

IN THE DISTRICT COURT
AGONA SWEDRU-A.D. 2022
BEFORE HIS HONOUR ISAAC APEATU ESQ

Suit No. A1/12/2021

23rd January, 2023

EBUSUAPANYIN KOBINA MENSAH ... Plaintiff

VERSUS

KWAMENA BREBO ... Defendant

Plaintiff	PRESENT
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Defendant	PRESENT
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Mr. J.K. Oppong for B.B. Simpson for Plaintiff	PRESENT
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Mr. K. Amoah for Defendant	ABSENT
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By Court: Ruling on challenge to capacity of Plaintiff

The Plaintiff filed his Writ of summons claiming among others declaration of title and recovery of possession of a piece of land lying at 'Agyahene' within the vicinity of Agona Swedru. Pursuant to the orders of the court, the Plaintiff filed by his lawyers, a statement of claim on the 26th day of February, 2021 in which he averred that he is 'a farmer and the head of Yego No.1 family of Manho We, Obaseman of Agona Swedru'. Defendant filed his defence to the Plaintiff's claims and in paragraphs 2, 3 and 4

thereof, he alleged that the plaintiff lacks the capacity and the locus standi to institute the instant action because he was not the Ebusuapanyin of any Yego No.1 family of Manho We Obaaseman of Agona Swedru. When this court's attention was drawn to this challenge to the capacity of the Plaintiff, it set down as a preliminary point the determination of the capacity of the Plaintiff.

The position of the law is that capacity to sue was a matter of law and could be raised by a party at any stage of the proceedings, even on appeal. It also could be raised by the court suo motu. It is a fundamental issue which even if a party fails to raise, cannot be ignored by any court, whether a trial court or an appellate court. This is because a party who does not possess the capacity to sue is not entitled to judgment; he is not entitled to a hearing on the facts and his writ will be struck out. See **Fosua and Adu Poku v Dufie (deceased) and Adu-Poku Mensah 2009 SCGLR 310 and The Republic V High Court, Accra; ex parte Aryeetey (Ankrah, Interested party) (2003-2004) 1 SCGLR 398**. The Supreme Court, in the **Fosua and Adu Poku v Adu Poku Mensah's case** at page 338 of the report held, per Ansah JSC, that:

“The Supreme Court considers the question of capacity in initiating proceedings as very fundamental and can have catastrophic effect on the fortunes of a case”

Dotse JSC, was also of the opinion in that judgment that;

‘want of capacity is a point of law, which if raised goes to the root of the action’

But it is also trite law that where a party's capacity to sue or bring an action is challenged, the onus is on him to prove his capacity by cogent evidence. In the case of **Sarkodee I v Boateng II [1982-83] GLR 715**, Apaloo CJ held at holding 2 of the Judgment thus;

“It was elementary that a plaintiff or petitioner whose capacity was put in issue must establish it by cogent evidence. And it was no answer for a party whose capacity to initiate proceedings had been challenged by his adversary, to plead that he should be given a hearing on the merits because he had a cast-iron case against his opponent”.

The Supreme Court in the case of **Asante-Appiah v Amponsa alias Mansah [2009] SCGLR 90** held per Brobbey JSC at page 95 that;

“Where the capacity of a person to sue is challenged, he has to establish it before his case can be considered on its merits”.

It bears emphasizing that though it is the party whose capacity is challenged who has the burden of proving that he has capacity, the challenge to that capacity must be based on some sound ground i.e. either in law or fact, before the party challenged can be questioned if he failed to prove same.

