

IN THE HIGH COURT HELD IN CAPE COAST ON TUESDAY, 28TH FEBRUARY, 2023, BEFORE HER LADYSHIP MALIKE AWO WOANYAH DEY (HIGH COURT JUDGE)

SUIT NO: E5/4/2020

**ANTHONY KWAME YEBOAH
SUING PER HIS LAWFUL
ATTORNEY NATHANIEL EKOW PANYIN**

VS

- 1. PIUS BOATENG**
- 2. MAAME ARABA**
- 3. ADWOA KUM**

PLAINTIFF PRESENT

DEFENDANT PRESENT

EUGENE LARBI APPIAH FOR PLAINTIFF

ROLAND AK HAMILTON FOR THE 2ND AND 3RD DEFENDANTS

JUDGMENT

The plaintiff claims against the defendants the following reliefs;

- a) A declaration that the Will purportedly executed by Stephen Bonku, a.k. a. Mallam Kweku Seidu on 7th July 2019, is not the last Will and Testament of Stephen Bonku, a.k.a. Mallam Kweku Seidu and, for that matter, fraudulent.

PARTICULARS OF FRAUD

- i. That on the alleged date of execution of the will, the testator who was ill was in the care of Felicia Amissah and Evelyn Amissah at Brafoyaw, and he did not execute the said will
 - ii. That on the said date of the purported execution, the testator was subsequently taken to the Abronsah Prayer Camp by Evelyn Amissah and Felicia Amissah and did not execute the will.
 - iii. That the said Felicia Amissah and Evelyn Amissah have indicated that the late Stephen Bonku, a.k.a. Mallam Kweku Seidu, did not execute any document on the said 7th July 2013.
- b) An order setting aside the purported Will of Stephen Bonku, a.k.a. Mallam Kweku Seidu
 - c) An order setting aside the purported distribution of the estate of Stephen Bonku, a.k.a. Mallam Kweku Seidu, as having been made without any lawful authority
 - d) An order of award of costs incidental to the institution of this action
 - e) Any further reliefs that this honourable court may deem fit to grant in the circumstance.

The plaintiff herein is a cousin and customary successor to one Stephen Bonku alias Mallam Seidu who died on 7th August 2013. The 1st defendant is an executor mentioned in a purported will of the said Stephen Bonku, whilst the 2nd and 3rd defendants are his surviving spouses. It is alleged that after his burial and funeral rites, a will purportedly executed by him was brought out and read in the absence of the plaintiff and other immediate family members of the deceased at the High Court. The plaintiff believes the will is fraudulent because the deceased was ill on 7th July 2013, the date the will was purportedly executed and could not have executed the same. It is alleged that on the said date, he was ill and in the company of Felicia Asamoah and Evelyn Asamoah at Braforoyaw Cape Coast. It is also averred that on the said date that the will was purportedly executed, due to the precarious nature of his illness, he

was taken to Aboransah prayer Camp by both Evelyn and Felicia and thus could not have executed the will. A letter dated 17th January 2017 written by a lawyer upon the instructions of the 2nd and 3rd defendants indicated that the properties of the said Stephen Bonku had been distributed according to the devises in the will purportedly executed by the deceased. According to the plaintiff, the distribution was not preceded by the grant of letters of administration to them or probate, and this was also done without recourse to him as the deceased's customary successor. He believes that until the court sets aside the purported will and the distribution of the properties by the 2nd and 3rd defendants, fraud will be perpetrated on the deceased's family with regard to the said will.

The defence of the 2nd and 3rd defendants was a total denial of the plaintiff's averments. They denied that the plaintiff was a customary successor to the deceased. They also denied as palpable falsehood the averment of the plaintiff that neither he nor the deceased's family was invited for the reading of the will. According to them, a letter was written to the family, including the plaintiff, but they refused to appear on the date the will was read. They claimed that a letter was sent from the court to the family, but they refused to attend the reading of the will. They claimed that whilst the deceased was at Aboransah, the 1st defendant came to inform them that the deceased asked him to give GHC200.00 to one Anty Lizbeth at the court to complete some work for him, and so they also asked him to inform one family member called one-one about it, and he also sent two people together with the 1st Defendant to Anty Lizbeth, and she told them the same thing. They denied that the will was fraudulent and stated that the action was frivolous, vexatious and without merits. For that matter, the plaintiff's reliefs should be dismissed with punitive costs.

On the general burden of proof, the Supreme Court held in **Bank of West Africa vs Ackun [1963] 1 GLR 176 SC** that the onus of proof in civil cases depends upon the pleadings. The party who, in his pleadings, raises an issue essential to the success of his case assumes the burden of proof. The burden would shift to the other party when

a prima facie case had been established. The test as to which party bore the burden of proof on any allegation is: Which party would fail if the allegation in question were struck out of the pleading?

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.

