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24, 1954

IN THE PRIVY COUNCIL

No.19 of 1953

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL

37666

IN THE MATTER OF THE ESTATE OF
JOHN ST. MATTHEW DANIEL, Deceased

UNIVERSITY OF LONDON
W.C.1.

23 FEB 1955

B E T W E E N

INSTITUTE OF ADVANCED
LEGAL STUDIES

MATTHEW OLAJIDE BAMGBOSE

(formerly DANIEL)

...

Appellant

- and -

1. JOHN BANKOLE DANIEL
2. MRS. FEYISHITAN BAMBOYE
3. MRS. ABIMBOLA OLADUMIYE
4. CRISPINAH DANIEL now CRISPINAH DEBAYO (Married Woman)
5. OLABODE DANIEL) By their guardian and next
6. MOBOLAJI DANIEL) friend Muniratu Ayinke Ajibola
7. ABIODUN DANIEL By his guardian and next
friend Janet Clay
8. OLAYINKA DANIEL) By their guardian and next
9. ADEYANJU DANIEL) friend Sabiyitu Adamo.
10. ADEYEMI DANIEL By his guardian and next
friend Rebecca Layinka.
11. KOLAPO DANIEL By his guardian and next
friend S.A.Lewis.
12. OLAYIWOLA DANIEL By his guardian and next
friend Nusiratu Oshodi.

- and -

THE ADMINISTRATOR GENERAL ...

Respondents

CASE ON BEHALF OF THE APPELLANT

1. This Appeal from a judgment of the West African Court of Appeal dated the 2nd June 1952 raises a preliminary question of law in the

the administration of the estate of an intestate who died domiciled in Nigeria. The intestate was a son of parents whose marriage was a monogamous and Christian marriage solemnised in accordance with the provisions of the Nigerian Marriage Ordinance. The Intestate himself had several wives whom he is alleged to have married in accordance with native law and custom and the question is whether his estate devolves on his children by those marriages or (as the Appellant contends) on the other issue of the Intestate's parents. The question depends on the true construction and effect of section 41 of the Marriage Ordinance of Nigeria No. 14 of 1884, which is reenacted in substance in section 36 (1) of the Marriage Ordinance of Nigeria of 1914 (chapter 128 of the Laws of Nigeria).

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2. The facts are as follows :-

5 1.30

(i) Matthew Joaquim Daniel (hereinafter called the grandfather) intermarried with Theresa Maria on the 28th September 1890 in accordance with the provisions of the said Ordinance of 1884 at the Wesleyan Methodist Church Tinubu Square Lagos

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7 1.30

(ii) Previously to their marriage the grandfather had a child by the said Theresa Maria namely Pedro St. Matthew Daniel (hereinafter called Pedro) who was born on the 20th October 1884 and who (as the Appellant claims) was legitimated by the subsequent marriage of his parents by virtue of the Legitimacy Ordinance of Nigeria of 1929. (Chapter III of the Laws of Nigeria). Section 3 of the last mentioned Ordinance is as follows :-

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(1) Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Ordinance, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in

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Nigeria, render that person, if living, legitimate from the commencement of this Ordinance, or from the date of the marriage, whichever last happens.

10 (2) The legitimation of a person under this Ordinance does not enable him or his spouse, children or remoter issue to take any interest in real or personal property save as is hereinafter in this Ordinance expressly provided.

By Section 5 (1) thereof it is enacted that a legitimated person and his spouse children and more remote issue shall be entitled to take any interest in the estate of an intestate dying after the date of legitimation in like manner as if the legitimated person had been born legitimate.

20 The Appellant is able in these proceedings or in other duly constituted administration proceedings to establish his status as the legitimate child of Pedro and the legitimation of Pedro irrespective of whether a petition for a declaration of Pedro's legitimation would lie.

