

**IN THE DISTRICT COURT HELD AT TAKORADI (MARKET CIRCLE)**  
**ON FRIDAY THE 14<sup>TH</sup> DAY OF APRIL 2023. BEFORE HER WORSHIP**  
**CATHERINE OBIRI ADDO ESQ:**

**SUIT NO. A1/ 05/2020**

**1. AKACHI ADUA. .... PLAINTIFFS**  
**2. ANNA CUDJOE**  
**3. VICTORIA CUDJOE**  
**4. EMMANUEL ALU CUDJOE**  
**SUING AS WIDOW, CHILDREN AND BENEFICIARIES**  
**OF THE ESTATE OF THOMAS EKEYEBOE CUDJOE (DECEASED)**  
**UNDER THE INTESTATE SUCCESSION ACT 1985) PNDC LAW 111)**  
**ALL OF H/NO. 20A/5 KWESIMINTSIM**

**VRS:**

**NANA KOFI ANSAH ..... DEFENDANT**  
**(HOLDING AND PARADING HIMSELF**  
**AS HEAD OF SEKYI AKONA OBRATU EBIRADZE FAMILY**  
**OF ESSILJOKROM NEAR KWESIMINTSIM)**

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**JUDGMENT**

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The Plaintiffs in this case initiated the action against the defendants at the registry of this honourable court on the 4<sup>th</sup> day of November 2020, and claim against the defendant the following:

- i. A declaration that the judgment and order of this honourable court dated 28<sup>th</sup> day of September 2020, ordering re-entry unto plot nos. 53 and 54 North Kwesimintsim in the case titled Ebusuapanyin Nana Kofi Ansah vs. Thomas E. Cudjoe suit no. A1/106/2020 is void.
- ii. An order of the court setting aside the judgment of this honourable court as referred in I supra and the order of re-entry on grounds of void ab initio (null from the beginning).
- iii. Any order that the court deems fit.
- iv.

**EVIDENCE OF THE PLAINTIFF**

2<sup>nd</sup> Plaintiff who alleges to be the daughter of the deceased Thomas Ekeyeboa Cudjoe speaking on behalf of herself and on behalf of the other plaintiffs avers, he knows one Thomas Ekeyeboa Cudjoe also known as Asama Asafo iv who was a chief of New Abelebo but deceased. According to plaintiffs he died on the 28<sup>th</sup> day of March 2013. She tendered in evidence the funeral brochure and the application for the Death certificate in evidence as Exhibit A series. According to 2<sup>nd</sup> plaintiff, the 1<sup>st</sup> plaintiff is the widow of the said deceased while the 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs are the children of the deceased. She further avers, the deceased Thomas Ekeyeboa was survived by 8 children.

Plaintiffs further avers plot nos. 53 and 54 situated at North Kwesimintsim belongs to her deceased father Thomas Ekeyeboa Cudjoe and he gave same to his children and as beneficiaries they have been paying all rates in respect of the said lands. She tendered receipts from administrator of stool lands in evidence as exhibit B. according to the plaintiffs upon the death of their deceased father, he was succeeded by one Dr Ackah Armah.

Plaintiff further avers she was working on the plots of land in contention when Nana Kofi Ansah and his people came to the said land indicating the land does not belong to them again, as they have a judgement pertaining to the said land. She tendered the said judgment in evidence as exhibit c. plaintiffs avers when she procured a copy of the said judgment, she got to know that the judgement is against her deceased father she proceeded to get copies of processes in that suit against her deceased father. She tendered the processes as exhibits D, E, and F respectively. According to plaintiffs they obtained letters of Administration upon the death of their deceased father which is in evidence as exhibit G she therefore prays the court to grant her reliefs as endorsed on the writ of summons.

The plaintiffs called pw1 the alleged customary successor of the late Thomas Ekeyeboa Cudjoe to corroborate their case. Pw1 avers the deceased Thomas Ekeyeboa Cudjoe was his grandfather. Upon his death he was appointed the customary successor to succeed him. According to pw1, 1<sup>st</sup> plaintiff was the wife

of the said Thomas Ekeyeboa Cudjoe whiles 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs are his children respectfully. He further avers, his grandfather died on the 28<sup>th</sup> day of March 2013 and exhibit G is the brochure of his late grandfather whom he succeeded.

