IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE PROBATE AND ADMINISTRATION DIVISION I HELD IN ACCRA ON FRIDAY THE 15TH DAY OF DECEMBER, 2023 BEFORE HER LADYSHIP EUDORA CHRISTINA DADSON (MRS.) JUSTICE OF THE HIGH COURT

SUIT NO. PA/0810/2023

1. **STELLA A. Y. ASANTE** }
2. **DIANA A. D. ASANTE** }
3. **EMMANUEL J. K. P. ASANTE** }
4. **MERCY A. A. ASANTE** }
5. **JULIANA N. ASANTE** } ……. **PLAINTIFFS**
6. **GIFTY ASANTE** }
7. **VERONICA N. ASANTE** }

(All of House No, 15, Roman Ridge Ayawaso West Municipality) }

VRS.

1. **MARGARET BOTCHWAY & 2 ORS.** }
   HOUSE NO. 104, PEAR LANE }
   TANTRA HILLS }
   WA WEST MUNICIPALITY }
2. **JUSTICE CHRISTOPHER ARCHER** }
   NO. 147, PAWPAW STREET }…… **DEFENDANTS**
   EAST LEGON }
   AYAWASO WEST MUNICIPALITY }
3. **LAWYER SARFO GYAMFI** } HOUSE NO. 101, HARPER ROAD }
   ADUM-KUMASI }

PARTIES: PLAINTIFFS ABSENT

1ST REPONDENT REPRESENTED BY ENOCK BONSU

2ND & 3RD RESPONDENT ABSENT

COUNSEL: AURELIUS AWUKU FOR THE PLAINTIFFS/APPLICANT PRESENT.

KOFI BOYE OTENG FOR THE 1ST DEFENDANT/RESPONDENT PRESENT

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RULING

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[1] Introduction

The Plaintiff/Applicant issued a Writ of Summons and Statement of Claim on 5th June 2023 for the following reliefs:

i. "A declaration that the 1st Defendant is not a person qualified to bring an application under Section 13(1) of the Wills Act,1971 (Act 360) in respect of the estate of the late Robert Kwaku Appiah Asante. ii. An order setting aside the reasonable provision made by High Court, Accra, (Probate Division 2) for the 1st Defendant.

iii. An order of perpetual injunction restraining the 1st Defendant, her assigns, agents and/or successors from interfering with the ownership, possession, use and/or development of the property or properties vested in the Plaintiffs pursuant to the Will of the late Robert Kwaku Appiah Asante. iv. Costs, inclusive of lawyer's fees.

v. Any other relief(s) the Court may deem meet."

The 1st Defendant entered appearance on 23rd June 2023 and the 2nd Defendant entered appearance on 26th June 2023.

The 1st Defendant filed his Statement of Defence and on 24th November 2023. The 2nd Defendant on 29th June 2023 filed Notice that he will not contest the action but shall abide by any orders or directives made by the Court. The 3rd Defendant though served with the Writ of Summons and Statement of Claim has not entered appearance.

[2] Motion to strike out pleadings in Statement of Defence

The Plaintiff/Applicant filed an application to strike out paragraphs 17 and 18 of the Statement of Defence of the 1st Defendant/Respondent. In a 10-paragraph affidavit in support Counsel for the Plaintiff deposed that in paragraph 17 of the said Statement of Defence the Respondent makes convoluted averments which are merely suspicious and conjectures that are scandalous and embarrassing. Counsel contends that the averments are needless and an effort to prove them will cause undue delay or the determination of the matter and that in the said paragraph 18 the Respondent makes averments which are also scandalous, vexatious, prejudicial and needless.

Counsel for Applicants states as follows:

"The pleadings complained about do not serve the useful purpose but merely intended to attack non-parties and to make wild allegations and in the circumstances the Applicant pray the Court to strike out paragraphs 17 and 18 of the Statement of Defence of the Respondent".

[3] Affidavit in opposition

Counsel for 1st Defendant/Respondent filed a 22-paragraph affidavit in opposition on 12th December 2023 and the gravamen of his opposition can be found in paragraphs 9 to 21 of the affidavit in opposition.

