IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: BAFFOE-BONNIE JSC (PRESIDING)

OWUSU (MS.) JSC

TORKORNOO (MRS.) JSC

ACKAH-YENSU (MS.) JSC

ASIEDU JSC

CIVIL APPEAL

NO. J4/45/2020

15TH MARCH, 2023

1. **AGYEI SEFA**
2. **ALHAJI ISSAH AMANFO**

PLAINTIFFS/APPELLANTS/APPELLANTS

VS

1. **OWUSU AFRIYIE**
2. **NATHAN OTI ANIM**

DEFENDANTS/RESPONDENTS/RESPONDENTS

JUDGMENT

OWUSU (MS.) JSC:-

The plaintiffs' claims as set out in their Amended writ of summons and statement of claim are:

a. *"A declaration of their family title and ownership of all that piece and parcel of land at Suhum/Akwadum road or Agyekumhene Akura bounded by the properties of Ohenemaah Fosua, Op. Kwasi Donkor, Mame Fokuo, Abena Dapaah, Mame Ataa, Kofi Afi, Op. Agyeman, Mame Asantewaah, Op. Kwabena Gyasi and Apea Adu;*
b. *Recovery of Possession of the land described in paragraph (1) supra.*
c. *Recovery of possession of House No. EF/A 140 Effiduase.*
d. *Perpetual injunction to restrain the defendant his agents, workmen and all persons claiming any interest through them from entering the land to do anything inconsistent with the plaintiffs and their family right to peaceable enjoyment of their land".*

In their 12-paragraph statement of claim which accompanied their writ of summons, the plaintiffs/appellants/appellants (herein referred to as plaintiffs) averred that they are the grandsons of the late Nana Agyekumhene who acquired the land in dispute and bring the action for the Bretuo and Agona families of Effiduase, New Juaben. The plaintiffs averred further that, when Kwadwo Boateng the customarily successor of the late Agyekumhene died, the line of succession of the latter became extinct and Yaw Brefo was appointed caretaker of the estate of Agyekumhene. The plaintiffs continued that, Yaw Brefo died in 1985 and the children and grandchildren of Agyekumhene appointed 1st defendant as the caretaker of the estate of Nana Agyekumhene. It is the case of the plaintiffs that, 1st defendant has been selling the land he was appointed to oversee to developers and has been warned to desist from disposing off the land but 1st defendant has not paid any heed to the said warning. Rather the 1st defendant had sold portions of the land in dispute to 2nd defendant. In addition, the 1st defendant had let out some rooms in House No. EF/A 140, Effiduase which he was allowed to occupy when he was appointed the caretaker of the estate of Nana Agyekumhene to tenants hence this action.

The defendants/respondents/respondents (hereinafter referred to as defendants) reacted on receipt of plaintiffs' writ of summons and statement of claim. In particular, the defendants averred that, plaintiffs being the paternal grandchildren of the late Nana Agyekumhene have no capacity to bring the instant action. Furthermore, the plaintiffs' Bretuo and Agona families have no interest in the properties in dispute. They continued that, Yaw Brefo was appointed successor of Opanin Boateng and not a caretaker of the estate of Agyekumhene and that 1st defendant was appointed the customary successor to Yaw Brefo by his family which family does not include the children and paternal grandchildren of the late Agyekumhene. It is the case of the 1st defendant that, he occupied House No. EF/A 140 Effiduase and all other properties of the late Agyekumhene as of right as the current successor of the late Agyekumhene and therefore he is not accountable to the plaintiffs for his stewardship as such successor. The 1st defendant concluded that, he cannot be restrained at the instance of the plaintiffs because the latter are not members of his family, neither do they have any interest in the properties in dispute as Nana Agyekumhene belonged to the Oyoko clan and not the Bretuo or Agona clan of Effiduase. Even if the plaintiffs had any interest in the properties in dispute, which interest is denied, having been in undisturbed adverse possession of the purported interest of the plaintiffs for twenty-eight (27) years at the time the writ was issued, plaintiffs' action is statute barred in view of section 10 (1) of the Limitation Act 1972 (NRCD 54).

