IN THE CIRCUIT COURT HELD AT GOASO IN THE AHAFO REGION

ON FRIDAY THE 12TH DAY OF APRIL 2024 BEFORE HIS HONOUR CHARLES KWASI ACHEAMPONG ESQ. CIRCUIT COURT JUDGE

A1/26/2021

KWABENA BADU **---** **PLAINTIFF**

VRS.

1. **VIDA ADUSEI POKU**
2. **AMA BOAMAH**
3. **ELIZABETH DAPAAH** **---** **DEFENDANTS**

JUDGMENT

The parties are relatives who hail from the same family, of the stock of one Madam Rosina Ama Boamah. Plaintiff is a son of the said Madam Rosina Ama Boamah, while 2nd and 3rd Defendants are her grandchildren. With regards to 1st Defendant, she is a great grandchild of Madam Rosina Boamah. Despite this close family affinity, the parties are unfortunately divided when it comes to the ownership and succession of the cocoa farm in dispute. While Plaintiff contended that the land in dispute measuring 262 acres devolved to all the children of Madam Rosina Boamah, the Defendants on the other hand strongly posited that it is only the uncultivated portion of the land in dispute which devolved to all the children of Madam Rosina Boamah upon her death. With regards to the cultivated portion, which is a cocoa farm, same devolved onto the daughters of Madam Rosina Boamah exclusively upon her demise. This was the bone of contention between the parties and even though there were peripheral issues arising from the pleadings, it is no gainsaying that the resolution of this central and germane issue would ensure that all

matters in controversy are laid to rest. Be that as it may, on the 17th of June 2021, this Court set down the following issues for trial;

i. Whether or not Rosina Ama Boamah directed that the land in dispute should devolve onto the female children alone upon her demise?

ii. Whether or not M.O Boadi succeeded Lucy Dwomor in Managing the farm in dispute?

iii. Whether or not M.O Boadi voluntarily handed over management of the farm to the female descendants of Rosina Boamah?

iv. Whether or not the arbitration was amicably resolved in favour of Defendants?

v. Whether or not the arbitration ruled in favour of M.O Boadi and put him in possession.

vi. Whether or not Plaintiff is clothed with capacity to initiate the present action?

It is trite that a party who comes to court must prove his case on the balance of probabilities and not on the weakness in the case of the opposing party. Thus the Supreme Court in Adwubeng vrs Domfeh [199697] SCGLR 660 crystallised the standard of proof required in all civil actions as follows:

> "Section 11 (4) and 12 of the Evidence Decree [1975] NRCD 323 which came into force on 1st October 1979) have provided that the standard of proof in all civil actions was proof by preponderance of probabilities no exceptions were made."

In Effisah vrs Ansah [2005-2006] SCGLR 943, the Supreme Court held that the principle as enunciated in the Kodilinge case that the plaintiff must rely on the strength of his own case and not on the weakness in the defence in land matters have tilted towards the need for proof on the balance of probabilities in terms of NRCD 323 Sections 11 (4) and 12.

Furthermore, it was held in Jass Co Ltd. & Other v. Appau & Another [2009] SCGLR 265 that;

> "The burden of proof is always put on the plaintiff to satisfy the court on a balance of probabilities in an action for declaration of title to land. Where the defendant has not counterclaimed, and the plaintiff has not been able to make a sufficient case against the defendant, then the plaintiff's claims would be dismissed..."

The first issue which comes up for determination relates to the capacity of Plaintiff to institute the present action. This issue arose as a result of a pleading captured at paragraph 15 of Defendants Statement of Defence filed on the 16th of March 2021 as follows;

> "The Defendants shall contend that the Plaintiff has no capacity to commence the instant action"

This pleading was specifically denied by Plaintiff in his Reply filed on the 30th of March 2021 thereby putting Defendant to strict proof of same.

CAPACITY:

In Emmanuel Kofi Mustapha V. Samuel Gyekyei & 3 ORS. (2016) JELR

68750 (CA) the Court of Appeal observed that;

> "Capacity is the power, ability or authority that allows you to institute a legal action. One cannot institute any legal action unless you are clothed with that capacity to do so. Capacity to sue was a matter of law and could be raised by the party at any time of the proceedings even on appeal. It could also be raised by the court suo motu. Capacity is so fundamental and goes to the root of the case and however iron cast your case may be once you lack capacity the court cannot give

you a hearing on the merits of the case. It's 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 and it is immaterial that later during the course of the proceedings he acquired the capacity".

