IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, LAW COURT COMPLEX, PROBATE AND L/A DIVISION, COURT '1' HELD IN ACCRA ON 22ND DAY OF APRIL 2024, BEFORE HER LADYSHIP EUDORA CHRISTINA DADSON, J.

SUIT NO: PA/177/2019

MARGARET DANKWAH }
STOP BASIS } …PLAINTIFF
GBAWE }

VRS

1. **JACINTA ATAKORAH a.k.a JACINTA YEBOAH }**
   GBAWE }
2. **INTERNATIONAL FEDERATION OF WOMEN }**
   MADINA ESTATE ROAD AFTER ACTION } …DEFENDANTS
   PROGRESSIVE SCHOOL }
   NEAR THE GOIL FILLING STATION }

PARTIES: PLAINTIFF PRESENT
1ST DEFENDANT REPRESENTED BY EBENEZER ASARE

COUNSEL: DOROTHY NEEQUAYE FOR THE PALINTIFF PRESENT
GERTRUDE ARMAH FOR 1ST DEFENDANT PRESENT

JUDGMENT

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[1] Introduction

The issues raised by this case is centered on issues relating to the matters unfolding after the death of a patriarch the late Frank Atakorah in the year 2011.

This brings to mind the words of Thomas Paine, when he stated as follows in 1796:

"Nothing they say, is more certain than death, nothing more uncertain than the dying[1]*."*

WCE Daniels in his seminal book the Law of Family relations in Ghana at page 209 stated:

"Parentage is an important institution in any modern society. Lack of knowledge of the membership of one's parent will therefore constitute a severe drawback to the accurate placing of such individual in his family."

The Plaintiff the surviving spouse of the late Frank Atakorah has instituted this action to seek a declaration that the 1st Defendant is not the biological child of the late Frank Atakorah and therefore not a beneficiary of his estate. The Plaintiff's position is sharply contended by the 1st Defendant that she is a biological child of the deceased and therefore a beneficiary of his estate.

Justice Kweku T Ackaah-Boafo J (as he then was) faced with a similar case, a claim against a dead person, stated succinctly in the case of **Grace Adu & 1 other vs Martin Anaglate & 2 Others, Suit No: BFA 103/2009, 5th April 2009** as follows:

"In proceeding to evaluate the nature of the evidence adduced at the trial I need to caution myself that this suit concerns Dr. Emmanuel Anaglate who is now deceased and is unavailable as a witness in terms of ***S. 116(e) (iii) of the Evidence Act, 1975 (NRCD 323)*** *and therefore cannot appear to tell his side of the story as to whether he indeed married both Plaintiffs. The settled rule*

[1] *Quotable Founding Fathers edited by B. F. Melton, page 63*

of law is that the evidence involving a deceased person is always received and treated with extreme circumspection and suspicion. The policy rationale is that the deceased, unlike the Biblical Lazarus, cannot come out of his grave to tell his side of the story, to assert any claim or disprove one. Proof must therefore be strict and utterly convincing from the living witnesses.

Judges have been advised to look with suspicion when claims are made against deceased persons. In the case of **Kusi & Kusi vs. Bonsu [2010] SCGLR page 60 at page 73, 82-84** the Supreme Court stated the principle succinctly as follows:

"…the claims the plaintiff family made against the deceased Asante in respect of the property, were all critical assertions against the deceased, in whose favour the presumption of ownership stood. These claims belong to the class of evidence that must first be received with the greatest caution and scrutinized carefully before being given the requisite weight. It is however clear from the evidence that the plaintiff family acquitted themselves creditably, by discharging satisfactorily, the legal burdens placed on them… The main argument is that the respondents, i.e. the plaintiff's family, failed to provide the requisite corroboration to the claim that Asante signed the petition exhibit A. There is no intractable rule of law that charges or claims against a dead person could not succeed without corroboration. To the contrary, the discernible principle was that a court could proceed on the uncorroborated evidence if satisfied about its truthfulness. The only rider or caution was that the court must examine the evidence critically, with utmost care, weighing or sifting it thoroughly, to ensure there were no loopholes or that the charge or claim did not suffer from any absurdities or the like. A judge in receipt of uncorroborated evidence consisting in the main of charges against a deceased person would not swallow the story lock, stock and barrel, but would first view it from a suspicious standpoint. If the story as presented was neither incongruous, preposterous, unreasonable, illogical, nor incredible, then the judge might proceed to give it the

weight it deserved. The exercise would relate to the cogency or the weight to be attached to the evidence given…[2]*"*

Dotse JSC has postulated in the case of **Fosua & Adu-Poku v Dufie (Deceased) & Adu Poku-Mensah [2009] SCGLR 310 at 316 & 349** that:

" It is also to be borne in mind that claims against the estate of a deceased person are to be viewed with caution and very cogent evidence is necessary to sustain the same…The law is settled that whenever issues touching the estate of a person who is deceased comes into play, the courts must be very slow in construing evidence against the dead person. See In re Krah (Decd); Yankyerah & Ors v Osei-Tutu [1989-90]1 GLR 638 at 662, SC and Bisi v Tabiri alias Asare [1987-88] 1 GLR, 360 at 409, where the principle was stated that "The well-known rule is that claims against a deceased's estate must be scrutinized with circumspection.[3]*"*

The Plaintiff issued a Writ of Summons and accompanying Statement of Claim on 3rd June 2019 and the Statement of Claim was amended on 13th April 2022 for the following reliefs:

1. *"Declaration that 1st Defendant born Jacinta Yeboah and her biological father being alive and cohabiting with 1st Defendant's mother is not the biological child of the late Frank Atakorah, the late husband of the Plaintiff and therefore has no interest in the estate of the deceased.*
2. *Declaration that 2nd Defendant's attempt to force Plaintiff to share the Gbawe house left behind by the deceased husband of the Plaintiff is unlawful".*

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[2] See also the case of GANDY V. MACAULY(1885) 31 CH D 1, *"where it was held that when an attempt is made to charge a dead man in a matter, in which if he were alive he might have answered the charge, the evidence ought to be thoroughly sifted, and the mind of any Judge who hears it ought to be, first of all in a state of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine [of corroboration] becomes absurd"*

[3] See also the case of OSEI SUBSTITUTED BY GILARD V KORANG [2013-14] 1 SCGLR 221
"whatever the statement by Brett MR in the English case of In Re Garnett; Gandy v MacCauley (1885) 3 Ch D 1 at 9 meant in the latter part of the nineteenth century, might not wholly apply in Ghana today where section 80 of the Evidence Act 1975 (NRCD 323), states how witnesses are evaluated for the assessment of their credibility. A statement that creates the impression that a claim against the estate of a deceased must be viewed with suspicion does not provide a useful criterion for assessing the credibility of witnesses in court in the administration of justice in our courts. However one looks at it, Brett MR did not say or was to construed as meaning that the evidence in a case of a claim against the estate of a deceased person must be rejected outright on the ground of his death per se. We agree with him that in such cases, the entire claim ought to be scrutinized meticulously and carefully weighed for its inherent probative value. Of course, that the person is dead and therefore cannot contradict, explain or give evidence on his version of the case may be considered.[3]*"*

The 1st Defendant was served with the Writ of Summons and accompanying Statement of Claim on 14th June 2019 and she caused entry of conditional appearance to be filed on 25th June 2019 on her behalf.

