

THE INTESTATE ESTATE OF THE LATE JAMES P. GAYE, represented
by AMOS W. TARPEH, Administrator & Legal Guardian, Appellant, v.
EUROBANK, represented by its General Manager, Appellee.

APPEAL FROM THE MONTHLY AND PROBATE COURT, MONTSERRADO
COUNTY.

Heard: April 20, 1994. Decided: September 22, 1994.

1. A judge shall of his own motion, take judicial notice of public historical facts that are so well known as not to be the subject of reasonable dispute.
2. The burden of proof rests on the party who alleges the fact.
3. A statement of account by a bank, verified and authenticated by its auditors will be presumed correct, in the absence of documentation by the depositor or the account holder, to the contrary.

Appellant, Amos W. Tarpeh, Administrator and Legal Guardian of the heirs of the late James P. Gaye, instituted an action of discovery proceedings in the Probate Court for Montserrado County against Appellee Eurobank, claiming L\$40,000.00 and US\$1,500.00 because the bank could not produce withdrawal slips to substantiate their claim that these amounts had been withdrawn by the late James P. Gaye out of his account prior to his death.

Appellee Eurobank filed returns in which it is alleged that the late James P. Gaye during his life time withdrew the amount of \$41,500.00 as indicated on their statement of account and verified by its auditor, Coopers & Lybrand, a copy of which was attached to their returns. From a ruling denying the petition, petitioner noted his exceptions and announced an appeal to the Supreme Court.

The Supreme Court found that the appellant/petitioner had no record in its possession regarding the savings account of the late James P. Gaye which he maintained with the Eurobank and therefore had to rely on documents which the bank could produce. The bank, in order to substantiate its allegation regarding the two withdrawal slips, requested its auditors, Coopers & Lybrand, to verify their records relating to the savings account and to issue a certificate authenticating the genuineness of the two withdrawals from James P. Gaye Savings account. Only one witness testified that the decedent had the amount claimed in the account at the

Eurobank. There was no corroborating witness, neither was any documentary evidence produced during the trial, apart from the statements of the account as well as the deposit and withdrawal slips produced by the respondent on orders of the court. Accordingly, the Supreme Court, holding that the petitioner had failed to prove his allegation laid in the petition, in discovery proceedings by a preponderance of evidence, *affirmed* the ruling of the trial court with the modification that Eurobank pays to Amos W. Tarpeh, administrator of the estate of the late James P. Gaye and guardian of the minor children of the decedent, the balance in the account, i.e., L\$971.64, plus accrued interest on the said amount from June 25, 1992.

T. Edwin Swen and *Harper S. Bailey* appeared for appellant. *N. Oswald Tweh* appeared for appellee.

MR. JUSTICE SMALLWOOD delivered the opinion of the Court.

This appeal comes to this Court from the Monthly and Probate Court of Montserrado County from a judgment rendered by the judge of the said court in a discovery proceedings. According to the records certified to this Court, Mr. James P. Gaye operated a savings account in Eurobank up until his death, which resulted from a motor car accident on the 21st day of July 1990. After his death the appellant herein, Amos W. Tarpeh, filed, before the Monthly and Probate Court, a petition requesting the court for letters of administration to administer the intestate estate of the late James P. Gaye. Accordingly, the letters of administration were granted unto him on the 5th day of February 1992, which was duly registered according to law.

The records before us also reveal that on the 1st day of May 1992, the appellant, Amos W. Tarpeh, Administrator and Legal Guardian of the heirs of the late James P. Gaye, filed a petition in discovery proceedings before the judge of the Monthly and Probate Court for Montserrado County, with Eurobank represented by its General Manager, of the City of Monrovia as respondent, claiming \$41,500.00 to be paid to the appellant because the bank could not produce withdrawal slips to substantiate their claim that these amounts, L\$40,000, 00 and US\$1,500.00 had been withdrawn by the late James P. Gaye out of his account prior to his death.

Appellee Eurobank filed a ten-count returns in which it is alleged that the late James P. Gaye during his life time, withdrew the amount of \$41,500.00 as indicated on their statement of account and verified by its auditor, Coopers & Lybrand. After the hearing, the judge rendered a ruling on the 2nd day of July 1993. Petitioner/appellant

not being satisfied with the final judgment, placed on the records his exceptions and announced an appeal to this Court, sitting in its March Term, A. D. 1994.

The appellant filed a six-count bill of exceptions and for the benefit of this opinion, we shall consider counts 3 and 6. Count 3 of the bill of exceptions alleges that the trial judge sustained appellee's objections to the admission into evidence of documents which were "testified by appellant's witness, Amos W. Tarpeh, confirmed and marked by Court, P/1". The appellant referred us to sheet 7 of the records of the Court, 25th day's session Tuesday, June 30, 1992.