Since it was Defendants who broached the issue capacity, it behooved them to lead such evidence necessary to establish that Plaintiff indeed lacked capacity to institute the present action. Surprisingly no scintilla of evidence was led by Defendants in that regard. The testimonies of 3rd Defendant and Grace Werekowaa (Dw1) as captured in their respective witness statements filed on the 1st of July 2021 do not even mention the alleged lack of capacity by Plaintiff. It thus becomes very obvious that Defendants had abandoned that leg of their argument and by extension and failed to prove same. It is trite law 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..." (See: Okudzeto Ablakwa (No. 2) v.

Attorney General and Another [2012] 2 SCGLR 845). The only time Defendants appeared to address the issue of Plaintiff's capacity was when their Lawyer stated at page 13 of his written address filed on the 27th of February 2024 that,"…in matrilineal communities succession is by female children and for that matter the Plaintiff being a male child has no capacity to institute the present action". Counsel based his conclusion on certain admissions made by Plaintiff and Martin Omain Boadi (Pw1) during their cross examination where they both admitted that their family hails from Asante-Mampong Nsuta and consequently they practice the matrilineal system of inheritance. The argument of Counsel for Defendants is however flawed and does not accord with law. A system of inheritance is not a basis for the determination of whether or not a person lacks capacity to institute an action. The mere fact that Plaintiff's family practices matrilineal

inheritance does not necessarily mean that, being a male child Plaintiff lacked capacity to institute the present action. On the contrary, the evidence on record clearly points to the fact that, if nothing at all, Plaintiff has an interest in the larger land in dispute by way of gift made to him and his siblings by their mother Rosina Ama Boamah. This fact was confirmed by the 3rd Defendant under cross examination as follows;

> Q. Rosina Boamah gifted the land to all her children, do you agree with me?
>
> A. That is true. However, the farm she was cultivating, she did not gift it to her male children.

By virtue of the fact that Plaintiff has some form of interest in the larger land in question which also forms the subject matter of this suit, there is therefore no doubt that Plaintiff is clothe with the requisite capacity to institute and maintain the present action as a Donee of the said gift. In any case had the gift of the large land not been established, the fact is that Plaintiff is a child of Rosina Ama Boamah and certainly a beneficiary to her estate and even though he has not personally obtained letters of administration in respect of the estate, being a beneficiary of the larger land in dispute, he is nevertheless clothe with capacity to initiate the action. (See: Adisa Boya v. Zenabu Mohammed (Substituted by Adama Mohammed) & Mujeeb [2018] DLSC 4225, where the Supreme Court held that a beneficiary under an intestate estate can still sue and be sued in the absence of letters of administration). In summary therefore, Defendants failed to establish that Plaintiff lacked capacity to institute the action.

Another issue of importance which cropped up from the pleadings of the parties relates to an alleged arbitration that took place between the parties. According to Plaintiff, the Defendants filed a complaint against him at Manhyia with regards to the land in dispute and that the arbitration panel ruled that, "…according to Asante custom, nephews and nieces cannot inherit family property when there are surviving uncles…Therefore

possession of the land should revert to M.O Boadi and his 3 surviving brothers to manage". (See: Paragraph 15 of Plaintiff's Statement of Claim). This averment was denied by Defendants but they indicated that, "the arbitrators advised the Plaintiff that in accordance with Akan custom and practice which the late Rosina Ama Boamah was subject to,the cocoa farm devolved onto her female children upon her death". (See: Paragraph 14 of Defendants' Statement of Defence). Pursuant to the above pleadings the Court set out the following issues for determination;

a. Whether or not the arbitration was amicably resolved in favour of Defendants?

b. Whether or not the arbitration ruled in favour of M.O Boadi and put him in possession.

The need to ascertain whether indeed an arbitration took place, whether a ruling was given and the outcome of the said ruling becomes very essential as its determination has the potential of bringing to rest all matters in dispute without the need to go into the merits of the present suit. This is borne out of the fact that, Section 109 of the Alternative Dispute
Resolution Act 2010 (Act 798) provides to the effect that;

"An award in a customary arbitration

(a) is binding between the parties and a person claiming through and under them; and

(b) need not be registered in a court to be binding."

Thus if it is determined that such customary arbitration took place and an award was made in favour of any of the parties, the present suit ought to be truncated and the customary arbitration award enforced according to its terms. This is due to the fact that

the party against whom the award is made would be estopped from challenging same as held in the case of Asano v. Taku and another [1973] 2 GLR 312, where the Court held that;

> "where a party had by his own showing admitted the existence of an arbitration between himself and the other party relating to the same subject matter in respect of which an award had been made against him…the issue of estoppel should be raised against him and dealt with even if the other party did not raise it".

