BENG AND ANOTHER v. POKU [1965] GLR 167–175

SUPREME COURT

15 MARCH 1965

MILLS-ODOI, OLLENNU AND BRUCE-LYLE JJ.S.C.

Evidence—Traditional history—Conflict of—Test for resolving conflict—Reliance on undisputed facts supporting traditional history.

Customary law—Succession—Intestate succession—Ashanti custom—Mother of intestate non-Ashanti—Person to succeed special case for consideration.

Customary law—Succession—Emancipated slave—Ashanti custom—Attachment to former master's family—Considered as member of that family—Children of emancipated slave regarded as members of his immediate family.

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Administration of estates—Letters of administration—Contested application—Principles governing grant—Person with greater beneficial interest in estate entitled to grant.

HEADNOTES

The first appellant applied to the High Court for the grant of letters of administration in respect of the estate of his father who died in Ashanti. He alleged that the deceased, though born in Ashanti, was not an Ashanti for his parents originally migrated to Ashanti from Krachi district, in the Volta Region, where succession is through paternal line. He claimed, therefore that he was the rightful person to be granted letters of administration to the estate.

Both the second appellant and the respondent entered a caveat denying that the deceased was a Krachiman. They asserted that the deceased was an Ashanti and that succession to his estate was governed by Akan customary law. The respondent claimed descent with the deceased from a common ancestress. He further maintained that the deceased was his slave, and, in accordance with customary law of Ashanti, he was entitled to succeed to his estate. The second appellant claimed that the deceased was his maternal uncle and that shortly before his death the deceased made a nuncupative will disposing of some of his properties to his wife and children, the residue of which he left for him (the second appellant) and also appointed him as his successor. The issue for the consideration of the trial judge was: who was entitled to be granted letters of administration? If the deceased was not an Ashanti as claimed by the first appellant, then between the respondent and the second appellant who was more closely related to

the deceased?

The trial judge dismissed the first appellant's application on the ground that he failed to prove that the deceased came from Krachi. On the issue between the respondent and the second appellant as to who was more closely related to the deceased, he found that the evidence relied on was entirely traditional evidence and he entered judgment for the respondent on the issue relying on the demeanour of the witnesses. He also held that the second appellant's claim that he was appointed a successor by the deceased was contrary to customary law and practice.

On appeal, counsel for the first appellant submitted that the trial judge was wrong in holding that Krachi law of succession did not apply to the deceased because the first appellant failed to prove that the deceased's father came from Krachi. He maintained that even if it had been proved that the deceased's father came from Ashanti, the Akan customary law would not apply to him unless his mother was an Ashanti.

Held, dismissing the appeal in the case of the first appellant and allowing it in the case of the second appellant:

(1) succession in Ashanti is matrilineal. Therefore if the father of a deceased is an Ashanti, but his mother is not, the deceased would have no maternal family in Ashanti who could succeed to his estate. Succession to the estate of such deceased person would, in such circumstances, be a special case to consider, and if it is shown that the deceased during his lifetime did not attach himself to any Ashanti family, then his children would constitute his family for purposes of succession. The plaintiff, however, led no evidence to indicate that the deceased's mother was a Krachi woman. Quarcoopome v. Quarcoopome [1962] 1 G.L.R. 15 approved.

(2) Where an emancipated slave remains and adopts the family of his former master, the children of the emancipated slave becomes his immediate family within the maternal family for purposes of succession. Nimo v. Donkor, Divisional Court, Kumasi, 21 February 1949, unreported, approved.

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(3) Where the claims of parties to an action are based upon traditional history which conflict with each other, the best way of resolving the conflict is by paying due regard to accepted facts in the case which are not in dispute and the traditional evidence supported by the accepted facts is the most probable. The trial judge was therefore wrong in relying on the demeanour of the witnesses to resolve the conflict in this case. Adjeibi-Kojo v. Bonsie (1957) 3 W.A.L.R. 257 at p. 260, P.C. applied.

(4) Though a person cannot appoint his own successor, he may, however, suggest or recommend some member of the family for appointment, and the family usually treats his recommendation or suggestion with due respect though they are not bound by it.

Akyeampong v. Marshall, Divisional Court, 11 November 1957, unreported, explained.

(5) The principle governing the grant of letters of administration where no appointment has been made by the family is that the court should lean in favour of the person shown to have the greater beneficial interest in the estate. In this case the proper person to be granted letters of administration was the second appellant.

