Freetown
July 26,
1962

Ames Ag.P.,
Dove-Edwin
J.A.,
Bankole Jones
J.

[COURT OF APPEAL]

In Re WILL OF MOMORDU ALLIE (DECEASED)

[Civil Appeal 3/62]

Wills—Construction of will—Time of appeal—Devise of land in trust—Rule against perpetuities—Whether devise was "for charitable purposes"—Imperial Statutes (Law of Property) Adoption Act (Cap. 18, Laws of Sierra Leone, 1960), s. 3—Whether English law applied to will.

The testator died in January, 1948, domiciled in Freetown, where he possessed land. In clause 26 of his will, he devised land in Freetown to trustees upon trust that they should lease it and, after payment of rates, taxes and repairs, use the balance for payment of the travelling expenses of his relatives at Jaber, Senegal, who might visit Freetown and for their maintenance while in Freetown. In 1953, the Official Administrator took action in the Supreme Court for the construction of clause 26 and two other clauses. The court decided that clause 26 was invalid because it violated the rule against perpetuities, and, therefore, that the properties therein devised fell into the residue of the estate. The court also construed the other two clauses, but the order embodying the judgment included only the decision as to the other two clauses and not the decision as to clause 26.

In December, 1961, a beneficiary under the will applied to the court to have the order amended to include the decision regarding clause 26, and this was done in January, 1962. The relatives at Jaber were informed of this application, and they authorised one of their number, the applicant, to apply on their behalf for leave to appeal against the judgment given in 1953 relating to clause 26. The applicant argued that the application was not too late since the time for appealing should be calculated from the date of the drawing up of the order in accordance with the practice of the Chancery Division in England.

Held, dismissing the application, that, notwithstanding the practice in the Chancery Division in England, under the law of Sierra Leone the application for leave to appeal came too late.

The court (Ames Ag.P.) also said, obiter, that the Supreme Court had not overlooked section 3 of the Imperial Statutes (Law of Property) Adoption Act but had held that it did not apply, since the devise of land in clause 26 was not "for charitable purposes."

Cyrus Rogers-Wright for the applicant.

AMES AG.P. The testator's origin was at Jaber, in Senegal. He died in January, 1948, domiciled here in Freetown, and possessed of land here. In clause 26 of his will, he devised land in Freetown to trustees upon trust that they should lease it and, after payment of rates, taxes and repairs, use the balance for payment of travelling expenses of his relatives at Jaber, who might visit Freetown, and for their maintenance while here.

In 1953 the Official Administrator, who by this time was administering the estate, took action in the Supreme Court for the construction of clause 26 and two other clauses of the will. The judgment of the court construing all three clauses was given in November 1953. None of the relatives at Jaber were defendants in that suit.

The drawn-up order of that judgment was filed also in November 1953, but it only included the decision of the court as to the other two clauses and omitted its decision as to clause 26.

In December, 1961, a beneficiary under the will applied to the court for an order to amend that paragraph about clause 26, " which was omitted therefrom by inadvertance ":

> " 1A. That clause 26 of the will of the above-named deceased is invalid and the properties therein devised lapse into the residue of the estate."

This does correctly state what the decision of the court was as to clause 26 and an order was made, as prayed, in January of this year.

That application was on notice to the master and registrar of the court, to the Official Administrator and to the " solicitor for the other beneficiaries." The relatives at Jaber were informed of this application, with the result that they authorised one of them, the applicant, to make this application on behalf of them and himself for leave to appeal against the judgment given in November 1953, as far as clause 26 was concerned. The application was filed in March 1962.

Mr. Rogers-Wright, for the applicant, submitted that in England in the Chancery Division time for appealing starts from the date of the drawing up of the order, and that consequently the time for appealing should be calculated from January 26, 1962. I do not agree with the submission. That may be so in England. Here the law as to appeals and the time for appealing differentiates between civil appeals and criminal appeals, but makes no differences between the various sorts of civil suits or matters. And by that law the applicant is very much out of time.

