If the plaintiff's motor car was not delivered according to the judgment the plaintiff had the same remedies open to all judgment creditors. He could have availed himself of these.

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[COURT OF APPEAL]

Freetown
*March* 9,
1962

GEORGIANA LUCRETIA ROSE AND OTHERS . . . . *Appellants*

*v.*

JACOB WILLIAMSON SAWYERR AND OTHERS . . . *Respondents*

Ames Ag.P.
Dove-Edwin
J.A.
Marcus Jones
Ag.C.J.

[Civil Appeal 14/61]

*Real Property—Will—Executrix de sa tort—Equity—Persons beneficially interested in property.*

Jacob Williamson Sawyerr, the testator, died testate in the Gold Coast in 1916. In his will, he left certain property in Freetown to his sister, Ransolina Patience Cromanty, two brothers and two daughters in equal shares. Mrs. Cromanty, who was the only surviving executor, obtained probate of the will in the Gold Coast in 1916, but did not obtain probate in Sierra Leone. Returning to Sierra Leone, Mrs. Cromanty began to collect rents from the property. She did not account for the rents to anyone, despite repeated protests from other members of the family. In 1932, Mrs. Cromanty conveyed part of the property to one Joseph E. Metzger, and in 1953 she conveyed another part to two grand-nieces. Between 1948 and 1952 Mrs. Cromanty's nephew collected the rents from one of the properties, but in 1952 he returned the rents to the payers, who handed them over to Mrs. Cromanty.

Mrs. Cromanty died in 1957, leaving the remainder of the property to certain named persons. Her nephew and the grandchildren and great-grandchildren of the testator brought suit against the executors and trustees of her estate claiming a beneficial interest in the property. The Supreme Court made a declaratory judgment in accordance with the claim, and the executors and trustees appealed.

*Held*, dismissing the appeal, (1) that Mrs. Cromanty, in taking possession of the property, became an executrix de sa tort.

(2) That, since she had full knowledge of the testator's devises, she held as trustee for the devisees; and

(3) That the declaratory judgment correctly included the property conveyed to Metzger and the two grand-nieces even though they were not joined as defendants. (Ames Ag.P. dissented from this part of the holding.)

Cases referred to: *Gooding* v. *Allen*, 3 Sierra Leone Law Recorder 69; *In re Lord and Fullerton's Contract* [1896] 1 Ch. 228.

*Edward J. McCormack* for the appellants.
*Melville C. Marke* for the respondents.

AMES AG.P. The plaintiffs/respondents sued the defendants/appellants "as executors and trustees of the estate of Ransolina Patience Cromanty, deceased," and they claimed:

(a) A declaration that the plaintiffs are beneficially interested in the hereditaments and premises situate at Fourah Bay Road, Malta Street and Lucas Street, all in Freetown in the Colony of Sierra Leone and devised by

the will of Jacob Williamson Sawyerr (deceased) to his bothers, Richard Williamson Sawyerr, James Beresford Sawyerr, his sister, Ransolina Patience Cromanty, and his daughters, Georgiana Lucretia Sawyerr and Jane Alice Sawyerr in equal shares.

(b) An account of mesne profits received by the late Ransolina Patience Cromanty in respect of the above premises.

The judgment of the court made a declaratory judgment in accordance, exactly, with item (a) of the claim, and awarded the respondents " the costs of this action," and this appeal is against that judgment. No order was made as to item (b). Mr. Marke, who represented the respondents before us (and also in the court below), attempted to address us as to why an order ought to have been made. There is no cross-appeal and we refused to hear argument about it. So item (b) of the claim need not be considered any more.

The claim sought the exercise of the equitable jurisdiction and powers, which the court below possesses by virtue of section 11 of the Courts Ordinance (Cap. 7). This disposes of the argument as to whether the claim is one in tort or not. The learned judge held that it was not, and I am of the same opinion.

