IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE, HOHOE, HELD ON TUESDAY THE 31ST DAY OF JANUARY 2023 BEFORE HIS LORDSHIP AYITEY ARMAH-TETTEH J.

SUIT NO: E12/22/2013

MOSES AMOAKO aka AFURI PLUMBER
suing for and of his sibling CATE ADWOA --- PLAINTIFF

VRS

KWAME BAAH --- DEFENDANT

PARTIES: - PLAINTIFF PRESENT

DEFENDANT PRESENT

COUNSEL: MR. EMILE ATSU AGBGAKPE FOR PLAINTIFF
NO LEGAL REPRESENTATION FOR DEFENDANT

J U D G M E N T

BACKGROUND

By way of background, one George Amoako alias Kofi Nyame (the deceased) a native of Asamankese in the Eastern Region and a resident of Hohoe died intestate in 1973. The deceased during his lifetime acquired three houses, the subject matter of this suit House No. ABA L-036, Gbi -Abansi and two other buildings in Asamankese his hometown. The deceased during his lifetime met and married an Ewe woman Comfort Tegbe with whom he had two children, the Plaintiff, and his sister Cate Adwoa Amoako. He also had other

children with different women. The Defendant is a nephew of the deceased, he being the son of a sister of the deceased.

The Plaintiff by himself on 18 June 2013 issued a writ of summons for himself and on behalf of her sister Cate Adwoa against the defendant for the following reliefs:-

a. *An order ejecting the Defendant from further occupation of House No. ABA L-036, situate lying and being at Gbi - Abansi and built by the Plaintiff's father which he upon his demise bequeath to the Plaintiff but the Defendant herein has stayed therein and incessantly laying adverse claim thereto and as well as fomenting troubles therein unceasingly .*
b. *An order Ad Infinitum restraining the defendant from having anything in or with the said House No. ABA-L-036, Gbi Abansi.*
c. *Costs.*

The defendant on 25 June 2013 entered appearance by himself. On 16 July 2013 on an application by the defendant the court joined one Kwasi Nkrumah the head of Amoakwa family of Asamankese as co-defendant. The plaintiff on 9 July 2013 appointed Nelson Kporha Esq. as his lawyer in the matter. On 6 September 2013 the defendant and co-defendant filed separate statements of defence in which they denied the entirety of Plaintiff's claim. On 15 November 2013 the defendants appointed Koku- Mensah Akude Esq of Mawulorm Chambers as their lawyer. With the leave of the court the defendants on 24 December 2013 filed an amended statement of defence and counter claimed as follows:

1) *The ejection of the Plaintiff and his sister Cate Adwoa Amoako from the house in dispute.*
2) *General damages*
3) *Costs*

On 10 July 2015 on an oral application Counsel for defendants the name of the 2nd defendant was struck out from the suit. On 8 January 2018, the defendant dispensed with the services of their lawyer Koku -Mensah Akude Esq. by filing a notice of withdrawal to that effect. Defendant has since then conducted the case by himself.

PLAINTIFF'S CASE

It is the case of the Plaintiff that because his mother was an Ewe, the deceased during his lifetime made a promise to build a house at Hohoe for them because according to plaintiff the deceased said after his death his immediate family will take over his properties at Asamankese. According to Plaintiff this promise of their father, the deceased, was not documented before he died. That Kwasi Addae who became the customary successor of the deceased handed over the property to them.

DEFENDANT'S CASE

Defendant denied the claim of the Plaintiff and said that the deceased never made a promise to build the disputed property for the Plaintiff, his sister Cate Adwoa and their mother. The Defendant further denied that Kwasi Addae the customary successor of the deceased ever handed over the disputed property to the plaintiff, his sister Cate Adwoa Amoako and their mother. Defendant contends that upon the death of the deceased, the disputed property devolved unto the deceased's matrilineal family he, being an Akan. According to defendant after the death of Kwasi Addae he was appointed the customary successor.

After the close of pleadings, the issues raised in the application for directions and additional issues were set down for the determination of this suit by the court differently constituted:

Issues raised in application for directions:

1. *Whether or not Kofi Nyame had intended to give the said house to the plaintiffs.*
2. *Whether or not Kofi Nyame had actually given the said house to the plaintiffs inter vivos.*
3. *What law should govern the dissolution of the estate of Kofi Nyame in Hohoe.*
4. *Whether or not the plaintiffs have a better title in the estate as compared to the defendant.*
5. *Whether or not Plaintiff's claim can be granted.*

Additional issues:

1. *Whether or not Kwasi Addae succeeded Kofi Nyame.*
2. *Whether or not Kwasi Addae gifted the house in issue to the Plaintiff.*
3. *Whether or not the 1st defendant succeeded Kwasi Addae.*

Additional issue 1, ***'Whether or not Kwasi Addae succeeded Kofi Nyame'*** is not an issue that arises out of the pleadings. Issues for determination of a case should be in respect of the disputed facts which its determination will lead to resolution of the dispute between the parties. Issues arise in a matter before a court when a material fact or law is alleged by one party and denied by the other. Unless a material proposition of fact is affirmed and denied a distinct issue will not arise. In this matter the material fact alleged by the plaintiff that Kwasi Addae was customarily succeeded by Kofi Nyame is not denied. From the pleadings both parties agree that the deceased was customarily succeeded by Kwasi Addae so, no issue arises here.

