IN THE CIRCUIT COURT HELD AT TECHIMAN THURSDAY 11TH JANUARY, 2024 BEFORE H/H SAMUEL DJANIE KOTEY ESQ. SITTING AS A CIRCUIT COURT JUDGE

SN: C08/01/2020

1. BEATRICE ADUBEA
2. EMMANUEL ACHEAMPONG
3. DANSO AMOAKO SAMPSON

VRS

1. NANA AMA
2. KWAME ADU

JUDGMENT

The plaintiffs are the children of the late Nana Kwaku Denteh who during his lifetime, was a traditional ruler. The defendants are the children also of the late Christiana Yaa Asantewaa who was the younger sister of the late Nana Kwaku Denteh. The parties are therefore cousins. They are in court over a property described in the plaintiffs' writ as house number AWC1 Atebubu. The plaintiffs claim that the house was put up by their late father whiles their cousins also claim the house as owned by their maternal grandmother in whose absence the property was placed under the caretakership of the mother of the defendants. The question ultimately turned on whether the property was indeed acquired by the late father of the plaintiffs. This issue dominated the issues proposed by the parties and adopted by the court. I will mention the other issues set by the court for determination shortly after I have narrated the stories told by both parties in their respective pleadings.

On the part of the plaintiffs, they claim that their late father Nana Kwaku Denteh personally acquired the disputed building during his lifetime and occupied it until he died in in fatal motor accident in 1952. According to the accounts of the plaintiff, upon the death of their father, the disputed building was placed under the caretakership of their paternal grandmother by name Nana Yaa Awo. It is recounted in the statement of claim of the plaintiffs that when the said Nana Yaa Awo died, her daughter and their aunt was made the new caretaker of the property in dispute until she died and the property was shared among the parties. The plaintiffs say that the defendants have seized the rooms which were given to them as their share of the house and that is the reason they have instituted the present action for a recovery of possession of those rooms from the defendants.

On the part of the defendants, they say that the disputed property was acquired by their late grandmother Nana Yaa Awo who died in 1971. They maintain that upon her death, the property was given to their mother Christiana Yaa Asantewaa to take care of it for the family. When their mother died, the defendants say that the property came into their possession and ownership without any challenge from any quarters. According to the defendants, their late mother was paying property rates in the respect of the property till her demise. The defendants contend that the property has been willed to them by their late mother in her last will and testament. The defendants averred that they gave some rooms to the plaintiffs to occupy out of sympathy but rather than occupying those rooms, they rented them out to tenants. Even after renting them out, the rooms according to the defendants were not being kept in good state so they took them back from the plaintiff. The defendants say that the plaintiffs are not entitled to the claims.

As earlier mentioned, at the direction stage, the dominant issue was whether the disputed property was truly acquired by the late Nana Kwaku Denteh in his lifetime.

The court also adopted the issue of *whether or not the disputed property was shared among the parties; as well as the issue of whether or not the plaintiffs have enjoyed possession of portions of the disputed house pursuant to the sharing*. The defendants also proposed the following issues which the court adopted for the trial:

Whether or not the disputed house was originally acquired by the defendants' late grandmother Nana Yaa Awo;

Whether or not the disputed house is the property of the late mother of the defendants, Christiana Yaa Asantewaa also known as Aunty Yaa;

Whether or not the plaintiffs' have the capacity to bring the instant suit;

Whether or not the plaintiffs are estopped by acquiescence and statute from mounting the instant action.

Whether or not the disputed building was shared among the children of Aunt Yaa and Nana Kwaku Denteh

From the pleadings settled, and from the issues adopted, the court will proceed to resolve the dominant issue about the ownership of the disputed building. That issue is a combination of plaintiff's issue one and defendants' issue one. After that, the court will resolve the issue of whether or not the disputed house is the property of the late Christiana Yaa Asantewaa. This issue will then settle the remaining issues which the court has adopted for the trial. The issue about the acquisition of the house although quite relevant is not at the heart of the suit before me. Whoever is held to have acquired the disputed building between the late Nana Kwaku Denteh and Nana Yaa Awo will really not decide the fate of the parties to this action in any way. The determination of how the ownership of that property should devolve and on who is to devolve is what will determine whether or not the plaintiffs' claims to the disputed property should be upheld or denied and whether the defendants' defence should be considered or otherwise.

