IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
KOFORIDUA – GHANA

CORAM: *SOWAH, J. A. (PRESIDING)*
OPPONG, J. A.
MENSAH-HOMIAH, J. A.

CONSOLIDATED CIVIL APPEAL
NO. H1/29/2021

12TH APRIL, 2022

1. DAVID AKWETER NAKOTEY
2. EDWARD NUERTEY TETTEH
…….....PLAINTIFFS/APPELLANTS

VRS.

1. TEYE JOSEPH
2. TETTEH
3. PASTOR KWESI EMMANUEL
……..…….……...…DEFENDANTS/RESPONDENTS

AND

1. TEYE JOSEPH
2. TEYE MATTHEW TETTEH
……...…PLAINTIFFS/RESPONDENTS

VRS.

1. DAVID AKWETER NAKOTEY
2. EDWARD NUERTEY TETTEH
…….…...…DEFENDANTS/APPELLANTS

J U D G M E N T

MENSAH-HOMIAH, JA:

INTRODUCTION

We have before us two appeals filed against a ruling of the Circuit Court, Odumase-Krobo, dated 3rd August, 2018. The said ruling was in respect of two motions filed pursuant to ***Order 23 rule 6 (1) of the High Court (Civil Procedure) Rules 2004, C.I. 47*** in two separate suits which were pending before that court, titled: ***(i) David Akwetey Nakotey (suing as head of Ami-Narh Family) & Edward Tetteh Nuertey v. Teye Joseph, Tetteh & Pastor Kwesi Emmanuel Suit No. C1/05/2011*** (the 1st suit) and (ii) ***Teye Joseph & Teye Mathew Tetteh v. David Akweter Nakotey & Edward Tetteh Nuertey Suit No, A1/08/2017*** (the 2nd suit).

It is observed that even though no formal order of consolidation had been made pursuant to Order 31 rule 2 of C.I. 47, the trial court proceeded to deliver one ruling as if the two suits had been consolidated. Since the parties to the two appeals, the subject matter and core issues for our consideration are virtually the same, these appeals would be, and are hereby consolidated.

THE ANTECEDENTS

On 2nd August 2010, David Akweter Nakotey who describes himself as the head of the Ami-Narh Family of Adjikpo- Adawuranya commenced the 1st suit for and on behalf of the said family against the defendants therein at the Circuit Court, Odumase-Krobo. Pursuant to an order of the court, Edward Nuertey Tetteh was

joined as the 2nd Plaintiff and an amended Writ of Summons was filed on 11th December, 2013. (See ROA part 1 page 49).

The reliefs sought in the 1st suit included a declaration of title to Plaintiffs' family land situate at Adjikpo- Adawuranya, Somanya; declaration that the purported grant of Plaintiffs' family land by 1st and 2nd Defendants to 3rd defendant is void; recovery of possession and damages for trespass. In their statement of

defence, 1st and 2nd Defendants challenged the capacity of Plaintiffs since they are not the head of the Ami-Narh family. Notwithstanding the challenge to Plaintiffs' capacity in the 1st suit, Defendants therein counterclaimed for declaration of title to the same piece of land, among other reliefs. Plaintiffs also filed their reply and defence to Counterclaim.

Application for directions was taken on 26th November, 2011 (ROA part 1 page 17) and the parties were consequently ordered to file their respective witness statements together with potential exhibits which was complied with after a series of amendments had been filed.

The Defendants in the 1st suit filed an amended statement of defence on 12th August, 2016 (ROA part 1 page 118). On the same day, they commenced the 2nd suit against the Plaintiffs in the 1st suit, for similar reliefs as in their counterclaim to the 1st suit. Upon service, Defendants in the 2nd suit filed ***"a motion for an order to strike out writ of summons for want of capacity",*** which the court ordered to be tried as a preliminary issue.