The 2nd Defendant was served with the Writ of Summons and accompanying Statement of Claim on 12th June 2019.

The 1st Defendant filed Statement of Defence on 9th July 2019 which was amended on 27th June 2022 and counterclaimed as follows:

1. *"A Declaration that the 1st Defendant is the lawful and biological daughter of the late Frank Atakorah, deceased husband of the Plaintiff.*
2. *A Declaration that the 1st Defendant being the biological daughter of the late Frank Atakorah, has a legal right to a share in the estate of her late father in accordance with law.*
3. *Heavy Costs, inclusive of professional fees."*

[1.1] The Issues

At the application for directions stage the following issues were set down for determination of the controversy between the parties:

1. *"Whether or not the 1st Defendant is the child of the Plaintiff's deceased husband.*
2. *Whether or not the Plaintiff raised an objection to the grant of letters of administration jointly to her and the 1st Defendant.*
3. *Whether or not the document the Plaintiff purports is the baptismal certificate of the 1st Defendant is conclusive evidence of the 1st Defendant's paternity.*
4. *Whether or not the 1st Defendant is entitled to a share of the estate of the deceased husband of the Plaintiff."*

[1.2] Case Management Conference

After setting down the above issues, the Court ordered the parties to file their respective witness statements and attach all documents they intended to rely on. The parties duly complied and after the mandatory case management conference the matter was set down for trial. The Plaintiff testified and called no witness. The 1st Defendant evidence was proffered by herself and two other witnesses Seth Obeng Atakora and Victoria Amankwa.

[1.3] Procedural issue

There was affidavit of service in respect of the 2nd Defendant dated 12th June 2019 at 1.18pm sworn to by Bailiff Joshua Odametey. The 2nd Defendant never entered appearance to the suit.

Affidavit of service was not filed by the Plaintiff. Application for default judgment against the 2nd Defendant was not filed by Plaintiffs' Counsel

The Plaintiff's Counsel did not apply to set the matter down for trial in respect of the 2nd Defendant who had defaulted in entering appearance.

If a party served with a writ does not appear within the time limited for appearance, the Plaintiff may file an affidavit of service and the action may proceed as if such party had appeared[4].

Order 10 rule 2 of CI 47 provides as follows:

"Rule 2 - Claim for unliquidated demand

Where the plaintiff's claim against a defendant is for an unliquidated demand only, and the defendant fails to file appearance, the plaintiff may, after the time limited for appearance, apply to

[4] *Ayiku IV v Attorney-General [2010]29 MLRG 99 SC [AT PAGE 122] per Owusu JSC: The Republic vs The High Court Winneba, Exparte Prof M. Avoke and Supi Kofi Kwayera & 2 Ors (Civ. Motion No. J5/45/2018); 31/10/2018*

enter interlocutory judgment against that defendant for damages and proceed with the action against other defendants, if any."

The reliefs endorsed in the claim and counterclaim is in the nature of an estate action.

Order 66 rule 39 of CI 47 provides as follows:

"39. Default of appearance

(1) A judgment in default of appearance shall not be entered in a probate action.

(2) Where the defendant or any of several defendants fails to enter an appearance, the plaintiff upon filing an affidavit proving due service of the writ or notice of the writ, may after the time limited for appearance, set down the action for trial."

The invaluable Author, S. Kwami Tetteh writing on default judgment in his book Civil Procedure, A practical Approach, at pages 326 to 329 delivered himself as follows:

"The rationale for default judgment is that the process of adjudication would not be efficient unless the timetable set out in the Rules for the conduct of litigation is followed strictly by lawyers. A writ of summons contains a command to the defendant to enter appearance within the specified time, failing which judgment may be given for the claim. Disobedience of the command thus entitles the plaintiff to apply for judgment in default of appearance where the Rules so permit.

Where the defendants are liable jointly and severally, judgment against one defendant would not bar the continuation of the action against any other defendant not in default neither would it preclude a fresh action against the other person jointly and severally liable.

Where the defendant defaults in entering appearance to a claim for possession of immovable property only, the plaintiff may apply for judgment for possession of the property claimed plus costs against that defendant, and proceed further in the action against any other defendant who has entered appearance. In an action to recover possession of land wrongfully sold by one defendant to the other, a default judgment against the vendor would not bind the purchaser neither would

such judgment against the purchaser operate as res judicata against the vendor who has appeared. A judgment for possession against a defendant liable jointly may not be enforced until judgment is entered against the other person jointly liable".

The late E.D. Kom in his **book Civil Procedure in the High Court**, writing on default of appearance delivered himself thus at page 31:

"Where a defendant duly served with writ of summons does not enter appearance (within 8 days in case of service within the jurisdiction or the time stipulated in case of service outside the jurisdiction) the plaintiff is entitled to proceed to enter judgment for his claim upon the writ in default of appearance…Usually the nature of the plaintiff's claim upon the writ that determines the procedure to follow."

It is provided under Order 66 rule 39 and rule 42 that the Court has no jurisdiction to enter default of appearance or default of pleadings in probate action[5].

What steps did the Plaintiff and her Counsel take when the 2nd Defendant failed to enter appearance within the period limited for same? The record shows that no application was filed to enter default judgment in respect of reliefs endorsed in the writ of summons. The Plaintiff also did not apply to set the case down for trial in respect of 2nd Defendant.

This Court will deem it that the Plaintiff has abandoned her claim against the 2nd Defendant having failed to invoke the applicable rules against it when it defaulted in entering appearance. This Judgment is in respect of the 1st Defendant only.

Suffice to say the 2nd Defendant never entered appearance and did not participate in the trial. The only Defendant under consideration in this judgment is the 1st Defendant.

[2] The Plaintiff's Case

[5] *The Republic v Major Clifford Atta Wirrom (Rtd); Ex parte Erasmus Quaison, Mrs Edith Davis [2014]63 GMJ 133 CA*

The Plaintiff averred that she is the widow of the late Frank Attakorah with whom she has a daughter by name Esther Attakorah. They got married 15 years ago
The Plaintiff has pleaded that prior to her marriage to her late husband the latter intimated to her that he had a fertility challenge, low sperm count and therefore had no child despite his efforts to have one.

The Plaintiff asseverated that:

"The Plaintiff avers that she and her late husband therefore cohabited and deferred the performance of their customary marriage rites until after they have successfully achieved conception of their child Esther Attakorah through fertility treatment at Specialist Hospital and Family Planning Centre, Dansoman".

It is the case of the Plaintiff that 1st Defendant is the biological daughter of one Charles Yeboah of Esaase and his wife Victoria Amankwaa and despite clear undoubted evidence of the parentage of the 1st Defendant she claims to be the biological child of Frank Attakorah, the husband of the Plaintiff.

It is the further case of the Plaintiff that the 2nd Defendant is an organization which give legal assistance to have nots which in spite of Plaintiff's insistence that 1st Defendant is not the biological child of her husband would not take the opportunity of modern science and technology such as DNA to determine her paternity but insisting 1st Defendant is a biological child of the deceased and must have a portion of the deceased estate.

