Journal of Management and Social Science Research, 2 (1/2), 24 – 34, 2021
ISSN: 2735-9395 (Print) 2735-9360 (Online) Available online at credencepressltd.com
DOI 10.47524/jmssr.v2i1.25

Legal implication of the use of extrinsic evidence in construing the contents of a will in Nigeria

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Abstract
The right to acquire property whether real or personal is incidental to the right to dispose of the property by a testator to persons of his choice. The right to freely dispose property is, however, limited by status enacted by various jurisdictions. Situation arises where the Will of a testator is a subject of litigation as a result of either patent or latent ambiguity involving the content, language or uncertainty as to the intention of the testator. Usually, the Court is called upon to arbitrate and construe the content of the Will. The judiciary in exercise of its authority sometimes applied extrinsic evidence in order to give true meaning to the content of an ambiguous Will. This paper is set to examine what is extrinsic evidence under Nigeria law of Evidence, admissibility of it in construction of the content of ambiguous Will and its legal implication on the right of a named beneficiary not listed as one of the beneficiaries in the Will.

Introduction

It is a natural right of individual in a given society, either primitive or a civilize society, to own property, whether real or personal. An incident of this right is the general freedom to use and dispose of one's bounties. According to T.O.G. Animashaun, eti al that,

> ''the best way to dedicate the manner in which a person would like his estate to be distributed after his death is by making a Will, for he can leave specific instructions as to how his estate should be administered and to whom it should go (subject to laws governing Wills) he has liberty to dispose of such property in the way he like''.

In drafting a Will, the draftsman must write the Will as simple as possible so that the wishes of the testator can be easily understood. But there are times that the wishes of the testator are not easily understood. The Court may be called upon to construe the contents of a Will by interpreting the provisions of the Will and trying to detect the intention of the Testator. How should a Court go about determining a testator's intention? The common law rule of interpretation was to reach the intention of the testator by giving the language used in a Will document its plain and ordinary meaning. That is, Court should give strict interpretation to the word used in Will. This ''plain meaning'' approach in will construction has actually done more injustice to beneficiaries than all the defects of the common law put together. A good illustration of unjust situation in literal construction of Will is: where XYZ on his sick bed informed his dutiful nephew that, 'as a result of your love and support all these years, I have written a letter to my solicitor to prepare a codicil for me to sign in which I have directed him to give you half of my estate and the other half to my only son, John'. The uncle died without signing the codicil. The Uncle instruction to his Lawyer is called extrinsic evidence. At common law, this piece of evidence cannot be allowed in construing testamentary intention, if the language used in a Will is clear and unambiguous. What then becomes the faith of the dutiful nephew?

One of the advocates of objective approach in line with the language of the

testator's Will is Sir James Wigram (1914). In 1983 Wigram outlined the law under seven propositions. The two propositions state that the words in the Will must be given 'their strict and primary acceptation' subject to the dictionary principle. Under the dictionary principle, if it is clear from other parts of the Will that the words have been used in a different sense, then the word may be interpreted in that way.

The third proposition is that, where words do not have any effect, a popular or secondary meaning can be used.

The fourth proposition is about Will drafted in foreign language.

The fifth proposition is the use of evidence of the circumstances surrounding the testator at the date of the making of the Will could be admitted to establish a link between the word and a person or object. This is also known as the "armchair rule".

Under the sixth and seventh propositions, evidence of a testator's dispositive intent could be admitted to resolve latent ambiguities.

Wigram proposition was that extrinsic evidence should only be used where the language used in the Will is ambiguous. Wigram support for the use of extrinsic evidence is not to reach the mind of the testator in his grave but to construe the testator's use of language in his Will in order to determine his intention via application of circumstances surrounding the testator at the date of execution of the Will in order to determine the sense of the wording in the Will.

