IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL
ACCRA – GHANA, A.D.2003

CA. 3\2003

30TH JANUARY, 2003

CORAM - B.T. ARYEETEY J.A.
ASARE KORANG J.A.
E.K. PIESARE, J.A.

AUGUSTINE YAW MANU … PLAINTIFF/RESPONDENT
[Customary successor to the late Stephen Yaw Nimo & Head of the Matrilineal Family of Stephen Yaw Nimo – {Deceased}

VRS:

MADAM ELIZABETH AMA NSIAH … DEFENDANT/APPELLANT

J U D G E M E N T

ASARE KORANG, JA -

The Plaintiff\Respondent (hereafter designated as the Plaintiff) as customary successor and head of family of the matrilineal family of the late Stephen Yaw Nimo sued the Defendant/Appellant (hereafter called the Defendant), the widow of the late Stephen Yaw Nimo (Yaw Nimo for short hereafter) for inter alia a Declaration that House No. ZE. 172, Zongo Extension, Kumasi is the property of the immediate matrilineal family of Yaw Nimo and that the purported gift inter vivos of the said house by Yaw Nimo to the defendant was null and void and of no effect whatsoever.

The case of the plaintiff was that the late Yaw Nimo inherited the property in dispute upon the death of the late Kwadwo Nsiah and that Yaw Nimo as customary successor

held the house in trust for the immediate matrilineal family of the late Opanin Kwadwo Nsiah to which he (plaintiff) belonged.

The plaintiff stated that the late Yaw Nimo had no testomentary capacity to dispose of the house in dispute without the consent and concurrence of members of his family and the purported gift inter vivos and subsequently the Will of the disputed house made in favour of the defendant was null and void and of no effect.

The story of the defendant was that the late KWADWO Nsiah during his lifetime gifted the house in dispute to her and she paid the required custom to seal same in the presence of witnesses.

It is not disputed that the property in contention was first acquired by the late Kwadwo Nsiah but the defendant resisted the plaintiff's claim on three main grounds; namely:

(a) the plaintiff was at no time appointed the customary successor of the late Yaw Nimo;
(b) the plaintiff is neither the head of family nor a member of the family of the late Yaw Nimo;
(c) the late Yaw Nimo was the last surviving member of the family and therefore the plaintiff was not and could not be a member of the family of Yaw Nimo.

It was also narrated by the Defendant that when late Kwadwo Nsiah realised during his lifetime that his family was about to become extinct, he bought two slaves, male and female, from Northern Ghana, for the purpose of reviving and perpetuating his lineage. The slaves, Kwesi Donkor (male) and Asempa Asa (female) were then adopted or assimilated into Kwadwo Nsiah's family and they gave birth to the defendant and at least one other female.

To solidify and strengthen his design of ensuring that his blood line remained intact, Kwadwo Nsiah gave the defendant in marriage to his only nephew Yaw Nimo, the only surviving child of his sister, Ama Badu.

It was contended by the Defendant that when she got married to Yaw Nimo, late Kwadwo Nsiah gifted the disputed house to them jointly.

Because the defendant positively contested the plaintiff's claim to membership of late Kwadwo Nsiah's and late Yaw Nimo's family, the plaintiff was constrained to trace his genealogy and flowing from that his relationship with the two deceased persons.

Having examined and reviewed the evidence on genealogy given by the plaintiff and the defendant, the learned High Court Judge made the following observation:

> "In this trial, two very important points emerge from the contrasting evidence of genealogy. While the plaintiff simply mentioned one Ampofowaa, who was said to be the mother of both Yaw Nimo and Ama Badu, the evidence of the defendant related to one Adwoa Ampofowaa who was a daughter of Akua Buruwaa and mother of Opanin Kwadwo Nsiah, Kwaku Sem, Kwaku Nimako and Ama Badu. There is obviously a big conflict here and it is necessary to resolve it in order to determine the correct genealogy.
>
> I feel the matter does not impose much difficulty to resolve and this I do by finding out the relationship between Opanin Kwadwo Nsiah, Ama Badu and Yaw Nimo."

Having clearly discovered the issue he had to resolve, the learned trial judge held:-

> "I am satisfied upon the evidence that contrary to the assertion by the plaintiff, Ama Badu was the mother of Yaw Nimo, not his sister and furthermore, that Ama Badu was Kwadwo Nsiah's sister. There is uncontroverted evidence from the defendant and

his witnesses that Ama Badu was the mother-in-law of the defendant by virtue of her marriage to Yaw Nimo who was Ama Badu's son. This is a priceless piece of evidence in favour of the defendant. It's far-reaching effect is the damming impact it casts on the Correctness of the genealogy given by the plaintiff."