Plaintiff thus proceeded to lead evidence in that regard by testifying, in paragraph 14 of his Witness Statement filed on the 14th of September
2021, as follows;

> "Subsequently 2nd Defendant took the matter to the Asantehemaa's Court at Ahenfie (Manhyia Palace) for arbitration. The Arbitrators, after deliberation ruled in favour of, we the four (4) surviving brothers - that is, myself, M.O Boadi, David Akwasi Asante and Kwabena Boateng - as persons qualified to control and manage the cocoa farm cultivation by S.A. Dappah, since we have life interests in the cocoa farm. That according to Asante custom, it is only after our demise that the nieces and nephews can inherit the disputed farm."(sic).

This assertion was however challenged under cross examination by

Counsel for Defendants when he questioned Plaintiff as follows;

> Q. I put it to you that no panel of the arbitrators has ever declared that when siblings are alive nephews and nieces cannot succeed the disputed cocoa farm? A. I disagree.

In a similar vein, when Pw1 Martin Omani Boadi made similar assertions in his evidence in chief, Counsel for Defendants did not let it slide but challenged same under cross

examination. By virtue of these denials, it behooved Plaintiff to proffer such corroborative evidence in the form of a written arbitration award or if same was not in writing in accordance with section 108 of Act 798/2010, to call material witnesses, preferably a member of the arbitration panel who would give evidence on;

i. The quorum of the arbitration panel.

ii. Whether the matter between the parties was brought before the panel for their consideration. iii. Whether a determination was made by the panel.

iv. When the said determination was made.

v. What was the outcome of the said determination.

These were however not done by Plaintiff making his assertion that the panel ruled in his favour unsubstantiated. In Ababio v. Akwasi III [19941995] GBR 774 it was held that, "a party whose pleading raised an issue essential to the success of the case assumed the burden of proving such issue…". Thus where the party fails to discharge that burden, he must fail with regards to that assertion. [See: Okudzeto Ablakwa (No. 2) case supra]. Specifically, a party who seeks to prove the validity of arbitration proceedings, bears the onus to call material witnesses such as the chief of the arbitration panel to testify to matters relating to, inter alia, "…what was the nature of the complaint and whether in consequence of the complaint, he held an arbitration based upon prior agreement to accept the award of the arbitrators by the parties, or he just appointed a team of men to demarcate the boundary between the contesting parties in an informal way

of settling the dispute between the parties…" . A failure to call such a witness is fatal to the case of the party seeking to establish the validity of arbitration proceedings or any arbitral award made. (See: Owusu v. Tabiri and another [1987–88] 1 GLR 287). By extension therefore, a failure by Plaintiff to tender a written or documented arbitral award or in the alternative call material witnesses such as members of the arbitration panel to confirm the alleged award made in his favour, was fatal to the case of Plaintiff on this issue.

With regards to the Defendants, it would be recalled that they contended that when the matter was called before the arbitration panel, the arbitrators stated by way of advise to the Plaintiff that, "…in accordance with Akan custom and practice which the late Rosina Ama Boamah was subject to, the cocoa farm devolved onto her female children upon her death". This assertion gave the impression that the arbitration panel made a definite pronouncement with regards to the rights of the parties pertaining to the land in dispute in favour of the Defendants. However, in the course of trial Defendants appeared to once again abandon their assertion. This u-turn is observed when one considers the respective testimonies of 3rd Defendant and Dw1 which essentially corroborated each other to the effect that, when the matter was called before the Asantehemaa's traditional court, "…the arbitrators after realizing that the parties were family members decided to amicably settle the matter without initiating arbitration proceedings such as calling witnesses among others". Thus it is not the case that any definite pronouncement was made by the panel in favour of Defendants but rather according to Defendants the parties were merely requested to settle their issues amicably given the fact that they were family members.

In summary therefore, with regards to issues IV and V, this Court finds as a fact that the dispute between the parties was sent to the Asantehemaa's traditional court for arbitration, however no award was pronounced or issued in favour of either party by the arbitration panel and the matter was not amicably resolved.

With the above issues resolved, I now turn to ascertain the truth regarding the central issue of this case. This issue seeks to ascertain whether or not Rosina Ama Boamah in her life time, directed that the land in dispute should devolve onto her daughters alone upon her demise?