The intentional approach

On the other hand, Francis Hawkins (1862) advocated an intentional approach in a lecture given in 1860 and in a text published in 1862, he stated that:

> ''… the intention of the testator, which can be collected with reasonable certainty from the entire Will, with the aid of extrinsic evidence of a kind properly admissible, must have effect given to it, beyond, and even against, the literal sense of particular words and expression, the intention, when legitimately proved; is competent not only to fix the sense of ambiguous words, but to control the sense of even clear words, and to supply the place of express words, in cases of difficult ambiguity'' (underlined for emphasis)

In 1863, Hawkins following Wigram's pattern, expressed his views on the general principles of construction in the form of four propositions. In contrast to the literal approach, Hawkins first proposition provides that the object of a Court in construing a Will is to ascertain the expressed intentions of the testator, that is, what the testator intended by the words in his Will, as opposed to what the testator intended in some general sense.

Similarly, to the literal approach, the second proposition states that the words and expressions used in a Will are to be construed in their …."ordinary, proper and grammatical sense" However, if ambiguity still arises in spite of reading them in conjunction with the facts of the case, Hawkins allows the primary meaning of the words to be modified, extended or abridged and words and expression supplied or rejected in accordance with the presumed intention, so far as to remove or avoid the difficulty or ambiguity in question, but no further. The third proposition provides that technical words and expressions must be taken in their technical sense, unless a clear intention can be established to use them in another sense. The last proposition is the

background of this paper and it will be worthy to set out the proposition in full.

> ‘‘notwithstanding the last two propositions the intention of the testator, which can be collected with reasonable certainty from the entire Will, with the aid of extrinsic evidence of a kind properly admissible, must have effect given to it, beyond, and even against the literal sense of the particular words and expressions, the intention, when legitimately provided, is competent not only to fix the sense of ambiguous words, but to control the sense of clear words, and to supply the place of express words, in cases of difficult ambiguity’’.

Samuel Azu Crabbe (1998) also made out a strong case in support of Hawkins proposition where he said:

> ‘‘In the construction of a Will by the Court, the overriding principle is the effect must, as far as possible, be given to the intention of the testator. This intention is to be ascertained from the words of the Will. If it is found that certain provisions of the Will are not in harmony with the intention of the testator as expressed in other clauses, a liberal construction, which tends to preserve all the parts of the Will, and which accords with the probable intention of the testator is to be preferred.”

The subjectivists take the view that where the words used in a Will document is ambiguous or where the testator would have made certain person a beneficiary, if he has advertent his mind to the existence of that person when the Will was prepared. The Court should use extrinsic evidence to give effect to the fact that the testator would have intended that person to benefit from his Will if he had knowledge of the existence of that person. The proper approach to be taken under the intentional approach was articulated in Re-Burke (1959).

> ‘‘Each judge must Endeavour to place himself in the position of the testator at the time when the Will was made. He should concentrate his thought on the circumstances which then existed and which might reasonably be expected to influence the testator in the disposition of his property. He must give due weight to those circumstances in so far as they bear on the intention of the testator. He should then study the whole contents of the Will, after full consideration of all the provisions and language used therein, try to find what intention was in the mind of the testator’’

In Re-Allen (1953), the late Lord Denning M.R. has this to say:

> ‘‘it is in general the function and duty of a Court to construe the testator’s language with reasonable liberty and to try if it can, to give sensible effect to the intention he has expressed.’’

In reaching the mind of the testator in his grave, Courts are expected to use extrinsic evidence to fill in the gap in a Will where the gap was not within the contemplation of the testator as at when the Will was executed.

The question now is; what type of extrinsic evidence needed to be admitted in

order to reach the mind of the testator in his/her grave? Secondly, what is extrinsic evidence? Thirdly, does the jurisdiction of Nigeria probate Court apply extrinsic evidence in adjudicating dispute involving Will?

