

IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: PROF. KOTEY JSC (PRESIDING)

OWUSU (MS.) JSC

AMADU JSC

PROF. MENSA-BONSU (MRS.) JSC

KULENDI JSC

CIVIL APPEAL

NO. J4/41/2021

18TH JANUARY, 2023

1. OPANIN KWAKU DUAH

.....

PLAINTIFFS/APPELLANTS/

2. YAW NKRUMAH MENSAH

APPELLANTS

VRS

1. PETER KOFI OKYERE

2. KWADWO OKYERE

.....

DEFENDANTS/RESPONDENTS/

3. ABENA KONADU

RESPONDENTS

JUDGMENT

AMADU JSC:-

INTRODUCTION:

- (1) The parties to this appeal are all members of the Ekuona Family of Ntonso, Ashanti. The dispute between them pertains to the ownership of three properties-House No.KO.60, Ashanti New Town, Kumasi; House No.019, Block 8, Ashanti New Town, Kumasi and a Cocoa Farm at Abrewapomaah.
- (2) While the Appellants claim that the aforementioned properties are family properties belonging to the Ekuona Family of Ntonso, the Respondents contend that, the properties are the personally acquired properties of their deceased father, Akwasi Okyere.
- (3) Fortified by their claims, the Appellants contend that, being family properties, the Respondents' deceased father could not have devised same under his last will and testament dated 30th January, 1995. Conversely, the Respondents maintain that, their late father had the right to devise the properties which were personally acquired and owned by him.
- (4) This appeal therefore emanates from the judgment of the Court of Appeal Kumasi, dated the 3rd of July, 2020, which affirmed the judgment of the High Court, Kumasi, dated the 17th of November, 2016. The decisions of the two lower courts pronounced the properties, the subject matters in dispute as the personally acquired properties of Akwasi Okyere (deceased) and not the family properties of the Ekuona Family of Ntonso, Ashanti.
- (5) Undoubtedly therefore, the key issue for in our determination of this appeal is whether the properties in dispute are family properties of the Ekuona Family of Ntonso, Ashanti, or the personal properties of the late Akwasi Okyere at the time of his death.

- (6) In deciding this appeal, we are mindful of our duty to undertake a thorough examination of the entire record of appeal in order to determine whether the two lower courts properly evaluated the evidence adduced at the trial and had correctly applied the relevant law. This duty is particularly enabling, when the Appellants have grounded the appeal on the omnibus ground of appeal that the judgment of the Trial Court which was affirmed by the Court of Appeal is against the weight of evidence.

BACKGROUND

- (7) On the 13th of December 2012, the Appellants caused to be issued out of the Registry of the High Court Kumasi, a writ of summons accompanied by a statement of claim for the following reliefs :

- (a) *A declaration that House Nos. K.O.60, Ashanti New Town, Kumasi, O.I. Plot 9 Block 8 Ashanti New Town Kumasi and the Cocoa Farm at Abrewapomaah Akura sharing boundaries with Opanin Poku, Kwabena Marfo, Kwaku Adiyee, Papa Sarfo, Opanin Yaw Amoako, Maame Akosua Duku, Papa Yaw Duro and Asidaa on Offinso Stool land are properties of the Ekuona Family of Ntonso, Ashanti.*
- (b) *A declaration that Akwasi Okyere (deceased) had no testamentary capacity what-so-ever over and in respect of House Nos. K.I.60 Ashanti New Town, O.I. Plot 9 Block 8 Ashanti New Town and the Cocoa Farm at Abrewapomaah Akura sharing boundaries with Opanin Poku, Kwabena Marfo, Kwaku Adiyee, Papa Sarfo, Opanin Yaw Amoako, Maame Aksofua Duku, Papa Yaw Duro and Asidaa and that the device in respect of the properties in the Last Will and Testatment of Akwasi Okyere (Deceased) is null and void ab initio.*

- (c) *A declaration that the purported device made in the Last Will and Testament of Akwasi Okyere (deceased) is an infraction of the proprietary rights of Ekuona Family of Ntonso.*
- (d) *An order for perpetual injunction restraining the Defendants, their agents, assigns and privies from in any manner attempting to distribute or vest the said properties in the persons named in the said Last Will and Testament of Akwasi Okyere (deceased) dated 30th January 1995.*
- (e) *A declaration that any documentation in respect of House Nos.Ko. O.60 Ashanti New Town, Kumasi O.I. Plot 9 Block 8 Ashanti New Town Kumasi and the cocoa Farm at Abrewapomaah Akura on Offinso Stool land which bears any name other than the Ekuona Family of Ntonso, (particularly the name of Akwasi Okyere) as being the owner(s) of the said properties is fraudulent and has no legal basis whatsoever and the same should be brought up and cancelled and declared invalid.*
- (f) *Such further order(s) as the Honourable Court may deem fit.*

