IN THE HIGH COURT OF JUSTICE, WESTERN REGION, HELD AT SEKONDI, ON THE 3RD DAY OF NOVEMBER, 2023, BEFORE HER LADYSHIP AFIA N. ADU-AMANKWA (MRS.) J.

SUIT NO. E5/7/20

1. GIBSON ADU APPIAH	**1ST PLAINTIFF**
2. AMA O. APPIAH	**2ND PLAINTIFF**
3. MRS. DOREEN B. ASAN	**3RD PLAINTIFF**
4. PRINCE A. APPIAH	**4TH PLAINTIFF**
5. GERTRUDE APPIAH	**5TH PLAINTIFF**

VRS.

1. EBENEZER A. APPIAH	**1ST DEFENDANT**
2. FELICIA NYARKO	**2ND DEFENDANT**
3. KWAME PAINTSIL ARHINFUL	**3RD DEFENDANT**

JUDGMENT

Per their amended writ of summons filed on 12th October, 2022, the plaintiffs are claiming for the following reliefs:

> "1. A declaration that the Letters of Administration granted by the High Court, Tarkwa to the 1st and 2nd Defendants to administer the estate of the late Mr. Kofi Afari Appiah was obtained through fraud and therefore a nullity.
>
> 2. A declaration that the 1st and 2nd Defendants lacked the capacity to sell Plot No. 39 Essaman and the house situate thereon to the 3rd Defendant on grounds that the

Letters of Administration granted to the 1st and 2nd Defendants by the High Court, Tarkwa to administer the estate of the late Mr. Kofi Afari Appiah excluded Plot No. 39 Essaman and the house situate thereon.

3. An order setting aside the purported sale of Plot No. 39 Essaman and the house situate thereon by the 1st and 2nd Defendants to the 3rd Defendant".

From their statement of claim, the plaintiffs' case is that they are the children of the late Kofi Afari Appiah (herein referred to as the deceased), who died possessed of an uncompleted building situate at plot No. 39 Essaman and other household chattels. The plaintiffs claim that the 1st and 2nd defendants, a child and one of the spouses of the deceased, fraudulently procured Letters of Administration from the Tarkwa High Court and sold plot No. 39 Essaman to the 3rd defendant. The plaintiffs contend that the purported sale of the disputed house to the 3rd defendant is null and void on the grounds of lack of capacity on the part of the 1st and 2nd defendants.

The defendants have disputed the plaintiffs' claim. In particular, the 1st and 2nd defendants deny perpetrating any fraud in procuring the Letters of Administration. According to them, the application for Letters of Administration was made in open court after the plaintiffs and their mother refused to cooperate with them. They further averred that the head of their family, who also doubled as the deceased's customary successor, gave his blessings to the procuration of the Letters of Administration. They contend that there was no deceit or fraud in their application for the Letters of Administration in Tarkwa because they had disclosed the last known place of abode of the deceased as Kweikuma.

The defence of the 3rd defendant is that he was a bona fide purchaser for value without notice of any wrongdoing on the part of the 1st and 2nd defendants as he properly acquired legal title from persons legally mandated to convey the disputed property to him. In his

statement of defence, the 3rd defendant averred that prior to transacting with the 1st and 2nd defendants regarding the disputed property, he examined the Letters of Administration drawn by the registrar of the High Court and presented to him by the 1st and 2nd defendants. It was valid without anything fraudulent on its face. The 3rd defendant further averred that he entered into a sale transaction only after satisfying himself that the 1st and 2nd defendants were the persons lawfully granted Letters of Administration by the High Court to administer the deceased's estate. According to him, after the sale of the property to him, a deed of assignment was executed by the administrators of the estate of the deceased, which had been registered with the Lands Commission Secretariat. He counterclaimed for the following reliefs:

> "1) A declaration of title to Plot No. 39, situate at Essaman and particularly registered with the Lands Commission Secretariat with Deeds Registry No. 6149 as having been validly sold by the 1st and 2nd Defendants.
>
> ii. Perpetual Injunction against the Plaintiffs, their assigns, agents, hires from interfering with the 3rd Defendant's quiet enjoyment of Plot No. 39, Essaman.
>
> iii. Legal Cost".

At the close of pleadings, the following issues and additional issues were set down for trial:

i. Whether or not the 1st defendant was appointed customary successor of the deceased.
ii. Whether or not Kweku Ohene Appiah is the head of the deceased person's family.
iii. Whether or not the 1st and 2nd defendants intentionally concealed the names of the real customary successor and head of family from the court.

iv. Whether or not the 1st and 2nd defendants filed the application at Tarkwa to conceal the application from the Plaintiffs.

v. Whether or not the disputed building and the land at its frontage was omitted from the inventory to deceive the court.

vi. Whether or not the value of the estate in the sum of GHc10,000.00 was falsified.

vii. Whether or not the 1st and 2nd defendants deceitfully did not post copies of the Letters of Administration at the last known place of abode of the deceased.

viii. Whether or not the 3rd defendant bought the disputed building and the land at its frontage was done malafide.

ix. Whether or not the 1st and 2nd defendants procured the Letters of Administration through fraud.

x. Whether or not the plaintiffs are entitled to their claim.

xi. Whether or not the 3rd defendant in purchasing House No. 39, Essaman from the 1st and 2nd defendants (administrators of the estate of the late Mr. Kofi Afari Appiah) acted as a bonafide purchaser for value without notice.

xii. Whether or not the 3rd defendant is entitled to his counterclaim.

PRELIMINARY OBJECTION

In their written addresses, counsels for the defendants have raised a preliminary legal objection to the propriety of the plaintiffs' action. The essence of their objection is that the plaintiffs ought to have filed a citation for the recall of the Letters of Administration granted to the 1st and 2nd defendants as provided for under section 67 of the Administration of Estates Act, 1961, Act 63, before initiating this action. They contend that the plaintiffs' failure to comply with this procedure rendered the writ and the entire proceedings a nullity.

In his response, counsel for the plaintiffs submitted that section 67 of Act 63 was inapplicable to this case. He argued that the disputed property, i.e. plot No. 39, Essaman, was not listed in the inventory of the estate of the deceased at the time the 1st and 2nd defendants applied for the Letters of Administration. As section 67 dealt with properties of the deceased comprised in the grant of the Letters of Administration, the absence or exclusion of the said property from the grant made to the 1st and 2nd defendants did not require the plaintiffs to comply with section 67 of Act 63. Counsel further submitted that even granted that their arguments were to hold sway with the court, it was too late in the day for the defendants to raise that objection, having participated fully in the proceedings to its logical conclusion. He cited **Order 81(2)(2) of High Court (Civil Procedure) Rules, 2004, CI 47** and **Republic vrs. High Court (Probate and Administration 2) Accra, Ex-Parte Tracy Opoku Darko and 3 Ors [2021] DLSC 10695** in support of his submissions.

In Ghana, issues pertaining to the administration of the estate of deceased persons are governed by the Administration of Estates Act, 1961 (Act 63) and Order 66 of C.I. 47. Order 66, in particular, regulates the procedure in respect of actions regarding the administration of the estate of deceased persons. **Section 67 of the Administration of Estates Act, 1961, Act 63,** states:

> *"Where administration has been granted in respect of any estate of a deceased person, no person shall have power to bring any action or otherwise act as executor of the deceased person in respect of the estate comprised in or affected by the grant until the grant has been recalled or revoked."*

The procedure governing the recall of a grant of probate or Letters of Administration was explained in the case of **Anyinam vrs. Mensah [1989-90] 2 GLR 96.** In that case, the plaintiff did not file any citation either before or at the time he commenced the action, calling on the defendant to bring his Letters of Administration to the registry of the court

and show cause why the Letters of Administration should not be revoked. After the plaintiff had closed his case, counsel for the defendant raised a preliminary legal objection to the effect that the plaintiff was bound to file a citation in such an action before or at the time of the filing of the writ. The court stated thus:

> *"Halsbury's Laws of England (3rd ed.), Vol. 16, para. 518 at 257, gives a clear elucidation of the procedure applicable and states: "Manner of obtaining revocation". Revocation may be obtained either voluntarily or by compulsory proceedings. In the former case evidence is filed setting out the circumstances, and the order may be made on motion or by a registrar. In the latter case a writ is issued, and a citation is served upon the grantee [citee] by the citor requiring him [grantee-citee] to bring the grant into the principal registry, and show cause why it should not be revoked. The citation must either precede or be simultaneous with the writ, and the plaintiff should allege in the endorsement of his claim on the writ and in his statement of claim, as the ground for revoking the grant, the invalidity of the will or the defendant's want of interest...*
>
> *A revoked grant must be produced and delivered at the registrar at the time of its revocation, so that it may be cancelled in the registry."*
>
> *A close examination of section 67 of Act 63 shows that before an aggrieved plaintiff commences an action aimed at the revocation of letters of administration already granted, he must, as a first step, file a citation calling upon the citee to produce his letters of administration at the registry of the court and the citee must show cause why his grant of letters should not be revoked. Within the citation, it is the duty of the plaintiff-citor to give the reason for his filing the citation"*

Order 66 rule 33 of C. I. 47 was carved out from this section. The rule provides that before a writ for the revocation of the grant of probate of a Will or Letters of Administration of

the estate of a deceased person is issued out, notice shall be given under rule 37 unless the probate or Letters of Administration has been lodged in the registry of the Court. Rule 37 provides that where an action is brought for the revocation of a grant of probate or Letters of Administration of the estate of a deceased person, the plaintiff shall serve a notice on the person to whom the probate or Letters of Administration is granted requiring the person to bring and leave at the registry of the Court the probate or Letters of Administration.

