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Case No: PT-2023-000740
Case No: PT-2023-000860

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN ENGLAND AND WALES
PROPERTY, TRUST AND PROBATE LIST (ChD)

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 25 October 2023

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

ADEKEMI ADEWUNMI OSAWESE OTITOJU	**Claimant**
- and -	
BENEDICTA NGOZI ONWORDI	**Defendant**

And between :

ADEFUNMILAYO ADESANYA	**Claimant**
- and -	
ADEKEMI ADEWUNMI OSAWESE OTITOJU	**Defendant**

- -
- -

Jamie Cockfield (instructed by **Moreland & Co**) for **Ms OTITOJU**
Owen Roach (instructed by **Church Street Solicitors**) for **Ms ONWORDI and Ms ADESANYA**

Hearing dates: 25 October 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this revised version as handed down may be treated as authentic.

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HHJ Paul Matthews :

1. This is my judgment on applications made in two linked claims concerning a very sad dispute about the funeral arrangements to be made for the late Peter Adebayo Otitoju, who was born on 8 January 1955 in Nigeria, but died in Walthamstow, London, on 8 August 2023. The claimant in the first claim, who is also the defendant in the second claim, is one of the five children of the deceased. I understand that she has the support of her siblings, as well as other relatives, including the deceased's mother. The defendant in the first claim is the deceased's former partner, to whom he was not married. The claimant in the second claim is the daughter of the defendant in the first claim. She claims to be one of the two executors nominated by a will dated 15 July 2023 made by the deceased, approximately three weeks before he died. This litigation is a tragedy for everyone concerned.

2. The claim form in the first claim was issued on 4 September 2023 for an order that the claimant be entitled to possession of the deceased's body and to make arrangements for its disposal, and for a limited grant of letters of administration under section 113 (though I think that is a mistake for section 116) of the Senior Courts Act 1981. On the same day the claimant issued a notice of application for an interim injunction restraining the defendant from taking possession of the deceased's body or making arrangements for disposal. This application was supported by a witness statement made the same day by the claimant herself. In this witness statement the claimant said, amongst other things, that the defendant claimed to be entitled to bury the deceased, that the defendant did not live with the deceased but was merely his girlfriend, and moved into the deceased's house after his death. Importantly, her evidence was that the deceased died intestate. She also said that the defendant had "hurriedly arranged the burial to take place on 8 September 2023". (In fact, that was one month after the death.)

3. The application came before Roth J on 6 September 2023, when the claimant was represented by counsel, and the defendant neither appeared nor was represented. I was told by counsel for the claimant, but I have not seen, that the claimant solicitor has a certificate of service to show that the papers for this application were inserted through the defendant's letterbox at 8 PM on 5 September 2023. On any view, that was very late service. On instructions, counsel for the defendant told me that his client was not aware of this service of the documents. Since she reacted very promptly to the service of the order made by Roth J, and issued an application to set it aside, I accept this statement.

4. The order made by the judge was in the form of an injunction, restraining the defendant from taking possession of the body, ordering (but perhaps declaring would have been better) that the claimant was entitled to remove the body for funeral purposes, and ordering the defendant to pay the costs of the claim, though not of the application itself. However, paragraph 5 of the order gave the defendant liberty to apply to vary or discharge the order. The order also recited that the judge had read the claimant's witness statement of 4 September 2023, a letter from the claimant's solicitors to the defendant dated 1 September 2023, and emails from three of the claimant's siblings supporting her application. I have of course seen the claimant's witness statement, but not the other documents referred to. So far as I can see, they are not on the court file.

5. The order of the judge was served on the defendant, who by solicitors issued an application on 11 September 2023 under the liberty to apply, for an order setting aside the order of 6 September 2023. In her application notice, the defendant said that she had not been notified of the hearing and had made her application as soon as she was aware of the order. That application notice was endorsed for hearing on 21 September 2023. (As I have already said, I was told that there was a certificate of service showing that documents had been put through the defendant's letterbox on 5 September 2023.)

