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Civ. App. 54/2006

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN:

SYLVANUS INA COLE - APPELLANT

AND

MUSA TARAWALLY

ANITA COLE - RESPONDENTS

CORAM:

HON. JUSTICE S. BASH-TAQI - J.S.C.

HON. JUSTICE S. KOROMA - J.S.C.

HON. JUSTICE E.E. ROBERTS - J.A.

ADVOCATES: E.E.C. SHEARS-MOSES FOR THE APPELLANT

F. CARLTON HANCILES FOR THE RESPONDENTS

JUDGMENT DELIVERED THIS 12th DAY OF July 2011

ROBERTS, J.A.

BACKGROUND

The brief facts of this case are that Eliza Thomas also known as Becummy Thomas, (deceased) was owner of property at 17 Dillet Street Freetown until her death. Upon her death, her daughter Mrs. Modu Elizabeth Cole (Nee Thomas) purportedly took out Letters of Administrations in respect of her estate and then vested property at 17 Dillet Street upon herself. The said Mrs. Modu Eliza Cole was married to the father of the Appellant and so the Appellant was her stepson. Mrs. Modu Cole had no child of her own but she had an adopted child, Anita Cole (the 2nd Respondent). The appellant lived in the house at 17 Dillet Street with Mrs. Modu Cole for several years until her death in October 2003. Before her death Mrs. Modu Cole purportedly made a Deed of Gift of property at 17 Dillet Street to the Respondents herein. The Respondents then gave notice to quit to the Appellant who rejected their claim, challenging their ownership and commenced an action in the High Court accordingly. The action commenced in the High Court was by Writ of Summons dated 23rd June 2004. The Appellant who was Plaintiff in the action

claimed that there were serious defects and irregularities in the Letters of Administration, Vesting Deed and Deed of Gift (upon which the Respondents' title is based) which rendered them void and that the said Mrs. Modu Cole did not make those instruments. The defects and irregularities complained of by the Appellant (as contained in the Writ of Summons and at the trial) are summarised here as follows:

1. That the defects in the Vesting Deed dated 28th December 1999 are:
 - a) The date of death of Elizabeth Thomas (mother of Mrs. Modu Cole) is stated in the Deed as 15th September 1960 whereas her death certificate (page 56 of the Records) states the date of death as 3rd November 1981.
 - b) Though the Vesting Deed was purportedly made by Mrs. Modu Cole the thumbprint was recorded as that of Elizabeth Thomas.
2. The defects on the Deed of Gift dated 28th December 1999 are the same though purportedly made by Mrs. Modu Cole was stated to be signed by "Elizabeth Thomas"
 - b) the Deed of Gift (unlike the Vesting Deed) did not contain an illiteracy protection clause as required by Section 2 of Cap 104 of the Laws of Sierra Leone.
 - c) The Deed of Gift stated the date of death of Elizabeth Thomas as 15th September 1960 whereas the death certificate (p.56 of Records) confirm the date of death as 3rd November 1981...
3. The defect in the Letters of Administration granted on the 18th October 1999 is that it contains the date of death of Elizabeth Thomas as 15th September 1960 when the correct date of death as per the death certificate (page 56 of the Records) is 3rd November 1981.

In the light of the above defects complained of by the Appellant he prayed in his Writ of Summons for inter alia

- a) A declaration of title to house at 17 Dillet Street
- b) Cancellation of Deed of Gift dated 28th December 1999.
- c) Recovery of possession etc.

An appearance was entered on behalf of the Respondents dated 2nd July 2004 and a Defence and Counterclaim dated 15th July 2004 was duly filed on their behalf. The Defendants' counterclaim in effect claimed a declaration that they are fee simple owners of property at 17 Dillet Street Freetown.

After close of pleadings the trial commenced during which the appellant testified and called one other witness and closed his case. The 1st Respondent and two other witnesses testified for the Defence.

After addresses by counsel for the Appellant and the Respondents respectively judgment was delivered on the 29th September 2006 dismissing the Appellant's action and granting the reliefs prayed in the Respondents' counterclaim. Being dissatisfied with the judgment and decision of the Learned Trial Judge (LTJ) the Appellant filed an appeal to this Court.

