IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: PWAMANG JSC (PRESIDING)

LOVELACE-JOHNSON (MS.) JSC

AMADU JSC

PROF. MENSA-BONSU (MRS.) JSC

ASIEDU JSC

CHIEFTAINCY APPEAL

NO. J2/04/2021

10TH MAY, 2023

1. ANKOMAH BROTHERS
   (SUBST. BY OPANYIN KWAKU KORANKYE)
2. NANA JAMES COBBINA
(SUBST. BY OPANYN MANU JELLICOE) — PLAINTIFFS/RESPONDENTS/APPELLANTS/RESPONDENTS

3. OPANYIN KWABENA BERFUO
(SUBST. BY OPANIN JACOB SARPONG)
4. OPANYIN KOFI ATTAKO

VS

1. OPANIN KWASI TANDOH
(SUBST. BY NANA KWASI KYEM) — DEFENDANTS/APPELLANTS
2. OBAAPANYIN YAA ATTIA — RESPONDENTS/APPELLANTS

(SUBST. BY NANA YAA KYEKYE)

JUDGMENT

LOVELACE-JOHNSON (MS.) JSC:-

The designation of the parties at the Judicial Committee of the Wassa Fiase Traditional Council (JCWFTC) will be maintained in this appeal.

On the 17th day of March 1994, one J M K Ankomah informed the Registrar of the Judicial Committee of the Wassa Fiase Traditional Council that they wished to "institute a writ of summons" against the defendants per a process with the understated title accompanied by a five paragraph affidavit in support. The said affidavit called upon the defendants who claimed to be royal members and kingmakers of the Tarkwa Banso Stool to appear before the JCWFTC to prove how they became s Stool family and Kingmakers in the light of certain facts they had stated in their affidavit in support.

1. Ankomah Brothers
2. Nana James Cobbina PLAINTIFFS
3. General Abusuapayin,Opanin Kwabina Berfuo
4. Opanin Kofi Attako

AND

1. Opanin Kwasi Tandoh
2. Opanin Kwabina Kyei
3. Opanin Yaw Bempeh DEFENDANTS
4. Obaapanin Attia

All of Tarkwa Banso

On 22nd day of April 1994, the defendants filed a process entitled "DEFENCE FOR APPLICATION FOR WRIT OF SUMMONS" and stated as follows therein

We the defendants deny the averments in paragraphs 1, 2, 3, 4, and 5 of the application of writ of summons and at the hearing will put the plaintiffs to strict proof of all the assertions"

The process was addressed to the Registrar and to the "Panel members, Wassa Fiase Traditional Council, Tarkwa."

The defendants followed this up with an affidavit in opposition sworn to on 5th May 1994 which stated in part at paragraphs 3, 4, and 5 as follows

1. *That we have been served with an affidavit together with so-called writ of summons which in fact is no writ at all*
2. *That we nevertheless deny all assertions contained in the affidavit and what seem to be the statement of claim which the Plaintiffs themselves labelled as evidence.*
3. *That the so called writ of summons does not conform to any mode of starting Chieftaincy dispute and therefore must be dismissed with heavy cost*

After a few preliminary issues such as the failure to pay the required deposits, interim injunction, exclusion of the names of some of the parties were dealt with by motion and rulings given, the substantive matter was heard on its merits and judgment given for the plaintiffs.

The defendants, being dissatisfied with the judgment appealed to the Judicial Committee of the Western Regional House of Chiefs (JCWRHC) on the following grounds

(i) The Judicial Committee of the Wassa Fiase Traditional Council breached the rules pf Natural Justice-The audi alteram PatemRule- by disallowing the Defendant/Appellants' star witness,Nana Kodwo Anomako 111 and Opayin Kwaw Bempe of Tarkwa Banso to give evidence for the Defendants,

(ii) The Judicial Committee of the Wassa Fiase Traditional Council exceeded their jurisdiction.

(iii) The judgment is against the weight of evidence

Seven additional grounds of appeal were later filed.

At the JCWRHC, both parties were represented by counsel who filed written submissions after which the said tribunal ordered in its judgment that the matter be heard de novo.

The plaintiffs further appealed to the Judicial Committee of the National House of Chiefs (JCNHC) which by its judgment allowed their appeal.

Being dissatisfied this, the Defendants have appealed to this court against the said judgment and reasons for it on the following grounds

(a) The Judicial Committee erred when it held that the Plaintiff's writ of summons at the Traditional Council was proper
(b) The judgment of the Judicial Committee is against the weight of evidence on record

No additional grounds of appeal were filed in spite of the intimation that this would be done.