At the preliminary hearing to determine the capacity of Plaintiffs in the 2nd suit, a Chief of Yilo Krobo State gave oral evidence on 9th November, 2016 as CW1; followed by the testimony of CW2 on 17th February, 2017 (ROA part two page 44).

CW2 was cross-examined on 5th April, 2017 and 31st May 2017 by the lawful attorney of 1st Plaintiff in the 2nd suit. The lawful attorney of 1st plaintiff in the 2nd suit also testified on 22nd September, 2017 and cross-examination commenced. The cross-examination of the lawful attorney of 1st Plaintiff in the 2nd suit continued on 28th November 2017 and was further adjourned to 17th January 2018 for continuation, but it was not concluded.

This preliminary hearing to determine the capacity of Plaintiffs in the 2nd suit was also truncated when the lawful attorney of 1st Plaintiff in the 2nd suit filed a ***"Motion on Notice for an order affirming the admission of 1st defendant, David Akweter Nakotey that he is a member of the Charway Clan"***, on 11th January, 2018.

Meanwhile, hearing in the 1st suit had commenced on 3rd April, 2017 with the evidence-in-chief of 1st Plaintiff, and Plaintiffs eventually closed their case on 19th September, 2017. Thereafter, the trial court adjourned the suit to 24th October, 2017 for the Defendants to open their defence. The lawful attorney of 1st Defendant, Raymond Tekpe Osanyornmor was to testify. Again, on 21st November, 2017, the trial court adjourned the case to 19th December 2017 for Plaintiffs' counsel in the 1st suit to cross-examine defendants' lawful attorney. It bears emphasis that cross-examination of 1st Defendant's lawful attorney in the 1st suit was not concluded.

Before the next court sitting scheduled for 19th December 2017, 1st Defendant's attorney filed a motion on 14th December, 2017 in the 1st suit, titled: ***"Motion on notice for an order for admission of the truth of a fact under Order 23 rule (6) (1) of C.I. 47."*** This application was strenuously opposed by Plaintiffs in the 1st suit

who were also Defendants in the 2nd suit. The motion was moved on 21st March 2018 and adjourned for ruling.

THE RULING

The state of confusion took a centre stage when the trial judge delivered a Ruling on 3rd August, 2018 titled: *"RULING ON MOTION FOR AN ORDER FOR ADMISSION OF THE TRUTH OF A FACT IN THE CONSOLIDATED SUIT No. C1/05/11 and A1/08/2017.* The confusion stems from the fact that the ROA does not reflect that the two suits were ever consolidated. Be that as it may, the trial judge delivered himself thus (page 379 ROA part 1):

> *"The defendants' motion against the capacity of plaintiffs, hence the motion for admission according to Order 23 Rule 6(a) of CI 47 is granted since there is prima facie prove and proof on the balance of probabilities that, the 1st plaintiff is not a patrilineal member of the Ami-Narh family. He therefore has no capacity to sue as a family head of the Ami-Narh family…*
>
> *I hereby order that: (1) plaintiff should hand over the office to the family of 1st and 2nd defendants; (2) The family of Ami-Narh should immediately appoint 1st defendant as the family head; (3) Whoever is appointed as a family head must also select at least 3,4 or 5 principal members to assist him as family head; (4) The new family head is hereby cautioned that family properties are not disposed of without the concurrence of the principal members of the family; (5) The disposition of the family land made by 1st and 2nd defendants is void since it was made without the consent of the*

family; (6) I also direct that, the family land site plan with plaintiffs should immediately be handed over to the defendants…"

