IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL

CORAM - AKOTO-BAMFO, JA [PRESIDING]
QUAYE, JA
ASAMOAH, J

H1/234/04
17TH NOVEMBER, 2006

1. ALEC GRANT SAM
2. JEANNIE THERESA SAM **… PLAINTIFFS/RESPONDENTS**
3. JULIANA SAM

V E R S U S

1. UNILEVER {GH} LTD.
2. NANA AFREDU IV **… DEFENDANTS/APPELLANTS**
3. K.X.Y. AHLIJAH

J U D G M E N T

QUAYE, JA - Trial in the lower court terminated in this action with the delivering of the judgment on 6th July 2001. A notice of appeal against the trial court's judgment was filed on or about 10th July 2001 by the 3rd defendant setting down as his principal ground that the judgment cannot be supported with regard to the evidence. The 2nd defendant also filed his notice of appeal on 24th September 2001.

In the trial court, the plaintiffs contended that their great-grand father, W.E. Sam, died testate on 11th July 1906 and left the disputed property known as Sam's Hill situate at Low Town, Cape Coast to their grand-father Thomas Birch Freeman Sam and his heirs by virtue of a deposition in the will of the said W.E. Sam to that effect. By paragraph (c) of the indorsement of the writ, the plaintiffs sought a declaration that W.E. Sam, by his last will and testament devised the disputed land to T.B.F. Sam and his heirs. The property was described in paragraph (a) as "all that piece or parcel of land lying and being situate at the then Low Town, Cape Coast on the road to Saltpond and popularly

known, and referred to, as "SAM'S HILL" and which is bounded on the South by the Ashanti Road; on the North and East by W.E. Sam's property and on the West by Governor Rowe road," In their effort to more particularly identify the subject-matter, the plaintiffs set out in paragraph (b) that the disputed land was the subject-matter of a leasehold agreement dated 12th November, 1902 and executed between W.E. Sam as lessor and F & A Swanzy (ie. the 1st defendant's predecessors in the title) as lessees for the space of ninety-nine years. In the trial, the will of the deceased great-grand father of the plaintiffs was tendered as exhibit G. The recording of proceedings in the trial court was sketchy and the evidence of the plaintiffs, now respondents, did not amount to much. The immediately preceding observation notwithstanding, it is clear that the plaintiffs traced the source of their claim to exhibit G. The trial court made certain findings of fact. These include (1) confusion as to the identity of the property in dispute because in the will the description of the devise to Thomas Birch Freeman Sam, the grand father of the plaintiffs/respondents, was not legible apart from the first letter "A" (b) W.E. Sam, the testator acquired property including the subject-matter herein over which he exercised exclusive ownership (c) an action at the instance of the predecessor of the first defendant in; or about 1931 established W.E. Sam's ownership of the disputed land to the exclusion of the 2nd defendant /appellant's family (d) the family had accepted and acknowledged W.E. Sam's self-ownership of the land and had reflected same in deeds and transactions in respect of the land (e) that the subject-matter of the 1902 lease between W.E. Sam and F & A Swanzy was to revert to the heirs, executors, administrators or assigns of the lessor W.E. Sam (f) that the plaintiff's/respondents are the heirs and therefore entitled to the reversion (g) that the 3rd defendant/appellant is an innocent purchaser of property for valuable consideration without notice of any incumbrance. The 2nd defendant/appellant's appeal is founded on the grounds (a) that the judgment is against the weight of evidence (b) that the learned trial judge failed to make findings of fact and thus gave an erroneous judgment.

We identify, the fulcrum of the respondents' action and the complaint of the appellants against the judgment to be the depositions in the will of W.E. Sam. The central question is whether the subject-matter herein was the property that was devised to

Thomas Birch Freeman Sam. We hold the view that the answer to this question will largely determine the appeal.

Before we approach the question however, we affirm that in so far as it has been established that the subject-matter of dispute was self-acquired and so utilized by W.E. Sam, then his testamentary rights over the property cannot be questioned. W.E. Sam had every right to make the dispositions of his property as evidenced in his last will and testament of 1906.

On the claim of the plaintiffs/respondents, it is our view that their claim and contention are at sharp variance with the statement of the testator. It is trite that in interpreting a will, the ordinary meaning of the words used should be attached to the depositions therein contained except, of course, where the words result in ambiguity. In the case of **BANINI V. KWAKU BANINI (1973) 1 GLR 17**, Ata-Bedu J. stated obiter that "in construing a will, the principle is that the clauses must be read referentially to each other unless they are clearly independent". A cursory look at the will, exhibit G will clearly show that the devise to Thomas Birch Freeman Sam is "my land known as Sam's Hill situate at Low Town Axim…." simpliciter. In the trial court, the learned judge expressed misgivings as to whether the location of the devise was Axim or Akyim or another. What appeared to confuse the trial judge could be resolved by looking at the will as one whole. It is clear that the confusion related only to the devise made to T.B.F. Sam. Counsel for the respondents referred to Low Town Cape coast. With the greatest respect, the body of the will does not support that contention. Wherever in the will that the testator wanted to make a disposition of property in Cape Coast, he so clearly mentioned Cape Coast. For illustration, after the devise to T.B.F. Sam, the following words appear: "….and to my daughter Rebecca Dawson and her children the land with the house thereon situate at Bentil street at Cape Coast Castle….." Prior to the passage evidencing the devise to T.B.F. Sam, the testator had made a bequest to "my wife Elizabeth and her issue my real estate known as Kessaw land situate at Ashanti Road, Cape Coat Castle…"