This paper is set to examine the meaning of extrinsic evidence and will also take a look at the jurisdiction of United Kingdom relating to application of extrinsic evidence in resolving dispute involving Wills, the effects of the application of this piece of evidence on the right of a named beneficiary not listed as a beneficiary in a Will and make recommendations accordingly.

What is extrinsic evidence?

Oxford law dictionary (2018) define extrinsic evidence as Evidence relating to matters referred to in a document that is not itself included in that document. It can also be described as evidence regarding an agreement that is not included in the written version of the agreement. Extrinsic evidence is external, outside evidence or evidence that is inadmissible or not properly before the Court, jury, or other determine body.

Types of extrinsic evidence

Going by Wigram and Sir Francis Hawkins dispositions on extrinsic evidence, two salient types of extrinsic evidence can be adducted; wit:

1. Extrinsic evidence of the circumstances surrounding the testator
2. Extrinsic evidence of the testator's intention.

Extrinsic evidence of the circumstances surrounding the testator

Evidence of the circumstances surrounding the testator, relates to events surrounding a testator on the date the Will was made, but not directly to his dispositive intentions, and is generally admissible for the purpose of interpreting a Will. For example, evidence of the testator's knowledge of his family tree, of the status of family members or beneficiaries and of the state of his property and the testator's habits of referring to a person by nickname is evidence of the circumstances surrounding the testator (Goodings v Goodings 1949).

However, the objectives are of the position that the admission of evidence of surrounding circumstances must be predicated upon finding of an ambiguity on the face of the Will (Alberta Law institute, 2010). The objectives support for extrinsic evidence is to construe the testator's use of language in his Will with the aid of evidence should be used to explain the testator's words in the Will and no more. To them, the Court can only give effect to an intention which is express on the face of the Will. The Court cannot re-write the Will for the testator.

On the other hand, the subjectivists are of the position that the admission of evidence of surrounding circumstance is not dependent upon a finding of an ambiguity on the fact of the Will as in the objrrounding circumstances either before or after studying the language of the Will (British Columbia 1982). This implies that an ambiguity not obvious on the face of the Will may be found in the surrounding circumstance. A simple illustration where this might occur is as follows; A testator leaves his estate 'to mother'. When the testator dies, his mother is not alive. An examination of the surrounding circumstance shows that he habitually referred to his wife as 'mother'

Extrinsic evidence of the testator's intention

Extrinsic evidence of the testator's intentions is direct evidence that tends to prove what the testator' actual dispositive intentions were (White.R.W). It consists of evidence of declarations made by the

testator outside of his Will which show his intention as to the meaning to be put on the language of his Will, such as the testator's instructions for his Will and statement he may have made as to whom he wished to leave his estate. A good example of extrinsic evidence of intention of the testator is the XYZ illustration. The statement made by XYZ to his nephew on his sick bed that, 'as a result of your love and support all these years, I have written a letter to my solicitor to prepare codicil for me to sign in which I had directed him to give you half of my estate and the other half to my only son, John'. This piece of evidence is called the extrinsic evidence outside the content of a Will. In the case of ERICKSON V ERICKSON (1998), the testator, two days to his wedding with the defendant executed a mutual Wills with the defendant.

The content of the Will disclosed the fact that Erickson passed the residue of his estate to the defendant. Unknowingly to Erickson and his wife, the Alberta Act under Section 17 provides that, 'a Will is revoked by the marriage of the testator except when there is a declaration in the Will that it is made in contemplation of the marriage'. The content of the Will in dispute, on the face of it, does not have any provision establishing the fact that the Will was made in contemplation of marriage. Almost seven years later. Erickson learned that he had a terminal disease. A couple of weeks before the testator died, the testator and his lawyer retrieved and reviewed the Will. The lawyer assured the testator that the Will that was executed eight years prior to his marriage with the defendant was valid and that his entire estate would pass to his wife. The testator relied on his lawyer and did nothing to his invalid Will.