GROUNDS OF APPEAL

Aggrieved and dissatisfied with the aforementioned ruling, two appeals were lodged on 27th August 2018 by Plaintiffs/Appellants in 1st suit and Defendants/ Respondents in 2nd suit. These can be found at pages 290 of ROA part 1 and 119 of part 2). Pursuant to leave of this court, an amended notice of appeal was filed in the two suits on 21st June 2021 with the following as grounds of appeal:

a. *The Plaintiffs/Appellants were denied their right to a fair trial when the Learned Trial Judge did effectively deny Counsel for Plaintiffs/ Appellants the opportunity to cross-examine the 1st Defendant/Respondent on the content of his witness statement.*

b. *The Defendants/Respondents having maintained a Counterclaim against the Plaintiffs/Appellants in Suit No. C1/05/11, the Trial Judge erred when he held that the 1st Plaintiff lacked Capacity to maintain the said suit as head of the Ami-Narh Family.*

c. *The Ruling is against the weight of the evidence.*

d. *The Learned trial judge erred when he ordered that the 1st Defendant/ Respondent be appointed as the head of the Ami-Narh Family.*

For the sake of convenience, the parties would be simply referred to as Plaintiffs/ Appellants and Defendants/Respondents.

CONSIDERATION OF THE APPEALS

Before delving into the merits of the grounds of appeal in the order in which they were argued before this court, we find it necessary to touch on a procedural blunder at the trial court. That is, the trial judge *suo motu* delivered one ruling in respect of two motions that had been filed in two separate suits pending before him without maintaining the separate identity of each suit. This procedural error had the effect of prejudicing Plaintiffs/Appellants case.

In strict terms, "consolidation" means trying two or more cases together if convenient. Thus, even if the two suits had been formally consolidated under **Order 31 rule 2 of C.I. 47**, the trial judge was required to deliver separate rulings. This court (differently constituted) illustrated the process of consolidation in the case of **Agboado v. Fiankor (1995-96) 1 GLR 278 at 281** as follows:

> *"An important incidence of consolidating cases is to enable the hearing to be facilitated and expedited. But another equally important incidence of consolidation is that a separate judgment must be delivered in each suit. Thus, the individual identity of each of the consolidated suits must be maintained throughout the proceedings up to execution…"*

GROUND B

> ***"The Defendants/Respondents having maintained a Counterclaim against the Plaintiffs/Appellants in Suit No. C1/05/11, the Trial Judge erred when he held that the 1st Plaintiff lacked Capacity to maintain the said suit as head of the Ami-Narh Family."***

Appellants' submission on this issue was that, the counterclaim filed by Respondents was a tacit admission of Plaintiffs/Appellants capacity to sue and be sued. And with that admission, Defendants/Respondents could not have challenged Plaintiffs/ Appellants' capacity. Counsel cited and relied on two cases, which are: **Subunor Agorvor v. Kwao & Another Suit No. J4/07/2018 dated 27th March, 2019 SC**; and **Emmanuel Adjei Ashong (Subst. by Margaret Fofo Mensah) v. Madam Ago Ala (Subst. by Mavis Adumoah & 2 others Suit No. H1/158/2019 dated 18th February 2021, CA**.

By his counter argument, counsel for Defendants/ Respondents contended that, in the Subunor Agorvor case referred to above, the court merely stated in passing that a counter-claim may, in appropriate instances operate as admission of a Plaintiff's capacity. And that *'passing statement'* was not the ratio. He invites this court to consider the appeal on its own facts and not to treat Respondents' counterclaim as amounting to admission of plaintiffs' capacity which has been denied.

In dealing with the effect of a counterclaim of defendants against the plaintiff whose capacity they had challenged, Gbadegbe JSC in the Subunor Agorvor case, supra, had this to say:

> *"… By the operation of the rules on pleadings in Order 11 of the High Court (Civil Procedure) Rules, CI 47, the making of a counterclaim against the plaintiff in respect of the disputed land has the effect of constituting an admission that the plaintiff is a competent person to take out the action herein on behalf of his family. Furthermore, Order 81 rule 2 of CI 47,*

precludes a party who knowingly takes a fresh step in a matter from complaining about a defect in the adversary's pleadings…"

We have read the authorities cited above and our view is that the circumstances of the case before us are distinguishable in the sense that in reading the pleadings as a whole, it cannot be said that the Defendants/Appellants admitted the Capacity in which the Plaintiffs/Appellants sued. Having made this distinction, we will be guided by the general position of the law that, where a Plaintiff whose capacity is challenged fails to prove the same, his suit ought to be dismissed for want of capacity and such a defendant cannot maintain a counterclaim against a person who lacks capacity to sue and be sued.

