CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON THURSDAY, 20TH JULY, 2023

SUIT NO. C11/105/22

BILLY KOJO HAIZEL - PLAINTIIFF

VRS

JOSEPH KWAME SAKYI - DEFENDANT

JUDGMENT

This is a tussle over a male toddler. Such tussles happen more often than not, when two adult egos refuse to bend over a little bit to accommodate each other and focus on the best interest of the child. The claim of the plaintiff against the defendant as filed per his writ of summons and statement of claim dated the 10th day of March, 2022 is for

a) A declaration that the plaintiff is the biological father of Nathan Paa Kwaku Haizel
b) An order giving the plaintiff custody of his son Nathan Paa Kwaku Haizel without any let or hindrance from the defendant
c) A further order directed towards the defendant to unconditionally release Nathan Paa Kwaku Haizel to the plaintiff.

The defendant filed his statement of defence and counterclaimed for;

a) An order directed at the plaintiff to pay domufa or kwaseabuo to the family before he is recognized as the father of the child by the family.

The battle lines having been clearly defined between the parties, these issues were set down for trial;

1. Whether or not per Akan custom, the plaintiff is recognized as the father of the child in issue
2. Whether or not custody of the child should be granted to the plaintiff or the defendant.

CONSIDERATION BY COURT

This is a civil matter and so **t**he plaintiff having asserted, he bears the legal burden of proof on a preponderance of probabilities. See ***Sections 11 and 12 of the Evidence Act, 1975 (Act 323)***. In the case of ***Gifty Avadzinu v. Theresa Nioone [2010] 26 MLRG 105 @ 108,*** their lordships held *"It is trite that the standard of proof in all civil actions without exception is proof by preponderance of probabilities, having regard to section 11 (4) and 12 of the Evidence Act. This means that a successful party must show that his claim is more probable than the other."*

As the defendant has counterclaimed, he also had the duty to produce credible evidence that would convince the court, on a balance of probabilities, of the existence of his claims.

In the case of ***Op. Kwasi Asamoah v. Kwadwo Appea (2003-04) SC GLR 226, the apex Court held at page 246 as follows:*** *"The position with regards to proof of the defendant's case was that since they made a counterclaim, they assumed the same onus of proof as lay on the plaintiff".*

The defendant by his counterclaim, ''assumed *the same onus of proof as lay on the plaintiff*''. See the cases of ***Messrs Van Kirksey & Associates v. Adjeso & Others [2013-2015] 1 GLR 24; In Re Will of Bremansu; Akonu – Baffoe & Others, Buaku v. Vandyke (Substituted by) Bremansu (2012) 2 SC GLR 1313 at holding 1.***

The requirements of what would constitute cogent and credible evidence that would meet the test of a balance of probabilities is succinctly contained in the case of ***Emmanuel Osei Amoako v. Standford Edward Osei [2016] DLSC 2830.*** The erudite Appau JSC speaking for the Supreme Court held: *"It is trite learning that a bare assertion by a party of his pleadings in the witness box without more is no proof. Proof in law has been authoritatively defined as the establishment of facts by proper legal means. As the celebrated Ollenu, J (as he then was) stated in his judgment in the case of Khoury and Another v Richter, which he delivered on 8th December 1958 (unreported), on the question of proof, which he repeated in the case of* ***Majolagbe v Larbi & Anor [1959] GLR 190 at 192;*** *"where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances or circumstances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the court can be satisfied that what he avers is true …"* See also the cases of ***International Rom Ltd. v. Vodafone Ghana Ltd. & Another [2016] DLSC 2791***

THE UNDISPUTED FACTS

To a large extent, the parties are agreeable to the facts of this case. This appears to all intents and purposes to be a tussle between statute and customary law. The plaintiff herein, a married man entered into an amorous relationship with the daughter of the defendant. They both lived and worked in Takoradi. The said daughter of defendant is

now deceased. The relationship between the plaintiff and the defendant's deceased daughter produced the child who is the subject matter of this action.