The Plaintiff averred as follows:

"Plaintiff and the late Frank Attakorah got married under Akan Customary law about 15 years ago and has a daughter with the deceased husband aged 14. When the deceased husband after attending his father's funeral was returning to Accra, came with the 1st Defendant who, he introduced to Plaintiff as a child of a family member who intended to continue her education in

Accra, she spent about eight months with the Plaintiff and the husband and the mother of the Plaintiff's husband took her away and stayed with her at Mallam. At a certain point in time Plaintiff was in serious doubt about her husband's relationship with the 1st Defendant, whether she was his child or otherwise. The husband seeking to prove otherwise that the girl was not his child after visiting his hometown brought with him the baptismal certificate of the girl, showing that the girl's father was a Charles Yeboah, the mother Victoria Amankwa and that she was born on the 24th July 1992 at Esaase in the Ashanti Region and that girl's name is Jancita (sic) Yeboah. Now Plaintiff and the husband lived peacefully without any source of contention."

According to the Plaintiff after her husband died in September 2011 a brother of the deceased asked her to quit the husband house since it belonged to him so she reported the matter to FIDA and it was at FIDA that the same brother told the FIDA officers that 1st Defendant was a beneficiary of his estate hence Plaintiff, her daughter and 1st Defendant were the beneficial owners of his house.

According to Plaintiff she opposed the statement of the brother of the deceased declaring she had a document to prove her case but upon her failure to produce same FIDA ruled that 1st Defendant was a beneficiary of the deceased estate when the best option was to determine same by DNA test.

[3] 1st Defendant's case

1st Defendant averred by her Statement of Defence that she is the biological child of the late Frank Atakorah and not Charles Yeboah who is the husband of her mother. According to 1st Defendant neither she nor her deceased father's family are aware of her deceased father suffering from any fertility challenges and the Plaitiff's allegations are a mere afterthought. It is the case of the 1st Defendant that the Plaintiff never raised the issue of the paternity of the 1st Defendant when she went to the 2nd Defendant for assistance.

The 1st Defendant averred as follows:

"The 1st Defendant shall say further that the deceased husband of the Plaintiff informed the Plaintiff of a biological child of his (the 1st Defendant) who lives with her mother in the Ashanti Region, and whom he intends bringing to live with him in Accra upon his return from his father's funeral in the aforementioned Region. The 1st Defendant further says that the deceased brought the 1st Defendant to live with him on or about the year 2003 but the 1st Defendant subsequently with the agreement of the deceased, had to go and live with the deceased's mother (1st Defendant's Grandmother) due to the ill-treatment meted out to her by the Plaintiff."

The 1st Defendant averred that the deceased was given the records of the 1st Defendant when he went for her from her mother and a baptismal certificate of the 1st Defendant formed part of the records given to the deceased. According to the 1st Defendant while living with her mother and her mother's husband she bore the name of her mother's husband (Yeboah) but immediately the deceased brought her to Accra, she was given the name of the deceased (Atakora) which name she has used since then and appears in all her records till date.

The 1st Defendant averred as follows:

"The 1st Defendant shall further say that Plaintiff however proceeded to the offices of the 2nd Defendant alleging an infringement of her rights for which reason the 2nd Defendant made a complaint to the Odorkor Police Station which directed that Letters of Administration be applied for and with the assistance of the 2nd Defendant, Letters of Administration was granted jointly to the Plaintiff and the 1st Defendant. The 1st Defendant says that at no time prior to the grant of the Letters of Administration did the Plaintiff raise any question concerning the paternity of the 1st Defendant; neither did she raise any issue with the grant of the Letters of Administration to both her and the Plaintiff."

[4] Standard of Proof, Burden of Proof and Persuasion

In all form of civil litigation and like all civil cases, the standard of proof is one of balance of probabilities or preponderance of probabilities. The proof prescribed in civil trial is provided under sections 10, 11, and 12 of the Evidence Act 1975 NRCD 323. These sections on the burden of proof, burden of persuasion and the burden of producing evidence provide thus:

"10. *(1) For the purpose 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 probabilities or by proof beyond reasonable doubt.

11. (1) *For the purpose of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party…*

12. (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 that 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.

The Supreme Court in the case of **Ackah vs Pergah Transport Ltd [2010] SCGLR 728 at page 736** held per Adinyira, JSC (as she then was) that:

"It is a basic principle of the law of evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail…"

In the case of **Aryee vs Shell Ghana Ltd & Fraga Oil Ltd [2017-2020] SCGLR 721 at 733** the apex Court speaking through Benin JSC had this to say:

"It must be pointed out that in every civil trial all what the law required is proof by preponderance of probabilities: See section 12 of the Evidence Act, 1975 (NRCD 323). The amount of evidence required to sustain the standard of proof would depend on the nature of the issue to be resolved".

It is essential to establish the burden of proof in this matter. As is trite learning, the Plaintiff bears the evidential burden to evince sufficient evidence if she is to secure a ruling on the existence or non-existence of a fact.

The venerable retired Jurist Justice S.A. Brobbey (Rtd), in his book, **Essentials of Ghana Law Of Evidence** at page 28 posits as follows:

" In the normal run of affairs, since the plaintiff is the one asking for something from the defendant, he should be the one who will start the proceedings by giving his testimony. That testimony will show what he wants from the defendant and why he wants the court to order the defendant to give it to him. If he drags the defendant to the court but he fails to lead evidence to establish his claim and the basis of the claim, he cannot have the assistance of the court to get what he wants. In life, one gets nothing from nothing. So it is in law. If the party does not lead evidence to establish the claim or its basis, the court will have no grounds or reason or basis for making any order in his favour. If he leads no evidence on what he wants, common sense alone dictates that he cannot get the court to order the defendant to give him what he wants. The court will rule against him on the claim he made in court by dismissing it. The established rule is therefore that the person to start leading evidence is the one against whom a ruling will be given if no evidence is led …The principle is emphasized in Section 17 and 11(1) of NRCD 323".

In Black's Law Dictionary, 6th edition at page 516 it reads:

"Ei incumbit probation, qui dicit, non qui negat, cum per rerum naturam factum negantis probation nulla sit"

This literally means *"The proof lies upon him who affirms, not upon him who denies, since by the nature of things, he who denies a fact cannot produce proof"*.

See the following cases: **Duah vs Yorkwa [1993-994]1 GLR 217**

Sarkodie vs FKA Co. Ltd (2009) SCGLR page 65

The law is trite and same supported by statute that for a court to decide a case one way or the other, each party to the suit must adduce evidence on the issues to be determined by the court to the standard prescribed by law. This position is supported by various provisions of the Evidence Act 1975 (NRCD 323) Section 14 provides as follows:

"(14). Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim or defence he is asserting".

I note that there is no paucity of case law interpreting the provisions of NRCD 323. In **Ababio vs Akwasi 111 [1994-95] Ghana Bar Report, Part 11, 74** the court stated that a party whose pleadings raise an issue essential to the success of the case assumes the burden of proving such issue. See also **Re Ashalley Botwe Lands: Adjetey Agbosu & ORS v Kotey & ORS [2003-04] SCGLR 420** which further elucidate the burden of proof as statutorily provided.

