IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- A.D. 2021

CORAM: APPAU, JSC (PRESIDING)

PWAMANG, JSC

DORDZIE (MRS.), JSC

LOVELACE-JOHNSON (MS.), JSC

AMADU, JSC

CIVIL APPEAL

NO. J4/49/2020

21ST APRIL, 2021

1.FLORINI LUCA ……. 1ST PLAINTIFF/APPELLANT/RESPONDENT

2.FLORINI ALESANDRO …….. 2ND PLAINTIFF/APPELLANT/RESPONDENT

VRS

1. MR. SAMIR ……. 1ST DEFENDANT/RESPONDENT/APPELLANT

2.DIVESTITURE IMPLEMENTATION COMMITTEE- 2ND DEF/RESP/APPELLANT

3.ATTORNEY GENERAL …….. 3RD DEFENDANT/RESPONDENT/APPELLANT

JUDGMENT

PWAMANG, JSC:-

The plaintiffs/appellants/respondents (the plaintiffs) are Italian nationals who have, through a lawful attorney, sued in the High Court, Sekondi to recover House No. 15, Whin Layout, Beach Road, Takoradi which is in the possession of the defendants/respondents/appellants (the defendants). The plaintiffs' case is that the house was acquired by their Italian mother who died intestate on 24th March, 2010 in Genova, Italy but used to live in Ghana where she was into timber business. They state that their mother was compelled by circumstances to flee back to Italy in 1982 when her business was confiscated at the height of the revolution. The defendants took possession of the house believing it was part of the confiscated assets of Subin Timber Company Limited/Central Logging and Sawmills Ltd but the plaintiffs contend that it was not and that all along it remained the personal property of their mother. The facts here appears to be similar to those in the case of **GIHOC v Hanna Asi** reported in **[2005-2006] SCGLR 458** where the Supreme Court held that GIHOC was a licensee of the original owner of the property.

However, the plaintiffs have been met with some legal defences as the defendants challenged their capacity to mount the action and also pleaded the statute of limitations. Midway in the trial in the High Court the judge entertained an application by the defendants praying that the suit be dismissed on ground of want of capacity of the plaintiffs. The trial judge granted the application and dismissed the suit but the plaintiff appealed to the Court of Appeal who reversed the High Court and restored the case to the list. The 1st defendant has appealed from the decision of the Court of Appeal and is supported ably by the 2nd and 3rd defendants per their counsel, Mr George Sackey Esq, Principal State Attorney.

The issue for our decision is whether the plaintiffs are deficient of capacity to bring this action. However, at the hearing of the appeal we requested the parties to address us on the question whether the decision of the Court of Appeal on appeal is an interlocutory or a final one. This point arises from the fact that the judgment appealed from dated 4th December, 2019 directed the trial to continue, thereby giving it the semblance of an interlocutory order. Meanwhile, the notice of appeal was filed on 4th February, 2020, more than 21 days from the date of the Court of Appeal judgment as required by Rule 8(1)(a) of the **Supreme Court Rules, 1996 (C.I.16).** If that decision is classified as interlocutory that would render the notice of appeal incompetent for being filed out of time. We have considered the submissions of the parties on the issue and are of the view that as the decision of the High Court dismissed the entire suit, that decision was final. See **Atta Kwadwo v Badu [1977] 1 GLR 1. CA**. In **Joseph v Okomfoankye [2013-2014] 1 SCGLR 267 at p 270,** the Supreme Court speaking through Gbadegbe, JSC said as follows; *"As an interim relief it cannot, in our thinking, be transformed into a final order of the court by virtue only of an appeal therefrom to a higher court"*. By parity of reasoning, the final order of the High Court in this case does not turn into an interlocutory order on its way up the ladder of the courts structure by the appeal process. It remains a final order not withstanding the appeals. Consequently, in our opinion, this is a final appeal and the notice of appeal before us is competent.

