Privy Council Appeal No. 19 *of* 1953

Matthew Olajide Bamgbose - - - - - - - *Appellant*

v.

John Bankole Daniel and others - - - - - - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED 15TH JULY, 1954

Present at the Hearing:

LORD MORTON OF HENRYTON
LORD COHEN
LORD KEITH OF AVONHOLM

[*Delivered by* LORD KEITH OF AVONHOLM]

This is an appeal from a judgment of the West African Court of Appeal in a matter relating to the distribution of the estate of John St. Matthew Daniel (hereafter referred to as the deceased) who died at Lagos on the 25th day of April, 1948, intestate. The Administrator-General of Nigeria was appointed administrator of the estate by Order of the Supreme Court of Nigeria made on 1st February, 1949.

The history of the matter is as follows: The deceased was the son, born posthumously, of Matthew Joaquim Daniel and Theresa Maria who were married in a Wesleyan Methodist Church in Lagos on the 28th September, 1890. This was a marriage under the Marriage Ordinance, 1884, of the Colony of Lagos, which applied to any person subject to native law and custom who contracted a marriage in accordance with the provisions of the Ordinance. The deceased was the only child born of the marriage. The deceased's parents had another son, Pedro, who was born, out of wedlock, in 1884. Pedro appears to have entered into a Christian form of marriage at Lagos in 1909. It is claimed by the appellant that Pedro became legitimated in 1929 by virtue of the Legitimacy Ordinance of Nigeria of 1929 which introduced the principle of legitimation *per subsequens matrimonium* and applied it to marriages contracted both before and after the date of the Ordinance. Pedro died in 1936. The appellant claims to be the only child of Pedro's marriage. The deceased is said to have entered into nine polygamous marriages in accordance with native law and custom and the respondents (other than the Administrator-General) claim, as issue of these polygamous marriages, to be legitimate children of the deceased under Nigerian law. It would appear and was assumed at the hearing that all the persons mentioned were at all material times domiciled in Nigeria. The contest in this appeal lies between the appellant who claims as lawful nephew of the deceased to succeed to the whole of the estate and respondents who claim, as children of the deceased procreated by polygamous marriages, to exclude him.

In the Supreme Court of Nigeria at Lagos Mr. Justice Robinson on 17th May, 1951, made orders for distribution of the estate among the deceased's children. On appeal by the present appellant the West African Court of Appeal, on 2nd June, 1952, allowed the appeal on the ground

that there was insufficient evidence before the trial judge to justify his assumption that the twelve children concerned were issue of marriages with the deceased and remitted the respondents' motions for distribution of the estate to the Court below for hearing *de novo*. The Court of Appeal further directed that the Court below should require the respondents to adduce evidence sufficient to satisfy it on the following matters:—

(1) Whether the mothers of the twelve respondents were married to the intestate John St. Matthew Daniel, in accordance with the native law and custom applicable in each case;

(2) Whether the respondents, or any of them, are the issue of such marriages; and if so, of which such marriages; and

(3) Whether by the native law and custom applicable in each case the respondents, or any of them, have the status of legitimate children.

The appellant was allowed to be joined as opposer to the respondents' motions.

In so doing it is clear from the judgment of the Court of Appeal that they rejected a claim by the appellant to oust the respondents from any share in the estate even if they were legitimate issue of polygamous marriages by the deceased. The appellant accordingly applied for leave to appeal against the judgment of the Court of Appeal to Her Majesty in Council which leave was granted by the Court of Appeal on 6th October, 1952.

The question at issue arises under the Marriage Ordinance of the Colony of Lagos of 1884. In the West African Court of Appeal it was assumed that the succession was governed by the Marriage Ordinance of Nigeria, of 1914. It is now agreed between the parties that it is the Ordinance of 1884 that falls to be considered and it appears to their Lordships that this must be so as the marriage of the deceased's parents was contracted under that Ordinance. There is no material difference in the language of the two ordinances on any point affecting this appeal. It was at one time indicated by an amendment made by the respondents to their pleadings and allowed by their Lordships that the respondents intended to argue, as an alternative to their main submission, that the relevant section of the Marriage Ordinance did not apply to the deceased. In the end counsel for the respondents did not see his way to submit any argument in support of this amendment. Their Lordships accordingly proceed on the view which has been accepted throughout this case that the succession to the deceased's estate turns upon an interpretation of the relevant provisions of the Marriage Ordinance.

