

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, SESSION HELD AT SEFWI WIAWSO IN THE WESTERN NORTH REGION ON MONDAY THE 24^H DAY OF OCTOBER 2022 BEFORE HIS LORDSHIP JUSTICE KWAME AMOAKO

SUIT NO. E12/32/2022

1. OPANYIN KOFI BOAH

2. GIDEON ACHEAMPONG - PLAINTIFFS

OF H/NO. AD 39/3

SEFWI BEKWAI

V

1. AKUA FOKUO

2. AKWESI GYABENG

3. KWABENA BOAKYE - DEFENDANTS

4. OP. JOHN MENSAH

ALL OF SEFWI BEKWAI

Plaintiffs absent

1st & 3rd Defendants present

2nd & 4th Defendants absent

Francis Osei-Nsiah for the Plaintiffs present

Counsel for 1st & 3rd Defendants (Anaama Nyinabisania) absent

No legal representation for the 2nd & 4th Defendants

JUDGMENT

On 21st June 2022, the Plaintiffs filed a Writ of Summons together with a Statement of Claim for the following reliefs against the Defendants:

“

- i. Declaration that the deceased, Op. Kofi-Senti @ Anthony Senti was a member of Plaintiff's family (Ekuona family of Bekwai)
- ii. Declaration that "the body of the deceased belongs to the Plaintiff's family absolute per custom and tradition of Akan people
- iii. An order of the court to compel the 1st Defendant to release documents of the body from Anwiaso mortuary the plaintiffs' family.
- iv. An order of the Court to restrain the defendant or anybody claims through them to organize one week, burial or final funeral rite of the late Kofi Senti
- v. Any order(s) the Honourable Court deems appropriate in the circumstance”.

On the same date, i. e. 21st June 2022, the Plaintiffs filed a motion on notice for interlocutory injunction praying for –

“an order for interlocutory injunction restraining Defendants from proceed with one week celebration of the late Anthony Senti @ Kofi Senti fixed by 23rd June, 2022 by the Defendants until the final determining of the suit upon the grounds set forth in the accompanying affidavit.’

Paragraphs 5 to 14 of the affidavit in support of the said motion for interlocutory injunction provide as follows:

- “5. That the deceased, Anthony Senti @ Kofi Senti was a prominent member of the family who passed on in April, 2022 after short illness at Bekwai.
6. That the body was deposited in Anwiaso mortuary by the surviving wife, the 1st Defendant / Respondent immediately after his death and subsequently informed the family of the death of our relative.
7. That the family quickly organized a meeting with the defendants to plan a befitting one week, burial and final funeral rites for the deceased
8. That immediately after the said meeting, the Defendants assumed a certain position just to frustrate the family from organizing the funeral and as part of their scheme, have put up notices for the one week celebration without reference to the Plaintiffs family.
9. That all attempts to stop the Defendants / Respondents from holding themselves as chief mourners and funeral planning committee for the family have been unsuccessful.

10. That the Defendants / Respondents who have no locus in whatever form, being tradition, customs or by the laws of the land are determined to ignore any caution from the family.
11. That without the Court's intervention to restrain the defendant / Respondents, they will organize the one week celebration which is likely to spark some controversy and disorder in the community.
12. That the applicants see the move or conduct of the Defendants as very provocative and insults to the Plaintiffs' family if not disdainful.
13. That I am advised by counsel and verily believe same to be true that the family stands to suffer an irretrievable loss and humiliation if not injustice if the injunction is not placed on the one week celebration slated for 23rd June, 2022 by the Respondents
14. That I am further advised by counsel that in the circumstances the ends of justice will be best served if this application for interlocutory injunction is favorably considered by this Honorable Court by granting same."

The Defendants filed a Notice of Appearance to the Writ on 12th July 2022 and on the same date, they filed their Defence and an affidavit in opposition to the motion for interlocutory injunction.

Paragraphs 4 to 9 of the affidavit in opposition to the motion for interlocutory injunction provide as follows:

- "4. That we have been served with a motion on Notice for interlocutory injunction which we vehemently oppose to same.

5. That we deny paragraph 1 and 5 of the Affidavit in support of the motion in part and state that the Applicants are not head of family and that the deceased was not only a prominent member of the family but a head
6. That we deny paragraphs 6, 7, 8, 9, 10, 11 and 12 of the Affidavit in support of the motion and state that the body of the deceased was not deposited at the mortuary by the 1st Defendant.
7. That there has never been any such meeting of the family involving us after the deceased passed on. That we have never done anything to frustrate the family and we have never planned to organize any one-week celebration of the deceased. Per the Akan customs and traditions, we cannot organize the one-week celebration, burial, and funeral of the deceased.
8. That the Applicants have never approached us to stop organizing the funeral of the deceased and we have never assumed the role of chief mourners nor purported to organize the burial and funeral of the deceased.
9. That we vehemently deny paragraphs 13 and 14 of the Affidavit in support of the motion and state that per the status of the deceased as the head of family (Abusuapanin) of the Roval Ekuona family of Sefwi Sukusuku, the planning of his one week celebration, burial and funeral lies with the chief and principal elders of Sefwi Sukusuku as per Akan custom and not Plaintiffs herein."