The learned judge also manifestly accepted the evidence of the Defendant that defendant was living testimony of the effort made by Kwadwo Nsiah to halt the biologic extinction of his family,
(Kwadwo Nsiah and his sister Ama Badu and Yaw Nimo being the last remaining members of their immediate family) by the purchase of two slaves of northern extraction, that act of Kwadwo Nsiah culminating in the fact of the defendant, the descendant of those slaves, customarily succeeding the mother of Yaw Nimo, Ama Badu after her death.

Having regard to this piece of evidence, the learned trial judge postulated as follows:

"It may be argued that if there were, or had been any members of the matriliny of Opanin Kwadwo Nsiah alive at the time, the inheritance
would not have passed to the defendant, who upon the evidence did not hail from the original or direct line."

There were also other significant findings of fact made by the learned trial judge. Even though, he for example rejected the evidence of the plaintiff that he provided two bottles of schnapps to seal his acceptance when he was appointed customary successor of Yaw Nimo, the learned judge went on to find, notwithstanding plaintiff's contention that there was "weightier evidence" from the defendant that it was she who provided one bottle of schnapps as "Aseda."

Having found that the defendant offered the acceptance drink, the learned judge held that initially one Yaw Krah was appointed to succeed Yaw Nimoh but later in view of the

illness of Yaw Krah, the plaintiff was appointed to take his place as customary successor of Yaw Nimo.

In his judgement, the learned trial judge refused to hold that the plaintiff belonged to the immediate matrilineal family of the late Opanin Kwadwo Nsiah but it was inter alia his finding:

(1) that the plaintiff MIGHT belong to the extended family of Opanin Kwadwo Nsiah (My Emphasis)
(2) that the plaintiff was related to the late Yaw Nimoh;
(3) that on the authority of ENNIN V. PRAH [11959] GLR 44 holding (1)

Yaw Nimoh was the last surviving member of his immediate matrilineal family;

(4) that plaintiff was appointed customary successor of Yaw Nimoh and he has the capacity to sue the defendant and
(5) that the disputed house is family property

It is against this decision that the defendant has appealed alleging three grounds in the Notice of Appeal which read:

"a. the trial court erred in holding that the late Yaw Nimoh was not the last surviving member of his family.
b. the trial court erred by holding that the plaintiff is a member of the family of the late Yaw Nimoh.
c. the judgement is against the weight of evidence on record.

Unless there was a typographical error in the judgment of the trial High Court that has given cause to the defendant to appeal, I am unable to discern in connection with the first ground of appeal, any conclusion by the trial court that the late Yaw Nimo was not the last surviving member of his family.

On the contrary, if I should presume as I do, that the judgment (which forms part of the record of proceedings in this appeal) is a true record, then in the penultimate paragraph of the judgement, the learned High Court judge plainly and unequivocally summarised his decision in the circumstances of this case as he perceived it that, on the balance of probabilities in favour of the plaintiff, the plaintiff is related to the late Yaw Nimo and Yaw Nimo WAS THE LAST SURVIVING MEMBER OF HIS IMMEDIATE MATERNAL FAMILY (My Emphasis).

At page 146 of the record, the learned trial judge also accepted the defendant's claim and found that Kwadwo Nsiah, Ama Badu and Yaw Nimoh were the last remaining members of their very immediate family and it was the defendant, the descendant of slaves who customarily succeeded the mother of Yaw Nimo after her death.

I propose now to deal with the second and third grounds of appeal together as they touch on the facts as found by the learned trial judge from the evidence led by the parties.

The law is that where an appellant contended that a judgement was against the weight of evidence, he assumed the burden of showing from the evidence that that was as expressed and where there is sufficient evidence to support the findings of a trial judge, the appellate court is loath to interfere with the trial judge's conclusion.

See NYAME V. TARZAN TRANSPORT (1973) 1 GLR 9 and BOATENG VRS. BOATENG (1987 – 88) 2 GLR 81.

In this appeal, the defendant particularly censured the verdict or declaration by the trial judge that Opanin Kwadwo Nsiah, Yaw Nimo and Ama Badu had members of their extended family living, one of them being the plaintiff and that none of the defendant's witnesses was able to positively deny the family tree of the plaintiff.