On the main issue, the defendants challenge the capacity of the plaintiffs on two fronts. First, they have no letters of administration over the estate of their mother and second, the power of attorney on basis of which the action was commenced by Isaac Benjamin Clement was only notarised by a Notary Public without any witness. In respect of the first leg, Mr E. K Amuah Sakyi Esq, learned counsel for the 1st defendant submits in his statement of case as follows;

"It was thus our contention that since the property was situate in Ghana and they had brought this action in a Ghanaian court *by law* they ought to have obtained Letters of Administration before they could be clothed with any capacity to mount any action in respect of the Estate of the deceased. The trial judge found merit in this argument and accordingly struck out the suit for want of capacity." (emphasis supplied).

The Ghana law that, according to the defendants, makes letters of administration a mandatory requirement for the plaintiffs to sue in court is Sections 1(1) and 108 of the **Administration of Estates Act, 1961 (Act 63).** They are as follows;

1(1) The moveable and immoveable property of a deceased person shall devolve on the personal representatives of the deceased person with effect from the date of death.

Section 108 defines personal representative as **"the executor, original or by representation, or administrator for the time being of a deceased person".**

Counsel further quoted and relied on the following statement in the Headnote of the report of the judgment of the Supreme Court in **Akrong v Bulley [1965] GLR 469**; *"Since at the time the plaintiff issued her writ she had not taken out Letters of Administration she lacked capacity to sue".*

But Counsel in quoting from the Headnote failed to quote the whole sentence which is as follows; **"1) since at the time the plaintiff issued her writ she had not taken out letters of administration, she lacked capacity to sue *under the Fatal Accidents Acts, 1846-64." (emphasis supplied).*** So, the Supreme Court in Akrong v Bulley never laid down a general requirement for letters of administration before a party can sue in respect of property that belonged to a deceased person. It is important to situate the decision in Akrong v Bulley within the confines of what the court actually said speaking through Apaloo, JSC (as he then was). He said as follows at p 474 of the Report;

*"As the plaintiff was suing **in a representative capacity** she was obliged by the mandatory provisions of Order 3, r. 4 of the Supreme [High] Court (Civil Procedure) Rules, 19547 to show in the endorsement to the writ in what capacity she brought the action. The plaintiff stated her capacity in the writ as "successor and next-of-kin." In the case of Dotwaah v. Afriyie, this court held in its judgment of 12 April 1965 that upon the appointment of a successor, the self-acquired property of the deceased to whom he succeeded vests in him for and on behalf of the family and he is thereby entitled, in place of the head of the family, to litigate the family's title to the property. A successor as such has a **locus standi**. This principle is clearly inapplicable to this case which is in no way concerned with family property. In my opinion, no question of customary law is involved in this case. Whether or not the endorsement on the writ discloses a valid capacity to sue depends solely on the provisions of the Fatal Accidents Acts and such interpretation as is put on those Acts by judicial decisions. The only persons statutorily clothed with capacity to sue under those Acts are executors and administrators and latterly, in certain circumstances, the dependants."(emphasis supplied).*

From the above, the plaintiff in that case was suing in a representative capacity and the trite learning is that such party must state so in the endorsement on the writ of summons and must prove that capacity. Secondly, in Akrong v Bulley the persons with locus standing to sue was provided for in the statues under which the action was brought, the Fatal Accidents Acts. It is pertinent to recognize that though capacity and *locus standi* are closely related and in many instances arise together in cases in court they are separate legal concepts. Capacity properly so called relates to the juristic persona and competence to sue in a court of law and it becomes an issue where an individual sues not in her own personal right but states a certain capacity on account of which she is proceeding in court. But locus standing relates to the legal interest that a party claims in the subject matter of a suit in court. This may be dependent on the provisions of the statute that confers the right to sue, such as the Fatal Accidents Acts in Akrong v Bulley. Otherwise, generally

locus standing depends on whether the party has a legal or equitable right that she seeks to enforce or protect by suing in court. In Akrong v Bulley the statute conferred locus standing on only executors, administrators and dependants but the plaintiff stated that she was suing as "successor and next-of kin" so the court held that she had no locus standing as she did not take letters of administration before commencing the action which would have clothed her with capacity as administrator.