Plaintiff averred in paragraph 9 of his statement of claim as follows:

> *9. Our paternal uncle Kwasi Addae in his life time succeeded to the said building and informed us that the deceased inter vivos informed him that he should hand over the said (house) to our mother and two of us in view of the fact that Ewes do not practice matrilineal inheritance and more so as he did not want us to interfere with the house he built at Asamankese.*

In his amended statement of defence the defendant pleaded in paragraphs 10 and 11 as follows "

> *10. Save that the Plaintiff's paternal uncle Kwasi Addae (deceased) succeeded to the building, paragraph 9 is denied.*
>
> *11. In further answer to paragraph 9, the Defendants say that the building in dispute had become their family property when the deceased died intestate in 1973. The then head of family Okyeame Boadi elected Kwasi Addae as the customary successor to the deceased and subsequently Kwasi Addae was granted letters of Administration. He administered and managed the house for and on behalf of the head of family."*

From the pleaded facts above, the fact affirmed by Plaintiff that Kwasi Addae customarily succeeding Kofi Nyame and the disputed property upon the death of Kofi Nyame is not disputed by defendant, so I wonder why Counsel for defendant will set out that as an issue for the determination in this suit. When facts are not disputed in any matter no issue arises for the court to determine same. I will therefore strike out issue 1 of the additional issue as irrelevant.

In proof of his case the plaintiff testified and called one witness. The defendant also testified and did not call any witness. The co-defendant, Kwasi Nkrumah whose name was struck out from the suit even though filed a witness statement did not attend the trial to testify despite the numerous adjournments at the instance of the defendant to produce him to testify for him.

In this case certain important material facts are not in dispute. The parties are not in dispute as to who acquired the subject matter in dispute, House No. ABA- L-036, Gbi-Abansi. They all agree that it was acquired by George Amoako alias Kofi Nyame, the father of the Plaintiff and a maternal uncle of the defendant. There is also no dispute that

the deceased died in 1973. It is also not in dispute that George Amoako alias Kofi Nyame was a native of Asamankese in the Eastern Region, an Akan and matrilineal community. With these undisputed set of facts in mind I will now deal with the issues and will start with issue 3 set out by the plaintiff which is:-

"*What law should govern the dissolution (devolution) of the estate of Kofi Nyame in Hohoe.* "

In his written address, on this issue Counsel for the plaintiff contended that, the subject matter in dispute is situate at Hohoe and that people of Hohoe are Ewes and that Ewes practice patrilineal system of inheritance so it is the Ewe system of inheritance that should govern the devolution of the estate of the deceased in respect of the disputed property. In support of this proposition of law Counsel cited **Yohana v. Abboud** (1973) 1 GLR 258 where the Court in holding 3 of headnotes held as follows:

> *"3) Where a person died intestate leaving immovable properties, the incidence and course of succession to them should depend entirely on the lex situs. In other words the law of Ghana was the law which had to be applied to determine whether the plaintiff was the person entitled to succeed to those immovable properties left in Ghana by her two sons, and by section 49 (1) of the Courts Act, 1971 (Act 372), the law applicable to the estate in question was the personal law of the intestate."*

In the ***Youhana*** case the plaintiff, a Lebanese resident in Lebanon, instituted an action per her attorney claiming that as the heiress, successor and head of family of her two deceased sons who died intestate, she was the real successor entitled to letters of administration and to succeed to the immovable properties left in Ghana by her said two sons. In my respectful opinion in that case the court was dealing with Private International Law or Conflict of laws situation and not internal conflict of laws situation, as in the instant case. Indeed the court further held in holding 4 of the headnotes as follows:

"(4) The plaintiff and the defendant were Lebanese and there was no evidence that the plaintiff's deceased sons, who were also Lebanese ever acquired Ghanaian domicile or citizenship, although they lived in Ghana for many years. They were therefore strangers who merely came to reside in this country and there was no evidence that by their conduct or acts they, during their stay in Ghana, adopted any family in Ghana for that matter. So that it could not be said that they embraced a particular system of customary law in Ghana. That being the case no particular system of customary law could be said to be their personal law, and consequently the common law was the law that should be applied to the devolution of the estate of the deceased persons and that common law should be the English common law as it stood in 1874. Under the said common law, the plaintiff could not be heiress, successor or head of family of her sons, since the deceased persons were survived by brothers, sisters and even a wife and children."

So, where a deceased is subject to a system of customary law in Ghana and the property, he acquired during his lifetime is situate in Ghana, it is his personal law which will govern the distribution of his estate and not where the property is situate in Ghana. And if he is not subject to any customary law then it is the common law which will govern the devolution of his estate. In the instant case the disputed property is situate in Ghana, the deceased was a Ghanaian and subject to a particular customary law which was his personal law. It his personal law that will govern the distribution of his estate unless a contrary view was expressed. The deceased who died in 1973 was an Akan who hailed from Asamankese, where the system of inheritance is matrilineal i.e. the system of inheritance through the female line. In Ghana in matrilineal communities children do not inherit their fathers and prior to 1985, the customary law was that on the death intestate of an Akan it was his successor being the next of kin, was the person entitled to inherit him, not his children.

In **Agyentoa v. Owusu & Anor** [2005-2006] SCGLR at 386, the Supreme Court per Bramford-Addo JSC held as follows:

> *"Prior to 1985, the customary law was that on the death intestate of an Akan like the late Owusu, his successor being the next of kin, was person entitled to inherit him, not his children. See the case of Eshun v. Janfia [1984-86] 1 GLR 105 which held (as stated in holding (1) of the headnote) in that case, dismissing an appeal that :*
>
> *(1) Appellants as children had no right to any specific portion of the estate, neither did they have any right to share the rents accruing from the properties with the Respondent. Their right was limited to occupation of their father's house and also to be maintained by the respondent out of their father's estate while young…….. where the children were sui juris as the Appellants were earning their living by petty trading and could , in fact , look after themselves, the question of maintenance was out and the only right that was left was their right to stay in their father's house, and on their own showing the respondent had never denied then that right. Manu v. Kuma [1963] 1 GLR 464 at 469, SC cited."*

See also **Odamtten and Others Vrs Wuta -Ofei** (J4 20 of 2016 [2018] GHASC 63 (12 DECEMBER 2018).

