IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA AD. 2023

CORAM:

H/L Justice Henry A. Kwofie, JA (Presiding)

H/L Justice R. Bernasko-Essah, J.A.

H/L Justice Richard Adjei-Frimpong, J.A.

Suit No.: H1/251/2020

Date: 9th March, 2023

NII ARDE NKPA VI & ORS : PLAINTIFFS/RESPONDENTS

VRS

1. IRRIGATION DEVELOPMENT AUTHORITY & ORS DEFENDANTS/APPELLANTS

2. NII AYINSAH SASRAKU III : 5TH DEFENDANT/APPELLANT

J U D G M E N T

ADJEI-FRIMPONG, J.A.:

The quest of this appeal does not determine the substantive matter in the suit at the court below. The parties before us are fighting over who was the rightful person(s) to prosecute

the matter in representation of the plaintiff family, the Nii Arde Nkpa Family of Plerno of the James Town Division.

The reliefs sought in the suit, for purposes of this appeal are not material to recount in any detail. Put as shortly as possible, the family was challenging the compulsory acquisition and subsequent allocation of part of its lands situate at Weija as described in the schedule to the statement of claim to the 2nd defendant.

Originally, the action was commenced by Nii Arde Nkpa VI, Mantse of Plerno, Nii Offei II, Mantse of Kokrobite, Nii Kwashie Gborlor III, Ngleshie Amanfro Mantse and Chief Ali Agbornarh, Tuba Mantse as 1st, 2nd 3rd and 4th plaintiffs respectively. The representative capacities in which they sued were pleaded as follows:

1. *"1. The 1st and 2nd plaintiffs are the chiefs of Plerno and Kokrobite respectively and are the accredited custodians of Kokrobite lands for and on behalf of the Nii Arde Nkpa Stool Family of Plerno in the James Town Division of the Ga Traditional Council and bring this action on the joint behalves and for and on behalf of the people of Plerno and Kokrobite.*

2. *The 3rd plaintiff is the Chief of Ngleshie Amanfro, Accra, also in the James Town Division of the Ga Traditional Council and brings this action on his own behalf and on behalf of the people of Ngleshie Amanfro.*

3. *The 4th plaintiff is the Chief of Tuba, a predominant farming community and/or settlement near Kokrobite, and is the custodian of Tuba lands for the Nii Arde Nkpa Stool Family of Plerno and brings this action on his own behalf and on behalf of the people of Tuba."*

The defendants cited on the writ were the Irrigation Development Authority, Central Mechanics & Spare Parts Dealers Association (CEMSDA), the Lands Commission Secretariat and the Attorney General.

About two months into the commencement of the suit, the 1st plaintiff, Nii Arde Nkpa VI died. Nii Arde Nkpa VII, the 1st plaintiff/Respondent (hereinafter, 1st plaintiff) in the capacity of the new Chief of the Nii Nkpa Family of Plerno, Kokrobite, Tuba and Langma successfully applied to be substituted for his deceased father. The application was made on 21st April and granted on 5th May 2005. In the course of time, the original 2nd and 4th plaintiffs also passed away and were upon separate applications, successfully substituted also.

About a year later, on 24th May 2006, a certain Nii Ayisan Sasraku III made an application to the court below which would have struck as odd. He prayed in the application that he be substituted for, or made to replace the 1st, 2nd and 4th plaintiffs. He made the application in the capacity of Dzaseste and acting Mantse of the Nii Arde Nkpa We of Plerno, James Town. He claimed to be *"the custodian and proper representative of all lands known as Korkrobite lands".*

The oddity of his application lay not only in the fact that Nii Ayisan Sasraku III waited till the court had made substitution for the deceased plaintiffs before bringing his said application but also how an application could be made for the substitution of living parties in a pending litigation. We state so because at the point of his application, there was no death which had resulted in an assignment or transmission of interest or devolution of liability in terms of Order 4 rule 6 of the High Court (Civil Procedure) Rules, C.I 47 to have warranted an order for substitution. Those who had died had already been substituted in accordance with the said rule. Neither is there anything to show that he had been served with notice as head of family in accordance with Order 4 rule 9 subrule 5 of C.I 47 to enable him apply for such substitution.

In any event, the trial court (as then constituted) decided rather, and rightly in our view, to join Nii Ayisan Sasraku III as a defendant so that the issue of who could properly prosecute the matter on behalf of the family would be determined. He was thus made the 5th defendant. This is what ended up in the preliminary trial at the court below the decision of which is on appeal before us.

At the trial, the case pleaded by the 5th defendant, now the appellant before us, but who retains his initial designation (as 5th defendant) went as follows.

Since the death of Nii Arde Nkpa VI in 2003, nobody had been nominated, elected and enstooled by the family as its Mantse. There was also no Dzasetse at the time of the demise of Nii Arde Nkpa VI. The family therefore appointed three (3) elders, namely the late Nii Tackie Owuowuo III, then Mantse of Korle-Gonno, Nii Odoi II, Dzasetse of Korle Gonno and Mr Francis Martei Dickson in consultation with the Nii Kojo Ababio V, James Town Mantse to run the affairs of the family including managing its land. The said appointment was published in the Daily Graphic of 30th April 2004.