In this case, apart from the lawful attorney who sued in a representative capacity and has stated it on the writ of summons (we shall deal with the challenge to that capacity later), the two plaintiffs are not suing in a representative capacity. It is vital to observe that they have not sued on behalf of the estate of their deceased mother either but they say that the property has devolved on them by operation of Italian law. At paragraph 9 of their statement of claim they averred as follows;

"Upon the death of the deceased the property in issue devolved by the law of Italy onto the plaintiffs."

Under those circumstances, they have locus standing to sue in their own right. The substance of the challenge of the defendants is more as to the locus standing of the plaintiffs than capacity since they have not pleaded a representative capacity and are not claiming the property on behalf of the estate of their mother.

My Lords, when the defendants claim that "by law" the plaintiffs require letters of administration before they can sue in this case the foremost question is which law, Italian Law or Ghana Law? Ghana law as stated above provides that on the death of a person her property devolves on her personal representative and so the argument may be made that it is the personal representative who has locus standing to sue in court in respect of property that belonged to the deceased. That is not necessarily what Italian Law provides. The plaintiffs contend, through the Statutory Declaration at page 52 of the record that by

Italian Law, they "are the heirs according to law" and "there are no other heirs legal or by reserve quota" of their deceased mother. The defendants do not challenge this deposition as to the content of Italian Law. In fact, the 1st defendant stated as follows in his statement of case; "Nobody is challenging the right of the plaintiffs to inherit or succeed their mother and therefore inherit her estate." The first defendant then submits that "The issue is to do with whether they are clothed with legal capacity to mount an action in respect of her estate without obtaining Letters of Administration." By this the 1st defendant is presuming that Act 63 is applicable in this case but that presumption is where his fallacy is. If Italian law is the applicable law the plaintiffs would not require letters of administration in order to gain locus standing to sue because the property of their mother on her death did not vest in her personal representative. It ought to be noted that before the passage of Act 63 the law applicable in Ghana was also that upon death of a person her property vested directly in her heirs and not in any personal representative. See **Conney v Bentum-Williams [1984-86] 2 GLR 301.** Therefore, contrary to the position of the defendants, the germane question in this case is, as stated by Mr John Mercer Esq, learned counsel for the plaintiffs, which law is to be applied here?

The question of choice of law in Ghana relating to a deceased foreigner's estate, which is determined by the conflict of law rules, has been settled in the case of **Youhana v Abboud [1974] 2 GLR 201** to be the law of the domicile of the deceased at the time of death which in this case is Italian Law. The defendants do not dispute this but have kept repeating their submission that the issue in this case is not about choice of law and conflict of laws but they are grossly mistaken and do not appear to appreciate the nature of the case of the plaintiffs. The law on the devolution of property on the death of a person is a rule of substantive law and not that of procedure so it is determined by the domicile of the deceased foreigner at the time of her death. It appears that the defendants think the issue is procedural hence their contention that once the plaintiffs are suing in Ghana they

require letters of administration but that is erroneous. Even under Ghana law, it is not in all instances involving the property of a deceased person that letters of administration or probate are required before a party can sue. For the reasons explained above, the challenge to the capacity of the plaintiffs for failing to obtain letters of administration before proceeding to sue is misconceived and same is rejected.

We shall next consider the challenge to the validity of the power of attorney in this case which the defendants claim does not satisfy the requirement of witness under Section 1(2) of the **Powers of Attorney Act, 1998 (Act 549)**. The 1st defendant relies on the following passage in the judgment of this court in the case of **Asante-Appiah v Amponsah [2009] SCGLR 90 at page 94;**

"The parties were agreeable that the appellant was at all material times during the litigation resident in England but sued through Nana Kwasi Twum Barima by the use of a power of attorney which was exhibited at page fifteen of the record of proceedings. That power of attorney was fatally flawed for two reasons. Firstly, the rule as contained in Act 549, s. 1(2) is that

"Where the instrument is signed by the author of the power one witness shall be present and shall attest the instrument."