In the instant case from the undisputed facts, unless a contrary intention was expressed, the personal law of the deceased, which is the Akan matrilineal system of inheritance will be the law that should govern the distribution of his estate upon his death intestate.

The deceased died in 1973 and the Court's Act, 1971 (Act 372) was dated and assented to on 22nd September 1971 till was repealed by the Court's Act 1993, Act 459.

Section 49(1) of Act 372 provided as follows:

"Subject to the provisions of this Act and any other enactment, the Court when determining the law applicable to an issue arising out of any transaction or situation, shall be guided by the following rules in which references to the personal law of a person are references to the system of customary law to which he is subject or to the common law where he is not subject to any system of customary law:

Rule 2. In the absence of any intention to the contrary, the law applicable to any issue arising out of the devolution of a person's estate shall be the personal law of that person.

This provision was substantially repeated in section 54 (1) of Act 459 and is as follows:

"Subject to clause (2) of article 11 of the Constitution, this Act and to any other enactment, a Court when determining the law applicable to an issue arising out of a transaction or situation, shall be guided by the following rules in which references to the personal law of a person are references to the system of customary law to which that person is subject or to the common law where that person is not subject to a system of customary law:

Rule 2 : in the absence of an intention to the contrary, the law applicable to an issue arising out of the devolution of a person's estate shall be the personal law of that person."

Was there a contrary intention expressed by the deceased that his personal law should not govern the devolution of his estate upon his death intestate? The answer to this question will lead us to the discussion of issues 1 and 2 of the issues raised by the Plaintiff and I will deal with them together as the discussion of one will dovetail into the other.

1. *Whether or not Kofi Nyame had intended to give the said house to the Plaintiffs.*
2. *Whether or not Kofi Nyame had actually given the said house to the Plaintiffs inter vivos.*

On this issue Counsel for the Plaintiff contends that there was an intention by the deceased that his personal law should not be used in the devolution of his estate upon his death.

Does the evidence led by the Plaintiff and his only witness support this contention of counsel? I do not think so.

BURDEN OF PROOF

Section 14 of the Evidence Act, 1975, (NRCD) 323 provides as follows: -

> *'Except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence that he is asserting. '*

Section 10 (1) of the Act explains 'burden of persuasion" as follows:

> *"For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court."*

In **Okudzeto Ablakwa (No. 2) v. A-G & Obestebi Lamptey (No.2)** [2012] 2 GLR 845 at 867:

> *" ….. if a person goes to court to make an allegation, the onus is on him to lead evidence to prove that allegation, unless the allegation is admitted. If he fails to do that, the ruling on that allegation will go against him. Stated more explicitly, a party cannot win a case in court if the case is based on an allegation, which he fails to prove or establish. This rule is further buttressed by section 17(b) which, emphasizes on the party on whom lies the duty to start leading evidence."*

Again a party who raises an issue essential to the success of his case assumes the burden of proof and he does discharge this evidential burden by the production of sufficient and reliable evidence.

See the case of **Bank of West Africa Ltd v Ackun** [1963] 1 GLR 176 where the court in holding 2 of the head notes held as follows:

> *"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. In the instant case the defendants accepted substantially the plaintiff's claim but raised an additional or separate issue. The trial judge was right in placing the onus of proving this additional issue on them."*

See also **Dzaisu v Ghana Breweries** [2009] 6 G.M.J. 111 where on the meaning of burden of persuasion and who has the burden of proving same, Adinyira , JSC held as follows:

> *"It is a basic principle in law of evidence that the burden of persuasion on proving all facts essential to any claim lies on whosoever is making the claim. Section 10(1) of the Evidence Act, 1975, Act 323 defines burden of persuasion as follows:*
>
> > *'(1) For the purposes of this decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court."*

The Court further held on whether an assertion made by a party in the witness box without proof shifts the evidential burden on the other party as follows:

> *" It is trite law that a bare assertion by a party of his pleadings in the witness box without proof did not shift the evidential burden onto the other party…"*

In civil cases, it is trite law that the parties are required to prove their respective cases on the preponderance of probabilities.

Section 12 (1) of the Act provides as follows:

> *'Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of probabilities.'*

Section 12(2) of the same Act explains what 'preponderance of probabilities' is as follows:

> *'Preponderance of 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 **Sagoe & Others v. Social Security and National Insurance Trust** (2012) 2 SCGLR 1093 the Supreme Court explained what Proof by preponderance probabilities as follows:

> '*Proof by a preponderance of Probabilities 'within the context of burden of proof as stated in section 12(2) of the Evidence Act, 1975 (NRCD 323), simply means weightier or superior evidence.* '

In the instant case since the Plaintiff claims that the deceased promised to build the disputed property him, his siter and their mother and that Kwasi Addae made a gift of the subject to them, a claim the defendant denied, the plaintiff assumes the burden of proof on these issues, and he discharges this evidential burden by leading sufficient and reliable evidence and he does so on the preponderance of probabilities failing which the court will not make a determination of those issues in his favour and his claim on those issues will fail.

The Plaintiff said his father promised or intimated to his mother that he will build a house for them at Hohoe. A promise to give a gift to children without more is not a known mode of devising property to children under customary law. Under customary law there are two modes or types of making a devise. The first is gift inter vivos and the second being devise under customary Will known as Samansiw in the Akan speaking communities in Ghana.

