



Neutral Citation Number: [2021] EWHC 1354 (Ch)

Case No: PT-2017-000215

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**PROPERTY TRUSTS ANAND PROBATE LIST**

**In the estate of GODFERY ITSE MENE OTUBU deceased**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 20 May 2021

**Before:**

**Ian Karet (sitting as a Deputy High Court Judge)**

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**Between:**

- (1) Oritsedere Samuel Otubu
- (2) John Mone Otbu
- (3) Joseph Ariogboma Otubu
- (4) John Eyituoyo Otubu
- (5) Alero Bosede Ogboghodo
- (6) Mejebi Toritseju Mayor
- (7) Oritsetimeyin Elizabeth Otubu

**Claimants**

- and -

**Celia Sisi Chis Otubu**

**Defendant**

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**William Henderson** (instructed by Fitzpatrick & Co) for the **Claimants**  
The **Defendant** was not represented and did not appear

Hearing date: 20 April 2021

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**JUDGMENT**

## **Ian Karet:**

### **Introduction**

1. This is the judgment following a trial of an action relating to the estate in England and Wales of Godfrey Itse Mene Otubu (the “Deceased”) who died domiciled in Nigeria on 17 November 2004.
2. The Claimants are the executors named in the will of the Deceased dated 26 April 1993 (the “Will”). They are also 7 of the 21 or 22 children of the Deceased and are beneficially interested in his estate under his will or intestacy.
3. The Defendant is one of four widows of the Deceased. She has three children.
4. On 7 April 1993, shortly before executing the Will, the Deceased executed a trust deed creating the Mene-Otubu Trust (the “Trust”) relating to certain property. The Deceased was the settlor and the Claimants were trustees. The Trust did not extend to any residential property in the United Kingdom.
5. Probate of the Will was granted to the 3<sup>rd</sup> and 4<sup>th</sup> Claimants out of the High Court of Lagos, Nigeria, Probate Registry on 22 October 2014, with power reserved to the 1<sup>st</sup> and 5<sup>th</sup> Claimants until they return to Nigeria.
6. On 12 November 2014 the Defendant wrote to the Probate Registry of the Lagos High Court to request a certified copy the grant.
7. On 3 November 2015 the Defendant completed HM Revenue & Customs form IHT 421 and Probate Application Form PA1. Form PA1 asks at A1 the question “Did the deceased leave a will/codicil?” The Defendant ticked the box “No” and added in manuscript “There is no will pertaining to the asset in this application”. Section B of the form seeks information about relatives of the deceased. The Defendant answered that there was one surviving lawful wife and three sons or daughters who survived the Deceased.
8. On 15 March 2016 the Defendant swore the Oath for Administrators in support of her application for a grant of representation of the Deceased’s estate in England and Wales (the “Oath”). By the Oath the Defendant swore that the Deceased “died...intestate”; that “no one has been entrusted with the administration of the estate”; and that she was “the lawful widow” of the Deceased.
9. On 14 April 2016 the Defendant was granted Letters of Administration of the estate of the Deceased in England and Wales by the Principal Probate Registry (the “English Grant”). The English Grant says that the Deceased died “Intestate” and certifies the net value of the estate as £265,000.

10. On 25 April 2016 the Defendant executed an assent (AS1) as Personal Representative to transfer into her sole name a residential property at 4 Berkhamsted Avenue, Wembley HA9. Berkhamsted Avenue was registered in the Deceased's name. On 3 May 2016 the property was registered in her name at the Land Registry.
11. On 9 June 2016 the Defendant executed an assent (AS1) as Personal Representative to transfer into her sole name a residential property at 82 Harley Road, London NW10. Harley Road was registered in the name of Seward Investments Inc, a Panamanian company ("Seward"). On the same day the Defendant signed a Land Registry form AP1 in her capacity as the personal representative of the Deceased.
12. On 5 August 2016 the Land Registry cancelled the form AP1. On 16 August 2016 the Defendant executed a Deed of Transfer (TR1) of Harley Road from Seward to herself. On 26 August 2016 Harley Road was registered in the Defendant's sole name. On 4 January 2017 Seward was dissolved.

### **The claim**

13. On 13 December 2017 the Claimants commenced this action alleging that Defendant had committed fraud and was liable for damages for deceit and conversion and compensation for breach of trust. The Claimants sought amongst other things (a) an order setting aside the English Grant on the grounds that it was obtained by fraud and/or by reason of the Defendant not being the person entitled or solely beneficially entitled to Berkhamsted Avenue; (b) a declaration that Harley Road was held on the trusts applicable to the Deceased's estate; (c) orders granting certain Claimants Letters of Administration as executors appointed by the Nigerian court; and (d) an order pursuant to s.50 Administration of Justice Act 1985 removing the Defendant as administrator of the Deceased's estate in England and Wales and the replacement of her by four of the Claimants or by some other fit and proper person.
14. The Claimants alleged that the Defendant had been well aware of the Deceased's financial arrangements as she had originally been his personal assistant. She had had attended the reading of the Will to the family by the Deceased's lawyer.
15. The Defendant served a defence. She did not accept that the Deceased had other lawful wives, and she alleged that the Will was conditional on the Trust not having been executed. As the Trust had been executed under Nigerian law the Will did not take effect.
16. The Defendant denied knowing the Deceased's lawyer. She had been "in attendance with other members of the family, after the Deceased's funeral, when

a person came to the Deceased's house on or around 31 January 2005 and read a document”.

17. The Defendant said that the application for the English Grant contained no false statements. She alleged that the probate application form contained an error as to the three children and that she had said she was “one of the persons beneficially entitled to the estate”. That is not correct.
18. The Defendant did not initially provide disclosure. The Oath was provided in May 2020 under threat of an “unless” order.
19. The Defendant made witness a statement made in September 2020. That says she is “a legal practitioner, admitted to the roll and called to the bar in three jurisdictions: England and Wales, Republic of Ireland and Federal Public of Nigeria”. The Defendant has signed email correspondence with the Claimants as “Barrister Celia Otubu”.
20. In her evidence the Defendant alleges that the Claimants have committed fraud on the estate of the Deceased and tried to remove her financial support. She refers to proceedings which appear to have been brought in Lagos by her children against the Claimants in relation to the Trust.
21. The evidence shows a major falling out in the Deceased's family. There is a substantial disagreement about what has happened and who has behaved badly to whom.
22. The Defendant was initially represented by solicitors. In January 2019 she became a litigant in person. A Consent Order made on 27 May 2020 by Deputy Master Hansen recites that consent was given by the parties' solicitors, showing that that Defendant was again represented. That order provided for a 5-day trial (with a half day pre-reading) to take place between 1 February and 31 May 2021. There was provision for witness statements and expert reports on questions of Nigerian law of trust, wills and succession and marriage under customary law.
23. On 9 November 2020 Deputy Master Jefferis gave the Claimants leave to amend the Particulars of Claim and the Defendant permission to serve an Amended Defence on or before 16 December 2020.
24. On 16 December 2020 the Defendants' solicitors wrote to the Claimants' solicitors:

“Not conceding the claims made in [in this action] find enclosed two Transfers of Whole Registered Title (TR1) dated 14 December 2020, transferring [Berkhampsted Avenue and Harley Road] from our Client to the Mene-Otubu Trust.”

25. On 6 January 2021 the Claimants' solicitors responded noting that the Defendant had failed to serve an Amended Defence (with the result that the amended allegations not answered in the Defence were deemed admitted) and that the Trust had no legal personality so that the transfers were not effective. The forms TR1 should thus be made out to the trustees of the Trust (or four of them).
26. On 27 January 2021 the Defendant's solicitors wrote to the Claimants' solicitors notifying them that they were no longer acting for the Defendant.
27. On 5 February 2021 the Claimants' solicitors wrote two letters to the Defendant. In the first they referred to their letter of 6 January 2021 (incorrectly stated as 16 January) and sought a response to that. The second proposed terms of settlement on the basis that the Defendant confirm that the properties were held on the trusts of the Deceased's estate; the Defendant deliver up possession of the properties: the Grant of Letters of the Administration be set aside; the Defendant's Assents of the properties be set aside; there be a grant of Probate or Letters of Administration to some of the Claimants; the Defendant render an account of and there be an inquiry into what the Defendant had received of the estate of the Deceased. The Claimants offered that each side bear its own costs.
28. The Defendant did not respond.
29. On 22 February 2021 there was a Pre-Trial Review ("PTR") before Mrs Justice Falk. The Defendant was not present or represented. The Claimants agreed to restrict the relief sought, broadly put, to recovery of property forming part of the Deceased's estate, setting aside the English Grant and granting the Claimants probate or letters of administration over the Deceased's estate in England and Wales. The Claimants also sought orders that the Defendant render an account of, and that there be an inquiry into, what she had received from the estate of the Deceased. The Defendants sought costs. The trial was reduced in length to one day (with a day pre-reading).
30. The PTR order directed that the trial take place on the written evidence only, with witness statements and expert reports standing as evidence. The order contained detailed provisions for service on the Defendant by post and by email confirmed by text message.
31. The Defendant did not respond to service of the PTR order and did not file a skeleton argument for the trial. In advance of the trial I directed the Claimants to contact the Defendant with a view to agreeing how the time at trial should be managed. The Defendant did not respond.

32. Trial took place remotely due to the Covid19 pandemic. Mr Henderson appeared at trial for the Claimants. The Defendant was not represented and did not appear.
33. Mr Henderson confirmed that the PTR order reflected the prospect raised at the PTR that the Defendant might not appear at trial.
34. At trial, the Claimants limited further the relief sought. In particular, they no longer sought any account or inquiry, and they sought no order as to costs.
35. As the Defendant did not attend trial and was not represented at trial it was not possible to explore the conflicting evidence.
36. Mr Henderson submitted that by signing the forms of transfer to the Trust the Defendant had shown an intention to transfer Berkhamsted Avenue and Harley Road to resolve the claim and that the court should accordingly order relief in respect. That was so even though those transfers were not made out to the right persons. I accept that submission.
37. The outstanding matters can thus be resolved without the need to make a finding that the Defendant acted fraudulently or to explore the history of Seward and various questions of Nigerian law set out in the expert reports.
38. The Defendant contests the Claimants' allegations of fraud. Given that there are allegations of dishonesty on both sides and that those issues may yet be live in the proceedings in Nigeria I make no finding on them.
39. I will then deal with the relief that follows from the Defendant's intention to transfer the properties.

**Relief – substitution the Defendant as personal representative**

40. The Claimants first seek an order appointing certain Claimants in place of the Defendant as personal representatives of the Deceased in England and Wales. This can be achieved in more than one way, and Mr Henderson sought an order pursuant to s.50 Administration of Justice Act 1985.
41. This approach was not within the restricted form of relief which the Claimants had agreed as part of the PTR order. The relief that had been sought was a declaration that the properties were held on trusts for the Deceased's estate and revoking the English Grant. Mr Henderson said that the route now proposed would have the same outcome without certain risks that arose from the previous proposal that the properties might vest in the interim in persons other than the Claimants.

42. The Claimants therefore asked to be released from the restrictions recited in the PTR order. I grant the Claimants leave to approach the matter this way.
43. S.50 Administration of Justice Act 1985 provides:
  - a) Where an application relating to the estate of a deceased person is made to the High Court under this subsection by or on behalf of a personal representative of the deceased or a beneficiary of the estate, the court may in its discretion—
  - b) appoint a person (in this section called a substituted personal representative) to act as personal representative of the deceased in place of the existing personal representative or representatives of the deceased or any of them.”
44. In *Kershaw v Micklethwaite* [2010] EWHC 506 (Ch) Newey J considered an application to remove certain executors of a will. He noted that Lewison J had addressed the circumstances in which a personal representative should be removed in *Thomas & Agnes Carvel Foundation v Carvel* [2008] Ch 395, holding that the overriding consideration is whether the trusts are being properly executed, and the main guide must be "the welfare of the beneficiaries". The court's principal duty is to see that the trusts are properly executed. Trustees may be replaced for a variety of reasons in non-contentious cases, and it was not necessary to make out a case of misconduct in order to remove a trustee. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.
45. Newey J said:

“I do not think that friction or hostility between an executor and a beneficiary will, of itself, be a good reason for removing the executor. On the other hand, a breakdown in relations between an executor and a beneficiary will be a factor to be taken into account, in the exercise of the court's discretion, if it is obstructing the administration of the estate, or even sometimes if it is capable of doing so. [The Claimant] accepted in the course of argument that for a breakdown in relations to warrant an executor's removal, the breakdown must at least have the potential to cause difficulty in the administration of the estate.
46. In the circumstances of this case, I find that the Defendant has accepted that the properties should be transferred; has failed to do so effectively; and has now withdrawn from the process. Accordingly, she should be substituted in her role.
47. By CPR 57PD 13.2(2) if a claim is made for the appointment of a substituted personal representative, the claim form must be accompanied by written

evidence as to the fitness of the proposed substituted personal representative, if an individual, to act. That did not happen in this case. Under CPR 3.10:

“Where there has been an error of procedure such as a failure to comply with a rule or practice direction (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error.”

48. Mr Henderson invited me to make an order remedying the error and I shall do so. The representatives proposed are the 3<sup>rd</sup> and 4<sup>th</sup> Claimants in their roles as executors currently appointed by the Nigerian Grant of Probate and the 6<sup>th</sup> Claimant. The status of the 3<sup>rd</sup> and 4<sup>th</sup> Claimants as executors named in the Nigerian Grant of Probate is for these purposes sufficient under CPR 57 PD 13.2(2). While the 6<sup>th</sup> Claimant has made a witness statement, it does not address the question whether she is fit as required by the rules and I decline to add her as a representative.

#### **Relief – alteration of registered proprietor**

49. The Claimants also seek an order pursuant to paragraphs 2 and 3 of Schedule 4 to the Land Registration Act 2002 and Rule 126 of the Land Registration Rules 2003 that the proprietorship registers of Harley Road Berkhamsted Avenue be altered so as to substitute the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Claimants as registered proprietors in place of the Defendant.

50. It follows from my decision not to add the 6<sup>th</sup> Claimant as a representative that an order would not apply to her.

51. Paragraphs 2 and 3 of Schedule 4 to the Land Registration Act 2002 provide:

“2(1) The court may make an order for alteration of the register for the purpose of—

- (a) correcting a mistake,
- (b) bringing the register up to date, or
- (c) giving effect to any estate, right or interest excepted from the effect of registration.

(2) An order under this paragraph has effect when served on the registrar to impose a duty on him to give effect to it.

3(1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.



(2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless—

(a) he has by fraud or lack of proper care caused or substantially contributed to the mistake, or

(b) it would for any other reason be unjust for the alteration not to be made.

(3) If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so.

(4) In sub-paragraph (2), the reference to the title of the proprietor of a registered estate in land includes his title to any registered estate which subsists for the benefit of the estate in land.

52. Rule 126 of the Land Registration Rules 2003 provides:

(1) Subject to paragraphs (2) and (3), if in any proceedings the court decides that—

(a) there is a mistake in the register,

(b) the register is not up to date, or

(c) there is an estate, right or interest excepted from the effect of registration that should be given effect to,

it must make an order for alteration of the register under the power given by paragraph 2(1) of Schedule 4 to the Act.

(2) The court is not obliged to make an order if there are exceptional circumstances that justify not doing so.

(3) This rule does not apply to an alteration of the register that amounts to rectification.

53. Following *NRAM Ltd v Evans* [2017] EWCA Civ 1013 the order here would be to bring the register up to date as regards the persons who should be the registered proprietors within the meaning of Schedule 4, paragraph 2(2) and not to correct a mistake. The basis for an order would be that by lack of proper care the Defendant caused or substantially contributed to registrations that require alteration. There are no exceptional circumstances which justify not doing so under Paragraph 3(3) of Schedule 4 or under Rule 126(2), so the court is obliged to make an order.

## **Conclusions**

54. I shall make the orders as described above. There will be no order as to costs, as requested by the Claimants.
  
55. Given the difficulties the Claimants have had contacting the Defendant I direct that the Claimants prepare a draft order and serve it on the Defendant within 7 days of the handing down of this judgment in the same manner that they served the PTR order. If the Defendant does not respond within 3 working days the draft order should be filed with the court with a confirmation that there has been no response. If the Defendant does respond then the Claimants should seek to agree the order with her and should apply to court if agreement cannot be reached.