IN THE HIGH COURT OF JUSTICE, WESTERN REGION, HELD AT SEKONDI, ON THE 26TH DAY OF OCTOBER, 2022, BEFORE HER LADYSHIP AFIA N. ADU-AMANKWA (MRS.) J.

SUIT NO. E1/68/16

1. MRS. AGNES AGYILLIHA POLLEY
SUING PER HER LAWFUL ATTORNEY
MACMILLAN NYAMEKE ADULLEY — **1ST PLAINTIFF**
2. MADAM ELIZABETH TANNUEH — **2ND PLAINTIFF**
3. MADAM EKUA EHYIAH — **3RD PLAINTIFF**

VRS.

1. NYAMEKEH ADJOBA — **1ST DEFENDANT**
2. EMMANUEL ASSOUAN NYAMI — **2ND DEFENDANT**

JUDGMENT

Mr. Amihere Agyilliha, until his demise, was the Omanhene of the Wassa Fiase Traditional Area. He died testate on 14th February, 1992. He left behind two wives, the 2nd and 3rd plaintiffs and children, one of whom is the 1st plaintiff. In the testator's Will, he appointed Ackah Kodwo and Ackah Manralah as the executors and trustees of the Will. Ackah Kodwo predeceased the testator, so Ackah Manralah became the sole executor/trustee of the deceased's Will. On 12th June, 1992, the Will of the late Amihere Agyiliha was admitted to probate by the High Court, Sekondi. Ackah Manralah died testate and named in her Will, Nyamekeh Adjoba, the 1st defendant and Archer Akua as her executors. However, the Court of Appeal declared her Will null and void in the case titled **Nyamekeh Adjoba and Archer Eku vrs. Osofo Hagar & 7 Ors (Suit No H1/78/07 dated 14th May 2009)**. Subsequently, the family of Ackah Manralah appointed the 1st defendant as the

customary successor of Ackah Manralah. The 1st defendant applied for and was granted Letters of Administration with Will annexed to administer the estate of the late Amihere Agyilliha. Consequently, the 1st defendant started administering the estate of the late Amihere Agyiliha through her son, the 2nd defendant, by donating a power of attorney to him to administer the estate of the deceased.

The plaintiffs contend that Ackah Manrallah having died intestate, the chain of representation pursuant to section 64(3)(a) of the Administration of Estates Act, 1961, Act 63, was broken and therefore, the appointment of the 1st defendant to take over from her to administer the estate of the late Amihere Agyiliha was contrary to law. The plaintiffs further contend that the Letters of Administration with Will annexed granted to the 1st defendant to administer the estate of the testator was contrary to law. The plaintiffs have accused the defendants of mismanaging the estate of the late Amihere Agyiliha. According to them, the defendants have not maintained the properties and left them in a severe state of disrepair. Again, the 1st defendant has managed and controlled the deceased's estate without accounting for her stewardship and giving the beneficiaries their due share. Therefore, they have sued the defendants, as endorsed on their amended writ of summons filed on 18th February, 2022, for the following reliefs:

> *"1. A declaration that 1st Defendant cannot delegate her authority to the 2nd defendant to administer the estate of the late Mr. Amihere Agyilliha.*
>
> *2. The revocation of the Letters of Administration with Will annexed granted to the 1st Defendant on 26th November 2009 to administer the estate of the late Mr. Amihere Agyilliha and the grant of letters of Administration with Will annexed to the 1st Plaintiff.*
>
> *3. Perpetual injunction restraining the Defendants their agents, assigns and all who claim through the Defendants from having anything to do with the Estate of the deceased.*

OR IN THE ALTERNATIVE TO RELIEFS 1, 2 AND 3 SUPRA

4. The grant of the Letters of Administration with Will annexed to the 1st Plaintiff and the 1st Defendant to administer the estate of Mr. Amihere Agyiliha.

5. An order directing the Defendants to account for monies had and received from the Estate of Mr. Amihere Agyiliha's and pay the share due the Plaintiffs to the Plaintiffs.

