

**IN THE DISTRICT MAGISTRATE COURT HELD AT NEW TAFO-AKIM ON
THURSDAY 06-07-2023 BEFORE HER WORSHIP JOSEPHINE SARFO (MRS.)**

SUIT NO: A1/21/2022

**LAWRENCE ADU SUING FOR
HIMSELF AND ON BEHALF OF
AGONA FAMILY OF OLD TAFO-AKIM PLAINTIFF**

VRS

**1.KWAME ACHEAMPONG
2. KWAME OPOKU
OLD TAFO-AKIM DEFENDANTS**

PARTIES - PRESENT

JUDGMENT

The Plaintiff in its writ seeks the following reliefs:

- a. Declaration of title to a cocoa farm on the Maase-Old Tafo motor road belonging to the Agona family of Akyem Old Tafo which shares boundaries with D.O. Abrokwa, Eric Adarkwah, Madam Agyeiwaa, Rev. Adarkwah and Yaw Aboagye which farm Defendants have confiscated and claiming same.
- b. Declaration of title to the house number B 21 Old Tafo belonging to the Agona Family of Akyem Old Tafo which house Defendants are claiming ownership.
- c. Recovery of possession of the said cocoa farm and house to the family.
- d. Cost.
- e. Perpetual injunction restraining defendants, their servants, assigns, privies, agent, any person claiming title through the defendants from interfering with the cocoa farm and the house number B21, Old Tafo.

Plaintiff avers per the statement of claim that he is the head of family of the Agona family of Akyem Old Tafo. It is the case of Plaintiff that the late grandfather, Opanin Yaw Okyere gave birth to six children namely Op. Brobbey, Op. Kwasi Amakye, Op. Yaw Opoku, Op. Eric Kwasi Adarkwa, Obaapanin Yaa Korkor, and Obaapanin Amma Ketewaa in his lifetime. He also had a sister by name Obaapanin Yaa Otiwaa. The said Op. Yaw Okyere acquired a vast cocoa farm on the Old Tafo-Maase motor road and two houses, one at Tafo Asemasa and the other at Old Tafo Fofiese. In his lifetime, he shared a portion of the cocoa farm among all his six children including the Defendant's father Yaw Opoku. He also gave the rest of the cocoa farm to the family which is the subject matter in dispute. He also gifted the house at Fofiese to, the father of the 1st Defendant and the house at Asamasa he gave to the family which is the house in dispute. Op Yaw Okyere died in the year 1962 and Op. Ataa Acheampong was appointed his customary successor. Upon his appointment, he inherited the cocoa farm and the house subject matter in dispute for over twenty-five years till he passed on. Upon his demise, the only surviving sister of the late Op Yaw Okyere, Yaa Otiwaa was appointed the customary successor to oversee the family cocoa farm and house at Asamasa. The tenures of these two successors were without any dispute. When Yaa Otiwaa also passed on, the head of family, elders, the family chief and members met to appoint the Plaintiff as customary successor. According to the Plaintiff he has been overseeing the house and cocoa farm in dispute and pays property rate for about twenty-five years now. When some of the children of the late Yaw Okyere, i.e. Op Brobbey, Op. Kwasi Amakye and Op. Eric Adarkwa passed on, he buried them in his capacity as a father as custom demands. The Plaintiff avers that he has been in quiet possession of the house and cocoa farm in dispute until quite recently when the Defendants begun claiming the cocoa farm and the house. The Defendants have also harvested the cocoa without the consent of the family and also cut down some of the cocoa trees. The Plaintiff states that according to custom, the 1st Defendant being a member of the Asona family and the 2nd Defendant being a member of the Kona family

have no right to claim ownership of the properties in dispute being the properties of the Agona family.