On 24th November 2022, the Plaintiffs prayed the Court as follows:

"Respectfully, we pray that the Court strikes out the processes as moot, because the Defendants have already celebrated the one-week celebration which we tried to injunct them. Submitted accordingly".

There was no opposition from the Defendants present.

Analysis

The law is that, a plaintiff, or a defendant who has a counterclaim, is at liberty to discontinue or withdraw the action, and the Court has no power to force a person to litigate.

Order 17 Rule 2 (1) of C. I. 47 provides as follows:

“2. (1) Except in the case of an interlocutory application, the plaintiff may at any time before service on the plaintiff of the defendant's defence or after the service of it and before taking other proceeding in the action, by notice in writing wholly discontinue the action against all or any of the defendants or withdraw any part of the alleged cause of action and thereupon the plaintiff shall pay the defendant's costs of the action or if the action is not wholly discontinued, the costs occasioned by the withdrawal.”

In the case of *Republic v High Court, Accra; Ex Parte Asakum Engineering & Construction Ltd.* [1993-94] 2 GLR 643, the Supreme Court stated, per Aikins JSC, at page 656 of the report as follows:

“No Court can force a person to litigate and if he should decline so to do, he is not to be held in contempt of the said Court... A Court cannot be seen to be instigating litigation.”

See also the case of *Odompre v Aryeetey* [1975] 1 GLR 297 on the matter.

Practical Guide to Civil Procedure in Ghana (2017) by Samuel Marful-Sau provides on 'Discontinuance of Action' at page 99 as follows:

"A party who initiates an action in Court may discontinue the action for various reasons. A plaintiff, or a defendant who has a counterclaim, is thus at liberty to discontinue or withdraw the action. The Courts are not supposed to instigate litigation and for that matter no Court can force a person to litigate."

Writing on 'Methods of Discontinuance or Withdrawal' and specifically on 'Discontinuance without Leave of the Court', *Practical Guide to Civil Procedure in Ghana* (2017) by Samuel Marful-Sau (supra) provides at page 100 as follows:

"The method to be used by a party to discontinue an action depends on the stage of the proceedings.

A party may discontinue an action without the leave of Court or with the leave of the Court depending on the stage of the proceedings.

Discontinuance without Leave of the Court

By Order 17 rule 2 (1), a plaintiff may discontinue the action against all or any of the defendants by filing a notice of discontinuance to withdraw any part of the claim at any time before or after being served with the defendant's statement of defence, provided the plaintiff does not take any other step in the action, for example, filing a reply or amended statement of claim. Upon the discontinuance

or withdrawal, the plaintiff will be ordered to pay a cost which is taxable. The discontinuance shall not be raised subsequently as an estoppel."

Writing on 'Discontinuance with consent', the learned Author and Justice continues at page 102 of his book as follows:

"All the parties in an action may by consent agree to withdraw the action by filing a written consent to withdraw."

Also, *CIVIL PROCEDURE - A PRACTICAL APPROACH* (2011) by S. Kwami Tetteh provides on 'WITHDRAWAL AND DISCONTINUANCE OF PROCEEDINGS' at page 773 as follows:

"A party who initiates lawsuit is not compelled to litigate to the end; neither the defendant nor the Judge may compel a party to litigate. No Court can force a person to litigate, and a plaintiff who decides not to pursue the claim before the Court cannot be compelled to continue."

The learned Author continues at page 774 of his book as follows:

"Discontinuance without leave

A plaintiff may discontinue the action against all or any of the defendants by notice in writing or may withdraw any part of the claim at any time before or after receiving the statement of defence but before taking any other step in the action, such as delivering an amended statement of claim or a reply; thereupon the plaintiff would be ordered to pay the defendant's costs occasioned by the withdrawal of the entire action or part of it. The costs so payable shall be taxed,

and neither the discontinuance nor the withdrawal may be raised in a subsequent action as judgment estoppel. It follows that the plaintiff, having progressed the action to trial may not discontinue an action set for trial may not discontinue an action set for trial except with the leave of Court.”

Conclusion

The Court cannot force a party to litigate. The prayer of the Plaintiffs is hereby granted.

The case is struck out as moot.

There will be no order as to cost.

H/L KWAME AMOAKO

JUSTICE OF THE HIGH COURT