IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

KUMASI AD. 2022

CORAM: 1. ANGELINA M. DOMAKYAAREH (MRS.) JA. (PRESIDING)

2. A. B. POKU-ACHEAMPONG, JA.

3. SAMUEL K.A. ASIEDU, JA.

CIVIL APPEAL NO. H1/32/2022

DATE: 28TH JULY, 2022

1. **NANA SARFO KANTANKA**
   HEAD OF OYOKO FAMILY
   OF WIAMOASE, ASHANTI
   SUING FOR HIMSELF AND
   THE OYOKO FAMILY OF
   WIAMOASE-ASHANTI

== PLAINTIFFS/APPELLANTS

2. **PAUL OPPONG**
   H/NO. PLOT 105 BLOCK
   'G' WIAMOASE-ASHANTI

VRS

1. **TAKYI MENSAH**

NEW TAFO, KUMASI

2. **DIANA NYAMEKYE**
   WIAMOASE, ASHANTI == DEFENDANTS/RESPONDENTS
   ADMINISTRATORS OF
   THE ESTATE OF KWASI
   TAKYI (DECEASED)

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JUDGMENT

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ASIEDU, JA.

This appeal is against the judgment of the High Court, Kumasi delivered on the 3rd day of July 2020. A writ of summons with an accompanying statement of claim was, on the 23rd May 2013, issued by the Plaintiffs/Appellants against the Defendants/Respondents. In the said writ, the 1st Plaintiff, suing as the head of family for himself and the Oyoko family of Wiamoase, Ashanti together with the 2nd Plaintiff, claim against the Defendants as administrators of the estate of Akwasi Takyi (deceased), jointly and severally, the following reliefs:

(i) Declaration that House No. Plot 1 Block 1 New Tafo (Krofrom), which was formerly numbered Plot 24 VI New Tafo, Kumasi, is the property of the Oyoko family of Wiamoase, and not the personal property of the late Kwasi Takyi, a member of the Oyoko family aforesaid.

(ii) *Declaration that a farmland at a place known and called Akwadwoa at Wiamoase on the Wiamoase stool land is the property of the Oyoko family of Wiamoase.*

(iii) *Declaration that a cocoa farm at Tarkwa in the Western Region of Ghana sharing boundaries with the properties of the following people: Opanin Kwame Tawia, Opanin Fobri, Madam Gyamfuwaa and Madam Afua Serwaa (widow of the late Akwasi Takyi) is the property of the Oyoko family of Wiamoase.*

(iv) *Perpetual injunction restraining the Defendants from denying the title and interest of the Oyoko family of Wiamoase in the disputed properties and also restraining them personally, their assigns, agents, workers, labourers etc. from dealing in any way directly or indirectly with the said properties.*

(v) *Declaration that the 1st Plaintiff herein as the overall head of the Oyoko family of Wiamoase assisted by the 2nd Plaintiff who is the direct nephew of the late Akwasi Takyi is the proper person to deal with and managed the said House No. Plot 1 Block 1 New Tafo (Krofrom) Kumasi and other properties herein stated, on behalf of the Oyoko family of Wiamoase.*

(vi) *Such further order or orders as the Honourable court may deem fit.*

In their statement of defence to the Plaintiffs' action, the Defendants also included a counterclaim for:

i. *A declaration of title to all that House No. Plot 1 Block 1 New Tafo (Krofrom) which was formerly numbered Plot 24 Block VI New Tafo, Kumasi.*

ii. *Declaration of title to the cocoa farm at Nkwatoo at Wiamoase under the Wiamoase stool land and bounded by the properties of Kofi Okoh, Adwoa Nsiah, Kwabena Owusu and Kwasi Oppong as the property of the Defendants.*

iii. *Declaration of title to the cocoa farm at Tarkwa in the Western Region of Ghana bounded by the properties of Kwame Tawiah, Opanin Fobi, Madam Gyamfua and Kwabena Agyei is the property of the Defendants.*

iv. *Damages for trespass.*

v. *An order for account for the rent received in respect of the aforesaid house and the proceeds received from the aforesaid cocoa farms.*

vi. *Perpetual injunction.*

After the hearing of the case, the High Court, with the exception of the second relief sought by the Plaintiffs, dismissed all the claims made by the Plaintiffs against the Defendants and at the same time granted the counterclaim sought by the Defendants against the Plaintiffs. It is against the judgment of the High Court delivered aforesaid that the Plaintiffs/Appellants filed the instant appeal on the 7th August 2020 which was later amended on the 2nd November 2020. In the said Notice of Appeal, the Plaintiffs pray this court to set aside the judgment of the High Court, Kumasi. The Plaintiffs' ground for the relief they seek is that "the judgment is against the weight of evidence". On the 3rd day of September 2020, the Plaintiffs filed Additional Grounds of Appeal as follows:

1. *That the learned High Court Judge erred when he held that the disputed house was gifted to the late Opanin Takyi by the late Opanin Kwabena Essah.*

2. *That the learned High Court Judge erred when he relied on the evidence of DW1 to hold that the disputed house was gifted to the late Opanin Takyi by the late Opanin Kwabena Essah and therefore part of his estate.*

3. *That the learned High Court Judge erred when he upheld and granted the reliefs claimed by the Defendants/Respondents in their counterclaim.*

4. *That the learned High Court Judge erred when he relied on the long possession of the disputed house by the late Kwasi Takyi to hold that the Defendants/Respondents are entitled to a declaration of title to the disputed house as part of the estate of the late Kwasi Takyi.*

5. *That the learned High Court Judge erred when he relied on the principles of laches and acquiescence as well as the Statute of Limitation and held that the Defendants are entitled to a declaration of title to the disputed house as part of the estate of the late Kwasi Takyi when same was not pleaded.*

6. *That the damages awarded in favour of the Defendants/Respondents cannot be supported by the evidence adduced at the trial and same was too excessive in the circumstance of the instant case.*

In discussing this appeal, we wish to place on record that we are not unaware of our duty to review the entire record of appeal and come out with a determination as to whether or not the trial court arrived at the correct conclusion in the light of the evidence placed before it and the relevant law as stated in the case of **Roland Kofi Dwamena vs. Richard Nortey Otoo Civil Appeal No J4/47/2018 dated, 8th May 2019**, where Pwamang JSC noted that:

"In this final appeal by the 1st Defendant, the sole ground of appeal is that the judgment is against the weight of evidence. This ground of appeal is an invitation to the Court to comb through the record that was placed before the lower Court and decide for itself whether having regard to the evidence and the law relevant to the determination of the case, the lower Court was right in its findings and conclusions."

