

IN THE HIGH COURT HELD IN CAPE COAST ON WEDNESDAY, 22ND DAY OF MARCH, 2023, BEFORE HER LADYSHIP MALIKE AWO WOANYAH DEY (HIGH COURT JUDGE)

SUIT NO: E5/16/2020

FLORENCE ESI IDUN -----

PLAINTIFF

Suing as Customary Successor

of J.E Baiden

VS

AMA BESIWA -----

DEFENDANT

PLAINTIFF PRESENT

DEFENDANT REPRESENTED BY PRESENT

ISAAC AGGREY FYNN FOR PLAINTIFF

ROLAND A.K. HAMILTON FOR THE DEFENDANT

JUDGMENT

On the 26th day of May 2020, the plaintiff issued a writ of summons and statement of claim against the Defendant for the following reliefs;

- a. A declaration that the plaintiff is the proper person to be granted letters of Administration with Will annexed to administer the estates of J.E Baiden.
- b. A declaration that the Defendant and all her relations, namely Aunty Mary, Badu, Maame, Kwamena, Ama Kakraba and Kwesi, have no interest in Hse No. 60/1 Tsintsimhwe, Agona Swedru.
- c. A declaration that the Defendant and all her relations, namely Aunty Mary, Badu, Maame, Kwamena, Ama Kakraba and Kwesi, all of H/No. 60/1

Tsintsinhwe, Agona Swedru, are liable to pay rent for all the period they have occupied the rooms.

- d. A declaration that the Defendant and all her relations, namely Aunty Mary, Badu, Maame, Kwamena, Ama Kakraba and Kwesi, are trespassers in the said property and are liable to damages for trespass.
- e. An order of the honourable court directing the Defendant to pay to the plaintiff's family the sum of GHC1440.00 unlawfully collected as rent advance for one year for the use of the said Cocoa premises as church premises.
- f. Interest on the said sum of GHC 1440 at the commercial rate of interest
- g. Further or other reliefs
- h. Costs.

The essence of the suit against the Defendant, as depicted in the statement of claim, is that the Defendant, not being a family member of the late John Empson Baiden and his wife, has sought to administer his estate to the exclusion of the plaintiff, who is the recognised customary successor of the said J.E Baiden. According to her, though J.E Baiden deceased died testate, his executors did not take probate before their death; thus, his estate, including H/NO 60/1 Tsintsinhwe, built by him, have been administered by his family, and she, as his present customary successor has administered the affairs of the said house for the past fifteen (15) years. However, the Defendant and her family members have taken over the house to the exclusion of J.E Baiden's family members.

THE CASE OF THE PLAINTIFF

In her statement of claim and witness statement, the plaintiff introduced herself as the 3rd customary successor to the estate of J.E Baiden and has been administering his estate for the past 15 years. On the other hand, Defendant is a descendant of a house help of J.E. Baiden's wife, known as Amba Gyanwah alias Mary Gomun deceased. According to the plaintiff, the building H/No 60/1 Tsintsimhwe, Agona Swedru, was put up by J. E Baiden, deceased. He died in 1971, and his Aboradze family has

administered the said property for several years since the executors did not apply for probate before their death. In his will, J.E Baiden devised certain rooms in the said property to his wife Amba Gyanwah, and those not specifically mentioned became family property by operation of law. She averred that there are four-chamber and hall units each and seven single rooms.

Additionally, there is a big room which was used as a cocoa shed but later converted into a chapel and rented by the plaintiff. It is her case that the Defendant received an amount of 1440 from the pastor as rent advance on her blindside when she had a misunderstanding with her brother. She quickly informed the pastor not to pay any rent to the defendant again, and since then, she has received the rent. Quite apart from these rooms, there is another single room which used to be a clinic, and since the last occupants left, the defendant has taken over the said property and has prevented her family from receiving rents of GHC400 Ghana cedis monthly from any prospective tenant. She stated that as far back as July, 2013, the defendant informed her that she would convert the room into a kitchen, thus causing financial loss to the family. She averred further that to her family's surprise, the defendant has rented out the said room as a clinic and has been collecting rent thereof. She averred that J.E. Baiden's wife, Amba Gyanwah did not bear any child for him and therefore left no offspring.

