

OC
CIV. APP. NO. 30/2007

IN THE COURT OF APPEAL FOR SIERRA LEONE

(CIVIL DIVISION)

BETWEEN:

ADE ROBERTS

AND

CECIL ROBERTS

- APPELLANTS

AND

ELIZABETH F. O. WILLIAMS

- RESPONDENT

CORAM:

HON. MRS. JUSTICE S. BASH-TAQI, JSC – PRESIDING

HON MR JUSTICE N. C. BROWNE-MARKE- JA

HON MRS JUSTICE A SHOWERS, J

Counsel

S. M. Sesay, Esq. for the Appellants

V. V. Thomas, Esq. for the Respondent

JUDGMENT DELIVERED ON THE 26th DAY OF JANUARY 2010

S. BASH-TAQI, JSC:-

This is an appeal against the judgment of the Hon. Mr. Justice Kamanda, J. A, delivered on the 5th June 2007.

By a specially endorsed Writ of Summons dated 13th May 2004, issued in the High Court, the Respondent (Elizabeth F. O. Williams), then Plaintiff, instituted the action against the Appellants, then, defendants, for the following reliefs:

1. A declaration that she is entitled to the piece or parcel of land situate lying and being No 22 Goderich Street Freetown.
2. Recovery of Possession of the said piece or parcel of land.
3. An Account of all rents collected by the Defendants from tenants since the death of Dora Roberts.
4. An Order for the payment by the Defendants to the Plaintiff of all monies found to be due to her on the taking of such accounts
5. An Injunction restraining the Defendants their servants, agents or privies from trespassing on or in any other way interfering with the Plaintiff's right interest or estate in the said piece or parcel of land.
6. Further Order of other relief.

In her Particulars Claim, the Respondent, (Plaintiff), alleged, inter alia,

1. That by a Deed of Gift dated 10th February 1978 made by one Sarah Thompson Smart ~~of the~~ ^{of the} described as Donor one part and the Respondent and Dora Roberts described as Donees of the other part registered as No 20/78 in Vol. 55 page 64 in the Books of Voluntary Conveyances the premises at no 22 Goderich Street Freetown were conveyed to the Respondent and Dora Roberts.
2. That the Respondent and Dora Roberts held the fee simple estate in the property from 10th February 1978 until the death of Dora Roberts in 1999 in the United States

3. That Dora Roberts during her life lived on the 1st Floor of the premises together with her children, who are the Appellants in this appeal and rented the ground and 2nd Floors of the premises and other living quarters in the compound.
4. That the said Dora Roberts shared some of the rents accruing from the rented portions of the premises with the Respondent from time to time and uses the balance for the repairs to the premises.
5. That Dora Roberts left Sierra Leone after 1996, leaving the Defendants, who are her children, in occupation of the first Floor of the premises up to the date of the Writ, and they continued to let the unoccupied portions and to collect all the rents accruing therefrom.
6. On 14th September 2004, the Respondent through her Solicitors wrote to the Appellants informing them that on the death of Dora Roberts, their mother, her interest in the property accrued to the Respondent by survivorship as the said property was held by the Appellant and the Respondent as joint tenants and she demanded possession of the premises from the Appellants as sole owner.
7. On 11th November 2004, the Appellants' Solicitors acknowledged receipt of the letter but did nothing else, other than promising to communicate with the Respondent's Solicitor. Nothing further was heard or done by their Solicitors to the above demand.

Appearance was entered on behalf of the Appellants, but no defence was filed. On 29th April 2005, pursuant to an application by the Respondent, Kamanda, J.A, after hearing arguments from V. V. Thomas granted the Respondent leave to enter judgment on the 4th May 2005 for the several reliefs claimed in the her writ. The Appellants and their Solicitors were not represented at the

hearing of the application for judgment, although their Solicitors had been duly served with the Notice of Motion and its supporting affidavit.

