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Civ. App. 25/2007

IN THE COURT OF APPEAL OF SIERRA LEONE

IN THE MATTER OF THE ESTATE OF MAKALAY TURAY (DECD) TESTATE

AND

IN THE MATTER OF THE ESTATE OF ALWALION NABIE TURAY (DECD) INTESTATE

AND

IN THE MATTER OF ADMINISTRATION OF ESTATE ACT CAP. 45 LAWS OF SIERRA LEONE

BETWEEN:

MORLAI TURAY
BY HIS ATTORNEY KANDEH YANSANEH - APPELLANT

AND

IBRAHIM KAMARA
AS ATTORNEY FOR IBRAHIM TURAY

AND

ALUSINE SUMAH

ALHASSAN SUMAH

JENEBA FOFANAH

NGADIE SUMAH

AND

THE ADMINISTRATOR & REGISTRAR-GENERAL -RESPONDENTS

CORAM:

HON. JUSTICE S. KOROMA	**-**	**J.S.C.**
HON. MR JUSTICE P.O. HAMILTON	**-**	**J.S.C.**
HON. MR. JUSTTICE E.E. ROBERTS	**-**	**J.A.**

SOLICITORS:
V.V. THOMAS ESQ. FOR THE APPELLANT
E.E.C. SHEARS-MOSES ESQ. FOR THE PLAINTIFFS/RESPONDENTS
A.E. MANLY-SPAIN ESQ. FOR THE 1ST RESPONDENT

JUDGMENT DELIVERED ON THE DAY OF 2011

ROBERTS, J.A.

My Lords, by Notice of Appeal dated 20th June 2007 the Appellant, that is Morlai Turay who was the 2nd Defendant in the court below, appealed to this court against the decision of the Hon. Justice S. Bash-Taqi contained in the Judgment dated 8th June 2007 on the grounds and for the reliefs contained in the said Notice of Appeal.

For ease of reference I shall here reproduce the grounds of appeal as contained in the Notice of Appeal dated 20th June 2007 which are as follows:

1. *The learned Trial Judge erred in Law and came to the wrong conclusion when she held that the 1st defendant is the most competent person to take out a grant de bonis non to the estate of Makalay Turay (Deceased Intestate) in that:*

a) *She totally ignored the fact that the 2nd defendant had already taken out a grant of Letters of Administration (de bonis non) in the estate of Makalay Turay (Deceased Intestate) which was exhibited as "E" in the affidavit in support of the Originating Summons and sworn to on 4th October 2005. See p. 25 of Records.*

b) *The said Letters of Administration (de bonis non) granted by the High Court of Sierra Leone on the 9th July 2003 had not been called in and/or set aside by the High Court of Sierra Leone.*

c) *There is no legal basis upon which the 1st defendant as administrator of the estate of Alwalion Nabie Turay is the person to take out a grant of Letters of Administration (de bonis non) in the estate of Makalay Turay (Deceased Intestate) as averred in the affidavit of the 1st defendant sworn to on the 23rd October 2006 filed in opposition to the affidavit of the Plaintiffs, as the chain of representation applicable in the case of proving executors does not apply to administrators.*

2. *The Learned Trial Judge erred in law and came to the wrong conclusion when she held that it is for the 1st defendant to determine the beneficiaries of the Estate of Makalay Turay after the said 1st Defendant has taken out a grant de bonis non in that the administrator of any estate is not the person who determines the beneficiaries entitled to an estate but the provisions of the applicable law.*
3. *The Learned Trial Judge erred in Law and acted on wrong principles when she held that the |Plaintiffs can be considered on equitable and moral grounds as persons beneficially interested in the Estate of Makalay Turay (Deceased Intestate) in that:*

a) *There is no basis in law for any such entitlement.*
b) *Such a conclusion is inconsistent with her earlier opinion that they cannot claim to be beneficiaries of the estate.*

4. *That the judgment is against the weight of the evidenc*

BACKGROUND

One Makalay Turay died on the 31st August 1981. The said Makalay Turay was survived by the Plaintiffs in this action (which was commenced in the court below) who claimed they were her wards and that during her life time she had held and treated them as her children, she having none of her own. According to the Plain tiffs the said Makalay Turay before her death and in appreciation of their services, made a will dated 3rd January 1981 and then a Deed of Gift dated 18th July 1981 effectively leaving property situate at 12 Free Street Freetown to them (the Plaintiffs). However on the 3rd of February 1981 Alwalion Nabie Turay who claimed to be the brother of Makalay Turay deceased took out Letters of Administration in respect of her estate according to Mohammedan Law.He then commenced an action in the High Court praying for the setting aside of the said Deed of Gift and the Will as well as a declaration that the said property situate at 12 Free Street Freetown formed part of the estate of Makalay Turay. On the 31st December 1981 the High Court gave judgment in favour of Alwalion Nabie Turay setting aside the said Will and Deed of Gift, and

ordered that the property at 12 Free Street Freetown which formed part of the estate of Mackalay Turay be administered on an intestacy. The High court also ordered that the Letters of Administration granted to the said Alwalion Nabie Turay then in the possession and custody of the Master and Registrar of the High Court by reason of its having been called in, be released to him. The plaintiffs (the defendants in that action) appealed to the Court of Appeal and by judgment dated 16th July 1991 the Court of Appeal confirmed the decision of the High Court. On the 6th March 2003 the said Alwalion Nabie Turay died intestate. On the 7th July 2003 Ibrahim Sory Turay claiming to be the lawful son and next of kin according to Mohammedan Law of the said Alwalion Nabieu Turay took out Letters of Administration in respect of the deceased's estate.

On the 9th of July 2003 the 2nd defendant the appellant herein also obtained Letters of Administration in respect of Estate of Makalay Turay claiming to be her son under Susu Customary Law. The Plaintiffs then commenced this action in the High Court by Originating Summons dated 5th October 2005 praying for the reliefs/ answer to the several questions or issues contained therein.

On the 8th June 2007 the High Court gave judgment in the action which said judgment contained the following answers to the issues raised in said Originating Summons:

1. *On the facts and circumstances in the case the Administrator and Registrar General is not competent to take over the management and control of Makalay Turay's estate;*
2. *In the light of the conclusion above, the Administrator and Registrar General should have nothing to do with the said estate;*
3. *As to who are the beneficiaries of the Estate of Makalay Turay, this is a matter to be left to the 1st defendant after he has taken the grant De bonis non. In my opinion the Plaintiffs not being the natural children of Makalay Turay cannot claim to be beneficiaries of the Estate. I hold that they can be considered on equitable and moral grounds as persons beneficially interested in the Estate.*
4. *The conclusions I have reached have disposed of the issues raised in 4 and 5.*

5. *Solicitors costs to be borne by the Estate.*

It is against this decision contained in the judgment dated 8th June 2007 that the appellant has appealed, which said appeal is now before us for our consideration.

By Notice dated 25th July 2007 the plaintiffs, the respondents herein, pursuant to Rule 18 of the Court of Appeal Rules Public Notice No. 29 of 1985 I presume, filed a Notice of Intention to Contend that the Judgment/decision of the High Court dated 8th June 2007 be varied.

THE ISSUES

The issues for consideration in this appeal are to be gleaned from the Synopses as well as submissions of Counsel for the Appellant and Respondents respectively which are represented as follows:

Counsel for the appellant contends that it is the appellant who is the person duly entitled to take out the grant de bonis non in respect of the estate of Makalay Turay and that it is the Appellant Morlai Turay who is the son of Makalay Turay by Susu Customary Law that is entitled to take out the grant in respect of her estate. On the other hand the 1st Respondent contends that he is entitled to administer the said estate of Mackalay Turay he having taken out Letters of Administration in respect of the estate of his father Alwalion Nabie Turay who before his death was administering the estate of Makalay Turay.In arguing ground one of the grounds of appeal, Counsel for the appellant also contends that the Learned Trial Judge ought not to have declared the 1st defendant the most competent person to take out a grant debonis non in respect of the estate of makalay Turay as the question posed in the Originating Summons dated 5th October 2005 was not who was the most competent person to take out such grant. Counsel for the Appellant also argued that Letters of Administration had already been granted to the 2nd Defendant which have not been called in or revoked.

I have carefully perused the contents of the amended Originating Summons dated 5th October, 2005 in which the determination of the following issues were prayed for or sought:

"1. *That the Administrator of the estate of Makalay Turay having died, the only person entitled to administer the estate of Makalay Turay is the Administrator and Registrar-General.*

2. *That the Administrator and Registrar-General is the only person to receive proceeds from the property at 12 Free Street, Freetown and distribute to the beneficiaries equally.*

3. *That the plaintiffs are beneficiaries of the estate of Makalay Turay.*

4. *That the Plaintiffs being the beneficiaries of the estate of Makalay Turay are entitled to equal portions of it.*

5. *That if there be no other proven beneficiary of the estate of Makalay Turay apart from the plaintiffs then the property at 12 Free Street, Freetown should be vested on them as the sole beneficiaries.*

6. *That the costs occasioned by the Plaintiffs."*

Admittedly, none of the above issues for determination expressly request the Court to determine the most competent person to take out a grant de bonis non in the instant case. Perhaps in her desire to answer or resolve the first issue for determination, (i.e. order 1 in the said Originating Summons), the Judge was tempted or persuaded or found it prudent to not only determine the issue raised but to go further and resolve the next issue which by implication necessarily arises. One can appreciate that in attempting to determine whether "...the only person entitled to administer the estate of Mackalay Turay is the Administrator and Registrar General" it would no doubt be useful and relevant to identify and perhaps disqualify those who are not so entitled. One must also appreciate that in dealing with this first issue posed in the Originating Summons it would be equally useful and relevant to determine who was entitled should it be resolved that the Administrator and Registrar General is not the only person entitled to administer as the case may be. Indeed that was what the judge did

in the Court below. The learned Judge in her wisdom resolved that the Administrator and Registrar General was not competent to take over the management and control" of the estate, having found that the 1st defendant was the most competent person to take out a grant de bonis non.

In all this I cannot say what operated in the judge's mind nor can I attempt to explain her decision in this respect. This would however not prevent me from looking at the issue raised for determination in the Originating Summons ,the submissions of Counsel as well as the decision of the Judge and to deal with the appeal before me accordingly.

I would refer to and deal with some curious issues that have been raised in this appeal.

Is the appellant correct in submitting that he is the proper person to take out the grant as the son by Susu Customary Law regarding her mother's estate, the then administrator Alwalion Nabieu turay having died intestate?. The 1st Respondent on the other hand claims to be entitled to administer the unadministered estate of the said Makalay Turay. In **Tristam and Coote's Probate Practice** 23rd Edition at page 405 under the rubric Administration "de bonis non" it is stated as follows:

> **"When an administrator dies, leaving part of his deceased's estate unadministered, if the whole estate vested beneficially in the administrator, the grant de bonis non must be made to his personal representative. If no personal representative has been appointed, one must be constituted for this purpose.**
>
> **But if there are other persons beneficially entitled who are still alive, they are entitled to the grant in preference to the personal representative of the deceased administrator, unless otherwise directed by a registrar."**

The above passage when applied to the instant case would suggest that the 1st Respondent Ibrahim Sorie Turay who is the son of Alwalion Nabie Turay could well take out the grant de bonis non of the estate of Makalay Turay if her whole estate

vested beneficially on the said Alwalion Nabieu Turay. However it is not clear or certain that the entire estate vested beneficially on his father.

In the instant case the appellant has appeared and claims to be the son by Susu Customary Law and claiming to be her next of kin and therefore beneficially entitled to her estate. If this is true then as is stated in the above passage the Appellant could be entitled to the grant "in preference to the personal representative of the deceased administrator....." i.e. the 1st Respondent.

But is the Appellant the son of the said Makalay Turay? I find the expression "*son by susu Customary Law*" very curious indeed. This claim as a son by susu customary law is disputed by the Plaintiffs. See pages 3 & 4 of the Records which is the affidavit of Alusine Sumah and Alhassan Sumah. And what did he mean by "*son by Susu Customary Law?*" I have perused the Records and I must state that the said expression has not been sufficiently defined, explained or proved. These kinds of assertions which were challenged in the Court below ought to have been substantiated and proved with sufficient evidence to establish their validity and acceptance. In this regard I find the following case (which was cited in the submissions) to be very instructive and persuasive, that is the case of **VICTORIA FANNY MARTIN V. CHARLES EFION JOHNSON AND EMANUEL DANIEL HENSHAW 3 WACA P. 91.** In this case the appellant was contending that he was entitled to administer an estate as an adopted son of the deceased by native custom. The Court held (on appeal) that where such a claim which is based on native law and custom is relied on, "the particular native law and custom must be established by positive evidence". Per Webber CJ. At page 92.

The status of the appellant and his true relationship with Makalay Turay therefore attracts further significance having regard to the effect it would have on the rights of the appellant and the 1st respondent as regards the grant de bonis non.

I am not entirely satisfied that the appellant is the son by Susu Customary Law as from all the records of this case this has not been "established by positive evidence" to any degree that would satisfy the Court. Again if it turns out that the Plaintiffs are ascertained as persons beneficially entitled to the said estate then

(having regard to the contents of the passage from **Tristam and Coote's Probate Practice)** they or any of them may well be entitled to take out the grant in preference to the Appellant.

As regards grounds 2 and 3 counsel for the Appellant's complaint is that the learned Judge was wrong when she held that it is for the first defendant to determine the beneficiaries of the estate and that it was wrong for the learned Judge to hold that the plaintiffs can be considered beneficially interested in the said estate on equitable and moral grounds. These submissions are sufficiently tied and related to the 1st ground and may all be summarised thus;

a) That the Learned Trial Judge ought not to have named the 1st defendant as the most competent person to take out the grant as there was no legal basis to do so and that the Court was not asked to make that pronouncement.

b) It is not for the 1st defendant to determine who the beneficiaries to the estate were and

c) There was no legal basis for the plaintiffs to be considered as beneficially interested on equitable and moral grounds.

It is clear in the entire records before me that there is no doubt that the estate of mackalay Turay is to be dealt with under Mohammedan Law. There is also evidence that the deceased was a Susu.I there believe that the following legislation would be very relevant in dealing with the estate of Makalay Turay who was a Susu and well as a Muslim.

Section 9 sub sections 1 & 2 of the Mohammedan Marriage Act cap 96 of the Laws of Sierra Leone 1960 provides as follows:

9.

1. ***If any party to a Mohammedan marriage and being at the date of his death a Mohammedan, or if any person being unmarried and being at such date a Mohammedan, shall die intestate, the estate real and personal of such intestate shall be distributed in accordance with Mohammedan Law.***

2. ***The following persons shall be entitled to take out Letters of Administration in the order named, viz:-***

(a) ***The eldest son of the intestate, if of full age according to Mohammedan law;***

(b) The eldest brother of the intestate, if of full age according to Mohammedan law;

© The official Administrator;....

In the light of the above I do not agree with the Learned Trial Judge that the Administrator and Registrar General had be "ruled out" of the matter which I presume would mean the administration of the said Estate.

Section 9 (2) clearly confirms that in the situation where a person being unmarried and a Mohammedan dies intestate then the "official administrator" may be entitled to take out a grant, of course ranking after the eldest son and the brother of the deceased in that order. Again, it is lawful and not uncommon for an Administrator to be removed and the Official Administrator be ordered to continue the administration of an estate left unadministered in his place .See section 16 of Cap 45 of the Laws of Sierra Leone

Furthermore the wisdom and practicality of choosing the Administrator is even more relevant when one examines the status and relationships of the various parties herein as regards the deceased. It is my view that the official administrator is better placed and duly empowered by law to follow due process and identify and ascertain the beneficiaries of the estate especially when it is so clear that Susu customary law would have to be applied. Section 43 of the Administration of Estates Act Cap 45 of the Laws of Sierra Leone 1960 empowers the Official Administrator to inquire from the relevant authority from the region from which the intestate hails to ascertain the names of the persons entitled to the estate.

Section 43 subsections (1), (2) & (3) of CAP 45 provide as follows;

(1) *Notwithstanding anything contained in this Ordinance, where any native dies intestate leaving assets in Sierra Leone which are not within the jurisdiction of any Native Court* ***the distribution of such assets after payment of the debts of the deceased and the costs of administration shall be according to native law and custom.***

(2) *Where the Official Administrator administers any such estate he shall request the District Commissioner to ascertain from the Native Court of the area to which the deceased belonged the names of the persons entitled to the balance of the estate and on such names being certified to him by the District Commissioner shall pay such balance to the persons so named.*

(3) *Where the District Commissioner certifies that there are no known persons entitled by native law and custom to the balance of the estate and there appears to be any person or persons who were dependent on the deceased or who would have been entitled had the deceased been a non-native, the Governor may direct the Official Administrator to pay the balance of the estate to such person or persons in such proportions as he may think equitable.*

Section 9 of the Mohammedan Marriage Act Cap. 96 and Section 43 of the Administration of the Estates Act Cap 45 afford the legal authority and necessary direction to the "Official Administrator" to not only take over the administration of the estate of Makalay Turay but also follow due process to identify and deal with the beneficiaries who may be entitled under Mohammedan and Susu customary law. By virtue of section 43(1) above the property at 12 Free Street Freetown is not within the jurisdiction of any "Native Court" and its distribution must therefore be " ...according to native law and custom".

I have dealt with the appeal in accordance and in conformity with the above authorities and legislation. I however did not find it necessary to apply the Devolution of Estates Act 2007 having regard to section 1(2) of the same as the deceased intestate herein died on the 31st August 1981,well before the coming into operation of the said Act.

It is my view that the Administrator General is a good and proper choice to administer the estate of Makalay Turay having regard to the authorities above cited and having regard to the neutrality of the office taking into consideration the competing claimants to the grant and the beneficiaries to the said estate.

I note that the administrator and Registrar General is a party in these proceeding but never appeared nor was he/she represented in this court.

It is however the view of this Court that the judgment of the High Court dated 8th June 2007 cannot be maintained and pursuant to and in accordance with Rule 32 of the Court of Appeal Rules 1985 this Court adjudges and makes the following orders:-

1. That the judgment of the High Court dated 8th June 2007 is hereby set aside.
2. The Letters of Administration granted to the Appellant Morlai Turay on the 9th day of July 2003 are hereby revoked.
3. The Letters of Administration granted to Ibrahim Sory Toure the 1st Defendant on the 7th July 2003 are hereby revoked.
4. The Administrator General be granted Letters of Administration in respect of the Estate left unadministered of Makalay Turay deceased.
5. The Administrator General shall identify and ascertain the beneficiaries of the Estate of Makalay Turay deceased in accordance with the provisions of (the law).
6. That all rents or monies collected in respect of No. 12 Free Street Freetown since the date of the Judgment of the High court be fully accounted for and paid to the Administrator and Registrar-General by the person that was in control throughout the period this matter was on Appeal.
7. The costs of the appeal to be borne by the estate such costs to be taxed if not agreed.

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Hon. Justice E.E. Roberts, J.A.

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Hon. Justice S. Koroma, J.S.C.

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Hon. Justice P.O. Hamilton, J.S.C.