



## Wills and Succession

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### **Court's Approach to Rectification of a Mistake or Mis-description in Wills and Testamentary Documents**

#### **1. Introduction**

- 1.1 A Will is a legal document which enables a person, known as the testator,<sup>2</sup> to declare his intentions and wishes regarding the distribution of his estate and management of his affairs after his death.<sup>3</sup> In the case of **Okeke v. Okeke**,<sup>4</sup> the Court of Appeal defined a Will thus:

*A "Will" in my understanding, is the legal expression, oral or documentary, of a person making a disposition of his property and for same to take effect after his death. By its very nature, a "Will" is said to be ambulatory and revocable during the lifetime of its maker that is before the act, here death, the occurrence of which is a condition precedent before the coming into being of the disposition so expressed. By a "Will" therefore, a man's declaration of his intentions is to become effective only after the death of the declarant. It was no "will" where a declared intention was given effect to immediately after same was made and the death of the declarant was not made a condition precedent to the coming into effect of the disposition so made or its continuity.<sup>5</sup>*

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<sup>2</sup> Where such a person is a woman, the appropriate description would be a 'Testatrix'.

<sup>3</sup> See, *Idehen v. Idehen* [1991] 6 NWLR (Pt. 198) 382.

<sup>4</sup> [2000] 3 NWLR (Pt. 649) 506.

<sup>5</sup> *Muhammad*, J.C.A. p. 520, paras. A-B.

Therefore, a Will allows the testator to ensure order and proper management of his affairs and estate after his death, which in turn may reduce the likelihood of chaos or disputes that may ensue among those who survive the testator.

- 1.2 As it were, everyone is susceptible to mistakes, as they are an inherent part of the human experience. But what happens when this fallibility extends to a legal document such as a Will? Some key characteristics of a Will are that it is testamentary and ambulatory.<sup>6</sup> When a mistake/misdescription is identified in a Will, it can be corrected by the Testator while he is alive. This ability to alter the document is the ambulatory feature of a Will. However, if the testator is deceased and a mistake/misdescription is suspected in the Will, what would be the appropriate course of action?
- 1.3 The aim of this article is to illuminate the approach of the courts regarding the rectification of mistakes or misdescriptions in Wills and testamentary instruments. By examining how the law addresses such errors, particularly after the death of the testator, the article seeks to provide a comprehensive understanding of the procedural mechanisms available for rectification.

## 2. The Court's Duty in the Interpretation of a Will

- 2.1 The Court of Appeal in **Akinkunmi v. Sadiq**<sup>7</sup> admonished that in exercising its interpretative jurisdiction, the Court must vindicate the testamentary intention of the deceased who is either the testator or testatrix by giving effect to his or her testamentary disposition of property. In **Smith v. Russell & Ors**,<sup>8</sup> the Court gave a useful guide on how to discover the intention of the testator in the following terms:

*True it is that you must discover his intention from the words he used: but you must put upon the words the meaning which they bore to him. If his words are capable of more than one meaning, or of a wide meaning and a narrow meaning, as they often are, then you must put them in the meaning which he intended them to convey, and not a meaning which a philologist would put upon them. In order to discover the meaning which he intended, you will not get much help by going to*

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<sup>6</sup> Yakubu J.C.A., in *Osemwingie & Ors v. Osemwingie & Ors*. [2012] LPELR-19790(CA) at p. 44 paras C, held that: "A Will is ambulatory. It can be changed by the testator before his death. However, it is indeed a secret document, kept away from the knowledge of the beneficiaries thereof until the demise of the testator. And this is why, it is usually sealed and kept in the custody of the probate Registrar of the High Court of Justice. It is strictly a confidential document, known only by the testator and a witness with a Solicitor who prepared it for the testator."

<sup>7</sup> [1997] 8 NWLR (Pt. 516) 277, 286, paras. G-H.

<sup>8</sup> [1963] TLR 10 CA.