The child was born in February, 2020 and the mother passed on in June, 2020. At all material times, prior to the death of his mother, the child had lived here in Tema with his mother and defendant's wife. The mother had travelled all the way from Takoradi to Tema to deliver believing that defendant's wife being her step mother would provide her with the necessary assistance and care as a new mother.

After the death of the child's mother, he continued to live with the defendant and his wife here in Tema. The plaintiff began to send money to defendant as maintenance for the child. The defendant rejected it on the basis that they had no agreement on this and most importantly, on the basis that the plaintiff had failed to perform Kwaseabuo or domufa to the family and so was not recognized as the father of the child. It is these facts less the red herrings that have brought the parties to this court.

1. ***Whether or not per Akan custom, the plaintiff is recognized as the father of the child in issue***

The plaintiff alleges that he is the father of the child in issue as he has named him in that capacity. In his evidence in chief, he says that the child was outdoored on the seventh day and named accordingly. He tendered in evidence EXHIBIT 1 and A1 as proof of the name of the child.

There is no dispute that the child was birthed on the 12th day of February in the year 2020. That would mean that he was outdoored on the 19th day of February, 2020. EXHIBIT 1 which is the name of the child as entered in the register of birth is certified

as being entered in the on the 24th day of March, 2020. EXHIBIT A1 which is the certified entry in the register of births is dated the 17th day of July, 2022. I take note that the plaintiff issued this writ in March, 2022. That would mean at the time of filing the writ, EXHIBIT A1 was not in existence.

EXHIBIT B series which the plaintiff tendered in evidence as WhatsApp conversations between himself and a brother of the deceased mother of the child as well as conversations between the said brother and mother of the child show that as far as April to June, 2020 the name of the child was still being discussed among them.

Then plaintiff's own EXHIBIT D1, in a chat message which he sent to defendant which is dated the 26th day of September, he states clearly that ''kindly take note that *after the naming ceremony*, I will take the baby…..''. From his own documentary evidence, the child could not have been ''outdoored'' and named Nathan Paa Kweku Haizel seven days after his birth.

The defendant contends that he named the child seven days after the birth of plaintiff on the basis that plaintiff was not traditionally recognized as the father of the child since he was unmarried to the mother of the child and per Akan custom, had not performed Kwaseabuo for impregnating the mother outside wedlock. That he named the child by his own name

The plaintiff does not deny that he impregnated the mother of the child without marrying her and has failed to perform Kwaseabuo to her family. He says that the said Kwaseabuo being demanded of him is excessive.

Both parties are Akan. The plaintiff is a Fante and the defendant is an Ashanti. Thus the applicable customary law that would apply to them is Akan customary law. Per ***section 55 of the Courts Act, 1993 (Act 459),*** customary law is a question of law.

Section 55 Ascertainment of customary law

(1) A question as to the existence or a rule of customary law is a question of law for the Court and not a question of fact.

To the extent that the plaintiff does not deny that he has to perform Kwaseabuo, I find that there is no dispute as to that particular customary law among the Akan. In the case of ***Quarshie vrs. Bosso [1992] 1 GLR 77,*** to which learned counsel for the defendant in his well written address points this court, ***Omari Sasu J.*** quoted with approval, the position of Akan law with regard to the naming of a child as enunciated by the respected N. A. Ollenu in his book ''The Law of Testate and Intestate Succession in Ghana.

In same, Ollennu posits that ''to become recognized as the father of a child, a man must perform the naming ceremony on the eight day of its birth or on a subsequent day and give the child a name''.

Plaintiff had not done this either on the 8th day of the birth of the child or on any subsequent date. I believe the evidence of defendant and his witnesses whom I found to be witnesses of truth that the plaintiff had initially promised the family that he would marry the deceased mother of the child and name the child on the same day after the birth of the child. That he recanted this after the birth of the child to only naming the child and so defendant and his family had refused to allow him to name the child as he was not known to them.

