IN THE SUPERIOR COURT OF JUCICATURE, IN THE HIGH COURT OF JUSTICE, HELD IN CAPE COAST ON 22ND APRIL, 2024, BEFORE HIS LORDSHIP JUSTICE JOHN-MARK NUKU ALIFO "J"

CASE NO. A1/03/2022

ABA AMOKUMAH - PLAINTIFF/APPELLANT

VRS

KOBINA KUM - DEFENDANTS/RESPONDENTS

HANNAH ARTHUR

JUDGMENT

INTRODUCTION

The fundamental question raised for the determination in this appeal involves the nature and ownership at customary law of a piece of land on which the deceased husband of the Plaintiff who died intestate built a house numbered KK66 at Kokoado. Whilst the 1st and 2nd Defendants maintain that the land belonged to their grandmother/mother respectively and thus assumed the nature of a family property, the Plaintiff on the other hand insists that her late husband acquired the property from Nana Kow Ansah, Chief of Dompoase Kokoase who is the rightful owner of the land.

This is an appeal against the Judgment of Her Honour Mawusi Bedjrah sitting at the District Court, Elmina delivered on 5th September, 2022.

Naturally dissatisfied with the decision, the Plaintiff/Appellant registered her protest against the decision of the by filing a Notice of Appeal on 1st December, 2022 consisting of 3 grounds.

Brief Facts

The facts that gave rise to the instant appeal are Plaintiff/Appellant (hereinafter called the "Appellant") was that the wife of the deceased who was also the uncle and brother of the 1st and 2nd Defendants (hereinafter called the "Respondent") respectively. 1st Defendant was appointed the customary successor of the Plaintiff's husband after his demise. According to the Appellant, the Respondents have taken over a 2.0-acre orange plantation and a 1.0-acre palm plantation which she jointly developed with her deceased husband some 15 years ago on land acquired from the Chief of Dompoase Kokoado, Nana Kow Ansah.

She further claims that a three-bedroom residential building numbered KK66 developed on a plot of land in the Kokoado township jointly acquired with her late husband from the same Nana Kow Ansah has been taken over by the Defendants. The Defendants vehemently denied the Plaintiff's claim and rather submitted that all the properties in contention including the plantations and land on which the house is situate are family lands originally acquired by their Great-grandmother from one Nana Kweku Mensah over a century ago.

On the 24th day of November, 2021 the Appellant commenced the instant action against the Respondents for the following reliefs:

The Plaintiff claimed against the Defendants jointly and severally the following reliefs:

(a) Declaration of title to that piece or parcel of orange plantation land situate, lying and being at Kokoado, in the Komenda district of the Central Region of the

Republic of Ghana containing an approximate area of 2.0 acre more or less bounded on the North-East by Opanyin Thomas Tawiah's Land, on the West by Opanyin Kwesi Duku's Land and on the South by Madam Adjoa Amoasi's Land.

(b) Declaration of title to that piece or parcel of oil palm plantation land situate, lying and being at Kokoado, in the Komenda District of the Central Region of the Republic of Ghana containing an approximate area of 1.0acre more or less bounded on the East by Kwesi Esoun's Land, on the North by Naana Eku's Land and on the West by Opanyin Kwabena Asafua's Land and the South by Opanyin Kweku Ahinakwa's land.

(c) An order directed at the defendants to pay to the Plaintiff the total yearly sale proceeds of orange and oil plantation amount due from the time defendants deprived the plaintiff (2016 – 2021) to be calculated at the yearly rate of GHc4,400.00.00.

(d) An order directed at the Defendants to pay to the Plaintiff the total yearly rent of one-bedroom of House No. KK66 at Kokoado amount due from the time defendants deprived the plaintiff (2016 to 2021) to be calculated at the yearly rent of GHc360.00.

(e) An order directed at the defendant to return to the plaintiff the following items which the defendants carried away from the plaintiff and her husband's house on the demise of the husband namely; three boxes with pieces of cloth and one suit, ice chest, one drum, one TV set, and one box containing documents three birth certificates and bank certificates, block-making machine.

(f) An order directed at the Defendants to vacate the estate and hand over possession to the Plaintiff.

(g) Damages for trespass.

(h) Cost.

All the reliefs above were granted except (d) the one-bedroom, House No. KK66 at Kokoado.

General damages and costs of GHc20,000.00 and GHc10,000.00 respectively were awarded in favour of the Plaintiff.

Judgment of the Court Below

The Trial Court set down two main issues for determination:

i. Whether or not the orange and palm plantations as well as House No. KK66 are the self-acquired property of the plaintiff's husband (deceased) or belong to the deceased's family?

ii. Whether or not Defendants took away the household chattels and if so, whether or not the Plaintiff is entitled to return of same.

At the close of a full Trial, the learned Trial Judge in her decision dated 5th September, 2022 which appears on pages 144-152 of the Record of Appeal made the following orders:

i. "Plaintiff is to recover possession of all that piece or parcel of orange plantation land situate, lying and being at Kokoado in the Komenda District of the Central Region of the Republic of Ghana containing an approximate area of 2.0 more or less bounded on the North-East by Opanyin Thomas Tawiah's Land, on the West by Opanyin Kwesi Duku's Land and on the South by Madam Adjoa Amoasi's land, from Defendants.

ii. Recovery of possession of all that piece or parcel of oil plantation land situate lying and being at Kokoado in the Komeneda District of the Central Region of the Republic of Ghana containing an approximate area of 1.0 more or less bounded on the East by Opanyin Kwesi Esoun's land,

on the North by Naana Eku's land, on the West by Opanyin Kwabena Asafua's land and on the South by Opanyin Kweku Ahinakwa's land, by Plaintiff from Defendant.

iii. By these orders Defendants are restrained from setting foot on the parcels of land and interfering with the possessory rights of the Plaintiff and Children in respect of the two parcels of land s described above.

iv. I award general damages to Plaintiff in the amount of GHS20,000.00

I also make the following order;

v. Defendants are hereby directed to return to the Plaintiff the following items which Defendants carried to return the Plaintiff the following items which defendants carried away from the Plaintiff in her husband's house on the demise of the husband namely, three boxes with pieces of cloth, one suit, ice chest, one drum, one TV set, and one box containing documents three birth certificates and bank certificates, block-making machine.