THE APPEAL

The Appellant filed a Notice of Appeal on the 12th October 2006. By order dated 22nd May 2007 leave was granted to the Appellant to amend his Notice of Appeal and an Amended Notice of Appeal was accordingly filed on the 24th May 2007. The Grounds of Appeal (as amended) are as follows:

- "1. The learned trial judge erred in law in failing to appreciate the defects in the purported deed of gift bearing the name of a deceased person as a party thereby rendering it defective.
2. The learned trial judge erred in law and in fact in holding that the deed of gift was thumb printed by Modu Cole.
3. The learned trial judge erred in accepting the letter of administration as a valid document from which title could be derived and conveyed, in the light of the serious inconsistency in it about the deceased (intestate).
4. The learned trial judge erred in failing to discountenance the letters of administration by which the said Modu Cole acquired title to 17 Dillet Street Freetown.
5. The learned trial judge erred in shutting her eyes to what was wrong in law and so gave credence to a questionable document.

6. The learned trial judge in consequence of accepting what was wrong erroneously concluded that the defendants/respondents are the fee simple owners of the property situate at 17 Dillet Street Freetown and consequently granted them possession.
7. The learned trial judge was mistaken in giving credence to a witness who said he did not know Modu Cole before that day."

Counsel for the Appellant and the Respondents filed their respective synopses of Arguments and made oral submissions.

In dealing with this appeal I note that the complaint of the Appellant is of errors of law and fact on the part of the Learned Trial Judge and I have therefore reminded myself of the powers and duties of this court in such circumstances. Rule 9(1) of the Court of Appeal Rule 1985 provides that "appeals" shall be by way of rehearing and this in my view empowers this court to review the trial and the decision of the Lower Court based on the material available to that court, in order to discover whether there are material errors of law and fact which vitiate the judgment of that Lower Court (see judgment of Roberts JA in the case of MOHAMED BAI SAMA KAMARA V MOHAMED BAI MARU KAMARA CIV. APP 16/2010 delivered on the 25th January 2011). Also in the case of COGHLAN V. CUMBERLAND (1898) 1 CH.D. 704 Lindley MR had this to say:

"Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the Court must reconsider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses who have been examined and cross-examined before the judge, the Court is sensible of the great advantage he has in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written

depositions; and when the question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the Court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the Court has not seen."

With the above in mind I shall now deal with the several grounds of appeal and I shall do so in the manner in which they were canvassed and argued by counsel for the appellant in his synopsis and oral submission.

GROUND 1.2. 6 & 7

In these grounds the Appellant's complaint is that the Deed of Gift upon which the Respondents rely for their claim of title to property at 17 Dillet Street is defective, that it was not signed by the said Modu Cole and so is void and ought to be cancelled. Counsel for the Appellant stated in argument that the Deed of Gift (page 45 of the Records) stated in its recitals that the said Eliza Thomas died on 15th September 1960 while the death certificate (page 56 of Records) states the date of death as 3rd November 1981. Counsel also pointed out that the Deed of Gift was stated to have been signed by "Eliza Thomas" and not Mrs. Modu Cole. Counsel further alleged that the Vesting Deed which purports to vest the property in the purported Donor Mrs. Modu Cole is itself defective in that it contained the wrong date of death of Eliza Thomas and it was also stated to have been signed by Eliza Thomas and not Mrs. Modu Cole.

On the other hand, Counsel for the Respondents submitted that Mrs. Modu Cole was, before her death (and before her marriage to Mr. S. Cole) she was known as Eliza Thomas which was a shortened form of Elizabeth Thomas. Counsel maintained that the Deed of Gift and the Vesting Deed were signed by Mr. Modu Cole and that this was confirmed by the evidence of DW2 Mohamed Kamara who was one of the attesting witnesses to both instruments.

Counsel admitted that the date of death of Eliza Thomas on both instruments was erroneous but that the error did not affect their validity. Counsel admitted that the death certificate in the name of Becummy Thomas (p. 56 of the Records) was that of Eliza Thomas. It is important to note that according to the 1st Respondent Eliza Thomas deceased (mother of Mrs. Modu Cole) was also known as Becummy Thomas.