On 27th May 2005, Solicitors for the Appellants filed a Notice of Motion applying for a Stay of Execution of the judgment of 4th May 2005 and for leave to argue and oppose the application for leave to enter judgment filed by the respondents on 26th May 2005. On 13th July 2005, Kamanda, J, ordered that the Order of 4th May 2005 be set aside and the Appellants given leave to defend the action. The Learned Judge further ordered that all rents that had been collected and were yet to be collected from the premises by the Appellants be paid to the Judicial Sub-Treasury.

Pursuant to the said order the Appellants filed a Statement of Defence and Counter-Claim. In their Defence, they contended, inter alia, that:

1. That the Respondent and Dora Roberts in fact became entitled to the said property at 22, Goderich Street, Freetown, by virtue of a Will dated 24th March 1976 executed by Sarah Thompson Smart, and that as surviving children of said Dora Roberts, the Appellants they are entitled to the said property together with the Respondents.
2. That the Deed of Gift could not have been executed by Sarah Thompson Smart as she was very old, ill, and bed ridden and incapable of executing the Deed being 86 years old; that the property for so many years had been divided by the Respondent and Dora Roberts; the top flat being that occupied by Dora Roberts and the bottom flat by the Respondent; they denied renting the premises as alleged in the Respondent's claim.
3. By way of Counter-Claim the Appellants contend that after the death of Sarah Thompson Smart, the Respondent went to the property and collected all the deceased's jewellery forming part of the deceased's estate and has not accounted for them.

4. The Appellants further contend that Sarah Thompson Smart could not have executed the Deed of Gift of 10th February 1978 as this was two years before her death in 1980, and that some few years before her death Sarah Thompson Smart was seriously ill and confined in her bed and so could not have executed the said Deed of Gift in 1978 two years before she died.
5. That Dora Roberts being the older of the two she always took precedence over the Respondent in all matters where the two were mentioned; further that the purported Deed of Gift was never brought to the attention of the Appellants until a few months before the action.
6. That the signature of the said Sarah Thompson Smart in the said Will is different from her signature in the Deed of Gift. They therefore counter-claimed for a declaration that they as children of Dora Roberts are also entitled to a half share of the property at 22 Goderich Street Freetown, the subject matter of this action.
7. That purported Deed of Gift dated 10th February 1978 registered in the Books of Conveyances in the Office of the Registrar General's Office in Freetown be cancelled. And an account be given by the Respondent of the deceased's jewellery now in her possession.

The Respondent in her Reply joined issue with the Appellants on their Defence, and also filed a Defence to the Counter-Claim.

It was on the basis of the above pleadings that the matter went to trial before Kamanda, JA.

During the course of the trial, the Respondent gave oral evidence as PW2. She told the Court that the property at 22 Goderich Street was conveyed to her and her cousin, Dora Roberts, jointly, by Deed Gift dated 10th February 1978 was executed in their favour by Sarah Thompson Smart, her aunt. The Deed of Gift was tendered in evidence by Samuel Sawyer, a Civil Servant in the Administrator & Registrar General's Office. It revealed that the property at 22 Goderich Street

Freetown was that of Sarah Thompson Smart who held the unincumbered fee simple in the said estate; that the said Sarah Thompson Smart, and out her natural love and affection for the Respondent and Dora Roberts, the mother of the Appellants, and also for the purpose of advancing them in life, she wanted to vest the said property in them. The Respondent went on to describe the property as a dwelling house consisting of three floors and some out houses in the yard. She explained that she once lived on the property with her aunt and Dora Roberts, and how she later visited the property from time to time on relocating to Wilkinson Road and how Dora Roberts continued to live on the property, with her children, the Appellants.