In further reliance on the above-mentioned case, the case of **Bonsu vrs. Eyifah [2001-2002] 1 GLR 9** held that the notice or citation could be issued before the commencement of the action or together with the writ at the same time. The court stated thus:

> *"Section 67 of Act 63, the present law from which LI 1515 derived its authority, should be read together with Orders 4 and 6 of LI 1515 and when that is done, what rule 6(1) of Order 6 of LI 1515 simply means is that where the action involves the recall and revocation of probate or letters of administration granted, then notice shall be given to the grantee of the said probate or letters of administration for a recall of same to be deposited at the registry and rule 2(3) of Order 6 was specific that notice shall be given before the writ is issued out…Since the citation could precede the action itself or both could be filed or issued simultaneously, the correct position of the law is that, before the commencement of an action for revocation of the grant of probate or Letters of Administration of a deceased person, or before the writ beginning an action for the revocation of probate or letters of administration in respect of a deceased person is issued out or served on the grantee the plaintiff shall first of all serve notice on the grantee requiring him to bring and leave at the registry the probate or letters of administration unless the said probate or letters of administration had already been lodged at the registry. The commencement of the present action by the plaintiff and the service of the writ on the defendant without first serving them with a notice requesting them to deposit the letters of administration granted them*

at the registry of the court is therefore irregular. The citation or notice precedes the service of writ of summons and not vice versa as counsel for the plaintiff wanted this court to believe".

The **Bonsu case, supra,** provided that the notice or citation could be issued before the commencement of the action or simultaneously with the writ. However, before effecting service of the writ on the grantee, the citation or notice must have been first served on the grantee.

The Court of Appeal in the case of **Mrs. Comfort Joyce Wereko Brobbey & 2 Ors**. **vrs. Peter Agyei Kufour, Civil Appeal No. H1/47/12 (26th July, 2013)** and reported at Dennislaw as **[2013] DLCA8111** held a contrary view to this position. The court was of the view that the notice and the writ could not be issued simultaneously. The notice or citation was to be served on the grantee before the issuance of the writ. On the combined effect of Rules 33(3) and 37(1) of Order 66 of CI47, the Court per Ayebi JA stated thus:

"The language of the two provisions as I observed is very simple and clear. The trial judge interpreted the decision of Apau J (as he then was) in Bonsu vrs Eyifah [2001/02] GLR 1 to be saying that the notice must be issued before the commencement of the action or contemporaneously with it. But where the notice and writ were issued contemporaneously, the notice ought to be served first before the issuance of the writ out of the registry of the court. I am not in agreement with that interpretation if my learned brother said so. In view of the subheading of rule 33(3), I am of the opinion that what the rule demands is that a notice should be given or served before the writ is issued out. It will therefore not be in compliance with the rule if the notice and the writ are issued contemporaneously".

In effect, a notice should be given or served before the writ is issued. The courts are divided on the effect of the non-compliance of this statutory condition and the rules. Whereas some courts hold the view that the failure to serve a notice is an irregularity

which can be cured by order 81 of CI47 and would not necessarily render proceedings void, others are of the view that not only is the non-compliance a violation of a rule of procedure but also constitutes non-compliance with a statutory precondition and therefore fatal which should render the action a nullity.

In **Heward Mills vrs. Heward Mills [1992-93] GBR 218**, the Court of Appeal held that failure to comply with the requirement of a citation was fatal to the action because the requirement was a statutory condition precedent, the failure of which took away the power of the court to act. The court held thus:

> *"It is clear from the rules…that before a plaintiff can cause the issue of a writ to revoke a grant of probate, he should first have served a notice on the person to whom the probate had been granted requiring him to bring and leave at the registry of the court the probate that had been granted to him….it seems to me that the failure by the plaintiff to comply with the mandatory provisions…is fatal to his action. For where a statutory condition must be complied with before a court can have jurisdiction to make an order, failure to comply with such a condition will leave the court with no discretion to make any order or orders in the matter".*

In **Grace Agboku & ors vrs. Augustine Yaovi Agboku & Ors., Civil Appeal No. 18-2003 (19th February, 2004)** and reported at Dennis law as **[2004] DLCA6481**, on the issue of whether in commencing the action, the plaintiff ought to have extracted a citation calling upon the last surviving executor to bring into the registry of the High Court, Accra the probate of the Will granted to them in respect of the deceased's estate in compliance with Order 6 r. 6(1) of LI 1515, which rule is in pari materia with Order 66 Rule 37(1) of CI 47, the Court of Appeal per Gbadegbe JA (as he then was) held that the writ in respect of the reliefs seeking a revocation of the grant was a nullity for non-compliance with the rule. He stated thus:

"That the above rule is mandatory and non-compliance with it would invalidate it is not in issue. See (1) Heward Mills vs Heward Mills [1992] 1 GLR 153".

He went further to state that:

"I think that on the facts of this case by not complying with the rule in question the appellants had caused to be placed before the court a writ which as regards some of the reliefs sought suffered from a fundamental defect which constituted the said reliefs into an ineffective or incompetent proceeding".

In **Mrs. Comfort Joyce Wireko Brobbey & Ors. vrs. Peter A. Kuffuor**, **supra**, the Court of Appeal on the effect of non-compliance with the rules on citation stated that:

"As submitted by the counsel for the appellant, compliance with rules 33 and 37 of Order 66 is the foundation of a probate action. The compliance with the said rules make the action so launched regular. It forms the basis of the court's jurisdiction in the action and over the defendant sued in a probate action. It cannot be remedied by the court. So the action so launched by the respondents against the appellant is a nullity."

In **Nana Aduna II & 1 or vrs Theodore Yeboah, H1/126/2017 (8/2/18)** and reported at Dennislaw as **[2018] DLCA5072**, the Court of Appeal on the issue of whether the failure to serve notice before issuing the writ was a mere irregularity or nullity failed to follow its previous decisions of declaring such actions a nullity. The court held that failure to serve the citation before the issuance of the writ was a mere irregularity which could be cured by Order 81 of CI 47. The court stated thus:

"Applying the above authority as my guide, it is patently clear that the non-compliance to serve a notice before issuing the writ in probate actions is to be regarded as an irregularity which does not cause automatic nullity. Simply put, the failure to serve notice before

issuing the writ in the instant case, is a mere irregularity of the rules of procedure, a voidable but not a void act, which might be set aside on terms."

It would be noted from the cases cited that postulate that non-compliance goes to the root of the action are cases emanating from the Court of Appeal. However, in **In Re Awere-Kyere (Decd); Awere-Kyere vrs. Foster & Anor [2003-2004] SCGLR 1050,** the Supreme Court per Date-Baah, JSC, held that failure to comply with the citation procedure did not go to jurisdiction. He stated that:

"We do not consider that the point about the need for citation procedure goes to the jurisdiction of the trial judge…Indeed, we consider that there would be a miscarriage of justice if the appellant, after allowing the trial to proceed without any objection as to the procedure adopted, were to be allowed, after evidence has been adduced establishing that the alleged will was invalid to rely on the invalid will, as if the trial never took place".

This appears to be the stand of the Supreme Court. For in the more recent case of **Republic vrs. High Court (Probate and Administration 2), Accra, Exparte Elizabeth Darko [2021] DLSC10695**, the Supreme Court held that non-compliance with the citation procedure would not have ousted the jurisdiction of the court given the time that the defendants raised the objection to the non-compliance.

In that case, the plaintiff, who was the applicant, issued a writ against the interested parties for, among other reliefs, an order for the revocation of the probate granted by the court on 23rd October, 2019 in respect of the purported Will of the late Nana Owusu Darko. The interested parties filed a motion asking the court to strike out the applicant's action as well as the 4th interested party's counterclaim because they were both filed in breach of a mandatory statutory precondition, to wit, filing a citation for the probate to be lodged at the registry of the court. The trial judge determined the application and

struck out the writ of summons taking the view that by order 66 rule 33(3) of CI 47, the applicant and 4th interested party should have filed a citation before the commencement of proceedings. It is the order of the trial judge setting aside the writ that was the subject of the certiorari application before the Supreme Court to have it quashed for fundamental error of the law.

The Supreme Court dismissed the application distinguishing the case from the Heward Mills case, which held that where a statutory condition had to be complied with to cloth a court with jurisdiction, then a failure to comply with such a condition would leave the court with no discretion to make any order or orders in the matter. The Court held that probate had not yet been delivered to the executors, and as they were not in possession of it, they could not be called upon to deposit same in the court's registry.