I shall briefly examine the evidence that was available before the trial judge in respect of these two instruments with a view to determining and see whether the correct inference was drawn from same. I shall first deal with the Deed of Gift which was the instrument that purportedly confirms the title of the Respondents.

The first complaint was regarding the signature or thumbprint against which is written the name "Eliza Thomas". The first question that I have asked is did Mrs. Modu Cole affix that thumbprint? I cannot fail to observe that in an affidavit made by her (Mrs. Modu Cole) page 81 of the Records, she signed by writing out her name in full and this affidavit was made on 1st of October 1999 only two months before she purportedly executed (thumb printed) the Deed of Gift. Counsel for the Respondent insisted that the name "Eliza Thomas" referred to Mrs Modu Cole who was also known as Eliza (short for Elizabeth) with the maiden name Thomas. The learned trial judge however accepted that the Donor was illiterate. In her judgment at page 37 line 28 of the Records the learned trial judge said that

"That means that the Donor Modu Cole being illiterate could only execute the document by means of affixing her thumbprint. The name "Eliza Thomas" and the letters "RHTP" signifying Right hand thumb print were written by someone else, and not the donor. It cannot be said to be her deed."

It is my view that the Learned Trial Judge erred in holding that Mrs. Modu Cole could only execute the document by means of affixing her thumbprint when there was no evidence to support this. On the contrary there is the affidavit at page 81 of the Records which confirms that Mrs. Modu Cole could sign by writing her name in full. Again as proof of the fact that Mrs. Modu Cole signed the Deed of Gift the learned trial judge seems to rely heavily on the evidence of DW2 Mohamed Kamara

who claimed to be an attesting witness, testifying that he was present when Modu Cole signed the Deed of Gift. The learned trial judge said she believed his evidence. See line 28 page 37 of the Records. But what was the evidence of DW2 Mohamed Kamara? At page 26 of the Records DW1 Mohamed Kamara testified as follows:

“My name is Mohamed Kamara. I live at 12 Syke Street Freetown. Yes I know the purpose of coming to court in relation to this matter. I am here to testify on behalf of the defendant. I see ex. A. I recognise the document. Yes I recognize my signature. I was living at 8B Hennessy Street Kingtom at the time. Yes I only knew Mrs. Modu Cole on that day, 23rd December. Yes she signed the document in my presence. She used her thumb. The document was signed at 4 Percival Street, the Solicitors Chambers.”

From the above evidence the following are clear.

- a) that the witness Mohamed Kamara did not know Mrs. Modu Cole before the date she purportedly signed the Deed of Gift as he only knew her on that day.
- b) The witness claimed the document was signed by Mrs. Modu Cole at the lawyers' office of 4 Percival Street.

On the first issue could such a witness seriously confirm that the person whom he saw that day was Mrs. Modu Cole when he had never met her before?

On the second issue the address of 4 Percival Street where he claimed the document was signed was the office of DW3 Mrs. F.C. Carlton Hanciles who is a solicitor but not the solicitor who prepared the Deed of Gift. At page 27 line 16 of the Records Mrs. Carlton Hanciles solicitor stated in evidence that her chambers were at 4 Percival Street. But she did not say she prepared the Deed of Gift instead she stated that the Deed of Gift was handed over to her by the Respondents. See page 27 of the Records. Indeed the back of the Deed of Gift bears the name of Richard A. During as the solicitor who prepared same and whose address is at 12 Clarence Street Freetown. See page 55 of the Records. All of the above leave me with inevitable conclusion that the evidence of DW2 Mohamed Kamara is most unreliable. I also note that the signature was not accompanied with the “illiteracy protection clause

especially when the learned trial judge chose to accept that Mrs. Modu Cole was illiterate. See cap 109 Laws of Sierra Leone 1960.