At the trial the plaintiffs' testified through the 2nd plaintiff and called one witness. 1st defendant also testified for himself and on behalf of the 2nd defendant and closed their case.

At the end of the trial, the plaintiffs' case was dismissed.

Dissatisfied with the decision of the High Court, the plaintiffs appealed to the Court of Appeal on the sole ground that the judgment of the High Court was against the weight of evidence.

The Court of Appeal, in a unanimous judgment dismissed plaintiffs appeal as lacking merit.

The plaintiffs have appealed to the Supreme Court against the decision of the Court of Appeal on the following grounds:

(1) *The judgment is against the weight of evidence.*

(2) *The substitute of 1st defendant (deceased) did not have capacity to be substituted for the 1st defendant as alleged as customary successor to Nana Agyekumhene (deceased) whose system of inheritance was the matrimonial (sic) system of inheritance.*

(3) *The Court of Appeal erred when it placed the burden of proof whether or not the 1st defendant (deceased) was the customary successor of Nana Agyekumhene (deceased).*

(4) *Further grounds may be filed upon receipt of the record of appeal.*

It is noted for the record that, no additional ground of appeal was filed.

In arguing the appeal, counsel for the plaintiffs argued grounds 1 and 3 together and we will follow the order in which the grounds of appeal were argued. He then submitted that, since an appeal is by way of re-hearing and the plaintiffs have alleged that the decision is against the weight of evidence, it is incumbent on this appellate court to analyze the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision so as to satisfy itself that on the preponderance of probabilities, the conclusions of the trial Judge are amply supported by the evidence. He referred us to the cases of: **TUAKWA vs. BOSOM [2001-2002] SCGLR 61; QUARCOPOME vs. SANYO ELECTRICAL TRADING CO. LTD**

[2009] SCGLR 213, 229; OPPONG vs. ANARFI [2011] 1 SCGLR 556 and OWUSU DOMENA vs. AMOAH [2015-2016] 1 SCGLR 790, 792.

Counsel for the plaintiffs continued that, 1st defendant having positively averred that he was the customary successor of Nana Agyekumhene deceased, it was incumbent upon him to prove that assertion. This is because, the law is that, he who alleges must prove what he alleges. He continued that, plaintiffs gave evidence and called PW1 Nana Okoawia Dwemoh Baabu 11, the chief of Effiduase. The evidence of PW1 is that upon the demise of Yaw Brefo who was a caretaker, his nephew Kwasi Osei, the 1st defendant was appointed a caretaker of Nana Agyekumhene's properties namely, two farms at Agyekumhene Akura by the children and grandchildren of Nana Agyekumhene. That he, PW1 witnessed the appointment of 1st defendant as a caretaker and was one of the persons who did the appointment. He therefore submitted that, since the 1st defendant stated that he is the customary successor of the late Nana Agyekumhene and that the mother of Yaw Brefo, Nyantakyiwaa was a blood relation of Nana Agyekumhene, it was incumbent on him to prove the said averment. This 1st defendant failed to do. He only mounted the witness box and repeated his averments in his statement of defence. He should at least have called one witness to corroborate his story that, his great grandmother was a blood relation of Nana Agyekumhene. Besides, the appointment of a customary successor is not automatic and the appointment is made by the family of the deceased person. Similarly, there was no evidence as to how Kwasi Osei was also appointed as a customary successor. Then there was the issue of the marriage of Nyantakyiwaa. According to counsel for the plaintiffs if Nyantakyiwaa was the sister of Nana Agyekumhene, then the marriage would have been celebrated at the palace of Effiduase and the Gyaasi and the linguist would have presided because it was a royal marriage. But because Nyantakyiwaa was not a princess as Nana Agyekumhene was a prince, that was why the marriage took place at Abompe in the chief's palace because

Nyantakyiwaa was a maid of Nana Agyekumhene and that was the reason why the latter gave her hand in marriage not because she was the sister.