(iii) The only issue of the said marriage of the grandfather and Theresa Maria was John St. Matthew Daniel (hereinafter called the intestate) who was born on the 30th March 1891.

p.7. 1.17

30 (iv) The Grandfather died in 1890 and the intestate as his only legitimate child at the time of his death, took the whole of his estate to the exclusion of Pedro (who did not become legitimated until the passing of the Legitimacy Ordinance 1929) No provision voluntarily or otherwise was made for the intestate's natural brother Pedro.

p.54. 1.20

40 (v) Pedro married monogamously in accordance with the provision of the said Ordinance on the 19th October 1909 at the Wesleyan Methodist Church at Olowogbowo in the Colony of Lagos. The Appellant is the only child of such marriage and was born on the 3rd day of December 1917. Pedro

p.81. 1.14

.7. 1.30. died on the 29th June 1936.

.6 1.3. (vi) The intestate was never married under the provisions of the said Ordinance but the Respondents other than the Administrator- General (hereinafter called the respondent children) claim to be children of the intestate by eight several "wives" whom he is alleged to have married polygamously in accordance with native law and custom. Several of such "wives" survive but the said marriages and the legitimacy of the respondent children by native law and custom have not yet been established.

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.5. 1.23. (vii) The intestate died intestate on the 25th April 1948.

.5. 1.26. (viii) By an Order of the Supreme Court of Nigeria (Lagos Judicial Division) made on the 1st February 1949 the Respondent, the Administrator-General was appointed administrator of his estate.

3. Section 41 of the said Marriage Ordinance of 1884 is as follows :

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41. Where any person who is subject to native law or custom contracts a marriage in accordance with the provisions of this or of any other Ordinance relating to marriage, or has contracted a marriage prior to the passing of this Ordinance, which marriage is validated hereby and such person dies intestate, subsequently to the commencement of this Ordinance, leaving a widow or husband or any issue of such marriage,

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And also where any person who is issue of any such marriage as aforesaid dies intestate subsequently to the commencement of this Ordinance,

The personal property of such Intestate and also any real property of which the said Intestate might have disposed by Will shall be distributed in accordance with the provisions

of the law of England relating to the distribution of the personal estates of Intestates, any native law or custom to the contrary notwithstanding.

10 Provided always, that where by the law of England, any portion of the estate of such Intestate would become a portion of the casual hereditary Revenues of the Crown such portion shall be distributed in accordance with the provisions of native law and custom and shall not become a portion of the said casual hereditary Revenues.

 Provided also that real property, the succession to which cannot by native law or custom be affected by testamentary disposition shall descend in accordance with the provisions of such native law or custom anything herein to the contrary notwithstanding.

20 Before the Registrar of Marriages issues his certificate in the case of an intended marriage, either party to which is a person subject to native law or custom, he shall explain to both parties the effect of these provisions as to the succession to property as affected by marriage.

 Section 36 (1) of the said Marriage Ordinance of 1914 is as follows :

30 36. (1) Where any person who is subject to native law or custom contracts a marriage in accordance with the provisions of this Ordinance, and such person dies intestate subsequently to the commencement of this Ordinance, leaving a widow or husband, or any issue of such marriage; and also where any person who is the issue of any such marriage as aforesaid dies intestate subsequently to the commencement of this Ordinance -

 The personal property of such intestate

and also any real property of which the said intestate might have disposed by will, shall be distributed in accordance with the provisions of the law of England relating to the distribution of the personal estates of intestates, any native law or custom to the contrary notwithstanding;

Provided that -

(a) where by the law of England any portion of the estate of such intestate would become a portion of the casual hereditary revenues of the Crown, such portion shall be distributed in accordance with the provisions of native law and custom, and shall not become a portion of the said casual hereditary revenues; and 10

(b) real property, the succession to which cannot by native law or custom be affected by testamentary disposition, shall descend in accordance with the provisions of such native law or custom, anything herein to the contrary notwithstanding. 20

4. The history of the litigation in this matter in Nigeria is as follows :-

(i) On the 7th May 1949 the Appellant presented a petition to the Court praying a declaration that Pedro had been legitimated by the Legitimacy Ordinance of 1929. The petition was dismissed on the ground that the Ordinance does not provide for a decree of legitimation in respect of a deceased person. 30

(ii) On the 6th February 1950 the Appellant presented a further petition praying a declaration that the grandfather and Theresa Maria were lawfully married and that by such marriage Pedro became legitimated as from the commencement of the Legitimacy Ordinance 1929: and that accordingly the Appellant took the status of a grandchild of the grandfather and a nephew of the intestate. On the

23rd October 1950 this petition was dismissed on the ground that the Court had no jurisdiction to grant the declaration prayed.