Section 41 of the Marriage Ordinance of 1884 is as follows:

"41. Where any person who is subject to native law or custom contracts a marriage in accordance with the provisions of this or of any other Ordinance relating to marriage, or has contracted a marriage prior to the passing of this Ordinance, which marriage is validated hereby and such person dies intestate, subsequently to the commencement of this Ordinance, leaving a widow or husband or any issue of such marriage,

And also where any person who is issue of any such marriage as aforesaid dies intestate subsequently to the commencement of this Ordinance,

The personal property of such Intestate and also any real property of which the said Intestate might have disposed by Will shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of Intestates, any native law or custom to the contrary notwithstanding.

Provided always, that where by the law of England, any portion of the estate of such Intestate would become a portion of the casual hereditary Revenues of the Crown such portion shall be distributed in accordance with the provisions of native law and custom and shall not become a portion of the said casual hereditary Revenues.

Provided also that real property, the succession to which cannot by native law or custom be affected by testamentary disposition shall descend in accordance with the provisions of such native law or custom anything herein to the contrary notwithstanding.

Before the Registrar of Marriages issues his certificate in the case of an intended marriage, either party to which is a person subject to native law or custom, he shall explain to both parties the effect of these provisions as to the succession to property as affected by marriage."

From what has been said at the outset of this judgment it follows that the deceased falls within the second category of intestate, being a person who was the child of a marriage contracted under the Ordinance. The short question is, what is the effect of the direction that his disposable estate shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any native law or custom to the contrary notwithstanding?

The relevant law of England in 1884 is to be found in the Statute of Distribution, 1670 (22 & 23 Car. II c. 20) and the Act of 1685, 1 Jac. II c. 17. For purposes of this appeal their Lordships are concerned only with the direction in the Statute of Distribution dealing with the succession of children of an intestate. The appellant's contention is that this law precludes the succession on intestacy of children or others who cannot claim kinship with the deceased through monogamous marriage; that the respondent claimants being the offspring of polygamous marriages fall to be regarded as illegitimate under the English Statute of Distribution and that he, the appellant, being the only person who can claim kinship with the deceased through monogamous marriage is entitled to the whole estate. This ignores one factor, that the appellant's father, the brother of the deceased, was the issue of an illicit union and was only legitimated in 1929 by a statute of the Nigerian Colony so that the appellant would have to rely on the law of his father's domicile for the purpose of bringing himself within the class of legitimate heirs. This point was not, however, adumbrated in the Courts below and owing to the course the hearing took before their Lordships was not developed in argument before their Lordships' Board. On the view on which this judgment proceeds their Lordships have found it unnecessary to deal with this point, to which special considerations may apply. Accordingly they do not refer further to this matter.

The contention for the respondent children is that by the law of their domicile of origin they are legitimate children of the deceased and accordingly come within the class of persons entitled to succeed under the English Statute of Distribution. This view has been upheld by the West African Court of Appeal subject to the respondents establishing their status of legitimacy.

This question has been the matter of some conflict of decision in the Nigerian Courts. It was very fully and clearly considered in *The Estate of Herbert Samuel Heelas Macaulay (deceased)* by the West African Court of Appeal in a judgment delivered on 23rd November, 1951, by Sir John Verity, Chief Justice, and concurred in by the two other members of the Court, which decided in favour of children of polygamous unions. In the present case Sir Stafford Foster Sutton, President of the Court of Appeal, who delivered the judgment of the Court followed this decision adding that he found himself "in entire agreement with that portion of the Chief Justice's judgment which touches the issue with which we are concerned on this appeal". These judgments overruled a previous decision in a contrary sense in the *Estate of Frederick Akidele Somefun,* 1941, 7 W.A.C.A. 156.

