ADMINISTRATOR-GENERAL v BIAKIEU

SC

SUPREME COURT OF SIERRA LEONE, Supreme Court Civil Appeal 2 of 1972, Hon Mr Justice E Livesy Luke CJ, 3 July 1973

[1] Civil Procedure – Costs – Administrator-General – Whether costs of opposing application for grant of letters of administration to deceased's brother ought to be paid by Administrator-General or out of estate – Whether errors in administration of estate – Administration of Estates Act (Cap 45) ss 6, 10(1)

[2] Government – Public officers – Whether Administrator-General liable for costs – Public policy importance of protecting public officers acting bona fides from liability – Administration of Estates Act (Cap 45) s 6

[3] Wills, Probate, Administration & Succession – Letters of administration – Muslim law – Elder brother of intestate had no standing – Necessary to prove applicant was "eldest brother" – Mohammedan Marriage Act (Cap 96) s 9(2)

On 23 December 1954, the deceased, a Muslim, died intestate owning land and was survived by her daughter. The respondent claimed that the deceased had sold the land to him some time in 1951 and that he was the owner, but the trial judge held that the respondent had failed to prove this, which was affirmed by the Court of Appeal on 23 April 1970. Thereafter, the respondent applied to the High Court for a grant of letters of administration of the deceased's estate. The Administrator-General entered a caveat, against which the respondent issued a writ claiming he was the lawful brother of the deceased. The trial judge ordered that, although the respondent was the lawful elder brother of the deceased, the letters of administration of the estate be granted to the Administrator-General, and ordered that the respondent pay costs. On 23 July 1972, the Court of Appeal reversed this decision and ordered that costs be paid personally by the Administrator-General. The main issue in this appeal was whether the Court of Appeal was correct to order the Administrator-General to pay costs personally instead of out of the estate.

Held, per Livesey Luke JSC, allowing the appeal as to costs:

1. There was no evidence to support the Court of Appeal's finding that the Administrator-General had made errors in the administration of the state. He had followed the necessary steps set out in s 10 of the Administration of Estates Act (Cap 45).

2. The respondent's claim that he was the lawful brother of the deceased under Muslim law did not entitle him to letters of administration. Under s 9(2) of the *Mohammedan Marriage Act (Cap 96) s 9(2)*, he had to prove that he was the "eldest brother" of the deceased. As such, the Administrator-General was entitled to dispute and oppose the grant of letters of administration to the respondent and enter a caveat, and entitled to his costs out of the estate.

3. Even if the Administrator-General had made errors in the administration of the estate, there was no evidence that he had acted "not only illegally, but wilfully or with gross negligence" so as to deprive him of the protection in s 6 of the Administration of Estates Act (Cap 45). Section 6 and similar statutory provisions are for the protection of public officers in the public interest. The appellant was indisputably a public officer and public policy dictates that such officers acting in the bona fide and honest performance of their actions ought to be protected from liability. To ignore this principle would be putting public officers in an intolerable and unenviable position.

4. The Court of Appeal erred in finding that the Administrator-General was "officially liable" for certain errors in the administration of the estate of the deceased, which presumably was the basis for the order for costs. Therefore the Court of Appeal's order as to costs should be set aside, and the Administrator-General's costs should be paid out of the estate. The respondent should pay his own costs. *Donald Campbell & Co Ltd v Pollak* [1927] AC 732 applied.

Cases referred to

Donald Campbell & Co Ltd v Pollak [1927] AC 732

Legislation referred to
Administration of Estates Act (Cap 45) ss 2(1), 6, 10(1), 15
Administration of Estate (Amendment) Act 1972
High Court Rules O 46 r 1
Mohammedan Marriage Act (Cap 96) s 9(2)

Appeal
This was an appeal by the Administrator-General against an order for costs made by the Court of Appeal in relation to an action by the respondent, Alhaji Abdul Wahid Biakieu, who claimed that he was the owner of property which belonged to the deceased, who died intestate. The facts appear sufficiently in the following judgment of Livesy Luke JSC.