I award cost of GHS10, 000.00 in favour of Plaintiff".

Notice of Appeal

The Plaintiff who was dissatisfied with part of the decision appealed from the judgement on the 20th of September, 2022 on the following 3 grounds:

i. The trial Judge erred in customary law when she refused to admit the land belongs to Nana Kow Ansah, the chief who gave the lad to the Appellant`s husband. Appellant`s evidence the plots of land were given to her husband by the chief, was corroborated by PW1 and PW2 being the Ebusuapanyin of the Akyiremadze Royal Family of Kokoado.

The court in relying on **IN RE YALLEY (DECD); YALLEY V. KELLS (2001-2002) SCGLR 762** should have invoked the special circumstances rule to admit the land belongs to Nana Kow Ansah, the chief and land owner of Gyetor since there is evidence available in this case in the nature of 1st Defendant/Respondent`s own admission that the land is a stool land. By customary law the land that belongs to the stool cannot be the virgin forest of a tract of land to be discovered by the 1st Defendant/Respondent`s great grandmother.

ii. The Court erred when it ruled that there is no evidence as to how Plaintiff/Applicant`s (SIC) husband came by the land in the face of clear evidence of PW1 and PW2 that the land is for the chief and that it will revert to the chief, who is the ultimate owner through the Asafo Company that protects the chief`s land is very instructive. This evidence was not destroyed under cross examination. The issue has to do with the ownership of the land on which the Appellant`s husband house was built after their marriage which Respondents claim belongs to the family. The two adjoining house belong to two separate persons on of which is the Plaintiff/Applicant`s (SIC) husband built on later and the other belong probably to 1st Defendant/Respondent`s great grandmother built earlier.

iii. The Judgment is against the weight of evidence adduced at the trial.

Issue for Determination

The fundamental issue in contention to be deduced from the grounds contained in the Notice of Appeal is whether or not the land on which the house numbered KK66 is the self-acquired Property of the plaintiff's husband. In the case of **Yehans**

International Ltd. v. Martey Tsuru Family and 1 Or., [2018] DLSC 2488 Adinyira JSC at page 8 held:

"It is settled 5 that a person claiming title has to prove: i) his root of title, ii) mode of acquisition and iii) various acts of possession exercised over the land … This can be proved by either traditional evidence or by overt acts of ownership in respect of the land in dispute. A party who relies on a derivative title must prove the title of his grantor. ***Awuku Vrs. Tetteh (2011) 1 SCGLR 366"****.*

Since proof of possession of the land in dispute has never been contested, the existence or otherwise of evidence in the Record of Appeal of her root of title to the land as well as how the land was acquired will be most critical to the determination of the instant appeal. It is also noteworthy that substantial evidence of possession will still be inadequate in aid of the Appellant's success in this Appeal because of the Respondents claim that the land is a family property. Justice Dennis Dominic Adjei on page 54 of the 3rd Edition of his book **Land Law, Practice and Conveyancing in Ghana (2021)** explains family land as *"land owned by the members of a particular family and it therefore treated as a community owned property. A family member who uses his own resources to improve upon an existing family property cannot alienate it because it is treated in every respect as a family property. The reason is that the land and the structure on it belong to the family and the family member only improves it for the benefit of the family."*

In further expatiation of family property in a recent case of **Mrs. Theresa Boakye & Frank Aseidu Boakye Suing per their law attorney Napolean Twum Barimah (As Legal Representatives of the Estate of Kingsley Kwadwo Boakye) Vrs. Opanin Kwame Aseidu with suit No. J4/22/2021** delivered on 15th December, 2021, the Supreme Court speaking through Torkornoo, JSC (as she was then) held as follows:

"Bearing in mind the dicta in in ***Larbi Vrs. Cato & Another [1959] GLR 35, and Yalley (Decd) Yalley Vrs. Kells[2001 -2002] SCGLR 762****, we will say that where no members of a family have been shown to have contributed to the acquisition of land or construction of a house, it must only be in the face of uncontested evidence of a deceased person handing over self-constructed property to the family as a gift, or allowing the use of that house by various members of that family during the lifetime of the one who built it, as if the house were jointly owned by that family, that a Court should find itself able to declare such a property as 'family property'. Even within that context, there must be clarity on how this 'family' is defined."*

The implication is that once there is evidence of contribution of the family to the acquisition of the land and/or the house thereon by the deceased, the property assumes the character of a family property and not the self-acquired property of Appellant's late husband is not capable of alienation without the prior consent and concurrence of the principal members of the family.

