**ALHAJI OLORUNKEMI AJAO**

**V.**

**MRS. M.E. SONOLA AND ANOTHER**

SUPREME COURT OF NIGERIA

10TH DAY OF MAY, 1973

SUIT NO. SC. 256/1970

**LEX (1973) - SC. 256/1970**

OTHER CITATIONS

2PLR/1973/9 (SC)

[1973] 5 SC 119

**BEFORE THEIR LORDSHIPS**

GEORGE BAPTIST A. COKER, J.S.C.

DAN IBEKWE, Ag. J.S.C.

AYO GABRIEL IRIKEFE, Ag. J.S.C.

**BETWEEN**

ALHAJI OLORUNKEMI AJAO - Appellant

AND

MRS. M.E. SONOLA AND ANOTHER – Respondent(s)

**ORIGINATING COURT**

HIGH COURT OF LAGOS STATE

**REPRESENTATION**

H. A. LARDNER - for Appellant.

BABATUNJI OLOWOFOYEKU - for Respondent.

**ISSUES FROM THE CAUSE(S) OF ACTION**

ESTATE ADMINISTRATION:- Intestacy –Statutes and customary law rules – Whether can operate together

ESTATE ADMINISTRATION:- Estate administration proceedings – Party asserting status as administrator – Extent of powers with regards to dealings with the estate – Need to prove ongoing status as administrator

ESTATE ADMINISTRATION:- Intestacy –Customary Law – Where it grants power to administer Estate of a deceased person – Whether such power cannot be extended to matters which are statutory rights under English law and to which statutory remedies apply

ESTATE ADMINISTRATION:- Intestacy proceedings relating to claim for damages for trespass – Competency of party claiming to be administrators of estate – Duty to plead and prove status and effective possession of the realty or right to such possession

CHILDREN AND WOMEN LAW:- *Women and Justice Administration –* Defence of interest in property – Role of competent lawyers and able jurists – Need to satisfy technical requirements of court proceedings with regards to competency of parties

**PRACTICE AND PROCEDURE ISSUES**

ACTION:- Competency of parties – Where plaintiff to an action claims by substitution – Need to satisfy onus of proving legal capacity to do the legal act under question– Nature of evidence required

INTERPRETATION OF STATUTE:- Application of ‘Received’ Law/Statute of General Application – Where it overreaches the provisions of the local law specifically enacted for the same purpose – How resolved

INTERPRETATION OF STATUTE:- Competing legal rules - statutes and customary law rules – Whether customary law can preclude the operation of statute

**MAIN JUDGMENT**

**COKER, J.S.C.** (Delivering the Judgment of the Court):

The appellant is the defendant in the action instituted against him in the High Court, Lagos, (Lagos State) in which the Plaintiffs’ claims, according to their statement of claim are as follows:

“(a) Declaration of title in fee simple to the said parcel of land situate at 49, Arolawun Street, Ikorodu Road, (and comprising the portion edged “Green” on the plan attached hereto) in the Lagos State.

(b) £150 (One hundred and fifty pounds) damages for trespass committed by the defendant on the said piece or parcel of land.

(c) Possession of the said land edged “Green” in the plan filed with this statement of claim.”

The Plaintiffs in the High Court are the present respondents and as designated on the writ and the pleadings they have sued as “Administratrices of the Estate of E.O. Aiyede (deceased).” The land concerned is situate at Arolawun Street, off Ikorodu Road, in the Lagos State. In describing the plaintiffs, paragraphs 1 and 2 of their statement of claim aver as follows:

“1. The Plaintiffs sue as the administratrices of the estate of Emmanuel Oke Aiyede late of 10, Abeokuta Street, Ebute Metta, in the mainland of Lagos who died intestate at Lagos on January, 30th 1960.

2. By the Letters of Administration dated August, 30th 1960 the plaintiffs were granted letters of Administration in respect of the deceased’s property.”