While the Plaintiff alleged that the land in dispute is a parcel of land measuring 262 acres situate at a place called Yayano on Abuom stool land, Defendants alleged that the actual land in dispute was the cocoa farm cultivated on part of the larger land referred to by Plaintiff. According to his pleadings, particularly paragraph 5 of the Statement of Claim, Plaintiff averred to the effect that his mother Rosina Ama Boamah, in her life time directed that, the land in dispute, which included the cocoa farm in question, was to devolve jointly to all her surviving children. This was denied by the Defendants who alleged that Rosina Ama Boamah rather directed that upon her demise the cocoa farm in question was to devolve unto her female children exclusively but the remaining uncultivated part of the larger land was to devolve unto all her children. It therefore became incumbent upon Plaintiff to establish on the balance of probabilities that Rosina Ama Boamah indeed declared that the land in dispute which included the cocoa farm was to devolve unto all her children upon her demise. In a strange twist and contrary to his earlier position, Plaintiff seemed to partially admit Defendants' contention. This is observed in paragraph 4 of his witness statement filed on the 14th of September 2021 where he stated as follows;

> "In 1954 my mother, the late Rosina Ama Boamah acquired the land from the then Chief of Abuom in the Ahafo Region of Ghana…she subsequently called all her eight(8) surviving children and declared that the land was for all of us. But she added that any cocoa farm that she will be able to cultivate in future will be for her three (3) daughters Akoto, Lucy Dwemoh and Felicia Akyaa @ Yaa Akyaa".

This was further affirmed by Pw1 in paragraph 6 of his witness statement also filed on the 14th of September 2021 where he stated that his, "…mother also declared that any cocoa farm she will be able to cultivate herself on the land will belong to her daughters collectively-excluding her sons". Hence contrary to Plaintiff's earlier position that his mother had declared that the land in dispute inclusive of the cocoa farm in question was to devolve onto all her children upon her demise, Plaintiff now contended that even though the land in dispute was to devolve to all his siblings upon the death of their mother, this did not apply to any cocoa farm his mother Rosina Ama Boamah managed to cultivate on the land in dispute. Plaintiff's new position thus fell in sync with that of Defendants' save that, Plaintiff sought to allege that his mother did not cultivate any cocoa on the land in dispute and as such her directive could not apply. If her directive did not apply then it meant that the cocoa farm belonged to all his siblings and not exclusively to his sisters. It thus becomes essential to ascertain whether or not Madam Rosina Ama Boamah during her life time cultivated cocoa on the land in dispute. One may argue that since this issue was not set down for determination by the Court, the Court is precluded from determining same. This is however not the position of the law, the law as it stands is that, "…a court of law is not entitled to raise an issue ex proprio motu outside the confines of the pleadings, which is inconsistent with and contrary to what the parties themselves had put forward without allowing the parties the opportunity to amend the pleadings and thereby raising a surprise in the trial…"[See: Mohammed Odartey Lamptey v. Lands Commission, Apostolic Faith Mission, Wafa Yaw and Asare K. Boadi (2018) JELR 68893 (SC)]. It follows therefore that, where the issue sought to be raised ex proprio motu by the Court is borne out from the pleadings of the parties, the Court has every right to determine same. This position is further confirmed by the Court in the case of James Toah Agyare v. Solomon Opare Addo Quaynor, Teye Ofoe and Regina l.A. Grand Sawyer (2016) JELR 65515 where the Court of Appeal observed as follows;

> "In Boakye v. Tutuyehene [2007-2008] 2 SCGLR 970, the Supreme Court unanimously allowing the appeal by the plaintiff from the judgment of the Court of Appeal held that the Court of Appeal erred grievously when it held that there was no real legal basis for the court to, suo motu, settle the issues for the parties. Speaking through Asiamah JSC, the court held that the provisions in Order 30 [of L.N. 140 A which is analogous with Order 32 of C.I. 47] gave the court power to formulate suo motu issues for trial where none have been filed by the plaintiff but the court can only do so where the issues are apparent and self-evident in the pleadings. The apex court approved the decision in Omane v. Poku [1973] 2 GLR 66. In that case, the Court of Appeal refused to disturb the trial judge's findings of fact in relation to the disputed farms, holding that where the issues were clear on the pleadings and in evidence, the failure to set them out in a summons for directions in accordance with Order 30 rules 1 and 2 of L.N. 140 A was not a fundamental defect"

In the instant suit therefore even though the issue regarding whether or not Madam Rosina Ama Boamah during her life time cultivated cocoa on the land in dispute was not set down by the Court at the application for direction stage, given the fact that this issue is apparent and self-evident in
the pleadings it behooves this Court to determine same so as to bring all matters to a definite finality. Moreover, that issue was not initially set down as the Court found same inconsequential to the resolution of this suit. However, owing to the above admission made by Plaintiff in the course of trial, this issue becomes central and relevant for determination.