Significantly, she averred that J.E Baiden purchased the land in 1923 from Chief Kweku Paintsil for 55 pounds 10s including "earnest money", and would tender the deed of sale, the building plan, the permit and his Will in evidence. He completed the building in 1924; in September 1971, he died and was buried in January 1972. He was succeeded by his niece Grace Odoom, and on her death, she was succeeded by the senior brother called Kojo Yena, who also stayed in the building and was the one who founded Baiden Memorial Clinic in the disputed house because he was a hospital worker in his lifetime. Thereafter, when Kojo Yena died, she succeeded him and administered the property on behalf of the family for the past 15 years.

It is her case that the defendant has no interest in the house because she is not a daughter of Amba Gyanwah deceased, and neither is the defendant a sister to her or even a relation who could be described as her descendant. According to the plaintiff, when J.E Baiden married Amba Gyanwah, she came into the marriage with a house help, the defendant's grandmother. The defendant's mother was called Esi Edufuah, whose mother was called Efua Egyyirwa, the house help who stayed with Amba Gyanwah in her matrimonial home.

She stated that the junior mother of the defendant, Aunty Mary and her child, Badu, were paying rent to her for the rooms they occupied in the house, and one other person, Maame, was also paying rent to her. Despite all these, the defendant has brought her junior brother, Kwamena, and her junior sister, Maame Kakraba, to stay in the rooms formerly used by the family members whenever they visited Swedru. The defendant's junior mother, Aunty Mary, also brought in another son, Kwesi, to stay in a single room in the house, and they have refused to pay rent for the past seven years despite repeated demands. The defendant has broken into a room which had the belongings of a customary son of the plaintiffs' family and where he was laid in state and packed them into the chamber, and is presently using the hall. Another room originally used by Yaw Amonkwandoh, who is also a customary son of the family has been taken over by the plaintiff.

She further averred that the defendant had leased some portion of the land where the disputed house is situated to some persons to operate their business. According to her in 2019, the defendant attempted to sell the disputed house to one Kwame Sam, and it was by the timely intervention of the plaintiff that it did not materialise.

She stated that the defendant and her family members are a nuisance in the said building, and they have adopted the practice of abusing and insulting the plaintiff's family whenever they visit the disputed house. She further stated that she contends that since the Defendant has taken over the entire house and has refused to pay rent, she has become an Administratrix de son tour and is liable to damages. She prayed

the court to eject the defendant and her family members as they were trespassers and squatters on the said property.

She called PW1 Aba Afadzewa who lives at Esuahyia and is a farmer. She confirmed the testimony of the plaintiff that she is the 3rd customary successor to the deceased testator J.E Baiden. She said she was brought into the disputed house by her uncle J.E Baiden and at that time, J.E Baiden's wife was married into the house. She met the defendant's grandmother and mother. The defendant's mother who was just as young as she was. Her grandmother's name was Efua Egyirwa, and her mother was Esi Edufuah. Her uncle informed her that the defendant's grandmother was his wife's house help brought into the house by his wife, and later the Defendant's mother also joined them in the said house. She grew up with the defendant's mother and was present when her mother gave birth to her in that house.

She stated further that her family was made to understand that J.E Baiden left a Will. However, those mentioned in the will could not obtain probate before their death. She also confirmed that the various customary successors have always managed J.E Baiden's property, and the plaintiff has managed the property for the past 15 years. She also stated that the defendant has taken over the entire H/No. 60/1 and has prevented plaintiff's family members from having anything to do with the said house. She also said she was aware that the defendant's relation was paying rent to the plaintiff for the single room she occupied in the said house. She further testified that in an earlier development, a creditor had filed an execution process to attach Hse No 60/1, but with the timely intervention of the plaintiff, the said process could not materialise.

DOCUMENTS TENDERED BY THE PLAINTIFF

Will of J.E Baiden marked as Exhibit A

Indenture covering J.E Baiden's land marked as Exhibit B

Building Permit marked as Exhibit B1

Notice of Interpleader marked as Exhibit C

Tenancy agreement between the plaintiff and End of days Ministries marked as Exhibit D

THE DEFENDANT'S CASE

The Defendant entered appearance by a lawyer and filed her defence. In her defence and testimony, she averred and testified that quite apart from the fact that she is a family member of the wife of J.E Baiden deceased, the late wife of J.E Baiden was allotted some rooms in the said house coupled with a plot of land. Thus the plaintiff has no authority over the said house. She also averred that her mother, Abena Akitsi, succeeded Mary Gomun upon her death in 1979. She averred that JE Baiden devised some of the properties to his wife, which has been under her and her mother's control since the death of Amba Gyanwah, her grandmother. She claimed that the plaintiff does not have capacity to institute the action because it is premised on misconceived law and fact.