In proof of his claim that the deceased promised to give the subject matter to them, the Plaintiff pleaded as follows:

7. *In our father's life time he intimated to our mother and our father by virtue of our mother being an Ewe he would construct a house for us at Hohoe since those he put up at Asamankese would be claimed by his siblings, nieces and nephew."*
8. *Unfortunately after the construction his said promise was not documented before he passed on.*

Under cross examination, the Plaintiff changed the narrative and said his father made a samansiw of the house to them.

This is what Plaintiff said under cross examination:

> *Q. By Akyem custom if a person dies intestate his properties devolve unto his family. At the time that your father died in 1973 his property became family property.*
>
> *A. My father made a Samasei of his property before he died.*

The law is that answers given in cross examination form part of the evidence of a party and should be considered by a court in evaluating the evidence as a whole. See the case of **Giwa & Ors v. Ladi** [2013-2014] 1 SCGLR 1139

The Plaintiff in his evidence in chief said his father promised to give the disputed house to them and later in cross examination said his father made a samansiw of the property to them. Indeed the first relief of the Plaintiff suggest that the deceased upon his demise bequeath the disputed property to them and it seem to support the claim of the Plaintiff that the deceased made a samsiw in respect of the disputed property. For ease of reference and emphasis I will reproduce the relief (a) of the Plaintiff's claim:

a. *An order ejecting the Defendant from further occupation of House No. ABA L-036, situate lying and being at Gbi -Abansi and built by the Plaintiff's father* ***which he upon his demise bequeath to the Plaintiff*** *but the Defendant herein has stayed therein and incessantly laying adverse claim thereto and as well as fomenting troubles therein unceasingly . (bold italics mine)*

I will examine the claim of samansiw as testified by plaintiff under cross examination. Did the deceased made a samansiw bequeathing the disputed property to the Plaintiff and his sister Cate Adwoa Amoako? I do not think so.

b.

In **Summey v Yohonu & others** (1960) GLR 73 Ollenu J (as he then was) gave the essential requirements of samasiw in holding 2 of the headnote as follows:

c.

(2) the essential requirements of a will valid by customary law, are,

(a) that the disposition must be made in the presence of witnesses, who must hear what the declaration is and must know its contents;

(b) that the member of the family who would have succeeded the person making the will, had the latter died intestate, must be among the witnesses in whose presence the declaration is made, and

(c) that there must be an acceptance, by or on behalf of the beneficiaries, indicated by the giving and receiving of " drinks."

These requirements the plaintiff had not proved and her claim so far as the will was concerned failed;

d.

Since the decision in **Summey v Yuhonu** supra there have been modifications to the essential requirements of valid customary Will or samansiw by subsequent judicial decisions like **Saarah v Asuah** (1962) 1 GLR 535, **Akle v coffie** (1964) GLR 334, **Mamaha Hausa and Ors v Baako Hausa & Anor** (1972) 2 GLR 169, **Abenyewaa v Marfo** (1972) 2 GLR 153 **In Re Okine (Dced): Dodoo and Anor** v **Okine and others** [2003-2005] 1 GLR 630, and one essential element of Samansiw is that a member of the family of the donor must be present. In recent decision of the Supreme Court in the case of **Ankomahyi and Anor** v **Buckman and Ors** (unreported), (J4//43 of 2013) [2014] GHASC 130 (26 February 2014) the Supreme Court per Akoto Bamfo JSC gave the essential requirements of valid customary law Will when she stated as follows :

e.

"Customary law is constantly changing especially in the area of nuncupative wills. The social and economic demands of the day have forced the pace. The ancient requirements regarding the kinship quality and plurality of witnesses, and the giving of aseda (thanks) to seal a legacy, have all suffered change. The courts in recent times have rejected or pruned very thinly these requirements, taking care not to throw away the baby with bath water, to use the celebrated expression. Thus the pristine formalities of Sarbah, Rattary and Ollenu

have had to yield to three simple rules, namely self-acquired ownership in the testator, his sanity at the time of the declaration and attestation by credible, disinterested witnesses, two at least in normal circumstances but one permissible in extreme exigencies."

f.

In the instant case, there is no evidence to show that the deceased was not of sound mind at the time of his death. There is also no doubt that disputed property was the self-acquired property of the deceased but from the evidence of plaintiff the promise or declaration was made before the subject matter was acquired. A non-existent property cannot be a subject of samansiw, the subject matter of the samansiw should by in existence. Before the declaration is made. That is why it should a self-acquired property of the deceased and not a yet to be acquired property of the deceased. Again there were no credible disinterested witnesses at the alleged promise or declaration. In paragraph 7 of the statement of claim plaintiff said his father told his mother about building a house for them. From the narrative of the Plaintiff it was only his mother who was present at the declaration. Even if the said declaration was ever made Plaintiff's mother cannot be a disinterested witness.

From the testimony of the Plaintiff the declaration was to his mother alone however from the evidence of the Plaintiff's only witness PW1 there were about 8 other people present at the said declaration.

PW1 on the alleged promise made by the deceased to give the house to plaintiff and his sibling and mother testified in his evidence in chief as follows:

"I know Kofi Nyame (deceased) who begat the plaintiff and built the house in dispute. He declared that the house in Hohoe belonged to the children he born in Hohoe among

which is the plaintiff. He invited some of us, the uncles of the Plaintiff. This declaration was made sometime in 1972 when he was alive."

Under cross examination of PW1 following took place;

Q. You have stated that the deceased i.e. plaintiff's father when he was alive invited some of the uncles of plaintiff and made a declaration.

