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C-4, S. 2

No. 4 of 1953.

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.

-4 JUL 1956

INSTITUTE OF ADVANCED
LEGAL STUDIES

ON APPEAL

FROM THE WEST AFRICAN COURT OF APPEAL
(NIGERIAN SESSION).

43570

IN THE ESTATE of ALFRED LATUNDE JOHNSON, deceased.

BETWEEN

HARIET JOHNSON (Defendant) *Appellant*

AND

10 BAFUNKE JOHNSON and OLUSEGUN JOHNSON
(by his next friend AGNES JOKOTADE) (Intervenors
on Appeal) *Respondents*

AND

20 AKINOLA MAJA, OLUMIDE OMIBAWE
JOHNSON and THE MANAGER, NATIONAL
BANK OF NIGERIA LTD. Executors under
the alleged Will dated the 27th November, 1943,
and Codicil dated the 27th July, 1945, of the
Deceased (Plaintiffs) *Pro-Forma
Respondents.*

Case for the Appellant.

RECORD.

1. The Appellant in this appeal is the widow (hereinafter called "the Widow") of Alfred Latunde Johnson (hereinafter, where not referred to by name, called "the Deceased"), late of Lagos, Colony of Nigeria, Barrister-at-Law and Solicitor who died on the 7th April, 1950; the appeal is in substance (a preliminary question arising, as is set forth in paragraph 2 *infra*) from :—

30 (1) A Judgment and Order of the West African Court of Appeal, holden at Lagos, given and made the 27th April, 1951 (Sir John Verity, C.J., Nigeria, Presiding Judge, Lewey, J.A., and De Comarmond, S.P.J.), granting leave to the Respondents, Bafunke Johnson, and Olusegun Johnson (hereinafter called "the

pp. 17-24.

Writ of Summons,
pp. 1 & 2.Exts. "A,"
pp. 55-61 ;
"A1" p. 62.p. 23, l. 45.
p. 24, l. 3.

Intervenors") respectively the natural daughter and natural son of the Deceased, the latter of whom being then (although he is not now) a minor appearing by Agnes Jokotade, his mother as his next friend (and also the mother of the said Bafunke) by way of intervention, to appeal from the Judgment (hereinafter called "the trial Judgment") of His Honour Stephen Bankhole Rhodes, C.B.E. Puisne Judge, dated the 23rd February, 1951, given in the Supreme Court of Nigeria in proceedings instituted by the Pro Forma Respondents (hereinafter called "the Executors") as being the Executors appointed by the Deceased under an alleged Will and an alleged Codicil dated respectively the 27th November, 1943, and 27th July, 1945, as Plaintiffs against the Widow as Defendant, whereby he pronounced against the said Will holding that it was not executed according to law and declaring it null and void and also declaring that in so far as the said Will was concerned the Deceased died Intestate, with Costs assessed at 80 guineas each to the Executors and the Widow to be borne by the Estate of the Deceased.

pp. 37-47.

(2) Subject to (1) above, the Judgment (hereinafter called "the Appeal Judgment") dated the 23rd November, 1951, of the said Court of Appeal (constituted the same as in (1) above with the exception that Jibowu, Acting S.P.J., sat in place of Comarmond, S.P.J.), given in the appeal brought by the Intervenors, pursuant to the said leave as aforesaid, whereby the trial Judgment was set aside, and there was substituted therefor a Judgment pronouncing in solemn form for the said Will and the said Codicil, the costs of all parties on the Appeal and in the Supreme Court to be borne by the said Estate.

PRELIMINARY QUESTION.

pp. 1-2.

p. 2, ll. 5-10.

2. A preliminary question arises as to whether the whole of the said proceedings are not void by reason of the form of the institution thereof and of the subject-matter of the Claim and the relief sought for as set forth in the Summons whereby the said proceedings were instituted and having regard to the terms of Rules 1, 2, 3 and 4 of Order 2 ("Form and Commencement of Suits"), and the other Orders and Rules hereinafter referred to, of the Supreme Court (Civil Procedure) Rules (Laws of Nigeria, 1948, Vol. X, p. 12).

