Civ App 27/2013 NUKM

IN THE COURT OF APPEAL OF SIERRA LEONE

BETWEEN;

MRS OLA KORJAY (NEE CAROEW) - 1ST APPELLANT

ZUBAIRU CAREW - 2ND APPELLANT
(Through his Attorney, ALHAJI MODU FREEMAN)

AND

ABDUL CAREW - RESPONDENT

COUNSEL:
MRS F SORIE for the Appellants
C F MARGAI ESQ for the Respondent

CORAM: THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MR JUSTICE E E ROBERTS
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MRS JUSTICE N MATTURI-JONES
JUSTICE OF THE SUPREME COURT(ACTING)

JUDGMENT DELIVERED THE 8th DAY OF MAY,2017

THE APPEAL

1. This is an appeal brought by the Appellants against the Judgment of the High Court delivered by SHOWERS, JA (now, Acting JSC) on 26 March,2013. The Notice of Appeal was filed on 30 May,2013. It is at pages 302 -307 of the Record. References to page numbers hereafter shall be construed as references to pages in the Record.The Grounds of Appeal are at pages 302 -205, and they are as follows:
   A. That the Learned Trial Judge erred in law and in fact in deciding that Hawanatu Carew (deceased), divested herself of the property situate at No. 40 Goderich Street.

PARTICULARS

i. That the Learned Trial Judge failed to properly interpret/construe the Will of KabbahTuray (deceased) dated 10th March,1952 and registered as No. 47/52 in volume 22 at page 29 of the Record Books of Wills kept in the office of the Administrator and Registrar-General, particularly paragraph 3 thereof, which reads: "*.....all that house and land situate at No. 40 Goderich Street, Freetown aforesaid wherein I now reside to my daughter Hawah Carew and her heirs and assigns forever.*"
By the will there is a limitation on the inheritance as the heirs and assigns of Hawah Carew were ascertainable on the death of KabbahTuray deceased.

ii. That the Learned Trial Judge erred in law in not finding that the Appellants as well as the Respondent were tenants-in-common of the property situate at 40 Goderich Street, being that Hawanatu Carew deceased only bore a life interest in the property above mentioned and upon her death the remainder was devised to her heirs and assigns forever.

iii. That the Learned Trial Judge erred in law and in fact in deciding that the Respondent is entitled to sole ownership of the property and as such, entitled to dispose of same as if he were the fee simple owner as Hawanatu Carew deceased bore a life interest in the property at No 40 Goderich Street and she could not then give that which she did not have and consequently the Deed is void and the Respondent could not convey or dispose of the property.

iv. That the Learned Trial Judge erred in law and fact in holding that the sale of the property to Hassan Nazzal is valid and that Hassan Nazzal was a bona fide purchaser for value, particularly with respect to the fact that the said Hassan Nazzal has been a Lessee of the premises with full knowledge of the facts surrounding the disputed ownership of the property and as such, cannot be regarded as an innocent purchaser for value who purchased the property at a time when the matter was not only sub judice, but ruling was pending on an application by the Applicant before the Trial Judge dated 14th October,2008 for the res to be preserved and the Respondent restrained from selling or disposing of the property.

v. That the Learned Trial Judge erred in law and in fact in holding that the Respondent had the sole right to convey the said property to one Hassan Nazzal.

vi. That the Learned Trial Judge in arriving at her decision failed to adequately consider the provisions of Section 12 of the Registration of Instruments Act (Cap 256).

B. That the Learned Trial Judge erred in law and in fact in determining that the failure of the purported Deed of Gift from Hawanatu Carew deceased to the Respondent to meet the requirements of the Illiterates Protection Act, 1898 (Cap 104) of the Laws of Sierra Leone was not fatal to the Respondent's claim to ownership of the property at 40 Goderich Street.

PARTICULARS

i. The object of the Illiterates Protection Act 1898 (Cap 104) of the Laws of Sierra Leone is to protect an illiterate person from possible fraud and strict compliance therewith is obligatory.

ii. The Learned Trial Judge must not be seen to interfere with the intent of the Legislature, otherwise, the objective of the Legislature will be rendered nugatory if the Act is not complied with.

iii. That the Learned Trial Judge in arriving at the decision did not adequately consider whether Hawanatu Carew was aware of the nature of the document she affixed here thumbprint on.