THE CASE OF THE APPELLANTS

- (8) In their statement of claim, the 1st Appellant is described as the head of the Ekuona family of Ntonso and commenced the action in his personal capacity as a member of the said family and as the head of the family. The 2nd Appellant is averred to be a principal member of the Ekuona family of Ntonso and also brought the action in support of the 1st Appellant as well as other principal members of the said Ekuona Family.
- (9) It is noted that, since the Appellants ascribe to the property in dispute the character of family property belonging to the Ekuona family of Ntonso, per the

rules of pleadings, statute and case law, the appropriate person to commence the action was the head of family. The 2nd Appellant was therefore, not a necessary party to the suit and ought to have been non-suited. This observation was not lost on the Trial Court when it stated, at page 284 of the ROA that: *"Although his presence appears to be unnecessary, I do not think 2nd Appellant's presence is fatal to this action."* [Emphasis Added]. Our view is that, non-suiting the 2nd Appellant could not have brought the suit to an end. The 1st Appellant alone was sufficiently capacitated to maintain the action. Be that as it may, the Appellants have asserted that the three properties in dispute belong to the Ekuona Family of Ntonso, Kumasi and not the personal properties of Akwasi Okyere (deceased) as claimed by the Respondents.

- (10) With respect to House No. K.O.60, the Appellants claimed, it was acquired through the instrumentality of Obaapanin Adwoa Pomaah, their maternal grandmother who was also, the natural and biological sibling of Akwasi Okyere (deceased)-Respondents' father. The Appellants pleaded that, one Nana Tetia the mother of Akwasi Okyere paid an amount of One Hundred and Sixty Pounds for the house. The money is said to have been procured from the proceeds of the sale of a cocoa farm. The Appellants' case is that at the time of the purchase of House No.K.O.60, although Nana Tetia had four children, namely: Akwasi Okyere, Kojo Kyere, Kwaku Mensah and Kwabena Donkor and Obaapanin Adwoa Pomaah (all deceased), Kwaku Mensah's name was inserted in the lease because, he was the only son and staying with her. The Appellants contended further that, Kwaku Mensah's name remained on all the documents for and on behalf of their matrilineal family until sometime in 1990 when Akwasi Okyere compelled Kwaku Mensah to substitute his name in the lease else in pursuance of which he lodged a criminal complaint against Kwaku Mensah.

- (11) The Appellants further asserted that, they summoned Akwasi Okyere before the Akwamuhene of Ntonso who at the time was the head of the Appellants' wider matrilineal family. According to the Appellants, in the presence of members of the family, one Kwabena Pong (alias Okyeampong) and an elder of the Seventh Day Adventist Church of Ntonso Elder Addae, Akwasi Okyere admitted that it was Nana Tetia who purchased House No.K.I.60 for and on behalf of their matrilineal family. The Appellants contended that since the purchase, the rents in respect of the house have always been collected by Kwadwo Kyere, a sibling of Obaapanin Adwoa Pomaah until his death, for and on behalf of their matrilineal family.
- (12) The Appellants averred also that, the family allowed Kwaku Mensah whose name was on the documents to use the house upon purchase as security for a store which G.B. Ollivant (Ghana) Ltd. was prepared to set up for the Ekuona family. The Appellants contended that more stores were opened for them by G.B. Ollivant (Ghana) Ltd. at the time.
- (13) In respect of House No.0.19, Block 8 situate at Ashanti New Town and the cocoa farm, the Appellants contended that, same had always remained family properties of the Ekuona Family of Ntonso who always exercised acts of ownership on them without let or hindrance. According to the Appellants, in the lifetime of the late Akwasi Okyere, he purported to make a gift of the family properties to his children and also ejected persons occupying the properties. According to the Appellants, in 1992, the family sued for a declaration of title to the three properties. And further that, Akwasi Okyere at a point in time acknowledged the family ownership of the property per a letter authored by him.
- (14) It is the case of the Appellants that, since the properties are family properties, Akwasi Okyere could not have devised same under his last will dated 30th

January 1995 and any devises made thereunder in respect of the said properties are illegal, null and void.