There is one other matter which I will refer to before coming to the main part of the appeal. It was much argued but does not seem to me to be of present importance. Jacob Williamson Sawyerr, deceased, whom I will refer to in this judgment as the testator (the first plaintiff is his namesake and nephew), included in his will the following devise:

> " I devise and bequeath my freehold lands with the buildings thereon situated at Fourah Bay Road, Malta Street, Lucas Street and farmland at Fourah Bay Road, all in Freetown, Sierra Leone, to my brothers, Richard Williamson, James Beresford, and my sister, Ransolina Patience Cromanty, and to my daughters, Georgiana Lucretia and Jane Alice, all in equal shares and it is my express desire that these lands be not sold but that they must descend from children to children."

Mr. Marke argued that this gave the five named persons an entailed estate as tenants in common which descended to the children in tail general. Mr. McCormack argued, for the appellants, that it gave them an estate in fee absolute as tenants in common. The learned judge held that it created an entailed estate. With all respect, I disagree. But it seems to me not to matter. The will was proved in Ghana (when it was the Gold Coast). Probate has not been resealed here. No one here has summoned anyone to come in and reseal it (although the defendants are the executors of the testator's executrix). No one has applied for letters of administration here, with will annexed or in any form. This is not a suit for the construction of the will, or to determine what interest anyone has in the property. It is merely a suit seeking a declaratory judgment, and the declaration asked for, if it was proper to make, would apply equally aptly whether the devise created a tenancy in common or in tail general. Indeed, the declaration seems so indefinite that I do not know how it will assist the plaintiffs.

I will now come to the main part of the appeal, and will set out the facts which are the background to the argument.

The dispute concerns the testator's " freehold lands with the buildings thereon at Fourah Bay Road, Malta Street, Lucas Street and farmland at Fourah Bay Road." The first-mentioned is now No. 98, Fourah Bay Road, the second is 10, Malta Street, the third is 28, Lucas Street, and the last is 81 and 20, York Street.

The testator had two brothers, Richard Williamson and James Beresford, both deceased, and a sister, Ransolina Patience Cromanty, whom I will call Mrs. Cromanty. The defendants are sued as the executors of her will.

The testator had two children, both girls, both deceased; one left no issue, the other, Jane Alice, left issue. One of the testator's brothers died without issue; the other had four children; three died without issue, and the fourth is the first plaintiff, James Williamson Sawyerr. Mrs. Cromanty left no issue.

Jane Alice married a Smith, and had five children; four of them are the second, third, fourth and fifth plaintiffs, and the other, who was a girl, married a Campbell and died leaving two sons (great-grandsons of the testator), who are the sixth and seventh plaintiffs.

The mother of the testator, his two brothers and Mrs. Cromanty had been one Ann Johnson, long since deceased, of course. She made a will, which was registered, but it seems doubtful if any one obtained probate of it. In it she left the property at Malta Street to the testator, that at Lucas Street to the testator, his brothers and Mrs. Cromanty, and the farmland to the same four, or else to them and two other persons. I do not find the evidence clear on this point. The other property, 98, Fourah Bay Road, came to the testator by mortgage from the brother who died without issue, and without having redeemed the property.

The testator left Sierra Leone long ago and went to the Gold Coast and died there in 1916 (August 15) testate, and the will, dated May 30, 1908, included the devise which I have already set out. Mrs. Cromanty, who was the only surviving executor and trustee, obtained probate in the Gold Coast on October 14, 1916.

Mrs. Cromanty returned to Sierra Leone on some unknown date, but was here before July 11, 1918. On that date she registered the testator's will here. But at no time did she reseal the Gold Coast grant of probate or obtain any grant here. Nevertheless, she went into possession of all the four properties by collection of the rents. (I do not know who had been collecting them before.) She did not account for the rents to anyone.

In 1931 the first plaintiff and "*my brother*" instituted an action against Mrs. Cromanty in " respect of the will " of the testator, but withdrew it because Mrs. Cromanty begged them to. I presume "*brother*" was used in the West African meaning of the term.

There were more protests by the family at her conduct, and a family meeting was held in 1936, at which she promised to share the rents with the members of the family. However, she did not. And in 1948 another meeting was held with more result. It was agreed that the first plaintiff should collect the rents of the four properties and distribute them to each beneficiary monthly. There were at this meeting others as well as members of the family, including a lawyer of distinction who read the testator's will and explained the position to Mrs. Cromanty. The first plaintiff collected the rent of 98, Fourah Bay Road until 1952; but Mrs. Cromanty continued to collect the other rents, and in 1952 the first plaintiff returned the rents collected by him, less expenses incurred, to the payers, who handed over the amount to Mrs. Cromanty. This was done in spite of the 1st plaintiff, and one can but conclude that Mrs. Cromanty caused it to be done.