6. The defendant's application was supported by a witness statement from the defendant dated 11 September 2023. In this statement the defendant says a number of things, including the following. First, she says that she was informed of the claimant's application only on 7 September 2023 by being served with the order of 6 September 2023. She says that she lived with the deceased for 18 years. She says that the deceased made a will on 15 July 2023, which named her daughter (the claimant in the second claim) and Kalule Joshua Kibindo as executors of his will. She also says that after the deceased's death she tried to contact the deceased's sister and his children on the same day, but was unable to get through. Her daughter however managed to contact one of the claimant's sisters to inform her of the death on the following day. She says that the claimant cannot have been aware of the will of 15 July 2023. Finally she says that the deceased and his children did not have a good relationship. The defendant's witness statement exhibits a copy of a document headed "Will of Peter Adebayo Otitoju". On the front page of the document at the bottom are the details of a firm of solicitors, called "Catherine Solicitors" in Camden Town, London. This will appoints the defendant's daughter and Mr Kibindo as trustees and executors of the will, and makes gifts to a number of people. These include Mr Kibindo (work tools), the deceased's granddaughters (the proceeds of sale of his motorcar), the claimant (£5000) and the defendant (the house, shares in companies, and the residue, but with a substitutionary gift over to the deceased's grandchildren. The will appears to be signed by way of a fingerprint rather than a signature. Two witnesses have subscribed their names, namely the defendant's daughter and someone called Abisola Bakare, whose occupation is described as "Nursing".

7. The defendant's application to set aside the order of 6 September 2023 is supported also by a witness statement from her daughter (the claimant in the second claim) dated 10 September 2023. This statement makes a number of points, repeating that the deceased lived with the defendant for over 18 years, that she had the authority of her co-executor to make this witness statement, and that the burial was not arranged hurriedly, but only after attempts had been made to contact the deceased's children and to discuss funeral arrangements.

8. As I have said, there are in fact two claims, the second brought by the daughter of the defendant in the first claim against the claimant in the first claim. The claim form was issued on 6 October 2023 for an order preventing the defendant (that is, the claimant in the first claim) from taking possession of the body, and declaring that the executors (of which she claims to be one) were entitled to possession for the purposes of the funeral. On the same day, she issued an application for an interim injunction. In order to avoid confusion, during the rest of this judgment I shall refer to the parties by their names rather than by the roles that they occupy in the litigation.

9. On 9 October 2023 the matter came before Richards J. His order recites that he heard Mr Roach as counsel for Ms Adesanya, and Azeez Abdullai, a trainee solicitor, for Ms Otitoju. He ordered that neither party should take possession of the body of the deceased until after (i) the determination of Ms Onwordi's application to set aside the order of 6 September 2023, or (ii) further order of the court. Costs were reserved.

10. After close of business on 24 October 2023 (that is, yesterday), Ms Otitoju filed and served a further witness statement, dated that day. This was of course served well out of time, but after hearing counsel on both sides I gave permission for it to be admitted in evidence. She says a number of things in that statement. She says that she and her siblings had no knowledge of the alleged will, and that it is not registered in the National Will Register. (I should say that will registration is not compulsory, and that a great many wills are not so registered.) They first became aware of this will on 10 September 2023, when attending at the deceased's home. She says that the purported will contains many errors. She also says that the deceased lived with a lady called Carol Bernard on and off for some 35 years, though they separated in 2014. Unfortunately, this lady died in March 2023 after having had two children together with the deceased, Vanesa and Sabrina. The statement also says that the deceased was an educated man, and could write his own name. She exhibits a number of documents which are said to demonstrate this. She disputes not only that the fingerprint on the document said to be a will is actually the deceased's fingerprint, but also whether he knew and approved the will, and whether he was able to understand it. In addition, she says there is evidence that the will could not have been executed on the date stated, as the nurse appears not to have attended on that day. Her evidence is also that the hospital has said that it does not allow the execution of wills in hospital.

11. I will refer to a few specific pages in the exhibit to her witness statement. At page 11 there is an hospital internal report summarising a conversation between a member of staff and Ms Onwordi on 16 July 2023, in which it is stated that she "visited yesterday (Saturday) with Peter's solicitor (lawyer) and she is helping him with other paperwork". On page 16 there is a hospital note which says "discussed going home. Peter would like some more help at home as possible – has steps at home and only has church friends. Described feeling a bit more sad and lonely since cancer diagnosis." On page 17 there is a note of a telephone call by the occupational therapist "to NOK Benedicta [*ie* Ms Onwordi] to clarify social". The note says "NOK reports that she is patient's partner and patient usually lives alone and she visits. However she has been staying with him to support him." On page 18 there is a note recording the review made by clinical staff on a ward round. It says "talked to us about being quite a solitary person. He has his friends at church, and chats, and then goes home. Has his friend Benedicta, who appears to have a caring role, helping with food *etc*. Spoke briefly about his daughter but she does not live nearby. Will speak to people on the phone, but likes to be alone." On page 24 there is a consent form dated 17 July 2023 (two days after the date of the will) apparently signed by the patient, using a signature rather than a thumbprint. There are other documents bearing the deceased's signature as well. On page 61, there is another internal hospital note (dated 17 July), reading "received a message today that Benedicta would like to see me to sign some documentation. She believes that this is something that I have agreed to. I spoke with Benedicta in the inpatient unit/Margaret Centre. I explained that I really do not want to appear unhelpful but that nursing staff do not participate in the signing of any legal documentation outside of the trust. She explained that it was for authorisation to gain

access to Peter's bank account. I then said that I was definitely not be able to help with this. .., She said that his signature for his will is outstanding. … "

