Privy Council Appeal No. 4 *of* 1953

Hariet Johnson - - - - - - - - - - *Appellant*

v.

Bafunke Aderemi (formerly Johnson, now a married woman) and others - - - - - - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH JUNE, 1955

Present at the Hearing:

LORD RADCLIFFE
LORD SOMERVELL OF HARROW
MR. L. M. D. DE SILVA

[*Delivered by* LORD RADCLIFFE]

In this appeal the appellant is the widow of Alfred Latunde Johnson (hereinafter referred to as "the testator") and she was the defendant in certain proceedings instituted in the Supreme Court of Nigeria to establish the validity of a will and codicil of the testator dated respectively 27th November, 1943, and 27th July, 1945. The purpose of the appeal is to reverse a judgment dated 23rd November, 1951, of the West African Court of Appeal, the effect of which was to grant probate in solemn form of the will and codicil. By this judgment the Court of Appeal set aside a judgment dated 23rd February, 1951, of the Supreme Court of Nigeria which had found that the will was not executed according to law and declared it to be null and void.

Of the respondents on the record the effective parties are Bafunke Aderemi and Olusegun Johnson, two illegitimate children of the testator, who were added as parties to the proceedings by an order of the Court of Appeal. The other respondents are the executors appointed by the joint operation of the will and codicil. These respondents started the proceedings as plaintiffs in the Supreme Court of Nigeria; but they have not taken any active part or appeared before the Court since judgment was given at the trial. It is the effective respondents who are hereinafter referred to as "the respondents".

On the hearing of this appeal a substantial part of the appellant's case was rested on two technical points arising out of procedure in the Courts in West Africa. First, it was submitted that all judgments and orders in the action ought to be treated as null and void because the form of summons which had been issued to institute the suit was the wrong one for its purpose, and no judgment for or against proof of a will in solemn form could validly be given in a suit so commenced. Secondly, it was

submitted that the proceedings in the Court of Appeal ought to be treated as void and its judgment set aside, because the order which had added the respondents as parties for the purpose of the appeal was incompetent; and, without them as parties, there would have been no appeal at all.

Neither of these points was taken at any stage prior to the hearing before this Board. If the first was to be taken at all, it should have been taken at an early stage, once the Statement of Claim had placed beyond doubt what was the nature of the relief sought. If the second was to be raised, it should have been raised at the beginning of the hearing in the Court of Appeal. Since, now that they have been argued, neither of the points commends itself to their Lordships as having any more merits in substance than it has in time of presentation, it is not necessary to give them more than a brief notice.

The form of summons employed by the plaintiffs in the suit was one that called upon the defendant to show cause why an order should not be made for the administration of the property of the testator under the direction of the Court. It can be accepted, as the appellant now argues, that this form, which is, in effect, " A2. Administration Summons " in the First Schedule of the Supreme Court (Civil Procedure) Rules was not the appropriate instrument to start a probate suit designed to obtain proof of a will in solemn form. Such a suit should be begun by a writ of summons analogous to the writ issued to begin a suit in respect of an ordinary claim (see Order 48, para. 16 of the Supreme Court Rules). The purpose of an administration summons is to obtain the Court's direction as to the proper administration of an estate, testate or intestate: it is not its function to raise an issue depending on contested facts as to testamentary capacity or the substantial validity of a will. Nevertheless it is impossible to suppose that in this case it made any difference to anyone that the suit was begun in this form. Even before the issue of the summons the appellant had lodged a caveat: the Statement of Claim made it quite clear that the object of the suit was to obtain a grant of probate in solemn form: and the Statement of Defence raised the three issues of lack of due execution, undue influence and absence of testamentary capacity, which were appropriate defences to a probate action but would have had no place in an administration summons properly so called. Had the technical point been taken at an early stage that the relief asked for by the Statement of Claim was not within the range of the relief covered by the summons, the Court would either have exercised its power under Order 33 of the Rules to amend the summons or would have put the plaintiffs to the somewhat barren exercise of abandoning the existing proceedings and issuing a writ. As however no such point was taken and the trial proceeded to judgment without either side apparently troubling about the matter, it is idle to suggest that the judgment is now to be regarded as a nullity. A case of this sort has no true relation with the line of authorities represented by *Ingall* v. *Moran* 1944 K.B. 160 and *Hilton* v. *Sutton Steam Laundry*, 1946 K.B. 65, in which the Court has dismissed the actions of plaintiff administrators who had not obtained letters of administration at the date of issuing their writs, on the ground that they had launched actions inherently incompetent which could not be rendered competent *ex post facto* by the obtaining of the necessary grant. In this case, on the contrary, the executors were fully competent to institute a probate action at the date of the administration summons: and to treat the action as competent from the date of the summons prejudices no defence of the appellant, such as the statutory rights of limitation that were in question in the English cases.

Secondly, it was argued that the Court of Appeal had no jurisdiction to make an order to add the respondents as parties, having regard to the fact that the suit in question was in substance a probate action; or, alternatively, that in making the order the Court exercised its discretion so wrongly and " injudicially " that the order ought to be reviewed and reversed on appeal. What happened was that, no action being taken by

the executors by way of appeal against the Supreme Court judgment refusing probate, the respondents made an application *ex parte* to the Court of Appeal, asking that they should be added as defendants to the suit for the purpose of prosecuting an appeal. They stood to gain substantially under the terms of the will and it was obvious that they were interested to maintain its validity. The Court, finding nothing in the West African Court of Appeal Rules, 1950, which dealt specifically with the situation before them, resorted to the general authority of Rule 42, which provides that when there is no provision in the Rules recourse may be had to the procedure and practice for the time being in force in the Supreme Court in England. There is no doubt that, generally speaking, it is the practice of the Court of Appeal in England to allow a person who might have been a party to a suit to conduct an appeal against a judgment that affects his interest and to be added as a party for this purpose (see Annual Practice, 1954, p. 1244).

