

**BRONWYN AMASIA and ISHMAEL BOSOKURU -v- DANIEL KIKILE (On behalf of Lakuili tribe) and ROSELYN DETTKE (on behalf of Kakau Jomu tribe) and MARY KONA**

**High Court of Solomon Islands  
(Muria, CJ.)**

Land Appeal Case No. 3 of 1995

Hearing: 26 June 1995

Judgment: 18 July 1995

*Andrew Radclyffe for the Applicants  
Thomas Kama for the first Respondent  
Philip Tegavoata for the second Respondent  
Gabriel Suri for third Respondent*

**MURIA CJ:** This matter arose out of a referral by the Official Administrator of Unrepresented Estates ("the OAU") to the Local Court to determine and certify as to who in accordance with current customary usage would be entitled to the disposition of the interest in the various parcels of land belonging to the deceased Fred Kona. Following that referral, the Guadalcanal Local Court decided on 25 August 1994 that:

- (a) *Parcel No. 191-050-23 be given to Daniel Kikile of the Lakuili Tribe and that Mary Fred Kona was to be under the authority of Daniel Kikile in so far as that parcel of land was concerned.*
- (b) *Parcel No. 190-001-87 be given to Ishmael Bosokuru, the brother of the late Fred Kona.*
- (c) *Parcel No. 190-001-88 be given to the Kakau Jomu Sub-tribe represented by Roselyn Dettke.*

This Court has been told that an appeal had been filed in Magistrate's Court by the Applicants and the third respondent against the Local Court's decision. That appeal is still pending as the applicants in these proceedings applied to the Magistrate to have it referred to this Court to determine the question as to whether the deceased's estate had been deprived of its property without compensation and thereby contravening section 8 of the Constitution. These proceedings are for the purpose of resolving that question.

In the course of their submissions to this Court, Counsel for all parties concerned extended their arguments to show that the Local Court did not possess the jurisdiction to deal with the referral made to it by the OAU. Thus while Counsel for the applicants and third respondent (Mary Fred Kona) support the section 8 of the Constitution argument and Counsel for the first and second respondents do not, they all agreed that the Local Court ought not to have dealt with the referral in the manner it did.

I have considered the arguments put by Counsel in the course of their submissions in this application and the problems presented before the Court seem to resolve themselves in the light of the provisions of the laws referred to by Counsel. The Constitutional question raised by the application would therefore appear to be no longer necessary to be determined as posed.

I turn briefly to consider the relevant legislative provisions of the laws referred to. The first of these is Section 190 of the Land & Titles Act under which the referral was made by the OAUE to the Local Court. The section provides as follows:

*"190. (1) Where the provisions of section 188 take effect with respect to an interest to which the deceased was entitled for his own use and benefit, and the interest vests in the official administrator or other personal representative, it shall do so upon the trusts declare by this section, but subject always to the right of the official administrator or other personal representative to dispose of such interest in some other manner in due course of administration.*

*(2) If the deceased validly disposed of the interest by a valid will, the interest shall be held upon trust to give effect to the terms of the disposition.*

*(3) Where the interest is not disposed of by a valid will, it shall, subject to section 188 (2), be held -*

*(a) in the case of an interest of which a Solomon Islander was onwer, upon trust to dispose of the interest in accordance with current customary usage;*

*(b) in the case of an interest of which a person not a Solomon Islander was owner, upon trust to dispose of the interest in accordance with the law relating to the administration of estates of person who are not Solomon Islanders.*

*(4) For the purpose of determining the disposition of an interest in accordance with current customary usage under the preceding subsection, the offical administrator or other personal representative shall apply to the local court having jurisdiction, to determine and certify to him the disposition of the interest in accordance with current custmary usage; and the local court shall prepare and submit to the official administrator or other personal representative a certificate showing*

*(a) the name of every heir;*

*(b) the share of every heir and the nature thereof, in particular whether the heir takes as joint owner, owner in common, on trust or otherwise;*

*(c) which (if any) of the heirs is under the apparent age of twenty-one years; and*

*(d) the date of the determination of the disposition.*

(5) *If any certificate under subsection (4) shows any persons to be entitled to divided shares in any estate of lease in circumstances involving subdivision of land, the official administrator or other personal representative shall apply to the Commissioner for his consent to the subdivision of the land under section 130, and where consent is refused under that section, the estate or lease shall be vested in the persons named in the certificate as owners in common, or where there are more than five such persons, in the first five so named, as joint owners on the statutory trusts.*

(6) *Notwithstanding the provisions of section 21 of the Local Courts Ordinance, no Magistrate shall have power to review the determination of a local court made under the preceding subsections, but any person aggrieved by such determination, may, within three months thereof, appeal to a Magistrate's Court having jurisdiction in the area in which the land concerned is situated.*

(7) *Any person who is aggrieved by the decision of a Magistrate's Court under the preceding subsection may, within one month such decision, and with the leave of the Magistrate's Court or of the High Court, appeal to the High Court on the ground that the Magistrate's decision or any part of it is erroneous in point of law or on the ground of failure to comply with any procedural requirement of the Local Courts Ordinance, or of any rules, regulations or warrant made or issued thereunder or under this Ordinance.*

(8) *The Court may, if satisfied that the decision is erroneous in point of law or that the interests of the appellant have been substantially prejudiced by failure to comply with any of the procedural requirements aforesaid, make such order or substitute for the decision of the Magistrate's Court such decision as it may consider just.*

(9) *The order or decision of the High Court on such an appeal, and subject to the provisions of this section, the order or decision of the Magistrate's Court under this section, shall be final and conclusive and shall not be questioned in any proceedings whatsoever.*

The abovementioned section had been repealed entirely by virtue of section 109 of the Wills, Probate and Administration Act, 1987 which came into force on 3 May 1991. The effect of that repeal is that the power of the OAUE or a personal representative of the deceased to apply to the Local Court to determine and certify to him the disposition of the deceased's interest in accordance with current customary usage had been abolished. Also abolished are the rights of appeal to a Magistrate's Court and High Court following such referral.

It must therefore be observed that as from 3 May 1991 section 190 of the Land and Titles Act ceased to have effect. Consequently, as from that date onward, there can be no valid referral by the OAUE or a personal representative under section 190 of the Land and Titles Act. It follows also that there could be no valid referral before the Local Court for determination in such a case.

The next provision which is of relevance is section 104 of the Wills Probate & Administration Act 1987. This provision deals with the question of proof of current customary usage in relation to the disposition of the estate of the deceased who is a Solomon Islander and who dies intestate. By the 1990 Wills, Probate & Administration Amendment Act, a new section 104A was added dealing with specifically the devolution of the perpetual estate of a Solomon Islander who dies intestate. The two sections are:

*"104 Where for the purposes of any of the provisions of this Act or regulations made thereunder proof of any current customary usage is required, unless otherwise specifically provided, it shall be lawful for the Court -*

*(a) to refer the matter in question by way of a case stated to the appropriate local court or Customary Land Appeal Court and to accept the certificate of such court (as the case may be) as evidence of the local custom applicable and the Court may in its discretion accept such certificate as conclusive proof of such custom; or*

*(b) to accept the oral or affidavit evidence of witnesses who, in the opinion of the Court, are competent to speak as to such local custom; or*

*(c) to refer to text books, reports (whether published or not), or other works of reference, official records relating to local custom; or*

*(d) to satisfy itself as to the application of local custom by all or any of the aforesaid means.*

*104 A. Where a Solomon Islander dies intestate and any perpetual estate owned by him does form part of the residuary estate, the devolution of such perpetual estate shall be in accordance with the current customary usage as certified by the Local Court having jurisdiction in the area where the land is situated."*

There is still reference to be made to the Local Court, as can be seen by the two sections, on matters of custom or current customary usage. The difference, however, between the reference made under section 104 of the Wills, Probate & Administration Act and that previously made under the repealed section 190 of the Land and Titles Act is that under 104 (and would follow also, under section 104 A) the reference is done by the Court which is the High Court whereas under the repealed section 190, it was done by OAUE or a personal representative.

