

IN THE FEDERAL COURT OF APPEAL
HOLDEN AT LAGOS
19TH MARCH, 1998. FCA/L/70/78

CORAM:- D. O. COKER, R. O. OKAGBUE, U. MOHAMMED, JJCA

J. O. OJOSIPE & 3 OTHERS PLAINTIFFS/APPELLANTS
AND
ADEKUNLE ODUNSI DEFENDANT/RESPONDENT

***APPEALS** - Evaluation of evidence - Conclusion by the learned trial judge that the evidence was evenly balanced is erroneous - When a fair evaluation of the evidence of D.W. 2 depicts him as a person whose evidence is utterly unworthy of any credit.*

***ADMINISTRATION OF ESTATE** - Wills - Grant of probate - Where there is a dispute as to a will - Those who propound it must show by Prima facie evidence that all is in order - Then the burden shifts to those who attack the will to substantiate the allegations they have made.*

***ADMINISTRATION OF ESTATE** - Wills - The presumption Omina rita essa acta - Where a will is on the face of it duly executed - If the witnesses are utterly forgetful of the facts the presumption applies - But not if the recollection of the attesting witnesses is clear - In the present case the evidence of one of the witnesses is undisputably defective.*

FACTS

The plaintiffs before the Lagos High Court claim to have the will dated 26th December 1969 of Chief Adeola Odunsi, who died on 25th May 1975, pronounced in solemn form. The defendant had entered caveat against the grant of probate to the said will and did not vacate it but entered appearance after due warning. In the statement of Defence the defendant, as one of the deceased children who was entitled to share in his estate on intestacy, pleaded that the document propounded as his

father's will "was not executed according to law" and that "the names and signatures of the witnesses were those of unidentifiable persons." At the trial the two attesting witnesses were called; one by the plaintiffs who said that the testator, the other attesting witnesses and himself were all present together when each signed the document. The other attesting witness, called by the defendant, said that he signed the document in the presence of the testator but he did so in the absence of the other attesting witness and did not see the testator sign it. Both witnesses identified the signatures of the testator and there was no suggestion of fraud against the document propounded to be the Will of the testator.

The trial judge dismissed the plaintiffs' claim. He held that the evidence given by both sides was evenly balanced and therefore that the plaintiffs have failed to discharge the onus of proving that the will was duly executed.

The plaintiffs being dissatisfied, appealed to the Court of Appeal, Lagos Division.

ISSUE FOR DETERMINATION

Whether the learned trial judge was right when he held that the Will was not duly executed and in consequence of which he declined to pronounce the will.

HELD (Unanimously allowing the appeal per judgment delivered by COKER JCA)

Will - Grant of probate

1. We wish to premise this judgment by referring to a case, which in our view, is apposite to this appeal. It is Babafunke Johnson & ano. vs. Akinola Maja & 2 ors. 13 W.A.C.A. 290 where Lewey, J. A. delivered the leading judgment of the Court said at p.292:

"Where there is a dispute as to a will, those who propound it must clearly show by evidence that, prima facie, all is in order; that is to say, that there has been due execution, and that the testator had the necessary mental capacity, and was a free agent. Once they have satisfied the Court, prima facie, as to these matters, it seems to me that the burden is then cast upon those who attack the will, and that they are required to

substantiate by evidence the allegations they have made as to lack of capacity, undue influence, and so forth. That, it is clear to me, must be their responsibility and nothing can relieve them of it; it is not only a rule of common sense but a rule of law, as appears from numerous authorities."

In view of the above authorities including Johnson's case (*supra ubi*) it is clear that the defendant failed to discharge the onus which shifted on to him on the case made out in support of the will. (pp. 1204 A/1210 F)

Evaluation of evidence

2. In this case the learned trial judge held that the evidence was evenly balance and that the rule of law is that the plaintiffs have not discharged the onus placed on them to satisfy the Court that Exhibit "A" was duly executed according to the provisions of the law; and in the circumstances therefore he was unable to place reliance on the evidence he did not say. He did say Ekeade was not shaken in his evidence under -cross-examination but only in respect of the absence of Afolabi when he signed the document. He commented "Ekeade was vigorously cross-examined, but on the issue that both he and Afolabi were present at the same time when the will was executed and that he signed the said will alone without Afolabi being present, he remained totally unshaken." He failed to evaluate his evidence as a whole, particularly his self contradiction. With due respect, we are of the view that the learned trial judge misdirected himself in this respect for he has to consider the evidence of Ekeade as a whole in relation to the other evidence before him particularly to the undisputed facts before deciding whether he is a person whose evidence could be relied upon. Reading his evidence as a whole, there is no doubt that he was completely discredited under cross-examination and a fair evaluation of his evidence depicts him as a person whose evidence is utterly unworthy of any credit bearing in mind the totality of evidence before the court. (p. 1206 E)