Recourse to the records reveals that witness Amos W. Tarpeh took the stand and was asked the following question by his counsel:

"Q. In your general testimony of June 15, 1992, sheet 3 of the records, you have identified the figure of forty thousand and one thousand five hundred dollars, (\$40,000.00 and \$1,500.00), that is to say \$40,000.00 that you are contending have not been withdrawn by the deceased James P. Gaye, and also one thousand five hundred dollars (\$1,500.00) which is foreign payment ordered that you are contending that has not been withdrawn by the. deceased, please look at the said document and say whether you confirm same to be the identical document?

A. Yes, I confirm the same document".

At this point the counsel for petitioner placed on record that the document having been "confirmed and affirmed" by petitioner, hereby respectfully applies to court to place a mark of identification thereon so as to form a cogent part of petitioner's testimony. The respondent objected to a mark of identification being placed on the document on the ground that the said document is a duplicate. Petitioner's counsel conceded to the objection in these words: "counsel for petitioner concedes the court". Thereafter petitioner's counsel asked the witness another question almost identical to the previous one to which the witness replied "yes", that is the same document". The court ordered that the document be marked P/1, placed on the document. The petitioner's counsel then waived the production of further evidence and applied to the court for the admission into evidence of the said document, which he said had been confirmed and affirmed.

The respondent's counsels then objected to the admission into evidence of court's mark P/1 on the ground that the said document was never confirmed by the witness,

which should be evidenced by a mark of confirmation placed on the document by this court. The court then made the following ruling:

"The records of this court in these proceedings on today's sitting after a careful inspection do not contain any order from this court ordering the clerk to place a mark of confirmation on the said document after same was identified by petitioner/witness on the stand. Therefore, petitioner/ witness on the stand not having confirmed the specie of evidence in keeping with procedure and practice hoary with age, same cannot be admitted into evidence. Therefore admission as to the said specie of evidence is denied".

Petitioner' s counsel having failed to follow the procedure and practice in having documents testified to, identified, and a mark of identification placed thereon by orders of court and for the same witness thereafter to make further testimony on the same document by identifying the signatures thereon and for a mark of confirmation to be requested and granted by the court; or another witness may testify and identify the same document for confirmation of court's mark. Count 3 of the bill of exceptions is therefore not sustained.

In count 4 of the bill of exceptions, the appellant contends that the trial judge took upon herself and ordered the clerk to issue a *subpoena duces tecum* summoning the auditing firm to appear on the 15th day of June to produce the original of the auditors report conducted on Eurobank, Liberia, which report the appellant contends, has no legal connection to the subject matter. The judge before approving the bill of exceptions, made the following notation:

"With reference to count 4, the court says that both counsels were present in court and did not raise any objection whatsoever. See sheet five (5) of the 5thday's session June Term A. D. 1993, dated Monday, June 7, 1993. (This count is not appealable).

Recourse to the records of the court revealed that the judge in questioning a witness of the respondent who had testified to an audit that had been conducted into the account of Eurobank upon reopening in 1991, asked the following questions:

"Q. Tell this court whether, after the civil crisis, a comprehensive report was made as to the condition, meaning both the physical structure and documentation of the Bank, as is or as was, at the time the reopening of the bank in 1991?

A. Upon reopening in 1991, our auditor was asked to conduct audit of the state of affairs of the Bank. The name of the auditors is Coopers & Lybrand."

With this answer, the court made the following record:

"The clerk is hereby ordered to have a writ of *subpoena duces tecum* served on Coopers and Lybrand ordering them to bring the original of the comprehensive auditors report of the state of affairs of Eurobank upon its reopening in 1992 after the first phase of the civil crisis. And it is so ordered".

It is also revealed in the records that on the morning of Monday, June 7, 1993, when this case was resumed for hearing, the petitioner was represented by Counsellors T. Edwin Swen and Harper S. Bailey. After this order of the court, there was no objection placed on the record by petitioner's counsels. Thereafter the second witness for the respondent took the witness stand. The trial judge was correct in not approving count 4 of the bill of exceptions; the said count therefore is not sustained.

The appellant contended in count 5 of the bill of exceptions that the trial judge in her final judgment on sheet 5 thereof, made baseless reference regarding the extra judicial conversation she had with the appellant in connection with the purported balance account of the decedent in the amount of two hundred thousand dollars, (\$200,000.00) which amount according to appellant, the judge said, she noticed to be thirty thousand one hundred forty dollars and ninety five cents (\$30,140.95) and that when the appellant, was asked what happened to the difference, the appellant did not raise any issue. To this count of the bill of exceptions, the judge made two notations:

"1. The amount quoted on the savings account instant statement as balance is \$36,142.95 and not \$30,140.95. Judge Scott, July 6, 1993, and

2. The court did not take cognizance of extra judicial conversation, but of a letter signed by appellant's counsel and addressed to this court dated February 17, 1992, and which letter is part of the court's record. Judge Gloria M. Scott, July 6, 1993".

