IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL - A C C R A

CORAM:- ASARE KORANG, JA [PRESIDING]
QUAYE, JA
DUOSE, JA

H1/25/2007
THURSDAY, 29TH MAY, 2008

NII PAUL AYITEY TETTEH
[SUBSTITUTED BY
ARTHUR HAMMOND TETTEH QUARCOO
SUING PER HIMSELF AND AS THE
HEAD OF ONAMROKO-ADAIN FAMILY
ACCRA .. **PLAINTIFF/RESPONDENT**

A N D

1. B.A. QUARCOO
H/NO. 24 OKATEI – NETTEY STREET
KORLE WORKO

2. JAFRO MENSAH LARKAI
H/NO. DOMIABRA STREET
KOTOBABI – ACCRA **DEFENDANTS/APPELLANTS**

A N D

1. B.A. QUARCO
2. JAFRO LARKAI **PLAINTIFFS/APPELLANTS**

V E R S U S

1. ARTHUR HAMMOND TETTEH
2. JUSTICE AYAA CUDJOE
ALL OF ACCRA **DEFENDANTS/RESPONDENTS**

JUDGMENT OF APPEAL

DUOSE, J.A. :- This is an appeal from the decision of an Accra High Court in a consolidated suit dated 21/03/08 . The judgment granted all the reliefs sought in the first

suit except the claim for general damages for personal injuries done to Paul Ayitey Tetteh on the ground that "the action did not survive him personally, because of the "Plaintiff having died during the pendency of the suit, he is not entitled to general damages." The second suit issued by the Defendants to the original suit was dismissed and the counter claim therein was granted with costs of ¢20,000,000.00 against the Defendants in both suits. For purposes of these appeals I shall refer to the Plaintiff in the first suit and the Defendants in the second suit as Respondents and the Defendants in the first suit who were Plaintiff in the second suit as Appellants.

Being dissatisfied by the judgment, the Appellants filed in all eighteen grounds of appeal, but argued only five of them. They are (1) ground one of additional grounds of appeal filed on 22-05-07. (2) additional ground one filed on 04-08-06. (3) ground two of second additional ground of appeal filed on 22—05-07, (4) ground three of first additional grounds of appeal and (5) ground four of additional grounds of appeal filed on 04-08—06.

On the other hand the Respondents filed three grounds by way of cross appeal and argued all three.

I now proceed to consider the grounds of appeal filed and argued seriatim.

1 (1) Ground one of Additional grounds of appeal filed on 22-05-07.

The trial of the action Paul Ayitey Tetteh instituted in 2002 Challenging the legality of his removal as head of family was a nullity because the motion to substitute some one for him as Plaintiff after his death was not taken and granted so there was no existing Plaintiff before the court when that suit was heard and judgment given in his favour.

(2) The trial judge erred in law in not striking out the suit No. F. 2453/2002 when Nii Paul Ayitey Tetteh died since the action instituted by him was to vindicate his personal status as head of the Onamrokor – Adain family and the cause of action did not survive his death.

In his argument learned counsel evoked the common law maxim "actio personalis montur cum persona" and stated that the action taken by the Respondent was to vindicate his personal status as head of the Onamroko Adain Family which the Appellants were

usurping Having died before he could vindicate his position the cause of action did not survive him either for the benefit or to the detriment of his estate.
It is not an action that his personal representatives can inherit. Statutory authority for this maxim is Order 4 rule 6(1) of the High Court Rules CI 47. He referred to the English authority of **JAMES V. MORGAN [1909] KBD 564.** Equally so that in the circumstances nobody could be substituted for Nii Paul Ayitey Tetteh.
See also **BOWKER V. EVANS [1885] QBD 565.** Further the application for substitution was not granted and as such was not drawn up as it was with regards to the consolidation. In the result when the matter was tried to conclusion and judgment, there was no Plaintiff properly so before the court. That counsel for the Respondent deliberately misled the learned trial judge who had freshly assumed jurisdiction over the case to assume that the issue of substitution had been concluded.

