

THE HEIRS OF THE LATE JESSE R. COOPER and **EDWARD A. COOPER**, Appellants, v. **THE AUGUSTUS W. COOPER ESTATE** and **HEIRS OF THE LATE JAMES F. COOPER**, Appellees.

APPEAL FROM THE CIRCUIT COURT FOR THE SIXTH JUDICIAL
CIRCUIT, MONTSERRADO COUNTY.

Heard: October 27, 1999. Decided: December 17, 1999.

1. Under our general practice and procedure, a court is required to pass on the issues of law before disposing of issues of fact.
2. A court should not pass on documentary evidence not testified to by witnesses, marked by the court, confirmed and admitted into evidence.
3. Documents attached to a pleading are part of the allegations of the proponent and must therefore be supported by evidence in order to amount to proof.
4. A judge cannot base his ruling on documents not formally admitted into evidence to form part of the records before the trial court.
5. An issue of fact requires evidence, oral and/or documentary, and so it is error for the trial court to make a conclusion of fact without first having taken evidence
6. Only evidence alone will enable a court to decide with certainty the matter in dispute.
7. While ordinarily the ruling on a motion to intervene is an interlocutory ruling, and the remedy available to the party aggrieved by such ruling is ordinarily remedial process instead of appeal, yet, where the ruling disposes of the crux of the matter in dispute, then and in that event, such ruling is deemed to be a final ruling, subject of review by the Supreme Court on appeal.
8. The determination of whether a ruling is an interlocutory ruling or a final ruling, the latter of which is subject to appeal, is not based solely on the title of the proceeding, but largely on the disposition the ruling makes. That is, if the ruling on a motion disposes of the crux of the main case, then and in that event, said ruling is a final ruling and subject to appeal to the Supreme Court.

9. Under the law of wills, it is the intention and dictates of a testator which are the controlling factors.

10. Where the claims of adversaries are based on a provision of the will, the trial court must entertain evidence in substantiation of the claims, without which the trial court will not be able to discern the true intent and dictates of the testator.

Appellants and appellees are first cousins; they are children of three brothers; and the father of these three brothers died seized of various property, which he disposed of in his Will. Long after the death of the three brothers, appellants instituted an action of summary proceedings to recover possession of real property against certain occupants of one of the property, subject of disposition in their grandfather's Will. Appellees moved to intervene in the case; but appellants objected to the intervention on the grounds that appellees are not devisees of the property under their grandfather's Will. Appellants submitted that while appellees were heirs of their mutual grandfather, the clause of the Will, which disposed of the subject property, restricted the legatees to children of the three brothers begotten in wedlock to their mothers. Appellants asserted that appellees are children of one of the brothers and therefore rightful heirs to their mutual grandfather, but that appellees were born out of wedlock and therefore cannot take under clause four (4) of the Will.

In disposing of the motion to intervene, the trial judge said that the motion contained mixed issues of law and fact. He also ruled that appellees, being heirs of the original owner of the property, are entitled to participate in the case and so they were permitted to intervene.

Appellants excepted to this ruling and announced an appeal to the Supreme Court. At the Supreme Court, appellees contended that the ruling on the motion to intervene was an interlocutory ruling and therefore not a subject of appeal.

In its several rulings in this case, the Supreme Court held that while ordinarily the ruling on a motion to intervene is an interlocutory ruling and the remedy available to the party aggrieved by such ruling is remedial process, instead of appeal, yet where the ruling disposes of the crux of the matter in dispute, as in the present case, then and in that event, such ruling is a final ruling, subject of review by the Supreme Court on appeal. The Supreme Court also found that the trial court's ruling is based on the Will attached to the pleadings from both appellant and appellee; yet that Will was not testified to, identified and marked by court and admitted into evidence. The Supreme Court then ruled that documents attached to a pleading are allegations just as the

pleading itself and they don't amount to proof without evidence. The Supreme Court further ruled that even though a ruling on a motion is usually disposition of law issues, where there are disputable issues of fact bearing on the law issues and for such reason the matter cannot be disposed of without determination of these facts, the trial court should entertain evidence to establish the veracity of the factual allegations of the parties on that point before making the ruling thereon.

The Supreme Court found that the interpretation of clause four (4) of the Will is the determinant factor in the case and the Supreme Court ruled that the intention of the testator is that which should be obtained in the construction of wills. The Supreme Court then ruled that the trial court should entertain evidence on clause four (4) of the Will to determine whether appellees are devisees of the subject property under said clause four (4) of the Will and make a ruling thereon.

Based on the foregoing, the ruling of the trial court was *reversed* and the case *remanded*.