#### EVIDENCE OF DEFENDANT AT TRIAL

The defendant speaking through an attorney with the power of attorney in evidence as exhibit 1, avers, the defendant through the attorney issued a writ against one Thomas Cudjoe. According to defendant attorney they went to the land thus plot nos. 53 and 54 and realised the lands were not developed as such they sent re-entry notices and posted same on the defendant land. In addition to that, the defendant Thomas Cudjoe also failed to pay ground rent in respect of the lands. He tendered an indenture made between the defendant herein and the said Thomas Cudjoe in evidence as exhibit 2. According to defendant, at the time of serving processes he was not able to effect personal service against the said Thomas Cudjoe as such they came for substituted service. He tendered the order of the court granting substituted service in evidence as exhibit 3 respectively.

Defendant avers he went with the Bailiff of the court to affect the substituted service of the processes on the plots of land. Upon getting to the lands, he met the 2<sup>nd</sup> plaintiff and some church members worshipping on the land and the bailiff made them aware they were needed by the court, but they failed to come to court.

Defendant avers, the 2<sup>nd</sup> plaintiff did nothing about the postings pasted on the land. Subsequently the court gave them judgment to re-enter the plots of land. Defendant further avers, when he went to the land to effect service, no one informed him that the defendant Thomas Cudjoe was deceased, he got to know after the judgment. According to Defendant he is not aware that the ground rent has been paid.

Defendant further avers, after he procured the judgment, plaintiff came to see him in his office with a drink to reclaim the land. He informed them he will put their request before the head of family and gave them time to come for the decision but plaintiff failed to appear before him again. According to the defendant, they served re-entry notices through the postal address of the defendant, since they did not

know the whereabouts of the defendant, they sent the notices through the address provided by the defendant in the indenture. Defendant avers, he had no idea the defendant was deceased at the time they issued the writ of summons against the defendant.

After the close of the case both counsels were made to file their addresses to the court. Only the plaintiff counsel file his address to the court.

### **ISSUE FOR DETERMINATION**

WHETHER OR NOT AT THE TIME OF INSTITUTING THE ACTION IN SUIT NO. A1/106/2020 THE DEFENDANT THEREIN THOIMAS E. CUDJOE WAS DECEASED.

WHETHER OR NOT THE PLAINTIFFS ARE ENTITLED TO SET ASIDE THE JUDGMENT GRANTED IN FAVOUR OF THE PLAINTIFFS IN SUIT NO. A1/106/2020

### **EVALUATION OF EVIDENCE AND APPLICATION OF THE LAW.**

The plaintiff bears the burden of proof in this case to establish claims. The standard of proof required from the plaintiff is proof by the preponderance of probabilities. It is a basic principle of law of evidence that in a civil case, a party who bears the burden of proof is to produce the required evidence of facts in issue that has the quality or credibility short of which his claim may fail. See the case of **ACKAH V PERGAH TRANSPORT LTD (2010) SCGLR 728 at P. 736. PER ADINYIRA JSC.**

The burden demands that a party produces sufficient evidence such as will lead a reasonable man on all the evidence to conclude that the existence of the fact in issue is more probable than its non-existence. **See sections 11(4) and 12(1) of the evidence Act.** It is only after the plaintiff has discharged his burden that the defendant is required to adduce evidence in rebuttal of the plaintiff's evidence.

It is trite law that he who alleges must prove. In the case of **ABABIO V AKWASI III (1994-1995) 2GBR, 774**, the court held that:

“The general principle of law is that it is the duty of a plaintiff to prove his case, i.e., he must prove what he alleges. In other words, it is the party who raises in his pleadings an issue essential to the success of his case who assumes the burden of proving it. The burden only shifts to the defence to lead sufficient evidence to tip the scales in his favour when on a particular issue the plaintiff leads some evidence to prove his claim. If the defendant succeeds in doing this he wins; if not his losses on that particular issue.”

Similarly, in the case of **BISI V TABIRI (1987-1988) 1GLR 360** the court stated thus: “ the standard of proof required of a plaintiff in a civil action was to lead such evidence as should tilt in his favour the balance of probabilities on a particular issue” .

I will proceed to determine the issues starting from the first issue.

WHETHER OR NOT AT THE TIME OF INSTITUTING THE ACTION IN SUIT NO. A1/106/2020 THE DEFENDANT THEREIN THOIMAS E. CUDJOE WAS DECEASED

The plaintiffs who alleged to be the widow, children and beneficiaries of the late Thomas Ekeyeboa Cudjoe the defendant in suit no. A1/106/2020 avers, their father and husband died on the 28<sup>th</sup> day of March 2018. Upon his death letter of administration was obtained to administer the Estate of the said Thomas Ekeyeboa Cudjoe which is in evidence as exhibit G. 2<sup>nd</sup> plaintiff avers she was there when Nana Kofi Ansah and his people came to plot nos. 53 and 54 situated at North Kwesimintsim that they have procured a judgment in respect of the said plots which were given to them by their late father as such the said plots does not belong to them anymore.

