IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA AD 2015

CORAM: AKUFFO (MS.), JSC (PRESIDING)
ADINYIRA (MRS.) JSC
BAFFOE-BONNIE JSC
GBADEGBE JSC
BENIN JSC

CIVIL APPEAL
NO.J4/6/2015

17TH JUNE 2015

1. **GUY NEE WHANG**
2. **KROWE MENSAH** ... **PLAINTIFFS/APPELLANTS/ RESPONDENTS**

VRS

VANDERPUYE MANISON ... **DEFENDANT/RESPONDENT/ APPELLANT**

JUDGMENT

ADINYIRA JSC:

FACTS OF THE CASE

The Plaintiffs/Appellants/Respondents (Plaintiffs) are the executors of the will of the late Joseph Borketey Manison (testator) who died on 21 January 2006. It was thought that he died intestate, and his estate was shared. Then by a letter dated the 9 July 2009, the Chief Registrar of the High Court, Accra invited members of his family to the registry of the Court for the reading of a will purported to be the last will and testament of the testator.

This will was tendered in evidence as Exhibit A. In his will, the testator devised almost the whole of his estate to Enoch Bortey Manison son of Madam Beatrice Ankrah. The other children including Defendant were given "other houses" which, as it turned out did not exist.

The Defendant/Respondent/Appellant (Defendant), who is one of the testator's sons, challenged the validity of the said will on the grounds that the will was forged as the signature on the will was not that of his late father. He also contended that as at 16 May 2001 when the testator was alleged to have executed the said last will and testament the testator had no testamentary capacity. On these grounds Defendant filed a notice calling upon the executors of the will to prove the will in solemn form.

Accordingly, the Plaintiffs issued a writ on 23 July 2007 to have the will pronounced valid. In their suit, the Plaintiffs claimed against the Defendant a declaration that the will dated 16 May 2001 was the true will and last testament of the testator and an order that the said will, be admitted to probate.

The issues for determination before the High Court were whether the will was properly executed by the testator and attested to by witnesses and whether the testator was compos mentis at the time he executed the will. The trial judge resolved all these issues in favor of the defendant.

The trial judge relied heavily on the evidence of PW3 the surviving attesting witness whose evidence was that the will was not the act of the testator as his signature and that of the testator on the will were forgeries. The trial judge compared the signatures of the testator on some exhibits with that on the will and found the signatures on all the exhibits were the same except that on the will which was different. The trial Judge also relied on the evidence of DWI, Dr Jacob Jordan Lamptey, the psychiatrist who treated the testator for dementia to come to the conclusion that Exhibit A, the will was a forgery.

At page 24 of the judgment, the trial judge dismissed the Plaintiffs' case in this manner:

> "There is direct evidence the testator did not have testamentary capacity. Whatever is in Exhibit A can never be his deed.
>
> The evidence of the attesting witness PW3 and DW1 the psychiatrist show that the document is not the free act and deed of the deceased.
>
> On balance of probabilities I find the defendant's evidence more probable and set aside Exhibit A as not the deed and act of the testator."
>
> The Plaintiffs' claim is hereby dismissed. Judgment is entered for the defendant."

The Plaintiffs appealed to the Court of Appeal on the sole ground that the judgment of the trial judge was against the weight of evidence.

The Court of Appeal by a majority decision upheld the appeal on the grounds that PW3 was an untruthful witness and the trial judge allowed himself to be swayed to declare the will invalid. The Court of appeal further held that if the testator was not compos mentis as DW1 led the trial court to believe he could not have gone through a marriage ceremony, make a will and operate a bank account during the same period of time. Their lordships also examined all the signatures on the various exhibits and compared them with those in the will and found all to be similar and came to the conclusion that the will was signed by the testator. The Court of Appeal applied the maxim *Omnia praesumuntur rite et solemniter esse acta* and declared the will to be valid and set aside the judgment of the High Court. The Defendant being dissatisfied appealed to the Supreme Court.