Henry Reed Cooper and *Moses Kron Yangbe* appeared for appellants. *Snosio E. Nigba* appeared for appellees.

MR. JUSTICE WRIGHT delivered the opinion of the Court.

This is the second time this case is before this Court; and both times from the trial court's ruling on appellees' motion to intervene in an action of summary proceedings to recover possession of real property instituted by appellants against two Lebanese businessmen in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County. Appellants and appellees are first cousins, being children of two brothers, the late Jesse R. Cooper and the late Augustus W. Cooper, respectively; all of them are grandchildren and sons, respectively, of the late James Francis Cooper, who died testate.

The subject property out of which this action of summary proceedings to recover possession of real property grows is one of several pieces of property owned in fee simple by the late James Francis Cooper, located on Meclin and Water Streets, Monrovia. This property was leased to CFAO, as lessee, by the late James Francis Cooper, as lessor, in a lease agreement signed in 1916. The lease agreement expired in 1996 and the property reverted to the Cooper family.

In 1949, James Francis Cooper died in Monrovia but, being testate, he distributed his various pieces of property, including the subject property, found in clause four (4) of

his Last Will and Testament. Appellants and appellees are in agreement that clause four (4) of the Will is the controlling factor; and in fact, they all derive their claim from this same clause four (4). They only differ on the interpretation and implementation of this very clause four (4).

Therefore, for the benefit of this opinion, we shall hereunder quote Clause Four (4) of the Will.

"4. It is my desire and I hereby direct that the agreements of lease entered into between the Companigne Franchise de L'Afrique Occidentale, Monrovia, and myself, Messrs, A. Woermann, and myself, and the Cavalla River Company and myself, with reference to certain properties situated on Water Street in the City of Monrovia, shall continue in full force for the term therein agreed upon, if possible, and the rents accruing therefrom, namely, 250 pounds from CFAO, 250 pounds from A. Woermann, 250 from CRC, be controlled and managed solely by my wife, Ellen, in trust and as such Special Trustee, it is my wish and I hereby so direct that from said rents she shall make the following annual payments to the persons hereunder named, or their lawful heirs by marriage. On the failure of issue by any legatees hereunder, his shall be divided pro rata by the others. Upon the termination of the leases above mentioned, and any renewals made, the Trust shall cease with respect thereto, and the fee simple title shall then vest in my sons, Jesse R. Cooper, Augustus Washington Cooper and Edward Cooper, and their lawful heirs by marriage. In case the above rents are reduced or increased the legatees shall get proportionately in accordance with such reduction or increase."

When the CFAO lease expired in 1996, and the property reverted to the Cooper family, they could not agree on who should occupy same and on what basis. As a result of this dispute, no arrangement could be concluded with the occupants of the premises and this led one group of Cooper heirs (i.e. the children of Jesse R. Cooper and Edward Cooper, who are appellants herein) to institute an action of summary proceedings to recover possession of real property against the occupants for being illegally on the premises.

When the case was called for hearing, the other group of Cooper heirs (i.e. the children of Augustus W. Cooper, who are appellees herein) filed a motion to intervene. The trial court heard the motion and at first denied it, without designating an attorney to take the ruling and to announce appeal for appellees, since appellees were not present in court on the day of rendition of the ruling.

Appellees then filed a petition for the writ of error, which was granted by this Court and the case was remanded to the trial court with instructions to resume jurisdiction and start a new trial commencing from the motion to intervene.

On rehearing of the motion to intervene, the trial court granted the said motion, to which ruling appellants excepted and announced an appeal therefrom. Hence, this review by this Court.

The basis of this appeal is that the judge made a final judgment when he concluded that appellees, being members of the Cooper family, have vested interest in the subject property. Appellants' contention is that this conclusion of the judge is a reversible error because he reached that conclusion without taking any evidence whatsoever to establish the factual issues or to support the reasons referred to in his ruling. The question is, how did the judge arrive at the conclusion that appellees have vested interest in the subject property?

In the motion to intervene, appellees alleged that their father, the late Augustus W. Cooper, was one of the sons of the late James Francis Cooper, testator and also their grandfather, who died seized of the CFAO property and that they, appellees, are the administrator and administratrix of the intestate estate of the late Augustus W. Cooper, and also grandchildren and heirs of the late James Francis Cooper.

In their resistance to the motion to intervene, appellants said that the issue is not whether appellees are members of the Cooper family, because it is not denied that both appellants and appellees are all heirs of James Francis Cooper; but rather, whether appellees are children of Augustus W. Cooper by lawful marriage. In other words, the issue is whether appellees' respective mothers were ever married to their (appellees') father, Augustus W. Cooper, because, according to appellants, that is the criterion for qualification under clause four (4) of the Will to benefit from the subject CFAO property.