The issues before the Court: Whether extrinsic evidence is admissible to show that the testator was misled by his lawyer to believe that his Will was valid?

Held- The Court held in the affirmative and further stated that the extrinsic evidence here showed by clear and convincing evidence that the attorney made an implied assertion that the testator's Will would be valid without the contingency of marriage. The Probate Court therefore admitted the Will to probate.

In Re-Williams' case (1984), the English Court of Chancery admitted as evidence a letter written by the testator with respect to her homemade will. The will contained no directions as to the proportion of the estate three groups of beneficiaries were to receive. The Court, in construing the Will admitted the letter (which is extrinsic evidence) to aid the Court in reaching the intention of the testator.

The use of extrinsic evidence in construing the contents of a will in England

In England, the adoption of extrinsic evidence of circumstances surrounding the testator as at the time of Will making and direct extrinsic evidence of testator's intention was not met without agitation by some judges and lawyers who were comfortable with the result of the objective approach to Will construction. This resulted in preponderance of different legal opinions and decisions on case law on the same subject matter.

The confusion and uncertainty in case law involving construction of Wills led to English Law Reform Committee in 1973 to publish its 19th Report, the England 1973 report on, '**INTERPRETATION OF WILLS'** The Committee adopted intentional approach to Will interpretation. Majority of the Committee members felt that admission of extrinsic evidence should be widened, noting the trend in the case law toward an intentional approach. In the majority's view; extrinsic evidence of any kind should be admissible to interpret a Will, a part from admission of evidence of

the testator's intention. The majority disagreed, taking the view that all evidence including evidence of the testator's intention would be admissible. The report specifically stated that the function of the Court was to find the testator's meaning. The Committee, however, advocated strongly for the adoption of intentional approach to Will construction. The result was the enactment of the Administration of Justice Act of 1982 which allows the admission of evidence of surrounding circumstances and the testator's intention.

Scope of section 21 of the administrative of justice act 1982 and its applicability in Nigeria

Under Section 21, the government set out rules for admission of evidence of surrounding circumstances and evidence of the testator's intent. For extrinsic evidence to be admissible there must be ambiguous or meaningless provision on the face of the Will or ambiguity in the surrounding circumstances which makes the language in the Will ambiguous. If such ambiguity is present, all extrinsic evidence is admissible, including evidence of the testator's intent.

Section 21 provides as follows: Interpretation of Wills-general rules as to evidence.

1. This Section applies to a Will
   a. In so far as any part of it is meaningless
   b. In so far as the language used in any part of it is ambiguous on the face of it
   c. In so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of its ambiguous in the light of surrounding circumstances.
2. In so far as this section applies to a Will, extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation.

It is worthy to note that Section 21(2) of the Act used the word, "may" in admission of extrinsic evidence in construction of Will. This implies that, it is not mandatory for Courts to use extrinsic evidence in aid of construction of Will even if, it is obvious that the application of extrinsic evidence will aid the Court in reaching the mind of the testator in his grave, the Court has the discretion to reject the evidence particularly where the extrinsic evidence is suspected to have been obtained by fraud.

However, where the use of the extrinsic evidence will aid the Court in reaching the intention of the testator, having erased fraud and suspicion Courts are enjoin to admit it. Such was the attitude of the Court in the case of **Perrin v. Morgan (1943)** A.C. at page 399. In this case, a woman died leaving a homemade Will in which she directed that, 'all money of which I possessed shall be shared by my nephews and nieces now living'. The woman's estate was worth more than 30,000 pounds which consisted almost entirely of stocks and shares. It was clear that she intended her stocks and shares to pass under the word, 'money'. The House of Lords held that in the context of the Will in issues, the bequest of 'money' included the whole of the testator's personal estate.