A. Yes

Q. And the declaration you said was that the building he built at Hohoe belong to the children he gave birth at Hohoe which included the plaintiff.

A. Yes, my lord.

Q. How many of you the uncles were present?

A. Alex Yao Kpeto, Agbemenule Kodzo, myself Victor Yao Kpeto and the defendant and he plaintiff.

Q. This is never true.

A. What I am saying is true.

Q. ***Where did he invite you to?***

A. The deceased came to our clan

Q. But you have stated that he invited some of you uncles.

A. They are all the same.

Q. Did he invite any of his relations or relatives?

A. Yes.

Q. Who are they?

A. The elder Okyeame from Asamankese. The clan head from Asamankese, siblings of the deceased.

Q. Did he invite his wife?

A. Yes. He also invited Mr. Dampare of Hohoe

Q. When the deceased died what did the Uncles do?

A. Rituals for the dead and also for the house. The plaintiff was called to come and give "Aseda" . They provided a big ram and two bottles of schnapps.

From the evidence of plaintiff the promise was made to plaintiff's mother alone. Plaintiff did not mention any other person present when the deceased made the promise or declaration, however PWI mentioned about eight people who were present when the so-called declaration was made.

PW1 further in evidence in chief said the deceased invited Plaintiff's uncles to make the declaration. But under cross examination he said the deceased came to the uncles to make the declaration. Again PW1 said the deceleration was made in 1972 but Plaintiff testified that the promise was made before the house was built. And there is evidence on record that the subject matter in dispute was acquired by the deceased in 1960.

The evidence of plaintiff and his only witness on the issue of whether the deceased Kofi Nyame intended to and did give the disputed property to the plaintiff and his sister are inconsistent and contradictory, and the inference is that it is unreliable, and I will not attach any weight to it.

It has been held by the Court of Appeal per Edward Wiredu J.A., Charles Crabbe J.S.C. and Edusei J.A. concurring): In the case of **Atadi v Ladzekpo** [1981] GLR 218 that whenever the testimony of a party on a crucial issue is in conflict with the testimony of his own witness on that issue, it is not open to the trial court to gloss over such a conflict and make a specific finding on that issue in favour of the party whose case contained the conflicting evidence. In the instant case the evidence led by the plaintiff and his only witness on the place, time and those present at the said declaration or promise of the deceased are contradictory and inconsistent and I am unable to make a finding of fact on

it that the deceased during his life time made a declaration or promised that the disputed property is for the plaintiff and his sister .

The essential requirements of a valid customary law will have not been met the Plaintiff and he has not been able to prove any samansiw as he claimed in his evidence under cross examination. I find that the deceased never made any customary law will or samansiw of the disputed property to his children including the plaintiff. I also make a finding that the deceased never made a promise that he will build a house for him and his sibling Cate Adwoa.

I am also satisfied the deceased never intended that his personal law should not govern the devolution of his estate upon his death.

The next issue is "Whether or not Kwasi Addae gifted the house in issue to the Plaintiff".

It is the claim of the plaintiff that the customary successor of the deceased Kwasi Addae gifted the disputed property to them after the death of their father.

In **Barko v. Mustapha and Another** [1964] GLR 78 the court held as follows:

> "*Since the appellant claimed, the land was given to her as a gift, failure to prove the customary ingredients of a gift, which are publicity, acceptance and placing the donee in possession, rendered her claim untenable. She did not discharge the onus of proving that the land was hers.*

In the instant case since it is the Plaintiff who claim that Kwasi Addae made a gift of the disputed house to them after the death of the deceased it is he who has the burden of proof on the issue.

What are the essential elements or ingredients of a valid customary law gift.

In **Abdul Rahman v. Baba Ladi** ; (Unreported) ,Civil Appeal . NO J4/36/2013, 29TH JULY 2013, the Supreme Court gave the essential validities of a gift inter vivos when it held as follows:

> "On proof of gift inter vivos, counsel for the appellant cited three relevant decisions of this court. These are *Mahama Hausa v Baako Hausa [1972] 2 GLR 469; Asare v Kumoji [2000] SCGLR 298; Akunsah v Botchway & Jei River Farm Ltd. [2011] 1 SCGLR 288*. The most important element of a customary gift that runs through these authorities and several others is that the gift must be offered and accepted and must be witnessed by somebody else other than the donor and donee. Thus, when the fact that a gift has been made is challenged, it will not be sufficient to state barely that a gift was made; you have to go on to show the occasion, if any, on which the gift was made, the date, the time, if possible, the venue and most importantly in whose presence it was made.

In **Akunsah v. Botchway & Jei River Farm Ltd**.[2011] 1 SCGLR 288 it was held as follows:

> "The giving and acceptance must be proved and evidenced by such delivery or conveyance as the nature of the gift admits of."

Also, in **Opanin Kwabena Agyei v. Opanin Kwadwo Wiredu; Chieftaincy Appeal No** J2/2/2005, 15TH FEBRUARY 2006(unreported) the court held as follows:

> *"(i)There must be a clear intention on the part of the donor to make a gift;(ii) publicity must be given to the making of the gift; and (iii) the donee must accept the gift by himself or herself giving thanks or conventional aseda, or by simply using and enjoying the gift , or in the words of Justice Apaloo in Anaman v. Eyeduwaa, by doing an act " which fulfills the objective which the giving of aseda is meant to fulfil, namely the expression of gratitude and the symbolic acceptance of the gift".*

Again, in **Yaguo And Another v. Agyeman And Other**s [1966] GLR 482, the court held as follows:

> *"The plaintiffs failed to prove all the essential ingredients of a valid customary gift of the house to them, namely (a) ceremony of transfer of property in the house to the plaintiffs; (b) publication to the living and the dead that ownership in the house had as from that date moved from the donor to the plaintiffs."*

From the legal decisional authorities, the important elements or ingredients of a valid customary law gift inter vivos are (i) the Donor must be the owner of the property; (ii) there must be publicity or in the presence of witnesses;(iii) and acceptance by the donee which may include the taking possession of the property or treating it as his or hers even before the death of the donor.

