IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: BAFFOE-BONNIE JSC (PRESIDING)
DORDZIE (MRS.) JSC
PROF. KOTEY JSC
OWUSU (MS.) JSC
PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL
NO. J4/10/2022

2ND MARCH, 2022

1. CHARLOTTE ANUM
2. GRACE ANNUM } **.... PLAINTIFFS/APPELLANTS/APPELLANTS**
3. CECILIA AKOSUA OPARE

VRS

1. THE HIGH COURT REGISTRAR, ACCRA
2. YORKE PROPERTIES
3. GOLD COAST SECURITIES
4. BINEY IMPEX LTD.
5. FATIMA YAKUBU BINEY } **DEFENDANTS/RESPONDENTS/**
6. GEORGE AFOTEY ODAI **RESPONDENTS**
7. CHRISTIANA AFORKOR
8. JOSUAH OKLE ODAI
9. HARRIET TSOTSO ODAI

JUDGMENT

DORDZIE (MRS.) JSC:-

Facts

Per a writ of summons dated 26 of August 2016 the plaintiffs instituted this action against the defendants.

By the facts averred in the statement of claim accompanying the writ, the 1st& 2nd plaintiffs & the 6th to 9thdefendants are children of Jonathan Odai-Quaye (deceased). The 3rd plaintiff is his widow.

The Plaintiffs and the 6thto 9th defendants are beneficiaries of the estate of late Jonathan Odai-Quaye. Jonathan Odai- Quaye died testate and in his will, dated 30thSeptember 1987, he devised House number 24/3 East Nukwe Djourne, Nungua to his widow and children to hold same as tenants in common.

Probate to the will was granted by the High Court Accra on 19th December 1991. The executors however failed to vest the property in the beneficiaries. By an agreement between the 6th to 9thdefendants and the 3rd to 5th defendants, the property in dispute was used to raise a loan for the benefit of the 4th defendant. 4th defendant defaulted in paying the loan. Consequently, the property was attached in execution of a judgment debt by the 1st defendant. The 2nddefendant purchased the property & was issued certificate of purchase by the High Court Accra.

The plaintiffs contend that they did not consent to the transaction between their siblings and the 3rd, 4thand 5thdefendants. No vesting assent had seen executed by the executors of their father's will. In the circumstances, the 6th, 7th, 8th and 9th defendants have no capacity to deal with the property in the manner they did.

The plaintiffs therefore instituted this action praying for the following reliefs:

i. A declaration that the property forms part of the Estate of their late father, Jonathan Odai-Quaye.

ii. A declaration that the purported use of the Property, H/No. 24/3 East Nukwe Djourne, Nungua as collateral for a loan from Gold Coast Security Ltd. to Biney Impex Ltd is null and void.

iii. A declaration that the purported sale of the Property House No. 24/3 East Nukwe Djourne, Nungua by the 1st Defendant (Registrar) to the 2nd Defendant (Purchaser)in Satisfaction of a judgment debt is null and void.

iv. An order setting aside the sale of Property House No. 24/3 East Nukwe Djourne, Nungua to the Purchaser as null and void.

v. An order that Property House No. 24/3 East Nukwe Djourne, Nungua remains partof the Estate of the late Jonathan Odai-Quaye.

vi. An order setting aside the certificate of purchase issued in favour of the purchaser

vii. General damages for trespass.

viii. Recovery of possession.

ix. Perpetual injunction restraining the defendants, their assigns, personal representatives, workmen, servants from interfering with Plaintiffs quiet enjoyment of the property.

x. Cost

The 3rd defendant entered a conditional appearance and applied to dismiss the action, on grounds that it does not disclose any reasonable cause of action, that the action is frivolous & vexations and constitute an abuse of the Court process.