In this case and as stated above, the Plaintiff averred that he is the Ebusuapanyin of the Yego No.1 family of what appears as ‘Manho We, Obaaseman of Agona Swedru’. Thus, the foundations by which he commenced the present suit hinges on his assertion that he is the head of the family by which authority he brings this action. It is this assertion that the defendant has challenged. According to the customary law, no one has an automatic right to be appointed as the head of family. A valid appointment can be made by the family at a family meeting expressly called for the purpose. In the case of **Hervie v Tamakloe (1958) 3 WALR 342**, it was held that by native custom, a person does not automatically become head of family as of right. He must either be appointed-elected-by the principal members of the family when the post becomes vacant by any means, or he must be acclaimed and acknowledged as such by the said principal members of the family, for example, by the principal members supporting acts he performs as head.

So in the circumstances of this case, the Plaintiff who claimed to be such head of family had to prove that he was appointed by the principal members of the family and that he has subsequently been recognised by the family as such head. In proof of his capacity, the Plaintiff gave evidence on his own behalf and called three other witnesses. The nub of his evidence is that he is a member of the Yego No.1 family of Manhodwe of Agona Swedru and the accredited Head of the said Royal family. He stated that there is a Yego No.1 family of Manhodwe of Agona Swedru of which he was duly nominated and accepted by the family and subsequently became its head after all customary rites had been performed before the Royal Nsona Family of Nkubease-Manhodwe being part of the Gyaase Division. He traced the chronological succession to the headship in the family from his late mother Obaapanyin Abena Yebiemmo to Kojo Ayitey to late Kweku Darko. That upon the death of Kweku Darko, Kobina Otoo acted as the head of family for about three (3) years until he, (Plaintiff) was duly appointed as the head of the said family in January, 2017. Plaintiff claimed that he performed all the customary rites in respect of his appointment as head of family by presenting three (3) bottles of Schnapps, two (2) crates of assorted minerals (drinks) and an amount of Six Hundred Ghana Cedis (GH¢600.00) to the overlords of the Gyaase Division which they duly accepted. That later on, he was presented to Swedruman Council of Chiefs where he presented two (2) crates of assorted drinks, two (2) cartons of beer, three (3) bottles of Schnapps, one (1) gallon of Akpeteshie and an amount of Five Hundred Ghana Cedis (GH¢500) which were accepted and libation poured to evidence his acceptance to the position of head of family of the Yego No.1 family of Manhodwe. He attached photographs to show events after his acceptance.

He further stated that as the head of family, he attends weekly meetings with other heads of family each and every Thursday at the Botwe Royal Palace where they deliberate on pertinent issues with the chiefs and elders of Swedruman. He attached as Exhibit, copies of the Attendance Register of Chiefs, Elders and Heads of

Family). He claimed further that his status as Ebusuapanyin (Head of Family) of the Royal Yego No.1 family of Manhodwe of Agona Swedru is further attested to and confirmed by Nana Kwame Donkoh II (Agonaman Gyasehene), Nana Kwesi Aryeetey (Nkubease Mankrado), Ebusuapanyin Okonta (Head of Aboradze Family. Swedru), Nana Kojo Acquah II (Head of Twidan Family/Swedrumen Tufuhene) and Nana Esieni V (Swedrumen Nifahene), all of who have appended their signatures to a document confirming his status as Head of Yego No.1 family of Manhodwe, Swedru. He attached as Exhibit 3 a copy of the said document.

During the ensuing cross examination, the plaintiff denied suggestions by counsel for the defendant that he was not appointed as the head of the Yego No.1 family of Manhodwe, Swedru. Further, he denied suggestions that there is no family called Yego No.1 family of Manho We Obaaseman of Agona Swedru insisting that he told his lawyer that he was the head of the Yego No.1 family of Manhodwe-Nkubeeseman of Agona Swedru.

