

Abiba Ali - - - - - Appellant

v.

Alhaji Mama Ali - - - - - Respondent

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 3RD JULY, 1942

Present at the Hearing:

LORD THANKERTON
LORD RUSSELL OF KILLOWEN
LORD ROMER
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* LORD ROMER]

Their Lordships on this appeal are called upon to determine the true meaning and effect of a devise of certain real estate contained in the will of one Ali, a native officer in His Majesty King Edward the Seventh's Hausas. This Ali was a much married man, being the possessor of no less than seven wives, of whom the senior was Madame Amina. He had, on the other hand, comparatively few children, for they numbered but eight in all. Of these children one, a son, was the respondent Mama Ali; another, a daughter, was called Meriam Ali; a third, also a daughter, was the appellant Abiba Ali.

On the 12th December, 1901, Ali made his will. It is written in the English language and is in the following terms:

IN THE NAME OF GOD AMEN!

This is the last Will and Testament of ALI an Officer in His Majesty King Edward the Seventh's Hausas.

1. I leave my House in the Horse Road in Ussher Town to the South of the late B. D. Coker's House in the charge of Madame Amina, Meriam Ali and my son Mama Ali. The said house is never to be sold but the rent received therefrom is to be divided equally between the said Madame Amina, Meriam Ali and my son Mama Ali.

2. I leave the land known as Ali's land behind the Mosque at Zongo in the charge also of Madame Amina, Meriam Ali and Mama Ali.

3. I bequeath to Adama, Aramu, Asibi Maminah, Adjumah, Zanaboo, Agara, my wives a sum of Twenty Pounds each.

4. I bequeath the balance of my money in the Bank of British West Africa after deducting the (£140) One hundred and forty pounds referred to in the preceding paragraph to Madame Amina, Meriam Ali, and Mama Ali. They are to use the money for the benefit of themselves and the members of my family and children in Accra.

5. I bequeath to my son Mama Ali all my effects consisting of trinkets, war medals and wearing apparel.

6. I appoint Henry Hely Wartemberg of Elmina and Timothy Laing of Accra and Cape Coast Son of the late Revd. Timothy Laing my executors. They are to see that the conditions and the terms of this Will are carried out and they are to be properly compensated by Madame Amina, Meriam Ali, and Mama Ali.

7. This Will shall be in full force at the date of my death.

On the 2nd February, 1908, Ali died and on the 10th September, 1908, the will was proved by Timothy Laing, one of the executors.

The question of construction to be determined on this appeal arises under clause 2 of the will. It is this: Is the property therein mentioned, which is hereinafter referred to as the Zongo land, devised to Madame Amina, Meriam Ali, and the respondent merely as trustees, or is it devised to them for their own benefit? If the former be the true view, then inasmuch as the trusts upon which the property is to be held are not declared in the will, the beneficial interest in it devolved as upon an intestacy. Their Lordships are informed that in that case, according to the law governing its succession, the property passed to all the testator's children in equal shares except that a son took two shares to a daughter's one. It was not, however, until the 18th October, 1937, that any attempt was made by the appellant to establish her right to a share in the Zongo land. On that date she began the present action as plaintiff, purporting to sue on behalf of herself and four other of the testator's children who would be interested on the footing of an intestacy. She claimed by her writ to have her and their title to share in the Zongo land declared and to have the usual consequential accounts taken. The defendants to the action were the respondent and Meriam Ali. In the meantime the respondent and Meriam Ali and, until her death in the year 1912, the widow Madame Amina, had treated the Zongo land as though it had been devised to them beneficially. If it had in truth been so devised, the question whether the three took it as joint tenants or as tenants in common need not be discussed. For it appears that on the death of Madame Amina all her real and personal estate devolved upon Meriam Ali, and that by a deed dated the 22nd October, 1917, the last named conveyed to the respondent the whole of her interest in the Zongo land, or rather in so much of it as then remained unsold, it being recited in the deed that part of the land had been sold and the proceeds divided between Meriam Ali and the respondent. On the assumption therefore that the devise of the Zongo land to the three passed the beneficial interest, the respondent as from the 22nd October, 1917, had become the sole owner of the land still remaining unsold, whether the three took as joint tenants or tenants in common. From that date down to the institution of this action it remained in his sole and undisputed possession.