Counsel for the plaintiffs therefore submitted that, the Court of Appeal erred in holding that it cannot uphold the contention of the plaintiffs that the line of Nanna Agyekumhene had become extinct. Counsel also had issue with the observation of the Court of Appeal that;

> *"Instead, we note that beyond the dogged assertion of the 2nd plaintiff that Yaw Brefo was appointed caretaker and after him 1st defendant by the children and grandchildren of Nana Agyekumhene, no evidence of the witnesses present at such an important event was led in corroboration, especially as in the case of the first defendant's alleged appointment, one Opanin Donkor, an alleged witness to the event, was said to be alive.".*

In the view of counsel for the plaintiffs, this statement cannot be correct as the said Kwasi Donkor who is now the chief of Effiduase and goes by the stool name Okoawia Dwemoh Baabu 11 gave evidence for the plaintiffs. Still on the issue of the marriage of Nyantakyiwaa, counsel submitted that, in Akan custom only a father has the right to give her daughter in marriage not her brother. Thus, if Nyantakyiwaa was the sister of Nana Agyekumhene, the latter could not have given the former in marriage.

On the issue of capacity, counsel for the plaintiffs referred to the case of **SARKODIE I vs; BOATENG II [1982-83] 1 GLR 715** where this Court held that:

> *"The Supreme Court considers the question of capacity in initiating proceedings as very important and fundamental and can have a catastrophic effect on the fortunes of a case".*

In this regard, counsel for the plaintiffs submitted on ground 2 that, the substitute of the first defendant (deceased) did not have capacity to be substituted for the first defendant as the alleged customary successor to Nana Agyekumhene whose system of inheritance

was matrilineal and the person substituted for first defendant (deceased) was the son of the latter. The substitute therefore lacked capacity to defend the action He referred us to the case of **FOSUA & ADU-POKU vs. DUFIE (Deceased) & ADU-POKU MENSAH [2009] SCGLR 310.** He then concluded that, the Court of Appeal overlooked this obvious flaw in the judgment of the High Court. Secondly the substitute of first defendant during his examination in chief was giving evidence as if he was the father, Kwasi Osei who claimed to have been appointed customary successor to Nana Agyekumhene. This is because, the power of attorney given to the person substituted for the first defendant (deceased) became automatically revoked with the death or demise of Kwasi Osei. He could therefore not have given evidence on the basis of the said power of attorney. Consequently, being the son of Kwasi Osei, the 1st defendant substitute not being a member of the family of Nana Agyekumhene, he could not have been substituted for his father, the 1st defendant (deceased) as the successor.

In response to the above submissions, counsel for the defendants after stating the respective cases of the parties, on grounds 1 and 3 of the appeal, submitted that, an appeal is by way of re-hearing. He referred us to the cases of: **ABBEY & Others vs. ANTWI [2010] SCGLR 61, 65 and AMPOMAH vs. VOLTA RIVER AUTHORITY [1989-90] 2 SCGLR 28.** He then submitted that, in an attempt to discharge the burden of showing that the judgment cannot be supported having regard to the evidence on record, counsel for the plaintiffs referred to the evidence of 2nd plaintiff to the effect that, Nyantakyiwaa the mother of Yaw Brefo was not a blood relation of Nana Agyekumhene. But 1st defendant stated positively that, Nyantakyiwaa was a blood relation of Nana Agyekumhene. He continued that, there are pieces of evidence on record which supported the defendants' claim that the 1st defendant (deceased) Kwasi Osei was indeed a successor and not a caretaker. On the burden of proof, counsel for the defendants referred to *section 11 (4) and 12 (1) of the Evidence Act 1975 (NRCD 323)* and submitted that,

the general rule is that a party who in his pleadings raises issues essential to the success of his case assumes the onus of proof. In this regard, since the plaintiffs claimed the 1st defendant (deceased) was a caretaker of the estate of the late Agyekumhene, they also had the burden of producing evidence to avoid a ruling on the issue against them. He referred to paragraph 10 of the plaintiffs' reply at page 15 of the record of appeal which states that:

> *"The plaintiffs say in further reply to paragraph 5 of the Statement of Defence that, during PNDC period the 1st defendant was ordered by the PNDC to give some of the rooms in Agyekumhene's house to Ohemaa Fosua and Kwaku Agyeman who were the children of Agyekumhene. They failed to take the 2 rooms since they were rather small. They still belong to them".*

Counsel for the defendants then submitted that, the above pleadings tended to corroborate the defendants' claim that the deceased 1st defendant was a successor of Nana Agyekumhene and not a caretaker of the estate of the latter. The reason being that if indeed the 1st defendant (deceased) was a caretaker, the children would have taken the rooms as of right and would not need the intervention of a third party (PNDC). The only reasonable explanation of the children's conduct in seeking the intervention of a third party to "plead" on their behalf to be given some rooms in their father's house is that in an Asante System of inheritance the 1st defendant (deceased) was a successor and not a caretaker. Still on the customary successorship of Nana Agyekumhene, counsel for defendants referred to the evidence of PW1 when the latter said with the death of Opanin Boateng, the matrilineal family of Nana Agyekumhene became extinct and thus no one was appointed his customary successor and the piece of evidence on record that 1st defendant (deceased) was reported to the CDR by Ohemaa Fosua, the daughter of Nana Agyekumhene for 1st defendant (deceased) to give them some rooms in their father's house. According to counsel this piece of evidence was not challenged under cross

examination by the plaintiffs nor did they lead any evidence to the contrary. The plaintiffs are deemed to have accepted that fact. He referred us to the case of **TAKORADI FLOUR MILLS vs. SAMIR FARIS [2005-2006] SCGLR 882** to support his point.

Counsel for defendants also referred to the evidence on record that 1st defendant (deceased) provided "Adisiede" whenever any of the children of the Nana Agyekumhene died which evidence PW1 admitted, except to say that 1st defendant (deceased) did that as a caretaker. On the issue of 1st defendant (deceased) accounting to plaintiffs, counsel submitted that, the defendants denied accounting to plaintiffs and yet the plaintiffs were not able to lead evidence as to when 1st defendant started accounting to them and when he stopped.

Counsel for the defendants submitted that, the trial judge after evaluating the evidence on record came to the conclusion that Opanin Kwasi Osei, late Opanin Boateng and Yaw Brefo were customary successors and not caretakers as alleged by the plaintiffs. Based on the above submissions, he urged us to dismiss grounds 1 and 3 of the appeal.

On ground 2 of the appeal which is in respect of the capacity of the person substituted for 1st defendant when the latter died, counsel for the defendants submitted that, the case of the defendants is that, with the death of 1st defendant (deceased) his maternal family became extinct. The only family the deceased had was his children. It was therefore right for the substitute who was appointed by his siblings to succeed their father to be substituted. Counsel therefore concluded on this ground that; it is the plaintiffs who do not have capacity to mount this action as they claim the properties in dispute as their family properties when they are not members of family of Nana Agyekumhene. He therefore invited us to dismiss the appeal and affirm the judgment of the Court of Appeal.

In this appeal, the defendants challenged the plaintiffs' capacity to institute the action when they averred in para graph one (1) of their Statement of Defence filed on 10th July, 2012 as follows:

> *"1. In answer to paragraph 1 and 2 of the Statement of Claim the defendants say the plaintiffs being the paternal grandchildren of the late Nana Agyekumhene have no capacity to bring the instant action against the defendants and further the Plaintiffs Bretuo and Agona families have no interest whatsoever in the properties in dispute".*

The plaintiffs again testified in the capacities they sued when 2nd plaintiff in his evidence in chief stated that:

"Q.: You have brought the defendants to court, why is it so?

A: Because of my grandfather Nana Agyekumhene's properties.

Q. Who is Nana Agyekumhene?

A: He was born in Asante in Effiduase.

Q: Where is he?

A: He is dead.