Subsequently, in July 2004, he was installed as Dzasetse of the Nii Arde Nkpa Family. By virtue of his installation, he became the acting Mantse and head of the Nii Arde Nkpa Family of Plerno.

He insisted 1st, 2nd and 4th plaintiffs were neither the Heads of the Nii Arde Nkpa Family nor had they been authorized in any way by himself, the Dzasetse and acting Mantse and head of family to sue for and on behalf of the family. He went as far as counterclaiming against the 1st, 2nd and 4th plaintiffs for a declaration to this effect, seeking also an injunction restraining them from holding themselves out as the lawful representatives of the family.

After what turned out to be a protracted trial, both sides having testified and called witnesses, the learned trial upheld the plaintiffs' case. She concluded on the facts established that, the 1st, 2nd and 4th plaintiffs proved successfully that they were clothed with capacity to represent the family. The 5th defendant on the contrary was unable to satisfy her on his claim to be the true and proper person to represent the family in the action. The 5th defendant consequently appealed in this court on no fewer than 13 grounds. They were formulated as follows:

i. *Ruling is against the weight of evidence*

ii. *The trial judge erred in concluding that because Nii Arde Nkpa VI (a chief) was a prominent member of the Nii Nkpa We, he could come under one of the exceptions as expounded by Brobbey JSC in the Re: Ashalley Botwe lands case on the rule in Kwan vs Nyieni.*

iii. *The trial judge erred in concluding that because at the time of instituting the action there was no substantive head and Nii Arde Nkpa VI was acting head, then he had capacity for which Nii Arde Nkpa VII could substitute although Nii Arde Nkpa VII never described himself as acting Head of family.*

iv. *The trial judge erred in concluding from Exhibit H that the mode of succession was only hereditary from father to son and in some cases from brother to brother whilst Exhibit H said otherwise.*

v. *The trial judge erred that 2nd and 4th plaintiffs had capacity by virtue of being clothed with same by Nii Arde Nkpa VI by virtue of being their caretakers of Nii Arde Nkpa family land.*

vi. *The trial judge erred in concluding that Exhibit F12 made the 2004 installation, a proper one even when all the parties and their witnesses including 1st plaintiff himself had described the 2004 installation as not following proper procedure.*

vii. *The trial judge erred by concluding that by virtue of the wrongful installation of 1st plaintiff in 2004, he became Mantse and acting head of family.*

viii. *The trial judge also erred in concluding that in the absence of a head of family, a chief can play the role of head of family.*

ix. *The trial judge erred that per Exhibit J and K, the chief was clothed with capacity to issue in respect of family lands after erroneously describing the land as stool land.*

x. *The trial judge erred in concluding that the Ga Mantse decision conferred on 1st plaintiff acting head*

xi. *The trial judge erred when she concluded that the appointment of 5th defendant as Head of family did not meet the requirement for the appointment of head of family as stated by Edward Wiredu J (as he then was) Quarcoo v Allotey (1980) GLR 788-798*

xii. *The trial judge in concluding that because the 5th defendant had said he was given position of head of family after his installation as Dzaastse and later confirmed by the principal Elders in 2007, he was not truthful even when the 1st plaintiff, PW1 and PW2 had alluded to the fact that he had acted as head of family.*

xiii. *The trial judge erred in concluding that the Nii Arde Nkpa family was patrilineal and therefore the 5th defendant was not a member of the family.*

Straightaway, we find grounds (ii) and (ix) incompetent. They simply do not flow from the findings of the trial court. They are formulated based either on a misapprehension of

what the trial judge said or deliberate distortion of the findings she made. Such grounds of appeal cannot be admissible in law.

The principle well understood is that a ground of appeal is a complaint against a specific finding of the lower court in the decision complained of. It must therefore relate to, arise or flow from the decision complained of. Consequently, a ground of appeal that is not related to, or does not arise or flow from the decision appealed against is incompetent by reason of it disclosing no reasonable ground of appeal. Such grounds are liable to be struck down. See MERCANTILE BANK OF NIGERIA PLC & ANOR VRS LINUS NWOBODO (2005)7 S.C.N.J 569; (2005)5 N.W.L.R (PT 917) 184; DAGACI OF DERE & ORS VRS DAGACI OF EBWA & ORS (2006)7 N.W.L.R. (PT. 979) 382.