In the case of **GIHOC Refrigeration and Household Products Ltd v. Hanna Assi [2005 2006] SCGLR 458**, it was stated that **"since the enactment of NRCD 323, therefore, except otherwise specified by statute, the standard of proof (the burden of persuasion) in all civil matters is by a preponderance of the probabilities based on a determination of whether or not the party with the burden of producing evidence on the issue has, on all the evidence, satisfied the Judge of the probable existence of the fact in issue."**

In the case of **Faibi v. State Hotels Ltd. [1968] GLR 471**, it was held as follows;

"Onus lay upon the party who would lose if no evidence was led in the case; and where some evidence had been led it lay on the party who would lose if no further evidence was led."

However, I must state that a higher standard of proof is required where criminal conduct, such as fraud, is alleged in a civil suit. That is an exception to the general rule. Thus where a party alleges any criminal conduct, such as fraud or forgery, against another party, that party shall be required to prove the allegation of criminal conduct on the standard burden of proof in criminal matters, and that is proof beyond a reasonable doubt. In the case of the civil aspect, he shall prove same by a preponderance of the probabilities.

See the case of **SASU BAMFO V SIMTIM [2012] 1 SCGLR 136** and section 13 of the Evidence Act, 1975 NRCD 323.

Justice Sir Dennis, in the case of **MAGNUS DE GRAFT, MENDS AND 2 ORS V Mary Atta Boakye and 2 ORS**, states;

"Fraud as I understand is a scarlet sin and it vitiates everything and a person who alleges fraud is required to prove same beyond reasonable doubt. Section 13 (1) of the Evidence Act 1975 Act 323 requires a person who alleges crime against his opponent must prove same beyond reasonable doubt."

In conceptualising proof beyond a reasonable doubt, Lord Denning in **Miller vs Minister of Pensions [1947] 2 All ER 372** had this to say

"...proof beyond a reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave a remote possibility in his favour which can be dismissed with the sentence "of course it is possible but not the least probable," the case is proved beyond a reasonable doubt, but nothing short of that will suffice...."

At the close of pleadings, the issues adopted are as follows;

- a) Whether or not the plaintiff is the appointed Customary Successor of the deceased Stephen Bonku, a.k.a. Mallam Seidu.
- b) Whether or not Stephen Bonkus made a valid Will before his death.
- c) Whether or not probate was taken in respect of the alleged Will of Stephen Bonku
- d) Whether or not the family of Stephen Bonku was invited to witness the reading of the alleged will.

I shall proceed to discuss the issues raised seriatim.

a) Whether or not the plaintiff is the appointed Customary Successor of the deceased Stephen Bonku, a.k.a. Mallam Seidu.

The plaintiff instituted this action in his capacity as the customary successor to Stephen Bonku (Deceased) through an attorney. However, the defendants have challenged that assertion in their statement of claim. Thus issues were joined in respect of that assertion. The burden is on the plaintiff to lead evidence to show that he is the customary successor of the plaintiff. What evidence did the plaintiff lead in this regard?

When the plaintiff's attorney testified, he introduced the plaintiff as the customary successor of the deceased. It seems that the denial was abandoned when counsel for the defendants cross-examined the plaintiff's attorney because he only sought to impugn the credibility of the witness with regard to the witness's testimony that he was given a power of attorney to institute the action against the defendants. That was when the plaintiff had inadvertently left out the power of attorney, which was later filed, and no further questions were asked of the witness. I, therefore, hold that the plaintiff is the customary successor of the deceased Stephen Bonku alias Mallam Seidu and the plaintiff's attorney provided the power of Attorney to show that the plaintiff appointed him to institute the action.

b) Whether or not Stephen Bonkus made a valid Will before his death.

In proving their claim, the plaintiff's Attorney testified that after the funeral rites of the late Stephen Bonku alias Mallam Seidu, they decided that his estate would be opened after one year because he was the head of the family. However, before then, the 2nd and 3rd defendants, with their children, wrote to the family through a lawyer that they would not be part of the meeting. He insisted that the deceased could not have made the will because he was ill on the said date. The defendants, however, claimed that the testator was taken to the prayer Camp on 13th July 2013 and not 7th July 2013, as testified to by the plaintiff.

Counsel for the plaintiff submitted that the court must enquire into the circumstances under which a will is made when contested. I agree with that submission, but having made an allegation of fraud, as already stated, the burden of proof requires the plaintiff to lead evidence of the fraud first. The plaintiff must produce cogent and reliable evidence for the court to make a finding that the testator did not make the said Will and that fraud had been perpetrated, especially when all the validities of a will are apparent on its face.

The plaintiff's evidence on the assertion that the deceased could not have made the Will because, on 7th July 2013, he was taken to the prayer camp is not sufficient in the opinion of this court. I agree with counsel for the defendants that the plaintiff should have gone a step further to provide evidence from the prayer camp, either in the form of documentary evidence or a witness from the prayer camp to substantiate the date that the said deceased was admitted there in the face of the vehement denial of the defendants. As alleged, the plaintiff's attorney was also nowhere around the deceased when he was taken to the camp.