The defendants seek from this court, a setting aside of the judgment of the JCNHC and in its place a restoration of the order of the JCWRHC that the matter should be heard de novo at the traditional Council.

We shall deal with the first ground of appeal which in effect impugns the manner in which this matter was initiated. This is because there will be no need to discuss the merits of the appeal if a conclusion is reached that the manner in which the case was initiated is such that it renders the entire proceedings a nullity. It is trite that if the foundation upon which a case rests is a nullity, the merits, even if iron cast will not cure this defect.

Counsel for the defendants sums up this position on the matter in the following words at page 35 of his statement of case

"Your Lordships, in the instant case the plaintiffs did not comply with any modes stated in LI 798 for Chieftaincy suit to be commenced. They rather chose to apply to the Registrar of the Judicial Committee of Wassa Fiase Traditional Council to issue the Writ which Writ was not issued by the Registrar.

Since no writ as required by law was issued the provisions contained in Regulation 4(2)(a)(b) and (c) were not complied with. These provisions include the full names of the Plaintiffs and the capacities in which they were bringing the action, the address for service of the Plaintiffs and the names and addresses of all parties who may be directly affected by the action. The mandatory provisions of Regulation 4(3) and (4) were also not complied with"

The response of counsel for the Plaintiff appears to be that the court should have a common sense approach to the interpretation of statutes especially in settings like the traditional councils. Counsel contends that so long as the parties were agreed on the issues to be determined and were heard on those issues this court should not allow technicalities such as the manner in which the action was commenced to override the substance which was to hear and determine the matter on its merits.

We shall proceed to examine the process by which the plaintiffs commenced this matter vis a vis the process set out in Regulation 4 of LI 798.

It is clear that the plaintiffs sought to initiate the present process under regulation 4(1) of LI 798 that is the **Chieftaincy (Proceedings and Functions) (Traditional Councils) Regulations, 1972.**

This Regulation states as follows

4(1) An action may be commenced in a traditional Council in one of the following manner:-

(a) by swearing a Chief's oath or any other oath recognized within the area of authority of a traditional Council;

(b) by writ in the form set out in the second schedule to these Regulations to which the Plaintiff shall append his thumbprint

(c) by any other means recognized by the customary law of a particular locality

(2) Where the action is commenced by a Writ, the Writ shall set forth as clearly as possible the nature of the reliefs sought by the Plaintiff and shall state;

(a) the full name of the Plaintiff and the capacity in which he is bringing the action;

(b) the address for service of the plaintiff which shall be an address for service;

(c) the names and addresses of all parties who may be directly affected by the action; and

(d) such other particulars as the committee may from time to time direct.

(3) The writ shall be accompanied by a statement of the plaintiff's case

(4) The Statement of the Plaintiff's case shall-

(a) set forth the facts and particulars upon which the plaintiff seeks to rely; and

(b) the names and particulars of the witness, if any whom he intends to call at the hearing.

It is clear from the title of the process the plaintiffs sent to the Registrar of the Traditional Council that their intention was to issue a writ and that being so, had the writ been formally been issued by the Registrar as applied for by the Plaintiffs, it should have met the requirements stated in Regulation 4(2) earlier reproduced.

The writ was obviously not issued by the Registrar and so as stated by counsel for the defendants, the requirements of Regulation 4(2)(a)(b) were not complied with.

There is authority for the position that having failed to initiate the trial at the traditional council in strict accordance with their chosen mode, that is by writ, there was no action properly before the traditional council.

The court of appeal in the case of **Republic v High Court, Sekondi; ex parte; Perkoh II (2001-2002) 2 GLR 460** cited by counsel for the defendants dealt with a similar issue. The court stated in part as follows

"The question that arises is whether the mere filing of a statement of case without a writ was proper and that the court could gloss over it since the substance of the relief sought was well explained in the statement of case…..[their Lordships then referred to the cases of Sam v Noah and Benyi v Amo and distinguished them from the case before them]….*In both cases that began from inferior courts, the court made sure a proper writ had been filed as required by the rules. I think where an enactment sets out a procedure for invoking the jurisdiction of a court or tribunal, the party must comply with it or he will be thrown out of court……I know that non-compliance with rules of procedure are treated as an irregularity and therefore does not nullify proceedings but as held in Smalley v Robey & Co……the proceedings referred to are steps in the action. What the rules tolerate by way of infractions are steps that are taken in action, that is after the appropriate originating action has been filed at the right place and is before the right forum…..All I am trying to say is that when it comes to the originating process, there can be no compromise of the rules by the court."*

Their Lordships went on to stress the importance and need for a party who comes to court to follow the procedure laid down in the relevant enactment. They found the action of the plaintiff in that case who had also not issued a writ as required by LI 798 but had just filed a statement of case, void.

