IN THE CIRCUIT COURT HELD AT MPRAESO ON TUESDAY 21ST DAY OF MARCH 2023 BEFORE HIS HONOUR STEPHEN KUMI, ESQ, CIRCUIT JUDGE.

SUIT NO: C1 /7/19.

ABUSUAPANYIN DANIEL ANKOMA ASIRIFI - PLAINTIFFS.

Suing on behalf of Asona Family

Of Obomeng Kwahu and Ano.

V

BEATRICE AGYEIWAA AND ANO. - DEFENDANTS.

J U D G M E N T:

The Plaintiffs herein by an amended Writ of Summons dated 22nd August, 2019, issued at their instance from the Registry of this court with its accompanying amended statement of claim, originally sued the 1st Defendant for the following judicial reliefs;

1. An order that H. No. 138, Nkawkaw, was devised in the Will of its owner Forson Kwame Asomani dated 22nd day of March, 1984, and admitted to probate on the 8th day of March, 1994.
2. Recovery of possession of House No. NF. 138, Nkawkaw Adoagyiri
3. Ejection of Defendant from House No. NF. 138, Nkawkaw Adoagyiri.
4. Damages for trespass.
5. Injunction to restrain Defendant, her assigns, workmen, family members, children, whatever called from having anything to do with the house.

THE CASE OF THE PARTIES FROM THE PLEADINGS:

The Plaintiffs claim to be the Abusuapanyin and a principal member of the Asona Family of Obomeng Kwahu respectively. The original Defendant- now first Defendant- is the wife of one Lawrence Ahimah Sefa, who is deceased.

Plaintiffs state that their deceased family member, Forson Kwame Asomani, put up or built house number NF 138 during his lifetime; and that in a Will that he executed in his lifetime, dated 22nd day of March, 1984, he devised the house in question situate at Nkawkaw Adoagyiri to the beneficiaries; which said Will was admitted to Probate on 8th day of March, 1997.

The Plaintiffs further state that in the residuary clause of the said Will of Forson Kwame Asomani, he bequeathed the residue of his estate to his family. That following the death of the late Forson Kwame Asomani, he was succeeded by his nephew, Lawrence Ahimah Sefa, who lived in the House No. N/F 138, Nkawkaw, together with the 1st Defendant, his wife.

Plaintiffs further state that the Lawrence Ahimah Sefa has since passed on and that following his demise, the 1st Defendant- who is not a family member- has taken over the house and has continually prevented members of the family of the late Forson Kwame Asomani to enter the house or to have anything to do with the house; with the 1st Defendant saying that her late husband told her that his late uncle, gifted him the property and thus following the death of her late husband, she now owns the property in dispute. That all efforts to make the Defendant yield vacant possession of the house to the family of the Plaintiffs have proved unsuccessful, which compelled them to institute the instant action.

DEFENCE OF THE DEFENDANTS FROM THEIR PLEADING:

It is instructive to state that it happened that following a joinder application brought by one Ebenezer Kofi Sefa- who identified himself as a son of the late Lawrence Ahimah Sefa and the 1st Defendant- this court- albeit differently constituted- granted same for him to be joined as the 2nd Defendant in the suit, to defend his interest and those of his other siblings in the property in dispute.

So, the two Defendants entered appearance at different points in time and subsequently filed a joint statement of defence, in which they essentially denied the claims of the Plaintiffs and the very reliefs they seek.

In the paragraph 1, Defendants averred that “save as hereinafter expressly admitted the Defendant denies each and every material allegation of fact contained in the statement of claim as if the same were set out in extenso and traversed seriatim”.

In the case of ***Akyer v. Ghana Industrial Development Corporation And Other*** **[1963] 2 GLR 291, SC, Adumua Bossman JSC, (as he then was),** after he had quoted and considered the cases of *Adkins v. North Metropolitan Tramways Company* [1863] 63 L.J.Q.B. 361, *John Lancaster Radiators Ltd. v. General Motor Radiator Co., Ltd.* [1946] 2 All E.R. 685, C.A., came to the conclusion that a general traverse as is found in the Defendants’ paragraph 1 of the statement of defence amounted to a sufficient denial to a plaintiff’s claim. This is what he said:

> **"*It seems reasonably clear from these authorities therefore that the statement of defence filed on behalf of the first defendants adequately and sufficiently denied the allegation in paragraph 1 of the plaintiff’s statement of claim and thereby put the plaintiff to proof of that allegation. It falls then to ascertain if the plaintiff discharged that onus.*"**

Despite the above legal effect of the Defendants’ general denial to the claims of the Plaintiff, the Defendants went on to specifically deny the material claims of the Plaintiffs as follows:

First, they challenged the capacity of the Plaintiffs to bring the action. In that, Defendants allege that the Asona family of the Plaintiffs- which they referred to as “***nton”-*** is patrilineal and is completely different from the matrilineal Akan family of the late Lawrence Ahimah Sefa. And thus as the Plaintiffs claim to be the head of family and principal family member of the Asona Family of Obomeng Kwahu and not the matrilineal family of the late Forson Kwame Asomani nor the late Lawrence Ahimah Sefa, they have no capacity to bring the suit.

The Defendants emphasized that this same court- albeit differently constituted- has in a ruling dated 6th September, 2018, set aside a similar Writ issued by the 2nd Plaintiff- Yaa Dansoaa- and some two others- including the Plaintiffs attorney in the present suit- Beatrice Asomani- for the same reliefs on grounds of lack of capacity; and that since then the 2nd Plaintiff has not acquired the necessary capacity to institute the present action to recover the alleged instant family property.

The Defendants further stated that the property in dispute is made up of two houses- which for ease of reference, they labeled as old and new house; and that while the late Forson Kwame Asomani put up the old house which has been occupied by the 2nd Plaintiff and other family members, the new house was put up from the scratch by the late Lawrence Ahimah Sefa, from a bare land that was gifted to him in 1981 by the late Forson Kwame Asomani, and thus the new house- the real property in dispute- could not have been inherited by the late Lawrence Ahimah Sefa from his late uncle.

Furthermore, the Defendants stated that the late Lawrence Ahimah Sefa continued to live in the new house with his wife and children during his lifetime and the Plaintiffs never challenged his title to the new house; and thus the Plaintiffs are estopped from doing so now after his death.

It is their further contention that the late Forson Kwame Asomani died intestate after which Letters of Administration were granted to the late Lawrence Ahimah Sefa, by the High Court, Koforidua, on 1st March, 1989; and thus any such probate of the Will of the late Forson Kwame Asomani dated 8th March, 1994, as claimed by the Plaintiffs could only be the product of fraud, mistake or misrepresentation.

