

**IN THE SUPERIOR COURT OF JUDICATURE  
IN THE COURT OF APPEAL  
KUMASI AD 2022**

*CORAM:*

*A. M. DOMAKYAAREH (MRS) J. A. PRESIDING*

*A. B. POKU-ACHEAMPONG, J. A.*

*S. K. A. ASIEDU, J. A.*

**SUIT NO.: H1/21/2022**

**DATE: 28<sup>th</sup> JULY, 2022**

**1. COLLINS AMPONSAH BOATENG**

**(Customary successor of the late  
Benjamin Kofi Gyimah and the Head  
Of family of the matrilineal family of  
the late Opanin Kwame Kumah,  
Opanin Frimpong, Opanin J. Y. Adade,  
Superintendent Akuoko, Kwaku Antwi and  
others at Oyoko, Ashanti for himself and  
also as the Head of the material family.**

**H/No.: BE 59 Oyoko – Ashanti substituted by  
Samuel Owusu Wireko)**

**PLAINTIFF/APPELLANT**

## VRS

1. RETIRED MAJOR YAW AGYENIM BOATENG

(H/No: 103, New site Buokrom)

2. K. APPIAH BOATENG

(H/NO.: 14, 69<sup>TH</sup> St. Bremang, Kumasi)

3. EDWARD APPIAH

01.284, Old Tafo-Kumasi

DEFENDANTS/RESPONDENTS H/No.:

4. B. E. ADU MANU

Near CCC Chapel, Ketinkrono, Kumasi

Executors/Administrators of the last will &

Testament of the late B. K. Gyimah

of Oyoko, Ashanti.

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## J U D G M E N T

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### POKU-ACHEAMPONG, J.A.:

This is an appeal against the judgment of a Kumasi High Court dated 10<sup>th</sup> February, 2020. In this judgment, for reasons of convenience, the parties shall retain the designations used in the Trial Court. Thus we shall refer to the Plaintiff/Appellant as the Plaintiff and the Defendants/Respondents as the Defendants.

Per his writ of summons issued on 8/10/14 the Plaintiff Collins Amponsah Boateng averred that he was the customary successor of the late Benjamin Kofi Gyimah, and the Head of the matrilineal family of the late Opanin Kwame Kumah, Opanin Frimpong, Opanin J. Y. Adade, and Superintendent Akuoko all of Oyoko, Ashanti. He claimed against the Defendants jointly and severally the following reliefs:

- (a) A declaration that H/No. O. I. 59, Ashanti New Town, Kumasi is the family property of the Plaintiff's said matrilineal family and therefore the said late testator Benjamin Kofi Gyimah had no testamentary capacity to have purported to devise the same to certain purported beneficiaries named in the Last Will and Testament dated 4<sup>th</sup> day of May 2014.
- (b) A declaration that H/No. A.H. 16 Oyoko, Ashanti, is the family property of the Plaintiff's matrilineal family and therefore the said late testator, Benjamin Kofi Gyimah had no testamentary capacity to have purported to devise the said property to certain purported beneficiaries in his said last Will and Testament dated 4<sup>th</sup> day of May 2014.
- (c) Recovery of possession.
- (d) An order of accounts in respect of the storerooms let out to tenants thereat.
- (e) Any further relief or order that may be appropriate or necessary in the circumstances of this case including an order of perpetual injunction restraining the Defendants, their servants or agents or any other persons including the purported beneficiaries named in the said Will of the said late testator, Benjamin Kofi Gyimah, from in any way interfering with the Plaintiff's title to, or possession of the said properties or otherwise dealing with the said properties in any other way contrary to the Plaintiff's exclusive title thereto and possession to the said properties.

### **The Case of the Plaintiff**

It is the case of the Plaintiff that he is a member of the same family as the late B. K. Gyimah whose last Will and Testament had become the subject of controversy in the instant suit.

According to the Plaintiff, he is from the Oyoko clan of the Oyoko town, Ashanti, with one Madam Ayowa being his ancestress. It is the case of the Plaintiff that his ancestress Madam Ayowa begat two daughters namely Madam Afoa and Madam Tanoah. The Plaintiff continued that Madam Afoa begat Opanin Frimpong, Opanin Kwame Kumah, Superintendent Akuoku and Akua Fokuo. (Akua Fokuo, the only daughter of Afoa begat Madam Koto, Opanin Joseph Yaw Adade, Opanin Benjamin Kofi Gyimah and Yaa Kani. Madam Abena Koto, a daughter of Akua Fokuo begat Opanin Kwaku Kodua and Madam Aboagyewaa.)