It was this assertion about the plaintiff's family tree that impelled the trial judge to hold that the plaintiff might belong to the extended family of Kwadwo Nsiah. But is it true that none of the defendant's witnesses challenged or denied the pedigree of the plaintiff?

The defendant's second witness Kwadwo Manu, who is the plaintiff's nephew, his mother being a cousin of the plaintiff, denied that he was in any way related to the late Yaw Nimo, the inference being that no relationship existed between the plaintiff and Yaw Nimo.

The defendant's third witness Nana Kofi Genfi II also stated on oath that the late Kwadwo Nsiah was his stepfather who had no surviving relatives anywhere apart from his sister Ama Badu and his nephew Yaw Nimo. Nana Kofi Gemfi added that he lived with his stepfather for over fifty years and on no occasion did he meet the plaintiff.

Of the evidence of the defendant's first witness, the portions constituting a challenge to the lineage of the plaintiff were that, the plaintiff was in no way related to Yaw Nimo by blood, Yaw Nimo being of the Asona clan and a direct servant of the Adumhene whilst the plaintiff is a member of the Aduana clan and a subject of the BOAYAASE Odikro. The plaintiff himself denied that he is a member of the Boayaase family but that he was of Boayaase was confirmed and corroborated by the plaintiff's fourth witness, Nana Kofi Agyei IV, chief of Kwanwoma and Gyasehene of Adum who when asked whether members of plaintiff's family belong to Boayaase replied in the affirmative.

In the face of these pieces of evidence, could it be contended that there was no challenge or denial of a blood relationship between the plaintiff and Kwadwo Nsiah?

The characteristic spirit of the plaintiff's evidence was that he was a member of the immediate family of Kwadwo Nsiah who was his granduncle and the brother of his grandmother, that is, his (plaintiff's) mother's mother.

In support of this assertion the plaintiff sketched a family tree that was rejected by the trial judge in one breath when he proclaimed:

> " I refuse to hold that the plaintiff belongs to the immediate
> matrilineal family of Opanin Kwadwo Nsiah,"
> and yet was accepted by him when he decided that none of the witnesses of the defendant was able to make a positive denial of the family tree of the plaintiff.

The trial judge rightly in my view distilled the issues to be resolved by him when he stated:

> " The plaintiff carries the burden to satisfy the court
> of his **CAPACITY,** more particularly that, he is customary successor to Yaw Nimo; that he is head of the family; and that the disputed property is family property……..Generally in law, the burden of proof lies upon the party who substantially asserts the affirmative of the issue." (My Emphasis).

In this case, since the plaintiff had claimed that he was the head of the matrilineal family of Yaw Nimo (deceased) and customary successor of the said deceased, an allegation that was fiercely denied by the defendant, the onus fell on the plaintiff to demonstrate that he was such head of family and successor.

The plaintiff had to show when and how he was appointed head of the matrilineal family of Yaw Nimo and by whom.

The trial judge culled references to a family in the Defendant's Exhibit C and paragraphs 8, 16 and 18 of her Statement of Defence to draw what he labeled as an unavoidable inference that there was a family of Yaw Nimo that could be identified.

The opinion I venture on this decision of the trial judge is that if it was demonstrably possible to conjure into existence a family of Yaw Nimo when the defendant had at all times insisted that Yaw Nimo was the last surviving member of his immediate family,

then the learned trial judge ought to have embarked on an inquiry as to the nature of the family the Defendant had in mind.

The defendant had no opportunity to be confronted at the trial with those references made by her to a family and what she considered to be their meaning and import and yet the learned trial judge had no reservations at all in concluding that those references to a family related to the extended family of Yaw Nimo and it is to that family as known to the defendant that the plaintiff claims to belong.

Now, the plaintiff in his pleadings and evidence, nowhere attached his name to the extended family of Kwadwo Nsiah and Yaw Nimo and yet the learned trial judge so found on the basis of what he said was the oral and documentary evidence before him.

On the issue of the appointment of the plaintiff as customary successor, the finding made by the trial judge reads:

> " Even though the plaintiff said he presented drinks, that is two
> bottles of schnapps to seal his acceptance, weightier evidence exists on the record from the defendant, her witness and the plaintiff's own witness, PW3, Nana Kwame Asua to support the competing version of the defendant, that the
>
> "aseda" was presented by the defendant herself, not the plaintiff. I therefore reject the plaintiff's allegation that he presented two bottles of schnapps as "aseda" and accept that it was the defendant who provided one bottle of schnapps."