The 1st Appellant also gave evidence. He stated that he lived at 22 Goderich Street Freetown since birth. He is the son of Dora Roberts, and the 2nd Appellant is his brother. The Respondent, he said, is his aunt. He said his mother, Dora Roberts, and his aunt, the Respondent, once lived with him at 22 Goderich Street Freetown. He knew that Sarah Thompson Smart was his grandmother and she owned the property at 22 Goderich Street Freetown. He also said that his mother knew more of the property than he did; that before she left (for the States, I assume), his mother told him to take care of her house (22 Goderich Street) which she told him, she had inherited from her deceased mother. He said his mother occupied the whole house and no portion of it was rented; that his uncle Jeremiah During occupied the Top Floor. He was not aware of any tenants paying rents to Dora Roberts. He knew Sarah Thompson Smart was bedridden for over nearly a year before she died at 22 Goderich Street where she was living. He could not recall the dates she lived there. He was not aware of any instrument that was made in respect of the property. He knew Sarah Thompson Smart left jewellery and trinkets which the Respondent took from the safe where they were kept; that although he was the caretaker of the property at 22 Goderich Street Freetown, the Respondent did not contact him after the death of Dora Roberts. He insisted that the Respondent is not the owner of 22 Goderich Street Freetown.

The 2nd Appellant's evidence is essentially the same as the that of the 1st Appellant, save that he said that he was aware that in the Deed of Gift Sarah Thompson Smart gave his mother, Dora Roberts and the Respondent, the

property at 22 Goderich Street and that his mother, (Dora Roberts), gave part of the rents collected by her from the property to the Respondent. He also knew of jewellery which Dora Roberts gave to the Respondent for safe keeping and that to the best of his knowledge the Respondent should still have them. He said on 10th February 1978 when the Deed of Gift was made, he was in the United States.

Another witness, Frederick Eusebius N'gozika Kawaley a retired City Council Valuer and Consultant Property Valuer, gave evidence for the Appellants. He knew the Respondent and Dora Roberts; they all grew up in Waterloo. He knew Sarah Thompson Smart as the mother of Dora Roberts and as Aunt of the Respondent. He also knows the property at 22 Goderich Street Freetown. He used to visit Dora Roberts there before she died. When Dora Roberts was alive she showed him the Deed of Gift and he interpreted the contents of the document to her and explained to her that the Deed was not in her favour, because the Deed purported to give the property to the Respondent and Dora Roberts as joint tenants. Dora said her aunt did not mean to do that. He went with Dora Roberts to Waterloo to acquaint Sarah Thompson Smart of this fact, who on hearing what was on the Deed, said she would not only rectify it but also summon the Respondent to tell her that the property was not meant to be conveyed to them as joint tenants and that it was to be held by them in equal shares as tenants in common, meaning that on the death of either of them, it was to pass to their beneficiaries. He said at the time he discussed the document with Sarah Thompson Smart, she understood what they were discussing; that from the discussion, he was aware that she was the maker of the Deed of Gift.

George Coker who prepared the Deed of Gift was not called as a witness, although PW3 said he discussed the document with him.

At the close of the evidence at the trial the learned Judge delivered his Judgment in favour of the Respondent granting her, inter alia, the declaration sought in her writ and recovery of possession of the property at 22 Goderich Street Freetown. In giving Judgment the Learned Trial Judge has this to say:

"I find Exhibit A is a deed of Gift by which STS (Sarah Thompson Smart) devised 22 Goderich Street to the plaintiff (Respondent) and Dora Roberts

as Joint Tenants.....I find that the legal effect of a Joint Tenancy in its application to this case, vested the property 22 Goderich Street Freetown in both the Plaintiff and Dora Roberts. This means that on the death of Dora Roberts, the property has become vested exclusively in the plaintiff by the principle of survivorship. This in effect entirely shuts out the Defendants from making any claim to the property, the interest of Dora Roberts through whom they claim having been extinguished."

Further in dismissing the Appellants' Counter-Claim the Learned Judge said:

"The Defendants (Appellants) in their Counter Claim have claimed a "half share of the property at 22 Goderich Street. To hold so would amount to saying that the Deed of Gift vested the property in the plaintiff and Dora Roberts as tenants-in-common. I have already ruled against this since the gift was made to these persons as Joint Tenants without words of severance. Nor is there evidence that the tenancy was brought to an end by any of the various ways which the law allows....."