Per the testimony of the Plaintiff, Madam Tanoah the other daughter of Ayowa (his ancestress) begat Akosua Sakaa and Madam Amma Ketewa. Madam Akosua Sakaa begat Yaa Achiaa, Opanin Kwaku Antwi, Opanin Kwaku Frimpong and Adwoa Fordjour. The Plaintiff continues that Yaa Achiaa begat him and others.

It is the case of the Plaintiff that the late Kwame Kumah, a son of Madam Afoa acquired property No. O. I. 59, Ashanti New Town, Kumasi whilst Opanin Frimpong, Opanin Kwame Kumah and Superintendent Akuoko who are all children of Afoa acquired House No. A. H. 16 Oyoko, Ashanti.

According to the Plaintiff, upon the death of Opanin Kwame Kumah, he was succeeded by his uterine brother, Superintendent Akuoku and Joseph Yaw Adade, a nephew of Superintendent Akuoko succeeded him (Supt Akuoku) on his death.

It is the case of the Plaintiff that when Opanin Kwaku Antwi, who is from the lineage of Madam Tanoah died, he was succeeded by Joseph Yaw Adade from the lineage of Madam Afoa. When J. Y. Adade died, he was succeeded by his uterine brother B. K. Gyimah and he the Plaintiff has succeeded B. K. Gyimah.

It is the case of the Plaintiff that two houses numbered O. I. 59 Ashanti New Town and A. H. 16 Oyoko Ashanti had become the properties of the family of his ancestress, Madam Ayowa and so the late B. K. Gyimah had no right to devise them in his Last Will and Testament and so filed a caveat against the Will and it is the filing of the caveat that had led to the present suit.

### **The case of the Defendants**

The Defendants who are the Executors of the Last Will and Testatment of the late B. K. Gyimah traced the ancestry of B. K. Gyimah to Adwoa Tanoah. Adwoa Tanoah who was the only child of her parents begat one child called Yaa Afoa.

According to the Defendants, Yaa Afoa got married to Nana Kofi Asare of Oyoko and their marriage produced five (5) children namely; Kwesi Addae, Kwame Boakye, Kwame Kumah, J. R. Akuoku and Akua Fokuo.

It is the case of the Defendants that Akua Fokuo the only daughter of Yaa Afoa gave birth to four (4) children, namely; Abena Abrafi alias Abrafi Koto, Joseph Yaw Adade, Benjamin Kofi Gyimah (B. K. Gyimah) and Yaa Kani. Yaa Kani died at age 14 not having any child.

According to the Defendants, Abena Abrafi alias Abrafi Koto gave birth to two children namely Kwaku Koduah, Akosua Aboagyewaa who was not survived by any child and

died in 2003. Thus according to the Defendants, there were two sisters of B. K. Gyimah namely; Abena Abrafi and Yaa Kani who died at age 14 without a child. Abena Abrafi begat two children namely: Kwaku Kodua and Akosua Aboagyewaa who did not have a child.

It is therefore the case of the Defendants that Abenaa Abrafi alias Abrafi Koto, the only surviving sister of J. Y. Adade and B. K. Gyimah died in 1995 and her only daughter, Akosua Aboagyewaa, was not survived by any child and died in 2003. Thus, according to the Defendants, as at 1995 the only surviving members of the family of the late Yaa Afoa were J. Y. Adade and B. K. Gyimah.

According to the Defendants, the death of Abrafi Koto the only sister of J. Y. Adade and B. K. Gyimah in 1995 shattered the two brothers particularly B. K. Gyimah as her death according to the Defendants' meant that the only surviving members of the family were B. K. Gyimah, his brother J. Y. Adade and their only niece Akosua Aboagyewaa who was also not survived by any child.

In 1998, the late J. Y. Adade conveyed property number O. I. 59 which was acquired by their deceased uncle Kwame Kumah to B. K. Gyimah, as the only other surviving brother. B. K. Gyimah died testate on the 7<sup>th</sup> day of July 2014 and his Will was read at the Registry of the High Court on 3<sup>rd</sup> September, 2014.

It is the case of the Defendants that as at the time of his death in 2014, the late B. K. Gyimah was the only surviving member of the family of the late Yaa Afoa and as such had every right and capacity to devise properties numbered O. I. 59 Ashanti New Town and A. H. 16 Oyoko Ashanti in his Will.

The Defendants denied that the Plaintiff is a member of the immediate family of the late B. K. Gyimah. They also denied that he is the Head of family of the late B. K. Gyimah and the customary successor of the late B. K. Gyimah.