The presumption Omina rita essa acta

3. Further, on the face of the will there is nothing defective. Every page

of it is signed by the testator. There is the attestation clause, which on the face of it is regular. It reads:

"Signed by the said (Adeola Odunsi) Adeola Odunsi in the presence of us both, being present at the same time, who at the same time, B who at the request, in his presence and in the presence of each other have hereunto subscribed our names as witnesses."

We have already observed that there is no dispute that both the testator and the two attesting witnesses signed their names after the testator had duly acknowledged his signatures in the presence of each of them. The Court will not allow defective memory alone to overturn a will which on the face of it is duly executed if the witnesses are utterly forgetful of the facts, the presumption *omnia rita essa acta*, but not if the recollection of the attesting witnesses is clear. In this case, the evidence D of one is clear as to the attestation, while the other is undisputably defective. The appeal therefore succeeds and is allowed. (pp. 1207 H/ 1210H)

REPRESENTATION

E Ademola Odunsi, 4th Defendant/Appellant in person
C. O. Adesanya with A. B. Adesanya for Respondent

CASES REFERRED TO

F Johnson vs. Akinola 13 W.A.CA. 290
Lawal v. Dawodu (1972) 9 S.C. 83 at p. 106
Whiting v. Turner (1903) (89) L.T. 71
Wyatt v. Berry 69 L. T. Rep. 416
Wright v. Sanderson 50 L.T. Rep. 769 and at p. 72
G Neal v. Denston 147 L.T. 640

JUDGMENT DELIVERED BY COKER JCA

H This is an appeal from the decision by Savage, J. of the High Court of Lagos State, dismissing the plaintiffs, claim to have the will dated 26th December 1969, of Chief Adeola Odunsi, who died on 25th May 1975, pronounced in solemn form. The defendant had entered caveat against the grant of probate to the said will and did not vacate it but

enter appearance after due warning. In the statement of Defence the defendant, as one of the deceased children who was entitled to share in his estate on intestacy, pleaded that the document propounded as his father's will "was not executed according to law" and that "the names and signatures of the witnesses were those of unidentifiable persons." B

At the trial, the two attesting witnesses were called; one by the Plaintiffs who gave evidence that the three of them, that is, the testator, Chief Adeola Odunsi, himself and Ekeade, 2nd defence witness, were all present together when each signed the document. Ekeade on the other hand, said although he signed in the presence of the testator only but did so in the absence of the other attesting witness; that Chief Adeola Odunsi, the testator, had invited him from Ifo, a town in Ogun State, for the purpose of witnessing the document. Both witnesses identified the signatures of the testator and there was no suggestion of fraud against the document propounded to be the Will of the Testator. D

Ademola Odunsi, a legal practitioner and one of the plaintiffs and executors named in the will, the only appellant, argued the appeal himself. E

The Appellant contends that the judgment is unreasonable having regard to the weight of evidence and that the learned trial judge erred in that he failed to apply to correct principles when he found that the will was not duly executed and in consequence of which he declined to pronounce the will. He submits further, that since the plaintiffs led a prima facie evidence that will was executed in due form of law, the onus shifted on to the defendant to disprove same. The evidence of the 2nd D.W., Ekeade, the other attesting witness, who said that the other attesting witness 2nd P.W. Afolabi, was not present when he (Ekeade) signed is completely worthless and unreliable, that the learned judge ought not to have preferred his evidence to that of Afolabi. In any event, the learned judge failed to state his reasons for preferring his evidence to that of Afolabi. And finally, he submits that if the learned judge had properly H directed himself by applying the maxim *omina praesumuntur rita esse acta* to the evidence before him, his decision would have been in favour of the plaintiffs.