Q: When you say he is your grandfather, what do you mean?

A: He was the father of my mother."

See page 38 of the record of appeal.

PW1 also in his testimony admitted that, the succession of Agyekumhene is matrilineal. This is what he said:

Q: "To what system of succession did Agyekumhene follow was it patrilineal or matrilineal?

A: It was matrilineal. Agyekumhene was the son of the Effiduase Chief whose stool I am currently occupying…."

If the plaintiffs are the paternal grandchildren of Nana Agyekumhene, then by Ashanti custom, plaintiffs do not belong to the family of Nana Agyekumhene to be able to succeed him customarily. Having challenged the plaintiffs of their capacity to sue, the plaintiffs needed to establish their capacity in order to succeed.

See the case **of SARKODIE 1 vs. BOATENG11 [1982-83] GLR 715 holding (2)** of the headnotes where this Court held as follows:

> ***"It was elementary that a plaintiff or petitioner whose capacity was put in issue must established it by cogent evidence. And it was no answer for a party whose capacity to initiate proceedings had been challenged by his adversary, to plead that he should be given a hearing on the merits because he had a cast-iron case against his opponent".***

See also the case of **ASANTE-APPIAH vs. AMPONSA ALIAS MANSAH [2009] SCGLR 90, 92** where it was held that that:

> ***"Where the capacity of a person to sue is challenged, he has to establish it before his case can be considered on the merits. In the instant case, the defendant challenged the capacity of the plaintiff right from the inception of the trial. The challenge was explicit in the first paragraph of the Statement of Defence and in cross-examination of the person who gave evidence on his behalf as holder of a power of attorney which has been declared invalid and inadmissible. The plaintiff had to establish his capacity before he could expect the trial court to have***

considered his case on its merits. He woefully failed to establish the capacity in which he sued by his reliance on the invalid power of attorney".

In its judgment, the Court of Appeal correctly identified the issues before the Court for determination when it held that:

> *"The main issues for determination before the Court below for determination were; whether or not the 1st defendant was a caretaker with a duty to account to the plaintiffs for his stewardship over the properties of Nana Agyekumhene or a customary successor. Two sub-issues arising thereunder for determination were: whether or not Nana Agyekumhene's matrilineal family was extinct and furthermore whether or not the plaintiffs who were the children and grandchildren of Nana Agyekumhene were entitled to the estate in such circumstances".*

See pages 5 to 6 of the record of appeal.

The Court of Appeal then continued as follows:

> *"It was the plaintiffs' evidence that their paternal grandfather Nana Agyekumhene the son of the late Effiduase Chief had considerable wealth and died possessed of landed properties: two cocoa farms and a house. Being an Akan man of Oyoko family and thus subject to matrilineal succession, his estate was succeeded to by Opanin Kwasi Boateng who was alleged to be one of three sons of his sister Asantewaa.*
>
> *It was the plaintiffs' allegation that with the death of Opanin Kwasi Boateng, Nana Agyekumhene's matrilineal line of succession became extinct for which reason the children and grandchildren appointed Yaw Brefo the son of the patriarch's maidservant to be the caretaker, and after him the caretaker's nephew. We are not persuaded of the matters narrated by the plaintiffs.*

It seems to us first of all that if the line of Agyekumhene had become extinct (which contention we cannot uphold), and that the children and grandchildren had indeed been the ones to appoint Yaw Brefo as caretaker, there would have been corroborative evidence of caretaker ship beyond a bare assertion both in pleadings and in evidence".

After referring to the case of **MAJOLAGBE vs. LARBI & Others [1959] GLR 190 and sections 11 (1) and 12 (1) of the Evidence Act 1975 (NRCD 323)** on what constitutes proof in law, the Court of Appeal continued that:

"In the instant matter. It seems to us that the allegation by the plaintiffs that the entire estate of their ancestor was placed in the hands of a caretaker, someone who was allegedly a stranger to the matrilineal succession, required proof. Since the plaintiffs alleged that they had appointed Yaw Brefo first and subsequently the 1st defendant (deceased) as caretaker of property of their ancestor whose matrilineal line was allegedly extinct, they assumed the burden of producing evidence of this fact. This would have included evidence of some form of accounting by the alleged caretaker, either by way of receipts of sales and purchases from the farms which would have been kept for evidential purposes and would have been available at the trial.

