IN THE DISTRICT COURT HELD AT KUKUOM ON THE 5TH DAY OF MAY, 2023 BEFORE HER WORSHIP AKUA OPPONG-MENSAH (ESQ)

SUIT NO A1/11/18

SAMUEL AGYEI BOAKYE
(SUING FOR HIMSELF AND } PLAINTIFF
ON BEHALF OF HIS 28 SIBLINGS
BORN TO THE LATE OPANIN
KWABENA AGYEI OF ABUOM)

VRS

NANA ADUSEI AND 2 OTHERS } DEFENDANTS

JUDGMENT

PROLOGUE

The courts have been the cornerstone and beacon of justice from the annals of history, but are reluctant to wade into disputes which extirpate and destroy cordial relationships between parties, however where persons with close family ties remain adamant about seeking recourse through the justice system, thereby causing a rift between them, the courts are bound though with much disaffection to resolve the dispute between the parties.

BACKGROUND AND FACTS

The case revolves around a burgeoning wrangle between two factions of a family over the devised property, of the late Opanin Kwabena Agyei, the father of the Plaintiff, a well-accomplished man of great repute who during his lifetime acquired a stout amount of

wealth. The background and facts of the case are that the Plaintiff mounted the present action on behalf of himself and his siblings numbering twenty-seven to recover possession of the subject matter of this dispute, a cocoa farm situate at Agyeikrom on Abuom Stool Land, acquired by their late father Opanin Kwabena Agyei in exercise of his rights as a royal/subject of the Abuom Stool, which the Plaintiff contends was gifted to him and his siblings by his late father during his lifetime, but the Defendants through subterfuge have maliciously taken over, under the pretext of being devised the cocoa farm under a will purportedly made on 8th February, 1987, by the late father of the Plaintiff, Opanin Kwabena Agyei.

The Plaintiff therefore on the 30th of April, 2018, issued a writ of summons claiming the following reliefs:

a. Recovery of possession and declaration of ownership of all that piece of cocoa farm situate at Agyeikrom on Abuom Stool Land bounded by the properties of Nana Kokor (deceased) now in the possession of Brenya, Opanin Yaw Marfo (deceased) , now in possession of Kwaku Marfo, Opanin Kwadwo Donkor (deceased) , now in possession of Opanin Boakye, Opanin Kwaku Duah (deceased), Nana Atakyi Mensah (deceased) and the Yaayaa streamlet .
b. An order directing the defendants to account for the proceeds derived from the disputed cocoa farm from April, 2018 to date.
c. An order of injunction restraining the Defendants, their agents, assigns, workmen etc. from interfering with the disputed cocoa farm

ISSUES: The germane issues for determination are:

i. whether the Plaintiff has the requisite capacity to institute the present action;
ii. whether or not the Defendants are estopped from laying adverse claim to the land

iii. whether a valid gift of the subject matter of the dispute was made to the Plaintiff and his siblings by their late father Opanin Kwabena Agyei during his lifetime; and

iv. whether the will purportedly made by the late father of the Plaintiff on 8th February, 1987 is valid;

EVIDENCE AT TRIAL

CASE OF THE PLAINTIFF

The case of the Plaintiff, is that his late father, in exercise of his rights as a royal/subject of the Abuom Stool, acquired a forest land at Agyeikrom on Abuom Stool Land, which he converted into a cocoa farm and during his lifetime, often made it known to some family members and distinguished Chiefs of Abuom, that he had cultivated the cocoa farm, purposely for the benefit of his children. According to the Plaintiff, their late father, Opanin Kwabena Agyei later made a gift of the cocoa farm which is the subject matter of the dispute, to the Plaintiff and his siblings in the presence of witnesses, namely, Opanin Owusu Ansah, Opanin Osei and Opanin Yaw Marfo, and in accordance with custom they offered aseda, in the presence of the witnesses in acknowledgment of the gift. The Plaintiff's case in essence was that he and his siblings, by virtue of the said gift were the only persons entitled to rightful possession of the cocoa farm in dispute to the exclusion of all others, which was distinct from other property their late father was possessed of including a cocoa farm at Nakete, a cocoa farm at Appea, a cocoa farm at Kofibadukrom and a cocoa farm at Akotosu.

The Plaintiff's case also is that his father died in 1987 and after the demise of his father, a family member by name Madam Abena Maaboa brought out a forged will and after same had been read at home, some family members and the children and the surviving wives

protested and challenged the validity of the will (of which no evidence was proffered during the trial). The Plaintiff further asserted that Madam Abena Maaboa admitted that the will was fake and the will was therefore disregarded. The Plaintiff again alleged that a meeting was subsequently convened by the late Chief of Abuom who happened to be the younger brother of the Plaintiff's father, where the principal members of the family including Madam Abena Maaboa, other family members, the children of the late Opanin Kwabena Agyei, his surviving and former wives and some subjects of Abuom were present.

According to the Plaintiff at the said meeting, the family gifted the disputed farm at Agyeikrom to the children of the late Opanin Kwabena Agyei, before witnesses, (including one Opanin Kwabena Nsiah alias Joe Tetteh who testifed in the suit as PW1) and he and his siblings offered a ram and two bottles of schnapps as aseda. The Plaintiff again alluded to the fact that at the meeting it was agreed that the storey building left behind by the late Opanin Kwabena Agyei at Pataase which had been partly floored at the level of the ground floor should be completed and another floor built at the upper part of the building which would be shared between the family and the children of late Opanin Kwabena Agyei, so that the cocoa farm of the family at Nakete and the cocoa farm of the children at Agyeikrom (the farm in dispute) would be used to complete the buildin, after which the children's cocoa farm would be released to them.

The Plaintiff and his siblings then put the cocoa farm in possession of the then head of family, the late Joseph Ahenkorah, to enable him use the proceeds to complete the building at Patase. The Plaintiff stated that it came to their knowledge that the head of family had misapplied the proceeds and had failed to use it for the construction of the building, so Madam Abena Maaboa, the sister of the late Opanin Kwabena Agyei admonished them to take over the farm.

The Plaintiff again asserted that upon the advice of Madam Abena Maaboa, he together with his siblings took over the cocoa farm in the 1987 main crop season at Agyeikrom for two years without accounting to anybody.

According to the Plaintiff, the late chief of Abuom, Nana Atakyi Mensah returned to Ghana from abroad and heard of the taking-over of the Agyeikrom cocoa farm by the Plaintiff and his siblings, and became infuriated and accused the Plaintiff and his siblings of disrespecting him by not giving him prior notice of their intention to take over their farm, and directed that the cocoa farm be shared between the family and the Plaintiff and his siblings. The Plaintiff again stated that due to the stance of the late Chief of Abuom, Nana Atakyi Mensah, the Plaintiff summoned Nana Atakyi Mensah, the head of family, the late Joseph Ahenkorah and Madam Abena Maaboa to the Office of the Committee for the Defence of the Revolution (CDR), Sunyani for title to the cocoa farm at Agyeikrom.

The Plaintiff further asserted that his family submitted to resolution of the matter by the Committee for the Defence of the Revolution in Sunyani and that at the said hearing he gave evidence for himself and his siblings with Madam Maaboa giving favourable evidence in support of their claim, whilst the late Joseph Ahenkora gave evidence on behalf of the family. According to the Plaintiff, judgment was given in his favour and he together with his siblings were asked to repossess the farm in 1989, so he and his siblings accordingly took over the cocoa farm in the 1988 to 1989 cocoa seasons.

The Plaintiff alluded to the fact that after weighing the cocoa beans the proceeds were shared among the children, and a portion was used to cater for their needs whilst another portion was saved, however there were allegations of misuse of the proceeds by the children who had been elected as supervisors so a meeting was convened to resolve the issue and in their bid to find a neutral person to manage the farm, a consensus was reached that the farm should be placed in possession of Abena Maaboa.