We wish to premise this judgment by referring to a case, which in our view, is apposite to this appeal. It is **Babafunke Johnson & ano. vs. Akinola Maja & 2 ors**, 13 W.A.CA. 290 where Lewey, J. A. delivered the leading judgment of the Court said at p.292:

B *"Where there is a dispute as to a will, those who propound it must clearly show by evidence that, prima facie, all is in order; that is to say, that there has been due execution, and that the testator had the necessary mental capacity, and was a free agent. Once they have satisfied the Court, prima facie, as to these matters, it seems to me that the*
 C *burden is then cast upon those who attack the will, and that they are required to substantiate by evidence the allegations they have made as to lack of capacity, undue influence, and so forth. That, it is clear to me, must be their responsibility and nothing can relieve them of it; it*
 D *is not only a rule of common sense but a rule of law, as appears from numerous authorities."*

It is therefore necessary first to examine the evidence carefully and the finding of the trial judge.

E As we have earlier observed, the fact that the deceased, Chief Adeola Odunsi executed the document in not disputed. Both the attesting witnesses admit that they subscribed to the document in his presence. Afolabi, 2nd P.W. said at p.20:

F *"I see Exhibit A. I have seen Exhibit "A" before. I see the last page of Exhibit "A". My name appears on the last page. I see the names Nathaniel Ekeade, Adeola Odunsi. I appended my signature on exhibit A. I wrote my name there. Three of us were present: Adeola Odunsi, nathaniel Ekeade and myself Afolabi. We all signed. Late Adeola Odunsi asked*
 G *Ekeade to sign and he signed in my presence.*

Adeola Odunsi was the first to sign Exhibit "A". Ekaede, 2nd D. W., in his evidence said: "I see Exhibit A. I know Afolabi, 2nd P.W. he was clerk under Adeola Odunsi

H *"My signature appears on Exhibit "A" It is the first one On the day I signed Exhibit "A" I had come all the way from ifo for the purpose after I had been sent for Mr. Adeola Odunsi. Mr. Odunsi asked m to sign. I signed. I saw the signature of Mr. Odunsi with which i was*

conversant, and I signed Exhibit "A". I was the only one present when I signed Exhibit "A" in the presence of the deceased. Adeola Odunsi The second signature to mine on Exhibit "A" is that of Adisa Afolabi. He did not sign in my presence. I did not know when he signed. We were not present together when the will was executed. It is not correct to say B I was present when Afolabi signed." (underlining ours).

The learned trial judge after reproducing the above quoted evidence of Ekaede stated at p.37:

"From the above, Ekeade's evidence is clear that not only was C Ekeade not present when the deceased signed Exhibit "A", but also that when Ekeade eventually did sign, Afolabi was not present; if the testator ever acknowledged his signature, he certainly did not do so in the presence of the two of them as witnesses present at the same time. The deceased sent for Ekeade to come down to Lagos all the way from Ifo in D the then Western State in order to subscribe to the deceased's will, the witness told the Court. He was however, familiar with the testators's signature which he said he saw on exhibit "A". He was asked by the testator, there was no one else present when he, witness, signed the will E Exhibit "A". The testator did not sign in his presence. Ekeade was vigorously cross-examined by learned counsel for the Afolabi were not present at the same time when the will was executed and that he signed the said will alone without Afolabi being present, he remained totally unshaken". F

At the concluding portion of his judgment he stated;

"The Court therefore has to consider the value of all the evidence given by both sides and generally the decision must ultimately depend upon the Court being satisfied on preponderance of probabilities in favour of one side or the other. But in this case, the two material G witnesses were Afolabi on the one hand and Ekeade on the other. The evidence is therefore evenly balance. There must be degree of satisfaction in the mind of the court to find in favour of the Plaintiffs and where the scales are evenly balanced; the rule of law is that onus placed on them H to satisfy the court that Exhibit "A" was duly executed according to the provisions of the law. In the circumstances I am therefore unable to place reliance on the evidence of Afolabi and must, and do hold that

Exhibit "A" was not executed according to law and therefore I must pronounce the will, Exhibit "A" on the ground of improper attestation and declare that the testator died intestate.

The action fails and the plaintiffs claims is accordingly dismissed."

B (underlining ours)

As to the principles which should guide an appeal Court on questions of facts the Supreme Court said in S.C.109/70: Lawal v. Chief Yakubu Dawodu & ano. (1972). 9. S. C. 83 at p.106.