3. By the said Rules 1, 2, 3 and 4 of the said Order 2 it is provided :—

"1. Every suit shall be commenced by a writ of Summons signed by a judge, magistrate or other officer empowered to sign Summons. The writ of summons shall be issued by the registrar, or other officer of the Court empowered to issue summonses on application. The application shall ordinarily be made in writing but the registrar or other officer as aforesaid where an applicant for a Writ of Summons is illiterate may dispense with a written application and instead himself record full particulars of the oral application made and on that record a writ of summons may be prepared, signed and issued.

“ 2. The writ of summons shall contain the name and place of abode of the plaintiff and of the defendant so far as they can be ascertained; it shall state briefly and clearly the subject-matter of the claim, and the relief sought for, and the date (called the return-day) and place (called the return-place) of hearing.

“ 3. Every writ of summons, and also every other writ, shall bear date on the day on which it is issued.

“ 4. Any alteration of a writ without leave of the Court shall render the writ void.”

- 10 4. The said proceedings were instituted by an “ Administration Summons ” directed to the Widow (described therein as . . . “ wife of the above-named Alfred Latunde Johnson (deceased) ”). In regard to the subject-matter of the claim and relief sought for, it is stated therein :—

“ You are hereby commanded in His Majesty’s name to attend this Court at Tinubu Square, on Tuesday the 24th day of October, 1950 at 9 o’clock in the forenoon, and show cause why an order for the administration of the property of the said Alfred Latunde Johnson under the direction of this Court should not be granted.”

The said Summons is signed “ De Comarmond, Senior Puisne Judge.”

- 20 5. Order 8 (*ibid.* pp. 19–20) of the said Rules provide “ General Forms of Process ” and by Rule 3 thereof it is provided :—

“ 3. The forms in the First Schedule, or forms to the like effect, may be used in all matters, causes and proceedings to which they are applicable with such variations as circumstances require.”

Provision in regard to “ Probate and Administration ” is made in the said Rules by Order 48 (*ibid.* pp 78–89) and in Rule 34 which is in section 6 of the said Order (headed “ Administration of Property ”) (*ibid.* p. 85) it is provided :—

- 30 “ 34. Any person claiming to be a creditor or legatee or the next of kin, or one of the next of kin of a deceased, may apply for and obtain a summons from the court requiring the executor or administrator (as the case may be) of the deceased to attend before the court and show cause why an order for the administration of the property of the deceased should not be made.”

The words “ Administration summons ” appear in the margin to the said rule 34.

6. In the said First Schedule of the said Rules (*ibid.* p. 98) a form of administration summons styled “ A.2. Administration Summons ” exactly as was issued and served as aforesaid (paragraph 2 *supra*) is provided.

- 40 By contrast, by Rule 16 of Order 48, which is in section 2 of the said Order headed “ Probate or Administration in General ” (*ibid.* p. 81) it is provided :—

“ 16. Suits respecting probate or administration shall be instituted and carried on as nearly as may be in the like manner and subject to the same rules of procedure as suits in respect of ordinary claims.”

From this it would, it is respectfully submitted, appear clear that in regard to the institution of an ordinary suit, the said Rules 1, 2, 3 and 4 of Order 2 would apply and strict and literal compliance therewith is imperative.

Furthermore there is provided in the said First Schedule of the Rules (*ibid.* p. 97) a form styled "A.1—Civil Summons" which is adaptable as clearly appears therefrom to be used "in respect of ordinary claims" in accordance with the said Rule 3 of Order 8 (*supra* paragraph 5) and the said Rule 16 of Order 48.

7. Subsequent to the said issue and service of the said Summons 10 by which as aforesaid the said proceedings were instituted, pleadings were delivered by the Executors and the Widow respectively as follows:—

pp. 3-4.
p. 3, ll. 26-27.

20th December, 1950. Statement of Claim by the Executors, alleging (apart from formal allegations of their being Executors as aforesaid and the Widow as being such) that the Executors have applied for a grant of Probate of the said Will to them, and that the Widow on or about the 18th July, 1950, caused a caveat to be lodged against the grant. The Executors therein claimed Probate of the said Will in Solemn Form of Law and Codicil.

p. 7, ll. 12-15.