For each issue raised, the court shall have regards to the evidence presented by each party on that issue and resolve the issue in favour of the party whose evidence satisfies the evidential law on proof on the preponderance of the probabilities. The court will preponderate towards the party whose evidence has a more probable occurrence than not as is required under section 11(4) of the Evidence Act, 1975 (NRCD 323). See the case of ROSINA ARYEE V. SHELL GHANA LTD AND ANOTHER SUIT NO. J4/3/2015 delivered on 22nd October 2015. On the matters of preponderance of the probabilities as the standard of proof in civil cases, the Supreme court stated through Benin JSC as follows:

"It must be pointed out that in every civil trial all what the law requires is proof by a preponderance of probabilities. See section 12 of the Evidence Decree, 1975 NRCD 323. The amount of evidence required to sustain the standard of proof will depend on the nature of the issue to be resolved. The law does not require that the court cannot rely on the evidence of a single witness in proof of the point in issue. The credibility of the witness and his knowledge of the subject-matter are determinant factors."

This judgment is an exercise that requires a careful examination of the evidence of both parties on a given issue before the court. The evidence adduced at the trial by each party becomes relevant. At the trial, the 3rd plaintiff testified for himself and on behalf of the rest of the plaintiffs. The plaintiffs then invited two other witnesses by way of subpoenas to come and testify for them. On the part of the defendants, the 2nd defendant also testified for himself and on behalf of the 1st defendant. In their pre-trial checklist, the defendants indicated they will subpoena a witness. They never did so at the trial.

Whether or not the disputed property was truly acquired by the late Nana Kwaku Denteh in his lifetime

On this issue, the 3rd plaintiff testified that the property was acquired by his late father during his lifetime without giving specifics on how he acquired same. The witness who appeared to testified at the instance of the plaintiffs all did not speak to the acquisition of the disputed house. The first witness for the plaintiffs testified as to the one who rented one of the shops in the house to him. He did not testify to who owned the house. The second witness for the plaintiff also testified to the alleged sharing of the rooms in the house. He also did not provide any evidence on how the house became acquired. The evidence of the plaintiffs on this issue was what I have said above.

On the part of the defendants, the 2nd defendant who testified also told the court that the disputed house was acquired by their paternal grandmother by name Nana Yaa Awo during her lifetime and she exercised control over same until she passed in 1971. He maintained that the disputed house has never belonged to the late Nana Kwaku Denteh. As said earlier, there was no witness for the defendants.

On the issue under discussion, it is the accounts of the plaintiffs against that of the defendants. In other words, it is the words of the plaintiffs v the words of the defendants without more. Beyond the claim by the plaintiffs that the property was acquired by their deceased father, they did not offer evidence of how he acquired it. There was also no evidence of the persons by whom he acquired the property. The defendants also did not provide any other evidence to support their assertion that the disputed house was acquired by their paternal grandmother beyond merely saying it belonged to her. Both parties were at par as far as the evidence on this issue is concerned. Although, both parties carry the same burden of proof, the plaintiff who makes the claim carries a higher burden than that of the defendant who merely refutes the claim of the plaintiff. The plaintiff who wants the court to find for him, is required to provide evidence so that on that claim, the court does not rule against him. Section 11(1) of NRCD 323 provides that

"For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party. "

The issue favours the plaintiffs. They want the court to resolve that the disputed house was acquired by their late father. The burden is on them to prove that indeed the property was acquired by their father. They are making a claim against what appears to be the status quo. They want the court to hold that contrary to what is the state of play, the property was acquired by their father. The burden is on them to prove that assertion. If they are not able to provide evidence to the requisite degree of belief, the result is that the court would not make the pronouncement they seek. The point I am making here was succinctly put by Hoffman LJ in the case of In **Re B,** [2008] UKHL, 35 wherein he delivered himself using a mathematical analogy thus:

"*If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who has the burden of proof fails to discharge it, a 0 value is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."*

In this case, the plaintiffs who carry the burden of proof of the issue has failed to discharge that burden. Their failure will attract a value of 0 and will result in the court treating the fact as not having happened. The fact not having happened in this case means the court cannot find as true, or having a probable occurrence, the claim that the disputed house was acquired by the father of the plaintiffs. That claim has a less probable occurrence than not. The court is unable to find evidence to support the plaintiffs claim that the disputed house was acquired by their late father.