### **Decision of Trial Judge**

The Trial Judge on 10/2/2020 gave judgment for the Defendants and stated inter alia as follows:

*“I hold that the late B. K. Gyimah had no family member matrilineally to inherit him after his death. The Plaintiff having failed to establish any matrilineal link with the late B. K. Gyimah and his family I uphold the objection raised by the Defendants that the Plaintiff was not clothed with the capacity to issue the writ of summons against the Defendants and go ahead to dismiss the writ of summons.”*

### **Notice of Appeal**

Aggrieved and dissatisfied with this decision the Plaintiff filed a Notice of Appeal on 24/02/20 with the following grounds of appeal.

1. The judgment is against the weight of evidence adduced on record.
2. The Judge erred in Law when he held that the Plaintiff has no capacity to institute this action.
3. The costs of GH¢10,000.00 awarded against each of the Defendants/Respondents totaling CH¢40,000.00 who were represented by the same Counsel is excessive and unjustifiable.
4. Additional grounds of appeal will be filed when the record of proceedings is received.

It must be remarked that no additional grounds of appeal were filed by the Plaintiff.

By this appeal the sole relief the Plaintiff is seeking is *“To set aside the judgment and orders contained in the said judgment and give judgment in favour of the Plaintiff/Appellant.”*

### **Ground One**

This is the omnibus ground that the judgment is against the weight of evidence.

It is trite law that an appeal to this Honourable Court is by way of re-hearing. See Rule 8(1) of the Court of Appeal Rules 1997, C.I. 19.

In the case of *Nortey (No. 2) Vrs African Institute of Journalism & Communication & Ors (No. 2) [2013-2014] 1 SCGLR 703* the apex court speaking through Akamba (JSC) stated as follows:

*“This court has stated in numerous cases such as*

*Tuakwa vrs Bosom [2001-2002] SCGLR 61 and 65.*

*Quarcoopome Vrs Sanyo Electric Trading Co. Ltd [2009] SCGLR 43 at 229.*

*Oppong Vrs Anarfi [2011] 1 SCGLR 556 that an appeal is by way of rehearing, particularly, where the Appellant alleges as in the omnibus ground that the decision of the trial court is against the weight of evidence.*

*In such a case it is incumbent on an appellate court such as this in a civil case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision so as to satisfy itself that on a preponderance of probabilities, that the conclusions of the trial judge are reasonably or amply supported by the evidence.”*

See also:

*Otoo & Another Vrs Dwamena [2018-2019] 1 GLR 23 at 28*



Olivia Anim Vrs William Dzandzi (Unreported) Civil Appeal No. J4/10/2018 6<sup>th</sup> June 2019.

Again, in respect of an appellant who puts forward such a ground of appeal the onus on him is as stated eloquently in the locus classicus case of Djin vrs Musah Baako [2007-2008] SCGLR 686.

Such an appellant is to demonstrate fully and clearly to the appellate court the errors, weaknesses and faulty findings or conclusions contained in the judgment being assailed which if corrected will tilt the verdict in his/her favour.

We would in this opinion have to determine whether the Plaintiff/Appellant has satisfied the above conditions imposed on him as an Appellant.

### **The issue of Capacity**

The issue of capacity is a key issue in this matter and we will determine that first.

The issue of capacity could be seen in the first issue in the Application for Directions (page 20 of the Record of Appeal) as follows:

“Whether or not the Plaintiff is the customary successor of the late Benjamin Kofi Gyimah and the Head of that family.”

The issue of capacity again reared its head during the trial when an application was brought by the Plaintiff to substitute the original Plaintiff who unfortunately passed away after he had given evidence and been cross examined. The application by way of a motion on Notice for Substitution to replace the original Plaintiff with Samuel Owusu Wireko was

fiercely resisted by the Defendants in their Affidavit in Opposition. See paragraphs 6, 7, 8, 9, 10, 11 of the Affidavit in Opposition at page 305 of the ROA.

Although the Learned Trial Judge granted the application for substitution, according to him, to enable the case to go on and be heard on its merits he was later on to decide that the Plaintiff did not have capacity.