To start with, the trial judge did not conclude, as canvassed under ground (ii) that because Nii Arde Nkpa VI (a chief) was a prominent member of the Nii Nkpa We, he could come under one of the exceptions as expounded by Brobbey JSC in the Re: Ashalley Botwe lands case on the rule in Kwan vs Nyieni. At page 14 of the judgment, [page 460, ROA] this is what the learned judge stated:

> *"In the instant case, there is no doubt that the original 1st plaintiff (Nii Arde Nkpa VI) was not only a prominent member of the Nii Arde Nkpa family,* ***but he was also a chief. This action was instituted at the time the head of family Dr E.B Tagoe was dead, having died in 2001. It is a fact conceded by both parties that upon the death of the head of family (Dr E.B Tagoe) in 2001, Nii Arde Nkpa VI assumed the acting role. It is therefore undeniable that in his position as the chief and acting head. Nii Arde Nkpa VI was clothed with capacity to institute the action whether the land is a stool land or family land.*** *Even before 2003, and in the lifetime of Dr E.B Tagoe, Nii Arde Nkpa VI was sued, and sued for and on behalf of the family—as seen in Exhibit J."*

All the trial judge was saying from the passage is that at the time the original 1st plaintiff, Nii Arde Nkpa VI commenced the action in 2003, the position of head of family was vacant, the head Dr E.B Tagoe having passed away in 2001. Nii Arde Nkpa **as chief** therefore assumed the role of acting head of family and was thus clothed with capacity to mount the action. The appellant's use of the description *"prominent member"* in the ground of appeal was disingenuous.

Secondly and closely related to the above, nowhere did the trial judge rule as stated under ground (ix) that the land was a stool land. On the contrary, she seemed prepared to hold, based on the testimonies of the parties and their witnesses that the land was a family land.

Observably, in the passage referred to above, the trial judge appeared hesitant in taking a definite position that the land was family or stool land. Perhaps this was due to some pronouncements contained in two earlier suits in Exhibits J and K concerning the same land. She therefore drew her conclusion on the capacity of Nii Arde Nkpa VI out of the vacancy of the position of head of family at the time and his previous involvement in the previous suits as the one representing the family. The trial judge never concluded anywhere that the land was a stool land.

For the principle we have stated, and the observation made above, we proceed to strike out the grounds of appeal under (ii) and (ix) as incompetent.

We also notice on a thorough perusal of the 5th defendant's written submission that ground (v) by which the capacities in which the 2nd and 4th plaintiffs sued were questioned was not argued. That ground is therefore deemed abandoned and is struck out.

Despite the sundry and manifold fashion in which the remaining grounds of appeal have been couched, the overarching issue to be captured out of all, is whether the trial judge was right in her holding that the 1st, 2nd and 4th plaintiffs and not the 5th defendant, were the proper persons to represent the family. As an appellate court, especially mindful of the omnibus ground of appeal under ground (i), our pre-occupation by way of rehearing, is to determine whether the said holding was supportable by the evidence. Our resolution of the remaining grounds of appeal which will not follow any particular mode or order, should ultimately lead to an answer to the issue.

In the case of IN RE ASHALLEY BOTWE LANDS; ADJETEY AGBOSU & ORS VRS KOTEY & ORS (2003-2004) SCGLR 420, the Supreme Court seized the chance to expound the exception to the customary law rule on who may sue or be sued in respect of a family property in Kwan v Nyieni.

Wood JSC (as she then was) observed:

> *"Given that society and indeed, customary law is dynamic and not static, the Court of Appeal in Kwan v Nyieni had left the matter open for possible expansion of those special circumstances when the need arose. Therefore, the question whether any particular case falls within the stated exceptions rather than the rule or even an exception not identified in Kwan v Nyieni, is dependent on the particular facts of the given case. This has been the approach which has been consistently followed by our courts. See, for example: Sabbah v Worbi (1966) GLR 87; Hausa v Hausa (1972)2 GLR 469, CA; and Otema v Asante (1992)2 GLR 105. Thus, the case of Yormewu v Awute (1987-88)1 GLR 9, CA which the defendants relied on to buttress their argument, turned primarily on its own peculiar facts."*

BROBBEY JSC also delivered himself thus:

"…The opinion of the Court of Appeal was founded on the old principle of law as espoused by Van Lare Ag CJ, in delivering the judgment of the Court of Appeal in Kwan v Nyieni (1959) GLR 67; and also by Ollenu J (as he then was) in Chapman v Ocloo (1957)3 WALR 84; and as further affirmed by the Court of Appeal in Yormewu v Awute (1987-88)1 GLR 9. Those cases propounded general principles, but at the same time they were accompanied by several exceptions. Those exceptions actually reflect a large measure of flexibility in respect of capacity to bring actions on behalf of families…The principle running through those exceptions was that the general rule that the head of family can sue and be sued in respect of family property is not inflexible. Circumstances do arise that should permit suits concerning family propertied to be initiated by persons beside heads of family…"

It is considered significant to indicate that, In re Ashalley Botwe Lands was decided before the enactment of the High Court (Civil Procedure) Rules, 2004, (C.I 47). Order 4 rule 9 thereof legislates the general customary law principle and the exception in Kwan Nyieni as follows:

1. *"(2) The head of family in accordance with customary law may sue and be sued on behalf of or as representing the family.*
2. *(3) If for any good reason the head of family is unable to act or if the head of a family refuses or fails to take action to protect the interest of the family any member of the family may subject to this rule sue on behalf of the family.*
3. *(4) Where any member of the family sues under subrule (3) a copy of the writ of shall be served on the head of family.*
4. *(5) A head of family, served under subrule (4) may within three days of service of the writ apply to the Court to object to the writ or to be substituted as plaintiff or be joined as plaintiff.*

5. *(6) If the head of family is sued as representing the family but it appears that he or she is not properly protecting the interests of the family, any member of the family may apply to the court to be joined as a defendant in addition to or in substitution for the said head.*

6. *(7) An application under subrule (5) or (6) shall be made on notice to the parties in the action and shall be supported by an affidavit verifying the identity of the applicant and the grounds on which the applicant relies."*

In spite of the above provisions, the obvious purpose of which was to properly define and streamline the application of the rule and the exceptions, we think the decision in In re Ashalley Botwe Lands prescribing a flexible approach to the application of the exceptions is still instructive and good law.

To our minds, the provisions under Order 4 rule 9 are not to be construed as truncating the non-intractable and flexible character of the exception identified in In re Ashalley Botwe. For, circumstances will keep arising that should permit suits concerning family properties to be initiated or defended by persons other than heads of family. Indeed, examining the provisions under Order 4 rule 9 particularly subrule 3, the impression we gather is that the exceptions operate on an assumption that there is always a head of family in place. The phrase; *"If for any good reason the head of a family is unable to act or if the head of a family refuses or fails to take action …"* clearly supposes that there must be someone occupying the position of head of family for the exceptions to apply. The question therefore is, what happens where, either by reason of death or otherwise, the position of head of family is for the time being vacant and there is a sudden necessity to institute or defend an action? The provisions do not appear to envisage such occurrence. There is therefore the need to keep the exception open to cater for new and emerging circumstances. And to drum home our point, we shall recognize that even after the

coming into force of the provisions in Order 4 rule 9 of C.I. 47, the Supreme Court in such recent decision as OBLIE & ORS VRS LANCASTER (J4/29/2015) [2016] GHASC 78 (15 March 2016) cited with approval the decision in In re Ashalley Botwe Lands.

Still on the flexible and intractable prescription by the Supreme Court in the case, we must be obedient to the wisdom in the statement of Wood JSC when she said; *"Therefore, the question whether any particular case falls within the stated exceptions rather than the rule or even an exception not identified in Kwan v Nyieni, is dependent on the particular facts of the given case".*

By *the particular facts of the given case,* we understand the learned jurist as prescribing a consideration of the broader context of each case which may include such matters as the type of family in question, the custom and practices it follows, the property in question or interest therein to be protected, the timing of the action and indeed, the entire circumstances of the case.

Guided by the foregoing, we, for purposes of this appeal find it necessary to delve into a bit of the historical context of the Nii Arde Nkpa family, in particular, how over the years, it has been represented in matters concerning its lands. We are convinced, this will aid the determination of who between the two disputing sides could represent the family and whether the trial judge was right in the conclusion she came to.

According to the evidence, the Nii Arde Nkpa family originally did not have a head. It only had a Mantse. In his evidence, PW1 who describes himself as the current head of family traces the family history as follows:

"Q. Can you give a brief history of the family?

A. The Nii Arde Nkpa family hails from Moree Asebu and we settled at Abola. Our ancestor's name is Nii Sasraku, he married at Abola… Our ancestor settled at Abola gave birth to 6 children One of them in the person of Nii Arde Nkpa moved from Abola and settled at Plerno. So it is Nii Arde Nkpa who created the Plerno or the Nii Arde Nkpa family dynasty. During those time, there was nothing like head of family, he performed all the roles. He also founded Kokrobite, Langma and Tuba communities.

Q. What position do Nii Nkpa occupy during this time?

A. He is a chief. It was in 1976 that the whole family met at Plerno and decided to restructure the family by so doing they grouped the entire family into two—Tagoes and Tackies—and they agreed to split the position into two that is Mantse and Head of Family. The Tagoes were rallied at Kwaku Tagoe for the appointment as head of family. The Tackies were rallied around Nii Arde Nkpa V that is Papa Tackie for the appointment as a chief. In the said meeting, Nii Arde Nkpa VI who has already been installed as chief and Dr E.B. Tagoe who hails from Kwaku Tagoe's line was appointed the head of family at the said meeting. It was also made clear at that meeting that the mode of succession will be father to son or brother to brother, so our mode of succession is patrilineal." [Page 402G Vol.2 ROA]

This account is amply supported by Exhibit H. By way of description, Exhibit H is the minutes of the supposedly all important meeting of the family held on 24th July 1976 at which certain mould-breaking decisions about the family including its headship were taken or adopted. Given the critical importance of the decision about the headship and *'Mantseship'* of the family to the issue at bar, we reproduce the relevant portion of Exhibit H in extenso:

"The Family Headship was next touched on, and Mr A.D Tagoe gave a brief sketch of the mode of succession as practised to the present day in the Nii Arde Nkpa family—namely that

succession is hereditary, from father to son and in certain cases from brother to brother. He proposed a change to enable better running of the headship namely division of the Headship into two branches--) (a) a Family Head or Weku Yitso as opposed to a Tutelar Head who will be Chief of Plerno and represent the family in James Town affairs to perform certain customary rites. These Heads, he said will be elected from descendants of Nii Arde Nkpa IV alias Asafoatse Tagoe, and Nii Arde Nkpa V alias Dan George Tackie, and any other accredited descendants of Nii Arde Nkpa I upon proof.

(i) Dr. E.B. Tagoe having been proposed by the Working Committee of the Family for Head of Family (Weku Yitso), was announced as the only candidate, and voting was unanimous in his favour.

(ii) Mr E.N.A Tackie being already enstooled as Nii Arde Nkpa VI by Nii Adja Kwao II James Town Mantse in 1959 in succession to the late Dan George Tackie who died in 1954 was also confirmed as Chief of Plerno. The two were thereupon congratulated by the elders and members and guests present and by the Kokrobite other delegations. Customary drinks were presented by the two heads and libation was poured by Mr Charles Kofi Atopi aided by Otsiame Kwadey and Nii Wulomo of Kokrobite."

Let the obvious be stated that as the family had no position of head of family until 24th July 1976, the Mantse who exercised the position of headship represented the family in matters about its lands. Evidence of this is found under another item in Exhibit H where a decision concerning a proposed acquisition of 500 acres of the family land at Krokobite by the then Tourist Board was discussed. It was disclosed at the meeting that concerning the proposed acquisition, the Mantse had led a delegation of the family to meet the manager of the Tourist Board and also presented a petition to General I.K Acheampong, the then Head of State to press certain demands for the family in the event of the acquisition.

Significantly, the evidence further shows that even after the creation of the office of head of family in 1976, the representation of the family in land matters did not rest entirely with the head of family and that at various points, the Mantse litigated over parts of the lands. In evidence as Exhibits J and K are two such suits which involved Nii Arde Nkpa VI, the 1st plaintiff's predecessor.

Of particular importance here is the suit in Exhibit J. It was commenced by Nii Arde Nkpa VI and another party against one Armeen Kassardjan over part of the lands of the family. In the course of those proceedings, Dr E.B. Tagoe who was head of family and Dzaatse applied to join the action. Justice Kwadu Amponsem refused the joinder on the basis that once the chief was representing the stool, there was no need to join the Dzasetse.

Admittedly, the learned judge had dealt with the land as stool land and not family land, that does not detract from the fact that the Mantse, Nii Arde Nkpa VI was the one that sued to claim the land when there was a substantive head of family at the material time.

The foregoing events present one peculiarity of the Nii Nkpa family in terms of who may sue to protect the interest of the family over its lands. The Nii Arde Nkpa family as we have come to appreciate, is accustomed to recognizing the authority of the occupant of the Mantse position to sue and represent the interest of the family, in some instances even whilst there is living head of family. It is thus established that by the practice of the family over the years, it is not the sole preserve of the head of family to sue over its lands. In our considered view, this presents a situation where the flexibility in the exception to the rule in Kwan v Nyieni espoused in In re Ashalley Botwe is applicable to allow someone other than the head of family to sue.

It is also to be observed of the family that at any time the position of head of family had become vacant, the Mantse or the Dzasetse had acted as head of family. The latter had so acted particularly when the position of Mantse was also vacant.

From the evidence, when the first head of family, Dr E.B. Tagoe died in 2001, Nii Arde Nkpa VI acted as head of family till he also died in 2003. Thereafter, there was no substantive head until 2011 when Rev. Tackie was appointed head of family. In between the period, 1st plaintiff and the 5th defendant as Dzasetse acted as head at certain points in time.

The evidence shows that at the time the 1st plaintiff applied to be substituted for the original 1st plaintiff, there was no substantive head of family. It was against this background and on account of the precedents set by virtue of Exhibits J and K that the learned trial judge held:

> *"It seems to me that these cases bring to the fore the status of the Nii Arde Nkpa We of Plerno as a family stool in which the chief asserted his authority as the overlord. The court holds as a fact that in the absence of a substantive head of family, the Mantse assumes the role of acting head of family. He is therefore clothed with capacity to represent the family."*

From what we have observed so far about the practice in the family over the years, the above holding of the trial judge cannot be faulted. By this, we dismiss ground (iii) and (viii) as devoid of merit.

Noticeably, in reaching her decision that the 1st plaintiff was clothed with capacity to be substituted for Nii Arde Nkpa VI, the trial judge was cautious not to stray into a cause or matter affecting chieftaincy which impinged on the 1st plaintiff authority as Mantse.

