

37, 1953

In the Privy Council.

No. 7 of 1953.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL (GOLD COAST SESSION). 33605

UNIVERSITY OF LONDON W.C.1. 9 - NOV 1956 INSTITUTE OF ADVANCED LEGAL STUDIES

IN THE MATTER of JOHN INTSIFUL (Deceased)

BETWEEN

HENRY CHARLES CHRISTIAN. Otherwise called KOFI AMPAH ... (Defendant) APPELLANT

AND

SAMUEL TAWIAH INTSIFUL ... (Plaintiff) RESPONDENT.

CASE FOR THE APPELLANT

1.—This is an appeal from a Judgment of the West African Court of Appeal, dated the 21st December, 1951, which reversed a Judgment of the Supreme Court of the Gold Coast, dated the 12th March, 1951. RECORD p. 19 p. 8

2.—The case originated in the Supreme Court of the Gold Coast by a Writ of Summons, dated the 20th December, 1950, obtained by the Plaintiff, Samuel Tawiah Intsiful, against the Defendant, Henry Charles Christian, otherwise called Kofi Ampah. p. 1

3.—In the Statement of Claim, dated the 17th January, 1951, the Plaintiff stated that he is one of the Executors of the last Will of John Intsiful, deceased, who died at Cape Coast on the 18th June, 1950; that the Defendant is the nephew of the said John Intsiful, and one of the Executors named in the Testator's last Will; that on the 20th November, 1944, the Testator duly executed his Will in the presence of the Rev. James Amissah Hammond and Joseph Brookman Amissah Arthur; that the Will was deposited in the Divisional Court by the said Rev. James Amissah Hammond by direction of the Testator on the day of its execution; that out of the four Executors two had died in the Testator's lifetime, leaving the Plaintiff and the Defendant who renounced Probate and entered a caveat against the p. 2

RECORD — grant of Probate of the Will ; and that he, the Plaintiff, made claim to have the Will established.

p. 3 4.—In the Statement of Defence, dated the 26th January, 1951, the Defendant (*a*) avers that at the date of the alleged Will the Testator was totally blind, having been blind since 1943, and could not have executed the Will as alleged :

(*b*) states that the signature in the Will is not the true signature of John Intsiful :

(*c*) Denies the Plaintiff's claim to have the alleged Will, dated the 20th November, 1944, established. 10

pp. 4-8 5.—Oral and documentary evidence was led by, and for, the Plaintiff before Mr. Justice Dennison on the 12th March, 1951, but no evidence was adduced by, or on behalf of, the Defendant whose contention was that the Plaintiff should be non-suited. p. 8

p. 7 6.—The Plaintiff, in his evidence, said that he was a son of the deceased whom he used to help in his store ; that when his father was not able to work he was placed in charge of the store ; that his father's eyesight started to fail in 1941 when he retired ; that in 1943 his father instructed him to collect the rents ; that in 1948 when totally blind his father gave him a Power of Attorney (Exhibit P.2) on which the deceased made a thumb print ; that p. 27 he did not know that his father had made a Will until the caveator told him ; that Mr. Hammond did not tell him ; that all the deceased's papers were in his custody ; that he had not seen a draft of the Will (Exhibit P.1) p. 21 but had seen a type-written copy of it (Exhibit P.4) ; and that from 1945 his father did not sign any papers. p. 24

p. 5 7.—J. M. Arthur, 1st witness for the Plaintiff, in his evidence, said that he was a barrister's clerk ; that some time before he died the deceased gave him a paper to be typed ; that he handed back the typed copy and the original paper ; that the typed copy is Exhibit P.1 which he understood to be the Testator's Will ; that he was not present when the Will was p. 30 executed ; that when the Will was typed the deceased was not blind as he could read ; that he did not know that the deceased had bad eyesight ; and that although he was old the deceased was very strong and not nervous.