She also averred and testified that the house in contention belongs to Amba Gyanwah alias Mary Gomun and same has been under the control of her deceased mother and herself since the death of Amba Gyanwah. She stated she had indeed received funds accruing from the estate of Amba Gyanwah to prevent the estate from going into ruins.

It is her case that her family members are occupying the rooms as of right because they are family members of Amba Gyanwah, her grandmother. She also claimed that she had not managed any property which does not belong to her family, and all that she had done was to protect the building from going to waste. She described the action as frivolous, vexatious, and abuse of the judicial process.

In her further testimony before the court, the defendant said that she is the great-granddaughter of Amba Gyanwa alias Mary Gomun and belongs to the Anona family of Ajumako Besease and Agona Swedru. She testified that Amba Gyanwah gave birth

to three daughters: Abena Prah @ Akitsi Esi Edufuah, her mother, and Mary Wilson. J. E Baiden died in 1970, whilst Amba Gyanwah died in 1979. According to her, J. E Baiden, in his will, gave the entire house H/No 60/1 to his wife. She claimed that by virtue of the death of Amba Gyanwah, she and her mother had exercised control over the said property. After her death, Abena Akitsi was appointed a successor by Nana Kwaitoo of the Anona family to administer the said property. She testified that all the relations of Amba Gyanwah are occupying the said house as of right.

Significantly, she claimed that Amba Gyanwah had land acquired personally adjoining that of her husband. It is her case that the house of Amba Gyanwah was on her own plot of land adjoining that of her husband, but both were given one house number. She testified that the house of J.E Baiden had only three rooms which he willed to her grandmother, whilst her grandmother's house adjoining J.E Baiden's house is made up of 6 single rooms with an attached big hall rented out to Cocoa farmers and now rented to a church. She testified that the plaintiff knows that the house belongs to Amba Gyanwah and sent evidence of same to the owners of a farm JE Baiden was working on to be prepared in favour of her grandmother.

She testified further that the plaintiff's family head gave her a copy of the will in 2013 and placed her in the property after pouring libation, apologising, and asking for forgiveness for the fact that he hid the said document from her. She testified that since the death of J.E Baiden, the grandchildren of Amba Gyanwah had always stayed in the said property adjoining the three rooms of J.E Baiden even before the will was brought out. She testified that the plaintiff has refused to take probate and only wants to rent the property and pocket the proceeds alone.

She tendered the following documents.

The Will of J.E Baiden as Exhibit 1

An indenture marked as Exhibit 2

Plan of a proposed building for Mary Gomun marked as Exhibit 3

Deed of support marked as Exhibit 4

Pictures of a building marked as exhibit 5 (1) and 6.

She called DW1 Kwamina Enison, who claimed to be the great-grandson of Amba Gyanwah. He testified that Amba Gyanwah, in her lifetime, begot Efua Agyiriwa, who gave birth to three daughters, Abena Akitsi Esi Edefuah and Mary, and his mother is Abena Akitsi. He supported the testimony of the Defendant that the relations of Amba Gyanwah are occupying the house by right in view of the devise in the Will of J.E Baiden. He also claimed that the defendant is a customary successor to Amba Gyanwah and that the plaintiff has no right over the said property.

She further called DW2 Ebusuapanyin Nana Kwaitoo, who testified that he is the head of the Anona family of Agona Swedru. He had been head of family for the past ten years. He testified that the defendant and the deceased Amba Gyanwah were his family members. He told the court that Ambah Gyanwah had land adjoining that of the deceased testator, and she also had a house on same. The late Amba Gyanwah had three children who were deceased. Upon the death of Amba Gyanwah, her daughter Abena Prah succeeded her. Upon Abena Prah's death, Defendant was appointed as her successor.

He also testified that H/No 60/1 Tsintsinhwe Agona Swedru belongs to Amba Gyanwah alias Mary Gomun because she had her own land adjoining her husband's six single rooms building with a big storage room for cocoa which is currently being used as a church. (See paragraph 10 of the witness statement of the witness). He also bequeathed his house adjoining Ambah Gyanwah's property to her and both houses share the same house number. The house of J.E Baiden comprises only three rooms currently occupied by the defendant, Kwamina Enison and Francis Sagoe.

