointment was renounced by Mr Daniel in his sworn statement dated 28 May 2015.

4. The first section of the deceased's Will is entitled: *"Decision ova long ol raits duties, kastom title mo land ona blong Marobe land long Efate Island"*. The deceased states that he is the paramount chief of Naflak Teufi and leaves all of the custom land in question to his eldest son Andrew so that he takes over as custom owner. This expressly includes all leasehold interests in the Marobe Land and any rights relating to any claims filed in Court together with any other possible claims he may have overlooked in relation to Marobe Land.

5. The second section of the Will is entitled *"Decision ova long ol propeti blong mi"*. This in turn is divided into two sections: *"Ol propeti long Ifira Tenuku"* and *"Ol propeti long main land long Efate"*.

6. The Will does not appear to include disposition of anything other than land. However the trial judge was informed that the deceased had several bank accounts and presumably also had other personal property which does not appear to have been dealt with in the Will.

Decision in the Supreme Court

7. The critical statutory provisions which the Supreme Court considered were sections 2 and 3 of the Wills Act [Cap 55]; which provide:

   Section 2:

   "Any person not being an infant and being of sound mind, memory and understanding may make provision by will for the disposal of the whole or any part of his property, of which he is the sole and total owner, after his death in accordance with and subject to the provisions of the Act."

   Section 3:

   "A Will under the provisions of this Regulation may only dispose of any estate in land vested in the testator of which he is competent to dispose on death in accordance with custom, or of any estate in land registered in his name alone."

8. The trial judge, in deciding on the capacity of a testator to dispose of property under these sections applied the following statement of principal in Re Estate of Molivono [2007] VUCA 22:

   ".....the fundamental point is that either under a Will, or a grant of administration, what will be affected will only be property which belonged to the deceased person in his own right. It does not and never will deal with custom ownership of land. Articles 73 to 75 of the Constitution could not be more clear and unequivocal. Questions of succession of land in custom on the death of a custom owner will be determined in accordance with custom and in the appropriate place which will be an Island Court or Land Tribunal. Neither a Will nor a grant of administration determine the question as to who will succeed to custom land."

9. The trial judge held that custom, as recognized by Article 74 of the Constitution, did not permit disposition of custom land in the manner contemplated by the first section of the deceased's Will. Custom land cannot pass from one custom owner to another (or anyone else) under the Wills Act. Accordingly letters of administration could not be granted in respect of the custom lands and associated property rights described in the first part of the Will.

10. The trial judge considered that the Will failed to deal with bank accounts and other personal property held by the deceased at the date of his death. In respect of that property the judge held that the deceased died intestate. The learned judge said:

> *"The question then arises whether the application should nevertheless be partially granted to the extent that the Will does not purport to dispose of customary land. Here, the definition in regulation 2 of the Queen's Regulation of "intestate" becomes relevant. This includes in the definition "a person who leaves a Will but dies intestate as to some beneficial interest in his estate." In other words, if a person who leaves a Will only disposes of some but not all of his property then for the purposes of the Regulation he is deemed to have died intestate. He or she is deemed to be in the same position as if there was no Will. Here as I have noted, the deceased did not in his Will purport to dispose of some property which he appears to have had, at least the contents of bank accounts. That means he is defined as having died intestate and the Will is totally ineffective because of that omission, quite apart from the customary land point. Even if I am wrong in that conclusion, I would nevertheless decline to grant the application because of the predominance in the Will of the customary land dispositions; it is pointless to grant administration in respect of a small and uncertain amount of property. And as I understand it, the applicant is not asking for such a partial or limited grant; he is seeking an order that he*

administer the whole of the purported estate including the custom-owned land."