As stated earlier, Plaintiff then called the three other witnesses. First was Obaatan Kobina Abam who testified to the effect that he is the Asafobaatan of Agona Swedru and a member of the Yego Family of Nkubease-Manhodwe. That he knows the Plaintiff herein as his Ebusuapanyin since he was duly selected by the Yego Family of Nkubease-Manhodwe and all necessary customary rites were performed to crown him as the Ebusuapanyin. That after the demise of Kweku Darko (the then Ebusuapanyin), Kobina Otoo acted as the head of family for about three (3) years until the Plaintiff herein was lawfully selected and appointed to be the Head of family (Ebusuapanyin) of the Yego Family of Nkubease-Manhodwe. That the family first presented him to the Nkubeeseman Ward which occasion was presided over by Opanyin Kwamina Koomson, the acting Nkubeeseman Panyin. That as custom demanded, three (3) bottles of Schnapps, One Carton of soft drinks, one (1) crate of

Guinness, one (1) gallon of Akpeteshie and an amount of Five Hundred Ghana Cedis (GH¢500) were presented to the Nkubeseaman Ward. That the items and the money were duly accepted and libation was poured and prayer said. That on or about 16th January 2017, the Plaintiff was presented to the Swedruman Council of Chiefs by the Nkubeseaman Ward for acceptance to Swedruman Royal Yego Family. That the Plaintiff presented to the Swedruman Council of Chiefs two (2) crates of assorted drinks, two (2) cartons of Beer, three (3) bottles of Schnapps, one (1) gallon of Akpeteshie, and an amount of Five Hundred Ghana Cedis (GH¢500) and same were accepted. That the Plaintiff further presented an amount of Two Hundred Ghana Cedis (GH¢200.00) to the existing Heads of Families as 'amantem nsa' (i.e. drinks taken from newly admitted Family Heads). That after the acceptance of the items by the Swedruman Council of Chiefs, libation was poured and prayers said for the new Ebusuapanyin of Yego Family of Nkubese-Manhodwe in the person of Ebusuapanyin Kobina Mensah. That powder was poured on his head and photographs were taken to signify the crowning as head of the Yego family of Nkubese, Agona Swedru.

The next witness who testified in proof of Plaintiff's capacity was Opanyin Martin Kwamina Koomson. He testified to the effect that he is the Head of Family (Ebusuapanyin) of Aboradze family of Manhodwe and the acting Mankrado of Nkubese. That he knows the Plaintiff as the Ebusuapanyin of the Yego family of Nkubese-Manhodwe. That the Plaintiff was selected by the Yego Family as the head of family. That as custom demanded, he was presented to the Nkubeseaman Ward being the Gyaase Division at a gathering which he presided over alongside with other elders. That the Plaintiff presented three (3) bottles of Schnapps, one carton of soft drinks, one crate of Guinness, one gallon of Akpeteshie and an amount of Five Hundred Ghana Cedis (GH¢500) to the Nkubeseaman Ward in line with the

customary rites. That the items and the money were duly accepted and libation was poured and prayer said for him.

That subsequently, he led Plaintiff to the Swedrumen Council for the final customary rites to be performed. That at the gathering presided over by the late Nana Botwe (Omanhene of Agona Swedru), the Plaintiff was accepted as the Ebusuapanyin of the Yego Family of Nkubease-Manhodwe after the performance of the requisite rites. That the Plaintiff has since been attending meetings of Chiefs and Heads of Families held every Thursday at Nana Botwe Palace without let or hindrance.

The last witness called by the Plaintiff in proof of his capacity was Nana Kweku Esieni V. He claimed to be the Nifahene of Agona Swedru and the Acting Regent of the Yego Family of Agona Swedrumen. He testified to the effect that he knows the plaintiff as the Ebusuapanyin of the Yego Family of Nkubease Manhodwe. That on or about 16th January, 2017, the plaintiff was presented to the Swedrumen Council of Chiefs by the Nkubease being the Gyaase Division, after he had been chosen by the Royal Yego Family and accepted by the Nkubease Ward to Swedrumen. That as custom demanded of a person for acceptance as Ebusuapanyin, the plaintiff presented to the Swedrumen Council of Chiefs two (2) crates of assorted drinks, two (2) cartons of Beer, three (3) bottles of Schnapps, one (1) gallon of Akpeteshie, and an amount of Five Hundred Ghana Cedis (GH¢500.00) and same were accepted. That the plaintiff further presented Two Hundred Ghana Cedis (GH¢200.00) to the existing Heads of Families as “amantem nsa”. That after the acceptance of the items by the Swedrumen Council of Chiefs, libation was poured and prayers said for the new Ebusuapanyin of Yego Family of Nkubease-Manhodwe who is Ebusuapanyin Kobina Mensah. That the Plaintiff was offered words of advice by the Chiefs and Heads of Families and thereafter powder was poured on his head and photographs were taken to signify the crowning as Head of the Yego Family of Nkubease, Agona Swedru. That the Plaintiff