As posited by Ollennu in the same book and by such authors like J.M Sarbah in his book Fante Customary Laws, 3rd edition, the Akan are matrilineal and a child born to a woman is considered is belonging to the woman's family rather than the man's family.

Thus in a situation of this nature where the father is not traditionally known to the family either by marriage, a knocking ceremony or the performance of kwaseabuo, the child is regarded as wholly belonging to the family of the mother and considered as the child of the woman's father.

Plaintiff has indicated his willingness to perform the kwaseabuo rites. Under cross examination by learned counsel for the defendant, he had answered;

Q: *In paragraph 15 of your evidence in chief and further in paragraph 9, (counsel reads out paragraph 15 and 9). You agree that there are rights to be performed customarily to play the role of a father.*

A: Yes, my lord but those statements came after when the court asked us to go and settle. When the defendant came out with his claims and I said that I am ready to perform any rites.

To the extent that the plaintiff was not married to the mother of the child who was the daughter of defendant and he has also not performed kwaseabuo, I hold that per Akan custom, he is not the recognized as the father of the child in issue.

The plaintiff has indicated that he is willing to pay the said kwaseabuo but same is exorbitant. By his evidence of willingness to pay, it means that he is not challenging the claim of the defendant that he be ordered to pay the said kwaseabuo or domufa before being recognized as the father of the child.

Unfortunately, the plaintiff cannot be a judge in his own cause and determine what he should be made to pay for what is considered a ''wrong' done to the family of the defendant by his taking of their child and impregnating her without their knowledge and consent.

Both plaintiff and the defendant as well as DW1 in this court have testified that the defendant demanded for three thousand Ghana cedis (Ghs 3,000) as kwaseabuo. It is this amount that the plaintiff finds exorbitant. Plaintiff indicated to the court that he travels to court from Takoradi on each court date by air and pays Ghs 2,000 as the air fare.

I do not find his claim of exorbitancy to be true per his own circumstances. I would refrain from granting the relief of defendant to order plaintiff to pay the said amount on the basis that the mother of the child to whom the wrong was done and who is the primary purpose for the payment of the kwaseabuo has passed on to eternity and so he cannot be compelled to pay the said amount even though the ''wrong'' was done not only to her but to her family as well.

It would however be in plaintiff's own interest in order to bring matters to finality as to being recognized traditionally as the father of the child to pay the said Kwaseabuo. Customary law has been known to rear its head during important milestones in a person's life and to apply very ruthlessly in some situations.

2. *Whether or not custody of the child should be granted to the plaintiff or the defendant.*

The plaintiff seeks an order granting him custody of his son Nathan Paa Kwaku Haizel without any let or hindrance from the defendant and a further order directed towards the defendant to unconditionally release Nathan Paa Kwaku Haizel to the plaintiff.

Whereas the plaintiff appears to be reliant on Statute as the basis of his contention before this court, the defendant relies on custom as the grounding for his contention that the plaintiff is not the father of the child. Chapter four of the Constitution, 1992 provides for the laws of Ghana in Article 11.

Article 11— The Laws of Ghana.

(1) The laws of Ghana shall comprise—

(a) this Constitution;

(b) enactments made by or under the authority of the Parliament established by this Constitution;

(c) any Orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution;

(d) the existing law; and

(e) the common law.

(2) The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature.

(3) For the purposes of this article, "customary law" means the rules of law which by custom are applicable to particular communities in Ghana.

Clearly, per Article 11 of the 1992 Constitution, the laws of Ghana include both statutes and customary law. However, in terms of hierarchy, statutes rank higher than customary law. Thus even though both the plaintiff and the defendant are Akan, their personal laws or customary laws would only be applicable where there is no statutory provision on an issue.

This is an issue involving a three and a half year old child. Parliament in exercise of its authority, enacted the ***Childrens' Act, 1998, Act 560*** to per its preamble ''An Act to reform and consolidate the law relating to children, to provide for the rights of the child, maintenance and adoption, to regulate child labour and apprenticeship, for ancillary matters concerning children generally and to provide for related matters''.

