BANGURA *v.* DAVIES and SHORUNKEH-SAWYERR

SUPREME COURT (Bankole Jones, C.J.): May 19th, 1964
(Civil Case No. 284/63)

[1] **Succession—wills—ascertainment of intention—exact measurement of land not required where testator a lay person:** Where a specified area of land is devised by a lay person and there is no evidence that he scrupulously measured it the area in the will will be construed to mean that specified area more or less (page 56, lines 9–17).

[2] **Succession—wills—ascertainment of intention—will speaks from death unless contrary intention appears:** A devise of the property in which a person is "at present living" will be deemed to show an intention that the will should speak from the time it was made rather than, as is the usual rule, from the date of the death of the testator, and will be interpreted as referring to the premises in which the person was living at the time of the making of the will (page 55, line 34—page 56, line 4).

The plaintiff brought an action against the defendants, executors of the estate of the testatrix, seeking an order to compel the executors to execute a conveyance of land devised to him by the testatrix and also an account of rents and profits due.

The testatrix devised by will in fee simple to the plaintiff four lots of land "in which he is at present living." A codicil revoked the devise and substituted a life interest in the "said" land.

At the time the will was made the plaintiff was living in Areas 1 and 2 of a farm, totalling four and one half lots. Later he moved to Area 4 of the farm which was three and one half lots in size, and was living there at the time of the death of the testatrix.

The plaintiff brought the present proceedings to compel the executors to execute a conveyance of the land devised to him and for an account of the rents and profits due in respect of the premises from the death of the testatrix to the time the premises would be conveyed to him, on the footing of wilful default. The plaintiff contended that it was the intention of the testatrix that he receive the land on which he had been living at the time the will was made.

The defendants contended that the land devised to the plaintiff was Area 4 as the will spoke as from the date of death.

Statute construed:

Wills Act, 1837 (7 Wm. IV & 1 Vict., c.26), s.24:
The relevant terms of this section are set out at page 55, lines 12–16.

D. E. Luke for the plaintiff;
McCormack for the defendants.

BANKOLE JONES, C.J.:

Edith Florence Jarrett hereinafter called "the testatrix," made and executed her last will and testament on November 21st, 1957 and later made and executed a codicil to this will on August 14th, 1959. The testatrix died on December 21st, 1961 in Freetown and on August 20th, 1962, probate with the will and codicil annexed was granted to two of the executors named in the said will, namely the defendants in this case.

Paragraph 3 of the will reads as follows:

> "I give and devise unto my farm-man, Santigie Bangura (otherwise known as Santigie Bangurah Jarrett) of Brewah Country (Limba) who has been a faithful servant to my family four (4) lots of land with the buildings thereon erected in which he is at present living at Blackhall Road, in Freetown aforesaid and commonly known as Jarrett's Farm absolutely forever."

Paragraph 3 of the codicil reads as follows:

> "*Whereas* by my said will I gave and devised unto my farm-man Santigie Bangura four (4) lots of land with the buildings thereon erected in which he is at present living at Blackhall Road in Freetown aforesaid and commonly known as Jarrett's Farm absolutely forever now *I hereby revoke* such devise and instead give and devise the said four lots of land to the said Santigie Bangura for the term of his natural life and after his death to the children born to him by his first wife absolutely as tenants in common."

It seems clear that the quantum of the devise in the will remained unchanged in the codicil but the nature of the devise to Santigie Bangura changed from one in fee simple absolute to one of an estate in life tenancy with remainder over to his children born to him by his first wife absolutely as tenants in common. In paragraph 4 of the will the testatrix directed her executors to dispose of or sell certain real properties belonging to her and situate in Freetown including: "All that my remaining lots of land and hereditaments in Jarrett's Farm and that the proceeds arising therefrom should form part of my personal estate."

The plaintiff is Santigie Bangura, the person mentioned in both the will and codicil and he claims, among other things, firstly, an

order for specific performance compelling the executors to execute an effective conveyance of the four lots of land with the buildings thereon devised to him, and secondly an account of the rents and profits due to the plaintiff in respect of these premises from the death of the testatrix to the time the said premises are conveyed to him, on the footing of wilful default. The plaintiff's first claim, as I understand it, was made on the footing that there was no codicil. But there was one and this was not disputed.

It is conceded that the plaintiff is a beneficiary under the will and the codicil. What is contended is the identity of the land described as—"four (4) lots of land with the buildings thereon erected in which he [Santigie Bangura] is at present living at Blackhall Road in Freetown aforesaid and commonly known as Jarrett's Farm." Now, "Jarrett's Farm" comprises far more than four lots. A plan (Exhibit A), put in by consent of both parties shows an area marked "1 and 2" respectively measuring four and one half town lots and another area marked "4" measuring three and one half town lots. The area marked "1 and 2" contains a shop and a concrete building and abuts on to Blackhall Road. "Area 4" contains a building and some outhouses and is about a hundred yards further away from Blackhall Road.