The Plaintiff's case further is that though an agreement was broached for Abena Maaboa to act as a supervisor and use the proceeds for the completion of the building at Pataase, only half of the cocoa farm should be placed in her possession whilst the other half remained in possession of the children which has been in their possession from 1990 to date.

According to the Plaintiff, the land at Pataase was a large land and so his father had preserved a plot behind the storey building to build a boys quarters, so the late Abena Maaboa convinced them that it would be more expedient to build another storey building to which they obliged

The Plaintiff however asserted that with time the proceeds from the cocoa farm now in dispute dwindled or reduced as a result of some of the cocoa trees dying and the children's refusal to rehabilitate and maintain the cocoa farm as owners, so the late Abena Maaboa could not complete construction of the second storey building, and was able only to build the ground floor and first floor on the upper part of the building, but could not complete the children's portion.

The Plaintiff also alleged that the children later took possession of their portion of the second story building on the ground floor and organized themselves financially and built the first floor on the children's portion and have occupied their separate portions in the first and second storey-buildings though the first floor of the storey building is yet to be plastered by the children.

According to the Plaintiff, he and his siblings later approached the late Abena Maaboa to release the cocoa farm now in dispute to them but the late Maaboa who was not happy made certain unsavory comments but promised to call the children and release the cocoa farm to them, which she promised to do by 2018, but unfortunately passed away in 2017.

The Plaintiff further claims that after the death of Abena Maaboa, he and his siblings approached the second born of Abena Maaboa by name Kwasi Nyantakyi for the release of the cocoa farm but Kwasi Nyantakyi requested that they wait for the children of Abena Maaboa at Abuom. The Plaintiff further stated that no resolution was reached as after the funeral of the late Abena Maaboa, the children returned to their various places of abode after the funeral.

The Plaintiff also claims that the children of the late Opanin Kwabena Agyei went to the cocoa farm in dispute and collected the dried cocoa beans in the farm but the Defendants caused the arrest of him the Plaintiff, and his brother one Kwadwo Asiamah on an allegation theft which resulted in the present action.

The Plaintiff initially intended to call five witnesses in support of his case, but however called only two during trial that is PW1, Opanin Kwabena Nsiah alias Joe Tetteh and PW2, Kwaku Marfo

PW1, Opanin Kwabena Nsiah alias Joe Tetteh, essentially corroborated the claims of the Plaintiff, and stated that after the death of Opanin Kwabena Agyei, a meeting was held between the late Opanin Kwabena Agyei's family, his surviving wives, his ex-wives and the surviving children of the late Opanin Kwabena Agyei. PW1 alleged that at the said meeting the children of the late Opanin Kwabena Agyei, through Kwadwo Asiamah, who was one of the late Opanin Kwabena Agyei's children told the gathering that their late father had gifted the remainder of his cocoa farm to them during his lifetime in which they had followed custom and offered aseda in the presence of Agya Marfo, Agya Owusu Ansah and Agya Osei, all deceased. PW1 however stated that the family did not accept the claims of the Plaintiff and his siblings, and entreated them to offer aseda in the presence of the family to seal the said gift. PW1 further alluded to the fact that the posture of the head of family, Nana Atakyi Mensah, brought about a misunderstanding, but he

together with the late Agya Marfo, Agya Owusu Ansah and Agya Osei advised the Plaintiff and his siblings to comply with the request of the head of family in order not to prolong matters or to give the family opportunity to possess the farm when litigation was going on. According to PW1, the family gifted the cocoa farm in dispute to the children in his presence and for which the children offered aseda of two bottles of schnapps and a ram in the presence of the late Agya Marfo, the late Agya Owusu Ansah and the late Agya Osei. PW1 further stated that it was further agreed at the meeting that the proceeds from the dipsuted farm and the family's farm at Nakete would be used to complete a storey building which had been left behind by the late Opanin Kwabena Agyei for the benefit of both the Plaintiff and his siblings and the family. PW1 concluded his evidence by stating that his late father Okyeame Kwabena Osei who was a linguist to the late Nana Atakyi Mensah was supposed to be present but as his father was ill, he delegated him to attend the meeting on his behalf, and affirmed that the portion of the cocoa farm which was released to the Plaintiff's family forms part of the cocoa farm in dispute which was released to the family in 1987.

PW2, Kwaku Marfo, who touted himself as the son of the good friend of the late Opanin Kwabena Agyei,, and having been born and bred on his father's cottage built on the late Opanin Kwabena Agyei's land which shares a boundary with his father's land, stated that during the lifetime of his late father, Opanin Yaw Marfo , his father gifted his cocoa farm at Agyeikrom to his wife and children and during the said gifting ceremony his father told the gathering that it was the Plaintiff's late father who opened his eyes about the need to gift one's property to one's wife and children. According to PW2, whilst he was a teenager, the Plaintiff together with his some of his siblings, and Madam Abena Maaboa came onto the cocoa farm at Agyeikrom which Opanin Kwabena Agyei gifted to his children in the company of others, so his late father asked him to accompany him to ascertain why there were so many people on the land. PW2 alluded to the fact that the

Plaintiff told his father in his presence that the children of Opanin Kwabena Agyei had agreed with Madam Abena Maaboa that a portion of the farm should be carved out and given to her to use its proceeds to finance the completion of a one storey building at Pataase, Kumasi whilst the other portion would remain with the children. It was the case of PW2 that his father was doubtful about the intentions of Madam Abena Maaboa, but Madam Abena Maaboa, informed his late father that had it not been for her intervention the family would have taken over the Plaintiff's farm in Sunyani, which was confirmed by the Plaintiff and his siblings, and being convinced that Madam Maaboa did not have any ulterior intentions, he together with his father accompanied the Plaintiff and his siblings to demarcate a portion of the disputed farm and place same in possession of Madam Abena Maaboa on the understanding that she would use the proceeds thereof to complete the Plaintiff and his siblings building at Patase after which she would release same back to them. PW2 finally stated that prior to his father's death a few years ago, he and his father met Madam Abena Maaboa and Osei Krom and his father asked Madam Abena Maaboa about the cocoa farm to which she responded that she intended to release the cocoa farm to the Plaintiff and his siblings within a few years.

DEFENDANT'S CASE

The Defendant's in their defence to the action, vehemently denied the claims of the Plaintiff. The Defendants contended that the late Opanin Kwabena Agyei, per his testamentary wishes in his Last Will and Testament dated 8th February, 1987 which he caused his lawyer, K.A. Nsiah Asare to prepare, and in which he named Mr. Nuamah and Mr. Joseph Ahenkorah as executors under the Will, devised the disputed farm to the Defendants to prepare on his behalf. The Defendant's further asserted that upon the death of Opanin Kwabena Agyei, the named executors, applied to the High Court, Kumasi for probate to administer the estate which was granted by the High Court, Kumasi. According to the Defendants pursuant to the grant of probate to the Executors,

the executors distributed the estate in accordance with the Will. It was further the case of the Defendants that in administering the estate the cocoa farm at Seaso now Agyeikrom was divided between Kwabena Agyei's children and the maternal family as directed under paragraph 1 of the Will. Again, the Defendants alleged that the disputed property, is the portion of the cocoa farm of the late Kwabena Agyei situate at Agyeikrom which was given to his maternal family by the Executors of the Will, and that the portion given to the children under the Will is still in their possession. The Defendant's case was further that, the then head of family, Joseph Ahenkorah, was made a custodian of the disputed cocoa farm, and at a meeting that was held following the death of the late Opanin Kwabena Agyei, the principal members of the family, Nana Atakyi Mensah, Joseph Ahenkorah and Mr. Nuamah, came to a consensus that the cocoa farm in dispute, be placed in the care of the late Madam Abena Maaboa, as she was the only female in the family. The Defendants asserted that the late Madam Abena Maaboa continued to remain at the helm of affairs and have oversight over the disputed cocoa farm till she died.

The Defendants further contended that the 1st Defendant, Nana succeeded the head of family Joseph Ahenkorah, as the Nana Amini Division of the Ekoana Family to which the Plaintiff's late father belongs, and the disputed property is therefore in possession of the Defendants who are the custodians and managers for and on behalf of the family. Again, the Defendants asserted that they have been in undisturbed possession from time of the late Opanin Kwabena Agyei's family to date.