This Court has stated consistently that even an amendment cannot cure that which is void and that a breach of mandatory provisions of the rules is fatal to the proceedings unless such a breach can be considered a mere irregularity.

In the recent Supreme Court case of **The Republic vrs Judicial Committee of Sekondi & Anor, suit No J4/25/2020** delivered on 25th November 2020, the minority decision of the court took the position that in circumstances such as the present, a failure to follow the mandatory requirements of LI 798 should not render the proceedings void or a nullity. The Minority asked itself the following question,

" In my view, the real issue on the facts of this case is whether indeed the Regulation was not complied with at all, and even if it was not strictly complied with, then what is the legal

consequence of such non-compliance? Is such non-compliance an irregularity or it vitiated the proceedings and rendered them ipso facto void?"

A summary of the Minority's reasons for taking the stance that the proceedings were not rendered void were as follows:-

- Unlike Order 81 in CI 47 which gives the court a discretion to waive non-compliance, LI 798 does not have any provisions on the effect of non-compliance with its rules
- In such circumstances, statute, in this case LI 798, is to be construed as a whole to glean the intention of the law maker
- Their Lordships construed the permissive language of Regulation 4(1) which gave various modes of commencing proceedings that is by swearing a Chief's oath, issuing a writ or by any other means recognized by the customary law of a particular locality as an intention by the lawmaker to make commencement of proceedings flexible.

Their Lordships stated that to give Regulation 4(1) a rigid legalistic interpretation would defeat the clear intention of the law maker. They concluded on the above point in the following words

" In the case of Pomaa v Fosuhene [1987-88] 1 GLR 244, the Supreme Court per Francoise JSC observed as follows at page 262 of the Report;

"Members of judicial committees of traditional councils have been urged on several occasions by this court to curb their enthusiasm to don a legalistic garb that is ill-fitting and turn their genius to deciding on customary and constitutional matters: see Kyereh v. Kangah [1978] 1 G.L.R. 83, C.A., and Nyamekye v. Tawiah [1979] G.L.R. 265 at 269, C.A. I add my voice. I think it cannot be over-emphasised that if our revered chiefs would resist the temptation of traipsing the maze of legal rules and procedures and restrict themselves to the sphere where they tower above everyone else, they would be providing greater service to Ghana and advancing the customary law." Then in Darko V Amoah [1989-90] 2 GLR 214 Francois, JSC

again in a case concerning the mode of commencement of proceedings in chieftaincy tribunals, said as follows at page 220;
"Where succession to a stool is at stake, I think the fullest consideration must be given to the merits. A tribunal must resist attempts to shunt off issues of substance, in gambits aimed purely at avoiding the real matters in controversy. A court can only be party to such manoeuvres if the law demands strict compliance."
Consequently, since even non-compliance with rules of the High Court on the commencement of proceedings stated in mandatory language would not automatically make the proceedings void, I wonder how a court can construe Reg 4(1) of L.I. 798 to mean that failure to initiate proceeding by filing a formal writ of summons, swearing an oath or adopting a specific pre-approved customary mode as rendering the proceedings void. It must be remembered that the Judicial Committees of the Traditional Councils are the lowest tier of chieftaincy tribunals and operate in less rigid settings. Secondly, the applicant having participated actively in the hearing is deemed to have waived any perceived breach of Reg 4(1) of L.I.798 and cannot be heard to now complain."

In the case of **Standard Bank Offshore Trust Company Ltd v National Investment Bank Ltd & 2 Ors [2017-2018] 1 SCGLR 707** this court stated that where a court, in spite of the provisions of the Interpretation Act which make a rule mandatory by the use of the word SHALL, finds it necessary to construe "shall′ as directional only, it must give reasons for deciding its discretion to waive none compliance. To quote the court

"*There must be reasons why some of the rules are mandatory whilst others are discretionary, a fact which the court must always bear in mind in deciding to waive non-compliance or otherwise"*

We adopt the stance and the reasons of the minority in the above-stated case as our reasons for NOT construing the word SHALL in Regulation 4(2) of LI 798 as mandatory. The non-compliance by the plaintiffs with the provisions of the said Regulation is hereby waived.