At the close of pleadings, the court differently constituted adopted the following issues;

- i) Whether or not the disputed building known as H/No. 60/1 Tsitsimhwe, Agona Swedru, was put up by J.E. Baiden before marrying Amba Gyanwah alias Gomun.
- ii) Whether or not the disputed property has been under the control of the plaintiff since the death of Kojo Yena, i.e. the second customary successor
- iii) Whether or not J.E Baiden died testate and devised certain rooms in the disputed building to his late wife, Amba Gyanwah.
- iv) Whether or not those rooms not specifically mentioned in the Will became family property by operation of law.
- v) Whether or not the Defendant received an amount of GH1440 as rent advance for one year on the blind side of the plaintiff in respect of the room which was turned into a church.
- vi) Whether or not the Defendant is receiving rent from the tenants of the house.
- vii) Whether or not on the death of Kojo Yena, he was succeeded by the plaintiff who administered the property on behalf of the family for the past 15 years.
- viii) Whether or not the Defendant is a descendant of Maame Amba Gyanwah
- ix) Whether or not the Defendant's grandmother was a house help of Amba Gyanwah
- x) Whether or not Defendant's relations have once paid rent to the plaintiff for the rooms they occupied in the disputed building
- xi) Whether or not the Defendant has an interest in the building in dispute
- xii) Whether or not the plaintiff is entitled to Letters of Administration with will annexed.

I shall proceed to discuss issue (i) alone, issues (ii), (vii) and (x) together, issues (iii) and (iv) together, issues (v) and (vi) together, issue (viii), (ix), and (xi) together and issue (xii) alone.

BURDEN AND STANDARD OF PROOF

Once issues were joined, the plaintiff would assume the burden of proof and the burden to produce sufficient evidence to prevent a ruling against her on any issue and to tilt the scales in her favour on the balance of probabilities.

Section 11 of the Evidence Act 1975, NRCD 323, states;

“the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue. In other words, a party needs to produce enough evidence once all the evidence is before the court; a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.”

The learned author and jurist S.A. BROBBEY explained the principle relating to the duty to produce evidence on page 31 of his book "Essentials of the Ghana Law of Evidence" in the following terms;

"This literally means "the proof lies upon him who affirms not on he who denies since by the nature of things he who denies a fact cannot produce proof."

Where the plaintiff makes a positive assertion at the start of the trial, he bears the legal burden. At the same time, he bears the evidential burden to adduce evidence at the start of the trial."

In the case of **FAIBI V STATE HOTELS LTD [1968] GLR 471**, it was held thus;

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

On how to discharge the burden of proof, the Supreme Court, in the case of **Ackah v Pergah LTD and others [2010] SCGLR 728** at 736, held that

"It is a basic principle of law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is

varied and it includes the testimonies of the party and material witnesses admissible hearsay, documentary and things (often described as real evidence) without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence, a reasonable mind could conclude that the existence of the fact is more probable than its non-existence. This is a requirement of the law on evidence under sections 10(1) and 2 and 11(1) and (4) of the Evidence Act, 1975 NRCD 323. "

Further, it must be borne in mind that generally, the defendant bears no burden of proof, particularly where there is no counterclaim; nevertheless, every positive averment ought to be established by the defendant herein.

See also T.K Serbeh & CO [2005-2006] Ltd. vs. Mensah 360 per Date-Bah JSC

I shall now proceed to discuss the issues as stated earlier.

I) WHETHER OR NOT THE DISPUTED BUILDING, KNOWN AS H/NO. 60/1 TSITSIMHWE, AGONA SWEDRU WAS PUT UP BY J.E. BAIDEN BEFORE GETTING MARRIED TO AMBA GYANWAH ALIAS GOMUN.

Exhibit B, the indenture attached to the plaintiff's witness statement, clearly shows that the land on which the building H/No. 60/1 renumbered as H/no. TS 117/2 Tsimsimhwe, Agona Swedru, was solely purchased by JE Baiden in 1923. This document Exhibit B describes the boundaries of the land, and it is noteworthy that the defendant, under cross-examination, admitted that one JA Yankson has a building adjoining House No 60/1. She also admitted that the said house is bounded by the main road leading to Ajumako to Mankessim Road, which is clearly depicted in Exhibit B. Thus though Exhibit B describes the land as situate at Adumadum, this

court finds that the land described in the said Exhibit B is the land on which House No 60/1 is situate.