For the above-mentioned reasons, it is the defence of the Defendants that the Plaintiffs are not entitled to their reliefs contained in the amended Writ of Summons. In addition, the Defendants counterclaimed against the Plaintiffs as follows;

a. A declaration that the new house of house no. F. 138, Nkawkaw Adoagyiri, is the personal property of the late Lawrence Ahimah Sefa and not the property of the Asona Family of Obomeng Kwahu and by operation of law, specifically the Intestate Succession Law, 1985 (PNDCL 111), the said new house of House No.

F. 138, Nkawkaw Adoagyiri, devolves on the Defendants, being the surviving wife and children of the deceased Lawrence Ahimah Sefa.

b. An order directed at the Plaintiffs, restraining them, their agents, assigns, privies, and workmen from further acts and/or omissions meant to disturb the Defendants peaceful and quiet enjoyment of the said new house of House No. F. 138, Nkawkaw Adoagyiri.

c. General damages for intermeddling in the estate of the deceased Lawrence Ahimah Sefa.

At the close of pleadings, the Plaintiff pursuant to the rules of court filed an Application for Directions dated 11th day of March, 2021, in which he raised the following as the issues to be set down for the trial;

1. Whether or not the (1st) Plaintiff herein is the head of the Asona family and therefore clothed with the capacity to institute the instant action.

2. Whether or not the late Forson Kwame Asomani executed and/or left a Will dated 22nd March, 1984.

3. Whether or not the said house NF 138 was devised by the (testator), Forson Kwame Asomani to his family.

4. Whether or not the late Lawrence Ahimah Sefa customarily succeeded the late Forson Kwame Asomani.

5. Whether or not the late Lawrence Ahimah Sefa personally acquired or built the new house NF. 138, Nkawkaw Adoagyiri.

6. Whether or not the land on which the new house is built was gifted to Lawrence Ahimah Sefa by Forson Kwame Asomani.

Meanwhile, the Defendants also filed the following additional issues for the consideration of the court at the trial;

i. Whether or not the property in dispute is the house built by the late Lawrence Ahimah Sefa.

ii. Whether or not the late Lawrence Ahimah Sefa acquired the house in dispute during the lifetime of his uncle, the late Forson Kwame Asomani.

iii. Whether or not the late Forson Kwame Asomani died intestate and the High Court, Koforidua, granted Letters of Administration in respect of his estate in the year 1989.

iv. Whether or not the Plaintiffs are estopped from challenging the ownership of the house in dispute and interest of the Defendants in same.

v. Whether or not the Defendants are entitled to their counterclaim.

The court merged the issues raised by the Plaintiffs and the additional issues filed by the Defendants and adopted them as the consolidated issues to be set down for the trial. The court accordingly ordered the parties- assisted by their respective Counsel- to file and serve on each other their respective witness statements and exhibits, if any, that they would rely on to prove their separate cases at the trial. A case management conference was subsequently conducted. The parties complied with the orders paving way for the trial.

BURDEN OF PROOF ON PLAINTIFF:

I wish to respectfully take a short yet necessary detour to state the duty cast on the Plaintiff in this case and how same ought to be discharged in order to succeed in this case per her claims and the reliefs that she seeks for. This is because it is the Plaintiff who has issued the writ, which raised issues, and which issues have been denied by the Defendants, who has and now generally assumes the onus of proof.

The relevant principle of law prominent in all civil claims is that, he who asserts must prove. This was reiterated by the Supreme Court in **Dzaisn v. Ghana Breweries Ltd [2007/08] SCGLR 547** where the court held:

> ***"It is a basic principle of law of evidence that the burden of persuasion in proving all essentials to any claim lies on whoever is making the claim."***

See also ***section 10(1) of the Evidence Act, NRCD 323*** which provides as follows:

> "***For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court."***

Similarly, ***section 12(1) of the NRCD 323*** also reads as follows:

> ***"Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of probabilities."***

In the case of ***Takoradi Flour Mills v Samir Faris [2005-2006] SCGLR 882 holding 2,*** the Supreme Court enunciates the law on civil proof thus:

> ***"The Plaintiff in a civil case is required to produce sufficient evidence to make out his claim on a preponderance of probabilities."***

See also holding 5 in the same case where it was stated that;

> "***It is sufficient to state that this being a civil suit, the rules of evidence require that the plaintiff produces sufficient evidence to make out his claim on a preponderance of probabilities, as defined in Section 12(2) of the Evidence Decree, 1975 (NRCD 323). In assessing the balance of probabilities, all the evidence, be it that of the plaintiff or the defendant, must be considered and the party in whose favour the balance tilts, is the person whose case is the more probable of the rival versions and is deserving of a favourable verdict***."

Similarly, in ***Okudzeto Ablakwa (No. 2) v. Attorney-General and Obetsebi-Lamptey (No. 2) [2012] 2 SCGLR 845***, the Supreme Court in dealing with the burden of proof held at page 867 of the report as follows:

> ***"… he who asserts, assumes the onus of proof. The effect of that principle is the same as what has been codified in the Evidence Act, 1975 (NRCD 323), s 17 (a) … .What this rule literally means is that if a person goes to court to make an allegation, the onus is on him to lead evidence to prove that allegation, unless the allegation is admitted. If he fails to do that, the ruling on that allegation will go against him. Stated more explicitly, a party cannot win a case in court if the case is based on an allegation which he fails to prove or establish."***

These are general principles on the burden of proof that a plaintiff or a claimant in civil suits assume without exception. However, there is some specific burden and standard of proof which applies and comes into play and for the consideration of the courts in land actions, just as we have in the present suit by the Plaintiff.

In that regard, I refer to and quote herein the case of ***Ago Sai and Others v Kpobi Tetteh Tsuru III [2010) SCGLR 762 at 779, where Ansah JSC (as he then was),*** held inter alia, as follows on the burden of proof that the Plaintiff assumes or has in a case ot this nature and hue:

> "***This being an action for a declaration of title to land, the burden of proof and persuasion remained on the Plaintiffs to prove conclusively that on the balance of probabilities, he was entitled to his claim of title. This he could do by proving on the balance of probabilities the essentials of their root of title and method of acquiring title to the area in dispute, the Ogbojo lands". See also the case of Fosua & Adu-Poku v Dufie (Deceased) and Adu Poku-Mensah (2009) SCGLR 310 at 325- 327 per Atuguba JSC (as he then was).***

Meanwhile, in the case of Benyak Company Ltd v Paytell Ltd and Others (infra) the Supreme Court of Ghana stated the following as the burden of proof on a Plaintiff in land actions of this nature for the stated reliefs:

> ***"It must be made clear that the action was for declaration of title to land and the usual ancillary reliefs. As the allegations of facts pleaded in support of the plaintiff's reliefs were all stoutly denied, the onus of proof of title was squarely on the plaintiff.***
>
> ***This is so in every civil case where averments are denied as the law has settled this in authorities namely: BANK OF WEST AFRICA LTD v. ACKON [1963] IGLR 176 SC, ABABIO v. AKANSI [1994-95] GBR Part II 74 and DUAH v. YORKWA [1993-94] IGLR 217 CA. Indeed, this court has held that the plaintiff, apart from pleading his root of title, mode of acquisition and overt acts of membership, if any, must prove that he is entitled to the declaration sought. In AWUKU v. TETTEH [2011] ISCGLR 366, this court has decided that in an action for a declaration of title to land, the onus was heavily on the plaintiff to prove his case, he could not rely on the weakness of the defendant's case. He must, indeed, show clear title…"***

Despite the above general principles of burden of proof in civil actions in respect of the Plaintiffs in particular, it is seen in this case that the Defendants have gone beyond merely denying the claims of the Plaintiff to also filing a counterclaim for similar reliefs.