The appellant submitted however that it was wrong to apply this practice to the present case, for the respondents, who had stated in their application that they were both absent from Nigeria at the time of the proceedings in the Supreme Court, would not have been treated as persons bound by the judgment in the probate suit and would therefore have been free to institute fresh proceedings to establish the will and codicil if they so desired. Their Lordships see no validity in the distinction suggested. On the contrary it seems an obviously convenient course that persons interested who wish to question a judgment affecting their interests, as the respondents did, should be enabled to carry the judgment to appeal without going through the more elaborate course of starting new proceedings with the necessity of a fresh trial at first instance. In any event the point canvassed is quite insufficient to affect the jurisdiction of the Court of Appeal to add parties.

It is necessary now to say something about the substance of what was at issue in the action. The trial judge found that the will dated 27th November, 1943, was not executed according to law and declared it to be null and void: he also declared that "so far as this 1943 will is concerned" the testator died intestate. The grounds upon which he based these findings were three ; that the will was not duly executed in accordance with the Wills Act, 1837, since the witnesses to the testator's signature were not both present at the same time to witness execution, that the testator's mental condition was not such as to support a proper testamentary capacity at the time of signing, and that he was in fact coerced or unduly influenced in the making of his will by Agnes Jokotade, the mother of the two respondents.

All these findings were reversed by the Court of Appeal. In their judgment, which was delivered by Lewey J.A., they made a full review of the evidence and of the legal principles applicable to it. Their Lordships have found this judgment satisfactory and convincing in its handling of the different issues and, since they are in complete agreement with its conclusions, they content themselves with making one or two observations on the aspects of the evidence that were particularly canvassed before them.

Only two of the three grounds which had commended themselves to the trial Judge were argued on the present appeal, the appellant's counsel rightly conceding that the evidence did not allow him to maintain the case that the will had not been duly executed as required by the Wills Act. There remained the issues of undue influence and lack of testamentary capacity.

As to the latter, there was in truth no evidence to support the appellant's case. Sometime before 1943 the testator had suffered from a form of stroke: his friend and medical adviser, Dr. Maja, put the date of it as far back as 1928-29. About September, 1943, he had an attack which the appellant in her evidence describes as "another attack of stroke". He was attended, apparently, both by Dr. Maja and another friend and doctor, Dr. Omololu, and the latter in his evidence describes the testator as suffering from physical and mental exhaustion in 1943. In any event

it seems that the doctors recommended a period of rest after the attack of September, 1943, and the testator accordingly retired for some weeks to a farm in the country. It was after his return from this rest that the will of 1943 was executed.

The only circumstances that can be added to these facts on behalf of the appellant's case are that a stroke may cause a progressive impairment of judgment, and in the case of a hard worker, such as the testator was said to have been, the deterioration is likely to be accelerated: while there was some evidence that, after the testator's return from his rest at the farm, he showed a sullen or suspicious attitude towards his wife and servants. On the other hand any probative value which these facts might have had, taken by themselves, must be next to nothing in face of the evidence of both doctors, who were called on different sides at the trial, that the testator's mental condition in 1943 was normal, and the evidence of Mr. Bright Wilson, a solicitor and personal friend, who witnessed the will, that he was well and normal at the time of execution. In fact, the testator continued in active practice as barrister and solicitor during and after 1943, telling his friend Dr. Omololu that he was prepared to die in harness.

In their Lordships' opinion these considerations dispose of the issue as to testamentary capacity. They agree with the view expressed by the Court of Appeal that the evidence adduced by the appellant is really of value upon the question of undue influence rather than upon the question of testamentary capacity. And here too the appeal must fail.

The story that appears from the evidence is a sad one and there is no need to review again the circumstances that cannot but be distressing to the appellant herself and to the members of the testator's legitimate family. The 1943 will and the 1945 codicil showed a much larger proportion of the testator's considerable fortune bequeathed to the respondents, the children of Agnes Jokotade, than to the testator's lawful children by the appellant. In these dispositions there is a marked change from the dispositions of an earlier will made in 1939 and indeed the appellant's own testamentary benefits are reduced by the later will. The case which was sought to be made at the trial was that this later will and codicil were executed under the undue influence of Agnes Jokotade. The trial Judge so found. It is sufficient to say that, when all the evidence as to the testator's conduct and situation has been reviewed, it falls far short of what would be needed to support such a finding, and the Court of Appeal were right when they said at the conclusion of their judgment "the defendant/respondent cannot be said to have substantiated the charge of undue influence and . . . the learned Judge was wrong in finding against the will on that ground."

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondents' costs.

(39397) Wt. 8064—69 120 7/55 D.L.

In the Privy Council

HARIET JOHNSON

v.

BAFUNKE ADEREMI (formerly Johnson, now a married woman) and others

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DELIVERED BY LORD RADCLIFFE

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