C. That the Learned Trial Judge failed to adequately consider the evidence and determine whether in fact the purported Deed of Gift from Hawanatu Carew deceased to the Respondent was properly executed, was done without any improper and undue influence, and was duly registered in accordance with the Law.

PARTICULARS

i. That the Deed of Gift was an incomplete document being that the survey plan attached to the document was only an advance copy that did not and does not bear the signature of the Director of Surveys and Lands, does not bear the an LS number and is undated. Additionally, the schedule of the Deed is incomplete in that it does not bear any of the above-mentioned information as required by law.

ii. That there is no record of any survey done on the property or any record of the property with the Department of Surveys and Lands in the name of the Respondent and that the registration of the Deed is therefore improper rendering the purported Deed of Gift invalid.

iii. That contrary to what the Respondent led the Court to believe, the deceased was illiterate and the general principle of law is that thumb printing is prima facie evidence of illiteracy. The Learned Trial Judge failed to consider the Amended Defence of the Respondent dated 14th November,2011 in which it was asserted that Hawanatu Carew deceased was "*literate up to her death*", thus implying the reason why an illiteracy clause was not indicated upon the Deed of Gift between Hawanatu Carew deceased and the Respondent.

iv. That the Learned Trial Judge failed to adequately consider the implications of undue influence on a 93 year old woman with respect to the execution of the purported Deed of Gift by Hawanatu Carew deceased to the Respondent.

v. That there is no credible evidence to lead to the conclusion that at least one of the said witnesses to the Deed of Gift Transaction did in fact witness the transaction.

D. The Judgment is against the weight of the evidence.

2. The relief sought from this Court, is as follows;

i. That the Appeal be allowed and the Ruling of the High Court dated 26th March,2013 be set aside.

ii. That the Deed of the property at 40 Goderich Street from Hawanatu Carew, deceased to Abdul Carew, be declared void.

iii. That the conveyance of the property at 40 Goderich Street from Abdul Carew to Hassan Nazzal be declared void and be revoked.

iv. That the Appellants and the Respondent be declared tenants in common of the property at 40 Goderich Street.

v. That the Respondent account for all his dealings with the property from the death of Hawanatu Carew, deceased.

vi. That the Respondent bears the Costs of the Appeal.

THE ACTION IN THE COURT BELOW

THE WRIT OF SUMMONS

3. The Appellants instituted actionagainst the Respondent in the High Court by way of writ of summons issued on 10 October,2008. The Appellants and the Respodent are brothers and sister, all of them being the children of Hawanatu Carew. In the writ, the Appellants brought the action as beneficiaries of the estate of their late mother and they sought a Declaration that the property situate at and known as 40 Goderich Street, Freetown constitutes the un-administered portion of the estate of their mother, Hawanatu Carew, who died intestate in Freetown on 2 November,2006; a determination and proper distribution of the interest of the Appellants in the estate of their late mother; an account of all rents collected by the Respondent since the demise of their mother, and the payment of the same to the Appellants according to their respective interests; interest on such rent found due and owing; an Injunction; and any other Orders the Court may deem fit.
4. The particulars of claim allege that the property at Goderich Street was owned by the grandfather of the parties, (the "*testator*", hereafter) and that he devised the same by his will made on 10 March,1952. The specific devise affecting the property is in clause 3 of the Will, and it states:

"3. *After payment of my funeral and testamentary expenses, I give and devise all that house and land situate at No. 40 Goderich Street, Freetown aforesaid wherein I now reside to my daughter Hawah Carew and her heirs and assigns forever.*"

5. In clause 6 of the Will, the testator directed that his two wives should stay in the said house for a period of six months after his death. The particulars allege also that the deceased mother always maintained during her lifetime that she had never divested herself of the property; and that the Respondent had sought to remove the Appellants from the property, as he considered them to be tenants-at-will. In fact, only the 1st Appellant was living there at the relevant time; the 2nd Appellant, apparently lives in the USA. It was for these reasons they prayed for the reliefs which have been set out in part above.