At one point, the learned trial judge noted:

"What is in contention is whether the lands of the Nii Arde Nkpa family are stool lands or family lands. If they are stool lands, then of course the proper person to represent the family would be the 1st plaintiff as chief. This court will resist the temptation of determining whether or not by 2004 the 1st plaintiff had been properly nominated, elected and installed as a chief as this would involve a cause or mater affecting chieftaincy." [Page 457, ROA]

She was later to caution herself:

"This court has cautioned herself not to be tempted to delve into the issue whether Nii Arde Nkpa VII (and for that matter the 2nd and 4th plaintiffs) was properly installed as Mantse as that would involve a cause or matter affecting chieftaincy which this court has no jurisdiction." [Page 468—468]

On the pleadings, the challenge to the 1st and 2nd plaintiffs' status as chiefs was introduced into the matter as follows:

"1. The 1st and 2nd plaintiffs are the chiefs of Plerno and Kokrobite respectively and are the accredited custodians of Kokrobite lands for and on behalf of the Nii Arde Nkpa Stool Family of Plerno in the James Town Division of the Ga Traditional Council, and bring this action on their own behalves and for and on behalf of the people of Plerno and Kokrobite." (Statement of claim of 5-3-2003)

1. *"1. Paragraph 1 of the Statement of Claim is vehemently denied by the 5th defendant and plaintiffs are put to strict proof of the averment therein.*
2. *In further denial of the said paragraph, 5th defendant says as follows:*
    (a) That 1st, 2ndand 4th plaintiffs do not have capacity to issue the current writ of summons for and on behalf of the Nii Arde Nkpa family of Plerno.

(b) *That 1st, 2nd and 4th plaintiffs are neither the heads of family of the Nii Arde Nkpa family nor have they been authorized in anyway by the 5th defendant, the current Dzasetse and head of family of the Nii Arde Nkpa family to sue for and on behalf of the family.*

(c) *That since the death of NII Arde Nkpa VI in May 2003, nobody has been nominated, elected and enstooled by the Nii Arde Nkpa family as its Mantse."* (Statement of Defence of 15-7-08)

The evidence shows that when in 2004 the 1st plaintiff was installed as Mantse to succeed his father Nii Arde Nkpa VI, a section of the family disputed him. The dispute raged on until an amicable settlement was successfully brokered by the Ga Mantse, King Tackie Tawiah. The settlement is evidenced in a document tendered at the trial as Exhibit 12. From the ruling of the trial judge, the relevant portion of the document records:

> *"I am further directed to inform you that the aforementioned issue has already amicably resolved before the Ga Mantse at his palace Kaneshie, decisions agreed by both sides, and both the Dzasetese, Nii Ayinsah Sasraku III and Nii Ardey Nkpa VII hold their positions as Dzasetse and substantive Mantse of Kokrobite unchanged"*

Ostensibly, to stay her hands off the cause or matter affecting chieftaincy, the trial judge dwelt on the settlement contained in Exhibit 12 by delivering herself thus:

> *"If there was any impasse at all, it was resolved before the Ga Mantse. The decision arrived at is very pertinent. Nii Arde Nkpa VII was to hold his position as "substantive-Mantse" unchanged. Nii Arde Nkpa was installed as Mantse in 2004, and he was to hold that position. A simple understanding is that Nii Arde Nkpa's position as "Substantive Mantse" was to remain unchanged. It therefore relates back to 2004 when he was installed Mantse. Further custom was only to be performed to finalize "the decision" (paragraph 3).*

Any "official installation" in 2008 was therefore for purposes of reconciliation. Nii Arde Nkpa VII's position as Mantse therefore took effect from 2004 and not 2008 as the 5th defendant would want the court to believe. In 2004, therefore, Nii Arde Nkpa VII became the Mantse and acting head of family. In that position and in the absence of a substantive head of family, he was clothed with capacity to represent the family."

It has been argued on behalf of the 5th defendant that by the above passage, the trial judge had erroneously concluded that Exhibit 12 made the 2004 installation of the 1st plaintiff as Mantse proper when there is evidence on both sides that no proper procedure was followed.

To us, what the 5th defendant has failed to recognize is that, the question of whether proper procedure was followed to install the 1st plaintiff in the 2004, that is to say whether the 1st plaintiff was properly nominated, elected and installed as Mantse in 2004 could not have been determined by the trial judge. Indeed, this court is equally disabled by law from determining same. Neither could the trial judge, nor we, determine whether the procedure in 2008 was what made the 1st plaintiff a properly nominated, elected and installed Mantse for the same reason.