On the corollary issue of *Whether or not the disputed house was originally acquired by the defendants' late grandmother Nana Yaa Awo* I am unable to hold this issue also as having been proved by the defendants for the same reason. However, in the case of the defendant, the failure to prove this issue does not affect their case much. In the first place, they are not making any claim before the court which would have been affected by the failure to proof this issue. As a matter of fact, I think it was rather ambitious of the defendants to have proposed this issue for resolution. The status quo favoured them. It is the plaintiff who is praying the court to change the status quo. If the defendants do not have any reason to make a counterclaim, and merely sought to dispel the claims of the plaintiff, then what business did they have proposing an issue for resolution on the basis of their defence as if they are making a positive claim to the subject matter of the suit. This practice is quite common among many a practitioner before our courts. If a defendant is not putting forward a counterclaim, then there is no reason for him or her to raise an issue unless those issues joined which is relevant for the determination of the suit and which the plaintiff in the case has failed to raise for consideration by the court. The issues should be reserved for the party making the claim to raise particularly in instances where the plaintiff wish the court to make a finding against the status quo. The status quo in most cases favours the defendant to an action and the plaintiff mostly would like for the court to hold against the status quo ante. In some few instances where the status quo is not in favour of the defendant, and the plaintiff merely wants the court to confirm their rights or the existence of the state of affairs then he or she may want to raise an issue for consideration. Even so, in such instances, it becomes prudent for the defendant to make a counterclaim in respect of the subject matter of the dispute. In this case, it was quite unnecessary for the defendants to have raised the present issue for consideration by the court especially after the issue we have just dealt in the paragraph immediately preceding this one had been raised by the plaintiff for consideration. If that issue is resolved against the plaintiff, the result will not be automatic that the property

was acquired by the one the defendants claim acquired it. But it will also not disturb the status quo ante in any way. In the absence of any counterclaim from the defendants, that issue was needless. Perhaps, the defendants recognizing that is the reason they failed to provide sufficient evidence on that issue at the trial.

Whether or not the disputed house is the property of the late mother of the defendants, Christiana Yaa Asantewaa also known as Aunty Yaa;

This issue as earlier indicated is at the very heart of the dispute before me. It is not seeking a determination as to the acquisition of the disputed property. Rather, it seeks a determination that the property has devolved on the mother of the defendants. Interestingly, it was raised by the defendants and adopted by the court. It invites the court to determine whether or not the defendants hold on the property can be legally justified. In other words, the issue will lead the court to make a finding whether or not the status quo ante should not be disturbed. The status quo ante as the plaintiffs say is that the defendants have taken over the house and have re-entered the rooms and the store they claim were given to them as their share of the house. The defendants also say that two rooms which was given to the plaintiffs by them out of sheer benevolence was not properly maintained so they had taken back those rooms. But whether or not they have the right to take back the rooms or continue to possess them is dependent on this very issue. As a matter of fact, although the plaintiffs did not see this issue as important enough for consideration, their first issue of alleged ownership of the house even if resolved in their favour would have been greatly impacted by this very issue. The fact is that if the court had resolved the first issue of whether or not the property is that of the late Nana Kwaku Denteh, given the time of his death, the status of the property would have been affected by the personal law of the said Nana Kwaku Denteh unless he made a will disposing of that property. That is the reason that the plaintiffs should have been more interested in this issue than the first one. Although the defendants contested the

claim by the plaintiffs that the disputed house was acquired by the plaintiffs ' late father Nana Kwaku Denteh, and insist it was rather their late paternal grandmother who acquired it, they want the court to make a finding that the dispute property had become vested in their late mother during her lifetime. They also make the assertion that the property has been devised to them by their mother in her last will and testament. Again if the court had determined that the house had been acquired rather by the late paternal grandmother of the parties as the defendants insist, that would still have been heavily impacted by a resolution of this present issue.