THE CASE OF THE RESPONDENTS

- (15) In the Respondents' statement of defence, which was subsequently amended, they denied all the assertions of the Appellants that the properties were family properties of the Ekuona Family of Ntonso. On the contrary, they contended that, all the properties were the self-acquired properties of Akwasi Okyere (deceased).
- (16) With respect to House No.K.O.60, Ashanti New Town, Kumasi, the Respondents averred that, same was acquired by Akwasi Okyere (deceased) from his personal resources at a time when the property was not fully developed. They asserted further that, Akwasi Okyere also lived at Akomadan which is why he allowed his younger brother, Kwaku Mensah who lived at Kumasi to supervise the construction. Further that, when it came to the attention of Akwasi Okyere that Kwaku Mensah had used his name in preparing the documents of the property, he caused same to be reverted to his own name. Kwaku Mensah thereupon, executed a statutory declaration confirming Akwasi Okyere's ownership of the land and same was regularized by the relevant authorities.
- (17) In respect of House No.019 Block 8, Ashanti New Town Kumasi, they asserted that Akwasi Okyere acquired same and, as far back as 7th May 1952, had a lease engrossed in his name. He had remained in undisturbed possession thereof until his death. According to the Respondents, the late Akwasi Okyere had the financial wherewithal to acquire the property as he operated a store at Akomadan which was not sponsored by G.B Ollivant (Ghana) Ltd.
- (18) Subsequently, Akwasi Okyere customarily gifted some rooms in these two houses to some of his children who have since been in undisturbed possession of their various rooms. It is the Respondents' case that, all property rates, taxes

and other outgoings in respect of the houses were being paid by Akwasi Okyere.

(19) Finally the Respondents averred that, Akwasi Okyere acquired a cocoa farm together with an adjoining food crops farm at a place known as Nyamebeykyere. The Respondents therefore contended that since all three properties were personally acquired by their deceased father, Akwasi Okyere. Consequently, he had the testamentary capacity to devise same under his Will at the material time.

(20) The Respondents counterclaimed for the following reliefs against the Appellants:

“(a) *A declaration that House No.KO.60, Ashanti New Town,*

Kumasi; House No. 0.19 Block 8, Ashanti New Town, Kumasi, and the Cocoa Farm together with the adjoining food-stuffs farm at a place commonly called Nyamebekyere, Nkenkanson on Offinso Stool land and bounded by the properties of Opanin Poku, Kwabena Marfo, Kwaku Adiyee, Papa Sarfo, Opanin Yaw Amoako, Maame Akosua Duku, Papa Yaw Duro and ASidaa are the self-acquired properties of Akwasi Okyere (Deceased) late of Ntonso, Ashanti.

(b) *A declaration that Akwasi Okyere (deceased) had testamentary capacity over and in respect of House No. KO. 60, Ashanti New Town, Kumasi, House No. O.19 Block 8, Ashanti New Town, Kumasi and the cocoa Farm together with the adjoining food stuffs farms at a place commonly known and called Nyamebekyere Nkenkanson on Offinso Stool Land bounded by the properties of Opanin Poku, Kwabena Marfo, Kwaku Adiyee, Papa Sarfo, Opanin Yaw Amoako, Maame Akosua Duku, Papa Yaw Duro and Asidaa and that the devises in respect of the properties in the Last Will and Testament of Akwasi Okyere (deceased) dated 30th January 1995 are valid.*

- (c) *An order of perpetual injunction restraining the Plaintiffs, their agents, assigns and privies from in any manner interfering with the Defendants' administration and distribution of the said properties in terms of the Last Will and Testament of Akwasi Okyere (deceased) dated 30th January, 1995".*

The Appellants filed a reply and joined issues with the Respondents on their amended statement of defence and counterclaim.

THE JUDGMENT OF THE HIGH COURT

- (21) At the end of the trial, the High Court dismissed the case of the Appellants and granted the counterclaim of the Respondents.

The Trial Court made the following findings of fact:

- i. *That the Appellants failed to disclose the vendor who allegedly sold House No. KO.60 as well as House No.019 Block 8 to the family and thus, they failed to prove their root of title.*
- ii. *The Appellants' case was fraught with contradictions. Whiles Appellants claimed that House No.KO.60 was purchased by their maternal great grandmother Tetia, their own witness PW1 contradicted them when she testified that Tetia bought it for her children and Pomaa alone and again PW2 claimed Tetia acquired it for her children alone.*
- iii. *The statutory declaration made by Kwaku Mensah acknowledging that the property was owned by Akwasi Okyere was made freely and not under any duress.*
- iv. *On House No. 019 Block 8, whiles Appellants claimed, that it was acquired through the proceeds from the GB Ollivant -operated stores, their own witness contradicted them by testifying that it was the four children of Tetia and Asiedu who came together to acquire it.*