Defendants have resisted the claim of the plaintiff and instead set out a cross action in the nature of a counter claim for the following reliefs:

- a. Declaration of title and recovery of possession of two houses, house number B21 Old Tafo -Akim and House number TD 101, New Tafo-Akim, parcel of land with cocoa thereon situate and lying at Fabreso Old Tafo-Akim and bounded as follows: On one side lies the property of Abena Donkor, on one side lies the property of Yaw Danso, on one side lies the property of Kwasi Okyere, on the other side lies the property of Koo Fie, on the other side lies the property of Ofosu Appiah, on the other side lies the property of Kwasi Kuma and on the other side lies the property of Yaw Domenavo being the self acquired property of Op. Yaw Okyere and his family.
- b. Perpetual injunction restraining Plaintiff, his agents, his assigns, his privies, etc. from interfering with the two houses and the cocoa farm.
- c. Punitive cost.

The Defendants in their statement of defence denied the claim of the Plaintiff and stated that the late Op. Yaw Okyere built two houses, one at Old Tafo and the other at New Tafo. The Plaintiff is not a blood relation of Op. Yaw Okyere so Plaintiff cannot claim that Op. Yaw Okyere was the grandfather.

The Plaintiff in defence to the counterclaim of the Defendants averred that the house at New Tafo, TD 101 is also a family property and all successive successors inherited all these properties for over forty years till he was appointed and has been in possession of same for over twenty-five years now.

At the close of the pleadings, the issues which came up for determination by the Court were:

1. Whether or not Plaintiff has capacity to institute this action?
2. Whether or not House Number B21 Old Tafo, Asamasa is the property of the Agona Family of Akyem Old Tafo?
3. Whether or not House Number TD 101, New Tafo is the property of the Agona Family of Akyem Old Tafo?
4. Whether or not the cocoa farm located on the Maase-Old Tafo motor road otherwise known as the cocoa farm at Fabreso is the property of the Agona Family of Akyem Old Tafo?

ANALYSIS OF THE EVIDENCE AND EVALUATION OF THE LAW

As there is a claim and a counter claim both parties have obligations to prove their claims and counter claims on the balance of probabilities. The dictum of Brobbey JSC in the case of **IN RE ASHALLEY BOTWE LANDS [2003 – 2004] SCGLR 420** is instructive in this regard that:

“The effect of sections 11(1) and 14 and similar sections in the Evidence Decree 1975 may be described as follows: A litigant who is a defendant in a civil case does not need to prove anything. The plaintiff who took the defendant to court has to prove what he claims he is entitled to from the defendant. At the same time if the court has to make a determination of a fact or of an issue, and that determination depends on the evaluation of facts and evidence the defendant must realize that the determination cannot be made on nothing. If the defendant desires a determination to be made in his favour, then he has a duty to help his own cause or case by adducing before the court such facts or evidence that will induce the determination to be made in his favour...”

In respect of the defendants' counter claim it is to be viewed with the same scale of measurement as if they were the plaintiff. As far back as the case of **AMON v BOBBETT (1889) 22 QBD 543** where Browne LJ noted that:

"a counter claim is to be viewed and to be treated for all purposes for which justice requires it to be so treated as an independent action".

Dotse JSC came to the same conclusion on counter claim actions in the case of **JASS CO. LTD v APPAU [2009] SCGLR 269 at 271** that:

'whenever, a defendant also files a counterclaim, then the same standard or burden of proof would be used in evaluating and assessing the case of the defendant just as it was used to evaluate and assess the case of the plaintiff against the defendant'