In the instant case, in support his claim of the alleged gift to him, his sister and their mother, the plaintiff pleaded in his statement of claim as follows:

7. *In our father's life-time he intimated to our mother and our father by virtue of our mother being an Ewe he would construct a house for us at Hohoe since those he put up at Asamankese would be claimed by his siblings, nieces and nephew.*

8. *Unfortunately after the construction his said promise was not documented before he passed on.*

9. *Our paternal uncle Kwasi Addae in his life-time succeeded to the said building and informed us that the deceased inter vivos informed him that he should hand over the said [house] to our mother and two of us in view of the fact that Ewes do not practice matrilineal inheritance and moreso as he did not want us to interfere with the houses he built at Asamankesie.*

10. *On an agreed date, Kwasi Addae informed our uncles of Gbi-Ahado and after we provided a live ram which was slaughtered as a customary 'Aseda' and to seal the gift and make it absolute we became the owners until our mother passed in the early '90s'.*

11. *It is significant to know that it was the defendant herein who slaughtered the said ram after traditional prayers were offered by Okyeame Boadi of Asamankesie being the then head of Amankwa-Ababio -Asuna Clan of Asamankesie."*

In support of the alleged gift the Plaintiff testified as follows:

3. After the death of my father in 1973 his estate in Asamankese was taken over by my uncle Kwasi Addae of blessed memory. No portion of his estate was given to my siblings and I on whose behalf I instituted this action. Our only consolation lies in the fact that the house in Hohoe which is now in dispute would be given us as promised by my father.

4. Kwasi Addae informed my uncles at Gbi -Ahado of his intention to hand over our father's property at Hohoe to my siblings and I as requested by our father George Kofi Nyame before his death. An agreed date was set for the family to meet for the said exercise. On the said date Kwasi Addae handed over the property at Hohoe to us in the presence of Okyeame Boadi the head of Amankwa Ababio Asona clan, Opanyin Dampare, Togbe Yao, Cate Amoako, Agbenule Kodjo, Moses Amoako and the defendant Kwame Baah who slaughtered the ram we provided for thanksgiving (Aseda) as demanded by custom after traditional prayers was said by Okyeame Boadi of Asamankese."

Did Kwasi Addae the customary successor of the deceased gift the property to plaintiff and sister? I do not think so for the following reasons.

According to plaintiff those who were present at the said ceremony were, Kwasi Addae who handed over the property, Okyeame Boadi, Opanyin Damapre, Togbe Yao, Cate Amoako, Agbenule Kodjo, Moses Amoako and defendant Kwame Baah.

In his evidence PW1 testified as to those who were present as follows:

> *"3. He died later in March 1973 and his younger brother Kwasi Addae acting on the family's behalf and in the presence of Opanin Dampare, of Akyem Begoro, Okyeame Boadi of Asamankese, and myself and in the presence of the defendants and formally handed the house over to the plaintiff."*

According to plaintiff 8 people were present whiles according to PW1 6 people were present. Again according to plaintiff he gave ram as 'Aseda' but PW1 said ram and two bottles of schnapps were given as "Aseda". From the evidence of plaintiff the ram was slaughtered the same day it was given but the PW1 said it was slaughtered the following day in his absence. The evidence of plaintiff and his witness on material issues in a customary gift are inconsistent and unreliable and cannot be taken as proof of a gift of the disputed house to the Plaintiff, his sibling Cate Adwoa Amoako and their mother. The evidence of plaintiff and his witness are unreliable, and I am unable to make any finding in favour of the plaintiff in the face of these inconsistencies. See **Atadi v Ladzekpo** supra.

Plaintiff has been unable to prove that Kwasi Addae made a gift or handed over the disputed property to him and his sibling Cate Adwoa Amoako.

The defendant without objection put in Exhibit 1, an affidavit sworn to by the plaintiff in the case of :

> *"Ghana Commercial Bank --Plaintiff/Judgment/Creditor*

vrs

Ronnie F. Baah -- Defendant/Judgment/Debtor

And

Cate Amoako

Moses Amoako -- Claimants."

In the suit the plaintiff had taken a loan from Ghana Commercial Bank (Now GCB Bank) and had defaulted in the repayment. The disputed property was attached in execution of the judgment debt against the defendant herein. The Plaintiff and his sister Cate Adwoa Amoako filed an interpleader and on 10 March 1993 filed his affidavit of interest. The said affidavit was sworn to on the same day it was filed before the Registrar of the High Court, Hohoe. The plaintiff deposed that he swore to the affidavit for himself and on behalf of his sister who he had her authority to do so . In the said affidavit Exhibit '1' the plaintiff herein then one of the claimants deposed to the certain facts which are necessary for the determination of the issue whether Kwasi Addae on behalf of the family of the deceased gifted the disputed property to plaintiff and his sister. The depositions are as follows:

2. *It has come to my notice that House No. AB/2 at Hohoe Abansi is the subject matter of a property which has been seized by Writ of Fiari Facias by the plaintiff/judgment/creditor in execution of judgment debt obtained against the Defendant .*
3. *I state as a fact that the said house was built by our father GEORGE KOFI NYAME AMOAKO now deceased who died in 1973.*
4. *After the death of our father his younger brother Kwasi Addae and another administer the estate of our father until his death Akwasi Addae also died in 1992.*

