IN THE SUPERIOR COURT OF JUDICATURE
IN THE COUR OF APPEAL
ACCRA - GHANA

CORAM - OWUSU, {MS} J.A. PRESIDING
KANYOKE, J.A.
KUSI-APPIAH, J.A.

CIVIL APPEAL
H1/154/2005
16TH FEBRUARY, 2007

TEIKO AKRONG {HEAD & LAWFUL REPRESENTATIVE OF THE BOI KWAO FAMILY OF OFANKOR} **… PLAINTIFF/APPELLANT**

V E R S U S

ADU KOFI DJIN **… DEFENDANT/RESPONDENT**

J U D G M E N T

KUSI-APPIAH, J.A. - This is an appeal against the judgment of the High Court, Accra, dated 24 February, 2004. The facts giving rise to this action are very simple. The defendant in this action claimed to have purchased a 30 acre land at Aboasa Medie from Abusuapanyin Boye Okai, the first defendant at the trial court. According to the defendant, he acquired valid title to the land from Abusuapanyin Boye Okai who was held out by the plaintiffs family as their Head. He averred that the land was sold to him with the knowledge, consent and concurrence of the plaintiff's family as the money was used to rehabilitate their family house at Ofankor.

The plaintiff, on the other hand contended that, in 1992 he and the principal members of the family learnt of the sale of their family land by the first defendant to the second defendant (the defendant herein).

He claimed that since Abusuapanyin Boye Okai had no capacity to transfer title in the land to the defendant herein, he summoned him before the chief of Ofankor. He averred that at the said forum, Abusuapanyin Boye Okai laid claim to the said parcel of land as the bonafide property of his late father to the exclusion of the Boi Kwao family. But when he was pressed further, he retracted and admitted later that he was unduly

influenced by the defendant herein to enter into that transaction. Consequently, the plaintiff as the Head of Boye Kwao family of Ofankor commenced the instant action against the first and second defendants claiming:-

"(1) Declaration that the alienation by conveyance number RE 31/92 appertaining to all that piece or parcel of land situate and being at Aboasa between first defendant as grantor on the one part and second defendant as grantee on the other part is void on grounds of want of capacity.

(2) An order that the said conveyance was procured by fraud and/or misrepresentation and/or undue influence.

(3) Recovery of possession of the said land against the second defendant.

(4) An order annulling indenture number RE 31/92.

(5) Perpetual injunction restraining second defendant, his assigns, agents, tenants, successors in title and any other privies from any dealing with the land the subject matter."

The defendants resisted the claim of the plaintiff and the case proceeded to trial. Before the actual trial of the case started, the first defendant, Abusuapanyin Boye Okai, had died and his name had to be struck out for the reason of his demise in the course of the proceedings.

The trial High Court dismissed the plaintiff's action and entered judgment for the defendant. The plaintiff was aggrieved by the judgment of the trial court and appealed to this court on two main grounds.

These are:-

(1) The judgment is against the weight of evidence.

(2) The trial Judge failed to adequately consider the evidence of the appellant.

On 14th March, 2005, the plaintiff filed two additional grounds claiming that:-

(1) The trial Judge failed to adequately consider the capacity of Boi Okai, since the appellant is the Head of family.

(2) The trial Judge failed to address herself to the provisions of

> Article 267(5) of the 1992 Constitution in relation to Stool and Skin Lands. The Freehold status created by the Indenture to the Respondent is therefore null and void. Again, the tampering of the date on the document made it a forged document, making it null and void.

Even though the plaintiff/appellant (hereinafter referred to as the appellant) has appealed to this court on a number of grounds, only two of those grounds (i.e. the additional grounds) were canvassed before us.

I propose to deal with the additional ground two, first which deals with Article 267(5) of the 1992 Constitution.

ARTICLE 267(5) OF THE 1992 CONSTITUTION

Counsel for the appellant urged upon us that the 1992 Constitution has imposed restrictions on the type of interest which can be granted out of stool lands. He referred the Court to Article 267(5) of the Constitution which provides inter alia:-

> "…….no interest in, or right over, any stool land in Ghana shall be created which vests in any person or a body of persons a freehold interest howsoever described."

He submitted that if Article 267(5) is read alongside with Article 295(1) of the Constitution which states:

> "……"Stool Land" include any land or interest in, or right over, any land controlled by a stool or skin, the head of a particular community or the Captain of a Company, for the benefit of the subjects of that stool or members of that Community or Company,"

then, Article 267(5) by interpretation includes family land. Learned Counsel contended that the tenor of Article 267(5) in the 1992 Constitution is that not even members of a stool or a family can, as from 7 January, 1993, acquire a freehold interest in any land in Ghana - in which a stool or a family holds the allodial title. He concluded that the purported grant of freehold in the land of the plaintiff's family by Abusuapanyin Boye Okai to the defendant herein is therefore unconstitutional, null and void and of no effect.