12. On the basis of the evidence put forward by Ms Otitoju, it is clear that the will being put forward by Ms Onwordi is challenged by the former on various grounds, including that the fingerprint is not his, and therefore he did not "sign" the will, he had no sufficient capacity to make the will, and he had no sufficient knowledge and approval of the contents of the will.

13. This evidence creates some difficulty for the court. No application was made for any of the witnesses to be cross examined on their witness statement or statements. There are therefore limits on the ability of the court to disbelieve any of the evidence. The validity of the will is key to the question whether Ms Adesanya is or is not an executor of the deceased's estate. If the challenge to the will is made and pursued to its conclusion, whether by way of probate action or otherwise, it will take a considerable time to be resolved. But the question of the funeral arrangements for the deceased has to be resolved much sooner than that, today if possible.

14. In *Buchanan v Milton* [1999] 2 FLR 844, Hale J (as she then was) said:

> "I accept entirely that the courts should be slow to entertain proceedings such as these. Modern methods of refrigeration may make them possible but they are certainly unseemly. They delay the proper disposal of the body and the normal processes of grieving, while bringing further grief in themselves."

This comment was cited with approval by Jonathan Klein (as he then was), sitting as a deputy judge, in *Anstey v Mundle* [2016] EWHC 1073 (Ch), [3]. In *Hartshorne v Gardner* [2008] EWHC 3675 (Ch), Sonia Proudman QC (as she then was), sitting as a deputy judge, said:

> "9. The most important consideration is that the body be disposed of with all proper respect and decency and, if possible, without further delay."

In *Ganoun v Joshi* [2020] EWHC 2743 (Ch), Robin Vos, also sitting as a deputy judge, expressly cited this comment at [60]. I also echo these sentiments.

15. I turn to consider the applicable law. Section 9 of the Wills Act 1837 sets out formal requirements for the validity of the will. These include that it be "signed by the testator". However, it is established that a testator may comply with that requirement by affixing a fingerprint if he intends thereby to authenticate the will: *Re Estate of Finn* [1935] All ER Rep 419. *Theobald on Wills*, 19th ed, 3-033 states:

> "The presumption that everything was properly done (*omnia rite et solemniter esse acta*), arises whenever a will, regular on the face of it and apparently duly executed, is before the court, and amounts to an inference, in the absence of evidence to the contrary, that the requirements of the statute have been duly complied with."

16. That presumption, of course, concerns formal requirements, rather than substantive requirements, such as capacity to make the will, knowledge and approval, and the

absence of undue influence. As to the first of these, *Williams, Mortimer and Sunnucks on Executors and Administrators* says, at [10-26],

> " … if the will is rational on the face of it and is shown to be duly executed and no other evidence is offered, the court will pronounce for it, presuming that the testator was mentally competent."

17. As to knowledge and approval, in *Gill v Woodall* [2011] Ch. 380, the Court of Appeal held that where a will had been professionally prepared by a solicitor, duly executed and read over to a testator before signing, a strong presumption arose that the will represented the testator's intentions at the relevant time, namely at the point of its execution. Lastly, as to undue influence, the burden lies on the person asserting that there was undue influence practised, and not on the person propounding the will to show that there was none.

18. Next, there is the question of right to possession of the body of the deceased person for the purposes of the funeral. In *Buchanan v Milton* [1999] 2 FLR 844, Hale J said:

> "There is no right of ownership in a dead body. However, there is a duty at common law to arrange for its proper disposal. This duty falls primarily upon the personal representatives of the deceased (see *Williams v. Williams* (1881) 20 Ch. 659 ; *Rees v. Hughes* [1946] K.B. 517). An executor appointed by will is entitled to obtain possession of the body for that purpose (see *Sharp v. Lush* (1879) 10 Ch. 468 at 472; *Dobson v. North Tyneside Health Authority* [1997] 1 WLR 596 at 600 obiter), even before there has been a grant of Probate. Where there is no executor that same duty falls upon the administrators of the estate, but they may not be able to obtain an injunction for delivery of the body before the grant of letters of administration (see *Dobson*)."