The Defendants in support of their case also tendered in the Last Will and Testament of the late Opanin Kwabena Agyei dated 8th February, 1987 as Exhibit 2, a copy of the order granting probate to the executors under the said Will as Exhibit 3, and the survey Plan evidencing the partitioning of the dispute cocoa farm in accordance with paragraph 1 of the Will as Exhibit 4

The Defendants finally asserted that the cocoa farm in dispute belongs to the family, and the Plaintiff and his siblings having sold some of the properties their late father gave them, want to reap where they have not sown and are laying adverse claim to the disputed land of which they have been in possession for over 20 years without any challenge from the Plaintiff.

The court now proceeds to determine the cardinal issues for determination.

ISSUE 1

WHETHER OR NOT THE PLAINTIFF HAS THE REQUISITE CAPACITY TO INSTITUTE THIS ACTION

Capacity to institute an action is so fundamental that without it the foundations of any case would crumble. Capacity is the lifeblood and nub of every legal action, and therefore a writ issued by a party to an action without the requisite capacity is null and void. The principles undergirding the importance of capacity to an action have been elucidated in a plethora of cases. In the case of Nii Kpobi Tetteh Tsuru v Agric Cattle and CIVIL APPEAL SUIT NO J4/15/2019, dated 18th March, 2020, the Supreme Court cogently summarized the importance of capacity in the following terms:

The law is trite that capacity is a fundamental and crucial matter that affects the very root of a suit and for that matter, it can be raised at any time even after judgment on appeal.

Thus, a Plaintiff whose capacity is challenged needs to adduce credible evidence at the earliest opportunity to satisfy the court that it had the requisite capacity to invoke the jurisdiction of the court. If this is not done, the entire proceedings founded on an action by a Plaintiff without capacity would be nullified should the fact of non-capacity be proved.

Furthermore, the case of **G BRANDS IMPEX LTD.V.BANK OF GHANA** HIGH COURT · SUIT NO. C 351/2000 · 21 FEB 2019 · GHANA, the court succinctly stated

The issue of *capacity* has been variously dealt with by the courts and it has been held on a number of occasions that *capacity* goes to the root of the matter and whenever it is raised, it has the potential of curtailing the action even before trial.

The court in the case of G. Brands Impex Limited (supra) in making its findings further drew inspiration from the sentiments of Professor Thomas Cromwell in his article entitled: IN LOCUS STANDI – A COMMENTARY ON THE LAW OF STANDING IN CANADA (TORONTO: CARSWELL 1986) where he stated

—*Capacity* has been defined as Power to acquire and exercise legal rights. In the context of the *capacity* of parties to sue and be sued, to say that a party lacks such capacity is to acknowledge the existence of some procedural bar to that party's participation in the proceedings. It concerns the Right to initiate or defend legal proceedings generally.‖

Consequently, in the case of **ALFA MUSAH V. DR. FRANCIS ASANTE APPEAGYEI** SUPREME COURT · CIVIL APPEAL NO. J4/32/2017 · 2 MAY 2018, the apex court on capacity stated.

If a suitor lacks capacity it should be construed that the proper parties are not before the court for their rights to be determined.

More recently, in **KASSEKE AKOTO DUGBARTEY SAPPOR V.VERY REV. SOLOMON DUGBARTEY SAPPOR (SUBST. BY EBENEZER TEKPERTEY AKWETEY SAPPOR) & 4 ORS**SUPREME COURT · CIVIL APPEAL NO. J4/46/2020 · 13 JAN 2021, the Supreme Court, per Prof. Henrietta Mensah Bonsu JSC made the following pronouncements on capacity:

Capacity to bring and maintain the action remains a cardinal hurdle that must be jumped if either party is to remain in the case.

Prof. Henrietta Mensah Bonsu JSC, went on further to state ―Black's Law Dictionary defines *Capacity* 'or Standing as: ―A party's right to make a legal claim or seek judicial enforcement of a duty or right *capacity*…‖ Thus, one's ability to appear in court to make a claim hinges on whether one is recognized in law as having sufficient interest in any matter to seek a hearing on any particular issue. This ―sufficient interest‖ must remain throughout the life of the case, or one's legal ability to stay connected with a case making its way through the courts would be lost.

The Plaintiff, in instituting the present action endorsed on the writ that he had mounted this present action in a representative capacity on behalf of himself and his 28 siblings (which he later amended in his statement of claim to be on behalf of himself and 27 siblings).

Order 9 r 1(1) of C.I.59 recognizes the right of a party to sue in a representative capacity, and provides that if a Plaintiff sues, or a defendant is sued in a representative capacity, this fact shall be stated on the writ.

The Plaintiff's capacity was however challenged by Counsel for the Defendants, during cross-examination, where he contended that at the time that the Plaintiff instituted the action two of his siblings were deceased, contrary to the Plaintiff's claim before the court. The Plaintiff in a bid to rebut counsel for the Defendant's assertion stated that he had replaced his deceased siblings with the children of his deceased siblings and therefore could bring the action on their behalf. The Plaintiff, however did not make any application before the court praying for an order substituting his said siblings before the court, and therefore his purported substitution has no grounding in law.

Notwithstanding the above observations by the court, two quintessential issues are brought to the fore i.e, whether or not where a party sues in a representative capacity, the names of the persons on whose behalf he intends to sue must appear on the face of the writ or be attached to the writ, and whether a party suing in a representative capacity has the right to sue in such a capacity without the consent of the persons on whose behalf he or intends to sue.

The courts have held that where a party is suing in a representative capacity that party can sue for and on behalf of other parties not named as Plaintiffs. This principle of law received judicial mention in the case of RICHARD ASARE & OTHERS V. FERRO FABRIK LIMITED,COURT OF APPEAL · CIVIL APPEAL SUIT NO: HI/16/09 · 23 JUL 2009, where the appellant challenged the capacity of the Plaintiff to sue.
The court, in its pronouncements on the legal implications of suing in a representative capacity stated

"I think that although the title to the action reads —Richard Asare and 54 others, the endorsement to the writ of summons as well as paragraph 1 of the statement of claim clearly indicate that the action was commenced in a representative capacity.

In such a case every person who is represented in the action by the plaintiff is a party though not named in the title as such, however the representative plaintiff remains in control of the litigation until judgment.

The learned judge then continued

"I observe that representative actions serve a useful purpose in that where numerous persons are interested in a right as was the case in the instant action and another person or other persons are also interested in contesting that right, which was a general right but it is either impossible or inconvenient to determine the question of the existence of the

right between them because of their large number then one individual out of the number interested in the determination of the question may bring an action on behalf of himself and the others or might seek authorization from the court to have some of them selected to represent them in order that the right might be finally determined between them in an action constituted for that purpose.

Thus, the word —representative‖ within the context of types of actions has a designation that goes beyond the scope of acting on behalf of others; for it includes the person who takes out the action on behalf of a group of persons who have the same or common interest in the subject matter of the action.

The court further observed. "Turning to representative actions, we observe that there two such categories cases-namely a representative action and class actions. Both forms of action are employed in contradistinction to personal actions and are sometimes referred to as derivative actions. Representative actions eliminate multiplicity of actions; reduce the time that would otherwise be spent by the parties if such cases were to be tried individually and by so doing help in decongesting the courts.

Furthermore, in the case of William Benjamin Brown Jnr. v. Michael H. Brown (2019) 133 GMJ 219, the Plaintiff sued for himself and four other persons; his mother Mary Donkor and his three siblings namely Cynthia Hagan Brown, Salina Evon Hagan Brown and William Benjamin Hagan Brown Jnr.

