IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA AD 2015

CORAM: AKUFFO (MS.), JSC (PRESIDING)
GBADEGBE JSC
AKOTO BAMFO (MRS) JSC
BENIN JSC
AKAMBA JSC

CIVIL APPEAL
NO.J4/45/2014

17TH JUNE 2015

MARY OKAILEY WELBECK ... PLAINTIFF/ APPELLANT /APPELLANT

VRS

SIMON TACKIE WELBECK ... DEFENDANT/RESPONDENT /RESPONDENT

JUDGMENT

AKAMBA, JSC:

The plaintiff/appellant (hereafter simply referred to as 'appellant'), and the defendant/respondent (hereinafter simply referred to as 'respondent') are children of the testator, Joseph Ayikai Welbeck (deceased). The appellant by an action initiated in the High Court, Accra, sought a declaration that the will of their

late father, executed on 17th July 1997 was either forged or obtained by fraud. The court heard the suit and dismissed the action on 22nd June 2011. It entered judgment in favour of the respondent who is one of two named executors/trustees under the said will. The appellant invoked the appeal process only for the Court of Appeal to similarly dismiss the appeal and to affirm the decision of the trial court in its entirety in its decision of 14th March 2013. Undeterred by the two unsuccessful bids, the appellant filed a notice of appeal on 6th May 2013 for further redress by this court.

GROUNDS OF APPEAL

The appellant filed the following grounds of appeal for the determination of this court, namely:

(a) "That the judgment is against the weight of evidence.
(b) That the Court of Appeal erred when it held that the finding by the trial High Court Judge to the effect that the signature on the will is that of the testator is supported by the evidence on record.
(c) That the Court of Appeal erred when it held that whether the testator meant Nii Kasablofo II who died before the will was made or Nii Kasablofo III is not material to affect the validity of the will.
(d) That the Court of Appeal failed to give adequate consideration to the evidence of CW1, the Police Forensic Examiner, and erred in disregarding his assessment that the alleged will was forged.
(e) That the Court of Appeal failed to give any adequate consideration to the 12th December 1997 date wrongly expressed to be the date of the will on exhibit '9', Probate Form 35 (affidavit of witness in proof of due execution of a will) and thus occasioned to the Appellant a miscarriage of justice."

EVALUATION OF GROUNDS OF APPEAL

Grounds [a] and [b] were argued together by the appellant. We would include ground [e] to the list and determine the three grounds together which we proceed to do. These grounds allege that the judgment is against the weight of evidence and that the Court of Appeal erred when it held that the finding by the

trial High Court Judge that the signature on the will is that of the testator is supported by the evidence on record. Also faulted is the Appellate Court's alleged failure to give adequate consideration to the 12th December 1997 date wrongly expressed to be the date of the will on exhibit '9', Probate Form 35. Proceeding on the basis that where the validity of a will is disputed those who propound it must adduce sufficient evidence of its due execution, the appellant contends in this appeal that it is only when it is shown that the will is prima facie valid that the burden will shift to those who challenge its validity to adduce strong evidence to displace the presumption of due execution.

This matter being a second appeal the presumption is that those issues had been dealt by the trial court and the 1st appellate court and it is for the appellant to clearly and properly demonstrate what errors were made by the lower courts which could turn events in appellant's favour.

Generally speaking however, where findings of fact made by the trial court are concurred in by the 1st appellate court the 2nd appellate must hasten slowly in disturbing same or coming to a different conclusion unless it is manifestly clear that the findings of the two courts are not supportable on the evidence or are perverse. In such circumstances, this Court has the power to review the evidence as a whole in order to ascertain whether the conclusions by the High Court as affirmed by the Court of Appeal are supported by the evidence. Achoro vs Akanfela [1996-97] SCGLR 209 Koglex (No2) v Field [2000] SCGLR 175; Obeng v Assemblies of God Church, Ghana [2010] SCGLR 300, Gregory Tandoh and Anr. [2010] SCGLR 971.

In Gregory v Tandoh IV & Hanson [2010} SCGLR 971 @ 975 this court per Dotse, JSC stated some instances in which a second appellate court such as this court could and is entitled to depart from the findings of fact made by the trial court and concurred in by the first appellate court as follows: 1 where from the record

of appeal, the findings of fact by the trial court were clearly not supported by evidence on record and the reasons in support of the findings were unsatisfactory; 2. Where the findings of fact by the trial court could be seen from the record of appeal to be either perverse or inconsistent with the totality of evidence led by the witnesses and the surrounding circumstances of the entire evidence on record; 3, where the findings of fact made by the trial court were consistently inconsistent with important documentary evidence on record; and 4, where the 1st appellate court had wrongly applied a principle of law. In all such situations, the second appellate court must feel free to interfere with the said findings of fact, in order to ensure that absolute justice in the case.

Also, where a finding made was an inference which the trial court drew from specific findings made, then the appellate court is in as good a position as the trial court to draw inferences from the specific facts found in the trial court. Adorkor v Gatsi 1966 GLR 31.