In reply counsel for the Respondents made efforts to rehabilitate its position. It was submitted that the Appellants acquiesced in the error made by the court to proceed to judgment in the teeth of the demise of the original Plaintiff and of the fact that substitution was not effected. That therefore under the authority of **REPUBLIC V. HIGH COURT, ACCRA, EXP ARYEETEY [ANKRAH INTERESTED PARTY] [2003 – 2004] 1 SCGLR 389 at 391,** the Appellants must be stopped.
That the motion was moved and counsel for the Appellants withdrew his affidavit in opposition, the consequence of a formal withdrawal was that he agreed to the substitution. Counsel concedes that there was no formal order of the substitution however in view of the conduct of the counsel on the other side the trial judge properly deemed that the parties had agreed to the substitution.

Having studied the records, it will appear that had learned counsel for the Respondent conducted her affairs before the new judge differently the judge would not have assumed that substitution was either agreeable or had been made. I am bound to reproduce what transpired on the records on the 9th of March 2005 when the matter first came before the trial judge on page 201 of the record….."1st Plaintiff in 1st suit, substituted by Arthur Hammond Quarcoo - Present.

Defendants in 1st suit - Absent.

1st Plaintiff in 2nd suit Arthur Hammond - Present

2nd Plaintiff and Defendants - Absent.

Mrs. M.Y.N. Acheampong for the Plaintiff in 1st suit - Present.

Messrs Anokye Johnny Hanson for the Defendants - Absent"……after other matters were considered the matter was adjourned to 17-03-05 and costs of ¢500,000.00 awarded against the absentees for failing to attend court, having been properly notified. The title of the suit changed at the next hearing dated the 17-03-05 to read **PAUL AYITEY TETTEH** substituted by **ARTHUR HAMMOND TETTEH QUARCOO.** From that day forward the suit proceeded to trial as if substitution had been made. In my opinion substitution is a very serious process in litigation. The application for substitution may be on notice or exparte. It must be made by the person seeking to be substituted or on his behalf. The affidavit in support must be sworn to personally by the applicant or a representative who must depose to the following: (1) The cause of action and the remedy or relief sought. (2) The stage of proceedings at the point of application. (3) That not withstanding the death of the party to be replaced or substituted, the cause of action survives either by virtue of statute or right. (4) The interest of the substitute must be indicated as a legal representative or successor, or next of kin as the case may be. In the application before the trial court it was counsel herself who deposed to the affidavit without disclosing the essential facts needed to be considered to grant substitution. Both Lawyer Anokye and Jafro Mensah Larkai 2nd appellant herein filed affidavits in opposition. The affidavit of Lawyer Anokye was withdrawn but that of 2nd appellant was still on file. From the foregoing it is clear that a person seeking to be substituted in an action pursuant to the demise of a party must lead affidavit evidence on his locus standii.

From all the circumstances the deceased took a personal action in tort to vindicate his personal position as a head of family. It was held in **BOWKER V. EVANS [1885] QBD 565** – that the cause of action being in tort died with the Plaintiff and did not pass to his personal representative." …..That legal position notwithstanding, the person of ARTHUR HAMMOND TETTEH QUARCOO never became a party to the suit. As such I will hold that the appeal succeeds on this ground and the judgment of the trial court is accordingly set aside. See **AMOAKO V. HANSEN [1987 – 88] 2 GLR 26. PETER ANKOMAH V. CITY INVESTMENTS CO. LTD. Court of Appeal 1/6/07** unreported.

(2) Ground two of the second additional ground of appeal filed on 22-05-07 reads as follows:-

> "The order for consolidation with the second suit together with the purported trial of the two actions as consolidated was a nullity since there is no Plaintiff in one action when the consolidation and the trial took place."

From the records the order for consolidation was made on 03-02-05. From the same the said Nii Paul Ayitey Tetteh died on the 4th of October 2004. The application for substitution was filed on 13th October 2004. It follows from the decision concerning substitution that the consolidation was improper since the said Nii Paul Ayitey Tetteh was not a party in suit No. BFA 31/05. Again the subject matter of the contests and the parties in suit No. F. 2453/02 and BFA. 31/05 are not the same. Indeed the relationship between the two can be grounded in the fact that the two suits concern affairs within the Onamroko Adain Family. At the time of the consolidation Nii Paul Ayitey Tetteh had died and his suit died with him. Even if he could be substituted, that had not been done prior to the consolidation therefore it is lawful to hold that there was no Plaintiff in the suit No. F. 2453/2002. The consolidation in the circumstances was premature and therefore null and void.