APPEARANCE ENTERED AND DEFENCE AND COUNTERCLAIM FILED

6. On 24 (not 19) November, 2008 Appearance was entered on behalf of the Respondent by Serry-Kamal & Co; a defence and counterclaim was also filed the same day. No doubt, Respondent's Solicitors must have been spurred on to quick action because the Appellants had on 19 November,2008 filed an Application for Judgment to be entered against the Respondent. In his pleading, the Respondent averred that the Appellants had no locus to bring action as they had not obtained a Grant in respect of their late mother's estate. The short answer to this objection is that as beneficiaries of their late mother's estate, they were entitled to bring action as such. I shall say much more about this later, as there might reason to believe that the property still lay within the estate of the testator. The Respondent also averred that the property had been conveyed to him by their mother by way of voluntary deed of conveyance dated 21 June,2005 and duly registered as No. 203/2005 at page 62 in volume 161 of the Record Books of Voluntary Conveyances kept in the office of the Registrar-General, Freetown.
7. There was an apparent error in paragraph 2 of the Defence which was later corrected by succeeding Solicitors, C F Margai& Associates. I say apparent, because if what was averred in the amended Defence is true, then, there should be some explanation why a literate woman would thumbprint a registerable instrument. In the original Defence filed, the mother was there described as an illiterate; this was later amended to read literate. The Respondent also added a new paragraph 5:

   5."*the defendant by reason of the deed of gift aforesaid sold the said property by conveyance dated the 31st day of December,2008 and registered in the office of the Administrator and Registrar-General as No. 16/2009 in vol. 647 at page 122.*"

   The relevant books kept in the office of the Registrar-General are not stated, but, presumably, the reference was to the Record Books of Conveyances. The amendments were allowed by SHOWERS, JA on 10 November,2011 and the amended pleading itself was not filed until 14 November,2011. At this point in time, the trial was ongoing, though regrettably in a very desultory and perfunctory way, mainly because of the recurrent absence of the Appellants' then Counsel, MrNgevao. And also, even

the Applicant to make a full and frank disclosure of material facts to the Court....." This last charge is one which could more appropriately be leveled against the giver of that assurance.If he did not know, or, had no reason to believe the property had been sold, it must follow logically, that his client was not being frank and forthcoming to him.

AGREED ISSUES IN DISPUTE AT TRIAL

11. On 30 June,2009, SHOWERS, JA gave directions for the future conduct of the action. In Respondent's Solicitors Court Bundle purportedly dated 14th, but actually filed on 31 July,2009, we find a list of admitted issues at page 116. Sub-paragraph 5f at the bottom of page 116 reads: " *That the said Hawanatu Carew (nee Turay) was an illiterate up to her death on 2 November,2006.*" I mention this admission at this stage in view of the amendment made to the Respondent's pleading after C F Margai and Associates had taken over as his Solicitorsfor the Respondent as stated in paragraph 6 supra. That admission was not renounced, nor withdrawn by C F Margai& Associates. That Madam Carew was literate, is also one of the issues admitted by the Appellants at sub-paragraph 4d of their Court Bundle - page 125.No admission was made by the Respondent that at that date, (i.e. 31 July,2009), Respondent had already sold the property to MrNazzal since December,2008. In fact sub-paragraph 5e on page 116 reads as follows: " *That the said Abdul Rahman Carew the defendant herein had been in exclusive possession of same since 2005 and has tenants occupying the same.*" As the property had then been sold, it would seem this was a thinly veiled attempt to mislead the Court into thinking that the Respondent was still the owner of the property. In any event, the Respondent could not have had exclusive possession of the property because the evidence shows that 1st Appellant was living there in 2009.
12. Further, the Respondent's issues in dispute are listed at page 117. One of them is *that (a) Whether the said Hawanatu Carew (nee Turay) had title to pass to the said Abdul Rahman Carew the defendant herein.*" And the last sub-paragraph, wrongly lettered *"(b)"* as there is another *"b"* above that, reads as follows: " *Whether the said deed of gift it having registered decreed no title to property known as 40 Goderich Street, Freetown to the Defendant Abdul RahmanTuray"* (sic). As of31 July,2009 the Respondent was

no longer the owner of the property. Ownership had purportedly passed to MrNazzal. In the issues in dispute in their Court Bundle - page 126 -the Appellants appear to have adopted those identified by the Respondent to be his.

