IN THE CIRCUIT COURT HELD IN KUMASI ON MONDAY THE 19TH DAY OF DECEMBER, 2022 BEFORE HER HONOUR PRISCILLA DAPAAH MIREKU (MRS.), CIRCUIT COURT JUDGE.

SUIT NO. A1/15/2021

JAMES OWUSU SUING PER HIMSELF AND ON BEHALF OF ASONAHENE FAMILY OF TANO-ODUMASI

VRS:

SOLOMON KODUA & 3 OTHERS

JUDGMENT

The Plaintiff instituted this action against the defendants for the reliefs listed below on the 2nd day of September, 2020. The reliefs are as follows;

a. Declaration of title, recovery of possession of all that piece and parcel of land lying, situate and being at "Tano-Odumasi-Ashanti" sharing common boundaries with the properties of Opanin Kwasi Nti, Opanin Kwabena Okai, Nana Kwasi Kwabi and River Kunkum.
b. General damages for trespass.
c. An order of perpetual injunction restraining the Defendants, their agents, servants, and assigns or anybody claiming through them from interfering with the Plaintiff Asonahene family's peaceful possession, control, and occupation etc. of the property listed in relief "a" supra.
d. Further orders.

The plaintiff alleges that he is suing for himself and on behalf of the Asonahene family of Tano-Odumase. Even though the defendants did not enter appearance after the writ of summons was served on the 10th day of September, 2020, it is important for this court to determine whether the plaintiff has the capacity to institute this action.

Capacity is very important and can be raised at any time even on appeal. In the case of **Asante-Appiah v. Amposah Alias Mansah [2009] SCGLR 90**, it was held that,

"*… where the capacity of a person is challenged, he has to establish it before his case can be considered on its merits*".

In this case the defendants have not entered appearance or file any defence to challenge the capacity of the Plaintiff but it is important for the Court to determine same as the plaintiff claims he is instituting this action in his own capacity and that of Asonahene Family of Tano-Odumase.

In an article titled 'IN LOCUS STANDI – A COMMENTARY ON THE LAW OF STANDING IN CANADA (TORONTO: CARSWELL, 1908); Prof Thomas Cromwell, who later became a judge of the Supreme Court of Canada, wrote at page 3 that:

> *Capacity has been defined as the power to acquire and exercise legal rights. In the context of the capacity of parties to sue and be sued, to say that a party lacks such capacity is to acknowledge the* ***existence of some procedural bar to that party's participation in the proceedings*** *– one that is personal to a party … and imposed by law for one or more of various reasons of policy usually quite divorced from the substantive merits …* ***it***

> ***concerns the right to initiate or defend legal proceedings generally***.[1]

Per the pleadings of the Plaintiff, he claims to be matrilineal member of the Asonahene Family of Tano-Odumase. According to the Plaintiff the defendants have laid adverse claim to the subject matter and winning sand on the land. Per the description of the Plaintiff, the subject matter is a family property and with a family property the ideal person to sue is the family head or the principal members of the family if there is no head of family. In the case of **SAMUEL OBLIE & 2 OTHERS VRS. TETTEH LANCASTER, CIVIL APPEAL, NO: J4/29/2015, 15TH MARCH 2016**, the Supreme Court stated,

> Under customary law, which is part of the common law of Ghana, it is axiomatic that it is the Head of Family who has capacity to sue and be sued in matters concerning family property. The only exceptions to this rule have been well-established in the cases of KWAN v NYIENI [1959] GLR 67 @ 68; AMPONSAH v KWATIA [1976] 2 GLR 189; YORMENU v AWUTE [1987] 1 GLR 9; IN RE ASHALLEY BOTWE LANDS; ADJETEY AGBOSU & Others v KOTEY & Others [2003-2004] 1 SCGLR 420 @ 423; MANU v NSIAH [2005-2006] SCGLR 25 and IN RE NEEQUAYE (DECD); ADEE KOTEY v KOOTSO NEEQUAYE [2010] SCGLR 348.

Thus, the subject matter not being the personal property of the Plaintiff but property of his matrilineal family, he ought to prove that he has capacity to institute this action. The Plaintiff in both his pleading and witness statement did not inform the court why he instituted the action rather than his head of family but at paragraphs 8 and 9 of his witness statement, he alleges that the family is about to nominate and install a new family head and it will be remiss on their part as members of the family

[1] Standard Bank Offshore Trust Company Limited v. National Investment Bank Limited and Others (J4/63/2016) [2017] GHASC 26 (21 June 2017)

if they sit by for their lands to be degraded or sold as it is in the case that has brought this instant action.

The Supreme Court in the **IN RE ASHALLEY BOTWE LANDS** case cited (supra) explained the principle as follows:

> The general rule recognised in Kwan v Nyieni, namely, that the head of family was the proper person to sue and be sued in respect of family property was not inflexible. There are situations or special circumstances or exceptions in which ordinary members of the family could in their own right sue to protect the family property, without having to prove that there was a head of family who was refusing to take action to preserve the family property. The special or exceptional circumstances include situations where: (a) a member of the family had been authorised by members of the family to sue; or (b) upon proof of necessity to sue.

The Plaintiff did not lead evidence that he has been authorized by the family to sue but he together with one witness Edmund Nsiah (PW1) who described himself as a principal member rather testified that the Defendants had trespassed on their land and causing damage to same. They did not tender any document to buttress their claim and neither did they lead any evidence to prove same. Mounting the witness box to repeat ones pleading is not ideal. If there was no need to lead evidence to prove ones claim, the Rules will not have ordered a party seeking for declaration of title to land to prove his or her case even if the defendant does not enter appearance.

In **Equity Assurance v. Palmers Green Int'l Ltd [2019] 134 GMJ 57**, proof in civil trials were stated as follows;

> *Section 11(4) and 12 of the Evidence Act, 1975 (NRCD 323) require a plaintiff in a civil matter to prove his case on a balance of*

probabilities. Based on section11(4(and 12 of Evidence Act (NRCD 323), the Supreme Court in the case of Awubeng v. Domfeh [1996-97] SCGLR 660 held that standard of proof in all civil acyion was proof by the preponderance of probabilities and there is no exception to this rule.

The plaintiff failed also to prove that it was necessary to institute this action before this Court. Thus the plaintiff failed to prove that he had capacity to institute this action.

The plaintiff alleges the subject matter belongs to the Asonahene of Tano-Odumase but the Plaintiff did not lead or tender any evidence to prove same but expect the Honourable Court to rely on just his averments.

In any case, since this Court has found that the Plaintiff lacks capacity to institute his action; this instant case instituted by the Plaintiff is hereby dismissed. There is no order as to cost as the Defendant did not enter appearance.

SGD.

H/H PRISCILLA DAPAAH MIREKU (MRS.)

CIRCUIT COURT 2, ADUM – KUMASI

19TH DECEMBER, 2022