For the defendant/respondent (hereinafter referred to as the respondent), Counsel submitted that the contention that Article 267(5) by interpretation includes family land is

inept and misconceived. He argued that the said Article is the same as Article 190(4) in the 1979 Constitution. But the definition of Stool land in the Constitution, 1979, differed from the definition in the Constitution, 1992. The respondent supported his stand with Article 213(1) of the Constitution, 1979 which read:-

> "Stool land" includes any land or interest in or right over any land controlled by a Stool, the head of a particular Community or a family for the benefit of subjects of that stool or the members of the community or family."

Learned Counsel for the respondent maintained that even with this some what wide definition given to stool land, the Court of Appeal in **OKWAN and OTHERS VRS. AMANKWA II {1991} 1 G.L.R. 213** held that the Constitution, 1979 did not do away with the distinction between Stool land and family land.

We are of the opinion that the omission of the word "family" in Article 295(1) of the 1992 Constitution which is different from definition of stool land as provided in Article 213(1) of the Constitution, 1979 meant or implied that the Committee of Experts who drafted the 1992 Constitution saw no reason to equate family lands with stool lands.

It is our candid view that the case of **OKWAN VRS. AMANKWA II** (supra) is on all fours with this ground of appeal. And as was held in that case, Stool lands are separate and distinct from family lands. Stool lands enure for the beneficial enjoyment of all the subjects of a stool while family lands are exclusively enjoyed by the members of a family and as such, are in their truest sense, private properties and are in no way restricted by the Constitution, 1992. This is because the Constitution, 1992 did not seek to regulate their enjoyment and made no provision for their management.
To us, any interpretation of Article 267(5) of the Constitution, 1992, in a manner which suggests that family lands are co terminous with stool lands with the same legal consequences would produce a plainly unjust result.

For these reasons this ground of appeal fails.

The next ground of appeal is the additional ground one which deals with the capacity of Boye Okai to convey title to the land, the subject matter of this suit to the defendant herein. This appears to be the plaintiffs main ground of appeal. The plaintiff in the endorsement of the writ and his statement of claim, denied the defendant's grantor

Boye Okai, the capacity to grant or convey title to the land to him. He averred that the land in question belongs to Boi Kwao family of Ofankor, having been acquired together with a large tract of land by their great grant father, Boi Kwao in 1910.
He claimed that after the demise of Boi Kwao in 1921, the family continued to remain in uninterrupted possession of the land through successive succession.

Counsel for the plaintiff submitted that at the time Boye Okai conveyed title to the land to the defendant, he was not the Head of Boi Kwao family of Ofankor and that the plaintiff, Teiko Akrong, was the accredited Head of that family. He contended that the sale was conducted by Boye Okai alone without the consent and concurrence of the Head and principal members of Boi Kwao family of Ofankor. The result is that the purported sale of the land to the defendant herein is void and of no legal effect.

The defendant contended otherwise. He maintained that he acquired valid title to the land as the same was sold to him by Boye Okai who was held out by the plaintiff's family as their Head. He averred that the land was sold to him with the knowledge, consent and concurrence of the plaintiff's family who used the money to rehabilitate their family house at Ofrankor. The defendant argued that it was incumbent on the plaintiff to have proved that Boye Okai was not the Head and the sale was without the consent and concurrence of the principal members of the family.

In the case of **ABABIO VRS. AKWASI III {1994-95} G.B.R. page 7744,** the Court held that:-

> "A party whose pleadings raised an issue essential to the success of the case assumed the burden of proving such issue. The burden only shifted to the defendant when the plaintiff has adduced evidence to establish the claim……"

The plaintiff in the instant case therefore assumed the burden of proving the issues he has raised in his pleadings that, he is the Head of family and has brought the action in a representative capacity. The plaintiff to discharge this burden is expected to lead admissible and credible evidence from which the fact or facts he asserts can properly and safely be inferred. Thus in **ZAMBRAMA VRS. JEGBEDZI {1991} 2 G.L.R. p. 221** at p. 223, this Court (C.A) said:

> "…..a person who makes an averment or assertion, which is denied

by his opponent, has the burden to establish that his averment or assertion is true. And he does not discharge this burden unless he leads admissible and credible evidence from which the facts he asserts can properly and safely be inferred. The nature of each avernment or assertion determines the degree and nature of that burden."