Mr Cyrus Rogers-Wright for the appellant.
Dr WS Marcus-Jones for the respondent.

LIVESY LUKE JSC: This is an appeal against an order as to costs only. It will however be convenient at the outset of this judgment to give a brief history of this case.

Kultumi Abayeh died intestate on 23 December 1954 seised in fee simple in possession of a house and land situate and known as 27 Dan Street Freetown, and survived by a legitimate and only child Zainabu Fatmata Sankoh. Kultimu Abayeh (hereafter referred to as "the deceased") was a Mohammedan. At the time of the death of the deceased, Zainabu Fatmata Sankoh was an infant. The respondent in this appeal, Alhaji Abdul Wahid Biakieu is the brother of the deceased and on the death of the deceased he became the guardian of Zainabu Fatmata Sankoh and he took possession of the property. Sometime after Zainabu Fatmata Sankoh had attained her maturity, she asked the respondent to give her possession of the property, but he refused. Thereafter sometime in 1969, Zainabu Fatmata Sankoh issued a writ of summons against the respondent claiming, inter alia, a declaration that the deceased died seised of the said property in fee simple in possession of the said property. In his defence the respondent denied that the deceased died seised of the said property in fee simple and alleged that the deceased had sold the property to him sometime in 1951 and he counterclaimed for a declaration that he was the fee simple owner of the property having bought it from the deceased for £800 (Le1600). The trial judge dismissed the claim of Zainabu Fatmata Sankoh on the ground that the property of the deceased vested in the Administrator-General by virtue of s 2(1) of the Administration of Estates Act (Cap 45) and not in Zainabu Fatmata Sankoh, and therefore she was not entitled to sue for recovery of possession. The trial judge also dismissed the counter claim on the ground that the respondent had failed to prove the alleged sale of the property to him.

Both Zainabu Fatmata Sankoh and the respondent appealed to the Court of Appeal against that decision. The Court of Appeal consisting of Dove-Edwin (Acting) P, Marcus-Jones JA and Thambiah JA delivered judgment on 23 April 1970 dismissing both appeals.

Dealing with the appeal of Zainabu Fatmata Sankoh, Dove-Edwin (Acting) P said, inter alia:

> "I agree with the learned judge's decision. This matter should have gone to the official administrator in the first place and the plaintiff was wrong in suing as she did. The fact that she is a Mohammedan did not alter the position in my opinion. I would dismiss her appeal holding that the matter be taken up by the Administrator-General".

Inter alia:

> "In my view, the respondent's counter-claim must fail on the evidence which he produced. He relies to a great extent on a document marked Exhibit B5. This document is a receipt which the defendant claimant suggested he got from the deceased when he bought the property in Dan Street. It was supposed to be signed by the deceased who made her thumb mark on it. The judge believed that at the time the receipt was made the deceased could sign her name. An important witness whose name appears on Exhibit B5 and was said to be alive and somewhere in Sierra Leone was not called … he (i.e., the respondent) was in the position after the plaintiff's mother died to take over all the properties available, that is deeds, etc, and no one was in a position to

challenge him. There is evidence that he took more than decent advantage of his power over his own niece by his relationship with her."

In his judgment Tambiah JA said, inter alia:

"The learned judge in a careful judgment has chosen not to accept the defendant's version that there was a sale of this property to him by Kultumi Abayeh. He has held that the property forms part of the estate of the deceased. In other words the learned judge has held that the receipt is a forgery although he has used euphemistic language."

It would appear that in the same month that the Court of Appeal judgment just referred to was delivered (i.e., April 1970) Zainabu Fatmata Sankoh gave written information to the Administrator-General, in accordance with s 10(1) of (Cap 45), that her mother Kultumi Abayeh (the deceased) had died intestate leaving her estate within the jurisdiction of the court.