Now with regards to the pertinent issue as to whether Rosina Ama Boamah cultivated cocoa on the land in dispute, Plaintiff testified to the effect that his mother acquired the land in 1954 but in 1955 she fell sick and had to be taken to the Northern Region as well

as Nkonya for medical and herbal treatment and that she eventually died in 1961. He alleged that, his brother S.A Dapaah had to go onto the land in 1955 to "start cultivating cocoa on the land as my mother due to her illness could not cultivate any cocoa on the land". This was challenged by Counsel for Defendant who questioned Plaintiff as follows;

> Q. I put it to you that the disputed cocoa farm was cultivated by your late mother? A. Not true.
>
> Q. As at the time your late brother S.A Dapaah was taking over the management and control of the disputed cocoa farm, your late mother was seriously ill.
>
> A. My mother never cultivated a farm, the farm was cultivated by S.A Dapaah.

From the testimony of Plaintiff and the answers he gave under cross examination, Plaintiff sought to allege that no cocoa was cultivated on the land in dispute by his mother and that cultivation of cocoa on the land in dispute was actually commenced by S.A Dapaah his brother. This is however not borne out from the evidence on record as shall be observed shortly.

it is not disputed that Rosina Ama Boamah acquired the land in dispute and that upon acquisition it was her intention to cultivate cocoa on a portion of the land in dispute for the exclusive benefit of her daughters. The questions that however arise are when did Rosina Ama Boamah acquire the land in dispute and when did S.A Dappah come onto the land in dispute? In answer to these questions, Plaintiff testified to the effect that his mother acquired the land in dispute in the year 1954 and that in 1955 when his mother fell ill his brother S.A Dapaah went onto the land. With regards to the periods alluded to by the Plaintiff, Counsel for Defendants did not challenge same during cross examination. His failure to do so meant that Defendants had effectively admitted the truth of that fact. In the case of Hammond vrs. Amuah and Anor [1991] 1 GLR 89, it was held that when a

party had given evidence of a material fact and was not cross-examined upon it, he need not call further evidence of that fact as the party who failed to so cross examine is deemed to have admitted the truth of that assertion. [See: The Republic vrs. Kwame Amponsah & 6 ORS (2019) JELR 107122 (HC)]. In any case, Defendants offered no contrary time frame in their evidence thus the Defendants are accordingly deemed to have admitted the truth of Plaintiff's assertion with regards to the periods in question. This Court thus finds as a fact that the land in dispute was indeed acquired by Rosina Boamah in 1954 and that S.A Dapaah came onto the land in 1955.

Now between 1954 and 1955 who occupied the land in dispute? This is again answered by Plaintiff when he stated in paragraph 6 of his Statement of Claim that when his mother fell ill S.A Dapaah joined his mother in the village-Oseikrom near Abuom, thus confirming the fact that, at least for one whole year, Rosina Ama Boamah was in occupation of the land in dispute prior S.A Dapaah coming onto the land in dispute. The question then is, what was she doing on the land during that one-year period?

Plaintiff sought to answer this question when he was asked under cross examination as follows;

> Q. How do you reconcile this answer you have given with paragraph 6 of your statement of claim?
>
> A. The cultivation of cocoa is a process. After acquiring the land, you obtain a permit from the council then you weed the land and burn the weeds. You then plant plantains whose leaves serves as shade for the cocoa seedlings. From that period, it will take 7 years for the cocoa to mature and bear fruit. My mother acquired the land in 1954 and died in 1961, which was exactly 7 years. My mother fell sick in 1955 and S.A Dapaah came unto the land in 1955. This means that my mother could not have cultivated

cocoa on the land since by the time S.A Dapaah came she had only spent one year in possession of the land. Dapaah died in 1974 thereby spending 20 years on the land.

This answer given by Plaintiff, in the view of the Court, was nothing but an attempt by him to be very economical with the truth. It is thus no wonder that he attempts to attribute all the preparatory stages for the cultivation of cocoa to his mother but deliberately reserves the actual cultivation of cocoa to his brother S.A Dapaah. Thus in Plaintiff's view, his mother used a full year to prepare the grounds for the cultivation of cocoa but did not in fact cultivate cocoa. I find this quite unbelievable coming from Plaintiff who was of a tender age at the time S.A Dapaah went onto the land and did not himself perceive the state of the land as at that time. In any case, even if it is true that Rosina Ama Boamah only prepared the land for the cultivation of cocoa for a full year, the question that arises is, what was the purpose for her conduct in preparing of the land? The obvious answer is that she was preparing the land for cultivation of a cocoa farm for the exclusive benefit of her daughters as was her initial intention.