As regards the erroneous date of death on the Deed of Gift, this date was admitted by DW1 to be wrong. The 1st Respondent who was DW1 Musa Tarawally stated in evidence at page 23 of the Records as follows:

"I recall testifying that I acquired 17 Dillet Street by virtue of a Deed of Gift. Ex. "A". I see a copy of the Deed of Gift. (paragraph 3). The Deceased therein is referred to Elizabeth Thomas. It is stated that she died on 15th September 1960. I see Ex. "B", the death certificate of Becommy Thomas. The date of death is 3rd November, 1981. I see Ex. G; the Letters of Administration. The correct date of her death is as stated in Ex. B. There is an error in the Deed of Gift and Letter of Administration in respect of her date of death."

The 1st Respondent clearly admitted that both the Deed of gift and the Letters of Administration were defective as they bore the wrong date of death of Eliza Thomas but I shall deal with this defect (of the wrong date of death especially in the Letters of Administration) in more detail when considering ground 3,4,& 5 later. I shall only state here that that error is patent and was never rectified. Indeed the same error occurs in the Vesting Deed purportedly signed by Mrs. Modu Cole.

Again the signature in the Vesting Deed appears to be that of "Eliza Thomas" and I shall here repeat the same conclusion that I arrived at in respect of the signature on the Deed of Gift. It cannot be safely said therefore that the Deed of Gift or indeed the Vesting Deed was signed by Mrs. Modu Cole. Furthermore the defects on those instruments are such as would leave me in no doubt that they should be described as incurably bad. I therefore hold that grounds 1,2,6 and 7 must succeed.

GROUND 3.4. & 5

As regards grounds 3,4 and 5 Counsel for the Appellant contended that the Letters of Administration (which was the foundation upon which the Deed of Gift and the Vesting Deed rested) contained defects and errors.

Counsel contended that in the Letters the date of death of the deceased whose estate is sought to be administered is incorrect. Counsel urged the Court that by virtue of Rule 31 of the Court of Appeal Rules the said Letters could be set aside.

Counsel for the Respondents admitted that the Letters of Administration contained the wrong date of death of the deceased, but he described it as clerical error made by the draftsman.

I have perused the Letter of Administration (Page 71 of Records) I must quickly state that I cannot accept the explanation by counsel for the Respondents that the error was one made by the Draftsmen. Firstly this wrong date is contained not only at page 71 but also page 73 of the Records which is the notice given by solicitors. See also paragraph 1 of the affidavit of Mrs. Modu Cole at page 75 of the Records. Furthermore Mrs. Modu Cole made a separate affidavit of death before a Commissioner for Oaths in which she stated as follows: (See page 81 of the Records)

"Affidavit of Death

I, Modu Cole, presently residing at 17 Dillet Street, Freetown do solemnly declare that:

- 1. Eliza Thomas died at Leicester Village Western Area of Sierra Leone on 15th September 1960.*
- 2. The death was not registered, but who was buried at Leicester Village Cemetery on the 16th September, 1960.*
- 3. I was alive when Eliza Thomas died and witnessed her burial."*

In the above affidavit she seemed to categorically state that Eliza Thomas died on 15th September 1960, was buried the next day and that she was present at her funeral. I therefore cannot accept that the wrong date was as a result of the error of the draftsman. This date must have been given to him by someone purporting to be Mrs. Modu Cole. Also in the said affidavit, Mrs. Modu Cole deposes that the death of Eliza Thomas was not registered. This cannot be true as there is evidence that the death of Eliza Thomas also known as Becommy Thomas was registered. PW2 Simeon B. Kuyateh the Registrar of Births and Deaths stated in evidence as follows:

"I am the Registrar of Births and Deaths. My duties include the registration of births and deaths. I have in my possession the registration of Becummy Thomas of 17 Dillet Street. The death was registered on page 132 with registration No.656 at Vol. 1765. The registration was on 3rd November 1981."

This confirms the registration of the death of Becummy Thomas contrary to the assertion of Mrs. Modu Cole in page 18 of the Records.

I must now determine the significance of the correct date of the deceased whose estate is sought to be administered. In Phillips's PROBATE & ESTATE DUTY PRACTICE 6th Edition the issue of the date of death of the deceased under oath for administration was accepted to be the same as under Probate and so at page 173 thereof it states under the rubric "Date and place of Death and Domicile" as follows

"Wherever possible the exact date of death must be given, and this must correspond with the date shown in the certificate of the registration of the death."

