

1967 GHANA LAW REPORT

AGBAJE AND ANOTHER V. BUCKNOR [1967] GLR 617-623

HIGH COURT, CAPE COAST

17 OCTOBER, 1967

ARCHER J.

Administration of estates—Conversion of property into cash—Nature of interest in property—Court order for sale of movable and immovable property with right of pre-emption in daughters of deceased—Exercise of right—Whether daughters took property by purchase or devolution—Whether son not recognised in administration proceedings entitled to claim co-ownership of property or share in proceeds of sale with his half-sisters.

HEADNOTES

The late B. married three times. He married first according to customary law and the defendant was the issue of that marriage. He then married A.M.B. under the Ordinance, and the plaintiffs were the issues of that marriage. At the time of his death intestate, B. was married again under the Ordinance to J.B., to whom letters of administration were granted. He left movable and immovable property in Cape Coast.

The plaintiffs were at all times resident in Nigeria, and when subsequently they took action against their step-mother, J.B., claiming an account of her [p.618] administration and their share in the estate of their deceased father, they did so through the defendant (their half-brother) as their lawful attorney. The court by consent of the parties, ordered the entire estate to be converted into money with a right of pre-emption vested in the plaintiffs. The plaintiffs exercised this right by transferring £2,410 9s. 6d. from Nigeria which was paid into court and then divided as to two-thirds for the plaintiffs and one-third for their step-mother.

The defendant remained in possession of the immovable property in Cape Coast as caretaker and attorney for his half-sisters until the present action when they sued him for recovery of possession thereof. The defendant resisted the action and counterclaimed for a declaration that, as a lawful child of his deceased father, he was a co-owner with the plaintiffs. The plaintiffs applied to the court under L.N.140A of 1954, Order 25, r. 4 for an order striking out the defence and for entry of judgment in their favour.

Held: the plaintiffs were entitled to judgment. It was clear from the earlier court proceedings that the plaintiffs had acquired the property of their deceased father not by devolution but as purchasers for valuable consideration of the whole estate. The defendant did not contribute anything towards the purchase price, and there was no indication whatsoever that he was recognised in the administration proceedings as either a party to the suit in his own right or as a beneficiary by virtue of his status as a child of the deceased. If the defendant had any interest at all, then it lay in the proceeds of sale after the conversion of the estate.

NATURE OF PROCEEDINGS

APPLICATION for an order striking out the defence and entry of judgment for the plaintiffs in an action for recovery of possession of land. The facts are set out in the judgment.

COUNSEL

Short for the plaintiffs.

Hayfron-Benjamin for the defendant.

JUDGMENT OF ARCHER J.

The plaintiffs have applied under Order 25, r.4 of the Supreme [High] Court (Civil Procedure) Rules, 1954 (L.N.140A), for an order striking out the statement of defence filed by the defendant and also for entry of judgment in their favour. In considering the application, I have found it necessary not to confine myself to the affidavits filed by both parties but to consider as well the whole of the pleadings so far delivered by the parties.

The facts of the case are very simple and straightforward. There lived in Ghana, one Arthur Joseph Eugene Bucknor who later died in Cape Coast on 19 September 1931, leaving an estate which included both movable and immovable properties. There is no indication that the deceased died testate but there is evidence that his lawful wife, Mrs. Joan Bucknor, at the time of his death was appointed administratrix. There is also evidence that before his marriage to the said administratrix, the deceased had been previously married lawfully under the Marriage Ordinance, Cap. 127 (1951 Rev.), to [p.619] one Augusta Margaret Bucknor, and the plaintiffs were the lawful children under the said earlier marriage.

In an administration suit No. 53/1949 in the then Divisional Court at Cape Coast, the plaintiffs took action against the administratrix, Mrs. Joan Bucknor, claiming account of her administration, and also claiming their shares in the estate as the lawful daughters of the deceased. To resolve their differences, the Divisional Court on 9 April 1953, made the following order:

"By consent, the plaintiffs are given three months from today's date in which to pay in respect of the movable and immovable properties the total value of the same into court, that is to say £2,410 9s. 6d. In the event of this not being done within the time stated all the property will be sold.

The only conclusion I can arrive at and the only possible construction I can place on this order is that by consent of the parties, the court ordered the estate of the deceased to be converted into ready cash with a right of pre-emption vested in the plaintiffs. The plaintiffs were unable to comply with the court's order of 9 April 1953 and a further extension of three months was granted them on 18 July 1953. The plaintiffs were able subsequently to transfer the sum of £2,410 9s. 6d. from Nigeria to the Divisional Court, Cape Coast. There is evidence from exhibit B (a cablegram received by the court on 3 October 1953) attached to the plaintiffs' affidavit in support of their motion, that the plaintiffs notified the registrar of the court of the transfer. Exhibit C is the official receipt issued by the registrar to the Bank of British West Africa Limited, as it was then called, for the said transfer.