- v. *Akwasi Okyere set up his own store and was not sponsored by G.B. Ollivant.*
- vi. *Appellants' claim that Akwasi Okyere had acknowledged the family's ownership of the property is false and moreover Akwasi Okyere made no such admission in any letter.*
- vii. *The Appellants, as administrators of the Estate of Akwasi Okyere in vesting the properties as they did acted properly.*

THE JUDGMENT OF THE COURT OF APPEAL

(22) On further appeal by the Appellants, the Court of Appeal dismissed the appeal and affirmed the judgment of the Trial High Court. The Court of Appeal reasoned and found *inter alia* that:

- i. *The claim by the Appellants that Akwasi Okyere always proposed settlement and compromises anytime suits were brought against him by Appellants' family is not borne out by the evidence on record.*
- ii. *Opanin Okyere became owner of House No. 60, Ashanti New Town, Kumasi since the 5th of August 1987 when the Statutory Declaration was executed by Kwaku Mensah. Therefore, the fact that the Indenture of the property was engrossed subsequent to the date of his will does not takeaway Akwasi Okyere's prior ownership.*
- iii. *House No. 019 Block VIII is the same as No. 019 Block 8.*
- iv. *Just as Exhibit 5 (a letter written by Akwasi Okyere requesting a change in ownership of House No. 60) was discredited for lack of jurat, Exhibit H (a letter purportedly written by Akwasi Okyere to the District Commissioner declaring that both house Nos KO 60 and O19 Block 8 were family properties) is also discredited for lack of jurat.*
- v. *Exhibit 4, the statutory declaration was properly drawn up and affirmed the ownership of Akwasi Okyere in House No. KO 60.*

vi. *The Appellants failed to prove the name of the person from whom Nana Tetia acquired House No.60 from.*

vii. *The late Akwasi Okyere had the financial means to acquire the properties in dispute.*

(23) Dissatisfied with the judgment of the Court of Appeal, the Appellants have appealed to this court by notice in which the following grounds of appeal have been set out:

(a) That the Learned Justices of the Court of Appeal erred in

their finding that the Statutory Declaration by Kwaku Mensah dated the 5th Day of August 1987 had the effect of conferring ownership of House No. K.O. 60 on Opanin Kwasi Okyere.

(b) The Judgment is against the weight of Oral and

Documentary Evidence on Record.

ACQUISITION OF FAMILY PROPERTY

(24) As an overture to analysing the grounds of appeal, we deem it necessary to evaluate the law on how family properties are acquired. Stated differently, how property assumes the character of a family property. This exercise is germane, having regard to the competing claims of the parties, whether the disputed properties are family properties or the self-acquired properties of Akwasi Okyere (Deceased).

(25) To begin with, is the all important question of what family property is: Literally, it is property owned by a particular family. Thus, its ownership does not lie with another person or entity but the family unit as recognised by law. It could be either land and or a building; a farm or such movable properties like vehicles and other chattels. The Land Act, 2020 (Act 1036) provides a statutory definition of a family land under Section 281 in the following words "*land, the*

allodial title , to which his held by a family for the benefit of the members of that family in accordance with customary law." To the extent that there are constitutional and statutory creations of fiduciary obligations on holders and/or custodians of family property to hold same on behalf of, and in trust for the members of the family, the above definition is apt. However, it appears that the legislature, in formulating this definition, sought to limit family land to only that land in which a family held the allodial title. It is customary, that a family may hold a leasehold, or even freehold. The definition in our view, will not detract from such land being ascribed as family land.

- (26) Be that as it may, as simply observed, the indicia in determining whether property is family property lies with its ownership. Is the property, whether movable or immovable owned by an identifiable family or another? If the former applies, then, the property assumes the character of family property. **The Head of Family (Accountability) Act, 1985 (PNDCL 115)** defines family property to include *"any property, whether movable or immovable, which belongs to the members collectively of a particular family or is held for the benefit of such members and any receipts or proceeds from such property."*
- (27) Evidentially, the meaning of family property places a burden on a party to a suit who asserts that a property belongs to a particular family, to lead sufficient admissible and credible evidence to prove how the family acquired or came to own the said property. The pleadings must be well formulated and the evidence sufficient to discharge the statutory burden in proving the root of title; acts of possession and ownership all in favour of the family to firm up the requirement of proof of the assertion.
- (28) Authorities abound on various means by which a family may acquire or own property. Generally, properties acquired with the resources of the family assume the character of a family property. Again, where members of the family

manifest a clear intention to acquire property for the family, there is a strong presumption that the property becomes family property. In the case of **BISI & ORS. VS. TABIRI ALIAS ASARE** [1987-88] 1 GLR 360, this court pointed out some of the various ways by which a family may acquire property by pronouncing that:

“Property may acquire family attributes in a variety of ways. Members of a family may pool their resources together to put up a family house, as in BOAFO VS. STANDI (1958) OII CLL 183. An individual or group may benefit substantially from the contribution of other members, to impress a family character on the end result of their building endeavours: See MENSAH VS. SCOA (1958) 3 W.A.L.R. 336. Death of one of two joint owners may transform their building into a family house: See HAGAN VS. KOTEY [1961] (PT 2) GLR 594 AT 598. The permutations seem endless. But an important consideration always remains. The process whereby the building acquired its family character or whatever event procured its transformation from private ownership to a family one must be identified or ascertained. This burden should be established if a legal suit is to be resolved in the Plaintiff's favour. It must be consistently expressed in the claim and supporting evidence to enable it to be fully tested. A plaintiff in my view fails if he cannot clearly set out and prove his root of title: See OPPONG KOFI VS. FOFIE (1964) GLR 174 S.C.

- (29) In an Article by Professor G.R. Woodman in the Journal of African Law Vol.7 No.3 titled *“The Acquisition of Family land in Ghana”* the learned author summarised the modes of acquisition of family property or family land as:
- (a) *By succession*
 - (b) *Acquisition with family resources*
 - (c) *Redemption of family property by a member*

(d) Building by a member on family land

(e) Operation of a rule placing the head of family in a position analogous to that of a chief so that the property owned privately by him at the time of his election and property acquired by him after his election become family property.

(30) This exposition aside, we are not unmindful that the principal players regarding the acquisition of the properties being disputed, namely Akwasi Okyere, Obaapanin Tetia or Kwaku Manu are all deceased. The accepted legal approach has always been that, courts should be very circumspect and slow in admitting adverse evidence against deceased persons as they are not alive to exercise their right to be heard. As this court observed in the case of *MONDIAL VENEER (GH) LTD. VS. AMUAH GYEBU IV* [2011] 1 SCGLR 466, “We have firmly established the principle that real danger lies in accepting without questioning or close scrutiny, claims against a dead person. The caution that such claims must be weighed carefully is based on plain good sense and has consistently been applied in a number of cases including:

FOSUA & ADU POKU VS. DUFIE (DECD) ADU POKU MENSAH [2009-] SCGLR 310.

IN RE: KRAH (DECD) YANKYERAAH AND ORS. VS. OSEI TUTU & ANOR. [1989-90] 1 GLR 638.

BISI V. TABIRI [1987-88] 1 GLR 360.

The Principle As Enunciated By *BRETT MR, IN THE CASE OF IN GARNETT, IN RE; GANDY V MACAULY* [1886] 31 CH D 1 AT 9 C.A. is that:

“The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive, he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to

be thoroughly sifted, and the mind of any Judge who hears it ought to be, first of all in a state of suspicion..."

- (31) Likewise, in disputes of this nature, the courts should be swayed more towards authentic documentary evidence as against oral evidence particularly if the latter is contradictory. As our respected brother, Pwamang JSC, speaking for this court in the case of **ABOAGYE VS. ASIAM (Civil Appeal NO.J4/10/2016 dated 24th October 2018)** said; *The settled principle of the law of evidence is that where oral evidence conflicts with documentary evidence which is authentic, then the documentary evidence ought to be preferred over and above the oral evidence.*" See also, **FOSUA & ADU POKU VS. DUFIE (DECEASED) & ADU-POKU MENSAH [2009] SCGLR 310; AGYEI OSAE V ADJEIFIO [2007-2008] SCGLR 499; REPUBLIC VS. NANA AKUAMOAH BOATENG II, EX-PARTE DANSOAH [1982-83] 2 GLR 913 SC.**
- (32) Against this background, we proceed to analyse the grounds of appeal beginning with the first ground that: *"the Learned Justices of the Court of Appeal erred in their finding that the Statutory Declaration by Kwaku Mensah dated the 5th Day of August 1987 had the effect of conferring ownership of House No. K.O.60 on Opanin Kwasi Okyere"*.
- (33) What obviously has informed the above ground, is the pronouncement by the Court below that :

"Concerning the date of the Last Will and Testament of the late Akwasi Okyere and the date of the Lease on House No. K.O. 60, the said house was the subject of the Statutory Declaration by Kwaku Mensah dated 5th August 1987 (See Exhibit 4 at page 334 of the ROA) reversing ownership of the said house to Opanin Akwais Okyere. Therefore, from that time Akwasi Okyere became the owner of that property and

remained so until 16th February 1995 when the Lease was engrossed in his name."