The first ground of appeal by the Defendants that the judicial Committee erred when it held that the plaintiffs' writ of summons at the traditional Counsel was proper fails and is hereby dismissed. Similarly the casual reference made by counsel for the defendants in his statement of case to the fact that the 1st plaintiff describes himself as 'Ankomah Brothers' and so it is not clear if it is a legal entity clothed with power to institute an action is also dismissed for the simple reason that the evidence shows that at the very least, the other plaintiffs are human and were represented in the matter by Ankomah. **See pages 11 and 14 of the Records of Proceedings (ROA)**. That is sufficient to save and give life to this action brought by the plaintiffs as a group.

The second ground of appeal before this court is that the judgment of the JCNHC is against the weight of evidence.

In order to proceed in an orderly manner there is a need to reproduce the grounds of appeal which led to the judgment from the National House of Chiefs. The plaintiffs' notice of appeal to the National House of Chiefs can be found at page 221 of the ROA. The grounds are stated as follows

(a) The decision was given without any reasons contrary to law.

(b) There is no legal basis for the decision.

The plaintiffs' upon these grounds sought a reversal of the decision of the JCWRHC and an order affirming the decision of the JCWFT.

The plaintiffs' appeal succeeded.

In their written submissions in response to those of the plaintiffs, counsel for the defendants had raised two issues. Firstly that the plaintiffs had not provided particulars of any misdirections in law. Secondly, he took issue with how the proceedings were initiated. The JCNHC found that the process used by the plaintiffs to initiate proceedings contained all the necessary details and that the identity of the plaintiffs was known in spite of the use of the expression "Ankomah brothers". It also

held that while they (ie the JCNHC) were bound to apply the law, they were cautious about applying technical rules, an allusion to the alleged failure of plaintiff to give details of misdirections in law. They were of the view that the JCWRHC did not go into the matter and did not give reasons for the order for a hearing de novo.

This conclusion is borne out by the said judgment found at page 197 of the ROA. The first three pages of the judgment deal with the claim of the plaintiffs, a mention that both parties led evidence, the fact that plaintiffs obtained judgment, the fact that the defendants appealed against the said judgment, the contents of the appeal process filed and then suddenly the following statement appears on the last page

"The institution of Chieftaincy and its laws and processes has undergone a very historic and enormous change. The current position of proving the status of a Chief has been succinctly stated by his Lordship Justice S A Brobbey of the Supreme Court of Ghana in his Book titled "The Law of Chieftaincy in Ghana at page 46 as follows:- "For a person to prove that he is a valid chief, he is required by law to establish his customary position as a Chief i.e. he was validly nominated, elected, selected and installed as a Chief in accordance with Customary Law. He does not need Government recognition or registration on the National Register of Chiefs before he can successfully prove that he is a valid Chief"

The Genesis of this case can be said to have gone through what one may describe as a tempestuous journey. This was a time when Chieftaincy attracted a lot of political interference. The 1992 Constitution has concretised the Custom, Law, and the Institution of Chieftaincy.

The Committee is of the opinion that this case should be tried de novo. It is therefore ordered that the case be sent down to the Traditional Council to be tried De NOVO. The order is to be carried forth with"

The above statement has absolutely nothing to do with the grounds of appeal which were before the committee. An inexplicable state of affairs indeed, to put it mildly, out of respect for Nananom!

Counsel for the Defendants contends that the JCNHC should have gone beyond the judgment from the JCWRHC to determine for itself if the judgment was supported by the evidence on record since an appeal is by way of rehearing. Which judgment, if one may respectfully ask?

It is our considered opinion that the grounds of appeal raised by plaintiffs as appellants in their appeal to the JCNHC (ie judgment was given without any reasons contrary to law and that there was no legal basis for the decision) were properly dealt with by that body in their reasoned judgment.

Where the ground of appeal is that the judgment is against the weight of evidence, as it is before this court presently, then the appellant has the duty to pinpoint lapses in the judgment that is on appeal. **Djin v Musa Baako [2007-2008] SCGLR 680,** refers. The appellate court does not embark on a fishing expedition all on its own just because it has the power of rehearing.