The resolution of this present issue is based on a mixture of law and facts. The factual matters needed to resolve this dispute are the date of the demise of both Nana Kwaku Denteh and Nana Yaa Awo. From the evidence led before me which are not in dispute, Nana Kwaku Denteh died in 1952 whereas Nana Yaa Awo died in 1971. The other factual matters necessary to determine this issue is who the family of both Nana Awo Yaa and Nana Kwaku Denteh are for purpose of inheritance. Again those are matters established beyond controversy in this dispute. The members of the family of Nana Kwaku Denteh for purposes of inheritance are Nana Awo Yaa, Christian Yaa Asantewaa and the defendants herein. The family of Nana Awo Yaa for purposes of inheritance are Christiana Yaa Asantewaa, Nana Kwaku Denteh and the defendants herein. With respect to the legal matters necessary to resolve this dispute, the pronouncement in the case of ADOMAKO ANANE V. AGYEMANG AND ORS Civil Appeal No. J4/42/2013 delivered on 26th February, 2013 per Wood CJ reiterating the decision given in an earlier case of *DOTWAAH VRS AFRIYIE: [1965]* ***GLR*** *at PAGE 257* becomes relevant. The statement of the Supreme Court in that case held as follows:

"*…[F]or the law then was that upon the death intestate, of an akan man, his personal property became family property. The period of Succession by Osei Hwirie, commenced from the early 1940's and the then firm legal position was that "In Customary Law, as soon as a Successor is*

appointed to succeed a deceased member of a family, the self-acquired property left by the deceased person vests in the said Customary Successor who holds same for and on behalf of the family."

The Court of Appeal decision also in the case of ATTA V AMISSAH reported in (1970) CC 73 is also important. The court of appeal reasoned as follows:

"It is settled customary law that upon the death of a person intestate, although his self-acquired property becomes the property of the whole family, the immediate and the wider family together- the right to the immediate or beneficial enjoyment in it and to the control and use and present possession of it vests in the immediate or branch family alone."

Also in the case of IN RE DUA AGYEMANG, DECEASED, SARPONG V AGYEMAN (1962) 2 GLR 138-143 the court defined immediate family for purpose of matrilineal inheritance as "*In the case of matrilineal family, the 'immediate family' consists of all who are descended matrilineally from the same womb as the deceased, namely his surviving brothers, surviving sisters and surviving children of his sisters, dead or alive."* See also the case of QUAGRAINE V EDU (1966) GLR 406-421 where the immediate family of an akan man was found to be his surviving mother, uterine brothers and sisters who are entitled to the beneficial enjoyment of the estate of the person as against the wider family.

Having provided the factual and legal matters upon which the issue is to be resolved, I now proceed to resolve it. I will proceed first under the assumption that Nana Kwaku Denteh was the one who acquired the disputed property although there was no evidence for the court to make that a definite finding. Nana Kwaku Denteh being an akan man, upon his death intestate which was before effective date of the Intestate Succession law 1985 (PNDL 111) then as determined in the Adomako Anane case, his self-acquired properties if it included the house fell to the family and became family property. Again being an akan man he hailed from his maternal family. His maternal family would have inherited his properties. That family for purpose of inheritance were Nana Awo Yaa,

Christian Yaa Asantewaa and the defendants herein. They did not include the plaintiffs being his children. So if the property in dispute had been found to have been acquired by the late Nana Kwaku Denteh, then given the time of his death, and given that he did not make any will, then the subject property would have fallen into intestacy and become family property. The plaintiffs would not have had any share in that property. Which means that their claim to the disputed property would have failed. Their right to live in that property would have been at the behest of the family of their late father and subject to good behaviour. See the case of AMISSAH-ABADOO V ABADOO [1974] GLR 110-132 where it was held that generally customary law recognized the rights of widows and surviving children of their deceased father to live in the family house subject to good behaviour.