It is against this Judgment that the Appellants have appealed to this Court on five grounds, namely:-

1. That the Learned Trial Judge failed to consider what was the intention of the donor at the time she made the gift to the Plaintiff/Respondent and the Appellants/Defendant's mother. The Plaintiff herself in her evidence said before it was made she called me and Dora with Mr. Africanus Coker to Waterloo in 1978. Sara Thompson Smart was living at Waterloo – all three of us went there. She said she was advanced in age and her strength was failing and will like to give Dora myself something – that was 22 Goderich Street. She asked Mr. Coker to prepare a document he prepared it – it was registered. Mr. Coker handed over the document to me. It was the original. I took a copy of the document to Dora. There was no evidence that the Donor intended to create a joint tenancy. All the evidence of the Respondent suggested the intention of the Donor to create a tenancy in common.

2. The Learned Trial Judge failed to draw the correct inference from the evidence of PW1 (the respondent) and DW3 Mr. Frederick E. N. Kawallay in deciding that there was a joint tenancy.
3. It was never the intention of the donor to create a joint tenancy.
4. The Deed of Gift prepared by Mr. Africanus Coker who was not a lawyer did not properly express the intentions of the donor and that in so far as it failed to do so was not her act and deed.
5. The decision is against the weight of the evidence.

Counsel both filed skeleton Arguments. Counsel for the Appellants argued all his grounds of appeal together.

In his submission on his ground one, Counsel relied on the wording of a purported Will of Sarah Thompson Smart (decd) dated 24th March 1976 in which she made the following devise:

"I give and bequeath unto –

1. My house and land situated at 22 Goderich Street Freetown to my nieces Dora Roberts and Elizabeth Oju Williams."

He submitted firstly, that the Will referred to above, was not made by a lawyer. Secondly, that by the above devise the intention of Sara Thompson Smart was to give the property at 22 Goderich Street to Dora Roberts and the Respondent.

I will pause here to state that the purported Will of Sarah Thompson Smart which the Appellants claimed devised the property at 22 Goderich Street to Dora Roberts, was not tendered in evidence by the Appellants or their witnesses even though reference was made to its existence before evidence was led during the trial. It is noted that such a document was exhibited as Exhibit "EE3" and used by the then Counsel for the Appellants in an Affidavit sworn to on 29th April 2005 in opposition to the Respondent's application for leave to enter judgment in default

of defence. However in the absence of its being tendered in evidence, no weight would be attached to it; its significance in the proceedings has not been disclosed.

Counsel submitted further that if Sarah Thompson Smart had intended to create a joint tenancy of the property, she would have said so on the document, and not having done so, he concluded that her intention was to create a tenancy-in-common. The converse of that argument is also true that if Sarah Thompson Smart intended to create a tenancy-in-common of the property at 22 Goderich Street, when she made Exh. "A", she would equally have said so.

It is accepted in this case that Sarah Thompson Smart, the Donor, Executed Exhibit "A" the Deed of Gift, and by Exh. "A", she intended to give the property at 22 Goderich Street to the Appellants' mother and the Respondent. The only difficulty is whether the Deed of Gift created a joint tenancy or a tenancy-in-common. Referring to what was being granted, Exhibit "A" states:

"NOW THIS INDENTURE WITNESSETH that in consideration of the natural love and affection the Donor a beneficial owner hereby grants and conveys to the Donees All that piece or parcel of land situate and being at Goderich Street, Freetown, in the Western Area of the Republic of Sierra Leone.....TO HAVE and to HOLD the same UNTO and to the use of the said Donees in fee simple in possession free from incumbrances."(emphasis added)

It is accepted that "Exhibit A" does not have any words of severance. The only oral evidence that Sarah Thompson Smart intended to create a tenancy-in-common is from DW3, who testified that the Appellants' mother told him of Sarah Thompson's intention to that effect. He said in evidence:

"I read through the document and it indicated that 22 Goderich Street had been conveyed to Mrs. Dora Roberts and Mrs. Ojumiri Williams by Sarah Thompson Smart as joint owners - I felt distressed because my interpretation of Joint ownership since from my understanding, the survivor takes all at the death of the other - I pointed out to Dora Roberts

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that this was not in her favour and she said to me her aunt did not mean that-.....(emphasis added).