On the issue of non-compliance, the Court explained that the objection to the non-compliance was taken at an advanced stage of the case when pleadings had literally closed. The court took the position that the non-compliance was an irregularity which could be cured by Order 81 of CI 47, and the writ could not be set aside after the interested parties had taken fresh steps. The court opined thus:

> *"In the instant case, the decision of the High Court is clearly a nullity arising from two basic points of law. First, misapplying the provisions of Order 66 rules 33(3) and 37(1) of the rules of the High Court, and secondly, setting aside proceedings contrary to the clear provisions of Order 81 rule 2(2) of the rules of the Court which forbid the perdition of proceedings initiated by a party on grounds of technicality where the procedural objection is not raised timeously and at the time the blunder is alleged to have been committed."*

The plaintiffs' first relief is for a declaration that the Letters of Administration granted by the High Court, Tarkwa, to the 1st and 2nd defendants to administer the estate of the deceased was obtained through fraud and, therefore, a nullity. The defendants' counsels

have argued that the relief in substance is a probate action which seeks to have the Letters of Administration revoked on grounds of fraud. Counsel for the plaintiffs holds a contrary view, arguing that as section 67 deals with properties of the deceased comprised in the grant of the Letters of Administration, the absence or exclusion of the disputed property from the grant made to the 1st and 2nd defendants makes section 67 of Act 63 inapplicable to the case. **Section 67 of Act 63** provides that:

> *"Where administration has been granted in respect of any estate of a deceased person, no person shall have power to bring any action or otherwise act as executor of the deceased person in respect of the estate comprised in or affected by the grant until the grant has been recalled or revoked".*

In other words, where Letters of Administration has been granted in connection with the estate of the deceased, one can only initiate an action in respect of the deceased's estate that is affected by the grant. The deceased's estate affected by the grant includes movable properties and monies at the bank. By the plaintiffs' reliefs, they contend that through fraud, the 1st and 2nd defendants obtained the grant to administer this estate and seek a pronouncement to that effect. Thus, counsel's argument that section 67 did not apply to this case, given that the disputed property was not exhibited in the inventory, is unmeritorious. As long as there are properties affected by the Letters of Administration, then section 67 should apply in so far as it is an action for purposes of the Act. An "action" for the purposes of the Act has been defined in **Order 66 Rule 32 of CI 47** as:

> *"For the purpose of contentious probate matters as provided for under this Order, "probate action" means an action for the grant of probate of the will or letters of administration of the estate of a deceased person or for the revocation of such grant or for a judgment or order pronouncing for or against the validity of an alleged will, being an action which is contentious or not common form probate business".*

An "action" for purposes of Act 67 is an action for the grant of probate of the Will or Letters of Administration of the estate of a deceased person or for the revocation of such grant or for a judgment or order pronouncing for or against the validity of an alleged Will. The plaintiffs' first relief is declaratory in nature. They did not seek to set aside or revoke the Letters of Administration obtained by the 1st and 2nd defendants. Probate actions do not include declaratory reliefs affecting Letters of Administration obtained from the court and, therefore, should not be affected by section 67 of Act 63. Even though a revocation of the administration and a declaratory relief to the effect that the administration was obtained through fraud may have the same effect, the declaratory relief is quite separate and distinct from the relief of the revocation of the Letters of Administration. For one, the declaratory relief is not executable. There is no consequence sought beyond the court's opinion on the matter, unlike a revocation of the grant, a consequential relief, which requires an action to be taken and is executable. As the plaintiffs would be quite satisfied with the declaratory relief without any consequential relief, what would be the essence in requiring them to comply with the Act when they have not asked that the Letters of Administration be revoked? In essence, section 67 does not apply to the case.

Even granted that the plaintiffs ought to have complied with the said provisions, the defendants' objection came in too late in the day. The defendants raised this procedural irregularity for the first time through their counsels in their concluding addresses to the court. The writ was filed in 2020. At no point during the pleadings stage nor the trial did the defendants ever raise this issue. If the Supreme Court in **Exparte Elizabeth Darko, supra,** took the view that the objection raised by the interested parties when pleadings were yet to be closed was too late in the day, then the objection raised by the defendants could not have been made within a reasonable time, given that pleadings had closed and the trial had also concluded. Setting aside the writ based on the defendants' tardiness to

object timeously would be unreasonable. The justice of the matter requires the court to look at the plaintiffs' reliefs instead of setting aside the writ when in essence, the defendants never complained of this issue until the conclusion of the case.

In any case, the plaintiffs' reliefs consist not only of the declaratory relief but the setting aside of the sale between the 1st and 2nd defendants on the one hand and the 3rd defendant. Granted that the defendants' arguments of recall hold sway with the court, the writ cannot be set aside given that the court can exercise its jurisdiction regarding the remaining reliefs not connected with the revocation of the Letters of Administration. The 2nd and 3rd reliefs have nothing to do with the Letters of Administration obtained by the 1st and 2nd defendants. The plaintiffs contend that the grant did not affect the disputed property not listed in the inventory.

On the severability of reliefs, Pwamang JSC, in **Exparte Elizabeth Darko, supra,** endorsed the principle of law as espoused in **Republic vrs. High Court Accra, ExParte Peter Sangber-Der (ADB Bank Ltd-Interested Party) SCLRG (Adaare) 552** and stated thus:

> *"Where several reliefs are placed before a court and the court takes the view that it has jurisdiction to hear some of them whilst its jurisdiction is excluded in respect of others, the court is not entitled to decline jurisdiction altogether. In such scenario, there are two options open to the court, it may strike out those reliefs which are outside its jurisdiction and proceed to hear those that fall within its jurisdiction or it may hear the whole case, but decline to grant the reliefs it is not competent to grant when it delivers its Final judgment in the matter".*

The writ cannot be set aside because of this. In the worst-case scenario, the court would have declined to grant the plaintiffs' 1st relief relating to the declaratory relief and dealt with the remaining reliefs. But as has already been stated, section 67 does not apply to

the case, and the objection came in too late in the day after the defendants had participated in the trial. The objection is misplaced and is therefore overruled.

BURDEN OF PROOF

It is the plaintiffs' case that the 1st and 2nd defendants obtained the Letters of Administration fraudulently from the Tarkwa High Court and did not have the capacity to deal with the disputed property. The 1st and 2nd defendants contend otherwise. The 3rd defendant claims to be a bonafide purchaser for value without notice of any defect in the Letters of Administration obtained by the 1st and 2nd defendants. The Evidence Act, 1975, NRCD 323, prescribes the procedure to be applied in every proceeding. It provides a useful guide on the burden required to be discharged by a party to a dispute at a trial. Section 11(1) of Act 323 obliges a party to introduce sufficient evidence to avoid a ruling against him on an issue. In seeking a declaration that the Letters of Administration were fraudulently procured, the plaintiffs have the initial burden to produce such evidence as would satisfy the court that the 1st and 2nd defendants perpetuated fraud on the court to obtain it. Kpegah JSC pithly captures the position of the law on proof in **Zabrama vrs. Segbedzi [1991] 2 GLR 221**, wherein he restated the well-known principle in Majolarbi vrs. Larbi as follows:

> *"The correct proposition is that, a person who makes an averment or assertion, which is denied by his opponent, has the burden to establish that his averment or assertion is true. And he does not discharge this burden unless he leads admissible and credible evidence from which the fact or facts he asserts can properly and safely be inferred. The nature of each averment or assertion determines the degree and nature of that burden."*

This burden is not discharged by merely entering the witness box and repeating the claims or averments in the pleadings. The burden is discharged by leading admissible and credible evidence from which the facts being asserted can be properly and safely

inferred or concluded. The 3rd defendant has also counterclaimed for a declaration of title to the disputed property and equally bears the same burden as the plaintiffs. Once made, a counterclaim proceeds as an independent action even if the original action were concluded, stayed, discontinued or dismissed. The rules provide that in proceedings arising out of a counterclaim, the counterclaim is deemed as a writ and statement of claim. The party making the counterclaim and the party against whom it is made are also deemed as the plaintiff and defendant, respectively. Therefore, the parties bear the burden of proving their respective claims on a balance of probabilities.

Before discussing the merits of the case, it would be appropriate at this juncture to summarise the parties' evidence.

SUMMARY OF EVIDENCE

The 1st plaintiff, Gibson Adu Afari Appiah, testified for himself and on behalf of the other plaintiffs, who are his siblings. He testified that the deceased was his father, who died intestate in 2014. The deceased was survived by two widows, namely Grace Osei and Felicia Nyarko, the 2nd defendant and ten children, including the 1st defendant. He gave the names of the children as Ebenezer Afari Appiah, Gibson Adu Appiah, Amma Otubee Age, Doreen Baah Afari, Edmond Osei Wusu, Prince Afari Appiah, Nana Owusu Afari, Gertrude Achiaa Afari, Awo Aferibea and Kwame Fosuhene. According to the 1st plaintiff, in his lifetime, the deceased owned, among other properties, an uncompleted building on Plot No. 39, Essaman and the land at its frontage. After the burial and funeral of the deceased, the 1st and 2nd defendants applied for Letters of Administration to administer the deceased's estate before the High Court, Tarkwa, by disregarding the plaintiffs and other beneficiaries of the estate. On 23rd January 2015, the High Court, Tarkwa, granted the Letters of Administration to the 1st and 2nd defendants.