It is not in dispute that the land sold to the defendant by Abusuapanyin Boye Okai is a family property, that is Boi Kwao family of Ofankor. The evidence was clear that Abusuapanyin Boye Okai sold the land absolutely to the defendant. The law was long established in the celebrated case of **KWAN VRS. NYIENI {1959} G.L.R. 67 at 69** that:

"…….a deed of conveyance, mortgaged or lease of family land which is on the face of it executed by the Head and another member, upon proof timeously made without the knowledge and consent of all the principal members of the family is void, and passed no title."

The principle enunciated in that case emphasizes the fact that the sale was without the principal members of the family. The principle will equally apply where the sale was conducted by a Head of family alone or a Head of family with ordinary members of the family or a principal member alone and not by the Head of family and all principal members of the family.

Now, what does the evidence say? In this case, the evidence showed that the plaintiff is challenging the capacity of Abusuapanyin Boye Okai to convey title to the land to the defendant. He testified that at the time Boye Okai conveyed title to the defendant, he was not the Head of Boi Kwao family of Ofankor. Rather, he the plaintiff, was the Head of that family together with the principal members summoned Boye before the chief of Ofankor and challenged him of his capacity. The plaintiff's evidence as the Head of Boi Kwao family of Ofankor was corroborated by P.W. 1, Anyigba Andrews, who is the tenant-farmer, on the disputed land. The P.W.2, Benjamin Kpakpo Allotey @ Tordi however, gave conflicting evidence. The conflicts spoken of were the following.

He knew Abusuapanyin Boye Okai as the Head of Boi Kwao family when he was alive. He died about 5 to 6 years ago.

On the conflicting evidence given by Benjamin Kpakpo Allotey (P.W.2), I will make an observation on it. When a person gives conflicting stories on the same issue, it is the duty of the court to consider their effect on the credibility of the witness as well as the entire case of the party for whom he/she testified. In the instant case, the court finds P.W.2 to be an unworthy and unreliable witness. His evidence would not be relied on by the court. However, there was enough e evidence on record that the plaintiff was the Head of Boi Kwao family at the time Boye Okai conveyed title to the defendant herein.

The defendant traced his title from the original first defendant, Abusuapanyin Boye Okai, who died before evidence was taken by the trial court and no substitution made thereto. The validity of the title of the defendant was therefore contingent on the validity of the title of Abusuapanyin Boye Okai. But the pertinent question to ask is: What then was the title of Abusuapanyin Boye Okai, which he purported to have passed on to the defendant herein? Did he deal with the land as family property or as his personal property? Answers to these vital questions can be ascertained from the record of appeal.

Even a cursory reading of the evidence of the defendant (including his witnesses) show that his case is different from and inconsistent with that which he and his grantor, Boye Okai have put forward in their pleadings. By their statement of defence jointly filed by the original first defendant, Boye Okai (the defendant's grantor), and the defendant herein, on 9 March, 1994, the defendant claimed that his grantor, and his family, that is the plaintiff's family agreed to convey title to their family land to the defendant herein for a consideration of ¢4 million.

However, the evidence of the defendant show that Boye Okai, dealt with the land as his personal property. This was amply corroborated by the defendant himself, D.W. 1 Robert Kojo Oppong and D.W. 2 Ben Asare Adjei in their testimony in court. Before the court, D.W. 2 stated as follows:

> "……Because of problems about sale of land, I asked him what indicated the land was his. <u>He showed me some documents and said his father gifted it to him…..</u>" {emphasis mine}.

In cross-examination of D.W.1 by counsel for the plaintiff, at page 79 of the record; this is what transpired:

"Q: I suggest to you that in or 1991 when Boi Okai purported to sell the land the land belonged to the family?

A: He said it was his so I cannot tell."

The issue of land conveyed to the defendant by Boye Okai as his personal property arose in the course of cross-examination of the plaintiff by defendant and the following exchange between defendant and the plaintiff is worth reproducing:-

"Q: Ago who inherited your grandfather in 1932 gifted the land to the 1st defendant.

A: That is not correct."

Worse still the defendant tendered Exhibit 1 which is the indenture/document evidencing the sale transaction between Boye Okai and the defendant. The ownership portion of the conveyance Exhibit 1 reads:-

"……**WHEREAS** the Vendor being so seized as aforesaid under Customary Deed of Gift from his Late Step father Aggo Kobbla and family of Asiniwokuwe of Ofankor…."

From the above pieces of evidence, it is abundantly in clear that the evidence of the defendant in court was a clear departure from his pleadings. In the case of **DAM VRS. ADDO {1962} 2 G.L.R. 200 at 203 S.C.** it was held inter alia that:

"A court must not substitute a case "proprio motu" nor accept a case contrary to or inconsistent with, that which the party himself put forward, whether he be the plaintiff or the defendant ."