After pointing out to Mrs. Dora Roberts the legal implications of Exh "A" the witness went on to say that he later confirmed what he was told with Sarah Thompson Smart. He continued in evidence:

".....she said she was going to acquaint her aunt of this situation – she did so and told me to accompany her to Waterloo to see her aunt – we did so - we saw (Sarah Thompson Smart) at her house – I explained to her my findings (understanding) of the Deed of Gift - she seemed most distressed - she said that was not her intention and that her intention was for both of them to have equal shares – that when either died, their beneficiary to have 50% of the property."

He said Sarah Thompson Smart said "she would immediately summon the plaintiff and acquaint her with the knowledge she had gained so that the position could be rectified for them to have equal share in the property-co-ownership."

There is no evidence that she ever contacted the Respondent on the matter, or that she contacted Africanus Coker, the maker of the Deed of Gift, to try to have it rectified. As a matter of interest Africanus Coker was not called to testify in the matter; having taken instructions from Sarah Thompson Smart to prepare the document, he would have been the proper person to testify as to the intention of the Donor. DW3 testified that Mr. Africanus Coker discussed the Deed of Gift with him. He also said Sarah Thompson Smart did not tell him that she had caused the Document to be rectified. Since she indicated that she would contact the Respondent and have the document rectified, it is reasonable to assume that she had ample time to rectify the document if she had wanted to do so. The fact that she did not, is an indication that she intended to gift to be held on a joint tenancy. Counsel's submission that the Respondent did not tell the Appellants' mother that on the death of one of them the property would belong to the survivor solely, is untenable, since at all material times, the Appellants' mother knew the legal implication of the Deed of Gift, having been told so by their own witness, DW3.

The fact that the author of the Deed of Gift was not a lawyer is neither here nor there; the Donor knew or ought to have known that Mr. Africanus Coker was not a lawyer and so did the Respondent and the Appellants' mother. Counsel himself has submitted that the Respondent gave a copy of the Deed to the Appellants' mother; Dora Roberts therefore had an opportunity to have the Deed corrected; she took the document to DW3 who explained to her the legal implications of the document; and although she informed the Donor of this fact, she did not see that the same was corrected.

The authorities are clear that where a document is silent as to what is intended by the donor, this creates a joint tenancy; and that the inclusion of words of severance creates a tenancy-in-common. On this point the Learned Judge had this to say:

"Did the Deed of Gift convey 22 Godreich Street to plaintiff and Dora Roberts as tenants in common or Joint Tenants?The central proposition running through all these authorities is this: When land is granted or demised (to) two or more person simply without words of severance, the donees become joint Tenants holding a single title, interest and possession, and when one dies, his/her interest is extinguished and passes to the survivors. This is the doctrine of survivorshipI find that Exhibit A is a deed of Gift by which STS (Sarah Thompson Smart) devised (presumably meaning granted) 22 Goderich Street to Plaintiff and Dora Roberts as Joint Tenants."

The Learned Trial Judge correctly stated the principle of law and applied it, in this case when held that the intention of the Donor, at the time she made Exhibit "A", was to create a Joint Tenancy.

I am strengthen in my conclusion by the evidence of DW3 who stated that he explained this fact to Sarah Thompson Smart, the Donor, when, he, at the instance of Dora Roberts, went to see Sarah Thompson Smart at Waterloo; therefore she was aware that she had created a joint tenancy of the property by the said Deed, with Respondent and Dora Roberts as joint tenants. In the absence of any other clear and direct evidence, the Learned Judge could only infer Sarah

Thompson Smart's intention from the evidence before him, and he did so correctly by holding that the Deed of Gift created a joint tenancy. Furthermore, the Learned Trial Judge could not have construed Exhibit "A" in any other way other than by looking at the document itself and construing the expressions and words used therein to discover the real intention of the donor.

In the premises I hold that the learned Trial judge properly considered the intention of the Donor, Sarah Thompson Smart, when she made the Deed, Exh. "A", and that she was aware of the legal effect of the document. I therefore see no merit in this ground and it must fail.