*a dictionary. It is unlikely that he used a dictionary, and even less likely that he used the same one as you. What you should do is to place yourself as far as possible in his position, take note of the facts and circumstances known to him at the time: and then say what he meant by his words.*

- 2.2 In deciphering the testator's intention, the first point of call is to apply the ordinary English meaning of the words in the Will, as those words, (if clear, precise, and unambiguous) are presumed to reflect the testator's true intention. This approach follows the literal rule of interpretation. However, where applying the literal interpretation would result in absurdity, the Court must jettison the literal rule and consider other principles of interpretation. In **Ahmed v. Shinkafi**,<sup>9</sup> the court held thus:

*An excursion to the canons of interpretation shows or dictates that the first place to start in finding out the intention of the lawmaker is the literal rule of interpretation. This rule of interpretation dictates that in finding the intention of the lawmaker, a Court will give the words used in the statute their normal grammatical meaning in arriving at the proper intent of the lawmaker...The literal rule is the first rule of interpretation to look at, and it is only when that rule will not meet the tenet of justice or the words are ambiguous in such a way that it cannot be seen as the intention of the lawmakers that other rules of interpretation can be applied...<sup>10</sup>*

Therefore, the Court's duty in the interpretation of a Will is to ensure that the testator's true intentions are given effect. In doing so, the Court first applies the literal rule of interpretation, focusing on the ordinary meaning of the words in the Will. If the language used is clear, precise, and unambiguous, the Court assumes it reflects the testator's intention. However, where the literal interpretation would lead to absurd or unjust outcomes, the Court must look beyond the literal meaning and apply other interpretive principles<sup>11</sup> to ensure the testator's true wishes are upheld. Ultimately, the goal is to respect the testamentary disposition and give effect to the intention of the deceased as expressed in the Will.

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<sup>9</sup> [2023] LPELR-60949(CA).

<sup>10</sup> Pages 32-34 paras F. It must be stated that the rules of interpretation of Will, legislative enactment, and other documents are the same. See, *Ogbonna v. The A. G., Imo State & Ors.* [1992] LPELR-2287(SC).

<sup>11</sup> Such as purposive interpretation. See, *PDP v. Mohammed & Ors.* [2015] LPELR-40859 (CA) at pp. 33-34 paras. B.

### 3. The Power of Court to Rectify a Will for Mistake/Misdescription

- 3.1 A mistake/misdescription in the Will of a testator, such as; error in a name or description, in the insertion or omission of any words, whether by the testator or his draftsman, may, in the absence of fraud, be corrected by the Court, but only on inference obtained from the whole Will and not on any extrinsic evidence of the material circumstances. In most cases, the Court relied on the legal maxim “*falsa demonstratio no nocet cum de corpore constat*” which means a false description doesn't void a document if the intent is clear. In **Masters v. Masters**<sup>12</sup> the Court rectified Mrs. Swopper's name that was misspelt as Mrs. Sawyer. In the case of **Beaumont v. Fell**<sup>13</sup> the Court rectified Gertrude Yardley's name that was misspelt as Catharine Earnley. Similarly, in the case of **Lee v. Pain**<sup>14</sup> the Court rectified 'Miss F.A.J's' name misdescribed as 'Miss S.J'.
- 3.2 The power of the Courts in the United Kingdom to rectify a Will has been codified by virtue of the **Administration of Justice Act 1982**, which provides in relevant part as follows:

“If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—

(a) of a clerical error; or

(b) of a failure to understand his instructions,

it may order that the will shall be rectified so as to carry out his intentions.”<sup>15</sup>

- 3.3 This provision was considered in the case of **Marley v. Rawlings**<sup>16</sup> where the court pronounced thus:

*Rectification is a form of relief which involves correcting a written instrument which, by a mistake in verbal expression, does not accurately reflect [the parties'] true agreement...It is available not only to correct a bilateral or multilateral arrangement, such as a contract, but also a unilateral document, such as a settlement: see Re Butlin's Settlement Trust, Butlin v. Butlin [1976] 2 All ER 483, [1976] Ch 251. However, it has always been assumed that the courts had no such*

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<sup>12</sup> [1718] 1 P WMS 421.

<sup>13</sup> [1723] 2 P WMS 141.

<sup>14</sup> [1844] 4 Hare 201 at 253.

<sup>15</sup> Section 20(1).

<sup>16</sup> [2014] 1 All ER 807. See also, Austin v Woodward & Anor. [2011] EWHC 2458 (Ch.).