The defendants have denied the allegations levelled against them. The thrust of their defence as contained in their amended statement of defence filed on 4th November, 2016, is that the plaintiffs and other beneficiaries have prevented the 1st defendant from carrying out her duties by intermeddling in the estate and collecting rents from tenants without the 1st defendant's knowledge. They have further contended that the plaintiffs, together with their children and grandchildren, occupied most of the properties that formed the bulk of the estate of the late Agyilliha, and this had affected the income that was to accrue from the estate. They have counterclaimed for the following reliefs:

"a. An order of the court directed jointly and severally against the Plaintiffs restraining them either by themselves, servants, privies etc from interfering with and/or intermeddling in the administration of the estate of Amihere Agyilliha (deceased);

b. General damages for intermeddling."

At the close of pleadings, the following issues were set down for trial:

i. Whether or not the 1st defendant can delegate the authority to administer the Estate of the Deceased to the 2nd defendant.
ii. Whether or not Ackah Manrallah performed her functions effectively under the Will of the deceased.

iii. Whether or not the beneficiaries of the estate have intermeddled in the Estate.
iv. Whether or not the 2nd defendant is effectively managing the estate of the deceased.
v. Whether or not the 2nd defendant has been accounting to the family.
vi. Whether or not some of the properties bequeathed under the Will were gifted to some persons in the lifetime of the deceased and therefore did not form part of the estate
vii. Whether the present suit is an abuse of the court processes.
viii. Whether or not the plaintiffs are entitled to their claim.
ix. Whether or not the defendants are entitled to their counterclaim.

Counsel for the defendants has questioned the jurisdiction of the court to entertain the plaintiffs' case. He contends that the plaintiffs have failed to fulfil a condition precedent to the institution of the action by failing to recall the grant of Letters of Administration pursuant to section 67 of the Administration of Estates Act, 1961, Act 63 and therefore rendering the writ a nullity.

In response to these submissions, counsel for the plaintiffs has contended that the submissions of the defendants are misconceived. He argues that the plain and ordinary meaning of section 67 of Act 63 is that where probate or Letters of Administration has been granted, any action in respect of the estate comprised in or affected by the grant cannot be initiated until the grant has been recalled or revoked. He contends that two disjunctive conditions are mentioned in the section: the recall of the grant through the citation process or the revocation of the grant. Thus, an action could only be commenced in respect of the estate after the grant had been recalled by citation or after the grant had been revoked by the court and not only after the grant had been recalled as counsel for the defendants seemed to suggest. Section 67 of Act 63 did not allow a grant to be recalled before the court could revoke it. Thus, an action for the revocation of a

grant which was not connected to the estate comprised in or affected by the grant need not go through the citation process. The plaintiffs' action was not in respect of the estate comprised in or affected by the grant. The plaintiffs' prayer for the revocation of the grant was based on the grounds that after the death of Ackah Manralah, the chain of representation envisaged by section 67 of Act 63 was broken. Counsel for the plaintiffs has further argued that the plaintiffs' failure to file a citation to recall the Letters of Administration before instituting the instant action was an irregularity that did not oust the jurisdiction of the court. Having filed a defence and participating fully in the trial to its conclusion, the objection raised by the defendants was not made within a reasonable time for which their objection ought to be overruled.

In Ghana, issues pertaining to the administration of the estate of deceased persons are governed by the Administration of Estates Act, 1961 (Act 63) and Order 66 of High Court (Civil Procedure) Rules, 2004 (C.I. 47). Order 66, in particular, regulates the procedure in respect of actions regarding the administration of the estate of deceased persons. Section 67 of the Administration of Estates Act, 1961, Act 63, states:

> *"Where administration has been granted in respect of any estate of a deceased person, no person shall have power to bring any action or otherwise act as executor of the deceased person in respect of the estate comprised in or affected by the grant until the grant has been recalled or revoked.*"

The procedure governing the recall of a grant of probate or Letters of Administration was explained in the case of **Anyinam vrs. Mensah [1989-90] 2 GLR 96.** In that case, the plaintiff did not file any citation either before or at the time he commenced the action calling on the defendant to bring his Letters of Administration to the registry of the court and show cause why the Letters of

Administration should not be revoked. After the plaintiff had closed his case, counsel for the defendant raised a preliminary legal objection to the effect that the plaintiff was bound to file a citation in such an action before or at the time of the filing of the writ. The court stated thus:

> *"Halsbury's Laws of England (3rd ed.), Vol. 16, para. 518 at 257, gives a clear elucidation of the procedure applicable and states: "Manner of obtaining revocation". Revocation may be obtained either voluntarily or by compulsory proceedings. In the former case evidence is filed setting out the circumstances, and the order may be made on motion or by a registrar. In the latter case a writ is issued, and a citation is served upon the grantee [citee] by the citor requiring him [grantee-citee] to bring the grant into the principal registry, and show cause why it should not be revoked. The citation must either precede or be simultaneous with the writ, and the plaintiff should allege in the endorsement of his claim on the writ and in his statement of claim, as the ground for revoking the grant, the invalidity of the will or the defendant's want of interest...*
>
> *A revoked grant must be produced and delivered at the registrar at the time of its revocation, so that it may be cancelled in the registry."*
>
> *A close examination of section 67 of Act 63 shows that before an aggrieved plaintiff commences an action aimed at the revocation of letters of administration already granted, he must, as a first step file a citation calling upon the citee to produce his letters of administration at the registry of the court and the citee must show cause why his grant of letters should not be revoked. Within the citation, it is the duty of the plaintiff-citor to give the reason for his filing the citation"*

Order 66 rule 33 of C. I. 47 was carved out from this section. The rule provides that before a writ for the revocation of the grant of probate of a Will or Letters of

Administration of the estate of a deceased person is issued out, notice shall be given under rule 37 unless the probate or Letters of Administration has or have been lodged in the registry of the Court. Rule 37 provides that where an action is brought for the revocation of a grant of probate or Letters of Administration of the estate of a deceased person, the plaintiff shall serve a notice on the person to whom the probate or Letters of Administration is granted requiring the person to bring and leave at the registry of the Court the probate or letters of administration.

In further reliance on the above-mentioned case, the case of **Bonsu vrs. Eyifah [2001-2002] 1 GLR 9** held that the notice or citation could be issued before the commencement of the action or together with the writ at the same time. The court stated thus:

> *"Section 67 of Act 63, the present law from which LI 1515 derived its authority, should be read together with Orders 4 and 6 of LI 1515 and when that is done, what rule 6(1) of Order 6 of LI 1515 simply means is that where the action involves the recall and revocation of probate or letters of administration granted, then notice shall be given to the grantee of the said probate or letters of administration for a recall of same to be deposited at the registry and rule 2(3) of Order 6 was specific that notice shall be given before the writ is issued out…Since the citation could precede the action itself or both could be filed or issued simultaneously, the correct position of the law is that, before the commencement of an action for revocation of the grant of probate or Letters of Administration of a deceased person, or before the writ beginning an action for the revocation of probate or letters of administration in respect of a deceased person is issued out or served on the grantee the plaintiff shall first of all serve notice on the grantee requiring him to bring and leave at the registry the probate or letters of administration unless the said probate or letters of administration had already been lodged at the registry. The commencement of the present action by the*

plaintiff and the service of the writ on the defendant without first serving them with a notice requesting them to deposit the letters of administration granted them at the registry of the court is therefore irregular. The citation or notice precedes the service of writ of summons and not vice versa as counsel for the plaintiff wanted this court to believe".

The **Bonsu case, supra,** provided that the notice or citation could be issued before the commencement of the action or simultaneously with the writ. However, before effecting service of the writ on the grantee, the citation or notice must have been first served on the grantee.

The Court of Appeal in the case of **Mrs. Comfort Joyce Wereko Brobbey & 2 Ors. vrs. Peter Agyei Kufour, Civil Appeal No. H1/47/12 (26th July, 2013)** and reported at Dennislaw as **[2013] DLCA8111** held a contrary view to this position. The court was of the view that the notice and the writ could not be issued simultaneously. The notice or citation was to be served on the grantee before the issuance of the writ. On the combined effect of Rules 33(3) and 37(1) of Order 66 of CI47, the Court per Ayebi JA stated thus:

"The language of the two provisions as I observed is very simple and clear. The trial judge interpreted the decision of Apau J (as he then was) in Bonsu vrs Eyifah [2001/02] GLR 1 to be saying that the notice must be issued before the commencement of the action or contemporaneously with it. But where the notice and writ were issued contemporaneously, the notice ought to be served first before the issuance of the writ out of the registry of the court. I am not in agreement with that interpretation if my learned brother said so. In view of the subheading of rule 33(3), I am of the opinion that what the rule demands is that a notice should be given or served before the writ is issued out. It will therefore not be in compliance with the rule if the notice and the writ are issued contemporaneously".