19. This statement has been repeated and followed in subsequent cases. However, it is subject to the power of the court under section 116 of the Senior Courts Act 1981, which provides as follows:

> "(1) If by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint as administrator some person other than the person who but for this section would in accordance with probate rules have been entitled to the grant the court may in its discretion appoint as administrator such person as it thinks expedient.
>
> (2) Any grant of administration under this section may be limited in any way the court thinks fit".

20. This provision has been considered by the court in a number of cases, including *Buchanan v Milton* itself. There, Hale J said:

> "There is very little modern authority on the use of s.116 and none at all on its use in this particularly unhappy context. In *Re Taylor (deceased)* [1950] 2 All E.R. 446 at 448, Willmer J., as he then was, was attracted by the view that the term "special circumstances" relates only to special circumstances in connection with the estate itself or its administration. He therefore declined to interfere for the ulterior purpose of protecting a 21 year old sole beneficiary

from the consequences of her youth and alleged immaturity. But in *Re Clore* [1982] Fam. 113, Ewbank J. at p.117 declined to impose any such limitation:

> 'I would say that the words 'special circumstances' are not necessarily limited to circumstances in connection with the estate itself or its administration, but could extend to any other circumstances which the court thinks are relevant, which lead the court to think it necessary, or expedient, to pass over the executors'."

21. In *Ganoun v Joshi*, the deputy judge said:

> "33. However, as will be apparent, Section 116 gives the court a discretion to appoint some other person if, by reason of any special circumstances, it is necessary or expedient to do so. The court must therefore decide whether, as a result of the existence of any special circumstances, it is necessary or expedient to appoint Mrs Ganoun as administrator rather than Ms Joshi.
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> 34. Previous decisions have broken down the test in section 116 into two stages. The first is to decide whether there are any special circumstances. If so, the second stage is to decide whether it is necessary or expedient to appoint some person as administrator other than the person who would normally be entitled (see for example Oldham MBC v Makin [at 71]).
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> 35. In my view this two stage approach is hard to justify. What the court must determine is whether it is necessary or expedient to appoint an administrator as a result of the existence of special circumstances. The special circumstances are therefore only relevant to the question as to whether it is necessary or expedient to appoint a particular person as administrator. They are not some separate pre-condition to the ability of the court to exercise its discretion in the first place.
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> 36. The identification of the special circumstances and the decision whether it is necessary or expedient to depart from the usual order of priority is therefore a single process. The factors which the court should consider in deciding whether it is necessary or expedient to appoint a different administrator are the special circumstances which have been identified and not any other factors which might exist."

22. It appears that the court also possesses an inherent jurisdiction to pass over an appointed personal representative in appropriate circumstances: see *Re JS* [2016] EWHC 2859 (Fam), [51]-[53]; *Anstey v Mundle*, [19]-[20]. But in the present case I do not think that it adds anything to the court's power under section 116, and I do not consider it further.

23. Ms Onwordi's counsel submitted that the judge on 6 September 2023 was not aware of the existence of the will now put forward by her, and that he would not have made the order that he did if he had known. So far as concerns the possible challenges to the will, he relied on the presumption of validity which he said applied to this will. He pointed out that the defendant applied promptly to the court on learning of the order that had been made. So far as section 116 or the inherent jurisdiction was concerned,

he submitted that there were no appropriate "special circumstances" which would justify bringing either jurisdiction into play.

24. For Ms Otitoju, counsel submitted in summary that, given that the validity of the will was challenged, and that there was considerable evidence to support that view, these were special circumstances which justified the court resorting to the power under section 116.

25. At the outset of the hearing today, I drew the attention of counsel a number of further authorities than those cited in the skeleton arguments, including the decision of Gibbs J in *R (Haqq) v Inner West London Coroner* [2003] EWHC 3366 (Admin). In that case the deceased had been married to the claimant, but later separated (although never divorced) from her, and married the second defendant in Bangladesh. The question arose as to whether the second marriage was valid, and therefore whether it was the claimant or the second defendant who had the best right to letters of administration to the estate, and hence to take charge of the funeral arrangements.