C "The Supreme Court had occasion to restate the principles on which a court of appeal acts in its approach to appeals on facts. And, in Paul O. Omoregbe vs. Ehigiator Edo S. C. 142/69 decided on the 29th October, 1971, this Court observed as follows at p. 9 of the judgment: "It is not the business of a court of appeal to substitute its own views of the D facts for those of the judge or tribunal that had heard and seen the witnesses but if the judge or tribunal has failed to make proper use of the opportunity of seeing and hearing the witnesses, or if from stated or uncontroversial or indisputable facts, inferences are shown to have been E drawn which are wrong or are not supported by the evidence, then the court of appeal must in the interest of justice exercise its own powers of reviewing those facts and drawing appropriate inferences from them."

In this case the learned trial judge held that the evidence F was evenly balance and that the rule of law is that the plaintiffs have not discharged the onus placed on them to satisfy the Court that Exhibit "A" was duly executed according to the provisions of the law; and in the circumstances therefore he was unable to place G reliance on the evidence he did not say. He did say Ekeade was not shaken in his evidence under -cross-examination but only in respect of the absence of Afolabi when he signed the document.

He commented "Ekeade was vigorously cross-examined, but on the issue that both he and Afolabi were present at the same time H when the will was executed and that he signed the said will alone without Afolabi being present, he remained totally unshaken." He failed to evaluate his evidence as a whole, particularly his self contradiction.

With due respect, we are of the view that the learned trial judge misdirected himself in this respect for he has to consider the evidence of Ekeade as a whole in relation to the other evidence before him particularly to the undisputed facts before deciding whether he is a person whose evidence could be relied upon. Reading his evidence as a whole, there is no doubt that he was completely discredited under cross-examination and a fair evaluation of his evidence depicts him as a person whose evidence is utterly unworthy of any credit bearing in mind the totality of evidence before the court.

He stated in his evidence that from 1/4/52 to 1966 he was employed by the deceased testator as a store-keeper/Cashier after which he went to Ifo to establish his own business which he set up in 1967, yet he admitted he continued to be an employee of Royal brostters (the deceased's Company) only up to 1967. That in 1967 he started entirely on his own and that he abandoned his own business at Ifo in 1970. Again when confronted with the wages book (Exh."A") in which his signatures appeared, he admitted he received wages from the deceased's Company up to December 1970 and also admitted that in Exhibit "C", he recorded in his own handwriting produce purchased and signed the said document at Ifo on behalf of Royal Brother, through 1970 as storekeeper; further, that in July 1970 he signed an application for loss of land (sic) in the name of Manager for royal brothers Limited." In Exhibit "A" the will dated 26 December 1969, he gave his address as 12A Alhaji Issa Williams Street, Lagos whereas in his evidence he said he went to Ifo in 1967 (and or 1968) to carry on his own business, but again shifted by saying he was going to ifo every day. His evidence reveals that either he was a negligent or carefree person on his own admission, for between 1958 and 1960 he was packed for loss of the Company's fund, but re-engaged on a lower wage, first from 41 to 20 and then to 10.

Against this, nowhere was Afolabi discredited in his evidence.

Further, on the face of the will there is nothing defective. Every page of it is signed by the testator. There is the attestation clause, which on the face of it is regular. It reads:

"Signed by the said (Adeola Odunsi) Adeola Odunsi in the presence of us both, being present at the same time, who at the same time, who at the request, in his presence and in the presence of each have here unto subscribed our names as witnesses."

B We have already observed that there is no dispute that both the testator and the two attesting witnesses signed their names after the testator had duly acknowledged his signatures in the presence of each of them.

C In whiting v. Turner (1903) (89) L.T. 71, the facts of which appear concisely at the heading of the Report reads:

"The plaintiff alleged that the will propounded was not duly executed according to the requirements of the Wills Act 1837, on the ground that it had not been signed by the deceased, nor had her signature D been acknowledged, in the presence of two witnesses present at the same time."

In his judgment, Burcknill J. reviewed earlier authorities including: Wyatt v. Berry 69 L.T. Rep. 416 and Wright v. Sanderson 50 L.T. E Rep. 769 and at p. 72 of the report said:

"The question has been raised as to whether she signed in their presence. What is the evidence to rebut the presumption that she did so? The statements of two persons, who, although they are perfectly honest witnesses, have no clear recollection of anything more than that they F signed their names on the will, which is now propounded. The witnesses Stevens, says that she cannot remember whether she saw the deceased sign, and Casey has given evidence to the same effect. That alone seems to me to be sufficient for the decision of this case. In Wright v. Sanderson G (ubi supra) Fry, L.J. said: "The codicil propounded is ex facie perfectly regular as regards all the formalities of signature and attestation. The presumption Omnia rite esse acta, therefore, applies to the codicil. But the conduct of the testator, both in the preparation of the codicil and in H the calling together of his witnesses, shows an anxious and intelligent desire to do everything regularly. That fact strengthens the presumption. The presumption is not, in my opinion, rebutted by the evidence of the two witnesses who think that the testator did not sign in their presence."