Also in Tristram And Coote's Probate Practice 23rd Edition page 122 under the rubric "Date of Death" it states as follows:

"The exact date of death, where this is known, must be given in the Oath."

I have read the above passages and now have no doubt as to the seriousness of giving the wrong date of death of the deceased whose estate is sought to be administered. In the instant case, the error or difference is not a few days but 21 years apart. i.e. 15th September 1960 and 3rd November 1981. Also the said Mrs. Modu Cole appeared to be so definite about the 1960 date that she stated at page 81 of the Records that she was present at her funeral and that deceased died on 15th September 1960 and buried the next day. This clearly raises the doubt as to whether in fact we were dealing with the same deceased.

Indeed all three instruments on which the Respondents would collectively rely to establish title are defective as clearly admitted by the 1st Respondent in evidence.

And the combined effect of all the defects in these instruments leave me with no alternative but to allow the appeal. The evidence was abundantly clear before the trial judge and the correct inference and inevitable conclusion to be drawn was that the Deed of gift was defective and therefore ought to be cancelled.

I have perused the Appellants claim in the Writ of Summons in which he prays for a declaration of title to the property at 17 Dillet Street. The Appellant had not shown any reason or established any claim in the court below or in the court to urge us to declare him fee simple owner of the said property. Indeed counsel has not urged this court to make such a declaration and it is not one of the reliefs sought in the Notice of Appeal as amended. This court cannot therefore make such a declaration.

Also, even though this is not contained in the Appellant's Notice of Appeal, Counsel for the Appellant (in his synopsis and oral submissions) has urged this court to exercise its powers under rule 32 of the Court of Appeal Rules 1985 to cancel the Letters of Administration granted to Mrs. Modu Cole on the 18th October 1999. Indeed I am aware of the powers of this court conferred by the Court of Appeal Rules 1985 including rule 32 thereof but I am afraid I do not think it appropriate to set aside the said Letters of Administration. I am aware that a revocation of agreement can be ordered even after the death of the grantee. However I do not think that this matter represents an appropriate circumstance where the Appellant can ask for the revocation of the grant of the letters. This was not prayed for in the Court below. Furthermore there is no evidence that all the interested parties have been duly notified of particularly an application for revocation of the grant. The Appellant may wish to bring an appropriate action or application for the revocation of the grant to Mrs. Modu Cole and would for that purpose be required to give notice of such action or application to such persons as are stated in Order 55 Rule 3 of the High Court Rules which provides:

"Every person who is entitled or claims to be entitled to administer the estate of a deceased person under or by virtue of an unrevoked grant of probate of his will or letters of administration of his estate shall be made a party to any action for revocation of the grant."

It would therefore be more appropriate for a separate application for revocation of the Letters to be made and it is for the above considerations that this Court would refuse to order such revocation as urged by counsel for the Appellant.

Having come to the conclusion however that the Deed of Gift herein must be cancelled, it would seem that the property at 17 Dillet Street must now and for the time being be considered as part of the estate of Mrs. Modu Cole (deceased). Furthermore all actions proceedings conducted on the basis of dependent upon the said Deed of Gift are therefore void and unlawful. In the result the appeal succeeds and we make the following orders.

1. The judgment of the High court dated 29th September 2006 is hereby set aside.
2. The Deed of Gift dated 28th December 1999 registered as No. 5/2000 volume 91 page 129 of the Book of Voluntary Conveyance is hereby cancelled and shall be expunged from the Record Books.
3. The Respondents' counterclaim in the Court below is hereby dismissed
4. All executions for possession or otherwise carried out upon the Judgment of 29th September 2006 are hereby set aside and reversed.
5. The Appellant shall have the cost of this appeal and the trial below such costs to be taxed.

Agree *sent ap; 12/07/2011*

 Hon. Justice S. Bash-Taqi - J.S.C.

[Signature]

 Hon. Justice S. Koroma - J.S.C.

[Signature]

 Hon. Justice E.E. Roberts - J.A.