GROUNDS OF APPEAL

(a) The majority erred in law by failing to observe and apply the principle of law that an appellate court that does not see and hear the witnesses ought not to, without compelling reasons, overturn the findings of the trial court based on the credibility of the witnesses and as a consequence the majority wrongly overturned the findings of facts by the trial High Court that the will is not valid on account of the evidence of the witnesses that it saw and heard.

(b) The majority of the Court of Appeal erred in law by failing to apply the principle of the law of evidence which states that failure to challenge a witness's testimony on a material aspect of a case through cross examination amounts to an admission of the veracity of that testimony; which ought to have been applied to

uphold the truthfulness of the testimony of the only attesting witness in this case to the effect that they will being propounded is not what he witnessed.

(c) The majority erred in law by applying the principle *Omnia praesumuntur rite et solemniter esse acta* to aid the Plaintiffs with regard to the discharge by them of their burden of proof whereas the position of the law in line with the decision of this court in the case of *Re: Blay-Miezah* [2001-2002]1 SCGLR 339 and other cases is that the burden of proof is wholly on the proponent of a will being proved in solemn form to be discharged by proving every element for the validity of a will; thereby the majority, wrongfully, changed the burden of proof and placed it on the Defendant.

(d) The majority of the Court of Appeal erred in law when it applied the principle *Omnia praesumuntur* to the proper execution of a will, a private act by an individual, whereas the Evidence Act of 1975 has confined the application of principle in Ghana law to official acts only and not to private acts.

(e) The majority decision of the Court is against the weight of the evidence.

(f) Further Grounds of Appeal to be filled upon receipt of the record of appeal.

No further ground of appeal was filed. The omnibus ground namely, "the majority decision of the Court is against the weight of the evidence" renders some of the grounds of appeal relating to questions of facts and law superfluous. Out of the copious statements of case filed in this appeal, arguably, the most important legal issue raised in this appeal is the same as

was before the trial and appellate courts: whether the Plaintiffs were able to prove the will in solemn form as required by the **Wills Act 1971, Act 360**.

It is provided by **the Wills Act, 1971, Act 360, sections 1 (2), 2(1), (3), and (5)** that:

> "1 (2) A person suffering from insanity or infirmity of mind so as to be incapable of understanding the nature or effect of a will does not have the capacity to make a will during the continuance of that insanity or infirmity of mind.
>
> 2 (1) No will shall be valid unless it is in writing and signed by the testator or some other person at his direction
>
> (3) The signature of the testator shall be made or acknowledged by him in the presence of two or more persons at the same time
>
> (5) The witnesses shall attest and sign the will in the presence of the testator but no form of attestation shall be necessary."

The issues then are:

1) Whether the testator had testamentary capacity to make a will
2) Whether the signature on the will was that of the testator
3) Whether the signature of the attesting witness was that of S.B. Krowe

The issue as to whether the testator had testamentary capacity to make a will

The trial court resolved in favor of the Defendant that the testator did not have testamentary capacity at the time it was purported he signed Exhibit A in May 2001. This finding was based on the evidence of Dr Jacob Jordan Lamptey, DW1, to the effect that the testator was his patient during the period May 2001

and January 2006 and he was suffering from dementia. He was referred to his Valley View Clinic from Nyaho Clinic.

The evidence of DW1, who from his credentials as a psychiatrist and a lecturer in Neuro Psycho Pharmacy and Chief Examiner in psychiatry at the College of Physicians and Surgeons in Ghana with 45 years experience, was evidently that of an expert.

Section 67(1) of the Evidence Act, 1975, NRCD 323 states:

> "67. (1) A person is qualified to testify as an expert if he satisfies the court that he is an expert on the subject to which his testimony relates by reason of his special skill, experience or training
>
> (2) Evidence to prove expertise may, but need not; consist of the testimony of the witness himself."

