

SUPREME COURT OF NIGERIA

16TH JULY, 1999. SC. 71/1993

**CORAM:- A. B. WALI, M. E. OGUNDARE, U. MOHAMMED,
O. ACHIKE, A. O. EJIWUNMI, JJSC.**

BERNARD EREFADAN-JUMBO PLAINTIFF/RESPONDENT
AND

1. DR. STEPHEN E. DAN-JUMBO) APPELLANTS
2. HOWELLS DAN-JUMBO)
3. GABRIEL OBUBRA DAN-JUMBO)
4. ALFRED D. W. JUMBO)
5. PROBATE REGISTRAR PORT HARCOURT DEFENDANT/
RESPONDENT

ADMINISTRATION OF ESTATES - Stay of execution - Appeal - Probate of a will - Granted when an appeal had been lodged - Was irregular - And there was no necessity to apply for a stay of execution - As the will was still in litigation.

APPEALS - Judgments - Stay of execution - An appeal will not operate as an automatic stay of execution - But the court should always consider - Whether such judgments if enforced - Will not render nugatory the result obtained on appeal.

WILLS - Caveat - Appropriate steps - To be taken - After the entry of caveat

WILLS - Probate - Caveat - Grant of probate - After the entry of caveat - The caveator was entitled to be put on notice - Before proceeding to make the grant.

WORDS & PHRASES - "A Caveat" - What it means.

FACTS

The plaintiff/respondent issued out a writ of summons in the High court of Rivers State of Nigeria holden at Port Harcourt against the 1st - 4th defendants/appellants and the 5th defendant /respondent, that is the probate registrar, Port Harcourt claiming for the revocation of the grant of probate in respect of the will of late chief Emmanuel Erefa Jene made to the 1st to the 4th defendants by the 5th defendant on the 6th of July, 1976 without notice to the plaintiff at a time plaintiff's appeal against the validity of the said will was pending. The said chief E.E Jene of Bonny died on or about the 29th or 30th of March, 1968 and was survived by the 1st to the 4th defendants and the plaintiff as his sons. The deceased left a will. On the reading of the will, the plaintiff disputed the signature on it as that of their deceased father. He promptly filed a caveat attacking its validity.

Without following the necessary procedure, the 1st to 4th defendant (appellants) filed suit No. PHC/49/71 in the Rivers State high court, Port Harcourt, asking for a declaration of the validity of the will. The declaration sought was granted by the High court and the plaintiff/respondent promptly appealed to the Court of Appeal. The 5th defendant granted the probate of the will on the strength of the judgment of the High court notwithstanding the appeal filed against the said judgment and without prior notice to the respondent whose caveat was still subsisting. It was as a result of this action by the 5th defendant that the respondent filed the present action seeking for the revocation of the probate granted by the 5th defendant. At the conclusion of hearing. The learned trial judge in a considered judgment found for the plaintiff and revoked the probate granted. Aggrieved the defendants Appealed unsuccessfully to the Court of Appeal. They have further appealed to the Supreme Court. The appeal was determined on one main issue.

ISSUE FOR DETERMINATION

What is the legal propriety in the grant of probate on the Will the validity of which was challenged by caveat and which was still to be determined by an appellate court.

HELD (Unanimously dismissing the appeal per lead judgment of **WALI JSC**)

Appeals - Judgment

1. Although an appeal against a decision will not operate as an automatic stay of execution against such judgment, but the court should always consider the facts in the case as to whether such judgment if enforced will not render nugatory the result obtained on appeal - See Nalsa & Team Associates v. Nigerian National Petroleum Corporation [1996] 3 S.C.N.J. 50. In my view, this is one of such cases. (p. 2353 C)

Administration of estates - Stay of execution

2. In the circumstance of this case, I agree with Kolawole JCA in the lead judgment when he opined thus- *In my view, the fifth appellant was not entitled to grant probate to the other four appellants after the conclusion of the case by Allogoa J on 10th April, 1972 when an appeal had been lodged against the judgment. There was no necessity to apply for a stay of execution as the lis was still pending and the Will was still in litigation.*

The position was admirably put at page 1147 of the Lord Trimlestown case by Sir John Nicholl thus-

"The taking of an administration with a Will annexed, which Will was in litigation, is, at least, practicing a deception upon the court The administration too was obtained, after knowledge that caveat had been entered which was never warned, and that caveat having expired, this administration was taken without giving any notice to the other party. At least then it was obtained, to use a tender expression, irregularly" (p. 2354 B)