We have decided to discuss together, the first two grounds of appeal stated in the Additional Grounds of Appeal filed by the Plaintiffs/Appellants. These are:

"1. That the learned High Court Judge erred when he held that the disputed house was gifted to the late Opanin Takyi by the late Opanin Kwabena Essah.

2. That the learned High Court Judge erred when he relied on the evidence of DW1 to hold that the disputed house was gifted to the late Opanin Takyi by the late Opanin Kwabena Essah and therefore part of his estate."

It has been submitted by Counsel for the Plaintiffs/Appellants on these grounds of appeal that DW1, the mother of the 1st Defendant/Respondent and the ex-wife of Opanin Akwasi Takyi, who was invited as a witness for the Defendants/Respondents failed to lead 'any credible evidence in support of the Defendants' claim that the disputed plot was gifted to the late Kwasi Takyi by the late Opanin Kwabena Essah. Counsel also submitted that DW1 again failed to lead credible evidence in support of the assertion that it was the late Kwasi Takyi who commenced the building of the House in dispute. According to Counsel, DW1 gave evidence to the effect that the disputed House was gifted to her and her late husband Kwasi Takyi and that that claim contradicts the claim of the Defendants that the House in dispute was gifted to Kwasi Takyi by the late Opanin Kwabena Essah. According to Counsel, in accepting the evidence of DW1, the trial Judge disregarded the numerous documentary evidence as well as the evidence of PW1 and PW2. Counsel opined that the Defendants failed to

lead evidence to establish when the said gift was made and when the building of the House in dispute was commenced and completed by the late Kwasi Takyi. Counsel finally submitted that the trial Judge erred in coming to the conclusion that the House in dispute was gifted to the late Kwasi Takyi by the late Kwabena Essah and therefore the judgment be set aside. In response, Counsel for the Defendants on the other hand submitted that the evidence by DW1 in respect of the gift of the land on which the house was built stood unchallenged.

The case of the Plaintiffs/ Appellants was that the late Kwabena Essah acquired the properties in dispute including House Number Plot 1 Block 1 New Tafo (Krofrom) which was formerly numbered Plot 24 Block VI New Tafo, Kumasi. The Plaintiffs say that the House in question came to the possession of Kwasi Takyi, the deceased father of the Defendants, when he succeeded Kwabena Essah after his death and lived therein till he also died in the year 2012. The Plaintiffs argue therefore that the House in dispute is, as a result, family property which can, therefore, not be included in the inventory to the application for the grant of Letters of Administration by the Defendants and that the inclusion of the House in the inventory was wrongful since it was not the personally acquired property of the late Kwasi Takyi.

From the evidence on record, the parties do not dispute the fact that the land on which House No. Plot 1 Block 1 New Tafo (Krofrom), Kumasi stands was originally acquired by the late Opanin Kwabena Essah. The testimony of the 2nd Plaintiff, who gave evidence on behalf of all the Plaintiffs, is to the effect that Opanin Kwabena Essah bought the land and put up a two-storey building on the land before he died and that it was after the death of Opanin Kwabena Essah that the father of the Defendants, Opanin Kwasi Takyi, moved to live in the House in dispute after he had been made the successor of Opanin Kwabena Essah.

The 2nd Plaintiff stated that Opanin Kwasi Takyi did not change the name of Opanin Kwabena Essah from the documents covering the House because he knew that he was not the owner of the property. It is a fact that all the documents in respect of the House in dispute tendered by the Plaintiffs in evidence bear the name of Opanin Kwabena Essah. However, the evidence of the 1st Defendant, who testified on behalf of all the Defendants, is that Opanin Kwabena Essah gifted the land on which the House was built to Opanin Kwasi Takyi, the father of the Defendants after which aseda was given by Opanin Kwasi Takyi to Opanin Kwabena Essah to seal the gift. The Defendants testified that Opanin Essah made a gift of the land to Kwasi Takyi because of the good service which Takyi rendered to Essah when Takyi was living with Opanin Essah. According to the Defendants, it was his father who built the House in question on the land. The evidence given by the Defendants in respect of the gift of the land in question was amply corroborated by DW1, Ama Duku, the wife of Kwasi Takyi. According to DW1, Opanin Kwabena Essah arranged for her to marry Kwasi Takyi at Agona her hometown and brought to live with her husband in Kumasi. Initially, the couple lived with Opanin Kwabena Essah in his house at Ahenboboano, Kumasi.

Later, Opanin Essah acquired the land from one Kwame Krah who had then built a swish house up to the window level on the land. Kwame Krah had also built two other rooms on the land with palm branches. This land was gifted to Kwasi Takyi by Opanin Kwabena Essah. DW1 stated that Opanin Kwabena Essah however cautioned them not to change his name on the documents covering the House in order that his name will be perpetuated since he Essah has no child and no sister. According to DW1, that is the reason why during the life time of Opanin Takyi, he never changed the name on the documents covering the House in dispute. After the gift, DW1 informed her father whiles Takyi also informed his brother Akwasi Oppong and together they went to Opanin Essah and thanked him by presenting to him one bottle of schnapps and 3

shillings. Later, the couple moved onto the land and with time built the House in dispute on the land.

DW1 testified that Kwasi Takyi had learnt tailoring while she was also a Seamstress and together, they operated in a Store acquired for them by Opanin Essah at the Kumasi Central Market. There is evidence by DW1 that, as time went on, Kwasi Takyi bought a vehicle which they run as (*trotro)* commercial transport. They again bought a second vehicle which was used to run commercial transport, this time, driven by Kwasi Takyi himself. When Kwasi Takyi bought a third vehicle, one Nana Sei who had been introduced to them by Essah advised them to start building and that was when they started putting up the House in question.