By a deed dated November 16, 1932, Mrs. Cromanty conveyed a portion of 98, Fourah Bay Road to one Joseph E. Metzger for valuable consideration.

The deed recites that she was the executor and trustee and residuary legatee of the estate of the testator and that the testator was seised in fee simple of the property from the date of his will to the date of his death, and that the testator had agreed with Metzger to sell him the land before his death, and that the purchase price was paid to her "as executor as aforesaid."

She continued in occupation of the rest of 98, Fourah Bay Road and of the other three properties until her death, notwithstanding that on October 6, 1953, she had by a deed of gift conveyed part of 98, Fourah Bay Road to Fatula Walker and Taiwo Edwards, two grand-nieces.

Mrs. Cromanty died on March 7, 1957, leaving a will dated October 5, 1953. The will had been registered on July 24, 1957, and probate thereof was granted to the defendants, the executors and trustees named therein on August 14, 1957. The defendants have been in possession and collected rents, except perhaps as to the part of 98, Fourah Bay Road, which was conveyed to the two grand-nieces.

Mrs. Cromanty's will devised 10, Malta Street to Jane Alice Smith (now deceased) a quarter-share, and Georgiana Lucretia Smith (now deceased) a three-quarter share; 28, Lucas Street to Jane Alice Smith, Jacob William Sawyerr and Simeon Crispin Edwards; Sawyerr's farm to trustees in trust for the same (excepting Simeon Crispin Edwards) and 98, Fourah Bay Road to the two grand-nieces (as mentioned above, it had already been conveyed to them).

The defendants averred that the testator was at no time entitled to the Lucas Street property or to the farmland at Fourah Bay Road, that he was never in possession of any of the property or in receipt of the rents after he left this country for the Gold Coast and that none of the plaintiffs had ever been in possession of any of the properties or of the rents either by himself (or herself) or by any ancestor.

The learned judge found it to be a fact that the testator died seised of all the properties, which, of course, he could have been, although residing in another country. The judge does not set out the evidence on which he based his finding. The first plaintiff gave evidence that the testator became possessed of three of the properties under his mother's will; that the testator visited Freetown in 1906 and lived for two months at 98, Fourah Bay Road (the witness was then 20 years old); that he (the witness) had lived there as a little boy for four years with the uncle who mortgaged it to the testator until the uncle went to Fernando Po; that the property was then rented to a doctor (who by, and who collected the rents?); that the witness then lived at the Malta Street property; that the testator "came into possession of" the farmland in the same road.

This is little evidence, but it was not contradicted by any other evidence. There was no evidence about possession of the other properties before the testator's death. There is the evidence already set out about the family meetings and the institution of an action.

It is against this background that the arguments have to be considered.

Mr. McCormack's main argument, as I understood it, is this. In this country the devisee of land can, and should, enter into possession thereof upon the death of the maker of the will. The Land Transfer Act, 1897, is not law here, for which argument he relies on *Gooding* v. *Allen* (3 S.L. Law Recorder

69), where the Supreme Court so decided. Consequently, no assent from an executor is needed. Mrs. Cromanty did not reseal the grant of probate. She went into possession not qua executrix but as a squatter, except, of course, as to any shares in any of the properties which she had in her own right. She was not a trustee. Time ran in her favour, and every other member of the family was statute-barred long before her death. In the deed of gift to the grand-nieces she recites her long and quiet possession as her title.

I cannot believe that such a cynical argument can be sound. I prefer Mr. Marke's argument.

There was argument by both counsel about the decision in *In re Lord and Fullerton's Contract* [1896] 1 Ch. 228 that an executor cannot accept probate in one country and disclaim in another. I do not think that case helps. Mrs. Cromanty did not disclaim here or accept. One can be an executor or an executor de son tort. There is no middle kind for those who, like her, were appointed by will but did not obtain probate. She very clearly intermeddled and was an executrix de sa tort, and no one knew better than she the terms of the will of the testator.