Sometime thereafter (the records do not disclose when) the respondent applied to the Master and Registrar of the High Court for the grant of letters of administration of the estate of Kultumi Abayeh. The Administrator-General thereon entered a caveat. As a result of the entry of the caveat, the respondent issued a writ of summons against the Administrator-General on 5 November 1970 and estate of Kultumi Abayeh. In his statement of claim the respondent averred that he was the lawful brother of the deceased according to Mohammedan law and that Zainabu Fatmata Sankoh was the illegitimate daughter of the deceased and therefore that she had no interest in the estate. In his defence the Administrator-General disputed these averments and denied that the respondent had any right or prior right of administration to him. The Administrator-General also counterclaimed for a grant to him of letters of administration to administer the estate of the deceased. The administration action was tried by Ken During J and the judgment of the Court of Appeal delivered on 23 April 1970 was tendered in evidence at the trial. The learned judge delivered judgment on 30 November 1971. In his judgment the learned judge found that the respondent "was the lawful elder brother of the deceased."

The learned judge held that "the Court had a discretion in granting letters of administration of the estate of the deceased, in law, equity, inherently and on the grounds of public policy." In exercise of that discretion he refused a grant of letters of administration to the respondent and ordered that letters of administration of the estate be granted to the Administrator-General on application to the High Court. As a result the learned judge dismissed the respondent's action with costs and ordered that the respondent pay the costs of the counterclaim.

On 24 February 1972 the respondent lodged an appeal against the decision of Ken During J. The appeal was heard by the Court of Appeal on 13 and 14 June 1972.

At the close of arguments by counsel, the court, there and then, made an order allowing the appeal and adding 'the court will give its reasons later when counsel will be heard on costs."

The Court of Appeal gave its reasons for its decision on 23 June 1972 and also made an order in these terms:

"Costs to be paid by the Administrator-General personally on solicitor and client basis here and in the court below."

It is against that order that the Administrator-General has appealed to this court. On 10 October 1972 the Court of Appeal granted the appellant conditional leave to appeal and on 3 November 1972 that court granted him final leave to appeal.

The main issue in this appeal is whether the Court of Appeal was right in ordering the appellant to pay costs personally instead of out of the estate. In their judgment the Court of Appeal said, inter alia:

"In the process of the administration of the estate of a deceased intestate of the Mohammedan faith, one Kultumi Deen (nee Abayeh), arose a series of errors for which we hold the respondent officially liable."

The person there referred to as respondent is the present appellant. I have searched the record for any evidence to support this statements by the Court of Appeal. I regret to say, with respect, that my search has been in vain and that there is no evidence to support or warrant such a bold assertion by the Court of Appeal. Indeed, in my opinion, the evidence is to the contrary. It is pertinent to recall that the appellant was informed by Zainabu Fatmata Sankoh that Kultumi Abayeh had died intestate leaving estate within the jurisdiction of the court. The machinery for obtaining an order for a grant of letters of administration of the estate of the deceased was thus set in motion. Section 10 of (Cap 45) sets out the steps to be taken by the Administrator-General after receiving the prescribed information. It is not necessary for the purposes of this judgment, to reproduce the section, but suffice it to say that it provides that the Administrator-General shall serve notice on the widow or widower, next-of-kin and others and publish the notice in the Gazette and any other public paper calling upon the widow or widower and next-of-kin etc. Within one month of such service or publication to show cause why an order should not be made for him to administer the estate, and if no cause is shown to the satisfaction of the High Court within one month, the Administrator-General shall petition the High Court for an order granting him letters of administration of the estate.

It was after the appellant had received the said written information and the machinery for obtaining a grant by him had been put in motion, that the respondent applied for a grant to him of letters of administration of the estate of the deceased. According to s 9(2) of the Mohammedan Marriage Act (Cap 96), the respondent was only entitled to a grant of letters of administration in preference to the appellant if he was:

(a) the eldest son of the intestate if of full age, according to Mohammedan Law, or

(b) the eldest brother of the intestate, if of full age according to Mohammedan Law."