In the case of the Republic Vrs High Court, Accra: Ex Parte Aryeetey (Ankrah Interested Party) [2003-2004] 1 SCGLR 398 at 405 the apex court per Kpegah JSC dealt extensively with the issue of capacity and delivered itself as follows in holding 2:

*“The requirement that a party endorses on the writ the capacity in which he sues is to ensure that a person suing in a representative capacity is actually invested with that capacity and therefore has the right to sue. Whether a person who has sued in a representative capacity, indeed has the capacity he claims to have or not, is a question of fact, and if challenged he must prove same to avoid his suit being dismissed since it is analogous in our view, to taking an action against a non-existent defendant. But if the representative capacity he claims is not challenged, naturally a Plaintiff assumes no such burden.”*

Again in the case of *Kasseke Akoto Dugbartey Sappor & 2 Ors (substituted by Atteh Sappor) Vrs Very Rev. Solomon Dugbartey Sappor (Substituted by Ebenezer Tekpetey Akwetey Sappor) & 4 Ors* [2021] 171 GMJ 33 the Court stated as follows:

*“There is no gainsaying the fact that the capacity to bring and maintain the action remains a cardinal hurdle that must be jumped if either party is to remain in the case. It is for good reason that Order 2(4) of the High Court (Civil Procedure) Rules 2004 I. C. 47 (as amended) insist on the capacity of the Plaintiff being indorsed on the writ before it becomes a competent writ ... One’s ability to appear in court to make a claim hinges on whether one is recognized in law as having sufficient*

*interest in any matter to seek a hearing on any particular issue. And of course this sufficient interest must remain throughout the life of the case, or one's legal ability to stay connected with a case making its way through the courts would be lost."*

In his bid to prove his capacity and establish that he belongs to the family of B.K. Gyimah and was the customary successor and Head of Family Plaintiff tendered in evidence the Family Tree of his family (See page 19 of the ROA) and traced his roots to the common ancestress Madam Ayowa who begat the two matriarchs Madam Afoa and Madam Tanoa. He argued that previously J. Y. Adade of the line of Madam Afoa had successfully "crossed over" to succeed Kwaku Antwi who was in his Plaintiff's family line and as such he could also cross over to succeed B. K. Gyimah. He relied on section 26 of the Evidence Act NRCD 322 to plead estoppel by conduct against the Defendants arguing that if they looked on and allowed the crossover of J.Y. Adade to succeed Kwaku Antwi then they were estopped from raising any arguments against him.

He contended that the two family lines constituted one family and the family of B. K. Gyimah could not be said to be extinct with the passing away of B. K. Gyimah as there were other members of the family in the Tanoa line.

Plaintiff argued further that the incident of the reading of tribute by B. K. Gyimah and his lamentations that with the death of J. Y. Adade, he B. K. Gyimah was the only survivor of the Afoa family was not a solid argument as such lamentations and emotional breakdowns amidst raw grief was a common occurrence at burial and funeral services.

The Plaintiff also referred to Exhibits 'A' and 'A1' the funeral cards of Adade and Antwi to demonstrate his direct connection to the B. K. Gyimah line of the family.

The Defendants in response vehemently denied this claim and argued that the Plaintiff had failed to produce the cogent evidence required to prove his capacity.

In his response, counsel for Defendants referred to the cross-examination of the Plaintiff and what transpired, as follows, to support their contention that the Plaintiff had failed to prove his capacity.

*Q: You want the honourable court to believe that two members of your family went behind you as Head of Family and executed Exhibit 'F'*

*A: My Lord, that is not true. At the time of the execution of this document, I was not the Abusuapanin*

*Q: If at the death of J. Y. Adade you were the Family Head, then at the time of executing Exhibit 'F' you were the Family Head at the time*

*A: My Lord, I became Abusuapanin in 2001*

*Q: Please whom did you succeed as Abusuapanin of B. K. Gyimah's family?*

*A: My Lord, I succeeded J. Y. Adade*

(See page 242 of the Record of Appeal (ROA))

(Exhibit 'F' is the deed of assignment dated 31/08/1998 executed between J. Y. Adade as Assignor to B. K. Gyimah as Assignee)

Counsel for Defendants contend that when it was pointed out to the Plaintiff that he could not have succeeded J. Y. Adade in 2001 because J. Y. Adade was alive in 2001, the Plaintiff changed his story to state that he was nominated by J. Y. Adade.

This is what transpired at the cross-examination: (See page 243 of the Record of Appeal (ROA))

*Q: I am putting it to you that you did not succeed J. Y. Adade for J. Y. Adade was not even dead in the year 2001*

*A: My Lord, he nominated me and introduced me to the Chief.*

The Plaintiff subsequently under cross-examination stated that some of the elders of the family who were present when he was appointed Abusuapanin were J. Y. Adade and B. K. Gyimah.

The question may be asked as to what may have led or necessitated the appointment of Plaintiff as the Head of Family of J. Y. Adade at a time when the Head of Family J. Y. Adade himself was alive. The evidence from the ROA show that J. Y. Adade died in 2006.

From the above responses it is difficult not to agree with Counsel for Defendants that the Plaintiff's evidence was not credible and sufficient to prove that Plaintiff was the Head of Family of B. K. Gyimah.