In all civil suits, the Court is enjoined by Section 12 of the Evidence Act, (NRCD 323) to evaluate and weigh the evidence adduced by the parties on the balance of probabilities. This requires a careful analysis of the entire evidence on record as held by Ansah JSC as he then was in the case of **Takoradi Flour Mills vs Samir Faris (2005-2006) SCGLR 882 at 884** as follows:

"It is sufficient to state that this being a civil suit, the rules of evidence requires that the Plaintiff produces sufficient evidence to make out his claim on a preponderance of probabilities, as defined in section 12(2) of the Evidence Act, 1975 (NRCD 323). In assessing the balance of probabilities, all the evidence, be it that of the plaintiff or the defendant must be considered and the party in

whose favour the balance tilts is the person whose case is the more probable of the rival versions and is deserving of a favourable verdict".

In the case of **Continental Plastics Engineering Co Ltd v IMC Industries – Technik GMBH [2009] SCGLR 298 at 306-307** Wood CJ as she then was stated as follows:

"The learned Justices of the Court of Appeal in Zabrama case explained the burden that rests on a party who makes an averment, particularly, an averment on a substantial fact, which is denied by his or her opponent, and is therefore under a legal obligation to prove the fact alleged. In explaining what is meant by proof in law, the learned justices of the Court of Appeal (per Kpegah JA (as he then was) stated (at page 246 of the Report) as follows:

> *"I will therefore venture to state the position to be 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".*

It is obvious that if the evidence adduced is such that the scales are evenly balanced, the burden of proof on the Plaintiff would not have been satisfied. In that event, the case of the Plaintiff should fail.

However, a different standard is used if the Defendant counterclaims to the Plaintiff's action.

Order 12 rule 1 of CI 47 states *"a defendant who alleges that he has a claim or is entitled to a relief or remedy against the plaintiff in an action in respect of any matter, whenever and however arising, may instead of bringing a separate action make a counterclaim in respect of that matter".*

Therefore, a counterclaimant is deemed to be the Plaintiff in respect of the counterclaim.

The Supreme Court in the case of **Gbedema vs Awoonor Williams (1970) CC 12** discussed the nature of a counterclaim as follows: *"a counterclaim is to all intents and purposes an action by a respondent against the applicant. It is an independent and separate action".* The Court relied on the case of **Winterfield v Bradnum 3 QBD 324** in which Bret

L.J. said at page 326 as follows: *"A counterclaim is sometimes a mere set off: sometimes it is in a nature of cross action, sometimes it is in respect of a wholly independent transaction. I think the true mode of considering the claim and counter-claim is that they are wholly independent suits which for convenience of procedure are continued in one action".*

Lord Esher M. R. in Stumore vs Campbell & Co (1892) 1 QBD 314 at page 317 said *"For all purposes except execution, a claim and counterclaim are two independent actions".*

Therefore, it is settled that a counterclaim is in law a separate and independent action which is tried together with the original claim of the Plaintiff. This means that, if in the course of an action in which there is a counterclaim, the Plaintiff action is struck out, dismissed, discontinued or stayed, the Defendant can proceed to prosecute his counterclaim.

See **Fosuhene vs Atta Wusu [2011] SCGLR 273**

In Re Will of Bremansu Akonu-Baffoe & Ors vs Buaku & Vandyke (Substituted by) Bremansu (2012) 2 SCGLR 1313

The law is thus clear that in circumstances such as the instant one, both Plaintiffs and Defendants are under obligation to introduce and lead credible evidence in proof of their respective claim and counterclaim. In this regard, they both bear the burden of proof and must persuade the Court by establishing a requisite degree of belief in the mind of the Court that their claims are legitimate and should be granted. See **Yeboah vs Ahele [2012] 44 GMJ 37 CA**. The degree of proof required is proof on the preponderance of probabilities.

[6] Court's opinion, evaluation of the evidence and analysis

Several of the issues set down are merely collateral or peripheral and do not help in the determination of the key issues in this suit. Be that as it may I shall determine the main issues based on the facts and evidence adduced at the trial. The important issue to my mind is issue 1.

I now turn my attention to issue 1.

[6.1] Issue 1: Whether or not the 1st Defendant is the child of the Plaintiff's deceased husband

How did the Plaintiff prove her case? Testifying under oath per her adopted witness statement the Plaintiff stated as follows:

"I got married to my deceased husband, the said Frank Atakorah, under the Akan customary marriage 2005 at Achimota. At the time of the consummation of the marriage I was not made(sic) to under that my late husband had a child with any women…the 1st Defendant is by documentary proof the biological daughter of one Mr. Charles Yeboah of Esase in the Ashanti and his wife Madam Victoria Amankwah; but contrary to undoubted documentary evidence that she is the daughter of Mr Charles Yeboah and his wife Madam Victoria Amankwah both of Esase in the Ashanti Region. However, presently she is claiming that she is Jacinta Atakorah, the daughter of my late husband Frank Atakorah failing to mention the person after whom she was named at birth according to Akan customary mores(sic) and usages."

According to Plaintiff long after the marriage the deceased after visiting his hometown returned to Accra in the company of the 1st Defendant whom he introduced to her a child of a relation at home who according to her husband wanted to take the opportunity to continue her education in the capital city and not in a provincial town.

It is the case of the Plaintiff that *"at a certain point in time I became suspicious of the kind of relationship my husband had with the girl, whether she was his child or fiancée to be his future*

wife…this the brother and members *of his family came to claim for the first time that the 1st Defendant is a biological child of my husband and hence a beneficiary of his estate."*

The Plaintiff tendered in evidence Exhibit A the 1st Defendant baptismal card which was rejected and marked as such however the court is duty bound to examine the evidence on record to see if there are other pieces of evidence to support the Plaintiff's case.

In the case of **West African Enterprises Ltd v Western Hardwood Enterprises Ltd [1995-96] 1 GLR155 at page 166** Acquah JSC as he then was delivered himself thus:

"Now, when in a trial any exhibit is found to be ineffective and invalidly inadmissible, the court ought to consider further whether apart from the inadmissible exhibit, there is no other admissible evidence and materials on record to sustain the party's claim. If there are other admissible evidence and materials on the record to sustain the party's claim the court is duty-bound to consider those matters. The inadmissibility or invalidity of an exhibit does not mean the automatic failure of the party's claim unless from the pleadings and the evidence that claim cannot be sustained on any other ground apart from the evidence.[6]"

It is the further case of the Plaintiff testifying per her supplementary witness statement after she was granted leave to adduce further evidence that the deceased told her that he had low sperm count so despite all his efforts to have a child of his own he was not able to have one.

According to the Plaintiff *"I went to see a Gynecologist at Special Hospital and Family Planning Centre at Dansoman who asked me to come with my husband. He examined both of us and confirmed that my husband had low sperm count so he prescribed medicine for us and by the grace of God I became pregnant and delivered our one and only child Esther Semoah Atakorah on 8th April 2005."* A medical report was tendered as Exhibit **C**.