The use of extrinsic evidence in Nigeria's courts

Before the colonization and amalgamation of the geographical location called Nigeria, every tribe in its territorial boundaries was administrating its customs on succession and inheritance on its subjects. When the English colonized Nigeria, some of these customs were considered barbaric, primitive and was eventually declared repugnant to natural justice, equity and good conscience. Consequently, the English then introduced set of rules known as the 'Received English Law'. This consist of the common law of

England, the doctrine of Equity, statutes of general application in forces in England on January 1, 1900 and status and subsidiary legislature on specified subject matters. These laws were introduced into the Nigerian judicial system by Nigerian legislation. The receptions of these English laws were made possible by the passage of Ordinance No. 3 in 1863 which introduced English laws in the colony of Lagos.

Statutes and subsidiary legislation on specified subject matters

Apart from the statute of general application, the Received English laws still consist of statute and subsidiary legislation on a specified subject matter. For instance, issues like marriage and probate matters have English statutes enacted to regulate and adjudicate on dispute relating to inheritance and marriage contracted under the English Marriage Act of 1845. However, Western region comprises of Delta, Edo, Ogun, Ondo, Ekiti, Osun and Oyo States, enacted its own law, thus the English law on probate cannot be enforce.

In the North, Section 33 of the High Court Laws of Northern Nigeria 1963, Cap 49 provides that:

"The jurisdiction of the High Court on probate cases and proceeding may be subject to customary law and the rules of Court be exercise in conformity with the law and practice for the time being in enforce in England."

Also in Lagos state, Section 16 of the High Court of Lagos, 1973, Cap 52 provides that on probate case, the received English law on probate for the time being in enforce in England is applicable in Lagos State.

In view of the above, the question that follows is; is the Administration of Justice Act of 1982 applicable in Nigeria?

Going by the provision of Section 16 of the High Court of Lagos State, 1973, which provides that, "the received statute on probate for the time being in force in England is applicable in Lagos State. It, therefore, means that English law on probate that is being currently applied in England may also be enforce in Lagos. However, by virtue of section 292 of the law (Miscellaneous Provisions) law of Lagos state, the received English law on probate currently enforce in England is only applicable and enforceable only in a situation where Lagos State House of Assembly has not enacted law on the subject matter. Impliedly, enactment of law by Lagos State House of assembly on the admissibility of extrinsic evidence automatically bars the application of Administration of Justice Act 1982 of England. Unfortunately, rules of Court in Lagos state do not permit the use of extrinsic evidence to construe the contents of a will. Order 55, Rule 29(1) of High Court of Lagos State (Civil Procedure) Rules 2004 permit the use of extrinsic evidence to aid the interpretation of content of Will if the testator expressly includes the documents in the Will or refer to the documents in the Will.

Order 55, Rule 29(1) provides as follows:

"Where a Will contains a reference to any document of such a nature as to raise the question where it ought not to form or constitute part of the Will a document cannot form part of a Will unless it was in existence at the time when the Will was executed".

The Evidence Act of 2011, however, made provision for the admissibility of extrinsic evidence for the purpose of construing the content of a Will under Section 45(1) (a) (b) (c) which provides as follows:

1. The declaration of a deceased testator as to his testamentary intentions and as to the content of his Will, are admissible when

a. His Will has been, lost and when there is question as to what were its content; or
b. The question as to whether an existing Will is genuine or was improperly obtained or
c. The questions as to whether any and which of more existing documents than one constitutes his will.

It is interesting to states that the above provision only made extrinsic, evidence of testator as to his testamentary intentions applicable in the following situations:

1. If the Will executed by the testator happens to get loss and cannot be found

2. When a Will is suspected to have been obtained by fraud or improperly executed either as a result of undue influence, lack of mental capacity etc.

3. When more than two wills are before the probate Court purported to have emanated from the same testator.

It is only on these grounds that extrinsic evidence as to the testator's testamentary intentions as to the content of his Will is admissible. Where the Will is defective or ambiguous as to be un-meaning or construing the Will in its plain and grammatical meaning will not reach the intention of the testator, extrinsic evidence as to circumstances surrounding the testator at the time of Will making or direct evidence of the testator's intention is prohibited.

