**ALBERT MARTIN LEWIS AND ANOTHER**

**V.**

**ABIGAIL MAJEKODUNMI**

SUPREME COURT OF NIGERIA

29TH DAY OF JUNE, 1966

SC. 69/1965

**LEX (1966) - SC. 69/1965**

OTHER CITATIONS

2PLR/1966/89 (SC)

**BEFORE THEIR LORDSHIPS:**

ADETOKUNBO ADEMOLA, C.J.N.

VAHE ROBERT BAIRAMAIN, J.S.C.

IAN LEWIS, J.S.C.

**BETWEEN:**

ALBERT MARTIN LEWIS AND ANOTHER – Appellant

AND

ABIGAIL MAJEKODUNMI - Respondent

**ORIGINATING COURT**

LAGOS HIGH COURT [109/1963], (SOWEMIMO J. Presiding)

**REPRESENTATION**

F. R. A. WILLIAMS, with A. AKESODE A. O. ADEREMI, - for Appellants

A. MAJEKODUNMI, with E. A. PETER THOMAS AND SHEKONI, - for Respondent

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

REAL ESTATE AND PROPERTY LAW – LAND:– FAMILY LAND: - Where not partitioned - Whether any question of acquiescence arises when a member of the family builds on family property for his private use and without consent of family head

ESTATE PLANNING AND ADMINISTRATION – WILLS: Validity of - Clauses – Construction – Designations and declarations as to status – “Daughter” and “Head of compound – Testator’s intention – Whether to be admitted upon the principle, that they are the natural effusions of a party, who must know the truth; and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth

CUSTOMARY LAW – FAMILY: - Family compound constituted via will - Members and relatives thereof – Whether includes former domestic servant designated under the will as daughter and whose son was designated as head of the family

CHILDREN AND WOMEN LAW: - Women and Inheritance – Women and customary law - Woman designated as daughter under a will – Family compound constituted under a will with ‘family head’ and ‘daughters’ – Woman designated as trustee and whose son was designated as head of family - Claim that she was a domestic servant and not entitled to rights conferred under a ‘family compound’ set up by the will alongside biological heirs and relatives – Attitude of court thereto

**PRACTICE AND PROCEDURE ISSUES**

ESTOPPEL**:-** Admission made in pleading of earlier suit by counsel – Admission therein not relevant to resolution of dispute or affirmed in final judgment – When sought to be set up as res judicata in another suit – Whether the pleading of counsel for a party is binding on the party in the suit in which it is delivered for the purposes of that suit – estoppel - Whether there is any rule of evidence which bars a party from pleading differently in a subsequent suit from what his counsel formally pleaded in the former suit on a subject that was not material to the former dispute – Relevant considerations

**MAIN JUDGMENT**

**BAIRAMIAN, J.S.C.** (delivering the judgment of the Court):-

The plaintiffs complain of the decision given by Sowemimo J. on 18 May, 1964 in the Lagos High Court Suit 109/1963, dismissing their claims.

These are-

1. A declaration that all that piece or parcel of land marked F in the attached probate copy of the will [is the] family property of Jose Domingo, deceased, the common ancestor of both plaintiffs and defendant.

2. An injunction restraining the defendant from erecting fence or building on family compound marked G mentioned in the said probate copy of the will without the consent of the plaintiffs.

3. An account of all moneys received and rents collected on the said piece or parcel of land marked G in the said probate copy and for an order directing the payment to the plaintiffs of their share on taking of such account.

Jose Domingo made his will on 27 January, 1911; he died on 5 February, and probate of the will in common form was granted on 31 March, 1911. The testator’s daughter Maria sued in July, 1912 to have the probate revoked but discontinued that suit and sued again in October, 1915 the executors Charles Patrick Williams and Alexander Martin Lewis for revocation: Suit 176/1915. The judgment in that suit quotes the pleadings. From the Statement of Claim it will be enough to copy paragraph 1 and paragraph 2:

1. The plaintiff is the only child of Jose Domingo otherwise known as Fadumila late of Tokunboh Street in Lagos who died on the 5th February, 1911.

2. The defendants are the executors of a pretended last will and testament bearing date the 27th day of January, 1911 and purporting to have been duly executed by the said Jose Domingo.

Paragraph 1 of the Defence states that-

The defendants admit paragraphs 1 and 2 of plaintiffs Statement of Claim but say that the last will and testament was not a pretended one.

The Defence is signed by A. Alakija, defendants’ solicitor. The judgment then goes on to deal with the allegations that the will was invalid for this reason and the other, and dismissed them as unfounded.