That been the case, they also bear the burden of proof on the counterclaim just as the Plaintiffs on the main claim. This is because it is trite law that a counterclaim is a separate and independent action that has to be proved just like the plaintiff's claims, as was held in the case of ***Moru v Hussein [2013] 59 GMJ 17 per Baffoe-Bonnie JSC.***

In the same vein, in the case of ***Sasu Bamfo v Sintim [2012] 1 SCGLR 136 at 155, Rose Owusu JSC (as she then was)*** delivered of herself as follows to illustrate both the nature of a counterclaim and the burden of proof that a counterclaimant, such as the Defendants herein assume:

> *"**A counterclaim is a different action in which the Defendant, as a counterclaimant Is the plaintiff in the action becomes a defendant. In the instant case, where both parties were seeking declaration of title, recovery of possession and perpetual injunction in respect of the disputed piece of land, each of them bore the burden of proof and persuasion to prove conclusively, on the balance of probabilities, that he was entitled to the reliefs claimed…".***

See also the case of ***Jass Co. Ltd v Appau [2009] SCGLR 265 holding (1)*** of the headnotes which reads:

> *"**The burden of proof is always on the plaintiff to satisfy the Court on a balance of probabilities in an action for a declaration of title to land. Where the defendant has not counterclaimed and the plaintiff has not been able to make out a sufficient case against the defendant, then the plaintiff's claims would be dismissed. Wherever a defendant also files a counterclaim, then the same standard or burden of proof would be used in evaluating and assessing the case of the defendant, just as it was used to evaluate and assess the case of the plaintiff against the defendant".***

In the light of the above, I must indicate clearly and it is instructive to state an important and non-negotiable duty of the court even in the face of all the burden of proof that the Plaintiff and indeed both parties in the suit have in this judgment. It is that it is the bounden duty of the court to assess all the evidence on record in order to determine in whose favour the balance of probabilities should lie or tilt in terms of which of the two versions of the story is more probable or acceptable.

This duty has been clearly enunciated in the case of ***In re Presidential Election Petition (No. 4) Akuffo-Addo and Ors. v. Mahama and Ors. [2013] SCGLR (Special Edition) 73,*** where the Supreme Court held at page 322 of the report as follows:

> ***"Our understanding of the rules in the Evidence Decree, 1975 on the burden of proof is that in assessing the balance of probabilities, all the***

evidence, be it that of the plaintiff, or the defendant, must be considered and the party in whose favour the balance tilts is the person whose case is the more probable of the rival versions and is deserving of a favourable verdict."

SUMMARY OF EVIDENCE ADDUCED BY THE PLAINTIFFS AND THE DEFENDANTS AT THE TRIAL:

For the case of the Plaintiffs, the 1st Plaintiff attorney, Beatrice Asomani, testified by verifying her witness on oath, which she relied on and same was admitted into evidence as her sworn evidence-in-chief. No other witness was called.

Although it is important to state the court subsequently- upon an application by the learned Counsel for Plaintiffs- gave leave to the Plaintiff attorney to file a supplementary witness statement.

In addition and in support of the Plaintiffs' case, the Plaintiffs' attorney had also tendered into evidence the following documents or exhibits:

1. Exhibit A- a copy of a power of attorney given to the 1st Plaintiff attorney by the 1st Plaintiff, Abusuapanyin Daniel Ashrifi Ankomah to institute and prosecute this action for him before this court.
2. Exhibits B and B1- a copy of the said Will and Probate of the late Forson Kwame Asomani.
3. Exhibit C- a copy of the national identification card of the 1st Plaintiff, Abusuapanyin Daniel Ashrifi Ankomah.
4. Exhibit D- a copy of a funeral poster showing the position of the 1st Plaintiff as head of family.

The 1st Defendant, Beatrice Agyeiwaa, testified for herself and on behalf of the Defendants case by a witness statement. However, subsequently, the 1st Defendant- with the leave of the court- filed and relied on supplementary witness statement and further supplementary witness statement.

The 1st Defendant also tendered the following exhibits into evidence in support of their case;

Exhibit 1: A copy of the initial Writ of Summons issued at this court by the 2nd Plaintiff and the Beatrice Asomani, which was said to have been struck out on grounds of want of capacity.

Exhibit 2: A copy of the said ruling of this court that struck out the Writ of Summons issued by the 2nd Plaintiff and Beatrice Asomani.

Exhibit 3: A picture showing the said old house and new house.

Exhibit 4: A building permit said to have been issued to the late Lawrence Ahimah Sefa dated 12th August, 1981, purportedly showing the then existing old house on a site and block plan as well as the now new house yet to be constructed.

Exhibit 5: Letters of Administration granted by the High Court, Koforidua, on 1st March, 1989, to the late Lawrence Ahimah Sefa in respect of the estate of the late Forson Kwame Asomani, showing that the late Forson Kwame Asomani, died on 17th December, 1987.

FACTS ADMITTED TO OR NOT IN CONTENTION BETWEEN THE PARTIES:

On the whole of the evidence before the court after trial, the following facts appear not to be in contention or are admitted:

a. ***That the late Forson Kwame Asomani and Lawrence Ahimah Sefa are both deceased now.***
b. ***That the two of them came from the same family.***
c. ***That the late Forson Kwame Asomani originally acquired the land on which sits the old house and new house.***
d. ***That the old house was built by the late Forson Kwame Asomani.***
e. ***That the late Forson Kwame Asomani died in 1987 and was survived by children including the Plaintiff attorney herein and was customarily succeeded by the late Lawrence Ahimah Sefa, a nephew.***
f. ***That the late Lawrence Ahimah Sefa was granted the letters of administration to administer the estate of his late uncle in 1989.***

The facts in contention or in dispute would be discussed or resolved in terms of the identified issues for determination in the judgment.