The 1st plaintiff further testified that in his lifetime, the deceased rented the frontage of the land to the 3rd defendant, for which the 3rd defendant became familiar with him and his family members. After the death of the deceased, he and the 3rd plaintiff engaged the 3rd defendant and evinced their intention of increasing the rent of the frontage from GH¢500.00 to GH¢1,000.00 a month. The 3rd defendant pleaded with them to wait till the following year for the increment to take effect. During that time, the 3rd defendant never mentioned to them his intention to acquire the uncompleted building together with the land at its frontage. Unknown to them, the 1st and 2nd defendants were engaged in secret talks with the 3rd defendant over the sale of the property. He testified that the property was situate in a very prime commercial area where a vacant plot of land cost more than GH¢40,000.00, and as such, the purchase price of GH¢100,000.00 paid by the 3rd defendant was too low. He contended that the 3rd defendant ought to have been put on notice that the 1st and 2nd defendants were carrying out a fishy transaction. The value of the estate which was stated as GH¢10,000.00 in the Letters of Administration should also have prompted the 3rd defendant to conduct further investigations or ask more questions concerning the estate of the deceased particularly when the value of the uncompleted building and the land at its frontage far exceeded GH¢10,000.00. Moreover, regarding the close relations between the 3rd defendant and his family, the fact that the transaction took place without any of them witnessing it should have raised suspicion about the transaction, prompting the 3rd defendant to conduct further investigations into the transaction. The plaintiff contended that the sale of the property to the 3rd defendant was null and void given that the Letters of Administration did not cover the property situate on Plot No. 39, Essaman and the land at its frontage and, therefore did not clothe the 1st and 2nd defendants with authority to sell the property to the 3rd defendant.

PW1, Nana Kumi Pako I, a professional estate surveyor, testified that the value of the disputed property was GHc280,000.00. According to him, in March 2021, the plaintiffs,

through the 1st plaintiff, commissioned him to assess the value of an uncompleted residential building situate at Esaman near Sekondi. He and his team inspected the building after being shown the building by the 1st plaintiff. Thereafter, he put together a report on the assessment of the value of the uncompleted building. The details of what went into the evaluation were all contained in his report which he tendered as exhibit "C".

The 1st defendant, Ebenezer Afari Appiah, testified that he was the 1st child of the deceased. After the death and burial of his father, Letters of Administration was required to administer his estate. Due to their misunderstanding, the plaintiffs refused to pick up their calls to discuss any issue with them. Since he and his father's brother resided in Tarkwa, they sought legal advice to ascertain whether they could obtain the Letters of Administration from the Tarkwa High Court. They were told they could file the application there since it was the same High Court. So they applied for Letters of Administration at the Tarkwa High Court and same was granted. Subsequently, the Letters of Administration was issued to them after complying with the court's orders for the grant of same. During the application, they indicated that the deceased's last known place of abode was Kweikuma, near Sekondi. Prior to applying for the Letters of Administration, they discussed the issue with his father's family since the plaintiffs were not communicating with them. The head of family, Emmanuel Ohene Assifo, who also doubled as the customary successor of his late father, authorised him to stand in his stead as the head of family to see to the application for the Letters of Administration.

Recounting the circumstances under which the property was sold, the 1st defendant testified that after the application, it came to light that his late father, during his lifetime, was indebted to some persons, including one Hajia and Kwabena Sarpong, a manager at Cal Bank. After the funeral celebration of the deceased, an outstanding funeral debt needed to be paid. They took a loan from Mrs. Saudatu Minyila to settle the debt. They

had to dispose of portions of his late father's estate to pay Saudatu as well. Initially, they arranged with Saudatu to use his late father's documents to continue the cement distributorship to settle the debt, but the 4th plaintiff threatened her, and thereafter she stopped. She came to them to demand for her money. They looked for another distributor to continue with the cement distributorship, but the 4th plaintiff threatened him also. These persons that his late father was indebted to began to put pressure on them to settle the debt. The plaintiffs were not responding to their calls and had stopped communicating with them. He, the 2nd defendant and Kweku Ohene Appiah, met with his father's head of family, his father's mother and some other principal members of the family and informed them about the situation at hand. They all agreed to dispose of a portion of his late father's estate to settle the debt. His father's mother, Obaa Panyin Akua Baah, also gave him a power of attorney consenting and authorising him to go ahead with the sale of the property. Before they sold the said property to the 3rd defendant, the plaintiffs secretly went to the 3rd defendant to collect monies on behalf of the estate without their knowledge and consent. After the sale, they settled the indebtedness of the deceased and shared the rest of the money. The plaintiffs' portion was given to one Clifford Adu Appiah. However, they refused to accept the money.

The 2nd defendant, Felicia Nyarko, testified that she was one of the two wives of the deceased. Her late husband was a member of the Alabiri Royal Clan of Akuapim North. Her marriage to the deceased was blessed with two children. Upon the death of her husband in 2014, there was the need to apply for Letters of Administration to administer his estate. At that time, her husband's senior brother, Kweku Ohene Appiah, and the 1st defendant were both residents in Tarkwa, so they sought legal advice regarding applying for the Letters of Administration in Tarkwa. They were told they could do so since it was the same High Court. Therefore, they applied for Letters of Administration in Tarkwa. The head of family, who was also her late husband's customary successor, also authorised

the 1st defendant to stand in his stead as the head of family to see to the application for the Letters of Administration. According to the 2nd defendant, at the time of the application, the plaintiffs had refused to communicate with them and were not responding to their calls. Therefore, it became difficult to seek their involvement to the said application. After the application, it came to light that, in his lifetime, her late husband was indebted to some persons, including one Hajia, Isaac Baidoo, a Cal bank manager and Kwabena Sarpong. After the funeral celebration of her late husband, there was some outstanding funeral debt which needed to be paid, so they took a loan from Mrs. Saudatu Minyila to settle the debt. They needed to pay Saudatu as well. They had to dispose of portions of her late husband's estate to settle all his indebtedness. Initially, they arranged with Saudatu for her to use her late husband's documents to continue the cement distributorship to settle the debt her late husband owed her, but the 4th plaintiff threatened her, and thereafter, she stopped. She came to them to demand for her money. They looked for another distributor to continue the distributorship, but the 4th plaintiff threatened him again. These persons her late husband was indebted to, began to put pressure on them to settle the debt. She, together with the 1st defendant and Kweku Ohene Appiah, met with her husband's head of family, her husband's mother and some other principal members of the family and informed them about the situation. They agreed to dispose of a portion of her late husband's estate to settle the debt. Her husband's family gave their approval to dispose of a portion of the estate to settle the indebtedness. Her husband's mother gave a power of attorney to the 1st defendant in respect of the sale of the property. Hence, she and the 1st defendant and the rest of her husband's family disposed of the disputed property to the 3rd defendant. Before they sold the property to the 3rd defendant, the plaintiffs secretly went to the 3rd defendant to collect monies on behalf of the estate without their knowledge and consent. After the sale, they settled the indebtedness of her deceased husband and shared the rest of the money. The plaintiffs'

portion was given to Clifford Adu Appiah, her deceased husband's brother. However, they refused to accept the money.

The 3rd defendant, Kwame Paintsil Arhinful, testified that the 1st defendant was the 1st child and customary successor of the deceased. He was fortified in his belief by the letter dated 25th January 2015 written by Abusuapanyin Emmanuel Ohene-Assifi of the Alabiri Royal Family to Ghacem Ltd., which he saw, which introduced the 1st defendant as the customary successor of the late Mr. Kofi Afari Appiah, who was a distributor of Ghacem during his lifetime. He described the disputed property as an uncompleted building which had never been inhabited. He further testified that the 1st and 2nd defendants represented the interest of the children of the deceased. All the children of the deceased were listed in the application for Letters of Administration. In his opinion, no fraud was perpetrated on the children of the deceased and beneficiaries of his estate. There was nothing clandestine about the application for and subsequent grant of the Letters of Administration. According to him, he carefully and critically examined the Letters of Administration drawn by the registrar of the High Court, Tarkwa, on the 23rd January 2015 and found nothing untoward or fraudulent on the face of it by virtue of which he entered into a sale and purchase agreement of Plot No.39 Essaman, with the 1st and 2nd defendants. The 3rd defendant contended that the 1st and 2nd defendants did not at any point conceal the application for the grant of Letters of Administration from the legitimate beneficiaries of the estate of the deceased as they were all listed on the application. The application for the grant of Letters of Administration revealed that the last place of abode of the deceased was at Kweikuma - a suburb of Takoradi. It was, therefore, a palpable falsehood for the plaintiffs to assert that the 1st and 2nd defendants deceived the High Court, Tarkwa, that the deceased was a resident of Tarkwa. He entered into the sale transaction with the 1st and 2nd defendants only after satisfying himself that the 1st and 2nd defendants were the persons who were lawfully granted the Letters of

Administration by the High Court, Tarkwa, to administer the estate of the deceased, including Plot No. 39, Essaman. He further testified that the property in question was not given to him for free but that he paid the full selling price of GH¢100,000.00 to the 1st and 2nd defendants, after which a receipt dated 21st February, 2020 and signed by the 1st and 2nd defendants with, Ebo Yankah and Kojo De-Graft Johnson as witnesses was issued to him. Thus, the sale transaction was a valid contract devoid of any vitiating factors in a valid contract of sale. Upon completion of the sale and purchase, the 1st and 2nd defendants caused an Indenture of Assignment dated 20/05/2019 to be prepared and signed by them to him, and same was registered at the Lands Commission with Deeds Registry Number 6149 under Serial No. 199/20. Since purchasing the uncompleted building, he had been in effective and undisturbed occupation without any adverse claim whatsoever by any individual or group of persons, including the plaintiffs. He contended that, given the circumstances, he was a bonafide purchaser for value without notice of the purported infractions or deficiencies relating to the vendors vis-a-vis the property as alleged by the plaintiffs.