On the question of capacity to sue and maintain an action, Verity Ag. P in the case of **Sokpui II v. Agbozo III (1951) 13 WACA 241,** stated at page 242 thus:

"There can be no doubt that where parties sue in a representative capacity and their authority to do so is questioned, it lies upon them to satisfy the Court that they have been duly authorised. It is for the Court to consider the evidence they have tendered in that regard and to come to its conclusion…

So, the trial court was bound to determine the Plaintiffs/Appellants capacity. The ROA reflects that evidence was being led in the 1st suit to, among other things, determine Plaintiffs' capacity therein. Consequently, it was wrong for the trial judge to have terminated the trial at a time when Defendants/Respondents were to open their defence and be cross-examined, and proceed to determine 1st Plaintiff/Appellant's capacity on an application filed pursuant to Order 23 rule 6 of C.I 47. More importantly, the affidavit evidence which the trial judge relied on to

determine the capacity of 1st Plaintiff/Appellant had not been tested by way of cross-examination.

Regarding the 2nd suit, the Defendants therein were not sued in any representative capacity as Counsel for Plaintiffs/Appellants has urged before us. They were sued as members of the Ami-Narh family simpliciter and so the capacity of Defendants in the 2nd suit was not put in issue.

Our view is that, the procedure adopted by the trial judge in determining the capacity of 1st Plaintiff/Appellant in the 1st suit jeopardized the case of the said Plaintiff and the ruling cannot be allowed to stand.

GROUND C

"The Ruling is against the weight of the evidence"

This ground requires us to re-hear the respective suits, pursuant to ***Rule 8(1) of the Court of Appeal Rules, C.I. 19***. We are enjoined to re-evaluate the entire record to ascertain whether or not the trial judge took into account, and gave weight to relevant facts before arriving at his decision. In the case of **Akufo-Addo v. Catherine (1992) 1 G.L.R. 377 at 391**, it was held thus:

> *"One must understand what the phrase 'by way of re-hearing means. It must be pointed out that the phrase does not mean that the parties address the court in the same order as in the court below, or that the witnesses are heard afresh. ...It does also mean that the Court of Appeal is not to be confined only to the points mentioned in the notice of appeal but will consider (so far as may be relevant) the whole of the evidence given in the trial court, and also the whole course of the trial."*

See also: **1. Agyeiwaa v. P&T Corporation (2007-2008) SCGLR 985 @989;**

2. Djin v. Musah Baako (2007-2008) SCGLR 686;

3. Mamudu Wangara v. Gyato Wangara (1982-83) GLR 63

A core issue which was argued under this ground by counsel for Plaintiffs/ Appellants was that, having regard to the peculiar circumstances of this case, it was most improper for the trial Circuit Court Judge to have granted Respondents' Application for judgment on admissions in the absence of a clear admission that 1st Plaintiff does not belong to the Ami-Narh family and cannot be the Head of that family.

On this issue, the contention of Counsel for Defendants/Respondents was that, 1st Plaintiff/Appellant made a clear admission in his pleadings and evidence that his biological father named Kwame Dortoh, hailed from Okperpiem and that he belongs to a family other than the Ami-Narh family, i.e., the Chaway clan (see exhibit 2 at page 80 of ROA part 1). Again, Counsel stressed that, the alleged concubinage relationship between 1st plaintiff/appellant's deceased parents would not change the established customary law that the Ami-Narh family of Bunase Division of Yilo Krobo is patrilineal. In effect, Counsel for Defendants/ Respondents wants this court to believe that by 1st Plaintiff/Appellant's own showing, he is not linked to the Ami-Narh Family in the male line and as such, he cannot be the head of that family. Counsel concluded that, the ruling of the Circuit Court which is on appeal, is sound in law.