DETERMINATION OF THE ISSUES.

Meanwhile, the issues in this judgment have been captured above. And I do not wish to repeat them again at this point.

Inasmuch as I concede that it was on the basis of those consolidated issues set down for trial that the parties and their Counsel prepared and submitted their respective witness statements, however, it is my considered opinion that when the pleadings of the parties as well as the evidence that they have adduced at trial are closely looked at, it would reveal and it may be seen that there are a couple of them that are very prominent whose resolutions could probably dispose of the suit and determine the dispute between the parties.

The position of the court finds support per the ***ipsissima verba*** of ***Wood CJ (as she then was) in the case of Fatal v Wolley (2013- 2014) 2 SCGLR 1070, at holding 2 as follows:***

> ***"It is sound learning that the courts are not tied down to only issues identified and agreed upon by the parties at pre-trial. Thus, if in the course of the hearing, an agreed issue is clearly found to be irrelevant, moot or even not germane to the action under trial, there is no duty cast on the court to receive evidence and adjudicate on it. The converse is equally true. If a crucial issue is left out, but emanates at trial from either the pleadings or evidence, the court cannot refuse to address it on the ground that it is not included in the agreed issues.."***

In the same vein, ***Anin Yeboah JSC (*** as he then was) in the case of ***Vincentia Mensah and Another v Numo Adjei Kwanko II; Civil Appeal No. J4/17/ 2016, delivered on 14th June, 2017,*** stated as follows:

> ***"It must, however, be made clear that a court of law is not bound to consider every conceivable issue arising from the pleadings and the***

> ***evidence if in its opinion few of the issues could legally dispose of the case in accordance with the law".***

I have had to quote the above authorities because from the statement of defence and counterclaim; and also from one of the issues set down for trial from the additional issues submitted by the Defendants- a challenge has been raised against the capacity of the Plaintiffs to bring the suit.

The law is that challenge to capacity can be raised at anytime of the trial or even on appeal. ***See the case of Sam Jonah v Duodu-Kumi (2003-2004) 1 SCGLR 50.*** It is therefore, necessary for the issue of capacity to be resolved by this court before considering any other issue.

Similarly, the Defendants had also raised another defence or objection that the Plaintiffs and their family are estopped from challenging the ownership of the Defendants and ***a fortiori*** from bringing the instant action.

In English case of ***EVERETT v. RIBBANDS [1952] 2QB 198,*** Romer L.J said as follows:

> ***"where there is a point of law which if decided in one way, is going to be decisive of litigation, advantage ought to be taken of the facilities afforded by the rules of court to have it disposed of at the close of the pleadings or ...shortly afterwards"***

In the light of the above principle and/or authorities, the court proposes to address the following issue first: Which is about the capacity ***vel non*** of the Plaintiffs to bring the instant action. That is the main issue, albeit there are other related issues that are subsumed under the capacity question. They are as follows:

1. ***Whether or not the 1st Plaintiff is the current head of the family of the late Forson Kwame Asomani and Lawrence Ahimah Sefa.***
2. ***Whether or not the 1st Plaintiff and for that matter the Plaintiffs have and is clothed with capacity to institute the action to recover the property in dispute.***

3. Whether it was the late Forson Kwame Asomani who personally acquired or built the new house NF. 138, Nkawkaw Adoagyiri.
4. Whether or not the land on which the new house is built was gifted to Lawrence Ahimah Sefa by Forson Kwame Asomani.
5. Whether or not it was the late Lawrence Ahimah Sefa who personally acquired or built the new house in dispute and that same was done during the lifetime of the late Forson Kwame Asomani.
6. Whether or not the late Forson Kwame Asomani died intestate and the High Court Koforidua granted Letters of Administration in respect of his estate in 1989.
7. Whether or not the late Forson Kwame Asomani died testate and left a Will dated 22nd March, 1984
8. Whether or not the Probate granted in respect of the alleged Will of the late Forson Kwame Asomani is the product of fraud, mistake or misrepresentation as claimed by the Defendants
9. Whether the new house in dispute belongs to the Plaintiffs and their Asona Family of Obomeng Kwahu or; it belongs to the Defendants as the surviving spouse and children of the late Lawrence Ahimah Sefa.

ADDRESSING THE ISSUES AND APPLICATION OF THE LAW.

I now proceed to resolve the issues set down for trial. In doing that, I have decided to resolve the above issues jointly and simultaneously as they flow from each other. In case the decision or answer is in the negative and against the Plaintiff- especially on the first issue of the capacity vel non of the Plaintiff- I will then have to draw the curtains down on this judgment.

In such a case, the court would be bereft of jurisdiction- and indeed it would be otiose- to continue to consider the other issues. In ***Sarkodie I v. Boateng II*** **[1982-83] GLR 715**, the Supreme Court said that

> ***"It was elementary that a plaintiff or petitioner whose capacity was put in issue must establish it by cogent evidence. And it was no***

> ***answer for a party whose capacity to initiate proceedings has been challenged by his adversary to plead that he should be given a hearing on the merits because he had a cast-iron case against his proponent."***

Similarly, in the case of ***Alfa Musah v Dr. Francis Asante Appeagyei; Unreported; Civil Appeal No. J4/32/2017; delivered on 2nd May, 2018; Anin Yeboah JSC (as he*** then was) in his usual no-holds-barred fashion criticized the two lower courts- High Court and Court of Appeal- for going ahead to discuss the other issues raised by the parties even though both lower courts had determined or found that the plaintiff/appellant had no capacity;

> ***"We think the law is that, when a party lacks the capacity to prosecute an action the merits of the case should not be considered. However, the two lower courts, with due respect, proceeded at length to discuss all the issues raised as if the appellant's case should be considered on the merits. If a suitor lacks capacity it should be construed that the proper parties are not before the court for their rights to be determined. A judgment, in law, seeks to establish the rights of parties and declaration of existing liabilities of parties.***
>
> ***In the case of* Akrong and Or *v.* Bulley *[1965] GLR 469 the then Supreme Court after holding that the plaintiff lacked capacity to prosecute the action as an administrator of the deceased, did not proceed to discuss the merits. For proceeding to discuss the merits when the proper parties are not before the court is not permitted in law. In this appeal, regardless of the other issues raised, the High Court, and the Court of Appeal for that matter erred in determining the other issues raised.***
>
> ***Even though the court may resort to taking evidence on all the issues raised by the pleadings, the court must always consider the issue of capacity first. In the Akrongs's case, supra, where lack of capacity was successfully raised on appeal before the Supreme Court, Apaloo JSC (as he then was) said at page 476 thus:***

> ***"But the question of capacity, like the plea of limitation is not concerned with the merits and as Lord Greene MR said in HILTON v. SUTTON STEAM LAUNDRY, once the axe falls it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitations [and I would myself add, or unanswerable defence of what of capacity to sue] is entitled of course, to insist upon his strict right".***

It is said that to be forewarned is to be forearmed. Thus, this court at Mpraeso – a lower court and bound to follow precedents of the superior courts- has taken the appropriate cue from admonitions in the above authorities to avoid a future censure from the superior courts. It is why the issue 1 in terms of the capacity ***vel non*** of the Plaintiffs would be treated first.