Here, DW1 was not merely giving evidence as an expert but also about his patient who was referred to his hospital for psychiatric treatment from Nyaho Clinic a well renowned medical facility in Accra. From the line of cross-examination of DW1, the Plaintiffs did not deny the testator was a patient at DW1's clinic; the only challenge was to the type of ailment which sent him there. We cannot imagine why a well-endowed clinic like Nyaho Clinic would refer its long-time patient to a psychiatry clinic if the patient has not been diagnosed with a mental health problem that needed a specialist's treatment. There was evidence that it was PW2, the testator's wife who took him to DW1's clinic.

DWI gave details of his diagnosis of the testator as follows:

> "Having examined him I found that his memory was impaired, so was cognitive-concentration memory attention. There was loss of judgment and delusional believes. He was unable to tell me the time of day, the date, the month and indeed the year. Indeed it appeared he was not able

to recognize that I am a doctor in spite of having the stethoscope on my neck. Obviously there are symptoms of dementia which many called secondary dementia being secondary to a hypertension causing the stroke and the diabetes."

Instead of treating DW1's evidence with some respect, his evidence was peremptorily dismissed by the majority of the Court of Appeal on the grounds that DW1 was unable to produce the referral letter from Nyaho Clinic. Furthermore the appellate court was also of the view that someone suffering from dementia "or in regular parlance, a mad man" cannot go through a wedding ceremony in the year 2001, go to his lawyer with others and make a will and return to his house and serve them drinks and operate a bank account with others at the Agricultural Development Bank; as such actions in the opinion of Welbourne J.A. were inconsistent with the activities of a mad person or one who is not compos mentis.

We do not agree with her ladyship findings as these events she chronicled took place before May 2001 and before he was taken to DW1'clinic for treatment bearing in mind that PW3 said the he attested to a will in 1999, and we gather from the marriage certificate Exhibit C that the wedding took place 0n 3 January 2001. It can be deduced from the cross-examination of DW1 that the testator was gradually deteriorating in both mental and physical health until his death.

On the other hand the trial judge considered the evidence of DW1 and came to the conclusion that the will was not the act of the testator and we find no reason to overturn that. We therefore hold that the testator had no testamentary capacity to make Exhibit A.

The issues as to whether the signature on the will was that of the testator

The only evidence the Plaintiffs offered on this issue was that of the lawyer, PW1 who prepared the will, and PW4, the son of the testator. We will examine PWI's evidence later. The only relevance of PW4's evidence was that he drove the father and 2 others to the lawyer's chambers in May 2001 to sign the will but he sat outside to wait for them. He was also taking the father to Nyaho Clinic.

Pw3, S.B. Krowe who is said to have attested to the will disowned the will. He said in his evidence that he went with the testator and one other to James Town to sign a document which he was told was the will of the testator in 1999 and not 2001. He said the document produced in court as the will of the testator was not the one he attested. He said before he signed the will he read it, but the lawyer told him he was not supposed to read it but to sign. He said the 1st Plaintiff name was not mentioned as an executor. It was only Krowe Mensah who was named as an executor. He ended that both his signature and that of the testator were forged. He tendered in evidence an indenture, Exhibit H in which he identifies his own signature and that of the testator.

The trial judge accepted the evidence of Pw3. The Judge also said he compared the signatures of the testator on some exhibits tendered in evidence as bearing his signature. These are; his Ghanaian passport tendered in evidence as Exhibit 3; a Ghana Exchange Control Travel Form T5/90, tendered in evidence as Exhibit 4, and a resolution of the Nungua Traditional Council tendered in evidence as Exhibit B.

The trial judge's observation was that the signatures on these 3 documents were the same and signed by the same person. He found the signatures on these three documents differed substantially from what was on Exhibit A, the will. He accordingly held that the plaintiffs failed to satisfy the court as to the genuineness of the testator's signature in Exhibit A.

Welbourne J.A. writing the majority decision of the court was of the view that PW3 was an untruthful witness whose main interest was to deny the will being admitted to probate. The learned justice therefore decided to follow the principle of dealing with such witnesses as stated in **Re Kotei (deceased) Kotei v Ollenu [1975] 2GLR 107** where it was held that the court has always been slow to allow the unreliable evidence of attesting witnesses to defeat a will which appears ex facie to be regular. The majority of the Court of Appeal rejected the findings of the trial court that the will was invalid.