There was argument before us about the Imperial Statutes (Law of Property) Adoption Ordinance (Cap. 18), which adopted the Trustee Act, on January 1, 1933, and whether that Act had retrospective application, and the effect of section 3 of the Execution against Real Property Ordinance (Cap. 22). I do not think these arguments of importance. I think the matter falls to be decided on general principles of equity and largely in accordance with the argument of Mr. Marke.

Here was Mrs. Cromanty, an executrix de sa tort (who could, and should, have been a legally authorised executrix) and with full knowledge of the testator's devises, entering into possession of all four properties, and remaining in possession until her death. She must be regarded as trustee for the devisees (including herself) and time does not run in favour of an executor de son tort with notice of a trust. I think the learned judge was right to make the declaration asked for, subject to one reservation.

It came to light during the hearing (it was not disclosed by the pleadings) that Mrs. Cromanty had conveyed, rightly or wrongly, some of the property to Joseph E. Metzger and some to her two grand-nieces. In my opinion, these persons should have been joined as defendants, when that matter came to light. As they were not, I think that the declaration should not have extended to those properties. I would amend the declaration accordingly but otherwise I would dismiss the appeal.

DOVE-EDWIN J.A. I have had an opportunity of reading my brother Ames' judgment in this case and I entirely agree that the appeal be dismissed.

I do not agree, however, and I do so with reluctance and with respect, to the addition that the declaration granted to the plaintiffs should not extend to the two properties transferred by the late Rosalina Patience Cromanty.

In my view, as the case was presented and argued, the persons concerned in the transfer do not come into the picture, yet they may do so at a later date in another action.

Except for this short observation I agree that the appeal be dismissed and that the declaration as granted remain.

MARCUS-JONES AG.J. I also share the opinion expressed by my learned brother Dove-Edwin that the property conveyed to Joseph E. Metzger as well as the property conveyed to Mrs. Cromanty's two grand-nieces do not enter into the picture now, and consequently the declaration should not be amended to exclude them.

In all other respects I agree with the judgment that the appeal be dismissed.

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[COURT OF APPEAL]

Freetown
*March* 9,
1962

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

ELIJA J. SPECK . . . . . *Appellant*

*v.*

GBESSAY KEISTER . . . . . *Respondent*

[Civil Appeal 13/61]

*Practice—Appeal—Preliminary objections to hearing of appeal—Compliance with rule of court—West African Court of Appeal Rules*, 1950, *rr.* 14 (4), 21 (1).

On June 23, 1961, respondent recovered judgment against appellant. On July 17, appellant died. On October 31, a motion was filed asking that his two executors be substituted for him for purposes of taking an appeal. In November, the Court of Appeal extended the time within which to appeal, and in February, 1962, the appeal was set down for hearing. At the hearing, counsel for respondent raised certain preliminary objections to the hearing of the appeal, of which the first was that "the appeal is not properly before the court." The ground for this objection was rule 14 (4) of the West African Court of Appeal Rules, 1950, which provides:

"No application for enlargement of time in which to appeal shall be made after the expiration of one month from the expiration of the time prescribed within which an appeal could be brought. . . . Any such application may be made to the court or to the court below . . . and when time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal."

It appeared that no copy of the order granting the enlargement of time was annexed to the notice of appeal.

*Held*, striking out the appeal, that the appeal was not properly before the court, since the requirement of rule 14 (4) had not been complied with.

The Court (Dove-Edwin J.A.) also said, obiter, that appellant's executors could bring an appeal against a judgment given against appellant touching the properties they were to administer, and that the Court of Appeal had inherent power to extend the time for appeal beyond the time specified in rule 14 (4) of the West African Court of Appeal Rules, 1950.

Cases referred to: *Chief Oloto and another* v. *Chairman, Lagos Executive Development Board* (1950) 13 W.A.C.A. 57; *Anoje* v. *Ukweje* (1955) 15 W.A.C.A. 41.

*Cyrus Rogers-Wright* (*James Mackay* with him) for the appellant.
*Edward J. McCormack* for the respondent.

DOVE-EDWIN J.A. The respondent in this appeal filed a notice to raise certain preliminary objections under rule 21 (1) of the Rules of the West African Court of Appeal as applied to the Sierra Leone Court of Appeal.