After that, the court- and assuming the Plaintiff successfully overcomes the capacity and estoppel hurdles, will resolve the other identified issues in this judgment.

ISSUE 1: THE CAPACITY OF PLAINTIFFS.

As has been stated above, the defendants challenged plaintiffs' capacity to sue in their paragraph 3 of their amended statement of defence and counterclaim. The essence of the challenge to the capacity of the Plaintiffs is that by Akan custom, the Asona Family of the Plaintiffs is "nton", which is patrilineal and is completely different from the matrilineal Akan family of the late Lawrence Ahimah Sefa and thus as the Plaintiffs claim to be the head of family and principal family member respectively of the Asona Family of Obomeng Kwahu, and not the matrilineal family of the late Forson Kwame Asomani nor the late Lawrence Ahimah Sefa, the Plaintiffs have no capacity to bring the instant action.

Besides, in the application for directions of the Plaintiffs, their Counsel had raised the following as the first issue to be set down for trial:

> ***"Whether or not the (1st) Plaintiff herein is the head of the Asona Family and therefore clothed with capacity to institute the instant action".***

In the opinion of the court, the paragraph 3 of the amended statement of defence of the Defendants did not only deny the Plaintiffs' title to the property but also implicitly challenged the capacity of the Plaintiffs to sue the Defendants for the stated reliefs on the Writ.

This is because the court is of the opinion that the Defendants are saying or suggesting that since the Plaintiffs are not from the matrilineal family of both the late Forson Kwame Asomani and Lawrence Ahimah Sefa, then the Plaintiffs and by extension their Asona Family do not have any title to the property to be entitled to the reliefs.

It is on the basis of the above authorities that the court finds that the defence of the Defendants per the paragraph 3 of their amended statement of defence raised the question of the real or proper family of the Plaintiffs for the purposes of succession to enable the Plaintiffs have an interest in the new house to clothe them with the capacity to initiate the instant action; which essentially challenges their right or capacity to bring the action and for the stated reliefs.

It was beautifully stated by Wiredu J (as he then was) in ***Amissah Abadoo v. Abadoo [1974] 1 GLR 110*** thus:

> ***"The law ... imposes a duty on a plaintiff for a declaration of title who maintains his action in a particular capacity to show by evidence brought by him or on his behalf that he is entitled to the declaration sought in that capacity.... The plaintiff in such a situation can succeed only if he were able to establish his capacity to sue in respect of the property in respect of which he is seeking the declaration or he must be able to establish by evidence a capacity which would have entitled him to sue in respect of that property..."***

So at this juncture, I pause to ask myself if the Plaintiffs succeeded to prove that they have capacity to bring this action? It is instructive to state that capacity is a point of law which is very fundamental, can be raised at anytime and goes to the root of the action.

It is axiomatic to say that a lack of capacity to sue, would render the writ and subsequent proceedings thereon null and void. In ***Republic v. High Court, Accra, Ex***

parte Aryeetey (Ankra Interested Party, [2003-2004] SCGLR 398, it was held per the brilliant jurist Kpegah JSC (as he then was) that:

> ***"Any challenge to capacity therefore puts the validity of a writ in issue. It is a proposition familiar to all lawyers that the question of capacity, like the plea of limitation, is not concerned with the merits so that if the axe falls, then a defendant who is lucky enough to have the advantage of the unimpeachable defence of lack of capacity in his opponent, is entitled to insist upon his rights: see Akrong v. Bulley [1965] GLR 469 SC."***

In terms of the burden of producing evidence it was held in ***Re Ashalley Botwe Lands; Adjetey Agbosu and others v. Kotey and Others (2003-2004) SCGLR 420*** as follows:

> "***Under the Evidence Decree 1975 (NRCD 323) the burden of producing evidence in any given case was not fixed but shifted from party to party at various stages of the trial depending on the issues asserted and/or denied"***

With regard to the standard of proof, Appau JSC (as he then was) held in ***Ebusuapanyin James Boye Ferguson (Substituted by Afua Amerley) v. I. K. Mbeah and 2 Others, Civil Appeal No. J4/61/2017, dated 11th July 2018, S.C***. (Unreported) as follows:

> ***"The standard of proof in civil cases, including land, is one on the preponderance of probabilities - {See sections 11 (4) and 12 of the Evidence Act, 1975 [NRCD 323] and the decision of this Court in ADWUBENG v. DOMFEH [1996-97] SCGLR 660 at p. 662}".***

What then is capacity? In the case of ***Kasseke Akoto Dugbartey Sappor & 2 Others v Very Rev. Solomon Dugbartey Sappor and 4 Others; Unreported; Civil Appeal No. J4/46/2020; delivered on 13th January, 2021,*** Prof. Mensa-Bonsu JSC, stated as follows as the meaning and scope of capacity in law;

> ***"Black's Law Dictionary defines 'Capacity' or Standing as: "A party's right to make a legal claim or seek judicial enforcement of a duty or right capacity…" Thus, one's ability to appear in court to make a claim hinges on whether one is recognized in law as having sufficient interest in any matter to seek a hearing on any particular issue. This "sufficient interest" must remain throughout the life of the case, or one's legal ability to stay connected with a case making its way through the courts would be lost…"***

In the case of ***The Republic v Bank of Ghana; Ex-Parte: Expressway Microfinance; Suit No: HR/005/2020; delivered on 12th March, 2020,*** the High Court, Accra, coram Abodakpi J, stated as follows as to the meaning and effect of capacity in law:

> ***"It is common knowledge that, capacity is a fundamental legal principle in commencement of any legal suit, the lack of which strips a plaintiff/applicant his locus.***
>
> ***In AKRONG v. BULLEY (1965) GLR469 SC and several decisions on the subject, the principle has been upheld as very important.***
>
> ***The capacity in which an action is commenced be it personal, representative etc. must exist from the beginning of the suit and it is immaterial that, during the pendency of the action the plaintiff/applicant acquired the requisite capacity.***
>
> ***Thus a person's capacity to sue whether under a statute or rule of practice must be found to be present and valid before the issuance of the writ of summons else, the writ will be declared a nullity.***
>
> ***In the case of a company, its authority to bring a lawsuit is one of capacity and not standing. Capacity to sue is a very critical component of any civil litigation without which the Plaintiff/Applicant cannot maintain a claim.***

I refer to the work of Prof. Thomas Cromwell on the subject [in an article titled, IN LOCUS STAND 1 - A COMMENTARY ON THE LAW OF STANDING IN CANADA, 1986]

He wrote:

> ***"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."***

In proving their capacity, the Plaintiff- as seen from the pleadings and evidence- traced their root of title from a devise made to them as beneficiaries and/or as part of the family of the late Forson Kwame Asomani who had at the paragraph 6 of his purported Will made on 22nd day of March, 1984- Exhibit B1- given the residue of his estate to them. Specifically, at the paragraph 6 of the Exhibit B1, it reads as follows;

"6. I DEVISE and BEQUEATH the residue of my estate to my family".