The defendant submitted that the majority of the Court of Appeal erred in law by failing to observe and apply the principle of law that an appellate court that does not see and hear the witnesses ought not to, without compelling reasons, overturn the findings of the trial court based on the credibility of the witnesses.

Clearly the attitude of the majority of the Court of Appeal was that the PW3 and DW1 were untruthful witnesses as they considered the signature on the will Exhibit A was that of the testator and that the testator was compos mentis at the time he made the will.

We have examined thoroughly the evidence of PW3 and our findings are that the witness did not say that the testator did not make a will. His evidence was that Exhibit A shown to him was not the will he attested to. His reasons are firstly, it was in 1999 that he accompanied the testator to a lawyer's chambers to attest to the will. Secondly the signature on Exhibit A of him as an attesting witness was a forgery. Thirdly the signature of the testator was not that of the testator. He tendered Exhibit H an indenture which bore the signature of the testator and his. Fourthly when the lawyer gave him the will to sign he read part of it before the lawyer told him he was not supposed to read the document but to sign it. There is also evidence that when the will was read to the family by the Registrar at the High Court, PW3 protested that the will was not that of the deceased. Finally he also challenged the fact that the 1st plaintiff was mentioned as an executor in the will as he was not mentioned in the will he read.

It is quite settled that where there is a dispute as to the genuineness of a signature in a document, it was fair and proper to compare signatures on other documents bearing the signature of the testator.

Justice Azu Crabbe in his book, ***The Law of Wills in Ghana*** published by Vieso Universal (Gh.) Ltd 1998, at page 198 wrote:

> "Where there is a dispute as to the genuineness of the signature of the testator, or of an attesting witness on the will, proof of custody of other documents bearing the signature of the person whose signature is in dispute may be produced for comparison. This affords an opportunity to the witnesses, who are conversant with the disputed signature, and also of the court, to compare the signature in the will directly with the disputed signature."

Both the trial and appellate courts compared the signatures of the testator on documents tendered in evidence for the purpose of comparison. The trial judge compared the alleged signatures of the testator on his passport, Exhibit 3; a Ghana Exchange Control Travel Form T5/90, Exhibit 4 and a resolution of the Nungua Traditional Council Exhibit B. His observation was that the signatures on these 3 documents were the same and signed by the same person. He found the signatures on these three documents differed substantially with what was on the will, Exhibit A. He accordingly held that the plaintiffs failed to satisfy the court as to the genuineness of the testator's signature in Exhibit A.

Welbourne JA said she examined all the signatures provided on the various exhibits particularly the will, Exhibits A; B, C, D, E, 3 and 4 and found the signatures on all the documents similar and therefore came to the conclusion that the will Exhibit A was signed by the testator.

On the issue as to whether the signature of the testator on Exhibit A is genuine, we are faced with two conflicting findings of facts from the trial court and the appellate court. In **Continental Plastics v IMC Industries [2009] SCGLR 298 at 307- to 308** Wood CJ opined that:

> "What does a second appellate court do when confronted with two conflicting findings of fact: one from a trial court and the other from a first appellate court? Does it automatically accept the appellate court's finding, it being the higher of the two**?**
>
> An appeal being by way of rehearing, the Supreme Court being a second appellate Court is bound to choose the finding which is

consistent with the evidence. In effect; the court may affirm either of the two findings or make an altogether different finding based on the record."

Based on the above principle we are disposed to affirm the trial court's finding that Exhibit A was not the act of the testator for the following reasons. We have also dutifully examined all the exhibits that bore the signature of the testator including Exhibit H. We find that the signatures on these exhibits were the same except that on the will Exhibit A. The testator signature was peculiar and the difference between that in the will and the other documents was so strikingly different that one can tell straightaway that the signature on the will is not that of the testator. We observed during this exercise that Exhibits D an Agricultural Development Bank Savings Passbook, which the Court of Appeal said it examined, does not contain anyone's signature. Exhibit E which the Court Of Appeal also said it examined consists of photocopies of the passports and visas of the 1st Plaintiff and some other traditional rulers and was therefore not relevant for comparison of signatures.

