IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL

CORAM - ASARE KORANG, J.A. {PRESIDING}
KANYOKE, J.A.
MARFUL-SAU, J.A.

H1/93/2006
24TH NOVEMBER, 2006

KWAMINA SIISI … PLAINTIFF/RESPONDENT

V E R S U S

PROPHET K. BOATENG … DEFENDANT
APPIMENYIM via SHAMA

KOFI MENSAH … APPLICANT/APPELLANT
Upper Inchaban

J U D G M E N T

ASARE KORANG, J.A. - The Plaintiff/Respondent (Respondent for short hereinafter) describing himself as the head of the PITSIR KWAATA ANONA family of Upper Inchaban sued the Defendant, inter alia, for a declaration of title to a piece or parcel of family land called **'SANDFILED'** situate AT Upper Inchaban.

In his Statement of Defence, the Defendant denied that the respondent was the head of the family aforementioned and insisted that the legitimate head of family was one Ebusuapanyin Kofi Mensah, Applicant/Appellant herein (to be called the Appellant hereafter).

The Defendant also explained that he was a member of the said Pitsir Kwaata Anona family and that he was granted the land in dispute by the appellant, as head of family acting in concert with the principal elders of the said family.

In his Reply to the Statement of Defence, the Respondent averred that the Appellant, Kofi Mensah, had vacated his position in the family as head and been replaced or substituted by the Respondent.

Among the issues set down for trial at the hearing of the suit were the following:

1. Whether or not the plaintiff (Respondent herein) is the head

of the Pitsir Kwaata Anona Family of Upper Inchaban.

2. Whether or not Ebusuapanyin Kofi Mensah (Appellant herein) is still the head of the said Pitsir Kwaata Anona family."

The issue was therefore joined as to who was the true and legitimate head of the said family.

Hearing of the issues defined for trial was fixed for 30 November, 2004and on 28th January 2005, the appellant filed a motion to be joined to the suit as a Co-defendant.

In a ruling delivered on 22nd June 2005, GABOR, J, sitting in the High Court, Sekondi, dismissed the appellant's application for joinder on the ground that no useful purpose would be served by joining the appellant as a Co-defendant in the suit as the issue of who was the head of family had been laid to rest by DOTSE, J.A. sitting as an additional High Court Judge on 20th October 2003 when he confirmed an earlier decision of the Sekondi High Court substituting Kwamina Siisi (the respondent herein) as head of family for Kofi Mensah (the appellant).

Against the ruling of GABOR, JA., the appellant has appealed to this court, relying on the following grounds of appeal:

(a) The learned trial judge erred in dismissing the application for joinder without taking evidence on the issue as to who is the EBUSUAPANYIN of the Pitsir Kwaata Anona Family of Upper Inchaban.

(b) The learned trial judge failed to consider the judgment of the District Court, Sekondi dated 16th June 2003 and annexed to the application for joinder as Exhibit C and also the settlement between Nana Mankrado family and the Pitsir Kwaata Family which was publicised in the in the newspapers and attached to the application as Exhibits "A" and "B".

(c) Additional grounds of appeal will be filed on receipt of the record of appeal."

There were no additions or amendments made to the original grounds of appeal.

In the penultimate paragraph of his ruling, GABOR, JA. stated:

"There can be only one head of family and he in this case is for

> the time being the plaintiff in this action. To join the applicant will lead to the absurd situation where we shall have two heads of family on opposite sides seeking to protect the very same family land. The applicant can and may be called by the Defendant, if he so desires as his witness. I find the present application for joinder no more than a ploy by the applicant to relitigate over the position of head of family. This occasion is certainly most inappropriate."

Quite clearly, Gabor, J. thought that the issue of who was head of family had been completely settled by the ruling of Dotse, J.A., AND THAT THE APPELLANT WAS TRYING TO REVIVE SAME. But it must be noted that there was no trial of the issue of headship of the family by Dotse, J.A. No evidence subjected to cross-examination was led before Dotse, J.A., and the appellant herein was not a party to the proceedings before Dotse, J.A.

As to what Gabor, J. described as "the absurd situation (of) two heads of family, on opposite sides seeking to protect the same family land," this appears to have been re-echoed by counsel for the Respondent in his Statement of Case when he posed these two questions.

> "(a) How can there be two Heads of family of the same family?
>
> (b) Why was the applicant/appellant seeking to join the suit as a Co-defendant and not a Co-plaintiff if he was also interested in protecting the family property?"

The first question was well framed and the answer to it as a matter of logic and of law would be that there cannot be two heads of family of the same family and therefore, it was the duty of the trial High Court Judge to ascertain and determine by evidence which of the two was the proper head of family.

The seeds of the answer to the second question lie in the record of proceedings as settled by the parties and would be that the appellant could only come into the suit as a Co-defendant because in the pleadings, of the Defendant, he is described as the

Defendant's grantor. As such he could only be joined to the suit as a Co-defendant and not as a Co-plaintiff because from the record the respondent's motive based on the endorsement on his writ of summons is to unravel and reverse the grant made by the appellant to the Defendant.

As I see it, the bone of contention is not so much the protection of family property as it is the question of the headship of the family. There is absolutely no dispute over the ownership of the property, the subject matter of the suit. It is not denied that it is owned by the Pitsir Kwaata Anona family to which family the appellant and the Respondent belong.

It cannot be true that the issue of the capacity of the appellant to be made a party to the suit had been settled or disposed of by DOTSE, J.A., because at page 5 of his ruling (page 48 of the record) DOTSE, J.A. himself observed:

> "The only person or persons capable of mounting a successful action to challenge the capacity or status of the Respondent herein are members of the Respondent's family and/or KOFI MENSAH."

Kofi Mensah as noted previously is the appellant herein and the course of action contemplated in the ruling of Dotse, J.A. is precisely what he embarked upon before GABOR, J. It therefore lay ill in the mouth of GABOUR, J. to decide that the issue of the headship of the PITSIR KWAATA NONA family had been laid to rest by DOTSE, J.A. in his ruling and that that issue could not be relitigated by the appellant.

I think the decision of GABOR, JA, dismissing the appellant's application for joinder was a wrongful exercise of discretion.

In the circumstances the appeal is allowed. The order of the High court refusing the application for joinder is hereby set aside. In its stead, the appellant/applicant who has been substituted by Ebusuapanyin John Olloko Wilson alias Kwasi Wilson should be joined to the suit in the trial High Court as a Co-defendant for the suit to be tried on it merits.

A. ASARE KORANG
JUSTICE OF APPEAL

I agree. **S.E. KANYOKE**
JUSTICE OF APPEAL

I also agree. **S.K. MARFUL-SAU**
JUSTICE OF APPEAL

COUNSEL - SAMUEL ADINKRAH, ESQ., FOR APPLICANT/APPELLANT.

FREDERICK FAIDU, ESQ., FOR PLAINTIFF/RESPONDENT.

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