IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: DOTSE, JSC (PRESIDING)
APPAU, JSC
PWAMANG, JSC
DORDZIE (MRS.), JSC
KOTEY, JSC

CIVIL APPEAL
NO. J4/15/2020

28TH OCTOBER, 2020

1. LESLIE NARTEY MARBELL
2. DUDLEY NARTEY MARBELL

PLAINTIFFS/APPELLANTS/RESPONDENTS

VRS

SALAMATU MARBELL ..... DEFENDANT/RESPONDENT/APPELLANT

JUDGMENT

DORDZIE (MRS.) JSC:-

Facts: The appellant Mrs. Salamatu Marbell is the widow of Victor Adolphus Tsate Marbell. The couple were the joint owners of House Number 29 Mensah Wood Street East Legon. In 1982, the couple migrated to England where they both acquired citizenship. They never came back to Ghana until Mr. Marbell died intestate on 7th February 2009. The appellant per an attorney applied and obtained Letters of Administration to administer the estate of her late husband here in Ghana. Her position is that the late

husband made a deathbed gift of his interest in N0. 29 Mensah Wood Street to her; therefore, she is the sole owner of the said property

The respondents are biological sons of Mr. Marbell (deceased) by different women. They maintain the property, No.29 Mensah Wood Street is family property and they have interest in the property as well. The appellant therefore has no right to obtain Letters of Administration without involving the family and cannot claim sole ownership of the property. They sued the appellant in the High Court, Accra seeking the following reliefs:

1. A declaration that defendant's Application for letters of Administration without any notice to the Plaintiffs nor the Head of the deceased's family contravenes the law on the Administration of Estates.
2. An order, revoking the letters of Administration granted to the Defendant.
3. A declaration that plaintiffs together with the defendant and her children are beneficiaries of the estate of the late Victor Adolphus Tsate Marbell.
4. An order of injunction to restrain the defendant either by herself or her agents, assigns and heirs from dealing with H/NO. 29 Mensah Wood Street, Ambassadorial Enclave in whatsoever manner to the exclusion of plaintiffs.

Counter Claim

The appellant resisted plaintiffs' claims and counterclaimed as follows:

a) A declaration that Mr. Marbell had made a deathbed donation of his interest in house number 29 Mensah Wood Street, East Legon, Accra to the Defendant;
b) A further or in the alternative, declaration that the estate of late Mr. Marbell and the defendant are jointly liable to pay about 100,000.00 British Pound Sterling being a mortgage debt in respect of flat number 128 Elizabeth House, Gosbrook Road Reading in the United Kingdom to the Santander Bank;
c) A further or in the alternative declaration that the late Mr. Marbell had ceased to be of Ghanaian domicile and therefore the Intestate Succession Act, 1985 (PNDCL 111) does not apply to his estate, if any;

d) A further or in the alternative declaration that by operation of English law the defendant is entitled to the house with number 29 Mensah Wood Street, Ambassadorial Enclave, East Legon, Accra absolutely;
e) A further or in the alternative declaration that the defendant by operation of English law was entitled to 125,000 British Pounds Sterling from the estate of the late Mr. Marbell, if any, with that amount attracting interest at 6% per annum from the date of death of late Mr. Marbell;
f) Perpetual injunction to restrain the plaintiffs, their agents, assigns, personal representatives and any person claiming through them from interfering with the ownership, possession and/or interest and/or in any manner dealing with the house number 29 Mensah Wood street, Ambassadorial Enclave, East Legon Accra.
g) Cost including legal fees.

The trial High Court dismissed the respondents' claims and found that the disputed property was a donatio mortis causa to the appellant. The court therefore partly granted the appellant's counter claim and declared the appellant sole owner of house N0 29 Mensah Wood Street East Legon.

The respondents appealed against this decision. The Court of Appeal allowed the appeal in part, reversed the decision of the High Court and held that the respondents have interest in their father's 50% share of No 29 Mensah Wood Street. The court of appeal further ordered that the said 50% share of the property be distributed in accordance with the provisions of the Interstate Succession Law 1985 PNDCL 111.