It is appellants' contention that the Late James Francis Cooper was deliberate in his Will in the distribution of his various pieces of property under different clauses of his Will, and as such each piece of property is governed by the distribution clause in which it is mentioned. Appellants contended that even though they recognize appellees as legal heirs of the Late James Francis Cooper, yet appellees do not qualify to benefit from the subject property in that the said subject property is distributed under clause four (4) of the Will, while appellees, through their father, are benefitting from other properties under other clauses of the Will (clauses 7, 9 etc.). Appellants

further contended that it is clear that the intention of the testator as to how his property was to be conveyed was clearly set out in clause four (4) and other clauses of his Will.

In short, appellants' contention is that the distribution made under clause four (4) of the Will is restricted to children of the three sons of James Francis Cooper who were begotten in lawful marriages. It is to be noted that the Will was proferted with the pleadings of the parties and since both parties rest their claim in this case on clause four (4) of their grandfather's Will, then that clause has to be reviewed and interpreted with the view of giving effect to it because under the law of wills, it is the intention and dictates of a testator which are the controlling factor.

Appellants identified two issues for our consideration; and these two issues are:

1. Whether in ruling on law issues before trial of the facts, it is a proper and lawful procedure for the trial court to base its ruling on documentary evidence of a non-public nature, which is not duly before the trial court, said document having not been first orally testified to, been offered and duly admitted into evidence?
2. Whether in construing wills, the trial court is bound by and must implement the intention of the testator that is clearly expressed in the said will or the trial court may rely on alleged interactions or alleged agreements of testators' family members?

Appellees, on the other hand, identified one basic issue for our consideration and that is:

Whether or not the ruling granting the motion to intervene is a final judgment against the appellants and from which an appeal will lie.

We shall address each of these issues even though some of the discussion will overlap.

Under our general practice and procedure, a court is required to pass on issues of law before disposing of issues of fact. *Gallina Blanca, S.A., et al. v. Nestle Products Ltd., et al.*, 25 LLR 116 (1976); *Morris v. Johnson*, 26 LLR 73, 76 (1977). We recall that both appellants and appellees based their claim to the subject property on the Will of their grandfather, which property is referred to in clause four (4) of that Will; they proferted the Will along with their pleadings.

Appellants contended that the proffer of documents in or along with pleadings is merely to provide notice as to what is expected to be proved at the trial and does not in and of itself constitute evidence. It is appellants' contention that the court erred when, in passing on the issues of law, it passed on factual matters without having taken evidence and without the Will being admitted into evidence. Appellants asserted that the trial court acted prematurely in passing on the contents of the Will in its ruling, and argued that the court's conclusion that the appellees had a vested interest in the subject property was therefore a final judgment.

We are in basic agreement with the contention of appellants that it was error for the trial judge to have concluded that appellees have vested interest in the subject property without first taking evidence on both (or either) side to prove or disprove their respective allegations and denials as raised in the pleadings. That is, a court should not pass on documentary evidence not testified to by witnesses, marked by the court, confirmed and admitted into evidence. *Maritime Transport Operators GMBH v. Koroma and Nigerian Ports Authority*, 25 LLR 371 (1976). Documents attached to a pleading are part of the mere allegations of the proponent and must therefore be supported by evidence in order to amount to proof. *Levin v. Juvico Supermarket*, 24 LLR 187 (1975).

Appellants conceded that appellees are legal heirs of their grandfather but contended that appellees are not legal heirs in so far as it relates to the CFAO property referred to in clause four (4) of the Will, because appellees are not children of lawful marriage of Augustus W. Cooper to their mother(s).

This is an issue of fact which requires evidence, oral and/or documentary, and we hold it to be error for the trial court to have made such an important conclusion of fact without first having taken evidence. When documentary evidence is proffered with pleadings, said documents must be testified to by witnesses, marked by court and confirmed by witnesses before being admitted into evidence to form part of the record in the case. *Id.* A judge therefore cannot base his ruling on documents not formally admitted into evidence to form part of the record before the trial court. *King v. The International Trust Company of Liberia*, 20 LLR 438 (1971). This Court has held over and again that only evidence alone will enable a court to decide with certainty the matter in dispute. *Id.*, 440-441.

Since both appellants and appellees base their respective claims to the property on clause four (4) of the Will, the trial court ought to have taken evidence to establish whether both parties meet the qualification requirements laid down in clause four (4)

of the Will, before making the determination as to whether they have a right to benefit from the CFAO property.