Defendants on their part called Grace Werekowaa (Dw1) who testified to the effect that her father was Stephen Kwabena Dapaah also known as S.A Dapaah and that when Rosina Ama Boamah fell sick, her father took over the management of the cocoa farm and further expanded it. Under cross examination by Counsel for Plaintiff, Dw1 was asked;

Q. In what year did you father's mother acquire the land?

A. I was young so I do not know. I was living with my parents at Korlebu when one day my father told my mother that his mother was ill and so he decided to go and help her on the farm. So we all followed my father to go and work on the farm which my father's mother was already cultivating. My father's mother made us to understand that she had acquired the land for her daughters so my father was just there to take care of the farm but the farm did not belong to my father.

This Court found no reason to doubt the above assertion by Dw1 as she appeared generally truthful. The only inconsistency in her evidence was when in one breath she told the Court that cocoa had already been cultivated on the land in dispute at the time she and her family came onto the land and at the same time alleged that she did not know if Rosina Boamah cultivated any cocoa upon being questioned by Counsel for Plaintiff. Be that as it may, this Court found the testimony of Dw1 more probable when compared with that of Plaintiff. Unlike Plaintiff, she personally observed the state of the land in dispute at the time her family went to occupy same and is very much suited to narrate what she saw first hand. Dw1 in fact had nothing to lose or gain by the outcome of this suit, a fact she made known when Counsel for Plaintiff questioned her as follows;

> Q. Lucy Dwomoh stated at paragraph 5 of her statutory declaration marked as Exhibit 7 that she was the sole owner of the property in dispute. Do you agree with that statement?
>
> A. I do not have anything to say about that. All I know is that my father told us that the farm was being cultivated for his sisters. Even though my mother cooked for the labourers we did not get any portion of the far and so we wasted our time.

This Court accordingly finds that on the balance of probabilities Defendants duly established the fact that Rosina Ama Boamah cultivated cocoa on the land in dispute.

What then did S.A Dapaah do on the land in dispute? In answer, both parties agree that S.A Dapaah cultivated the land at least from 1955 till his demise in 1974. Thus S.A Dapaah cultivated the land in dispute for 19 years and according to Dw1, her father used this period to expand the cocoa farm already cultivated by Rosina Ama Boamah a fact Counsel for Plaintiff appeared to concede during the cross examination of Dw1. However, Counsel then attempts to distinguish the cocoa farm cultivated by Rosina Ama Boamah and that cultivated by S.A Dapaah when he asked

Dw1 the following questions;

Q. Do you know that your father Stephen Dapaah expanded the farm you claimed Rosina cultivated?

A. When my father cultivated the land there was no time that he alleged or intimated that any portion of the land he cultivated belongs to him. He always made it known that the farm was being cultivated for the daughters of his mother.

Q. I put it to you that any additional land cultivated by Stephen Dapaah could not belong to his sisters because that was not what Rosina Boamah cultivated?

A. My father never told me that any farm he cultivated in addition belonged to him. What he rather told me was that the farm as cultivated by him belonged to his mother's daughters. However, my mother was cooking for the labourers but she did not get any portion of the land.

Q. What is the size of the entire land Rosina Boamah acquired?

A. I do not know the size, however it was very large hence my father could not cultivate the entire land prior to his demise.

Q. What was the size of the cocoa farm Rosina Boamah cultivated before your father arrived? A. I do not know.

From the above discourse one observes an attempt by Counsel to suggest that it is only the portion actually cultivated by Rosina Ama Boamah that can devolve unto her daughters per her earlier directive but not the portion cultivated by S.A Dapaah. Indeed, had Plaintiff managed to distinguish the land cultivated for one year by Rosina Ama Boamah from that cultivated by

S.A Dapaah, Counsel's contention would have found credence before this Court. This is due to the fact that, as admitted by the parties, Rosina Ama Boamah had indicated that any cocoa farm she would cultivate herself on the land was to devolve to her daughters. Consequently, all that was required of Plaintiff was for him to establish the actual size of land cultivated by Rosina Ama Boamah prior to she leaving as against the actual size of land cultivated by S.A Dapaah when he took over. Had this been done, there would have been no difficulty in settling that portion of land actually cultivated by Rosina Ama Boamah on her daughters, while the portion cultivated by S.A Dapaah would be settled on all the children of Rosina Ama Boamah according to the latter's dictates. Unfortunately for Plaintiff, no such distinction is made. Plaintiff rather stuck to his assertion that Rosina Ama Boamah cultivated no cocoa farm, a fact which this Court has found to be false. As earlier noted, Dw1 affirmed that, Rosina Ama Boamah herself made them, "…to understand that she had acquired the land for her daughters so my father was just there to take care of the farm but the farm did not belong to my father". This material fact was neither challenged nor denied by Counsel for Plaintiff in the cross examination of Dw1, with the effect that Plaintiff is deemed to have admitted the truth of same. [See: Hammond vrs. Amuah and Anor (supra)].