What are the lapses in the judgment of the JCNHC that have been pinpointed by the Defendants to enable this court perform its statutory function of rehearing by combing through all evidence on record to ascertain if indeed certain pieces were wrongly applied against them or to decide whether if some such had been correctly applied in their favour, the decision of the court would have been in their favour? **Djin v Musa Baako supra.**

The first point of note by counsel for the defendant is that the JCNHC should have combed through the whole record in a bid to 'rehear' the matter and in not doing so it disabled itself from deciding the matter on the merits.

Our answer to this has been stated earlier. The JCNHC decided the appeal on the grounds upon which it was filed. We find that its conclusion is correct. No reasons were indeed given by the JCWRHC for their order that this matter be tried de novo. We have earlier given our reasons for our position that the process for initiating the

action was proper and that the description of one plaintiff as "Ankomah Brothers" did not remove from the capacity of the plaintiffs as a whole.

The next lapse complained of is found at page 11 of Defendants statement of case and it has to do with the JCWFTC, whose judgment is NOT on appeal here. It is contended that the said Council's conclusion that Plaintiffs family was the only royal family and that Nana Nyamfo Gyanpoma became a chief as a result of threats by the paramount chief was arrived at without any evaluation of the evidence led.

The third complaint is that the JCWFTC whose judgment is not on appeal here did not resolve the issue of whether or not there was intermarriage between the two families before coming to a conclusion that there was indeed such.

Fourthly, it is alleged that the JCWFTC whose judgment is not on appeal here did not resolve the issue of whether or not Nana Ntsiful Essah IV supported the forcible enstoolment of Nana Gyampoma II.

Counsel contends that these conclusions by the JCWFTC, whose judgment is not on appeal here are perverse.

Counsel also disputes the weight put on exhibit A tendered by the Plaintiffs during the trial at the JCWFTC whose judgment is not on appeal before this court.

Counsel further disputes the contention by the JCWFTC, whose judgment is not on appeal before this court that the witnesses of the plaintiffs were more consistent and reasonable that those of the defendants

The general tenor of counsel's complaints is that the JCWFTC, whose judgment is not on appeal before us did not make findings on the primary issues and that the evidence led rather points to the conclusion that the parties are all members of one big family with various gates.

All these alleged lapses have nothing to do with the judgment on appeal before this court and it is not proper to use a backdoor to try to put these matters before this court at this final stage of the appeal.

When the defendants were dissatisfied with the judgment of the traditional council, they filed a notice of appeal to the following effect at page 121 of the ROA.

1. The judicial Committee of the Wassa Fiase Traditional Counsel breached the rules of natural justice
2. The said council exceeded its jurisdiction
3. Their judgment was against the weight of evidence

An additional seven grounds of appeal were filed. See page 124 of the ROA

It was upon these grounds that the JCWRHC gave judgment that the matter should be held de novo. They had no complaints that their grounds of appeal were not particularly dealt with in the judgment and indeed went ahead, at the National House of Chiefs to defend the judgment which had failed to deal with their grounds of appeal. Their counsel stated categorically at page 299 of the ROA that the JCWRHC was justified in making the order for a hearing de novo and ended his written submission with the statement that the appeal at the National House of Chiefs should fail. Defendant cannot now seek to say that the judgment before us is against the weight of evidence.

We find that the present appeal is without merit and fails in its entirety. The judgment of the judicial committee of the National House of Chiefs dated 30th October 2018 which allowed the appeal against the judgment of the Judicial Committee of the Western Regional House of Chiefs dated 14th February 2012, for the reasons given on 28th March 2019 at page 320 of the ROA, is hereby affirmed.

In consequence, the judgment of the Judicial Committee of the Wassa Fiase Traditional Council dated 26th February 1997 whose effect is that the plaintiffs are 'the original owners and occupants' of the Tarkwa Banso Stool stands affirmed.

A. LOVELACE-JOHNSON (MS.)

(JUSTICE OF THE SUPREME COURT)

CONCURRING OPINION

PWAMANG JSC:-

My Lords, I read in draft the opinion of the court in this appeal contained in the succinct judgment of our distinguished sister, Lovelace-Johnson, JSC and I concur but wish to add a few words. Besides the reasons stated in the lead judgment, the prayer by the defendants/appellants/respondents/appellants (defendants) for the whole proceedings in this case to be quashed on the basis that there was a breach of procedure at the commencement of the case cannot be granted also on account of the particular circumstances in this case and the conduct of the defendants themselves.