As stated above Counsel for the Plaintiffs/Appellants has attacked the testimony of DW1 as lacking credibility. However, it must be pointed out that the testimony of the 2nd Plaintiff was largely a narration of what he claims was told him by his uncle. At page 111 of Volume 1 of the Record of Appeal (ROA), the 2nd Plaintiff stated, among others, that:

> *"Kwabena Essah is deceased. He put up the ground floor and put tenants in it before he died. From what* ***my uncle told me*** *Kwabena Essah died between 1959 and 1962. When Kwabena Essah died it was my uncle Kwasi Takyi who customarily succeeded him."*

In contrast, the testimony of DW1 represents an event which she witnessed with her own eyes. Therefore, between the two stories, a court of law should be inclined to lean favourably towards the testimony of DW1. It implies also that the evidence of DW1 is entitled to more credit than the testimony of the 2nd Plaintiff on the acquisition and the building of the House in dispute. And, the fact that DW1 spoke in the second person with respect to the fact that the gift was made to Kwasi Takyi and herself, does not, in our view, detract from the weight of the evidence of the Defendants generally in respect

of the making of the gift to Kwasi Takyi as Counsel for the Plaintiffs/Appellants would want the court to believe. As stated in **Effisah vs. Ansah [2005-2006] SCGLR 943** @ 960 that:

> *"… in the real world, evidence led at any trial which turns principally on issues of fact, and involving a fair number of witnesses, would not be entirely free from inconsistencies, conflicts or contradictions and the like. In evaluating the evidence at a trial, the presence of such matters per se, should not justify a wholesale rejection of the evidence to which they might relate. Thus, in any given case, minor, immaterial, insignificant or non-critical inconsistencies must not be dwelt upon to deny justice to a party who has substantially discharged his or her burden of persuasion. Where inconsistencies or conflicts in the evidence are clearly reconcilable and there is critical mass of evidence or corroborative evidence on crucial or vital matters, the court would be right to gloss over these inconsistencies."*

In particular, the credibility of the evidence of DW1 with respect to the making of the gift is unimpeachable as it satisfies all the ingredients for the validity of a gift of immoveable property at customary law. In **Ackun and Another vs. Yanney [1962] 1 GLR 464**, the court held that:

> *"The essential requirements of a valid gift in accordance with customary law are publicity, acceptance, and placing the donee in possession. The acceptance is normally evidenced by the presentation of a drink. But in addition to this drink the donee must also make a valuable presentation to the donor. It is not necessary that all the members of the donor's family are present at the ceremony."*

In **Okoe vs. Okai [1997-1998] 2 GLR 980** the court stated that:

"Now the customary law requirements of a valid gift have been laid down in many judicial decisions. And it is not necessary to reproduce all of them in this judgment. The bare essentials are:

(a) There must be a clear intention of giving or passing the property in the thing given to the donee by the donor.

(b) The acceptance of such gift by the donee must be made in the lifetime of the donor.

(c) The giving and acceptance must be proved and evidenced by such delivery or conveyance as the nature of the gift admits of."

We hold that the evidence of DW1 as stated above, is in consonance with the essential elements of a valid gift at customary law and given that the said evidence was not seriously challenged under cross examination, we hold that it is more credible and reliable than the evidence of the Plaintiffs and their witnesses which was, as they claim, narrated to them by persons who were not invited to testify before the trial court.

There is evidence on record to the effect that Opanin Takyi was in possession of the House in question for a period of close to sixty years before his death in 2012. The house is said to be made up of twenty-eight rooms out of which about eight rooms were occupied by Opanin Takyi and his wives and children with the remainder of the rooms rented out to tenants. During the period of his possession, Opanin Takyi never accounted for rent collected or otherwise to any member of his family and for a brief period that about two of his family members lived in the House with his permission, no family member essentially lived in the House in question. On the preponderance of probabilities, we hold that the Defendants' case that the House in question is the personally acquired property of Opanin Takyi is more probable than the case of the Plaintiffs that the House in dispute is a family House. The learned trial Judge

recognised the above facts and stated at page 44 of his judgment which can be found at page 203 of the ROA among others that:

> *"As to whether or not the late Essah as the purchaser of the plot made a customary gift of same to the late Takyi for which the later offered 'aseda' to the former, DW1 a co-donee of the gift testified about the motivation, the form of the presentation, the conditions, the participants and the nature of 'aseda' offered for the gift… All the evidence of the other parties consisted of bare denials and complete assertions based on hearsay or traditional evidence not borne out by the consequential use of the House and proceeds therefrom. I find the version of the Defendants supported by the personal account of DW1 much more probable and hold that there was a customary gift of the House in dispute by Kwabena Essah to the late Takyi and aseda of one bottle schnapps and cash of 3 shillings provided in acceptance in the presence of witnesses."*

By their endorsement on the writ of summons, the Plaintiffs/Appellants claim: **(a)** a declaration that House No. Plot 1 Block 1 New Tafo (Krofrom), which was formerly numbered Plot 24 VI New Tafo, Kumasi is the property of the Oyoko family of Wiamoase, and not the personal property of the late Kwasi Takyi; **(b)** a declaration that a farmland at a place known and called **Akwadwoa at Wiamoase** on the Wiamoase stool land is the property of the Oyoko family of Wiamoase; and **(c)** a declaration that a cocoa farm at Tarkwa in the Western Region of Ghana sharing boundaries with the properties of the following people: Opanin Kwame Tawia, Opanin Fobri, Madam Gyamfuwaa and Madam Afua Serwaa (widow of the late Akwasi Takyi) is the property of the Oyoko family of Wiamoase. Thus, clearly, three properties are claimed by the Plaintiffs/Appellants herein. These claims, endorsed on the writ of summons, were repeated in paragraph 26 of the statement of claim filed by the Plaintiffs/Appellants herein.

It is worthy of note that, in respect of the second relief endorsed on the writ of summons to the effect that *"a farmland at a place known and called **Akwadwoa at Wiamoase** on the Wiamoase stool land is the property of the Oyoko family of Wiamoase*", the Defendants pleaded at paragraph 16 of their statement of defence that:

> *"16. The defendants deny paragraphs 11, 12 and 13 of the Plaintiffs' statement of claim that they are in possession or occupation of the said farm at Akwadwoa on Wiamoase stool land and not laying claim to same."*

The Defendants re-inforced their disclaimer to the farm at Akwadwoa on Wiamoase stool land when the 1st Defendant/Respondent testified in his evidence in chief, among others, at page 16 Volume 2 of the ROA to the effect that:

> *"We have never said the cocoa farm at Akwadwoa in Wiamoase belongs to our father but the one at Nkwatoo in Wiamoase is for our father"*

We are satisfied from the ROA that the farm at Akwadwoa on Wiamoase stool land is not being claimed by the Defendants/Respondents in this matter and the ownership of that farm/land is not in dispute. It belongs to the Oyoko family of Wiamoase headed by the 1st Plaintiff/Appellant herein.