We therefore hold that the judge erred in this regard, and for which his ruling is set aside and overruled and the case remanded for the trial court below to take evidence on the status of the parties under the Will. The trial court must thereafter interpret and give effect to clause four (4) of the Will, because as stated *supra*, it is generally known that when construing a will, the testator's intention must be discerned and strictly implemented in the distribution of his property. *Bryant v. Rolland*, 8 LLR 394, 397, 399 (1944); *Duncan v. Karpel*, 10 LLR 194, 196, 197, 199 (1949); *Cole and Cole v. Sharpe*, 14 LLR 232, 233-234, 238 (1960).

There is dispute between the parties that the ruling of the court now under review is a final judgment. Appellants say it is, while appellees say it is merely an interlocutory ruling. To answer this question, we take recourse to the trial court's ruling on the motion to intervene, now subject of this review.

On the surface, the ruling seems to be interlocutory, in that, it says that the issue of whether or not appellees are lineal heirs of James Francis Cooper is a mixed question of law and facts to be proved during trial. But the trial judge ended his ruling by saying that "Movants (appellees), members of the Cooper family have vested interest in the subject matter of these proceedings and are entitled to participate in the trial of these proceedings... Movants (appellees) are therefore ordered by this Honourable Court to fully participate in this summary proceedings to recover possession of real property".

Appellants contended that when the trial court concluded that appellees have vested interest in the subject property and therefore are ordered to fully participate in the trial, the trial court thereby decided the issue of the status of appellees under clause four (4) of the Will without the trial court having first taken evidence on the issue. Accordingly that ruling put finality to the issue because they were ordered to fully participate, while appellants are directly opposed to the participation.

We are in agreement with appellants and hold that the ruling prematurely decided that appellees have vested interest in the CFAO property covered by clause four (4) of the Will without the trial court first taking evidence. This is the crux of the dispute between the parties, where appellants contended that appellees are not legal heirs within the contemplation of clause four (4) because appellees are not children of Augustus W. Cooper by lawful marriage to their mother(s).

While it is a legal issue as to whether or not appellees can intervene because they have interest in the CFAO property, it is nevertheless a factual issue as to whether or not appellees are children by lawful marriage of their father, Augustus W. Cooper, to their mother(s), which facts need to be established only by production of evidence; and this will be the key to giving effect to clause four (4), which, in turn, is the key to this motion being granted or denied.

While this issue has been raised in a motion to intervene and the resistance thereto, which, generally is a legal issue, yet our law provides for the taking of evidence during the disposition of a motion in order to establish a factual issue, which might form the basis of a conclusion of law. Civil Procedure Law, Rev. Code 1:11.2(3). And this exercise cannot take place at the level of the Supreme Court.

Thus this Court is constrained to remand this case to the trial court with specific instruction to rehear the motion to intervene and take evidence to establish the legal status of the appellees, because appellants have challenged appellees' capacity to take under clause four (4) of the Will. Accordingly, the trial court's ruling on the motion to intervene rendered on February 1, 1999 is hereby reversed and set aside and a rehearing ordered.

This Court notes that if, as a result of the taking of evidence on the motion as to the eligibility of appellees to take under clause four (4) of the Will, it is determined that appellees are legal heirs within the contemplation of clause four (4) of the Will, then they will be and are hereby declared capable of participating in the trial as the present ruling now under review has held; but, if on the other hand, appellees are found to be ineligible to take under clause four (4) of the Will, then they have to be excluded from the trial as appellants are claiming. So then, we see that the interpretation and effectuation of clause four (4) of the Will is the determinant in this case

WHEREFORE, and in view of the foregoing laws, fact and circumstances, it is the considered opinion of this Court that the trial judge committed reversible error when, in ruling on the motion to intervene, he concluded that appellees had vested interest in the subject property, basing his ruling on the Will and other documents annexed to the pleadings, without taking evidence to establish the factual elements contained therein. For this legal error, the said ruling on the motion is hereby declared illegal, void and without effect, and as such is set aside and reversed. The case is hereby remanded with instructions that the judge rehear the motion to intervene so that the legal status of appellees can be established.

The Clerk of this Court is hereby ordered to send a mandate to the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, ordering the judge therein presiding to resume jurisdiction and re-hear the motion to intervene and take evidence to establish the legal status of appellees as to their eligibility to take under clause four (4) of the Will and thereafter proceed with the trial; It is noted that the participation of appellees in any further proceedings in the main case is dependent upon, and should be consistent with the findings on, and interpretation of, clause four (4) of the Will. Costs to abide final determination. And it is hereby so ordered.

Ruling reversed, case remanded.