We proceed to examine the ruling in the light of these submissions.

By his ruling on the applications filed pursuant to Order 23 rule 6 (1) of C.I. 47, the trial judge posed the following question at page 280 of the ROA part 1 thus:

> *"Is there any admission so far made by the plaintiffs in truth that 1st plaintiff is not a member of Ami-Narh family?"*

At page 283 of the record of appeal, the trial judge answered this question in the affirmative as follows:

> *"In the pleading of the plaintiffs (see their Reply to the Statement of Defence and to the counterclaim paragraph 13), it is a clear admission by the 1st Plaintiff that he is not a member of the Ami-Narh family and therefore he cannot assume family headship unless appointed by the members of the Ami-Narh family."*

It would be a useful guide to reproduce the averments in paragraph 13 of the Reply & Defence to Counterclaim, found at page 122 of the ROA part 1. It reads:

> *"That the 1st Plaintiff whose mother Nako, was from the Charwe gate of the Ami-Narh family, became a member of his mother's family – the Ami-Narh family by operation of Krobo customary law."*

We observe from the ROA part 1 that, two of the issues set down for trial in the 1st suit were: (i) whether or not plaintiff (1st plaintiff) is a member of the Ami-Narh family of Adjikpo Adawuranya and (ii) whether Plaintiff (1st Plaintiff) is the head of the 1st & 2nd defendants' family?

In our view, the averment in paragraph 13 of the *"Reply Cum Defence to Counterclaim"* cannot be mischievously construed as a clear admission of the fact

that 1st Plaintiff is not a member of the Ami-Narh family and to resolve the above issues in favour of Defendants/Respondents based on affidavit evidence.

From the ROA part 1, these contentious issues were being tried in the 1st suit. Indeed, the trial had reached a point where 1st Defendant/Respondent's lawful attorney was to be cross-examined on 19th December 2017. Yet, in a manner which is incomprehensible to us, the trial judge entertained an application for judgment on admissions filed by the lawful attorney for 1st Defendant/ Respondent's lawful attorney. The ruling in that application terminated the trial and so the 1st Defendant/Respondent got away without being cross-examined thoroughly.

We have examined the record very carefully and considered the respective submissions of Counsel and hold the view that, there was no basis for the trial court to have entertained the applications brought under Order 23 rule 6(1) of C.I. 47 having regard to the circumstances of the case and the stage reached. These are our reasons.

First, for **Order 23 rule 6 (1) of C.I. 47** to be properly invoked, there must be a clear and unambiguous admission which leaves no other important issues to be determined. In the present case, there was no such unequivocal admission. Apart from the lingering issue of Krobo customary law as regards the family to which a child born out of wedlock belong, the supplementary affidavit in opposition filed by 1st Plaintiff which is at page 80 of the ROA part 1, negatived every intention to unequivocally admit that 1st Plaintiff is not a member of the Ami-Narh family. **Pomaa v. Fosuhene (1987-88) 1 GLR 244** is a good authority for the principle that, judgment on admissions would not be given unless the

admission was clear and unequivocal. The case of **Opoku & others v. Axes Co Ltd (No.2) (2012) 2 SCGLR 1214**, is very apt. On the question of admissions, the Supreme Court speaking through Gbadegbe JSC had this to say at page 1227:

> *"Once there has been such an unequivocal admission before a court in respect of a claim or part thereof as was done in the case before us and not withdrawn there cannot be in principle an objection to a decision based thereon."*

Second, where a serious question is left to be determined or argued, or the matter cannot be conveniently tried on a motion, it would be inexpedient to apply this rule. On this point, the case of **Adjavon v. Ghana Industrial Holding Corporation (1980) GLR 135**, comes in handy. It was held therein (holding 1) that:

> *"The rule enabling judgment to be obtained on the pleadings under Order 32, r. 6 of L.N. 140A applied where there was no controversy, and the matter was clear and unequivocal.* ***Again, where there was a serious question of law to be argued the rule would not be applied****."*

Third, the rule cannot be invoked after trial had commenced as in the case before us. On this point, the Court of Appeal decision in **Kofi III v. Akrasi II (1992-93) GBR 1012,** is very apposite. In that case, the Plaintiff instituted an action in the High Court, and among other things, sought a declaration that defendant had forfeited his right to farm on the disputed land because defendant had laid adverse claim to it. Pleadings were filed and the hearing was ongoing. However, before Plaintiff closed his case, Defendant filed an application for dismissal of Plaintiff's case as a result of alleged admissions made by Plaintiff. The trial judge granted the application, terminated the hearing and entered judgment for Defendant.

Dissatisfied, Plaintiff appealed on the grounds that it was contrary to natural justice for the court to deny him the opportunity to state his case in full and that the decision has resulted in substantial miscarriage of justice. In allowing the appeal, Court of Appeal took the view that *"there was no legal justification for the procedure adopted by the trial court in stopping the plaintiff from completing his testimony and then giving judgment against him."*

To the extent that the trial to determine the very question raised in the motion for judgment on admissions was in progress, we reiterate that, it was wrong for the trial court to have entertained the said application in the first place. Moreover, considering the totality of the affidavit evidence, the exhibits attached thereto and the pleadings filed in the first and 2nd suits, there was no unequivocal admission that 1st Plaintiff is not a member of the Ami-Narh family. Therefore, the trial judge's ruling to the contrary cannot be justified and we hold that the said ruling is against the weight of the affidavit evidence.

The appeal succeeds on this ground.

GROUND D

The Learned trial judge erred when he ordered that the 1st Defendant/ Respondent be appointed as the head of the Ami-Narh Family

On this ground of appeal, Counsel for Plaintiffs/Appellants has argued, and rightly so in our view that, the trial judge went beyond what the parties themselves had submitted to the court for determination by ordering the removal of 1st Plaintiff/ Appellant as head of Ami-Narh family and appointing 1st Defendant/Respondent as Head of the said family. Counsel also rightly contended that under customary

law, it is the exclusive preserve of a particular family to appoint or remove its Head.

Without any intention to disrespect Counsel for the Defendants/Respondents, his contrary submissions on Ground D are quite unfortunate. Counsel argued that, 1st Plaintiff not being a member of the Ami-Narh family has no locus to complain about the affairs of that family; no member of the family is aggrieved by the orders of the trial judge and this ground is merely technical. We disagree with these submissions and would reject the same.

What is the alleged technicality raised in this ground of appeal? We see none! Considering the consequential orders made by the trial judge, Ground D deserves a quick judicial intervention. At the risk of sounding repetitive, I reproduce the orders complained of for emphasis as follows:

> *"…I hereby order that: (1) plaintiff should hand over the office to the family to 1st and 2nd defendants; (2) The family of Ami-Narh should immediately appoint 1st defendant as the family head; (3) Whoever is appointed as a family head must also select at least 3,4 or 5 principal members to assist him as family head; (4) The new family head is hereby cautioned that family properties are not disposed of without the concurrence of the principal members of the family; (5) The disposition of the family land made by 1st and 2nd defendants is void since it was made without the consent of the family; (6) I also direct that, the family land site plan with plaintiffs should immediately be handed over to the defendants…"*

Concerning the power to appoint a head of family, it was decided in the case of **Edah v. Hussey (1989-90) 1 GLR 359, CA** that:

"… the appointment was made by the family at a meeting where they would look for the person who in their discretion was best suited for the post…the appointment could be made by popular acclamation or acknowledgment…"

In an earlier case of **Re Katahena & Dzuali (1962) 1 GLR 449**, the court applied the decision in **Lartey v. Mensah & Dedei (1958) 3 W.A.L.R 410** that:

"The appointment of head of a family should be made by all the principal elders of the family at a family meeting. When it is intended to make an appointment, a notice convening a family meeting and stating the intention to appoint at such meeting should be given to all those entitled to attend and participate in the appointment. Failure to give such notice renders invalid any appointment made at a meeting from which any elders entitled to participate in the appointment are absent unless such absent elders subsequently ratify the appointment thus made."