The appellant initiated the present action in the High Court on the basis of a claim for:

1. "A declaration that the alleged Will of Joseph Ayikai Welbeck (deceased) purportedly executed on 17th July 1997 is either forged or was obtained by fraud.
2. An order invalidating the alleged will as null and void by reason of forgery and/or fraud.

3. Any further or other orders."

The appellant subsequently amended her claims by adding the following reliefs:

(i) "A declaration that the will dated 17th July 1997, not being the last will and testament of Joseph Welbeck is invalid and cannot form the basis for the administration of his estates.

(ii) An order declaring the Probate obtained by the defendant for the purpose of administering the estate of the deceased under and by virtue of the said will of 17th July 1997, null, void and of no legal effect whatsoever.

(iii) An order declaring any distribution or purported distribution or the enforcement or purported enforcement of any directive carried out or intended to be carried out by the defendant, under or by virtue of the said will of July 17th 1997, null, void and of no legal effect whatsoever."

The trial High Court judge concluded the matter as follows:

"Assessing the evidence on the whole I will find that there was no subsequent will to that of the 17th July 1997. Mr Nuvor did not say there was such a will. He said there may be. What made him express doubt I attribute it to instability in his mental recollection of events and a mix up in the thinking process. I watched his demeanor and had no difficulty coming to this conclusion. Having alleged there was a will dated 12th December 1997 it was the duty of the plaintiff to prove the existence of such Will. She did not. The Registrar who was recalled was again clear that there was no such will of the 12th December 1997 with the registry…."

As to whether or not the insertion of 12th December 1997 on the affidavit, Exhibit 9, was a mistake, this is what the trial Court concluded:

"As for the 12th December 1997 on the affidavit Exhibit 9, I do not see why I should not see that as a typographical mistake by the typist. It appears to me that such dates and the like produced by secretaries and typists should be taken with caution. Unless there are strong reasons they should not always form the only basis for drawing conclusions. I will have to express the view that the courts should be slow in coming to conclusions, unless very clear evidence is provided, that will declare that a person died intestate where there is a testament, albeit with defects. The defects should be such that it questions the legal validity of the

Will. I will conclude this part of the plaintiff's claim that on the evidence in its entirety there is no other will of the testator dated 12th December 1997."

It is important to address the issue raised by the conflicting dates of December 12th 1997 stated in the 'affidavit of witness of due execution of a will or codicil' of Probate Form 35 attached at page 308 of the Record of Appeal (ROA) and the 17th July 1997 given on the will attached to the application for Probate with will attached at page 313 of the ROA. A similar issue was raised before the trial judge but this was in the context of whether or not the December 12th 1997 stated therein was a reference to or an indication of yet another will by the testator other than that of the 17th July 1997. Under Order 66 rule 8 of the High Court (Civil Procedure Rules), CI 47, an application for the grant of Probate shall be supported by an affidavit sworn by the applicant and with such other documents as the court may require, using the relevant Forms in the schedule to the rules.

The present action revolves around a will for which Probate was granted by the High Court in 'common form' to the respondent on 8th December 2004 as evidenced by Exhibit 9B (See page 312 of ROA). It is apparent that at the time exhibit 9B was obtained no objection had been raised to its grant hence the grant of the Probate was made in 'common form'.

The learned authors of, **Tristram and Coote's Probate Practice [20th ed)** have at page 542, highlighted on what proof in common form means as follows:

"*A will is proved in 'common form' where its validity is not contested or questioned. The executor or the person entitled to administer with the will annexed, brings the will into the principal registry or district registry, and obtains the grant notwithstanding the absence of other parties interested, upon his own oath and any further affidavits which may be required."*

'Proof of a Will in Common Form' is provided under Order 66 rule 25 of CI 47 as follows:

"Where a will appears regular on the face of it and there is no dispute as to its validity, the application for probate may be sufficiently supported by affidavit

deposing to the due execution and attestation of the will and by such other documents or papers as the court may require."

In contrast, **Tristram and Coote's Probate Practice** (supra) states of a Will in Solemn Form, thus:

"A will is proved in 'solemn form' by the executor, or a person interested under the will, propounding it in an action to which the persons prejudiced by it have been made parties, and by the court, upon hearing evidence, pronouncing for the validity of the will."

The High Court (Civil Procedure) Rules, CI 47, provides for 'proof in solemn form' under Order 66 rule (26) of CI 47, as follows:

"26. (1). Where for any reason the executors of a will are in doubt as to its validity or the validity of the will is disputed, the executors may if they consider it necessary to do so, prove the will in solemn form in an action commenced by writ asking the court to pronounce the will as valid.

(2). Any person who claims to have an interest in the estate of a deceased person may by notice in writing request the executors named in the will of the deceased to prove the will in solemn form."

Sub rules 3 to 7 of Order 66 rule 26 (supra) stipulate the requirements to be met by a person who claims to have such an interest in the estate.