The other paragraphs of the statement of claim deal with the claims of the late E.O. Aiyede to the title and possession of the land concerned, the trespass alleged against the defendant and eventually the claims as already set out earlier on in this judgment. The defendant’s statement of defence puts all the facts contained in the statement of claim in issue and claims the land as property of the defendant. The case went to trial and the parties gave evidence and at the end of the day the learned trial judge gave judgment in favour of the plaintiffs on all their claims against the defendant with costs.

The defendant has appealed to this court against that judgment and before us had sought and obtained leave to argue a number of additional grounds of appeal. One of such grounds of appeal relates to the competency of the present plaintiffs ever to institute the action and before us it was contended on behalf of the defendant that the action was not competent inasmuch as the plaintiffs are not competent to institute same. We stopped learned counsel for the defendant at this point, for we are of the view that if the plaintiffs were incompetent to institute the present action, it would be doing injustice to their case to throw into the hotchpotch of argument whatever merits their case may possess. We then made the following order at the hearing:

“Judgment is reserved. If we hold against Lardner, then he would continue his further argument on the appeal. If otherwise, our judgment will make the necessary and final orders.”

Before reserving judgment however, we called on learned counsel for the plaintiffs to reply to the argument attacking the competency of the action and the capacity of the plaintiffs to maintain the present action. Learned counsel for the plaintiffs submitted relying on section 1 of the Land Transfer Act, 1897 (of England) and a number of decided cases, that the plaintiffs as personal representatives are vested with the property in question being one of the properties purchased by the late E.O. Aiyede himself. We point out that on this point learned counsel for the defendant relied on and referred us to section 2 of the Administration (Real Estate) Act, Cap. 2, Laws of Nigeria, as applicable in Lagos State and to the present case.

Section 1 of the Land Transfer Act, 1897, so far as it is material to the case provides as follows:

“1 (1) Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

(2) This section shall apply to any real estate over which a person executes by will a general power of appointment, “as it were real estate vested in him.”

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Undoubtedly the Land Transfer Act, 1897 is a statute of general application which has been rightly held to apply in Nigeria. See the observations of Brett F.J. in Lawal AND OTHERS . vs. A. Younan & Sons & Co. (1961) ALL N.LR. 245 at page 254; see also Olabode Renner AND OTHERS . vs. Albert Renner (1961) ALL N.L.R. 233. In Lawal’s case supra the Federal Supreme Court explained the application of the Act and it was made clear the purposes and the conditions of such vesting.

As stated before, learned counsel for the defendant has relied on the provisions of section 2 of the Administration (Real Estate) Act, Cap. 2 and has contended that, apart from the fact that the pleadings of the plaintiffs say nothing as to whether they were still administering the estate of the late Mr. E.O. Aiyede or that they had completed any such administration, Section 2 only vests the real property of the intestate deceased in them “for the purposes of administration” and that in any case they may not deal with the real estate without the leave of the court, and that then they must show to the satisfaction of the court that the personal estate is insufficient to pay the intestate’s debts, the Learned counsel further submitted that the plaintiffs produced in evidence as Exhibit “A” the Letters of Administration granted them to administer the personal estate of the deceased, that by their pleadings and their oral evidence they stated that the late E.O. Aiyede was the owner of the freehold interest in the land in dispute, but that they said nothing concerning their own locus standi to this property or how it had devolved, if ever it does, on them.

We consider it generally accepted as a sound legal proposition that the plaintiff to an action must be competent to institute such an action and if such a plaintiff claims by substitution, he has the onus of proving that he has the legal capacity to do the legal act which he had set out to perform. In Lawal AND OTHERS vs. A. Younan & Sons & Co. supra, the question arose as to right of persons who were granted Letters of Administration in a Customary Court to administer the estate of a deceased person by virtue of that grant to sue for damages on behalf of the dependants of the deceased under the Fatal Accidents Acts, 1846. In the course of the judgment of the Federal Supreme Court, Ademola, C.J.N. observed at page 253 of the Report thus:

“On the view I have taken of this matter, it is clear a person to whom power is given under Customary Law to administer the Estate of a deceased person, is a person empowered by that law to administer the estate of the deceased where Customary Law can be invoked, and such power cannot be extended to matters which are statutory rights under English law and to which statutory remedies apply.”