In their counterclaim, the Defendants/Respondents sought by way of relief "(ii) a declaration of title to the cocoa farm at **Nkwatoo at Wiamoase** under the Wiamoase stool land and bounded by the properties of Kofi Okoh, Adwoa Nsiah, Kwabena Owusu and Kwasi Oppong as the property of the Defendants."

The Plaintiffs/Appellants did not, in their Reply, except for the general traverse, deny the Defendants' counterclaim about the farm land at Nkwatoo and yet, at page 148 of Volume 1 of the ROA, the 2nd Plaintiff testified that: *"In response to the counterclaim I say the farm at Nkwatoo is family property. The farm was in the hands of Akwasi Takyi but is now in possession of his sisters because it is family property. The Defendants are not entitled to their*

counterclaim." We think that the Plaintiffs committed a decessus by not pleading a specific denial of this important claim by the Defendants and leaving it to a general traverse.

Indeed, Order 11 rule 8 of the High Court (Civil Procedure) Rules, 2004, CI. 47 specifically requires a Plaintiff to plead a denial of any material fact contained in a statement of defence if he does not admit such fact. The rule states that:

> *"8. Matters to be specifically pleaded*
>
> *(1) A party shall, in any pleading subsequent to a statement of claim, plead specifically any matter, for example, performance, release, any limitation provision, fraud or any fact showing illegality*
>
> *(a) which the party alleges makes any claim or defence of the opposite party not maintainable; or*
>
> *(b) which, if not specifically pleaded, might take the opposite party by surprise; or*
>
> *(c) which raises issues of fact not arising out of the preceding pleading.*
>
> *(2) Without prejudice to subrule (1), a defendant of an action for possession of immovable property shall plead specifically every ground of defence on which the defendant relies, and a plea that the defendant is in possession of the immovable property in person or by a tenant shall not be sufficient."*

Order 11 rule 14 (3) of the High Court Rules, CI.47 reinforces the above rule by providing that "There shall be no joinder of issue on a statement of claim or counterclaim". What it implies therefore is that once a material allegation is made in a counterclaim, a Plaintiff shall be deemed to have admitted such allegation if he does not specifically deny the claim in a Reply and a general traverse contained in the Reply shall not operate as a denial of the material allegation made in the Counterclaim. Order

11 rule 13(3) of CI.47 therefore puts the matter beyond reasonable debate when it provides that:

> *"Subject to subrule (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit shall be specifically traversed by the party in the party's defence or defence to counterclaim and a general statement of non-admission shall not be a sufficient traverse of them."*

In respect of the Nkwatoo farm therefore, the 2nd Plaintiff/Appellant is not entitled to give the evidence which he purported to give in his evidence in chief to the effect that the Nkwatoo farm is a family property. At any rate a bare assertion that the Nkwatoo farm is a family property is not enough and does not explain how that farm became a family property. The evidence given by the 2nd Plaintiff/Appellant must be juxtaposed with the evidence in chief of the 1st Defendant/Respondent which can be found at page 16 of Volume 2 of the ROA where he stated, among others, that:

> *"We have never said the cocoa farm at Akwadwoa in Wiamoase belongs to my father but the one at Nkwatoo in Wiamoase is for our father. This farm shares boundary with Opanin Akuoko, Opanin Akwasi Oppong, Maame Adwoa Nsiah and Opanin Kwabena Owusu. When my father was alive it was my sister Diana Nyamekye who took care of it on behalf of my father but when he died the 2nd Plaintiff and his mother and others took over the farm. This Nkwatoo farm was acquired and cultivated personally by my father with assistance of my mother, sister Diana Nyamekye, 2nd Defendant and my father's step son Yaw Yeboah, Ama Serwaa, Maame Abena Kwamu my father's second wife and the labourers".*

In respect of this same farm at Nkwatoo, Wiamoase, DW1, Ama Duku stated, at page 79 of Volume 2 of the ROA, in her evidence in chief that:

"A friend of my husband told him that the Agric people were giving out special cocoa seeds for free and so if my husband has a land, he should go for some of the cocoa seeds and cultivate. My husband sold the last of his cars and used the proceeds to cultivate the cocoa farm at Nkwatoo at Wiamoase. Myself, my son Yaw Yeboah (step son of my husband), Pomaa my husband's wife and her daughter Nana Yaa helped him to cultivate the farm. The farm was cultivated within five years and the land got finished. Nana Yaa is the 2nd Defendant in this suit. When we started harvesting the cocoa, my husband Opanin Kwasi Takyi was receiving the proceeds until he died. For the five years that we cultivated the farm nobody came to claim interest in the land. He also did not account to anybody. Until his death nobody came to claim interest in the land or the proceeds from the farm"

The evidence of DW1 quoted above corroborates the evidence given by the 1st Defendant in all material particular with regards to the acquisition and ownership of the farm at Nkwatoo and on the preponderance of probabilities, the evidence of the Defendants/Respondents is more convincing and preferable as against the bare and unsubstantiated testimony of the 2nd Plaintiff/Appellant regarding his claim to family ownership of the farm at Nkwatoo.

The learned trial Judge, again, recognised these facts about the Akwadwoa and Nkwatoo farms in his judgment when he observed at page 48 of his judgment which can be found at page 207 of the ROA that:

"It is apparent from the evidence that the Plaintiffs were interested in the cocoa farm at Akwadwoa, which is not being contested by the Defendants while the Defendants' interest in the Nkwatoo (Nkoatoo) was not seriously contested by the Plaintiffs. There was no evidence of any orange farm on the Nkwatoo land. The Defendants nonetheless produced further evidence on the acquisition and cultivation of the Nkwatoo farm by DW1 and DW2.

DW1 who was married to the late Takyi and the mother of the 1st Defendant led evidence about how the seeds of cocoa for planting were acquired, the source of income for the cultivation being proceeds from the sale of the third vehicle of the late Takyi, and the persons who assisted in the cultivation of the farm. She said her late husband received the proceeds of harvest of the cocoa until he died."

