IN THE NAURU COURT OF APPEAL
AT YAREN
APPELLATE JURISDICTION

CIVIL APPEAL NO. 4 OF 2020
Miscellaneous Cause No. 3 of 2019

BETWEEN

NITA SEYMOUR — Appellant

AND

SPRENT DABWIDO (Estate of) — Respondent

Before: Khan, ACJ
Date of Hearing: 19 January 2021
Date of Ruling: 27 January 2021

Case to be referred to as: Seymour v Dabwido

CATCHWORDS: Appeal against an interlocutory summons to strike out an application for grant of probate for non-compliance with section 3(2) of the Succession, Probate and Administration Act 1976 – Whether the appeal is against an interlocutory order or a final determination – Whether the appeal is competent.

APPEARANCES:

Counsel for the appellant: T Tannang
Counsel for the respondent: E Soriano

RULING

INTRODUCTION

1. Following the ruling of Jitoko, CJ on 21 August 2020 in Supreme Court Miscellaneous Cause No. 3 of 2019 (probate proceedings) the appellant filed an appeal on 8 September

2020, and also a summons for a stay of the probate proceedings in the Supreme Court until the determination of this appeal.

2. On 17 November 2020 the respondent filed an application to strike out the appeal on the grounds that the orders made in the miscellaneous probate action were interlocutory orders in nature, and the appellant neither obtained leave of the Supreme Court or of this Court prior to the filing of the appeal, and thus the appeal is incompetent.

3. I advised counsels that to be able to deal with this strike out application I will need to refer to the stay application; and it was agreed that I should deal with the two applications together. Both counsels have filed written submissions in respect of their applications.

BACKGROUND

4. Sprent Dabwido (deceased) died on 8 May 2019 at Armidale, Australia. He made his last will and testament on 5 May 2019 in Armidale and appointed Mr Matthew Batisua as his executor and trustee and made some specific bequests of jewellery to his daughter Eimoma Dabwido (Eimoma) and gave the remainder of his estate to his partner Lucinta Rosel Heinrich.

5. The appellant and respondent got married in 1997 and Eimoma is their only daughter. They were divorced in 2017.

6. On 26 September 2019 Mr Matthew Batisua made an application for grant of probate and on 30 September 2020 Vaai, J made an order for the publication of a Notice for the Grant of Probate in the Government Gazette.

7. On 14 October 2019 the appellant filed an application to strike out the application for probate on the grounds that Mr Matthew Batisua had no locus standi to file the action for probate by virtue of Succession, Probate and Administration Act 1976 (SPA 1976); and that the Supreme Court had no probate jurisdiction under SPA 1976.

8. The strike out application was opposed by the respondent. It was heard on 3 August 2020 and Jitoko, CJ delivered his ruling on 21 August 2020 in which he discussed the implications of s. 3(2) of SPA 1976 and found that all the requirements of that section were met, except that the testator did not direct that the SPA 1976 should apply to his will and estate; and also made a finding that s.3(2) of SPA 1976 was superseded by Part 8 of the Supreme Court Act 2018 (2018 Act); that the application to strike out was not in proper form; that the proper procedure was to lodge a caveat under s.34 of 2018 Act which was also recognised by s.67 of SPA 1976; and the application was dismissed.

9. Following the dismissal as I stated earlier the appellant filed an appeal on the following grounds:

    1) That the learned judge erred in law and fact in the interpretation of section 3 of the Succession, Probate and Administration Act 1976 to be overridden by Part 8 of the Supreme Court 2018 in spite of the legislation being the principal Act on the subject.

2) That the learned judge erred in law and fact in interpreting that section 3 of the Succession, Probate and Administration Act 1976 is superseded by Part 8 of the Supreme Court Act 2018, without considering the overarching legal impediments of the process legislated by Parliament for Nauruan estates under the Customs and Adopted Laws Act 1971, and the Nauru Lands Committee Act 1956 as amended.

3) That the learned judge erred in law and fact in failing to consider the legal principle of Generalia Specialibus Non Derogant which supports the appellant's position on the application of s.3 of the Succession, Probate and Administration Act 1976.