[6] *Kwashie Gbo v Kwabena Antie & 1 ors (2008) 15 MLRG 93 SC [at pages 119-120]*

The Plaintiff was cross-examined on key aspects of her testimony and she admitted that the 1st Defendant came to live with the deceased some months prior to the marriage and subsequently said that the 1st Defendant was brought by the deceased to his Gbawe house after her marriage to him. The Plaintiff, in a bid to explain the 1st Defendant presence in her matrimonial home in a question posed to her said the 1st Defendant was the child of the deceased relative.

The cross-examination of Plaintiff by Counsel for 1st Defendant is relevant to the issue at stake.

Below is snippets of the cross-examination of Plaintiff by Counsel for 1st Defendant on 18th May 2021:

"Q: Can you tell this Court the number of years you courted before getting married to him?

A: One year.

Q: You lived with the Deceased in his home at Gbawe before he married you under Customary Law, is that correct?

A: Yes, My Lord.

Q: In your witness statement before this Court, you mentioned that you married the Deceased in 2005 at Achimota. Is that correct?

A: Yes, My Lord.

Q: During the period of your courtship the 1st Defendant was brought by the Deceased to the Gbawe house in which you lived with the Deceased. Is that correct?

A: Yes, My Lord.

Q: The 1st Defendant was then enrolled in a school by the Deceased, is that correct?

A: Yes, My Lord.

Q: So, you therefore married the Deceased many months after having first seen the 1st Defendant.

A: Yes, My Lord.

Q: Your assertion in paragraph 7 of your witness statement is therefore false (paragraph 7 read out).

A: My Lord after the marriage, my husband lost the dad and we went to the village for the funeral and returned with the child.

Q: I put it to you that the 1st Defendant was known to you before your marriage to the Deceased because she lived with you before the Deceased married you.

A: No, My Lord, I did not know the child, it is after the funeral of his dad that he brought the child. When he brought the child, I asked questions about the child. He explained that child's father is Mr. Yeboah.

Q: In your witness statement, you mentioned that you had one daughter named Esther Atakorah, is that correct?

A: Yes, My Lord.

Q: You had other children with other men before meeting with the Deceased, is that correct?

A: I already had two children when I met him.

Q: These two children you already had occasionally stayed with you and the Deceased in the Gbawe house.

A: Yes, My Lord.

Q: While courting the Deceased and after marrying him, you knew his family members, is that correct?

A: Yes, My Lord.

Q: In paragraph 7 of your witness statement, you state that the Deceased introduced the 1st Defendant to you as a child of a relation at home, is that correct?

A: Yes, My Lord.

Q: Which of the relations was that?

A: Mr. Yeboah is his relative.

…

Q: The 1st Defendant was enrolled in a school whilst living with you and your late husband, is that correct?

A: Yes, My Lord.

Q: When she was enrolled in school, you knew she was using the name Jascinta Atakorah.

A: Yes, My Lord, which was why I called for that meeting in my chambers.

Q: Did you ask your late husband why he allowed her to bear his name?

A: Yes, My Lord.

Q: What did he say?

A: He told me that if you had three kids in one school one of the children will not pay school fees.

Q: Which two other children of Frank Atakorah in question attended that school.

A: He made his mind to add my two children to the school.

Q: What was the name of this school?

A: Emepet School.

Q: Did your two other children join the 1st Defendant in that school.

A: No, My Lord.

Q: I put it to you that at the time the 1st Defendant was enrolled in the school with the name Jacinta Atakorah, you knew she was your husband's child and that was why she bore the name Jacinta Atakorah.

A: No, My Lord, she is not my husband's daughter."

The nagging question is why the Plaintiff did not protest during the lifetime of her late husband when the 1st Defendant adopted her husband's surname?

Cross-examination of Plaintiff by Counsel for 1st Defendant on 12th July 2021:

"Q: At the time the 1st Defendant lived with you and the deceased in the deceased house, the Deceased frequently took her to his mother's house to see his mom and his sisters including Nana Ama who is present in this court, is that correct?

A: That is true, at times on Sunday he often takes them there and brings them back.

Q: The Deceased also provided for all the 1st Defendant's needs whilst she was living with you in house, is that correct?

A: When he was alive, he was taking care of her.

Q: The 1st Defendant went to live with the deceased mother a few months after coming to live with you and the deceased.

A: That is so.

Q: You are also aware that the 1st Defendant has lived with the deceased brother Seth Atakora from age 13 until age 28.

A: That is so.

Q: So you aware that the deceased family accepted and recognised the 1st Defendant as the deceased daughter.

A: I do not know. The deceased told me that she was his brother's daughter.

Q: In paragraph 19 of your witness statement you said that the 1st Defendant is an imposter being supported by the deceased family without any legal basis, is that correct?

A: My husband went for a funeral and brought her and said she is his brother's daughter but if the family are saying that she is my husband daughter I have no knowledge of that.

Q: I put it to you that per your own witness statement you acknowledge that the deceased family accepted and recognised the 1st Defendant as the deceased daughter.

A: It was during the funeral that her name was mentioned as the deceased daughter.

Q: In paragraph 9 of your witness statement you said that you were suspicious of the kind of relationship the deceased had with the 1st Defendant. Whether she was his child or fiancee to be his future wife, is that correct?

A: No, My Lady.

Q: In paragraph 10 of your witness statement you admit nagging repeatedly at your deceased husband over the presence of the 1st Defendant in your house, is that correct?

A: That is so because I wanted to find out the truth.

Q: In which year did your late husband passed on.

A: My daughter was at the age of 6 years when my husband died and she is now 16 years, so is ten years now.

Q: You are aware that in your late husband's obituary, the 1st Defendant and Esther Atakora were listed as his children, is that correct?

A: That is so.

Q: You are also aware that donations were made at the funeral to the 1st Defendant and Esther Atakora as the children of the Deceased.

A: After the funeral the family gave me ¢10,000,000.00.

Q: After the death of your husband you applied for Letters of Administration together with the 1st Defendant to administer his estate. Is that correct?

A: That is true after the demise of my husband they wanted to evict me from the house so I went to FIDA, that was when I applied for Letters of Administration.

Q: The Letters of Administration was jointly, to you as the Widow and the 1st Defendant as Daughter of the Deceased, is that correct?

A: That is so but during the distribution FIDA lawyer said he was going to take my Kitchen and toilet and bath to the 1st Defendant which I refused. That is why I am in court.

Q: At the time of the Letter of Administrator application you did not raised any objection that the 1st Defendant is not a biological child of the deceased, is that correct?

A: That is true and as is because I could not trace my document to prove at that time and my counsel advised me to let it go because it is only one room that will be given to the 1st Defendant and that it does not matter if she given one room.

Q: So, it was at the point of the distribution of your late husband's estate that you said that the 1st Defendant is not the biological child of your late husband.

A: That is so because that was when I found the document to prove that 1st Defendant is not the daughter of the deceased.

Q: Can you tell this court the properties that constitute your late husband's estate.

A: It a half plot and the house on it is 3 bedrooms with kitchen, toilet and bath and I built a store in front of the house.

Q: Is that where you currently live?

A: Yes, My Lady.

Q: Has the 1st Defendant come to live in that house with you ever since she left to go and live with your mother in-law.