He also built the house, per the evidence of the plaintiff and the defendant. This fact is supported by Exhibit B and all the attachments; the building permit (Exhibit B1) was granted to him before he put up the building on a 100 by 100 plot described in both the indenture and the plan. It is also supported by the devises he made of portions of the house in his will (Exhibit A), which is the basis upon which the plaintiff and the defendants make certain claims before this court. Thus it is beyond dispute that Hse No 60/1, now renumbered TS 117/2 in question, was put up by J.E. Baiden.

There is also no doubt in the mind of the court that the deceased J.E Baiden married one Amba Gyanwah, also known as Mary Gomun and as to whether it was before the purchase of the land or thereafter, the plaintiff, in her pleadings, challenged the defendant and stated that the said house was built long before the defendant's grandmother's marriage to J.E Baiden. The plaintiff was not cross-examined on that fact. Thus, this court finds that J.E Baiden built the disputed house before his marriage to Ambah Gyanwah. I find that there is no evidence on the record that he put up the building with the help of Amba Gyanwah, as alleged by the Defendant in the testimony before the court.

- ii) WHETHER OR NOT THE DISPUTED PROPERTY HAS BEEN UNDER THE CONTROL OF THE PLAINTIFF SINCE THE DEATH OF KOJO YENA, I.E., THE SECOND CUSTOMARY SUCCESSOR**
- vii) WHETHER OR NOT ON THE DEATH OF KOJO YENA, HE WAS SUCCEEDED BY THE PLAINTIFF WHO ADMINISTERED THE PROPERTY ON BEHALF OF THE FAMILY FOR THE PAST 15 YEARS.**
- x) WHETHER OR NOT DEFENDANT'S RELATIONS HAVE ONCE PAID RENT TO THE PLAINTIFF FOR THE ROOMS THEY OCCUPIED IN THE DISPUTED BUILDING**

Though the Defendant challenged the capacity of the plaintiff herein to mount this action, per the evidence before this court, the plaintiff succeeded in leading evidence to substantiate her claims that after the death of Kojo Yena, whom the Defendant admitted was once a customary successor of the deceased, she succeeded JE Baiden as the 3rd customary successor. This point was established when the court determined the issue of capacity as a preliminary point and ruled that, as a customary successor, she could mount the action. Therefore, it is the finding of the court that after the death of Kojo Yena, who was once a customary successor and managed J.E Baiden's property, the plaintiff succeeded J.E Baiden and managed his properties, including H/No 60/1 Tsimitsinhwe per the evidence led.

According to the defendant, the plaintiff left the house when they discovered the will in 2013, and it was at that point they realised that the entire house belonged to Amba Gyanwah as same had been devised to her in the Will of J.E Baiden. The evidence of the defendant that the plaintiff left the house upon the discovery of the will cannot be true because, under cross-examination, the plaintiff told the court that she was in Accra when the defendant brought the said will to her that a cousin by name Duncan had given the will to her. That evidence by the plaintiff was not challenged under cross-examination. Thus the defendant's evidence that the plaintiff left the house when the will was discovered cannot be accepted as the truth. The defendant did not dispute that the plaintiff was managing the house. This fact is supported by Exhibit D, in which the Defendant as a witness, signed when the tenancy agreement was reached between the plaintiff and one Pastor Joe Ghartey Tagoe of End of Days Ministries. That clearly shows that it was the plaintiff who was administering the said property upon the death of Kojo Yena because, having signed the said agreement, she was bound to receive the rent in respect of the agreement. Therefore, it is the finding of the court that the plaintiff was the one administering the property up to the point when the Will of J.E Baiden came out and the defendant started laying claims to the entire house, as confirmed by her own testimony.

It ought to be noted that the allegation that the Defendant's relations were paying rent to the plaintiff at a point in time has not been discounted by the defendant.

This court, therefore, finds that the plaintiff succeeded J.E Baiden after the death of Kojo Yena and administered the said property to the defendant's knowledge, and collected rent from the said house from the relatives of the defendant.

iii) WHETHER OR NOT J.E BAIDEN DIED TESTATE AND DEvised CERTAIN ROOMS IN THE DISPUTED BUILDING TO HIS LATE WIFE AMBA GYANWAH.

iv) WHETHER OR NOT THOSE ROOMS NOT SPECIFICALLY MENTIONED IN THE WILL BECAME FAMILY PROPERTY BY OPERATION OF LAW.