CASES REFERRED TO

(1) Quarcoopome v. Quarcoopome [1962] 1 G.L.R. 15.

(2) Nimo v. Donkor, Divisional Court, Kumasi, 21 February 1949, unreported.

(3) Adjeibi-Kojo v. Bonsie (1957) 3 W.A.L.R. 257, P.C.

(4) Akyeampong v. Marshall, Divisional Court, 11 November 1957, unreported.

NATURE OF PROCEEDINGS

APPEAL from a decision of Djabanor J. delivered in the High Court, Kumasi, unreported, wherein he dismissed the application of the first appellant for letters of administration to the estate of his deceased father. The facts are fully set out in the judgment of the court.

COUNSEL

Owusu Afriyie for the first appellant.

S. A. Gyimah for the second appellant.

Osei Bonsu for the respondent.

JUDGMENT OF OLLENNU J.S.C.

Ollennu J.S.C. delivered the judgment of the court. The proceedings which have culminated in this appeal commenced in the High Court, Kumasi, with an application by the plaintiff, the first appellant herein, for a grant of letters of administration in respect of the estate of his deceased father, Kofi Beng, also known as Okomfo Kofi Beng. Caveat to the said application was first entered by the first defendant, the respondent herein, and later another was entered by the second defendant, the second appellant herein, each of whom claimed to be the proper person entitled to the grant of letters in respect of the estate. After the preliminary proceedings required by the rules of procedure applicable to the High Court in administration matters [p.170] had been completed and writ of summons issued by the plaintiffs, pleadings were filed, and the matter proceeded to trial..

The plaintiff based his claim upon facts pleaded in paragraphs (2), (3), (5) and (6) of his statement of claim which are as follows:

(2) The deceased, who was about 70 years old at the time of his death, was survived by a wife Afua Manu, four sons, namely, plaintiff, Kwabena Appiah, Akwasi Pasa and Alexander Ofori, and by two daughters, namely, Akua Afriyie and Akosua Kitiwaa. Deceased was predeceased by two sons and two daughters.

(3) save for those mentioned in paragraph (2) herein, deceased left no relative or other issue.

(5) Deceased was not a native of Ashanti, but was born in Moseaso of parents who had migrated thither from the Krachi district in the Volta Region.

(6) By the customary law of the said Krachi district, which plaintiff contends is the proper law applicable to the estate of deceased, inheritance on intestacy is through the paternal line."

Each of the two defendants denied that the late Kofi Beng was from Krachi; they each asserted that he was an Ashanti, and that succession to his estate is governed by Akan customary law. But while the first defendant claimed descent with the deceased from a very remote common ancestress, one Akosua Brago, who was five generations above his mother, the second defendant claimed to have descended with the deceased from one Yaa Gyaa or Adjoa Gyaa, the great grandmother of the deceased Kofi Beng. In addition The second defendant pleaded that the deceased, shortly before his death distributed some of his properties to his wife and children, and appointed himself his successor to take charge of the residue of his estate.

The trial judge, Djabanor J., dismissed the claim of the plaintiff as well as that of the second defendant, and entered judgment in favour of the first defendant, as the proper person entitled to the grant of letters of administration. From that decision the plaintiff and the second defendant have separately appealed.

Three original and eight additional grounds of appeal were filed on behalf of the plaintiff; of these only the first two of the three original grounds merit some consideration; these are:

"(1) The learned judge in the court below erred in finding as he did that since plaintiff's father came from Ashanti therefore plaintiff's father was an Ashanti.

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(2) The learned judge entirely disregarded the evidence on which plaintiff depended to prove that his father was a Krachiman, i.e. the evidence that plaintiff's father's mother hailed from Krachi and had no relatives in Ashanti."

Arguing this ground, counsel for the plaintiff submitted that the learned judge erred in holding that Krachi law of succession did not apply to the deceased because his, the deceased's, father had not been proved to have come from Krachi; he submitted that even if the father of the deceased had come from Ashanti, the Akan law of succession might not apply to him, if it was proved that his mother was not an Ashanti. There is substance in this submission. Succession in Ashanti is matrilineal; therefore if the father of the deceased was an Ashanti, but his mother was not an Ashanti, he the deceased would have no maternal family in Ashanti to which he would belong for purposes of succession, and succession to his estate would in those circumstances be a special case to consider, and if he was shown not to have attached himself to any Ashanti family, then his children would constitute his family for purposes of succession. On this point we cite with approval the judgment of the High Court in Quarcoopome v. Quarcoopome.1 On the other hand if he is proved to have been an emancipated slave who had remained and adopted the family of his former master, then by customary law his children would be regarded as his immediate family within the maternal family for purposes of succession. On this point also we cite with approval the judgment of Korsah J., as he then was, in the case of Nimo v. Donkor.2