FRAUD

The plaintiffs contend that the 1st and 2nd defendants fraudulently procured the Letters of Administration from the Tarkwa High Court. In accordance with the requirements of Order 11 Rule 12(1) of CI 47, the plaintiffs particularised the fraud in paragraph 9 of their statement of claim as follows:

"9. PARTICULARS OF FRAUD

i.) The 1st and 2nd Defendants clandestinely made the application without regard to the Plaintiffs and other beneficiaries of the estate.

ii.) The 1st and 2nd Defendants applied for the Letters of Administration before the High Court, Tarkwa, to conceal the application from the other beneficiaries.

iii.) The 1st and 2nd Defendants knew that the last place of abode of the deceased was at Kweikuma and knowingly deceived the High Court Tarkwa to believe that the deceased was living at Tarkwa.

iv.) The contents of the application for Letters of Administration were full of misrepresentations.

v.) After procuring the Letters of Administration fraudulently, the 1st and 2nd Defendants purported to sell the Deceased person's House situate on Plot No. 39 Essaman to the 3rd Defendant".

Certainly, these last set of particulars cannot by any stretch of imagination constitute fraud, given that it deals with the sale of the disputed property after the acquisition of the Letters of Administration.

In proof of the fraud which the plaintiffs allege the 1st and 2nd defendants perpetrated on the Tarkwa High Court, the 1st plaintiff testified that:

"a. The Head of Family's affidavit to the application was signed by one Kwaku Ohene Appiah of New Layout, Tarkwa who falsely represented to be the Head of family when the 1st and 2nd Defendants knew very well that the head of family was Ohene Kwame.

b. The 1st and 2nd Defendants deceitfully did not post any Notice of the Application at the last known place of above(sic) of the deceased at Kweikuma as directed by the court and obtained the Letters of Administration falsely representing that the notices were posted.

c. The 1st and 2nd Defendants intentionally omitted the uncompleted building and the land at its frontage from the list of inventory of the deceased movable and immovable properties to conceal the entire estate from the court.

d. The 1st and 2nd Defendants together with Kwame Ohene Appiah intentionally omitted the name of Grace Osei as one of the widows of the deceased in the application to deceive the court.

e. The 1st and 2nd Defendants falsely represented that the 1st defendant was appointed the customary successor of the deceased when they knew that it was Ohene Kwame who was appointed the customary successor.

f. The 1st and 2nd Defendant(sic) deliberately and deceitfully with the intention to sideline the other beneficiaries of the estate filed the application for Letters of Administration before the Tarkwa High Court.

g. The 1st and 2nd Defendants intentionally and deceitfully stated the value of the estate as GH¢10,000 when they knew very well that that was false.

h. That the deposition by Kweku Ohene Appiah in the Head of Family's affidavit that he appointed the 1st Defendant to apply for Letters of Administration was false".

The question to determine is whether the evidence on these set of particulars constitutes fraud. In the case of **Derry vrs. Peak (1889) 14 App. Cas 337 at 374**, the court per Lord Hershell defined fraud as:

"Fraud is proved when it is shown that a false representation has been made: (1) knowingly, (2) without belief in its truth or (3) recklessly, careless whether it be true or false. To

prevent a false statement being fraudulent, there must I think, always to be, an honest belief in truth and this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief".

As fraud is criminal in nature, the standard of proof required is proof beyond a reasonable doubt. As was held in the case of **Nana Asumadu II (deceased) and Nana Dankyi Quarm IV (deceased) vrs. Agya Ameyaw [2019] DLSC6295**

"In law, fraud is a deliberate deception to secure unfair or unlawful gain, or to deprive a victim of a legal right. It is both a civil wrong and a criminal wrong. Fraud, be it civil or criminal, has one connotation. It connotes the intentional misrepresentation or concealment of an important fact upon which the victim is meant to rely, and in fact, does rely to the harm of the victim. It is therefore criminal in nature even where it is clothed in civil garbs".

The rule in section 13(1) of the Evidence Act, 1975 (NRCD 323), emphasises that where in a civil case, crime is pleaded or alleged, the standard of proof changes from the civil one of the balance of probabilities to the criminal one of proof beyond a reasonable doubt.

One of the allegations levelled against the 1st and 2nd defendants is that they deliberately and deceitfully filed the application for Letters of Administration before the Tarkwa High Court with the intention to sideline the other beneficiaries of the estate. The plaintiffs tendered in evidence as exhibit "A" series, copies of the application processes for the Letters of Administration. The 3rd defendant also tendered the copies of application processes for the Letters of Administration in evidence as exhibit "6" series. From these exhibits, it is quite clear that the application for the Letters of Administration was made at the Tarkwa High Court, which, in fact, granted the application as shown by exhibits "B" and "7". In his defence, the 1st defendant explained in paragraph 4 of his witness statement that:

> *"Since my father's brother and I were residing in Tarkwa, we sought legal advice to ascertain whether we could obtain the Letters of Administration at the Tarkwa High Court. We were told that since it was before the same High Court, we could make the application there. So we applied for Letters of Administration at the Tarkwa High Court and same was granted and subsequently the Letters of Administration was issued to us after complying with the orders of the court for the grant of same".*

The 2nd defendant's explanation was no different from the 1st defendant's. Under cross-examination from the plaintiffs, the 1st defendant further explained that the application was filed at the Tarkwa High Court because the family also lived there. In essence, the 1st and 2nd defendants filed the application at the Tarkwa High Court because the application could be filed anywhere given that there was only one High Court. Moreover, the family was resident in Tarkwa, and it was more convenient for them to file it there. The plaintiffs contend that the reasons proffered by these defendants are untenable and that the application was filed at the Tarkwa High Court to conceal the application from them and the other beneficiaries of the deceased's estate.

The evidence on record is that the deceased had his last place of abode at Kweikuma, which is within the Sekondi-Takoradi Metropolis. Except for the 1st defendant, all the beneficiaries also lived in Takoradi. **Order 66 Rule (1) (1) of CI 47** provides that:

> *"An application for Probate or Letters of Administration in respect of the Estate of a deceased person may be made only to the court with jurisdiction where the deceased had at the time of his death a fixed place of abode".*

Thus, per the rules, given the last place of abode of the deceased as Kweikuma, the application for Letters of Administration ought to have been filed at the Sekondi High Court and not the Tarkwa High Court. But could fraud be inferred from the actions of the defendants? The defendants' explanation that they filed the application at the Tarkwa

High Court based on the advice of a lawyer that they could do so is plausible under the circumstances. They honestly believed that the application could be filed in Tarkwa. More important is the fact that the 1st and 2nd defendants never hid from the court the fact that the deceased's last place of abode was at Kweikuma, Takoradi. It was stated so clearly in the motion paper. Despite this revelation, the trial judge assumed jurisdiction over the application, and it cannot be said that fraud was perpetrated on the court to obtain the Letters of Administration. Moreover, given the notices that would have been posted at Kweikuma following the grant of the application, it is quite difficult to appreciate the plaintiffs' contention that the defendants filed the application with the intention to sideline them as beneficiaries of the estate of the deceased as the notices would have come to their attention.

On the issue of notices, the plaintiffs also claim that the 1st and 2nd defendants did not post any notice of the grant at the last known place of abode of the deceased at Kweikuma as directed by the court and obtained the Letters of Administration falsely representing that the notices were posted. The defendants state otherwise, contending that the notices were posted at Kweikuma. The 1st defendant testified that he carried out the posting with the bailiff. The plaintiffs claim that the defendants failed to prove that any such posting was done, given their denial that there was such a posting. The proceedings for the day regarding the grant of the application for Letters of Administration were not tendered in evidence to determine the orders the judge made following the grant of the application. Be that as it may, the defendants have testified that they posted notices at Kweikuma, indicative that such an order was made for posting notices. As the plaintiffs assert that no such postings were carried out, they bear the burden of proving the non-posting of the notices. The issuance of the Letters of Administration to the defendants following the grant of the application is an indication that the notices were posted. It is only after the

notices have been posted and no caveats filed that the registrar of the court would issue the Letters of Administration.

S**ection 37(1) of the Evidence Act, supra,** provides the rebuttable presumption that *"official duty has been regularly performed*". This presumption is also known as *omnia praesumuntur rite et solemniteresse acta denec probetur in contrarium* (all things are presumed to have been done properly and with due formalities until it be proved to the contrary). Thus, anybody tasked with an official duty will be presumed to have performed that duty regularly. This raises a presumption of regularity in respect of the registrar's issuance of the Letters of Administration. As long as the registrar issued the Letters of Administration, it is presumed that the notices were posted in compliance with the court's orders. The issuance of the Letters of Administration places on the plaintiffs the burden of producing evidence to dislodge that presumption if they consider that the presumed state of affairs is not the true state of affairs. The evidence does not show that this presumption has been dislodged. The plaintiffs failed to lead any evidence regarding the failure of the posting of notices. This allegation is without any merit.