CONSIDERATION

10. I shall first consider as to how the probate division of the Supreme Court was set up. In my research there have been hardly any probate actions in the Supreme Court in Nauru as most of the matters relating to wills is resolved by the Nauru Lands Committee (which I shall discuss later). The only matter that I have come across which related to a probate action and causes is *Lucy Ika and Kinza Clodumar v Nauru Lands Committee and Curator of Intestate Estates and Others*[1] at page 4 it is stated as follows:

> "Both the Supreme Court and the Nauru Lands Committee are creatures of statute. The Supreme Court was created by the Constitution as 'a Superior Court of Record' (Article 48). The Courts Act 1972, on the authority of the Constitution, conferred on the Court its jurisdiction. Section 17(2) thereof provides:
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> > "(2) The Supreme Court shall, subject to any limitation expressly imposed by any written law, have and exercise within Nauru all the jurisdiction, powers and authorities which were vested in, or capable of being exercised by, the High Court of Justice in England on the thirty-first day of January, 1968."
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> The High Court of Justice in England, at the relevant dates specified in the said section 17(2) possessed probate jurisdiction conferred on it by section 20 of the Supreme Court of Judicature (Consolidation) Act 1925 (U.K.) including "testamentary causes and actions". An action to determine the validity of a will or its interpretation is a testamentary action. A testamentary cause is any cause relating to a will. As above stated the relevant rules governing probate actions in our Civil Procedure Rules have adopted the same procedural rules as those governing such actions in the English Courts. The Supreme Court clearly has statutory jurisdiction to deal with probate actions and causes."

11. The 2018 Act in repealing the Courts Act 1972 set up a probate division in s.4(2) it is provided:

> (2) The Supreme Court shall have the jurisdiction conferred on it by the Constitution, **any other written law** and inherent jurisdiction.

[1] Civil Case No. 2/91; Civil Case No. 3/91 and Civil Case No. 8/91 Donne, CJ unreported

(emphasis added). The only law in relation to probate is SPA 1976 and its preamble reads as follows:

"An Act to make provision for the succession to and the probate and administration of estates of certain deceased persons."

12. The three grounds of appeal are almost identical; they state that His Honour Jitoko, CJ erred in finding that Part 8 of the 2018 Act had superseded section 3 of SPA 1976 and that he failed to comply with the principles of Generalia Specialibus Non Derogant.

13. At [25] of the ruling it is stated:

> [25] If it was the intention of the legislature for Section 3(2) of the Succession, Probate and Administration Act 1976 to be superseded by the Supreme Court Act 2018 and specifically, Part 8 thereof, then it is within its powers to rectify it. Until such time, the Court holds the view that Part 8 of the Supreme Court Act supersedes section 3 of the 1976 Act.

I shall discuss the consequences of this finding later.

14. I stated earlier that there is hardly any probate proceedings or actions and in *Agir v Nauru Lands Committee*[2] (Agir)Eames, CJ it is stated in [35], [36], [37], [51] and [52] as follows:

> [35] The issue in the case of *Lucy Ika and Kinza Clodumar v Nauru Lands Committee and Others* was whether the Nauru Lands Committee had jurisdiction to determine the validity of a will. The defendants contended that the Committee, and only the Committee, had the jurisdiction, it being a customary law role. Donne, C.J. rejected that contention. He held that the jurisdiction of the Committee to resolve disputes was confined to the matters identified in s.6 of 1956 Act. He held:
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> > "If in fact there were certain customary powers of adjudication hitherto exercised by the Committee's predecessor, they were not, by the Act conferred on the Committee. In my opinion by implication they were abolished by the legislation. They are no longer recognised. See Custom and Adopted Laws Act 1971, sec. 3."
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> [36] Notwithstanding the apparent breadth of that statement, in his reference to 'customary powers of adjudication' Donne, C.J. was addressing the exercise by the Committee of what he called 'judicial' or 'quasi-judicial' functions. One of those traditional functions was determining the validity of a customary will. That power, he held, was not given to the Committee by its legislation. Nonetheless, Donne C.J. held that:
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> > "The administration of the estate is, by custom, the job of the Committee in its customary role".

[2] [2011] NRSC 8 (6 May 2011) (Agir)

[37] He held that that was a role for which the Committee "is eminently equipped and suited". He concluded, "The Committee has the exclusive task to enquire into and ascertain the extent of the deceased estate and the interests therein of the beneficiaries thereof". Donne C.J. did not confine that role to the real estate of the deceased person. The Curator, he ruled, held the estate both real and personal until the extent of the estate was ascertained and the beneficiaries was determined. Since the Curator had no role in getting either the real or personal estate that role was taken by the Committee, doing so with respect to land, by virtue of its empowerment by section 6, and doing so with respect to personal estate, by virtue of custom. Donne C.J. noted, however, that in so far as the determination of the Committee's "may touch on any interest other than that in respect of land" there was no right of appeal against the determination.

[52] With respect to His Honour, I have difficulty accepting that a party could challenge decisions of the Committee by way of a 'probate action', given that not only are the provisions of the **Succession, Probate and Administration Act 1976** almost entirely excluded, by s.3, from application to the estates of Nauruans, that the Act also does not empower or provide a supervisory function with respect to the Nauru Lands Committee. It is unnecessary for me to resolve this question however.