p. 5 The Rev. J. A. Hammond, 2nd witness for the Plaintiff, in his evidence, said that the deceased was a member of his church and that he had stayed with the deceased, who had been his guardian, while at school ; that at the request of the deceased the witness and J. B. A. Arthur met on the 20th November, 1944, at the house of the deceased, who said he had made his Will and wished them to witness it ; that the deceased signed in their presence and they witnessed it ; that the deceased asked him to help him to p. 40 sign because he said his eyes were dim ; that he (the witness) aided him and held his hand whilst he signed after he had indicated where the deceased should sign ; that after the deceased had signed and he and Arthur had

signed, the Will was sealed and deposited in Court at the Testator's request ; that the deceased was not totally blind but his eyesight had been bad for some time before he died at the age of 93 ; that the deceased had been nervous for some time prior to his death ; and that he only held the hand of the deceased when he signed.

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J. B. A. Arthur, 3rd witness for the Plaintiff, in his evidence, said that on the 20th November, 1944, the deceased said he had made his Will and asked him and Mr. Hammond to witness it ; that the deceased who could not see very well asked Mr. Hammond to help him to sign ; that the latter showed the deceased where to sign and directed his hand in the signing ; that he and Mr. Hammond witnessed the Will which was sealed up ; that the deceased did not show the original draft or say who had prepared the Will ; that he had no occasion to read the Will ; that prior to the signing he had not seen the deceased's signature ; that he could not remember if the deceased was nervous ; and that he could not say if the deceased was totally blind when he signed the Will, but he was groping the things on his table.

The Rev. G. R. Acquah, 4th witness for the Plaintiff, in his evidence, said that he signed the Power of Attorney at the request of the deceased in 1948 when he was nearly blind but mentally alert ; and that in 1948 the deceased, who was not illiterate, might have been able to sign his name if some one had guided his hand.

J. B. A. Arthur, 3rd witness for the Plaintiff, was recalled by the Court and said in his further evidence that the Will was not read over to the deceased prior to execution.

8.—Judgment was delivered by Mr. Justice Dennison on the 12th March, 1951, in the following terms :—

“ The witnesses for the Plaintiff all struck me as completely honest. It is established by the evidence that the Testator started to go blind in 1941 and that his malady increased with each succeeding year. I have no doubt that in 1944 the Testator's eyesight was so bad that he could not read also that his health was so feeble as to require help when he signed Exhibit P.1. In these circumstances Order 49 Rule 29 applies (see also page 29 of the 18th edition of Tristram and Cootes Probate Practice) ; the evidence in this case is that the Will was not read over to the Testator prior to execution, nor is there any evidence before me except that of J. M. Arthur that the Testator had full knowledge of its contents ; it is indeed curious that this lawyer's clerk did not read over to the Testator the result of his labours.

“ In the circumstances the Plaintiff's claim must fail and as a result the Testator is held to have died intestate. This case is occasioned by reason of the manner in which the Testator made the alleged Will and it is therefore a proper case for each party to receive his costs out of the estate and I so order.”

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9.—Order 49 Rule 29 of the Courts Ordinance chapter 4, to which the learned trial Judge referred in his judgment, dated the 12th March, 1951, reads thus :—

“ Where the testator was blind or illiterate, the Court shall
 “ not grant probate of the Will, or administration with the will
 “ annexed, unless the Court is first satisfied, by proof or by what
 “ appears on the face of the Will, that the Will was read over to
 “ the deceased before its execution, or that he had at that time
 “ knowledge of its contents.”

p. 9 10.—There was an application, under Order 41 of the Courts Ordinance 10
 p. 8 Chapter 4, for a Review of the Judgment of Mr. Justice Dennison, dated
 the 12th March, 1951, and which is quoted in paragraph 8 hereof.

p. 15 The Ruling of Mr. Justice Dennison, dated the 21st April, 1951, reads
 as follows :—

“ An application having been made under Order 41 for
 “ review, I agreed to recall Mr. John Michael Arthur.