Another piece of inconsistency in Plaintiff's case is seen in the following cross-examination of PW2, Kwame-Gyebi his witness. (See page 285-286 of the ROA)

*Q: When did he (Plaintiff) assume that position?*

*A: He was elected after the demise of B. K. Gyimah. He was elected*

*Q: And where did the election take place?*

*A: Oyoko*

*Q: Do you recall the date or the year of the said election?*

*A: I cannot remember the very date but it was the day the family elected him as customary successor that he was elected to replace him.*

*Q: You make mention of the fact that the Plaintiff was elected as a customary successor not Head of Family. Is that right?*

A: *That is so. But after the death of B. K. Gyimah, it got to the Plaintiff's turn to become Head of Family.*

Q: *Appointment of Head of Family is not by right. It is by the family*

A: *The family elects*

Q: *The Plaintiff has said in this court that he succeeded B. K. Gyimah long before his death as Head of Family.*

A: *That is not true*

We see from above that PW2 Plaintiff's own witness contradicts Plaintiff's evidence that he was elected the Head of Family even during the life time of J. Y. Adade. Counsel for Defendants in his submissions draws the court's attention to this contradiction and contends, quite rightly, that the Plaintiff could not prove his capacity with the said inconsistencies and contradictions.

The issue of marriage between or among clan members also comes up as one of the factors to be considered in determining the credibility of the Plaintiff.

Counsel for Defendants submitted that the Plaintiff in his case created the impression that he and B. K. Gyimah families are of the Oyoko clan and hail from the town of Oyoko in Asante.

The Defendants deny this assertion and claim that they are of the Aduana clan. The Defendants argued that if the family of B. K. Gyimah, J. Y. Adade are all of the Oyoko clan (Abusua) then J. Y. Adade could not have married Afua Saah the queenmother of Oyoko who was from the Oyoko Royal family.

Both Plaintiff and PW1 admitted under cross-examination that two persons from one clan in this case the Oyoko clan cannot marry.

In his book, *The Law on Family Relations in Ghana* (published by Black-Mask Limited, 2019). Prof. W. C. Ekow Daniels in Chapter 1 on Family Relationship at page 24 states as follows:

*“Members of a family who are descended lineally through the female or the male from a common ancestor or ancestress are in exogamous relationship with another. Hence, according to early customary law, a person of one clan (Abusua) could under no possible circumstances marry or have sexual intercourse with anyone who belonged to his or her clan. Intermarriage between members of the clan according to Rattray was forbidden. “Infringement of this law was punished by death or expulsion from the clan, for both parties concerned.” The old sanctions are no longer enforced with such degree of severity.”*

Looking at the circumstances of this matter, i.e. that the marriage between J. Y. Adade and Afua Saah the Queenmother may have been contracted long ago and involved a royal it is most unlikely that the rule would have been breached for them to face the severe sanctions stated above.

Further, in the said book in the same chapter, at page 34-35 the learned author Prof. Daniels deals with the issue of how to fill a vacancy in the position of a Head of Family and states as follows:

*“A vacancy may arise during the tenure of office of the head in the event of misconduct, retirement, or abdication or death. Ollennu lists three ways whereby a person may become a Head of Family in the event of removal, abdication or death of the incumbent head. They are:*

- (i) By formal election or appointment*
- (ii) By popular acclamation or acknowledgment, and*
- (iii) In the absence of appointment or acclamation, the eldest male member of the family*

- (iv) *Failing him, the eldest female member of the family is automatically the Head of the Family."*

The case cited for the principle of appointment of a head of family by formal decision is that of *Lartey v. Mensah and Dedei & Others* (1958) 3 WALR 410 at 411 in which the court held as follows:

*"The appointment of a Head of 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."*

From the evidence adduced by Plaintiff in respect of his appointment as Head of Family of B. K. Gyimah family, it is most apparent that these guidelines were not complied with.

It is clear that, his appointment, if ever there was such an appointment, was not done by the principal elders of the family. There is no evidence of any notice being given to attend and participate in a meeting to appoint a head of Family.

In his book, **"Principles of Customary Land Law in Ghana"**, the eminent Jurist Ollennu has posited that a formal election or appointment of a Head of family is not absolutely necessary, the family may by informal acknowledgement or acclamation constitute a valid head of the family.



The evidence does not show that there was an informal acknowledgement or acclamation by members of the B. K. Gyimah family to make Plaintiff their Head of Family. Thus, on even this less formal and rigorous test the Plaintiff's evidence does not satisfy the condition or meet the requirements.