We now turn to the evidence of PWI, the lawyer who prepared Exhibit A. Though the lawyer naturally defended the document he prepared, his evidence did not advance the Plaintiffs' case in any way. In cross-examination he said he usually typed a will and leave out the date and signatures to be done in ink, as and when it is signed, which makes sense. In respect of Exhibit A he typed the final version of the will in the presence of the testator and the two attesting witnesses in his chambers and the testator and the attesting witnesses signed the document there and then. Thus it is reasonable to expect the lawyer to type in the date or to ensure that it is dated by the signatories. However it came out

in cross-examination that the will was not dated and he inserted in ink the date '16' on the first page.

We examined the will Exhibit A and we see the date '16' inserted in ink on the first page, but the back where the signatures of the testator and attesting witnesses are, was undated. The non-availability of dates on the will cast doubt on it being genuine.

Judging by these pieces of evidence we find no basis for the majority of the Court of Appeal to discredit the evidence of PW3 and call him an untruthful witness. The Plaintiffs knew before hand that PW3 had protested at the reading of the will at the High Court that the will was not genuine and yet they called him as a witness and they did nothing to discredit his evidence. **In Fosu & Adu Poku v Dufie (deceased) & Adu-Poku Mensah [2009] SCGLR 310**, it was held in head note 4 that:

> " The veracity or otherwise of a witness was a function reserved exclusively for the trial judge and would ordinarily not be interfered with except it was proved he did not take advantage of seeing the witnesses as they testified before him, or drew the wrong inferences from the evidence."

The generally accepted principle of law is that the findings of fact made by a trial court ought not to be disturbed unless they are perverse or not supported by the evidence on record. The trial judge had enough evidence to make his findings and for that reason was not so perverse as to be reversed on appeal. We accordingly hold that the plaintiffs failed to prove the genuineness of the testator's signature in Exhibit A.

From the foregoing we hold that the majority view that the will, Exhibit A was signed by the testator was in error.

The issue as to whether the signature of the attesting witness was that of S.B. Krowe

We examined PW3's signature on Exhibit H and compared it with his signature on Exhibit A and we find that too to be dissimilar. Accordingly we accept PW3's evidence that his signature on the will was forged.

Conclusion

In conclusion we hold that there was sufficient evidence to support the findings by the trial judge that Exhibit A was not the act and deed of the testator as he was of unsound mind and could not have executed Exhibit A. PW3 who was the surviving attesting witness said he attested to a will in 1999 and what was shown to him as Exhibit A was not the will he attested to. He denied his own signature and that of the testator.

We are of the view that in their effort to give effect to the will of the testator, the majority of the appellate court erred in applying the maxim *Omnia praesumuntur rite et solemniter esse acta* (all things are presumed to be correctly done); as the primary findings by the trial court that the testator had no testamentary capacity, and his signature and that of the attesting witness PW3 were forgeries, are valid. However the argument by Counsel for the Defendant that the maxim applies to only official acts is in error and as Counsel for the Plaintiffs correctly stated the maxim applies also to duties required by law by reference to **Ghana Ports and Harbours Authority & Ziem v Nova Complex Ltd [2007-2008] SCGLR 806**.

From the foregoing we hold that the will Exhibit A is not that of the testator. Accordingly the Plaintiffs have failed to prove the will in solemn form and we therefore declare it invalid and cannot be admitted to probate.

The appeal succeeds, the majority decision of the Court of Appeal is set aside and the judgment of the High Court is restored.

The Plaintiffs' action is hereby dismissed.

(SGD) S. O. A. ADINYIRA (MRS)

JUSTICE OF THE SUPREME COURT

(SGD) S. A. B. AKUFFO (MS)

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE BONNIE

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