A: No, My lady."

Learned Counsel for the Plaintiff in her address referred to the case of **Hawa Abdul-Rahman v Edward Ritter Mensah (Suit No. C5/34/21) 16th December 2022** and the Odartey Lamptey case. The Court notes that these two cases were decided among other factors, on results of DNA tests and clearly distinguishable from the present case. Counsel submits that the 1st Defendant is not the biological child of the Plaintiff's deceased husband and states that "*We shall use the above provision (S 41 of Act 560) as the blue litmus test for the parentage of Jacinta, the 1st Defendant herein."*

Learned Counsel for the Defendant submitted that Section 18 of PNDCL111 and Section 18 of the Wills Act impute that the paternity of a child may be determined in a number of ways; biologically birthing a child, statutory or customary adoption and by recognition. Learned Counsel referred to the case of **Sirebour v Dome [1962] 1 GLR 82** which held that in customary law all children whose paternity is acknowledged by their father are children for the purpose of imposing obligations on their father. Counsel also referred to the case of **Carboo vs Carboo [1961] GLR 83**. Learned Counsel referred to Section 41 of the Children's Act and submitted that there was overwhelming evidence on record that she was indeed the child of the deceased Frank Attakorah as the deceased birthed her as acknowledged by her own mother DW2 and also acknowledged her as his child from the time he took her from her mother to live with him in Accra.

From the answers elicited from the Plaintiff she kept shifting goalpost about the relationship between the 1st Defendant and the deceased. In one breath the 1st Defendant was the deceased relative's daughter. In another breath she was the brother's daughter.

The Plaintiff admits that the 1st Defendant was accepted by the deceased mother and also lived with deceased's brother up to age 28.

The Plaintiff admits under cross-examination that the 1st Defendant's name was included in the obituary notice of the deceased as one of his daughters and even applied for Letters of administration with the 1st Defendant as the daughter of the deceased.

In proceeding to evaluate the nature of the evidence adduced at the trial I need to caution myself that this suit concerns Mr. Frank Atakorah who is now deceased and is unavailable as a witness in terms of **S. 116(e) (iii) of the Evidence Act, 1975 (NRCD 323)** and therefore cannot appear to tell his side of the story as to whether he is the biological father of the 1st Defendant.

The settled rule of law is that the evidence involving a deceased person is always received and treated with extreme circumspection and suspicion. The policy rationale is that the deceased, unlike the Biblical Lazarus, cannot come out of his grave to tell his side of the story, to assert any claim or disprove one. Proof must therefore be strict and utterly convincing from the living witnesses. See: **MOSES v ANANE (1989-90) 2 GLR 694 C/A** as adopted and applied by Brobbey JSC in **APEA v ASAMOAH (2003-2004) SCGLR 226 at 241**.See also **GRACE ASANTEWAAH v. MARK AMANKWAH ADDO [2008] 1 GMJ 2009 @ page 212**[7].

Exhibit **5** which is the Letters of Administration certificate was tendered by the 1st Defendant and admitted into evidence without objection.

For ease of reference I shall produce the salient information on the certificate as follows:

[7] Justice K. T Ackah-Boafo J as he then was in the Grace Adu case supra

*"Be it known that on the **19th day of April 2018** **movable & immovable properties,** Letters of Administration of the personal property of **Frank Atakorah** late of **Accra** deceased who died on the **6th day of September 2011** at Nkawie Hospital, Ashanti Region intestate, and who had at the time of his death his fixed place of abode at **Unnumbered House, Gbawe, Top Base, Accra** within the jurisdiction of this court, were granted by the Court to **Margaret Dankwa and Jacinta Atakorah** of **unnumbered house, Gbawe Top Base, Accra** the **Widow & Daughter** of the said intestate **they** having been first duly sworn."*

If the Plaintiff was indeed convinced that the 1st Defendant was not the daughter of her late husband why would she agree to apply for letters of administration jointly with her as the daughter of the deceased?

The Plaintiff cannot approbate and reprobate. Having admitted under oath that the 1st Defendant is a daughter of the deceased she cannot resile from same.

The law is trite that where an adversary has admitted a fact advantageous to the cause of a party, the party does not need any better evidence to establish that fact than by relying on such admission which is an example of estoppel by conduct.

See the case of **In Re Asere Stool; Nikoi Olai Amontia IV (Substituted by Fato Amoni 11) vs Akotia Oworsika 111 (Substituted By Laryea Ayiku 111) 2005 -2006 SCGLR 637@656**[8].

The principle of estoppel by conduct has been provided for in Section 26 of the Evidence Act, 1975, NRCD 323 as follow:

"Except as otherwise provided by law, including a rule of equity, when a party has, by that party's own statement, act or omission intentionally and deliberately caused or permitted another person

[8] *Afrikana Mission Church v Seba Construction Ltd [2013] 59 GMJ 176 at pages 204-205 per Dordzie JA; Ago Sai & Others vs Kpobi Tetteh Tsuru III [2010] SCGLR 762 797 per Rose Owusu JSC*

to believe a thing to be true and to act upon that belief the truth of the thing shall be conclusively presumed against that party or the successors in interest of the party in proceedings between".

Section 41 of the Children's Act, 1998, Act 560 as amended on evidence of parentage has been stated as follows:

"Evidence of parentage

A family tribunal shall consider the following as evidence of parentage:

(a) the name of the parent entered in the register of birth,

(b) performance of customary ceremony by the father of the child,

(c) refusal by the parent to submit to a medical test,

(d) public acknowledgment of parentage, and

(e) any other matter that the family tribunal may consider relevant"

Though Section 41 is applicable to the family tribunal the criteria set out would serve as a useful guide as I resolve issue **1**.

WCE Daniels in his seminal book the **Law of Family relations in Ghana at page 211 to 212** on ascertaining paternity delivered himself thus:

"The term acknowledgment of paternity is used to signify the acceptance by a putative father of a child as his own. Exactly what is meant by the term has not been the subject of legal argument, because the ingredients of acknowledgment are well understood. The acceptance must move from the father to the parents of the mother or to any responsible member of the mother's family. An acknowledgment by the representative or agent of the father might be accepted as sufficient admission by the mother's family… The concept of acceptance of paternity does not have much to do with the law of contract, in the sense that for there to be an acceptance of a child as a child of

the putative father there must be an offer[9]*.It rather involves a deliberate and positive act of recognition of a state of affairs after the putative father is armed with the full knowledge of such relevant facts as will enable him to arrive at a final decision"*

The evidence of the Plaintiff is sharply countered by the 1st Defendant who testified per adopted witness statement that she is the biological daughter of the late Frank Atakorah. According to the 1st Defendant she was born in Esaase where she lived with her mother and her husband for some years.

The 1st Defendant testified that:

"when I was about 8 years old, a man whom I later came to know was Mr. Frank Attakorah, came to my home at Esaase and took me to a funeral in a neighbouring town with the permission of my mother. Whilst at the funeral, he introduced me to his family members at the funeral as his daughter. Upon our return to my home, I was informed by my mother that he was my biological father and I was to go and live with him in Accra. When we got to Accra, I met the Plaintiff in Mr Attakorah's house and I later got to know she was in a relationship with my father. After a few weeks in Accra, I was enrolled in school and my surname was changed from Yeboah to Attakorah. A few months after coming to live in Accra with my father, he got married customarily to the Plaintiff."