Inspite of this conclusion arrived at by the learned trial judge, he cited paragraph 12 of the Defendant's Amended Statement of Defence wherein the averment was made that Opanin Yaw Krah succeeded the late Yaw Nimo, and therefore having regard to the decision in DAM VRS ADDO [1962] 2 GLR 200 to the effect that a party will not ordinarily be allowed to set up in evidence a story contrary to what is stated in his

pleadings, he found that there was evidence from the defendant and her witnesses that the plaintiff was made to stand in the shoes of Yaw Krah as customary successor after Yaw Krah had declined the appointment.

The pleading of the defendant notwithstanding, I have not seen anything in the evidence of the defendant and his witnesses that the plaintiff was appointed customary successor in place of Yaw Krah who at the time this case came up for hearing was deceased. The consistent narrative of the defendant and her first witness was that Yaw Krah was only appointed a caretaker and Yaw Krah citing his ill health nominated the plaintiff to stand in for him as caretaker, and not as customary successor.

Assuming even that the averment in the Amended Statement of Defence is true that the late Yaw Krah was appointed as customary successor of Yaw Nimoh and that this averment found corroboration in the affidavit filed by Yaw Krah and others on 26th January 1996 which forms part of the record of this appeal and reference to which was made by the trial judge in his judgment (See pages 35 and 152 of the record), the trial judge ought to have given consideration to other depositions and their effect in the said affidavit, such as that the plaintiff only acted as successor and representative of Yaw Krah who had been ill and who at the time the affidavit was sworn had recovered for which reason plaintiff had ceased to be acting successor.

In any event, the plaintiff also swore to an affidavit (at page 37 of the record) filed on 1st February 1996, that ran counter to the depositions in the affidavit of 26th January, 1996.

In his affidavit, the plaintiff denied that Yaw Krah was ever appointed as customary successor of Yaw Nimo. Plaintiff insisted that he and not Yaw Krah was customarily appointed successor in his own right as a member of the matrilineal family of Yaw Nimo.

Because of the contents of plaintiff's affidavit, it appears, with due respect to the learned trial judge, rather strange, to say that the plaintiff was made to stand in the stead of Yaw Krah as customary successor after the appointment had been declined by Yaw Krah.

In my opinion the averment by the defendant in her pleading that Yaw Krah was appointed customary successor must not be taken as going beyond that. It is not meant to be an admission by the defendant that the plaintiff was also appointed as customary successor of Yaw Nimo. If any such meaning is ascribed to the internal logic of that averment, then in my view, it is incorrect.

For me, it was difficult to appreciate how the trial judge resolved the evidence concerning the appointment of the customary successor of late Yaw Nimo.

Having stated that the evidence on the issue was very much varied, the trial judge then made a finding that the question of succession as well as what took place was settled once and for all.

In my estimation, the evidence on the succession to the estate of Yaw Nimo, coming from the plaintiff and his witnesses was rather murky.

What the plaintiff's third and fourth witnesses told the trial court on the issue was largely based on hearsay. According to the plaintiff's third witness what Yaw Krah told him was that he had been appointed as caretaker of the estate of Yaw Nimo and that he (Yaw Krah) had in turn appointed the plaintiff to sit on his lap and act in his stead.
To the plaintiff's fourth witness who is the chief of Kwanwoma what Yaw Krah told him was that he had declined to be appointed as customary successor and that in his place, the appointment had been given to the plaintiff.

This conflict or inconsistency in the evidence of the plaintiff and his witnesses was not insubstantial. They, indeed, in my undoubted view undermined the case of the plaintiff that he was as of right appointed to succeed Yaw Nimo and that he was not made to sit on anybody's lap.

As it had been suggested to the defendant's first witness in cross-examination that a person who is appointed a successor or personal representative provides drink to seal the appointment and that it is uncustomary for a person so appointed not to provide the drink, the learned trial judge ought to have declared on the evidence that if the plaintiff was appointed the customary successor of Yaw Nimo, since he did not provide any drink to signify the appointment, drinks on the occasion of the 40th day observance of Yaw Nimo having been provided by the defendant, as widow of the deceased, the plaintiff was not in all the circumstances appointed as customary successor.

I think when, on the evidence, the learned trial judge discerned or discovered that the plaintiff was not a member of the immediate family of Kwadwo Nsiah, he ought to have gone further to hold that the plaintiff had not established that he was the head of the said family and that he could not have been appointed in his own right as a member of that family to customarily succeed the late Yaw Nimo.