See also **ALLOTEY and OTHERS VRS. QUARCOO {1981} G.L.R. 14 C.A.**

In a recent case of **APPIAH VRS. TAKYI {1982-83} 1 G.L.R. 1,** the Court Appeal has even held that where there was a departure from pleadings at a trial by one party whereas the other's evidence accorded with his pleadings, the latter's was as a rule preferable.

With the above authority as my guide, I prefer the evidence of the plaintiff to that of the defendant which is in accord with his pleadings that the land the subject of this

appeal, purportedly conveyed to the defendant as the property of Boi Kwao family of Ofankor and not as the personal property of Boye Okai.

Now back to the issue of capacity. The most crucial issues to be resolved are: Did Boye Okai have capacity to dispose of their family land by an outright sale to the defendant?: Was he the Head of Boi Kwao family of Ofankor at the time of the sale? Did he have the consent of the principal members of the family? Was the plaintiff the Head of Boi Kwao family of Ofankor at the time of the sale? Was he aware of the sale? Answers for these questions can also be found on the record.

Exhibit 1, the Indenture covering the outright sale of the land to the defendant spelt out the defendant's grantor's root of title. The first part of Exhibit 1 which deals with the preamble, that is, commencement, date and parties states:-

> "**THIS INDENTURE** is made the 4th day of October, 1978 between Abusuapanyin Boye Okai**, <u>Head and Lawful Representative of a Section of Asiniwokuwe family of Ofankor"</u>** {Emphasis mine}.

The question now is: which section of Asiniwokuwe family of Ofankor was Boye Okai the Head? Is that section of Asiniwokuwe family a part of Boi Kwao family? Who was the overall Head of their family?

In any case; if Boye Okai in Exhibit 1 claims to be a Head of a section of Asiniwokuwe family of Ofankor, then ipso facto, he admits not being the overall Head of that family. Who then was the Head?

Indeed the admission of Boye Okai in Exhibit 1 to be the Head of a section of Asiniwokuwe family and not the whole family is another complete depature from his pleadings that he was the Head of Boi Kwao family of Ofankor. In **<u>APPIAH and OTHERS VRS. AKOS TRADING COMPANY</u> {1972} 1 G.L.R. p. 28,** it was held that:-

> "A party is bound by his pleadings and cannot at the trial set up a case different from that which he had pleaded….."

The defendant herein is therefore bound by his pleadings. He therefore cannot change his case without amending. The defendant did not amend his pleadings. Therefore he is bound by his pleadings that the land in dispute is a family property.

In any case, since Boye Okai by the words in Exhibit 1 is asserting the affirmative that he was the Head and Lawful representative of a section of Asiniwokuwe family of Ofankor, the burden shifted on him or defendant to discharge that obligation as stated in Section 11(1) of the Evidence Decree, 1975 {N.R.C.D. 323}.
But the defendant's grantor could not do so until his demise and no substitution was made to discharge that burden. The defendant is therefore bound by his pleadings.

For these reasons, the principle of law in **DAM VRS. ADDO** {supra} and **APPIAH VRS. TAKYI** {supra}is applicable here too. I therefore prefer the evidence of the plaintiff to that of the defendant which is in accord with his pleadings that the plaintiff was the Head of Boi Kwao family of Ofankor at the time of the sale of the land by Boye Okai to the defendant herein I also hold that the sale or conveyance of the land by Boye Okai to the defendant was done without the consent of the Head and principal members of Boi Kwao family of Ofankor.

It was held in **DOTWAAH and ANOTHER VRS. AFRIYIE {1965} G.L.R.** 257 S.C. that a conveyance made by any other member of the family without the Head of family or the successor is void ab initio. Again in the case of **FIAKLU VRS. ADJIANI {1992} 2 G.L.R. 209 C.A.** cited with approval in **WORDIE and OTHERS VRS. AWUDU BUKARI {1976} 2 GLR 371 C.A.;** it was held that conveyance made in the absence of the requisite consent passed no title whatsoever and was void ab initio.

This brings me to the question: what then is the effect of the Indenture, Exhibit 1, that is, the conveyance made by Boye Okai to the defendant? Was it a void conveyance? The position of the law is that a conveyance made without the consent of the requisite authority, be it traditional or otherwise, was void ab initio.
See **MENSAH VRS. GHANA COMMERCIAL BANK and ANOTHER 3 W.A.L.R..** 123.