Words & Phrases - A caveat

3. Guided by the ratio decidendi in Lord Trimlestown v. Lady Trimlestown (1830) 162 ER 1145 particularly at 1147, the Court of Appeal was right when it stated thus-

"A caveat" according to Tristram and Coote's is a notice in writing lodged in the principal Registry or in any district probate

registry, that no grant is to be sealed in the estate of the deceased named therein without notice to the person who has entered the caveat. No grant can be sealed if the registrar has knowledge of an affective caveat" (page 527). (p. 2355 G)

B

Wills - Caveat

4. *"After the entry of caveat, a warning or notice to appear is issued against the caveator by the party whose application for a grant has been stopped, and the appearance to such warning by the caveator will disclose the names and addresses of the parties and their respective interests in the estate of the deceased, and with this information it is open to either of them if the interest conflict, to commence an action against the other for the purpose of establishing his own claim." (p. 2356 A)*

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Wills - Probate

5. It is not in doubt from the facts of this case that the application for the grant of probate cannot but be in solemn form. The caveator was entitled to be put on notice by 5th defendant before proceeding to make the grant. It was irregularly obtained. The trial court was therefore right to revoke it and the Court of Appeal correctly affirmed it. See Akinyemi Adesanya & Olatunji Alli v. Sunbo Olatunji & Benbele Olatunji (1970) All NLR 551. (p. 2356 C)

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NOTABLE POINTS OF INTEREST

WALI JSC

1. *The doctrine of lis pendens*

G *"True, so many years have elapsed since the filing of the appeal in PHC/49/71 and the institution of action in this appeal on 21st May, 1979 in suit number PHC/137/79 but that appeal has not been determined on its merit and neither has it been terminated on the application of the respondents to the appeal. On that basis, there is lis pendens and the principle is that the law does not allow to the litigant parties or give to them during the currency of the litigation involving any property rights in such property so as to prejudice any of the litigating parties. (See Ogundaini*

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v. Araba & Barclays Bank of Nigerian Ltd. (1978) 6/7/SC 55 P 78. *John A. Osagie v. S. O. Oyeyinka & Anor.* (1987) 3 NWLR (Part 59) P. 144 at P. 155. *Steven Omo Ebueku v. Sunmola Amola* (1988)2 NWLR (Part 75) 128 at P. 155." (p. 2354 H)

B

ACHIKE JSC

2. Need to admonish persons guilty of acts of irregularity

This court cannot lend its weight to the effectuation of an act that is manifestly irregular and improper, but would strenuously and roundly admonish the person or persons that have led to the irregularity, more so, if such person or persons are officials involved in the administration of probate. This was the position of the probate Registrar in this case wherein the judgment of the trial court was delivered on 11/8/83. I imagine that the probate Registrar has since taken his exit as holder of that office and, therefore, would restrain myself from making coercive order as it relates to him. Suffice it, therefore, to say that the two lower courts were right in ordering and confirming the revocation of the grant. (p. 2357 D)

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REPRESENTATION

B. O. Abiaezue for Chief I. Tabbo Nwobu for the defendants/Appellants
Nnaemeka Ngige, Esq., for the Plaintiff/Respondent

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CASES REFERRED TO

Nalsa & Team Associates v. Nigerian National Petroleum Corporation [1996] 3 S.C.N.J. 50.

Lord Trimlestown v. Lady Trimlestown (1830) 162 ER 1145

B.W.A. Ltd. v. N.I.P.C. Ltd [1962] L.L.R 31

Ogunremi v. Dada [1962] 1 All NLR 663

Akinsanya v. Adegbenro (1965) NMLR 301

Kigo [Nig.] Ltd. v. Holman Bros. (1980) 5-7 SC 60

Ogundiani v. Alaba [1978] 6 and 7 SC 55

Ajayi v. Union Bank of Nigeria [1989] C.L.R. Q 220

Iheanyi v. A.C.B. Ltd. [1991] 7 NWLR (Pt. 205) 628

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LEAD JUDGMENT BY WALI JSC

In the High Court of the Rivers State of Nigeria, holden at Port Harcourt, the plaintiff Bernard Erefa Dan Jumbo, issued out a Writ of Summons against (1) Dr. Stephen E. Dan-Jumbo, (2) Howells Dan-Jumbo (3) Gabriel Obubra Dan-Jumbo (4) Alfred D.W. Jumbo (5) Probate Registrar, Port Harcourt claiming as follows:-

"CLAIM

the plaintiff's claim against the defendants is for the revocation of the grant of probate in respect of the will of late Chief Emmanuel Erefa Jene made to the 1st to the 4th Defendants by the 5th Defendant on the 6th of July, 1976 without notice to the plaintiff at a time plaintiff's appeal against the validity of the said will was pending."

Issues were joined and pleadings were ordered, filed and exchanged. The 1st - 4th Defendants filed a joint Statement of Defence while the 5th Defendant filed a separate Statement of Defence.

The plaintiff testified in support of his own case and called no witnesses. 1st Defendant testified for himself and on behalf of 2nd - 4th Defendants, while Johnson Eremie, the 5th Defendant also testified.

At the conclusion of the evidence, learned counsel addressed the court after which judgment was reserved to 11th August, 1983.

In a considered judgment delivered by Dagogo Manuel, J. he concluded as follows:

"I therefore hold that the plaintiff having lodged an appeal against the decision of the High Court considering the will as being valid and as he has done all what is required by him to prosecute his appeal and as the loss of the original will which has apparently caused the extreme delay in placing the proceedings before the appeal court has not been shown to be of his own making, it cannot be legally proper, as has been done, to grant probate before the appeal against the validity of the will is determined.

In consequence the claim succeeds and the probate granted on the 6th July, 1976 and marked Exhibit "G1" in these proceedings is hereby declared invalid and therefore revoked."

Aggrieved by the decision of the trial court, the Defendants ap-

pealed against it to the Court of Appeal. The Court of Appeal unanimously dismissed the appeal and Kolawale JCA, who delivered the lead judgment stated therein thus-

"The conclusion which I have reached upon all the authorities to which I have referred is that the learned trial judge was right in his conclusion that probate ought not to be granted to the appellants upon a will the validity of which is still to be determined by the Court of Appeal. I am also satisfied that the fifth appellant was not entitled to grant probate to the first to fourth appellants. The respondent had entered a caveat against the grant without serving on the caveator a notice in the prescribed form."

The defendants have further appealed to this court.

The facts of case briefly stated are as follow:

Chief E.E. Jene of Bonny died on or about the 29th or 30th of March, 1968 and was survived by (1) Dr. Stephen E. Dan-Jumbo, (2) Howells Dan-Jumbo, (3) Gabriel Obubra Dan-Jumbo, (4) Chief Alfred D.W. Jumbo and (5) Bernard Erefa Dan-Jumbo as his sons. The deceased left a will.

On 28th March, 1971, the probate Registrar, Rivers State [5th Defendant], invited the five sons of the deceased to the Probate Registry, Port -Harcourt and read the deceased's will to them. On seeing the Will, Bernard Erefa Dan-Jumbo disputed the signature on it as that of their deceased father. He promptly filed a caveat on 28th June, 1971 attacking its validity. Dr. Stephen E. Dan-Jumbo, Howells Dan-Jumbo, Gabriel Obubra Dan-Jumbo and Chief Alfred D.W. Jumbo countered the caveat by taking out a writ of summons in the Rivers State High Court against Bernard Erefagha Dan-Jumbo for a declaration or pronouncement on the validity of the Will and at the end of the case the trial judge, Allagoa J, delivered a considered judgment in which he concluded as follows-

"On the evidence before me I am satisfied and find as a fact that the document Exhibit 'A' and 'A1' is the last will of Chief E.E. Jene and that the attack of the Defendant on the Will is misconceived and that as the probate Registrar testified the quarrel of the Defendant is not about the validity of the Will itself but disgruntled about its contests."

The Judgment by Allagoa J was delivered by him on 10th April, 1972 while the appeal against it by Bernard Erefa Dan-Jumbo was filed on 15th June, 1972 as shown on the Notice of Appeal. The probate Registrar, on the strength of the Judgment by Allagoa J, proceeded and granted the probate of the Will to Dr. Stephen E. Dan-Jumbo, Howells Dan-Jumbo, Gabriel Obubra Dan-Jumbo and Alfred D.W. Jumbo notwithstanding the appeal filed against the said judgment by Bernard Erefa Dan-Jumbo.