“ Mr. Williams, Counsel for the Plaintiff bases his submissions
 “ on the fact that the whole circumstances of the case go to show
 “ that the Testator was fully aware of the contents of his Will
 “ when he executed it, and was also aware of it when he received 20
 “ it back from Mr. Arthur, the law clerk. On both occasions
 “ that Mr. Arthur has been before the Court his evidence made it
 “ clear that he did not read over P.1 to the Testator.

“ In the case of *Garnett-Botfield v. Garnett-Botfield* 1901,
 “ P. page 335, it was held that if the Court is not satisfied with
 “ the way in which the Will was read over to the Testator intestacy
 “ would result.

“ In this case the Testator was very old when he made his
 “ Will and his eye-sight was beginning to fail. In these
 “ circumstances I fail to see how a Court could presume that the 30
 “ Testator himself read the Will and understood its contents.
 “ In all the facts of the case, I am far from satisfied that it has
 “ been proved before me that the Testator was fully aware of
 “ and understood the contents of P.1 when he executed the same.
 “ For these reasons, I do not propose to review my Judgment.
 “ I consider it was right and proper to have the witness J. M.
 “ Arthur recalled and each side will receive its costs out of the
 “ estate.”

p. 16 11.—There was an appeal from the Judgment of Mr. Justice Dennison
 dated the 12th March, 1951, and its confirmation on review on the 40
 21st April, 1951, to the West African Court of Appeal which, by a Judgment
 p. 19 dated the 21st December, 1951, held that although the evidence showed
 that the Testator was in feeble health with bad eye-sight on the
 20th November, 1944, and that the Testator's hand had to be guided when

he made his signature, nevertheless the Testator knew what he was doing when he executed the Will ; that the Testator had given detailed instructions for the preparation of the Will which he kept in his possession for several years before it was executed ; that he was fully aware of the contents of the Will ; and that he wished to make his last Will and Testament.

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The West African Court of Appeal accordingly allowed the appeal, but ordered the costs to be paid out of the Testator's estate.

12.—An Order granting Final Leave to Appeal to the Privy Council was made on the 26th June, 1952.

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10 13.—The Appellant humbly submits that the Judgment of the West African Court of Appeal, dated the 21st December, 1951, which allowed the appeal from the Judgment of Mr. Justice Dennison, dated the 12th March, 1951, is erroneous and should be reversed, and this appeal allowed by the restoration of the Judgment of Mr. Justice Dennison with costs throughout of both parties to be paid out of the Testator's estate as was ordered by the two Courts below, for the following, among other,

REASONS.

1. BECAUSE the trial Judge rightly applied Order 49, Rule 29 of the Courts Ordinance Chapter 4.
- 20 2. BECAUSE the evidence showed that the Will was not read over to the deceased before its execution, and the trial Judge was right in so finding.
3. BECAUSE, in all the facts of the case, the trial Judge was far from satisfied that it had been proved that the Testator was fully aware of and understood the contents of Exhibit P.1 when he executed it, and he was right in so finding.
- 30 4. BECAUSE in the absence of these two requirements " the " Court shall not grant probate of the will, or administration " with the Will annexed," and the trial Judge was right in deciding that there was an intestacy.
5. BECAUSE the West African Court of Appeal, although it came to the conclusion that the Testator knew what he was doing when he executed the Will and was fully aware of its contents, had to accept the evidence of the two witnesses to the Will that the Testator's hand had to be guided when he made his signature to the Will.

T. B. W. RAMSAY.

In the Privy Council.

No. 7 of 1953

ON APPEAL FROM THE WEST AFRICAN
COURT OF APPEAL
(GOLD COAST SESSION).

IN THE MATTER of JOHN INTSIFUL (Decd.).

BETWEEN

HENRY CHARLES CHRISTIAN
otherwise called KOFI AMPAH
(*Defendant*) APPELLANT

AND

SAMUEL TAWIAH INTSIFUL
(*Plaintiff*) RESPONDENT.

CASE FOR THE APPELLANT

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