It is patent on the instrument that no one signed it as a witness. The Court of Appeal rightly rejected the argument of counsel for the appellant that the Commissioner for Oath doubled as both the witness and the person before whom the power was executed. There is no legal or statutory basis for that argument. It would be observed that the provision is couched in imperative terms. In so far that the power of attorney in question was not signed by any witness, it was not valid."

From the above statement, the Supreme Court basically endorsed the reasoning of the Court of Appeal in that case. We therefore consider it useful to quote what the Court of

Appeal itself said in their judgment in respect of the issue of validity of the power of attorney. The court said;

"The defendant next highlighted an infringement, this time, of the mandatory provisions of the Power of Attorneys Act (Act 549). The defendant's concern is that the plaintiff's power of attorney infringes the mandatory provision of section 1 (2) of Act 549 which states as follows:

"2.Where the instrument is signed by the donor of the power one witness shall be present and shall attest the instrument."

It is obvious that the power of attorney exhibited at page 15 of the record was not witnessed by any person even though provision was made for witnessing. When the attention of Asante Ansong, Esq. of counsel for the plaintiff was drawn, not only to his failure to respond to the point in his written statement but also for any explanation, he submitted in court that the commissioner for oaths dabbled as a commissioner and a witness. Unfortunately this submission is not borne out by the contents of the document. The commissioner for oaths simply signed as such commissioner before whom the power of attorney was executed and no more. The submission can thus be described as an afterthought and should not be relied upon. By this failure even if the plaintiff had endorsed his writ appropriately his claim must necessarily fail, for the power of attorney upon which it was founded was void for lack of witnessing. The result is that the plaintiff had not established his capacity for issuing the writ as he did."

My Lords, the provision in operation here is very simple, it says that where the donor of the power signs the instrument creating the power of attorney it shall be signed in the presence of one witness who shall attest the instrument. The plain purpose of the presence of the witness is to attest the instrument. Attest is defined in **Black's Law Dictionary Revised Fourth Edition** as follows;

"ATTEST. To bear witness to; to bear witness to a fact; to affirm to be true or genuine; to act as a witness to; to certify; to certify to the verity of a copy of a public document; formally by signature; to make solemn declaration in words or writing to support a fact; ***to signify by subscription of his name that the signer has witnessed the execution of the particular instrument.(emphasis supplied)."***

So, attest may entail different actions but all are to be done by a witness for the purpose of affirming that indeed and in truth the thing was done in her presence. On a reading of section 1(2) of Act 549 it appears that it is the last part of the definition of attest quoted above that was intended by the legislator, that is the witness should not only see the donor sign the instrument, but must sign her name to signify that she saw the donor execute the particular instrument. We have read all the seven sections of the Act and no where does it state any special criteria for a person to qualify to witness a power of attorney and it also does not disqualify any group of persons from acting as witness to the execution of a power of attorney. In our understanding, the critical fact to look for when the validity of a power of attorney is questioned on ground that it has not been witnessed is for the court to satisfy itself that the donor signed the instrument in the presence of a witness and that that witness signed the instrument signifying that she was present at the execution of the instrument by the donor. In the case under reference, the Court of Appeal stated that the Commissioner for Oaths signed as the person before whom the instrument was signed. The question then is, in substance, how is that different from attesting the instrument as a witness as required by section 1(2) of the Act? It appears to us that both the Court of Appeal and the Supreme Court in Asante-Appiah v Amponsah were looking for a magic word "witness" with a signature against it on the document. This approach places form over substance but there is no basis for such an extreme literalist interpretation from even a casual reading of the Act as a whole. The Act contains a precedent form for a general power of attorney as a Schudule to section 6 of

the Act. That precedent form is very simple and no portion with the word witness is to be found on it. In the interpretation of statutes, a court ought to render an interpretation that would achieve the purpose of the enactment and not to defeat it. See **Abu Ramadan & Nimako v EC & A-G [2013-2014] 2 SCGLR 1654.**