Henceforth Bernard Erefa Danjumbo will be referred to as the respondent while Dr. Stephen E. Danjumbo, Howells Dan-Jumbo and Alfred D.W. Jumbo will be referred to as the 1st, 2nd, 3rd and 4th appellants. The probate Registrar will be referred to as the 5th defendant as the lodged no appeal.

In compliance with the Rules of this court both the plaintiff as respondent and the defendants as appellants filed and exchanged briefs of argument. These were orally elaborated upon.

In the brief filed by the 1st - 4th appellants the following issues were formulated-

- "(1) Was the grant of probate by the Fifth Defendant to the first to the Fourth Defendants/Appellants made "mala fide or surreptitiously"?"*
- (2) Was it a legal necessity for the 5th Defendant to put the plaintiff Respondent on notice, in the circumstances of this particular case, before making a grant of the probate of the will of the deceased to the First to the Fourth Defendants/Appellants?"*
- (3) In the circumstances of this case*
 - (i) Does the pendency of an appeal in a court operate as a stay of execution?*
 - (ii) Does the doctrine of "Lis PENDENS" apply?*

The respondent raised the following issues in his brief for this court's determination -

- (i) Was the Court of Appeal right after reviewing the evidence, the posture of the Probate Registry and the circumstances that attended the grant of probate, to conclude that the grant was made mala fide or surreptitiously?*

(ii) Was the Court of Appeal right to say that the non-filing of a motion for stay of execution of the judgment of Allogoa, J. was not necessary given the circumstances of the case?

(iii) Was the Court of Appeal right to resort to the doctrine of 'lis pendens' to the facts of this case?

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(iv) Was the Court of Appeal right to invoke the probate Rules of England?

Learned counsel for the respondent Akpamgbo SAN raised successively objection to grounds 1 and 2 of the grounds of appeal as regards their competence and same were struck out. Since issues 1 and 2 were hinged to the incompetent grounds, the issues must be struck out as they relate to no grounds of appeal. Issues 1 and 2 of the appellants' brief are accordingly struck out. Also, particulars (iv) and (v) of ground 3 of the grounds of appeal are also struck out as they are not covered by the ground to which they are supposedly related.

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In considering this appeal I shall confine myself to argument related to Issue 3 which covers ground 3 particulars (i) (ii) and (iii) of the grounds of appeal.

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In arguing Issue 3, it was the submission of learned counsel for the appellant that ordinarily an appeal does not operate as a stay of execution and a court is competent to execute its judgment. He argued that in the case in hand there was no order of stay of execution against the judgment in PHC/49/71 delivered by Allogoa J. Learned counsel cited and relied on B.W.A. Ltd. v. N.I.P.C. Ltd. & Ors. [1962] L.L.R 31; Ogunremi v. Dada [1962] 1 All NLR 663; Akinsanya v. Adegbenro (1965) NMLR 301 and KIGO [NIG.] LTD. V. HOLMAN BROS. (1980) 5-7 SC 60 AMONG OTHERS.

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ON THE DOCTRINE OF LIS PENDENS LEARNED COUNSEL ARGUED THAT THE DOCTRINE ONLY APPLIES IN CASES HAVING AS THEIR OBJECTIVE THE RECOVERY OR ASSERTION OF TITLE TO A SPECIFIC property and invariably, real property. He relied in support on Ogundiani v. Alaba & Ors. [1978] 6 and 7 SC 55; John Ajayi v. Union Bank of Nigeria [1989] C.L.R. Q 220 and Iheanyi v. A.C.B. Ltd. [1991] 7 NWLR (Pt. 205) 628.

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He urged this court to allow the appeal, set aside the judgment of the Court of Appeal and the court below and dismiss the respondent's claim in toto.

In reply to submissions of learned counsel for the appellant, Mr. Akpamgbo, SAN learned counsel for the respondents agrees that an appeal against a judgment does not ordinarily operate as a stay of its execution but submits that in the circumstances of the case in hand, a stay of execution of Allogoa's judgment was necessary since the caveat entered by the respondents was neither discharged not withdrawn. He also submits that it was the 5th appellant who unilaterally and relying on the judgment of Allogoa J, against which he knew there was pending appeal, granted the probate.

