

21, 1955

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No. 4 of 1955.

In the Privy Council.

UNIVERSITY OF LONDON  
W.C.1.

-4 JUL 1956

ON APPEAL FROM THE WEST AFRICAN  
COURT OF APPEAL (NIGERIAN SESSION)

INSTITUTE OF ADVANCED  
LEGAL STUDIES

43571

IN THE ESTATE of ALFRED LATUNDE JOHNSON deceased

BETWEEN

HARIET JOHNSON (*Defendant*) ... .. APPELLANT

AND

BAFUNKE ADEREMI (formerly Johnson, now a married woman) and OLUSEGUN JOHNSON (formerly suing by his next friend AGNES JOKOTADE now of full age) (*Interveners on appeal*) ... .. RESPONDENTS

AND

AKINOLA MAJA OLUMIDE OMIBAWE JOHNSON and THE MANAGER, NATIONAL BANK OF LIMITED, Executors under the alleged Will dated 27th November 1943 and codicil dated 27th July 1945 of the deceased (*Plaintiffs*) ... .. *Pro forma* RESPONDENTS.

CASE FOR THE RESPONDENTS

1.—Alfred Latunde Johnson (hereinafter called “ the deceased ”) late of Lagos, Nigeria, died there on or about the 7th day of April, 1950, leaving a will dated the 27th day of November, 1943 (hereinafter called “ the 1943 will ”) and a codicil dated the 27th day of July, 1945 (hereinafter called “ the 1945 codicil ”). The deceased had previously executed a will dated the 24th day of June, 1939 (hereinafter called “ the 1939 will ”).

2.—The deceased had continued in busy practice as a barrister and solicitor at Lagos aforesaid until shortly before his death.

3.—The deceased had been lawfully married in 1911 to the Appellant, Harriet Johnson, who bore him nine children of whom seven survived the deceased.

4.—For at least twenty years prior to his death the deceased had been on terms of intimate friendship with one Agnes Jokotade who bore the deceased two children, Bafunke and Olusegun, the above-named Respondents, both of whom were recognised and acknowledged by the deceased as his children.

5.—During, in particular, the last twelve years of his life the deceased was estranged from his lawful wife, the Appellant, and devoted to the 10 said Agnes Jokotade.

6.—By both the 1939 will and the 1943 will the deceased gave to the said Agnes Jokotade only a life interest in a house, but in both wills he made substantial provision for the said two children of Agnes Jokotade as well as for his lawful children.

7.—The Appellant lodged a caveat in the estate of the deceased and when the executors of the 1943 will and the 1945 codicil propounded the same and sought probate thereof in solemn form the Appellant opposed probate and alleged :

(A) That the 1943 will was not duly executed in accordance 20 with the provisions of the Wills Act, 1837 ;

(B) That the execution of the 1943 will and the 1945 codicil was obtained by the undue influence of the said Agnes Jokotade and others unnamed ;

(C) That at the time of the execution of the 1943 will and the 1945 codicil the deceased was not of sound mind memory and understanding.

8.—The law of Nigeria as to the execution of, and capacity to make, wills is the same as the law of England on those matters.

9.—The Appellant's right to oppose probate of the 1943 will and the 30 1945 codicil was based upon her claim to be entitled with her children to share in the estate of the deceased in the event of an intestacy. The 1939 will was not referred to in the pleadings, although there could be no intestacy until it also had been pronounced against.

10.—On the 23rd day of February, 1951, His Honour Judge Rhodes, sitting in the Supreme Court of Nigeria, pronounced against the 1943 will and the 1945 codicil finding that the 1943 will was defective in all the respects alleged by the Appellant. He made no findings in regard to the 1945 codicil, but nevertheless pronounced against it.

11.—The Respondents were not made parties to the action and had no knowledge of it until after Judgment had been delivered. They were not in Nigeria at the time.

12.—The Plaintiffs in the action, who were the executors appointed by the 1943 will and the 1945 codicil, refused to appeal from the decision of Judge Rhodes but the Respondents obtained leave to intervene in the action and leave to appeal. On the hearing of the appeal the West African Court of Appeal reversed the decision of Judge Rhodes and pronounced for the 1943 will and the 1945 codicil. From that order the Appellant  
10 now appeals.

13.—The only evidence which the Judge heard as to the execution of the 1943 will was that of Mr. Bright Wilson, a solicitor and one of the attesting witnesses to the will. This witness testified that the requirements of the Wills Act, 1837, were complied with in every respect, but the Judge rejected his evidence and referred to the “indifferent demeanour” of the witness. The Judge expressed the view that the signature of the other attesting witness was in a different coloured ink from the signatures of the deceased and Mr. Bright Wilson and on that evidence alone based his finding that the 1943 will had not been duly executed.