The Plaintiff, in the William Benjamin Brown Jnr. v. Michael H. Brown case (supra) in his statement of claim averred that he had initiated the claim for himself and on behalf of his mother Mary Donkor and all his siblings namely, Cynthia Hagan Brown, Selina Evon Hagan Brown and William Benjamin Hagan Brown Jnr, but had failed to include their names on the face of the writ. The court was however of the view that same did not render

the writ null and void as he had endorsed on the face of the writ that he was suing in a representative capacity.

The court further relied on which Order 4 r 11 of the High Court Civil Procedure Rules, 2004 (C.I. 47) which allows actions of a representative nature under Order 4 rule 11 (1) (C.I.47) and stipulates:

—11(1) Where numerous persons have the same interest in any proceedings, other than proceedings mentioned in rule 13 of this Order, the proceedings may be commenced, and unless the Court otherwise orders, continued by or against any one or more of them as representing all or as representing some

The court therefore concluded that where there is a common grievance and a common interest, a representative suit, was permitted under the rules the plaintiff having a common grievance or interest with the other four persons he could represent them in a representative capacity.

The above cited authorities are in consonance with the order 9 r 1(2) and order 9 r 3 of C.I. 59 which provide Order **9 r 1(2)**

Suit on behalf of others

The Court may order any of the persons represented to be made a party either instead of or in addition to the previously existing parties.

Order 9 r 3

Where joint interest, parties may sue or defend for others

Where a number of persons have the same interest in one suit, one or more of those persons may be authorized to sue or to defend the suit for the benefit and on behalf of all parties interested

Therefore, it may be inferred that where a party sues in a representative action, that party does not have to include the names of the persons on whose behalf the action is brought on the writ.

This is contrast with the case of Clement Agbesi and Others v. Ghana Ports and Harbour Authority [2007-2008] SCGLR 469 which was cited with approval in the case FIAWORNU ERASMUS & 163 ORS.V. GHANA COMMERCIAL

BANKHIGH COURT · SUIT NO: INDL 49/09 · 8 JUN 2012 · In the Agbesi case, a purported class action was issued in the names of five persons and others, whose names were not disclosed on the writ. Subsequently, the names of other persons were attached in an addendum attached to the writ, and an application was made to join 356 more persons which was granted by the court. The additional number of persons was however not endorsed on the face of the writ. The Supreme Court was of the view that if the parties named on the face of the writ were actually suing in a representative capacity, they should have clearly stated they were 'suing by themselves and for the 3839 others' on the writ or statement of claim, whichever was appropriate. The court found therefore found that the Plaintiffs whose names were endorsed on the writ were suing in an individual capacity.

Furthermore, in the context that two of the Plaintiff's siblings were deceased, it may be surmised, that he did not have their consent to sue, however, does that render the writ a nullity?

The court in determining this question relies on the case of YAW SEFA V OSEI KWAME AND KWASI AFIRIYIE COURT OF APPEAL · H1/17/2021 ·

MARCH 25, 2021, where one of the pertinent issues for determination by the court was whether a party commencing an action could institute a representative action without the consent of the other persons. The court was of the view that where that party had a common interest with the other persons on whose behalf they sought to sue, same could be done without their consent.

The court is therefore of the view that the absence of consent of the Plaintiff's siblings does not rid him of the capacity to sue.
I therefore find that the Plaintiff is clothed with the requisite capacity to sue.

WHETHER THE DEFENDANTS ARE ESTOPPED FROM CHALLENGING THE PLAINTIFF'S TITLE TO THE LAND

The Plaintiff, per his statement of claim pleaded estoppel, on the basis that before the Committee for the Defence of the Revolution, Madam Abena Maaboa (whom I must state is not a party to the suit) admitted before the office of the Committee for the Defence of the Revolution that the whole land/ cocoa farm in dispute at Agyeikrom belongs to the Plaintiff and his siblings, and therefore the Defendants had no right to lay adverse claim to the land.

The Plaintiff in particularizing the grounds upon which his plea of estoppel was hinged, couched same in the following terms under paragraph 56 of the Statement of Claim which is reproduced below:

56. The Plaintiff states that the family or children or the grandchildren and all those claiming through Madam Abena Maaboa are estopped by conduct to deny the
Plaintiff's title to the cocoa farm in dispute

PARTICULARS OF ESTOPPEL

i. (By admitting before CDR Office that the whole land or cocoa farm at Agyeikrom belongs to his siblings.
ii. By admitting before others that she would release the cocoa farm in dispute to the Plaintiff and his siblings in 2018.
iii. That it was Plaintiff and his siblings that enjoyed the proceeds therefrom in 1988 to 1989
iv. That it was the Plaintiff and his siblings that demarcated that portion of the cocoa farm in dispute to Madam Maaboah.

The plea of estoppel appears to be defective as it does not refer to the Defendants against whom the Plaintiff has brought this suit. The plea of estoppel was crafted in terms making reference to Madam Abena Maaboa who is neither a party to the suit nor being represented in any capacity by the Defendants.

Nonetheless, even if the plea of estoppel had been properly couched the Plaintiff failed in his duty to prove to the court that the Defendants are estopped from laying adverse claim to the land.

What constitutes estoppel, generally, was discussed in the case of SARAH KANTON V. CAL BANK LTD & 2 ORS SUIT NO LD/751/2018 dated 6th June
2019, where the court opined

Generally, estoppel is a principle of law which prevents one party to a civil suit from denying or asserting a fact or situation. It plays a significant role when the admissibility of evidence is being considered, when it is raised in a trial.

There are various branches and facets to the plea of estoppel, including the plea of estoppel by conduct on which the Plaintiff's claim is grounded.

The principle of estoppel by conduct finds expression under the law under section 26 of the Evidence Act, which provides

Estoppel by own statement or conduct

Except as otherwise provided by law, including a rule of equity, when a party has, by that party's own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon that belief, the truth of the thing shall be conclusively presumed against that party or the successors in interest of that party in proceedings between(a)that party or the successors in interest of that party, and(b)the relying person or successors in interest of that person.

In the case of AGNES YIRENKYI V. GEORGE ATTA GYIMAH, EVANS OPOKU GYIMAH AND CECILIA KUKUA (2014) JELR 65419 (CA) COURT OF APPEAL · SUIT NO: H1/32/2013 · 16 JAN 2014 · GHANA, the court, on estoppel by conduct noted that

Estoppel in pais, referred to as estoppel by conduct, is a well-known legal concept"

The court further quoted the observations of Lord Denning on the concept of estoppel, in the case of Moorgate Mercantile Co Ltd v. Twitching [1975] 3 All ER 314 at 323, where he stated

—Estoppel ... is a principle of justice and of equity..... When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so‖

Again in ERIC OSEI BONSU V.ARB APEX BANK LIMITED & BANK OF GHANA HIGH COURT · SUIT NO. INDL/29/12 · 6 APR 2016 · GHANA, the court opined

—....., estoppel will be held to operate by reason of a person's conduct which had led another to believe a state of affairs even though the person never intended it to be that way.

Also, in Social Security Bank Limited v. Agyakwa [1991] 2 GLR 192-206 CA the court noted that —the principle of estoppel by conduct was applicable..... in those circumstances where it was just to invoke it, namely in those circumstances in which it would be unjust, inequitable or unconscionable to permit a party against whom a plea of estoppel by conduct was raised to go back on his word or conduct. Consequently, in invoking a plea of estoppel by conduct, one had to have regard to the circumstances surrounding the particular conduct which was the subject of the plea. Invariably, each case had to be decided on its own peculiar facts.‖

Last but not least in the case of MARY AKYAA BOAKYE (SUBSTITUTED BY YAW BOAKYE ADDEI)V.THE PRESIDING BISHOP OF THE METHODIST CHURCH & 3 ORS SUPREME COURT · J4/14/2021 · 31 MAR 2021 · GHANA, on estoppel by conduct stated

This (estoppel by conduct)(emphasis mine) happens where a person puts up a behavior or makes a statement knowing very well that the other party will act upon it; or if a person is made to believe the existence of a factual situation by another person, then that person who so conducted himself, will be estopped from denying his behavior or statement or the consequences of his behavior.