The third relief endorsed on the Plaintiffs'/Appellants' writ of summons is a declaration *"that a cocoa farm at Tarkwa in the Western Region of Ghana sharing boundaries with the properties of the following people: Opanin Kwame Tawia, Opanin Fobri, Madam Gyamfuwaa and Madam Afua Serwaa (widow of the late Akwasi Takyi) is the property of the Oyoko family of Wiamoase*." The Defendants/Respondents also sought, as the third relief in their counterclaim, a *"declaration of title to the cocoa farm at Tarkwa in the Western Region of Ghana bounded by the properties of Kwame Tawiah, Opanin Fobi, Madam Gyamfua and Kwabena Agyei is the property of the Defendants."* It follows therefore that both parties carried the burden of proof of their respective claims to the farm in question.

In his evidence in chief, recorded at page 131 Volume 1 of the ROA, the 2nd Plaintiff gave evidence to the effect that this particular land in dispute is at a place called Kofi Gyau in the Western Region. He stated, among others, that:

"The original cultivator of that land is my uncle Kwasi Takyi. He acquired two pieces of land and demarcated it. He gave one part to his wife Maame Ama Duku and her seven children including the 1st Defendant. He gave a part to the family but divided it and gave a portion of it to his wife Afua Serwaa. That portion is still in possession of Afua Serwaa. She was his surviving spouse. The portion belonging to the family is in possession of my uncle Yaw Poku who succeeded Kwasi Takyi. When he made those gifts, they all performed aseda. With respect to Afua Serwaa's gift my uncle Yaw Poku who succeeded Kwasi was present when the aseda was given. With respect to the family's gift, Nana

Sarfo Kantanka, 1st Plaintiff was present. Opanin Kwabena Dwumfuor, Opanin Osei Kwadwo, Obaapanin Ama Adwoaboa were at the aseda"

At pages 144 to 145 Volume 1 of the ROA, the 2nd Plaintiff testified in respect of this same land that:

"With respect to the farm at Tarkwa I say Kwasi Takyi gave a portion to the family and later gave a portion of that portion given to the family to his wife, the surviving spouse. Afua Serwaa is a boundary owner of that farm, the surviving widow. The boundary owners they gave is not correct"

Afia Serwaa gave evidence as PW1 and stated the late Opanin Kwasi Takyi was her husband and that she knew of a farm situate at Kofi Gyau near Tarkwa in the Western Region. These farms, according to PW1, are three in all and had been cultivated before she visited there. She testified that one of the farms was taken by the Chief of the area called Sikasem. The second farm, which is at Mpempesu, was given to Yaw Mensah and his mother. According to PW1, a portion of the last farm also at Mpempesu was carved out for her and she gave aseda in the presence of witnesses and she has been in possession of her farm for about twenty years before the demise of her husband. She concluded her evidence in chief by stating that the portion of the farm ear-marked for the family was being taken care of by her late husband till he died. She stated that she took the members of the family to the farm demarcated for them and showed them the farm. PW1, Afia Serwaa gave evidence to the effect that the farms in the Western Region had already been cultivated before she got married to the late Opanin Kwasi Takyi. She admitted under cross examination that the second farm in the Western Region is at a place called Pampamsoagya and that that farm was cultivated by the mother of the 1st Defendant Ama Duku. PW1 admitted again that it was part of the farm at Pampamsoagya that was gifted to her and the other part gifted to the family in the absence of the children of 1st Defendant and his siblings.

The 1st Defendant stated in his evidence at page 13 Volume 2 of the ROA that after the death of his father Opanin Takyi, the family joined forces with the widow under the guise of inspecting the properties of the deceased Kwasi Takyi. The family and the widow first went to the Western Region to share the farm with the widow and later came to Kumasi to share the personal belongings of the deceased. The 2nd Defendant stated in her evidence in chief at page 16 of Volume 2 of the ROA among others that it was after the death of Kwasi Takyi that the family and Maame Afia Serwa, his father's widow, took over the farm at Tarkwa and shared it among themselves.

It is clear from the evidence of the 2nd Plaintiff that the farm or farms in the Western Region was originally acquired by Kwasi Takyi the father of the Defendants. So, there is no dispute as to the original ownership of the farms at Tarkwa. The Plaintiffs' claim to the family ownership of the farm at Tarkwa arises from an alleged gift of same by Kwasi Takyi to them. It is also clear from the evidence on record that it was after the death of Kwasi Takyi that the family was taken to Tarkwa and shown the alleged gifted land. It follows that during his life time the family did not take possession of the land, allegedly, gifted to the family by Kwasi Takyi. It is very clear from the record of appeal (ROA) that the Plaintiffs/ Appellants did not invite any person to testify as a witness to the alleged ceremony at which the lands or farms at Tarkwa in the Western Region were allegedly gifted; partly, to the family and partly, to PW1, Afia Serwaa, the widow of Kwasi Takyi. There is no concrete evidence of the demarcation of any farm to the family and PW1 Afia Serwaa. The alleged gifts infringe the law as laid down in several judicial decisions. Indeed, in **Summey vs. Yohuno and Others [1962] 1 GLR 160**, the Supreme Court pointed out that:

> *"To claim land as a customary gift inter vivos, therefore, it must be established, quite apart from the usual customary formalities, that (1) the gift was voluntary and gratuitous; (2) that the gift was made in the lifetime of the donor; (3) there was a full*

intention that the land shall remain the property of the donee without restoring it to the donor; and (4) that the donee accepted the gift and went into possession of the land, either physically or constructively, during the life-time of the donor."

There is no evidence that the family went into possession of any farm in the Western Region on the strength that it has been gifted to them during the life time of Opanin Kwasi Takyi. As stated by PW1 in her evidence, it was after the death of Opanin Takyi that she unilaterally took certain members of the family to the Western Region and allegedly showed them a piece of land that that land had been gifted to them. Kwasi Takyi continued to exercise rights of ownership over the lands/farms in the Western Region till he died. This was admitted by PW1 when she said that Kwasi Takyi took care of the land given to the family. The truth is, no land was given to any family by Kwasi Takyi in his life time. On the other hand, if it is true that Kwasi Takyi had given a portion of his farm to his family and the family had really accepted that so-called gift, which had thereby become the property of the family, what capacity again had Kwasi Takyi to gift a portion of this same land to PW1, Afia Serwaa? For, once land was gifted and accepted it ceases to be the property of the donor and he had no right to further gift a portion of that which had already been gifted to another person. The principle of nemo dat quod non habet operates here with full force. See, **Duagbor and Others vs. Akyea-Djamson [1984-86] 1 GLR 697**