In the opinion of the court, these issues are very germane to settling the dispute between the parties before this court. From the evidence led, it is evident that both the plaintiff and the defendant herein have come to terms with the fact that J.E Baiden left behind a Will which was brought to the fore in 2013, but no probate had been taken due to the fact that the executors died before its discovery. It is also clear that no court has issued any of the parties herein with any letters of Administration with will annexed. Under cross-examination, the plaintiff's witness, Pw1 told the court that the family has accepted that the Will, i.e. Exhibit A, is the Will of JE Baiden. Thus it is beyond dispute that he died testate, though the will was not discovered for a long time, and his successors had managed the disputed house as a family property under customary law for a long time.

It is also evident that the plaintiff admitted under oath that in the said Will (Exhibit A), J.E Baiden devised three rooms in the disputed house to his wife, Ambah Gyanwah alias Mary Gomun. However, it is her case that the other rooms, per the will, which have not been devised, are to be taken over by the family and enjoyed by them. The Will, per paragraph 3, states as follows;

"I give and bequeath three rooms in my house No. 60/1 at Agona Swedru to my wife by name Amba Gyanwa otherwise Mary Gomun"

Additionally, paragraph 12, which is the last paragraph of the Will, states as follows;

I declare that the house I have built on the land belonging to my said wife Amba Gyanwah aforesaid, near my house No B.60/1 aforesaid, is for herself.

These devises made by the deceased testator form the basis upon which the defendant informed the court that the entire House No 60/1 belongs to Amba Gyanwah, also known as Mary Gomun, the deceased wife of the testator. The plaintiff, on the other hand, insists that only three rooms per the Will were given to the late wife of the testator to live in for her lifetime and that since the other portions of the house have not been devised explicitly to anyone, by paragraph 11 of the Will the residue of any property belonging to the deceased testator belongs to the family to be enjoyed by the family.

In the court's opinion, the dispute between the parties calls for the interpretation of the said provisions in the testator's will.

In his submission before the court, counsel for the plaintiff opined that the courts, in their interpretations of wills, have adopted the process of giving effect to the intention of the testator unless there are overriding legal obstacles in the will. In the case of **Mensah Deceased Barnie vs Mensah and others, 1978 1GLR 225 CA at page 229** cited by counsel for the plaintiff, the court held that the policy of the courts in matters affecting testamentary dispositions was to give effect to the last wishes of the deceased and to uphold them unless there were overriding legal obstacles in the way. Thus a liberal approach is usually adopted by the courts.

"At page 771 of his book Contemporary trends in the law of immovable property in Ghana, the author states, "it would appear that the search for the testator's intent principle has been a dominant approach to the interpretation of Wills."

In **Prempeh vs Agyapong [1993-94] 1 GLR 255**, the court held that the cardinal principle in the construction of wills is that they should be construed so as to give effect to the intention of the testator since the whole essence of a will, in any case, was the declaration of the wishes and intention of the testator.

The above principle is indeed the position of the law with regard to the interpretation of wills, and this court is bound by it.

From the evidence on record, it is clear that house no 60/1 Tsimtsinhwe comprises six single rooms with a cocoa shed attached thereto and three hall and chamber units. It is also established that the testator's wife and the Defendant lived in some of the six rooms on the same plot of land with the three-chamber and hall rooms.

It is also imperative that this court, in seeking the intention of the testator, must give the words used in the will their ordinary meaning and not to construe the will as what it should have been but rather what the testator meant by his words unless it would lead to absurdity. The insistence of the defendant on her assertion that the three rooms bequeathed in paragraph 1 of the will are equivalent to the three sets of hall and chamber cannot be accepted by the court because if that were so, the testator would not have mentioned three rooms knowing very well that on the same land were three sets of chamber and halls which in the opinion of the court cannot be described as "rooms". In this case, it is evident that no other interpretation can be put on same except to say that the testator gave three single rooms out of the six single rooms in his house No B/60/1 to his wife Amba Gyanwah; otherwise, he would have described the hall and chamber so expressly more especially so when there is evidence from the defendant herself that that was where her relation Amba Gyanwah lived during her lifetime. Thus the testator knew that there were halls and chambers but did not mention same and limited it to three rooms. Thus this court in giving the words their ordinary meaning and bringing out the intention of the testator, the court holds that when the testator spoke about bequeathing "three rooms" to the said Amba Gyanwah,

he meant three single rooms and not the set of three halls and chamber contrary to the assertion of the Defendant.