In effect, a notice should be given or served before the writ is issued out. On the effect of the non-compliance of this statutory condition and the rules, the courts are divided on this issue. Whereas some courts hold the view that the failure to serve a notice is an irregularity which can be cured by order 81 of CI47 and would not necessarily render proceedings void, others are of the view that not only is the non-compliance a violation of a rule of procedure but also constitutes non-compliance with a statutory precondition and therefore fatal which should render the action a nullity.

In **Heward Mills vrs. Heward Mills [1992-93] GBR 218**, the Court of Appeal held that failure to comply with the requirement of a citation was fatal to the action because the requirement was a statutory condition precedent, the failure of which took away the power of the court to act. The court held thus:

> *"It is clear from the rules…that before a plaintiff can cause the issue of a writ to revoke a grant of probate, he should first have served a notice on the person to whom the probate had been granted requiring him to bring and leave at the registry of the court the probate that had been granted to him….it seems to me that the failure by the plaintiff to comply with the mandatory provisions…is fatal to his action. For where a statutory condition must be complied with before a court can have jurisdiction to make an order, failure to comply with such a condition will leave the court with no discretion to make any order or orders in the matter".*

In **Grace Agboku & ors vrs. Augustine Yaovi Agboku & Ors., Civil Appeal No. 18-2003 (19th February, 2004)** and reported at Dennis law as **[2004] DLCA6481**, on the issue of whether in commencing the action, the plaintiff ought to have extracted a citation calling upon the last surviving executor to bring into the registry of the High Court, Accra the probate of the Will granted to them in respect of the deceased's estate in compliance with Order 6 r. 6(1) of LI 1515, which rule is in pari materia with Order 66 Rule 37(1) of CI 47, the Court of Appeal per Gbadegbe

JA (as he then was) held that the writ in respect of the reliefs seeking a revocation of the grant was a nullity for non-compliance with the rule. He stated thus:

> *"That the above rule is mandatory and non-compliance with it would invalidate it is not in issue. See (1) Heward Mills vs Heward Mills [1992] 1 GLR 153".*

He went further to state that:

> *"I think that on the facts of this case by not complying with the rule in question the appellants had caused to be placed before the court a writ which as regards some of the reliefs sought suffered from a fundamental defect which constituted the said reliefs into an ineffective or incompetent proceeding".*

In **Mrs. Comfort Joyce Wireko Brobbey & Ors. vrs. Peter A. Kuffuor**, **supra**, the Court of Appeal on the effect of non-compliance with the rules on citation stated that:

> *"As submitted by the counsel for the appellant, compliance with rules 33 and 37 of Order 66 is the foundation of a probate action. The compliance with the said rules make the action so launched regular. It forms the basis of the court's jurisdiction in the action and over the defendant sued in a probate action. It cannot be remedied by the court. So the action so launched by the respondents against the appellant is a nullity."*

In the more recent case of **Nana Aduna II & 1 or vrs Theodore Yeboah, H1/126/2017 (8/2/18)** and reported at Dennislaw as **[2018] DLCA5072**, the Court of Appeal on the issue of whether the failure to serve notice before issuing the writ was a mere irregularity or nullity failed to follow its previous decisions of declaring such actions a nullity. The court held that failure to serve the citation before the issuance of the writ was a mere irregularity which could be cured by Order 81 of CI 47. The court stated thus:

"Applying the above authority as my guide, it is patently clear that the non-compliance to serve a notice before issuing the writ in probate actions is to be regarded as an irregularity which does not cause automatic nullity. Simply put, the failure to serve notice before issuing the writ in the instant case, is a mere irregularity of the rules of procedure, a voidable but not a void act, which might be set aside on terms."

It would be noted from the cases so far cited which postulate that non-compliance goes to the root of the action are cases emanating from the Court of Appeal. However, in **In Re Awere-Kyere (Decd); Awere-Kyere vrs. Foster & Anor [2003-2004] SCGLR 1050,** the Supreme Court per Date-Baah, JSC held that failure to comply with the citation procedure did not go to jurisdiction. This appears to be the stand of the Supreme Court. For in the more recent case of **Republic vrs. High Court (Probate and Administration 2), Accra, Exparte Elizabeth Darko [2021] DLSC10695**, the Supreme Court held that non-compliance with the citation procedure would not have ousted the jurisdiction of the court given the time that the defendants raised the objection to the non-compliance.