It was the evidence of PW1, who claimed she took him to the prayer camp on 7th July 2013, that the plaintiff's attorney also relied on in his testimony before the court. Since the burden imposed on the plaintiff is higher than the burden generally required in a civil case, it was not sufficient to just enter the witness box and repeat the allegations of fraud. In the court's opinion, the plaintiff could have done so by showing that the signature on the will does not belong to the testator and, for that matter, was forged. That could have been done by producing forensic evidence to show that the purported signature on the will does not belong to the testator in the face of the vehement denial of the defendants. It is not enough to allege under cross-examination that the signature on the Will does not belong to the deceased. That could have been proved by more cogent evidence as required by law. I think the plaintiff presented a hollow case on the issue of fraud.

In addition to showing that the signature is not for the deceased, he could have produced independent evidence of a witness from the prayer camp to show that, indeed, that was the date that the deceased was taken to the camp and that he could not do anything for himself or that the attesting witnesses were nowhere near the deceased at the time they claimed the will was made.

On the other hand, the defendants also testified about the circumstances under which the will was made and even called one of the attesting witnesses, a 75-year-old pensioner who testified he was present with the other witness when they both signed. Counsel for the plaintiffs submitted that this court should prefer the plaintiff's case to that of the defendants because the defendants could remember the date they claimed they took the deceased to the prayer camp and yet said they could not remember whether it was a Sunday or not. The inability of the defendants to remember whether it was a Sunday or not cannot be the basis for believing the testimony of the plaintiff's attorney and his witness. The law required more from the plaintiff on this issue. Counsel for the plaintiff submitted that the person who is literate mentioned the date the deceased was taken to the prayer camp; thus, she ought to be believed as against the defendants, who are illiterates but testified that the date was 13th July 2013. I am afraid I have to disagree with this submission. If that is what counsel wants the court to take, the plaintiff witness PW1 did not tell the court that she is literate, and there is a jurat and a thumbprint under her witness statement, which shows that she is also not literate. Thus the court cannot believe the plaintiff's attorney and the witness against the defendants on that score.

This court holds that on the face of the entire will, it meets the requirements of the law, and thus it behoved the plaintiff to lead evidence to show that it is not a deed of the testator.

Under cross-examination, the plaintiff's attorney answered questions thus,

Q: The family of Mallam Seidu rejected that the information that he had made a Will because they were not aware and were not informed about it, according to your paragraph 8, is that not the case?

A: That is so.

Q: You have said in this court that you have read the Will of Mallam Seidu is that not the case?

A: That is so. We were not aware until we met the children that a photocopy of the will was brought.

Q: In the said will he appointed executors and dated the Will as a will must be, is that not the case?

A: That is so.

Since, on the face of the will, it meets the requirements of the law, there is a presumption that the will was duly executed by the deceased unless cogent and reliable evidence is led to the contrary and the plaintiff failed woefully to impugn the validity of the will except to say the deceased was ill at the time without more. They failed to prove their case in terms of the standard of proof required. I, therefore, hold that having failed to displace that presumption with cogent and reliable evidence, this court cannot hold that the will was fraudulently procured.

c) Whether or not probate was taken in respect of the alleged Will of Stephen Bonku

It is evident from the evidence led by both parties that no probate has been obtained regarding the will. The defendants admitted this fact, and the named executor of the will seems uninterested because he refused to participate in the trial when he was even made a defendant. This court, therefore, holds that the estate cannot be distributed as required by the law without the probate, but the evidence is that the deceased's family has sold the DAF truck the deceased used for his business to offset a debt he owed.

This fact was admitted by PW1 without any remorse though they claim that no probate had been taken.

d) Whether or not the family of Stephen Bonku was invited to witness the reading of the alleged will.

The defendants, in their evidence, testified that the deceased's family was invited to the reading of the will, but they refused to attend on the date set for reading the will. In the court's opinion, they could also have produced documentary proof of their allegation but claimed that the Registrar intimated that he would not wait for them as they were not around at the time of the reading. Thus they could also not establish by cogent evidence that the court invited the family. Therefore, this court finds that the deceased's family was not present when the Registrar of the court read the will. Nevertheless, that fact does not affect the validity of the will.

On the totality of the evidence before the court, the court holds that the plaintiff has failed to prove the case of fraudulent procurement of the will against the defendants and must fail in the action. His reliefs are hereby dismissed except to say that probate or the appropriate legal document in the appropriate circumstance ought to be obtained before the formal distribution of the properties is made.

Costs of GHC5000.00 against the plaintiff.

MALIKE AWO WOANYAH DEY (MRS)
JUSTICE OF THE HIGH COURT
CAPE COAST