Regarding the inventory, the plaintiffs have accused the 1st and 2nd defendants of intentionally omitting the uncompleted building and the land at its frontage from the list of inventory of the deceased properties to conceal the entire estate from the court. They further alleged that the defendants deceitfully stated the value of the estate as GHc10,000.00 when they knew that it was false. The 1st defendant admitted that the properties listed in the inventory were movable properties i.e. things used in furnishing a room. He explained that:

> *"I did not add the landed property because at the time I had not seen any documentation covering these properties. It is not the only property that my father left and we did not add it to the inventory to court. My father was a cement distributor. He had one trailer for*

distribution of cement. But because I had not seen the document covering those vehicles, I did not add it to the inventory".

In exhibit "A3", the properties listed in the inventory were old clothing, furniture, television, fridge, and sound system, all valued at GHc10,000.00. The amount in the bank was unknown. Given the properties listed, I fail to appreciate the plaintiffs' concern regarding the value of the deceased's estate as GHc10,000.00. The values, as shown, are consistent with the present market values of the properties. This value did not include the value of the disputed property, which was not exhibited to the inventory. The 1st defendant's explanation that he was unsure if the property still formed part of his father's estate is plausible. The plaintiffs' contention that the 1st and 2nd defendants' omission of the property from the inventory was to deceive the court and avoid the payment of estate duty but yet deal with the property as if they had the authorisation to do so is farfetched. After all, the administrator's authority to deal with the deceased's estate is limited to the properties listed in the inventory. The plaintiffs have failed to prove any fraudulent conduct on the defendants' part in omitting the disputed property from the inventory.

The plaintiffs also make the point that the head of family's affidavit supporting the application was signed by one Kwaku Ohene Appiah, who falsely represented that he was the head of the deceased's family when the 1st and 2nd defendants knew very well that the head of deceased's family was Ohene Kwame. They further claim that the defendants falsely represented that the 1st defendant was appointed the customary successor of the deceased when they knew that it was Ohene Kwame who was appointed the customary successor. In his defence, the 1st defendant testified that the head of family, Emmanuel Ohene Assifo, who also doubled as the deceased's customary successor, authorised him to stand in his stead as head of family to see to the application for Letters of Administration by executing a power of attorney in his favour. He tendered the power

of attorney in evidence as exhibit "2". The document was admitted in evidence without any objection from the opposing parties. Ordinarily, the court should consider this document as long as it is in evidence. Unfortunately, the exhibit is unstamped and, therefore, inadmissible per se. Evidence is inadmissible per se when a statute or law makes it inadmissible, and its inadmissibility is not founded upon a fact that the matter to be proved by that evidence had not been pleaded. See **In Re Okine (Decd); Dodoo & Another vrs. Okine & Others [2003-2004] SCGLR 582**. Evidence inadmissible per se includes unstamped documents and unregistered documents. The law makes them inadmissible even if the opposing party does not object. Section 32(6) of the Stamp Duty Act, 2005 (Act 689) states:

> *"Except as expressly provided in this section, an instrument*
>
> *(a) executed in Ghana, or*
>
> *(b) executed outside Ghana but relating to property situate or to any matter or thing done or to be done in Ghana, shall except in criminal proceedings, not be given in evidence or be available for any purpose unless it is stamped in accordance with the law in force at the time when it was first executed.*

This Act requires documents such as power of attorney to be stamped before it is admitted in evidence. A power of attorney is an instrument that requires stamping. In his book **"Trial Courts and Tribunals" at page 309**, the learned retired Supreme Court Judge and author Allan Brobbey wrote:

> *"As a rule, the power of attorney should be stamped. Being a document requiring a stamp, it should not be received in evidence unless it has been stamped".*

As an unstamped documents, exhibit "2" is inadmissible per se. As held in **Lizori Ltd vrs. Mrs. Evelyn Boye, School of Domestic Science & Catering [2013-2014] 2 SCGLR 889:**

> *"Either the document has been stamped and appropriate duty paid in accordance with the law in force at the time it was executed or it should not be admitted in evidence. There is no discretion to admit it in the first place and ask the party to pay the duty and penalty after judgment. Thus the trial court would have been perfectly justified to reject the receipts without stamping".*

Being inadmissible per se, the document should not have been admitted in evidence in the first place. Therefore, it would not be considered as part of the evidence led on record. After all, where such evidence is received in the course of the trial (with or without objection), it is the duty of the court to reject such evidence when giving judgment, if not, the appellate court would reject it. This rule is founded on the fundamental principle that a court must arrive at its decision by relying on legal and admissible evidence and nothing less. See **Tormekpe vrs. Ahiable [1975] 2 GLR 432.**

The evidence on record shows that Emmanuel Ohene Assifo, also known as Ohene Kwame, was the head of the deceased's family at the time of the application for Letters of Administration. The 1st and 2nd defendants admitted this fact in their evidence. In exhibit "A2", one Kwaku Ohene Appiah deposed to the affidavit of head of family as *"the head of family of the deceased who died on the 9th February, 2014"*. The 1st plaintiff described Kwaku Ohene Appiah as the deceased's senior brother. Under cross-examination from the plaintiffs, the 1st defendant testified that the head of family, who was advanced in age, authorised Kwaku Ohene Appiah to act in his stead. If that was the case, then Kwaku Ohene Appiah should have deposed to that affidavit as the attorney of the head of family and not as the substantive head of family. In any case, there is no evidence on record showing that he was authorised by the head of family to act in his stead. Meanwhile, the

1st defendant had previously testified that the head of family executed a power of attorney in his favour to see to the application for Letters for Administration for which he sought to tender the power of attorney. If this evidence is anything to go by, then Kwaku Ohene Appiah had no business describing himself as the head of family when he was not. It was expected of the 1st defendant then to have deposed to that affidavit as the attorney of the head of family and not Kwaku Ohene Appiah. Exhibit "A2" gives the impression that it was Kwaku Ohene Appiah who was the substantive head when, in fact, he was not. The 1st and 2nd defendants have proffered no reasons why Kwaku Ohene Appiah deposed to that affidavit when the head of family was still alive. Given his inconsistent statements, I do not consider the 1st defendant to be telling the truth in this regard. Again, he has not assigned any reasons for allowing Kwaku Ohene Appiah to depose to the affidavit when according to him, the head of family had authorised him (1st defendant) to act in his stead.

Further, the evidence shows that Emmanuel Ohene Assifo was not only the head of the deceased's family but was also the deceased's customary successor. In exhibit "A1", the 1st defendant applied as the deceased's customary successor even though he testified that it was Emmanuel O. Assifo who was the deceased's customary successor. He explained that:

> *"But he made me to understand that I was to be my father's customary successor. He said it was the son that succeeded his father. And he being older could not be customary successor of his younger brother, my late father. He therefore gave me power of attorney to stand in and carry out all activities in relation to my late father as his successor".*

Thus, for all intents and purposes, the 1st defendant is not the customary successor of the deceased; otherwise, there would not have been the need for the execution of the power of attorney in his favour. As a matter of fact, the 1st defendant recognises Emmanuel Assifo as the deceased's customary successor as evidenced by his testimony. Thus, he

could not, as of right, apply for the Letters of Administration as the customary successor of the deceased. He should have informed the court that he was acting on the authority of the customary successor to apply for the Letters of Administration. This omission is quite fatal. Under cross-examination, the 1st defendant testified that when it came to the court's attention that the head of family was the deceased's customary successor, the court remarked that the head of family could not act as referee and successor at the same time. That was when they called the head of family who said an elder couldn't succeed a younger person under the Akuapem custom. By this evidence, it is presumed that the application had been filed and was before the court. As there is no indication of any amendment made to the processes filed, the 1st defendant had already applied in his capacity as the deceased's customary successor even before the judge made this remark. Thus, his explanation regarding the Akuapem custom of the first child succeeding his father is an afterthought. If that were the case, why was he not appointed the customary successor, but the head of family was? I hold the view that the 1st defendant had no reasonable basis for holding himself as the deceased's customary successor. If his story is anything to go by, he was the attorney of the customary successor which fact should have reflected in his affidavit in support of the application.

The plaintiffs further allege that the 1st and 2nd defendants omitted the name of Grace Osei as one of the widows of the deceased. The parties are ad idem that Grace Osei was the first wife of the deceased. However, in the application for Letters of Administration, the applicants averred that the 2nd defendant was the only widow of the deceased. The 1st defendant explained that when the application was given to Grace Osei to sign, she refused to do so. Upon the advice of their lawyer that one of them could represent the wives and sign the application, they omitted her name. This explanation would have sufficed had the 1st and 2nd defendants omitted the plaintiffs' names from the application as children of the deceased. It has been the defendants' case that the plaintiffs were not

co-operative. The plaintiffs had refused to respond to their calls to discuss the issue of the Letters of Administration. In spite of this conduct, the 1st and 2nd defendants listed the plaintiffs as children of the deceased. Why did the 1st defendant not only list his name as a child of the deceased to represent the rest of the children just as they did with Grace Osei? Thus, it was a misrepresentation of fact to have stated in the application that the deceased was survived by only the 2nd defendant when Grace Osei was also a widow.