The Children's Act would thus take precedence over the customary law of both plaintiff and defendant in the determination of this matter.

Per section 41 of Act 560, the name of a parent as entered in the register of birth shall suffice as evidence of parentage. ***Section 124 which is the interpretation section of Act 560,*** a parent includes the natural parent and a person acting in whatever way as a parent.

EXHIBIT A which was tendered in evidence by the plaintiff is the entry in the register of birth and B of the child. In both exhibits, the plaintiff is named as the father of the child. That is evidence of parentage.

In this court, there has been no dispute that he is the natural or biological father of the child. The defendant had admitted this at page 41of the record of proceedings.

Q: So as you stand there, you knew for sure because of the various interactions that have happened between you and Billy Kojo Haizel that he is the biological father of your grandson.

A: My Lord that is so.

DW1, who is the primary carer of the child also admitted this at page 53 of the record of proceedings that plaintiff is the biological father of the child.

Q: Who is the biological father of Nathan?

A: Billy Kojo Haizel - plaintiff

To the extent that the law specifically Act 560 recognizes the plaintiff as the natural parent of the child and the defendant also recognizes him as such, I find that customary law cannot operate contrary to the provisions of a statute. Thus the performance or otherwise of Kwaseabuo or domufa cannot be the basis of determining whether or not the plaintiff is the biological father of the child. To that extent, I hereby hold that the plaintiff is the biological father of the child in issue.

Plaintiff is entitled to his claim for declaration as the biological father of Nathan Paa Kwaku Haizel.

The plaintiff is seeking custody of the child simply on the basis that he is the biological father. Per the provisions of ***section 5 of Act 560***, as the parent of the child, he is within his rights to make this prayer.

Section 5— Right to Grow up with Parents.

No person shall deny a child the right to live with his parents and family and grow up in a caring and peaceful environment unless it is proved in court that living with his parents would—

(a) lead to significant harm to the child; or

(b) subject the child to serious abuse; or

(c) not be in the best interest of the child.

However, simply being the biological father of the child does not entitle him automatically to custody of the child. As section 5 (c) provides, where it is proved in court that the child living with the plaintiff would not be in the best interest of the child, the court shall deny the plaintiff this right.

See the case of ***Josephine Sokroe (Suing as administrator of the estate of the late Hayford Wogbe) v. Anthony Kofi Assmah [2013] DLHC 2485*** where the Court held that "Applying the welfare principle, parentage alone is no guarantee for the custody of a child. The welfare principle supersedes even parentage in appropriate cases in considering custody of the child. That principal would be equally paramount in considering custody to members of the wider family''.

The best interest of the child is the primary consideration in matters pertaining to the grant of custody of a child. This position is referred to as the welfare principle and it has been concretized by Statute in ***section 2 of Act 560.***

Section 2—Welfare Principle.

(1) The best interest of the child shall be paramount in any matter concerning a child.

(2) The best interest of the child shall be the primary consideration by any court, person, institution or other body in any matter concerned with a child.

A court in arriving at decisions as to custody and access of a child is bound to consider the best interest of the child and the importance of a young child being with his mother. The court must also consider the age of the child; that it is preferable for a child to be with his parents except if his rights are persistently being abused by his parents; the views of the child if the views have been independently given; that it is desirable to keep siblings together and the need for continuity in the care and control of the child. ***See section 45 of Act 560***

According to ***Azu Crabbe CJ*** in the case of ***Braun v. Mallet [1975] 1 GLR 81-95*** "in questions of custody it was well-settled that the welfare and happiness of the infant was the paramount consideration. In considering matters affecting the welfare of the infant, the court must look at the facts from every angle and give due weight to every relevant material''. See also the case of ***Gray v Gray [1971] 1 GLR 422;***

Plaintiff contends in his pleadings and evidence in chief that his wife is aware of all that is happening and is willing to take on the child and care for him. Plaintiff under cross examination answered that he lives in Anaji, Takoradi. The plaintiff not only lives in but works in Takoradi and is stationed there with his wife and five children. The child lives in Golf City, Tema with the defendant and his wife; DW1

By his own contention, plaintiff would not be the primary care of this child; it would be his wife, the very woman he was married to and whom he had promised the mother of the child that he was going through divorce proceedings with and would marry her after the said divorce proceedings.