20 14.—The 1943 will was regular on the face of it, was apparently duly executed and contained a regular attestation clause. The deceased was himself a practising barrister and solicitor, presumably experienced in the art of will-making and familiar with the technical requirements of a valid will. It is submitted that the Judge failed to give effect, or even to consider, the presumption *omnia rite esse acta*.

30 15.—As to the allegation that the deceased was lacking in testamentary capacity, the Judge heard the evidence of the deceased’s two doctors who were both also personal friends of the deceased. They both testified that although the deceased had suffered from cerebral hæmorrhage his mental condition in 1943 and in 1945 was normal. The attesting witness, Bright Wilson, said that the deceased was well when he executed the will. The Appellant said in evidence that after his stroke the deceased would sometimes act as a normal person and at other times as an abnormal person and, in cross-examination, she explained that by “abnormal” she meant that he would sometimes be alone, refusing to talk to anyone. After making the 1943 will the deceased continued for several years in active practice in his profession. It was on this evidence alone that the Judge found that the deceased was not of sound mind memory and understanding when he made the 1943 will. It is submitted that there  
40 was no evidence, and certainly no sufficient evidence, to support that finding.

16.—As to the allegation that the execution of the 1943 will was procured by the undue influence of Agnes Jokotade (who was not made a party to the action), the Judge heard evidence from the two doctors to the effect that a person who has had an attack of cerebral hæmorrhage would be susceptible thereafter to the influence of others. Importance was placed by the Judge on the fact that the deceased, who was a wealthy man, had during his lifetime made a number of comparatively small money payments to the said Agnes Jokotade. It is submitted that while there was some evidence that a person who had suffered, as the deceased admittedly had, from cerebral hæmorrhage would be more susceptible to the undue influence of others, there was no evidence whatsoever to show that the deceased was in fact so influenced. The learned Judge misdirected himself in holding, as he did, that the burden of proving the absence of undue influence rested upon the Plaintiffs. When the parties propounding a will have proved that it has been duly executed by a person of competent understanding and apparently a free agent they have *prima facie* discharged the burden of proof which the law casts upon them and the burden of proving that the will was executed under undue influence is on the party who alleges it. 10

17.—The learned Judge failed, moreover, to consider the effect upon the 1943 will of the 1945 codicil. By Section 34 of the Wills Act, 1837, it is provided : 20

“ Every will re-executed or republished, or revived by any codicil, shall, for the purposes of this Act, be deemed to have been made at the time at which the same shall be so re-enacted, republished or revived.”

The 1945 codocil was, and was expressed to be, a codicil to the 1943 will and it therefore incorporated the 1943 will. There was no evidence, nor were there any findings by the Judge, against the validity of the 1945 codicil. The 1945 codicil therefore effectively revived and republished the 1943 will free from any defect it may have had. 30

18.—The Respondents respectfully adopt the reasoning and the reasons contained in the Judgment herein of the West African Court of Appeal and submit that the decision of the West African Court of Appeal reversing the decision of Judge Rhodes was right and ought not to be disturbed.

19.—The Respondents humbly submit that the decision of the West African Court of Appeal should be maintained and this appeal dismissed for the following, amongst other

**REASONS**

1. BECAUSE there was no evidence, or no sufficient evidence, upon which the Court could properly pronounce against the 1943 will and/or the 1945 codocil.
2. BECAUSE the learned trial Judge drew unjustifiable inferences from the evidence he heard.
3. BECAUSE the learned trial Judge misdirected himself as to the onus of proof.
4. BECAUSE the learned trial Judge failed to have regard to the presumption *omnia rite esse acta*.
- 10 5. BECAUSE the learned trial Judge failed to consider the effect which the 1945 codicil had upon the 1943 will, namely the effect of curing any defect the latter may have had.

**K. BRUCE CAMPBELL.**

**In the Privy Council.**

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

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BETWEEN  
HARIET JOHNSON (*Defendant*)  
APPELLANT  
AND  
BAFUNKE ADEREMI (formerly  
Johnson, now a married woman)  
and OLUSEGUN JOHNSON  
(formerly suing by his next  
friend AGNES JOKOTADE now  
of full age) (*Interveners on  
appeal*) ... .. RESPONDENTS  
AND  
AKINOLA MAJA OLUMIDE  
OMIBAWE JOHNSON and  
THE MANAGER, NATIONAL  
BANK OF NIGERIA  
LIMITED, Executors under  
the alleged Will dated 27th  
November 1943 and codicil  
dated 27th July 1945 of the  
deceased (*Plaintiffs*) *Pro forma*  
RESPONDENTS.

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**CASE FOR THE RESPONDENTS**

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HATCHETT JONES & CO.,  
110, Fenchurch Street,  
London, E.C.3,  
*Solicitors for the Respondents.*