5. *That during the lifetime of our father George Kofi Nyame Amoako he had the following children, namely:-*
    I. *Cate Amoako , aged 44 years*
    II. *Moses Amoako , aged 41 years*
    III. *Lawrence Adjei, aged 37*
    IV. *Mercy Amoako , aged 34 years*
    V. *Dora Amoako, aged 33 years*
    VI. *Alex Amoako , aged 28 years*
    VII. *Daniel Amoako, aged 25 years*
6. *During and after the death of our father , house No. AB/2, Hohoe Abansi had been represented to us and made to be the matrimonial home of our parents and indeed that is the home in which we have been born and bred all these years.*

7. *After the death of our Uncle KWASI ADDAE, the Defendant, a nephew of our father and Uncle respectively, was appointed as caretaker of the house the subject matter of claim.*

8. *After the death of our father the 1st claimant and I were given 5 rooms in the said house in which we continue to live as at now.*

9. *I am advised by counsel and verily believe same to be true that since we the children of the deceased have beneficial interest in the said house it is not proper for the said house to have been mortgaged by the defendant to the plaintiff .*

The parties do not dispute that House No. AB/2 at Hohoe Abansi is the same as House No. ABA-L-036 Gbi -Abansi and all refer to the subject matter in dispute.

The Plaintiff in the said affidavit deposed that the disputed property was administered by Kwasi Addae till Kwasi Addae died in 1992. The plaintiff in his evidence in chief said when his father died , letters of Administration was issued to Kwasi Addae , the younger brother of the deceased. Plaintiff tendered exhibit C which is the said letters of administration . If indeed the property was gifted to the Plaintiff and his sister and mother in 1973 by Kwasi Addae , then Kwasi Addae could not have continue to maintain the same house until his death in 1992. I am satisfied that the disputed was still part of the estate of the deceased in 1992 at the time Kwasi Addae died and it was never gifted to the plaintiff , his mother and sister in 1973.

Again in the said affidavit plaintiff again deposed to the fact that he and his sister were given 5 rooms in the disputed house.
Under cross examination of Plaintiff the following ensued:

Q. Look at paragraph 9 of exhibit 1, how many bedrooms does the house in issue consist of ?

A. 10 chamber and hall and 3 boys quarters .

Q. But in your affidavit you said after the death of your father you and your sister were given 5 rooms but now you are claiming 10 rooms and 3 attached boys quarters.

A. You took a loan from Ghana Commercial Bank and you defaulted and an auction order was made for the house to be sold so we came in for the 5 rooms because of that that we made the claim.

The Plaintiff by the answers above admit that on 10 March 1993 when made those depositions in exhibit 1 , their interest in the disputed property was the 5 rooms and not the whole house. Indeed nothing stopped him from claiming the whole house at the time if indeed Kwasi Addae gave them the whole house. His claim then in the interpleader suit would have been stronger than claiming just five rooms of the property under attachment for execution. I find this consistent with the customary practices at the time of the death of deceased. The law was that children of a deceased Akan male who died intestate were allowed to stay in the self-acquired property deceased subject to good behaviour. See **Agyentoa v. Owusu & Anor supra.**

Plaintiff's oral evidence is inconsistent with the contents of exhibit 1 and I seem to prefer the documentary evidence to the oral evidence of the Plaintiff.

In **Fosua & Adu- Poku v. Dufie(Deceased) & Adu-Poku Mensah[2009]** SCGLR 310 it was held in as follows:

> *"This is especially so because as laid down in Atadi v Ladzekpo[1981] GLR CA and Republic v Nana Akuamoah Boateng II Ex-parte Dansoah [1982-83] 2GLR 913 SC documentary evidence should prevail over oral evidence. And in Guardian Assurance v. Kyat Trading Store[1972] 2 GLR 48 C.A. at 55 Amissah J.A. (his brethren concuring), held that the supportive evidence of an opponent is as strong as the documentary evidence of the other party in proof of the latter's case. However, as was held in in Ahiabley v Dorga [1984-86] 2 GLR 537 C.A., where documents support one party's case as against the other, the court should consider whether the latter party was untruthful or truthful but with faulty recollection . whenever there was in existence a written agreement and conflicting oral evidence over a transaction, the practice in the Court was to lean favourably towards the documentary evidence, especially if it was authentic and the oral evidence conflicting. Yorkua v Duah [1992-93] GBR 278 cited."*

I find that the Plaintiff had all along claimed that he and his siter were given 5 rooms to live in the disputed house and he is estopped from denying the defendant's family title to the disputed property. The term 'Estoppel" has been defined in the Black's Law Dictionary, Ninth Edition, edited by Byran A. Garner as; " 1. ***A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been established as true…"***

This has been codified by section 26 of the Evidence Act 1975 NRCD 323

Section 26 provides as follows :

> *26. " Except as otherwise provided by law, including a rule of equity, when a party has, by that party's own statement, act or omission, intentionally, and deliberately caused or permitted another person to believe a thing to be true and to act upon that belief, the truth of the thing shall be conclusively presumed against that party or the successors in interest of that party in proceedings between*
>
> *(a) that party or the successors in interest of that party, and*
>
> *(b) the relying person or successors in interest of that person."*

Again it is on record that the defendant has constructed additional structures to the property. Under crosse examination of the defendant the following took place :

> *Q. Out of my own contract business I have constructed three bedrooms and two stores on the same plot that the building is situate.*
> *A. Yes but you took the proceeds from the house to do it.*

I do not believe the Plaintiff when he said the defendant took proceeds from the house to build the three bedrooms and two store. The plaintiff never testified nor produced any evidence that the defendant was taking proceeds from the house which he used to put up the structures on the disputed property.