The savings account instant statement dated August 1, 1990 carrying the number 168 in pen and ink, has a current balance of \$36,142.95 which supports the notation made to this court by the trial judge.

It is observed that the letter of February 17, 1992 referred to in the judge's second comment on count 5 of the bill of exceptions mentions \$200,000.00 (two hundred

thousand dollars) as the balance deposit in the account of the decedent. It is clear therefore that the judge had reference to the amount mentioned in the letter of February 17, 1992, written to her by one of petitioner's counsel in person of Counsellor T. Edwin Swen. Count 5 of the bill of exceptions is therefore not sustained.

In count 6 of the bill of exceptions, petitioner/appellant made several contentions, most of which relate to the judge's ruling on objections to the admission of documents, and the granting of application for the *subpoena of duces tecum*. We shall consider the exception to the final judgment of the court which is also mentioned in this count, since the others are not pertinent to the final determination of this matter.

The judge in her final judgment rendered on July 2, 1993, concluded in these words:

"In view of the foregoing, this court hereby denies the petition filed by petitioner and says that respondent is free from answering to the said petition..."

It is from this final judgment that this matter has been brought before us on appeal.

The petitioner charged the respondent bank with fraud because the bank could not produce two (2) withdrawal slips for a total of \$41,500.00, \$40,000.00 Liberian dollars and \$1,500.00 US dollars allegedly withdrawn by the late James P. Gaye before his death. The respondent bank had claimed that its premises were looted during the civil crisis and the majority of its records were destroyed; apart from the two slips, several accounting records and documents were destroyed and had become unavailable because of the civil crisis when the bank was looted. The respondent also stated that because of the unavailability of the records, it obtained verification of its records from its auditors, Coopers & Lybrand, copies of which were attached to its returns.

The trial judge in her final judgment said of the issue of fraud that the burden of proof is upon the one who alleges the fact and that the petitioner having alleged that fraud was committed on the savings account of the late James P. Gaye by the respondent bank, that the petitioner had not produced any evidence to the court besides his personal belief that fraud was committed, and the copy of the savings account instant statement. Continuing, the judge said:

"This court finds itself in a very precarious situation because the law requires that this court protects the estate of deceased persons. However, this court is a court of records and cannot proceed on mere personal belief and speculation the Civil

Procedure Law requires that during a trial a person who alleges a fact must prove that fact with a preponderance of evidence and the petitioner has been unable to do this."

From the records in this case, it is observed that the petitioner had no record in its possession regarding the savings account of the late James P. Gaye which was maintained with the Eurobank and therefore had to rely on documents which the bank produced. To substantiate this fact, we quote a paragraph from the letter of February 17, 1992, addressed to the judge of the Monthly & Probate Court for Montserrado County by Counsellor T. Edwin Swen, counsel for the petitioner as follows:

"In view of the foregoing, Your Honour, we are kindly requesting you to instruct and/or order the management of said Eurobank to send you the last customer deposit reports for the months of April and May 1990 which reports will reflect the actual amount in the savings account of the late James P. Gaye, and to also order said management of Eurobank to release unto the petitioner, Amos W. Tarpeh, who has been appointed administrator of the intestate estate of the late James P. Gaye and guardian of his minor children, the said amount, thru the sheriff of the court; plus interest, for proper administration by the administrator and guardian, and to close said savings account that was opened by the decedent".

It is because of this request of the petitioner that Eurobank presented to the court statement of the account of the late James P. Gaye including deposits and withdrawal slips which they were able to locate, and reported that the bank was looted during the civil crisis and many of their accounting records and documentation were destroyed in the process and as such the bank was unable to produce copies of two withdrawals slips in the amount of L\$40,000.00 and US\$1,500.00 - which were reflected on the savings account instant statement as having been withdrawn by the late James P. Gaye on May 30, 1992, prior to his death.

The bank, in order to substantiate its allegation regarding the two withdrawal slips, requested its auditors, Coopers & Lybrand, to verify their records relating to the savings account and to issue a certificate authenticating the genuineness of the two withdrawals from James P. Gaye Savings account No. 721220. We deem it necessary to quote the letter of the auditor bearing on the withdrawals:

"April 8, 1992

Mr. Ratan K. Gurtoo

Vice President

Eurobank Liberia Limited
Broad Street
Monrovia, Liberia

Dear Sir,

James P. Gaye

Savings Account No. 721220

Withdrawal Slips (a) L\$40,000

(b) US\$1,500

In your letter dated April 6, 1992, you asked that we verify your records relating to savings accounts and issue a certificate authenticating the genuineness of the two withdrawals noted above.