See also: **Welbeck v. M. Captan Ltd & another (1957) 2 WALR 47**.

Whether 1st Plaintiff/Appellant is a busy body or not as alleged by Counsel for Defendants/Respondents, all the authorities lead to the irresistible conclusion that, it is the family concerned which appoints its own head of family. Consequently, no court has power to appoint and impose a person as head of any family and direct the person to select principal family members. Nevertheless, the jurisdiction of a court could be invoked to pronounce on the validity or otherwise of such an appointment or removal as happened in the case of **Ofori v. Annan & another (1962) 1 GLR 255**.

In our opinion, the trial judge exceeded his jurisdiction by ordering the Ami-Narh family to "*immediately appoint 1st defendant as the family head"* and for the 1st

Plaintiff to hand over the office of head of family to the family of 1st and 2nd defendants. These, and the other consequential orders made by the trial judge ought to be set aside.

For these reasons, the appeal succeeds on Ground D.

GROUND A

The Plaintiffs/Appellants were denied their right to a fair trial when the Learned Trial Judge did effectively deny Counsel for Plaintiffs/ Appellants the opportunity to cross-examine the 1st Defendant/Respondent on the content of his witness statement.

Counsel for Plaintiffs/Appellants contended that under our adversarial legal system, a party has an unfettered right to cross-examine his or her opponent on the testimony given by that opponent. Counsel argued further that, any judgment founded on evidence which is not cross-examined upon is a nullity. It was also his contention that, by truncating the trial before the completion of the cross-examination of 1st Defendant/Respondent's lawful attorney in the 1st suit, Plaintiffs/ Appellants were denied their right to a fair trial. He urged this court to set aside the ruling of the Circuit Court on the basis of the denial of fair trial mentioned above. Cases cited and relied on by Counsel in support of these arguments included: **Mensah & Another v. Donkor (1980) GLR 825; Atuahene v. Commissioner of Police (1963) 1 GLR 448 and Banda v. The Republic (1975) 1 GLR 52.** All these cases underscore the need for cross-examination of evidence given by an opponent.

We observe that, as between parties to a suit and their witnesses, cross-examination is a matter of choice. A party who elects to cross-examine his or her opponent cannot be denied that right. However, where the evidence sought to be cross-examined upon was admitted by the opponent or his witnesses, cross-examination would not achieve any useful purpose and in that case, non-cross examination will not be fatal. We observe further that, under the rules of evidence, a court has discretion in dealing with evidence which was not subjected to cross-examination. What readily comes to mind is **Section 62 (2) of the Evidence Act, 1975 NRCD 323**, which provides as follows:

> *"(1) At the trial of an action, a witness can testify only if the witness is subject to the examination of the parties to the action, if they choose to attend and examine.*
>
> *(2) Where a witness who has testified is not available to be examined by the parties to the action who choose to attend and examine, and the unavailability of the witness has not been caused by a party who seeks to cross-examine the witness**, the Court may exclude the entire testimony or a part of the testimony as fairness requires**."*

From the foregoing, it is correct to say that, depending on the peculiar circumstances of each case, a court may jettison the entire testimony which was not subjected to cross-examination, or take into account part of the testimony as fairness requires. In doing so, a court must caution itself on the dangers in relying on testimony which has not been tested by way of cross-examination.