(3) GROUND III of the first additional grounds of appeal reads as follows:-

> "The trial judge erred in law in entering the claim against Justice Ayaa Cudjoe in suit No. BFA 31/05 since it was a cause or matter affecting Chieftaincy over which the High Court had no jurisdiction."

According to counsel for the Respondent the Appellant who launched the writ can not be heard to raise this objection or ground of appeal.

Article 277 of the Constitution 1992 defines chief as follows:

> "Chief" means a person, who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled, or enskinned or installed as a chief or queen mother in accordance with the relevant customary law and usage."

In the light of the above provision of the Constitution one only has to look at the endorsement on the statement of claim filed by the Appellants to discern their intentions and or purpose. It reads "An injunction to restrain the defendants by themselves,

> Their servants, assigns or agents, or otherwise howsoever from Installing a chief at Dome and burying Paul Ayitey Tetteh (Deceased) at the cemetery reserved for the substantive head of the Onamroko Adain Family of Accra.

In **BAAFOUR KWAME FANTE ADUAMOA II & ORS. VRS. NANA GYANKORANG ADU TWUM II SC** dated 9/2/00 suit No. 3/94. The Supreme Court faced with the question what is a Chieftaincy matter adopted the following procedure, per Acquah J.S.C. and I deem it fit to reproduce relevant portions of that judgment for emphasis. At the end it will be patent that Art 277 of the Constitution 1992 is only a summary of the relevant section of the Chieftaincy Act 1971 (Act 370).

Acquah J.S.C. as he then was set out in the following fashion. "A cause or matter affecting Chieftaincy is defined in S 66 of the Chieftaincy Act 1971 (Act) (370) as follows. "Cause or matter affecting Chieftaincy means any cause or matter, question or dispute relating to any of the following.

(a) Nomination, election, appointment or <u>installation</u> of any person as a chief or the claim of any person to be nominated, elected, appointed or installed as a Chief.

(b) The destoolment or abdication of any Chief."

(c) The right of any person to take part in the nomination, election, appointment or <u>installation</u> of any person as a Chief or in the destoolment of any chief.

(d) The recovery or delivering of Stool property in connection with any such nomination, election, appointment, <u>installation</u> destoolment or abdication.

(e) Constitutional relations under customary law between Chiefs.

This he did in order to put beyond doubt whatever the necessary details of the

situation was relating to a cause or matter affecting Chieftaincy. His conclusion which I shall soon quote will lay to rest the vexed question in this appeal as to whether suit No. BFA 31/05 was a cause or matter affecting Chieftaincy.

> "The 1992 Constitution which granted to the Supreme Court original Jurisdiction to interpret and enforce the provisions of the Constitution also guaranteed in chapter 22 thereof the institution of Chieftaincy tribunals the jurisdiction to determine any cause or matter affecting Chieftaincy. In this wise the Supreme Court was vested with final Appellant jurisdiction from the decisions of the judicial committee of the National House of Chiefs.
>
> The Supreme Court has no jurisdiction to determine at first instance actions seeking the destoolment of a Chief"……Accordingly notwithstanding the manner in which the Plaintiffs action is presented, it is clear that its proper forum is the appropriate Chieftaincy tribunal. The appeal succeeds on this ground and it is accordingly dismissed.

(4) This ground is ground IV of the Additional grounds of appeal filed on 4th August 2006. It reads "The trial judge erred in dismissing the claim by the Plaintiff/appellants in suit No. BFA 31/05 concerning the proposed burial of the late Paul Ayitey Tetteh at the family cemetery at Dome in his capacity as head of the Onamnoko Adain Family when by his death he was unable to establish his claim that he was still head of that family when he instituted that action."

I have read the beautiful and clear judgment of the trial court. The conclusions I have arrived at involve painful decision making regarding procedure and the law. In this particular aspect I think the question of the burial of a head of family is not a matter affecting Chieftaincy and was tried in the proper forum. The learned trial judge after taking all the evidence also referred to learned authorities such as (1) **ALLOTEY & OR. VRS. QUARCOO [1980] GLR 788 CA. (2) LARTEY V. MENSAH [1958] 3 WLR 410** Ollenu Principles of Customary Land Law and concluded that the procedure and persons who participated in the meeting whereat the Plaintiffs in case No. BFA 31/05

were elected were not the proper persons vested with power to take such an important customary law decision.