Plaintiff testified for himself and tendered in Exh A to C. in support of its case Plaintiff called one witness, PW1 whose testimony in essence corroborated that of the Plaintiff. The Defendants in a quest to prove their case also testified individually and called one witness, the mother of the 2nd Defendant to testify on their behalf. The essence of the Plaintiff's evidence is that Op. Yaw Okyere in his lifetime acquired a vast cocoa farm at Fabreso, Old Tafo. After he had apportioned part of this cocoa farm to his children, he gave the remaining portion to the Agona family of which he was a member. He also acquired three houses, two at Old tafo and one at New Tafo. He gave one of the houses located at Old tafo to the father of the 1st Defendant. The remaining house at Old Tafo and that of New Tafo were also gifted to the Agona Family by Op. Yaw Okyere. It is this cocoa farm located at Fabreso and these two houses which the Defendants are laying claim to as the grandchildren of the late Op. Yaw Okyere. He was appointed the customary successor to the late Ob. Yaa Otwiwa the only sister of Yaw Okyere who had herself succeeded Atta Acheampong the successor to Op Yaw Okyere. Upon the Plaintiff's appointment as customary successor he took over the caretaking duties of the

properties in dispute, i.e the cocoa farm at Fabriso, H/No. B21 Old Tafo and H/No. TD101 New Tafo. As customary successor he paid property rates on the houses in dispute which receipts he tendered into evidence. He stated that the 1st and 2nd Defendants being of the Asona and Ekona family respectively could not lay claim to the properties in dispute as Op. Yaw Okyere belonged to the Agona family.

The 1st Defendant testified that his grandfather, Yaw Okyere, migrated from Asante to Tafo with his mother Ob. Akua Ketewaa and the younger sister, Yaa Otiwaa. Through dint of hardwork, he acquired the properties in dispute. Growing up, they used to visit the cocoa farm at Fabreso. Kwaku Anane, his late father also cultivated a portion of the cocoa farm until his demise. As was the practice of Akans, when Op Yaw Okyere and his sister migrated to Tafo, they joined the Agona family. His sister, Yaa Otiwaa also took a maidservant, Adwoa Ohenewaa who happens to be the mother of the Plaintiff and eventually adopted her as a daughter. Op. Yaw Okyere subsequently died in the year 1961 and Op. Atta Acheampong succeeded him. Upon the demise of Op. Atta Acheampong, Yaa Otiwaa succeeded him. Upon Yaa Otiwaa's demise, Ama Nkyankomango tried to succeed her but her actions were met with resistance. The 1st defendant denied that Plaintiff was the head of family of the Agona family.

The 2nd Defendant in his evidence corroborated materially the evidence of the 1st Defendant. The essence of his testimony is that he is the son of Yaa Korkor, a daughter of Op. Yaw Okyere. His grandfather, Op. Yaw Okyere acquired the cocoa farm in dispute and three houses, one in Old Tafo with H/No, B 21 and two at New Tafo. One of the houses is being occupied by Plaintiff and the other house, H/No. TD 101 which he left for his children. Before his demise, Op. Yaw Okyere gifted one of the houses at New Tafo to his sister Yaa Otiwaa which house is currently being occupied by the Plaintiff. According to the 2nd Defendant, when Yaa Otiwaa died, Plaintiff tried to succeed her but he was resisted by one of the sons of Op Yaw Okyere, Kwadwo Brobbey, on grounds that

Plaintiff was not a direct descendant of Op. Yaw Okyere to be his successor. That H/No. B21 Asemasa was the matrimonial home of the late Op. Yaw Okyere. The 2nd Defendant did not state who was appointed to succeed Yaa Otiwaa upon her death.

The Defendants' witness, Yaa Korkor (DW1) in her evidence stated that she recalls that her late father, Op. Yaw Okyere told her while alive that upon his death, houses, B21 and TD101 and other farmlands should be taken over by his children and passed on to the grandchildren.