Plaintiff also answered under cross examination that his said wife has had a baby after the birth of the child in issue and that child was not borne as at the time that he issued the writ of summons in March, 2022. That means that the child is just about one year old. His wife, the biological mother of that child would be expected to focus her love, care and attention on that child more than on a three year old child who was born by an amorous relationship her husband had with another woman.

I take note that although the plaintiff says his wife is ready to have the child in their matrimonial home and care for him, his wife has never stepped foot in this court in the course of proceedings and most importantly has not testified of her willingness and readiness to receive the child into her fold.

The undisputed facts are that after the death of his mother, when the child was about five months old, the child continued to live with the defendant and his wife here in Tema and they have been his primary carers and guardians. The child is currently more than three years old and enrolled in school here in Tema. The only people he has known are the defendant and his wife; his step grandmother. He is used to their love, care and control.

The said wife of the defendant testified in this court as DW2. She was in tears and begged the court as well as the plaintiff not to take the child away from her. At page 55

of the record of proceedings under cross examination by counsel for the plaintiff, she had answered;

Q: You see, I am suggesting to you that for the welfare of little Nathan, you and your husband should allow the plaintiff to take charge of him and play his role.

A: My Lord, please I am pleading with the court that that child is quite young. Although he can say some words, he cannot take or speak about anything it if something happens. I love the child very much and so does he and so for that, I plead with the plaintiff to allow the child to grow up a bit before if at all, he can have charge of him.

BY COURT: D.W 1 breaks down in tears.

She does not only care for the child, but without any challenge by the plaintiff, has taken care of the child as her own and is as attached to the child as he is to her. In accordance with the definition of a parent as contained in section 124 of Act 560, she can be regarded as the mother of the child as she has been acting and performing the duties of a mother towards him.

Supplanting the child from such a home and persons to go and live with a father and a step mother in another region whom he has no knowledge of would not be in his best interest. Particularly so when the said father works for 28 days at sea and would not be available for the child to see him during those periods.

Again, there is no dispute to the fact that save for a medical insurance provided to the child through the plaintiff's work insurance, it is the defendant who has been bearing the costs involving in taking care of the child. Indeed, the abundant evidence on record which I find credible is that even after the mother of the child put to bed and her

personal work insurance could not cover the full costs involved, the defendant rather than the plaintiff paid the extra costs to enable her to be discharged from the hospital before the plaintiff later reimbursed the defendant.

From plaintiff's own EXHIBIT D, he reimbursed the defendant on the 20th day of February, 2020; eight days after the delivery of the child. From EXHIBIT 3, which is the detailed bills and receipts of the late mother of the child, she was admitted to the hospital on the 12th day of February, 2020 and discharged on the 15th day of February, 2020. Thus it took five days after her discharge for the plaintiff to reimburse the defendant for the payment of the remainder of the hospital bills. I thus believe the evidence of defendant that is was eight days after he had made payment that the plaintiff reimbursed him.

The combined effect of EXHIBIT D and EXHIBIT 3 proves that the plaintiff was not being truthful to the court when he insisted that he paid the bills of the deceased mother of the child and denied that it was the defendant who paid the outstanding bills of the late mother of the child before he reimbursed him. Also from the evidence in chief of DW1, it took the plaintiff about two weeks after the birth of the child before he saw him.

Although the plaintiff insists that he was taking care of the child prior to the death of the mother in June, 2020, he fails to provide any evidence of same. As he made the assertion, the burden of proof lies on him and he failed to discharge the burden.

What he tendered in evidence as EXHIBIT D1 is a conversation between him and the defendant dated the 24th and 26th day of September, 2020. In same, the defendant had rejected an amount of Ghs 1000 which the plaintiff sent for the upkeep of the child for the months of August and September. The plaintiff did not send any money thereafter.