After the plaintiffs had exercised this right of pre-emption and had deposited the sum of £2,410 9s. 6d. as the total purchase price of the whole estate as valued, the Divisional Court on 22 October 1953 made the following order for the distribution of the converted estate:

"It is ordered that the registrar of this court do pay to the plaintiffs herein two-thirds share of the sum of £2,410 9s. 6d. now in his custody. It is also ordered that the defendant do produce all the personal effects with the inventory of the valuers appointed by the court and do deposit same with the registrar of this court for delivery to the plaintiffs: The defendant is hereby ordered to hand over forthwith to the registrar of this court for the plaintiffs all the movable and immovable properties together with any keys and title deeds in her possession."

[p.620]

At this stage, there is no doubt that the conversion of the whole estate had been completed and the court had ordered the mode and ratio of distribution of the proceeds of sale. The plaintiffs thereby became purchasers for valuable consideration of the whole estate. But as beneficiaries of the estate, they received two-thirds of the proceeds of sale of the estate. In other words the plaintiffs became owners of all the movable and immovable properties of the deceased by purchase and not by devolution. They took the two-thirds share of the cash by devolution as the lawful children of the deceased. The next question I shall deal with is what was the role of the present defendant, Charles J.B. Akin Bucknor. The defendant is a half brother of the plaintiffs. His own affidavit discloses that he was the son of the deceased, Arthur Joseph Eugene Bucknor, by virtue of an earlier marriage under native customary law contracted by his deceased father. I have no reason to disbelieve this averment since it has not been denied by the plaintiffs. There is, however, evidence that from the inception of the administration suit in 1949, the present defendant's role was that of a lawful attorney for the plaintiffs who were resident outside the jurisdiction whereas the defendant was resident within the jurisdiction. There is no indication whatsoever that he was recognised in the administration proceedings as either a party to the suit in his own right or as a beneficiary by virtue of his status as a child of the deceased. Indeed, there is incontrovertible evidence in exhibit D attached to the plaintiffs' affidavit that before the court made its order for the distribution of the proceeds of conversion, the defendant wrote as follows to the court registrar:

"The court today made an order granting the plaintiffs garnishee for the sum of £787 14s. 1d. out of the one-third share due to Mrs. Joan Bucknor from the sum of £2,410 9s. 6d.

I shall be grateful if you will transmit this amount together with the two-thirds share due to the plaintiffs and when the court orders distribution to the credit of the plaintiffs, Mrs Cecilia Evelyn Agbaje and Dorothy Kathlyn Ajibade to the National Bank of Nigeria Limited in Lagos less bank charges for the transmission.

Further I shall be grateful if the registrar keeps in court the movable properties in the hands of the defendant to await plaintiffs' personal collection.

Yours obediently,

(Sgd.)C.J.B. Akin-Bucknor

Plaintiff's Lawful Attorney."

[p.621]

When one reads this letter, one is struck by the lack of enthusiasm and zeal on the part of the defendant to claim anything from the father's estate. He not only instructed the registrar to transfer the whole cash

to Nigeria for the benefit of the two plaintiffs but also advised the registrar to keep the other movable properties to await collection by the plaintiffs themselves. The immovable property of the deceased which was converted consisted of a piece of land with buildings thereon known as Mohmo Villa No. 64/4, on the Jukwa Road, Cape Coast, covering a total area of 8.07 acres. It appears that after the conversion of the estate the plaintiffs who were still resident in Nigeria appointed the defendant their resident caretaker of this land in Cape Coast. The defendant now claims by paragraph (4) of his statement of defence that by a family arrangement the plaintiffs together with the defendant jointly pooled their resources together in depositing in the Divisional Court, Cape Coast, the sum of £2,410 9s. 6d. I must confess that I can find no evidence in support of this averment. There is, however, evidence that the whole amount came from Nigeria. Moreover, the defendant does not say what was his contribution towards raising the said amount. In the same paragraph (4) it is also suggested that Mrs. Joan Bucknor, the step-mother of both the plaintiffs and the defendant was paid off to preserve the immovable properties of the deceased for the benefit of the plaintiffs and the defendant being the lawful children of the deceased. As I have already observed, the whole estate was valued and the plaintiffs were given the option of purchasing the whole estate before the estate was offered for sale to non-beneficiaries, that is, strangers. The two plaintiffs provided the purchase money and later took their share of the proceeds of sale. The two plaintiffs in my view became owners of the land in dispute by purchase.