Under the **Chieftaincy (Proceedings and Functions)(Traditional Councils) Regulations, 1972 (L.I 798),** the modes by which an action may be commenced in a traditional council are; by swearing an oath or, by any other means recognised by the customary law of a particular locality for starting proceedings, or by a writ. As is to be expected, L.I.798 does not indicate any specifics to be observed when swearing an oath or using other recognised customary mode of commencing proceedings but particulars are stated in respect of commencing proceedings by writ. The rules require a plaintiff proceeding by writ to provide to the Registrar of the Traditional Council

the names and addresses for service of the parties, the reliefs sought, a statement of the plaintiff's case and the names of possible witnesses. The settled practice, which developed from the practice in the Magistrate Court under CAP 4, is that the plaintiff makes an application to the Registrar of the Traditional Council requesting for a writ of summons to be issued and on the application paper the plaintiff states the information as required above. On receipt of the application and statement of case and, payment of the requisite filing fees, the Registrar of the Traditional Council would then use the information provided by the plaintiff to fill out the writ form provided in L.I. 798, sign and issue it, and cause it to be served on the defendants. The practice has developed whereby the Registrar attaches the plaintiff's application and statement of case to the writ of summons and serves all together on the defendants.

In this case, the plaintiffs/respondents/appellants/respondents (the plaintiffs) prepared and filed with the Registrar of the Wassa Fiase Traditional Council, Tarkwa, on or about 17th March, 1994, an application for writ of summons to issue, setting out the parties, the reliefs prayed for and the grounds for the reliefs. They filed an accompanying affidavit in support in which they stated further grounds on which they sought the reliefs. However, the Registrar of the Traditional Council failed to issue a formal writ, for whatever reason, but served the processes as filed by the plaintiffs on the defendants. On service, the defendants filed an "affidavit in opposition" sworn to on 5th May, 1994, in which they described the processes served on them as "so called writ of summons" and stated that the processes did not conform to any mode of starting chieftaincy dispute and therefore must be dismissed with costs. They nevertheless went ahead in that affidavit to react to the facts stated in the plaintiffs' processes and denied all the assertions.

The defendants did not pursue their objection to the processes served on them, which they ought to have done by moving the Judicial Committee of the Wassa Fiase Traditional Council to dismiss the action. From the record, about a year after the defendants were served, the Judicial Committee sat on the case on 22nd February,

1995 and, in the presence of the parties, they made an order for payment of deposit of c500,000.00 by both the plaintiffs and the defendants towards the sitting and transportation allowances of the Committee panel members who shall hear the case. Though the defendants delayed in paying, they did pay their portion of this deposit.

Thereafter, the defendants filed a motion on notice dated 12th September, 1995 with an accompanying affidavit described as "Affidavit in Opposition". At paragraphs 4 to 7 of this affidavit, one Opanin Kwesi Sankah, representing the 1st defendant described as head of family, and on behalf of the defendants deposed as follows;

4. That we object to the inclusion of Opanin Kwaw Bempah and Opanin Kobina Kyei's summons of alleged charge of claim of kingmakers to the original charge.

5. That we aver the said Opanin Kwaw Bempah and Opnin Kobina Kyei are not kingmakers but rather chief's elders appointed by the late Nana Nyamfo Djwampomah II, chief of Tarkwa Banso in 1966.

6. That we aver that the rightful kingmakers on Tarkwa Banso stool are Odikrofo of Enyinase, Dormama, Atwereboanda, Adontenhene, Tufuhene, Benkumhene and Gyasehene.

7. That we aver that paragraphs 4 and 5 of Plaintiff's writ of summons is a different issue from the original charge and should be dealt with exclusively.

Wherefore I swear to this Affidavit in support of my motion to separate the plaintiff's writ of summons into two issues.

As can be gathered from the depositions above, the purpose of this motion and affidavit by the defendants was to object to the petitioners' inclusion of the 2nd and the 3rd defendants as kingmakers of Tarkwa Banso and to pray for deletion of their names from the plaintiffs' writ of summons. In this affidavit, the defendants now referred to the process of the plaintiffs as "writ of summons". Thus, by this affidavit,

the defendants accepted the process of the petitioners served on them as writ of summons.