Throughout the will, the name "Cape Coast" was mentioned at least sixteen times. Wherever the testator made a devise of property situate in Cape Coast he identified it as such in addition to further peculiar or particular characters. We would therefore conclude

that if the testator had meant to devise Sam's Hill Cape Coast to T.B.F. Sam, he would have so stated in unequivocal language. In similar breath, the respondents' argument that the name previously used to describe the location of the property was "Low Town" is not borne out by the evidence. If, as the respondents are claiming, the place was called Low Town, then the testator would have described it as Low Town Cape Coast. The fact that he failed to add Cape Coast would put us on guard that the location could be otherwise than Cape Coast. The question on hand can furthermore be answered by a critical examination of the will, with particular attention to the property devised to the 2nd appellant's family. The relevant portion of the will states that "I direct that the following lands shall be retained used and enjoyed as family property by the aforesaid children of my said cousin Adjua Atta deceased for themselves and all the members of the Afodu Amanful family that is to say the land known as Tantri land situate near Cape Coast portions of which are now in occupation of certain Mohammedan tenants and Messrs F and A Swanzy Ltd…." This was how the portion of the property that the testator intended for, and gave to the family of the 2nd defendant/applicant was described. The peculiar and distinctive features of the land are that (a) it is at Tantri (b) near Cape Coast (c) occupied by certain Muslims (Mohammedans) as tenants (d) Messrs F & A Swanzy. In specific terms therefore, in so far as the evidence and facts of this case are concerned, the only property of the testator at Tantri, Cape Coast, occupied by the Muslims and F & A Swanzy was the one that was to be enjoyed by the Afodu Amanful family, not the descendants and heirs of W.E. Sam or T.B.F. Sam.

Even though the trial court found that the whole property was self acquired by W.E. Sam, which we endorse, there is another compelling fact which goes to confirm the ownership of the property which the 2nd defendant/appellant asserts to be the ancestral property of the Afodu Amanful Family. Where the origin of the property is lost in history, one way by which the quandary can be resolved is by examining the name of the place.

Assuming that the property belonged to the Afodu Amanful Family before W.E. Sam became head of that Family, if ever he was, then the 2nd defendant/appellant is yet to unravel why the name of W.E. Sam is attached to it, and not the family's name. The name Sam's Hill is more suggestive that it was acquired by Sam. It could be another

person of that name than W.E. Sam. However the likelihood of there being another Sam who first acquired that property does not reflect in the evidence. The onus of supplying that evidence lay with the 2nd defendant and his family. We hold therefore that Sam's Hill was originally acquired by W.E. Sam as self acquired property. Generally speaking, the position at law is that findings of fact by a trial court, whether based on oral or documentary evidence, shall not be set aside unless they are found to be clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. A finding is said to be clearly erroneous when, although there is evidence to support it, the appellate or reviewing court, on the entire evidence is left with definite and firm conviction that a mistake has been committed. See **AMERICAN POSTAL WORKERS UNION VRS. UNITED STATES POSTAL SERVICE, 871 F 2d 556, 561** which was cited with approval in **COMMONWEALTH PETROLEUM V. PETROSOL INTERNATIONAL 901 F. 2D 1314.** We agree therefore that the finding by the trial court concerning the identity of the subject matter of dispute is clearly in error and we do not find any justifiable reason to affirm it.

The action mounted by the respondents for declarations in their favour based on alleged devise to T.B.F. Sam having failed, we are left now to consider whether in the alternative, the respondents' can be justified as residuary legatees. This capacity was stated in paragraph (a) of the relief endorsed at the back of the writ.
Therein it states (a) A declaration that the plaintiffs as representatives of the descendants of William Edward Sam (deceased) are vested with reversionary title to all that piece or parcel of land lying and being situate at the then Low Town Cape Coast on the road to Saltpound and popularly known as and referred to as Sam's hill and…." The residuary estate in a will generally includes the property which remains after debts and expenses of administration, legacies, and devises have been satisfied. It is that portion of a person's estate which has not otherwise been particularly devised or bequeathed. It consists of all that has not been legally disposed of by will other than by residuary clause. See **MILLER'S ESTATE FLa App 301 So 2 d 137, 139.**

In exhibit G, the residuary clause is in the following terms " I give to and for the use of my dear grandson William Edu Sam one equal half of all my shares securities concessions and the residue of my real and personal Estates wheresoever situate not

disposed of by my will and to my said Trustees the other equal half upon trust to pay two thirds of the income arising therefrom to my son Thomas Birch Freeman Sam for life and the remaining one third to his children after the deceased of the said Thomas Birch Freeman Sam to transfer the whole capital to the said children in equal proportions on their attaining twenty-four years and on the failure of the said trust any Trustees are to hold the said capital upon trust to transfer the same to my dear grandson William Edu Sam on his attaining the age of twenty-two years…." The clause affects property that had not been devised or in any way given by the testor to any other beneficiary.

This, as a matter of fact and evidence, does not include the subject-matter of this suit which had been given out in clear terms.

G.M. QUAYE
JUSTICE OF APPEAL

I agree.

V. AKOTO-BAMFO
JUSTICE OF APPEAL

I also agree.

R. ASAMOAH
JUSTICE OF APPEAL

MR. JUSTINE AMENUVOR FOR PLAINTIFFS/RESPONDENTS.

MR. CARSON FOR 2ND DEFENDANT/APPELLANT.

MR. K.O. AMPONSAH DADZIE FOR 3RD DEFENDANT/APPELLANT.

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