Going under the second assumption that the subject property was acquired by the late Nana Awo Yaa as the defendants would have the court believe, the conclusion arrived at under the first assumption would not have been different. If the property was indeed acquired by the late Nana Awo Yaa or was found in this judgment to have been acquired by her, then again upon her death intestate, given the time she passed, her self-acquired property would have become family property. Again her family for purpose of inheriting the subject property would have been Christian Yaa Asantewaa and the defendants herein and plaintiff's father if he was alive. Here also, the plaintiffs would not have been entitled to their claim to rooms in the property because they are not members of the family of the late Nana Awo Yaa for purposes of inheritance.

But beyond these conclusions, the defendants want the court to find that the property has become the personal property of their late mother Christiana Yaa Asantewaa. It is these same defendants who insist that the property was acquired by their paternal grandmother Nana Awo Yaa. If the property was indeed acquired by Nana Awo Yaa then then that assertion is inconsistent with their case that the property is now the

personal property of their late mother which she has bequeathed to them under her last will and testament. The inconsistency is not difficult to find. I have already said that an assertion that the disputed property was acquired by the late Nana Awo Yaa would mean that upon her death at the time she is said to have died, the property had become family property. If it had become family property, then that nature of the property can never be changed. The mother of the defendant would not have been able to appropriate that property belonging to the family to herself without committing fraud on the family. Any claim to the property by the defendants as the personal property of their late mother is therefore inconsistent with their own assertion that the property was acquired by the late Nana Awo Yaa and had become family property upon her death. In the case of CATHLINE AND ANOTHER V ADKUFO-ADDO [1991] 2 GLR 292-312 at page 312, the Court of appeal berated the high court in that case for failing to pay attention to a conflict between the endorsement on the parties pleading and the oral evidence of that same party at the trial in resolving an issue. This court takes note that the defendants are literally blowing hot and cold in this case. In their statement of defence, they aver that the disputed property was acquired by their late paternal grandmother. Then in the evidence of the second defendant, he says that the property was willed to them by their deceased mother who he testified was appointed customary successor to their late grandmother in respect of the property. Maybe they are under the misconception that when their mother was appointed caretaker of the property upon the death of Nana Awo Yaa, she became the beneficial owner of that property. In the Adomako Anane case supra, the Supreme court did not mince words when it stated emphatically that once a property has attained the status as family property, it does not lose that status to the customary successor. It went further to hold that the responsibility of the customary successor is to take care of the property for and on behalf of the family. It becomes fraudulent for the customary successor to seek to appropriate the property entrusted to his or her care. Hear what the Supreme Court again had to say in the Adomako Anane case:

"In any event, given these bare facts, this sound and well settled principle of customary law, intended to protect family property from being converted into private property, would imply that even if Asante used his own personal resources, ingenuity and the best of his negotiating skills in acquiring the property, he did so on behalf of the family and not for himself. The principle, which has been accepted and applied in a number of cases, including the relatively modern case of Ansah –Addo and Others v Addo and Another AND Ansah- Addo and others v Asante (Consolidated) [1972] GLR 400, is that if any member of a family uses his or her own funds to recover property lost to the family, the property reverts to its family character; it does not become the individual's private property. On this principle also, the property cannot be described as the appellants' self-acquired property."

From the evidence led before me, the claim by the defendants that the disputed property belonged to their late mother is a claim that invites an action in fraud against the estate of their late mother. As earlier said, that assertion also runs in conflict with their own averments in their statement of defence that the property was acquired by their late mother. To the extent of that inconsistency, the court cannot hold that the property belonged to the late mother of the defendants. I have found earlier that whether the property was acquired by the late father of the plaintiffs as they would have the court believe, or acquired by the late grandmother of the defendants, it became family property upon their relative deaths by authority of the customary law regulating such estate at the time of their relative deaths. I find no difficulty at all in coming to the conclusion that the disputed property is not the personal property of the deceased mother of the defendants. I hold firmly that the subject property is family property upon death intestate of both plaintiffs' father and defendants' maternal grandmother and remains family property.