At the conclusion of the trial, I find that the plaintiffs have made a case of the procurement of the Letters of Administration by fraud. The 1st and 2nd defendants concealed vital information from the court. They concealed from the court the fact that Grace Osei was a widow of the deceased. They also concealed the fact that Emmanuel Ohene Assifo was the head of the deceased's family but instead lied about the fact that it was Kwaku Ohene Appiah who was the head of the family when they knew he was not. It is fraud when a party conceals from the court something material which should have been disclosed. I admit that no mandatory provision under Order 66 of CI 47 requires an applicant to exhibit a full list of all beneficiaries before a grant of letters of administration is made. However, by virtue of Order 66 rule 13 of CI 47, which provides for the priority of grant, it becomes necessary for the court to be seised with all such relevant information to make an informed decision as to whether an applicant is the proper person to be granted the Letters of Administration.

In **Good Shepherd Mission vrs. Sykes & Others [1997-98] 1 GLR 978,** Georgina Woode JA (as she then was) approved the definition of fraud in the book "Kerr on Fraud and Mistake" (7th ed), page 1, and held that:

> *"Fraud in the contemplation of a civil court of justice may be said to include properly all acts, omissions, and concealment which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are injurious to another, or by which an undue or*

unconscient advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone is considered as fraud. Fraud in all cases implies a willful act on the part of any one whereby another is sought to be deprived, by illegal or inequitable means of what is entitled to."

By the application placed before the court, all the persons to whom the Letters of Application could be granted were supposedly before the court. The surviving spouse, children and customary successor of the deceased were before the court when, in fact, they were not. Perhaps, if it had been disclosed to the court that there was another surviving spouse who had refused to sign the affidavit, or that the application was made without the consent of the plaintiffs, the judge may have ordered the applicants to serve the plaintiffs and Grace Osei with the application. The application for Letters of Administration by the 1st and 2nd defendants was fraught with concealment and deliberate omissions purposely carried out so that the court would consider the application favourably. Fraud vitiates every conduct. If proven and sustained, an allegation of fraud will wipe and sweep away everything in its trail as if that thing had never existed. See **Mass Projects Ltd (No.2) vrs. Standard Chartered Bank & Yoo Mart Ltd. (No. 2) [2013-2014] 1 SCGLR 309**. Therefore, I declare that the Letters of Administration granted by the High Court, Tarkwa, to the 1st and 2nd defendants to administer the estate of the late Mr. Kofi Afari Appiah was obtained through fraud and, therefore a nullity.

CAPACITY

Upon the grant of the Letters of Administration, the 1st and 2nd defendants sold the disputed property to the 3rd defendant. The plaintiffs contend that since the property was not listed in the inventory, the 1st and 2nd defendants lacked the capacity to sell the property to the 3rd defendant, rendering the transaction invalid. They further contended

that by the defendants' lack of capacity to deal with the disputed property, the protection afforded by law under section 97(1) of the Administration of Estates Act, supra, could not avail the 3rd defendant.

The parties are ad idem that the disputed property belonged to the deceased. However, from the evidence on record, the said property was not listed in the inventory of the estate of the deceased at the time the 1st and 2nd defendants applied for and were granted the Letters of Administration. As a general rule of practice and a requirement under Order 66 r. 8 of CI 47, an applicant for Probate or Letters of Administration as the case may be, shall make a true declaration of the nature and true value of all movable and immovable properties of the deceased. In practice, inventory properties of the deceased are attached to the application for Probate or Letters of Administration. Prima facie, the inventory shows the estate's value for the court's consideration and for it to make orders in respect of the application, as the case may be. The declaration of assets and the value given thereof is also for the purpose of payment of estate duty before the certificate is finally issued to the applicant.

A grant of Letters of Administration to the administrator entitles him to administer the deceased's estate. At page 151 of Williams on Executor, and administrator, (1960 ed), it is stated that:

> *"But with respect to an administrator, the general rule is that a party who is entitled to administration can do nothing as administrator before letters of administration are granted to him, inasmuch as he derives his authority entirely from the appointment of the court".*

Thus, the authority of an administrator to deal with the estate of a deceased is derived from his appointment of the court by the grant of the Letters of Administration. Prima facie, the estate of the deceased is as shown in the inventory attached to the application for Letters of Administration. Thus, an administrator does not have the authority to deal

with any property not listed in the inventory until the court has given such authorisation. His authority is only limited to the property as exhibited in the inventory.

The deceased's estate, as exhibited in the inventory(exhibit "A3"), comprised only of the furniture, television, fridge, old clothing and money at the bank and nothing else. These were the only properties the 1st and 2nd defendants had been authorised by the Letters of Administration to administer and not the property in dispute.

The 1st defendant explained that they omitted the house because they were unsure if it belonged to the deceased at the time of the application for Letters of administration in 2015. Subsequently, when they realised that the house belonged to the deceased, they should have gone back to the court to have the inventory amended to include the disputed property. In the case of **In Re Ackom-Mensah Decd; Ackom-Mensah vrs. Abosopem & Anor [1973] 2 GLR 18,** the wife of the deceased and administrator of his estate, failed to include the matrimonial home in the inventory. The Court, per Hayfron Benjamin J (as he then was) gave the following options to the family:

> *"In the present case, the administratrix, the widow of the deceased under the Marriage Ordinance has not exhibited the matrimonial home in the inventory. The courses open to the family are:*
>
> *(a) If they are satisfied that the house was the self-acquired property of the deceased, built with his own resources without any contribution in cash or kind from the wife, then they are free to file objections by way of motion asking for the amendment of the inventory and an insertion therein of the said matrimonial home, if the administratrix admits that it was so built or acquired.*
>
> *(b) If they are satisfied that the house was self-acquired in terms of (a) above, but yet the administratrix does not admit it, then they are free to bring an action for a declaration that*

it forms part of the estate of the deceased, and ought to be administered and distributed as part of the estate.

(c) If they are satisfied that the house was family property even in the lifetime of the deceased, e.g. having been part of the estate of a deceased member of the family which the deceased inherited under customary law, then to bring an action for a declaration that it is family property".

The 1st and 2nd defendants should have taken a cue from this case to amend the inventory to include the disputed property. Thus, they had no authority to deal with the disputed property. As has already been stated, their mandate to administer the deceased's estate was only limited to the deceased's property as exhibited in the inventory and nothing else. I am fortified in my thinking by the ratio in the case of **Sam Boateng vrs. Yaw Osei and 2 Ors [2008] DLCA 6947** where the Court of Appeal stated thus:

"The contention of the appellant in his written statement of client's case with regard to this ground of appeal is that the property listed in the "DECLARATION OF MOVABLE AND IMMOVABLE PROPERTY OF TESTATOIR OR INTESTATE" did not include the landed property that was sold to the co defendant. It means therefore that the court was wrong in declaring the sale valid. Counsel relied on the case of Sam Boateng v. Paradise Farms and Another which is an unreported judgment of this court. The case involved the estate of Frank Moore and sale of payloader which was not included in the inventory filed for the Letters of Administration which she obtained from the Circuit Court. This court held that since the payloader was not declared as belonging to the estate of the late Frank Moore its sale to a third party was not valid and therefore would not enjoy the protection afforded by section 97(1) of Administration of Estates Act, 1961 (Act 63)".

Even if the disputed house was exhibited in the inventory, I doubt if the 1st and 2nd defendants could just have sold the house without the court's direction. The case of the

1st and 2nd defendants is that the sale of the house was necessitated by the need to discharge the deceased's debts owed to his creditors. According to the 1st defendant, the deceased owed Hajia and Kwabena Sarpong. They also had to borrow money from Mrs. Saudatu to offset the funeral debt incurred in burying the deceased.

The parties testified that the deceased had other properties both in Takoradi and Tarkwa. They did not specify whether they were movable or immovable properties. However, I am inclined to believe that they were movable properties, given the absence of evidence pointing to the fact that the deceased had other buildings apart from the disputed property. The 1st defendant testified that the disputed property was the only landed property his father left behind. The 2nd defendant testified that the deceased lived in the disputed property with his first wife. That being the case, the disputed property is one affected by sections 3 and 4 of the Intestate Succession Act, PNDCL 111. Properties affected by sections 3 and 4 of PNDCL 111 include the deceased's house if that is the only house of the deceased's estate and the household chattels.

Sections 92 and 93 of Act 63 mandate personal representatives to pay all funeral, testamentary and administrative expenses before sharing the residuary estate to the beneficiaries. The deceased's movable and immovable property are assets for the payment of his debts and liabilities. As such, the administrators of the estate of a deceased can sell and convert into money any immovable and movable property of the deceased. Sections 93(1) and (2) of Act 63 state:

> "***Section 93—Realisation of Assets.***
>
> *(1) Subject to subsection (2) of this section the personal representative may, so far as required for the purposes of administration sell and convert into money any movable and immovable property of the deceased other than those household chattels and immovable*

property to which sections 3 and 4 of the Intestate Succession Law, 1985 (PNDCL 111) apply.

(2) Notwithstanding subsection (1) of this section if the personal representative is of the opinion that the conversion into money of those household chattels and the immovable property referred to in that subsection is necessary for the purposes of administration he shall apply to the Court for an order to sell and convert into money those household chattels and immovable property.

(3) The Court shall, in making an order under subsection (2) of this section, consider all the circumstances of the case, including the wishes of those beneficiaries entitled to the household chattels and the immovable property.