Thus in the absence of consent from the plaintiff as Head of family and other principal members, Exhibit "1" passed no title whatsoever and is void ab initio. I therefore hold that Boye Okai did not have the requisite capacity to convey title to the land, the subject of this appeal to the defendant herein as he did and the purported conveyance is void ab initio.

The first ground of appeal urged on us was the ominibus ground that the judgment was against the weight of evidence.

An appeal is by way of re-hearing Rule 8(1) of C.I. 19 and in the case of JUAKWA VRS. BOSOM {2001-2002} S.C. G.L.R. 61, the Supreme Court held that an appeal is by way of rehearing, particularly where the appellant alleges in his Notice of Appeal that the decision of the trial court is against the weight of evidence.

In such a case, it is incumbent upon the appellate court to analyse the entire record of appeal, take into account the testimonies and all the documentary evidence adduced at the trial before arriving at its decision so as to satisfy itself that on the preponderance of the probabilities, the conclusions of the trial Judge are reasonably supported by the evidence.

It seems to me that the Learned Trial Judge with all due deference failed to critically consider the evidence of the plaintiff. Her finding and conclusion on the issue of capacity against the defendant's grantor were not borne out by the evidence. I therefore accept the contention of counsel for the appellant that the judgment was against the weight of evidence.

I have no doubt in my mind that the Learned Trial Judge would have found for the appellant if she had not erroneously misdirected herself as to the law of capacity.

In the premises, I will allow the appeal and reverse the judgment of the High Court, Accra dated 24th February 2004 and enter judgment for the plaintiff for his claims endorsed on his writ of summons.

F. KUSI-APPIAH
JUSTICE OF APPEAL

KANYOKE , JA :- I agree with my brother Kusi-Appiah J.A. that the appeal should and is hereby allowed.

In my opinion the issue of capacity of the 1st defendant in connection with the sale of the land in dispute to the respondent is crucial to the fate of this appeal. I therefore propose

to add words of my own on this crucial issue. I do this mindful of the principle of law that generally an appellate court should be extremely slow in disturbing findings of fact made by a trial judge. This rule or principle of law is however flexible and its application depends on the facts and circumstances of each case. As the Supreme Court explained in **Barclays Bank Ghana Ltd. Vrs. Sakovi{1996 – 97}S.C.G.L.R. 639 at p. 461:**
"Where the findings were based on undisputed facts and documents, the appellate court was in a decidly the same position as the lower court and could examine those facts and materials to see whether the lower court's findings were justified in terms of the relevant legal decisions and principles."

Also in the case of **Cudjoe Vrs. Kwatchey {1935} of W.A.C.A. 371 at p. 374** the West African Court of Appeal stated the same principle as follows:

> "(1) The appellate court is not debarred from coming to its own conclusion on the facts and where a judgment has been appealed against on the ground of weight of evidence the appeal court can make up its mind on the evidence not disregarding the judgment appealed from but carefully weighing and considering it and not shrinking from overruling it if on the full consideration it comes to the conclusion that the judgment is wrong."

See also the cases of **Koglex Ltd. (No.2) Vrs. Field {2003} S.C.G.L.R. 170, S.C.** and **Bonney Vrs. Yankum {1961} 1 G.L.R. 133, C.A.** With this principle of law in mind I proceed to consider the fate of this appeal. As far as the capacity of the 1st defendant is concerned, paragraphs (a) – (c) of the grounds of appeal are relevant. They are as follows:

(a) The judgment is against the weight of evidence.
(b) The trial judge failed to adequately consider the evidence of the appellant.
(c) The trial judge failed to adequately consider the capacity of Boi Okai since the appellant is the head of family."

In his written submissions learned counsel for the appellant submitted that the trial judge based her finding that the 1st defendant was the head of the Boi Kwao family on and simply because (1) the 1st defendant carried the title, Abusuapanyin and secondly (2) because the appellant said in cross-examination that if the transaction was a lease and not a sale he would not have minded.

In the view of learned counsel for the appellant the conclusion of the learned trial judge that the 1st defendant was the head of family on the basis of these facts is wrong and unjustified because in the first place the term "Abusuapanyin" is unknown to the Gas. According to counsel among the Gas, the head of family is called "We Kumtso" or "Wekumpka" and not 'Abusuapanyin.' The respondent thinks otherwise.

In her judgment the learned trial judge rightly in my opinion asked herself this question…."who is the head of Boi Kwao or Boye family." She then continued as follows:-

"It is quite notworthy that Boye Okai was described throughout as Abusuapanyin Boye Okai by both the plaintiff and P.W. 2 who are both family members.
The writ of summons describes Boye Okai thus and in their evidence both plaintiff and P.W. 2 throughout referred to him as Abusuapanyin. Plaintiff got to know when he became head that Abusuapanyin Boye Okai had sold family land.