If indeed the property was gifted to the plaintiff and his sister, they will not have stood by for the defendant to put up additional structures on the land without their consent. The plaintiff did not object to defendant building on the land . The Plaintiff did not object to the construction of the additional structures on the disputed property by the Defendant because he (plaintiff) acknowledged the family nature of the disputed property. Defendant is a nephew of the deceased and a principal member of deceased's matrilineal family of Asamankese could construct additional structures on the land. the plaintiff will once again be estopped from denying the ownership of defendant's family to the disputed property. The family nature of the disputed has been maintained by the family of the deceased by the defendant building additional structures thereon.

The defendant again put in evidence without objection exhibits 7 and 8. Exhibit 7 is a final demand notice for property arrears. And it is in respect of House No. ABA-1/0360 Abansi , the subject matter in dispute and it is dated 25 August 2011. Exhibit 8 is a receipt of payment of property rate in respect of House No. ABA-L-036 the subject matter in dispute. It is dated 28 August 2008 and it is in the name of the Defendant . Receipts do not confer titles on their holders per se, are nevertheless strong acts of ownership. It is the owner of a property that pays property rate. The property rates of the disputed property as late as 2011 were paid by the defendant representing the matrilineal family of the deceased. If the property was gifted to the Plaintiff and his sister in 1973 why haven't they be the ones paying the property since then. The answer is that the house was not gifted to them, and they were not the owners for them to pay property rates on it.

On the balance of probabilities the plaintiff has failed to prove that the deceased promised or declared that the disputed property are for them and based on that promise or declaration Kwasi Addae gave it to them and I find that disputed property house Number ABA-1/0360 Abansi after the death of George Amoako alias Kofi Nyame devolved unto his matrilineal family of Asamankese .

There is no doubt that the Plaintiff and his sister are living in the said house and that is consistent with the law at the time of the deceased . Their only right is to live in their father's house subject to good behaviour. See the case of **Agyentoa v. Owusu & Anor supra.**

I will deal with last issue *"whether or not the defendant was appointed the customary successor of Kwasi Addae."*

The defendant counter claimed for the ejection of the plaintiff and his sister from the house in dispute . The defendant averred that he is the customary successor of Kwasi Addae and therefore the ultimate customary successor to the deceased. This was denied by the plaintiff and said on the 8th of March 2013 the defendant issued a writ of summons against him and in that suit the defendant referred to himself as the customary successor of the deceased. He was asking the court in that suit to eject the Plaintiff from the disputed property. According to the Plaintiff the court dismissed the action on the ground that the defendant then plaintiff lacked capacity to sue. Plaintiff tendered in evidence the said ruling dismissing as exhibit "B". In the said ruling the court said the defendant failed to endorse the writ with his capacity as a customary successor and dismissed the suit. In the instant suit the defendant once again failed to prove that he is the customary successor of Kwasi Addae. It is a basic principle in law of evidence that the burden of persuasion on

proving all facts essential to any claim lies on whosoever is making the claim. See Section 14 of Evidence Act supra.

And it is trite law that a bare assertion by a party of his pleadings in the witness box without proof did not shift the evidential burden onto the other party.

In the case of **Mojalagbe** v. **Larbi & Ors** (1959) GLR 190 Ollenu J.(as he then was) stated as follows:

> *"Proof in law is the establishment of facts by proper legal means; Where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances, or circumstances, and his averment is denied, he does not prove it by merely going into the witness-box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the Court can be satisfied that what he avers is true."*

See **Dzaisu v Ghana Breweries supra**

In the instant case the defendant just mounted the witness box and repeated his averment in his pleading that he was the customary successor of Kwasi Addae and nothing more. He failed to discharge the evidential burden placed on him and would be deemed not have proved his claim that he was appointed the customary successor of Kwasi Addae.

The defendant by his counter claim is seeking an order of the court to eject the Plaintiff and her sister from the disputed property. In his own evidence defendant said even if Kwasi Addae gave the house to the Plaintiff which he denied, he (Kwasi Addae), could

not have done so without the consent and authority of the head of family of the deceased's family at the time Okyeame Boadi . By parity of reasoning the defendant who is not the head of family of the deceased's matrilineal family cannot eject the Plaintiff and his sister from the disputed property. He can only do so with the authority of the head of family. There is no evidence that the defendant has such authority from the head of family. Even though I have made a finding that the subject matter is the property of the deceased's matrilineal family of Asamankese, his children have the right to live in the house subject to good behaviour. It is only the head of family of the deceased's matrilineal family who can eject the plaintiff and his sister from the house if they do not live there in accordance with the condition of their stay i.e. being of good behaviour .

In conclusion, I find and declare that the house in dispute was the self-acquired property of the deceased and upon his death his personal law which is the Akan matrilineal system of inheritance that should govern the devolution of his properties including the disputed property. The disputed property therefore devolved unto his matrilineal family of Asamankese and his children including the Plaintiff and his sister Cate Adwoa Amoako have the right to stay in the said house. And the defendant not being the head of the matrilineal family of the deceased has no capacity to eject the Plaintiff and his sister from the disputed property . I will therefore dismiss the plaintiff's claim as well as the counterclaim of the defendant.

I make no other as to costs .

(sgd)
AYITEY ARMAH-TETTEH J.
(JUSTICE OF THE HIGH COURT)