- (34) Regarding this pronouncement, the Appellants submit, that since a statutory declaration only evidences the facts they recite and does not normally create any propriety interest, the court below was wrong in seeking to suggest, that the statutory declaration conferred ownership of the disputed land on the Appellants. Next, Appellants contend, that the said statutory declaration was inadmissible, for not being stamped. This objection, is being raised for the first time in this court.
- (35) Indeed, the legal position is that, a statutory declaration is a self-serving document of the facts recited therein and it will be rendered of no probate value in the face of a challenge to the facts it recites. It cannot therefore, in the face of a challenge to ownership of a land claim a pedestal of sanctity to conferring ownership. The irony with regards to the present facts are that, the Appellants at the trial court, did admit, that Kwaku Manu executed the statutory declaration confirming the fact that House No. KO 60 was owned by Akwasi Okyere. When critically examined, the Appellants herein are not denying this act done by Kwaku Manu. The Appellants' only complaint is the statement by the Court of Appeal that, by the statutory declaration, Akwasi Okyere became owner of the land on the 5th August 1987, the date the statutory declaration was executed.
- (36) It is our view that, per the evidence on record within this context, Kwaku Manu was holding the land in trust for Akwasi Okyere. And thus, at all times, since its acquisition, the owner was Akwasi Okyere. Therefore, the statutory declaration per se, did not seek to create a new ownership nor dictate the date of ownership. The evidence on record shows that, Akwasi Okyere became

owner of House No. KO.60 long before the creation of the statutory declaration, sometime in the 1960s. The subpoenaed witness from Lands Commission, DW3 testified on this as follows:

Q: In the course of your testimony last Friday in answer to the question relating to the duration of the lease on House No. K.O. 60 you stated that the lease was for 78 years and that same commenced from April 1964 and was to expire 31st March 2042.

A: Yes.

Q: How did you come by that information since on the face of Exhibit '13' it was prepared in 1995.

A: 1995 is the date the lease was prepared. But April 1964 was the date Kwasi Kyere started owning the land.

(37) We therefore hold that, to the extent that the Court of Appeal sought to suggest that, Akwasi Okyere became owner of the land on the date the statutory declaration was executed, the said holding was in error. Per the evidence on record, he became owner in 1964 long before the statutory declaration was even executed. The first ground of appeal therefore succeeds but must be confined to the issue of the date Akwasi Okyere became owner of the land. The success of the ground cannot be construed as conferring ownership of the properties on the family.

(38) It is settled law that, a court is not permitted to admit and or rely on evidence which is legally inadmissible per se, with or without objection. Therefore, since Exhibit '4' constitutes an instrument affecting land, under the Stamp Duty Act, 2005 (Act 689) but had not been duly stamped in accordance with the Act, same was inadmissible and we so hold. The principle in **LIZORI LTD. VS. BOYE & SCHOOL OF DOMESTIC SCIENCE & CATERING [2013-2014] SCGLR 889**

is hereby applied. The said Exhibit '4' will therefore be expunged pursuant to Section 8 of the Evidence Act, 1975 (NRCD 323). See the case of **JUXON SMITH VS. KLM DUTCH AIRLINES [2005-2006] SCGLR 438.**

(39) As aforesaid, it must be quickly pointed out that, the rejection of Exhibit '4' as legally inadmissible will not automatically result in a finding in favour of the Appellants that the House No.60, Ashanti New Town Kumasi becomes the property of the Ekunoa Family of Ntonso, Ashanti. As already observed, both parties do not dispute that, sometime back, Kwaku Manu executed a statutory declaration proclaiming the land to belong to Akwasi Okyere. In such a situation, the rules on admission operate in favour of the Respondents. That is, once the Appellants have admitted the averment by the Respondents that the said statutory declaration was duly executed, the Respondent carries no further burden on the production of that document. The principle has always been that, a fact admitted by an adversary insulates the other from discharging the obligation of proving the said fact. The cases of **EFFISAH VS. ANSAH [2005-2006] SCGLR 943** and **BANAHENE VS. ADINKRAH & OTHERS [1976]1 GLR 346** are instructive.

(40) The Appellants' attack on the said document was that, same was executed under duress as Akwasi Okyere is alleged by the Appellants to have threatened Kwaku Manu that should he fail, he will lodge a criminal complaint against him. This allegation was vehemently denied by the Respondents and the Appellants did no better to lead further evidence in proof of the said allegation. Indeed, the subject of the said complaint, or what might have informed the said criminal complaint against Akwasi Okyere is absent from the record. We therefore endorse the finding of the Trial Court which the Court of Appeal accepted in the following statement: *[W]ould an adult person like Kwaku Mensah give in to Akwasi Okyere's threats so meekly knowing very well that*

he had committed no crime? It all sounds preposterous and puerile to me. I shall not lend any credence to it by accepting it as an event that happened. That means that Kwaku Mensah made the statutory declaration freely and under no duress whatsoever."