Grounds of Appeal

11. The appellant now appeals on the following grounds:

a) In law and fact to have held that Section 3 of the Wills Act [Cap 55] do not cover custom-owned land

b) Further and/or in the alternative in law and fact not to have taken into account the fact that there is no dispute as to ownership of Marope Land. This having been determined and settled in custom in the Efate Island Court is Land Case No. 1 of 1993 and in Civil Case No. 12 of 2004.

c) In law and fact by failing to distinguish the difference between the case of Re Estate of Molivono [2007] VUCA 22 with the appellant's case.

d) In law to have held that because the testator did not dispose of some property he appears to have had, he is deemed to have died intestate and that his Will is totally ineffective.

e) In law to have held that because the deceased Aloani Kano Chichirua died intestate, the application for administration with Will annexed must be dismissed.

f) Further and/or in the alternative, in law to have held that because the deceased died intestate, the Court could not partially grant the administration to the appellant.

Discussion

12. Grounds of appeal (a) – (c) challenge the finding that the Wills Act does not permit a custom owner of land to dispose of custom land. The wording of s 2 of the Wills Act is quite clear. The testator can only dispose of *"his property, of*

which he is the sole and total owner". A person holding custom land as a custom owner does so in a representative capacity. He is not the sole and total owner. If custom land is at the time of death held or registered in the deceased's name, it is not his property to do as he wishes with it. It is custom land held in a representative capacity for those who in custom are entitled to enjoy the benefits of the land for the time being.

13. In our opinion s 3 of the Wills Act, which deals specifically with the disposition of any estate in land, must be read subject to the general provision in s 2, and for this reason the capacity of a testator under s 3 is limited to disposing of land *"of which he is competent to dispose".*

14. The concluding words of s 3, *"of any estate in land registered in his name alone"* must also be understood as subject to the general provision of s 2. Thus s 3 only permits the disposition by Will of land registered in the testator's name where it is land of which *"he is the sole and total owner".*

15. If the owner for the time being of custom land could dispose of that land to whom so ever he chose in his Will this would have the consequence that custom land could pass on death to people who are not entitled to it in custom.

16. In considering at trial the argument that Mr Daniel has advanced before this Court to the effect that s 3 of the Wills Act permitted the testator to dispose of custom land under the first section of his Will the trial judge said:

> *Mrs Trief's submission highlighting Regulation 9 of the Queen's Regulation which provides*: "Upon the grant of probate or administration, all the estate of which a deceased person dies possessed, or entitled to, in the New Hebrides shall, as from the death of the such person, pass to and become vested in the personal representative for all the estate and interest of the deceased therein, in the manner following, that is to say:
>
> a) on testacy or on partial intestacy, in the executor or administrator with the Will annexed; and

b) on intestacy, in the administrator"

This means that if Mr Daniel had not renounced and had applied for probate then all of the property referred to in the Will would have vested in him. The same would be true of any other named executor, including for example someone who is not a member of the same tribe as the deceased or not ni-Vanuatu. This surely cannot be right because it would mean that interests in custom land would pass out of the hands of "indigenous custom owners and their descendants" contrary to Article 73. While that person would have the obligation to dispose of the land in accordance with the Will, it surely cannot have been intended that custom land would vest in such an executor, even temporarily. And of course, if Mr Daniel's argument were correct, there would be nothing to prevent the Will itself disposing of interests in custom land to, for example, a non-ni-Vanuatu resident of another country.

17. We adopt these observations of the trial judge which reinforce the conclusion that s 3 does not have the meaning for which the appellant contends.

18. The trial judge was correct in concluding that the deceased could not validly dispose of the custom land which he was controlling in a representative capacity as custom owner at the time of his death. So much was decided in Molivono's case which the trial judge correctly applied. Whilst the facts in that case are different the statement of principle relied on is directly applicable.

19. The observations of the Court of Appeal on page 4 of the Molivono judgment are misconstrued in the appellant's submissions. When the Court said that in the case of customary land an application should be made to a land tribunal or Island Court for determination "*if there is no complete agreement*", the Court simply meant that such an application was unnecessary where everyone agreed how the custom land was to pass on the death of the custom owner. In that case succession to ownership of the custom land would be clear without further

involvement of a land tribunal or island court. The passage relied on by the applicant goes on to make it clear that custom land, even where there is no dispute, cannot be dealt with by the deceased in the same way as his own personally held property.