*power to rectify a will: ... As at present advised, I would none the less have been minded to hold that it was, as a matter of common law, open to a judge to rectify a will in the same way as any other document: no convincing reason for the absence of such a power has been advanced. However, it is unnecessary to consider that point further, as Parliament has legislated on the topic, in s 2 of the 1982 Act (s 20). Section 20 is headed 'Rectification', and sub-s (1) provides as follows: 'If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—(a) of a clerical error; or (b) of a failure to understand his instructions, it may order that the will shall be rectified so as to carry out his intentions.' Section 20(2) provides that, save with the court's permission, no application for rectification under sub-s (1) can be made more than six months after the grant of probate. Section 20(3) protects executors who distribute in accordance with the terms of a will before it is rectified after the six-month period referred to in sub-s (2). Mr Ham QC, for the appellant, realistically accepted that it would be inappropriate for the court to hold that it had wider powers to rectify a will than those which were conferred by s 20. Given that Parliament decided to confer a limited power of rectification at a time when there was clear authority that the court had no inherent power to rectify, it would be wrong for any court to hold, at least in the absence of a compelling reason, that it actually had an inherent power which was wider than that which the legislature conferred.<sup>17</sup>*

Furthermore, on page 820, Lord Neuberger explained that the approach to the interpretation of a Will now followed the modern contextual approach to interpretation of contracts. He opined:

*...I can see no reason in principle why a wholesale correction should be ruled out as a permissible exercise of the Court's power to rectify, as a matter of principle. On the contrary: to impose such a restriction on the power of rectification would be unprincipled – and it would also lead to uncertainty...It does not appear to me that a document has to satisfy the formal requirements of section 9, or of having the testator's knowledge and approval, before it can be treated as a "will" which is capable of being rectified... (Emphasis added).*

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<sup>17</sup> Pages 818-817 paras G-D.

- 3.4 Consequently, it is clear that Courts are imbued with jurisdiction to order the rectification of a Will for a mistake or misdescription, for clerical errors or misunderstanding of the testator's instruction. However, such rectification can only be ordered based on inference obtained from the whole Will and not on any extrinsic evidence.
- 3.5 In Nigeria, there is no known corresponding provision to **Section 20** of the **United Kingdom's Administration of Justice Act 1982**, nor are there established cases where the courts have explicitly addressed the power of the Court to rectify a Will for mistakes or misdescriptions. The absence of such legal frameworks creates a gap in the guidance available for rectifying Wills under Nigerian law. However, in instances where relevant Nigerian precedents are lacking, foreign case law may significantly inform judicial reasoning. Courts may look to established legal principles from jurisdictions with similar legal systems, such as the United Kingdom, to fill the void left by the absence of local authorities. This principle was affirmed in **Agbaje v. Fashola**<sup>18</sup> where the court recognized that foreign cases could be relevant in the absence of local precedents. This view was further supported by the decision in **Omega Bank Plc & Anor v. The Government of Ekiti State & 2 Ors**<sup>19</sup> where the court held that in the absence of known Nigerian decisions on a particular principle of law, foreign court decisions, particularly those addressing common law issues like the tort of libel, could be persuasive and applied by Nigerian courts. This approach allows Nigerian courts to expand the frontiers of local jurisprudence by drawing on relevant foreign legal principles.
- 3.6 Consequently, when confronted with cases involving mistakes or misdescriptions in a Will, Nigerian courts may adopt analogous interpretative approaches. Therefore, the principles established in cases such as **Marley v. Rawlings, Austin v Woodward & Anor, Masters v. Masters, Beaumont v. Fell** and **Lee v. Pain** may be regarded as persuasive authority, providing guidance to Nigerian courts in their deliberations concerning rectification matters.

#### **4. Conclusion**

- 4.1 The court has the power to rectify a Will under certain circumstances, a principle well-established in the United Kingdom. While Nigerian law currently lacks explicit provisions for the rectification of Wills due to mistakes or misdescriptions, the courts can draw upon the authoritative precedents set in foreign jurisdictions. By referencing

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<sup>18</sup> [2008] 6 NWLR (Pt. 1082) 90.

<sup>19</sup> [2007] 16 NWLR (Pt. 1061) 445, 468-469 paras D-A.

established cases, such as those from the UK, Nigerian courts can effectively uphold the true intentions of testators, ensuring that errors do not undermine the integrity of the testamentary process.

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