It is a great pity that 1st defendant Boye Okai was not substituted after his death at least by one of the principal members of the family to testify as to the titlehood of the plaintiff and the 1st defendant. We had P.W. 2 who testified that plaintiff was head of Boye Kwao family but also testified that Abusuapanyin was also a member of the same family. Plaintiff stated that Boye Okai was a principal member of Boye Kwao family. There was no evidence to distinguish between Abusuapanyin and the head of family. Here I believe it was very crucial for plaintiff to have led evidence to establish that he indeed was the head of family or to explain why Boye Okai was given the title Abusuapanyin if indeed he was not….

The defendant, D.W. 1 and D.W. 2 also gave evidence that they know Boye Okai as Abusuapanyin of the family and at least for the defendant, Boye Okai was held out as the Abusuapanyin."

Thus from this passage it is true that one of the reasons that influenced the trial judge to find that the 1st defendant was head of the Boi Kwao family was because he had the title "Abusuapanyin." I agree with the trial judge that the appellant had a duty to prove that he was the head of family but I disagree with her that it was the duty of the appellant to explain why Boye Okai (1st defendant) was given the title "Abusuapanyin."

The trial judge failed to appreciate the fact that the appellant instituted this action on the basis of the sale transaction – exhibit 1.

In Exhibit 1 it is the 1st defendant who described himself as "Abusuapanyin." In cross-examination D.W. 2 – gave the circumstances under which exhibit 1 was prepared. This is what transpired in the cross-examination of D.W. 2

"Q: Exhibit 1 the instrument which transferred the land you were trying to explain some discrepancy in the date.

A: At the time the documents were to be prepared I took Boi Okai (ie. 1st defendant) to a certain lawyer at Lands Department. They know how to prepare the documents. So he gave the documents to the lawyer and he being the lawyer prepared the documents."

The 1st defendant therefore accompanied D.W. 2 to the Lands Department where Exhibit 1 was prepared. The reasonable inference is therefore that it was the 1st defendant who gave his title as "Abusuapanyin" to the lawyer to be inscribed in Exhibit 1. The appellant obviously therefore used the word "Abusuapanyin" to describe the 1st defendant in the body of the writ of summons because that is the description of the 1st defendant in exhibit 1. It was therefore the duty of the 1st defendant to adduce evidence to show why he was called Abusuapanyin though he is a Ga and not an Akan. Since that was the case of the 1st defendant and the respondent at the court below that the defendant was the head of the Boi Kwao family at the time of the sale transaction (i.e. at the time of the execution of Exhibit D) it was incumbent on 1st defendant to establish by evidence that "Abusuapanyin" meant head of family and how he became "Abusuapanyin" in order to avoid a ruling against him on that issue as provided under Section 11(1) of the Evidence Decree, 1975 (N.R.C. 323) which provides that:

"11(1)…….the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue."

The learned trial judge therefore erred in law in shifting the burden of proof to the appellant on the issue of why the 1st defendant was called Abusuapanyin. In any case there is no evidence on the record to show that even among the Akans "Abusuapanyin" means head of family. In the instant case the 1st defendant died before he could testify

and for reasons best known to the respondent an attempt to substitute the 1st defendant was fiercely and successfully resisted by the respondent. Neither D.W.1 nor D.W. 2 in his evidence testified on how and why the 1st defendant a Gaman came by the title "Abusuapanyin."

The second reason given by the learned trial judge that because the appellant said in cross-examination that he would not have minded if the transaction was a lease, that was on admission that the 1st defendant was head of the Boi Kwao family is baseless and preposterous to say the least Whether that transaction was a lease or a sale did not by itself provide proof that the 1st defendant, was head of family at the time of execution of Exhibit 1.

In civil proceedings where the capacity of the plaintiff or the defendant is raised it has to be strictly proved by evidence. If the capacity of the plaintiff like in the instant case to have instituted the action is challenged he must prove his capacity otherwise the action would be thrown out. Similarly if a case is made that the defendant had no capacity to do what he did culminating in the suit, he too must prove that capacity whether or not he has counter claimed otherwise what he did would be held to be null and void and of no consequence whatsoever. In the instant case though the 1st defendant did not counterclaim his capacity to have conducted the sale transaction as head of family was challenged and made an issue in the summons for directions.