has since been attending meetings of Chiefs and Heads of Families held every other Thursday at Nana Botwe Palace without let or hindrance.

Defendant did not lead any evidence in proof of his assertion that the Plaintiff has not been appointed to the office as a head of the Yego No.1 family and as such lacks the capacity by which he instituted the action. Indeed, he bore no onus under the circumstances of this case, to lead evidence as the onus was solely on the Plaintiff to establish his capacity.

As I have stated above, where a party's capacity to sue or bring an action was challenged, the onus is on him to prove his capacity by cogent evidence. The Plaintiff's capacity having been challenged by the Defendant, what did he do in proof of his capacity? Was the evidence he led sufficient to prove the capacity by which he instituted the action? I think that I can answer the above question affirmatively. Having analysed the evidence led by the Plaintiff, I am satisfied that the Plaintiff has led sufficient evidence on the balance of probabilities to show that he is the head of the Yego No.1 family of Manhodwe-Nkubease of Agona Swedru.

It bears noting that the appointment and removal of a head of family was a matter of custom and is governed by the custom of each locality. Since the parties are from Agona, the Akan customary law is applicable to the appointment and removal of the head of family. This is in accord with section 55 of the Courts Act, 1993 (Act 459).

It is also important to emphasize that the Defendant merely claimed that the Plaintiff was not the head of the Yego No.1 family of Manhodwe of Nkubeamen. He did not suggest that another person was the head of the said Yego No.1 family. He merely denied that the Plaintiff was the head of the Yego No.1 family. I think that a challenge to the headship of a family of a party to an action in the air will not do. It is the

prerogative of any party to an action to challenge the capacity of his adversary if he deems it necessary. However, merely denying the capacity of such an adversary to the headship of a family without providing any alternative antithesis renders the challenge one of mere formality done without any real conviction or belief in its success.

In any case, the defendant maintained the challenge that the Plaintiff was not the head of the Yego No. 1 family of Manhodwe. The Plaintiff has been called to establish by evidence that he is the head of the family. He has by his evidence established that there are four traditional suburbs or wards in Agona Swedru; the Onwaneman, the Nkubeamen, the Oguanman, and the Anafoman. He established that there are various families in each of these suburbs one of which is the Yego No.1 family. He established that he was duly appointed by the elders of his family and presented to the 'Oman' who gave him their blessings. So according to him, after his appointment, the relevant traditional authorities endorsed him as such head of the Yego No.1 family.

I do not see what better evidence there is that the plaintiff could have led in proof of his capacity. As is trite learning, the appointment or removal of a family head is a question of law and it is determined based on the particular custom of an area. The Yego No.1 family which plaintiff claims he is head of is located in Agona. As such, as has been stated above, it is the custom pertaining to the people of Agona which will be used as a yardstick to determine whether in actual fact the plaintiff is the appointed head of the said Yego No.1 family. The custom pertaining to a traditional area that is outside Agona cannot be applied to determine whether the Plaintiff is or not the head of the Yego No.1 family.