(4) Out of the money arising from sale and conversion and any ready money of the deceased, the personal representative shall pay all testamentary and administration expenses, debts and other liabilities properly payable therefrom having regard to the rules of administration contained in this Part, and shall provide for any pecuniary legacies bequeathed by the will (if any) of the deceased".

The effect of these provisions is that the administrators can sell the deceased's properties, including those affected by sections 3 and 4 of the Intestate Succession Act, PNDCL 111. However, regarding properties affected by sections 3 and 4 of PNDCL 111, the administrators should apply to the court for an order to sell. The 1st and 2nd defendants ought to have complied with this section before selling the disputed property. The plaintiffs, as children of the deceased, together with the 1st, 2nd defendants and Grace Osei, are all beneficiaries of the deceased's estate and entitled to have an equal share in the disputed property. A section of the beneficiaries can only sell the house with the consent of the rest of the beneficiaries. The deceased's mother, Obaa panyin Akua Baah, who the

1st defendant claimed to have consented to the sale and executed a power of attorney to him to sell the house, as shown by exhibit "3", though a beneficiary of the estate of the deceased under PNDCL 111 was not a beneficiary regarding properties affected by section 3 of PNDCL 111 and therefore had no capacity or authority to authorise the sale of the property.

Whichever way one looks at it, the 1st and 2nd defendants lacked capacity to deal with or sell the disputed property, i.e., plot No. 39 Essaman and the house situate thereon to the 3rd defendant. The Letters of Administration did not authorise them to deal with the disputed property, and even if it did, they did not seek the court's authorisation to sell it.

PURCHASER FOR VALUE WITHOUT NOTICE

The 3rd defendant contends that he is a bonafide purchaser for value without notice of any alleged wrongdoing in the application and subsequent grant of the Letters of Administration to the 1st and 2nd defendants to administer the deceased's estate. According to him, he lawfully acquired the disputed property from the 1st and 2nd defendants when they presented the Letters of Administration to him as the proper persons to deal with the deceased's estate.

The equitable doctrine of a purchaser for valuable consideration without notice provides that an equitable interest may be enforced against the entire world except a bonafide purchaser for value of the legal estate who has taken without notice of the existence of that equitable interest. The plea of an innocent purchaser or bonafide purchaser of a legal estate for value without notice is an absolute, unqualified and unanswerable defence against the claims of any prior equitable owner. The onus of proof lies on the person

setting it up. As stated in the case of **Appolo Cinemas Estates (Gh) Ltd. vrs. Chief Registrar of Lands & Others [2003-2005] 1 GLR 167**,

> *"The principal points of detail of this plea are four-fold, namely: (1) bonafide; (2) purchaser for value; (3) of a legal estate; and (4) without notice. All the above details must be established before the plea can succeed:"*

The 3rd defendant purchased the disputed property for GHc100,000.00. He tendered the receipt issued to him by the 1st and 2nd defendants as exhibit "8". It is the 3rd defendant's case that he had no notice of any alleged wrongdoing and subsequent grant of the Letters of Administration to the 1st and 2nd defendants. The purchaser, the 3rd defendant in this case, is deemed to have actual notice if he becomes aware during the negotiations of the existence of a prior equitable interest. As held in **Boateng vrs. Dwimfour [1979] GLR 360**, the general principle of equity was that a purchaser had actual notice of all that a reasonably prudent purchaser would have discovered. Thus, where a purchaser had actual notice that the property was in some way encumbered, he would be held to have had constructive notice of all that he would have discovered if he had investigated the encumbrance. As to whether a party is a bonafide purchaser for value without notice, the court mainly is embarking on an enquiry into matters that are incapable of direct or positive proof. Such knowledge, on the part of a party, can only be inferred from other facts proved in evidence and after taking into account all the circumstances of the case, including the party's conduct alleging lack of knowledge.

The 3rd defendant testified that he entered into the sale transaction with the 1st and 2nd defendants only after satisfying himself that they were the persons lawfully granted the Letters of Administration by the Tarkwa High Court to administer the deceased's estate. His diligent searches and examination of the Letters of Administration revealed no illicit dealing on the defendants' part. Again, he did not have any notice, be it actual or

constructive, of the lack of capacity on the defendants' part to transfer the property. However, the evidence points to the fact that the 3rd defendant was privy to the fact that the property was not listed in the inventory as part of the deceased's estate. According to him, the 1st defendant explained to him that they did not know that the property existed at the time of the application. His knowledge of the fact that the property was not listed in the inventory should have prompted him to enquire further regarding the capacity of the defendants to deal with the disputed property. As a lay person, he should have sought professional help and advice on the propriety of purchasing such a property that had not been exhibited to the inventory. There is no evidence on record to show that the 3rd defendant sought professional advice regarding the purchase of the property. The conduct of searches at the appropriate departments may not be enough to discharge the onus of the want of notice on his part. In such circumstances, a prudent purchaser ought to seek professional advice from persons such as lawyers before proceeding with the transaction. As stated by Georgina Wood CJ (as she then was) in **Kusi & Kusi vrs. Bonsu [2010] SCGLR 60:**

> *"It is trite learning that any person desirous of acquiring property ought to properly investigate the root of title of his vendor. In this case there was no evidence of such prudent search conducted by the defendants. In their own pleadings, they asserted that they only inspected the title deeds of the assignor coupled with the permit for construction and were satisfied. The record does not show that they sought professional advice before entering into the transaction".*

Also apt on the need to conduct proper investigations on the title of one's vendor is the admonition by the Court of Appeal in the case of **Zambramah vrs. Mohammed [1992-93] GBR 1614 @ 1618**. The court stated that:

"The principle which emerges out of this case is that a person buying landed property is duty bound to properly investigate the title of the vendor. This is a hackneyed principle of law to settle to require detailed enunciation. Proper investigations will usually depend on the facts of each case generally it should include enquiries aimed at establishing the validity of the vendor. If no enquiries are conducted at all or if no reasonable enquiries are conducted, and the title in the property which is sold turns out to be defective, encumbered or invalid, the purchaser will be pinned with the defect in the title. In the latter event, the purchaser will not be permitted to assent that he is a purchaser for value without notice".

By the 3rd defendant's lack of diligence, it is presumed by his knowledge of the fact that the house was not exhibited to the inventory that he knew that the 1st and 2nd defendants had no capacity to convey the property to him.

It is on record that the 3rd defendant knew quite a number of the beneficiaries of the deceased's estate. Under cross-examination, he testified that he knew the two spouses of the deceased and some of the plaintiffs. He knew the 1st, 3rd and 4th plaintiffs. He also knew that Grace Osei lived on the disputed property with the deceased. When the 1st and 2nd defendants approached him to sell the property without the consent of the other beneficiaries, it should have raised red flags, prompting him to investigate further. According to him, the plaintiffs were aware of the sale, yet the plaintiffs have denied this. From the evidence of the 1st and 2nd defendants, the plaintiffs had refused all communication with them, and as such, they had to meet with the deceased's head of family and other principal members of the family to discuss the issue of the sale of the property. It is clear then that the plaintiffs were not privy to the sale. The 3rd defendant, as a prudent purchaser could just have enquired from the plaintiffs, or at the very least from the plaintiffs he knew or Grace Osei, regarding the sale. He failed to do this. According to him, since 2016, he had not spoken to the 1st plaintiff. It was not enough for

him to rely on the Letters of Administration shown to him by the 1st and 2nd defendants when he knew other persons were interested in the property.

The 3rd defendant cannot be described as a prudent purchaser. The steps he took are not adequate for a prudent purchaser of the disputed property, and as such, the plea would not avail him.

Counsel for the plaintiffs alluded to the fact that because the 1st and 2nd plaintiffs lacked the capacity to deal with the disputed property, the protection afforded by law under section 97(1) of Act 63 would not avail the 3rd defendant. Section 97(1) of Act 63 states:

> *"**Section 97—Validity of Conveyance not Affected by Revocation of Representation.***
>
> *(1) All conveyances of any interest in movable or immovable property made to a purchaser either before or after the commencement of this Act by a person to whom probate or letters of administration have been granted are valid, notwithstanding any subsequent revocation or variation, either before or after the commencement of this Act, of the probate or administration.*
>
> *(2) This section takes effect without prejudice to any order of the court made before the commencement of this Act, and applies whether the testator or intestate died before or after such commencement.*

The said section envisages the situation where the administrators conveyed property to persons when the Letters of Administration had been revoked or varied. That is not the situation here. At the time of the sale of the disputed property to the 3rd defendant, the Letters of Administration had not been revoked. This case borders on dealing with property not listed in the inventory. The said section does not apply to the case.

The plaintiffs have made a case for setting aside the sale. The sale of the disputed property, i.e. Plot No. 39 and the house situate thereon by the 1st and 2nd defendants to the 3rd defendant, is set aside as null and void. The 1st and 2nd defendants lacked the capacity to sell the property to the 3rd defendant. The 3rd defendant's counterclaim is dismissed.

(SGD.)

H/L AFIA N. ADU-AMANKWA (MRS.)

JUSTICE OF THE HIGH COURT.

COUNSELS

Audrey Boateng-Duah (holding Baffour A. Dwumah's brief) appears for the Plaintiffs.

J. E. K. Abekah (holding J. E. Abekah's brief) appears for the 1st and 2nd Defendants.