Permit me to say here that, while Nigerian legislators made generous provisions for the use of extrinsic evidence relating to subject matters involving contracts or agreement between parties under section 128 and 129 of the Evidence Act, Laws of the Federation of Nigeria 2011 as amended, they consciously excluded same regulations from being used in interpretation of ambiguous Will.

Section 120 (1) provides as follows:
Section 128 and 129 apply only to parties to documents and their representatives in interest and only to cases in which some civil right or civil liability is dependent upon the terms of a document (Underlined for emphasis).

Will is not made by two or more parties. It is made by testator and witnessed by two persons. The witness, in this situation are not parties to the Will making. They are only invited to witness the execution of the Will. The combined effects of Sections 128 and 129 of the evidence Act of 2011 has made it not admissible extrinsic evidence; whether evidence of circumstances surrounding the testator at the time of Will making, or direct evidence of the testator's intention. Impliedly, the provisions of the administration of Justice Act of 1982 cannot be applied in any part of Nigeria due to the provisions of Sections 45 of the Evidence Act. Aside this, the Administration of Justice Act of 1982 is a post English status of general application. In view of this, post English statute cannot be applied in Nigeria.

The legal implication of non-use of extrinsic evidence in Nigeria.
The primary concern of Courts in Nigeria is to construe the content of a Will in conformity with the plain language of the Will. In MR OMOBUDE OMONUWA V MR BENSON EDEGBE AND OTHERS SUIT NO: B/507/2012. The claim of the Claimant was that his late father wrote a Will and captured most of his properties in the Will but however, left the following instruction in the Will;
'l hereby direct that my properties not specifically mentioned herein shall be shared amongst my children'

The Claimant further averred that his late father prior to his demised left instruction that his properties should not be sold by one. The instruction that the properties should not be sold is extrinsic evidence which does not form part of the content of the Will. The Presiding Judge of the High Court, in Benin City held that gleaning at the contents of the Will, there is no such instruction and thereafter dismissed the claim of the claimant. His Lordship states as follows;

'No one can import into the clause what is not expressly mentioned therein'.

The question that borders one's mind is; was there such instruction from the father? If the answer is in the affirmative, the next question is; couldn't it has been proper to add the oral instruction to aid in construing the content of the Will? As earlier stated, "Plain meaning" approach in Will construction has actually done more injustice to suppose beneficiaries than all the defects of the common law put together. A good illustration of unjust situation in literal construction of Will is: Where XYZ on his sick bed informed his dutiful nephew that, " as a result of your love and support all these years, l have written a letter to my Solicitor to prepare a codicil for me to sign in which l directed him to give you half of my Estate and the other half to my son, John". The Uncle died without signing the codicil. The Uncle letter to his Solicitor and the statement made by the Uncle on his sick bed is called extrinsic evidence. Under Nigeria law of evidence, this piece of evidence cannot be allowed in construing testamentary intention. What then becomes the faith of the dutiful nephew?

Recommendation

1. Section 128 and 129 of the Evidence Act should be amended to incorporate oral evidence relating to circumstances surrounding the testator at the execution of the Will for the purpose of construction of an ambiguous Will
2. There is also the need to amend the Evidence Act to accommodate documents outside the Will which establishes testimonial intention of the testator despite the fact that same was not mentioned in the Will.

Conclusion

The construction of a Will should be derived from the four corners of the Will. An imputation of evidence outside the expressly written and signed document of a testator may make the dead to turn in his grave since such evidence may not help in reaching the intention of the testator and since the testator cannot resurrect from the grave to confirm his intention. However, where there is a clear and provable claim of testamentary intention different from the contents of the signed Will, for instance, video records of last testament, Courts should endeavor to study the Will and cautiously aid itself with evidence surrounding the testator as at the time the will was executed.

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