26. The judge said this:

> "47. In discussing the matter with counsel before the hearing began, I pointed out that the present case was potentially extremely complex. There were a number of factual matters which could not be satisfactorily resolved and concluded. The reasons for that included the following: (a) oral evidence was not to be taken and could not be taken today, (b) there was evidence from Bangladesh, the reliability and provenance of which could not properly be tested without an adjournment for further evidence, (c) there was a very recently served expert's report on aspects of Bangladeshi law and Sharia law which might be open to challenge, (d) there were potentially awkward questions of domicile which might, if a conclusive decision upon them were required, take certainly more than today and probably several days to determine. Indeed, conclusive findings on that issue alone might well require adjournment for further evidence.
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> "48. In the circumstances I discussed whether I should proceed today on the basis of the material available and subject to its limitations. I proposed that if I were to proceed I should not make any definite findings on the legal or factual issues involved, but rather base my decision on a provisional assessment of the weight of evidence on these issues. That approach would enable me to make the speedy determination sought, but it would also preserve the right of any party to reopen the issues for other purposes, if necessary; for example, for the purpose of any questions over entitlement to act as personal representative or other inheritance questions. It was agreed that I should proceed on the basis of the approach which I proposed; namely that I should make no concluded findings on issues of fact or law, but to simply make an assessment of the weight of evidence and exercise my discretion in determining to whom the body should be released."

27. In the present case counsel agreed that I should take a similar approach. This means that whatever I decide will not have any impact on any probate challenge that may be made to the validity of the will hereafter.

28. As I have said, because there was no cross-examination of witnesses, I cannot disbelieve the evidence of Ms Onwordi or Ms Adesanya unless the relevant evidence is incredible in light of all the circumstances: see *Long v Farrer & Co* [2004] BPIR 1218, [57], which was applied in *Coyne v DRC Distribution Limited* [2008] EWCA Civ 488, [58]. The relevant evidence of these witnesses is that dealing with the validity and genuineness of the will of 15 July 2023. The evidence which might be said to count against the validity of the will includes the fact that a fingerprint was used, when other contemporaneous (hospital) documents were apparently signed by the deceased, and evidence from Ms Otitoju that the nurse could not have witnessed the will because the hospital did not allow the execution of wills in hospital. However, in my judgment, there can be explanations for all of these matters, including (in the second and third cases) simple mistake. I cannot conclude that the evidence of Ms Onwordi and Ms Adesanya is simply incredible. Accordingly I cannot disbelieve it.

29. The will is regular on the face of it, appearing to have been properly executed in accordance with section 9 of the Wills Act 1837. Accordingly, the presumption of formal validity applies. In my judgment, there is not enough evidence here to rebut the presumption. In particular, the document dated 17 July 2023 (two days after the will) at page 61 of the exhibit to the second witness statement of Ms Otitoju is clearly referring to a power of attorney that requires a signature, although there is subsequently an ambiguous reference to a *will* signature being outstanding. But since a solicitor attended the execution of the will, I cannot believe that this is an accurate recording of the conversation concerned. The suggestion that the hospital did not allow the execution of wills on its premises must be a misunderstanding of the policy that hospital staff would not witness legal documents.

30. The will is rational on its face, and the presumption of capacity applies. Ms Otitoju has not produced any sufficient evidence to show that the deceased lacked capacity on 15 July 2023. The will appears to have been professionally drafted by a firm of solicitors, a representative of which appears to have visited the deceased in hospital on 15 July 2023. I have no doubt that a solicitor attending a client to execute a will would have explained the will in simple terms and answered any questions that the testator might have. In my judgment, therefore, there is sufficient evidence of the knowledge and approval by the deceased in making this will.

31. In these circumstances, I must conclude that, solely for the purposes of the decision which I must make today concerning the person who should have charge of making the funeral arrangements for the deceased, the will has validly appointed Ms Adesanya and Mr Kibindo as the deceased's executors, and, *prima facie*, it is for them to decide on the funeral arrangements.

32. Are there therefore any "special circumstances" which would justify overriding the position of the executors under section 116 of the 1981 Act? Counsel for Ms Otitoju submitted that there were. He pointed to the challenge being made to the will by his client, and the evidence which he said tended to support that challenge. He also pointed to the wishes of the children of the deceased, and to the evidence which he said put question marks over the relationship between the deceased and Ms Onwordi. In my judgment, although these are matters of concern to Ms Otitoju, and may be ventilated in other proceedings hereafter, they do not amount to "special circumstances" which would justify the court's intervention under section 116. This is

not a case where there is an argument about which country the funeral services should take place in, and, although there is a preference for cremation on the part of Ms Otitoju and her siblings, they do not object as such to a burial, which is the preference of Ms Onwordi. Ms Onwordi has also, through her counsel, expressed her agreement that the deceased's children and other relatives and friends should be able to participate in the funeral.

33. Accordingly, I will set aside the order of Roth J, and make a declaration that the executors named in the will of 15 July 2023 are entitled to take possession of the body of the deceased and arrange his funeral, and that Ms Otitoju is not so entitled. I will consider with counsel whether any further orders are required, and in particular whether it is necessary to grant an appropriate injunction.

34. I am very grateful to both counsel for their considerable assistance in arguing this case, and to the parties for their patience in waiting for this judgment.