The 1st defendant therefore had an obligation to also produce evidence to show that at the time he undertook the transaction in exhibit 1 he was head of the Boi Kwao family as pleaded by him in his statement of defence in order to avoid a ruling against him on that issue. See paragraphs 4 – 11 of the statement of defence. But as I said the 1st defendant failed to discharge this obligation. The learned trial judge should therefore have ruled against him on that issue.

But that is not all. The learned trial judge seriously failed to consider the contents of Exhibit 1 vis-à-vis the statement of defence. The case of the 1st defendant as averred in paragraphs 4 – 11 particularly in paragraphs 8, 9 and 10 of the statement of defence is that when his grandfather – Boi Kwao died it was his father who succeeded him as head of family and took over control and possession of the Aboasu family land and that when his father also died, he succeeded him as head of family and also took over control and

possession of the Aboasu family land. According to his pleading, it was in that capacity as head of that family that he and some of the principal member of the family sold the land in dispute to the respondent. In short the case of the 1st defendant as pleaded by him is that the land he sold to the respondent was his family land meaning the Boi Kwao family of Ofankor and secondly that he was the then head of family at the time.

But the contents of exhibit 1 are to the contrary and are in fact poles apart from the averments in the statement of defence.

For example the opening paragraph of Exhibit 1 is in these words:-

> "This Indenture made the 4th day of October 1978 Between Abusuapanyin Boye Okai, Head and Lawful Representative of **a Section of Asiniwokuwe family of Ofankor** in the Greater Accra Region of Ghana….."

So whilst in Exhibit 1the 1st defendant is described therein as head and lawful representative of **a Section of Asiniwokuwe family of Ofankor,** in paragraph 8 of the statement of defence the 1st defendant averred that when his father died the Boi Okai family land came "into the hands of the 1st defendant as head of the family…."

The 1st defendant never pleaded in his statement of defence that the Boi Kwao family is also known as Asiniwokuwe family or that the Boi Kwao family had sections or branches and sectional or branch heads. No evidence whatsoever was also led on these crucial issues of fact.

Again whilst in his pleadings (statement of defence) the 1st defendant averred that the land he sold to the respondent was part of Boi Kwao family land in exhibit 1 the same 1st defendant said the land he sold to the respondent was his own personal property which was gifted to him by his step father. Thus the second paragraph of Exhibit 1 states:

> "Whereas the vendor at the Date hereof and immediately prior to the execution of these presents is seized of an Estate absolutely in said piece or parcel of land described in the schedule herein and intended to be hereby conveyed. Whereas the vendor being so seized aforesaid under customary Deed of Gift from his late step father Ago Kobla and family of Asiniwokuwe of Ofankor." (emphasis mine).

The inevitable inference from these two passages of Exhibit 1 is that if the 1st defendant was head of family at all, then he was a sectional head of the Asiniwokuwe family of Ofankor and not head of the Boi Kwao family of Ofankor and that if he sold any land to the respondent then it was his own personal land gifted to him by his step father and not the Boi Kwao family land. As I have already noted the 1st defendant did not live to testify in court to explain this serious and fatal conflict in his pleadings and the contents of Exhibit 1.

It has to be noted that land is the central baseline in this action but the appellant is not by this action seeking a declaration of title to that land. What the action is, is essentially one to set aside a sale transaction couched in an Indenture executed between the 1st defendant and the respondent for the reason that the land subject-matter of the sale is the family property of both the 1st defendant, the appellant and other members of the same family and that the 1st defendant was not the head of family so he had no capacity to sell that land.

In otherwords in the instant case none of the parties sought a declaration of title to the land in dispute. The parties agree that the land was Boi Kwao family land and that they ie. appellant and 1st defendant were members of that family. Therefore in the circumstances of this case the principle that inclaims for title to land the plaintiff must rely on the strength of his own case and not on the weakness of the defence is not applicable. The trial judge should therefore have considered not only the description of the 1st defendant as Abusuapanyin as the guiding factor but she should have considered the totality of the evidence including the documentary evidence (exhibit 1) very carefully before arriving at his finding that 1st defendant was head of family.

For obviously the contents of Exhibit 1 have very seriously and totally dented the averments in the 1st defendant's statement of defence for as already stated, by his pleadings the 1st defendant averred that he was the head of the Boi Kwao formerly of Ofankor and that he alienated the land to the respondent in his capacity as head of that family but the passages quoted above from Exhibit 1 show to the contrary. He never pleaded that he was gifted the land by his step father.

