IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Probate Division)
2015

Probate Case No. 17 of

IN THE MATTER OF: THE ESTATE OF THE LATE ALOANI KANO CHICHIRUA
Deceased

IN THE MATTER OF: AN APPLICATION BY ANDREW CHICHIRUA for a grant of administration with Will annexed
Applicant

Hearings: *3 June and 14 August 2015*
Date of Judgment: *31 August 2015*
Before: *Justice Stephen Harrop*
Appearances: *Mr Willie Daniel for the Applicant*
Mr Silas Hakwa for "Family Chichirua"
Mrs Viran Molisa Trief as Amicus Curiae

JUDGMENT OF JUSTICE SM HARROP

Introduction

1. At the time of his death on 26 November 2014, Aloani Kano Chichirua ('the deceased") was chief of the Naflak Teufi tribe of Ifira Island, a right which was passed on to him by late father, the late 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 a judgment of the Efate Island Court on 28 October 2004.

2. In his last Will dated 8 November 2014, the deceased purported to leave, among other property, all of this custom land to his eldest son Andrew Chichirua who has applied for a grant of administration with Will annexed. The executor named in the Will, Mr Willie Daniel, who is counsel for the applicant in this proceeding, renounced that appointment in his sworn statement of 28 May 2015.

3. After the advertisement of the application Mr Hakwa was engaged by other members of *"Family Chichirua"* (Esau Chichirua, Ben Chichirua, Abel Chichirua, Gilbert Kanegai and Tony Kanegai) who sought to be joined as parties. Later, Esau Chichirua denied this application was made on his behalf. The intention of the others in seeking to be joined was: *"To ensure that all land or properties which are owned by Family Chichirua are excluded from the Estate of the Late Aloani Chichirua (deceased)."* They added: *"All land which Family Chichirua owns in custom belongs to Family Chichirua and does not form part of the estate of late Aloani Chichirua (deceased)."*

The course of this proceeding

4. When I first considered this application on 8 May 2015, I formed the view that Mr Hakwa's clients were not so much opposed to the grant of the application in itself but rather concerned to ensure that the administration subsequent to grant was properly carried out, and in particular that the assets administered were only those personally owned by the deceased. It seemed to me that that was not a matter for the Court to address on the application, but it might become one if there was subsequently a challenge to the way the estate was administered. My immediate reaction therefore was that there was no basis on which Mr Hakwa's clients could be joined as parties to the proceeding in which the

application for grant itself would be determined. Nevertheless, I permitted Mr Hakwa to remain involved as counsel for parties with an interest in the proceeding and who had taken the trouble to file a response.

5. After an initial hearing on 3 June, I reflected further on the position and decided it was necessary to seek further submissions from Mr Daniel which he duly provided by memorandum of 16 June.

6. As a result of Mr Daniel's submissions I was conscious of there being only one active party in relation to the application, namely the applicant. The important questions raised needed careful consideration and would benefit from independent submissions. I therefore appointed the Attorney-General to make submissions as amicus curiae pursuant to section 11 (2) (a) of the State Proceedings Act 2007.

7. The Solicitor-General Mrs Trief duly filed submissions on 28 July to the effect that because the Will purported to dispose of customary land rather than beneficially-owned property it was at least invalid in part, if not in whole and either the application should be refused or held to be limited in its scope to beneficially-owned property.

8. Mr Daniel filed submissions in reply on 6 August, maintaining that the Solicitor-General was incorrect in her reasoning and that the application should be granted because, in his submission, the Wills Act [Cap55] permits custom land to be transferred by a dying custom land owner in accordance with custom. Mr Hakwa indicated his agreement with the Solicitor-General's position, subject to a couple of brief points.

9. A chambers hearing was convened on 14 August and counsel had the opportunity to supplement their written submissions with oral submissions in reply to those of other counsel. Judgment was reserved.

Issue

10. Leaving aside question of the legitimacy of the dispositions contained within it, the Will is technically valid and I proceed on the basis that the application should be granted if the question relating to disposition of customary land is resolved in favour of the applicant, as Mr Daniel submits it should be. I also proceed on the assumption that the deceased was the custom owner of the land he purported to dispose of in his Will. There is no reason on the information before me to reach any other conclusion.