The testator devises sundry pieces of land by reference to the plan attached to his will. He devises a piece to “my daughter Maria Joseph of Okepopo Lagos,” and another piece to “my daughter Lorintina Joseph of Tokunboh Street” (which was his address too). As to F (which is the subject of the 1st claim in this suit) he gives it to “my nephew Domingo Akindele Joseph now at Sekondi Gold Coast”; and as to G (which is the subject of the 2nd claim and the 3rd) he devises it to

“Alexander Martin Lewis his heirs and executors in trust for all my relatives both in Lagos and in the interior who shall desire to build and live in my compound and the same is hereby constituted my family compound”;

and he goes on to declare that Alexander Martin Lewis shall be the head of his family compound.

Alexander Martin Lewis was the child of Lorintina and the father of the plaintiffs in this suit. The defendant Abigail Majekodunmi is the daughter of Maria, who also had other children. In her Defence the defendant alleges that Lorintina (or, as she calls her, Laurentia) was a domestic servant of the testator Jose Domingo and his wife, both of whom adopted her. The learned trial judge refers to this allegation made by the defendant, who supported it by the admission made by the plaintiffs’ father in Suit No. 176/1915 that Maria was the only child of Jose Domingo, the testator; the judge notes that this admission was made in the lifetime of Alexander Martin Lewis and of Maria; he concludes that Alexander’s sons, the plaintiffs, are no blood relations of the defendant and cannot, in face of that admission, say that Lorintina, their grandmother, was a daughter of the testator, although he speaks of her as his daughter in his will. The learned judge goes on to decide that the plaintiffs are strangers for all purposes and cannot make any claim either to the land marked F or to that marked G.

Even if the learned judge were right, he overlooks the provision in the will in regard to G-that it is devised to “Alexander Martin Lewis his heirs and executors in trust for all my relatives”; which gives the plaintiffs, the sons of Alexander, an interest to see to it that G is preserved as the family compound and is not turned into the private property of the defendant or any other relative of the testator. Mr Thomas, the defendant’s counsel in this appeal, concedes that on any view the learned judge erred in regard to the land marked G on the plan. In effect he concedes both the 2nd and the 3rd claims but says they were superfluous.

As to the 2nd claim: There used to be an old fence of bamboo sticks, the position of which is shown on a plan and on a sketch put in by counsel for both sides at the hearing of the appeal; we have marked them as S.C. 1 and S.C. 2 and attached them to this judgment: (they also show where the new concrete fence has been erected.) The plaintiffs do not object to the defendant putting up a bamboo fence in exactly the same places and to the same extent. What they object to is the new concrete fence erected elsewhere inside G, which bars free access and virtually marks off a part of G as private property. The new fence ought to be pulled down. The plaintiffs are entitled to an injunction restraining the defendant from erecting any fence (except a fence similar to the old bamboo fence where that had stood) or building inside the family compound G without their consent.

As regards the 3rd claim: Mr. Thomas concedes that the defendant is not entitled to profits, if any, from rents of rooms in the family compound G; but he says that the rooms are occupied by members of the family and only one is let for the sake of paying the rates. The defendant might as well provide an account of rents received and rates paid in respect of the premises in G, and it will be ordered that she shall do so on oath within three months from the date of this judgment as from the 1st April, 1963, when the question of an account was first brought to her notice by the present suit, down to the 30th June, 1966.

Before dealing with the 1st claim, we have to refer once more to the use of the admission in the Defence in Suit 176/1915 made by the trial judge in the present case. The judgment in the former suit deals with the allegations against the validity of the will, and the res judicata is the validity of the will. The suit was against the executors of the will; the admission was made by their counsel in his pleading, who may well have thought that the allegation of Maria being the only child of the testator was not germane to the dispute and that the executors as representing the estate were not concerned to deny that allegation and raise an irrelevant question in the case. The pleading of counsel for a party is binding on the party in the suit in which it is delivered for the purposes of that suit, and serves to reduce the evidence which need be called in the facts in issue, and thus reduce the costs in the case; and the formal admissions which counsel makes must not be stretched beyond those purposes. The learned trial judge refers to the admission in the 1915 suit, and goes on to pose this question in his judgment:

“In view of this admission by plaintiffs’ father that the mother of the defendant in this case was the only child of Domingo Jose, how can his children now say that their grandmother one Lorintina Jose was a daughter of Domingo Jose?”

With respect the true question is whether there is any rule of evidence which estops a party from pleading differently in a subsequent suit from what his counsel formally pleaded in the former suit on a subject that was not material to the former dispute. The judgment in the 1915 suit was not pleaded in the Defence; it was tendered through one of the plaintiffs in cross-examination; it was not relied upon in any way in the concluding address for the defendant in the court below. Why it was put in we cannot understand. We asked Mr. Thomas, the defendant’s learned counsel, to tell us whether he knew of any authority for the use made by the trial judge of the admission in the 1915 suit; he said he did not know of any and did not rely on that admission. We have since verified the point; it will be enough to quote this passage from the leading case of Boileau v. Rutlin, 2 Exch. Reports 665 at 681 (154 E.R. 657 at 663):

“The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, upon a different principle, and for the purpose of terminating litigation; and so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though, for the purposes of the cause, he is bound by those that are material, and the evidence must be confined to them upon an issue, ought not, it should seem, to be treated as confessions of the truth of the facts stated.”