Burden of Proof

In all civil suits such as the instant action, the primary burden of proof, that is, the duty of producing evidence in support of averments necessary for the Court to deliver a favourable decision, rests upon the party who made the averment. The primary burden of proof is usually on the Plaintiff because she made the primary averments when she instituted the action. Under certain circumstances, this burden may shift to the Defendant to open the trial by the adduction of evidence as was noted by Date-Ba, JSC in the case of **Sumaila Bielbiel Vrs. Adamu Dramani & AG (No.3) [2012] 1 SCGLR 370***:*

"Ordinarily, the burden of persuasion lies on the same party as bears the burden of producing evidence. However, depending upon the pleadings or what facts are admitted, the evidential burden can move on to a Defendant. The cumulation on the Defendant of the evidential burden on the issues to be tried in a case can result in the right to open the case shifting to the Defendant."

However, where the Plaintiff adduces sufficient evidence in the discharge of the primary burden, the onus then shifts under Section 14 of Act 323 onto the Defendant, who under Section 10 (2) of Act 323, is required to adduce sufficient evidence in rebuttal, to avoid a ruling against him on the particular issue as was held in **Faibi Vrs. State Hotels Corporation [1968] GLR 471**. **Section Act 323** provides that:

"14. Except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defense that party is asserting."

In the case of **Birimpong Vrs. Bawuah [1994-95] GBR 837,** the Court held that in any action where a Defendant has a counterclaim, the same primary burden of proof, and standard of proof are placed on him as it is with the plaintiff**.**

The obligation of the party making the averment or an allegation of fact essential to the success of his case is two-fold. The first is the production of evidence in proof of the averment, as required by Sections 11(1) and 14 of the Evidence Act, 1975 (N.R.C.D 323) and second the production of evidence to meet the standard of proof under Section 10(1) of NRCD 323.

Firstly, that burden may be discharged by adduction of evidence by the plaintiff himself or by his witness (es). In the case of **NDC Vrs. Electoral Commission [2001-2002] SCGLR 954**, the Supreme Court in dismissing the case of the Plaintiff for their inability to adduce evidence in proof of their allegations, Wiredu Ag. CJ held that *"…To allege that a person has breached the constitutional provision requires the production of sufficient, cogent and clear evidence to support the allegation. Unfortunately, what we have before us from both sides cannot be said to be sufficient, clear and cogent."*

Secondly, the burden of producing evidence may be discharged if the averment made by the Plaintiff or Defendant-counterclaimant, is admitted by the opponent. In **West African Enterprise Ltd Vrs. Western Hardwood Enterprise Ltd [1995-96] 1 GLR., CA**, it was held (in holding 3),

"...no principle of law required a party to prove an admitted fact.''

Thirdly, the burden of proof may be discharged by evidence from the mouth of an opponent or his witness. In **Nyame Vrs. Tawiah & Anor [1979] GLR 265, C.A (Full Bench),** it was held:

"A party could prove his case by admissions from the mouth of his opponent or his adversary's witness...''

The second leg of the obligation on the averrer is to ensure that the evidence adduced meets the standard of proof set by the law. The evidence must be sufficiently cogent in persuading the trier of fact under section 10 (1), Act 323, of the existence of the fact alleged. **Section 10 of the Evidence Act, 1975 (Act 323**) also states:

"*10. (1) For the purposes of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court.*

(2) The burden of persuasion may require a party.

(a) To raise a reasonable doubt concerning the existence or non-existence of a fact, or

(b) To establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt."

In the case of **Dzaisu and Others Vrs. Ghana Breweries Limited [2007-2008]1 SCGLR 539** at p.545, the Supreme Court per Adinyira JSC., stated as follows:
"It is a basic principle in the law of evidence that the burden of persuasion on proving all facts essential to any claim lies on whosoever is making the claim." In the case of **Mondial Veneer (Gh.) Limited Vrs. Amuah Gyebi XV [2011] 1 SCGLR 466**, Wood CJ (As she then was) also held same at page 475 thus: *"A person asserting title to land and on whom the burden of persuasion falls, must prove: 'The root of title, the mode of acquisition and various acts of possession exercised over the subject-matter of litigation".*

The test applied by the Court in determining whether the evidence adduced was persuasive, is "*proof by a preponderance of probabilities'',* under **Section 12 of Act 323**:

"12. Proof by a Preponderance of Probabilities

(1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.

(2) "Preponderance of the probabilities" means the degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence."

Where a party alleges the commission of a crime by the other in a civil suit, the standard of proof is the same as in a criminal case, which is "*proof beyond a reasonable doubt.*" In **Sasu Bamfo Vrs. Simtim [2012] 1 SCGLR 136 at 138**, it was held:

"*The law regarding proof of forgery or any allegation of a criminal act in a civil trial was governed by section 13 (1) of the Evidence Act, 1975 (NRCD 323); that section provided that the burden of persuasion required was proof beyond reasonable doubt…*"

The effect of Sections 11, 12 and 14 of Act 323 as well as the principles enunciated under case law by the Superior Courts is that a party whose pleadings raise an issue which is essential to the success of his case has the burden of adducing sufficient evidence in proof of that issue. The burden only shifted to the Defendant when the Plaintiff has succeeded in the discharge of that burden.

LEGAL ANALYSIS AND OIPION

The duty of this Court in the instant appeal is to review the Record to determine whether or not the findings of the Trial Court are amply supported by evidence of record as was held in **Koranteng II and Ano Vrs. Klu [1993-94] 1 GLR 280 (SC).** In a further expatiation of the role of the appellate Court in **Bakana Ltd Vrs. Osei [2014] 77 GMJ 68 at 76 (CA)**, the Court of Appeal stated that an appellate court as a

rehearing court is to rehear an appeal as if the rehearing were the original hearing of the case and hence may comprehensively review the whole case by analyzing the entire record of appeal, taking into consideration testimonies and all documentary evidence adduced at the trail before arriving at a decision, to satisfy itself that on the preponderance of probabilities, the judgement of the Trial Judge is reasonably or amply supported by the evidence on record.