The respondent claimed to be the lawful brother of the deceased according to the Muslim law. It is patently clear that such a claim by the respondent did not entitle him to grant of letters of administration of the estate of the deceased. According to s 9(2) of (Cap 95), to be entitled to a grant of letters of administration, the respondent had to prove that he was the "eldest brother" of the deceased and not only merely that he was the "lawful brother of the deceased." Therefore, in my opinion, on the basis of the claim of the respondent alone, if on no other ground, the appellant was entitled and justified to dispute and oppose the grant of letters of administration of the estate of the deceased to the respondent. And in addition, the Court of Appeal had said in a considered judgment delivered on 23 April 1970, inter alia:

> "This matter should have gone to the Official Administrator in the first place and the plaintiff was wrong in suing as she did. The fact that she is Mohammedan did not alter the position in my opinion, I would dismiss her appeal holding that the matter to be taken up by the Administrator-General."

Without going into the question of whether or not the judgment of the Court of Appeal constituted sufficient written information under s 10(1) of (Cap 45), the Court of Appeal by the above quoted statement and other statements in the judgment, had clearly indicated that the appellant was entitled to letters of administration of the estate of the deceased in preference to the respondent.

In the circumstances, I am of the opinion that the appellant was justified in entering a caveat to a grant of letters of administration to the respondent, if for no other reason that it was necessary for the respondent to prove to the satisfaction of the court that he was the eldest brother of the deceased according to Mohammedan law and thereby entitled to a grant of letters of administration for the estate of the deceased in preference to the appellant.

It was contended by counsel for the respondent that the order appealed against is justifiable on the ground that the appellant was guilty of culpable neglect of duty by his failure to investigate adequately or at all the respondent's claim or entitlement to a grant. But what was the respondent's status which he claimed entitled him to a grant? It was, as stated in paragraph 1 of the statement of claim, that he was the "lawful brother according to Mohammedan Law and one of the persons entitled to share in the estate of Kultumi Deen (nee Abayeh) etc." Is this claim one that deserves investigation? In my opinion, it is not, for the simple reason that the proof of such a claim would not

entitle the respondent to a grant of letters of administration under s 9(2) of (Cap 96). And even assuming that the appellant investigated the claim and found it to be true, the appellant would still be justified in resisting the claim to a grant of letters of administration because, as I have said before, the proof of such a claim would not entitle the respondent to a grant of letters of administration. In my judgment the finding of the learned trial judge that the respondent was "the elder brother" and not the oldest brother of the deceased indicated the appellant's action in challenging the claim of grant of letters of administration by the respondent. Indeed there was no evidence before the learned judge that the respondent was the oldest brother of the deceased and Dr Marcus-Jones, learned counsel for the respondent, conceded that before us.

In view of the forgoing I am of the opinion that the appellant was not liable officially or otherwise for errors, if indeed there were any, which might have been committed in the administration of the estate of the deceased.

But even if the appellant had been guilty of errors in connection with the administration of the estate of the deceased, could he be held personally liable? Counsel for the respondent answered this question in the affirmative, referring to s 6 of (Cap 45), the relevant part of which (as amended) provides:

> 6. Neither the Administrator and Registrar-General nor any agent shall be personally liable to any person in respect of assets in the possession at the time of his death of any person, whose estate shall be administered by the Administrator and Registrar-General and generally neither the Administrator and Registrar-General nor any agent shall be liable for any act done bona fide in the supposed and intended performance of their duties, unless it shall be shown that such act was done not only illegally but wilfully or with gross negligence.

Dr Marcus-Jones submitted that the appellant had acted mala fides, wilfully and with gross negligence.

I, for my part do not think that his submission has any merit because there is no evidence that the appellant acted "mala fides or wilfully or with gross negligence." The submission also ignores the very important words in the section "not only illegally." In my judgment, if the Administrator-General has done any act wilfully or with gross negligence but bona fides, in the supposed and intended performance of his duties, he is not personally liable unless he had also acted illegally. Similarly, if he has acted illegally, he is not personally liable unless he had also acted wilfully or with gross negligence.