Plaintiffs aver the said Thomas Cudjoe died on 28<sup>th</sup> day of March 2013 they tendered the said brochure of their alleged deceased father in evidence as exhibit A series.

A cursory look at exhibit A series reveals that, the funeral ceremony of the alleged Thomas Cudjoe the defendant in suit no. A1/106/2020, the funeral and thanksgiving ceremony was held on the 11<sup>th</sup> day and 12<sup>th</sup> day of May 2013 in addition, exhibit A, contains a letter from the medical superintendent Dr Nana Asampong Brobbey of

Nana Hima Dekyi Hospital replying to a letter of the plaintiffs for death certificate where the said doctor indicated that, the said Thomas Ekeyeboa Cudjoe was admitted at their hospital mortuary for preservation on the 28<sup>th</sup> day of March 2013 and was subsequently discharged for burial.

This piece of evidence was corroborated by pw1 where he indicated upon the death of Thomas Cudjoe his grandfather, he was elected the customary successor.

Its worthy of note that the defendant counsel never challenged the assertion of the plaintiffs. In the case of In Re Presidential Election petition: Akuffo Addo & 2ors (NO.4) v Mahama & 2 Ors. (No. 4) (2013) SCGLR (special edition) 73 at page 425 decided: "I accept the proposition of law that when evidence led against a party is unchallenged under cross examination, the court is bound to accept that evidence". Similarly in the case of Ashanti Gold co. ltd v Westchester Resources Ltd (2013) 56 GMJ 84 at page 128, Korbieh J.A also decided: "the law is that where the evidence of a witness is unchallenged in cross examination, it is deemed to have been admitted by the other side." See also the case of Takoradi flour Mills v Samir Faris (2005-2006) SCGLR 882 at page 890 and Fori v Ayirebi (1966) GLR 627 S.C.

Per evidence on record, the court finds that the said Thomas Cudjoe died 6 years before the plaintiff in suit no A1/106/2020 instituted the suit against him and judgment granted in their favour.

The question that this court need to resolve is whether an action can be commenced or instituted against a dead person.

An action can be instituted against a dead person not personally but against the estate of the deceased person.

Under section 1(1) of the Administrator of Estates Act, 1963 Act 63 states

"The movable and immovable property of a deceased person shall devolve on his personal representative with effect from his death".

The law was settled that trustees, executors and administrators are the proper people to sue in respect of the properties they hold in trust or estate.

See also the case of Okyere (deceased) substituted by Peprah Vrs: Appenteng and Adoma (2012) 1SCGLR 65.

Recently in the decision of case of BOYA VRS MOHAMMED (SUBSTITUTED BY MOHAMMED) CIVIL APPEAL NO. J4/44/2017 ( 2017 -2018) SCGLR , popularly known as the Adisa Boya case, the supreme court now endorsing the obiter dictum of Brobbey JSC in the okyere case stated which went contrary to the earlier decision in Okyere case supra although the latter is still good law, beneficiaries of an estate can sue even though vesting assent has not been vested in them to protect the estate of a deceased person to check unscrupulous executors or administrators for refusing to administer the estate of a deceased.

From the above positions of the law, the court finds that the plaintiffs in suit No. A1/106/2020 should have sued the estate of the said Thomas Ekeyeboa Cudjoe and not the deceased person personally.

The question is what is the effect of suing a deceased person personally.

In the case of THERESA OFORI V STATR ASSURANCE COMPANY LIMITED, CIVIL APPEAL NO. J4,27,2013, the court stated

“We have taken into consideration the cases referred to by the learned counsel and we are of the view that, if it is established that the suit was commenced against a deceased person, then it meant that the proceedings and the subsequent judgment had been procured against a deceased person. Speaking legally, such phenomenon amounts to a nullity and has no legal effect whatsoever. Under the

circumstances, the judgment procured by the plaintiff is unenforceable not only against the deceased defendant, but also against the instant defendant’s...”

As has been found supra, that the said Thomas Ekeyeboa Cudjoe died 6years before an action was instituted against him, per evidence on record which same was not

objected to counsel for the defendant, the court finds that, the judgement procured by the plaintiff in suit no. A1/106/2020 is unenforceable not only against the defendant therein but also against the plaintiffs herein.

The defendant in his evidence to the court avers, they served the said Thomas Ekeyeboa Cudjoe by substitution by postings copies on the plots of land in contention and through the address provided by him in the indenture. He tendered the said documents as exhibits 2 and 3 respectively thus the order of posting and the indenture.