Despite this above finding, no effort is made by Plaintiff to distinguish that portion of land cultivated by Rosina Ama Boamah from that cultivated by S.A Dapaah which gives the impression, and rightly so, that the cocoa farm is one and the same and I so hold. From the evidence adduced by both parties, S.A Dapaah merely continued from where his mother left off and expanded the farm his mother started. He was simply an agent of his mother and all his efforts on the farm was simply to bring to fruition the intent and purpose of his mother, Rosina Ama Boamah which was to cultivate the cocoa farm for the benefit of her daughters exclusively.

At this juncture, it is pertinent to state that contrary to Plaintiff's assertion, the actual land in dispute was not the entire land acquired by Rosina Ama Boamah which Plaintiff alleged measured 262 acres. The actual land in dispute was that portion of land initially cultivated by Rosina Ama Boamah and expanded by S.A Dapaah. However, the actual size of this land is unknown neither are its boundaries known. In his written address filed on the 22nd of February 2024 Counsel for Plaintiff stated at page 7 as follows;

> "Failure to prove the identity of the disputed cocoa farm and its limit with accuracy is fatal to Defendants case. This was the holding in the case of In Re Ashalley Botwe Lands: Adjetey Agbosu & others v. Kotey and others (2003-2004)1 SCGLR 420.
>
> The Defendants must establish by positive evidence the identity of the cocoa farm which is the subject matter of the action otherwise
> Defendants action must fail for lack of certainty…"

I must state that although Counsel for Plaintiff rightly stated the position of the law he wrongly attributed its application to Defendants. Counsel ought to have known that the onus to establish the identity of the actual land in dispute rested upon the Plaintiff right from the inception of the suit. The description of the land in relief (i) of Plaintiff's writ of summons and statement of claim was not a description of the actual land in dispute.

Plaintiff knew right from the onset of the suit that the actual land in dispute was the cocoa farm within the larger land acquired by Rosina Ama Boamah, yet deliberately pleaded facts which gave the impression that it was the entire 262 acres of land which was in contention. Since Defendants' only contention was that the cocoa farm belonged to the daughters of Rosina Ama Boamah exclusively, a position denied by Plaintiff, it was obvious to Plaintiff, prior to the inception of the suit, what the actual dispute related to. It thus behooved Plaintiff to have delineated and identified the cocoa farm in dispute and not seek his opponent to do so on his behalf. In fact, Defendants were under no obligation

to identify the actual cocoa farm in dispute given the fact that they did not counterclaim in the present action. The onus was upon Plaintiff to do so. In the case of Odoi v Hammond [1971]2 GLR 375, the Court of Appeal observed that in an action for declaration of title, the Plaintiff cannot rely on the weakness of the Defendant's case but must win on the strength of his own case. Consequently, Plaintiff cannot succeed by seeking to rely on Defendant's failure to identify the actual land in dispute.

In summary, from the totality of the evidence adduced, this Court finds that Rosina Ama Boamah did direct that any cocoa farm she cultivated was to devolve onto her female children exclusively upon her demise. This Court further finds that Rosina Ama Boamah subsequently cultivated cocoa on the land she acquired and this cocoa farm was expanded by S.A Dapaah for a period of no less than 19 years. Furthermore, this Court finds that S.A Dapaah's efforts in expanding the farm originally started by his mother was simply to bring to fruition his mother's intent of cultivating a farm for the benefit of her daughters. The fact that S.A Dapaah later came to expand the farm did not change the character of the land nor the purpose for which Rosina Ama Boamah commenced cultivation. It is thus no wonder that the farm which S.A Dapaah cultivated as an expansion of the original cannot be distinguished from that initially cultivated by Rosina Ama Boamah and hence they are one and the same.