Where the Appellant alleges as in the omnibus ground that the decision of the Trial Court is against the weight of the evidence, as in this Appeal, this Appellate Court has a duty, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trail before arriving at a decision, to satisfy itself that on the preponderance of probabilities the conclusions of the Trial Judge is reasonably or amply supported by the evidence on record. - **Tuakwa Vrs. Bosom (2001-2002) SCGLR 61, 65** and **Oppong Vrs. Anarfi (2011) 2 SCGLR 556.**

Capacity of the Appellant.

Counsel for Respondents have raised the issue of capacity of the Appellant to initiate the action first time on Appeal which is entirely within their right as per the Judgment in the case of **Nii Kpobi Tetteh Tsuru III (Substituted by Nii Obodai IV suing on behalf of La Stool) & 2 Ors Vrs. Agri-Castle & 4 Ors. (Civil Appeal No. J4/15/2019, dated 18th March, 2020.SC.**

The Respondents argue the Appellant claims the house belonged to her late husband but never provided any evidence as to her capacity to sue to recover the estate of her deceased. Counsel argued that the Appellant is not an Administrator of the estate neither is she a customary successor of the estate of the deceased husband and therefore lack capacity to mount the action from inception. Learned Counsel cited the cases of **Akrong Vrs. Bulley (1965)1 GLR 469** to support his arguments. He

added that capacity to bring an action and maintain an action remains a cardinal hurdle that must be jumped if either party is to remain in the case. He stated that it is for good reason that Order 2(4) of High Court (Civil Procedure) Rules, 2004 (C. I. 47) as amended, insist on the capacity of the Plaintiff to be indorsed on the Writ before it becomes a competent writ.

The case of **Sokpui II Vrs. Agbozo III (1951) 13 WACA 241** offers a good illustration of the catastrophic effects lack of capacity can have on the fortunes of a case. Where the Plaintiffs lacks capacity the entire writ is a nullity and cannot be sustained. The issue of capacity goes to the root of the action and can be raised at any time even for the first time on appeal. See also the case of **Akrong Vrs. Bulley [1965] GLR 469, SC. In the case of Republic Vrs. High Court Ex-parte Aryeetey (Ankra Interested Party) (2003-2004) SCGLR 405**, the venerable Kpegah JSC held thus;

'…If a party brings an action in a capacity he does not have, the writ is a nullity and so are the proceedings and judgment founded on it. Any challenge to capacity therefore puts the validity of a writ in issue. It is a proposition familiar to all lawyers that the question of capacity like a plea of limitation, is not concerned with the merits so that if the axe falls, then a defendant who is lucky enough to have the advantage of the unimpeachable defence of lack of capacity in his opponent is entitled to insist upon his rights'.

The practice is that once the issue of capacity is raised, it must first be determined before the action can proceed. See cases such as **Asante Appiah Vrs. Amponsah alias Mansah (2009) SCGLR 90, Fosua & Adu-Poku Vrs. Dufie (2009) SCGLR 310 and Kowus Motors Vrs. Check Point (2009) SCGLR 230,** as authority for this preposition.

The current position of the law is that capacity must be present before a writ is issued, such authority must be endorsed on the Writ of Summons and accompanying Statement of Claim.

It is trite that a writ which does not meet the requirements of capacity is null & void. The nullity can be raised at anytime in the cause of the proceedings even on appeal, see the case of **National Investment Bank & Ors. (No.1) V. Standard Bank Offshore Trust Co. Ltd (No.1) (2017-2020) 2 SCGLR 28.**

Where a party has the right capacity but the title of the suit is wrongly stated, the court are inclined to amend the title and not strike out the writ such was held in the case of **Obeng & Ors V. Assemblies of God Ghana (2010) SCGLR 300** where the court deleted the additional words "Executive Presbytery" in the Plaintiff's name by amendment.

In the case of **Ghana Ports & Harbours Authority V. Issoufour Kabore (1991) 1 SCGLR 500 CA** where the Court deleted "ETS" from "ETS Issoufour Kabore as Plaintiff by amendment.

However, where the Plaintiff had no capacity to issue the writ from the onset, the writ will be null & void. No amendment can be made later to clothe the Plaintiff with Capacity such was the situation in the cases of **Akrong Vrs. Bulley (1965) GCR 469, Noas Holdings Inc. Vrs. Ghana Commercial Bank (2005-2008) SCGLR 407.**

National Investment Bank & Ors. (No.1) Vrs. Standard Bank Offshore Trust Co. Ltd (No.1) (2017-2020) 2 SCGLR 28 and Nii Kpobi Tetteh Tsuru (Substituted by Nii Obodai IV suing on behalf of La Stool) VRS. Agric Castle & Ors. Civil Appeal No. J4/15/2019 dated 18/March/2020 SC.

The Court refused to amend the Plaintiff's capacity as that will amount to substituting a different Plaintiff in the case.