We are of opinion that the learned judge erred in the use he made of the former judgment. In regard to portion F, the subject of the 1st claim, Mr. Thomas did not urge that Lorintina was not a daughter of the testator; he urged that on the evidence Domingo Akindele Joseph was not the nephew of the testator himself, but of his wife. So the defendant testified, and Mr. Thomas pointed out that she was not cross-examined on that part of her testimony. It is sometimes wiser not to cross-examine. The defendant was born in 1906. Akindele was referred to in the will made by the testator in January, 1911, as being at Sekondi in the Gold Coast (Ghana). The defendant does not say that she ever knew him; she does not even explain how she came to know that he was the nephew not of the testator but of the testator’s wife. The first plaintiff gave evidence that Akindele was the nephew of the testator through a brother and that the plaintiffs father sent someone to Ghana to look for Akindele, but he could not be found; so said the 2nd plaintiff too. In truth they did not know anything about Akindele any more than the defendant did. The defendant testified that her mother Maria corresponded with Akindele, and when he died she was informed and took out letters of administration. She took them out in 1931; he was supposed to have died in 1927. The letters of administration can serve as evidence that Maria was next-of-kin, but not that Akindele was the nephew of Maria’s mother (the testator’s wife). The 1st plaintiff said he did not know of those letters being taken out. Chief Williams, for the plaintiffs, referred to s. 33(e) of the Evidence Act on the admissibility of statements by deceased persons on the issue of pedigree, and argued that it has been shown that that provision has been satisfied by the will but not otherwise. As we have already stated, the defendant did not say in her evidence that her mother Maria told her of the pedigree to which the defendant testified; we cannot accept the suggestion that the defendant must have derived her knowledge from her mother Maria; and no question of the circumstances in which Maria may have so told her arises. Maria and Lorintina, the plaintiffs say, were anything but friends, and no wonder in view of Maria’s action to overthrow the probate of the will. However, Maria knew of the will, and if it was her case that the testator was inaccurate in describing Lorintina as his daughter and Akindele as his nephew-if in 1927 or thereabouts she wished to get a declaration in her favour on pedigree, she ought then to have taken action. As things are there is no reliable evidence to go by on pedigree, and we must accept the testators description in his will of Lorintina as his daughter and of Akindele as his nephew, following the statement of Lord Eldon in Whitelocke v. Baker, 13 Ves. 510, at 514 (33 E.R. 385 at 386) that-

“declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in Bibles, and Registry Books, all are admitted upon the principle, that they are the natural effusions of a party, who must know the truth; and who speaks upon an occasion, when his mind stands in an even position, without any temptation to exceed or fall short of the truth.”

(We note here that it was not cited in argument.) We therefore accept that Lorintina was a daughter and Akindele a nephew of the deceased testator; and upon Akindele’s death the portion F left to him by the will became family property.

It remains to notice the argument that in 1933 the defendant and her brother made alterations and renovations to the buildings in F, which the first plaintiff admits, that the defendant testified that she and her brother built in F, and that the plaintiffs’ father acquiesced in their doing so. Equally the defendant’s brother built in G, but it is conceded that as G is family property that does not affect the character of G as family property; and we cannot see why if F is family property any question of acquiescence arises when a member of the family builds there for his use. In our view the plaintiffs are entitled to a declaration that the portion marked F is family property.

The appeal is allowed, and the judgment of 18 May 1964 in the Lagos High Court Suit No. 109/1963 is set aside with fifty-two guineas as costs of appeal and sixty-five guineas as costs in the High Court, and it is ordered that judgment be entered for the plaintiffs-

(1) granting the plaintiffs a declaration that all that piece or parcel of land marked F on the plan attached to the probate copy of the will of Jose Domingo is the family property of Jose Domingo deceased, the common ancestor of both plaintiffs and defendants;

(2) granting the plaintiffs an injunction restraining the defendant from erecting any fence (except a fence similar to the old bamboo fence where that had stood as appearing on the tracing marked S.C. 1 and the sketch marked S.C. 2 attached hereto) or building in the family compound marked G on the plan attached to the probate copy of the will without the plaintiffs’ consent, and ordering the defendant to pull down the concrete fence built inside the family compound within three months from the date of this judgment;

(3) ordering the defendant to provide on oath by the end of September, 1966 an account of rents received and rates paid in respect of the premises in the family compound G from the 1st April, 1963 (when the question of an account was first brought to her notice by the present suit) to 30th June, 1966, and to pay by the end of September, 1966 the surplus if any into the High Court of Lagos for disposal as to that court may seem fit.

**CASES REFERRED TO:**

Boileau v. Rutlin, 2 Exch. Reports 665; 154 E.R. 657

Whitelocke v. Baker, 13 Ves. 510