As regards the doctrine of lis pendens, learned Senior Counsel for the respondent submits that although it prevents the effective transfer of rights in any property which is the subject matter of an action pending in court, it is not confined to tangible rights only but it also applies to intangible rights, such as the right involved in this case. It was his contention that the 5th defendant was aware that the appeal against the judgment of Allogoa 'J, was pending at the time he granted the probate of the Will containing the disputed signature of its alleged maker. He urges the court to dismiss the appeal and affirm the judgments of the trial court and the Court of Appeal.

It is pertinent to reiterate that the 5th defendant, though being referred in the proceedings in both the Court of Appeal and this court as the 5th appellant had neither appealed against the judgment of the trial court nor that of the Court of Appeal.

The fact in this case are not seriously in dispute. The gravamen is whether the signature on the Will sought to be probed is genuinely that of Chief E.E. Jene [deceased]. Both the 1st - 4th appellants together with respondent were invited by the 5th defendant who was the probate Registrar at the time, to the Probate Registry, Port Harcourt, Rivers State to read to them the Will of their deceased father. On reading the Will, the respondent demanded to see it and after doing so, he disputed the genuineness of the signature on it as that of their deceased father. This was

on 28th March, 1971. On the same day the Respondent entered caveat attacking the validity of the Will.

The 1st - 4th appellants filed Suit No. PHC/49/71 seeking for a declaration of the validity of the Will in dispute. This was before Allagoa J [as he then was] At the conclusion of the hearing the learned judge granted the declaration. The respondent promptly appealed against this decision to the Court of Appeal. The 5th defendant was aware of this move by the respondent, yet he went ahead and granted the probate of the Will to the appellants. It was as a result of this action by the 5th defendant that the respondent filed Suit No. PHC/137/79 before Dagogo Manuel J, seeking for the revocation of the probate granted by 5th defendant.

As I have indicated earlier in this judgment, the 5th defendant did not appeal against this judgment but only the 1st - 4th appellants did. In a considered judgment of the Court of Appeal delivered by Kolawole JCA which was concurred in by Onu JCA [as he then was] and Omosun JCA, the learned justice concluded-

"The conclusion which I have reached upon all the authorities to which I have referred is that the learned trial judge was right in his conclusion that the probate ought not to be granted to the appellants upon a Will the validity of which is still to be determined by the Court of Appeal. I am also satisfied that the fifth appellant was not entitled to grant probate to the first to fourth appellants the respondent had entered a caveat against the grant without serving on the caveator a notice in the prescribed form."

It is not in doubt, nor is it disputed that the respondent questioned the validity of the Will as regards the signature of the testator. He promptly entered a caveat.

In paragraph 9 of the Statement of Claim the plaintiff/respondent averred:

"The plaintiff at a meeting with the 5th defendant asking (sic) to see the Will and on seeing the Will disputed the signature of the deceased and later filed a caveat attacking the validity of the Will on the 28th June, 1977."

This was admitted by the 1st - 4th defendants/appellants in paragraph 4 of their joint Statement of Defence which averred:

"The 1st - 4th defendants admit paragraph 9 of the Statement of Claim."

B The 5th defendant also admitted paragraph 9 of the Statement of Claim in paragraph 6 of his Statement of Defence wherein he pleaded thus-

"6. The 5th defendant admits paragraph 9 of the Statement of Claim."

C Although what is admitted requires no further evidential proof, the defendants/appellants further confined the admission by oral testimony. The 1st defendant/appellant stated under cross-examination-

"The plaintiff was present at the reading of the Will and questioned the validity of his father's signature on the Will. I did not disclose D to the officer for probate that the validity of the Will was being challenged."

The 5th defendant/appellant testifying as D.W.1, stated thus-

"I was Registrar at the time the probate was granted E the plaintiff lodged a caveat against the validity of the Will. The High Court gave a decision in favour of the Executors as shown in Exhibit A. A probate was thereafter granted to the Executors."

F The consideration is now limited to two aspects of the issues raised to wit:

1. Whether an appeal lodged against a judgment can operate as a stay of execution of that judgment.

2. Whether the doctrine of Lis Pendens is applicable in this case.

G These issues seemed to have been in ground 11 of the Grounds of appeal contested in the Court of Appeal.