11. As a result the issue I need to consider and resolve in this judgment is: Was it in accordance with the law of Vanuatu for the deceased to purport to dispose of interests in customary land in his Will? If the answer is yes, the application ought to be granted. The answer is no, it ought to be refused, at least in large part.

The Will in more detail

12. 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.

13. 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"*.

14. I note that the Will does not appear to me to include disposition of anything other than land. Accordingly, while I understand from the application that the deceased had several bank accounts and presumably also had other personal property, this does not appear to have been dealt with in his Will as would usually have been achieved, as a minimum, by a *"catchall"* clause.

Submissions

15. With no disrespect to the helpful submissions of counsel, it is not necessary to recount everything that has been said. Mr Daniel particularly relies on section 3 of the Wills Act which provides: *"A Will under the provisions of this Act 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"*.

16. I suggested to Mr Daniel that the effect of the judgment of the Court of Appeal in *In Re Estate of Molivono* [2007] VUCA 22 was that custom land could not be disposed of by Will. Mr Daniel submitted this view is not correct and that the *Molivono* case is distinguishable. That is because custom ownership of the land in that case was disputed by several claimants and that dispute had not been heard or settled by the Island Court or an appropriate land tribunal at the time the Court was dealing with it. By contrast, Mr Daniel submitted that here there is no longer any

dispute about the right of this deceased to the custom land interests which he purported to dispose of in his Will. As I have already noted I proceed on the assumption that the factual part of this submission is correct i.e. that there is no outstanding dispute about custom ownership of that land and that the deceased is the declared custom owner.

17. In her submissions, Mrs Trief noted that section 3 was originally enacted as Joint Regulation 5 in 1969 and had effect from 23 September 1969. It then provided: *"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 current native usage, or of any estate in land registered in his name alone."*

18. Mrs Trief also pointed out that section 2 of the Wills Act provides: *"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 is the sole and total owner, after his death in accordance with and subject to the provisions of this Act."*

19. Mrs Trief drew my attention to Articles 73 to 75 of the Constitution which provide:-

> *"73. All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants.*
>
> *74. The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.*
>
> *75. Only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of the land."*

20. Mrs Trief submitted that although on one interpretation sections 2 and 3 of the Act might appear to allow for the distribution by Will of land which is custom-owned, this would be contrary to the Constitution because:-

a) A testator who was purportedly the sole and total owner of custom land could dispose of it by Will in any way he chose and thereby cause the custom-owned land to cease to belong to indigenous custom owners and their descendants, contrary to Article 73; and

b) The Will or, on intestacy, the rules of succession, would then determine disposition of land which is custom-owned, rather than the rules of custom as to ownership and use (Article 74). In relation to ownership, any such disposition must be determined by the body authorized in law and in accordance with the applicable recognised system of land tenure (Article 75).

21. In summary, Mrs Trief submitted that the determination of the correct interpretation of sections 2 and 3 must be informed by and align with the Constitution. She argues therefore that s.2 means that a testator cannot lawfully dispose of interests in custom-owned land by Will and that s.3 means a Will cannot validly purport to dispose of land which is custom-owned. Accordingly, at least to the extent that the current Will purported to dispose of interests in land which was custom-owned it should be held to be invalid.

Discussion and Decision

22. Though I accept that the facts of the *Molivono* case were different, in my view it contains a clear statement of principle which is not only binding on me but, with respect, in any event must be right. The Court said:

> *"……the fundamental point is that either under a Will, or under 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. Article 73 to 75 of the Constitution could not be more clear and unequivocal. Questions of successions 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."*

23. Applying this, I am satisfied that Mrs Trief's submission about the way in which section 3 of the Wills Act should be regarded is correct. The reference to competence of disposition on death in accordance with custom cannot mean in my view that a testator is entitled to dispose of interests in custom land. Rather, he may only dispose of an estate in land in the way permitted by custom. Custom, as recognised by Article 74 of the Constitution, does not permit disposition of customary land through a Will; its disposition is to be determined in accordance with custom. The corollary is that an interest in custom land may not be disposed of by Will.