Again in Wright v. Rogers & ano. 21 L.T. (N.S.) 156, a similar question arose. The Will in question was drawn by a competent solicitor from the testator's instructions. For the purpose of obtaining probate in common form, the Solicitor made an affidavit as to the execution which was prepared by the other attesting witness. The solicitor died a short time afterwards, and the other attesting witness for the first time afterwards stated that the will has not been attested in presence of the deceased. Lord Penzance at p. 157 in his judgment said:

"The presumption, as I have said, is in favour of the Will. The presumption is of course capable of being rebutted; but when two persons, one of them a professional man of large experience, who will understood what the law required, have signed an attestation clause duly worded, the court ought to have the strongest evidence to induce it to believe that the statement in the clause is not true. Nothing would tend more to greater uncertainty in the proving of wills than the contrary practice, and the consequence is, that where there is a duly worded attestation clause, the court is always in the habit of presuming as largely as possible in favour of the due execution of the instrument. The proof of the due execution lies upon those who set up the will, and when the two attesting witnesses come and swear that the will was not duly executed, and there is no evidence the other way, the court has nothing upon which to take its stand in maintenance of the presumption. That was the case in Croft v. Croft, 34 L.J., N.S., 44, p. & M., 4 Sw, Tr. 10. In this case the court has the evidence of only one witness to the fact that they did not sign in the presence of the deceased; and when I find that he stood by and assented to an affidavit made by his fellow witness to the effect that the will was duly executed, and also remained so long without disclosing the alleged defect in the attestation, I cannot rely upon his circumstances, I am not satisfied with the evidence, and I shall therefore hold that the will was well executed."

We have already stated that the evidence of Ekeade is far from being reliable and are of the view that the learned trial judge misdirected himself in preferring his evidence to that of Afolabi simply because he stubbornly adhered to his evidence that Afolabi was not present when he

signed. We are of the considered view that his evidence is not of such weight as to rebut the maxim which we have already stated. As in the case of Neal v. Denston 147 L.T. 460 where Langton J, said at p. 463:

*"The maxim is not wanted where such observance is proved, nor
B has it any place where such observance is disproved. The maxim only
comes into operation where there is no proof one way or the other; but
where is more probable that what was intended to be done was done as it
ought to have been done to render it valid rather than that it was done in
C some other manner which would defeat the intention proved to exist, and
would render what is proved to have been done of no effect
That very clerified definition of the maxim, or expansion of the maxim,
is to my mind helpful in this case. I am in this case really rely at all as to
the manner in which this act of execution was performed, and I have a
D document before me which, on the face of it, was properly and duly
executed. The signature of the testator appears above the signature of
the two witnesses the signatures of the two attesting witnesses appear
where they ought to appear, and where one would expect them to appear
E - opposite the attestation clause - and exactly where they would be ex-
pected to appear if the execution of the will had been due and proper.
Applying the maxim in those circumstances in the manner in which Lindley,
L.J. explained it, say as a matter of probability, that the probabilities are
F that this execution was due and proper."*

In view of the above authorities including Johnson's case (supra ubi) it is clear that the defendant failed to discharge the onus which shifted on to him on the case made out in support of the will and that the learned judge erred by misdirecting himself when he
G stated "where the scales are evenly balance, the rule of law is that Plain-
tiffs have not discharged the onus placed on them to satisfy the court
that Exhibit A was duly executed according to the provisions of the law."
We are also the view that he failed to apply the principles which should
H have guided him in evaluating the evidence and drawing reasonable infer-
ence therefrom. **The Court will not allow defective memory alone to
overturn a will which on the face of is duly executed if the wit-
nesses are utterly forgetful of the facts, the presumption omina**

rita essa acta, but not if the recollection of the attesting witnesses is clear. In this case, the evidence of one is clear as to the attestation, while the other is undisputably defective.

The appeal therefore succeeds and is allowed. The judgment of Savage J. dated 7th September 1977 is hereby set aside, and we order B and pronounce the document dated 26th December 1969 propounded by the plaintiffs as the Will of Chief Adeola Odunsi, and this shall be the judgment of the Court.

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