The plaintiff's case is that he was the farm-man of the testatrix and had lived on the farm since 1914 in a house which was just outside Area 1, numbered 2 Blackhall Road, and formed part of "Jarrett's Farm." A few years before the death of the testatrix this house was demolished and a petrol filling station was in the process of erection. The testatrix offered him alternative accommodation in a building in Area 2, but because of the dangerous works operation in erecting the petrol filling station nearby, he refused the offer. Whereupon the testatrix built him a house in Area 4 where he now still lives. This house is numbered 2B Blackhall Road. He swore and received support for this that whilst he was living at 2 Blackhall Road the testatrix called him one day and told him that she was going to leave him the area marked "1 and 2" as well as the house where he was then living, namely 2 Blackhall Road. However, before the testatrix died, 2 Blackhall Road was demolished and he went to live at the newly built house, 2B Blackhall Road.

The defendants say that the area marked "1 and 2" was not what was contemplated by the testatrix. They say that the testatrix must have contemplated Area 4 for two reasons, firstly, because on a proper construction of para. 3 of the will and para. 3 of the codicil when

read in conjunction with para. 4 of the will the testatrix devised only four lots of land and no buildings thereon to the plaintiff, and secondly, that the words—"in which he is at present living" can only mean the house in Area 4 where the plaintiff was living at the death of the testatrix because a will speaks as from the date of death. As to the first reason, there can be no support for such construction. The will and codicil speak of "four lots of land with the buildings thereon erected" and not only four bare lots. Paragraph 4 does not mention buildings. As to the second reason, Mr. McCormack directed my attenion to s.24 of the Wills Act, 1837 which reads:

> "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

He submitted that the expression "in which he is at present living at Blackhall Road" must mean 2B Blackhall Road where the plaintiff resided immediately before the death of the testatrix.

I am afraid I do not, with respect, agree with this interpretation. Paragraph 3 of the codicil up to a point repeats *ipsissima verba* para. 3 of the will, and continues as follows: *"Now I hereby revoke* such devise and instead give and devise the *said* four lots of land to the said Santigie Bangura for the term of his natural life and after his death to the children born to him by his first wife absolutely as tenants in common." [Emphasis supplied]. The words *"said* four lots of land" to my mind clearly relate to the description of land devised in the will and the fact that on the date of the testatrix's death the plaintiff was not living in the house where he was living at the date of the execution of the will does not destroy the description of the premises in the will.

I am buttressed in this view by a passage from *Jarman on Wills*, 8th ed., at 431 (1951):

> "'Another question', Mr. Jarman remarks, 'will be whether the enactment which makes the will speak from the death will have the effect of carrying forward to that period words pointing at present time. For instance, supposing a testator to bequeath "all that messuage in which I *now* reside," and that subsequently to the making of his will he changes his residence to another house belonging to him, which he continues to occupy until his death; does the Act make the word

"now" apply to the house occupied by the testator at his death? It is conceived that the principle will not be carried such a length, and that this would be considered as a case in which "a contrary intention appears by the will".'"

The court moved to the *locus in quo*. The plaintiff pointed out the area marked "1 and 2" which he had sworn the testratix showed to him as the land with the buildings thereon she was going to leave to him. He also pointed out where 2 Blackhall Road was. The court also saw Area 4 and the house where the plaintiff now resides. I do not think it is of importance that the area marked "1 and 2" measures out four and one half town lots and that Area 4 measures out three and one half town lots. The testatrix was a lay person and there is no evidence that she scrupulously measured out the plots. I construe her will to mean no more than this, that she devised to the plaintiff four lots more or less, and I have come to the conclusion that the area marked "1 and 2" measuring four and one half town lots covers that description and that that was the land with the buildings thereon devised by her to the plaintiff.

Now, there arises the question as to whether the plaintiff can be granted the specific performance sought by him. It seems to me that plaintiff's counsel was under the impression that the will was the only testamentary document in existence and that the plaintiff was entitled to a devise in fee simple. It has turned out otherwise. What then in these circumstances can the court do? I opine that it can only make a declaration, not asked for by the plaintiff but raised in para. 7 of the defendants' amended defence, that the plaintiff is entitled to a life interest in the area marked "1 and 2" in Exhibit A, and I so make the declaration and order the defendants to give effect to this declaration subject to the administration of the estate of the testatrix.

I think I must state that it is my view, from the evidence, that there are or could be sufficient assets in the estate to meet all claims so as not to delay the plaintiff from enjoying the devise made to him. I do not find that the defendants have in any way been guilty of wilful default.

On the question of accounts of rents and profits raised by the parties, I order that the Master and Registrar do hold an inquiry relating to all rents and profits accruing from Areas 1, 2 and 4 from a year after the date of the death of the testatrix and report the result to this court when final judgment on this issue will be given. The costs of both parties will come out of the estate.

Order accordingly.