The Plaintiffs claim or suggest to be the head and principal member of that "family" as used in the paragraph 6 of the Exhibit B1. Meanwhile, the Exhibit B is a probate granted in respect of the Exhibit B1, in March, 1994. However, it would be seen that the Defendants deny the capacity of the Plaintiffs on two fronts:

First is that the Plaintiffs are not the head and principal member of the Asona Family of Obomeng; and second that, the said Asona Family of Obomeng was only the patrilineal family of the late Forson Kwame Asomani and Lawrence Ahimah Sefa and not the matrilineal family to enable the Plaintiffs have an interest in same.

On the first leg of their capacity, the court finds that the 2nd Plaintiff, Yaa Dansoa is a principal family member of the Asona family. The Plaintiffs' attorney, Beatrice Asomani, who had testified for the case of the Plaintiffs, identified the 2nd Plaintiff as her aunt, and a brother to the late Lawrence Ahimah Sefa.

The Plaintiff attorney had told the court that she was even more than seventy (70) years of age. Looking at the 2nd Plaintiff in court, she appeared much older and frail than the Plaintiffs' attorney and I have no doubt to find that the 2nd Plaintiff is a principal member of the Asona family.

In terms of the 1st Plaintiff, the court finds and holds that he exists and is the head of the Asona family of Obomeng. The Exhibits C series and D series amply supported his position as head of family and his identity.

Those pieces of evidence succeeded to raise a prima facie evidence of his position and identity; which shifted the burden on the Defendants who were alleging that one Opanyin Yaw Darkwa was the head of family to call evidence to rebut that.

In the opinion of the court, the Plaintiffs have been able to discharge the burden of proof on them and has by the evidence, established facts from which an inference can reasonably be drawn in their favour, then the onus would shift on the Defendants, to dispute that inference, not by a mere denial, but a reasonable evidence to rebut the presumption. See ***Takoradi Flour Mills v. Samir Faris (2005-2006) SCGLR 882.***

For it is trite learning that the evidential burden is not fixed or inflexible but swings like a pendulum. Wood CJ (as she then was) restated this position of the law in **POKU V, POKU (2008) MLRG 1@ 30** when she stated that;

"Generally, the burden of proof is on the party asserting the facts in issue with the evidential burden shifting as the justice of the case demands"

I therefore find and hold that the Plaintiffs are head and principal member of the Asona family of Obomeng respectively. The second leg is whether or not the

"family" used in the clause 6 of the Will of the late Forson Asomani is and refers to the Asona family of Obomeng that the Plaintiffs belong to.

It was therefore required of the Plaintiffs whose capacity have been challenged to prove not only that they are the head and principal family member of the Asona Family of Obomeng but also that they are the family of the late Forson Kwame Asomani and Lawrence Ahimah Sefa for the purposes of succession or inheritance.

It is seen that the deceased as well as the parties in this case are Akans, more specifically Kwahus. Succession in Akan customary law is matrilineal or maternal, more specifically the immediate matrilineal or maternal family.

In his book, ***"The Law of Testate and Intestate Succession in Ghana"*** (1966) at page 75, Justice Ollennu, of blessed memory, says this about the composition of the immediate matrilineal or maternal family of an Akan:

"(1) The immediate maternal family of a deceased male or female consists of his or her mother, the mother's brothers and sisters, and all who were descended matrilineally from the same womb as himself or herself, i.e., his or her surviving uterine brothers (if any), his or her surviving uterine sisters (if any); in the case of a woman her own children and uterine grand-children, and in the case of a man the surviving children of all his sisters, dead or alive ... in short, the immediate maternal family consists of all children of his or her uterine grandmother, and all descendants of his or her mother in the direct female line."

See also the case of ***Republic v Bonsu and Others; Ex-parte Folson***; Unreported: delivered on 23rd November, 1999; per Kanyoke J (as he then was).

In applying the above authorities to the facts of this case, it is seen that the late Lawrence Ahimah Sefa was a nephew of the late Forson Kwame Asomani. It is no

wonder why the former customarily succeeded the latter in fidelity to Akan custom and traditions.

The 1st Defendant is the sister to the late Lawrence Ahimah. Indeed, while the Plaintiff attorney- who is a daughter of the late Forson Asomani- called the 2nd Plaintiff her "aunt"- that is '***sewaa';*** the 1st Defendant even identified the 2nd Plaintiff as sister of her late husband, Lawrence Ahimah Sefa.

Therefore since the late Lawrence Ahimah Sefa and the 2nd Plaintiff are nephew and niece respectively of the late Forson Asomani, then the reasonable inference or conclusion is that they are the children of the sister of the late Forson Asomani.

The result is that, the 2nd Plaintiff, Yaa Dansoa, is the surviving child of the sister of the late Forson Kwame Asomani; and would thus make her a member of the immediate family of the late Forson Asomani under Akan customary law. I find and hold so accordingly.

In that light, I find that the 2nd Plaintiff as a surviving niece of the late Forson Kwame Asomani, is part of his immediate family and thus has interest in the estate of the late Forson Kwame Asomani. I accordingly find and hold that the Plaintiffs are members of, nay, head and principal member respectively of the 'family' that was used in the Will of the late Forson Kwame Asomani. See the Supreme Court case of ***DOTWAA and ANO. v. AFRIYIE [1965] GLR 257-269,***

Despite the above resolutions in favour of the Plaintiffs that they are head and principal family member of the Asona Family of Obomeng, and also that they belong to the matrilineal family of the late Forson Kwame Asomani, the court will however add that it will appear that that will not be enough to clothe them with capacity to institute the present action in relation to the disputed property. They will need and be required to do more.

Specifically, what I want to say is that even though it has been found above by the court that the Plaintiffs are head and principal member of the family as used in the Will of the

late Forson Kwame Asomani, that is not enough even as beneficiaries of the residuary clause of the Will. I will explain myself further.