The Plaintiff, although, he claimed that Madam Abena Maaboa made pronouncements before the Committee for the Defence of the Revolution confirming that the Plaintiff and his siblings had exclusive ownership of the disputed cocoa farm, did not provide the court with the proceedings to buttress his claims

(though he indicated in his evidence that he would tender same at trial, and although I inherited the matter is a part-heard case, no record of same was in the proceedings). The law is clear that a plea of estoppel must not only be particularized but proved. The Plaintiff apart from making a mere assertion did not proffer any succinct evidence to persuade or sway the court to be inclined to believe the veracity of his claims. The court, based on the above finds that the Plaintiff's plea of estoppel fails, as the Plaintiff woefully failed to lead cogent evidence on same.

WHETHER OR NOT A CUSTOMARY GIFT OF THE DISPUTED COCOA FARM WAS MADE TO THE PLAINTIFF AND HIS SIBLINGS BY THEIR LATE FATHER OPANNIN KWABENA AGYEI DURING HIS LIFETIME

A focal issue for determination, is whether or not a gift of the disputed cocoa farm was made to the Plaintiff and his siblings, by their late father, Opanin Kwabena Agyei during his lifetime.

The essentials of a customary law gift were discussed in the case of Ibrahim Gyamfi & Anor v Cecelia Boahene and Anor Suit No OCC/156/15, decided on 1st December, 2015, per Angelina Mensah-Homiah J (as she then was).

The court in its judgment relied on the case of Barko v Mustapha (1964) GLR 78, where the Supreme Court, laid down the ingredients of a customary gift. The court noted that for a customary gift to be given effect in law, the following ingredients must be present:
(i) publicity;

(ii) acceptance; and

(iii) the donee must be placed in possession.

More recently in the case of Nathaniel Baddoo and 3 Others v. Mrs. Mercy Ampofo and 2 Others SUIT NO.OCC/95/14 · FEB. 24, 2016, the court relying on the case of KYEI and ANOR V. AFRIYIE (1992) 1 GLR 257 per Lartey J observed:

"The essentials of a valid gift in customary law were publicity, acceptance and placing the donee in possession. The way to give publicity to a gift of land was to make the gift in the presence of witnesses. The acceptance should be evidenced by the presentation of "drink" or some small amount of money to the donor, part of which was served to the witnesses. —

The courts have however observed that the two most salient elements are that of publicity and aseda.

Consequently, in the recent case of YAW SEFA V. OSEI KWAME AND KWASI AFRIYIE COURT OF APPEAL · H1/17/2021 · MARCH 25, 2021 · GHANA, in determining whether a customary gift had been established, the court relied on the Supreme Court case of Giwa v. Ladi (2013) 63 GMJ 1, per Benin JSC at pages 18 and 19 where he stated:

… —The most important element of a customary gift that runs through these authorities and several others is that the gift must be offered and accepted and must be witnessed by somebody else other than the donor and donee. Thus when the fact that a gift has been made is challenged, it will not be sufficient to state barely that a gift was made; you have to go on to show the occasion, if any, on which a gift was made, the date and the time if possible, the venue and most importantly, in whose presence it was made.

The court continued

—These factors are by no means exhaustive, but it is important that when you seek to claim a gift was made by a donor who has since died a bare averment and a bare assertion will not suffice as proof‖.

Again, in the case of In Re Suhyen Stool; Wiredu and Obenwaa v. Agyei and Others [2005-2006] SCGLR 424 Prof. Ocran JSC in a Chieftaincy Appeal case extrapolated on the requirements of a customary law gift and stated

—The requirements of a gift at customary law were:

(i)There must be a clear intention on the part of the donor to make a gift

(ii)Publicity must be given to the making of the gift and

(iii) The donee must accept the gift by himself or herself giving thanks offering or conventional aseda or by non-conventional aseda such as simply using and enjoying the gift or by doing act which fulfilled the object which the giving of the gift was meant to fulfil, namely the expression of gratitude and the symbolic acceptance of the gift‖.
In Jacqueline Asabere and Anita Asabere v Johnson Aboagye Asim CIVIL APPEAL NO: H1/41/2016 · 19 OCT 2016, the court also stated:

The broad essentials of a valid gift in customary law are that (1) there must be a clear intention on the part of the donor to make a gift, (ii) publicity must be given to the gift and (iii) the donee must accept the gift by himself giving thank-offering or aseda, or by enjoying the gift.

Again, in the YAW SEFA V. OSEI KWAME AND KWASI AFRIYIE (supra), the court was of the firm view that the where the three requirements for a valid customary gift as outlined in the Suhyen case are fulfilled or met, namely that there was an intention on the part of the donor to make a gift, publicity of the gift had been made and that either conventional or non-conventional acceptance or acknowledgment, had been made, a customary gift could be established.

Last but not least, the Supreme Court in the case of the court **MR. PETER OSEI**

 relied on the case of Bonney v Bonney (1992-93) 2 GBR 779 where the Supreme Court held that the continued enjoyment by the donor of the property so gifted did not detract from the validity of the gift.

The highlighted requirements in the above cases do not transcend to possession. Therefore, though possession, may assist the court in establishing title, a gift may proved even if possession cannot necessarily be established.

The Plaintiff, per his claim before the court, claimed that his late father, Opanin Kwabena Agyei gifted the disputed land to him and his siblings at Agyeikrom in the presence of witnesses who are now deceased, namely Opanin Owusu Ansah, Opanin Osei and Opanin Yaw Marfo. The Plaintiff however failed to state the time period where the said ceremony took place, the venue of the ceremony nor the form of aseda which was rendered in acknowledgment of the gift contrary the requirements laid down by the eminent judge Benin JSC in Giwa v Ladi (supra) particularly when the alleged donor was deceased.

In the case of Nii Odartei Lamptey v. Nii Odartey Lamptey Suit No. BC243/2008 dated 11th May, 2009, the court stated that —the settled rule of law is that evidence involving a deceased person is always received and treated with extreme circumspection and suspicion.

The Plaintiff's claim involving a deceased person particularly where the standard fell short of what was required in law was therefore doubtful.

Furthermore, there was no enjoyment of the gift which the court could construe as aseda, as the Plaintiff himself alluded to the fact he and his siblings were never in possession

during their late father's lifetime and therefore it is evident that the Plaintiff could not prove that aseda was provided as required by law.

Therefore, based on the above, the alleged gift, assuming same was made by the late Opanin Kwabena Agyei in his lifetime did not meet the focal requirements of the law.

I therefore find that no customary gift of the disputed cocoa farm was made.

WHETHER THE WILL PURPORTEDLY MADE BY THE PLAINTIFF'S LATE FATHER IN 1987 IS VALID

The final issue for determination is whether or not the Will purportedly made by the Plaintiff's late father is valid and of full legal effect. The court in determining this issue is clothed with the duty to consider what elements must be present for the court to construe a gift as valid in law. The Supreme Court in the locus classicus of Mr. Senti Michael vrs Rev. Father Mon Kwame and Another SUPREME COURT, CIVIL APPEAL NO J4/51/2019 dated 4th November, 2020, on the vital elements of a Valid Will opined

".....under section 2 of the Wills Act, 1971 (Act 360) for a Will to be prima facie valid it must have the following essential ingredients

1. It must be in writing;
2. It must be signed by the testator or by some other person at his direction;
3. The signature of the testator shall be made or acknowledged by him in the presence of two or more witnesses; and
4. The two or more witnesses must be present at the same time. The witnesses shall attest and sign the will in the presence of the testator

The court stated that a *Will*, therefore, which is prepared in accordance with the instructions given while the testator was of a sound disposing mind and executed at a time the testator appreciated what he was executing *will* prima facie comply with the law.

The courts, as a general rule, have a duty to sustain bequeaths and devises made in a Will which prima facie complies with the requirements of due execution under the prevailing law.