15. Sections 37(3) and 63(7) provides as follows:

s.37(3) Notwithstanding the provisions of section 3, the provisions of this section shall apply to the estates of Nauruans;

Provided that for the purposes of applying the provisions of this section to the estates of Nauruans, the expression '***pending the grant of probate of a will or administration of the estate of a deceased person'*** shall be taken as meaning the period from such person's death until the time when the persons entitled to receive the estate as beneficiaries have been finally ascertained, whether by a family agreement, a decision of the Nauru Lands Committee or, where any appeal is taken against such a decision of the Nauru Lands Committee, the decision of that Court on that appeal.

s.63(7) Notwithstanding the provisions of section 3, the provisions of this section shall apply to Nauruans:

Provided that the Curator shall not distribute the assets except in accordance with a family agreement or the decision of the Nauru Lands Committee as the persons entitled thereto, or where any appeal is taken such decision of the Nauru Lands Committee, the decision of the Court on that appeal.

16. In s.37(3) the key words are:

> "… the provisions of this section shall apply to the estates of Nauruans"; and in s.63(7) the key words are: "the provisions of this section shall apply to Nauruans"; and for s.3(2) of SPA 1976 to apply to a "Nauruan" estate both real and personal, amongst other things stated therein, the deceased in his will has to direct that SPA 1976 is to apply to his estate. Thereafter the determinations of his estate is to be made according to the provision of s.37(3) by the Nauru Lands Committee in accordance with the provisions of Nauru Lands Committee Act 1956 (the amendments thereto) or any appeal therefrom to the Supreme Court and now the Nauru Court of Appeal – by virtue of s.19(c) of Nauru Court of Appeal Act 2018.

17. With respect to the ruling that was superseded by Part 8 of 2018 Act the appellants have raised the principles of Generalia Specialibus Non Derogant which is a Latin maxim for statutory interpretation. In an article titled 'Inconsistent Statutes'[3] it is stated at page 603 as follows:

> "2. GENERALIA SPECIALIBUS NON DEROGANT
>
> 1) The principle
> …. [W]here there are general words in a later Act capable of reasonable and sensible application without extending them to subject specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so.[4]
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> Rather, in such a case, the earlier special statute continues to have exclusive application to its own subject matter, and the latter general act, although in terms wide enough to extend to the subject matter of the earlier act is held not to have any application to it."

18. When Part 8 of 2018 Act was enacted that enactment did not show any intention to repeal or alter s.3(2) of SPA 1976 and therefore that section which has very special characteristic still in force.

19. The effect of the ruling that s.3(2) of SPA 1976 has been superseded by Part 8 of the 2018 Act is that it operates as "res judicata" in respect of the probate action is concerned. In an article titled 'Declarations – Homer Simpson's remedy – is there anything they cannot do?'[5] it is stated at [5]:

> [5] Nevertheless, declarations by Courts have legal consequences. A declaration is not 'a mere opinion devoid of legal effect'. It "operates

[3] J.F. Borrows LLM (Canterbury, PhD London) (Professor of Law, University of Canterbury

[4] Seward v Vera Cruz (owners) (1884) 10APP.CAS.59, 68 per Lord Selbourne

[5] (FCA) [2007] Fed J. Schol 24 Justice Robert French

in law either as res judicata or an issue estoppel and such an order is a **final order for the purposes of appeal**". (emphasis added)

20. The appellant contends that leave is not required as the ruling resulted in the "final determination of civil proceedings" despite the proceeding being interlocutory in nature for the purposes of s.19(3) (f) as provided for in s.20 of the 2018 Act. "Civil proceedings" is defined in s.19(1) as "for the purposes of this part, civil proceedings means "any cause or matter when commenced in the District Court or the Supreme Court was not a criminal proceedings". In s.3 of the 2018 Act, "cause or matter" includes any appeal, action, suit, or other original proceeding in any Court between the person originating the proceedings and one or more other parties as defendant or respondent, and includes any criminal proceedings.

21. The appellant had joined in the proceedings as a respondent to strike out the probate proceedings for non-compliance of the provision of s.3(2) of SPA 1976, and further in the discussion in paragraph 19 hereof "res-judicata" is a final order for the purposes of an appeal.

22. In dealing with the two applications, I had to discuss the merits of the appeal in greater detail than I should ordinarily have done. I wish to make it clear that I had no intention of deciding the issues on appeal which is entirely a matter for the full court.

CONCLUSION

23. I therefore find that the appeal is competent and I further make an order that the miscellaneous probate proceedings shall be stayed pending the determination of the appeal.

DATED this 27 day of January 2021

Mohammed Shafiullah Khan
Acting Chief Justice
President, Nauru Court of Appeal