In the case of ***Network of International Christian Schools and Another v Laurie Korum and Others and American International School and Others v Network of International Christian Schools and Others (Consolidated); Unreported; delivered on 12th June, 2015, Torkornoo JA (*** as she then was) sitting as an additional High Court Judge, stated as follows which highlights my duty as a judge to consider and address the legal issues arising from the pleadings and evidence, even if a party is unaware of it:

> ***"A court is required to look at the legalities of the issues in a suit even if the parties fail to do so. As the Supreme Court held in GIHOC REFRIGERATION (NO.1) HANNA ASSI(NO.1) 2007/2008 SCGLR1 'A court was entitled to apply the law to the facts of the case even if the parties were unaware of it. Therefore, while a court was bound by the parties' evidence, it was not bound by the parties' legal misconceptions arising there-from.'***

Now, I have had to quote the above authority because there appears to some legal defect with the Exhibits B and B1 that the Plaintiff tendered into evidence as root of title and a fortiori as basis for their capacity to sue, even though same had not been specifically pleaded by the Defendants nor argued by the learned Counsel for the Defendants during the trial; and also despite that same had not been set down as part of the issues for trial.

However, as it bordered on the capacity ***vel non*** of the Plaintiffs, I was enjoined to raise it suo motu and determine same, especially when there is evidence on record to support same. See the dictum of Twumasi J (as he then was) in ***KARIYAVOULAS v. OSEI (1982-83) GLR 658***

Now, from the evidence, the Plaintiffs attorney had tendered into evidence Exhibits B and B1, which were the Will and Probate of the late Forson Kwame Asomani. They

appeared in order despite the allegations by the learned Counsel for the Defendants that they were procured through fraud, mistake or misrepresentation.

The doctrine ***omnia Praesumuntur rite esse acta*** applies here in favour of the Exhibits B and B1 which are official documents from the High Court, Koforidua. See the case of ***Anthony Wiafe V. Dora Borkai Bortey; Case No J4/43/2015 dated 1/06/2016***. The Supreme Court whilst pronouncing on this maxim above per Benin JSC stated as follows:

> ***"the Lands Commission must be credited with the knowledge of who is the rightful person to give away registrable documents to Nungua Stool Lands. The Lands Commission is the repository of the appropriate persons to sign away state and family lands. Thus the principle Omnia Praesumuntur rite esse acta should be credited to the Lands Commission. Therefore the Defendants who are asserting the contrary should lead evidence to rebut the presumption of regularity that is raised by the Lands Commission act of accepting Exhibit A for registration".***

This common law maxim enjoys statutory blessing as per ***section 37(1) of the Evidence Act, NRCD 323*** as follows:

> ***"It is presumed that official duty has been regularly performed."***

The Defendants who were asserting the contrary in this case failed to lead evidence in the opinion of the court to rebut the presumption of regularity that is raised by the Exhibits B and B1.

Despite that, I find that there is no evidence before the court that the Plaintiffs and their Asona Family of Obomeng have been granted the vesting assent to the disputed property as beneficiaries by the sole executor. Even if they have been granted the vesting assent in respect to the disputed property, same was not tendered into evidence by the Plaintiffs.

The reasonable inference is that the Plaintiffs and their Asona Family of Obomeng have not been granted or have executed in their favour the vesting assent concerning the property in dispute by the sole executor in that Will.

In the case of ***Bousiako Co. Ltd v. Cocoa Marketing Board (1982-83) 2 GLR 824, it was held at page 839*** that if a party had in his possession certain documents to establish his case, but fails to produce them, then the proper inference to be drawn is that the documents never existed or if it did, it did not contain the averments mentioned or testified about.

I hold that on the authorities, such failure is fatal to the case of the Plaintiffs as it does take away and shakes the foundation of their capacity to sue to recover or even deal with the property.

What is a vesting assent? It may be described as an instrument whereby a personal representative, after the death of a tenant for life or statutory, owner, vests settled land in a person entitled as tenant for life or statutory owner – Osborn Concise Law Dictionary 8th Edition.

It is instructive to state that before the passage of the Administration of Estates Act, 1961, (Act 63)- that is under sections (1) (1) and 96(1)- the position of the law was different and that devisee could dispose and convey an estate obtained from a Will without a Vesting Assent.

However, the position of the law has since changed under Act 63. It is thus provided by section 1 (1) of the Administration of Estate Act, 1961 (Act 63) that:

> "The movable and immovable property of a deceased person shall devolve on the personal representatives of the deceased person with effect from the date of death".

Section 96 (1) of the Act 63 also provides that:

"A personal representative may assent to the vesting ... in a person who, whether by devised, bequest, devolution, appropriate ion or otherwise, it entitled to the vesting beneficially or as trustee or personal representative, of any estate or interest in immovable property.

a. To which the testator or intestate was entitled, or

b. Over which the testator exercised a general power of appointment by will, and which devolved on the personal representative."

In **Conney v. Bentum Williams *[1984-86] 2 GLR 301, CA*** the Court of Appeal explained that a beneficiary of an Estate must be vested with the estate by Vesting Assent before he could convey the property.

Furthermore, in the case of *Okyere (Deceased) (Substituted by) Peprah v. Appenteng and Adomaa* [2012] 1 SCGLR 65, the issue of capacity came up again for determination. Dr. Date-Bah JSC (as he then was) in delivering the judgment of the apex court stated as follows to affirm the decision or principle held in the Conney v Bentum Williams case supra;

"After the enactment of the Administration of Estates Act, 1961 (Act 63) the correct legal position is that a devisee could not sue or be sued in relation to the devised property before a vesting assent had been executed in his or her favour.."

Appropriate reference is also made to the learned authors B J da Rocha and CHK Lodoh in their book, " Ghana Law and Conveyance" who wrote that after the coming into force of the Administration of Estate, Act 1961 (Act 63), gifts or devisees under a Will do not vest automatically in the devisees and the legatees.

For it is the law that even after the grant of probate, same does not alone vest title in named beneficiaries until personal representatives or executors of the deceased have assented to the vesting of the devisees in the beneficiaries before such beneficiaries can deal with the gifts as they like. For at the death of the testator, the testator's immovable and movable properties on his personal representatives with effect from the date of the testator's death.

With regards to the devisees, the personal representative must vest such gifts in the beneficiaries concerned by means of a vesting assent – Section 96 (1) (Supra). An assent must be in writing and in the name of the person in whose favour it is made.

Intentions in a Will do not have any legal effect while the Will has not been admitted to probate. It is only after probate had been granted to the Executors that the provisions of the Will could be carried out – *Conney v. Bentum William* (Supra).

"After the grant of Probate, a beneficiary of any real estate under the Will must have a vesting assent executed in his favour by the executors under the Administration of Estates Act, 1961.