The appellant has appealed against the decision of the Court of Appeal praying that this court sets aside the decision of the Court of Appeal. The following are the grounds of appeal canvassed before us:

1. The Court of Appeal erred in law in not setting aside the writ of summons and service of it as void.

The alleged error is particularized as follows:

a) The lawyer who issued the writ of summons for the Plaintiff/Appellant/Respondent had no practicing license for the year the writ of summons was issued i.e. 2013. (This was abandoned)

b. The Plaintiff/Appellant/Respondent did not obtain leave of the trial court before issuing the writ of summons against the Defendant/Respondent/Appellant a foreign resident person.
c. The Defendant/Respondent/Appellant was served with the writ of summons outside the jurisdiction contrary to law.

B) The Court of Appeal erred in law in holding that *donatio mortis causa* was not established by the Defendant/ Respondent/Appellant

The error alleged under this ground are:

a) The essential indicia of the property in issue could only be the lease document which was jointly owned and possessed.
b) Late Mr. Marbell had no more right to the lease document than the Defendant/Respondent/Appellant.
c) The delivery of essential indicia of the gift should have been deemed in the peculiar facts of this case.

C) The Judgment was against the weight of evidence before the Court of Appeal;

D) Additional grounds of appeal with leave of the Supreme Court will be filed on receipt of a copy of the record of appeal.

No additional grounds were filed and ground 3 was abandoned. Grounds 1 & 2 therefore are the only grounds to be determined in this appeal. Two issues can be deduced from these grounds as issues for our determination in this appeal and they are:

i. Whether the writ of summons is void, therefore all proceedings held under it are void as well.
ii. Whether the evidence on record established donatio mortis causa

The first issue is based on the first ground of appeal and it is a legal issue being raised by the appellant for the first time in this 2nd appellate court. In his submission, counsel for the appellant concedes that the general rule of law is to raise such issues of law at the trial court but justifies his doing so in the appellate court on the ground that the issue goes to the jurisdiction of the trial court; this is an exception to the general rule. This argument is well placed.

The offending act of the respondents which is the basis for seeking to have proceedings in this whole suit set aside as void is that they failed to obtain leave of the court before issuing the writ of summons. The defendant /appellant is not ordinarily resident in Ghana. Her permanent residence is in the United Kingdom; notice of the writ of summons issued against her therefore, would have to be served outside the jurisdiction. Order 2 Rule 7 (5) of the High Court (Civil Procedure) Rules, 2004 (C. I. 47) requires that leave be obtained before the writ of summons is issued. The respondents however failed to comply with this rule. The appellant's position is that, the effect of non-compliance with Order 2 Rule 7 (5) of C. I. 47 is that the jurisdiction of the High Court was not properly evoked; the writ of summons is void, consequent proceedings and decisions taken by the court in the suit are void as well.

Order 2 Rule 7 (5) of the High Court (Civil Procedure) Rules 2004 C. I. 47 provides "No writ, notice of which is to be served out of the jurisdiction, shall be issued without leave of the Court as provided in Order 8." (Order 8 outlines the process of service out of jurisdiction).

The general position of the law however is that non-compliance with the rules of court would not render proceedings void unless the non-compliance amounts to a breach of the rules of natural justice, a breach of the Constitution or of a statute other than the rules of court; or that the breach goes to the jurisdiction of the court.

The question is whether the non-compliance in question affects the jurisdiction of the trial court therefore renders the writ and the subsequent proceedings void.