Even though admittedly, this is the current position of the Supreme Court with regard to indorsement of relevant capacity on a writ; with great deference to the apex Court of the land, I agree with Learned **Bobby Banson** in his "**Book Civil Litigation In the High Court of Ghana"** where he stated at page 116 that *"**Standard Bank Offshore case (Supra)** was decided without a consideration of Order 16 Rule 5(4) of*

CI.47….The above rule quoted marks a substantial departure from their earlier decisions in cases such as ***Akrong Vrs. Bulley (Supra);*** *for the rules now appear to allow a new capacity that was not present at the time of the action but was acquired in the course of the suit, subject to necessary amendment, to the made to reflect the new capacity on the writ of summons".*

I will now proceed to deal with the issue of capacity as raised by the Respondents for the first time on Appeal which I have stated is entirely within their right so to do.

The old position of the law as rightly argued by Counsel for the Respondents in the case of **Akrong Vrs. Bulley (1965) 1 GLR 469** is that a person who is not an Administrator of the estate of a deceased person cannot institute an action with respect to the estate.

"Since at the time the Plaintiff issued her writ she had not taken out letters of administration, she lacked capacity to sue ... This lack of capacity was not cured by the fact that she eventually took out letters of administration … The Plaintiff 's writ was thus a nullity and so were the proceedings and the judgment founded upon it". ***Akrong Vrs. Bulley (supra).***

The principle stated in **In Re Appau (Dec'd) Appau Vrs. Ocansey [1993-94] 1 GLR 146** was that anyone with an interest in an estate, such as a beneficiary, could take an action in respect of the estate where there was no formal grant of letters of administration under which vesting assent might be considered, provided the action taken was aimed at protecting the estate from being wasted. But this position was held to be wrong in the case of **Okyere (Dec'd) Substituted by Peprah Vrs. Appenteng & Adomaa (2012]) 1 SCGLR 65** *"That decision by the Court of Appeal was a statement of the old common law position. The law of Ghana after the enactment of the Administration of Estates Act, , 1961, Act 63 was different. The correct legal position was that a devisee could not sue or be sued in relation to the devised property before a vesting assent executed in his or her favour. Accordingly, in the absence of a vesting assent executed in favour of the second defendant she could neither sue nor be sued on her devises"*. On the

peculiar circumstances of the case, the Supreme Court in the case of **Adisa Boya Vrs. Mohammed (Substituted by Mohammed & Mujaab (2017-2018) 1 SCGLR 997,** was of the view that the defendants being children of their intestate father and having interest in the property were competent to defend the action and even mount an action for declaration of tittle, even though they had not sought and obtained letters of administration. This must be contrasted with the apex court's own earlier decision in the case of **Djin Vrs. Musa Baako (2007-2008) SCGLR 686 @ page 696**. That decision was to the effect that the right to recover land in respect of an intestate estate accrues from the date letters of administration is granted. This was to answer the claim of a defence of the action being statute barred under section 10 of NRCD 54. That decision is line with the **Akrong Vrs. Bulley (supra)** principle.

However, in the face of the **Adisa Boya case** one need to have recourse to the specific provisions of the Administration of Estates Act, 1961, Act 63, sections 1(1), 2(1), 96 and 108 to the effect that, *"The movable and immovable property of a deceased person shall devolve on his personal representatives with effect from his death".*

(1) The personal representatives shall be the representative of the deceased in regard to his movable and immovable property.

(2) The personal representatives for the time being of a deceased person are deemed in law his heirs and assigns within the meaning of all trusts and powers". Section 108 under definition section, defines a personal representative as "personal representative" means the executor, original or by representation, or administrator for the time being of a deceased person".

This view of the law under Act 63 is reflected in the case of **Fordjour Vrs. Kaakyire (2015) 85 GMJ 61 @85, CA** that the proper person to sue in respect of the estate of a deceased, when the person died intestate is either the customary successor or the Administrator of the estate.

Nonetheless, the Supreme Court has affirmed its decision in the **Adisa Boya case** in **Bandoh Vrs. Appeagyei-Gyamfi & Anor (2017-2018) 1 SCGLR 299.** In the **Bandoh Case** the **res litiga** belonged to the mother of the plaintiff but she issued the writ in her own right as a beneficiary at a time she had not obtained Letters of Administration. Marful-Sau JSC allowed the action as he reasoned that the plaintiff brought the action as personal representative and a beneficiary of the estate. Further, that the capacity was furnished on the statement of claim but not on the writ and any defect in a writ could be cured in the statement of claim as held in **Hydrafoam Estates Gh. Ltd. Vrs. Owusu (per lawful Attorney) Okine and Others [2013-2014] 2 SCGLR 1117**. The Supreme Court endorsed the correctness of the **Adisa Boya case** in the **Bandoh** decision by noting that: *"I wish to add that the above proposition of law is only fair and equitable in view of the interest created in estate for beneficiary children under the Intestate Succession Act, PNDC Law 111. I therefore, entirely agree with the legal proposition enunciated by Gbadegbe JSC, and hold that even in this appeal the appellant, being a beneficiary child, was a competent party, notwithstanding the fact that she had no letters of Administration".*

On the authority of **Adisa Boja and Bandoh (supra)** thoroughly discussed above, I am fortified to dismiss the issue of lack of capacity of the Appellant raised by the Respondent in this appeal. The Appellant, as spouse of the deceased husband Mr. Samuel Arthur had capacity to initiate the action as she did being a beneficiary of the late husband`s estate even though she has hand not procured Letters of Administration at the time of initiating the suit at the Trial Court.

Evidence of Plaintiff/Appellant

The Plaintiff/Appellant in establishing her case testified by herself and called three (3) other witnesses namely Nana Amonoo-Rockson-PW1, Nana Kwabena Kwanin-PW2, and Olivia Arthur-PW3 to testify on her behalf. Two exhibits which are not germane to the determination of the instant appeal were also tendered.