TRIAL OF THE ACTION

13. The trial actually commenced before SHOWERS, J on 21 May,2010 with MrSesay, then Counsel for the Respondent, tendering in evidence the documents the Respondent wished to use at the trial - page *179*. On 9 July,2010, the 1st Appellant began giving evidence as PW1 - page *180*. She tendered in evidence as exhibit "*G*" her witness statement and applied for it to form part of her evidence in chief - page *181*. She was cross-examined by MrSesay at pages *182 - 183*. Page *186* shows that by 18 March,2011, MrMargai had begun appearing as Counsel for the Respondent. It was thereafter he made the application for the amendment dealt with above. 1st Appellant was further cross-examined by MrKowa, Counsel for the Respondent on 25 January,2012 - page 198. She was not re-examined - page 199. Again, because of the desultory manner in which MrNgevao was conducting the trial, SHOWERS, JA had cause to close the Appellants' case, on the application of MrMargai on 30 May,2012.
14. The Respondent gave evidence beginning 17 October,2012 and it is recorded at pages *208 - 210*. At page *209*, whilst being cross-examined by MrNgevao, the Respondent said that his mother died in October,2006 and that she was 94 years at the time. She was 93 years old in 2005 when she executed the Voluntary conveyance in his favour, and was still active. The 1st Appellant was his sister and had been living in the house, together with her children and without paying rent to him, and had not done so even after the property was conveyed to him. He said also that he had told the 1st Appellant and the other tenants that he had sold the property to MrNazzal.
15. After the Respondent had concluded his testimony, MrNgevao sought the leave of the Court to re-open his case, and to call two witnesses - page *210*. Leave was granted. Their separate testimonies are recorded at pages *211 - 213*.

ISSUES FOR DETERMINATION IN THE APPEAL

16. It seems to this Court that the issues in this appeal are as follows:

i. Whether the Will of the testator created an entail? And if so, how should the Court interpret it in view of the Rule in Wild's case?

ii. And also, if the Will indeed created an entail, whether Hawanatu Carew had by the conveyance made in favour of the Respondent barred the entail? And if she had done so, was her action enforceable by the Courts?

iii. Alternatively, were the words used in the Will, to wit, "*.....I give and devise all that my house and land situated at No. 40 Goderich Street, Freetown aforesaid wherein I now reside to my daughter Hawah Carew and her heirs and assigns forever*", a devise to Hawah Carew absolutely, or, to her and her children as joint tenants, or, as tenants-in-common? Were the words, "*...her heirs and assigns...*" words of limitation and/or words of purchase?

iv. Was there any evidence that Hawanatu Carew did notsign the deed of conveyance to the Respondent? Could her thumbprint on the said deed be rendered null and void because there was no illiteracy clause in the deed?

v. Was MrNazzalan innocent purchaser for value, and should the conveyance to him have been upheld by the Court below?

WHETHER WILL CREATED AN ENTAIL AND THE RULE IN WILD'S CASE

17. Section 28 of the Wills Act,1837 which still applies in this jurisdiction by virtue of Section 74 of the Courts' Act,1965, states:

28." *Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear in the will."* Whether we consider the words used by the testator in the Will under review to be words of purchase or, of limitation, it is clear, that in view of the plain words of Section 28, the fee simple estate did not pass to Hawanatu Carew. If the words used by the testator were construed as words of purchase, such a construction would inure to the benefit of the Appellants and their brother, the Respondent, together,

as they would clearly be considered as beneficiaries; and if the same words were construed as words of limitation, section 28 would apply.

29. Moving on to the principal issue of whether an estate tail was created, and what its effect was, we must first turn our attention to HALSBURY'S LAWS OF ENGLAND, 4th edition at pages 454 -455, paragraph 616, under the rubric "*Estates Tail*". There the Learned Editors state the Law, prior to 1926 as follows:

"Before 1 January,1926 an estate tail could exist in real estate only; it could be created by will by the same words which were effective for this purpose in a deed, namely by the words "heirs of the body" or other words expressly or impliedly denoting heirs to issue from the body of the donee, or, by the expression "in tail" which was allowed as an alternative by statute. In a will, however, greater latitude was allowed than in a deed, and an estate tail might also be created by words, such as 'sons' or 'issue', indicating descent from the body of the donee. Accordingly, a devise by the owner in fee simple to the donee and his heirs male or to him and his heirs female.....formerly created an estate in fee tail.....and many words descriptive of descendants were capable in a will of being words of limitation. Thus, 'first and every son' or 'children' might be taken as words of limitation if it was necessary to give them that construction in order to effectuate the testator's intention, although ordinarily speaking they were words of purchase; and similarly in the case of 'son', 'eldest son', 'eldest male issue' or 'family'. 'Issue', 'descendants' and posterity were more easily susceptible of such a meaning. If such words included not only persons who were heirs by lineal descent but also person who could only be collateral heirs, the estate was a fee simple; but if they comprised only persons who were heirs by lineal descent, the estate taken was an estate tail, the stock of descent being chosen so as to include all the members of the family intended to take."

30. The devise as we have seen in this case, was to lineal descendants, the children of Hawanatu Carew. Clearly, an estate tail had been created by the testator in this case, and Hawanatu Carew was not entitled to the fee simple estate. When a fee or estate tail is created, on the death of the person immediately entitled, the property immediately devolves to the

lineal descendants of that person, but does not pass to collaterals. The fee tail was brought into existence after the passing into law by the Barons of the Statute De BonisConditionalibus in 1285. In order to defeat the purpose of the fee tail, the initial beneficiary of the devise, in this case, Hawanatu Carew could have executed a disentailing assurance thus barring the entail. This she could have done pursuant to the Fines and Recoveries Act,1833 which is still Law in Sierra Leone.

WILD'S CASE (1599)

31. Moving on to WILD'S CASE (1599) 6 Co Rep 16b, 17a, the Court in that case decided, to cite WILLIAMS, "THE LAW RELATING TO WILLS" 2nd Edition, at pages 540 - 541, that:

" Where there was an immediate devise of real estate to a person and his children, and he had at the date of the will no child, then, prima facie, the word 'children' was taken to be a word of limitation and the named person took an estate tail; but the context might show that the unborn children were to take as purchasers. On the other hand, if he had a child or children at the time of the devise, then the will was prima facie construed as a giving a joint estate to him and his children as purchasers, but even in the latter case the context might show that the word was a word of limitation and that an estate tail was intended, or, that the children took in succession to their parents and as purchasers..... The rule applied only where the testator had not sufficiently indicated his intention and the Court always considered itself at liberty to disregard it in both its branches where an adherence to it would have defeated the intention shown by the will as whole."

This view is also concurred in by the Learned Editors of the edition of HALSBURY'S LAWS cited above at paragraph 621.

32. It is our view, and on reading of the authorities we have cited that this rule should have been applied by the Learned Trial Judge to the devise in the testator's will, as, based on the evidence led at the trial, the Appellants had already been born before the testator died. It follows also that our answer to the second question we have posed above is that Hawanatu Carew had not legally or sufficiently barred the entail so as to

deprive the Appellants of their inheritance. If that had been her intention, she would have executed the requisite disentailing assurance before purporting to convey the property in question to the Respondent.It follows also, that our answer to the third question posed above is that Hawanatu Carew and the Appellants and the Respondent, took the property as joint tenants. She could not therefore by herself, alienate the whole of the property in favour of the Respondent only.

33. In effect, we do not share the view expressed by Counsel for the Respondent at paragraph 15 of page 4 of his written closing address as to the state of the law relating to the meaning of a devise to "*A and his heirs*".

34. We agree with him however that as fraud was not specifically pleaded by the Appellants at in the lower Court, it ought not to have been considered by that Court. In the event, on this vexed issue of whether Madam Carew was fully aware of what she was signing away, the Appellants were, in effect, raising a plea of "*non est factum*".The Learned Trial Judge, (see pages *229 - 231*), dismissed the Appellants' arguments in favour of the conclusion suggested by Respondent's Counsel.

MEANING OF "ISSUE"

35. In GEORGE & 4 OTHERS v GEORGE]1964 66] ALR SL, 480 HC, COLE, Ag CJ came to a similar conclusion, as we have also come to, in construing the meaning of the word *"issue"* in the will of the testator in that case, William George, and the effect of the use of that word. At page 480 of his judgment, the Learned Judge had this to say: " *The general rule is that the word "issue" in a will prima facie means the same thing as heirs of the body and is to be construed as a word of limitation, but this prima facie construction will give way if there be sufficient on the face of the will to show that the word was intended to have a less extended meaning and to be applied only to children.....in the context of the will of the testator with particular reference to cl. 11 the word "issue" is a word of purchase and not one of limitation.....*"

ALLEGED ILLITERACY OF HAWANATU CAREW

36. Turning to the fourth question posed above, the Appellants have themselves raised the issue of Hawanatu Carew's illiteracy. In IN THE ESTATE OF ABOUD (DECEASED), BLELL v LEWIS & ANOTHER, [1972 - 73] ALR SL, 157, judgment of AGNES MACAULAY, J (as she then was) at pages 158 - 161, the Learned Judge struck down a will which had been executed by an illiterate, but she did so not only the ground that the testator had been an illiterate, but also because the maker of the will, Moses Lewis had not appeared to her to understand the meaning of words used in the will.

37. In JOINT VENTURE CONSTRUCTION COMPANY v CONTEH AND OTHERS [1970 -71] ALR SL 145 CA, TAMBIAH, JA did not think that failure to comply with the requirements of Cap 104 was fatal to the case of someone relying on due execution of an agreement - see page 153 of his judgment. In view of the conclusion we have reached, we do not think it is necessary to decide the issue of Hawanatu Carew's illiteracy. She had no legal right to execute the conveyance in favour of the Respondent as the property was not hers to dispose of without first taking certain legal steps.

WHETHER MR NAZZAL IS A BONA FIDE PURCHASER FOR VALUE

38. The fifth question we have posed above deals with the position of MrNazzal who bought the property from the Respondent whilst the trial was ongoing, and whilst an Injunction against disposing of the property was in force. Was he really an innocent purchaser for value as argued by his Counsel? We must examine the facts to see whether they support this contention. The Learned Tria! Judge was rather brief on this issue. She adverted to it at the tail end of her judgment at page 233 with these words:

"*...Indeed, there is evidence that he has sold the property to a bona fide purchaser for value in the person of HASSAN NAZZAL. See deed of conveyance to that effect, Exh H. The said purchaser has acquired a good title to the said property.*"

She did not explain how she came to this conclusion. So, we must examine what evidence she had before her, before coming to a decision as to

whether there was sufficient evidence before her to come to that conclusion.

39. First, we have the application dated 19 November,2008 filed by the Appellants seeking an injunction restraining the Respondent from alienating the property. That Application was only decided, and in favour of the Appellants on 2 April,2009, after the property had been sold.

40. Next we have the evidence of the 1st Appellant, as PW1. Under cross-examination by MrSesay at pages 182 -183 she explained that MrNazzal was a tenant of her mother, Madam Carew. At page 198, whilst being cross-examined by Mr R B Kowa, who had taken over as Counsel for the Respondent, she said, among other things that "*MrNazzal did not know anything about the deed of gift....*" In other words, he did not know that the property belonged to the Respondent. This was evidence elicited during cross-examination.MrNazzal did not give evidence. It follows that there was no evidence before the Court that he had no knowledge of the history of the property, or that he was unaware that the Appellants were also contending that they were part owners of the property. We do not know whether he made any enquiries to ascertain the status of the property before buying it. The cases show how the Courts should deal with the issue of how to determine that a purchaser is innocent and is without notice. The authorities were exhaustively examined by this Court, BROWNE-MARKE, ROBERTS, ADEMOSU, JJA in Civ App 50/2007, AHMED v BAH, Judgment delivered 20 February,2010. This is what I said whilst giving judgment, a judgment in which the other Justices concurred:

41. Paragraphs 37 - 40:

"Section 3(1) of the Conveyancing and Law of Property Act,1882 (and not the 1881 Act as cited by MrTejan-Cole) which is part of the adopted Law of Sierra Leone by virtue of Schedule to Chapter 18 of the Laws of Sierra Leone,1960 provides that: " 3(1) A purchaser shall not be prejudicially affected by notice of any instrument, fact or thing unless - (i) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or (ii) in the same transaction with respect to which a question of notice to the

purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent." Clearly, this provision attributes constructive notice to the purchaser. The subject of the notice need not be a Deed or registerable Instrument as in the case of equitable charges registered as Land Charges under the English Land Charges Act,1925. It could be a fact or thing, and not necessarily an instrument. The facts of this case show, that at the time the purchase price was paid in full by the Respondent, she had not made the proper inquiries as to the status of the property, to wit, whether there was any equitable right binding the 5th Defendant to another person. It follows that, the Respondent cannot lawfully or factually claim that she was a bona fide purchaser for value without notice. That being the case, and the LTJ having so found, and having found also, that as of 17th June,1995, the 1st Defendant had an enforceable right to have a Deed executed in his favour, it is my Judgment, that she should have found that the Respondent could not then be entitled to possession of the property, as she had been in a position where she could have found out, that the 5th Defendant had no beneficial interest to convey to her.

In SNELL'S PRINCIPLES OF EQUITY 27th Edition, page 50, the Learned Editors have this to say about Notice under the rubric '".Constructive Notice': "(a) The general principle is that a purchaser will be treated as having constructive notice of all that a reasonably prudent purchaser would have discovered. Constructive notice has been said to be "in its nature no more than evidence of notice, the presumptions of which are so violent that the court will not allow even of its being controverted. There are two main heads of constructive notice, namely:- (i) those where the purchaser had actual notice that the property was in some way encumbered.....and (ii) those where the purchaser has, whether deliberately or carelessly, abstained from making those inquiries that a prudent purchaser would have made." This case, contrary to the assertions and submissions made by Mr Jenkins-Johnston, is not about whether 5th Defendant had a Deed in his possession showing that he was the owner of the property; or that the Deed was

properly registered; or that the survey plan in the Deed was duly authorised by the Director of Surveys and Lands; but whether, if Respondent has taken the proper steps, she would have found out that 5th Defendant was no longer the beneficial owner of the property. The only way she could have found this out, would have been to visit and inspect the property, as she eventually did, after paying for the same.

HUNT v LUCK (1902) 1900-1903 All ER Reprint 295, cited by Counsel on both sides, is a case in point. There, VAUGHAN-WILLIAMS,LJ in the Court of Appeal, said at page 297 para E: "..if there is a purchaser or a mortgagee and he has notice that the vendor or mortgagor is not in possession, he must make enquiries of the tenant in possession and find out from him what his, the tenant's rights are, and, that if he does not choose to do so, then, whatever title he gets as purchaser or mortgagee, that title will be subject to the title of the tenant in possession." Later, the Learned Judge points out at page 298 that ..In my judgment the only inquiry which ought reasonably to have been made here by the intending mortgagee was an inquiry to protect himself against any right which the tenants would have in the subject-matter of the mortgage. I do not think that there is, for the purpose of ascertaining the title of the vendor, any obligation whatsoever to make these enquiries of the tenant in reference to any other thing but protection against the rights of the tenant." There, the Court recognised that the raison d'etre for the inquiry, was not to find out the status of the vendor's title, but to ascertain the rights of the tenants. This is exactly what the Respondent did, but only after, after she had paid the purchase price to the 5th Defendant. She did not have to go to the house to find out whether 5th Defendant had title to the property, but rather, to find out whether there were tenants there, and what those tenants' rights were. It appears,Mr Jenkins-Johnston has missed this fine distinction at page 11 of his synopsis.

Further, STIRLING,J had this to say in BAILEY v BARNES [1894] 1 Ch 25 at page 31. Citing LORD CRANWORTH in WARE v LORD EGMONT 4 D.M.&G 460,473, he said: "But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired, but also, that he ought to have acquired, the notice with which it is sought to affect him- that he

43. Further, when the conveyance to the Respondent is put side by side with the conveyance to MrNazzal, it becomes clear immediately, that sufficient enquiries could not have been made by MrNazal before he purchased the property. In the deed of gift, it is recited only that Madam Carew had been well and sufficiently in possession of the property before the date of the deed. But in MrNazzal's conveyance the history of the property going back to 1899 is recounted. It recites also that he had been a tenant of Madam Carew since 1990. Where did all this information come from since it had not been recorded in the earlier deed, one may ask? And according to the 1st Appellant, she had been living on the property all this while.