It is the case of the 1st Defendant/Respondent that the conclusion drawn by the Applicants to support the striking out of the two impugned pleadings does not have any basis.

Counsel for 1st Defendant/Respondent refers to Applicants' paragraphs 10, 13 and 14 and deposes that the cumulative effect of those pleadings was that the order for

reasonable provision was procured on their blind side. It is the case of the 1st Defendant/Respondent that it was in response to the paragraphs 10, 13 and 14 paragraphs 17 and 18 of the Statement of Defence were introduced to demonstrate that the said lawyer for the estate, Samuel Ansah Quansah contested the application for reasonable provision in Probate 2, the Court of Appeal and Supreme Court respectively is the husband to the 4th Plaintiff/Applicant and a brother-in-law to the other Plaintiffs.

Counsel for 1st Respondent submits that the said paragraphs are not borne out of mischief or suspicion but are facts that are very material to the determination of the suit.

Counsel for 1st Respondent states:

"That the 1st Respondent is therefore of the respectful view that the pleadings complained of are not scandalous neither are they vexatious or an abuse of the Court's process. That on the contrary, it is the Applicants who are seeking to relitigate issues that have long been put to rest by a court of co-ordinate jurisdiction who are rather abusing the Court's process and pray the Honourable Court to dismiss the instant application."

[4] Court's Analysis and Opinion

The sole question to be resolved by this present application is whether the two paragraphs in the 1st Defendant/Respondent's Statement of Defence should be struck out because it sins against Order 11 rule 18 of CI 47?

Order 11 Rule 18 of CI 47 provides as follows:

18. Striking out pleadings

"(1) The Court may at any stage of the proceedings order any pleading or anything in any pleading to be struck out on the grounds that

(a) it discloses no reasonable cause of action or defence; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass, or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly. (2) No evidence whatsoever shall be admissible on an application under subrule (1) (a).” This particular rule has been the subject of a plethora of cases determined by the Apex Court.

To succeed in an application under Order 11 Rule 18 of High Court (Civil Procedure) Rules, 2004, C.I. 47, the Applicant should demonstrate to the Court, the specific pleadings he seeks to attack and if he succeeds and those pleadings are struck out, the Court may thereafter proceed to dismiss the action where necessary, because if vital pleadings are struck out, the action may have no leg to stand on.

In other words, not until the pleadings have been attacked and struck out, the Court is not empowered to dismiss the suit under the said Order.

In the case of, **HARRIET MORRISON (NEE BAAH) & ANOR V. REGISTERED TRUSTEES VICTORY BIBLE CHURCH & 3 OTHERS (2015) 86 GMJ 59 AT PAGE 83**, Justice Sule Gbadegbe JSC (as he then was) delivered himself thus:

“In applications such as what we are considering, the Court must first be invited to strike out defective pleadings before proceeding to stay, dismiss or enter judgment accordingly. It appears from the application that was granted by the trial High Court that in the notice of motion invoking the jurisdiction of the Court, no paragraph of the plaintiff’s pleadings was attacked for the purpose of it being struck out to enable the Court to consider whether to stay, dismiss the action or enter judgment for the party to the proceedings. We think this was a serious procedural lapse that needs to be addressed for the purpose of future guidance as our Courts are beset on a daily basis with applications to strike out pleadings and terminate proceedings consequently”.

The Court in the case of **GHANA MUSLIM REPRESENTATIVE COUNCIL & ORS v. SALIFU (1975) 2 GLR** held that:

It is a matter within the judicial discretion of a judge whether or not to strike out pleadings or stay proceedings on the ground that the pleadings disclosed no reasonable cause of action or

defence or that the action has no reasonable chance of success. The jurisdiction of the Court must, however be exercised with extreme caution. A pleading would be struck out where it was apparent that even if the facts were proved the plaintiff was not entitled to the relief he sought. In any case affidavit evidence was inadmissible on an application to strike out pleadings on the ground that the action had no reasonable chance of success… ***For the Court would not permit a plaintiff to be driven from the judgment seat, without considering his right to be heard, except where the cause of action was obviously and almost incontestably bad"***

The principle of abuse of process was discussed in the case of **NAOS HOLDING INC v GHANA COMMERCIAL BANK LTD [2011] 1 SCGLR page 492 at 493** where the Supreme Court speaking through Justice Dotse JSC(as he then was) discussed the principle:

This principle of abuse of process had been formulated years ago by the English Courts as was evident in the statement of the principle in Date-Bah JSC's opinion which had been accepted and applied by the Courts in Ghana. Some of the English cases that readily come to mind are the following[1].

[1] *Stephenson vs Garnet [1898] 1 QB 677, Reichel vs Magrath [1889] 14 AC 665, Macdougall vs Knight [1890] 25 QBD 1, Phosphate*

Sewage Co. Ltd. vs Molleson [1879] 4 App Cas. 801 at 81, Hunter vs Chief Constable of West Midlands [1982] AC 529 or [1981] 3 A.E.R.

727 H.L, Secretary of State for Trade and Industry vs Bairstow [2003] EWCA Civ 321 Court of Appeal [Civil Division]

In all the above cases, the principle of abuse of process that is discernible has been postulated on the fact that the matters in controversy have been determined by a Court of competent jurisdiction between the same parties and basically on the same subject matter and that it would

therefore be an abuse of the process of the Court to allow a suitor to have an open ended opportunity to be litigating and relitigating over and over again in respect of the same issue which has over the period and in previous decisions been decided against him.

The doctrine of abuse of process, commonly known as the rule in Henderson v Henderson, would require the parties, when a matter had become the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the Court so that all aspects of it might be finally determined (subject to appeal) once and for all. In the absence of special circumstances, the parties could not return to the Court to advance arguments, claims, defences which they could have put forward for decision on the first occasion but failed to raise. The rule was not based on the doctrine of res judicata in a narrow sense, or even on any strict doctrine of issue or cause of action estoppel. It was a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do".

See **Okofoh Estates Ltd vs. Modern Signs Ltd and Another [1996] DLSC 587**.

Knowles vs. Roberts 1888 38 CN. Dir. 263 (a) 270 per Bowen LJ Ch. Div.

The rule that the Court is not to dictate to parties how they should frame their case is one that ought to be preserved sacred but that rule is of course subject to this limitation and modification that the parties must not offend against the rules of pleading which have been laid down by law and if a party introduces a pleading which is unnecessary and it turns to prejudice, embarrass and delay the trial of the action then it becomes a pleading which is beyond his right[1].

Pleadings are important not just because they serve procedural fairness as noted by Mason CJ and Gaudron J in **Banque Commerciale SA v Akhil Holdings [1990] 169 CLR 279 at 286** but also because rulings on the relevance and admissibility at trial will

[1] *See the case of Naos Holding Inc. vs. Ghana Commercial Bank Lt [2011] 1 SCGLR 492 (a) 500 per Dotse JSC: Osei-Ansong & Passion International School vs. Ghana Airport Co. Ltd. [2013-2014] 1 SCGLR 25 (a) 26.*

be decided by reference to a party's pleadings, pleadings can therefore be described as the pegs on which evidence hangs.

In the case of **Hammond v Odoi [1982-83]2 GLR 1215** Charles Crabbe JSC (as he then was) opined as follows:

"Pleadings are the nucleus around which the case-whole case revolves. Their very nature and character thus demonstrate their importance in actions, as for the benefit of the Court as well as for the parties. A trial judge can only consider the evidence of the parties in the light of their pleadings. The pleadings form the basis of the respective case of each contestants. The pleadings bind and circumscribe the parties and place fetters on the evidence that they would lead…The pleadings thus manifest the true and substantive merits of the case."

See also the cases of:

- **Fabrina Limited v Shell Ghana Ltd [2011] 33GMJ 1 SC @ page 18**
- **Klah v Phoenix [2012] 52 GMJ 1 SC page 20**
- **Oworsika III v Amonitia [2006] 1 MLRG 61 SC**

What are the material facts? The word "material" means necessary for the purpose of formulating a complete cause of action, and if any one material fact is omitted, the Statement of Claim is bad, per Scott L.J. in Bruce v Oldhams Press Ltd [1936]1 K.B. at p. 72[2].