The counsel for Defendants further argue that the Plaintiff was not the Head of the J. Y. Adade family at the time of J. Y. Adade's death. If he were, he would have been the one to challenge the distribution of the family properties when they were being dissipated or distributed.

#### **Common Ancestress and Crossover:**

The next important issue to deal with is the Plaintiff's counsel's submission that even though the lineage of Yaa Afoa may be extinct, the wider extended family could inherit the properties of the extinct family.

Counsel for Defendants disagrees with this and refers to the following cases as authorities in support of his position:

*Andrews v. Hayford [1982-83] GLR 214*

*Okine v. Welbeck [2013-2014] 2 SCGLR 1335*

In the *Andrews v. Hayford* case, the court at holding 2 held as follows:

*"Plaintiff having died intestate, his self-acquired properties became his family properties to be enjoyed by members of his immediate family. Members of the immediate family in the case of a deceased male according to Fanti custom consisted of the mother of the deceased and the mother's matrilineal descendants. It was that class which had the beneficial enjoyment and control of the self-acquired properties of which he died intestate."*

Again in the case of *Okine v. Welbeck* [2013-2014] 2 SCGLR 1335 the apex court in its unanimous decision in which it allowed the appeal by the defendant and set aside the judgment of the trial High Court and the Court of Appeal stated as follows:

*“The clearly established principle is that in a matrilineal system of inheritance, the self-acquired property of a deceased intestate is inherited by his immediate family and that family has the right to dispose of the same.*

*In the instant case the only surviving members of the immediate family of the deceased intestate the original owner of the disputed property, a native of James Town, Ga Mashie, where the system of inheritance is matrilineal and who died on 21<sup>st</sup> August, 1973, competently conveyed it to the defendant. The Plaintiff Grace Ayeley Welbeck and the other members of the family on whose behalf she sued had only realistically a spes successions to that property which by reason of its sale to the Defendant –appellant – cannot be attained”*

At page 1339 of the Okine case mentioned supra, the apex court cited with approval the case of *Duodu vs. Kwasi* [1992] 1 GLR 109 in which Lartey J.A. (as he then was) stated inter alia as follows:

*“It is settled customary law that upon a death of a person intestate, although his self-acquired property becomes the property of the whole family, the immediate and the wider family together – the right to immediate or beneficial enjoyment in it and to the control, use and present possession of it vest in the immediate or branch family alone... It is the immediate family and not the extended family which has the power to alienate the property by virtue of its possession of the right to the beneficial enjoyment of the property. Those members of the extended family who do*

*not belong to the immediate family are excluded from enjoyment of the property until the extinction of the immediate family."*

The above dictum makes the issue very clear and it is our position that the principle is applicable to the instant case even though B. K. Gyimah died testate and not intestate.

See also the case of *Manu Vrs Nisiah* [2005-2006] SCGLR 25 holdings 1 & 2. The holding 2 statement below is very apt and fits the situation in the current case.

**"In the instant case the Plaintiff's contention was that by virtue of his appointment as customary successor of the deceased (the husband of the defendant) he belonged to the matrilineal family of the deceased. This contention was hotly disputed by the Defendant who claimed that the Plaintiff was in no way related to the deceased husband nor was he appointed his customary successor following the death of the husband. The Plaintiff's contention that he belonged to the deceased's family was not supported by two of his witnesses, namely the third and fourth Plaintiff witnesses, whose evidence tended rather to support the Defendant's version that the deceased and the Plaintiff were not members of the same family.**

**Their evidence corroborated that which was led through the defendant and her witnesses that the Plaintiff's family was different from that of the deceased. The overall effect of the evidence of the third and fourth witnesses was to render the Plaintiff's case less weighty or simply incredible on the issue whether or not the Plaintiff and the deceased were of the same family. Since the Plaintiff is of a different family (as contended by the Defendant) then he has no capacity to sue in respect of property which does not belong to the family of which he is a member."**

In the instant case PW2 contradicted the Plaintiff's evidence when he said in answer to a question under cross examination that it was not true that the Plaintiff C. Amponsah Boateng succeeded J. Y. Adade long before his death as the Head of Family. This considerably weakens the Plaintiff's case.

The authorities cited above confirm, in a way, the contention of Defendants and endorsed by the Trial Judge *"that whatever the lineage of the Plaintiff he cannot cross over to the matrilineal family of the late B. K. Gyimah to inherit or customarily succeed a member of that family as expressed in the Asante customary saying that "Yenni Ayiboade", to wit we cannot crossover and inherit legacies from other families."*

Counsel for the Plaintiff in his written submission (Reply) attached a copy of the judgment in the case of ***Agyenim Boateng Vrs Akwasi Ofori & Akosua Yeboah case Civil Appeal No J4/9/2007 Unreported 5<sup>th</sup> May 2010***. This is a unanimous judgment of the Supreme Court by B. T. Aryeetey JSC (as he then was). Counsel sets much store on this judgment as the authority which should guide this court in deciding this matter.