The action came on for hearing in the month of August, 1938, before Petrides C.J., who on the 8th October of that year gave judgment in favour of the plaintiff. Upon the question of construction he held that the Zongo land had not been devised by paragraph 2 of the will to Madame Amina, Meriam Ali, and the respondent but was placed in their charge. "It results," he said, "from this paragraph that these three persons were trustees of the land and held the land not for their own benefit but for the heirs of the testator, i.e., in this case the children." He accordingly declared that the appellant and those she purported to represent were entitled to certain specified shares in that part of the Zongo land that remained unsold, and directed an account to be taken of the moneys received by the respondent from that part of the land. It should be mentioned in this connection that, for reasons which it is unnecessary to specify, the appellant at the trial had abandoned her claim against the defendant Meriam Ali.

From this judgment the respondent appealed to the West African Court of Appeal (Webb C.J., Lloyd A. C.J. and Strother-Stewart J.) who on the 6th April, 1939, made an order allowing the appeal. From that order the appellant now appeals to His Majesty in Council.

There is unquestionably much to be said in favour of the construction of paragraph 2 of the will for which the appellant contends. Upon the whole, however, their Lordships find themselves in agreement with the conclusion reached by the majority of the Court of Appeal. If that paragraph were the only one in the will it is probable that the result of it would be what Petrides C. J. held it to be. But even so, the words "I leave in charge of" are not those commonly used for creating a trust and may well have been used by this native officer as meaning no more than "I leave in the hands of" the three named persons. The paragraph, however, must be read in connection with the rest of the will including paragraph 4 in which the testator, when desiring to create a trust, has used the appropriate words

for doing so. But in particular it must be read in connection with paragraph 1, a paragraph that Petrides C.J. unfortunately thought it unnecessary to construe as the appellant made no claim to the property with which it was concerned. Surely in order to construe the words "I leave in charge of" contained in paragraph 2 it is very material, to say the least of it, to construe the same words where they occur in paragraph 1. Turning then to this latter paragraph the first observation to be made is that the second sentence in it makes it abundantly clear that the three named devisees were to take absolute interests in the house in Horse Road as tenants in common in equal shares, it being well settled that a devise of the rent of land for an indefinite time is now equivalent to a devise of the land itself. It is argued, however, on behalf of the appellant that these absolute interests are equitable interests only, and that the legal estate in the house was by virtue of the first sentence of the paragraph vested in the three named persons jointly as trustees, the trusts on which the property was to be held by them being declared in the second sentence. It is said in other words that the testator's intention was to constitute these persons jointly trustees for themselves absolutely as tenants in common in equal shares. Their Lordships are not prepared to attribute to the testator so unlikely an intention. It seems to them a far sounder construction to regard the first sentence as conferring upon the devisees the absolute beneficial interest in the property and the second sentence as an attempt, though an ineffectual attempt, to impose upon them a restraint on alienation. If, indeed, the first sentence merely constituted the devisees trustees they would not as such have possessed a power of sale. As the absolute beneficial owners on the other hand they would, of course, have had such a power. The attempt to deprive them of that power seems therefore an indication that by the first sentence the testator intended to confer the beneficial ownership upon the three persons and not merely to constitute them trustees.

Their Lordships are accordingly of opinion that in paragraph 1 of the will the words "I leave in the charge of . . ." are upon their true construction equivalent to "I devise absolutely to . . ." But if these words have that meaning in paragraph 1, there can be no valid reason for giving them a different meaning in paragraph 2. They are therefore effectual to confer upon the three named persons the absolute beneficial interest in the Zongo land. Some confirmation of this view is afforded by the use and the position of the word "also" in that paragraph. The place in which it is found suggests that the testator was not merely adding a new clause to his will but was adding a new subject matter to the "charge," that is to say to the beneficial devise contained in the preceding paragraph, though without the attempted restraint on alienation.

In adopting this construction of the words "I leave in the charge of" contained in paragraph 2 of the will their Lordships do not doubt that they are giving effect to the real intention of the testator. They find it difficult to suppose that the testator intended to devise the Zongo property to trustees and yet deliberately refrained from indicating the trusts upon which such property was to be held.

For these reasons, which are substantially the reasons upon which the decision of Webb C.J. and Lloyd A.C.J. in the Court of Appeal was founded, their Lordships are of opinion that the appeal should be dismissed. They will humbly advise His Majesty accordingly.

The costs of the respondent must be paid by the appellant.

In the Privy Council

ABIBA ALI

v.

ALHAJI MAMA ALI

DELIVERED BY LORD ROMER

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