Reference was also made by counsel for the appellant to a number of decisions in the Nigerian Courts commencing with the case of *Cole* v. *Cole,* 1898, 1 N.L.R. 15, where, in the case of marriages contracted under the rites of a Christian church, to which for one reason or another the

provisions of a marriage ordinance did not apply, the Courts held that the parties must be taken to have intended their succession on intestacy to be regulated by English law, not by native law and custom. Their Lordships have carefully considered these cases but cannot extract from them any principle that would affect the present case. They find it unnecessary to decide whether the Courts were right in applying the English law of succession or whether if English law was applicable it was rightly applied in the circumstances of the particular cases.

Their Lordships would observe that no question can arise as to the capacity of the deceased to enter into polygamous marriage by his local law. He himself was the child of a monogamous marriage, but that was no impediment to his contracting a marriage by native law and custom. Even a person who has himself contracted a monogamous marriage under the ordinance is by section 37 of the Ordinance prohibited from contracting a valid marriage under any native law or custom only during the continuance of the monogamous marriage. If then the respondent children are found to have been from birth legitimate children of the deceased the only question with which their Lordships are concerned is whether they are entitled to share in the succession of the deceased under the Statute of Distribution.

Their Lordships entertain little doubt that under what are now well accepted principles recognised by the English courts no ground exists, in circumstances like the present, for excluding the respondents from taking their rights of succession if they are legitimate children of the deceased under the law of their domicile. In *Re Don's Estate,* 1857, 4 Drew. 194 at 197 Vice-Chancellor Kindersley, dealing with the status of a child born in Scotland of a father domiciled there and legitimated by the subsequent marriage of his parents, said: "It appears to me that on the authorities applicable to this question the principle is this: that the legitimacy or illegitimacy of any individual is to be determined by the law of that country which is the country of his origin. If he is legitimate in his own country then all other civilized countries, at least all Christian countries, recognise him as legitimate everywhere. Questions may arise and have arisen whether the law which is to determine the legitimacy or illegitimacy is the law of the country where the individual was born, or the law of the country where the parents intermarried, or the law of the country of the domicile of the parents? And if the domicile of the parents was different whether the law of the father's or mother's domicile governs? If it were necessary for me to determine these questions I should hold that the law of the father's domicile governed." None of the special questions referred to in this passage arise here for, as their Lordships apprehend, all the circumstances concur to fix Nigeria as the domicile of the parents, the place of their marriages, and the place of birth of the children. This and similar expressions of opinion in earlier cases were no doubt given in cases dealing with the institution of monogamous marriage. But more recent authority shows that the principle cannot be confined within so narrow a field. (See opinion of Lord Maugham in the *Sinha Peerage Case* to be found in 1946, 1 A.E.R. at 348 and opinion of Lord Greene, M.R., in *Baindail* v. *Baindail, ibid* at 346.) Their Lordships' Board have also on various occasions had regard to and acted on the application of the Statute of Distribution to Chinese successions in the Straits Settlements, arising from polygamous unions. (See *Cheang Tye Phin* v. *Tan Ah Loy* [1920] A.C. 369 ; *Khoo Hooi Leong* v. *Khoo Hean Kwee* [1926] A.C. 529 ; *Khoo Hooi Leong* v. *Khoo Chong Yeok* [1930] AC. 346.)

In their Lordships' opinion the West African Court of Appeal has reached a right conclusion on the law applicable in this case. *Re Goodmans Trusts,* 1881, 17 Ch.D. 266, on which that Court in the case of *Macaulay's Estate* largely proceeded, was a case under the Statute of Distribution in which it was held by a majority of the Court of Appeal that a child born in Holland, where her parents were at the time domiciled, who had been legitimated under Dutch law by the subsequent marriage of the parents there, was entitled to share as a "brother's child"

under the Statute of Distribution. As already indicated their Lordships cannot hold that the principle of this decision is restricted to the case of monogamous marriage. Lord Justice Cotton said in that case: "I am of the opinion that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England, except in the case of succession to real estate in England, recognises and acts on the status thus declared by the law of the domicil". And Lord Justice James said: "It must be borne in mind that the Statute of Distributions is not a statute for Englishmen only, but for all persons whether English or not, dying intestate and domiciled in England and not for any Englishman domiciled abroad. . . . And as the law applies universally to persons of all countries, races and religions whatsoever, the proper law to be applied in determining kindred is the universal law, the international law, adopted by the comity of States. The child of a man would be his child so ascertained and so determined". The decision and reasoning of the majority in that case has not, so far as their Lordships are aware, been questioned in any subsequent case. It proceeds in their opinion on sound principle and gives a meaning and effect to the Statute of Distribution wider than it would have under the purely domestic law of England.