(41) The second ground under the omnibus ground is that: *"the judgment is against the weight of oral and documentary evidence on record"*. To ground an appeal on the omnibus ground is to allege an improper evaluation of the evidence led at the trial to the issue vis-à-vis the facts of the case. Such complaint enjoins the appellate court to engage in an examination of the entire record of appeal and to right all possible wrongs that might have been committed by the Court below in their evaluation of the evidence on record. This exercise however, must be preceded by the Appellant walking this court through what he complains to have been overlooked by the Court below or what has not been properly evaluated in terms of the evidence on record. See the cases of **DJIN VS. MUSAH BAAKO (2007-2008) SCGLR 687; FOSUA & ADU-POKU VS. DUFIE (DECEASED) & ADU-POKU MENSAH** (supra) etc.

(42) Being a second appellate court, we are cautious not to disturb any findings of fact which were properly arrived at by the two lower courts, unless there are special circumstances which authorize and justify such interference. In **SYLVIA GREGORY VS. NANA KWESI TANDOH IV [2010] SCGLR 971** cited by Counsel for the Respondents, this court summarized the circumstances that will authorise and justify a reversal of concurrent findings of fact made by the trial and first appellate courts as follows:

- i) *Where from the record the findings of fact by the trial Court are clearly not supported by the evidence on record and the reasons in support of the findings are unsatisfactory.*
- ii) *Where the findings of fact by the Trial Court can be seen from the record to be either perverse or inconsistent with the totality of the evidence led*

by the witnesses and the surrounding circumstances of the entire evidence on record.

iii) Where the findings of fact made by the Trial Court are consistently inconsistent with important documentary evidence on record.

(43) From the entire record, there is no evidence on who sold House No.Ko.60, Ashanti New Town, Kumasi to Nana Tetia as well as from whom the Appellants' family acquired House No.019, Block 8, Ashanti New Town, Kumasi. The Appellants did not produce any evidence at the trial to prove same. This serious default in the case of the Appellants, was pointed out by the two lower courts as well as Respondents in their statement of case, yet, the Appellants have blown a muted trumpet on such a crucial issue for which they carry the burden of proof but failed to discharge.

(44) If the Appellants' case is worthy of belief, then, there should not be any difficulty at all in disclosing the person from whom the said Nana Tetia acquired the property. Again, while the Appellants sought to suggest that, they were rather in possession of the disputed property, their own writs which they tendered in evidence, Exhibits 'D', 'E' and 'F' proved otherwise. Those exhibits despite the absence of their accompanying statements of claim reveal that, the Appellants were seeking among other reliefs, an order for accounts as well as the setting aside of leases bearing the name of Akwasi Okyere in respect of the two houses in dispute. The necessary inference therefore, is that, at all times, it was Akwasi Okyere, who was in possession of the properties and was duly receiving rents in respect of same and not the Appellants.

(45) This court cannot discount the numerous inconsistencies in the case of the Appellants, which they sort to treat as negligible. The law is that obvious inconsistencies in evidence when put together can blight credence to evidence. In the case of **OBENG VS. BEMPOMAA [1992-1993] Part 3 GBR.1027, CA** the court held that: *"Inconsistencies, though individually colourless, may*

cumulatively discredit the claim of the proponent of the evidence . . .” As was found by the Trial Court, the Appellants’ evidence on the acquisition of the properties in dispute were fraught with numerous inconsistencies which pales belief in their claim.

(46) Based on the evidence adduced, the Trial Court found that, in the testimony of ‘PW1’, she claimed, that the three properties belonged to Nana Tetia’s children, namely Kwabena Donkor, Okyere Panin, Okyere Kuma and Kwaku Mensah. Deviating from and contradicting the Appellants case at the Trial Court, she testified that, her grandmother purchased the property which at the time was uncompleted and gave same to her daughter Poomaa and that it was upon completion that she used Kwaku Mensah’s name on the documentation. Further, PW2 in his testimony testified that, the three disputed properties belonged to their family and same were acquired by Nana Tetia for her four sons namely Kwabena Donkor, Kwadwo Kyere, Akwasi Kyere and Kwaku Mensah and a daughter, Adwoa Poomaa. Thus, on the one hand, the Appellants appear to suggest, that the properties belong to children of Nana Tetia and on the other, to the wider Ekuona Family of Ntonso. In further contradicting the evidence of PW1’s, she testified that the House No.60, Ashanti New Town was purchased for Tetia’s daughter Poomaa.