The Agyenim Boateng's decision can however be distinguished from the facts and circumstances of this case. In that case the High Court had found one Kwasi Wono as a nominal purchaser of the property in dispute and Kwasi Teppa as the legal and beneficial owner of the property –House No. KO47, Kumasi.

The Trial High Court decided that as the legal owner of the property the said property could go to the wider family of Kwasi Teppah. On appeal the Court of Appeal in a majority decision found that Kwasi Wono was the real owner of the property H/No. KO 47. Kumasi and thus could pass it on to his immediate family.

The Supreme Court in its unanimous judgment opined that the High Court's specific and primary finding that Kwesi Teppa was the real owner of the property had been set aside without any solid evidence or grounds by the Court of Appeal. The apex court in that judgment reminds us of the trite learning on the powers of the Appellate courts in appeals. This is that on issues of the primary and specific findings, it is the Trial Court which has had the benefit of seeing the witnesses and their demeanour who are the experts. Thus in instances where inferences are to be made from the primary or specific findings that are not the major primary findings themselves the Appellate courts have the same power as the trial Court and could safely overturn the Trial Courts findings in rehearing the matter.

See Fofie Vrs Zanyo (1992) 2GLR 475.

*Cross Vrs Hillman Ltd [1969] 3 WLR 787 at 798 C.A and Lord Widgery's* caution to appellate courts as follows:

An appellate court ... *"which sees only the transcript and does not see the witness, must hesitate for a very long time before reaching a conclusion different from the trial Judge as to the credibility and honesty of a witness."*

See also Praka Vrs Ketewa [1964] GLR 423 SC

Adorkor vrs Gatsi [1966] GLR 31 at 34.

In the instant case the Trial Judge made the following statement on the basis of which he decided the case:

*"The Defendants on the other hand have proved to this court that the late J. Y. Adade and B. K. Gyimah do not belong to the same family of the Plaintiff. They also established that the family of the two brothers became potentially extinct with the death of their niece Akosua*

*Agyeiwaa the only daughter of Abrafi Koto when she died without a child. Sensing that he J. Y. Adade himself and B. K. Gyimah were the only surviving members of their family J. Y. Adade distributed and disposed off some of the properties belonging to his family during his life time and transferred the interest in House No 01. 59 Odumasi Kumasi into the name of his brother B. K. Gyimah in 1998 without the consent of the Plaintiff. After the death of J. Y. Adade in June 2006 the sole survivor of the family was B. K. Gyimah as a result he had the legal capacity to dispose of or devise any property which was left of his family either by gift or testamentary disposition.”*

In the face of the above findings and conclusions we are inclined to follow the words of caution of Lord Widgery and be very hesitant in reaching a conclusion different from that of the Trial Judge. We therefore distinguish the case of *Agyenim Boateng Vrs Akwasi Ofori & Anor* as not applicable in this case.

### **The Will of B. K. Gyimah and His Testamentary Capacity**

It is trite law that only self-acquired property and not family property can be alienated, i.e. bequeathed or devised by a testator.

The case of *Kofi Segbedzi Moses Juji & C.K. Davordzie Vrs Ashrifie Akrong [2014] (CA) Court of Appeal Civil Suit No H1/82/2013, 10<sup>th</sup> July 2014* affirms this principle.

Section 1 of the Wills Act 1971 provides that a person may make a will disposing of any property which is his or to which he may be entitled at the time of his death or to which he may be entitled thereafter.

The case of Duodo vrs Kwasi cited supra bears some similarity to this case. Lartey J, (as he then was) expounded the applicable law at pages 116-117 as follows:

*“Even though the properties in dispute have been proved to be family properties, the defendants have raised a very important point of law. They contend that since I. B. Asamoah was the only survivor of his immediate family he had the right to dispose of the properties in dispute by his will in favour of his children to the exclusion of his wider family even if they were properties inherited by him.”*

Again Exhibits 3 to 53 tendered by the Defendants (copies of which are found in the ROA pages 46 -119) are receipts for property rates, ground rent, rent demand notes paid in respect of Plot No. 01/159 Odumasi Kumasi, in the names of J. Y. Adade and B. K. Gyimah. The exhibits show that between 1984 – 2000 the receipts were in the name of J. Y. Adade and thereafter the receipts were issued in the name of B. K. Gyimah.