Order 81 of The High Court (Civil Procedure) Rules 2004, C. I. 47 generally provides that non-compliance with the procedural rules would not render proceedings void. The said order reads:

"Non-compliance with Rules not to render proceedings void

1. ***(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, <u>the failure shall not be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order in it."</u>*** ***(Emphasis supplied)*** Sight must not be lost of the fact that the word **'not'** in the phrase "the failure shall not be treated as" underlined above distorts the meaning of order 81. In the case of Republic v High Court, Accra Ex-parte Allgate Company Ltd. (Amalgamated Bank Ltd. Interested Party) [2007 -2008] SCGLR 104 this court pointed out that the word 'not' is an error in drafting or a typographical mistake in the said phrase. Until the appropriate amendment is made to correct the error, it is important to omit the word 'not' in reading the phrase to avoid the distortion.

Commentary by **Halsbury's Laws of England (Fourth Edition) Vol 37 (Practice and Procedure)** at paragraph 36 has a comment on the effect of Order 2 of the Supreme Court Rules of Practice in England. The wording of Order 81 of C. I. 47 is exactly the same as the wording of Order 2 of the English Supreme Court Rules of Practice. For a better understanding of the effect of order 81 of C. I. 47, I would quote the said commentary from Halsbury's Laws of England.

"Effect of non-compliance with rules. This is one of the most beneficent rules of the Rules of the Supreme Court. It is expressed in the widest terms possible to cover every kind of non-compliance with the rules, and in both the positive and negative forms, so as to ensure that every non-compliance must be treated as an irregularity and must not be treated as a nullity. Under the former rule, which it replaced, a distinction was drawn between a non-compliance which rendered the proceedings a nullity, in which case the court had no discretion and no jurisdiction to do otherwise than set the proceedings aside, and a non-compliance which merely rendered the proceedings irregular in which case the court had a discretion to amend the defective proceedings as it thought fit. The modern rule has done away with this old distinction, and every omission or mistake in practice or procedure is to be regarded as an irregularity which the court can and should rectify as long as it can do so without injustice.

It should, however, be emphasized that this rule applies only to non-compliance with the requirements of the Rules of the Supreme Court, so that non-compliance with requirements prescribed by statute or other authority may still render the proceedings in which they occur a nullity."

Since the promulgation of C. I 47 this court has followed the trend as stated in this commentary. Thus Professor Date Baah JSC speaking for the court in the case of ***Republic v High Court, Accra; Ex-parte Allgate Co Ltd. [2007-2008] SCGLR 1041*** said, ***"where there had been non-compliance with any of the rules contained in the High Court (Civil Procedure) Rules, 2004 (C. I. 47), such non-compliance is to be regarded as an irregularity that does not result in nullity, unless the non-compliance is also a breach of the Constitution or of a statute other than the rules of court or the rules of natural justice or otherwise goes to the jurisdiction."***

In the case of ***Boakye v Tutuyehene [2007-2008] 2 SCGLR 970*** This court held that by the plain meaning of Order ***81 "perhaps apart from lack of jurisdiction in its***

true and strict sense, any other wrong step taken in any legal suit should not have the effect of nullifying the judgment or the proceedings"

A more recent decision of this court which is on all fours with the present case before us, on the non-compliance issue is ***Friesland Frico Domo Alias Friesland Foods BV v Dachel Co Ltd. [2012] 1 SCGLR 41.*** The appellant to this court in that case, as in the present case contented that the plaintiff had not complied with the rule of procedure under Order 2 rule 4 of the old High Court (Civil Procedure) Rules, 1954 (LN 140 A), which provides that an intended plaintiff must obtain leave of the court before issuing a writ out of the jurisdiction; and must also seek leave to serve notice of the writ out of jurisdiction under Order 11 rules 6 & 7 of (LN 140 A). Non-compliance with these rules goes to jurisdiction therefore renders the proceedings void.