WHETHER OR NOT PLAINTIFF HAS CAPACITY

Plaintiff though issued the writ in his capacity as head of family is not the head of family per his own admission and that of his witness PW1. They admitted while under cross-examination that one Kwaku Duah is the head of the Agona family. Plaintiff further gave evidence that he was appointed as the customary successor upon the demise of Yaa Otiwaa at a meeting of the head of the Agona family, the family chief and the family elders. He has been a caretaker of the properties in dispute for over twenty-five years. The Defendants on the other hand have denied that Plaintiff is the customary successor. The defendants stated that Plaintiff is not related to Op. Yaw Okyere and thus cannot succeed him, the evidence on record proves otherwise. The Defendants per their own showing testified that the sister of Op. Yaw Okyere, Yaa Otiwaa adopted her maidservant, Adwoa Ohenewaa, in her lifetime. Adwoa Ohenewaa per the adoption became the daughter of Yaa Otiwaa and a maternal niece of Yaw Okyere. This Adwoa Ohenewaa is the mother of the Plaintiff. Plaintiff is therefore the grandson of Yaa Otiwaa and also a grandson of Yaw Okyere by implication.

I gather from the evidence that Plaintiff is the customary successor of Yaa Otiwaa. The payment of property rates in respect of houses B21 Asamasa and TD 101 New Tafo reinforces this finding. The Plaintiff will not be paying for the property rates of these

houses if he was not the customary successor. This is more so when the Defendants testified that one of the sons of Op. Yaw Okyere, Yaw Opoku, lived in TD 101 until his death on 27th December, 2021. The practice of the Plaintiff paying property rates in respect of the houses would have been resisted by Yaw Opoku if truly the Plaintiff was not the customary successor of Yaa Otiwaa. The receipts of the property rates (Exh A and B) tendered into evidence shows clearly that as far back as 2011, the Plaintiff was paying the property rates of the houses in dispute.

The Defendants failed to state or mention the name of the person who succeeded Yaa Otiwaa having denied that Plaintiff was the successor. I find from the foregoing that Plaintiff was appointed the customary successor of the late Yaa Otiwaa and has capacity to bring this suit on behalf of the Agona family of Akyem Old Tafo. For it has been held in the Supreme Court case of **DOTWAAH AND ANOTHER VS. AFRIYIE [1965] GLR 257 SC**, per Ollenu JSC, that, *“Upon the appointment of a successor, the self-acquired property of the deceased to whom he succeeded vests in him for and on behalf of the family and he is thereby entitled, in place of the head of the family, to litigate the family’s title to the property. A successor as such has a locus standi”*.

Again, in the case of **ADJETEY AGBOSU AND OTHERS V KOTEY AND OTHERS [2003-2004] SCGLR 420**, the Supreme Court held that:

“The general rule recognized in Kwan v Nyieni, namely, that the head of family was the proper person to sue and be sued in respect of family property was not inflexible. There are situations or special circumstances or exceptions in which ordinary members of the family could in their own right sue to protect the family property, without having to prove that there was a head of family who was refusing to take action to preserve the family property. One of the special or exceptional circumstances is upon proof of necessity to sue”.

The Plaintiff in this case is not just an ordinary member of the Agona family, which the customary successor to the late Yaa Otiwaa and thus on the authority of the aforementioned decisions, as customary successor, the Plaintiff is clothed with the requisite capacity to sue in respect of the properties in dispute which he asserts belongs to the Agona family.

WHETHER OR NOT THE PROPERTIES IN DISPUTE BELONG TO THE AGONA FAMILY OF AKYEM OLD TAFO

A careful analysis of the evidence on record reveals that the properties in dispute were acquired by Op. Yaw Okyere in his lifetime. The dispute however relates to whether the properties belong to the Agona family or it devolved unto the children of Op Yaw Okyere upon his death. While the Plaintiff claims that Yaw Okyere gifted the properties in dispute to the Agona family in his lifetime, the defendants dispute that there was any such gift; that the properties in dispute upon the death of Op Yaw Okyere devolved unto his children by customary law practices.