24. In my view there are in Vanuatu two parallel systems in operation relating to the disposition of property held at time of death by a deceased person. On the one hand, the system of probate and administration inherited from Great Britain covers beneficially-owned land and all other

property and on the other hand the applicable rules of custom determine the post-death ownership and use of that very special (as recognised by the Constitution) category of property, interests in custom land.

25. Accordingly a testator is perfectly able to dispose, for example, of any beneficially-held lessee interest in land by Will but, in respect of any interest in land which is held effectively as trustee for his tribe as custom owner rather than beneficially, its disposition is to be determined by custom and, in the event of a dispute, by an Island Court, customary land tribunal or, since February 2014, by the processes set out in the Custom Land Management Act.

26. The fallacy in Mr Daniel's argument is exposed by considering what would have happened if the deceased had not made a Will. On the basis of his argument it would have been competent for his widow to apply for a grant of administration under Regulation 7 (a) of the Queen's Regulation and, if granted, she would have been duty-bound to distribute the estate, including all of the interests in customary land, pursuant to Regulation 6. In that way, on the assumption that this deceased's estate including the customary land well exceeds in value $10,000, then his widow would have received his personal chattels and the first $10,000 but the rest would be distributed as set out in Regulation 6. That would have meant that one-third of the interests in custom land would have gone to the widow and the balance two-thirds to the deceased's children absolutely, per stirpes and not per capita.

27. It cannot be right that custom land is distributed in accordance with section 6. On that basis it equally cannot be right that it is dealt with under a grant of administration with Will annexed. Either the "British"

system applies to custom land in all cases, regardless of whether there is a Will, or it applies in none.

28. The Wills Act, and the Queen's Regulation with which it must be read, can only, in light of Article 73 to 75 of the Constitution, be seen as dealing with property *other than* interests in custom land.

29. Reinforcing this conclusion , I note 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"

30. 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.

31. This reinforces the fundamental point made by the Court of Appeal in *Molivono* that custom land simply cannot pass from one custom owner to another (or anyone else) under the Wills Act or the accompanying Queen's Regulation, but rather the transfer must occur in accordance with the rules of custom as expressly required by Article 74 of the Constitution.

32. 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.*"

33. 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.

34. 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.

35. In these circumstances of intestacy, while an application for a grant of administration of beneficially-owned property could be still be made under Regulation 7, the current application for a grant of administration with Will annexed must be, and is, dismissed.

36. The answer to the questioned posed at paragraph 11 is no, and the application is entirely, rather than partially, dismissed.

37. If, in light of the dismissal of this application, an application for grant of administration is now made, then as I have observed to counsel there appears to be no choice but for the widow, Nellie Chichirua, to make that application, even though she has informed the Court that she does not wish to act in such a role and would prefer her son Andrew to do so. Regulation 7 (b) means that it is only where there is no widow or widower surviving the deceased that a next of kin, such as a son, may be granted administration. Therefore the application could only be made by and granted to the widow, although I note that under Regulation 18 (1) she could immediately on appointment relinquish her office and the Court would then appear to have the power to appoint Andrew Chichirua (or anyone else).

38. As I observed to counsel at the hearing on 14 August, the dismissal of the current application does not necessarily mean there will ultimately be any different outcome from that expressed by the deceased in his Will. The

transfer of the interests in custom land owned by the deceased in his capacity as paramount chief must be determined in accordance with the rules of custom rather than under the Wills Act or the Queen's Regulation. The latter may, or may not, dictate that it is, as the deceased intended, the applicant who receives them. If there is no dispute that the applicable customary rules requiring that the applicant acquiresthose interests, then he will "step into his father's shoes". However, the fact of the response by Mr Hakwa's clients may indicate this is not as straightforward as either the deceased or the applicant may have thought.

39. For these reasons the application is dismissed. I make no award of costs, but thank Mrs Trief for her ready assistance and helpful submissions as amicus curiae.

BY THE COURT

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU