Not Restricted

IN THE SUPREME COURT
REPUBLIC OF NAURU

Civil Case No. 5 of 2012

Wanda Wiram
Plaintiff

And

Nauru Lands Committee
1st Respondent

David Mwaredaga
2nd Respondent

And Between

Land Appeal No. 24 of 2012

David Mwaredaga

And

Melba Akua and Others
1st Respondent

Nauru Lands Committee
2nd Respondent

JUDGE:	von Doussa, J.
DATE OF HEARING:	4th June 2013
DATE OF JUDGMENTS:	18th June 2013
CASE MAY BE CITED AS:	Wanda Wiram v David Mwaredaga & NLC
MEDIUM NEUTRAL CITATION:	[2013] NRSC 7

CATCHWORDS: Succession – requirements for a valid customary will – requirement for two witnesses – instructions to a lawyer to prepare a will but deceased died before the will prepared – Nauru Lands Committee did not err in not taking instructions to lawyer into account – breadth of matters that the Committee entitled to take into account in dividing an intestate estate covered by clause 3(b) of *Administration Order No 3 of 1938* discussed – entitlement of widower to Life Time Interest under clause 3(b).

APPEARANCES:

For Wanda Wiram, Melba Akua & Others Mr R Kun (Pleader)

For David Mwaredaga Mr P N Ekwona (Pleader)

For Nauru Lands Committee Mr Steven Bliim Solicitor-General

von Doussa J

1. These two matters have been heard together as they both relate to the distribution of the property of Paula Mwaredaga (the deceased) who died on 4th of August 2011. Civil Case No.5 of 2012 commenced by Wanda Wiram concerns the distribution of personalty (the personalty matter). Land Appeal No.24 of 2012 concerns the distribution of real estate (the land matter).

2. Both matters came before the court as appeals against the distribution of the Nauru Lands Committee (NLC), not as judicial review proceedings.

3. The personalty matter was initially commenced as a claim for judicial review but on 4th March 2013 Eames CJ gave leave to institute an appeal against the determination of the Nauru Lands Committee (NLC) made in GN No.68 of 2012 and published in the Gazette on 8 Feb 2012 (the first Determination). The judicial review proceedings were then abandoned, at least were not thereafter pursued. The power to extend the primary time limit of 21 days for instituting an appeal from a determination of the NLC was extended by an amendment to the *Nauru Lands Committee Act 1956* (the NLC Act) effective from 10 October 2012 (see s6 and the newly inserted s6A). The amending legislation specifically provided that the power to extend time applies to decisions made whether before or after the commencement of the amending legislation (s10).

4. The deceased was a Nauruan and she had been married to, and had lived with, Mr David Mwaredaga – the second respondent in the personalty claim – for the 27 years leading up to her death. On the evidence, Mr Mwaredaga is now in his late 70s, is confined to a wheelchair, and is in poor health. Until her death, the deceased and Mr Mwaredaga were dependant on her land rentals and Ronwan interest.

5. The appellant in the personalty matter is one of eight nephews and nieces of the deceased. As was acknowledged in the course of argument, she is, in substance, pursuing the several equal interests of all the nephews and nieces, but, so the court was told, has brought the appeal in her own name alone as the other nephews and nieces have agreed that she should have the benefit of any personalty to which they are otherwise entitled. No objection was raised by the other parties to her being named as the only appellant. She complains about the first Determination which excluded the nephews and nieces from all the interests in the deceased's personalty.

6. In the land matter, the appellant is Mr Mwaredaga and the first respondents are all eight nephews and nieces. Mr Mwaredaga complains that the Determination did not award him a Life Time Only interest in the whole of the deceased's real property interests.

7. In both matters of the NLC is joined as a respondent.

8. The appeals are appeals by way of rehearing and were conducted solely on the information that was before the NLC. The Supreme Court has jurisdiction to determine appeals made under the *Nauru Lands Committee Act 1956* (the NLC Act) and "to make such order on the hearing ...it thinks fit". In short, the Supreme Court is empowered to decide the subject matter of the appeals on their merits and is not confined to correcting errors of law as would be the case in judicial review

proceedings.

The personalty claim

9. The first Determination declared that "all monies due, rentals and ronwan interest (if any)" should be distributed in its entirety to Mr Mwaredaga. The appellant contends that this determination was wrong for two reasons:

a) The NLC failed to follow the wishes of the deceased expressed in a "verbal will", and
b) The NLC wrongly applied the relevant provisions of *Administraton Order No.3 1938 (Regulation Governing Intestate Estates).*

The "verbal will"

10. The deceased left no formal written will. The evidence said to establish the verbal will is in a letter dated 8 November 2001 from Barrister and Solicitor Mr Leo Keke addressed to the chairperson of the NLC. Mr Keke wrote:

> *Paula came to see me in late July 2011 seeking my assistance to draw up her Will. We met prior to my departure for Australia on 10 August 2011. At the time of our meeting Paula was in full control of her senses and clearly knew the instruction she was giving to me.*
>
> *She had instructed me to draw up a Will to bequeath her property (real and personal) to the following persons:*
>
> *1. Xiena Wiram*
> *2. Chyna Wiram*
> *3. Celina Wiram*
>
> *Paula had undertaken to provide to me the children's details such as birth certificates in order for me to have all the relevant information. I understand from Paula that these children were daughters of Wanda Wiram (nee Harris). Wanda Wiram is to be the trustee of her estate on behalf of the children Xiena, Chyna and Celina.*
>
> *I know that Mrs Wanda Wiram is a niece of Paula Mwaredaga. Paula is the elder sister of Wanda's father, the late Rene R Harris.*
>
> *As I was imminently travelling overseas I had deferred drawing up the Will for Paula until I returned to Nauru. I returned to Nauru on Monday, 17 October 2011. Whilst I was away overseas I had learned that Paula had passed away. As a result, the Will was not drawn up as instructed, above.*
>
> *Madam Chair, I trust the information is assistance to the committee in reaching a decision on the deceased estate of Paula Harris.*

11. The deceased saw Mr Keke only shortly before her death on 4 August 2011. It seems she was then aware that she was suffering a serious illness. The three named proposed beneficiaries are the children of the plaintiff Wanda Wiram, as Mr Keke's letter indicated.

12. The NLC took advice on Mr Keke's letter from the Acting Secretary for Justice. His advice was that a valid will should be in writing and be signed by two witnesses.

13. Mr Kun, counsel for Wanda Wiram, argued that the NLC erred in not having regard to "the

written advice of a long serving officer of the court". However, it is to be noted that Mr Keke did not offer any advice whether in custom the instruction he received could in the circumstances amount to a verbal will valid in custom.

14. Mr Kun argued that in custom the verbal instructions as evidenced in Mr Keke's letter were sufficient to amount to a will that the NLC should have implemented. The general proposition that in custom a clear expression of the deceased's wishes regarding the distribution of his or her estate may constitute a valid testamentary disposition recognised by the law of Nauru is well-established. Thompson CJ recognised this customary position in *Giouba v Eidiatareb* (1969-1982) NLR (B) 1, Land Appeal No 3 of 1969. In that case the deceased left a written document which directed how his estate should be distributed. According to the evidence of a witness it was made shortly before the deceased's death in Truk during the Second World War. The document was in the handwriting of a Customary Chief, but was not signed by the deceased, although it had his name written at the bottom, apparently by the Chief. Thompson CJ observed:

> *"As verbal Wills were recognised under Nauruan customary law, the lack of a signature ought not necessarily be fatal."*

However there were features of the document in that case which raised doubts about the evidence as to when it was made; it may have been made many years before the deceased's death. Further, the appellants in that case had not raised any claim based on the document until years after death. In the circumstances the court was not satisfied that the validity of the will had been proved.

15. Thompson CJ again considered a claim based on a verbal will in *Eidiogin Rasch and Others v Natale Akibwib and Another* (1969-1982) NLR (B) 145, Land Appeals Nos 3, 4 and 5 of 1980. On this occasion he discussed the formalities required for a customary will to be valid; he said, at page 146:

> *In earlier times it was common for Nauruans to express their testamentary wishes orally to their Chiefs and the Chiefs ensured that effect was given to those wishes. Later, at the behest of the first Australian Administrator, Brigadier Griffiths, either the testator himself wrote down in the presence of his Chief and another person of standing the manner in which his estate was to be disposed of, or he orally told his Chief in the presence of another person of standing, and his Chief wrote it down. In either event, the testator signed it and the Chief and the other person signed it as witnesses. That is the Nauruan custom to-day, with Councillors and Member of Parliament taking the place of Chiefs. It is quite as strict as English law, so far as witnessing of wills is concerned. A will not properly witnessed is not valid, even though there may be no doubt that it was made by the deceased person.*

16. In this case, the oral instructions to Mr Keke cannot amount to a verbal will as those instructions were not given in circumstances that meet the witness requirement set out by Thompson CJ. Moreover, I consider it is important that the deceased was not intending to make a will according to custom. She was intending to make a will according the general law.

17. In my opinion the information available to the NLC, and to the court, is that the deceased intended to make a formal will, not customary will, and unfortunately she failed to do so as her untimely death intervened. In my opinion the NLC did not fall into error in not acting on Mr Keke's letter as proof of a "will" binding in custom.

Administration Order No.3 of 1938

18. After concluding that Mr Keke's letter was not evidence of a verbal will, the NLC met interested members of the family and informed them that NLC could only distribute in the manner

stated in Mr Keke's letter if all the family were unable to agree.

19. By its terms the Order applies to both real and personal property. Paragraph 1 of the Order provides for the preparation of a list of all property of the deceased by the Chief of the District, but in more recent times since the passing of the *Succession, Probate and Administration Act 1976* this function is likely to have been carried out by the Curator, though nothing turns on this. Paragraphs 2 and 3 relevantly provide:

> *(2) The distribution of the property shall be decided by the family of the deceased person, assembled for that purpose. The distribution of the property agreed to by the family of the deceased shall be reviewed by the Government Surveyor to ensure that there is no apparent irregularity, who will refer any doubtful matter to the Administrator.*
>
> *(3) If the family is unable to agree, the following procedure shall be followed:-*
>
>> *(a) In the case of an unmarried person the property to be returned from whom it was received, or if they are dead, to the nearest relatives in the same tribe.*
>>
>> *(b) Married- no issue, - the property to be returned to the family or nearest relatives of the deceased. The widower or widow to have the use of the land during his or her lifetime if required by him or her.*
>>
>> *(c) Married- with children- the land to be divided equally between the children, and the surviving parent to have the right to use the land during his or her lifetime. When an estate comprises only a small area of land the eldest daughter to receive the whole estate and the other children to have the right to use the land during their lifetime.*

20. Mr Kun argues that the Order does not stipulate that the spouse is to be the sole beneficiary of the estate or any part of it. Rather, the estate should be shared by the nearest blood relatives of the deceased (in this case by the nephews and nieces). The Order was intended to incorporate principles of custom. He submitted "The inclusion of a spouse as a beneficiary may be construed to give him/her a share, both of realty and personalty, insofar as to ensure the surviving spouse is to be provided sufficiently to survive. It was never the intention of the 1938 Order to enrich the surviving spouse at the expense of blood relatives. The LTO concept is based on need and not a right per se. In fact the 1938 Order clearly favour blood relatives be given priority as beneficiaries in a deceased estate".

21. Two points arise from these submissions. First, the submissions recognise that the words in par 3(b) "family or nearest relatives", include a spouse. This is correct. The meaning of the word "family" is dictated by the context in which it is used and by its association in the phrase with "nearest relatives". The word "family" is in that context used in a sense sufficiently wide to include a spouse. Thompson CJ so held in *Ikirir v Duburiya and Ors* Land Appeal No 10 of 1971 after a detailed examination of the Order. I respectfully agree with his reasoning.

22. Secondly, the submissions recognise that par 3(b) gives a broad power to distribute the estate in a way that takes into account all the circumstances of the parties involved including the needs of a spouse. By its terms par 3(b) does not require priority to be given to any particular member of the "family or nearest relatives"

23. In my opinion the Order requires the NLC to consider all the circumstances and to distribute the property of the deceased in whatever way the NLC considers fairly balances the different interests of each of the potential beneficiaries, in this case the surviving spouse and the nephews and nieces. The NLC is given a broad discretion constrained only by the second sentence dealing with the

Life Time Only entitlement of a surviving spouse.

24. Relevant circumstances are likely to include the extent of the property in question, the ages of the parties, their economic circumstances and matters such as health issues which could impose particular burdens on one or some of them. The closeness of the blood and family relationship is likely to be another consideration. In its evaluation of all the circumstances the NLC must also follow the dictate of the Life Time Only entitlement of a widow or widower in respect of the use of land.

25. The complexities of the host of circumstances that are likely to arise in a particular case will mean that different minds may reach different conclusions as to where a fair balance lies. However the fact that the court, or one of the parties, holds a different view about the fairness of a distribution does not mean that the conclusion reached by NLC is necessarily wrong. A court will not hold that a broad discretion has been wrongly exercised unless the court is satisfied that the decision maker took into account irrelevant considerations, or omitted to take into account relevant ones, or misconstrued or failed to apply relevant legislative provisions or reached a conclusion which was wholly unreasonable having regard to the evidence before it. As to the principles governing the interference by a court with the exercise of a broad discretion see *House v The King* (1936) 55 CLR 499 at 504-505.

26. In the present case no error of the kind which would permit the court to interfere with the exercise of the discretion by NLC has been pleaded, save for the alleged misapplication of the Order. In my opinion no error in the application of the Order has been made out.

27. Mr Mwaredaga is an old man, disabled and in poor health. Before his wife's death he and the deceased had a way of life dependant on the rental and Ronwan Interest income that the NLC has treated as personalty. The Determination made by NLC would ensure the continuation of the stream of income which Mr Mwaredaga and his wife would have enjoyed but for her early death. Having regard to the age and health of Mr Mwaredaga his entitlement under the Determination will not be of long duration. On his death the land interests which give rise to the rentals and interests will revert to the nephew and nieces. In *Clara Agir v Daniel Aeomage and Ors* [2013] NRSC 14, Eames CJ held that under section 19 of the *Nauru Phosphate Royalties Trust Act 1968* a Life Time Only holder "while living" has the right to Ronwan interest to the exclusion of the beneficial owners of the land, but on the death of the Life Time Only holder that land and the interest arising in respect of its reverts to the landowner. It will be necessary to return to this topic later after considering the appeal in the land claim.

The Land Claim

28. By Determination GN 300 of 2102 published on 6 June 2012 the NLC identified numerous parcels of land in which the deceased had an interest, and determined that the deceased's interest in each case would be redistributed as to a Life Time Only interested in one ninth share to Mr Mwaredaga and to each of the eight nephews and nieces another one ninth share each. On the termination of Mr Mwaredaga's life interest the one ninth share in respect of which he held his Life Time Only interested would be redistributed to the nephews and nieces such as that they thenceforth each held a one eighth share.

29. The short point raised by Mr Ekwona, counsel for Mr Mwaredaga, is that the NLC misapplied par 3(b) of the Order by not awarding him a lifetime interest in the whole of the deceased's landholdings. The relevant clause of par 3(b) reads

> *"The widower...to have the use of the land during his...lifetime if required by him..."*

30. Mr Mwaredaga had appeared before the NLC at meetings of the family called by the NLC and in my opinion had sufficiently made known to the NLC that he required the income arising from the deceased's landings. No party has suggested otherwise. There is also a question whether the receipt of income arising from the land is, within the meaning of par 3(b), "the use of land". No party has argued that it is not. In my opinion the receipt of income from income producing land comes within the scope of the "use of land" in par 3(b).

31. The NLC in its response says only that it applied par 3(b). That statement fails to articulate why or how par 3(b) could be applied so as to award a Life Time Only interest in only one ninth of the deceased landholding. The court is left to speculate how that result was reached having regard to the second sentence of par 3(b). The words "to have the use of the land" means use of all the land of the deceased. There is nothing in the words to suggest that the Life Time Only interest is to be in part only of the land.

32. Mr Ekwona submits that under the Life Time Only provisions of par 3(b), Mr Mwaredaga had an entitlement to a life interest in the whole of the deceased's landholdings. Such entitlement appears from the ordinary meaning of the words used in par 3(b). In Land Appeal No 21 of 1970, *Nei Takea Akamwarar v Eiraidongio and Ors* 1968-1982 NLR (B) 29 at 30-31, Thompson CJ gave this meaning to the words, observing "if that state of affairs (disagreement) had continued, the Committee would have been obliged to award the appellant a life interest in all the estate". In *Clara Agir* Eames CJ at [49]-[50] assumed this was the requirement of par 3(b).

33. In my opinion the NLC fell into error in not awarding Mr Mwaredaga a life time interest in the whole of the deceased's landholdings.

34. I return to the personalty matter. The Determination awarding Mr Mwaredaga all personalty is understandable on the basis of the facts and circumstances known to the NLC when the Determination was made. If the appeal is now allowed in the land matter and a determination substituted which awards Mr Mwaredaga a life interest in the whole of the deceased's landholdings a question arises whether this might have the effect that Mr Mwaredaga ends up with a greater benefit under the two determinations such that the balancing exercise which led the NLC to its decision in the personalty claim is undermined. If this were so it would be open to the court to frame a result that took this into account so as to do what s7 of the NLC Act contemplates, that is, to make an order that it thinks just.

35. I have reached the conclusion that to allow the appeal in the land matter while at the same time dismissing the appeal in the personalty matter does not give rise to a significant prospect of Mr Mwaredaga getting any extra benefits or a "double dip". It is clear from the terms of Determination GN No 68 of 2012 that the NLC intended Mr Mwaredaga to receive all of the rentals and Ronwan interest arising from the deceased's landholdings. The effect of allowing the appeal in the land matter and awarding Mr Mwaredaga a Life Time Only interest in all the deceased's landholdings will be to secure for him those rentals and Ronwan interest payments which he was entitled to receive under Determination GN No 68 of 2012 when it has published, but arguably would have lost once Determination GN No300 of 2012 was made distributing eight ninths of the deceased's landholdings to the nephews and nieces.

36. If the appeal in the personalty matter is dismissed and the appeal in the land matter is allowed the result will be that Mr Mwaredaga's entitlement to the rentals and Ronwan interest after the deceased's death and during his lifetime will arise under both determinations. Whilst there will be two separate bases for entitlement, there is only one amount of rentals and Ronwan interest. So those benefits received by Mr Mwaredaga will not be increased in amount.

37. As it does not appear that Mr Mwaredaga's entitlements are likely to increase if the appeal in

the land matter is allowed, I consider that appeal should be allowed and a determination substituted which has the effect of awarding Mr Mwaredaga a Life Time Only interest in all the deceased's landholdings at the date of death, as identified in the first paragraph of Determination GN No 300 of 2012. It is paragraph 2 of that determination that requires amendment. The beneficiaries in each case should be described in a manner that makes it clear that the entitlement of "David Mwaredaga Snr (LTO)" is in respect of the whole of the deceased's landholdings and, if the practices of the NLC allow, to make it clear that the nephews and nieces interest in the land holdings is deferred during the life of Mr Mwaredaga.

38. On the footing that the appeal in the personalty matter is dismissed, and the appeal in the land matter is allowed, I consider that the nephews and nieces should bear the costs of both appeals, and that there should be no order as to costs either for or against the NLC.

39. For these reasons the appeals will be disposed of as follows:

1. The appeal in Action No 5 of 2012, the personalty matter, is dismissed.
2. The appeal in Action No 24 of 2012, the land matter, is allowed. Paragraph 2 of Determination GN No 300 of 2012 will be varied so as to show that Mr Mwaredaga has a Life Time Only interest in all the deceased's landholdings.
3. Wanda Wiram and Melba Akua and those that they represent must pay the costs of Mr Mwaredaga in respect of both appeals.
4. There will be no order as to costs against the Nauru Lands Committee.

Dated the 18th day of June 2013

John von Doussa AO QC

Judge