In the case of **Zambrama v Segbedzi [1991] 2 GLR 221**, the Court of Appeal rejected a suggestion by counsel that the absence of a *jurat* on the face of a document executed by an illiterate invalidated the document because section 4(1) of the **Illiterates Protection Ordinance (CAP 262) (1951 Rev)** provides as follows;

4. (1) Every person writing a letter or other document for or at the request of an illiterate person, whether gratuitously or for a reward shall—

(1) Clearly and correctly read over and explain such letter or document or cause the same to be read over and explained to the illiterate person.

The court held that it is a question of fact to be proved by admissible evidence whether the document had been read and explained to the illiterate person in a language he understood and that the presence of a *jurat* is but only one of such admissible evidence.

Commissioners of Oaths are appointed by the Chief Justice pursuant to the **Oaths Act, 1972 (NRCD 6)** and they are sworn before they are given authority to administer oaths. Their normal function in the legal system is to administer oaths and attesting same by signing and affixing their stamps on affidavits and statutory declarations signed by deponents before them. Their appointments can be revoked if they misconduct themselves and they can even be charged under section 191 of the **Criminal and Other Offences Act, 1960 (Act 29)** for administering an unlawful oath. Though Act 549 does not require a power of attorney to be made in any particular form, so it must not be made under oath, but then nothing in the Act debars the making of a power of attorney under

oath. From the judgment of the Court of Appeal in Asante-Appiah v Amponsah it does appear that the power of attorney in that case was not made under oath and that the commissioner for oaths was not performing his normal function of administering an oath but acted as a witness, just as any person could do so it is difficult for us to understand why it was said he could not be the attesting witness to the execution of the instrument.

By that decision the court appears to imply that if the instrument had been signed by any one else, no matter who, provided she signed against the designation "witness" that would have satisfied the provision. But the purpose of the presence of the witness is to attest to the due execution of the instrument, therefore, in our view, a commissioner for oaths is even better qualified to witness and attest a power of attorney than a person who cannot be easily traced and whose credibility cannot be vouched for. A commissioner for oaths performs his duties on pain of clear legal sanctions and it is easy to trace her in case there is a dispute about the due execution of the power of attorney. In our opinion, the Court of Appeal did not correctly decide the issue of the validity of the power of attorney in Asante-Appiah v Amponsah and when the case came before this court on appeal the court regrettably did not thoroughly consider the full ambit and purpose of the Act as a whole before endorsing the view of the Court of Appeal. That holding, in our clear thinking, is not right and just having regard to the purpose and plain meaning of the provisions of Act 549 as a whole. If our decision in Asante-Appiah v Amponsah has been interpreted as disqualifying a commissioner for oaths from acting as a witness to a power of attorney, or to mean that a power of attorney cannot be validly constituted by a statutory declaration sworn to before a commissioner for oaths, then we hereby depart from that decision pursuant to Article 129(3) of the Constitution. In our view, a power of attorney constituted by a statutory declaration attested by a commissioner for oaths or Notary Public has more gravitas than one stated on a paper signed by the donor and

attested by a witness without an oath so it cannot be right and just to hold such a power of attorney invalid.

In the face of our interpretation of section 1(2) of Act 549 as explained above, the defendants' challenge to the validity of the power of attorney of Isaac Benjamin Clement is no longer tenable. The statutory declaration by which the power was given to him was signed by the plaintiffs on pain of penal sanctions under Italian law, in the presence of a Notary Public who has attested that the instrument was signed before her. The power of attorney satisfies section 1(2) of Act 549 and is valid.

In conclusion, the appeal against the decision of the Court of Appeal dated 4th December, 2019 fails and is dismissed. The case is to be remitted to the High Court Sekondi for the trial of the remaining issues set down for determination appearing at page 31 of the Record of Appeal.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

Y. APPAU

(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)

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