This motion for the exclusion of the 2nd and the 3rd defendants was heard by the Committee on 28th September, 1995 and they, in fact, took evidence in respect of the statuses of the two defendants to determine whether they indeed are kingmakers and qualify to be added as defendants to the action. At the end of that hearing, the Committee rendered a ruling upholding the contention of the 1st and 4th defendants and awarded costs against the plaintiffs. Following the ruling, the Committee proceeded on that same day to commence hearing of the substantive case by taking the evidence of the plaintiffs' first witness. From then, the trial continued for about two years and the Committee heard the parties and their witnesses testify and were cross-examined. On 20th March, 1997 the Committee delivered a twenty-page full reasoned unanimous judgment on the substantive case in favour of the plaintiff.

Our opinion from the background of the proceedings as narrated above is, that the plaintiffs substantially complied with the requirements of the rules for commencing an action by writ in a Traditional Council, as far as they were concerned. It was the Registrar who failed to do his/her part to use the information the plaintiffs provided to fill the writ form, sign and issue it and we do not think that the fault of the Registrar of the Traditional Council ought to be visited on the plaintiffs. To hold otherwise would enable a mischievous Registrar of a Traditional Council to vitiate chieftaincy proceedings by his/her singular act of defaulting in the filing and signing of the writ form which is in his/her custody. The processes served on the defendants furnished them with all the information required by the rules to be provided by the plaintiffs so the defendants were not thereby prejudiced in their defence of the case in any manner.

Secondly, the overview of the proceedings above shows that the defendants abandoned their initial objection to the process served on them by taking steps that amounted to waiving the irregularity and accepting the process as a competent writ for commencing the proceedings. Not only did they not move the Committee to set

aside the process but, when they moved the Committee by their motion of 12th September, 1995, they limited their objection to the inclusion of some defendants so the remaining defendants clearly adopted the process used to commence the action as a writ. When that ruling went in their favour these remaining defendants were content to proceed with the case on the merits and our view is that it is too late for them to complain.

I wish to also comment on the submission made before us by the defendants, that as an appeal is by way of a rehearing, we ought to examine the evidence led at the trial of the case and decide for ourselves whether the judgment of the Judicial Committee of the Wassa Fiase Traditional Council is supported by the totality of the evidence. This, as a general rule, is the position of the law on appeals but the facts of this appeal are different and the general rule does not apply here for the following reasons. When the defendants initially appealed against the judgment of the trial Judicial Committee they set down the following grounds of appeal;

(1) The Judicial Committee of the Wassa Fiase Traditional Council breached the Rules of Natural Justice-The audi Alterem Patem Rule-By disallowing the Defendant/Appellants' star witness, Nana Kwadwo Anomako III and Opanyin Kwaw Bempe of Tarkwa Banso to give evidence for the Defendants.
(2) The Judicial Committee of the Wassa Fiase Traditional Council exceeded their jurisdiction.
(3) The judgment is against the weight of the evidence.
(4) Further grounds of appeal will be filed on receipt of the proceedings and judgment.

They did file additional grounds of appeal which, apart from alleging that two judgments were produced, one 15 pages and another 20 pages, in substance the additional grounds they filed were a particularisation of the defendants contention that the judgment was against the weight of the evidence. The defendants however did not pursue their appeal and it was struck out by the Judicial Committee of the

Western Regional House of Chiefs. After the striking out, the defendants engaged Gaisie Zwennes Hughes & Co as their lawyers and they applied and got the appeal relisted. The defendants lawyers then filed "Further Additional Ground of Appeal" to say that the plaintiffs failed to comply with the statutory requirements for the initiation of this action so the proceedings were a nullity.

The appeal proceeded to hearing but it was argued by a different lawyer, Erickson Abakah who filed written submissions in the Judicial Committee of the Western Regional House of Chiefs on behalf of the defendants. However, in the written submissions, the defendants argued only one ground of the appeal and did not argue the remaining grounds. The only ground argued was that the plaintiffs failed to comply with the procedure for commencing the action so the whole proceedings were a nullity. The plaintiffs accordingly responded to only the arguments on that ground in their written submissions. When the Judicial Committee of the Western Region House of Chiefs gave judgment in the appeal, they did not even address the submissions of the parties on the issue of the procedure but, out of no where, they ordered a trial do novo of the case for no justifiable legal reason. The plaintiffs therefore appealed to the Judicial Committee of the National House of Chiefs. The arguments in the Judicial Committee of the National House of Chiefs were only about the procedure by which the action was commenced in the Judicial Committee of the Wassa Fiase Traditional Council and nothing about the findings on the evidence.