As clearly stated by Apaloo JSC (as he then was) in Yankah **& Ors v Administrator-General & Anor [1971] 2 GLR 186 at 191**, quoting reliance on **Probate Practice by Macdonell and Sheard (1953 ed)** at p. 252:

"*An executor who has proved a will in common form may be compelled afterwards to prove it in solemn form, at the instance of any person interested. If the proof in solemn form fails, the probate will be revoked."*

The difference in the date rendered on the affidavit of the witness in support of the due execution of the will and that on the will attached, renders the Probate issued based on such background voidable. It is however not enough for the trial judge to attempt to conjecture whether the reference to the two different dates in the application for probate was an error or referable to two different transactions particularly when the testimony of the surviving witness to the will DW 3 Selina Quarcoo is taken into account.

The High Court rules CI 47 specifically provide for an action for the purpose of revoking the grant of Probate, under Order 66 rule (29) of CI 47. This relief is independent of the reliefs provided under Order 66 rules (26) and (28) which are all available depending on the circumstances. The appellant by her statement of claim sought a declaration that the alleged will of Joseph Ayikai Welbeck purportedly executed on 17th July 1997 is either forged or obtained by fraud. This appears to be a relief under Order 66 rule 28 (1).

The pith of the appellant's argument before this court is that the Probate application was not properly procured and if even it was granted properly, which is denied, it was procured for the administration of a 12th December 1997 will and not the 17th July 1997 will. The respondent has therefore been wrongfully administering the property of the testator in reliance on the 17th July 1997 will for which Probate has not been granted. For us, no point of substance can be made of the fact that Probate was granted to the respondent. The Probate, exhibit 9B, on its face, is valid for the purposes for which it was granted and if a party has reason/s to doubt or challenge its validity, such as the allegation of conflicting dates, the remedy lies in invoking the appropriate High Court rules for redress. An error in the dates in the Probate form 35 (a solemn oath of a deponent) and the will cannot be corrected by the stroke of a pen as the trial court sought to do. It also cannot be corrected by an action which seeks a declaration that the will is invalid on grounds of fraud. It is good law that a party seeking redress from the court for a specific remedy provided by statute, shall resort to the remedy or the tribunal specified for it. This general principle of law was concisely stated by Lord Justice Asquith in **Wilkingson v Barking Corp (1948) 1 K.B. 721 @ 724** as follows:

"It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others."

Since the appellant's real concern is about the conflicting dates on the solemn form and the will, culminating in the grant of the Probate, the present initiative does not truly express her desire. The necessary preliminary step that the appellant ought to have taken was to seek a revocation of the Probate in the circumstances recounted above. The steps or practice to be followed in seeking such revocation is captured in "**The Law and Practice of the Probate Division of the High Court of Justice (2nd ed.) at p. 550"** [quoted with reliance in **Duku v Dwumah [1974] 2 GLR 98 at 103,** as follows:

"The preliminary steps to be taken by a party who desires to obtain revocation of probate, or to compel an executor who has proved the will in common form, to propound it for proof in solemn form, are the entry by him of a caveat, followed by the extraction of a citation against the executor to bring the grant into the registry, and the issue of a writ making the executor defendant and alleging the invalidity of the will. The executor thereupon lodges the grant in the registry, enters an appearance to the writ, and an action commences."

The High Court rules CI 47 provides under Order 66 rule 33 the following:

" (*1) A probate action shall be commenced by writ.*

(2) The writ must be indorsed with a statement of the nature of the interest of the plaintiff and of the defendant in the estate of the deceased.

(3) Before a writ for the revocation of the grant of probate of a will or letters of administration of the estate of a deceased person is issued out, notice shall be given under rule 37, unless the probate or letters of administration has or have been lodged in the registry of the court."

It is also important to stress that any action initiated under Order 66 rules 25 to 29 must comply with rules 32 to 43. This does not appear to have been the case when the appellant embarked on her initiative.

In the instant appeal, it appears to me that what the appellant wanted when she embarked on her action was to set aside the Probate which, according to her, was granted for the administration of a 12th December 1997 will and not a 17th July 1997 will but this is a far cry from what was actually attributed to her.

In any case none of the parties to the present dispute, not even the appellant, has produced any will dated 12th December 1997 to warrant the initiative that the appellant complained of.

Though the affidavit initiating the Probate refers to a 12th December 1997 will, there was no such thing attached to the application and the witness to the 17th July 1997 will was categorical that it was the only testamentary document he signed as a witness.

The record supports the conclusion that the will attached to the application for probate and for which the court granted the Probate was that dated 17th July 1997.

In all the circumstances of this case, a fair conclusion to reach on the evidence is to dismiss the action initiated by the appellant which I hereby do. In the light of the conclusion reached on the three main grounds, I find no need to consider the remaining grounds of appeal. The appeal is accordingly dismissed in its entirety.

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

(SGD) S. A. B. AKUFFO (MS)

JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO BAMFO (MRS)

JUSTICE OF THE SUPREME COURT

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