In the present case the Statute of Distribution is a statute applying to a limited class of persons domiciled in Nigeria. As a matter of construction and on the authorities referred to it cannot in their Lordships' opinion be limited in its local application to children who are the issue of monogamous unions. The effect of the application of the statute in the cases to which it applies is to fix the order of succession according to a table different from that prevailing under native law and custom, leaving it to the Courts to determine in accordance with the principles indicated who are the particular individuals who fall within any particular class in the succession table.

It was contended for the appellant that the Statute of Distribution could not be applied to polygamous unions because of the difficulty of applying its provisions to a plurality of wives. The West African Court of Appeal observed that no claim had been put forward in this case by any person as a widow of the deceased and their Lordships propose to say nothing as to what rights, if any, widows would have in the event of a claim being made. They cannot, however, agree with the appellant's submission. Whatever difficulties may arise in the case of the mothers of the children the claims of the children as lawful children of the deceased must in their Lordships' opinion be considered independently. This may be so in some cases even in questions of status. In a judgment of the Board in *Khoo Hooi Leong* v. *Khoo Hean Kwee* [1926] A.C. 529, where the claim of a child to be legitimate by the law of a community in which polygamy was recognised and practised was considered, Lord Phillimore, who delivered the judgment of the Board, said: "In deciding upon a case where the customs and the laws are so different from British ideas a Court may do well to recollect that it is a possible jural conception that a child may be legitimate though its parents were not and could not be legitimately married. This principle was admitted by the canon Law which governed western continental Europe till about a century ago and governed still later, if it does not govern still, countries of Spanish America". Two other cases may be mentioned. In *Seedats Executors* v. *The Master (Natal)*, 1917, S.A.L.R. 302, the Supreme Court of South Africa held, in a learned judgment by Sir James Rose-Innes, Chief Justice, that they could not recognise as valid in Natal a polygamous marriage of the deceased entered into in India before he became domiciled in Natal, but that the children of this marriage who were all born in India while their parents were domiciled there were entitled to be treated as legitimate children. Accordingly while the widow was not entitled to exemption in the matter of succession duty but on the contrary was liable to the rate appropriate to a stranger in blood, the rate of duty attributable to the children's share of the succession was held to be that borne by lawful children of a

testator. Again in *Re Bischoffsheim* [1948] Ch. 79, Mr. Justice Romer had to consider the question of the legitimacy for the purposes of succession under the will of an English testator of a child born in New York of English parents who were domiciled in New York at the time of the child's birth. A question might have been raised as to the validity of the parents' marriage under English law, but in holding that the child was legitimate by the law of New York at the time of his birth and therefore entitled to be treated as a lawful child of his mother under the will, Mr. Justice Romer adopted the view " that where succession to personal property depends on the legitimacy of the claimant, the status of legitimacy conferred on him by his domicile of origin (i.e., the domicile of his parents at his birth) will be recognised by our courts ; and that if that legitimacy be established, the validity of his parents' marriage should not be entertained as a relevant subject of investigation ". It would be a strange result that in the converse case where a marriage of the parents was recognised as valid the children should be deprived of their rights of succession because of a difficulty in working out the rights of the wife.

In their Lordships' view the West African Court of Appeal reached a right conclusion. They have accordingly humbly advised Her Majesty to dismiss the appeal. The appellant must pay the costs of the respondents other than the Adminitrator-General who was not represented before the Board.

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In the Privy Council

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DELIVERED BY LORD KEITH OF AVONHOLM

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