From the foregoing, what happened in the Judicial Committee of Western Regional House of Chiefs was that the defendants abandoned their appeal on the ground that the judgment of the Wassa Fiase Traditional Council was against the weight of the evidence hence that ground did not feature in that appeal or in the appeal in the Judicial Committee of the National House of Chiefs. The effect of abandoning that ground was that the defendants were no longer complaining about the findings of fact in the judgment of the trial Judicial Committee. Now, in the defendants Notice of Appeal in the Supreme Court they state as ground (b) as follows;

"The judgment of the Judicial Committee is against the weight of evidence on record".

The question is; the judgment of which Judicial Committee are they talking about as being against the weight of the evidence on record? The appeal before us is against the judgment of the Judicial Committee of the National House of Chiefs but the appeal to them did not involve an assessment of evidence on record due to the fact that the defendants abandoned that ground of their appeal in the Judicial Committee of the Western Regional House of Chiefs. In the circumstances, the defendants are estopped from now complaining about the original Judicial Committee's findings on the evidence on record. They made a conscious choice to fight the case on only one technical ground and having failed in that regard, they cannot go back twenty three years to resurrect the case they abandoned.

In any event, a review of the totality of the evidence that was led before the Judicial Committee of the Traditional Council, and which is on the record before us, shows that, whereas the plaintiffs claimed exclusive ownership of the Tarkwa Banso Stool and led evidence to prove their claim, the defendants counterclaimed also for exclusive ownership of the same Stool and adduced evidence in support of their case. The trial Judicial Committee which saw, observed and heard the witnesses preferred the case of the plaintiffs to that of the defendants. In their twenty-page judgment, they went through the whole evidence of both sides, analysed the evidence and assigned reasons for opting for the case of the plaintiffs. For instance, at page 110 of the Record of Appeal (ROA) the trial Judicial Committee stated as follows in their judgment;

"The Committee also observed that the witnesses of the plaintiffs actually corroborated the evidence of the plaintiffs as their evidence was consistent and reasonable especially P.W.2 Opanyin Kwaning who gave short but impressive evidence. He said, he refused to receive the (son Kahyira) as custom demands in the sense that the four villages never united and sanctioned the installation of Nana Yamfo Gyampoma II because he was not entitled to occupy the Tarkwa Banso Stool

as he was not royal to the Stool and moreover refused to surrender the sword to the bearer of the 1st defendant Opanyin Kwesi Tandoh. With this piece of evidence the defendants were unable to cross-examine the witness to discredit his evidence. The exhibit "A" is very vital document tendered in evidence by the plaintiff but the defendants was silent on it and the said evidence proved that the defendants are not royals to the Tarkwa Banso Stool but only forced their way through to occupy the Stool as the gate was open to them by Nana Nyamfo Gyampoma II's enstoolment."

And at page 112, the trial Judicial Committee stated reasons for rejecting the case of the defendants in the following words;

"The long story by the defendants did not carry any weight at all since none of their witnesses was able to corroborate it. Merely telling a story is not sufficient as far as the chieftaincy cases are concerned. It must be corroborated or supported with documents and moreover none of the exhibits tendered by the defendants helped the Committee in its deliberations to convince the Committee that the case of the Defendants and their evidence in support are reasonably probable to give judgment in their favour."

So, the trial Judicial Committee gave due consideration to the evidence adduced and provided reasons in justification of their findings. In the statement of case of the defendants in this final appeal, Counsel for the defendants now argues, that even if the defendants did not proof exclusive ownership of the Stool in dispute, their evidence showed that they are one of the royal gates legible to ascend the Stool. This is a new and different case that Counsel is making and it is inconsistent with the case his clients presented in the trial Judicial Committee but our system of law does not allow that. See **Dam v Addo [1962] 2 GLR 200.**

An appellate court must be slow to overturn findings of fact made by a trial court unless there is no evidence on the record to support the findings. See **Asibbey III &**

Ors v Ayisi [1973] 1 GLR 102. There is cogent evidence on the record before us based on which the trial Judicial Committee made their findings in favour of the plaintiffs. They saw, observed and heard the parties and the witnesses. We did not and the defendants have not furnished us with valid reasons to alter those findings.

My Lords, it is also for the above reasons that the appeal by the defendants ought to fail.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

I. O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

PROF. H. J. A. N. MENSA-BONSU (MRS.)

(JUSTICE OF THE SUPREME COURT)

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