STATUS OF PW2 - ALHAJI MODU FREEMAN

44. We have also considered the Respondent's argument that AlhajiModu Freeman, PW2 had no right to have instituted the action on behalf of the 2nd Appellant since no power of Attorney was tendered in Court. That may be true; but the 1st Appellant did not require one. In view of the conclusion we have reached it was not absolutely necessary that the 2nd Appellant be a party to the proceedings in the High Court. Irrespective of whether he was a party or not, he would have benefitted from the outcome, had the judgment gone in favour of his sister and himself. We do not think this argument has much merit.

45. Before Iconclude this judgment, I must mention that during my researches, I came across the judgment of O B R TEJAN, J in IN RE TURAY, TURAY v CAREW [1972 - 73] ALR SL, 177, HC. The Plaintiffs in that case were the brothers of Hawanatu Carew, the deceased mother of the parties to this appeal; she was the Defendant in that case. The Plaintiffs therein had brought caveat proceedings against her, contending that the will which is the subject matter of this appeal as well, had not been executed by their deceased father. The issue of res judicata was raised by Mr Francis Minah, Counsel for Madam Carew. He contended, as recorded by TEJAN, J (later, JSC) at pages 190 -191 of his judgment, that my late father, N E BROWNE-MARKE, J, (later, JSC) had presided over the same issue in an earlier trial which had gone on to the Court of Appeal but which is unreported. At page 191, TEJAN, J said, inter alia:

"Browne-Marke, J made it quite clear in his judgment that he did not determine the question of validity of the will although the question was raised in the pleadings. In such event, I think the plea of res judicata fails." At the end of his judgment, he (i.e. TEJAN, J) had this to say at page 192: *"...I will give judgment for the plaintiff, and I make the following order: (a) that the will dated March 10th, 1952 and produced in this case be declared invalid; (b) that letters of administration be granted to the first plaintiff to administer the estate of the late Kabba Turay (deceased)late of 40 Goderich Street, Freetown, and (c) that each party pay his or her own costs. Order accordingly."*

46. The conclusions reached by TEJAN, J on the supremacy of muslim law over a testator's testamentary dispositions at page 189 LL3 - 31, have been swept away since the passing of the Muslim Marriage (Amendment) Act, 1988. As this authority was not cited by Counsel during the course of argument, nor by the Court, it cannot form the basis of the judgment of this Court. Further, we do not know what the outcome was in the event that there was an appeal. But it shows that as far back as nearly 45 years ago, a very Learned Judge had cast doubts on the authenticity of the testator's will and of the bona fides of the Madam Carew.

47. In the result, this Court Orders as follows:

I. The Appellants' appeal to this Court is allowed, and the Judgment of The HonourableMrs Justice A SHOWERS, dated 26 March,2013 is set aside.

II. The Deed of Gift dated 21 June,2005 and duly registered as No.203 at page 62 in volume 107 of the Record Books of Voluntary Conveyances kept in the office of the Registrar-General, Freetown is hereby cancelled and annulled and this Court Orders, consequently, that it be expunged from the said Record Books.

III. The Deed of Conveyance dated 31 December,2008 and duly registered as No.16/2009 at page 122 in volume 647 of the Record Books of Conveyances kept in the office of the Registrar-General, Freetown is hereby cancelled and annulled and this Court Orders, consequently, that it be expunged from the said Record Books.

IV. The Appellants and the Respondent being the sole surviving heirs of Hawanatu Carew are hereby declared the fee simple owners of the property at 40 Goderich Street, Freetown as tenants-in-common.

V. The Respondent shall render an account of all income received in respect of the said property with effect from the date of death of Hawanatu Carew to the date of this Judgment.

VI. The Appellants shall have the Costs of this appeal and of the trial of the action in the Court below. Any Costs paid to the Respondent shall be refunded by him forthwith to the Appellants.

THE HONOURABLE MR JUSTICE N C BROWNE-MARKE
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MR JUSTICE E E ROBERTS
JUSTICE OF THE SUPREME COURT

THE HONOURABLE MRS JUSTICE N MATTURI-JONES
ACTING JUSTICE OF THE SUPREME COURT