In terms of paragraph 11 of the Will, the plaintiff has insisted that there is no house adjoining house number B/60/1 which was given to Amba Gyanwah, because the said house is one whole unit. Indeed this court is saddled with interpreting what the testator meant when he used the words "the house near" House No. 60/1. The word "near", used by the testator, must be construed to bring out the testator's intention. If the court is to go by the interpretation put on the said paragraph by the defendant, then one may ask why the testator went through the trouble of specifying the rooms to be given to the defendant's relation and not state that he has bequeathed the entire HNo 60/1 to her because according to the evidence on record, the entire house is numbered HNo 60/1.

A critical look at the exhibit attached to the Defendant's witness statement, i.e. exhibit 2, describes the land therein as follows;

"...All that piece and parcel of land situate and being at Agona Swedru aforesaid and bounded on the North by JA Mensah's land measuring seventy-five 75 feet more or less on the South by J.E Baiden and Kwagyir-Panyin's land measuring seventy-three (73) feet more or less on the East by the Grantors land measuring ninety-five (95)". As per the site plan attached, this land shows that the boundary owners to the said land are entirely different from those who share boundary with house number 60/1. Thus, this court is at a loss as to why the Defendant insists that the 100 by 100 plot on which Hse no 60/1 has been built encompasses her great grandmother's land as depicted in her attached document. The said document shows that the land is close to the Saltpond road which does not feature in the description of the land purchased by J.E Baiden. Thus, the defendant's production of the said exhibit to show that a portion of the land purchased by her grandmother is near the land on which House No 60 /1 has been built flies in the face of reason. Clearly, that document even shows that the said land is a gift and not a purchase as alleged by the defendant. If the land depicted in the

Defendant's Exhibit 2 is what the defendant is relying on to claim the entire House No 60/1, then that document rather shows that the defendant's relation does not have any land adjoined to House No.60/1 because that land does not share any boundary with JA Amponsah or with the Ajumako Mankessim road.

I am of the opinion that the testator's description of the land as to "house near Hse No 60/1" does not include any of the properties located in Hse No 60/1. Otherwise, the testator would not have excluded HNo 60/1. To my mind, the intention of the testator was not to give the entire House No 60/1 to his wife but to give her only three single rooms in House No 60/1, nothing more, nothing less. This court cannot, therefore, interpret the words "house near Hse No 60/1" to include the land on which the six single rooms have been built because the said single rooms and three sets of Halls and chambers, a yard and a cocoa shed make up H/No 60/1 per the evidence of the parties themselves. I am afraid I have to hold that the house the testator referred to as being near Hse No 60/1 cannot include any building in HNo 60/1, be it the three chambers and hall with a single room attached or the six single rooms with a hall. As counsel for the plaintiff noted, I agree that the defendant never pleaded that her grandmother had her own land on which J.E Baiden built a house.

It is the holding of the court that it was the intention of the testator to give his wife only three single rooms in the said house and not the three-chamber and hall as claimed by the defendant and not to give her the entire house No.60/1.

I also take the evidence of the defendant regarding Mr Duncan performing rites to put her in possession of the house as an afterthought introduced only when she was asked to file her witness statement. It is the opinion of the court that such an important ceremony would have been done in the presence of the testator's family members and the defendant's family. This court takes a serious view of that testimony because the said Mr Duncan is deceased, and it is trite that evidence against the dead must be treated with circumspection as the dead cannot speak. I doubt that evidence given as there is no corroboration of same. I, therefore, reject it as the truth. The defendant was

the one who gave the will that interpretation and hijacked the house as she admitted she had done so under cross-examination. I, therefore, reject the argument of counsel for the defendant that the plaintiff and her family are estopped by conduct because they left the property for the defendant.

Besides, DW1 told the court that at least a member of the testator's family lives in one of the chamber and hall apartments in House No 60/1; thus, it cannot be true that the entire house was handed over to the Defendant as belonging to the estate of Ambah Gyanwah.

It is worthy of note that her witness DW2 who testified that he is their head of family in his witness statement, contradicted himself on which side of the property belongs to Amba Gyanwah. Whilst paragraph 10 states that her deceased relative had a property adjoining J.E Baiden's 6-bedroom house, in another breath, he claimed that J.E Baiden had only three rooms in the disputed house. I, therefore, discount his evidence as the truth.