It is not in dispute that the respondent entered caveat against the Will in dispute. During the trial of the appellants' case before Allagoa J [as he then was] the original Will was tendered and admitted in evidence. H The respondent appealed against the judgment in PHC/49/71 and paid all necessary fees as testified by. P.W .1 in PHC/137/79. The process of compiling and forwarding the record in PHC/49/71 was terribly hampered by the loss of the original Will. On this Manuel J commented thus-

"I will accept that the loss of the original Will does not doubt the grant of probate but this will be subject to the acceptance of the Will as being valid. In the present suit where the validity of the Will is challenged on the ground of the signature not being that of the testator, a certified copy of the Will, is the one attached to the Probate in this suit, which does not carry any signature, cannot be helpful to resolve the challenge. A photocopy would have been more helpful as it would show the signature being questioned."

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"All that the court is concerned with in this suit is to determine the legal propriety in the grant of probate of the Will the validity of which has not been determined by an appeal court."

Although an appeal against a decision will not operate as an automatic stay of execution against such judgment, but the court should always consider the facts in the case as to whether such judgment if enforced will not render nugatory the result obtained on appeal - See Nalsa & Team Associates v. Nigerian National Petroleum Corporation [1996] 3 S.C.N.J. 50. In my view, this is one of such cases. The crux of the matter involved in this case is the validity of a Will vis-a-vis the signature of its maker. A caveat attacking its validity was lodged by the respondent and without following the necessary procedure, the appellants filed Suit No. PHC/49/71 before Allogoa J, asking for a declaration of the validity of the Will. He granted the request as contained in his judgment Exhibit A as evidenced in Exhibit B, the Notice of Appeal. Immediately after Exhibit A, the 5th defendant granted the probate of the Will without prior notice to the respondent whose caveat was still subsisting. This action by the 5th defendant is hasty and against the laid down procedure. The learned trial judge was cognizant of the irregular procedure in handling the matter by the 5th defendant when he stated, thus in Exhibit A-

"Before going into the merits of the case having regard to the procedure adopted both by the applicant for grant of probate and by the probate Registrar which in my view appears to be novel and a misunderstanding of Rules and practice in probate matters and which have given

rise to this litigation I consider it necessary to refer to the Law and the Rules governing this matter since I am not aware of any previous decision by this court in support of the procedure adopted."

That notwithstanding he proceeded and granted the declaration sought.

B In the circumstance of this case, I agree with Kolawole JCA in the lead judgment when he opined thus-

"The fifth appellant/defendant did not take the appropriate steps which he should have taken after the entry of caveat by the respondent.

C *The fifth appellant, in my view, ought to have issued a notice to appear against the caveator, respondent, on behalf of the first to fourth appellants whose application for a grant had been stopped as the fifth appellant clearly admitted in paragraph 7 of his statement of defence thus -*

D *"That as a result of the caveat filed by the plaintiff the 5th defendant was estopped from the grant of probate."*

In my view, the fifth appellant was not entitled to grant probate to the other four appellants after the conclusion of the case by Allogoa J on 10th April, 1972 when an appeal had been lodged against the judgment. There was no necessity to apply for a stay of execution as the lis was still pending and the Will was still in litigation.

E *The position was admirably put at page 1147 of the Lord Trimblestown case by Sir John Nicholl thus-*

F *"The taking of an administration with a Will annexed, which Will was in litigation, is, at least, practicing a deception upon the court*

G *The administration too was obtained, after knowledge that caveat had been entered which was never warned, and that caveat having expired, this administration was taken without giving any notice to the other party. At least then it was obtained, to use a tender expression, irregularly"*

On the issue of lis pendens. The learned Justice commented and concluded as follows-

H *"True, so many years have elapsed since the filing of the appeal in PHC/49/71 and the institution of action in this appeal on 21st May, 1979 in suit number PHC/137/79 but that appeal has not been determined on its merit and neither has it been terminated on the application*

of the respondents to the appeal. On that basis, there is *lis pendens* and the principle is that the law does not allow to the litigant parties or give to them during the currency of the litigation involving any property rights in such property so as to prejudice any of the litigating parties. (See *Ogundaini v. Araba & Barclays Bank of Nigerian Ltd.* (1978) 6/7/SC 55 P 78. *John A. Osagie v. S. O. Oyeyinka & Anor.* (1987) 3 NWLR (Part 59) P. 144 at P. 155. *Steven Omo Ebueku v. Sunmola Amola* (1988) 2 NWLR (Part 75) 128 at P. 155."

All other issues raised and argued in this appeal apart, and as stated by Dagogo Manuel J in his judgment, the main issue in this case is to determine the legal propriety in the grant of probate on the Will the validity of which was challenged by caveat and which was still to be determined by an appellate court.