Learned Counsel for the Appellant is his written submission argued that PW1, a retired Teacher and PW2 who is the Ebusuapanyin of the Akyiremadze Royal Family of Kokoado corroborated her evidence that the land on which House numbered KK66 sit belongs to Nana Kow Ansah who gave same to her late husband. Counsel submits that the Trial Court in relying on **In Re Yalley (Decd); Yalley Vrs. Kells (2001-2002) SCGLR 762** should have invoked the special circumstances rule to admit the land belongs to Nana Kow Ansah, the Chief and land owner of Gyetor since the Defendant did admit that the disputed land is a stool land. He further argues that under customary law a stool land could not have been a virgin forest for the Respondents' great-grandmother to have discovered same.

The evidence on the Record shows that beyond the bare assertions of the Appellant she acquired the land on which the House No. KK66, Kokoado sits from Nana Kow Ansah in 2006, no credible or sufficient evidence was adduced to buttress her claim of ownership. At pages 62 to 63 of the Record of Appeal, this is what ensued between Plaintiff and 1st Respondent during the former's cross-examination by the 1st Respondent.

Q: Before my uncle left, had he built a mud house before leaving?

A: He built the mud house before leaving.

Q: Who did the land belong to?

A: The land belonged to Nana Kow Ansah.

Q: Do you remember that the land belonged to my great-grandmother, Nana Afua Edu?

A: **My husband told me that the land belonged to Nana Kow Ansah**. What you are saying is not true.

Q: Do you remember that where your husband's building is, one of my grandmother's house is also at the same place?

A: That is so, my Lord.

Q: **I am putting it to you that the land in issue belongs to great grandmother.**

A: **All I know is that the land belongs to Nana Kow Ansah.**

Q: Before you got married to my uncle and brought to Kokoado, was the building already in existence or you put up the building with my uncle?

A: I came before my husband put up the building.

The Learned Trial Judge found that this evidence raised a presumption in favour of family property under customary law. There is no denying that the Appellant could not adduce sufficient evidence in the discharge of her burden of producing evidence of the allegation of fact that the land on which the house sits belongs to Nana Kow Ansah. The position of the law in such a situation as provided under Section 11 of Act 323 and explained in the case of **In Re Ashaley Botwe Lands; Adjetey Agbosu & Others [2003-2004] SCGLR 400, 425-426.**, is that a ruling will be made against him on that fact. **Section 11(1) of the Evidence Act 1975 (NRCD 323)**, provides that:

"11(1) For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on an issue."

Learned Counsel for the Appellant's submission is that PW1 and PW2 corroborated the Appellant's evidence that plots of land were given to the Plaintiff's husband by Nana Kow Ansah. It is important to point out that the land in dispute which was litigated in the Trial Court were three (3) namely, 1. Orange plantation land; 2. Oil palm plantation land and 3. Land with house number K66. A careful perusal of the Record lends credence only to the first two plots of land which contain the orange and palm plantations. PW1 in both his evidence-in-chief and under cross-examination testified that Appellant's husband was given plots of land by Nana Kow Ansah acting through the Asafo Company on which he planted oranges and oil palm. PW2 essentially corroborated PW1's testimony in respect of lands for orange

and oil palm cultivation. No evidence proceeded from them to support Appellant's claim that the land on which the house sits was the self-acquired property of the deceased granted to him by Nana Kow Ansah.

I reiterate that in the instant appeal, the burden of persuasion on the Appellant as to the deceased being the owner of the land in issue required that she discharged the burden of producing evidence of this fact. The primary function of PW1 and PW2 is to corroborate the testimony of Plaintiff that this land was indeed allocated to her deceased husband by Nana Kow Ansah or his agents to be his sole property.

Corroboration in law is evidence that supports the testimony of a witness by confirming that the witness is telling the truth in some material particular. Section 7 of the Evidence Act directs that:

"7(1). Corroboration consists of evidence from which a reasonable inference can be drawn which confirms in some material particular the evidence to be corroborated and connects the relevant person with the crime, claim or defence."

The testimony of the Appellant in essence as captured in the Record of Appeal is at best a regurgitation of what she claims her deceased husband allegedly told her about how he came by the land whose ownership is in dispute. She lacked personal knowledge of how the land was acquired by her late husband. In order to persuade the Trial Court to believe in the truth of her testimony, she needed her witnesses especially PW2 to have offered cogent evidence to reinforce her own testimony. Unfortunately, there is no evidence on the Record, upon careful perusal, to corroborate the evidence of the Appellant. Although Counsel for the Appellant submits rather strongly that the Trial Court ought to have considered extraneous evidence to reach a finding that the land in dispute is the self-acquired property of the deceased granted to him by Nana Kow Ansah, there is however, nothing in the Record from which this Court could reasonably infer that the land in contention is the personal property of the deceased granted to him by Nana Kow Anash.

The rule of evidence as already stated above is that per Section 14 of Act 323, the onus only shifts to the opponent to offer a rebuttal only when the averrer had successfully discharged her evidential burden of proof. The logical outcome for a party who fails to discharge her burden of proof in respect of an allegation of fact essential to the success of her case is an unfavourable ruling on that fact.

The 1st Respondent in paragraph 4 of his Statement of Defence and Evidence in Chief said the land in dispute was acquired by his mother's ancestors who reduced a parcel of virgin forest which formed part of a larger tract into bare land, took possession and occupied same since antiquity. He further stated that his grandmother also occupied the land and built a switch house which served as the family abode. The relevant part of paragraph 4 of Defendant's Statement of Defence filed on 9th December, 2012 at pages 19 and 20 of Record of Appeal reads as follows:

"…2nd Defendant states that the disputed land is a portion of a tract of land at Gyetar the virgin forest of which was broken by her mother's ancestors."