The court finds that one cannot institute a writ against a deceased person and purport to serve that deceased person and expect such proceedings to stand with its outcome. Once the basic foundation of the case is non-existent, i.e the defendant has died, no proceedings can be founded on such a situation and expect it to stay there whether at the time of instituting the action, the plaintiff knows or does not know that he has died. Once there is enough evidence to proof that at the time of instituting the action the defendant had died, any proceedings with its attendant judgement are a nullity and cannot stand because you cannot put something on nothing and expect it to stand. See the case of THERESAH OFORI VS STATR ASSURANCE SUPRA.

The distinction between the void and voidable judgment has repeatedly drawn. If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the court declare it to be so. Every proceeding which is found on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.....”

See the case of CHANTEL V KOI (2011) 29 GMJ 20 C.A, (at page 38) per Kusi Appiah J.A, MOSI V BAGYINA (1963) 1GLR 337 and MCFOY V UNITED AFRICA CO. LTD (1961) 3ALL E. R 1169 at 1172, PC.



Counsel for the defendant sought to put across that when the processes were posted on the lands in contention, PW2 saw the processes but ignored it and never said anything in respect of the processes as such she is not entitled to her reliefs.

The court finds that this piece of evidence is irrelevant, whether they saw the processes or not, the fact still remains that the initial suit was instituted against a dead person which is in itself a nullity. Once an action is void, its void the failure of the 2<sup>nd</sup> plaintiff to say anything to the plaintiffs at the time that they were posting the processes does not correct the defects in the suit or the proceedings.

The defendant sought to indicate to the court that after the judgment, the 2<sup>nd</sup> plaintiff and his siblings came to see him to reclaim the lands. As the court has found supra, that the judgement obtained against a deceased person, such a judgement cannot be enforced against the said deceased Thomas Ekeyeboa Cudjoe nor the plaintiffs herein.

To this regard, I agree with counsel for the plaintiffs where he indicated in his address to the court that the fact that suit no. A1/106/2020 issued at the registry of this court against a deceased person remains unchallenged and as such proceedings and judgment founded on same are all a nullity and of no legal effect.

The court finds that, the proceedings and judgment against the said Thomas Ekeyeboa Cudjoe are a nullity and renders everything void. This is because the original suit against Thomas Cudjoe must in itself be valid before any liabilities might flow from same.

Another issue worthy of consideration as raised by counsel for the plaintiffs is that the original writ of summons, which was issued in a representative capacity in the name Nana Kofi Ansah suing as the head of Sekyi Akona Obratu Ebiradze family was not signed by him in his representative capacity but by his attorney however it must be noted that the capacity of the alleged attorney James Duntu was not endorsed on the writ of summons, as such the said James Duntu who signed the writ of summons and depose to other motions in the name of the said Nana Kofi Ansah has no capacity to do same.

The court therefore finds the writ of summons as defective as same is void. To this regard I agree with counsel for the plaintiffs.

This will lead me to me to my final issue

WHETHER OR NOT THE PLAINTIFFS ARE ENTITLED TO SET ASIDE THE JUDGMENT GRANTED IN FAVOUR OF THE PLAINTIFFS IN SUIT NO. A1/106/2020.

The plaintiffs per exhibit G, are the administrators of the estates of the late Thomas Ekeyeboa Cudjoe and therefore have the right and capacity to bring an action against the defendant in respect of the plot no's, 53 and 54 thus the plot of land in contention as it forms part of the estates of the late Thomas E. Cudjoe as administrators of the said estate, they have the right to sue and be sued in respect of the estate of the deceased. Assuming without admitting that they are not the administrators of the estate of the deceased, they have indicated in their evidence that they are beneficiaries of the estate of the deceased and as beneficiaries they have the right to bring an action in respect of the estate of the deceased if they could satisfy the court that, either the administrators has refused to act or the property is at a risk of being lost etc. see the Adisa Boya case supra.

Base on the above position of the law, the plaintiffs having satisfied the court per Exhibit G, that they are the administrators of the estates of the deceased Thomas G Cudjoe without any objection from the defendants, the court finds that they have the capacity to mount the action against the defendant.

In KEN KWAME ASAMOAH V SIC SUIT NO. J4/55/2021 I hereby summarise my orders as follows:

Taking all the above into considerations, this court is of the view that since a deceased person cannot be sued and a valid proceeding held against him, it follows that the proceedings and judgment in suit no. A1/106/2020 titled EBUSUAPANYIN NANA KOFI ANSAH VRS THOMAS E. CUDJOE is accordingly set aside as null, void and of no legal effect.

Cost of GHC 5000.00 awarded in favour of the plaintiffs.

**(SGD)**

**H/W CATHERINE OBIRI ADDO ESQ:**

**(MAGISTRATE)**

**Ladd\***