The above mentioned principle was re-iterated in the case of Wilfred Nsiah vrs Humphrey O.Nsiah Suit No BFA/148/2010 dated 21st July, 2017, where the court stated that the main elements for the valid execution of a Will …….are that the Will i. must be signed by the testator and ii. The signature of the testator must be made or acknowledged by him in the presence of two or more witnesses present at the same time.

The Last Testament and Will of the late Opanin Kwabena Agyei met the requirements of a valid will as it was duly executed by him in the presence of three witnesses, in consonance with the rudimentary requirements of the law.

Furthermore, the Will, almost 31 years prior to the commencement of this action had been admitted to probate. In, In Re Deceased Abaka and Anor v Atta Hagan and Another (1972) 2 GLR 432, the court held that although the grant of probate of a Will is not conclusive evidence that the court had given its blessings to the contents of the law, it determined that the Will has been validly executed and the named executors are at liberty to administer the estate. The contextual analogy that may be drawn from the above cited authority is that once probate is granted it is deemed that the Will is on the face of it Valid. Therefore, the Will having been admitted to probate without any challenge, I find that the Last Will and Testament of the late Opanin, Kwabena Agyei is valid.

ANALYSIS OF EVIDENCE ADDUCED AT TRIAL

In civil trials, the standard of proof required for a party to prove the veracity of his claim in court, is proof on the balance of probabilities. This is codified under our law under 12 (1) and (2) of the Evidence Act, 1975 (NRCD 323) which provide:

Section 12—-Proof by a Preponderance of the Probabilities.

(1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.

(2) "Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence.

The concept of preponderance of the probabilities was described by the court in the case of **ESTHER KUDZORDZIE V.MAJOR NELSON AGBEKO** (2010) SUIT NO: BFA 59/08 · 15 DEC 2010 · GHANA, in the following terms —…… in assessing the *balance* of probabilities, all the evidence, be it that of the plaintiff and the defendant must be considered *by the court (emphasis mine)* and the party in whose favour the balance tilts is the person whose case is more probable and he wins.

Furthermore, more recently in the case of SAMUEL Y. MENSAH V.KWADWO DONKOR & ANOR COURT OF APPEAL H1/31/2021 · 1 JUN 2022, the court cogently stated —Cases are decided on the totality of evidence adduced by balancing the cases of both sides and determining whose version is more probable and whether a relief sought has been proved in accord with the standard burden of proof.

Again, the court in the case of **DZIEDZOM AWO HETTEY V. JOSEPH BLAY ERZUAH** E1/64/19 · 7 APR 2022 · GHANA, explained what proof connotes:

"*Proof*, in law, is the establishment of fact by proper legal means; in other words, the establishment of an averment by admissible evidence. Where a party makes an averment and his averment is denied, he is unlikely to be held by the Court to have sufficiently proved that averment by his merely going into the witness-box, and repeating the averment on oath, if he does not adduce that corroborative evidence which (if his averment be true) is certain to exist."

The Plaintiff's claims before the court appear to be unfathomable from the evidence on record. From the evidence garnered at trial, the crux and nub of the Plaintiff's claim was that the cocoa farm in dispute was gifted to him by his late father, during his lifetime, and therefore unfettered ownership of the land had been conferred on him and his siblings. The Plaintiff however did not lead any cogent evidence to support his claims. The law is well settled that a person who asserts that a gift has been made in his favour must establish, that there was a pellucid intention of the donor to part with the gift, that it was made in the presence of witnesses and that some form of acknowledgment of the gift has been provided by the donee.

A mere assertion of the alleged gift was made by the Plaintiff, and no proof as to the time the alleged gift was made, or where same was made, and the form of aseda that was provided.

As may be garnered from the evidence the Plaintiff on whom the duty lay to provide the court with lucid evidence, so that on a balance of probabilities, the court would find his version of events more credible, did not even broach the subject of the form of aseda he provided to his father for the said gift, but rather fumbled during cross-examination when Counsel for the Defendants enquired the form of aseda he provided.

Q It is not correct that you and your alleged 27 siblings provided aseda in respect of the purported gift to you

A It is true we even brought a ram and two schnapps and gave it to my father as aseda

The Plaintiff, however, later stated that it was rather a bottle of schnapps that was given to the late Opanin Kwabena Agyei, his father, by him and his siblings to seal the said gift.

Q The alleged two gifts, what is the manner of aseda of the gifts

A We gave aseda of one schnapp to my father and we gave two schnapps and a ram to the family.

Again, the Plaintiff's claim that the family made a subsequent gift of the land to affirm the gift already made by their late father, by requiring them to provide aseda which was pivotal and fundamental to the legitimacy of a customary law gift is quite a dubitable claim as a customary gift otherwise known as a gift inter vivos can only be made during the lifetime of a person.

Furthermore, presuming the court were to accept that such an absurdity was initiated by the family of the late Opanin Kwabena Agyei, the Defendants in the case, the said ceremony was a complete nullity. This is because once, Opanin Kwabena Agyei, had devised half of the disputed land to his family and given the other half to the Plaintiff and his siblings even if any gift had been made of the whole land in dispute during Opanin Kwabena Agyei's lifetime to the Plaintiff and his siblings same had been revoked by the operation of the Will, and therefore there was no existent gift for aseda to be provided on same.

The well-known principle of law on the right of a parent to revoke a gift previously made to a child, was touched on in the case of **KOFI ANANE STEPHEN V. MOHAMMED OPOKU GYAMFI** HIGH COURT · SUIT NO: E1/6/17 · 6

DEC 2018 · GHANA where the court in delivering its judgment relied on the case of Jacqueline Asabre and Anor. v. Johnson Aboagye Asim [2017] 109 G.M.J. 206 [supra], where the Court of Appeal, per Ayebi JA. held: *"As a general rule, a* gift *which is perfect or valid, or in other words accepted by the donee is irrevocable....The exception to the general rule is that a gift by a parent to a child is revocable in the lifetime of the parent or by his will or dying declaration..."*.

Again, in **JOANA NYARKO V. MAXWELL TETTEH & 2 ORS** COURT OF

APPEAL · CIVIL APPEAL SUIT NO: H1/10/2018 · 24 MAY 2018, the court on the above concept stated that the revocation of a gift by a parent was valid, once the intention to revoke (the gift)(emphasis mine) is clearly and unequivocally expressed by the parent, be it orally, in writing or in a will.

Again, as noted supra the Will was also admitted to probate which gave the Will full legal effect and gave the Executors the right to administer the estate of the Late Opanin Kwabena Agyei.

In ***KPALIGA KWASI KUMASSAH & ANOR.V.ROBERT KPRZUXE & ANOR*** COURT OF APPEAL · SUIT NO.: H1/05/17 · 28 FEB 2018 · GHANA**,** the court relied on the case of Conney V. Bentum-Williams, where the Court of Appeal held inter alia that an intention as expressed in the will did not have any legal effect until the will had been admitted to probate. The pronouncements of the court in this case suggests that once probate is granted the executors named in a Will a conferred with the power commence the process to distribute the estate of the deceased.

This principle was re-stated in the case of OPANIN WILLIAM ANU QUAYE & 1

OR. V.MRS. MERCY GAISIE & ANOTHER COURT OF APPEAL · CIVIL APPEAL NO. H1/21/19 · 30 APR 2019, where the court stated that it is only the grant of probate which legally gave the authority in any manner to deal with the properties of a deceased person in accordance with the intentions expressed in his Will.

From the above, it can be deduced that the Defendants did not act on their own whims and caprices, but in conformity with the requirements of the law, went through the legitimate processes required under the law by applying for probate at the High Court, Kumasi to be conferred with the authority to distribute the estate of the late Opanin Kwabena Agyei. Therefore, the Plaintiff's claim that the Defendants, in bad faith took possession of the cocoa farm in dispute is not borne out by the record.

Furthermore, the Plaintiff claims that the Last Will and Testament of his late father, was not the deed of his father as his father was speechless and bedridden and therefore was not *compos mentis* to have made the Will.