It is important to note that the defendant is not a member of the Plaintiff's family. The defendant is said to be from the Asona family. Therefore, it stands to reason that he may not know the processes and procedures by which the members of other families appoint their heads of family. In my assessment of the evidence led by the Plaintiff in proof of his capacity, I think that he (plaintiff) succeeded in establishing by the preponderance of probabilities, that he is the head of the Yego No.1 family to which he belongs. The Plaintiff called in evidence personalities whom I consider key, both within and without his family but who, from the evidence, appear crucial to the appointment and confirmation of a head of family in Agona traditional setting.

Opanyin Abam is a member of plaintiff's Yego family. Under normal circumstances, if plaintiff has not been appointed as the head of the Yego No.1 family or that there was another person with a better right to the headship of the family, he would have raised an objection to plaintiff's assertion that he is the head of family, he being a member of the family. However, far from it, he testified that he recognises the plaintiff as the head of his family. He confirmed that the plaintiff was appointed by the family and was presented to the Nkubesean elders for approval. That after he was accepted there, the plaintiff was sent to the Swedruman council of chiefs who also confirmed him. If a key member of the Yego No.1 family of which plaintiff claims to be head, has testified to his due appointment and confirmation as such head of the family, by what basis can a person who is not a member of that family dispute it?

The other witness namely Opanyin Martin Kwamina Koomson testified to the effect that after the appointment of the Plaintiff, he was presented to the Nkubesean suburb or ward. After the performance of the requisite rites, he was accepted and libation was poured to signify the acceptance. The Plaintiff was then presented to the Swedruman council of chiefs who also accepted him after the performance of rites. Kweku Esieni V, who claimed to be the Nifahene of Agona Swedru and the Acting Regent of the Yego Family of Agona Swedruman also testified that the Plaintiff was

brought before the Swedruman council where he was accepted by them. It appears from the testimony of the Plaintiff and his witnesses that after a person is appointed as head of his family, he is presented to the suburb or ward. When he is confirmed there, then the ward leads him to the Swedruman council of chiefs where the final act of acceptance is done. According to the Plaintiff, the above procedure is that by which a person is appointed and confirmed as head of family under Agona custom.

Be that as it may, the Defendant maintained his denial that the procedure resorted to was one mandated under custom. Yet, he failed to suggest to this court what the correct procedure ought to have been. Defendant failed to produce any alternatives besides asserting that the Plaintiff was not properly appointed. For instance, counsel for the defendant put to the plaintiff in his cross-examination that the Agona Gyasehene, Nkubese, Mankrado and the Swedruman palace etc. are not persons authorised to confirm appointment of family heads. This assertion is found repeated in the cross-examination of the witnesses called by the Plaintiff in proof of his capacity. It is instructive to note that both Plaintiff and his witnesses denied counsel's assertion and maintained that the plaintiff was approved through the right customary procedure. In the face of such denials, one would have thought that the Defendant or his counsel would have, for evidential purposes, provided the right procedure the Plaintiff ought to have been appointed and confirmed by in accord with Agona custom. This would have aided the court in assessing the procedure adopted in appointing and confirming the Plaintiff in light of what the Defendant had provided. However, save insisting vehemently that the Plaintiff was not appointed as head and at other times that he was not appointed by resort to the right procedure, the Defendant left it to the court to fish for alternatives for itself. It is as if to say, 'I have made my challenge. Find the right procedure yourself'. This I think is unfortunate. Having failed to point to the alternative head of family or the rightful procedure which the Plaintiff ought to have been taken through to attain legitimacy, I see the

Defendant as only taking shots in the dark not minding the target. This approach ought not to be encouraged at all. I do not think that the court ought to accord any weight or credence to the approach adopted by the Defendant in this case. In the absence of any suggested alternative procedure by which the Plaintiff ought to have been appointed as the head of his family, I accept that the Plaintiff was duly appointed as head of his Yego No.1 family by the principal members of that family and was duly confirmed customarily as such head after all requisite rites had been performed.