- v) WHETHER OR NOT THE DEFENDANT RECEIVED AN AMOUNT OF GH1440 AS RENT ADVANCE FOR ONE YEAR ON THE BLIND SIDE OF THE PLAINTIFF IN RESPECT OF THE ROOM, WHICH WAS TURNED INTO A CHURCH.**
- vi) WHETHER OR NOT THE DEFENDANT IS RECEIVING RENT FROM THE TENANTS OF THE HOUSE.**

Per paragraph 12 of her statement of defence, the Defendant admitted collecting certain amounts accruing to the estate of Ambah Gyanwah to prevent her estate from going into ruins. Thus I hold that indeed she has collected rent from the tenants, including the 1440 cedis, because she admitted same in her defence.

- vii) WHETHER OR NOT THE DEFENDANT IS A DESCENDANT OF MAAME AMBA GYANWAH**

viii) WHETHER OR NOT THE DEFENDANT'S GRANDMOTHER WAS A HOUSE HELP OF AMBA GYAMWAH

ix) WHETHER OR NOT THE DEFENDANT HAS INTEREST IN THE BUILDING IN DISPUTE

The defendant asserted and testified that she is a biological descendant of Ambah Gyanwah, whilst throughout her case before this court, the plaintiff insisted that she is the descendant of a house help of Ambah Gyanwa. The plaintiff's testimony was supported by PW1, who said she was the same age as the defendant's mother, the daughter of Ambah Gyanwah's house-help. The family of J.E Baiden have insisted that Ambah Gyanwah did not have any child for J.E Baiden, yet the defendant testified that she had three daughters but was silent on whether they were J.E Baiden's children. In one breath, she testified that Ambah Gyanwah was her great-grandmother, but surprisingly her witness DW2 who testified that she is a great-grandson to Ambah Gyanwah said Ambah Gyanwah gave birth to Efua Agyiriwaa who gave birth to three children. Their testimony is contradictory and cannot be relied on by the court. However, it seems that during the trial, the plaintiffs gave up their challenge in answering their questions and causally referred to Ambah Gyanwah as defendant's grandmother. In any case, whether the defendant is related to the said Ambah Gyanwah or not should not be the preoccupation of this court. Since per the will and the holding of this court, three single rooms were bequeathed to Ambah Gyanwah then her estate is entitled to the three rooms and whoever comes up as here relation is entitled to it. I must say that the will did not say Ambah Gyanwah was entitled to three rooms in her lifetime. Thus it cannot be that upon her death the three single rooms reverted to the plaintiff's family. the three rooms therefore form part of Ambah Gyanwah's estate.

x) WHETHER OR NOT THE PLAINTIFF IS ENTITLED TO LETTERS OF ADMINISTRATION WITH WILL ANNEXED.

In the opinion of the court, there is sufficient evidence on the record for the plaintiff, being the customary successor of the deceased, to be entitled to the grant of letters of Administration with will annexed to administer the estate of the deceased testator.

FINAL ORDERS

This court hereby declares as follows;

- a) The plaintiff, a customary successor to J.E BAIDEN, is the proper person to be granted letters of Administration with a Will annexed to administer the estates of J.E Baiden.
- b) The Defendant and all her relations, namely Aunty Mary, Badu, Maame, Kwamena, Ama Kakraba and Kwesi, have no interest in Hse No. 60/1 Tsintsimhwe, Agona Swedru except three rooms out of the six single rooms in Hse No 60/1 to be determined by the plaintiff.
- c) The Defendant and all her relations, namely Aunty Mary, Badu, Maame, Kwamena, Ama Kakraba and Kwesi, all of H/No. 60/1 Tsintsinhwe, Agona Swedru, are liable to pay rent for all the period they have occupied the rooms except for three single rooms out of the six single rooms belonging to J.E Baiden to be given to them by the plaintiff.
- d) Relief D is hereby dismissed because they had the belief that their late relative is entitled to the whole house, which belief has been held by this court to be contrary to the will of J.E BAIDEN.
- e) The Defendant is ordered to pay to the plaintiff's family the sum of GHC1440.00 unlawfully collected as rent advance for one year for the use of the said Cocoa premises as church premises and all other rents collected.
- f) Interest on the sum of GHC 1440 at the commercial interest rate.
- g) Costs of 5000.00 against the defendant.

MALIKE AWO WOANYAH DEY

**JUSTICE OF THE HIGH COURT
CAPE COAST**