In respect of these alleged gifts therefore the learned trial Judge found, at page 208 to 209 Volume 2 of the record of appeal, that:

"Neither the Plaintiff nor PW1 defined in clear and certain terms the boundaries of the farms so gifted to her. She did not mention the names of witnesses to either the presentation of the gift or the receiving of the aseda for it…The Defendants alleged that the purported division was done between the Plaintiffs and PW1 after the death of the late Takyi. Since it was the Plaintiffs who asserted the gift, it lay on them to provide evidence

of the demarcation of the land by boundary features, the publicity of presentation and acceptance by an aseda. It was not enough to make a bare assertion of a gift especially against the interest of a deceased. I find therefore that no such division or a gift was made by the late Kwasi Takyi for PW1 or at all. He therefore died intestate in respect of his cocoa farm at Gyan Kofi near Tarkwa. It formed part of his intestate estate susceptible to the administration under a Letters of Administration granted to the Defendants"

The above findings and holding by the learned trial Judge are amply supported by the evidence on record. In **Bisi vs. Tabiri alias Asare [1984-1986] 2 GLR 282** it was pointed out that:

"As a judge of fact, it is his peculiar province, listening to the evidence and having the witnesses before him, to weigh the several statements on each issue and to decide which to believe and which to reject. And so long as his conclusions can find support from statements on record, it is not open to an appellate tribunal, except for just and compelling reasons, to disturb them".

See also **Bakers-Wood vs. Nana Fitz [2007-2008] SCGLR 878**

The circumstances under which an appellate court may interfere with the findings of a trial court has been succinctly spelt out in **Amoah vs. Lokko & Alfred Quartey (substituted by) Gloria Quartey [2011] 1 SCGLR 505**. In the words of Aryeetey JSC at page 514 of the report:

"The appellate court can only interfere with the findings of the trial court if they are wrong because (a) the court had taken into account matters which were irrelevant in law; (b) the court excluded matters which were critically necessary for consideration; (c) the court had come to a conclusion which no court properly instructing itself would have reached; and (d) the court's findings were not proper inferences drawn from the facts."

And as held in **Fofie v. Zanyo [1992] 2 GLR 475;**

"Although an appellate tribunal in appropriate circumstances had the right to interfere with the findings of fact of a trial court, that right was subject to the exclusive preserve of a trial tribunal to make primary findings of fact where such findings of fact were supported by evidence on the record and were based on the credibility of witnesses when the trial tribunal had had the opportunity and advantage of seeing and observing their demeanour and had become satisfied of the truthfulness of their testimonies touching on any particular matter in issue. Where such findings could not be said to be wrong because the tribunal had taken into account matters which were irrelevant in law, or had excluded matters which were crucially necessary for consideration, or had come to a conclusion which no court properly instructing itself on the law would have reached and the findings were not inferences drawn from specific facts, it was incompetent for an appeal court to interfere."

We hold consequently that the Plaintiffs/Appellants herein have failed to make out the first two grounds of appeal stated in their Additional Grounds of Appeal and the same are dismissed.

We now turn to grounds 4 and 5 of the Additional Grounds of Appeal which states that:

"4. That the learned High Court Judge erred when he relied on the long possession of the disputed house by the late Kwasi Takyi to hold that the Defendants/Respondents are entitled to a declaration of title to the disputed house as part of the estate of the late Kwasi Takyi.

5. That the learned High Court Judge erred when he relied on the principles of laches and acquiescence as well as the Statute of Limitation and held that the Defendants are entitled to a declaration of title to the disputed house as part of the estate of the late Kwasi Takyi when same was not pleaded."

Under this ground Counsel submitted that the learned trial Judge erred *"for relying on the long possession and enjoyment of the disputed house by the late Kwasi Takyi and his wife and children and upon the common law principle of laches and acquiescence as well as the statute of Limitation to come to the conclusion that the Defendants are entitled to a declaration of title to the disputed house."* According to Counsel, the principle of laches and acquiescence as well as Statute of Limitation were not pleaded by the Defendants as part of their defence and therefore, the trial Judge in relying on same to declare title of the disputed house and the cocoa farm at Tarkwa in the Defendants committed an error for which reason the judgment should be set aside.

It is true that in his judgment, the learned trial Judge observed at page 205 Volume 2 of the ROA that:

> *"I have already upheld the version of the defendants, and coupled with the overwhelming evidence from both sides that the late Takyi has held exclusive possession and enjoyment of rights of ownership including personal occupation with his wives and children and giving out rooms and stores for rent without accounting to any member of the family for well over 50 years since the death of the purchaser, common law principles of laches and acquiescence as well as statutory limitation of action inclines me to hold that the defendants are entitled to a declaration of title to the house as part of the estate of the late Takyi under their letters of administration granted on the 28th January 2013."*

It is incorrect, as submitted by Counsel for the Plaintiffs/Appellants in his Written Submission, that the trial Judge relied on evidence of long possession and the use of the properties in dispute by Opanin Takyi particularly the House in question as well as principles of laches and acquiescence and statute of limitation to find for the Defendants/Respondents when no pleading was made with respect to these legal defences. The statement of defence and counterclaim filed by the Defendants herein contains sufficient averment on long possession and enjoyment of the properties by

Opanin Takyi without accounting to any member of family for well over 60 years before his demise. In paragraph 13 of the statement of defence and counterclaim, the Defendants/Respondents pleaded that:

> *"13. The Defendants say that the building Akwasi Takyi erected contained about 28 rooms out of which he and his wife and children occupied 8 rooms while the remaining 20 rooms were rented out to tenants and Akwasi Takyi for over a period of sixty (60) years until his death in 2012 collected rent and without accounting to any member of his family."*

In their evidence in chief the 1st Defendant testified at pages 11 to 13 of Volume 2 of the ROA, among others, that:

> *"My father built the house on the plot which was gifted to him by Opanin Kwabena Essah, it was a storey building and on ground floor it has thirteen rooms and with two rooms with the kitchen as an outer-house. Opanin Yaw Mensah rented eight of these rooms to operate the then Atomic Night Club and later became Subin Nite Club and currently houses the Kingdom Life Ministry. On the top floor are thirteen rooms. One Opanin Krah also came to rent four rooms of the ground floor where he operated Coronation Bar and currently Amaniapong Nite Club and Opanin Atta Poku also rented one room where he operated a corn mill. I was living with him in a chamber and hall on the first floor and Maame Abena Akomu, the second wife, was also living in one room with her children on the ground floor. In all he had rented all the rooms except six where he lived with his wife and children. He was collecting the rent himself. After he built the house, he lived for about seventy years before he died. He was not accounting to anybody in the family. No member of his family was living there except Yaw Poku whose mother pleaded for him to live there but he ejected him and rented the room out."*

Indeed, this piece of evidence was given by the 1st Defendant without any objection by the Plaintiffs/Appellants and it therefore remained and formed part of the record of evidence available to the trial court for consideration and evaluation. It has long been the position of the law that where unpleaded evidence is allowed to get into the record without any objection, a trial Judge is bound to consider that evidence in his evaluation of the evidence as a whole unless the unpleaded evidence is inadmissible per se.