It must however be noted that the above conclusion does not apply to the uncultivated portion of the land acquired by Rosina Ama Boamah. As alluded to by the parties, it was only that portion of land that Rosina Ama Boamah cultivated that was to devolve unto her daughters exclusively which this Court has found relates to the cocoa farm in question. Thus the uncultivated portion of the land acquired by Rosina Ama Boamah belonged to all her children and this fact was admitted by 3rd Defendant herself when she confirmed under cross examination that the uncultivated portion was gifted to all the children of Rosina Ama Boamah. The question however is how were the children to hold

the uncultivated portion of the land gifted to them by their mother Rosina Ama Boamah? Were they to hold same as joint tenants or tenants in common? Counsel for Plaintiff put a similar question to 3rd Defendant in the following manner;

> Q. Having gifted the entire land to all her children, it meant that the male children were tenants in common and not joint tenants?
>
> A. Not true. If that was the case, then my father's children of which I am one would have had a share in the farm but that is not the case.

The answer given by 3rd Defendant appeared to refer only to the cocoa farm in question but not the uncultivated portion of the land. In any case her answer is however not borne out by the evidence on record and same does not accord with the law.

With regards to the type of tenancy held by the children of Rosina Ama Boamah with in respect of the uncultivated portion of the land gifted to them, the Court of Appeal in Obaapanin Abena Manu & 43 Ors. V. Opanin
Kwaku Mensah & 4 Ors. (2018) JELR 69605 (CA) stated;

> "The two esteemed authors BJ da Rocha and CHK Lodoh in the book entitled Ghana Land Law and Conveyancing in Chapter 13 at page 261, discuss the implications of co-ownership of land. In their view, there are two types of co-ownership of land, namely joint tenancy and tenancy in common. According to them the ultimate determinant as to the type of ownership is in the case of a gift or a grant of land, the intention of the acquirers; and in the case of a gift or a grant of land, the intention of the donor or grantor. However, where the parties or their grantors or donors are silent on how they should share the property acquired by them, then the law will imply that they hold the property as tenants in common....Regarding tenancy in common, the tenants all have shares in a single

property which has not yet been divided among them, none of them can claim sole ownership of any part of the property concerned. The essential feature in a tenancy in common is unity of possession.

The present state of the law in Ghana according to the learned authors is that where a grant of land is made to two or more persons, it is presumed that it is made to them as tenants in common in equal shares unless a contrary intention is expressed in the grant, (see section 14(3) of the Conveyancing Act, 1973 (NRCD 175) which provides as follows:

A conveyance of an interest in land to two or more persons, except conveyance in trust, creates an interest in common and not in joint tenancy,

a) Unless it is expressed in the conveyance that the transferees shall take jointly, or as joint tenants, or to them and the survivor of them, or

b) Unless it manifestly appears from the tenor of the instrument that it was intended to create an interest in joint tenancy"

It ought to be noted that presently, the applicable provision is Section 40(3) of the Land Act 2020 (Act) which is analogous to section 14(3) of the Conveyancing Act, 1973 (NRCD 175) which has been repealed. In the instant suit, the evidence on record indicates that when Rosina Ama Boamah made the gift of the uncultivated land to her children she was silent on how they should share the property. By operation of law therefore, particularly section 40(3) of Act 1036, it implies that the children of Rosina Ama Boama held the uncultivated portion as tenants in common. The implication of this holding is that, each child of Rosina Ama Boama who was alive when the gift was made had an equal share in the uncultivated part of the land and his share or interest can pass to his beneficiaries under his will or intestacy.

Based on this holding, in order to forestall future litigation between the parties, the parties are admonished to demarcate the entire land acquired by Rosina Ama Boamah and reduce same into a site plan. They are further admonished to delineate the cocoa farm initially cultivated by Rosina Ama Boamah which was later expanded by S.A Dapaah for which this court has found devolves unto only the female children of Rosina Ama Boamah on the same site plan. The remaining uncultivated portion is to be held by all the children of Rosina Ama Boamah as tenants in common and same may be shared by them equally and dealt with in the manner each child or their descendants deem fit.

The above conclusion effectively determines the present matter before this Court and issues 2 and 3 above listed have been rendered superfluous to determine same would be merely academic which has no bearing in the conclusions reached by the Court presently.

Since the essence of the present action was for the recovery of the cocoa farm initially cultivated by Rosina Ama Boamah and expanded by S.A

Dapaah, based on the findings of the Court heretofore elucidated, Plaintiff's case must accordingly fail. Given the fact that the parties are relatives and there is the need to ensure cordiality amongst the family members, this Court deems it just not to impose punitive cost but such cost that is reasonable to cover expenses in the suit. The present action is dismissed with cost of GH¢4,000.00 awarded against Plaintiff.

SGD
H/H CHARLES KWASI ACHEAMPONG ESQ.
CIRCUIT COURT JUDGE – GOASO