In the absence of such documentary evidence, ***the evidence of witnesses within living memory*** *(our emphasis) regarding the alleged relationship would have given corroboration to the weighty matters asserted by the plaintiffs. No such evidence was led".*

The Court of Appeal was right on point on the above assessment and evaluation of the evidence in the record of appeal. The issue of Nana Agyekumhene and whether Nyantakyiwaa was his sister or maidservant is traditional history. None of the parties before us witnessed the said events. The test of traditional history was laid down by the Privy Council in the case of **ADJEIBI-KOJO vs. BONSEI [1957] 3 WALR 257** where the Court per Lord Denning held as follows:

"The most satisfactory method of testing traditional history is by examining it in the light of much more recent facts as can be established by evidence in order to establish which of the two conflicting statements of tradition is more probably correct. Where there is conflict of traditional history one side or the other must be mistaken, yet both may be honest in their beliefs, for honest mistakes may occur in the course of transmission of the traditions down the generations. In such circumstances and particularly where (native) courts below have deferred, an Appeal Court must review the evidence and draw their own inferences from the established facts: the demeanor of the witnesses before the trial Court is of little guide to the truth".

This Court applied the test laid down in the case referred to supra in the case of **AGO SAI & Others vs. KPOBI TETTEH TSURU III [2010] SCGLR 762, holding (1)** of the headnotes as follows:

"It was well-established that where in a land suit, the evidence as to title to the disputed land was traditional and conflicting (as in the instant case), the surest guide was to test such evidence in the light of recent acts to see which was preferrable".

The Court of Appeal applied the test quoted above in evaluating the evidence of the parties on record. For instance, the Court of Appeal held that:

"We find a number of matters most instructive in this case that when the said alleged caretaker Yaw Brefo died, his own nephew who would be his successor under the system of matrilineal succession he was subject to was placed in charge of the estate of Nana Agyekumhene. The unlikelihood of the successor of a mere caretaker being placed in position of one in charge of a trust estate administered by his predecessor cannot be gainsaid, especially in the light of the subsequent conduct of the children of Agyekumhene".

The third recent fact the Court of Appeal relied on in coming to the conclusion that, with the death of Opanin Boateng, the matrilineal line of Nana Agyekumhene did not become extinct was the complaint the children of Agyekumhene lodged before the CDR Court/Tribunal. The plea of the children Kwaku Agyeman and Ohemaa Fosua was that they should be given some rooms in their late father's house. This is how the Court of Appeal assessed and evaluated the above piece of evidence.

> *"This singular piece of evidence speaks volumes and belies the case of the plaintiffs, for it seems to us that if the 1st defendant (deceased) had been a caretaker appointed by the children and grandchildren of Nana Agyekumhene as the plaintiffs alleged, then if he was found wanting in his stewardship, the said children would have simply removed him from the caretaker ship role rather than make a complaint against him to the authorities and asked to be permitted the enjoyment of some of the patriarch's properties".*

The fourth recent fact according to the Court of Appeal was the fact that 1st defendant was said to have played the customary role of a father to the children of Nana Agyekumhene. This is how the Court of Appeal put it:

> *"Unchallenged evidence was led of this very significant fact: that upon the death of a child of Nana Agyekumhene, the 1st defendant was informed of the death according to custom and he attended the funeral to present what was referred to as "adesiedie" as father of the deceased according to custom. These things could not have been done by him and permitted of him in the role of a mere caretaker of properties.*
>
> *In the light of these uncontroverted matters, we cannot fault the reasoning or the conclusion of the court below that the first defendant was indeed the customary successor in charge of the estate of Nana Agyekumhene and not the caretaker of properties alleged by the plaintiffs".*

See page 247 of the record of appeal.