In that case, the plaintiff, who was the applicant, issued a writ against the interested parties for, among other reliefs, an order for the revocation of the probate granted by the court on 23rd October, 2019 in respect of the purported Will of the late Nana Owusu Darko. The interested parties filed a motion asking the court to strike out the applicant's action as well as the 4th interested party's counterclaim because they were both filed in breach of a mandatory statutory precondition, to wit, filing a citation for the probate to be lodged at the registry of the court. The trial judge determined the application and struck out the writ of summons taking the view that by order 66 rule 33(3) of CI 47, the applicant and 4th interested party should have filed a citation before the commencement of proceedings. It is the order of the trial judge setting aside the writ that was the

subject of the certiorari application before the Supreme Court to have it quashed for fundamental error of the law.

The Supreme Court dismissed the application distinguishing the case from the Heward Mills case which held that where a statutory condition had to be complied with to cloth a court with jurisdiction, then a failure to comply with such a condition will leave the court with no discretion to make any order or orders in the matter. The Court held that probate had not yet been delivered to the executors and as they were not in possession of it, they could not be called upon to deposit same in the court's registry.

On the issue of non-compliance, the Court explained that the objection to the non-compliance was taken at an advanced stage of the case when pleadings had literally closed. The court took the position that the non-compliance was an irregularity which could be cured by Order 81 of CI 47, and the writ could not be set aside after the interested parties had taken fresh steps. The court opined thus:

> *"In the instant case, the decision of the High Court is clearly a nullity arising from two basic points of law. First, misapplying the provisions of Order 66 rules 33(3) and 37(1) of the rules of the High Court, and secondly, setting aside proceedings contrary to the clear provisions of Order 81 rule 2(2) of the rules of the Court which forbid the perdition of proceedings initiated by a party on grounds of technicality where the procedural objection is not raised timeously and at the time the blunder is alleged to have been committed."*

Juxtaposing this to the facts of the case, the defendants raised this procedural irregularity for the first time through their counsel in his concluding address to the court. The writ was filed in 2014. At no point during the pleadings stage nor the trial did the defendants ever raise this issue. If the Supreme Court took the view that the objection raised by the interested parties when pleadings were yet to be

closed was too late in the day, then the objection raised by the defendants could not have been made within a reasonable time, given that pleadings had closed and the trial had also concluded. It would be unreasonable to set aside the writ based on the defendants' tardiness to raise the objection timeously. The justice of the matter requires the court to look at the plaintiffs' reliefs instead of setting aside the writ when in essence, the defendants never complained of this issue until the conclusion of the case.

In any case, the plaintiffs' reliefs consist not only of the revocation of the Letters of Administration, which would require citation but a grant of Letters of Administration to both the 1st plaintiff and 1st defendant and an order for account. The plaintiffs also seek a declaration that the 1st defendant cannot delegate her authority to the 2nd defendant to administer the deceased's estate. Granted that the defendants' arguments that the letters of Administration ought to have been recalled before the filing of the writ hold sway with the court, the writ cannot be set aside given the fact that the court can exercise its jurisdiction regarding the remaining reliefs not connected with the revocation of the Letters of Administration. On the severability of reliefs, Pwamang JSC, in the **Republic vrs. High Court (Probate and Administration 2), Accra, Exparte Elizabeth Darko case** endorsed the principle of law as espoused in **Republic vrs. High Court Accra, ExParte Peter Sangber-Der (ADB Bank Ltd-Interested Party) SCLRG (Adaare) 552** and stated thus:

> *"Where several reliefs are placed before a court and the court takes the view that it has jurisdiction to hear some of them whilst its jurisdiction is excluded in respect of others, the court is not entitled to decline jurisdiction altogether. In such scenario, there are two options open to the court, it may strike out those reliefs which are outside its jurisdiction and proceed to hear those that fall within its jurisdiction or it may hear the whole case, but*

decline to grant the reliefs it is not competent to grant when it delivers its Final judgment in the matter".