Thus it is manifest that the financial maintenance of the child has always been borne by the defendant whilst his wife; DW1 provides the necessary care, control, love, affection and attention. In sum, the child has received the necessaries of health and life to which he is entitled to from the defendant and his wife and not the plaintiff.

Although the defendant has not prayed the court for custody of the child, it is a legal known that the courts have moved from a position of granting reliefs only when same are expressly sought to one of granting reliefs which are supported by the evidence on record and can be regarded as a matter of course. See the decision of the Supreme Court in the case of ***In Re: Gomoa Ajumako Paramount Stool; Acquah vrs. Apaa &Anor [1998-1999] SCGLR 312***

In Republic v. High Court, Kumasi, Ex parte Boateng [2007-2008] SCGLR 404 @ 408, the Supreme Court held: *'… the courts in modern times administer justice not classically but functionally. ……. it is trite learning now that a court is not confined to only the specific reliefs claimed by the plaintiff and the court, if necessary can amend the claim to cover an appropriate relief though unclaimed*." See also the case of ***Hannah Asi (No. 2) v. GIHOC Refrigeration & Household Products Ltd. (No. 2) [2007-2008] SCGLR 16.***

Defendant under cross examination by learned counsel for the plaintiff at page 51 of the record of proceedings had answered;

Q: And therefore when the plaintiff is allowed to perform the domufa or Kwaseabuo, he has the right to have custody of the child.

A: My Lord, that is partially true and partially untrue. The mother of the child has passed and he has known us as his only family for the past 3 years. He is used to us and the other grand children in that house. It is my wife who has taken care of him till date and

he sees her as his mother. I plead with the court to grant us custody because his welfare and training is important to us and we have a role to play.

Between the plaintiff and his wife and the defendant and his wife, I find that it is in the best interest of the child to continue to live with the defendant; his biological grandfather and the defendant's wife who is the only mother the child has known and is accustomed to. This would allow for continuity in the care and control of the child.

Consequently, I hereby proceed to dismiss the second and third relief of the plaintiff. The child is to continue to live with the defendant and his wife and they are to maintain custody of him. In order to ensure that he grows up knowing his biological father; the plaintiff, I hereby grant the plaintiff access to visit the child on weekends and school holidays subject to reasonable notice to the defendant and his wife.

When the child attains eight years old, in order to know his siblings, the plaintiff may have access to him for three weeks during the long school vacation and one week during the short school vacations and the child may live with him, his wife and siblings during the period. During the period that the plaintiff would have such access, the defendant and his wife have the right to visit the child.

I have considered the issue of maintenance of the child and I find that the plaintiff is eager to maintain his child albeit on his own terms. As the father of the child, he has a duty to maintain the child and must not be denied from performing his duties as such. From the circumstances of his employment, he appears very capable of doing this.

Maintenance of a child includes the necessaries of health and life which are shelter, food, health and education. The defendant says he is gainfully employed as a marine supervisor.

The plaintiff has since October, 2020 provided for the health insurance of the child. He is to continue doing so. He is to pay the school fees and all other school related bills of the child subject to being furnished with those details in time. For peace to reign, DW1 is hereby ordered to provide him with the said details immediately the child vacates.

Plaintiff is also to pay the sum of one thousand Ghana cedis (Ghs 1,000) each month towards the maintenance of the child commencing from the 31st of July, 2023. He is to pay the amount to DW1. The defendant has always provided shelter for the child. He is to continue to do so and also top up with any ancillary needs including clothing of the child.

There would be no order as to costs.

(SGD)

H/H BERTHA ANIAGYEI (MS)

(CIRCUIT COURT JUDGE)

MICHAEL OWUSU AWUAH FOR THE PLAINTIFF PRESENT.

SOLOMON KOFI ADDO FOR RICHARD AKPOKAVIE FOR THE DEFENDANT PRESENT