We cannot but agree with the above findings by both the trial court and the Court of Appeal and as a second appellate court we do not find any reason to disturb the above findings.

See the case **of FOSUA & ADU-POKU vs. DUFIE (DECEASED) & ADU-POKU MENSAH [2009] SCGLR 310, 312 313 holding (4)** where their Lordships held that:

> ***"In the instant case, the most important issue was whether the disputed house was the self-acquired property of the late Kwaku Poku as contended by the defendants. That was an issue of fact entirely within the province of the trial judge to determine one way or the other. Provided he resolved the issue in favour of or against one side based on the evidence before it, the settled law was that an appellate court would be slow to interfere with or set aside the findings of fact so made unless the findings were perverse or not supported by the evidence on record*** *(our emphasis).*

If the 1st defendant (deceased) was the customary successor of Yaw Brefo, then the plaintiffs lacked the requisite capacity to initiate the present action. In the case of the **REPUBLIC vs. HIGH COURT, ACCRA; EX-PARTE ARYEETEY (ANKRAH INTERESTED PARTY) [2003-2004] SCGLR 398 @ 405**, it was held that:

> ***"Any challenge to capacity therefore puts the validity of the writ in issue".***

In the words of **KPEGAH JSC** at page 405 of the report:

> ***"The requirement that a party endorses on the writ the capacity in which he sues, is to ensure that a person suing in a representative capacity is actually invested with that capacity and therefore has the legal right to sue. This includes the***

submission that the requirement also enables a defendant, if he is so minded, to challenge the capacity the plaintiff claims he has and such a challenge may be taken as a preliminary issue. This is because if a party brings an action in a capacity he does not have, the writ is a nullity and so are the proceedings and the judgment founded on it. Any challenge to capacity therefore puts the validity of the writ in issue. It is a proposition familiar to all lawyers that the question of capacity like a plea of limitation, is not concerned with merits so that if the axe falls, then a defendant who is lucky enough to have the advantage of the unimpeachable defence of lack of capacity in his opponent, is entitled to insist upon his rights" *(our emphasis).*

Relating the case cited supra to the case under consideration, the defendants challenged the plaintiffs' capacity to initiate this action in paragraph one (1) of their statement of defence and the cross-examination of the plaintiffs and their witness which have been quoted in this delivery. Based on the foregoing, there are no pieces of evidence on record if applied to the plaintiffs' case would have changed the decision in their favour or pieces of evidence on record wrongly applied against them.

Grounds 1 and 3 of the appeal fail and they are accordingly dismissed.

This brings us to ground 2 of the appeal which complained that, the person substituted for 1st defendant (deceased) has no capacity to be substituted.

Flowing from our conclusion on grounds 1 and 3 of the appeal that, the plaintiffs' lacked the requisite capacity to initiate this suit, no useful purpose would be served in going into the merits of this ground. See the case of ***HUSEINI vs. MORO [2013-2014] 1 SCGLR 363, 364***; where their Lordships in a unanimous decision held that:

> ***"Since the attorney lacked capacity to issue the writ because the power of attorney was void, the defendant also could not pursue his counterclaim. Even though a counterclaim is a separate action from the claim, in the peculiar circumstances of this case, the bottom of the matter had been knocked off for want of capacity. If there was no capacity to sue because of a defective power of attorney, then there was no capacity to defend the action*** (our emphasis).
>
> ***Consequently, any pleadings served on the attorney would be deemed not to have been properly served on the principal. To the extent that service of the defendant's counterclaim on the deficient attorney is deemed as no service, evidence given in proof of the counterclaim cannot be allowed to stand."***

See this determination captured in holding (2) of the headnotes of the report referred to supra.

Relating the case referred to supra to the case under consideration, since the plaintiffs did not have capacity to institute this action, to go into the issue whether the person who was substituted for the 1st defendant (deceased) was the right person or not will not make any difference.

It is for these reasons that the appeal fails in its entirety and it is accordingly dismissed.

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)

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