What is certain from Exhibit 12 however is that there was an amicable settlement by the Ga Mantse with the result that 1st plaintiff's position as Mantse (talking about the 1st plaintiff only in this instance) was to remain unchanged. The only thing added to be done was the outdooring of the 1st plaintiff. There was nothing to suggest that the process of 2004, whatever it entailed, was to be restarted all over again. The effect, as the trial judge reasoned was that, the process of 2004 was recognized and never reversed. Whatever grievance the opposers had was appeased by the settlement. We find no flaw in the

conclusion drawn by the trial judge and by that we think the grounds (vi) and (vii) of the appeal must fail for lacking merit.

Following from the above, we must dismiss the 5th defendant's contention under the ground (x) that the trial judge had concluded that the Ga Mantse decision conferred on the 1st plaintiff the head of family. The settlement never determined who was head of family and the trial judge did not say so. What was established was that, upon the 1st plaintiff becoming Mantse at the time when there was no substantive head of family, he assumed the role of acting head of family. This was what the trial judge alluded to citing as precedent in the family, the assumption of the acting head by Nii Arde Nkpa VI when Dr. E.B. Tagoe died as head of family and Dzasetse.

Also lacking merit, as we are convinced to hold, are the grounds (iv) and (xiii) where a challenge is mounted against the trial judge's finding that succession to the headship in the Nii Arde Nkpa family was hereditary and patrilineal and that the 5th defendant was not a member of that patrilineal family.

It has been submitted on behalf on the 5th defendant that Exhibit H did not state that succession in the family was hereditary and patrilineal. That is naked untruth. In this delivery, reference has been made to the following from Exhibit H:

> *"The Family Headship was next touched on, and Mr. A.D. Tagoe gave a brief sketch of the mode of succession as practised to the present day in the Nii Arde Nkpa family—**namely that succession is Hereditary, from father to son and in certain cases from brother to brother."***

The 5th defendant seemed to have forgotten his own admission under cross-examination that the family was patrilineal. He had said:

"Q. You will agree with me that the Nii Arde Nkpa family is patrilineal, they trace their descent from the male line is that no so?

A. That is correct."

There is overwhelming evidence on record that the 5th defendant does not belong to the patrilineal line of the Nii Arde Nkpa family. His mother by name Janet Osekre rather belonged to that family. It would be inconceivable that the 5th defendant, a male child would belong to the same paternal family with his mother. Indeed, the 5th defendant himself admits that his father hailed from the Kotoko We of Teshie and that when by some convenient arrangement, he was being considered for the position of Dzasetse, the approval of the father's family as custom required, had to be sought. Thus, on the facts established in the case, succession to the headship in the Nii Arde Nkpa family was hereditary and patrilineal and that the 5th defendant did not belong to that family by the patrilineal line. We therefore dismiss grounds (iv) and (xiii).

The above position however does not detract from the already established fact that the 5th defendant had previously acted as head of family. That, however, was on the basis of his position as Dzasetse to which he was elected in 2004. But did that make him a substantive and properly installed head of family as he claimed? This question is determinative of grounds (xi) and (xii).

In resolving this question, the introduction of the position of Dzasetse into the Nii Arde Nkpa Family ought to be recounted and placed in proper perspective. The historical account of it as PW1 narrated and which never became a subject of debate went as follows:

"After the appointment of Dr. E.B. Tagoe as the head of family in 1976 a year after, that is 1977 he was advised by the James Town Paramount Chief in the person of Nii Kojo Ababio

who happens to be his school mate that a head of family cannot be part of the traditional council and in order for Nii Kojo Ababio to tap the knowledge of Dr. E.B Tagoe, he advised him to take the position of Dzasetse and he obliged. So in 1977 the family met and installed Dr. E.B Tagoe as Dzasetse of Plerno because of that his name changed to Nii Sasraku."

Now, it was this position that the 5th defendant succeeded to in 2004 as Nii Sasraku III after the pioneer occupant, Dr. E.B Tagoe (Nii Sasraku II) had passed away in 2001. In the interim, Nii Arde Nkpa VI as Mantse had, upon the death of Dr. E.B. Tagoe added on the two positions of head of family Dzasetse in an acting capacity to fill the void. Eventually, when Nii Arde Nkpa also died in 2003, all three positions, the Mantse, the Dzasetse and head of family became vacant. These facts must bring clarity to the distinction and delineation of the three positions in the family.

In the 5th defendant's application for substitution filed on 24th May 2006, he described his capacity as Dzasetse and acting Mantse of Nii Arde Nkpa We of Plerno. He did not claim to be head of family. It was when he was joined to the suit that he filed a statement of defence and pleaded to be head of family claiming for that reason to be the rightful person to represent the family in the suit. Ignoring the shift of the goal posts for a moment, the state of the pleadings meant that he assumed the onus of proof of his position as substantive head of family.

Upon a thorough examination of the oral and documentary evidence on record, the trial judge concluded that the 5th defendant woefully failed to lead cogent and credible evidence to establish his claim that he was the head of family. For authority, she relied mainly on the case of QUARCOO VRS ALLOTTEY (1980) 788 on the requirement of appointment and removal of head of family.