- (iii) On the 19th January 1950 the respondent children launched a motion against the Administrator General asking for an Order that he do proceed to distribute the estate of the intestate among them. Subsequently the Appellant was made a respondent to the motion. No claim has in fact been made by any of the mothers of the respondent children, but it is apprehended and contended that their respective positions cannot be neglected and are relevant to the determination of the question of law involved in this appeal. p.1. p.86 1.28
- (iv) On the 14th February 1950 judgment was given on the motion by His Honour Vahe Robert Bairamian Puisne Judge who refused the application but gave liberty to renew it on condition that notice was given to the Appellant. Subsequently a partial distribution on security being given was allowed. p.13 1.20
- (v) Two further motions were launched by the Respondent children on the 25th April 1951 asking for a distribution of the real and personal estate of the intestate and on the 17th May 1951 an Order was made directing that all the real property of the intestate be partitioned among his children and his personal estate be distributed among them. p.32 1.20 p.36 1.1. p.49 1.20
- (vi) On the 28th May 1951 the Appellant gave notice of motion appealing from such Order to the West African Court of Appeal, and the execution of such order was subsequently stayed pending the appeal. p.50 1.20
- (vii) The appeal was heard on the 20th and 21st May 1952 and the judgment of the Court of Appeal (Sir Stafford Foster Sutton President Joseph Henri Maxime de Comarmond Acting Chief Justice Nigeria and Sir James Henley Coussey Justice of Appeal) was delivered by the President on the 2nd June 1952 p.80
- The Court addressed itself to the issue of law involved on the assumption that the appellant and

the respondent children established the status for which they respectively contended and proceeded to review two conflicting decisions of its own, viz (a) In the matter of the estate of Frederick Akindele Somefun deceased re Adeline Subulade Williams (1941 - 7 W.A.C.A. Reports p.156) and (b) In the matter of the Estate of Herbert Samuel Heelas Macaulay deceased re Sarah L. Adadevoh and others (1951 cyclostyied reports dated 23rd November 1951). In the former case the West African Court of Appeal had excluded from the succession to the estate of an intestate (who was the issue of a marriage contracted under the Marriage Ordinance) his widow and issue by a native marriage and had allowed the claims to succeed of the other issue of his parents' marriage. In the latter case it would appear that the West African Court of Appeal (1) declined to follow its own previous decision in Somefun holding that it was reached per incuriam (2) held in effect that in applying the English law of succession the status of claimants should be determined by the law of the domicile irrespective of whether the marriage upon which such claims were founded were monogamous or polygamous. The Court in the present case concluded that it was bound by the decision in re Macaulay and expressed its agreement with it. Nevertheless, holding that there was insufficient evidence before the Court below on the question whether the intestate was married to any of the mothers of the respondent children in accordance with native law and custom and if so which if any of the respondent children were the issue of such marriages, the West African Court of Appeal allowed the appeal and remitted the motions of the respondent children to the Court below for hearing de novo and for further evidence on these and other matters to be adduced, but on the footing (in effect) that claims by "widows" of the intestate were not in issue, since none had been made.

5. The said judgment of the West African Court of Appeal in the present case concludes in that Court (as the Court subsequently held) the issue of law which arises in this case as between the

Appellant and the respondent children and accordingly the Appellant duly applied for the leave of the West African Court of Appeal to appeal from such judgment to Her Majesty in Council. Conditional leave was given and the Appellant having complied with the conditions by order of the said Court made on the 6th October 1952 final leave so to appeal was granted to the Appellant.

p.88

10 6. It is humbly submitted on behalf of the Appellant that the preliminary question of law which is set out in paragraph 1 hereof should be determined before the inquiries directed by the West African Court of Appeal are proceeded with since they may become unnecessary in the event of the Appellant's contentions succeeding.