Therefore the learned judge misdirected himself in basing his decision on that issue simply upon his finding that the father of the deceased was an Ashanti; and this is all the more so in view of the averment in the statement of claim that the parents of the deceased migrated from Krachi in the Volta Region to Ashanti. But this misdirection is not serious, and has not occasioned any injustice because the plaintiff led no evidence that his late father's mother was a Krachi woman, while the defendants proved conclusively for about five generations back in the family line, that the deceased's mother was an Ashanti. Therefore the judgment, as far as the dismissal of the plaintiff's claim is concerned, is fully warranted upon the facts and in law. The appeal of the plaintiff must therefore fail.

The appeal of the second defendant is in quite a different category from that of the plaintiff. The issue between the two defendants is: [p.172] which of them is a member of the deceased's family and if both of them are members of his family, then which of them is the closer relation? In deciding that issue between the two defendants the learned judge directed himself that the case of each of them was based upon tradition; he therefore properly warned himself, in the opinion of the Privy Council in the case of Adjeibi-Kojo v. Bonsie,3 that, "it must be recognised that, in the course of transmission from generation to generation, mistakes may occur without any dishonest motives whatever. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago." The principle applicable to all such cases where the claims of the parties are based upon traditional history which conflict with each other is that the court must pay due regard to accomplished facts in the case which are not in dispute, and accept the tradition which is supported by the accomplished facts; this guiding principle is enunciated in the same case cited by the learned trial judge, i.e. Adjeibi-Kojo v. Bonsie,4 and is there stated as follows:

"Where there is a conflict of traditional history, one side or the other must be mistaken,

yet both may be honest in their beliefs. In such a case demeanour is little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence and by seeing which of competing histories is the most probable."

Unfortunately the learned judge failed to direct his attention to these principles which immediately followed the words he quoted, and rather relied upon demeanour and age of witnesses to resolve the conflict. In this he erred gravely.

Now there are such accomplished facts in this case which provide conclusive guide as to which of the conflicting traditions the court should accept. But instead of allowing himself to be guided by this principle the learned judge based his election between the two conflicting traditions upon a most controversial matter. While under cross-examination, the plaintiff's mother, his first witness, said that one Yaa Nyako, mother of the second defendant, was married for a very short time to one Kwasi Kramo, the brother of the deceased Kofi Beng. The second defendant gave evidence that his said mother was never married to the said Kwasi Kramo, now deceased, who was her cousin, and called the wife of the said Kwasi Kramo who testified that her husband was never married to the said Yaa Nyako. The learned judge said he preferred the evidence of the plaintiff's mother on that point to the evidence of the second defendant and [p.173] his witnesses, upon the simple ground that the evidence given by the plaintiff's mother on that point was in cross-examination, while that given by the second defendant and Kramo's wife was given in evidence-in-chief. In our view, the grounds upon which the learned judge preferred the evidence of the plaintiff's mother, and rejected that of the second defendant and his witnesses, is untenable.

Now one outstanding fact in the case of which all the parties to the suit gave evidence, is the fact that a few days before his death, when he had lost all hope of recovery and death was imminent, the deceased made a disposition of some of his properties to his wife and children, and appointed the second defendant, whom he said was his nephew, to take charge of the undisposed residue of his property. The first defendant objected to that action by the deceased, and swore oath against him, according to him, because he was a relation of Kofi Beng, and by custom Kofi Beng should have informed him before making the said dispositions, and giving those directions. According to the plaintiff and the second defendant the reason the first defendant gave at the time for swearing the oath on Kofi Beng was that the said Kofi Beng was his slave, and so had no right to dispose of his properties without his permission. In connection with that oath and certain consequential steps taken, the deceased made a written declaration to the local authority policemen who investigated a complaint of assault made by the first defendant to the said local authority police. In the said statement Kofi Beng asserted that he was not a slave, that the second defendant was his nephew, and that he was entitled as a free man to dispose of his self-acquired property to his children and his nephew the second defendant. That incident proved conclusively that Kofi Beng in his lifetime declared that the second defendant is a member of his family entitled by customary law to succeed to his estate. When that accomplished fact is taken together with the conflicting traditions related by the two defendants, it is made abundantly clear

that it supports the tradition relied upon by the second defendant, and not that of the first defendant. It is therefore wrong for the learned judge to have rejected the tradition of the second defendant, and have accepted that of the first defendant instead.