Nevertheless, there is a further development on which the defendant thinks he can safely rely whether correctly or not I shall say shortly. By paragraph (9) of the statement of defence, the defendant pleaded estoppel and res judicata by virtue of a judgment delivered in an interpleader proceedings on 1 May 1964. In a suit entitled Godfrey Acquah v. Joan Bucknor the land in dispute was attached by the judgment creditor, Godfrey Acquah, but the plaintiffs and the defendant counterclaimed and their claim was sustained. The judgment of the court reads as follows:

"It is quite clear from the evidence that at the time of the attachment the claimants were in possession as owners thereof, jointly with the witness, their attorney, the judgment obtained against Mrs. Joan Bucknor was in her capacity as administratrix of the personal estate of the deceased the claimants were not parties to those proceedings.

[p.622]

I find that the claimants were in possession of the property seized on their own behalf and not on behalf of the judgment debtor as administratrix of the estate.

The claim accordingly succeeds and the property attached is released from attachment. The judgment-creditor to pay £35 12s. 6d. total cost to the claimants which includes £21 counsel's costs, which I award owing to the work involved and circumstances in which adjournments were granted at the judgment creditor's request."

The defendant is therefore of the view that because the judgment in this interpleader proceedings observed that "the claimants were in possession as owners thereof, jointly with the witness, their attorney," therefore by this judicial observation, he had become a joint owner. I must confess that in the absence of any evidence given by the plaintiffs themselves during the hearing of the interpleader proceedings, I can only say that that observation is based on the evidence given by the defendant himself alone as the sole witness for the plaintiffs who were resident outside the jurisdiction and who

could not give evidence. I fail therefore to see how the plaintiffs could be estopped. The actual finding of the court is expressed in the words of Bernas J., "I find that the claimants were in possession of the property seized on their own behalf and not on behalf of the judgment debtor."

The present defendant in my view claimed because he was caretaker and attorney in possession. He has failed to prove how he became a joint owner after the purchase by the plaintiffs but before the judgment of 1 May 1954 was delivered. Nevertheless, I do sympathise with the contention of the defendant that by operation of law he is entitled to a share in the estate of his late father presumably on the strength of the latest and modern developments in the law of intestate succession in Ghana relating to the rights of children born out a marriage under the Ordinance vis a vis the rights of children born out of an earlier customary marriage contracted by the same deceased father. However, whatever sympathy I may entertain cannot destroy the fact that on his father's death, the whole estate was converted into cash and if the defendant has any interest at all that interest will lie against the proceeds of sale and not the corpus of the estate which was converted thereby vesting legal ownership in the purchasers who are the plaintiffs. Moreover, I have no evidence that the defendant made any contribution towards the purchase money provided by the plaintiffs. I have considered very carefully the affidavit filed by the defendant, the substance of which is to the effect that there had been no sale of the property in dispute but I [p.623] do not think the defendant's contention is supported by the various court orders I have referred to earlier in this judgment.

There is no doubt that it would have been highly desirable if the court had ordered the registrar to execute a vesting deed or even a formal conveyance in favour of the plaintiffs but, of course, such a conveyancing device could have been employed *ex abundanti cautela* and not for the perfection of any title. I think the final paragraph of exhibit A by itself was sufficient to transfer the land and building in dispute to the plaintiffs as purchasers.

I cannot see how the defence in this action can be sustained. Accordingly the whole defence is struck out under Order 25, r.4 and judgment is hereby entered in favour of the plaintiffs on their claim for recovery of possession as purchasers of the house and land known as Mohmo Villa, No. B 64/4, Jukwa Road, Cape Coast.

If the defendant has any interest at all then in my view that interest may be in the proceeds of sale after conversion of the estate and the defendant is not entitled to a declaration that he is co-owner with the plaintiffs of the properties in dispute as he did not provide anything towards the purchase price paid by the plaintiffs. It is also not legally possible to partition the properties in dispute because the defendant has no interest in them.

The defendant's counterclaim cannot therefore be countenanced and it is hereby dismissed without prejudice to any future action he may wish to take to claim an interest in the proceeds of sale, that is after conversion of the estate.

One hundred guineas costs to the plaintiffs.

DECISION

Judgment for the plaintiffs with costs.

J.D.