The court has jurisdiction to deal with the plaintiffs' first relief as well as their alternative reliefs. The writ cannot be set aside in view of this. In the worst-case scenario, the court would have declined to grant the plaintiffs' 2nd and 3rd reliefs relating to the revocation of the Letters of Administration and dealt with the remaining reliefs. But as has already been stated, the objection came in too late in the day after the defendants had participated in the trial. The objection is misplaced and is therefore overruled.

MERITS

Having disposed of this preliminary legal objection, I will proceed to consider the merits of the case. Ackah Manralah obtained probate to administer the estate of the late Amihere Agyiliha as the sole executor on 12th June, 1992. The probate in question was admitted into evidence as exhibit "2". She administered the estate for only six years before her demise in 1998. Following the invalidation of her Will by the Court of Appeal, the 1st defendant was appointed her customary successor and granted Letters of Administration with Will Annexed on 26th November, 2009 to administer the estate of the late Amihere Agyiliha. This is evidenced by exhibit "4" tendered by the defendants in evidence. Upon her appointment as administrator, the 1st defendant executed a power of attorney to her son, the 2nd defendant (exhibit "1") on 7th May, 2010 to administer the estate of the late Amihere Agyiliha.

It is the plaintiffs' contention that when Ackah Manralah died, the chain of representation was broken as specified in section 64 of Act 63 such that the 1st defendant could not have stepped in her shoes as executor of the estate of the late Amihere Agyiliha. Counsel further argued that the order of the Court of Appeal for Ackah Manralah's family to appoint a personal representative based

on which the 1st defendant was appointed was obiter in the sense that it was not part of the case to be decided by the court. Even if it were an order of the court, the directive was for the family to appoint a personal representative and not a customary successor to administer the testator's estate.

I agree with the plaintiffs' counsel that upon the death of Ackah Manralah, the chain of representation as specified in section 64(3)(a) of Act 63 was broken. This is so because Ackah Manralah died intestate, her Will having been declared invalid by the Court of Appeal. Section 64 reads:

> *(1) An executor of a sole or last surviving executor of a testator is the executor of that testator.*
>
> *This provision shall not apply to an executor who does not prove the will of his testator, and, in the case of an executor who on his death leaves surviving him some other executor of his testator who afterwards proves the will of that testator, it shall cease to apply on the probate being granted.*
>
> *(2) So long as the chain of the representation is unbroken, the last executor in the chain is the executor of every preceding testator.*
>
> *(3) The chain of the representation is broken by—*
>
> > *(a) an intestacy; or*
> >
> > *(b) the failure of a testator to appoint an executor; or*
> >
> > *(c) the failure to obtain probate of a will;*
>
> *but is not broken by a temporary grant of administration if probate is subsequently granted.*

Indeed, in the judgment of the Court of Appeal (exhibit "3"), the Court acknowledged this fact when A. Asare Korang J.A. (as he then was) opined:

> *"I have already decided that the Will of Madam Ackah Manrallah was not validly executed and that the dispositions of property made therein were null and void. This, in effect, means that Madam Ackah Manrallah never made a valid Will and she, therefore, died intestate. It cannot therefore be said that the chain of representation with regard to executors laid down in Section 64(1) and (4) of Act 63 applies in her case".*

Thus, the 1st defendant could not have stepped into the shoes of Ackah Manralah to administer the estate of the late Amihere Agyilihia. Counsel for the defendants countered this argument by submitting that the basis for the 1st defendant's grant of Letters of Administration with Will annexed was as a result of the consequential orders made by the Court of Appeal when they declared the Will of Ackah Manralah invalid and directed her family to appoint a personal representative to act in her stead to administer the estate of the late Amihere Agyiliha.

Having declared the Will of Ackah Manrallah invalid, the Court of Appeal made the following consequential orders:

> *"The grant of the right to administer the estate of a deceased person is a matter entirely within the discretion of the Court under section 79(1) of Act 63 and it is hereby directed that the family under the customary law of the late madam Ackah Manrallah take immediate steps to appoint a personal representative to act in her place and stead to administer the estate of the late Amihere Agyilihia which would otherwise fall into limbo in the absence of such an appointment. Having made this order, what remains to be determined is the question of the costs".*

The Court of Appeal directed the family to appoint a personal representative and not a customary successor of Ackah Manralah, who would administer the estate of the late Amihere Agyilihia.