In EDAH VRS HUSSEY (1989-90)1 GLR 359 at 363, Ampiah J (as he then was) held:

"No one had the inherent right to be appointed successor or head of family. The appointment is made by the family at a meeting. In making the appointment, the family look for the person who in their discretion is best suited for the post. The only rigid rule is that the appointment must be made by the council of the family".

See also LARTEY VRS MENSAH AND DEDEI & ORS (1958)3 WALR 410; QUARCOO VRS ALLOTTEY (supra).

From the 1976 meeting evidenced in Exhibit H, there can be no doubt that the occupation of the position of head of family was by an election at a properly convened family. Dr. E.B. Tagoe, the first head of family went through that process.

The 5th defendant's testimony in chief as to how he became head of family suggests that he was installed Dzasetse and head of family the same day, at the same ceremony and by the same customary rites. Even then, his account was unclear and incoherent. He said:

"These three people delegated by the chief of Ngleshie Amafro Nii Ababio helped the elders of Plerno and they installed Nii Ayinsan Sasraku III being me the one in the box. I swore before them on the 10/7/04. After swearing me, they made me to understand that I was taking over the position of the late Dzasetse Nii Ayinsan Sasraku II. Then they poured libation and they made me to understand that it is only chiefs that are confined but not head of family. So the libation they poured was for the headship of the family. From 2004 up to 2008, I was the Dzasetse, the Acting chief and the head of family."

From our standpoint, this rendition does not pass for a properly convened family meeting to elect a head of family. It is more in congruence with his installation as Dzasetse. This may explain why from the evidence, he still saw himself as an acting head of family (because the position was vacant) and not as a duly elected substantive head of family. He said as follows during cross-examination:

"Q. You have never been confirmed by the family as head of family?

A. That is not true, the elders of the family met and confirmed me as head of family in 2007.

Q. And from your own evidence you have never been elected as head of family.

A. That is not true, what I know is that the family met in 2007 and confirmed me as head of family.

Q. You were only an acting Mantse and acting head of family after the death of Nii Arde Nkpa VI.

*A. **That is exactly so from 2004 up to 23/12/08 before Nii Arde Nkpa VII was installed before the family gave him the title as Mantse.**"*

Additionally, the 5th defendant admitted to his being recognized generally as Dzasetse and acting Mantse and not as a substantive head of family. To recall, it was in that capacity that he applied to be substituted to represent the family. To one question in cross-examination, he answered:

Q. In all instances, in all cases, in all circumstances you were to be recognized as Dzasetse and acting Manste, is that not so?

A. That is so"

To reinforce the position Exhibit L, a newspaper publication reporting his installation shows that the 5th defendant was formally introduced to Nii Kojo Ababio V, the paramount chief of Ngleshie Amanfro as Dzasetse and acting Mantse.

From what we gather, the 5th defendant's claim to have been elected or installed a substantive head of family was not credible. We dare ask that if he was elected the substantive head of family in 2004, what was the need for the so called confirmation by the family in 2007?

In the final analysis and having considered the facts established in the case, we are convinced that the findings and conclusions of the trial judge were amply supported by the evidence on record and we find no factual or legal basis to reverse them.

We are mindful that the omnibus ground of appeal as contained under ground (i) derives from the principle of proof required in civil cases which is that the party on whom the burden of proof on the pleadings lay, must establish a preponderance or a balance of probabilities in his favour. This means that such a party must persuade the court that his version of the matter is more probable than that of his opponent. We are satisfied that the case put forth by the 1st, 2nd and 4th plaintiffs were able to meet this legal threshold for which the 5th defendant's case was to fail. Consequently, the appeal which lacks merit on all the grounds fails and is accordingly dismissed.

For purposes of completeness, we have to make consequential orders. It is noted that the court below joined the 5th the defendant to the suit for purposes of determining which party or parties could properly represent the Nii Arde Nkpa Family in the matter. When the trial judge found for the 1st, 2nd and 4th plaintiffs she ought to have struck out the 5th defendant's name from the suit for ceasing to be a necessary party. Again, as the 5th defendant made a counterclaim in his statement of defence, same ought to have struck out. By affirming the decision in this appeal, we invoke our power under Rule 32 of the Rules of this Court (C.I 19 as amended) and strike out the name of the 5th defendant from the suit and also strike out his counterclaim.

Cost of GH¢20,000.00 awarded to Plaintiffs/Respondents.

(SGD)

RICHARD ADJEI-FRIMPONG
(JUSTICE OF THE COURT OF APPEAL)

(SGD)

I agree **HENRY A. KWOFIE**
(JUSTICE OF THE APPEAL COURT)

(SGD)

I also agree, **SOPHIA B. BERNASKO-ESSAH**

(JUSTICE OF THE COURT OF APPEAL)

COUNSEL:

1. Naa Abiana Mensah-Yawson for 5th Defendant /Appellant
2. Nelly Bernice Wallace with Patrick Okpah Danso for 1st Plaintiff/Respondent.