The said last two words "and Codicil" were added pursuant to an 20 amendment granted at the trial.

pp. 4-6.
Index, p. 1,
No. 3.
p. 5, ll. 8-13.

18th January, 1951. Statement of Defence by the Widow wherein (apart from alleging the want of due execution of the said Will) the validity of the said Will and Codicil were challenged and attacked on the grounds, briefly stated, that:—

p. 5, ll. 30-38.

(1) The Deceased at the time of their execution was deficient in testamentary capacity, and

p. 5, ll. 14-29.

(2) Their execution was obtained by the undue influence of the said Agnes Jokotade (mother of the Interveners) who had been the kept mistress of the deceased and was a beneficiary under the 30 said Will.

pp. 6-16.
pp. 17-24.

8. Upon the said pleadings and the issues arising thereon the said proceedings were tried on the 14th and 15th February, 1951, and on the 23rd February, 1951, the trial Judgment (which had been reserved) was delivered.

pp. 24-25.

9. On the 27th April, 1951, upon an application made *ex parte* the said leave was granted by the West African Court of Appeal to the Interveners to appeal to the said Court of Appeal from the trial Judgment.

p. 27.

10. On the 30th April, 1951, Notice of Appeal pursuant to the said 40 leave was given by the Interveners.

pp. 32-36.

11. On the 7th and 8th November, 1951, the Appeal pursuant to the said leave and in accordance with the said Notice of Appeal was heard, and on the 23rd November, 1951, the Appeal Judgment (which had been reserved) was delivered.

p. 37.

12. Upon the said preliminary question it is submitted that there was no jurisdiction under Order 48 r. 34 to issue the said administration summons upon the application of persons not claiming to be a creditor or legatee or one of the next of kin of a deceased and that, though there is jurisdiction under section 11 of the Supreme Court Ordinance and rule 1 of Order 2 for executors to commence an action for the administration of the estate of their testator, such action cannot be instituted and carried on before grant of probate (*Dowdeswell v. Dowdeswell* (1878), 9 Ch. D. 294, and even if such an action for administration is properly instituted, the
 10 only relief which can be granted in it is administration by the Court of the estate or relief connected with the administration of the estate so that it is incompetent to seek or grant in such an action probate of the Will of the deceased. It is accordingly submitted that for these reasons and by reason of the matters hereinbefore set forth in paragraphs 2 to 6 the said proceedings were misconceived and are null and void and of no legal force or effect whatsoever and so, accordingly, are the Appeal Judgment and the pronouncement made thereby in favour of the said Will and Codicil in regard to which the result, in consequence, being expressible as the *status quo ante bellum*.

20 INTERVENTION OF THE INTERVENERS.

13. In regard to the said granting by the West African Court of Appeal of special leave to appeal to the Interveners it is submitted that :—

(A) The said Court had no jurisdiction, or power, and it was not competent for it, to grant the said leave in the absence of any provision in the West African Court of Appeal Rules, 1950, or otherwise, to enable it to do so, and because moreover the said Rules negative, and are inconsistent with, the said Court having such jurisdiction or power or being competent to do so.

30 (B) If the Court had in any circumstances jurisdiction and power to grant leave to appeal to the Interveners, they had no jurisdiction to do so except under Rule 13 (1) of the West African Court of Appeal Rules, 1950, which provide that where an appeal lies by special leave only, any person desiring to appeal shall apply to the Court by notice on motion for special leave within fourteen days from the date of the decision against which leave to appeal is sought and the motion for special leave to appeal was filed on the 11th April, 1951, from the Judgment of the Supreme Court
 of the 23rd February, 1951, and, accordingly, the said Court had no jurisdiction or power to grant the same. p. 26.

40 (C) Even if, as was held by the said Court, that according to the provisions of Rule 42 of the said Rules, in the absence of anything in the said Rules prescribing the means by which it might do so, recourse might be had to the practice for the time being in force in England, by the application of such practice the said Court could not grant the said leave and, in having done so, acted injudicially and contrary to law, and the Interveners were not entitled thereto, and could not intervene as by the said leave granted to them they did, inasmuch as the proceedings wherein p. 25, ll. 11-19.

the trial Judgment from which they obtained the said leave to appeal was given were in the nature of a probate action and the Interveners (or either of them) were not parties to the said action either as Plaintiffs, Defendants or Parties cited.

(D) In any event, and even by the application of the English practice as aforesaid, the granting by the said Court of the said leave was beyond its jurisdiction or power and, in granting the same, it acted injudicially and contrary to law inasmuch as the Interveners had not been cited to see the said proceedings and were (both of them) absent from Nigeria at the time and thus were 10
unaware thereof or of their right to intervene therein, and they could not, therefore, in any sense have been bound by the trial Judgment given in the said proceedings and the course, if they chose to do so, which was always, accordingly, open to them, and which they were free to take, was to take proceedings *de novo* to have the said Will and Codicil pronounced for.

(E) Inasmuch as one of the grounds (as set forth in paragraph 7 *supra*) upon which the Widow had challenged and attacked the validity of the said Will and Codicil, was that their execution had been obtained by the undue influence of the said Agnes Jokotade, 20
the mother of the Interveners, and by whom one of them as aforesaid appeared as his next friend, and the kept Mistress of the Deceased, it would consequently be greatly to the prejudice of the Widow that the said leave should be granted, since if the Interveners had themselves brought the proceedings to have the said Will and Codicil pronounced for, or had they been parties in the said proceedings which had taken place for the said purpose, the absence of the said Jokotade as a witness, in view of the said allegation, must have assumed a very much greater significance as weighing 30
most strongly in favour of the said allegation being true.

Therefore, in granting the said leave the said Court had wrongly exercised its discretion (so far as it had the jurisdiction and power and it was within its discretion to do so) by having done so, without taking into consideration at all the said prejudice, which the Widow would, or was likely to, suffer or in not having given due or sufficient consideration thereto.

Furthermore in all the circumstances of and connected with and relating to the said proceedings, including the said prejudice to the Widow, the said Court in the granting of the said leave wrongly exercised its 40
discretion.

MERITS.

14. As has been above set forth (*supra* paragraph 7) the substantial issues raised in the said proceedings were, in addition to whether or not the said Will and the said Codicil were duly executed, whether or not—

(A) The Deceased possessed the testamentary capacity requisite for the valid execution by him of the said Will and Codicil.

(B) The execution of the said Will and Codicil were obtained by the undue influence of the said Agnes Jokotade.

The questions which arise for determination in this appeal in regard to the said issues, having regard to the evidence given on behalf of the Executors and the Widow with regard thereto, and to the trial Judgment given thereon as aforesaid and the Appeal Judgment whereby the trial Judgment was set aside as aforesaid, are, therefore, in substance, as follows :—

10 (1) Whether, having regard to the evidence given on behalf of the Executors and the Widow, and as found in the trial Judgment by the learned trial Judge, the circumstances disclosed thereby were not such, as held by him to be, in regard to the health, mental condition and vigour of the Deceased and in relation to the said Agnes Jokotade, that it cast upon the Executors the onus of satisfying the conscience of the Court and putting beyond doubt that in regard to the said Will and Codicil propounded by them, the Deceased was in a state of health and mind in which he was, testamentarily speaking, capable and had acted freely, and, this being so, whether the learned trial Judgment was not entitled upon the said evidence to hold, as he did, that he was not so satisfied.

20 (2) Whether the said evidence was not such as to entitle the learned trial Judge to find thereon as he did, as stated by him in the trial Judgment as follows :— p. 23, ll. 8-33.

30 “ I must come to the conclusion that (the Deceased’s) mental condition was at the time of his executing this 1943 Will of such a state that he could easily have been coerced and that the actions of Agnes Jokotade who has two children for (the Deceased), who are substantially benefited under this Will, such benefits having shifted from the 1939 Will in favour of (the Widow) to these two bastards and the fact that Jokotade remained alone with (the Deceased) at the farm and on his return home continued to prepare his meals and send to his house despite the presence of (the Widow) in the house (the Deceased) refusing to eat meals prepared by (the Widow) the Caveatrix has led me to come to the conclusion that (the Deceased) was coerced by this woman at the time he executed this Will, as it was during that same period, that all this took place ; that is September to November, 1943.