These show that the two at different points in time exercised rights of ownership over the property and were in possession of the property. They honoured all financial and other obligations in respect of same without any protest from any quarters.

We on the basis of the above conclude that B. K. Gyimah had the capacity to dispose of the two properties in dispute that is House No C.I 59 Ashanti New Town, Kumasi and House No. A4 16 Oyoko, Ashanti in his will.

### **Funeral Cards**

Counsel for the Plaintiff in his written submission refers to the funeral cards printed by the family on the death of Kwaku Antwi and J. Y. Adade and attaches same to the submissions as evidence that the Plaintiff is a member of the immediate family of B. K. Gyimah.

It must be said, without equivocation, that funeral invitation cards, obituaries are not good proof of the exact family relationship or connection between the deceased and those mentioned therein.

We can take judicial notice of the fact that invariably in the midst of grief and the strong desire for the bereaved to be commiserated with in this country, names pop up on such cards and are given designations which in reality are not exact or strictly accurate.

The funeral invitation cards are therefore not a good source of evidence to prove the exact relationship between people. There are several occasions when people are referred to as children, father, mother, brother or sister when in fact they really are not.

This is done for a good cause and as a way of recognizing or appreciating a key or significant role an individual may have played in the life of the deceased and not necessarily because he is family in the real sense of the word.

#### **Exhibits – Video Recording Exhibit 79**

We are of the opinion that there is enough evidence available to determine the matter as we have done without any reliance on the video recording Exhibit 79. We hold that ground 1 has not been made out and that there is no merit in that ground.

#### **Second Ground of Appeal**

The Judge erred in law when he held that the Plaintiff has no capacity to institute this action.



We have in dealing with the omnibus ground, ground 1, come to a determination on the matter of the capacity which is the second ground and would like to reiterate that the Trial Judge cannot from the evidence adduced be said to have erred in his holding that the Plaintiff has no capacity to institute this action. From the evidence Plaintiff could not prove that he belongs to the immediate family of B. K. Gyimah and also failed to prove that he is the duly appointed Head of Family of B. K. Gyimah.

### **Ground 3 - Excessive Cost**

The ground states that the cost of ₵10,000 awarded against each of the Defendant/Appellants totaling GH₵40,000.00 who were represented by the same Counsel is excessive and unjustifiable.

Counsel makes the point which is trite learning that cost is at the discretion of the Court. In this case Counsel's contention is that the discretion has not been judicially or fairly exercised as the amount awarded as cost is excessive and unjustifiable. The basis for the award of cost is provided by statute in Order 74 of C. I. 47 High Court (Civil Procedure) Rules 2004 Rule 2 (4) of Order 74 sets out the factors to be considered in determining costs.

The case of *Juxon Smith Vrs KLM Royal Dutch Airlines [2005-2006] SCGLR 438 at 456-457* expounds this and outline the factors as stated below:

- (a) The amount of expenses, including travel expenses, reasonably incurred by that party or that party's lawyer or both in relation to the proceedings.
- (b) The amount of court fees paid by that party or that party's lawyer in relation to the proceedings.
- (c) The length and complexity of the proceedings.

Although the length of the trial which was six years is a factor which can make the cost high, taking into account the fact that all four defendants were represented by one Counsel and thus did not have to pay separate charges for filing fees, we are of the view that the total cost of ₵40,000 or ₵10,000 per defendant is high and appears punitive.

In the case of *Acquah vrs Oman Ghana Trust Holdings Ltd [1984-86] 1 GLR 157 at 170 C.* A. Apaloo C.J. stated that though cost was at the discretion of the Court it must not be punitive in nature.

We are of the view that the cost is high and appears punitive and therefore find merit in this ground. We would therefore in lieu of that award a total cost of ₵20,000 which works out to be ₵5,000 per each Defendant.

### **Conclusion**

Apart from this variation of cost the appeal fails on all the grounds and the judgment and the orders of the Trial Judge of 10<sup>th</sup> February 2020 are hereby affirmed subject to the variation in respect of ground 3 on cost.

(SGD)

ALEX B. POKU-ACHEAMPONG

(JUSTICE OF THE COURT OF APPEAL)

(SGD)

I agree,     **ANGELINA M. DOMAKYAAREH (MRS)**  
**(JUSTICE OF THE COURT OF APPEAL)**

**(SGD)**

I also agree,     **SAMUEL K. A. ASIEDU**  
**(JUSTICE OF THE COURT OF APPEAL)**

**COUNSEL:**

Lawrence Asumadu Sakyi for Plaintiff /Appellant

K. Asante Krobea with Stephen Boateng for Defendants/Respondents.