The second ground of appeal is that the Trial Judge failed to draw the correct inference from the evidence of PW1 (the respondent) and DW3, Mr, Frederick E. N. Kawallay in deciding that there was a joint tenancy. This ground has been adequately dealt with in ground one above. I agree with Mr. Thomas' submission that the joint tenancy arose as a matter of law from the fact that the grant is not limited by words of severance, and not from inference to be drawn from the evidence adduced.

However, looking at the evidence of PW1 in its entirety, I see nothing to indicate that the Donor intended to create a joint tenancy. Her evidence is to the effect that the Donor gave the property to Dora and the Respondent and for which she caused the Deed of Gift to be prepared; she said the donor called her (Respondent) and Dora (Appellants' mother) with one Mr. Africanus Coker to Waterloo and said she would like to give "Dora and myself something - that was 22 Goderich Street, Freetown. She asked Mr. Coker to prepare a document - he prepared it - it was registered."

Even from the above evidence, it is clear that the Donor's intention was to give the Respondent and the Appellants' mother, the property at 22 Goderich Street, Freetown, and throughout the life time of Dora Roberts, the rents collected from the premises, after the death of Sarah Thompson Smart, was shared between the Respondent and Dora Roberts. There is nothing in the Respondent's evidence to suggest that the donor intended to create a tenancy- in-common, and therefore

the Learned Trial Judge could not have drawn that inference from what was before him.

The testimony of DW3 on the other hand, was that Sarah Thompson Smart told him that "it was not her intention to create a joint tenancy but a tenancy-in-common with the beneficiaries of both parties having 50% share of the property, was not direct evidence from Sarah Thompson Smart, and even though the evidence was admitted in evidence, it was a matter for the Learned Trial Judge to decide what weight to attach to such evidence, and in this case he chose not to give undue weight to it. It was this witness who said, when he was shown the Deed of Gift, that he saw that it created "a joint tenancy", and he brought this fact to the notice of Dora Roberts (the Appellants' mother), and later to the Donor herself. At that point, as I stated earlier in this judgment, Sarah Thompson Smart had every opportunity to correct/rectify the position when she became aware of the contents of the deed; that she failed to do so before her demise, is an indication that her intention was to create a joint tenancy. In the circumstances, we hold that the Learned Judge drew the correct inference from all the evidence before him, including the evidence of PW1 and DW3 that the Donor intended to create a joint tenancy. We therefore dismiss this ground of appeal.

Similarly, for the same reason, we dismiss ground three and four of the grounds of appeal. We hold that for the reasons stated, the Deed of Gift was the act and deed of Sarah Thompson Smart, the Donor. A party who executes a document is presumed to intend what is stated on the document, and unless a contrary intention is shown by evidence or otherwise, the document must be construed to mean what is stated therein. The intention of Sarah Thompson Smart, in the absence of other evidence to the contrary, in this case can only be discern from the contents of the document, Exhibit "A", itself.

As regards ground 5 of the Appeal, I have already spelt out the evidence of the Appellants and the Respondent; in my opinion the evidence does reveal a clear intention on the part of the Donor, Sarah Thompson Smart, to create a joint tenancy. This conclusion is supported by Exhibit "A" and the oral evidence of

DW3. The Learned Trial Judge adequately considered the entire evidence adduced in this case and rightly concluded the matter in favour of the Respondent. In the circumstances, I see no reason to disturb his findings of fact and will accordingly dismiss ground five of the appeal.

In the premises the appeal is dismissed. The Judgment of the High Court is hereby upheld.

The cost of this appeal is to be borne by the Appellants such costs to be taxed.

S Bash-Taqi

THE HON MRS JUSTICE S BASH-TAQI, JSC

I AGREE.....*Mile 26/01/16*.....

THE HON MR JUSTICE N. C. BROWNE-MARK, J.A

I AGREE.....*A. Showers*.....

THE HON MRS JUSTICE A SHOWERS, J