Upon the death of a deceased, his property, whether movable or immovable, devolves unto his personal representatives. In the absence of an executor, the estate shall vest in the successor until a personal representative is appointed if the entire estate devolves under customary law. See section 1 of Act 63. There is, therefore, a distinction between a personal representative and a customary successor. A personal representative is either an executor or an administrator appointed by a court. Section 108 of Act 63 defines a personal representative as:

> *"personal representative" means the executor, original or by representation, or administrator for the time being of a deceased person".*

An administrator is one to whom Letters of Administration, whether general or limited or with Will annexed or otherwise, has been granted to. See section 108 of Act 63. On the other hand, a customary successor is one who succeeds under customary law to the rights in the self-acquired property of a deceased person. As A. K. P. Kludze puts it in his book "Modern Law of Succession in Ghana", 2015 Ed, page 291,

> *"…the word "successor" refers to the individual person who, whether by an automatic right or by an appointment by the family, succeeds at customary law to the rights in the self-acquired property of a deceased person".*

Thus, until a customary successor obtains Letters of Administration from the court, he is not a personal representative who can administer the estate of a deceased. He can only temporarily administer such estate pending the appointment of a personal representative if the entire estate devolves under customary law.

The deceased's estate did not devolve under customary law to warrant the appointment of a customary successor to administer the deceased's estate temporarily. Upon her appointment as customary successor of Ackah Manralah, the 1st defendant applied for Letters of Administration pursuant to the orders of the Court of Appeal to administer the estate of the deceased. However, the directive of the Court of Appeal was for the personal representative and not the customary successor of Ackah Manrallah to administer the deceased's estate. In fact, the court was very clear on this issue when it stated in exhibit "3" that:

> *"The only person entitled to deal with the properties devised under the Will of Amihere Agyiliha would be the personal representative of Madam Ackah Manrallah in whom was vested, under the law of trusts, the legal interest in the estate of Amihere Agyiliha."*

As the customary successor of Ackah Manralah, the 1st defendant never obtained Letters of Administration with Will annexed to administer the estate of Ackah Manralah. The 2nd defendant confirmed this fact during his evidence in court. As such, she was not entitled to apply for Letters of Administration to administer the estate of the late Amihere Agyiliha, more so when there was a break in the chain of representation, the Will of Ackah Manralah having been declared invalid by the Court of Appeal. In compliance with the orders of the court, the 1st defendant, as customary successor of Ackah Manralah, ought to have taken Letters of Administration to administer her estate and to cloth her with capacity to apply for Letters of Administration to administer the estate of the late Amihere Agyilihia. //

Even though the 1st defendant was granted Letters of Administration to administer the estate of the late Amihere Agyilihia, it is her son, the 2nd defendant, who, administers the testator's estate based on the power of attorney executed in his favour to do so. The statement of defence of the defendants disclosed that the 2nd defendant was an illiterate. However, in his testimony, the 2nd defendant

explained that his seventy-five-year-old mother was an elderly woman who could not do all the work.

The primary role of an administrator is to distribute the estate of the deceased in accordance with his Last Will or the laws of the state where the estate is being administered. A person who takes on the role of an administrator acts as a fiduciary. A fiduciary acts for the benefit of another and puts their interest first. A fiduciary may not delegate their authority to make decisions concerning the estate to someone else unless permitted by statute or the order of the court. The administrator's office is one of trust and confidence in a particular person. **Form 32, the Oath for Administrator with Will Annexed**, supports the legal position that the office is one of trust and confidence. In the said oath, the administrator personally takes an oath to administer the estate according to law. Portions of the oath states:

> *"…that I will faithfully administer the movable and immovable property of the testator by paying his just debts and the legacies given by his will (or will with codicils)…..so far as his immovable and immovable property shall extend and the law bind me, and distributing the residue of his personal property according to law; that I will exhibit an inventory and render an account of my administration whenever lawfully required…"*