The courts on this point have generally adopted the view that if no evidence of fraud or foul play can be established, a Will made by a deceased person, even in a state of deteriorating health is valid. Thus, in the case of Mr Senti Michael vrs Rev. Father Mon Kwame (supra), where the Plaintiff claimed that his father could not have made the Will due to his debilitating condition, but did not proffer any evidence of this assertion, the Supreme Court held that in the absence of any compelling evidence to the contrary the Will was valid. Thus, the Plaintiff failed in proving this assertion also.

Also, the Plaintiff, who appears not to have a hint of timidity, failed to challenge the action by failing a caveat, prior to the Will being admitted to probate, nor did he institute an action for revocation of the grant of probate despite stating that the purported Will was a

forgery, and therefore he could not hinge his claim on same. Again, the Plaintiff never pleaded fraud to have the Will set aside on grounds of same.

Thus, in the case of **YAW AFRIFA V.ANTHONY SARPONG AND 6 ORS SUIT NO C7/167/2019** decided on 9th February, 2022 the court observed ……., it is trite learning that if you disagree with the contents of a *Will*, you challenge it in court for the court to determine your grievance one way or the other. One does not sit in his house and shout up to the top of his roof that he does not accept the contents of a Will.

Furthermore, the Plaintiff's evidence and that of his witnesses were riddled with glaring inconsistencies and contradictions. From the evidence on record, the Plaintiff's responses to the questions posed in cross-examination materially departed from his claims in court.

The Plaintiff, in his witness statement which was adopted as his evidence in court stated that although PW1 was present the purported acknowledgment of the gift or aseda was presented to the Defendants, by their brother, one Kwadwo Asiamah. The Plaintiff however in cross-examination somersaulted and claimed that the aseda was made by him and his siblings through PW1 who received the gift on behalf of the family.

Q It's not correct that you offered any aseda for the alleged gift given to you by your father's family

A That is true, I have a witness called Opanin Kwabena Nsiah whose father delegated him to accept the aseda.

Q I put it to you that it's not correct that you provided aseda to your father's family, through Opanin Kwabena Nsiah or his father.

A It is correct. Opanin Kwabena Nsiah is my witness

The following also ensued in cross-examination between Counsel for the Plaintiff and PW1.

Q I put it to you that it is not correct that a ram and two bottles of schnapps were offered to Opanin Kwabena Agyei's family by the Plaintiff and his siblings through you in respect of the disputed land.

A. That's correct. I am speaking the truth they provided aseda
PW1, in his evidence only asserted that he was a witness to the Plaintiff's and his siblings offering aseda, but altered his story and stated that he had received same on behalf of the family of the late Opanin Kwabena Agyei .

Again, I do not find PW1 credible as he stated in cross-examination that it was not within his knowledge that the late Opanin Kwabena Agyei gifted the disputed cocoa farm to anyone during his lifetime, but later retreated and changed his story to conform with his evidence as may be surmised from the following cross-examination.

Q During the lifetime of Opanin Kwabena Agyei , did he gift any portion of his land at Agyeikrom to anybody

A No, he did not

Q You see, I put it to you that under paragraph 7 of your evidence-in-chief, you stated that the late Opanin Kwabena Agyei gifted portions of his land at Agyei krom to his surviving wives and ex-wives, is that not so

A That's correct, I said so because those names are the names, I gave to this Honourable Court as boundary owners, including Yaw Marfo

Q I put it to you that Opanin Kwabena Agyei never in his lifetime, gifted his cocoa far at Agyeikrom to his 28 children

A It is true that Opanin Kwabena Agyei gave the said land to his children, but I was not there .

PW1,again stated that it was part of the disputed cocoa farm which was release to Madam Maaboa by the children, but again contradicted himself in cross-examination by stating that it was the entire cocoa farm.

The Plaintiff's claims also appear fallacious as when Counsel for the Defendant's posed a question regarding the Will, although the Plaintiff denied knowledge of the Will, in cross-examination he conceded that Mr, Nuamah and Mr. Ahenkorah were executors of his father's Will.

Q The people your father chose as the Executors of his Last Will are Mr. Nuamah and Mr. J.A. Ahenkorah
A That's correct.

Last but not least, the Plaintiff further claimed that he was not aware that the Will had been admitted to probate but was however in Abuom at the time the Notice was posted as directed by the High Court, at his father's house at Abuom.

Q Where were you on 27th July, 1987

A I was then at Abuom

Q It was on the 27th day of July, 1987 that the High Court admitted your father's will to probate

A That is not correct

The court, in observing the above, however does note and does not gloss over the fact that at the bottom of the document, Exhibit 3, evidencing the grant of probate the date was notated numerically as 27.8. 87, which is at variance with the date in the body of the probate which is 27th July, 1987. The court however construes that same was an error and adopts the fully expressed date of 27th July, 1987.

In the case of Vivianne Strehle v Madam Elizabeth Pokuaa High Court Suit No. SOL/47/2011, dated 23rd November, 2016 the court observed that — the rule of evidence is that a party who makes an assertion must produce credible and admissible evidence in proof of the assertions.

The Plaintiff not only omitted to lead convincing evidence in support of the case but inundated the court with conflicting evidence that casts doubts on his credibility on the authenticity of his claims in court.

In the case of ALFRED TETTEH ANNAN V. GOLD ROYAL ENTERTAINMENT CO. LTD. HIGH COURT · SUIT NO. INDL/29/15 · 11 APR 2016 the court relied on the case of **OBENG v. BEMPONG [1992-1993] GBR part 3 @ PAGE 1027** the Court of Appeal held that "inconsistencies, *though individually colorless, may cumulatively discredit the claim of the proponent of the evidence."*

The court before proceeding to analyze the evidence of the Defendants, would proceed to determine a preliminary issue, of whether the absence of a jurat clause in the witness statement of the 1st Defendant's Lawful Attorney nullifies the evidence given by the Defendants.

The 1st Defendant's lawful Attorney on the face of her witness statement stated that she had elected to testify in Twi, however in cross-examination by Counsel for the Plaintiff , it emerged that the Defendant's Lawful Attorney is not literate.

The court is therefore clothed with the responsibility of determining whether or not the absence of the jurat renders the entirety of the Defendant's evidence invalid.

In the case of SODZEDO AKUTEYE, AGNES AKUTEYE AND AFI AKUTEYE V. ADJOA NYAKOAH, TETTEH AKUTEYE AND EBENEZER AKUTEYE SUPREME COURT · CIVIL APPEAL (2017-2018) 2 SC GLR 1007, the court stated

…….there is indeed no requirement that there be a jurat clause certifying that the document was read over and explained to the illiterate person. All it does is specify certain formalities that the physical author of the document must undertake. The jurat clause simply developed as a practice to evidence that the writer of the document has indeed fulfilled his/her formal statutory obligation under the Act, towards the protection afforded by the Act. That is why the presence of the interpretation clause creates only a rebuttable presumption that the document is the deed of the illiterate person. Conversely, that is also why the mere absence of a jurat clause cannot per se vitiate the deed of an illiterate person without any tangible proof that he/she did not understand the contents. Section 3 of Cap 262, is thus a partial shield rather than a total sword. In law, therefore, the issue as to whether or not an illiterate person fully understood and appreciated the contents of a document before executing same is a question of fact to be determined by the evidence on record.

The court further relied on the case of Duodu and Others v. Adomako and Adomako, per Wood C.J stated at page 216, as follows:—...the courts must not to make a fetish of the presence or otherwise of a jurat on executed documents. To hold otherwise, without a single exception, is to open the floodgates to stark injustice, the presence of a jurat at best raises a rebuttable presumption only, not an irrebuttable one. Thus, any evidence which will demonstrate that the illiterate knew and understood the contents of the disputed

document, that is the thumb printed or marked document, as the case may be, should settle the issue in favour of the opponent.

The principle in the Sodzode case supra was affirmed in the case of Yaw Basoah v Kwaku Saka and 2 Others Court of Appeal H1/57/2020 dated 25th March, 2021.