The answer can be ascertained from the reliefs Plaintiffs' seek in this present action. Neither party need disclose in his pleadings the evidence by which he proposes to establish his case at the trial. But each must give his opponent a sufficient outline of his case[3].

What is Judicial Notice

[2] *Simon Goulding, Odgers on Civil Court Action, 24th Edition, page 155*

[3] *Simon Goulding, Odgers on Civil Court Action, 24th Edition, page 145: See the case of Hammond v Odoi [1982-83]2 GLR 1215 where Charles Crabbe JSC(as he then was) held as follows: Pleadings are the nucleus around which the case-whole case revolves. Their very nature and character thus demonstrate their importance in actions, as for the benefit of the court as well as for the parties. A trial judge can only consider the evidence of the parties in*

Judicial notice is a method used by a Court when it declares a fact presented as evidence as true without a formal presentation of evidence. A Court can take judicial notice of indisputable facts, usually for purposes of convenience. In Ghana Judicial Notice is provided for under Section 9 of the Evidence Act.

Section 9 of Evidence Act provides as follows:

9. Judicial notice

" (1) This section governs the taking of judicial notice of facts in issue or facts which are relevant to facts in issue.

(2) Judicial notice can be taken only of facts which are

(a) so generally known within the territorial jurisdiction of the Court, or

(b) so capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, that the facts are not subject to reasonable dispute.

(3) Judicial notice may be taken whether requested or not.

(4) Judicial notice shall be taken if requested by a party and the requesting party

(a) gives each adverse party fair notice of the request through the pleadings or otherwise, and

(b) supplies the necessary sources and information to the Court.

(5) A party is entitled, on timely request, to an opportunity to present to the Court information relevant to the propriety of taking judicial notice and the meaning of the fact to be noticed.

(6) Judicial notice may be taken at any stage of the action.

(7) In an action tried by jury the Court may, and upon a timely request shall, instruct the jury to accept as conclusive the facts which have been judicially noticed."

The Plaintiff/Applicant contends that paragraphs 17 and 18 of the 1st Defendant/Respondent Statement of Defence should be expunged for being prejudicial, scandalous etc.

Counsel for Plaintiffs/Applicants refers the Court to Section 9 of Evidence Act on what constitutes Judicial Notice. Counsel for 1st Defendant/Respondent has also canvassed strongly that the said averments are material because of the basis of the Plaintiffs' Claim. He contends that these paragraphs are simply to demonstrate that the Plaintiffs were aware of the said Action in Probate Court 2 but decided otherwise. A recourse to Plaintiff's reliefs would assist the Court.

Plaintiffs' reliefs is as follows:

i. *"A declaration that the 1st Defendant is not a person qualified to bring an application under Section 13(1) of the Wills Act,1971 (Act 360) in respect of the estate of the late Robert Kwaku Appiah Asante. ii. An order setting aside the reasonable provision made by High Court, Accra, (Probate Division 2) for the 1st Defendant.*

iii. *An order of perpetual injunction restraining the 1st Defendant, her assigns, agents and/or successors from interfering with the ownership, possession, use and/or development of the property or properties vested in the Plaintiffs pursuant to the Will of the late Robert Kwaku Appiah Asante.*

iv. *Costs, inclusive of lawyer's fees.*

Any other relief(s) the Court may deem meet."

After carefully considering the arguments for expunging paragraphs 17 and 18 and the arguments in opposition the Court is of the considered view that the said paragraphs may be material as contended by Counsel for 1st Defendant/Respondent it is unnecessary for the determination of this present suit. The averments contained therein falls outside the requirements of a fact the Court can take judicial notice of.

It is for this reason that the application by Counsel for Plaintiff dated 6th December, 2023 is granted as prayed. Paragraphs 17 and 18 of the 1st Defendants Statement of Defence filed on 6th December, 2023 is hereby expunged. No order as to costs.

SGD

H/L EUDORA CHRISTINA DADSON (MRS.) (JUSTICE OF THE HIGH COURT)