While simple administrative tasks can be delegated, the administrator has a duty of oversight. Key decisions cannot be delegated. The 1st defendant took an oath to administer the estate of the late Amihere Agyiliha according to law. She cannot go to sleep and hand over the administration of the estate to the 2nd defendant, who has not sworn to administer the estate in accordance with law. The 2nd defendant is not known to the court and has not been vetted by the court to be competent enough to administer the estate. The 2nd defendant cannot act as the administrator as he has not been appointed by the court. The 1st defendant should not have applied for Letters of Administration if she could not effectively

administer the estate for health and age reasons. It is quite clear that she is not in a position to administer the estate, given that "she was an elderly woman and could not do all the work". For this reason, the Letters of Administration granted to her ought to be revoked to pave the way for the grant to another to administer the estate of the late Amihere Agyiliha. For one, she was not a personal representative of Ackah Manralah to have applied for the Letters of Administration in the first place and secondly, she is not a fit person to administer the estate given that it is her son who is administering the estate on her behalf. Consequently, the Letters of Administration with Will annexed granted to the 1st defendant on 26th November, 2009 is hereby revoked. The defendants are also restrained from having anything to do with the estate of the late Amihere Agyiliha. The 1st defendant is ordered to deposit the revoked Letters of Administration with the registry of this court within thirty (30) days from today.

I would decline the grant of Letters of Administration with Will annexed to the 1st plaintiff at this point and direct any of the beneficiaries under the Will, including the 1st plaintiff, to make an application for the grant. Quite apart from the fact that the 1st plaintiff is a beneficiary under the testator's Will, little is known about her. She is ordinarily resident outside the country, which explains her nonparticipation in the trial as she testified through an attorney. The estate of the late Amihere Agyiliha is vast, requiring attention, diligence, commitment and skill to manage it. The court is unable to assess the ability of the 1st plaintiff to manage the estate at this stage. Again, there are quite a number of beneficiaries under the testator's Will who can equally apply to administer the estate.

The defendants have counterclaimed for general damages against the plaintiffs for intermeddling. Even though the Letters of Administration has been revoked, the estate of the late Amihere would be entitled to damages if it is proved that the plaintiffs interfered or intermeddled with the estate during the administration of the 1st defendant as the administrator of the estate and have caused damage.

Once made, a counterclaim proceeds as an independent action even if the original action were concluded, stayed, discontinued or dismissed. The rules provide that in proceedings arising out of a counterclaim, the counterclaim is deemed a writ and statement of claim. The party making the counterclaim and the party against whom it is made are also deemed as the plaintiff and defendant, respectively. In that wise, the defendants have the initial burden to produce such evidence as would satisfy the court that the plaintiffs have intermeddled in the estate of the late Amihere Agyiliha.

The 2nd defendant testified that the plaintiffs and other beneficiaries prevented the 1st defendant from carrying out her duties by intermeddling in the estate and collecting rents from tenants without the knowledge of the 1st defendant. In particular, he cited the attorney of the 1st plaintiff as occupying two stores and a room in one of the properties since 2009 without paying rent. He also testified that he had issued a writ of summons at the Circuit Court, Takoradi, to eject some of the siblings of the 1st plaintiff who had forcefully occupied rooms in the house without paying rent. Apart from the attorney of the 1st plaintiff, none of the plaintiffs have been cited for intermeddling. Instead, it is the defendants' case that most of the properties that form the bulk of the estate of the late Amihere Agyiliha were occupied by beneficiaries, children and grandchildren of the deceased, thereby affecting the income that accrued to the estate. None of these persons are parties to the action from whom he can claim damages on behalf of the estate. The plaintiff's attorney admitted occupying some stores and rooms he claimed were gifted by the late Agyiliha in his lifetime to his parents. Whether that fact is true is of no consequence, as the attorney is not a party to the action. In the circumstances, the defendants' claim for damages for intermeddling ought to be dismissed as they have failed to prove that fact against the plaintiffs. Their claim is dismissed. Likewise, their claim for an order of the court directed jointly and severally against the plaintiffs restraining them either by

themselves, servants, privies etc., from interfering with or intermeddling in the administration of the estate of Amihere Agyilliha (deceased) is also dismissed.

(SGD.)
H/L AFIA N. ADU-AMANKWA (MRS.)
JUSTICE OF THE HIGH COURT.

COUNSELS
Baffour Anthony Dwumah appears for the Plaintiffs.
E. K. Amua-Sekyi appears for the Defendants.