(47) As against the Appellants’ evidence, the Respondents’ evidence was consistent that, their deceased father, Akwasi Okyere operated a store at Akomadan from which he acquired House No.60 in its uncompleted state. He charged his younger brother Kwaku Mensah to supervise its completion. At the time, Kwaku Mensah documented the land in his name, but when it came to the attention of Akwasi Okyere, he caused same to be reversed to his name instead. This was done per a statutory declaration executed by Kwaku Mensah proclaiming the fact that Akwasi Okyere is the owner of the land. The only attack against the statutory declaration by the Appellants was that same was

procured under duress. As already held, the Appellants failed to prove the said duress. As evidence of his acquisition, Akwasi Okyere further proceeded to regularise his interest in the land with the Land Authorities and has remained same over several decades until the dispute.

(48) Having regard to the documentary proof, i.e. the lease engrossed in respect of House No.60 in the name of Akwasi Okyere vis-à-vis the contradictory oral testimony of the Appellants that the property belongs to the Ekuona Family of Ntonso, to whose version should the court sway? The court in applying the best evidence rule will be inclined more towards the hard documentary evidence which supports the ownership claim by the Respondents that House No.60 was owned by their deceased father, Akwasi Okyere as against the contradictory oral testimony of the Appellants.

(49) Infact, as can be further gleaned from Exhibit '8', Akwasi Okyere, as far back as 1982 was paying taxes in respect of House No. 019 Block 8. The lease in respect of this property also bears the name of Akwasi Okyere. In the face of the documentary evidence of the lease engrossed in respect of Block 8 in favour of Akwasi Okyere, the Appellants cannot sway the probability in their favour when they rely on their contradictory evidence that the said property is for the Ekunoa Family of Ntonso. This argument sways also, in favour of the cocoa farms whose documents are again in the name of Akwasi Okyere. It appears from the statement of case of Counsel for the Appellants that, the Appellants were more concerned with House No.60, Ashanti New Town and did not apply themselves to the other two properties. As demonstrated per the analysis of the evidence, those other two, per the evidence on record were also acquired by Akwasi Okyere during his lifetime.

(50) We are however in agreement with Counsel for the Appellants that the Learned Justices of the Court of Appeal erred in proclaiming Exhibits 'H' and '5'

inadmissible for the mere absence of a jurat. The Illiterates Protection Ordinance, 1951 (CAP 262) does not require the endorsement of a jurat to validate a document executed for and or on behalf of an illiterate. On the contrary, under Section 4, the law requires that the content of the document being prepared for the illiterate person, is read over and explained to him or her. The legislative intent is to prevent fraudsters from using illiteracy as a deformative tool to hoodwink vulnerable illiterates into doing what they would not ordinarily do. It is therefore essential that such illiterates appreciate what they sign or thumbprint.

(51) Where therefore, there is a challenge that this requirement of a jurat was not complied with, the proponent of the document is under an obligation to prove the contrary and not the illiterate. Consequently, we reverse the findings that Exhibits 'H' and '5' were inadmissible merely for the absence of a jurat. Whereas Exhibit 'H' is alleged to be a letter authorised by Akwasi Okyere recognising the family's ownership of the property, same was denied by the Respondents to the effect that Akwasi Okyere was not even aware of the said letter. The burden thus shifted on the Respondents to prove the fact they assert in that, same emanated from Akwasi Okyere. This is particularly so, when, Akwasi Okyere subsequently instructed his lawyer to deny the content of the said letter as emanating from him. This burden, unfortunately was left undischarged by the Appellants.

(52) As rightly observed by the Court of Appeal, we also notice that, the Appellants abandoned their claim to the cocoa farm as no submission was made in respect of same. Indeed, as aforesaid, substantial part of the case of the Appellants was in respect of House NO.60; while House No.019 Block 8 received no much attention. In all probability, the Appellants threw in the towel in respect of

those two properties, whose documents from the onset, bore the name of Akwasi Okyere.

CONCLUSION

(53) From the totality of the evidence on record, we find no reason to disturb the concurrent judgments of the two lower courts. The Appellants simply failed in the discharge of their evidential burden to prove that the properties, the subject matter of the dispute belong to the Ekunoa Family of Ntonso. The appeal therefore fails in its entirety and is accordingly dismissed.

**I.O. TANKO AMADU
(JUSTICE OF THE SUPREME COURT)**

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(JUSTICE OF THE SUPREME COURT)**

**M. OWUSU (MS.)
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