There is no evidence and indeed no suggestion by counsel for the respondent that the appellant acted illegally. In my opinion, s 6 of (Cap 45) and similar statutory provisions are for the protection of public officers in the public interest. The appellant was indisputably a public officer and public policy dictates that such officers acting in the bona fide and honest performance of their actions ought to be protected from liability. To ignore this principle would be putting public officers in an intolerable and unenviable position.

It was suggested on behalf of the respondent that the appellant should be made personally liable for the costs because there was some irregularity in his appointment as "Official Administrator." But with respect, the appellant did not appoint himself and I do not think that there is any principle of law or justice which would make him personally liable in such circumstances. If indeed there was any irregularity in his appointment, and we are not called upon to decide that issue, it has been rectified by the Administration of Estate (Amendment) Act 1972 (Act No 19 of 1972) which was made retrospective to 14 May 1964. The Amendment Act substituted the words "Administrator and Registrar-General" for the words "Official Administrator" wherever the latter words appear in the Administration of Estates Act (Cap 45) and make the Administrator and Registrar-General a corporation sole.

In my opinion the manifestly erroneous view of the Court of Appeal that the appellant was "officially liable" for certain errors in the administration of the estate of the deceased, which presumably was the basis for the order for costs, is a sufficient ground for disposing of the appeal in favour of the appellant. But Dr Marcus-Jones further contended that the Court of Appeal had

exercised a discretion in ordering the appellant to pay the costs personally and that in the circumstances this court should not interfere. I agree that as a general rule costs are in the discretion of the court. But this rule is subject to certain well-established exceptions and to the over-riding principle that the discretion must be exercised judicially. Mr Rogers-Wright submitted that by virtue of s 15 of (Cap 45), the appellant is a trustee and that he was thereby entitled to the payment of his costs out of the estate by virtue of O 46 r 1 of the High Court Rules. Section 15 of (Cap 45) as amended provides as follows:

> "The Administrator and Registrar-General and every administrator appointed under this act shall be deemed a trustee within the meaning of any Imperial Statute or local Act, now or hereafter to be in force, relating to trusts and trustees."

The relevant part of O 46 r 1 reads:

> "Subject to the provisions of any Act and these rules, the costs of and incidental to all proceedings in the High Court including the administration of estates and trusts shall be in the discretion of the Court:
>
> Provided that nothing herein contained shall deprive an executor, administrator, trustee or mortgagee who has not unreasonably instituted or carried on or resisted any proceedings, of any rights to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the law court of justice in England."

I do not think that it is disputed that the Rules of the High Court have statutory effect. Dr Marcus-Jones' contention was that the appellant acted unreasonably in resisting the claim by the respondent for a grant of letters of administration. In my opinion all the evidence points unequivocally to the conclusion that the appellant acted reasonably in resisting the respondent's claim. In my judgment therefore the Court of Appeal acted erroneously in depriving the appellant of the costs out of the estate.

I share the view that when it is shown that the Court of Appeal in dealing with costs has fallen into error on a point of law which governs or affects costs, that is sufficient ground for allowing an appeal as to costs (see *Donald Campbell & Co Ltd v Pollak* [1927] AC 732). For the foregoing reasons I would allow the appeal and set aside the order of the Court of Appeal relating to costs. I would order that the appellant's costs in this court and the courts below be paid out of the estate.

With regard to the respondent's costs, I think that the learned trial judge had ample justification on the basis of the evidence before him to deprive him of his costs out of the estate. A piece of the respondent's evidence referred to by the learned judge in the judgment is not only curious but telling.

The respondent said:

> "I am of the opinion that it is desirable for letters of administration to be granted to me instead of the Administrator-General in the light of previous court proceedings I have referred to. It is because, although I bought property from the deceased, she did not transfer the same to me that I am of the opinion that is desirable for letters of administration to be granted to me."

I, for my part, taking all the circumstances into consideration, would deprive the respondent of his costs out of the estate and order that he pay his own costs in this court and the courts below.

Reported by Anthony P Kinnear