In **Banahene vs. Shell Ghana Ltd. [2017-2018] 2 SCLRG 338**, the Supreme Court held, among others, that:

> *"The plaintiff did not plead negligence against the defendant as required under Order 11 rule 8(1). The failure of the plaintiff to specifically plead negligence, however, did not preclude the court from considering the duty of care arising from negligence. Because of the provisions under section 5 and 6 of the Evidence Act, 1975 and the existing authorities, if there was evidence to that effect on the record, which was not objected to at the hearing, the court was bound to act on it. In cases where fraud was not pleaded but the record disclosed that some evidence was led on fraud at the hearing of the case, the court accepted and relied on the evidence to establish fraud. The principle is that, even if negligence was not pleaded, but evidence is admitted on the record without objection and the evidence is not rendered inadmissible on legal grounds, the court cannot ignore it, unless it will result in a miscarriage of justice. Consequently, for plaintiff to succeed in this ground, there must be some evidence on the record showing negligence on the part of the defendant, even in the absence of a plea of negligence."*

So also, **Ecobank Nigeria Plc. vs. Hiss Hands Housing Agency [2017-2018] 1 SCLRG 355**, where it was pointed out by the final court that:

> *"In this case, fraud has not been pleaded as the practice requires. But in view, especially of the provisions of sections 5, 6 and 11 of the Evidence Decree, 1975, NRCD 323,*

regarding the reception of evidence not objected to, it can be said that where there is clear but unpleaded evidence of fraud, like any other evidence not objected to, the court cannot ignore the same, the myth surrounding the pleading of fraud not withstanding: see generally Asamoah vrs Setordzie [1987-88] 1 GLR 67, SC and Atta vrs Adu [1987-88] 1 GLR 233, SC. In the context of equity, it can even be said that fraud relates to any colorable transaction and not necessarily fraud in strict legal sense."

As shown above therefore, it is not correct, contrary to the submission of Counsel for the Plaintiffs/Appellants, that the trial Judge relied on evidence of unpleaded facts in the nature of long possession, laches and acquiescence and statute of limitation to arrive at his judgment and even if he did so, the law allows him to consider evidence given and which is part of the record to the extent that no objection was taken to its reception. A fortiori, the learned trial Judge committed no error in relying on the evidence adduced in coming to his conclusion. We do not therefore find any merit in these grounds of appeal which are therefore dismissed.

In Ground 3 of the Additional Grounds of Appeal, the Plaintiffs/Appellants state that:

"That the learned High Court Judge erred when he upheld and granted the reliefs claim by the Defendants/Respondents in their counterclaim."

On this ground of appeal, Counsel for the Plaintiffs/Appellants submitted that *"the Defendants were sued in their capacities as the Administrators of the estate of the late Kwasi Takyi and not in their personal capacities and therefore cannot counterclaim for declaration of title to the disputed properties as their personal property."* Counsel concluded by submitting that the Defendants are not entitled to a declaration of title to the disputed properties. In **Afranie II vs. Quarcoo and Another [1992] 2 GLR 561**, the court held that:

"The provisions in section 1 (1) of Act 63 that the movable and immovable properties of a deceased person should devolve on his personal representatives with effect from his death

does not also mean they acquire any beneficial title in the property. The deceased's property is vested in his executors or administrators only "on trust" and "for the purposes of administration."

In the instant matter, the Defendants/Respondents were sued in their capacities as Administrators of the estate of Kwasi Takyi. In paragraph 3 of the statement of claim, the Plaintiffs/Appellant pleaded that:

3. *The Defendants are two of the 14 children of Kwasi Takyi (deceased), and also the Administrators of the estate of Kwasi Takyi (deceased), and this suit is brought against them in such capacity.*

Consequently, in paragraph 3 of their statement of defence and counterclaim, the Defendants averred that:

3. *The Defendants admit paragraph 3 of the Plaintiffs' statement of claim.*

What the Defendants' admission implies is that all along and throughout the suit, the understanding is that the action is being defended by the Defendants in their capacity as administrators of the estate of Kwasi Takyi. So also, when the statement of defence and counterclaim was filed the understanding was that the Defendants did so in their capacities as the administrators of the estate of Kwasi Takyi. Indeed, there is nowhere in the statement of defence and counterclaim filed by the Defendants that they purported to make any claim in any other capacity other than the capacities in which they were sued. The argument by Counsel for the Plaintiffs/Appellants is therefore unfounded. At any rate the learned trial Judge did not grant any of the reliefs sought by the Defendants in their personal capacities as Counsel would want us to believe. At pages 210 to 211 of Volume 2 of the ROA, the trial Judge summed up his judgment in favour of the Defendants in the following terms:

1. I confirm the interlocutory order for accounts against the plaintiffs and hereby make a further and final order against the plaintiffs to file Statement of Accounts in compliance with the order of this court given by the Ruling of Justice Robin B. Batu J. (of blessed memory) dated the 31st October, 2013.
2. I award to the Defendants against the Plaintiffs damages of GH¢50,000.00.

3. I declare title to the House No. Plot 1 Block 1, New Tafo (Krofrom) which was formerly numbered Plot 24 Block VI, New Tafo, Kumasi in the Defendants as Administratices. (sic)

4. I declare title to the cocoa farm at Nkwatoo at Wiamoase on the Wiamoase Stool Land and bounded by the properties of Kofi Okoh, Adwoa Nsiah, Kwabena Owusu and Kwasi Oppong in the Defendants as the administratices (sic) of the estate of the late Akwasi Takyi.