Dealing with this aspect of the case, namely, the death-bed declaration which Kofi Beng made, the learned judge misconceived the point at issue and interpreted the second defendant's claim to entitlement to have been made upon grounds that Kofi Beng had appointed him his successor. He therefore directed himself as follows:

"The second defendant, Kojo Alata, adduced evidence to the effect that the dying Kofi Beng declared him his successor before he died.

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That is contrary to customary law and practice and I declare it ineffective." He relied upon Akyeampong v. Marshall,5 for that declaration. In the first place the evidence led by the second defendant and all the witnesses who testified to the incident is, that Kofi Beng made a samansiw of all the residue of his estate in his, the second defendant's favour to take effect upon his Kofi Beng's death, and that he, the second defendant, gave the customary drink, aseda, to seal the said samansiw. The first defendant supported this fact, and he stated that he swore the oath to prevent this. He said, "when Kofi Beng was brought and was dying I went to pay him a visit. I saw that he was distributing his property without calling me, and I told him that if he died his corpse would be for me to bury. I therefore swore to an oath that when he died his corpse would be for me to bury."

Now the proposition of the customary law that a person cannot appoint his successor is a sound one. Dr. J.B. Danquah at p. 182 of his book, Akan Laws and Customs, states the principle that a person, "can as a fact recommend a member of the family or clan as his possible successor, but there is nothing in the Akan institutions to bind the members of the Stool [family] to defer in every respect of the dying wish or testament. They may as a matter of sentiment strive to give effect to his wishes."

In other words, though a person cannot appoint his own successor, he may yet suggest or recommend some member of the family for appointment, and the family usually treats his recommendation or suggestion with due respect though they are not bound by it. Again, it is noticeable that in the dying declaration made by Kofi Beng in consequence of the oath sworn upon him by the first defendant, he emphasized that he was not a slave. This confirms the evidence led by both the plaintiff and the second defendant that the first defendant swore the oath upon the dying Kofi Beng, maintaining that he Kofi Beng was his slave. In those circumstances, it is unreasonable to hold that the first defendant is a blood kinsman of Kofi Beng; and further it is unrealistic to expect that if the family had to appoint a successor to Kofi Beng they would prefer the first defendant who regards Kofi Beng as his slave, to the second defendant whom Kofi Beng himself held out as his nearest relation entitled to succeed him. Surely, in circumstances such

as these, the family must show some respect for the choice of Kofi Beng.

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Now it being clear on the record that the second defendant is a member of Kofi Beng's family, and assuming, as the learned judge held, that the first defendant is also a relation of the said Kofi Beng, and since the first defendant admits that he is not the head of Kofi Beng's family, the only criterion which should guide the court in preferring one to the other is nearness of relationship. There is no doubt that upon the genealogical tree, the second defendant is in the customary sense, a very close relation of Kofi Beng, while the first defendant is far remote from him; and therefore the second defendant would in the circumstances of the case be a member of the immediate family of Kofi Beng, while the first defendant would be only of the ancestral family, if at all. The principle which the court follows in choosing between claimants for letters of administration where there is no appointment by the family, is that it should lean in favour of the person shown to have the greater beneficial interest in the estate. If the learned judge had followed that principle, there is no doubt that as between the two defendants, the second is the proper person as between himself and the first defendant, to be granted letters of administration in respect of the estate of Kofi Beng.

For these reasons the appeal of the plaintiff must fail, and it is accordingly dismissed; but the appeal of the second defendant must succeed, and it is hereby allowed. The judgment entered in favour of the first defendant is set aside, and the following substituted. There will be judgment for the second defendant for declaration that he is the proper person entitled to the grant of letters of administration in respect of the estate of Kofi Beng, deceased.

The second appellant will have his costs in this court against the first defendant fixed at £G63 15s. and his costs in the court below against the plaintiff and the first defendant agreed at 25 guineas.

DECISION

Appeal allowed in part.

K.T.

FOOTNOTES

1 [1962] 1 G.L.R. 15.

2 Judgment of the Divisional Court, Kumasi, 21 February 1949, unreported.

3 (1957) 3 W.A.L.R. 257 at p. 260, P,C.

4 Ibid.

5 Judgment of Divisional Court, 11 November 1957, unreported.