20. Grounds (a) – (c) of the Notice of Appeal fail.

21. Grounds (d) – (e) of the Notice of Appeal raise issues concerning the disposition of property of which the testator was the *"sole and total owner"* within the meaning of s 2 of the Wills Act, namely interests in real estate that was not custom land and his personal property including his bank accounts. These interests are dealt with in the second part of the deceased's Will.

22. In the first part of the deceased's Will which deals with custom land, clause 5 reads as follows:

> "ANY NARAFALA SAMTING WE MI NO SAVE TALEMAOT LONG PEPA IA" which is translated into English to mean:
> *"Any other matter (or things) that I am not able to say in this document (Will)".*

This is a catch-all clause that in our view is capable of being given a very wide interpretation. Nevertheless as it appears in the first section of the Will we do not think it can be construed as dealing with personal property owned by the deceased in his own right which the Will not otherwise cover.

23. We are at the view that the trial judge was correct in assuming that the Will did not cover personal property such as bank accounts. This assumption has not been challenged by the appellant. On the contrary the appellant's submissions are based on this assumption being correct.

24. Grounds of appeal (d) – (e) are directed to the trial judge's construction of regulation 2 of the Queen Regulations. We differ from the construction placed on

the definition of *"intestate"* by the trial judge. That definition merely says that *"intestate"* includes a person who leaves a Will but dies intestate *"as to some beneficial interests in his estate."* We consider that as to other beneficial interests which are covered by the term of the Will the testator does not die intestate.

25. The Will continues to operate in respect of the property covered by the dispositions in the Will and that property will pass to the nominated beneficiary or beneficiaries according to the relevant gifts in the Will. If the whole estate were to be treated as *"intestate"* all the deceased's own property would pass to the next-of-kin in the manner provided for in the case of an intestate estate under the Queen's Regulation. In all probability that would lead to a distribution of the estate in a manner far removed from the testator's expressed wishes.

26. In our opinion although the express gifts in the first section of the deceased's Will fail because the testator had no authority to dispose of custom land, the provisions of the second part of the Will were valid. We consider letters of administration with the Will annexed should be granted in accordance with the provisions of the Succession, Probate and Administration Regulation 1972 (The Queen's Regulation).

27. To whom the grant of letters of administration should issue is not a matter we are in a position to determine. The matter should be returned to the Supreme Court to make that decision. We are told that there is an issue here still to be sorted out by the deceased's family as the deceased's widow does not wish to act as administrator and would prefer the appellant do so. The trial judge has helpfully commented on the options open to the widow and the appellant. They now need to work out with the Supreme Court how the application for letters of administration will proceed.

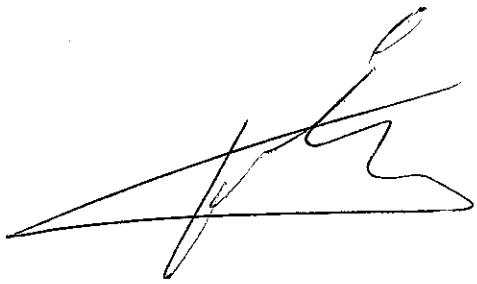
28. The appeal is therefore allowed in part and the matter will be returned to the Supreme Court for further consideration of the application for letters of administration.

29. Finally, we express our thanks to the Attorney-General and Mrs Trief of counsel for the assistance which they have given the Court in their role as amicus curiae. The submissions made on the construction of the Wills Act and the Queen's Regulations have been very helpful.

30. This is not a matter where there should be any order as to costs.

DATED at Port Vila this 20th day of November, 2015.

BY THE COURT



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Hon. Chief Justice Vincent Lunabek