5. I declare title to the cocoa farm at Tarkwa in the Western Region of Ghana bounded by the properties of Kwame Tawiah, Opanin Fobi, Madam Gyamfua and Kwabena Agyei in the Defendants as the administratrices (sic) of the estate of the late Akwasi Takyi.

6. I grant to the Defendants an order of perpetual injunction restraining the Plaintiffs from interfering in the administration of the Defendants of the estate of the late Akwasi Takyi.

7. I order the Plaintiffs to account to the Defendants for rents received in respect of the subject house and proceeds received from the subject cocoa farm.

8. The Plaintiffs shall pay costs of GH¢10,000.00 to the Defendants.

Thus, contrary to the claims of Counsel for the Plaintiffs/Appellants, no relief in the counterclaim was granted to the Defendants/Respondents in their personal capacities. All the reliefs granted to the Defendants were made in their capacities as the Administrators of the estate of Kwasi Takyi. This ground of appeal therefore does not find favour with the court and it is accordingly dismissed.

In the next ground of appeal, the Plaintiffs/Appellants say that:

> *"That the damages awarded in favour of the Defendants/Respondents cannot be supported by the evidence adduced at the trial and same was too excessive in the circumstance of the instant case."*

According to Counsel for the Plaintiffs/Appellants, the GH₵50,000.00 damages awarded against the Plaintiffs is very excessive in the instant case. This is because the Defendants did not lead any credible evidence to prove any actual loss as a result of the trespass. Besides, the trial Judge failed to give any reason for the sum of GH₵50,000.00 awarded as damages against the Plaintiffs. Counsel therefore submits that the damages awarded be set aside. For the Respondents, it was submitted that the award of damages for trespass was discretionary and that this Court should not interfere with the discretion exercised by the trial Judge.

It is clear from the pleadings filed by the parties herein and the evidence on record that right after the death of Kwasi Takyi, the Plaintiffs/Appellants, in pursuance of their claim that the properties in dispute were family properties, arrogated to themselves the right to deal with the properties as they pleased. There is evidence on record that they first proceeded to the Western Region and took possession of the farms of Kwasi Takyi and shared them with the widow, PW1 herein under the pretence that same have been gifted to them inter vivos by the late Opanin Kwasi Takyi. Thereafter, the Plaintiffs

came to Kumasi and took over the House in dispute again under the claim that that House was family property. The Plaintiffs started collecting rents from tenants in the said House without rendering accounts to anybody and, even, after they have been ordered by the trial court to file accounts the Plaintiffs have not been regular in filing same to the court. There is evidence on record that even the personal properties of Opanin Kwasi Takyi including his clothes were taken by the Plaintiffs/Respondents. There is further evidence that the 2nd Plaintiff/Appellant, in particular, received proceeds from the farm at Nkwatoo, Wiamoase and pocketed it till the 2nd Defendant lodged a complaint against the Caretaker of that farm before the Caretaker started rendering accounts of the proceeds to her. We take note that the actions and conduct of the Plaintiffs in respect of the properties; both movables and immovables of Opanin Kwasi Takyi as proved by the evidence on record amounted to intermeddling and it is punishable as for a criminal offence. Order 66 rule 3 of the High Court Rules is clear on this. It states that:

> *"3. Intermeddling with property*
>
> *Where any person, other than the person named as executor in a will or appointed by Court to administer the estate of a deceased person, takes possession of and administers or otherwise deals with the property of a deceased person, the person shall be subject to the same obligations and liabilities as an executor or administrator and shall in addition be guilty of the offence of intermeddling and liable on summary conviction to a fine not exceeding 500 penalty units or twice the value of the estate intermeddled with or to imprisonment for a term not exceeding two years or to both."*

See In re Appau (decd); Appau v. Ocansey [1993-94] 1 GLR 146.

In **Standard Chartered Bank (Ghana) vs. Nelson [1999-2000] GLR 366**, the Supreme Court pointed out in no uncertain terms that:

"An appellate court could reverse or vary the award of damages on the ground that (a) the judge acted on some wrong principles of law; or (b) the amount awarded was so extremely high or so very small as to make it in the judgment of the appellate court, an entirely erroneous estimate of the damage to which the plaintiff was entitled."

In our opinion, the Plaintiffs/Appellants have not shown in their Written Submissions that the trial Judge acted under wrong principles of law in awarding the sum which he gave to the Defendants/Respondents as damages for the trespass committed by the Plaintiffs. On the contrary given the criminal conduct of the Plaintiffs/Appellants in the manner they intermeddled with the properties of Opanin Kwasi Takyi at a time when they had not even attempted to apply for letters of administration, the sum of GH₵50,000.00 awarded by the learned trial Judge for damages for the trespass committed by the Plaintiffs/Appellants herein against the Defendants/Respondents herein is appropriate in the circumstances of this case and we have no reason to disturb the award. The appeal on this ground is hereby dismissed.

The next and final ground of appeal is the main and omnibus ground that *"the judgment is against the weight of evidence*". We wish to place on record that we have examined the whole of the record of appeal including the reliefs and claims endorsed on the writ of summons and the statement of claim. We have also sifted the statement of defence and the counterclaim filed by the Defendants/Respondents and the Reply. After examining the evidence of the parties and their witnesses vis-a vis the relevant law, we have come to the conclusion that the Plaintiffs/Appellants herein have failed in their duty to point out to us the pieces of evidence in the record of appeal which the learned trial Judge failed to apply in their favour and which should have turned the outcome of the case in their favour. Indeed, all the arguments canvassed by the Plaintiffs/Appellants in their Written Submission under the omnibus ground of appeal have been discussed in the grounds of appeal specially raised in the Additional Grounds of Appeal filed and

argued by the Appellants herein and there is no point in repeating them all over again. Suffice it therefore to say that we find no merit in the appeal filed by the Plaintiffs. Consequently, the appeal is dismissed and the judgment of the trial court is hereby affirmed.

Costs of GH₵10,000.00 to the Defendants/Respondents against the Plaintiffs/Appellants.

(Sgd)

Samuel K. A. Asiedu

(Justice of Appeal)

(Sgd)

I agree **Angelina M. Domakyaareh (Mrs.)**

(Justice of Appeal)

(Sgd)

I also agree **A. B. Poku-Acheampong**

(Justice of Appeal)

- Samuel Ayeh Agyei for Plaintiffs/Appellants
- Eunice Mensah for Defendants/Respondents