The deceased died on 28 October 1991 and as such section 104 of the Wills, Probate & Administration Act clearly applies in this case. In such a case the person who has been granted administration of the estate would be the proper person to apply to the High Court for an order to refer matters of custom or current customary usage to the Local Court for certification. That person would, in terms of section 29 of the Wills, Probate & Administration Act, be the person having the beneficial interest in the estate or some other person appointed by the Court by reason of special circumstance or current customary usage. Section 29 is in the following terms:

"29 (1) *Where the deceased died wholly intestate, the persons having a beneficial interest in the estate shall be entitled to a grant of administration in the order of priority that may be prescribed for the purpose by rules.*

(2) *Notwithstanding the order of priority prescribed by rules made under subsection (1), where it appears to the court, that by reason of any special circumstance or current customary usage, any estate ought to be administered by some person other than those specified in the order of priority, the court may grant administration to such person."*

There is no provision in the Wills, Probate & Administration Act similar to that of the repealed section 190 of the Land and Title's Act. The referral by the OAUE in respect of the deceased's estate in this case to the Local Court had therefore been done without legal basis and must be regarded as void and of no effect.

An important concern had been raised by Mr. Radclyffe regarding the possible conflict between section 104A of the Wills, Probate & Administration Act and section 8(2)(b) (ii) of the Constitution. Section 104A as we have seen allows the perpetual estate of a Solomon Islander who dies intestated to be devolved in accordance with the current customary usage. The Constitutional provision referred to allows a law to be made for the taking of possession or acquisition of a deceased's property so that it be administered *for the benefit of persons entitled to the beneficial interest* in that property. The Wills, Probate & Administration Act 1987 is such a law the provisions of which must clearly be read subject to provisions of the Constitution.

The word "interest" in section 8(2)(b)(ii) of the Constitution clearly refers to the interest in the property of the deceased person. As such those who are entitled to the said interest must become so entitled beneficially. The words "entitled to the beneficial interest" carry with them the implication that the persons for whose benefit the deceased's property is to be administered, have interest in the property which they can sue for and recover. In another word, such an interest must be capable of being protected in a court of law or equity as was pointed out in *Re Miller's Agreement, Uniacke -v- Attorney General* [1947] 2 All E.R. 78

In construing section 104A of the Wills, Probate & Administration Act, it must therefore be borne in mind that any devolution of property in the perpetual estate of the deceased must also conform to section 8(2)(b)(ii) of the Constitution. Any disposition of an interest in the deceased's perpetual estate under section 104A of the Wills, Probate & Administration Act to a person or persons who are not entitled to the beneficial interest in the property, though in accordance with current customary usage, would be contrary to section 8(2)(b)(ii) of the Constitution and would be void.

I do not say that in the present case there has been such a contravention since the referral by the OAUE under section 190 of the Land & Titles Act was void from the start and so the Local Court's whole proceedings and determinations amounted to nothing. However, section 104A of the Wills, Probate &

Administration Act, though not void *per se*, is capable in its present form, of producing a consequence which may very well contravene section 8(2)(b)(ii) of the Constitution.

In the circumstances of the present application, the appropriate course for this Court to take is to declare the whole of the Local Court's proceedings and the determinations made on 25 August 1994 null and void and of no effect. Consequently any appeal now before the Magistrate's Court against the Local Court's determinations are of no force and effect as there is no valid determination in existence yet, in this case.

I order accordingly.

(Sir John Muria)  
**CHIEF JUSTICE**