I concede that in his evidence in chief PW2 said 1st defendant was head of the Boi Kwao family but he did not give the period when 1st defendant was head of the Boi Kwao

family. But even quite significantly PW2 also said the appellant was the incumbent head of the Boi Kwao family. In effect this is not the situation in which the witness of a party has corroborated the case of that party's opponent whilst that same witness failed to corroborate the case of the person who called him. The case of **Asante Vrs. Bogyabi & Ors. {1966} GLR 232** cited by the respondent is therefore not applicable in the circumstances of this case. In any case the evidence of PW2 on the headship of 1st defendant is weightless having regard to Exhibit 1.

By way of a rehearing I have myself perused, examined and carefully considered the totality of the evidence on the record and I have come to the conclusion that the finding of the trial judge that the 1st defendant was the head of the Boi Kwao family of Ofankor is not supported by the evidence on the record. That finding is clearly against the weight of the evidence and unjustified. It is significant to note that both DW1 and DW2 who were the contact men between the 1st defendant and the respondent were emphatic in their evidence that the 1st defendant told them that the land he wanted to sell and which he purported to sell to the respondent was his personal property, having been gifted that land by his step father. But it turned out during the trial that, the land sold to the respondent is not the personal property of the 1st defendant but the property of the Boi Kwao family. The evidence is overwhelming that after all the 1st defendant was not the head of the Boi Kwao family. This is proved by the 1st defendant's own document – Exhibit 1. In cross-examination the respondent had to embarrassingly admit that the 1st defendant was not the head of the Boi Kwao family. In that cross-examination the following transpired:

"Q: I further suggest to you that at the Palace of Ofankor Mantse, your Vendor, Boye Okai sought to lay exclusive claim to the land saying the land belonged to his father to the exclusion of the entire family.

A: As I said the title was couched, as if the Vendor was the head of family, hence the the disagreement." (My emphasis).

The evidence is therefore overwhelming that Exhibit 1 does not portray the true position of the 1st defendant and the correct status of the land described therein Exhibit 1 is a complete misrepresentation; it is false and clearly fraudulent.

My conclusion is therefore that on the totality of the evidence the 1st defendant was not proved to be the head of family of the Boi Kwao family of Ofankor at the time he purported to sell the land to the respondent. The law is that it is only the head who together with the concurrence of the principal members or some of the principal members of the family who can legally alienate family land. Therefore any alienation of family land by only the principal members of the family without the head of family is null and void and any document such as an Indenture prepared and executed on the basis of such alienation is equally null and void. In the case of **Allotey Vrs. Abrahams {1957} 3 W.A.L.R. 288,** the legal position is stated therein as follows:

"According to native custom it is only the occupant of the stool or the head of family who is entitled with the consent and concurrence of the principal elders of the stool or family to alienate stool or family land. There can be no valid disposal of stool or family land without the participation of the occupant of the stool or the head of the family……

The occupant of the stool or the head of family is an indispensable figure in dealing with stool or family land.

Therefore the law is that a deed of conveyance of stool or family land executed by the occupant of the stool or the head of family and a linguist and or other principal elders of the stool or family purporting to be with the necessary consent is valid…..

On the other hand a deed of Conveyance of stool or family land which on the face of it is executed only by the principal elders of the stool or family, no matter how large their number is prima facie void ab initio, since on the face of it the indispensable person – the occupant of the stool or the head of family, is not a party to it {My emphasis}.

See also **Mensah Vrs. Ghana Commercial Bank & Anor. {1957} 3 W.A.L.R. 123.** In the instant case, on the balance of probabilities, the case of the appellant that he was the head of family is more reasonable and preferable than that of the 1st defendant who did not give evidence to support his averments. DW1 and DW2 did not also give evidence to support the case of the 1st defendant as averred. Since the 1st defendant was not the head of the Boi Kwao family he had no capacity to alienate any portion of the Aboasu land to anybody without the consent of the accredited head of that family being the appellant. Consequently since the evidence is that the appellant was not a party to

Exhibit 1, that sale transaction couched in Exhibit 1 is null and void. The Indenture (Exhibit 1) is equally null and void. That sale transaction and the Indenture are accordingly set aside. Having come to the conclusion that the sale transaction and the Indenture (Exhibit 1) are null and void and must be set aside; I do not find it necessary to consider the other grounds of appeal as that will be an exercise in futility.

In conclusion I will allow the appeal. The judgment appealed from is hereby set aside. In its place judgment is entered for the appellant for the reliefs endorsed on the writ of summons.

S.E. KANYOKE
JUSTICE OF APPEAL

OWUSU, JA:- I entirely agree with the judgment of my brother Kusi-Appiah J.A. as supported by the judgment of my brother Kanyoke J.A that on the issue of capacity, the appeal be allowed.

R.C. OWUSU
JUSTICE OF APPEAL

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ADU KOFI DJIN, ESQ FOR HIMSELF.

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