In the instant suit, although there was no jurat clause incorporated in the witness statement of the 1st Defendant's lawful attorney from the evidence of record, there was nothing to suggest that she did not understand the import of her evidence, I therefore conclude that the evidence of the Defendants had been rendered invalid.

Again, counsel for the Plaintiff, raised an issue in cross-examination concerning the authority of the 1st Defendant's Lawful Attorney to testify for and on behalf of the 2nd and 3rd Defendants as the 1st Defendant had not given her such power in the
Power of Attorney Exhibit 1. The court is however of the view that that once the 1st
Defendant's Lawful Attorney had been conferred with the authority to defend the suit on his behalf, the 1st Defendant's lawful Attorney could take whatever action she deemed prudent to effectively mount their Defence, including representing the other Defendants.

The law is that the onus lies on a party who makes a claim to prove all facts that are essential to the claim.

In Sarpong (Deceased) substituted by **Koduah v. Jantuah (2017-2020) 1 SCGLR 736 at 747 per Benin JSC.** The Supreme Court held that:

"The principle of law is that the burden of persuasion rest with the person who substantially asserts the affirmative of the issue on the pleadings and this is the principle of law that has been unremittingly followed by our courts for decades." It has however, it has been held that this

burden may shift from party to party at various stages of the trial depending on the issues asserted or denied.

The Defendants when the burden shifted on them to disprove the Plaintiff's claim effectually discharged the burden.
The Defendants in support of their defence to the Plaintiff's action that the Plaintiff was not entitled to the disputed cocoa farm, buttressed same with lucid and trenchant evidence.

The Defendants tendered in evidence the Last Will and Testament of the Late Opanin Kwabena Agyei dated 8th February, 1987, Exhibit 2, which per paragraph 1 showed that the disputed cocoa farm had been devised to both the Plaintiff and his siblings and the Defendants, and therefore each party was entitled to a half-share of the cocoa farm.

The Defendants further fortified and substantiated their claims, by tendering in the Order for probate granted by the Kumasi High Court, on 27th July, 1987, as Exhibit 3, which was not challenged by the Plaintiff, prior to or subsequent to its grant despite having notice, though he claimed in court that the Will should be disregarded as a forgery, and set aside without harnessing any evidence.

In, **YAA KYEREWAAH & 2 ORS V. NANA KWADWO BOAKYE & ADWOA NKANSAH SUIT NO. C7/115/19 dated 10th Feb, 2022**

Consequently, the courts have a duty to be extraordinarily slow in interfering with the *Will* of a deceased person. This is because, it constitutes a hallowed ground and no one should tread upon it, unless there are strong legal reasons, such as mental incapacity, forgery etc. which may render the contents of the *Will* or portion of it void.

Furthermore, a careful observation of the Survey Plan Partitioning the Cocoa Farm of the Late Opanin Kwabena Agyei dated 17th March 1994 (Exhibit 4), suggests that the portion of the cocoa farm the Plaintiff is claiming in court is that which was given to the family, per paragraph 1 of the Last Will and Testament of the Late Opanin Kwabena Agyei. This has been deduced by the court as in the Writ of Summons on which the Plaintiff's claim was hinged, the Plaintiff named Opanin Kwadwo Donkor, and Opanin Yaw Marfo as boundary owners, however on the face of the Survey Plan, it is rather the Defendants 'portion of the cocoa farm marked in green that shares a boundary with the aforestated persons. The portion apportioned for the Plaintiff's party that has been marked in yellow does not share a boundary with any of the named persons (supra).

This suggests that the Defendant's assertion that the Plaintiff and his siblings have retained the portion of the land devised to them, but are only clamouring for more land, more probable than not.

Again, the courts tend to lean towards documentary evidence, particularly where there is a dispute as to the fact in issue and there is conflicting oral evidence. In the case of *Agyei Osae and others v. Adjeifio and others* (2007-2008) 1 SCGLR 499 , the court stated that :-

—whenever there was in existence a written document and conflicting oral evidence, the practice of the Court was to lean favourably towards the documentary evidence

Also, in the case of Fosua Adu Poku vrs. Adu Poku Mensah (2009) SC GLR 310, the court stated that the settled principle of law is that documentary evidence should prevail over oral evidence especially if the document is proved to be authentic.

Furthermore, although the Defendants did not call any witnesses to substantiate their claims, the corroborative records of Exhibits 2, 3, and 4, that is, the Last Will and Testament of the Late Opanin Kwabena Agyei, and the ancillary processes procured by

the Defendants for the distribution of the estate of the Late Opanin Kwabena Agyei in accordance with the devises in his will, lends credence to their defence.

This observation by the court is supported by the case of THERESA BOAKYE &. FRANK ASIEDU BOAKYE V. OPANIN KWAME ASIEDU SUPREME COURT · J4/22/2021 · 15 DEC 2021, where the court found that corroborative record of a receipt, Exhibit 1 provided by the Defendant/Appellant was of more probative value than that of the Plaintiff/Respondent's witness, PW1, who gave contradictory evidence as the Plaintiff's witness in this case.

Furthermore, although there was no evidence to show that a vesting assent had been obtained by the Defendants, the Defendants could still defend the action to protect their rights under the estate, by virtue of the pronouncements of the Supreme Court on this legal proposition in the case of Adisa Boya v Zenabu Mohammed (substituted by Adama Mohammed- Civil Appeal No. J4/44/2017, dated 14th February, 2018.

The High Court, in the recent case of Vida Okanta and Christiana Ohene vrs Alhaji Ahmed Muddy (Suit No. GJ/1872/2019) dated 28th July, 2022 cited the case of Okyere (deceased) vrs. Appenteng and Adoma (2012) 1 SCGLR 65, where Brobbey JSC as he then was stated that until a vesting assent had been granted to the beneficiaries or devisees under a Will, they had no title or locus standi over any part of the estate. The court however observed that in the Adisa Boya (supra), the apex court, being of the view that the Defendants had an immediate legal interest in the estate, and had the right to defend the action in respect of their deceased father's property and have an order of declaration made in their favour, although the property had not been vested in them under a vesting assent.

The court in the Vida Okanta case (supra) further cited the case of Bandoh v Appiagyei-Gyamfi and Another (2018-2019) 1 SC GLR 299, where the apex court affirmed the position in the Adisa Boya case, and stated that even where letters of administration had not been granted, a person with a legal interest could sue and be sued in respect of the estate.

In the present case, though there is no iota of evidence to persuade the court that a vesting assent was obtained, juxtaposing the facts with the applicable law, as the Defendants were not merely named as beneficiaries, but probate had been granted in respect of the late Opanin Kwabena Agyei's estate, then they were entitled to defend the action to protect their interest in the estate, in accordance with law.

Therefore, on the balance of probabilities, the court is more persuaded by the case of the Defendants.

The court concludes this judgment by quoting the following text from the case of
YAA KYEREWAAH & 2 ORS V. NANA KWADWO BOAKYE & ADWOA
NKANSAH SUIT NO. C7/115/19 dated 10th Feb, 2022

The law is however settled that a testator of a *Will* is free to make his *Will* and distribute his estate as he pleases. He is not bound to leave any fixed part of his estate to any particular person. Therefore, he is permitted to be capricious and improvident.

Consequently, notwithstanding how the Plaintiff perceived the devises made by his late father in his will, the court cannot interfere with same.

The court therefore, finds that, on a balance of probabilities, and weighing the rival versions of the parties, the Plaintiff failed to discharge the burden placed on him to prove his claim.

The Plaintiff's claim is therefore dismissed in its entirety. Judgment is hereby entered for the Defendants.

The court was to have awarded costs against the Plaintiff for engaging in a hodgepodge of fibs and casuistry, for which the Defendants expended time and money to defend the suit.

The court, however, tempering justice with mercy, waives the award of costs against the Plaintiff, as the parties are closely-knit relatives and the award of costs could brew further acrimony.

No order as to costs.

SGD.

AKUA OPPONG-MENSAH

DISTRICT MAGISTRATE