Further ground for the application is that the plaintiff lack capacity to sue for no vesting assent had been executed by the executors to the beneficiaries, therefore all the children including the plaintiff have no capacity to sue in defence of the property

The High Court granted the application and dismissed the action. The plaintiffs appealed to the Court of Appeal. The Court of Appeal affirmed the High Court decision and dismissed the appeal in a judgment dated 24/1/2019. The plaintiffs are in this

Court praying that the decision of the Court of Appeal be set aside and the case remitted to the High Court differently constituted for trial on its merits.

The ground of appeal argued by counsel for the parties in their respective statements of case is that-

> "The learned Justices of the Court of Appeal erred in holding that in absence of a vesting assent in favour of the plaintiffs/appellants; the plaintiffs/appellants were precluded from commencing an instant action in the trial High Court. This occasioned a substantial miscarriage of justice.

In arguing this ground of appeal, counsel for the appellants made the following submissions: Section 96 of The Administration of Estates Act, 1961 (Act 63) does not bar a beneficiary completely from commencing an action in court to save the estate from dissipation.

Counsel made reference to order 66 R57 of C.I. 47 and argued that procedural law permits a beneficiary to apply to the court to preserve the estate without waiting for the grant of probate or L A.

The plaintiffs by this action counsel submitted is to restore the house back to the estate of Jonathan Odai Quaye.

The plaintiffs are not out to claim title in the house to themselves. The move of the appellants is in line with the concurring opinion expressed by Brobbey JSC in the case of ***In Re Okyere (deceased) (substituted by) Peprah v Appenteng & Adomaa [2012] 1 SCGLR 5***

Counsel made reference to this court's decision in the case of Adisa Boya v Zenabu Mohammed (sub. by Adama Mohammed Mujeeb) (unreported) CA. No. J4/4 4/2017 dated 14/2/2018 and the decision of the Court of Appeal in Appau v Ocansey & Anor [1992-93] GBR 850 where the view is that a person with an interest in an estate such as a beneficiary could take an action to protect an estate without necessarily being granted a vesting assent.

In his argument opposing the appeal, counsel for the 3rd respondent clanged to the strict interpretation of the provisions of the Administration of Estate Act. He argued that it is only the executors and administrators who have power to sue and be sued in respect of an estate because the executor is the one vested with that authority upon the death of the testator. Until the executor passes the interest it holds in the estate to the beneficiaries by execution of a vesting assent, the beneficiary has no authority to deal with the property.

It is further argued by counsel that the appellants have failed to demonstrate that the executors who obtain probate failed to act therefore they have taken action to protect the property.

Consideration of the Appeal by the Supreme Court

The first issue in my view, which needs to be resolved in this appeal, is - in what capacity did the 6th, 7th, 8th& 9th defendants who are beneficiaries of the estate of Jonathan Odai-Quaye deal with the property in question when they entered the agreement leading to the auctioning of the property.

The said defendants' are beneficiaries just as the plaintiffs. By the provision of section 96 (2) of the Administration of Estates Act, they have no control or authority over the estate until a vesting assent is granted vesting the estate in them.

The facts of this case as borne out by the record are that the 6th to 9thdefendants took advantage of the inaction of the executors to enter agreement with the 4thdefendant represented by the 5thdefendant allowing the property, the subject matter of the suit to be used as Collateral for a loan. There was a default in the payment of the loan by the 4thdefendant leading to the property being sold in satisfaction of a judgment debt. The 6th to 9th defendants obviously had no capacity to deal with the property the way they did. As a result of their action, the property has been lost to the estate of the deceased. Is it in the interest of justice for the court to bar other people who have interest in the property from taking steps to redeem the property? My answer is no.

The acts of the 6th to 9th defendants were an illegality which the court ought not condone. The plaintiffs are in court requesting a declaration that the said acts are a nullity and that the property must be restored to the estate of the deceased. Clearly, this action is aimed at preserving the estate of the deceased, which is being dissipated.