In paragraph 6 of his Statement of Defence, he asserted that the land in dispute is the property of his grandmother. The switch house was demolished by the deceased husband of the Appellant and developed into a house built with concrete. Under cross-examination however, 1st Respondent admitted that the land is a stool land. Counsel for the Appellant submits that this admission should be taken as evidence in support of the Appellant's claim that the land is the property of her deceased husband granted to her Nana Kow Ansah. He further argues that stool land cannot be the virgin forest of a tract of land to be discovered by the Respondent's ancestors. Learned Counsel did not provide any legal authority under custom for this proposition.

Adade, JSC explained in the case of **Nartey Vrs. Mechanical Lloyds Assembly Plant Ltd. (1987) 2 GLR 314 at page 344**, that in discharging his burden of proof, the averrer was not precluded from capitalizing on the shortcomings of his opponent's case to his own benefit in the following words:

"A person who comes to Court, no matter what the claim is must be able to make a case for the Court to consider otherwise he fails. But that is not to say that having succeeded in establishing some case he cannot take advantage of conflicts, admissions and other weaknesses in the defendant's case"

In fairness to the 1st Respondent, he did not assert that his ancestors discovered the virgin forest. Even if they did, they could have done so on behalf of the stool. As subjects of the stool, they could also have entered upon a virgin forest on land forming part of stool property, reduced same into their possession and occupation as usufructs. In **Ohimen Vrs Adjei & Another** delivered by the Supreme Court on 14th March, 1957, Ollenu J., held:

"There are four principal methods by which a stool acquires land. They are: conquest and subsequent settlement thereon and cultivation by subjects of the stool; discovery, by hunters or pioneers of the stool, of unoccupied land and subsequent settlement thereon and use thereof by the stool and its subjects; gift to the stool; purchase by the stool. Each of these methods involves either the sacrifice of lives of subjects, or the expenditure of energy or contribution of money by subjects, and use and occupation of the land by the subjects. The stool holds the absolute title in the land as trustee for and on behalf of its subjects, -and the subjects are entitled to the beneficial interest or usufruct thereof and have to serve the stool. Each individual or family is regarded in the broad sense as the owner of so much of the land as it is able by its industry or by the industry of its ancestors to reduce into possession and control. The area of land so reduced into the lawful possession of the individual or family, and over which he or they exercise a usufructuary right, is usually called his property. It cannot, save with the express consent of the family or individual, be disposed of by the stool."

The seeming departure of the 1st Respondent from his pleading under cross-examination as highlighted by learned Counsel for the Appellant in his submission did not do much violence to the former's case.

Paragraph 5 of 1st Respondent's witness statement filed on 17th January 2022 page 45 of Record of Appeal reads:

"1st Defendant states that the disputed land is a portion of a tract of land at Gyetar the virgin forest of which was broken by my great grandmother.'

Under cross-examination the Respondent responded as follows on page 92 of Record of Appeal:

"Q: You have claimed that the land on which Mr. Arthur, your uncle built on belongs to your great-grandmother. Tell this Court how your great-grandmother acquired that land.

A: The town was a very small one by then. The then-chief gave the land to my great-grandmother.

Q: What was the name of the chief?

A: He was called Nana Kweku Mensah.

Q: What year was that?

A: It was more than 100 years. By then, I was not even born."

In any case, bruises which may have been sustained by the 1st Respondent's case as a result of this testimony were nevertheless insufficient to lighten the burden of the Appellant to adduce cogent evidence in proof of her allegation that the land in dispute was acquired by her late husband from Nana Kow Ansah.

A careful review of Record of Appeal leads to a finding that on the balance of probabilities the land on which House No. k66 stands is not the self-acquired property of the deceased husband of the Appellant. It therefore stands to reason that the land will form part of the property of the late Samuel Arthur's immediate family and therefore qualifies as family property.

The Trial Judge decided the case correctly when she found that House No. k66 was built by the Appellant's husband on family land per the rule espoused in **In re Yalley (Decd); Yalley Vrs Kells [2001-2002] SCGLR 762** and reiterated in the **Mrs.**

Theresa Boakye case supra that when a family member develops a family property, he only acquires a life interest in it and therefore cannot alienate either by his will or by sale.

K.A Gyimah "J" in his Book **"A Concise Guide To The Study Of Ghana Land Law"** stated at **page 107** of as follows: "*The authorities have also held that a house which a person builds with his private resources on family land becomes family property and improvements on family land also becomes family property but the family member only has a life interest in such properties".* See the cases of **Owoo Vrs. Owoo (1945) 11 WACA 81; Ansah Vrs. Sackey (1958) 3 WALR325; Amissah-Abadoo Vrs. Abadoo (1974) 1 GLR 110; Biney Vrs Biney (1974) 1 GLR 318.**

The Supreme Court in the case of **Veronica Opoku (Suing per her Lawful Attorney Ms.Dorothy Poku) Vrs. Mary Lartey (Unreported) JELR 65710(SC). Civil Motion No.J4/14/2016. Dated 24th January, 2018 said per Akoto-Bamfo JSC** as follows: *"It is generally established that an appellate court must not disturb findings of fact made by a trial Court, even if the Appellate Court could have come to a different conclusion unless the findings of fact made by the trial Judge were wholly unsupported by the evidence.*

In **RE Okine (Dec`d); Dodoo and Another Vrs. Okine and Ors (2003-2004) 1 SCGLR 582 Atuguba JSC** re-echoed this principle **In Re Krobo Stool (No1); Nyamekye (No1) Vrs Opoku (2000) SC GLR 347** at 380 in these terms " It is a worn-out principle of law that findings of fact made by a trial Judge are presumed to be right and the onus is on the plaintiff-appellant to displace that presumption".