It is the further case of the 1st Defendant due to maltreatment meted to her by the Plaintiff the deceased mother came for her and eventually she stayed with her father's younger brother Seth Obeng Attakorah (DW1).

According to the 1st Defendant whilst living with her uncle the deceased constantly visited her and contributed towards her living expenses. The family of the deceased accepted her and treated her as their own. Upon the death of the deceased she took part

[9] Snow vs Snow [1971] 3 All E.R. 833 at 869 per Davies L.J.

in all his funeral arrangements and her name was in his obituary notice together with that of his half-sister as his children.

The 1st Defendant states that "*after my father's death, Letters of Administration was granted jointly to the Plaintiff and i being the widow and daughter of the deceased respectively by the High Court. …When we applied for the letters of administration, the Plaintiff never alleged that I was not the child of my late father. It was only at the point of distribution of my father's estate that the Plaintiff raised the above objection.*"

The 1st Defendant tendered the following documents and same was received into evidence without objection as follows:

- Exhibit 1 - Certified copy of entry in register of birth
- Exhibit 2 - Photograph
- Exhibit 3 series - Testimonial, BECE, WSSCE & UG Certificates,
- Exhibit 4 - Obituary Notice of the Late Frank Atakorah
- Exhibit 5 - Letters of Administration certificate

Under cross examination by Plaintiff's counsel, Miss Jacinta Atakorah stood by her testimony and again reiterated that she was the biological daughter of the deceased. The cross-examination centered on the 1st Defendant date of birth and the fact that she had previously been known as Yeboah however the 1st Defendant was clear in her responses on whose daughter she was.

In cross-examination this is what the 1st Defendant said as captured in the proceedings of 28th November 2022:

"Q. Are you aware that when you were brought to Accra by the late Mr Frank Attakorah he changed your name?

A. Yes my lady that is correct.

Q. He changed your surname to which surname?

A. He changed my surname Yeboah to Attakorah.

Q. So you had a birth certificate previously prior to the one attached to your witness certificate is that correct?

A. That is not correct because I have never seen my birth certificate as a child before, the only one is the one I have in my possession.

Q. I am putting it to you that you had a birth certificate which had the name of Mr Yeboah as your father and not Mr Frank Attakorah and that was the birth certificate your mother alluded to in her witness statement tended in this case.

A. That is incorrect because I have never come across a birth certificate of that sort. The only birth certificate I have is the one I currently use.

Q. Your mother stated in paragraph 19 of her witness statement filed on 19th May 2020 that the name in your birth certificate is Yeboah because Mr Yeboah was the one who named you as a child is that correct?

A. I have no idea of what transpired during that day and the only birth certificate I have is the one I currently use and no other one.

Q. I am putting it to you that your original birth certificate borne the name of Mr Charles Yeboah as your father and Madam Victoria Amankwaa as your mother and had 24th day of July 1992 as your birth date.

A. That is incorrect because I have never come across such a document.

Q. I am putting it to you that you are not being truthful to the court.

A. That is not true.

Q. I am further putting it to you that your biological father is Mr Charles Yeboah.

A. That is also not true because the only I father I know I had was Mr Frank Attakorah.

…

Q. You were brought from Esaase to Accra by Mr Frank Attakorah because he did not have any biological child of his own as at that time is that not correct.

A. That is not correct because the only reason I was brought to Accra is because my father wanted to take care of me himself.

Q. And Mr Frank Attakorah together with his finance the Plaintiff herein took good care of you as their own biological daughter thus making the evidence you have just given this court incredible and indeed false I am putting it to you.

A. That is not correct because the only person who made my life habitable was my father and not the Plaintiff."

The 1st Defendant called Seth Obeng Attakorah as a witness. He testified per his adopted witness statement that he was the younger brother of the deceased and that at the funeral of their father the deceased informed the family that he had a daughter at Esaase the adjoining town and he would go and take the child and send her to Accra. DW1 stated as follows:

"A few hours after, he brought the 1st Defendant then about 8 years old to the funeral grounds and introduced her to the family as the daughter he informed us about. One of my auntie who lived in Esaase confirmed to the family that he knew of the existence of the child as both my late brother and the woman he had the child with had informed her many years ago of the child".

DW1 was extensively cross-examined on his testimony by Counsel for Plaintiff but same was not successfully assailed.

Exhibit **4** is the deceased obituary notice where the 1st Defendant was acknowledged as a daughter of the deceased. Regarding the criteria under the Children's Act the evidence before the Court supports the public acknowledgement of the 1st Defendant as a daughter of the late Frank Atakorah. The evidence shows that the 1st Defendant name was changed and from Exhibit **3** series from the primary school right up to the university the 1st Defendant borne the deceased family name. That in itself might not suffice to prove paternity however all the pieces of evidence on record seems to support the 1st Defendant's contention that she is the biological daughter of the late Frank Atakorah.

DW2 was Victoria Amankwaa who testified on the circumstances leading to the birth of the 1st Defendant and the abandonment by the late Frank Atakorah in the course of her pregnancy. DW2 further explained the circumstances that the 1st Defendant borne the surname Yeboah. The DW2 was extensively cross-examined by Counsel for Plaintiff on her testimony and yet she remained resolute on the key issue which was the paternity of the 1st Defendant.

In cross-examination this is what DW2 said as captured in the proceedings of 4th April 2022:

"Q: In what year did you purport to have met the late husband of the Plaintiff by name Frank Attakorah?

A: 1991.

Q: Did he tell you the town he hails from?

A: He told me he hails from Moseaso and lives in Accra.

Q: Can you tell the court the distance between Frank Attakorah's home town and where you live?

A: About 5miles.

Q: Since you said in paragraph 4 of your witness, did you make any effort to search for Frank Attakorah from his hometown since you said he got you pregnant

A: No my lady.

Q: Did any of your parent or relative make any effort to let the family of Frank Attakorah know that he got you pregnant.

A: By then there was no phone, so when I informed him that I was pregnant he told me he was going to Accra and that he would be back.

Q: Were you not worried that the man who impregnated you was not taking care of you for which reason you should search from his hometown from which his hometown was 5miles away from your home.

A: He told me that he does not live there and that he lives in Accra with his parents. He told me that he was going to inform them and that he would be back and he never came back.

Q: I am putting it to you that your statement in paragraph 4 of your witness is false.

A: My statement is true.

Q: I am also putting it to you that your statement in paragraph 5 of your witness statement that after you told Mr Frank Attakorah that he has impregnated you, you no longer heard from you because he stopped coming to you hometown is false.

A: My statement is true.

Q: I am putting it to you that Mr Yeboah is the biological father of Jacinta the 1st Defendant and not Mr Frank Attakorah.

A: Jacinta is the daughter of Frank Attakorah and not Mr Yeboah.

Q: I am putting it to you that Mr Frank Attakorah had severally attempted to have a biological child of his own without success and would have gladly accepted that pregnancy if it was his.