Whether or not the plaintiffs' have the capacity to bring the instant suit

There was no evidence led on this issue at the trial. In the writ of summons and statement of claim, the plaintiffs identified themselves as children of the late Kwaku Denteh. They

did not disclose any capacity in which they bring the action apart from the identity above. I struggled to find the reason for which this issue was proposed and adopted by this court differently constituted. The issue calls into question the identity of the plaintiff's as children of the late Kwaku Denteh. There was no denial of that identity in the defendant's statement of defence. There was therefore no joinder of issues on that claim. There was therefore no basis for an issue to be proposed from that. The defendants admit the plaintiffs are the children of their late maternal uncle. The plaintiffs have mounted the action in their capacity as children of defendants' late uncle; a fact which has been admitted. The court finds that the issue is not relevant for the determination of the suit before it. Accordingly same is hereby struck out.

Whether or not the disputed building was shared among the children of Aunt Yaa and Nana Kwaku Denteh

This issue was proposed by the plaintiff together with the issue of whether or not the family of the Nana Kwaku Denteh allowed the children of Kwaku Denteh and Aunt Yaayaa to share the building in dispute. These two issues are hereby tried together. The plaintiff testified that the parties were assisted by the Ankobeahene to share the disputed house among the parties herein. The plaintiffs continued that the sharing was agreed to by all the parties. The witness summoned to come and testified for the plaintiff in the person of Emmanuel Atongo also testified that when he wanted the store, he was directed to see the 3rd plaintiff who rented it to him for two years initially and subsequently renewed it for another two years. There is therefore evidence that there was a purported sharing of the house. The question is whether it was done by the family.

The testimony before me does not suggest that the alleged sharing of the house was by the family. The evidence from the plaintiff was that the sharing was supervised by the Ankobeahene who is not the head of family of the parties. I have already found that the disputed property is family property. Being a family property, the head of family should

be the one to supervise the sharing of the family property in order to give it some legal backing. Without the involvement of the head of family, the purported sharing of the property in dispute cannot be said to have been done by the family or permitted by the family. On the basis of that also, I resolve that there was no sharing of the family.

Whether or not the plaintiffs are estopped by acquiescence and statute from mounting the instant action.

On this issue also, there was no evidence offered by either side. It was the defendants who insisted that the plaintiffs are estopped by acquiescence from bringing the action. In their statement of defence, the defendants averred that since the death of their mother and they moved into possession, the plaintiffs have never challenged their right to occupy the said property. It is based on this averment that they claim estoppel. The practice before our courts requires that where certain assertions are made, such as estoppel, laches and acquiescence, the facts giving rise to that assertion are pleaded. The defendants in this case did not plead the facts on the basis of which they claim estoppel against the plaintiffs. Beyond pleading the facts, it is further required of the defendants to prove the estoppel. They also failed woefully to prove same in court at the trial. The burden was on them squarely to prove the defence of estoppel. In the case of DUAGBOR AND OTHERS V AKYEA-DJAMSON [1984-86] 1GLR 697 it was held in that case on appeal that since the plaintiff failed to offer evidence in proof of his plea for estoppel for laches and acquiescence, they were not entitled to their claims. The judgment of the trial court in favour of the plaintiff was overturned on appeal for failure by the plaintiff to lead evidence to establish the plea of estoppel by laches. Beyond that, I have already made a finding in this judgment that the property was family property. The defendants must show that it is the family that owns the property that are estopped by the alleged laches. The claim of laches will not hold against a person that does not own the property in respect of which the claim of laches is made. The defendants claim that the plaintiffs are

estopped from laying claim to the disputed property because of their acquiescence. Meanwhile, since the property is not owned by the plaintiffs, even if there is sufficient evidence of laches on the part of the plaintiffs, it will not avail the defendants in their quest to claim the property. The plea of estoppel by defendant therefore fails.

From the totality of evidence presented by both parties before me, I am unable to uphold the claims by the plaintiffs for declaration of title to one store room and four bedrooms situate in house numbered AWC1 Atebubu. That claim is accordingly dismissed. Plaintiffs's claim also for recovery of possession is also dismissed. The remaining claims for general damages and perpetual injunction are also dismissed for want of evidence. The plaintiffs failed to prove their claims before me. For reasons assigned in this judgment, plaintiffs' claims are hereby dismissed.

Cost

The court hereby awards cost of Ghc 12,000.00 against the plaintiffs in favour of the defendants.

SGD
HH S.D. KOTEY

Legal representation:

Amoako Frimpong for Plaintiffs

Moses Kofi Obah with Frederica Boakye for Defendants