A very basic question which begs for answers is, whether the trial judge's act of unilaterally truncating the cross-examination of 1st Defendant/Respondent's

lawful attorney in the 1st suit and the preliminary trial to determine the issue of capacity in the 2nd suit is unfair and has resulted in travesty of justice? We think so!

We are in agreement with the submissions by Counsel for Plaintiffs/Appellants to the effect that, the trial judge ought to have allowed cross-examination of 1st Defendant/Respondent's lawful attorney in the 2nd suit to be completed. Also, evidence had been adduced on whether or not 1st Plaintiff/Appellant in the 1st suit is a member of the Ami-Narh family and cross-examination of Defendants/ Respondents lawful attorney on his witness statement was essential to the success or otherwise of Plaintiffs/Appellants' case in the 1st suit.

Having examined the submissions by Counsel for Defendants/Respondents under this ground of appeal, we are unable to agree with Counsel and we reject the same. It appears to us that, the trial judge was oblivious to the need to try the question of capacity of Plaintiffs/Appellants in the 1st suit as a preliminary issue. The affidavit evidence subsequently relied on by the trial judge to determine the capacity of 1st Plaintiff in the 1st suit was insufficient because the depositions therein which had been denied, were inconclusive.

In our respectful opinion, Plaintiffs/Appellants were denied a fair trial when cross-examination of 1st Defendant/ Respondent's lawful attorney was truncated in the 1st suit, and the trial judge proceeded to rule on 1st plaintiff's capacity in the two suits as if they had been consolidated.

There is merit in this ground of appeal and the same succeeds.

CONCLUSION

Having performed our re-hearing function, we are very satisfied that, there was no legal justification for the procedure adopted by the court below in truncating the trial and giving judgment against the Plaintiffs/Appellants in the 1st suit based on an application brought under Order 23 rule 6(1) of C.I. 47. Apart from the strange course adopted by the court below, the ruling, dated 3rd August 2018 cannot also be supported by the weight of the affidavit evidence. We conclude that, the said ruling ought to be set aside on grounds of procedural blunders, denial of right to fair trial and excess of jurisdiction in making the consequential orders complained of. The appeal succeeds in its entirety.

DECISION

In **Suit No. C1/05/2011 (first suit)**, we allow the appeal, set aside the ruling dated 3rd August 2018, and dismiss the *"Motion on notice for an order for admission of the truth of a fact"*, filed on 14th December, 2017 pursuant to Order 23 rule 6(1) of C.I. 47.

In **Suit No. A1/08/2017 (2nd suit)** , we allow the appeal, set aside the ruling dated 3rd August, 2018 and dismiss *the "Motion on notice for an order affirming the admission of 1st defendant, David Akweter Nakotey that he is a member of a Charway clan"*, filed on 11th January, 2018.

Subject to the transfer powers of the Chief Justice under section 1**04 of the Courts Act, 1993 (Act 459),** we recommend the transfer of the two suits to a different Circuit Court by the Supervising High Court, Eastern Region, to be determined in accordance with law.

We award cost of Twenty Thousand Ghana Cedis (GH₵20,000.00) in favour of Plaintiffs/Appellants in 1st Suit and Defendants/Appellants in 2nd Suit.

Sgd.
A. MENSAH-HOMIAH (MRS.)
(JUSTICE OF APPEAL)

SOWAH, J.A. – I agree.

Sgd.
C.H. SOWAH (MRS.)
(JUSTICE OF APPEAL)

OPPONG, J.A. – I also agree.

Sgd.
A. OPPONG
(JUSTICE OF APPEAL)

COUNSEL:

- **OSMAN GYAN FOR PLAINTIFFS/APPELLANTS IN 1ST SUIT AND DEFENDANTS/APPELLANTS IN SECOND SUIT**
- **JONATHAN ALUA FOR DEFENDANTS/RESPONDENTS IN 1ST SUIT AND PLAINTIFFS / RESPONDENTS IN 2ND SUIT.**