40 “ Reviewing the evidence before me as a whole, I find (the Deceased) was not a Free Agent at the time he executed the 1943 Will, that his mental condition was not in a fit and proper condition to execute a lawful Will and, his condition was such that he was influenced unduly for the benefit of her two children.”

50 It should be here mentioned (as is pointed out in the Appeal Judgment) that the learned trial Judge made no express finding with regard to the said Codicil, but it is submitted in regard thereto that (A) the proof required to enable probate thereof to be granted was lacking and (B) as the trial Judgment clearly shows, and is supported by the evidence upon which the part of trial Judgment above quoted is based, the trial Judgment similarly applies to the execution of the said Codicil by the Deceased. And in any case this was not fully or finally dealt with in the Appeal Judgment. p. 46, l. 44.

(3) Whether the upon said evidence and the law properly to be applied thereto the trial Judgment should not be held to have rightly decided the said issues and accordingly be upheld and restored and the Appeal Judgment set aside.

15. It is submitted that the said evidence amply and abundantly supports the trial Judgment and was such, especially having regard to the nature of the said issues to be decided and the great importance in relation thereto of the fact that the learned trial Judge saw and heard the witnesses and caught the atmosphere of the trial, essential in such a case, that the trial Judgment should not have been held, as has been held by the Appeal 10 Judgment, to be wrong, based upon the principle that it is not for an Appellate Court to see whether the Judgment *a quo* is right but rather to see, whether it is wrong, and then, only if it is wrong (as it is submitted the trial Judgment was not) to interfere with it.

16. It is submitted that :—

(A) The whole of the said proceedings are null and void and of no legal force or effect whatever and therefore the Appeal Judgment should accordingly be set aside and such further and necessary orders made consistent therewith.

(B) Alternatively the granting of the said leave to appeal by 20 the West African Court of Appeal to the Interveners was injudicial, wrong and contrary to law and, accordingly, the said appeal by the Interveners was wrongly brought and, therefore, the Appeal Judgment ought to be set aside and the trial Judgment restored or that a new trial be ordered with the Interveners as parties thereto.

(C) In the further alternative the Appeal Judgment was wrong and ought to be set aside and the trial Judgment restored or a new trial be ordered for the following amongst other

REASONS

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(1) BECAUSE the proceedings had been instituted by means of the wrong process and one inappropriate and contrary to the requirements provided by law and as provided thereby are void.

(2) BECAUSE the West African Court of Appeal—

(A) Had no jurisdiction or power and were incompetent to grant leave to the Interveners to Appeal from the trial Judgment.

(B) In granting leave to appeal to the Interveners by the Application of the English practice misapplied 40 the said practice and acted injudicially and were wrong in law in regard thereto.

(C) In granting the said leave to appeal wrongly exercised its discretion.

- 10
- (3) BECAUSE the learned trial Judge was entitled upon the evidence to find upon the issues raised as aforesaid, as he did.
- (4) BECAUSE the learned trial Judge correctly appreciated and weighed the evidence and correctly applied the law thereto in his findings and conclusions in the trial Judgment.
- (5) BECAUSE for the reasons contained therein and for other good and sufficient reasons the trial Judgment is right.
- (6) BECAUSE the Appeal Judgment is wrong and in thereby setting aside the trial Judgment the West African Court of Appeal did not exercise its appellate function or duty correctly according to law.
- (7) BECAUSE upon the facts proved or admitted the trial of the said issues raised in the said proceedings and the law applicable thereto the Widow was entitled to Judgment as given by the trial Judgment.
- 20
- (8) BECAUSE neither the said Will nor the said Codicil could, and should not, have been admitted to probate.
- (9) BECAUSE the trial Judgment should not have been disturbed by the Appeal Judgment.

S. N. BERNSTEIN.

In the Privy Council.

ON APPEAL

*from the West African Court of Appeal
(Nigerian Session).*

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BETWEEN

HARIET JOHNSON (Defendant) .. Appellant

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Case for the Appellant.

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