The Appellant, having lost before the District Court and she is undoubtedly before this Court in an attempt at derailing the decision of the Trial Court.

In the Appellant's Statement of Case the Judgment of the Trial Court, is under attack. What the contention of the Appellant in this appeal amounts to is that the Trial District Court was in error of law when it made its findings that culminated in its Judgment and that the Judgment was against the weight of evidence. First of all this Appellate Court is obligated to consider whether the findings by the Trial Court,

which is being assailed by the Appellant in her Statement of Case, is supported by the evidence on record. It is only when the findings of the Trial Court are not supported by the evidence that the appellate court could interfere and substitute its own findings for that of the Trial Court. It is trite law that the Trial Court has the exclusive duty to make primary findings of fact which would constitute the means by which the final outcome of the case would be arrived at. For the Trial Court's judgment or verdict to be irrefutable: 1) It must be supported by evidence on record. 2) It must be based on credibility of witnesses. 3) The Trial Court must have had the opportunity and advantage of seeing and observing the demeanour of witnesses. 4. It must be satisfied of the truthfulness of the testimonies of witnesses on any particular matter.

In the case of **Cross Vrs. Hillman Ltd. (1969) 3 WLR 787 at 798, C.A. Lord Widgery** cautioned that an appellate court *"... which sees only the transcript and does not see the witnesses, must hesitate for a very long time before reaching a conclusion different from the Trial Judge as to the credibility and honesty of a witness".* The Appellate Court can only interfere with the findings of the Trial Court if they are wrong because (a) the Court has taken into account matters which were irrelevant in law, (b) the Court excluded matters which were critically necessary for consideration, (c) the Court has come to a conclusion which no Court properly instructing itself would have reached and (d) the Court's findings were not proper inferences drawn from the facts. See the case of **Fofie Vrs. Zanyo (1992) 2 GLR 475**. However, just as the Trial Court is competent to make inferences from its specific findings of fact and arrive at its conclusion, the Appellate Court is equally entitled to draw inferences from findings of fact by the Trial Court and to come to its own conclusions. See also the case of **Naa Lamiley Amoah Vrs. Gloria Quartey & Ors. Suit No. J4/20/2010, dated 10th February, 2011, (SC)** where in its judgment, **Aryeetey JSC** cited the following cases **Kofi (Oppong) Vrs. Fofie (1964) G.L.R. 174, S.C.; Praka v. Ketewa (1964) G.L.R. 423, S.C.; Azagba Vrs. Negov (1964) G.L.R. 450, S.C.; Asibey III Vrs. Ayisi (1973) 1 G.L.R. 102.**

In the case of **Adorkor Vrs. Gatsi (1966) G.L.R. 31 at 34, S.C.,** the Supreme Court summed up appellate powers as follows:

> "The law governing this is that while findings of specific facts are within the competency of the Trial Court alone, a finding of fact which is an inference to be drawn from specific facts found is within the competency of an appeal Court no less than the Trial Court; in other words, an appeal Court is in as good a position as the trial Court to draw inferences from specific facts which the Trial Court may find."

The attitude of Appellate Courts is admirably expressed in the Judgment of **Kludze JSC** (as he then was) in the case of **In Re Okine (Dec'd) (supra) at 607** when he observed as follows:

> *"In the Court of Appeal, and before us, it was argued that we must not disturb the finding of fact made by the trial judge unless they are wholly unsupported by the evidence. I accept that as a sound proposition of law. There is a long line of cases to the effect that even if the appellate Court would have come to a different conclusion, it should not disturb the conclusion reached by the trial court. This is because the Trial Court is presumed to have made the correct findings…… In other words, where the evidence can reasonably support the conclusions of the trial judge, the appellate judges should not order a reversal just because their assessment and comparison, or their view of the probabilities, may be at variance with those of the Trial Judge. If the evidence can lead to two or more plausible conclusions, the conclusion of the trial judge should prevail, even though a different judge might come to a different conclusion."*

Having gone through the record of proceedings therefore, I am very convinced and satisfied without shred of doubt that the Appellant has not met the standard set in the cases of **In Re Okine and In Re Krobo Stool (No1) Veronica Opoku (Suing per her Lawful Attorney Ms.Dorothy Poku) Vrs. Mary Lartey (Unreported) (supra)**

and so has failed to rebut the presumption of correctness of the findings of the Trial Court.

There is no evidence that there were any errors in the findings in the face of the documentary evidence or evidence of a misapplication of any principle of evidence or law. The allegations made in the notice of appeal and the submissions made thereon have therefore not been substantiated.

I am satisfied that the findings, the subject of the challenge, are amply supported by evidence on record.

I will therefore not disturb the Judgment of the Trial Court and consequently dismiss the Appellant's Appeal in its entirety and affirm the decision of the Trial Court as sound Judgment.

Cost of Ghs3,000.00 awarded against the Appellant.

(SGD)

JOHN-MARK NUKU ALIFO "J"

(JUSTICE OF THE HIGH COURT)

COUNSEL:

EBENEZER KWESI HAIZEL ESQ. FOR APPELLANT

OSCAR ASANTE NNURO ESQ. FOR RESPONDENTS