As correctly stated in Exhibit A by Allagoo J that the jurisdiction of the High Court of Rivers State is governed by section 17 of the High Court Law which provides that-

"The jurisdiction of the Court in probate causes and matters shall, subject to the law and to any rules of court, be exercised in conformity with the law and practice in force in England on the thirtieth day of September, 1960."

The learned trial judge further stated-

"The Rules of court order 51 Rules 1 - 46 are very limited in scope and are more concerned with directions which the court may make and not to the practice. In view therefore of the provisions of section 17 above quoted, it would then be necessary to fall on the English Law and practice in force on 30th September, 1960. This is contained in TRISTRAM AND COOTE'S ON PROBATE PRACTICE 23RD EDITION p. 612 - 630."

Guided by the ratio decidendi in *Lord Trimlestown v. Lady Trimlestown* (1830) 162 ER 1145 particularly at 1147, the Court of Appeal was right when it stated thus-

"A caveat" according to Tristram and Coote's is a notice in writing lodged in the principal Registry or in any district probate registry, that no grant is to be sealed in the estate of the deceased

named therein without notice to the person who has entered the caveat. No grant can be sealed if the registrar has knowledge of an affective caveat" (page 527). After the entry of caveat, a warning or notice to appear is issued against the caveator by the party whose application for a grant has been stopped, and the appearance to such warning by the caveator will disclose the names and addresses of the parties and their respective interests in the estate of the deceased, and with this information it is open to either of them if the interest conflict, to commence an action against the other for the purpose of establishing his own claim."

It is not in doubt from the facts of this case that the application for the grant of probate cannot but be in solemn form.

The caveator was entitled to be put on notice by 5th defendant before proceeding to make the grant. It was irregularly obtained. The trial court was therefore right to revoke it and the Court of Appeal correctly affirmed it. See Akinyemi Adesanya & Olatunji Alli v. Sunbo Olatunji & Benbele Olatunji (1970) All NLR 551.

The appeal therefore lacks merit and I hereby dismiss it with N10,000.00 costs to the plaintiff/Respondent.

OGUNDARE

I agree with the judgment of my learned brother Wali, JSC just delivered. I have nothing more to add. I too dismiss the appeal and affirm the judgment of the court below with costs as assessed by Wali, JSC.

MOHAMMED JSC

I have had the advantage to read in draft the judgment of my learned brother, Wali, J.S.C., and I agree with him that this appeal is without merit. For those reasons given in the leading judgment I also dismiss the appeal. I abide by the consequential orders made including the award of costs.

ACHIKE JSC

The whole essence of a caveat being entered by a person interested in the grant of probate, is to give a notice to the probate Registrar, to desist from making a grant of probate in the face of the caveat unless the court has given a hearing for the determination of the success or lack of success as it relates to the caveat. For the probate Registrar to make the grant without first putting the caveator on notice is palpably reprehensible and snacks of incurable irregularity. It was common ground that the caveator disputed the signature of the testator which undoubtedly was a clear signal that the validity of the Will was under fire. Indeed, all the defendants, including the probate Registrar admitted the caveator's attack on the validity of the Will, yet, and rather strangely, the probate Registrar granted probate to the four defendants when an appeal was lodged against the judgment. In my judgment, this was a deliberate deception upon the court, bearing in mind that there was a subsisting caveat.

This court cannot lend its weight to the effectuation of an act that is manifestly irregular and improper, but would strenuously and roundly admonish the person or persons that have led to the irregularity, more so, if such person or persons are officials involved in the administration of probate. This was the position of the probate Registrar in this case wherein the judgment of the trial court was delivered on 11/8/83. I imagine that the probate Registrar has since taken his exit as holder of that office and, therefore, would restrain myself from making coercive order as it relates to him.

Suffice it, therefore, to say that the two lower courts were right in ordering and confirming the revocation of the grant.

For all I have said and fuller judgment of my learned brother, Wali, JSC, with which I entirely agree, I would, myself dismiss this appeal as totally bereft of substance. I award N10,000.00 costs to the Respondents.

EJIWUNMI JSC

I have had the privilege of reading before now the judgment just delivered by my learned brother Wali, JSC. As I agree entirely with the B reasons given for dismissing the appeal. I too dismiss the appeal, and abide with the order made as to costs.

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