Counsel for the Defendant made capital of a reference to the Plaintiff as head of Yego No.1 family of what appears as 'Manho We, Obaaseman of Agona Swedru'. This is contained in paragraph 1 of the Plaintiff's written Statement of claim and his reply to the statement of Defence and Defence to counterclaim. Counsel appears to have derived much impetus from the above reference claimning that there is no such Yego No.1 family of 'Manho We Obaaseman' of Agona Swedru. When it was put to the Plaintiff that there was no such family at 'Manho We Obaaseman', the Plaintiff answered that he had told his lawyer that he was the head of the Yego No.1 family of Manhodwe Nkubaseman. The Plaintiff thus appears to say that what he told the lawyer who prepared his processes was that he was the head of the Yego No.1 family of Manhodwe Nkubaseman and not what appears as Monho We Obaaseman. Clarifying this further, the Plaintiff claimed that there are four traditional suburbs or wards which I have named in this ruling. That the Yego No.1 family of Manhodwe serves the Nkubaseman traditional block or ward. The witnesses called on the issue of capacity confirmed the existence of these traditional blocks or wards one of which is the Nkubaseman ward.

From the evidence as led by the Plaintiff and his witnesses, I accept that what appears as 'Manho We' in the Plaintiff's statement of claim and the Reply are typographical

errors made by his lawyer. I accept that the said error was meant to read as 'Manhodwe'. I also accept that what appears as 'Obaaseman' was written in error by the lawyer and was actually meant to read as 'Nkubaseman'. I do not think that this court ought to find fault where there is none against an innocent party for the clerical or typographical errors committed by his lawyer. I do not think that the poor client should be made to bear the brunt of a solicitor's error in typing out his instructions.

I believe that the Defendant jumped into challenging the capacity of the Plaintiff with no real conviction or belief that there is a known procedure by which the Plaintiff ought to have been appointed as head of his family. I think that as soon as counsel to the Defendant saw the typographical errors occasioning the misspelling of Manhodwe Nkubaseman as Manho We Obaaseman, he got excited and raised an objection to capacity. Even though a party has a right to require that his opponent establishes the capacity by which he brings a suit, such exercise should be done with circumspection rather than arbitrarily as shown in this case.

As I have found and accepted in this ruling, the Plaintiff meant 'Manho We Obaaseman' to read as 'Manhodwe Nkubaseman'. Rule 1 of Order 19 of the District Court Rules, 2009 (C.I. 59) creates room for amendment by the court suo motu in order to determine the real questions in controversy in a case. Having found that what appears as 'Manho We Obaaseman' in paragraph 1 of the plaintiff's written Statement of claim and paragraph 2 of his Reply to Statement of Defence and Counterclaim were clerical or typographical errors, I suo motu amend that error and in place of 'Manho We Obaaseman', insert 'Manhodwe Nkubaseman' in the aforementioned paragraphs. This amendment shall be made with ink at the sitting of the court.

On the totality of the evidence led in this preliminary matter, I find that the Plaintiff proved by a preponderance of probabilities that he has been duly appointed by his

family as head of the Yego No.1 family of Nkubease-Manhodwe traditional ward of Agona Swedru. That he has been confirmed by the authorized traditional bodies as such head of family and has held this position as head of the Yego No.1 family since January 2017 and continues to be the head of the said family. Claims that he is not the head of the said family have not been proven and therefore are dismissed. Having filed the suit in the capacity of the head of the Yego No.1 family of Nkubease-Manhodwe, the action was grounded on a solid capacity as head of family. I hold that the Plaintiff successfully proved his capacity and is entitled to prosecute the case in that capacity. The preliminary challenge is therefore dismissed.

In assessing cost, I have taken into consideration the length of time taken by the court to conclude this preliminary challenge and the industry applied in the matter by the Plaintiff and his counsel. I hereby award cost of GH¢2,000 against the Defendant in favour of the Plaintiff.

(SGD)

HIS WORSHIP ISAAC APEATU
DISTRICT MAGISTRATE