Before the passage of the Intestate Succession Law, 1985 (PNDCL 111), intestate succession in Ghana was governed by customary law. The undisputed evidence before this Court is that Op. Yaw Okyere died in or about 1961/1962. Thus, upon his death his self-acquired properties fell into intestacy. The personal law of Yaw Okyere which is the Akan Customary law applies in respect of his estate. **In QUAICOE AND OTHERS V FOSU AND ANOTHER (1965) C.C 105, Archer J** (as he then was) held that by Akan customary law the self-acquired property of the deceased had become family property on his death intestate and the maternal family have become the successors to the estate subject to the life interest of the deceased's children and occupancy rights of the widows during their widowhood in the houses built by the deceased on self-acquired land.

In **RE ATTA, (DECD); KWAKO V TAWIAH (2001-2002) SCGLR 461 at 463** the Supreme Court held, *“whenever the self-acquired property of a deceased is said to become family property, it is the immediate family of the deceased which takes the property. But, the family as owner, always, and invariably appoints a member of the family called the ‘successor’ to administer the property for and on behalf of the family. This successor, strictu sensu, does not have title. He is variously described as a trustee or caretaker of the family with powers to control and manage the property...”*

Who constitutes the immediate family of an Akan man? The immediate family of an Akan man would consist of his mother, his own brothers and sisters, maternal nephews and nieces as well as maternal uncles and aunts. The man’s own children who form part of his nuclear family are excluded from the immediate maternal family by the Akan customary law.

It is not in dispute that Op. Yaw Okyere belonged to the Agona family as the defendants have themselves stated that he joined the Agona family with his mother and sister upon their sojourn in Tafo. On the authority of the aforementioned decisions therefore, the self-acquired properties of Op Yaw Okyere who died before 1985 devolved unto his immediate family, i.e., the Agona family. Upon his demise his self-acquired property became the Agona family property. It is for this very reason that upon the demise of the customary successor, Atta Acheampong, the Agona family appointed his sister, Yaa Otiwaa, as the customary successor to act as caretaker of the family properties. Whether or not Op. Yaw Okyere gifted the properties in dispute to the Agona family will not be of essence in this instance as the properties by operation of customary law became the Agona family property upon the death of Op. Yaw Okyere. The Defendants are laying claim to the properties in dispute in their capacity as grandchildren of Yaw Okyere. Based on Akan customary law practices, the children of Yaw Okyere which includes the father of 1st Defendant and the mother of 2nd Defendant are not part of the immediate family of

Yaw Okyere and by implication the Defendants are also not members of the immediate family of Yaw Okyere. This is further reinforced by the fact that 1st Defendant is of the Asona family while 2nd Defendant is of the Ekona family. In view of the fact that the properties in dispute devolve unto the Agona family the Defendants have no business claiming title to the properties in dispute.

As there is also no evidence before the Court to suggest that Op. Yaw Okyere gifted the properties in dispute to his children in his lifetime, his children per customary law only had life interest in these properties and this explains why Yaw Opoku, lived in the property in dispute until his death. I therefore hold that the properties in dispute, i.e., the cocoa farm at Fabreso, the Houses, H/No. B21, Asamasa and H/No. TD 101 New Tafo are the family properties of the Agona family of Old Tafo-Akim.

CONCLUSION

In conclusion, I dismiss the counterclaim of the defendants and grant the reliefs endorsed on the writ of the plaintiff. I accordingly order as follows:

- a. The cocoa farm located on the Maase-Old Tafo Motor-road (Fabreso) is the property of the Agona family of Akyem Old Tafo.
- b. The houses, House Number B21, Asamasa-Old Tafo and House Number TD101, New Tafo are the properties of the Agona family of Akyem Old Tafo.
- c. Recovery of full possession of the cocoa farm at Fabreso and the two houses, H/No. B21 Asamasa-Old Tafo and H/No. TD101 New Tafo by the Agona family of Akyem Old Tafo.
- d. Perpetual injunction restraining the Defendants, their agents, assigns, privies, etc from claiming or interfering with the Agona family of Akyem Old Tafo's enjoyment of the properties.
- e. Cost of GHc 2,000.00 against the Defendants in favour of the Plaintiff.

SGD

H/W JOSEPHINE SARFO (MRS)