We think it is settled that competency to institute an action is an essential or indeed a vital factor in deciding the competency of the action itself, and if challenged by a defendant, the plaintiff has the onus of establishing it.

The Land Transfer Act, 1897 makes provisions for the establishment of a real representative, someone who accepts responsibility for the administration of the real estate of a deceased person, whether the deceased had died testate or intestate. The Land Transfer Act, 1897 as we pointed out before applies in this country and it is part of the “Received” law of the country, and applicable in the Lagos State. This is so by virtue of the relevant provisions of the Supreme Court Ordinances since 1900 and in particular by virtue of section 14 of the Supreme Court Ordinance Cap. 211 (1958 Laws of Nigeria) which provided thus:

“Subject to the terms of this or any other Ordinance, or any law, the common law, the doctrines of equity, and the Statutes of general application which were in force in England on the 1st January, 1900, shall be In force within the jurisdiction of the court.”

As the contents of that section show, the application of the statute to this country is “subject to the terms of ... any other Ordinance or any law ... In force within the jurisdiction of the court” concerned. Section 2 of the Administration (Real Estate) Act, Cap. 2 (Laws of Nigeria 1958) provides thus:

“2. When any person shall die intestate after the commencement of this Ordinance leaving any real property of whatsoever nature of which the intestate might have disposed by will, such real, property shall for the purposes of administration be deemed to be part of the personal estate of the said intestate and shall be administered accordingly: Provided always that the real property the succession to which cannot by native law and custom be affected by testamentary disposition shall descend in accordance with the provisions of such native law and custom anything herein contained to the contrary notwithstanding: Provided also that the real estate shall not be administered unless the administrator shows to the satisfaction of the court that the personal estate is insufficient to pay the intestate’s debts and the expenses of his funeral and of taking out administration.”

Such are the provisions of the Administration (Real Estate) Act, Cap. 2 and it is easy to see that it applies to all cases of intestacy where the deceased leaves real estate which on the conditions contained in the section have to be dealt with in the course of administration.

As stated by us before in this judgment, the Land Transfer Act, 1897 applies in this country and its application is demonstrated in the case of Renner & Co. vs. Renner supra where at page 235, the Federal Supreme Court explained it as follows:

“In the circumstances mentioned above the relevant law is the Land Transfer Act, 1897. Subsection (1) of section 2 of that Act provides that the personal representatives of a deceased person shall hold the real estate as trustees, subject to the powers, rights, duties and liabilities mentioned in the Act. Subsection (2) of that section provides that all rules of law relating to the administration of personal estate and the powers, rights, duties and liabilities of personal representatives in respect of personal estate, apply to real estate so far as the same are applicable, as If that real estate were a chattel real vesting in the representatives ... The position therefore is that the rules relating to the administration of personal estate apply also to real estate ... and upon the completion of administration, executors who are also trustees, though they may remain personal representatives, are deemed to have become trustees in accordance with the principles laid down in the case of Re Ponder (1921) 2 Ch. 59.

The Land Transfer Act, 1897 provides in essence for personal representatives to administer the real estate of a deceased person whether such a deceased persons left a will or not, but in this country and certainly in Lagos and within the jurisdiction of the High Court of Lagos State, the Administration (Real Estate) Act, Cap. 2 applies having been specifically enacted to meet cases of intestacies where the deceased left real property. The application of the Land Transfer Act, 1897 by virtue of section 14 of the Supreme Court Ordinance Cap. 211 (1948 Laws of Nigeria) is expressly made subject to the “terms of any other Ordinance, or any law’ in force within the same jurisdiction, and so the Land Transfer Act, 1897 cannot be preferred or applied where the Administration (Real Estate) Act, Cap. 2 specifically applies. In cases where the deceased had died testate or left a will and left real property, there is no specific legislation or law providing for the vesting of real property, and so the Land Transfer Act, 1897 would apply. See for example Cappa Ltd. v. Ferreira (1966) 1 All N.L.R. 57. Learned counsel for the plaintiffs had in the course of his argument and in support of his case referred to Cappa’s case, supra, but it is sufficient to observe on this that that case concerns the duties of a deceased person. Similarly the case of Olulode vs Oduwole (1962) W.N.L.R. 41 referred to by learned counsel for the plaintiffs in support of his contentions has no bearing on the issues before us since that case was decided on the application of particular Western State statutes on which the decision was based.