This court held at page 50 of the report that: ***"Both order 81 of the new High Court (Civil Procedure) Rules, 2004 (C. I. 47), and Oder 70 of the old High Court (Civil Procedure) Rules, 1954 (LN 140 A), had provided in clear terms that non-compliance with the rules of procedure should not render any proceedings void but be regarded as a mere irregularity which might be allowed, amended or set aside on terms at the discretion of the court upon application brought within a reasonable time and the person applying had not taken a fresh step after becoming aware of the irregularity,"***

The court however emphasized its position as held in the Ex-parte Allgate Co Ltd. (cited supra) that provisions under Order 81 cannot be interpreted to waive a High Court's actual lack of jurisdiction and said at page 53 of the report: ***"So where, for example, the whole subject-matter of the action affect an immovable property situate outside the jurisdiction of Ghana, then non-compliance of Order 2 r 4 of LN 140 A (now Order 8 r 1 of C. I. 47), cannot be waived to cure the deficiency in jurisdiction. The subject matter of the action which was began by the writ issued by the plaintiff for compensation for the termination of the agency agreement executed in Ghana on behalf of the defendant company is manifestly within the jurisdiction of the court. Accordingly, we would hold that***

the non-compliance of Order 2 r 4 of LN 140 A in this case was a mere irregularity which did not derail the jurisdiction of the court."

The subject matter of litigation in the instance case is equally 'manifestly' within the jurisdiction of Ghana. The High court therefore had jurisdiction to entertain the suit. There is no reason why we should depart from this court's decision in the ***Friesland Frico Domo Alias Friesland Foods BV v Dachel Co Ltd.*** Case and hold otherwise on the issue.

The appellant herein upon entering a conditional appearance obviously was aware of the irregularity in the issuing of the writ however; there is no indication on the record that she took any steps to apply to set it aside. Rather she filed her defence and fully participated in the trial and even pursued a counter claim. What nails the coffin on this ground finally is that the appellant gave her address for service in her notice of appearance as N0 29 Mensah Wood Street Accra. Incidentally, that is the address of the subject matter of the suit, which is situate within the jurisdiction of Ghana. This means the appellant from the onset accepted to defend the suit from the address within the jurisdiction. She is deemed to have waved her right under Order 81 rule 2 and cannot validly raise this issue at this level. There is no evidence that the irregularity complained of has occasioned any injustice to the appellant.

Counsel for the appellant in support of his submission on this ground cited the following cases: ***Ayikai v Okaidja [2011]1 SCGLR 205*** and ***Standard Bank Offshore Trust Company Ltd. (Substituted) by Dominion Corporate Trustees Ltd v National Investment Bank Ltd. & Ors Civil Appeal N0 J4/63/2016 dated 21/06/2017***. I must say the circumstances under which this court dismissed the suit for non-compliance in these cases are distinguishable from the instant case. In Ayikai v Okaidja the court dismissed the writ because there was no cause of action; it was therefore incompetent. The court found that the complaint of the plaintiffs was non-compliance with Order 43 rule 3 (3) of C. I. 47. The said non-compliance rendered execution of a judgment obtained by the defendants from the Greater Accra Regional House of Chiefs irregular. The remedy

open to the plaintiffs was to apply to have the execution process set aside. They however issued a writ. This court's position was that the default did not create a separate cause of action, the writ was incompetent therefore, it was dismissed.

In the case of Standard Bank Offshore Trust Company Ltd. (Substituted) by Dominion Corporate Trustees Ltd v National Investment Bank Ltd. & Others, the issue had to do with the capacity of the plaintiffs. The writ was issued by a foreign based firm who claimed to be suing on behalf of "certain investors" the identity of the 'certain investors' was not disclosed on the writ. The court held that the capacity of the plaintiff must exist before the writ is issued, the authority to issue the writ must appear in the endorsement and / or the statement of claim accompanying the writ. A writ that does not meet the requirement of capacity is null and void. The default cannot be cured under Order 81 because capacity cannot be acquired while the case was pending.

It has been amply demonstrated in the analysis above that the jurisdiction of the High Court was properly evoked; the writ of summons and the proceedings in the High Court are not void. The first ground of appeal therefore has no merit and must fail.

In determining the second issue, that is whether the appellant succeeded to establish the gift of donatio mortis causa to her, I would briefly discuss what the doctrine entails and the circumstances under which the gift could be said to have been validly made.

Donatio mortis causa is a common law doctrine and it is referred to as deathbed gift. It has been defined in many decided cases as a gift made by the donor in anticipation of death. The gift becomes effective only when the donor dies. This means when the anticipated death does not occur the gift reverts to the donor. Three elements have evolved from decisions of the courts which must exist to make a donatio mortis causa valid. ***In Cain v Moon [1896]2 QB 283*** these three elements were set out per Lord Russell in his judgment in the following words: "first, the gift or donation must have been made in contemplation, though not necessarily in expectation, of death; secondly, there must have been delivery to the donee of the subject-matter of the gift; and, thirdly, the gift must be made under such circumstances as shown that the thing is to revert to the

donor in case he should recover." Decisions of courts in our jurisdiction follow the same principles.

In the case of ***Asante v University of Ghana [1972]2GLR 86*** Abban J following the Common Law cases gave the following definition to the doctrine: ***"A donatio mortis causa is a singular form of gift. It may be said to be of an amphibious nature, being a gift which is neither entirely inter vivos nor testamentary. It is an act inter vivos by which the donee is to have the absolute title to the subject of the gift not at once but if the donor dies. If the donor dies the title becomes absolute not under but as against his executors. In order to make the gift valid it must be made so as to take complete effect on the donor's death. The court must find that the donor intended it to be absolute if he died, but he need not actually say so."***

Another common law decision that defines the doctrine of donatio mortis causa is ***Gardner v. Parker 3 Madd. 184,*** where ***Sir John Leach V.C.*** says ***'It is to be inferred that it was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition that it is to be held only in the event of death. It is a question of fact: the inference may be drawn that the gift was intended to be absolute, but only in case of death."***

By the nature of the gift, which is made in circumstances of contemplation of death by the donor, the likelihood of such a donor being open to persuasion or influence is very high. It is therefore important that the courts tread cautiously in the type of evidence they accept as proof of a valid donatio mortis causa.

In the case of ***Cosnaham v Grice [1862]15 Moore 216 at 223 Lord*** Chelmsford in delivering the judgment of the Court of Appeal, Isle of Man, sounded this caution and said ***"Cases of this kind demand the strictest scrutiny. So many opportunities, and such strong temptations, present themselves to unscrupulous persons to***

pretend these deathbed donations, that there is always danger of having an entirely fabricated case set up. And without any imputation of fraudulent contrivance, it is so easy to mistake the meaning of persons languishing in a mortal illness, and, by a slight change of words, to convert their expressions of intended benefit into an actual gift of property, that no case of this description ought to prevail, unless it is supported by evidence of the clearest and most unequivocal character."

Stout CJ of the New Zealand Supreme Court added his voice to this caution when he held in the case of ***Heitman v Mace & Another [1903]41 NZLR 1242 that "Evidence by a claimant of a gift by a deceased person always require the strictest scrutiny"***

One thing that boggles my mind is whether it is necessary to cling to the common law doctrine of donatio mortis causa in our jurisdiction. What the doctrine seeks to do is to give validity to a deathbed gift. It is clear from decided cases from other common law jurisdictions that proof of a valid donatio mortis causa poses a challenge. In the United Kingdom, for example the doctrine is being given a second look in line with modern day development of the law and social circumstances. In the case of ***King v Dubrey [2016] Ch 221 the English court per Jackson LJ held*** the view that the doctrine had outlived its usefulness; to quote him: ***"Indeed I must confess to some mystification as to why the common law has adopted the doctrine of donatio mortis causa at all. The doctrine obviously served a useful purpose in the later Roman Empire. But it serves little useful purpose today, save possibly validating deathbed gifts. Even then a considerable caution is required."***

In our jurisdiction, it is my view that our customary law will; (Samansiw) provides a more reliable alternative to a deathbed testator. In the sense that, case law has developed stated requirements of a valid customary law will, thus making the ascertainment of its validity easy to the courts.

In the case of ***Abadoo v Awotwi [1973]1GLR393*** for example the requirements of a valid customary law will were spelt out as follows: a) It must be made in anticipation of death b) the deathbed declaration must be made in the presence of witnesses. c) The witnesses must know the content of the declaration and be able to testify about same.

It had been held that samansiw is akin to donatio mortis causa. ***Akufo-Addo CJ*** (as he then was) in the case of ***Atuahene v Amofa (1969) CC 154*** held the view that: ***"Samansiw as the name implies (it is an Akan expression which literally means `a ghost behest') is a disposition of property which takes effect after death, and it is the customary law mode of testamentary disposition. In its origin it is akin to donatio mortis causa in English law. Like all customary transactions samansiw is a verbal disposition and requires publication for the purpose of perpetuating the testimony thereof."***

This supports my view that Samansiw provides a better alternative to the ancient Roman Empire common law doctrine of donatio mortis causa.

Coming back to the issue as to whether a donatio mortis causa had been established by the appellant, I would say that the appellant presented very scanty evidence on the alleged gift to her. There is undisputed evidence that the deceased had a terminal decease, cancer. The possibility that he might die of that decease was high. However, that the deceased made a gift of half share of the property he jointly owned with the wife, to her, five months prior to his death has not been proved by any evidence whatsoever.

The evidence adduced by the appellant's attorney on the alleged gift is at page 172 of the record, and it is this:

"Q: In respect of the East Legon property, do you know if the late Victor Marbell has done something in respect of the house before his death?

A: Yes my Lord, he told the defendant that he was giving her his interest in the land at East Legon.

Q: When was this made

A: It was in September 2008."

That the deceased actually made the gift is seriously doubtful. A possible way of scrutinizing the circumstance of the gift is to examine the words or the manner in which the deceased expressed the giving of the gift. The evidence provided by the appellant as stated above offers the court nothing to work with in that regard.

One other ingredient of a valid donatio mortis causa that the evidence on record failed to prove is the delivery of the subject matter of the gift or the essential indicia of title to the gift. There is no evidence on record to prove the deceased made a parting of the gift to the appellant. Counsel for the appellant argued that proof of this ingredient is not applicable to the appellant because they both (deceased husband & appellant) jointly owned and possess the lease documents on the land. What this argument is suggesting is that the court should assume that the lease document was parted with in fulfilment of the 3rd ingredient of proof of the deathbed gift. Accepting such suggestion would lead to injustice. If in deed the deceased intended to gift his half share of the property to the appellant the law requires that, he parted with the lease document to her. There is no justification in arguing that the said requirement should be waived.

It is part of the undisputed evidence on record that the deceased executed a deed of assignment in favour of his two sons, the respondents in this appeal, making a gift of a piece of land in Accra to them. Exhibit 3 is the deed of assignment and it was made on the 3rd of April 2008. The alleged danatio mortis causa was made in or around September 2008, only five months after the deed of assignment was made. If indeed the deceased had the intent of making a gift of his portion of the No 9 Mensah Wood property to the

appellant it is highly probable that he would have followed the same procedure as the deed of assignment to his sons.

It is my view that there is no evidence from which the court can reasonably infer that there was a donatio mortis causa. The holding of the Court of Appeal that donatio mortis causa had not been established is in place.

The appeal fails in its entirety and it is hereby dismissed, the judgment of the Court of Appeal is hereby affirmed.

A. M. A. DORDZIE (MRS.)

(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

Y. APPAU

(JUSTICE OF THE SUPREME COURT)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

COUNSEL

C. AMON-KOTEI FOR THE PLAINTIFFS/APPELLANTS/RESPONDENTS.

ALI GOMDAH ABDUL-SAMAD FOR THE DEFENDANT/RESPONDENT/APPELLANT.