As rightly argued by counsel for the appellant the procedural rules on Probate and Administration matters allow a grant for the preservation of the estate until those entitled to the grant apply. Order 66 Rule 57 sub rules 1 and 3 read –

57. (1) The Court may make a grant for the preservation of the estate of a deceased before those entitled to a grant apply.

T(3) Any grant made under this rule shall be limited only to the collection and receipt of property that forms part of the estate and the doing of such acts as may be necessary for its preservation and until a grant is made to the person entitled.

This to my understanding means the court ought to be more concerned about the preservation of the estate than strict interpretation of statutory provision that allow the dissipation of the estate.

The decision of this court ***In Re Okyere (deceased) (substituted by) Peprah v Appenteng & Adomaa [2012] 1 SCGLR 5*** is a strict interpretation of Section 96 (2) of the Administration of Estates Act, 1961 Act 63 an interpretation which in the circumstances of this case works against the preservation of the estate of a deceased.

The concurring judgment of Brobbey JSC in the Okyere case sounded a caution in circumstances such as the one we are faced with in this case. A view the two lower courts totally over looked.

At page 76 of the report in the Okyere case, Brobbey JSC expressed his opinion in the following words:

> ***"The import of the judgment in this case is this: when a person dies testate or intestate, his estate devolves on the executor or personal***

representative respectively until a vesting assent has been executed to the beneficiaries or devisees; and until the grant to them of the vesting assent, the beneficiaries and devisees have no title or locus standi over any portion of the estate.

In the light of the peculiar circumstances that sometimes bedevil the administration of estates in this country, it is felt that some clarification is necessary on the interpretation of the law as given in this judgment so that we may not be taken as interpreting the law to result in absurdity. It is common knowledge that in this country some estates are dissipated by the inaction of the executors or personal representatives. Others go to waste or are lost as a result of the active misuse or abuse of the estate left by deceased persons when executors or personal representatives refuse or fail to attend to duties entrusted to them under estates or selfishly make use of the estate to their benefit or benefit of undeserving persons.

If the law is that a beneficiary or devisee has no title to sue or be sued until the grant to him of a vesting assent, what does he do in any of the situations postulated above?"

The peculiar circumstance in this case is that the executors of the will have not shown any interest in vesting the property in the beneficiaries. Probate of the will was obtained as far back as 1991, 31 years ago. Some of the beneficiaries of the estate have taken advantage of this situation and illegally disposed of a property, which belongs to the estate. In interpreting Section 96 (2) of the Administration of the Estates Act, we would take in to consideration the total intent behind the Act, which in my view includes preservation of the estate of a deceased against such acts as complained of in this suit.

By Section 3 of the Courts Act, 1993 Act 459, this court can depart from its previous decisions where it finds it necessary to do so, Section 3 ***provides*** - ***(3) The Supreme Court may, while treating its own previous decisions as nominally binding,***

depart from previous decision when it appears to it right to do so; and all her courts shall be bound to follow the decisions of the Supreme Court on questions of law.

This lamentation expressed by the learned jurist is in other words saying this court should take a second look at the position this court at that time took on the issue.

It is my view that the circumstances of this case demand that this court departs from its previous decision in the Okyere case to avoid a decision that will work against public policy. It is against public policy to allow the illegal acts of the 6th to 9thdefendants to prevail.

We therefore hold that the plaintiffs who have interest in the property have the capacity to take steps to protect the property irrespective of them not having the property vested in them. The executors abandoned their duties over 30 years ago, justice demands that anyone who has interest in the property takes steps to protect and preserve properties belonging to the estate of the deceased.

We would allow the appeal, the decision of the Court of Appeal affirming the decision of the High Court is hereby reversed. The case is restored to the cause list to be tried on its merit.

We do order that the case be remitted back to the High Court, (differently constituted) to be tried.

A. M. A. DORDZIE (MRS.)
(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

PROF. H. J. A. N. MENSA-BONSU (MRS.)

(JUSTICE OF THE SUPREME COURT)

COUNSEL

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