He says that none of the Jaber relatives had any knowledge of the action and judgment in 1953 until they were told of the application made in 1961. Affidavits have been filed to support that contention, one by the appellant, from Jaber, and one by a Freetown relative of the testator.

I am not persuaded by the affidavits that the Jaber relatives did not know. The deponent from Jaber deposes, inter alia, that the family at Jaber were informed of the testator's death in 1948; that, although too late, of course, to attend the funeral, he and his uncle (now the head of the family) came to Freetown to attend the funeral rites; that the will of the testator was read and interpreted to them; that they understood that some properties had been left for the use of the relatives in Jaber; that the deponent and his uncle returned from Freetown to Jaber in March 1948; that the deponent had no knowledge of the 1953 case; that the other relatives have informed him that they likewise had no knowledge; that the testator left 13 children, all living in Freetown and all known to the deponent; and that most of them (the 13 children) have visited Jaber.

The other deponent is the eldest of the 13 children and he deposes, inter alia, that he knows his uncles and aunt of Jaber; that he has been to Jaber and " there I used to meet them regularly."

The application includes a notice of appeal, which shows the grounds of appeal would be:

> " 1. That the learned trial judge was wrong in law in holding that English law applied to clause 26 of the will, the learned judge having found that the said clause 26 created a trust.

"2. The application of English law in order to restrict or prohibit the means of doing charity is expressly prohibited by section 3 of Chapter 39 of the Laws of Sierra Leone."

By Chapter 39 is meant Chapter 18, the Imperial Statutes (Law of Property) Adoption Act. Section 3 thereof is:

"3. So much of English law as prohibits or restricts the alienation or devise of land for charitable purposes, or the bequest of personalty to be laid out in the purchase of land for charitable purposes, shall have no force or effect in the colony."

The argument of Mr. Wright is that in the 1953 action, the learned Chief Justice overlooked this section and no counsel drew his notice to it. We caused a copy of the judgment to be exhibited (and also a copy of the application of December 1961). I do not agree with the argument. Section 3 is not mentioned in the judgment, but clearly it was not overlooked. The learned Chief Justice held that the devise of land offended against the rule against perpetuities and, therefore, was invalid unless its purpose was a charitable purpose in which case (although he did not actually say so) section 3 would save it. He went fully into that aspect of the matter and decided that it was not a charitable purpose. Consequently section 3 did not save it.

The learned Chief Justice did hold that English law applied (this is ground of appeal 1) and that the rule of English law against perpetuities applied to the devise because "the properties concerned are in tenures under English law." The document creating the trust is a will made and probated under English law, which is the general law of the colony." Of course, it is no longer "the colony"; it is now the Western Area of Sierra Leone, but the "general law" as to land tenure, wills and the creation of trusts remains the same.

I would dismiss the application.

Freetown
July 27,
1962

Ames P.,
Benka-Coker
C.J.,
Dove-Edwin
J.A.

[COURT OF APPEAL]

H. M. KANAGBO, W. L. SHERMAN, A. B. FOFANA AND H. M. MORIBA . . . . . *Appellants*

v.

M. J. KAMANDA BONGAY . . . . . *Respondent*

[Civil Appeal 14/62]

Election Petition—Electoral Provisions Act (No. 14 of 1962), ss. 60, 62, 66—Rules 12, 15, 23 of the West African Court of Appeal Rules—Rules 11, 19, 20, 60 of the House of Representatives Election Petition Rules (P.N. 97 of 1951)—Whether court should dismiss appeal for failure to comply with rule 12 of West African Court of Appeal Rules—Meaning of words "At the time of filing the notice of appeal" and "in such manner as the court may order" in section 66 (3) of the Electoral Provisions Act—Whether rule 19 of House of Representatives Election Petition Rules directory or mandatory—Meaning of "immediately" in rule 19—Whether petition should have been dismissed or struck out.