He concluded in the following words at page 450 of the record same as page 17 of the judgment "That being so, can it be said that B.A. Quarcoo and Jafro Mensah Larkai were properly elected as head and assistant head of family I think not because it is not known who actually convened the meeting and presided over it. Apart from two, all the existing members of the Council of elders were not invited to the meeting and so did not take part in the elections. As per Exhibit "A" in the declaration of the Defendants/ Plaintiff, most of the signatories are the direct relatives of B.A. Quarcoo from the Tsotso line of the family. In my view the said meeting and election of the Defendants/Plaintiffs as head and assistant head of family is null and void."

By parity of reasoning I am of the respective view that the meeting and the election from the circumstances was a coup d' etat. That coup d' etat did not succeed in removing Paul Ayitey Tetteh as head of family and the Defendants/Plaintiff now appellants must not be allowed to benefit from it. The appeal therefore fails on that ground and is accordingly dismissed.

The following grounds were filed in a cross-appeal.

(1) Part of the judgment which states that Jafro Mensah Larkai is member of the Onamrokor Adain family of Accra (page 7 and 10 of the judgment).

I am amazed at the argument in support of this ground of appeal. In the first place the issue of whether Jafro Mensah Larkai is a member of the Onamrako Adain Family was not set out in the issues to be tried. If as counsel herself says and the same is attributed to Paul Ayitey Tetteh in paragraph 15 of his statement of claim that Jafro Mensah Larkai is a true member of the family then where in lies the denial of that statement of fact on oath by the so called personal representative of Paul Ayitey Tetteh. In law when a witness testifies to facts that are contrary to his pleadings, the conflicting evidence neutralizes his credibility on the point. Counsel can not therefore seek before this court to take advantage of conflict within her own set of facts. There is no legal reason why this court will give more weight to a party's own conflicting evidence as

against his opponents straight forward evidence. In any case this court holds that the whole trial was a nullity because Nii Justice Ayaa Cudjoe who purportedly testified for the family was not properly before the court as there was no Plaintiff. This ground of appeal is ridiculous and must fail.

(2) Part or the judgment that states that Tetteh Quarcoo was B.A. Quarcoo's father page (10). The short answer to this complaint is that quite apart from the holding by this court that the trial and the judgment in respect of case No. F. 2453/02 was null and void, the parties were tracing linage in the material line. In such circumstances fatherhood is an irrelevant consideration. That ground of appeal should not have been raised at all. It is accordingly dismissed as irrelevant.

(3) The declaration that the subsequent appointment of the substituted Plaintiff (Arthur Hammond Tetteh Quarcoo) can not stand in law.

It is clear from all the evidence that there is a breach or division in the Onamroko Adain Family. The long standing authority on that point can be found in page 167 of Principles of Customary Land Law – in particular **ANKRAH V. ALLOTEY [1943]** Divisional Court – which stated "where a branch is in dispute with another, a head of family appointed by one branch will not be permitted by law. Only a united family can make such an appointment. The two factions must reconcile first."

This ground of cross appeal is entirely without merit and accordingly dismissed.

In conclusion the appeal succeeds in part as earlier indicated. The cross appeal fails entirely and is accordingly dismissed. Finally we observe that the Onamroko Adain Family is split in two between the Dome members and the Accra city members. Well meaning members of the family are advised to heed the authority in **ANKRAH V. ALLOTEY** to take steps to reconcile the family and properly elect a new and mutually acceptable head.

I.D. DUOSE
JUSTICE OF APPEAL

I agree. **A. ASARE KORANG**
JUSTICE OF APPEAL

I also agree. **G.M. QUAYE**
JUSTICE OF APPEAL

COUNSEL: MR. JAMES AHENKORAH FOR APPELLANTS.
MRS. M.Y.N. ACHIAMPONG FOR RESPONDENTS WITH HER NANA YAW ACHIAMPONG AND ELLEN ACHIAMPONG.

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