Apart from all these there is another aspect of the case to which neither party has referred. We have set out earlier on in this judgment paragraphs 1 and 2 of the plaintiffs statement of claim, and these show that the deceased lived and died intestate in Lagos. What then happened after his death to his real property and after the completion of administration? The answer to this question was put as far back as 1901 by Osborne C.J. delivering the judgment of the Full Court In the case of Lewis vs. Bankole (1909) 1 N.L.R. 81 at page 90 as follows:

“At Mabinuori’s death the piece of land which he owned became family property. The defendants as his daughters or their fathers of mothers as his children were entitled to reside on the land in dispute subject to and in accordance with native Law and custom:”

The case of Lewis vs. Bankole was not directly concerned with that issue, but the issue neatly and directly arose for determination in the case of Ogunmefun vs. Ogunmefun & Co. (1931) 10 N.L.R. 82, whereat page 83, Webber J. explained the law as follows:

“The remaining portion of the late Thomas William Davies’ property was thus left unpartitioned and the surviving children of T.R. Davies namely Ada and Elsie Davies and Frances, held this remaining portion in common under native customary tenure. It has been decided in these courts... that even where property had originally been acquired under a conveyance according to English Law, yet after the owner’s death as an intestate, the property vested in the family under native law and custom and that the members of the family were not tenants in common under English law but held in common under native customary tenure, which tenure does not recognise the right of an individual member of the family to alienate his interest without the consent of the family.”

In Oiowu vs. Desalu (1955) 14 W.A.C.A. 662, the West African Court of Appeal confirmed the principle of law - see per Coussey J.A. at page 663; also see Fynn vs. Jane Gardiner (1953) 14 W.A.C.A. 260 [a Gold Coast (now Ghana) case, but dealing with the same principle].

We are of the view that in the circumstances of this case, the application of the Land Transfer Act, 1897 is excluded by the provisions of the Administration (Real Estate) Act, Cap. 2 Laws of Nigeria, 1958 and indeed the present High Court of Lagos Act Cap. 80 (1958 Laws of Nigeria) contains no provisions similar or in pari materia with section 14 of the old Supreme Court Ordinance cap. 211 (1948, Laws of Nigeria). The laws of the country or the state provide for the vesting of realty on intestacy and it is a misconception to argue in such circumstances that a “received” law will apply and so overreach the provisions of the local law specifically enacted for the purpose. See also in this connection the case of Adeseye vs. Taiwo and ors. (1956) 1 F.S.C. 84. In the present case both the Administration (Real Estate) Act, Cap. 2 and the customary law preclude the operation of the Land Transfer Act, 1897 and we can see no justification for its application.

The provisions of the Administration (Real Estate) Act, Cap. 2 vests the realty of the deceased intestate in the administrators only for the purposes of administration and no more. See Pratt vs. Haffner (1956) 4 F.S.C. 82 and both the pleadings and the evidence of the plaintiffs in this case are fatally silent on whether the plaintiffs are still administering the estate of the deceased Mr. E.O. Aiyede or not. They i.e. the present plaintiffs qua administratrices are not entitled to an order for possession unless they can claim title or establish that they are still administering the estate and that the personal estate is not sufficient for the purposes shown in the Act; indeed they could not so succeed on a claim for damages for trespass for that postulates that they are in possession of the realty or that they have a right to such possession.

The argument against the competency of the action and the capacity of the present plaintiffs to institute the present action succeeds and the appeal is allowed. The judgment of the High Court, Lagos in Suit No. L.D1256/70 including the order for costs is set aside. We order that the plaintiffs’ case be struck out and this shall be the judgment of the court. The plaintiffs shall pay to the defendant the costs of the proceedings fixed in this court at N140 and in the court below, at N140.

Appeal allowed.