In accordance with the above instruction, we reviewed a sample of savings transactions of Eurobank Liberia Limited during the months of May and June 1990. We also reviewed the internal control procedures established by management to ensure the validity, accuracy and completeness of processing of savings accounts transactions. Our review was limited by the non availability of some deposit and withdrawal slips supporting certain transactions. We understand that the documents got missing as a result of the Liberian crisis. We also understand that the Banks' premises were not only looted during the crisis, but that some of its accounting records and documentation were also destroyed in the process.

Our review of the internal control procedures revealed that the controls operated satisfactorily during the two months that were reviewed. Based on the satisfactory operation of the internal control procedures during May and June, we are of the view that the two withdrawals noted above would appear to have been effected under normal operating conditions and that any defalcation would have been picked up by the President or his Vice President as they are directly involved in the day to day transactions of the bank and in implementing the internal control procedures then in force.

If you need further explanations on any of the issues noted above, contact Andrew Sowah in the first instance and Kevin Dixon in his absence.

Best regards.

Yours truly

Sgd: Andrew W. Sowah

(t) Andrew W. Sowah

Mr. Amos W. Tarpeh, administrator of the intestate estate of the late James P. Gaye and guardian of the minor children of decedent James P. Gaye, took the stand and testified as follows:

"Yes, my nephew, the late James P. Gaye, was a customer of the Eurobank; there he is banking our money and he is the only man that the bank knows; and when I came from Sinoe I brought money and we carried the money there. We deposited \$40,000.00 (forty thousand dollars). Back in August 1989, May 5, 1990 I was in town with James P. Gaye in the house, the same May 30, the bank said that he withdrew \$40,000.00 from his account and if it was so, I would have known. The same bank said he, James P. Gaye paid \$1,500 foreign debt the same May 30; when we asked for the withdrawal slips for the \$40,000.00 and the statement for the \$1,500.00, which he paid foreign debt, they do not have it and cannot produce it, for this reason, I do not believe that it is true that the man took that money. So that is the reason why I brought this case to court".

This witness was the only one who testified for the petitioner. There was no corroborating witness nor was any documentary evidence produced during the trial, apart from the statements of the account as well as the deposit and withdrawal slips produced by the respondent on orders of the court.

There being no evidence to the contrary, the court was duty bound to accept the statement of account of the savings account of the late James P. Gaye together with the audit report of the external auditor of the respondent bank, Coopers & Lybrand, on the operation of the internal control procedure of the bank. Apart from the lack of evidence to support the allegation of the petitioner, the court was also bound to take judicial notice of the prevailing situation in Liberia since 1990 up to the present, when the country was plunged in a bloody civil crisis, which resulted into tremendous carnage, looting and destruction of properties, both public and private.

"The judge shall of his own motion take judicial notice of public historical facts that are so well known as not to be the subject of reasonable dispute". Civil Procedure Law, Rev. Code 1:25.2.

It is provided by law that the burden of proof rests on the party who alleges the fact. *Id.*, 25.5, and *Multinational Gas and Petro Chemical Company v. Crystal Steamship Corporation S. A.*, 27 LLR 198, 208 (1978).

According to the statement of account found in the records of the case dated June 25, 1992, after the withdrawal of the \$41,500.00, there remained a balance \$36,142.95. An amount of \$528.69 as bi-annual interest was added making balance of \$36,671.64. From this balance, Mr. Amos W. Tarpeh, Administrator of the estate and legal guardian of the minor children, was paid an amount of \$30,000.00 upon his written request of March 18, 1992, and receipted for on March 19, 1992. Again, on the 8' day of April 1992, Mr. Amos W. Tarpeh requested the withdrawal from the balance of \$6,671.64, of an amount of \$5,700.00 which was withdrawn on order of the judge, thus leaving a net balance of \$971.64 in the account.

In the file of the case are letters of requests to the court and orders from the court to the bank evidencing the transaction of these withdrawals.

In view of the failure of the petitioner to prove his allegation laid in the petition in discovery proceedings by preponderance of evidence, the ruling of the trial court in this discovery proceedings be and the same is hereby affirmed with the modification that the Eurobank will pay over to Amos W. Tarpeh, administrator of the estate of the late James P. Gaye and guardian of the minor children of the decedent, the balance in the account of L\$971.64 plus whatever interest that has accrued on the said amount from June 25, 1992.

The Clerk of this Court is hereby instructed to send a mandate to the trial court below commanding the judge to resume jurisdiction over the matter and give effect to this opinion. Costs are disallowed. And it is hereby so ordered.

Judgment affirmed.