Until that was done, any purported sale of the real estate by the beneficiary or the devisees would be of no legal consequence and the purchaser thereof would not have a valid title..."

See the dictum of Welbourne (Mrs.) JA, in the case of ***Gloria Greenish and 4 Others v Hernicus Johannes Maria Wienties and 2 Others; Civil Suit No; H1/06/16; delivered on 23rd June, 2016.***

So what is the effect of all the above authorities on the instant case and in terms of the fate of the Plaintiffs who have not been granted and/or adduced the vesting assent in respect of the property they have sued in this action? The following authorities provide the answers.

In the case of ***Akua Gyankye of Pakyi Nkrumah v Kwadwo Mensah For Himself and On behalf of his family members of Pakyi Nkrumah; Civil Appeal No. H1/21/13; delivered on 22nd January, 2028***, the Court of Appeal, per Dzamefe JA held as follows, which applies to the instant case against the Plaintiffs ***mutatis mutandis*** and with which I wish to rely on to determine the capacity of the Plaintiffs in this case;

> ***"....From the Record of Appeal, there is no evidence that the Executors had granted vesting assents to the beneficiaries like the plaintiff. There is also no evidence of any vesting orders from the court. The law is certain that a devisee cannot sue nor be sued in relation to the devised property before a vesting assent has been executed in his or her favour. Accordingly, in the absence of a vesting assent executed in favour of the***

plaintiff in the instant case, he could neither sue nor be sued on his devise…..

A beneficiary cannot sue or be sued in respect of a property devolved unto him under a Will or intestacy for which vesting assent has not been registered on his behalf in accordance with Sections 1 (1), 2 (1) and 96 (1) of the Administration of Estates, Act. Any alienation by a beneficiary under a Will or intestate estate without a valid registered vesting assent is void for want of capacity.

Capacity goes to the root of every case and where the capacity of a party is challenged especially the plaintiff such as in the instant appeal, the court must first resolve that issue because a person without capacity cannot be given a hearing even though he may have an iron cast case. Capacity to institute an action is a precondition to the institution of an action in court. See* Yorkwa v. Duah *[1992/3] GBR 278.

The trial court erred in holding that the Will devised the lands in issue to the plaintiff and the siblings and therefore they own those lands. The court failed to see whether the devisees have the vesting assent given them by the executors to be able to assume title……

In the instant appeal there is no evidence that the vesting assents were executed by the executors of the Will to the beneficiaries including the plaintiff nor was same done and registered as required by the Administration of Estates Act. This is a creature of statute and must be strictly adhered to…….

The plaintiff/respondent therefore lacks capacity to institute this action. That ground of appeal succeeds. Once he lacks that capacity, the whole trial is a nullity and same is set aside…"

Accordingly, the court finds and holds that for the lack or absence of evidence of a vesting assent been granted or executed in favour of the Plaintiffs and their Asona

Family of Obomeng, the Plaintiffs herein lack the requisite capacity to have sued the Defendants and in respect of the property (new house) in dispute at House No. NF 138, Nkawkaw Adoagyiri.

Its trite learning that a plaintiff who sues in a representative capacity but at the date of issue of the writ he is not clothed with such capacity the writ of summons and the statement of claim are null and void and incurably bad. See ***Fosua and Adu Poku v. Dufie (decd) Adu Poku Mensah [2009] SCGLR 310.***

The court accordingly dismisses the action or suit brought by the Plaintiffs as well as the reliefs endorsed on the Writ of Summons on the grounds of lack of capacity to institute and maintain the suit. The court is unable to give judgment to the Plaintiffs. It is non-negotiable.

FATE OF COUNTERCLAIM OF THE DEFENDANTS:

So what happens to the counterclaim of the Defendants as mentioned above? The following authorities are instructive in that regard:

In the case of ***Nii Kpobi Tetteh Tsuru III v Agric Cattle; Civil Appeal No: J4/15/2019***; delivered on 18th March, 2020, per Marful-Sau, JSC (as he then was) held that;

> ***"Now, assuming even if the rule enabled this court to join Agric Cattle Lakeside Estate Ltd, to replace the 1st and 5th defendants as argued by Counsel, the counterclaim would still be struck out since the Plaintiff's writ is a nullity for lack of capacity. A counterclaim cannot be maintained when the writ which commenced the action is declared a nullity…".***

Similarly, in the case of ***Huseini v Moru (2013- 2014) 1 SCGLR 363***, Baffoe-Bonnie JSC held that;

> ***"….It is true that a counterclaim is a separate action from the claim. But in the peculiar circumstances of this case the bottom of the matter had been knocked off for want of capacity. If there was no capacity to sue***

> ***because of the defective Power of Attorney, then there was no capacity to defend the action, any pleadings served on the Attorney would be deemed not to have been properly served on the principal. To the extent that service of defendant's counterclaim on the deficient attorney is deemed as no service, evidence given in proof of the counterclaim cannot be allowed to stand…. with the plaintiff struck off for want of capacity, there was no defendant to the counterclaim and therefore the counterclaim could not have been prosecuted. Both the claim and the counterclaim are struck out…"***

On the basis of the above authorities, the court is bound to strike out the counterclaim of the Defendants. Same is struck out accordingly.

Nonetheless, the court will say that the Defendants may continue to be in possession or occupation of the disputed property. In ***Seraphim v Amua Sekyi (1961) 1 GLR 238*** at holding 1, it was stated that a person in possession can maintain an action against the whole world, except the true owner.

Again in ***Osei (substituted by Gilard) v. Korang (2013-2014) 1 SCGLR 221 at p. 234*** it was held inter alia that possession is nine points of the law and that a person in possession of land is entitled to the protection of the courts against the whole world, except the true owner. Until someone with a superior and better title comes forward to establish such title, the Defendants may rely on their possession of the property without any disturbance from the Plaintiffs.

I must however caution that this must not be taken to mean a judicial declaration of the court that the Defendants own or have title to the property for the reason that the merits of their case as per the counterclaim were not determined.

Meanwhile, after reviewing Order 74 of the C. I. 47 of 2004 (supra), the court awards costs of GHC 3,000.00 (Three Thousand Ghana Cedis) in favour of the Defendants to be paid by the Plaintiffs.

The costs are awarded with the expectation that it would deter the Plaintiffs from mounting a similar action against the Defendants when they have not obtained the requisite capacity, mindful that this very court- albeit differently constituted- had in 2018 struck out a similar action by them on grounds of lack of capacity.

SGD:

H/H STEPHEN KUMI ESQ
CIRCUIT JUDGE.

COUNSEL:
PHIDELIS OSEI DUAH ESQ FOR THE PLAINTIFFS PRESENT.
KENNEDY EFFAH, ESQ, FOR THE DEFENDANTS PRESENT.