7. The Appellant will contend:-

20 (a) that where (as here) it applies the said Marriage Ordinance imports into the law of the domicile all and not some only of the provisions of the law of England relating to the distribution of the personal estates of intestates (save as regards bona vacantia and certain realty as therein mentioned);

(b) that the relevant provisions of the law of England recognise only monogamous marriages and the issue thereof and do not contemplate or make provision for polygamous marriages and the issue thereof;

30 (c) that accordingly, although for other purposes by the law of the domicile the issue of polygamous marriages may be regarded as legitimate, yet for the particular purposes of distribution in accordance with the said Ordinance the status of claimants must (save only as aforesaid and subject to the said Legitimacy Ordinance of Nigeria) be determined in the same manner as it would be determined in English law which for those purposes is part of the law of the domicile; and status by
40 native law or custom be wholly excluded;

(d) that accordingly in the present case the several widows of the intestate and his issue by polygamous marriages are wholly excluded from participation in his estate if there are living at his death any other legitimate or legitimated issue of his parents by monogamous marriage;

(e) that the judgment of the West African Court of Appeal must as a logical consequence thereof involve the admission of the several "widows" of the intestate to share in his estate; and this consequence (which is not avoided by the fact that none of such widows has in fact thus far claimed to participate) is not capable of being worked out consistently with the provisions of the law of England relating to the distribution of the personal estates of intestates; 10

(f) that such judgment was wrong in law in that it determined as legitimate (subject to proof) the status of the children of the intestate by polygamous marriages by reference to native law and custom; 20

(g) that accordingly subject to the appellant's establishing the legitimation of Pedro his claim to the estate of the intestate has priority over the claims of the respondent children.

8. The Appellant submits that the decision of the West African Court of Appeal on the question of law involved was wrong and should be reversed and that the claims of the respondent children (or such of them as establish their status as children (or such of them as establish their status as children of the intestate by marriages under native law and custom) to the estate of the intestate should be dismissed and that the claim of the Appellant (if he establishes the legitimation of his father Pedro) should be allowed for the following (amongst other) 30

R E A S O N S

1. BECAUSE the law of England relating to the

distribution of the estates of intestates does not recognise polygamous marriages or the legitimacy of the issue thereof.

2. BECAUSE the said Marriage Ordinance expressly applies that law to the issue who die intestate of a marriage contracted in accordance with the provisions thereof "any native law or custom to the contrary notwithstanding."
- 10 3. BECAUSE the recognition of the legitimacy of the respondent children for the purposes of the distribution of the estate of the intestate would or might involve the recognition of more than one of their mothers as persons entitled to share in such estate as widows of the intestate; and it is irrelevant for deciding the issues of law that in the present case none of such mothers has in fact thus far claimed to participate.
- 20 4. BECAUSE the importation into Nigerian law by the marriage Ordinance of Nigeria of the law of England in the form aforesaid must necessarily presuppose at most one surviving spouse (being the survivor of a monogamous marriage) and issue only of one, or of one or more successive, monogamous marriages; and must negative distribution among a plurality of surviving spouses and the issue of
- 30 polygamous marriages irrespective of native law and custom.
5. BECAUSE for the purposes of the said Ordinance the status of persons claiming to participate in the estate of an intestate thereunder, as well as the law of succession applicable to the case, must be governed by the English law imported by the said Ordinance.
6. BECAUSE the decision of the West African Court of Appeal so far as concerns the point of law involved, was wrong.

No.19 of 1953

IN THE PRIVY COUNCIL

ON APPEAL FROM THE WEST AFRICAN
COURT OF APPEAL

MATTHEW OLAJIDE BAMGBOSE

- v -

JOHN BANKOLE DANIEL and
OTHERS

CASE ON BEHALF OF THE APPELLANT

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