A: He accepted the pregnancy and he did so when the child was 8 years old.

Q: I am putting it to you that he did not accept the pregnancy even when the child was 8 years old and that allegation is a false allegation.

A: It is true he came to accept the child when she was 8 years old.

Q: I am putting it to you that he only took the child to take care of her because he had no child then of his own but he did not take the child as being the biological child.

A: Jacinta was his child and that was the reason after he took her he changed her name to Attakorah.

Q: What is the birth date of Jacinta?

A: 24th July 1992.

Q: What day of the week was she born?

A: Friday.

Q: Do you have her original birth certificate?

A: I do not have her birth certificate but I had her baptismal certificate which her father came for it.

Q: In paragraph 19 of your witness statement, you stated that the name on the 1st Defendant's birth certificate is Yeboah is that correct?

A: That is the name on her baptismal certificate.

Q: Aside the baptismal certificate which bears the name Yeboah as surname of Jacinta, you have also stated that the name on the 1st Defendant's birth certificate is Yeboah because Mr Yeboah was the one who named your child when you delivered is that not correct?

A: It is true that it was Mr Yeboah who stood behind us during her baptism. When I informed Mr Frank of my pregnancy he never came back so it was Mr Yeboah who took care of me during the time that I was pregnant till I delivered. It is the practice of the Roman Catholics that during baptism there should be a man who would stand in as the father and it was Mr Yeboah who stood in at that time and that is the reason Jacinta bore the name.

Q: Looking at paragraph 13 of your witness statement you stated that a few weeks after taking the 1st Defendant to Accra, Frank Attakorah returned to Esaase and requested for all records of the 1st Defendant (weighing card, birth certificate and baptismal certificate). I am asking if you have the original birth certificate of Jacinta Yeboah.

A: What I have is the baptismal certificate which I gave to Frank Attakorah."

I had the opportunity to observe the demeanor of DW2 and I am largely convinced she had no basis to mislead the Court particularly in her evidence regarding the 1st Defendant biological father.

In accepting the evidence of 1st Defendant and her witnesses, her uncle and mother and thus concluding that the 1st Defendant was the biological daughter of the late Frank Atakorah, I must be quick to state that it does not mean that 1st Defendant's and her witnesses evidence was without challenges as the cross-examination showed. They indeed prevaricated on some parts of their testimony but I am of the view that on the

essential issue of the 1st Defendant being the biological child of the late Frank Atakorah, they were credible and therefore I am satisfied that their evidence was reasonable.
It is important to state that as a Judge I am not required to reject all of a witness' testimony because I do not believe and accept part of same. A Court can reject part of the evidence proffered and accept part in doing justice to parties in a litigation. In this case I am of the view that the 1st Defendant and her witnesses' evidence on the crucial aspect of the counterclaim are acceptable and I do accept same.
The Commentary on section 12 (2) of the Evidence Act, 1975 (NRCD 323) as reproduced by Kanyoke JA in the case of **Kai v. Kissiedu [2010-2012] 2 GLR 57 at page 75** further states:

"A party with the burden of producing evidence is entitled to rely on all the evidence in the case and need not rest entirely on evidence adduced by him. The party with the burden of producing evidence on the issue may point to evidence introduced by another party which meets or helps meet the test of sufficiency. It is for this reason that the phrase 'on all the evidence' is included in each of the tests of sufficiency."

After an evaluation of all the evidence on record I found that, there are other pieces of material evidence particularly cross-examination of Plaintiff and Exhibit *5* which proves the fact that the 1st Defendant is the biological child of the late Frank Atakorah and I find that the 1st Defendant is a biological child of the deceased the late Frank Atakorah.

I therefore resolve issue **1** in favour of the 1st Defendant.

The consideration of issues **2** and **3** has been rendered moot in view of Exhibit **5** and the Court's rejection of Exhibit **A**.

[6.2] Issue 4: Whether or not the 1st Defendant is entitled to a share of the estate of

the deceased husband of the Plaintiff.

Is the 1st Defendant entitled to her Counterclaim

It has been held in the case of **2000 Limited vs Francis Otoo [2018] DSLC 3300** at page 5 per Appau JSC that *"the Appellant could only succeed in his counterclaim on the strength of his evidence as he called no witness. Though we do not deny the fact that the appellant's success or failure did not depend on whether he called a witness or not, the standard of proof required that for the appellant to succeed on his counterclaim, he must lead satisfactory evidence, either by himself or otherwise which, on the balance of probabilities makes his case more probable than not."*

The 1st Defendant on counterclaimed against the Plaintiffs as follows:

1. *"A Declaration that the 1st Defendant is the lawful and biological daughter of the late Frank Atakorah, deceased husband of the Plaintiff.*
2. *A Declaration that the 1st Defendant being the biological daughter of the late Frank Atakorah, has a legal right to a share in the estate of her late father in accordance with law.*
3. *Heavy Costs, inclusive of professional fees."*

Black's Law Dictionary, 8th Edition edited by Bryan A. Garner defines intestate as *"one who died without a valid will"*.

Derrick Adu-Gyamfi, the learned Author, in his book Handbook on Probate & Administration Practice in Ghana (with Precedents) page 1 writing on intestate succession states:

"intestacy describes an estate in which the deceased died without making a Will…The law is that when a person dies without a Will, he is said to have died intestate".

From the pleadings of the parties which has been reiterated in their adopted witness statement, the deceased died without leaving a will therefore died intestate and both parties have been granted letters of administration in respect of his estate.

Section 3, 4 and 5 of PNDCL111 states that the surviving spouse, child or both are entitled to household chattels and one house and the residue.

Section 18 of PNDCL111 defines a child as follows: *"child includes a natural child, a person adopted under an enactment or customary law relating to adoption and a person recognized by the person in question as the child of that person or recognized by law as the child of the person".*

Section 18 of the Wills Act, 1971 (Act 360) also defines child as follows:

"Child includes a person adopted under an enactment relating to adoption, any person recognised by the person in question to be the child of, or to whom, that person stands in loco parentis, and in the case of a Ghanaian, includes a person recognized by customary law to be the child of that person."

Having resolved that 1st Defendant is the biological child of the late Frank Atakorah I find that the 1st Defendant has a legal right to a share in the estate of her late father in accordance with law. I resolve issue **4** in favour of the 1st Defendant.

[7] Conclusion

From the totality of the evidence led, I hold that the Plaintiff claim fails entirely and same is accordingly dismissed. For the avoidance of doubt reliefs, **a** and **b** endorsed on the Plaintiff's Writ of Summons is accordingly dismissed.

Judgment is entered in favour of the 1st Defendant in respect of her counterclaim:

a) I grant relief **a** as follows: I hereby declare that the 1st Defendant is the biological daughter of the late Frank Atakorah, deceased husband of the Plaintiff.
b) I grant **relief b** in the following terms: I hereby declare that the 1st Defendant as the biological child of the late Frank Atakorah has a legal right to a share in the estate of her deceased father in accordance with law.

Nominal cost of GHC5,000.00 awarded in favour of 1st Defendant.

(SGD.)

EUDORA CHRISTINA DADSON (MRS.)

(JUSTICE OF THE HIGH COURT)