Having so held, the trial judge should then have dismissed the plaintiff's action on the ground of lack of capacity in him to sue the defendant.

In AKRONG & ANOR. VRS. BULLEY, [1965] GLR 469, S.C., it was held that where the plaintiff lacked capacity to sue, his writ was a nullity and so were the proceedings and judgment founded upon it.

Then in HUSSEY VS. EDAH [1992] GLR Mrs. Bamford-Addo, J.S.C., in her judgment held that only a successor or head of family could sue and be sued in respect of family property and the position of customary successor or head of family was by appointment and not as of right. The appointee became the head of family or successor and administered the ancestral properties on behalf of the family.

The plaintiff in the above-cited case having failed to prove his capacity as successor or head of family, his appeal was dismissed.

The case of NYAMEKYE VRS. ANSAH [1989-90] GLR. C.A. also reiterated the general rule that the head of a family as representative of the family was the proper person to institute suits for the recovery of family property. And where the authority of a person to sue in a representative capacity was challenged, the onus was on him to prove that he had been duly authorised as he could not succeed on the merits without satisfying the court on that important preliminary issue.

In this appeal, the learned trial judge, having refused to make a finding that the plaintiff belonged to the immediate matrilineal family of Kwadwo Nsiah ought not to have stretched the evidence before him beyond tolerable limits to enable him hold that the plaintiff might belong to the extended matrilineal family of Kwadwo Nsiah.

The defendant did not counter-claim in this action and having denied the capacity with which the plaintiff purported to sue, the only burden the defendant bore was to lead evidence to show that the plaintiff lacked the capacity he claimed to have, namely that he was a member of the immediate matrilineal family of Yaw Nimo and the customary successor of Yaw Nimo.

I think, on the evidence that burden was discharged by the defendant when in his judgment the trial judge declared that the evidence regarding the bloodlines of Kwadwo Nsiah , Ama Badu and Yaw Nimo, given by the defendant was a priceless piece of evidence casting a damning impact on the plaintiff such that an issue touching on the very immediate family of Yaw Nimo would not affect the plaintiff.

I see the declaration made by the learned trial judge that the plaintiff MIGHT belong to the extended family of Kwadwo Nsiah as an observation floating in the realm of conjecture or speculation, at once controversial, imprecise and uncertain.

The law was laid down in DAM VRS. ADDO (supra) which I have already stated was cited by the learned trial judge in this case, that a court must not substitute a case

PROPRIO MOTU, nor accept a case contrary to, or inconsistent with, that which the party himself puts forward, whether he be the plaintiff or the defendant.

For the learned trial judge to have held that the plaintiff might belong to the extended family of Kwadwo Nsiah goes against the grain of the law as settled in the case above-cited (Dam vr. Addo).

The plaintiff at any time in leading evidence to prove his case, never sought to portray himself as belonging to Kwadwo Nsiah's or Yaw Nimo's extended family and indeed I saw no evidence to that effect. The plaintiff was unwaveringly out to prove that he belonged to the immediate matrilineal family of the two named persons being the head of that family and the customary successor of Yaw Nimo and in attempting to prop up that claim he, to my mind, failed.

I see the attempt by the learned trial judge to place the claim of the plaintiff within the context of a claim by the extended family of Yaw Nimo as only a brave but futile effort to rescue and revive the cause or claim espoused by the plaintiff after his evidence touching on his membership of the immediate family of Kwadwo Nsiah and Yaw Nimoh had been demnified and rejected by the learned trial judge.

On the whole the opinion I express is that the plaintiff failed to prove that he is the head of the immediate family of Yaw Nimo and the customary successor of Yaw Nimo in in consequence of which he had No LOCUS STANDI to sue the defendant.

The learned trial judge was therefore wrong to have entered judgment in favour of the plaintiff. He ought to have dismissed the claim of the plaintiff on the ground of want of capacity in him to sue.

The appeal in the circumstances is therefore allowed and the Writ filed in the court below by the plaintiff and the proceedings and judgment founded thereon declared a nullity.

ASARE-KORANG
JUSTICE OF APPEAL

I agree - **B.T. ARYEETEY**
JUSTICE OF APPEAL

I also agree - **E.K. PIESARE**
JUSTICE OF APPEAL

COUNSEL

DENNIS ADJEI for Defendant/Appellant.

FRANCIS KOFFIE for Plaintiff/Respondent.